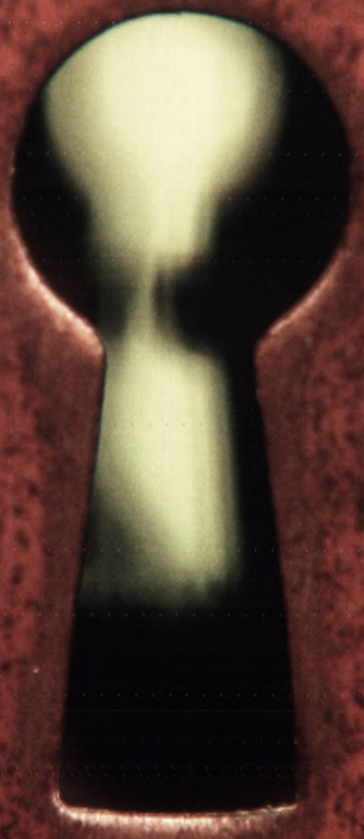
'A MAN WITHOUT PRIVACY IS A MAN WITHOUT DIGNITY'[1]

It's time for a tort of invasion of privacy

Penelope Watson



'There's a loss of personality;
Or rather, you've lost touch with the person
You thought you were. You no longer feel quite human.
You're suddenly reduced to the status of an object
A living object but no longer a person.'[2]

PRIVACY AND LAW REFORM

In 2006, the Australian Law Reform Commission (ALRC) was asked to inquire into 'the extent to which the *Privacy Act* 1988 (Cth) and related laws continue to provide an effective framework for the protection of privacy in Australia'.[3] The Victorian and NSW Law Reform Commissions are also currently examining privacy. Influential earlier ALRC reports, including *Unfair Publication: Defamation and Privacy*[4] in 1979, and *Privacy* (ALRC 22) in 1983, did much to shape the current law. Many of the recommendations relating to information privacy contained in ALRC 22 were subsequently enacted in the *Privacy Act* 1988, which also gave effect to the Organisation for Economic Co-operation and Development (OECD) guidelines adopted in 1980 to facilitate the harmonisation of national privacy legislation among member countries. The present terms of reference focus on 'rapid advances in information, communication, storage, surveillance, and other relevant technologies; possible changing community perceptions of privacy and the extent to which [it] should be protected by legislation; the expansion of state and territory legislative activity … relevant to privacy; and emerging areas that may require privacy protection'.[5]

The Victorian Law Reform Commission (VLRC) began inquiring into workers' privacy, and privacy in public places, in 2002.[6] The April 2006 reference to the NSW Law Reform Commission (NSWLRC) concerned protection of the privacy of the individual. The NSW terms specifically direct the Commission to inquire into 'the desirability of privacy principles being uniform across Australia, and … of a consistent legislative approach … and the desirability of introducing a statutory tort of privacy in New South Wales'.[7] The question of a statutory tort is the first item on the agenda. Developments in tort law in the last two decades across the common-law world indicate that privacy is very much on the judicial agenda as well. Recent decisions in the House of Lords and the New Zealand Court of Appeal have recognised tort protection of personal privacy, and the Australian High Court has made some tentative steps in that direction. The US recognises four separate privacy torts.

This article briefly considers some of the problems and issues involved in protecting privacy, before examining recent developments in tort law both in Australia and overseas, and their implications for a new tort of invasion of privacy in Australia. Definitional issues are of major concern, as are questions relating to the appropriate roles of courts and Parliament in initiating new law; in particular, whether privacy protection should be achieved via legislation, by judicial adaptation of existing tort causes of action such as *Wilkinson v Downton* and breach of confidence, or by creating an entirely new tort. Certainly the time is right for a tort of invasion of privacy in Australia, whether in statutory or traditional common-law form.

