

FREEDOM OF POLITICAL COMMUNICATION, PUBLIC OFFICIALS AND THE EMERGING RIGHT TO PERSONAL PRIVACY IN AUSTRALIA

ABSTRACT

In recent times Australian courts have demonstrated a willingness to fashion a right to personal privacy at common law. The Australian Law Reform Commission has noted this important development and said it was likely to continue in the absence of legislative action in the area. The aim of this article is to outline a theoretical framework to underpin and inform the development of this emerging right — howsoever framed — and the extent to which it is possible for the law to provide meaningful privacy protection to public officials under the *Constitution*.

INTRODUCTION

The march toward the recognition of a legal right to privacy in Australia appears inexorable. The law has always afforded some and varying degrees of protection to a range of interests that are concerned with unwelcome invasions of privacy.¹ But recent common law developments in Australia and abroad centre on the development of a right to *personal* privacy, something that it had long been assumed was foreclosed in Australia by earlier authority.² In the United Kingdom, for example, the passage of the *Human Rights Act 1998* (UK) was considered the catalyst for the courts' renewed interest in, and sensitivity to, privacy interests.³ In Australia, the High Court made it clear in

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¹ In Australia, for example, a range of divergent privacy interests are given protection by the laws of defamation, trespass and breach of confidence, while personal data is protected through privacy statutes. See generally David Lindsay, 'Freedom of Expression, Privacy and the Media in Australia' in Madeleine Colvin (ed), *Developing Key Privacy Rights* (2002) 157.

² See *Jane Doe v Australian Broadcasting Corporation* (Unreported, County Court of Victoria, Civil Division, Hampel J, 3 April 2007) ('*Jane Doe*'); *Grosse v Purvis* (2003) Aust Torts Reports ¶81-706. It had long been considered that *Victoria Park Racing and Recreation Grounds Co Ltd v Taylor* (1937) 58 CLR 479, 496 (Latham CJ), 521 (Evatt J) was authority for the proposition that the common law of Australia did not recognise a right to personal privacy.

³ *Campbell v MGN Ltd* [2004] 2 AC 457, 472 (Lord Hoffman), 480 (Lord Hope); see generally Gavin Phillipson and Helen Fenwick, 'Breach of Confidence as a Privacy Remedy in the Human Rights Act Era' (2000) 63 *Modern Law Review* 660; Rabinder Singh, 'Privacy and the Media: The Impact of the Human Rights Bill' in Basil Markesinis (ed), *Protecting Privacy* (1999) 169.

*Australian Broadcasting Corporation v Lenah Game Meats Pty Ltd*⁴ that it would countenance — if not positively encourage — further common law development in privacy law.⁵

Moreover, in its recent discussion paper entitled *Review of Australian Privacy Law*, the Australian Law Reform Commission (ALRC) noted these common law developments, and said they were likely to continue in the absence of legislative action in the area.⁶ In this regard, the ALRC favours more robust legal protection of privacy interests in Australia but considers statute, rather than common law, to be the preferred vehicle for doing so.⁷

In any event, as Gummow and Hayne JJ noted in *Lenah Meats*, ‘the disclosure of private facts and unreasonable intrusion upon seclusion, perhaps come closest to reflecting a concern for privacy “as a legal principle drawn from the fundamental value of personal autonomy”’.⁸ It is the first of these privacy interests — the disclosure of private facts and information — that has a clear constitutional dimension when public officials are involved. The *Constitution* contains an implied right that protects the communication on political matters needed to secure the effective operation of representative and responsible government in Australia (‘implied freedom’).⁹ The purpose of this article is, then, not to add to the body of scholarship that has emerged in the aftermath of *Lenah Meats* as to how — and in what legal form — a right to privacy ought to be developed in Australia.¹⁰ Instead, I will consider one important question that law-makers (whether judicial or parliamentary) must address when they further develop this area of law: whether it is possible (or even desirable) for public officials in Australia to enjoy a right to personal privacy under the *Constitution*?

I will do so by considering the position of elected public officials in Part I, non-elected public officials in Part II and judges in Part III. The possible intersection between the implied freedom and the privacy interests of each category of public officials will be considered first. It will be argued in each case that it is possible

⁴ (2001) 208 CLR 199 (‘*Lenah Meats*’).

⁵ Ibid 248–50, 258 (Gummow and Hayne JJ); see generally Francis Trindade, ‘Possums, Privacy and the Implied Freedom of Communication’ (2002) 10 *Torts Law Journal* 1.

⁶ Australian Law Reform Commission, *Review of Australian Privacy Law*, Discussion Paper No 72 (2007) [5.64].

⁷ Ibid [5.68]–[5.71].

⁸ *Lenah Meats* (2001) 208 CLR 199, 256.

⁹ *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520, 560 (‘*Lange*’).

¹⁰ See Megan Richardson, ‘Whither Breach of Confidence: A Right of Privacy for Australia?’ (2002) 26 *Melbourne University Law Review* 381; Jillian Caldwell, ‘Protecting Privacy Post *Lenah*: Should the Courts Establish a New Tort or Develop Breach of Confidence?’ (2003) 26 *University of New South Wales Law Journal* 90; Des Butler, ‘A Tort of Invasion of Privacy in Australia?’ (2005) 29 *Melbourne University Law Review* 339.

(and desirable) under the *Constitution* that the private lives of elected and non-elected public officials in Australia attract meaningful legal protection. I will then consider four kinds of private information and facts — sexuality, infidelity, health and drug use — for which there is, in my view, a reasonable expectation of privacy. However, the media may wish to disclose these sorts of matters when they concern public officials, notwithstanding that those involved would rather they remain private. My aim, therefore, is to develop a theoretical framework that may assist the developing law of privacy — howsoever framed — in recognising *when* the ‘public interest’ in the disclosure of these private facts and information is constitutionally required or sufficiently important to defeat the reasonable expectation of personal privacy of public officials.

I ELECTED PUBLIC OFFICIALS

In *Lenah Meats* there was an interesting disagreement between Callinan and Kirby JJ about whether the American media was right not to disclose publicly the physical disability of President Franklin D Roosevelt when in office. Kirby J thought that such restraint — that is, respect for Roosevelt’s personal privacy — was probably ‘misconceived’, as public disclosure ‘might well have contributed to more informed attitudes to physical impairment generally.’¹¹ On the other hand, Callinan J thought that such disclosure would now be inevitable; but there is no doubt (considering the overall tone of his judgment, which laments the state of modern journalism and the invasiveness of the media more generally) that he would consider it an intrusive and offensive invasion of personal privacy.¹²

In any event, what lies at the core of this disagreement is the more fundamental question of whether our elected public officials can (or ought to) have any legally protected zones of personal privacy.¹³ It is a question that Australian lawmakers must necessarily answer in the development of a legal right to privacy. Moreover, as the High Court alluded to in *Lenah Meats*, there is a constitutional dimension to it.¹⁴ In the next part of the article, I will explain the nature of that constitutional issue and then develop an argument as to how I think it ought to be resolved. This argument seeks to accommodate — if not reconcile — two very different conceptions of what the *Constitution* requires in the context of the privacy interests of elected public officials.

¹¹ *Lenah Meats* (2001) 208 CLR 199, 288.

¹² *Ibid* 336; see 298–309 for Callinan J’s version of ‘[a]n overview of the circumstances prevailing today’.

