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Reviewing Privacy Law in New South Wales

Michael Tilbury discusses the NSWLRC recommendations on invasions of privacy in anticipation of its report later this year.

Current Privacy Reviews

When the Australian Law Reform Commission (**ALRC**) delivered its report on privacy to the federal Attorney-General at the end of May 2008, two other reviews of privacy in Australasia remained on foot: those of the New South Wales Law Reform Commission (**NSWLRC**) and of the New Zealand Law Commission (**NZLC**). The NSWLRC is planning to report by the end of 2008: the NZLC in late 2009. Meanwhile all three Commissions have published background or consultation papers in response to their respective references.[1]

This article deals with the NSWLRC's reference, focusing on its Consultation Paper, *Invasion of Privacy*, published in May 2007. In that paper the Commission identified a preferred model for a general cause of action protecting privacy on the assumption (that remained to be tested) that it was desirable to introduce greater privacy protection into the law of New South Wales. In its Discussion Paper, *Review of Australian Privacy Law*, published in September 2007, the ALRC picked up the substance of the NSWLRC's preferred model and proposed that there should be a statutory cause of action for invasion of privacy in federal legislation.[2]

The NSWLRC's terms of reference, which in this respect are substantially similar to those of the ALRC, require it to consider the extent to which legislation in New South Wales provides an effective framework for the protection of the privacy of an individual.[3] Unlike the ALRC, however, the NSWLRC is specifically required to consider the 'desirability of introducing a statutory tort of privacy in New South Wales'. In consultation with the ALRC, with which it is charged to liaise, it seemed sensible for the NSWLRC to devote its resources to 'the statutory tort issue' first, since any review of the effectiveness of legislation regulating privacy in New South Wales would necessarily have to take into account the findings of the ALRC in respect of the effectiveness of legislation in protecting privacy across Australia. This is especially so since the terms of reference of the NSWLRC require the Commission to consider the 'desirability of privacy protection principles being uniform across Australia'.

A General Cause of Action for Invasion of Privacy

'General cause of action for invasion of privacy' refers to an action in which an individual claimant seeks redress, generally in the form of compensation, against another individual or some legal person for what is alleged to be a breach of the claimant's privacy. As such, a general cause of action focuses on the role of privacy in private law. In *Invasion of Privacy*, the NSWLRC made two recommendations about such a cause of action: it should be provided for by statute, which would identify the objects and purposes of the statute and contain a non-exhaustive list of the types of privacy invasion that fell within it; and a finding that the claimant's privacy had been invaded would empower the courts in their discretion to award the most appropriate remedy from a legislative catalogue, which would include compensation.[4]

The first recommendation

The first of these recommendations reflects the well-known difficulties of setting the boundaries of privacy with any precision. At base, the difficulties arise because privacy, or its invasion, can comprehend diverse and disparate issues, ranging, for example, from the encroachment on the solitude of an individual (fairly easily describable as an invasion of privacy), to the interference by statute with an individual's ability to access condoms (not so obviously identifiable as an invasion of that individual's privacy).[5] This suggests that the concept lacks coherence. Indeed, even if there is something coherent about privacy, it is difficult to pin down exactly what that is and how it is distinctive of related concepts.

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The best illustration of the difficulty comes from America, where privacy protection in private law originated in a theorised general 'right to privacy' (articulated further as 'the right to be let alone').[6] But this 'right' soon disassembled itself into four specific torts,[7] arguably protecting four separate interests of the plaintiff.[8] Those torts are: unreasonable intrusion on the seclusion of another (whose gist is, arguably, protecting the plaintiff against the intentional infliction of mental distress);[9] the appropriation of the name or likeness of another (arguably protecting the plaintiff's proprietary interest in his or her identity);[10] unreasonable publicity given to another's private life (arguably protecting the plaintiff's reputation);[11] and publicity that unreasonably places another in a false light before the public (also, arguably, protecting reputation).[12]