DEFINING PRIVACY AND BALANCING COMPETING INTERESTS

Debate about privacy relates directly to concerns about the interface between citizen and state, the drawing of appropriate boundaries between public and private in a mass media society imbued with concepts of freedom of speech and the public's 'right to know', national security and democratic rights, human rights, and sometimes, also to commercial exploitation of attributes, likenesses or spectacles associated with celebrities and public figures. As Fleming says, 'demand for legal protection of [privacy] appears only in a relatively advanced culture, with increasing refinement in the social and aesthetic values of the community. It becomes more insistent as the intensity of modern life renders desirable some retreat from the world and as personal modesty, dignity and self-respect are increasingly exposed to practices which overstep the bounds of propriety.'[8] In *Australian Broadcasting Corporation v Lenah Game Meats Pty Ltd*,[9] Gleeson CJ pointed out 'the lack of precision of the concept of privacy [which] is a reason for caution in declaring a new tort'. He continued: 'Another reason is the tension that exists between interests in privacy and interests in free speech. I say "interest" because talk of "rights" may be question-begging, especially in a legal system which has no counterpart to the First Amendment to the United States Constitution or to the *Human Rights Act* 1998 of the United Kingdom… There is no bright line which can be drawn between what is private and what is not.' Gleeson CJ suggested that:

> 'certain kinds of information about a person, such as information relating to health, personal relationships, or finances, may be easily identified as private; as may certain kinds of activity, which a reasonable person, applying contemporary standards of morals and behaviour, would understand to be meant to be unobserved. The requirement that disclosure or observation of information or conduct would be highly offensive to a reasonable person of ordinary sensibilities is in many circumstances a useful practical test of what is private.'[10]

In the High Court's view, 'the foundation of much of what is protected where rights of privacy are acknowledged, is human dignity'.[11] This categorisation suggests that if such a tort is judicially recognised in Australia, it will not protect corporations. There are many parallels between defamation and privacy, in that both protect dignitary interests, both depend on emotional distress and intangible injury, and both conflict with countervailing democratic rights of free speech and freedom of the press. Uniform defamation laws,[12] which came into effect in January 2006, similarly restrict the rights of corporations, providing that reputation is a human or personal concept. Autonomy, or the right to be self-determining, is a strongly protected value in the common law, particularly in the medical domain. Intrusions on privacy impact on autonomy, particularly the 'Big Brother' >>

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style of intrusion, whether it be in the form of surveillance in the workplace, drug-testing of athletes, open access to personal data, destruction of civil liberties in the name of anti-terrorist legislation, or governmental initiatives such as the Australia Card or proposed Access Card.[13] Technological progress, computerisation, and the mass media threaten privacy on all fronts.

RECENT DEVELOPMENTS IN TORT LAW

The common law has always protected privacy tangentially through torts such as defamation, trespass to land and person, breach of confidence, breach of trust, nuisance, passing off, conspiracy, malicious or injurious falsehood, and *Wilkinson v Downton*. Privacy is at the heart of many actions brought under other torts, especially by public figures. Examples include *Ettingshausen v Australian Consolidated Press*[14] and *Chappell v TCN Channel 9 Pty Ltd*[15] (defamation); *Bernstein v Skyviews & General Ltd*[16] (trespass to land); and *Kaye v Robertson*[17] (libel, malicious falsehood, trespass to person, passing off). Major developments in the common law have led towards a more coherent and deliberate protection of privacy.

> Creation of a **statutory tort** of invasion of **privacy** would speed up and unify the protection of privacy.

Australia

Australian courts have accepted since the 1930s that *Victoria Park Racing and Recreation Grounds Co Ltd v Taylor*[18] denied any common-law right to privacy. In that case, the defendant built a tower on neighbouring land overlooking the plaintiff's racecourse, from which he broadcast the races, causing a decline in attendance and profits. The plaintiff brought an action on the case in nuisance (watching and besetting), seeking an injunction. Dixon J stated that 'English law is rightly or wrongly clear that the natural rights of an occupier do not include freedom from the view and inspection of neighbouring occupiers or other persons.' Judicial support for increased recognition of privacy began to build slowly from the 1980s; for example, Murphy J in 1982 described 'unjustified invasion of privacy' as one of the 'developing torts',[19] and Kirby J in 1993 criticised legislative inactivity on privacy, in *Ettinghausen*.