¹³ See generally Frederick Schauer, ‘Can Public Figures Have Private Lives?’ in Ellen Frankel Paul, Fred D Miller Jr and Jeffrey Paul (eds), *The Right to Privacy* (2000) 293; Basil Makesinis and Nico Nolte, ‘Comparative Rights of Privacy of Public Figures’ in Peter Birks (ed), *Privacy and Loyalty* (1997) 113.

¹⁴ *Lenah Meats* (2001) 208 CLR 199, 220 (Gleeson CJ).

*A The Intersection Between the Constitution and the Privacy
Interests of Elected Public Officials*

In its seminal decision in *Lange*, the High Court made it clear that any legislative or executive action which disproportionately burdens communication necessary for the effective operation of responsible and representative government guaranteed by the *Constitution* is invalid.¹⁵ Significantly, it also held that '[o]f necessity, the common law must conform with the Constitution. The development of the common law in Australia cannot run counter to constitutional imperatives.'¹⁶ The upshot of this constitutional free speech imperative is that Australian privacy law — whether based in statute or common law — cannot protect those matters for which there is a reasonable expectation of privacy in circumstances where the effective operation of constitutional government requires they be in the public domain. The specific constitutional question in this context is, then, when the public disclosure of the sexuality, infidelity, health or drug use of an elected public official is mandated by the implied freedom.

1 The 'all relevant information for voting' argument

One possible argument is that the constitutional imperative of the implied freedom always requires disclosure of these personal matters regarding elected public officials in order to facilitate the effective operation of constitutional government. The argument would go something like this: 'the Constitution necessarily protect[s] that freedom of communication between the people concerning political or government matters which enables the people to exercise a free and informed choice as electors.'¹⁷ The implied freedom, therefore, secures 'access by the people to relevant information about the functioning of government in Australia and about the policies of political parties and *candidates for election*.'¹⁸ That relevant information about election candidates — and those already holding office — includes information about their personal morality and private behaviour which is needed to enable voters to assess their fitness for public office. It is, therefore, *always* in the 'public interest' and constitutionally required that details of the sexuality, infidelity, health or drug use of an election candidate be placed in the public domain.

This argument — and the conception of the implied freedom that underpins it — suggests that election candidates effectively waive the presumption of personal privacy on these matters when they choose to enter the political fray.¹⁹ It has, as a consequence, a clarity in its scope which appeals from a rule of law perspective. It

¹⁵ *Lange* (1997) 189 CLR 520, 560.

¹⁶ *Ibid* 566 (citation omitted).

¹⁷ *Ibid* 560.

¹⁸ *Ibid* (emphasis added).

¹⁹ For an argument along these lines see Ian Loveland, 'Privacy and Political Speech' in Peter Birks (ed), *Privacy and Loyalty* (1997) 51, 88–9.

also evinces a robust commitment to freedom of speech, when it is understood that the *Constitution* requires that a right to personal privacy cannot protect from public disclosure private facts and information concerning candidates for elected office that *may* inform the voting choices of the citizenry.

Moreover, this is not simply a case of mobilising constitutional principle to equate what might happen to be of interest to the public with the ‘public interest’. As Frederick Schauer has argued, ‘in a democracy there appears to be a right to base one’s voting decisions on criteria that other people take to be wrong.’²⁰ That is, there will always be significant and legitimate disagreement amongst the citizenry as to what personal characteristics of candidates are relevant to their fitness for holding or retaining elected office. More specifically, in this regard, it seems undeniable that the voting intentions of some persons will turn on information regarding the sexuality, infidelity, health or drug use of an election candidate, *irrespective of their policy platform and otherwise than to satisfy mere curiosity or a salacious interest*. And, notwithstanding the irrelevance of such criteria for many other voters, it becomes difficult — if not impossible — for the law to quarantine the public disclosure of these matters to only those persons for whom it may relevantly inform their vote. So it emerges that there are sound reasons in both policy and principle for the view that the implied freedom may require public disclosure of private facts and information concerning candidates for public office in order to facilitate the effective operation of constitutional government.²¹

2 *The ‘informed political discourse’ argument*

There is, however, another conception of the implied freedom that grounds a different argument as to how the freedom might inform the content and scope of the privacy rights of elected public officials. This conception posits that a robust and *informed* public discourse on political and governmental matters is necessary for the effective operation of constitutional government. On this view, a privacy rule that *always* required public disclosure of the sexuality, infidelity, health or drug use of an elected public official would in fact have a corrosive effect on the quality of political discourse. Eric Barendt explains it in the following terms:

[T]he law would in effect deny politicians privacy rights, even to stop the publication of stories which have no clear relationship to the discharge of their public duties ... Without protection from privacy laws, sensitive people may prefer not to enter public life or may leave it, rather than allow themselves and their family to endure constant tabloid exposure. The media may find it easier to write about personalities and their private life than to explore social issues. That has already happened in England and the United States, where privacy is not well protected, but may have happened less on the continent of Europe, in

²⁰ Schauer, above n 13, 303.

²¹ See Eric Barendt, *Freedom of Speech* (2nd ed, 2005) 232.

particular France where politicians can claim the protection of strong privacy laws.²²

So weak or non-existent privacy rights for elected public officials — which result from the first conception of the implied freedom outlined above — may undermine the quality of political discourse in two ways. First, by dissuading meritorious candidates from running for public office; and second, by providing further incentive and opportunity to the media to cover their private lives at the expense of providing a public forum to stimulate and critique informed political discourse and debate.²³ The operation of these forces may, in time, undermine the ability of ‘the people to exercise a free and informed choice as electors’,²⁴ which is the democratic right promised — indeed guaranteed — to them by the *Constitution*. On this argument, then, a right to personal privacy must extend to elected public officials, *at least in some circumstances*, to secure the effective operation of constitutional government.

3 *A consensus approach*

It can be seen that the task of crafting a legal right to personal privacy to ensure its compatibility with the implied freedom depends on the conception one holds of the system of representative and responsible government established by the *Constitution*. As my preceding analysis demonstrates, it is not simply a matter of choosing between freedom of political communication on the one hand and the privacy interests of elected public officials on the other. There is, as noted, a defensible conception of the implied freedom that considers privacy rights in this context to enhance, rather than undercut, public discourse on political and governmental matters.

Consequently, the development of privacy law in this area requires the law-maker to decide what is the nature of the theoretical relationship between privacy interests and the implied freedom. And that decision — what is required for a privacy right to be compatible with the *Constitution* — necessarily involves making a difficult value judgment. The methodology employed, for example, by the High Court in

²² Ibid 232. See also Lee Bollinger, *Images of a Free Press* (1991) 24–7.

²³ I am not suggesting here that all, or even most, parts of the print and electronic media would become tabloids — consider the American experience. However, there is a likelihood that the most popular Australian newspapers, for example, which are tabloids would continue to go down this path. The veteran American political journalist Carl Bernstein recently said: ‘[t]he elevation of gossip, sensationalism and manufactured controversy; the values of journalism are appealing to an ever-descending common denominator rather than the best attainable version of truth.’ See Tom Allard, ‘Truth Beats the Idiot Culture, Says News Sleuth’, *The Age* (Melbourne), 20 November 2007, 4. On the American media experience, see generally *Lenah Meats* (2001) 208 CLR 199, 306–9 (Callinan J).

²⁴ *Lange* (1997) 189 CLR 520, 560.

Lange to refashion the law of defamation is not obviously transferable to the privacy context, where the relationship between freedom of political communication and privacy is arguably more complex and ambivalent.²⁵

It may, however, be possible — desirable even — for our law-makers to develop a right to personal privacy that, if not reconciles, at least seeks to accommodate both conceptions of the implied freedom and the arguments outlined above. I will argue shortly that this consensus approach is not only constitutionally permissible, but may in fact be *necessary* for a personal privacy right to gain a foothold in the Australian legal landscape. This is especially so when one considers the intersection between constitutional free speech and privacy interests in the United States. It is to that American jurisprudential story that I will now briefly turn.

