Personal Privacy Protection in Australia: A Statutory Solution

Henry Fraser and Rowan Platt examine the proposal made by the ALRC and recently addressed in the Government's Issues Paper for the introduction of a statutory cause of action for invasion of privacy.

The Federal Government is currently consulting on whether it should legislate to protect personal privacy by creating a statutory cause of action that will allow individuals to sue for serious invasions of privacy. The Government's September 2011 Issues Paper[1] follows the Australian Law Reform Commission's 2008 recommendation[2] for the introduction of a statutory cause of action. It also refers to similar proposals since made by the New South Wales[3] and Victorian Law Reform Commissions.[4] The Government's Issues Paper discusses whether there is ultimately a need for a statutory cause of action for serious invasion of privacy; and if so, what elements it might consist of, and what defences and remedies should be made available. Whilst the final form any legislation might take is not yet known, such a cause of action would provide certainty about what type of invasive conduct, and what type of harm would give rise to liability for a serious invasion of privacy.

This article briefly examines the existing privacy law landscape in Australia, before assessing the merits and potential difficulties faced by the current proposal, such as whether the proposed cause of action strikes the right balance between an individual's interest in privacy and the public interest in freedom of the press.

The modern privacy context

In 1937 the High Court considered whether a racetrack owner was entitled to prevent a broadcaster from calling the races from a platform constructed on the adjacent property.[5] In determining whether there was a legal basis for preventing the invasion of the owner's privacy, Chief Justice Latham suggested that "[i]f the plaintiff desires to prevent [people looking over his fence], the plaintiff can erect a higher fence".[6] For a long time, the case stood for the proposition that there is no right to personal privacy in Australia.

Over the past ten years, however, courts have begun to reconsider whether invasions of privacy may be compensable. One factor that has heightened the risk of invasion of privacy during this time is the development in mobile and internet technology. A smart phone's audio, picture and film recording functions allow people to take and share content without the knowledge of the subject. The name given to this emerging trend is a metaphor for the speed with which the information is disseminated across networks - "going viral". The content is typically stored on social networking sites. Like most other cloud based software, user data is stored on a remote server that is vulnerable to hacking. Even without hacking, the terms and conditions of such websites may permit the service provider to deal with personal information in a way that users did not expect. In either of these ways, personal content can be mined for either commercial or more sinister purposes.

Recently data and security breaches have received increasing media attention. Hackers are achieving a level of notoriety and fame. The risks of data and security breaches are likely to increasingly affect individuals as more personal information is moved to 'the Cloud'. There have also been egregious breaches of personal privacy that have recently come to light during the News of the World inquiry. Protecting individual privacy in the 21st century has become substantially more difficult than simply erecting a higher fence.

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Nonetheless, seventy four years after the *Victoria Park Racing* case, there is still no right to personal privacy in Australia. Under the *Privacy Act 1988* (Cth), protection is focussed on the collection, use and distribution of personal information, rather than on invasion of privacy generally. All enforcement is left in the hands of the Privacy Commissioner: individuals have no power to take independent legal action for infringements. The position in analogous State and Territory Legislation is similar.[7]

Before considering the proposed statutory cause of action for invasion of privacy, it is instructive to note how the Australian courts have dealt with cases involving breaches of privacy. In particular it is interesting to observe how the different circumstances confronting the courts have shaped some of the elements comprising the proposed statutory cause of action.

Common law tort of privacy

In 2001 the High Court in *ABC v Lenah Game Meats*[8] removed what was considered to be the major obstacle[9] to the recognition of a

1 *A Commonwealth Statutory Cause of Action for Serious Invasion of Privacy*, September 2011

2 'For Your Information: Australian Privacy Law and Practice', *ALRC Report 108*, 11 August 2008

3 New South Wales Law Reform Commission, *Report 120: Invasion of Privacy* (2009) (NSWLRC Report) available at <www.lawlink.nsw.gov.au/lawlink/lrc/ll_lrc.nsf/vwFiles/R120.pdf/$file/R120.pdf>.

