Protecting personal privacy

Why Australia needs a tort of invasion of privacy

By Michael Lyons and Brett Le Plastrier

The rationale for treating privacy as a right worth recognising at law lies in the recognition of fundamental human values.

Judges across several jurisdictions have acknowledged 'human dignity' as the basis for affording legal protection to privacy.[1] In a similar vein, the concept of 'personal autonomy' has been used to rationalise the legal protection extended to privacy.[2] It follows from this inherent right that there is a 'natural human desire to maintain privacy' and to 'exercise choice in respect of the incidence and degree of social interaction'.[3] It is the role of the law to preserve the exercise of this choice.

An unfortunate aspect of modern communications, including the internet, is the potential for breaches of a person's privacy. With the advent of devices such as camera phones that can record and transmit material instantaneously to a large number of people, the need for the law to respond to protect potential interference with human dignity is paramount. At present, the Australian response to this need—both legislative and judicial—is inadequate.

Existing privacy law

Current legislation in Australia does not provide adequate protection of privacy because of the limited number of circumstances in which it can be used. At a federal level, the *Privacy Act 1988* (Cth) only imposes obligations on discrete categories of entities rather than the public at large.[4] This is problematic because the ability to obtain a remedy under the *Privacy*

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Finalists and judges of the Kirby Cup competition 2006

Act depends not upon what was done, but on who it was done by. It has also been noted that, even though the *Privacy Act* now reposes some power in the courts to provide remedies,[5] it still 'stops short of what might be called a statutory tort of privacy invasion'.[6]

The states and territories have enacted legislation that prohibits the recording, listening, communication or publication of private conversations in certain circumstances,[7] however these laws only apply when a listening or surveillance device has been used. The trigger, therefore, is the form of an intrusion of privacy rather than its substance.

No traditional principle of common law or equity in Australia protects the privacy of an individual in and of itself. While recognised remedies may provide compensation in certain circumstances, they do not remedy an invasion of privacy—for example, defamation protects the reputation of the plaintiff, not his or her privacy; actions in trespass (either to goods or to land) and in conversion protect posessory rights rather than any right of the plaintiff to privacy on their land; actions in breach of confidence protect confidential information that is used in an unauthorised manner rather than private information or an invasion of privacy; and the tort of infliction of mental harm is inadequate because a person's privacy can be invaded in the absence of any intention to inflict mental harm.

Development of a tort of privacy in Australia

The perceived impediment in the past 70 years to the development of a tort of privacy lay in *Victoria Park Racing and Recreation Grounds Ltd v Taylor* [8] *(Victoria Park)* where the plaintiff company was not able to protect a spectacle occurring on its own property from being broadcast by an unauthorised party. However, the High Court in *Australian Broadcasting Corporation v Lenah Game Meats Pty Ltd (Lenah)* held that *Victoria Park* does not prevent the development of a tort of privacy in Australia.

Gleeson CJ held that while the law should be more receptive to protecting 'interests of a kind which fall within the concept of privacy', the 'lack of precision of the concept of privacy is a reason for caution in declaring a new tort [of privacy]'.[9] His Honour thought that the duty of breach of confidence was sufficiently broad to provide a remedy 'in a case such as the present'.[10]

The Kirby Cup 2006

The Kirby Cup is held every two years in association with the Australasian Law Reform Agencies Conference (ALRAC) and is a unique opportunity for Australian law students to gain recognition for their vision for law reform.

The format of the Kirby Cup has varied over the years. In the 2006 competition, students were invited by the ALRC to submit a proposal for law reform relevant to the ALRC's current Privacy Inquiry.

Teams of two law students submitted a written component. Based on these written entries, three teams were short-listed and invited to participate in an oral advocacy round which was held in Melbourne on 5 July 2006, during the 28th Annual National Australian Law Students' Association (ALSA) Conference.

The teams advancing to the oral advocacy round presented their proposal to an expert judging panel which consisted of Justice Tim Smith of the Supreme Court of Victoria; Judge Felicity Hampel of the County Court of Victoria; Angela Langdon, Team Leader with the Victorian Law Reform Commission; and Assoc Professor Les McCrimmon, Commissioner, ALRC.

The submissions received from the three teams were treated as formal submissions into the ALRC's privacy review.