In 2001, the High Court opened the door to the development of a tort of privacy by deciding, in *Australian Broadcasting Corporation v Lenah Game Meat Pty Ltd*,[20] that *Victoria Park* no longer represented an impediment. In *Lenah*, the plaintiff sought an injunction to restrain the televising of possums being slaughtered at its Tasmanian abattoir. The slaughter had been filmed by unknown trespassers, and the film passed to the ABC television's *7.30 Report* by an animal liberation group. The Tasmanian Supreme Court granted Lenah Corporation interim and mandatory injunctions against the ABC and the animal liberation group, and the ABC appealed. The High Court made it clear that an injunction cannot be issued except to restrain invasion of the plaintiff's legal rights, and since the ABC was not the trespasser, invasion of some other right had to be proved. This forced Lenah to argue for a right to privacy protected in tort. A related issue was whether, if such a right were acknowledged, it should extend to corporations as well as individuals. By a majority (4:2), the High Court set aside the interlocutory injunction because it was not supported by any underlying cause of action (right). Despite this decision, there was some support for privacy protection, and a general consensus on *Victoria Park*. Callinan J said that: 'the time is ripe for consideration whether a tort of invasion of privacy should be recognised', and Gleeson CJ was of the view that 'the law should be more astute than in the past to identify and protect interests of a kind which fall within the concept of privacy'.[21] However, Gummow and Hayne JJ, with whom Gaudron J agreed, stated that 'reliance on an emergent tort of invasion of privacy is misplaced'. Gleeson CJ commented that if the information had been confidential, an action for breach of confidence would have been open. All the justices except Callinan J opposed recognition of a privacy right for corporations, because the 'foundation [of privacy rights] is human dignity'.[22]

An interesting judgment by Skoien J in the District Court of Queensland in *Grosse v Purvis*[23] built substantially upon *Lenah*, taking the 'bold step' of recognising a tort of invasion of privacy. Unfortunately for legal development, the case settled on appeal. The plaintiff in *Grosse* was a well-known local figure and Mayor of Maroochy Shire, who sued her former work colleague and lover for invasion of privacy, harassment, intentional infliction of physical harm, nuisance, trespass, assault, battery, and negligence, arising out of a sustained course of stalking and harassment over six years. The plaintiff suffered from post-traumatic stress disorder, and had attempted suicide. She sought compensatory, aggravated and exemplary damages, as well as a permanent injunction. Skoien J interpreted 'stalking' within the meaning of the Queensland Criminal Code ss359A-E to include harassment, and decided that 'unlawful stalking involves an invasion of the privacy of the victim'. He concluded that, as all the offences contained in the Code encompass an actionable tort giving the victim the right to sue civilly, there was no reason to differentiate stalking.[24] In his discussion of *Lenah*, he noted that 'within the individual judgments certain critical propositions can be identified … to found the existence of a common-law cause of action for invasion of privacy,' and considered developments in the UK and USA discussed in *Lenah*. He concluded: 'it is a bold step to take … the first step in this country to hold that there can be a civil action for damages based on the actionable right of an individual person to privacy… In my view there is such an actionable right.'[25]

The essential elements of any such tort would include a 'willed act by the defendant' and 'such a degree of seriousness that the ordinary person should not reasonably be expected to endure it'.[26] Further, a defence of public interest should be available, although it was not open on these facts. Skoien J agreed with Jeffries J in *Tucker v News Media* that the 'right to privacy ... seems a natural progression of the tort of intentional infliction of emotional distress [*Wilkinson v Downton*] and in accordance with the renowned ability of the common law to provide a remedy for a wrong'. The plaintiff was awarded compensatory, aggravated and exemplary damages for breach of privacy totalling $178,000. Following these two decisions, much uncertainty remains in Australia about a privacy tort, but the stage is set for future development.