4 Victorian Law Reform Commission, *Surveillance in Public Places: Final Report 18* (2010), ch 7 (VLRC Report) available at <www.lawreform.vic.gov.au/wps/wcm/connect/justlib/Law+Reform/Home/Completed+Projects/Surveillance+in+Public+Places/>.

5 *Victoria Park Racing and Recreation Grounds Co Ltd v Taylor* (1937) 58 CLR 479

6 Ibid, at 494

7 See, for example, the *Privacy and Personal Information Protection Act* 1998 (NSW) under which the Privacy Commissioner is required to resolve any 'privacy related complaint' by arbitration

8 *Australian Broadcasting Corporation v Lenah Game Meats Pty Ltd('Lenah Game Meats')* (2001) 208 CLR 199, at 248.

9 For further discussion on this point, see D Butler, 'Tort of Invasion of Privacy in Australia?' (2005) 29 *Melbourne University Law Review* 339, 341; and Australian Law Reform Commission, *Unfair Publication: Defamation and Privacy,* ALRC 11 (1979), [223].

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common law right to privacy in Australia, by clearly indicating that its 1937 decision in *Victoria Park Racing*[10] no longer stood in the path of a cause of action developing. The court did not, however, make the leap to recognising that a tort of privacy exists. Indeed, as the New Zealand Court of Appeal later observed, 'the High Court of Australia has not ruled out the possibility of a common law tort of privacy, nor has it embraced it with open arms'.[11] Since *Lenah Game Meats*, two lower courts have held defendants liable in tort for invasion of privacy, but no appellate court has confirmed that the tort is now a valid cause of action.[12]

In the Queensland District Court decision of *Grosse v Purvis*, Senior Judge Skoien held that a case of persistent stalking amounted to an invasion of privacy. He formulated the elements of a fledgling tort as including: (i) a willed act by the defendant; (ii) which intrudes upon the privacy or seclusion of the plaintiff; (iii) in a manner which would be considered highly offensive to a reasonable person of ordinary sensibilities; and (iv) which causes the plaintiff detriment in the form of mental, psychological or emotional harm or distress or which prevents or hinders the plaintiff from doing an act which he or she is lawfully entitled to do.[13] His Honour also noted that a public interest defence should be made available.[14]

In *Doe v Australian Broadcasting Corporation*, in the County Court of Victoria, Judge Hampel held that the publication of the identity of a rape victim was, inter alia, a tortious invasion of privacy. Responding to the suggestion that recognition of a tort of privacy would be a 'bold step', her Honour asserted that the cases 'decided since *Lenah Game Meats* demonstrate a rapidly growing trend towards recognition of privacy as a right in itself deserving of protection'.[15] While she did not formulate a precise description of the elements of a cause of action, she did note that the wrong included 'the publication of personal information, in circumstances where there was no public interest in publishing it'.[16]

Despite the recognitions made in these two cases, appellate courts have cited two main obstacles to the tort's development: the lack of precision in the concept of privacy, and the difficulty of balancing the interest in personal privacy with the interest in free speech and publication.[17]

Breach of confidence – extension to private information

Although a common law tort of invasion of privacy has not yet developed, the equitable action for breach of confidence has expanded to furnish a degree of protection for personal privacy. Since *Lenah Game Meats*, Australian courts have accepted that a duty of confidence may arise from circumstances rather than exclusively from a relationship of trust and confidence.[18] In that case Gleeson CJ identified three elements required to prove a breach of confidence: (i) that the information is confidential; (ii) that it was originally imparted in circumstances importing an obligation of confidence; and (iii) that there has been, or is threatened, an unauthorised use of the information to the detriment of the party communicating it.[19] His Honour suggested that private information could satisfy the first two requirements and formulated as a practical test of what is private, "the requirement that disclosure or observation of information or conduct would be highly offensive to a reasonable person of ordinary sensibilities".[20] Gleeson CJ's test of what is private was endorsed by Judge Skoein in *Grosse v Purvis*, in characterising invasion of privacy as a tort rather than merely another form of breach of confidence, and subsequently, by the ALRC, NSWLRC and VLRC in their respective reports.