Justices Gummow and Hayne found that *Victoria Park* does not 'stand in the path of the development of such a cause of action'.[11] While not finding that the tort could be developed on the facts of the case, their Honours were at pains to stress that their reasons should not be taken as 'foreclosing any such debate' on the development of the tort in respect of 'natural, not artificial persons'.[12]

Justice Kirby indicated that 'it may be that more was read into the decision in *Victoria Park* than the actual holding'.[13] Similarly, Callinan J held in *obiter* that 'the time is ripe for consideration whether a tort of invasion of privacy should be recognised in this country, or whether the legislatures should be left to determine whether provisions for a remedy should be made'.[14]

Since *Lenah*, only three cases have dealt explicitly with the tort of privacy in Australia. In *Grosse v Purvis*, Skoien SDCJ held that from *Lenah* it is possible to 'found the existence of a common law cause of action for invasion of privacy'.[15] The essential elements of the tort were distilled by his Honour after an analysis of the US jurisprudence adverted to by Callinan J in *Lenah* and consideration of principles surrounding development of tort law stated by Jeffries J in *Tucker v News Media Ownership Ltd*.[16] According to his Honour the elements of the tort are a 'willed act by the defendant' which 'intrudes upon the privacy or seclusion of the plaintiff, in a manner which would be considered highly offensive to a reasonable person of ordinary sensibilities'. Finally, the intrusion must 'cause 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 she is lawfully entitled to do'.[17] His Honour also found that the defence of public interest should be available.[18]

However, *Grosse* was criticised by Heerey J in *Kalaba v Commonwealth of Australia*.[19] Justice Heerey took the view that Gillard J was correct in finding in *Giller v Procopets* [20] that 'the law has not developed to the point where the law in Australia recognises an action for breach of privacy'.[21] To that end, his Honour found that Skoien SDCJ erred in introducing the tort in Australia.[22]

A state of confusion

There are no adequate statutory or general law remedies that protect privacy in Australia. While the High Court has left open the prospect of the tort coming into existence, only one lower court has developed a tort of privacy [23] and subsequent cases have left the law in a state of confusion. Therefore, either judicial or statutory reform is needed to clarify the state of the law and protect a person's legitimate privacy interests.

Recommended formulation of the tort

Two torts of invasion of privacy should be introduced into Australia. The first tort protects against disclosure of private facts. This tort is necessary because the defence of truth is available to protect a defendant who publishes material that would ordinarily be defamatory. This defence leaves a plaintiff with no protection against publication of what may in fact be true but intensely private information. The second tort protects against intrusions into privacy. This tort is required owing to the absence of adequate protection from other remedies. Moreover, it follows logically from the underpinning of the tort—human dignity—to develop a tort of this nature because an invasion of privacy in many instances is an affront to human dignity.

Australia should not follow the United Kingdom method of adopting a tort of invasion of privacy.[24] The theoretical underpinnings are both alien to our legal system, as well as displaying a departure from principles of equity and common law. Both the European Commission on Human Rights' jurisprudence and the United Kingdom *Human Rights Act* have had a significant influence on the United Kingdom's judicial response to the need to protect privacy. In the absence of this influential jurisprudence in Australia, it is not appropriate to ground any protection of privacy in Australia on the UK's approach.

The UK approach is also inconsistent with the development of the second type of tort that is recommended—the intrusion tort.

The better approach to privacy is that seen in New Zealand. The New Zealand tort has developed under the same jurisprudential influences that pervade Australian law, namely High Court of Australia cases and international law. By aligning itself more with law deriving from the United States, the NZ tort offers Australian courts a raft of references when developing the tort in Australia. While caution is necessary given the different constitutional

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and social forces operating in the US and Australia,[25] it is submitted that this body of law is preferable over the UK law.

The first tort should comprise of:

1. The existence of facts in respect of which there is a reasonable expectation of privacy unless that information or material constitutes a matter of legitimate public concern justifying publication in the public interest; and
2. Publicity given to those private facts that would be considered highly offensive to an objective reasonable person.

However, this tort would still not go far enough to protect privacy and a tort of intrusion of privacy should also be introduced, to protect citizens from the sort of situation that arose in *Kaye*.[26] At present, the law has no answer to this. It is important that the tort require similar considerations to the first tort, namely that the intrusion be 'highly offensive to an objective reasonable person'. This will create uniformity. Thus the tort will resemble in large part the tort already existing in the US, but with some modification to take account of the language used by the New Zealand court in formulating the first tort.

The second tort should exist where there is:

> an intentional intrusion, physically or otherwise, upon the solitude or seclusion of another or his private affairs or concerns if the intrusion would be highly offensive to an objective reasonable person.

Strategies for implementation

Justice Callinan observed in *Lenah* that 'the time is ripe for consideration whether a tort of invasion of privacy should be recognised in this country, or whether the legislatures should be left to determine whether provisions for a remedy for it should be made'.[27] Therefore it is necessary to analyse whether adoption of the tort of privacy at common law or by the judiciary would provide the most effective reform in contemporary Australia.

Putting the problem of having judges make the law to one side, there are two problems with a common law adoption of the tort of privacy. First, it involves waiting for an appropriate case for the tort to be formulated. This means that the law will remain uncertain until this case arises. Second, it may impose an unreasonable financial burden on the plaintiff who is forced to take his or her action to higher courts to assert the right. Therefore, a common law adoption of the tort of privacy is recommended only in the absence of any statutory intervention.