(a) *The intersection of the First Amendment and American privacy law*

The pervasiveness of the First Amendment in American constitutional jurisprudence has, in the opinion of some commentators, undermined — if not gutted — the ability of their statute and common law to provide for meaningful protection of personal privacy.²⁶ The putative source of protection is the tort of invasion of privacy, which is generally understood to encompass four distinct torts:²⁷ Intrusion upon Seclusion;²⁸ Appropriation of Name or Likeness;²⁹ Publicity Given to Private

²⁵ See above n 21, 231–2. As Barendt has noted, the relationship between the privacy interests of public officials and freedom of speech is complex, and it ‘would be wrong simply to apply the arguments relevant to defamation ... The arguments for free speech from its role in ensuring effective democracy, and the key importance of uninhibited public discourse, make that claim hard to resist. Free speech is clearly in issue. But it is not necessarily a trump card. Otherwise, the law would in effect deny politicians privacy rights, even to stop the publication of stories which have no clear relationship to the discharge of their public duties.’

²⁶ *United States Constitution* amend I reads: ‘Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.’ On this point see David Anderson, ‘The Failure of American Privacy Law’ in Basil Markesinis (ed), *Protecting Privacy* (1999) 139; Jeanne M Hauch, ‘Protecting Private Facts in France: The Warren and Brandeis Tort is Alive and Well and Flourishing in Paris’ (1993) 68 *Tulane Law Review* 1219, 1287–90.

²⁷ See American Law Institute, *Restatement of the Law Second, Torts* (1977) 376 § 652A.

²⁸ *Ibid* 378 § 652B: ‘One who intentionally intrudes, physically or otherwise, upon the solitude or seclusion of another or his private affairs or concerns, is subject to liability to the other for invasion of his privacy, if the intrusion would be highly offensive to a reasonable person.’

²⁹ *Ibid* 380 § 652C: ‘One who appropriates to his own use or benefit the name or likeness of another is subject to liability to the other for invasion of his privacy.’

Life;³⁰ and Publicity Placing Person in False Light.³¹ As noted, the High Court considers the first and third torts the heartland of personal privacy concerns in Australia, with the most relevant for the purposes of this article being the tort of public disclosure of private information. David Anderson describes that tort in the following terms:

[T]he tort of public disclosure of private facts is the only body of law that purports to give the individual a remedy for unwanted disclosures, and it is the only direct source of legal restraint on media disclosures of private facts. This tort creates a cause of action for damages against the media or others who disclose private information that would be highly offensive to a reasonable person and is not of legitimate public concern.³²

However, in a series of Supreme Court decisions, the talismanic effect of the First Amendment — in particular, viewing the constitutional status of privacy through the lens of the underlying First Amendment rationale of its famous defamation rule in *New York Times Co v Sullivan*³³ — has, for all practical purposes, ‘obliterated’³⁴ the tort of public disclosure of private facts.³⁵ Brennan J’s landmark judgment in *New York Times* explained that rationale in the following terms:

The general proposition that freedom of expression upon public questions is secured by the First Amendment has long been settled by our decisions. The constitutional safeguard, we have said, ‘was fashioned to assure unfettered

³⁰ Ibid 383 § 652D: ‘One who gives publicity to a matter concerning the private life of another is subject to liability to the other for his invasion of privacy, if the matter publicized is of a kind that

(a) would be highly offensive to a reasonable person, and

(b) is not of legitimate concern to the public.’

³¹ Ibid 394 § 652E: ‘One who gives publicity to a matter concerning another that places the other before the public in a false light is subject to liability to the other for invasion of his privacy, if

(a) the false light in which the other was placed would be highly offensive to a reasonable person, and

(b) the actor had knowledge of or acted in reckless disregard as to the falsity of the publicized matter and the false light in which the other would be placed.’

³² Anderson, above n 26, 141.

³³ 376 US 254, 279–80 (1964) (*New York Times*). According to Brennan J, ‘[t]he constitutional guarantees require, we think, a federal rule that prohibits a public official from recovering damages for a defamatory falsehood relating to his official conduct unless he proves that the statement was made with “actual malice” — that is, with knowledge that it was false or with reckless disregard of whether it was false or not.’

³⁴ See *Florida Star v B.J.F.*, 491 US 524, 550 (1989) (*Florida Star*). In *Florida Star*, White J wrote in dissent that the Court had accepted the invitation ‘to obliterate one of the most noteworthy legal inventions of the 20th century: the tort of the publication of private facts’.

³⁵ See Anderson, above n 26, 157–9.

interchange of ideas for the bringing about of political and social changes desired by the people.' ... Thus we consider this case against the background of a profound national commitment to the principle that debate of public issues should be uninhibited, robust, and wide-open, *and that it may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials.*³⁶

The core of this rationale is to foster — indeed to constitutionally guarantee — the public discourse required for meaningful self-government.³⁷ Yet the rule in *New York Times* moved quickly beyond the capacity of public officials and those running for public office to recover in defamation. It would apply equally to 'public figures'³⁸ because the Supreme Court, in the words of Warren CJ, considered that 'differentiation between "public figures" and "public officials" and adoption of separate standards of proof for each have no basis in law, logic, or First Amendment policy.'³⁹ The logic of this extension of the rule is compelled by a First Amendment rationale (or policy, as Warren CJ called it) that, if implicated, always favours — if not requires — publication. This may well be appropriate in the context of the intersection between constitutional free speech and defamation. However, the *New York Times* rule, and the 'publication/disclosure creep' that it triggered for defamation law more generally, is by no means universally welcomed.⁴⁰

In any event, what has proved disastrous for the constitutional status of personal privacy in the United States is the application of the First Amendment rationale embodied in the *New York Times* rule to the tort of public disclosure of private facts. In a trilogy of privacy cases — *Cox Broadcasting Corporation v Cohn*,⁴¹ *Florida Star*⁴² and *Bartnicki v Vopper*⁴³ — the rationale of *New York Times* loomed large and, unsurprisingly, resulted in public disclosure in circumstances where there were strong, if not compelling, privacy interests at play. In *Cox*, for example, in

³⁶ 376 US 254, 269–70 (1964) (Brennan J) (emphasis added).

³⁷ On this rationale for the First Amendment, see Alexander Meiklejohn, *Political Freedom: The Constitutional Powers of the People* (1965); Alexander Meiklejohn, 'The First Amendment Is an Absolute' [1961] *Supreme Court Review* 245.

³⁸ *Curtis Publishing Co v Butts*, 388 US 130 (1967); *Associated Press v Walker*, 389 US 28 (1967).

³⁹ *Curtis Publishing Co v Butts*, 388 US 130, 163 (1967).

⁴⁰ See Barendt, above n 21, 209–10.

⁴¹ *Cox Broadcasting Corporation v Cohn*, 420 US 469 (1975) ('*Cox*'). I note here the factual similarity between this case and the recent Australian case, *Jane Doe*: both involved the disclosure by the media of the name of a rape victim during the relevant criminal trial. The disclosure in *Jane Doe* was, however, unlawful under statute law — irrespective of any common law privacy claim.

⁴² 491 US 524 (1989).