In *Doe*, Judge Hampel added to Gleeson CJ's test a formulation of privacy from the UK case of *Campbell v MGM Ltd.*[21] Her Honour defined private or confidential information as information in respect of which a person has a reasonable expectation of privacy. Whether there is a reasonable expectation of privacy will be a matter for evidence from case to case. So even information which has some degree of public exposure may sometimes be considered private or confidential. The upshot of *Lenah Game Meats* and *Doe* is that circumstances which give rise to a reasonable expectation of privacy are also capable of giving rise to a duty of confidentiality. The concept of a reasonable expectation of privacy also features in the elements of the ALRC's proposed statutory cause of action.

In the Victorian Court of Appeal decision of *Giller v Procopets*, the court considered a claim brought in the context of a former de facto relationship where the defendant had published (to the plaintiff's

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10 *Victoria Park Racing and Recreation Grounds Co Ltd v Taylor* (1937) 58 CLR 479

11 *Hosking v Runting* [2005] 1 NZLR 1, at [59] per Gault P and Blanchard J. See also G Taylor and D Wright, 'Australian Broadcasting Corporation v Lenah Game Meats: Privacy, Injunctions and Possums: An Analysis of the Court's Decision' (2002) 26 *Melbourne University Law Review* 707, 709.

12 *Grosse v Purvis* [2003] QDC 151; *Kalaba v Commonwealth of Australia* [2004] FCAFC 326; *Doe v Australian Broadcasting Corporation ('Doe')* [2007] VCC 281; *Giller v Procopets* [2008] VSCA 236

13 *Grosse v Purvis* [2003] QDC 151 at [444].

14 Ibid, at [34].

15 *Doe v Australian Broadcasting Corporation* [2007] VCC 281, at [161].

16 Ibid, at [163].

17 *ABC v Lenah Game Meats* (2002) 208 CLR 199 at 41 and 225; *Giller v Procopets* [2008] VSCA 236 at [167] – [168] per Ashley JA and [447-452] per Neave JA.

18 *Lenah Game Meats* at [34], see also *Doe* at 112.

19 *Lenah Game Meats* at [30].

20 *Lenah Game Meats* at [40].

21 [2004] 2 AC 457 at [13]-14].

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friends and family) a video he had filmed of his sexual activities with the plaintiff, some with the plaintiff's consent. The court found that this was a breach of confidence and awarded the plaintiff damages for her mental distress.[22] All three judges noted that while the common law does not provide a remedy for mere distress, equity could provide relief for embarrassment, humiliation or distress.[23]

Despite the recent success of plaintiffs protecting their private information by pleading breaches of confidence, the action into which the protection of privacy is now 'shoe-horned'[24] in English law, there is an important limitation on the use of breach of confidence to address privacy issues. The action is confined to cases involving the *use* of private information. There will be no cause of action for breach of confidence until an intrusive photograph or private information is published.[25] This means that using the equitable action to protect privacy would protect against the conduct in cases like *Doe*, but would provide no cause of action to remedy equally invasive and harassing conduct where there is no actual publication, such as the stalking that took place in *Grosse v Purvis.*

The answer?: the creation of a statutory tort

In its 2008 report,[26] the ALRC asserted that the enactment of a statutory cause of action for invasion of privacy would both provide broader protection than the equitable action for breach of confidence, and offer more certainty than the unestablished common law tort. In its submission for the ALRC consultation process, the Commonwealth Office of the Privacy Commissioner argued that 'a dedicated privacy based cause of action could serve to complement the existing legislative based protections afforded to individuals and address some gaps that exist both in the common law and legislation'.[27] It would also alleviate the need for judges to refine the standard and elements of the cause of action on a case-by-case basis. This would provide certainty as to the defences and remedies available, as the distinction between equitable and tortious causes of action would be removed.