The practical lesson for law reform is that any statutory definition of privacy that is not circular is bound to be under - or, more likely, over - inclusive. The generality of the circumstances in which an individual ought to have an action for invasion of privacy cannot be identified with greater specificity than those in which the individual has a reasonable expectation of privacy. There seems little doubt that the two American torts of intrusion on seclusion (local or spatial privacy) and publicity given to another's private life (information privacy) identify such circumstances. In *Australian Broadcasting Corporation v Lenah Game Meats Pty Ltd*, Justices Gummow and Hayne (with whom Justice Gaudron agreed), described these two torts as 'perhaps coming closest to reflecting a concern for privacy "as a legal principle drawn from the fundamental value of personal autonomy"'.[13] And this is reflected in the two recent first instance Australian cases that do protect privacy explicitly at common law and in tort: *Jane Doe v ABC*,[14] which involves a tort of public disclosure of private information; and *Grosse v Purvis*,[15] which involves a tort of intrusion on seclusion, amounting in the case at hand to what is commonly called 'harassment'. This does not, of course, mean that privacy is necessarily only concerned with the terrain of these two torts. It can range wider.

Is a general requirement of a reasonable expectation of privacy in the circumstances sufficient to set boundaries to that range (leaving aside for the moment any other factors that ought to be relevant to establishing a cause of action)? Arguably, it is no more difficult for a court to determine whether, in the circumstances, the plaintiff has a reasonable expectation of privacy than, for example, whether the defendant owed the plaintiff a duty of care in circumstances in which the defendant's conduct has caused purely economic loss to the plaintiff; or whether the conduct of the defendant is false and misleading for the purposes of section 52 of the *Trade Practices Act 1974* (Cth). It is true that, unlike negligence or section 52 cases, there will, initially, be no body of precedent to guide the courts. However, case law will develop, just as it is developing in England,[16] where privacy is now protected (through the action for breach of confidence) within the framework of the *Human Rights Act 1998* (UK), and where it seems reasonably clear that circumstances in which privacy will be protected are those in which the claimant has a reasonable expectation of privacy.[17]

A more substantial criticism of the 'reasonable expectation of privacy' formula is that it provides too ready a protection of privacy. In New Zealand, where there is now a common law privacy tort of unauthorised publication of private and personal information, the action is available if: (1) facts exist in respect of which there is a reasonable expectation of privacy; and (2) publicity is given to those facts that would be considered highly offensive to an objective reasonable person.[18] The second part of the test is drawn immediately from the judgment of Chief Justice Gleeson in *Lenah Game Meats*.[19] That it acts as a real qualification of a test based simply on a reasonable expectation of privacy is illustrated in *Andrews v TVNZ*,[20] a subsequent New Zealand case concerned with the screening on television of footage shot at the aftermath of a motor accident that had occurred on a public road. The victims of the accident were a husband and wife and the footage included expressions of support and love that passed between the couple as they were being rescued. The couple sued for invasion of privacy. Justice Allan held that, although a person has a reasonable expectation of privacy in respect of the sort of conversations that passed between the husband and wife in this case, their publication could not be regarded as highly offensive to an objective reasonable person. The ALRC is of the view that the second part of the test is too restrictive and has suggested that 'substantial offence' should replace 'highly offensive' in the formula.[21]

Whether too restrictive or not, the effect of denying the availability of an action for invasion of privacy in the circumstances of the *Andrews* case is, prima facie, to allow the defendant to publish facts in respect of which the plaintiff has a reasonable expectation of privacy. But only prima facie, because, in New Zealand, a *defence* of legitimate public concern is available to the defendant.[22] Indeed, in *Andrews* itself, Justice Allan held that, even if the publicity given to the facts were considered highly offensive to an objective reasonable person, the action for invasion of privacy would still fail because the defendant could rely on the defence, the rescue and treatment of accident victims being a legitimate concern to the public, since any member of the public may some day stand in need of the service. In this context, then, the application of the defence has the effect of buttressing a particularly important public concern, namely freedom of speech or of expression.