USA

The US has long recognised four separate judicially developed torts protecting privacy. A very influential article by Warren and Brandeis in 1890,[27] discussing mainly English precedents, stimulated great judicial and academic interest in privacy, so that by 1960, 26 states had authoritatively recognised a tort of invasion of privacy, and a further 11 had limited protection.[28] Analysing over 300 reported cases, Prosser claimed in 1960 that four separate emerging torts could be identified under the umbrella of privacy, 'tied together by the common name, but otherwise hav[ing] almost nothing in common except that each represents an interference with the right of the plaintiff ... "to be let alone"'.[29] The four torts concern intrusion upon seclusion or into private affairs; appropriation of the plaintiff's name or likeness for the defendant's advantage; publicity given to private life; and publicity placing a person in a false light.[30] The separation into different torts overcomes many of the definitional issues discussed above, and allows for autonomy and human-rights based approaches to co-exist with protection of commercial interests. The *Restatement of Torts* (2nd) 1977, provides in s652A that 'one who invades the right of privacy of another is subject to liability for the resulting harm to the interests of the other'. While the *Restatement* is not legislative, the US approach gives some idea of how a statutory tort of privacy might look. As Fleming[31] points out, however, 'the American experience has taught the lesson that there is no easy embracing formula for dealing with all the different practices encountered. The proper balance to be struck between the clashing interests ... varies greatly and demands individualised solutions.'

The US is not directly comparable to Australia, because of the constitutional guarantee of privacy contained in the 14th Amendment. This has been interpreted very broadly; for example, in *Griswold v Connecticut*,[32] where it was used to invalidate statutes preventing the use and distribution of contraceptives to married couples, on the grounds that such decisions properly fell within marital privacy. Similarly, in *Roe v Wade*,[33] the Supreme Court recognised a constitutional right to abortion prior to foetal viability, based on personal autonomy and the right to privacy. Commentators have frequently pointed out the tension between the First Amendment, guaranteeing freedom of speech, and the 14th Amendment, arguing that protection of privacy is weak in practice as a result. Anderson[34] claims that when competing interests such as freedom of the press collide, 'privacy almost always loses. Privacy law in the US delivers far less than it promises, because it resolves virtually all conflicts in favour of information, candour, and free speech. The sweeping language of privacy law serves largely to mask the fact that the law provides almost no protection.'

United Kingdom

The UK has led the development of a tort of privacy as an extension of breach of confidence, which is well established in equity, where it is restrained as unconscionable conduct akin to breach of trust. Cases such as *Coco v A N Clark (Engineers) Ltd* [35] explain classic breach of confidence as disclosure 'in circumstances importing an obligation of confidence'. The extension of the concept began with *Argyll v Argyll*.[36] The Duchess of Argyll sought to restrain publication by her ex-husband of marital confidences relating to her adultery and sexual behaviour during the marriage. Ungoed-Thomas J commented that the case 'raises difficult and profound questions of the policy of the law, its function in our society and how far it is still capable ... of development to carry out that function.' In granting the injunction, his Honour extended breach of confidence beyond its traditional >>

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context of contract or property relationships, saying that 'the confidential nature of the relationship [of marriage] is of its very essence and so obviously and necessarily implicit in it'.

Breach of confidence developed from the implied obligation of confidence in *Argyll* to encompass not only information supplied by the plaintiff, but also information about the plaintiff, such as the disclosure of hospital records identifying a person as suffering from AIDS,[37] or identifying a person as an informer.[38] Since *Att-Gen (UK) v Guardian Newspapers Ltd (No. 2)*[39] the requirement of an initial confidential relationship between the parties has disappeared, and the law now imposes a 'duty of confidence' whenever a person receives information he knows or ought to know is fairly and reasonably to be regarded as confidential.[40] Examples given in the case included 'obviously confidential' documents, and 'secrets of importance to national security' coming into possession of a member of the public. Yet Glidewell J could still say in 1991 in *Kaye v Robertson* that 'It is well known that in English law there is no right to privacy, and ... no right of action for breach... The facts of the present case are a graphic illustration of the desirability of Parliament considering whether and in what circumstances statutory provision can be made to protect privacy of individuals.'[41] In *Hellewell v Chief Constable*[42] Laws J, hypothesising disclosure of an unauthorised photograph of another engaged in some private act, said that this would amount to a breach of confidence, and 'in such a case the law would protect what might reasonably be called a right of privacy, although the ... cause of action would be breach of confidence'. Of *Hellewell*, Fleming[43] said that 'in effect a new tort was born, though disguised by a more familiar name'.