It is recommended that federal legislation that enshrines a tort of privacy should be enacted. This would ensure uniformity of the tort across Australia. However, the clear obstacle to implementation of federal legislation is finding a Constitutional head of power for the Commonwealth to legislate under. It may be possible for the Commonwealth to enact legislation pursuant to its external affairs power. The power of the Commonwealth to legislate in order to implement a treaty has been recognised consistently in the High Court.[28] Australia is a party to the *International Covenant on Civil and Political Rights* (the ICCPR),[29] Article 17 of which relevantly provides that 'no one shall be subjected to arbitrary or unlawful interference with his privacy' and 'everyone has the right to the protection of the law against such interference or attacks'. Therefore, enacting legislation that implements a tort of privacy may be constitutionally valid because it provides a person with a right to protection of the law from interference with his or her privacy.

In *Lenah*, Kirby J noted that Article 17 of the ICCPR 'appears to relate only to the privacy of the human individual ... [i]t does not appear to apply to a corporation or agency of government'.[30] Therefore it would appear that any legislation enacted under the authority of implementing the ICCPR could only protect natural persons. Despite the comments of Callinan J that may support a right of privacy for corporations,[31] this goes against the theoretical underpinning of the tort as being an incident of human dignity.

In the alternative, the states and territories should enact complementary legislation that provides for the tort of invasion of privacy. While this model has greater political risk associated with it, the recent adoption of uniform defamation laws provides some hope.

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Endnotes

1. *Australian Broadcasting Corporation v Lenah Game Meats* [2001] HCA 63, [43].
2. Douglas v Hello! [2001] 2 WLR 992, 1025.
3. Hosking v Runting [2005] 1 NZLR 1, 264.
4. See *Privacy Act 1988* (Cth), s16 (Commonwealth or ACT agencies), s16A (organisations). See also ss 6C, 6D (small business exemption).
5. *Privacy Act 1988* (Cth) ss 55A, 62.

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relief' for irrigators. As usual, when it comes to environmental issues, politicians ignore both science and common sense to serve short-term ends.

Unless all shoulders are to the same wheel and the number one priority is the restoration of the health of the river and a serious review of suitable crops for increasingly marginal land is conducted, free from the clutches of DOMI, then the future of Australia's largest river system looks very bleak indeed. If the High Court's recent decision that the corporate powers of the Federal Government can extend to workplace relations, perhaps these powers could extend to the waterways.

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15. National Competition Council. www.ncc.gov at 14 December 2006.
16. J Quick and R Garran, *The annotated Constitution of the Australian Commonwealth* (1976), 887.
17. *Ashworth v State of Victoria* [2003] VSC 194, (17 June 2003).
18. *Murrumbidgee Groundwater Preservation Association Inc v Minister for Natural Resources* [2005] NSWCA 10.
19. *He Kaw Teh v R* (1985) 157 CLR 523.
20. <www.dpmc.gov.au/nwi/docs/nwi_wts_chapter9.pdf> at 14 December 2006.

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6. *Australian Broadcasting Corporation v Lenah Game Meats Pty Ltd* [2001] HCA 63, [163].
7. *Listening Devices Act 1992* (ACT), *Listening Devices Act 1984* (NSW), *Surveillance Devices Act 2000* (NT), *Invasion of Privacy Act 1971* (Qld), *Listening and Surveillance Devices Act 1972* (SA), *Listening Devices Act 1991* (Tas), *Surveillance Devices Act 1999* (Vic), *Surveillance Devices Act 1998* (WA).
8. *Victoria Park Racing and Recreation Grounds Ltd v Taylor* (1937) 58 CLR 479.
9. *Australian Broadcasting Corporation v Lenah Game Meats Pty Ltd* [2001] HCA 63, [41].
10. Ibid, [55].
11. Ibid, [107].
12. Ibid, [132].
13. Ibid, [187].
14. Ibid, [335].
15. Grosse v Purvis [2003] QDC 151, [423].
16. *Tucker v News Media Ownership Ltd* Unreported, High Court, Wellington, CP 477/86 20 October 1986.
17. *Grosse v Purvis* [2003] QDC 151, [444].
18. Ibid, [447].
19. *Kalaba v Commonwealth of Australia* [2004] FCA 763.
20. *Giller v Procopets* [2004] VSC 113.
21. Ibid [447].
22. *Kalaba v Commonwealth of Australia* [2004] FCA 763, [6] (Heerey J).
23. *Grosse v Purvis* [2003] QDC 151.
24. The approach taken in the UK is more fully discussed in the unedited article.
25. *Australian Broadcasting Corporation v Lenah Game Meats* [2001] HCA 63, [335].
26. *Kaye v Robertson* (1990) 19 IPR 147.
27. *Australian Broadcasting Corporation v Lenah Game Meats* [2001] HCA 63, [335].
28. See, for example *Commonwealth v Tasmania* (1983) 158 CLR 1.
29. [1980] ATS 23.
30. *Australian Broadcasting Corporation v Lenah Game Meats Pty Ltd* [2001] HCA 63, [190].
31. Ibid, [328].

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