The New Zealand cases illustrate the application to privacy of the methodology of tort law, involving the identification of the ingredients of a cause of action and the specification of defences that can be raised in opposition to it. In the context of privacy, this puts the burden on the defendant of proving that the conduct

or publication that is alleged to invade the plaintiff's privacy promotes the public interest in, for example, freedom of speech. But this raises fundamental questions. Why should public interest be a defence, the burden of which lies on the defendant? Indeed, why should not the burden be on the plaintiff to establish that the success of their action would not infringe the public interest? In short, why should an invasion of privacy be actionable in the first place if, in all the circumstances, the public interest indicates that it should not be? The protection of the public interest in individual privacy frequently provokes conflicts with other public interests. The resolution of such conflicts is not addressed by the separate establishment of the ingredients of a tort and then making out a defence to it. Rather, the factors arguing for and against the application of each interest need to be weighed up against each other to determine which interest is to prevail in the circumstances, a methodology alien to tort law.

A basis must, of course, be found if one interest is to be privileged over another in that balancing process. In the United States, for example, the First Amendment provides justification for preferring interests in free speech over privacy interests. A similar result may flow in New Zealand by reason of the protection of freedom of expression (but not of privacy) in the *New Zealand Bill of Rights Act 1993*. But Australian law provides no basis for balancing these interests other than on a level playing field, as is the case in England where neither the right to private life guaranteed in article 8 of the European Convention on Human Rights and Fundamental Freedoms nor the right to freedom of expression in article 10 have precedence over one another.[23]

As foreshadowed in *Invasion of Privacy*,[24] these considerations have led the NSWLRC to the view that a statutory cause of action for invasion of privacy should provide that a court must take account of the public interest at the outset in determining whether or not there is a reasonable expectation of privacy in the circumstances of the particular case.

The second recommendation

The NSWLRC's second recommendation that a 'remedial smorgasbord'[25] should support the statutory cause of action has two important consequences. First, it gives the court discretion to choose from the prescribed list the remedy that is the most appropriate in all the circumstances, free of the restrictions that may apply to the availability of like remedies at general law. Thus an injunction may be available if, in all the circumstances, it is the appropriate remedy notwithstanding that damages would be an adequate remedy (a condition, however nominal, to the grant of such a remedy at general law). Secondly, it means that rules and principles relating to individual remedies need not necessarily apply to the equivalent remedy listed in the statute. Thus, although the Consultation Paper does envisage the retention of aggravated damages,[26] it is debatable that there will be a need for such damages under the statute if aggravated damages refer to no more than the increased loss that the plaintiff suffers as a result of the defendant's conduct and there is no technical need to identify them as such (for example, to distinguish them from exemplary damages, which the Consultation Paper envisages will not be recoverable).[27]

It remains important to stress that the remedies under the statute will be able to draw analogies as appropriate to like remedies available at general law. For example, as public interest remains an important consideration at the stage of remedy, injunctive relief should be no more capable of being used as a weapon to restrain freedom of speech than it is at general law.[28] Nor, of course, should any other remedy – such as an apology.[29]

Distinguishing the Statutory Regulation of Privacy

The proposed general cause of action for invasion of privacy is to be distinguished from the current statutory regulation of privacy. In New South Wales the broadest regulation of privacy occurs in the *Privacy and Personal Information Protection Act 1998* (NSW) and the *Health Records and Information Privacy Act 2002* (NSW). The characteristics of the legislation are, first, that its scope is limited to the protection of information (classifiable as 'personal' or 'private'); secondly, that it is not generally aimed at conferring a private right of action on individuals for compensation for its breach, but rather at regulating the collection, storage, access, use and disclosure of the information to which it applies.

Uniformity

The ALRC has made two important proposals about the statutory regulation of privacy in Australia that need to be noted here. The first is its proposal that the *Privacy Act 1988* (Cth) should generally apply to all private sector organisations in Australia.[30] If this proposal is adopted, the most important context in which State privacy legislation would continue to operate is in the handling of personal information by State public sector agencies. Secondly, the ALRC has also proposed the development of Unified Privacy Principles (**UPPs**) that would be applied in State legislation, which would also adopt minimum provisions of federal law.[31]

The enactment of these proposals, as well as the inclusion of a statutory cause of action for invasion of privacy in the federal *Privacy Act*, would result in substantial uniformity of law in Australia. This would be a significant result of the reviews of privacy by the ALRC and the NSWLRC, strengthening the claim of uniformity as an important goal of law reform in Australia – a goal that has been at the forefront of the work of the NSWLRC in the past.[32]