The passage of the *Human Rights Act* 1998 (UK) gave further impetus to privacy, requiring English courts to take the European Convention on Human Rights into account in their decision-making, including Article 8 which mandates 'respect for ... private and family life ... home and ... correspondence.' As Butler[44] points out, later cases demonstrate that the UK has moved a considerable distance away from the original rationale for breach of confidence as in *Argyll*. In *Venables v News Group Newspapers*,[45] for example, the plaintiffs had been convicted of murdering toddler James Bolger when they themselves were children of ten. On their release from prison at age 18, they sought to prevent disclosure by the press of their identity and whereabouts. It was held that their right to confidence protecting against disclosure of identity outweighed the freedom of the press because of the danger to their lives. Butler-Sloss P held that protection of confidential information can be extended even where it results in restriction of the press 'where not to do so would be likely to lead to serious physical injury or death of [plaintiffs] and there is no other way to protect [them].'[46]

By 2001 Sedley LJ in *Douglas v Hello!*[47] considered that 'The law no longer needs to construct an artificial relationship of confidentiality between intruder and victim: it can recognise privacy itself as a legal principle drawn from the fundamental value of personal autonomy.' *Douglas* was an appeal against an interlocutory injunction obtained by Catherine Zeta-Jones and Michael Douglas against *Hello!* magazine regarding initial and further publication of unauthorised pictures of their wedding. The plaintiffs had sold exclusive rights to a rival magazine, and taken extensive precautions to keep other photographers out. Brooke LJ considered that although the claim to privacy was not strong publication should not be allowed because of confidentiality, while Keene LJ saw no real difference between breach of confidence and breach of privacy. At trial, the case was decided on the commercial value of the photos to the media, and given that extreme steps had been taken to exclude unauthorised pictures, the Court of Appeal held that the defendant's photos were acquired in circumstances where it ought to have known that the pictures were the subject of an obligation of confidence.[48]

In *Wainwright v Home Office*,[49] the House of Lords again considered privacy, this time based on Britain's international obligations and *Wilkinson v Downton*, rather than breach of confidence. *Wainwright* concerned a strip-search of a mother and her mentally impaired adult son while on a prison visit to another family member. The mother was required to undress in front of a window, and the son was touched on the genitals. The son developed post-traumatic stress disorder, but the mother, while distressed by the experience, suffered no recognised psychiatric illness. At trial, McGonigall J found the defendants liable in trespass to the son, and characterised the issue regarding the mother as 'whether this particular form of trespass to the person ... should be extended to other rights, including a right to privacy.' He held that trespass to person does cover infringements of privacy, and tort should remedy any kind of distress caused in this way because of Article 8 of the *European Convention*. The Court of Appeal disagreed regarding the extension of trespass, setting aside all verdicts except in relation to the son's battery. In the House of Lords,[50] the plaintiffs argued first that, because of Britain's international obligations under the *European Convention*, a tort of privacy had always existed; but in the absence of a general tort of privacy, the House should comply with the *Convention* by extending *Wilkinson v Downton*. Lord Hoffman delivered the main judgment, containing a lengthy discussion of privacy,[51] but confirming that the UK still does not recognise a general tort of invasion of privacy. The views expressed on *Wilkinson v Downton* cut off that avenue of development for the UK.

Finally, breach of confidence was again the preferred approach in *Campbell v Mirror Group Newspapers Ltd.*[52] The plaintiff was super-model Naomi Campbell, who sued the publishers of the *Mirror* newspaper over two articles; one of which, entitled 'Naomi: I am a drug addict', revealed her

attendance at Narcotics Anonymous. She sued for breach of confidence and compensation under the *Data Protection Act* 1998 (UK), winning at trial a 'modest' £2,500 plus £1,000 in aggravated damages. In the House of Lords, Lord Nichols of Birkenhead reaffirmed that there was 'no overarching, all-embracing cause of action for breach of privacy in the UK' as decided in *Wainwright*, but continued: 'protection of various aspects of privacy is a fast developing area of the law', instancing the New Zealand decision in *Hosking v Runting*, and pointing to the effect of the *Human Rights Act* 1998 (UK). *Campbell* concerns only the wrongful disclosure of private information (equivalent to the 3rd category protected under the US *Restatement*). According to Lord Nicholls, 'confidential' is an awkward term, the 'more natural description is ... private. The essence of the tort [of breach of confidence] is better encapsulated now as misuse of private information.'[53] Further, 'the values enshrined in Articles 8 and 10 [of the European Convention] are now part of the cause of action for breach of confidence'.