The Government's recent Issues Paper on the proposed 'Commonwealth statutory cause of action for serious invasion of privacy', draws principally on the ALRC recommendations. The following is an assessment of the proposed cause of action and its principal features, some of which have already been subject to heated debate in the press.

The proposed statutory tort

Elements

Under the ALRC's proposal, in order to establish the cause of action for serious invasion of privacy, a claimant would need to show that, in all the circumstances:

- they had a reasonable expectation of privacy;
- the defendant's act or conduct was highly offensive to a reasonable person of ordinary sensibilities; and
- the public interest in maintaining the claimant's privacy outweighs other matters of public interest, (including the public interest in allowing freedom of expression and the interest of the public to be informed about matters of public concern).

The first thing to note is the objective test of seriousness. The adoption of the 'highly offensive' formulation from *Lenah Game Meats* is intended to set a high threshold, narrowing the range of circumstances in which a plaintiff could successfully demonstrate a serious invasion of privacy. The advantage of this formula is that the courts will already have some guidance as to its application from the cases discussed above, and from New Zealand cases.[28]

Recognising Freedom of Expression: A Balancing Test

Perhaps more significant and controversial is the manner of weighing the public interest that the ALRC has proposed. Rather than attempting to protect other public interests like freedom of expression through a defence such as fair comment (as was proposed in its earlier report[29] and by the VLRC), the ALRC took the view that it would be better in both principle and practice to add an additional element to the cause of action. The inclusion of such a balancing test would ensure that individual privacy rights are not privileged over other public interests. It would achieve this by placing on the claimant the burden of demonstrating that an invasion of privacy was not in the public interest. Rather than defendants, such as media organisations, being required to demonstrate, for example, that the publication of private material was in the public interest, the claimant would be required to prove that the contrary was true. This would also help to guard against unmeritorious claims, and would set a higher threshold for what could be considered a serious invasion of privacy. An invasion of privacy would only be unlawful if it were not in the public interest. Accordingly, bona fide investigative journalism about matters of pubic interest would presumably be unlikely to attract liability.

Whether the public interest in freedom of expression might be better protected or recognised in some other way will undoubtedly be the subject of many submissions from media organisations.

No need to prove harm

As with the torts of defamation and trespass to the person, the cause of action of invasion of privacy would be actionable *per se*: without any requirement that the claimant prove that any actual damage or calculable loss was suffered as a result of the invasion of privacy. This would neutralise the debate over whether causing mere distress, as opposed to psychological or economic harm, would incur liability.

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22 *Giller v Procopets* [2008] VSCA 236 at [159] per Ashley JA and [423] per Neave JA.

23 *Giller v Procopets* [2008] VSCA 236 at [159] per Ashley JA and [423] per Neave JA.

24 *Douglas v Hello! Ltd (No 3)* [2006] QB 125, [53].

25 Sir R Toulson, 'Freedom of Expression and Privacy' (Paper presented at the Association of Law Teachers Lord Upjohn Lecture, London, 9 February 2007), 7.

26 In *ALRC Report 108*, the ALRC handed down nearly 300 recommendations on reform of Australian privacy law and practice, one of which was the introduction of a statutory cause of action for invasion of privacy.

27 Office of the Privacy Commissioner, *Submission PR 499* [to the ALRC Privacy Review], 20 December 2007.

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

29 Australian Law Reform Commission, *Review of Australian Privacy Law,* DP 72 (2007), Proposal 5-5.

there is no proposed exemption for media organisations that publish sensitive information about an individual's private life

The requisite fault element

The ALRC recommended that the cause of action for serious invasion of privacy be restricted to intentional or reckless acts by the respondent. Recklessness, which is defined in Section 5.4 of the *Criminal Code Act 1995* (Cth), occurs where a person is aware of a substantial risk that a circumstance or result will occur, but continues in their conduct notwithstanding their knowledge of that risk. The Issues Paper explains that this would preclude actions brought where there has been only a negligent or accidental invasion of privacy.[30]

By comparison, the standard required of corporations under National Privacy Principle 4 of the *Privacy Act* is to take 'reasonable steps' to protect against information privacy breaches. Arguably, the proposed fault element of recklessness will make it more difficult to impose liability on corporates for data breaches, as it will require evidence of their knowledge of a risk or a situation where they ought to have known about the risk which has eventuated.