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(Endnotes)

1 ALRC: *Review of Privacy*, Issues Paper No 31 (October 2006); *Review of Privacy – Credit Reporting Conditions*, Issues Paper No 32 (December 2006); *Review of Australian Privacy Law*, Discussion Paper No 72 (September 2007); NSWLRC: *Invasion of Privacy*, Consultation Paper No 1 (May 2007); *Privacy Legislation in New South Wales*, Consultation Paper No 3 (forthcoming June 2008); NZLC: *Public Registers*, Issues Paper No 3 (September 2007); *A Conceptual Approach to Privacy*, Miscellaneous Paper No 19 (November 2007); *Privacy: Concepts and Issues (Review of the Law of Privacy Stage 1)*, Study Paper No 19 (February 2008); *Public Registers: Review of the Law of Privacy Stage 2*, Report No 101 (February 2008).

2 Australian Law Reform Commission, *Review of Australian Privacy Law*, Discussion Paper No 72 (2007) vol 1, ch 5 (**ALRC, DP 72**).

3 The terms of reference are set out in NSW Law Reform Commission, *Invasion of Privacy*, Consultation Paper No 1 (May 2007), vii (**NSWLRC, CP 1**). Note that the ALRC's terms of reference are not restricted to *individual* privacy.

4 NSWLRC, CP 1, x.

5 See R Wacks, "Why There Never will be an English Common Law Privacy Tort" in A Kenyon and M Richardson, *New Dimensions in Privacy Law* (2006), 154, 175-178.

6 S Warren and L Brandeis, "The Right to Privacy" 4 *Harvard Law Review* 194 (1890), attributing the "right to be let alone" to Judge Cooley: id, 195.

7 *Restatement (Second) of Torts* § 652A.

8 See W L Prosser, "Privacy" 48 *California Law Review* 383 (1960) (**Prosser**), which forms the basis of the law as articulated in the *Restatement*.

9 Prosser, 422.

10 Prosser, 406.

11 Prosser, 398, 422.

12 Prosser, 400, 422-23.

13 *Australian Broadcasting Corporation v Lenah Game Meats Pty Ltd* (2001) 208 CLR 199, [125], the embedded quotation coming from the judgment of Sedley LJ in *Douglas v Hello! Ltd* [2001] QB 967, [126].

14 [2007] VCC 281.

15 [2003] QDC 151.

16 Especially *Campbell v MGN Ltd* [2004] 2 AC 457. Compare *Wainwright Home Office* [2004] 2 AC 406, *OBG Ltd v Allan* [2008] 1 AC 1, esp [108]-[136], [323]-[329].

17 See especially *Murray v Big Pictures (UK) Ltd* [2008] EWCA Civ 446.

18 *Hosking v Runting* [2005] 1 NZLR 1, [117].

19 (2001) 208 CLR 199, [42].

20 [2006] NZHC 1586.

21 ALRC, DP 72, [5.80].

22 *Hosking v Runting* [2005] 1 NZLR 1, [129]-[135].

23 See esp *In re S (a child)* [2005] 1 AC 993, [17] (Lord Steyn).

24 NSWLRC, CP 1, [7.26]-[7.48].

25 The expression is that of Mason P in *Akron Securities v Iliffe* (1997) 41 NSWLR 353, 364.

26 NSWLRC, CP 1, [8.16]-[8.17].

27 NSWLRC, CP 1, [8.11]-[8.15].

28 NSWLRC, CP 1, [8.37]-[8.42].

29 NSWLRC, CP 1, [8.45]-[8.46].

30 ALRC, DP 72, Proposal 4-1. Compare Proposal 4-3.

31 ALRC, DP 72, Proposal 4-4.

32 New South Wales Law Reform Commission, *Guaranteeing Someone Else's Debts*, Report 107 (2006), Rec 4.1 (reforming the law relating to contracts guaranteeing another's debt only makes sense in the context of a uniform law reform initiative).