New Zealand

Bradley v Wingnut Films[54] and *Tucker v News Media Ownership Ltd*[55] were the first two New Zealand decisions to consider privacy in tort. In *Tucker*, the plaintiff was initially granted injunctions restraining publication of his past criminal record, but these were later refused on appeal because widespread publicity had already occurred. McGechan J pointed to the need for urgent reform, including 'legislative action on some comprehensive basis determining the extent of the right to privacy and the relation of that right to freedom of speech'.[56] The plaintiff in *Bradley* was denied an injunction to restrain publication and/or dissemination of a gory and violent 'splatter film' called *Brain Dead*, which was made on location in a cemetery, and showed glimpses of the plaintiff's burial plot and tombstone. He sued for intentional infliction of emotional harm under *Wilkinson v Downton*, breach of privacy, and defamation. The High Court held that a tort of invasion of privacy did form part of the common law of New Zealand. Its essential elements included public disclosure of private facts, and that the disclosure must be highly offensive and objectionable to a reasonable person of ordinary sensibility. Gallen J considered that to accept breach of privacy on the facts in *Bradley* 'would be to extend the boundaries of an emerging tort far beyond what is safe, and would impose restrictions on the freedom of expression which would alter the balance against such freedom more than could be justified'.

Two recent cases, *Hosking v Runting*[57] and *Brown v The Attorney-General of New Zealand*[58] have taken the law further. The male plaintiff in Hosking was a television celebrity whose wife gave birth to twins by in vitro fertilisation. *New Idea!* magazine hired the defendant, Runting, to take covert pictures of the babies shopping with their mother. The Hoskings sought an injunction to restrain publication of the pictures, arguing that although they had been taken in public places, publication represented an intrusion into their private life and exposed the children to dangers of kidnap. The NZ Court of Appeal rejected the injunction unanimously, but recognised a new tort of invasion of privacy by a majority of 3:2.[59] The *NZ Bill of Rights Act* 1990 does not recognise a right to privacy, although it affirms New Zealand's commitment to the International Covenant on Civil and Political Rights, which includes protection of privacy in Article 17. In view of this, and other New Zealand legislation protecting privacy,[60] the majority concluded that the courts should act alongside Parliament to protect privacy and give a civil remedy for its invasion. The central elements of a privacy tort were identified as the presence of facts where a reasonable expectation of privacy existed, and publicity given to private facts that would be highly offensive to the objective reasonable person.

Thus the Court of Appeal restricted the new tort to wrongful publicity given to private lives, arriving 'although by a different route ... [at a result] not substantially different' from that adopted in the UK in *Campbell v MGN*. The requirement of 'harm' contained in the second limb does not depend upon proof of personal injury or economic loss, since the harm is 'in the nature of humiliation and distress'. It was accepted that public figures have less reasonable expectation of privacy that others, and that a defence of 'legitimate public concern' would be needed to balance individual privacy and freedom of speech. The main remedy envisaged was damages, with injunctions being rarely granted, as in defamation. >>