⁴³ *Bartnicki v Vopper*, 532 US 514 (2001). There is also a strong factual parallel between *Bartnicki* and *Lenah Meats*: both cases involved the lawful publication of illegally obtained material.

finding that the First Amendment prohibited an award of ‘damages for [an] invasion of privacy caused by the publication of the name of a deceased rape victim which was publicly revealed in connection with the prosecution of the crime’,⁴⁴ White J wrote:

[I]n a society in which each individual has but limited time and resources with which to observe at first hand the operations of his government, he relies necessarily upon the press to bring to him in convenient form the facts of those operations. Great responsibility is accordingly placed upon the news media to report fully and accurately the proceedings of government, and official records and documents open to the public are the basic data of governmental operations. *Without the information provided by the press most of us and many of our representatives would be unable to vote intelligently or to register opinions on the administration of government generally.*⁴⁵

The disclosure logic outlined in *Cox* — underpinned as it was by the First Amendment rationale noted above — was taken significantly further by the Supreme Court in *Florida Star* and *Bartnicki*. In *Florida Star*, it was held that if ‘a newspaper lawfully obtains truthful information about a matter of public significance then state officials may not constitutionally punish publication of the information, absent a need to further a state interest of the highest order.’⁴⁶ The relevant information was the name of a rape victim located in a police report that was published at a time when the perpetrator was still at large. It led White J to write scathingly in dissent that

by holding that protecting a rape victim’s right to privacy is not among those state interests of the highest order, the Court accepts appellant’s invitation ... to obliterate one of the most noteworthy legal inventions of the 20th century: the tort of the publication of private facts.⁴⁷

It was probably inevitable, then, that in *Bartnicki* the Supreme Court would hold that the First Amendment prohibited recovery for an invasion of privacy when the relevant information was ‘the repeated intentional disclosure of an illegally intercepted cellular telephone conversation about a public issue.’⁴⁸

My point here is not that decisions in this trilogy of privacy cases were necessarily wrong — although I must confess to finding the dissent of White J in *Florida Star* to be particularly compelling — but that they were *inevitable* once the Supreme Court articulated its First Amendment rationale in *New York Times* and then applied

⁴⁴ 420 US 469, 471 (1975) (White J).

⁴⁵ Ibid 491–2 (emphasis added).

⁴⁶ 491 US 524, 533 (1989) (Marshall J) (citation omitted).

⁴⁷ Ibid 550 (joined in dissent by Rehnquist CJ and O’Connor J).

⁴⁸ 532 US 514, 517 (2001) (Stevens J).

it directly to the privacy context.⁴⁹ That constitutional rationale, as noted, posits that the animating free speech principle is that ‘debate on public issues should be uninhibited, robust and wide-open, and that it may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials.’⁵⁰ So, in the event of a clash between the privacy interests of elected public officials (indeed of persons involved in any matter of public interest and concern) and the First Amendment, the latter will *always* prevail and compel the public disclosure of private facts to conform to that constitutional principle.

(b) The American constitutional experience: lessons for Australian privacy law?

This brief excursus into First Amendment jurisprudence suggests that a theory of constitutional free speech that takes no meaningful account of privacy interests inevitably results in elected public officials enjoying no legally enforceable zones of personal privacy. And it seems to me that the first conception of the implied freedom outlined above — where the *Constitution* would compel the public disclosure of private facts concerning candidates for elected office to ensure fully informed voting choices — is underpinned by a similar logic and understanding of the relationship between privacy interests and constitutional free speech.

There are, however, important textual and doctrinal differences between the First Amendment and the implied freedom. Most notably, the former is an express and free-standing right to free speech that provides constitutional protection to a range of expression extending well beyond ‘political’ speech or communication. It might therefore be suggested that, considering the very different constitutional contexts, the intersection between constitutional free speech and privacy interests in the United States is less than instructive for the emerging law of privacy in Australia. But it is worth keeping in mind that the First Amendment rationale articulated in *New York Times* is similar to the core imperative of the implied freedom: to guarantee constitutionally the public discourse required for meaningful self-government. Once that conception of constitutional free speech took root in First Amendment jurisprudence, the disclosure logic that it compelled made it almost impossible for a privacy right to resist it whenever a matter of public interest or

⁴⁹ Moreover, as Anderson, above n 26, 158–9 explains, the nature of the balancing test which the courts must apply in ‘all privacy cases, or at least all that arise from discussions about matters of public significance’ will almost always see constitutional free speech (resulting in public disclosure) trump privacy interests: ‘[p]rivacy in the abstract will not be assumed to be a state interest of the highest order; rather, the plaintiff must convince the court that the specific privacy interest at stake in the particular case is of the highest order. And even if the privacy interest is sufficiently high, the plaintiff will still lose unless the remedy the state has provided is ‘narrowly tailored’. Tort law by its nature is rarely narrowly tailored; it provides broad-gauge remedies designed to be adapted in a fairly ad hoc way to varying factual patterns.’

⁵⁰ *New York Times*, 376 US 254, 270 (1964) (Brennan J).

concern was at play — as the trilogy of American privacy cases clearly demonstrated.

It is for these reasons that the first conception of the implied freedom ought to be rejected by Australian lawmakers in the privacy context. The trajectory of American constitutional free speech and privacy jurisprudence provides a salutary lesson for Australian law. That is, that to adopt this conception of the implied freedom may plant the constitutional seeds of destruction of the nascent right to personal privacy for elected public officials and a range of other persons besides.⁵¹

However, even if the implied freedom does not *always* require the public disclosure of private facts concerning elected public officials, it seems equally clear that it should not be possible to mobilise a privacy right to keep private such matters when they *are* necessary to secure the effective operation of our system of constitutional government. The difficult issue is, therefore, how to frame a privacy rule (or exception to it) that can take seriously the privacy interests of elected public officials without offending the *Constitution* by depriving the citizenry of information that is necessary to make informed voting choices.

B The Right to Personal Privacy of Elected Public Officials in Australia

In this part of the article, I will argue that it is possible to frame a rule that provides meaningful protection to the privacy interests of elected public officials in a manner that conforms to the *Constitution*. This rule seeks to accommodate, if not reconcile, both conceptions of the implied freedom outlined above.

1 The rule

The ALRC has recently proposed the following statutory privacy tort:

An invasion of privacy could be determined as made out where:

The plaintiff had, in all the circumstances, a reasonable expectation of privacy in relation to the relevant conduct or information; and/or

The defendant's invasion of privacy in relation to that conduct or information, is, in all the circumstances, offensive (or highly offensive) to a person of ordinary sensibilities.⁵²

⁵¹ See Anderson, above n 26, 157–9.

⁵² Australian Law Reform Commission, above n 6, [5.75]. This form of statutory tort was first proposed by the New South Wales Law Reform Commission, *Invasion of Privacy*, Consultation Paper 1 (2007) [7.5]. See also Butler, above n 10, 373, where the author suggests that Australia should adopt the following tort of unreasonable intrusion upon privacy:

This kind of privacy rule would offer protection for those matters for which I suggested earlier there is, or at least ought to be, a reasonable expectation of privacy such as a person's sexuality, infidelity, health and drug use. In doing so, it would foster the core privacy values of individual autonomy, integrity and the capacity to develop meaningful family and other intimate relationships so critical to human flourishing.⁵³ Moreover, extending this protection to elected public officials has, as noted, a defensible constitutional justification. But when the public disclosure of private facts and information concerning elected public officials *is* necessary for the citizenry to make informed voting choices, then a privacy right must yield in these circumstances to ensure its compatibility with the *Constitution*. It makes sense to do so by providing a defence to a general privacy rule.