What type of acts or conduct will it protect against ?

The ALRC's recommendations recognise that individuals should be protected from unwanted intrusions into their private lives or affairs in a broad range of circumstances, irrespective of whether the act or activity takes place in private. To that end, it was proposed that the legislation contain a non-exhaustive guiding list of the types of activities and conduct that may constitute serious invasions of privacy, including:

(a) a serious interference with an individual's home or family life;

(b) unauthorised surveillance of an individual;

(c) interference with, or misuse or disclosure of, an individual's correspondence or private written, oral or electronic communication; and

(d) disclosure of sensitive facts relating to an individual's private life.

The ALRC considered that such a list would alleviate the need for judges to define the notion of serious invasions of privacy by construing the statute and its words over time against evolving notions of privacy.

In the ALRC's view it is important that the cause of action not be used as an intellectual property style personality right to protect commercial value (as, for example, was the case in the UK case of *Douglas v Hello!*). Under the proposed cause of action, exploitation of a person's identity or likeness without their consent that damages the person's reputation would not be characterised as an invasion of privacy.

The Issues Paper asks whether a non-exhaustive list of activities should be included in the legislation itself or in the other explanatory material.

Defences and Exemptions

The ALRC proposed that a range of defences to the cause of action should be available where:

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

The ALRC recognised that any cause of action should not impede legitimate law enforcement and intelligence activities but did not recommend a blanket exemption for particular types of organisations or agencies. The Issues Paper asks whether these are appropriate and whether particular types of organisations should be excluded from the ambit of the proposed cause of action, or whether defences should be used to restrict its application.

Remedies

The ALRC recommended that the court, if satisfied that a serious invasion of privacy has been established, should be empowered to choose the most appropriate remedy in the circumstances, including damages, aggravated (but not exemplary) damages, an accounts of profits, an injunction, declarations, a court-ordered apology, correction orders and an order to deliver up and/or destroy material. The Issues Paper asks whether these remedies are necessary and sufficient. It also asks whether it is desirable to include an appropriately adapted offer-of-amends process, similar to that which was created by recent reforms to the law of defamation.[31]

Class actions

The Issues Paper also briefly discusses the possibility of claimants bringing class actions for serious invasions of privacy where claims arise out of similar or related circumstances. Providing that the claim gave rise to a substantial common issue of law or fact,[32] class action rules could have application in claims where an individual or company's act resulted in a serious invasion of privacy.

Who will be affected?

Whatever the precise formulation, it can reasonably be expected that the introduction of any separate statutory cause of action for invasion of privacy will require a range of businesses to reassess their privacy practices to minimise their liability.

Importantly, despite the ALRC's suggestion that the proposed cause of action should not hinder legitimate investigative journalism (that deals with, for example, allegations of misconduct or corruption in public life, and other matters of genuine public concern), there is no proposed exemption for media organisations that publish sensitive information about an individual's private life. This would be an important departure from the current position under the *Privacy Act*, where media organisations are afforded an automatic exemption from compliance with the Act where they use personal information in the course of journalism.[33] Nonetheless, the formulation of the balancing test as an element of the cause of action is calculated to favour freedom of the press over privacy plaintiffs, in circumstances where publication of private material is in the public interest.

The Issues Paper makes clear that the Government is desirous of strengthening our privacy law, but not at the expense of freedom of expression and the freedom of the media to seek out and disseminate information of public concern.

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30 See NSWLRC, *Invasion of Privacy*, Consultation Paper 1(2007) at [7.24] for the view that including accidental or negligent acts 'would, arguably, go too far'.

31 Now found in ss 12-19 Uniform Defamation Laws

32 See s 33C(1) *Federal Court Act 1976* (Cth) for requirements that apply to 'representative proceedings'.

33 *Privacy Act 1988* (Cth), section 7B(4).