In 2006, a convicted paedophile successfully relied on *Hosking* to obtain damages against the police for violating his privacy by publicising his name, criminal background, and photograph after his release from prison on parole, in a leaflet drop headed 'Convicted Paedophile Living in Your Area'. The Wellington District Court in *Brown*[61] awarded the plaintiff $25,000 for breach of privacy and breach of confidence, suggesting that privacy law New Zealand was more aligned to US jurisprudence than to that of Australia, Canada or Britain. What constitutes private information was seen as ultimately a 'matter of degree and circumstance … to be assessed on an individual case basis', within the *Hosking* test of 'reasonable expectation' of privacy, as determined by an 'objective observer' standard. In *Tucker*, a 20-year-old criminal record was private in the circumstances, but in *Brown* the criminal history was clearly public information as the five-year sentence was ongoing at the time of parole. The crux of the decision for the plaintiff was that the police had gone further than simply releasing information already available in the public domain. The public display of the plaintiff's photograph and street address constituted breach of confidence. Although he had consented to being photographed for 'legitimate Police business', he was not informed that it would be used in a public leaflet drop – such use came under the second limb of the *Hosking* test (whether 'highly offensive').

CONCLUSION

The time is right to recognise a tort of invasion of privacy. The UK, New Zealand, and US have all arrived at this conclusion, by different paths. Many of the possible options have been explored and tested through the courts, the dominant preferred approach being the development and metamorphosis of existing torts – in particular, breach of confidence and *Wilkinson v Downton*. As the preceding survey demonstrates, the traditional manner of common-law development is to 'grope forward cautiously along the grooves of established legal concepts … rather than make a bold commitment to an entirely new head of liability,'[62] although torts do on rare occasions appear[63] and disappear[64] with little warning. In part, this stems from concerns about the legitimacy of non-elected judicial officers undertaking major law reform without direct accountability to the people. Creation of a statutory tort would speed up and unify the protection of privacy, providing a firm foundation for subsequent judicial development, and 'filling in the gaps' in the present legislative patchwork quilt of privacy protection.[65] Australia and the Gleeson High Court have shown little sympathy for 'judicial creativity' or activism since the Mason years, as evidenced by the very cautious and incremental approach adopted in *Lenah*. A statutory tort, built on extensive investigation and recommendation by many law reform bodies past and present, which takes into account common-law developments over the last two decades, seems the most fruitful and likely way forward. Any such tort is likely to be founded on principles of personal autonomy and protection of dignitary interests, excluding corporations and the commercial interests that are protected in the US. ■