2 *The defence*

The ALRC (and others) have identified the importance of providing a defence to those who disclose otherwise legally protected private facts and information when it is in the 'public interest' that they do so.⁵⁴ In this part of the article, my aim is to outline the rationale and scope of such a defence as it relates to elected public officials. But before doing so, I want briefly to say something about an important procedural matter. That is, on whom should the evidentiary and legal burdens for such a 'public interest' defence fall? I would argue that if the law is to take seriously the privacy interests of elected public officials then both should fall on the defendant to a privacy action. Sean Scott has made this argument in the context of American privacy law where she says that it

should result in expansion of the privacy right. However, it will not threaten First Amendment values. While an individual's interest in privacy may be at

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1. an intentional intrusion (whether physical or otherwise) upon the situation of another (whether as to the person or his or her personal affairs) where there is a reasonable expectation of privacy; and
 2. the intrusion would be "highly offensive to a reasonable person of ordinary sensibilities".⁵³

⁵³ See Eric Barendt, 'Privacy as a Constitutional Right and Value' in Peter Birks (ed), *Privacy and Loyalty* (1997) 1; Raymond Wacks, *Personal Information: Privacy and the Law* (1989) 7–13.

⁵⁴ Australian Law Reform Commission, above n 6, [5.83]. The ALRC note that defences to a cause of action for invasion of privacy generally include:

- 'act or conduct was incidental to the exercise of a lawful right of defence of person or property;
- act or conduct was authorised or required by or under law';
- disclosure of information was of public interest or was fair comment on a matter of public interest; or
- disclosure of information was, under defamation law, privileged.'

stake, there are larger societal issues protected by privacy. These societal values may be the same values protected by the First Amendment.⁵⁵

These values include the search for truth, the promotion of self-government and individual autonomy.⁵⁶ Scott argues, persuasively in my view, that providing the citizenry with meaningful privacy protection ‘encourages people to come forward and engage in the [public] debate.’⁵⁷ This may ‘motivate the public to learn about issues and to engage in meaningful dialogue concerning them. This engagement promotes the search for truth, *and encourages an informed rather than an ignorant public.*’⁵⁸ Importantly, this view is consistent with the ‘informed political discourse’ argument outlined above in the context of the *Constitution*, and provides a principled justification for placing these burdens on the defendant in the context of Australian privacy law.

In any event, a ‘public interest’ defence in this context must also, as noted, conform to the constitutional imperative of the implied freedom. It is my argument that there are at least two contexts in which private matters such as the sexuality, infidelity, health or drug use of an elected public official are clearly relevant in this constitutional sense. They are when the private facts and information disclosed (or sought to be disclosed) would compromise, undermine or contradict the integrity of the public official’s stated policy agenda or may impact negatively on the public official’s capacity to properly discharge his or her public duties.

(a) When private facts and information regarding elected public officials reveal the insincerity or hypocrisy of their policy agenda

The clearest example of this first category is when a politician runs for office on a particular policy agenda but his or her private behaviour demonstrates the insincerity or hypocrisy of that public position. The controversy that engulfed Conservative UK MP David Ashby in 1995 is a case in point. Ashby, who was married with a child, had campaigned on a conservative sexual and family values agenda at a time when, according to the *Sunday Times*, he was conducting a homosexual affair with a younger man.⁵⁹ The public disclosure of this kind of marital infidelity is justified, for it demonstrates Ashby’s political hypocrisy and dishonesty to the electorate.

⁵⁵ Sean Scott, ‘The Hidden First Amendment Values of Privacy’ (1996) 71 *Washington Law Review* 683, 707.

⁵⁶ *Ibid* 708; see generally Barendt, above n 21, 6–21; Raymond Wacks, *Privacy and Press Freedom* (1995) 21–47.

⁵⁷ *Ibid* 710.

⁵⁸ *Ibid* 711 (emphasis added).

⁵⁹ For a description of the Ashby affair, see Loveland, above n 19, 88–9.

A more recent example is the controversy surrounding long-term Idaho Senator Larry Craig. In August 2007 Craig pleaded guilty to a public disturbance for allegedly soliciting an undercover police officer for homosexual sex in a toilet at the Minneapolis airport. In this regard, the events alleged to have occurred in the airport toilet were put on the public record by Craig's guilty plea.⁶⁰ But more importantly from a privacy perspective, it made further, more detailed, revelations about Craig's homosexual past in a subsequent investigative report by *The Idaho Statesman* clearly in the public interest, considering his strident conservative views and voting record on matters concerning homosexuals.⁶¹

In Australia, public disclosure of these sorts of private facts in similar contexts would clearly be in the 'public interest', and may indeed be constitutionally required to secure for the people the free and informed voting right guaranteed by the implied freedom. It cannot be that privacy law keeps from the citizenry private facts and information concerning public officials that would clearly undermine or contradict the political agenda that they themselves have advocated in the public domain to secure or maintain elected office.

(b) When private facts and information regarding elected public officials may diminish their capacity to discharge their public duties

In my view, the following examples would fall into this category: the prescription drug habit of Richard Nixon when President of the United States,⁶² and also the cancer illness of Francois Mitterrand when President of France.⁶³ Maybe more controversially, I would also include the extramarital affair of Gareth Evans and Cheryl Kernot when the former was a Labor senator and government minister and the latter the leader of another political party, the Australian Democrats.⁶⁴ In my view, the extramarital status of the affair was not in itself compelling, but the relationship raised a potential and serious conflict of interest between their public duties as elected members (and senior members) of different political parties. Indeed, I think that public disclosure in this instance was warranted irrespective of the fact that Evans eventually succeeded in recruiting Kernot to the Labor Party. That fact, whilst clearly sufficient to justify public disclosure, seemed to me simply

⁶⁰ See National Public Radio, 'Senator's Support Scatters as Arrest Comes to Light', *All Things Considered*, 29 August 2007 <<http://www.npr.org/templates/story/story.php?storyId=14033089>> at 15 June 2008.

⁶¹ See National Public Radio, 'Newspaper Writes on Senator's Sexuality', *All Things Considered*, 28 August 2007 <<http://www.npr.org/templates/story/story.php?storyId=14004861>> at 15 June 2008.

⁶² See Anthony Summers, *The Arrogance of Power: The Secret World of Richard Nixon* (2000) 316–18, 449–50, 455.

⁶³ See Barendt, above n 21, 241–2.

⁶⁴ 'Kernot "Had Affair With Gareth Evans"', *Sydney Morning Herald* (Sydney), 3 July 2002 <<http://www.smh.com.au/articles/2002/07/03/1025667005180.html>> at 15 June 2008.

to underscore the nature of the central conflict of interest, and the fact that it eventually became manifest.⁶⁵

(c) When private facts and information regarding elected public officials may reflect poorly on their honest and probity: a third disclosure rationale?

There is an argument that the public disclosure of private facts and information concerning elected public officials is constitutionally required in Australia — and in the ‘public interest’, at any rate — if it reflects poorly on their honesty and probity more generally. The underlying constitutional premise of this argument is that the people must have access to relevant *personal* information about ‘candidates for election’⁶⁶ in order to make informed voting choices. But the essence of this argument is largely indistinguishable from the first conception of the implied freedom (‘all relevant information for voting’) and the voting criteria ‘right’ that Schauer says exists in a democracy. The upshot, again, would be that the privacy rights of elected public officials would *always* be trumped by a constitutional rationale that compelled public disclosure.