Notes: **1** Professor Zelman Cowen, *The Private Man* (The 1969 Boyer Lectures) (1969), 9. **2** T S Elliott, *The Cocktail Party*, Act 2, Sc 1; quoted in Australian Law Reform Commission Report No 11: *Unfair Publication: Defamation and Privacy*, 1979, Ch 8 'Privacy in Australia: The story so far'. **3** Australian Law Reform Commission, Issues Paper 31, *Review of Privacy*, 2006, p 29. Review also recommended in: Parliament of Australia – Senate Legal and Constitutional References Committee, *The Real Big Brother: Inquiry into the Privacy Act 1988* (2005), Rec 2; Office of the Privacy Commissioner, *Getting In On the Act: The Review of the Private Sector Provisions of the Privacy Act 1988* (2005), Rec 1. **4** Above note 2. **5** ALRC Issues Paper 31, above note 3, at 45. **6** See VLRC, *Workplace Privacy* (Final Report, 2005). **7** Terms of reference contained in a letter to the NSWLRC received on 11 April 2006, from the attorney-general, the Hon R J Debus MP. **8** J G Fleming, Ch 26 'Right of Privacy', *The Law of Torts*, 9th ed, 1998, p664. **9** [2001] HCA 63 (*Lenah*). **10** *Ibid* [40] (Gleeson CJ). **11** *Ibid* [42] (Gleeson CJ). **12** For example, *Defamation Act* 2005 (NSW), s9; similar to s8A, *Defamation Act* 1974 (NSW). **13** See article by Graham Greenleaf in this edition of *Precedent*, p34. **14** (1991) 23 NSWLR 443. Well-known football player whose naked photo, taken in shower after game without consent, was used as cover on men's magazine. Succeeded. **15** Well-known test cricketer seeking to suppress publication of article detailing his extra-marital affairs. **16** [1978] QB 479. Unsuccessful action against aerial photographer for trespass to land over stately home. **17** (1991) 19 IPR 147. Well-known English actor involved in serious car accident sued media for photographs and interview at bedside without consent while plaintiff semi-conscious and recovering from brain surgery. Interlocutory injunction grounded in malicious falsehood. **18** (1937) 58 CLR 479, (*Victoria Park*). **19** *Church of Scientology v Woodward* (1982) 154 CLR 25. **20** *Lenah*. **21** *Ibid* [40]. **22** *Ibid* [43]. **23** [2003] QDC 151 (*Grosse*). **24** *Ibid* [420]. **25** *Ibid* [422]. **26** *Ibid* [444]. **27** Samuel Warren and Louis Brandeis, 'The Right to Privacy' (1890-91) 4 *Harvard Law Review*, 193. **28** As traced by Dean Prosser, 'Privacy', 48 *Calif LR* 383 (1960); *The Law of Torts* (4th ed, 1971), Ch 20; quoted in ALRC No. 11, 1979, above note 5, p 111. **29** Prosser, 'Privacy', *Ibid*, at 389. **30** *Restatement of Torts* (2nd) 1977, ss 652A – 652E. **31** Fleming, above note 8, at 665. **32** 381 US 479 (1965). **33** 410 US 113 (1973). **34** Anderson, 'The Failure of American Privacy Law', in B Markensis (ed), *Protecting Privacy*, (1999) 139 at 140; cited in *Lenah* at [118] (Gumow and Hayne JJ). **35** [1969] RPC 41 (Megarry J), see especially [47]-[48]. **36** [1967] Ch 302. See also *Prince Albert v Le Strange* (1849) 32 De G & Sm 652; 64 ER 295. **37** *X v Y* [1988] 2 All ER 648, cited in Fleming, above note 8, 670. **38** *G v Day* [1984] 1 NSWLR 24, cited in Fleming, *ibid*. **39** [1990] 1 AC 109. **40** *Campbell* [2004] UKHL 22 at [14] per Lord Nicholls discussing *Coco v AN Clark*. See also *A v B plc* [2003] QB 195. **41** *Kaye*, above note 17. **42** [1995] 1 WLR 804 at 807 (Laws J). **43** Above note 8, at 672. **44** D Butler, 'A Tort of Invasion of Privacy in Australia?', (2005) 29 (2) *MULR* 339 at 349. **45** [2001] Fam 430. **46** *Ibid*, 462. See Butler, above note 44, at 349. **47** [2001] QB 967. **48** Butler, above note 44, 348-9. **49** [2004] 2 AC 406. **50** *Wainwright v Home Office* [2004] 2 AC 406. **51** *Wainwright, ibid*, esp [14] – [35]. **52** *Campbell* [2004] UKHL 22. **53** *Campbell, ibid* at [14]. **54** [1993] 1 NZLR 415. **55** [1986] 2 NZLR 716. **56** *Tucker, ibid*, 736. **57** [2005] 1 NZLR 1. **58** [2006] CIV-2003-085-236. **59** Gault P and Blanchard J (Tipping J concurring). **60** For example, *Privacy Act* 1993, *Harrassment Act* 1997, *Broadcasting Act* 1989. **61** *Brown*, above note 58. **62** Fleming, above note 8, p664. **63** For example, *Wilkinson v Downton* (1897) 2 QB 57. **64** For example, *Rylands v Fletcher* (1868) LR 3 HL 330, subsumed into negligence in Australia in *Burnie Port Authority v General Jones Pty Ltd* (1994) 179 CLR 520. **65** For example, *Privacy and Personal Information Protection Act* 1998 (NSW); Health Records and Information Privacy Bill 2002 (NSW) (commenced 1 March 2004); *Privacy Act* 1988 (Cth); *Privacy Amendment (Private Sector) Act* 2000 (Cth); *Listening Devices Act* 1984 (NSW); *Broadcasting and Television Act* 1956 (Cth); *Telecommunications (Interception) Act* 1979 (Cth); *Freedom of Information Act* 1982 (Cth).

Penelope Watson *is a Senior Lecturer in the Division of Law, Macquarie University, Sydney.* **PHONE** *(02) 9850 7071*
EMAIL *penelope.watson@mq.edu.au*