In this regard, consider my categories of private facts and information — sexuality, infidelity, health and drug use — and when their public disclosure would reflect poorly on the general honesty and probity of an elected public official. For example, the only time I can think where the ‘sexuality’ of a candidate for election would fall into this category is when disclosure would contradict or undermine a publicly stated position on *that* policy matter. If so, this scenario is already covered by my first category. In terms of infidelity, it is in this context that the argument becomes indistinguishable from the first conception of the implied freedom outlined earlier, and from Schauer’s voting criteria ‘right’. It is clear enough that the infidelity of an election candidate would reflect poorly on his or her general honesty and probity in the view of many people. But if public disclosure is *always* justified in this context — to inform the voting choices of some members of the public — then the law is incapable of providing meaningful (indeed any) protection of the privacy interests of election candidates, as my earlier analysis made clear.

The other two categories are the health or use of drugs by elected public officials. If either of these private facts would likely diminish their ongoing capacity to properly discharge their public duties, then public disclosure is already lawful under my second category. But what about information regarding the illicit drug use of an election candidate in a private social context?⁶⁷ Or whilst he or she was a university

⁶⁵ See Laurie Oakes, ‘Secrets and Lies’, *The Bulletin* (Sydney), 9 July 2002, 16.

⁶⁶ See *Lange* (1997) 189 CLR 520, 560.

⁶⁷ See, eg, Mark Latham, *The Latham Diaries* (2005) 320. The author admitted that, whilst a Member of Parliament, he had smoked a marijuana joint at a corridor party in 1994 in the ministerial wing of the Federal Parliament.

student some years prior?⁶⁸ These are hard cases. But I would, again, argue that if the law is to provide elected public officials with some level of privacy protection then public disclosure is only in the public interest if these matters satisfy either the ‘hypocritical policy agenda’ or ‘diminished capacity’ disclosure rationales.

In any event, it seems to me that illicit drug use in a private social context by an election candidate could, depending on the circumstances, fall into either category. For example, the second disclosure rationale may be satisfied if an elected public official has a serious and ongoing drug problem; or a conscious decision to break the law may betray such a serious lack of political judgment that his or her capacity to properly discharge his or her public duties must be open to question. Moreover, the first disclosure rationale is satisfied when a candidate for elected office campaigns on an anti-drugs agenda. On the other hand, I think illicit drug use in the past (whilst a university student, for example) could only ever satisfy my first disclosure rationale. And even then it is only constitutionally relevant, in my view, if the election candidate campaigns on an anti-drugs agenda *and* has positively denied illicit drug use in the past.

Consequently, if a legal right to personal privacy must extend to elected public officials in at least some circumstances, then this ‘honesty–probity’ argument, with one possible qualification, must be rejected as a third rationale to make lawful the public disclosure of private facts and information for which there is a reasonable expectation of privacy. The one qualification in this regard is when the private matter — such as the illicit drug use of an elected public official — is the subject of a criminal conviction. As noted regarding Senator Larry Craig, there is an argument that this information is already in the public domain, so that it can never be a matter for which there is a reasonable expectation of privacy.⁶⁹ But, maybe more importantly from a constitutional perspective, the fact that an elected public official has a criminal record must go to the heart of whether he or she is a fit and proper person to hold or retain public office.

A criminal record (or guilty plea, for that matter) is also an objective and verifiable legal fact regarding the criminal activity of an elected public official. It does not involve a *subjective assessment* by some members of the public that otherwise lawful private behaviour (such as infidelity or poor health) reflects poorly on his or her honesty and probity. This is important, for it suggests that the public disclosure of a criminal record in this context can also be made without fear that it would

⁶⁸ For example, Liberal Party Senator Nick Minchin admitted to smoking marijuana whilst at high school and university. See Jessica Irvine, ‘Of Course I Inhaled, Says Finance Minister’, *Sydney Morning Herald* (Sydney), 12 July 2007 <<http://www.smh.com.au/news/national/of-course-i-inhaled-says-finance-minister/2007/07/12/1183833608886.html>> at 15 June 2008.

⁶⁹ See Loveland, above n 19, n 141. The author ‘assume[s] (following *Monitor Patriot v Roy*, 401 US 265 (1971)) that a politician’s criminal activity is always to be regarded as in the “public” domain.’

trigger the kind of ‘disclosure creep’ that would inevitably occur if the ‘general honesty–probity’ argument were a ground for the lawful disclosure of private facts and information more generally.

I now turn to consider non-elected public officials, and to what extent the law can provide meaningful protection of their privacy interests whilst conforming to the *Constitution*.

II NON-ELECTED PUBLIC OFFICIALS

A Who Are ‘Non-Elected Public Officials’?

This part of the article will seek to outline the possible scope and content of a legal right to personal privacy for non-elected public officials in Australia. However, before I can do so, I must first identify who those persons are. The public–private divide in law, and the administration of public affairs more generally, is anything but clear-cut — with governments increasingly willing to ‘contract out’ a range of their functions to the private sector. The contemporary reality is that the same person or institution may perform a mixture of public and private roles.

Some assistance may be gleaned from the United States, where the Supreme Court and lower courts have considered this difficult issue in the context of applying the *New York Times* defamation rule. They have had to consider the extent to which the First Amendment limits the ability of ‘public officials’ to recover for defamation.⁷⁰ The leading Supreme Court decision said that public officials are, ‘at the very least ... those among the hierarchy of government employees who have, or appear to the public to have, substantial responsibility for or control over the conduct of governmental affairs.’⁷¹ The lower courts have, for example, found that a police officer,⁷² a principal of a public school⁷³ and a state prosecutor⁷⁴ were all public officials. To define public official in these relatively broad terms in the context of delineating the scope of the *New York Times* defamation rule promotes the underlying ‘robust and wide-open public debate’ rationale of the First Amendment. As Erwin Chemerinsky has noted, this makes good sense:

[F]or any government employee, even at the lowest rung of the hierarchy, it is possible that issues could arise concerning their performance on the job and thus be of importance to the public.⁷⁵

⁷⁰ See generally Erwin Chemerinsky, *Constitutional Law* (2nd ed, 2005) 1284–9.

⁷¹ *Rosenblatt v Baer*, 383 US 75, 85 (1966) (Brennan J).

⁷² *McKinlay v Baden*, 777 F 2d 1017 (5th Cir, 1985).

⁷³ *Stevens v Tillman*, 855 F 2d 394 (7th Cir, 1988).

⁷⁴ *Crane v Arizona Republic*, 972 F 2d 1511 (9th Cir, 1992).

⁷⁵ Chemerinsky, above n 70, 1288.

The animating constitutional principle at work here is that the public will always have a legitimate interest in the *performance* of those persons — from senior members of the executive right through to low-level government employees — entrusted with and involved in the exercise of functions of a public nature. And as I will explain in more detail below, it is my view that this constitutional principle is equally applicable to the administration of government in Australia. It will, therefore, inform the extent to which non-elected public officials can enjoy a right to personal privacy under the *Constitution*.

In any event, the High Court in *Lange* also made some pertinent observations as to what constitutes the executive branch of government that may assist in clarifying who are ‘public officials’ in an Australian (privacy) context. In seeking to delineate what amounts to ‘political and governmental communication’ for the purpose of the implied freedom, the Court wrote:

[T]hose [constitutional] provisions which prescribe the system of responsible government necessarily imply a limitation on legislative and executive power to deny the electors and their representatives information concerning the conduct of the executive branch of government throughout the life of a federal Parliament. *Moreover, the conduct of the executive branch is not confined to Ministers and the public service. It includes the affairs of statutory authorities and public utilities which are obliged to report to the legislature or to a Minister who is responsible to the legislature.* In *British Steel v Granada Television*, Lord Wilberforce said that it was by these reports that effect was given to ‘[t]he legitimate interest of the public’ in knowing about the affairs of such bodies.⁷⁶

This passage, and the italicised part in particular, provides a good definitional framework for identifying those persons who may be considered non-elected public officials in Australia. For example, it would include public servants, Crown prosecutors, teachers and administrators in public educational institutions, members of the police force and all other statutory bodies. Moreover, as I will explain shortly, the reason why these persons are properly considered ‘public officials’ in the Australian system of government also provides the constitutional justification for why, and when, the public have a legitimate interest in the disclosure of private facts and information concerning them.

B *The Intersection Between the Constitution and the Privacy Interests of Non-Elected Public Officials*

As noted in Part II, to enable ‘the people to exercise a free and informed choice as electors’,⁷⁷ the *Constitution* secures ‘access by the people to relevant information about the functioning of government in Australia and about the policies of political

⁷⁶ *Lange* (1997) 189 CLR 520, 561 (emphasis added, citations omitted).

⁷⁷ *Ibid* 560.

parties and candidates for election.⁷⁸ This reflects the fact that the *Constitution* provides not only for representative but also *responsible* government; that is, that the executive government is ultimately responsible to the democratically elected Parliament. As the High Court made clear in *Lange*, it is in this regard that the public has a legitimate constitutional interest in knowing about the conduct and affairs of the executive branch of government and those ‘of statutory authorities and public utilities which are obliged to report to the legislature or to a Minister who is responsible to the legislature.’⁷⁹ It therefore follows that the public will always have a correlative constitutional interest in the *performance* of those persons (that is, non-elected public officials) through whom the executive branch of government — as defined in *Lange* — operates.

If so, that legitimate public interest *must* include the disclosure of private facts and information concerning non-elected public officials that may diminish their capacity to properly *perform* their public duties. It is in this context that the *Constitution* intersects with the privacy interests of non-elected public officials. I now turn to consider those circumstances in which this constitutional rationale may justify disclosure of these otherwise legally protected private matters.

C The Right to Personal Privacy of Non-Elected Public Officials in Australia

It was argued earlier that two rationales justify disclosure of private facts and information regarding elected public officials. To recall, they are when these private matters either demonstrate the insincerity or hypocrisy of the officials’ stated policy agenda, or demonstrate that the officials’ capacities to properly perform their public duties may be diminished. And though I rejected as a third rationale that their private behaviour may reflect poorly on their honesty and probity more generally, the one qualification to this was when it forms the basis of a criminal conviction. For similar reasons, I would endorse that qualification for non-elected public officials as well.

However, as the public officials of present concern do not run for elected office, the circumstances in which there is a public interest in the disclosure of matters concerning their private lives will necessarily be more limited. Most relevantly, non-elected public officials do not have to promulgate or rely upon a stated policy agenda for their position or in order to properly discharge their public duties. Indeed, for many of them — public servants in particular — it is anathema.⁸⁰ The upshot is that the first ‘hypocritical policy agenda’ rationale — which justified, for example, the disclosure of the homosexual behaviour of politicians who promote a conservative sexual and family values agenda — is not relevant to non-elected

⁷⁸ Ibid.

⁷⁹ Ibid 561.

⁸⁰ See, eg, *Public Service Act 1999* (Cth) s 10(1)(a), which says: ‘the Australian Public Service is apolitical, performing its functions in an impartial and professional manner.’

public officials. And, as my analysis in Part I demonstrated, it is difficult to justify the disclosure of a person's sexuality on any other rationale. Consequently, there is unlikely ever to be a legitimate public interest in the disclosure of the sexuality of a non-elected public official; an important point to which I shall return shortly.

1 When private facts and information regarding non-elected public officials may diminish their capacity to discharge their public duties

It is only on this rationale that the privacy interests of non-elected public officials may be trumped. The public has a legitimate — and constitutional — interest in the disclosure of private facts and information concerning non-elected public officials that may diminish their capacity to properly perform their public duties. In principle, this disclosure rationale would — indeed must — apply to all non-elected public officials, regardless of their seniority in or importance to the executive branch of government and the administration of public affairs. In reality, however, there will be little (if any) interest in, and pressure from, the public (and therefore the media) to have disclosed information concerning, for example, the private drug use or poor health of a low-ranking public servant or public school teacher. But the lack of interest from the public on such private matters in these less important contexts does not mean there is no legitimate public interest in their disclosure. Interestingly, it demonstrates that what is in the 'public interest' is not necessarily of interest to the public: the well-known privacy aphorism noted earlier can cut both ways.⁸¹

In any event, as it covers all non-elected public officials, this rationale would, for example, justify the disclosure of information regarding the alcoholism of a foreign diplomat or the serious ill health of a university Vice-Chancellor. These are private matters that may diminish the physical or psychological capacity of these non-elected public officials to properly discharge their public duties. It would also cover the private use of illicit recreational drugs by a member of the police force and the infidelity of a public school teacher when his or her lover was a student. In these instances the private behaviour undertaken fundamentally betrays, if not breaks, the solemn public trust placed in those persons who perform these specific public roles. In this regard, the public has a right to expect that members of the police force themselves obey the laws which they swear to uphold and that high school teachers never abuse the relationship of trust and power they have with and over their students. When the private behaviour of police officers and schoolteachers ruptures the public trust that is integral and essential to their positions, then the capacity of these non-elected public officials to perform their duties is seriously compromised — if not destroyed.

⁸¹ That aphorism — '[w]hat interests the public is not necessarily in the public interest' — was recently noted in *Ash v McKennitt* [2007] 3 WLR 194, 216 (Buxton LJ).

It is, however, difficult to think of a context in which, on this rationale, it is ever in the public interest to disclose information regarding the sexuality of a non-elected public official. There may once have been an argument that disclosing the homosexuality of a member of the Australian Defence Force was justified on this rationale, and therefore in the public interest, when there was a prohibition on gays and lesbians serving in the military. But the Australian government removed this ban in 1992, so that heterosexuality is no longer a legal pre-requisite for defence service.⁸² It cannot, therefore, be argued that the homosexuality of military personnel deprives them of the *legal* capacity to properly perform their public duties. There are, of course, sections of the community that consider homosexuality to be morally wrong and physiologically perverse. They may well, as a consequence, object in principle to homosexuals being schoolteachers or members of the police or defence forces, for example. But if the reality that some members of the public will always morally condemn a person's sexuality is enough to justify disclosure of that private fact (or any other for that matter), then the law will prove incapable of providing any meaningful protection of the privacy interests of non-elected public officials. It must, therefore, be rejected as a ground for disclosure lest the 'public interest' defence in this context operates to swallow the privacy rule.

I now turn to consider the privacy interests of another category of public official: judges. They are also not elected, but perform a constitutional role within the judicial rather than the executive branch of the Australian government. The distinct nature of the public function performed by judges and their quite different relationship to the system of constitutional government established by the *Constitution* makes it appropriate to undertake this privacy analysis separate from the species of non-elected public officials just considered.

III JUDGES

A general privacy rule of the kind proposed by the ALRC would also provide judges with legal protection on matters for which there exists a reasonable expectation of privacy. As with election candidates and non-elected public officials, the key question is, then, when a defence ought to be available to make lawful the public disclosure of facts and information concerning a judge's sexuality, infidelity, health or drug use. However, in order to do so, the relationship between the *Constitution* and the privacy interests of judges must first be ascertained.

A The Intersection Between the Constitution and the Privacy Interests of Judges

There is certainly a constitutional dimension to the question of the extent to which the privacy interests of judges can be afforded meaningful legal protection in Australia. However, as the following passage from McHugh J in *APLA Ltd v Legal*

⁸² See Justin Healey (ed), *Sexuality and Discrimination* (2002) 3, 18–9.

*Services Commissioner (NSW)*⁸³ makes clear, the application of the implied freedom to the judiciary is quite different and more circumscribed compared with the legislative and executive arms of government:

Discussion of the appointment or removal of judges, the prosecution of offences, the withdrawal of charges, the provision of legal aid and the funding of courts, for example, are communications that attract the *Lange* freedom. *That is because they concern, expressly or inferentially, acts or omissions of the legislature or the Executive Government.* They do not lose the freedom recognised in *Lange* because they also deal with the administration of justice in federal jurisdiction. However, communications concerning the results of cases or the reasoning or conduct of the judges who decide them are not ordinarily within the *Lange* freedom.⁸⁴

That important constitutional proposition enjoys State Supreme Court support,⁸⁵ though some commentators,⁸⁶ and even a judge of the Federal Court, have questioned its logic and correctness.⁸⁷ What it means in a privacy context is that the private behaviour of judges may be relevant in a constitutional sense when it forms part of the '[d]iscussion of the appointment or removal of judges'.⁸⁸ I will return to and expand upon this rationale shortly.

In any event, the implied freedom does not presently extend to 'communications concerning the results of cases or the reasoning or conduct of the judges who decide them'.⁸⁹ That is, the administration of judicial power (by judges) is not constitutionally relevant in the same way as it is for the administration of legislative and executive power by elected and non-elected public officials in Australia.

The distinction between communications concerning the administration of justice that are within the *Lange* freedom and those that are not may sometimes appear to be artificial. But it is a distinction that arises from the origins of the constitutional implication concerning freedom of communication on political and government matters. The *Lange* freedom arises from the necessity to promote and protect representative and responsible government ... Courts and judges and the exercise of

⁸³ (2005) 224 CLR 322 ('*APLA*').

⁸⁴ *APLA* (2005) 224 CLR 322, 361 (emphasis in original).

⁸⁵ See *John Fairfax Publications Pty Ltd v Attorney-General (NSW)* (2000) 158 FLR 81, 95–7 (Spigelman CJ); *Herald & Weekly Times Ltd v Popovic* (2003) 9 VR 1, 10 (Winneke ACJ), 8–11 (Warren AJA), cf 51–3 (Gillard AJA); *John Fairfax Publications Pty Ltd v O'Shane* [2005] Aust Torts Reports ¶81-789.

⁸⁶ See, eg, Andrew Lynch, 'Is Judicial Dissent Constitutionally Protected?' (2004) 4 *Macquarie Law Journal* 81, 92.

⁸⁷ See Ronald Sackville, 'How Fragile Are the Courts? Freedom of Speech and Criticism of the Judiciary' (2005) 31 *Monash University Law Review* 191, 209–11.

⁸⁸ *APLA* (2005) 224 CLR 322, 361 (Mc Hugh J).

⁸⁹ *Ibid.*

judicial power are not themselves subjects that are involved in representative or responsible government in the constitutional sense.⁹⁰

Interestingly, this more limited application of the implied freedom to the judicial arm of government may in fact prove a blessing for the privacy rights of laypersons who become involved in the judicial process. For example, consider that in two of the American privacy cases considered earlier (*Cox* and *Florida Star*) the parties seeking (unsuccessfully) to assert their common law right to personal privacy were victims of serious crimes. The United States Supreme Court applied the *New York Times* free speech rationale when considering the relationship between the First Amendment and American privacy law. That rationale sought to constitutionally guarantee the public discourse required for meaningful self-government. But the constitutional conception of ‘government’ articulated by the Supreme Court in *Cox* and *Florida Star* quite clearly covers the *judicial* arm of government:

Without the information provided by the press most of us and many of our representatives would be unable to vote intelligently or to register opinions on the administration of government generally. *With respect to judicial proceedings in particular*, the function of the press serves to guarantee the fairness of trials and to bring to bear the beneficial effects of public scrutiny upon the administration of justice.⁹¹

The upshot is that American law cannot protect the privacy interests of persons once they became involved in the judicial process. This is due to the constitutional logic of disclosure that, according to the Supreme Court, is required by the First Amendment to scrutinise the proceedings of government, including the administration of justice.

The implied freedom does not extend to the judicial arm of the Australian government in the same way. Consequently, Australian law *is* capable of providing meaningful protection of the privacy interests of persons who become involved in the judicial process. This may prove significant in the development of Australian privacy law. As my earlier analysis of the trilogy of American privacy cases inferentially demonstrates, once ‘communications concerning the courts or judges or the exercise of judicial power’⁹² fall within a *constitutional* conception of free speech, then the ‘obliteration’ of the privacy interests of *any* person drawn into that judicial process will inevitably follow. Moreover, the effective demise of American privacy law *more generally* suggests that, were it to endorse this constitutional conception of ‘free speech’ and ‘government’, the High Court would risk triggering a ‘disclosure creep’ that may similarly doom the emerging right to personal privacy in Australia.

⁹⁰ Ibid.

⁹¹ *Cox*, 420 US 469, 492 (1975) (White J) (emphasis added); see also *Florida Star*, 491 US 524, 532 (1989) (Marshall J).

⁹² *APLA* (2005) 224 CLR 322, 361 (Mc Hugh J).

B *The Right to Personal Privacy of Judges*

As is the case with non-elected public officials, the fact that judges are not elected makes the first ('hypocritical policy agenda') disclosure rationale irrelevant in this context. Indeed, the proper discharge of their judicial duties requires that judges do not have or seek to advance a stated policy agenda, but do justice to all according to law.⁹³ However, as noted, the private behaviour of judges is relevant in a constitutional sense when it forms part of the political discussion regarding their appointment or removal. I now turn to consider the circumstances in which the disclosure of the sexuality, infidelity, health or drug use of a judge or candidate for judicial office is constitutionally justified.

1 *The constitutional relevance of private behaviour to the appointment of judges by the executive government*

It is certainly possible that the private behaviour of a person who is a candidate for judicial office is relevant to the executive's decision as to whether he or she should be appointed or not. But it seems to me that only the second rationale — when the private matters (sought to be) disclosed may diminish his or her capacity to discharge his or her public duties — justifies disclosure in the appointment context.

Consequently, the disclosure of a judge's sexuality or infidelity cannot be justified on this rationale, in my view. Of course some people consider homosexuality and infidelity to be morally wrong and would prefer to have judges whose private behaviour is in harmony with their own conception of an ethical life. But if *that* possibility — that an adverse moral judgment about a judge's private life may be made by some parts of the citizenry — were enough to justify disclosure of otherwise private matters, then the right to personal privacy of a candidate for judicial office would be quickly and forever eviscerated. Moreover, and more importantly, these private facts alone do not diminish the capacity of a person to properly discharge judicial duties. Indeed, to suggest that the disclosure of the sexuality of a judicial candidate is justified because that personal quality may impair his or her capacity to properly discharge his or her judicial duties is itself both morally dubious and legally discriminatory.⁹⁴

The most relevant private facts in this regard would be the health or drug use of a judicial candidate. It would, for example, be constitutionally justified to disclose

⁹³ See, eg, *High Court of Australia Act 1979* (Cth) s 11, which outlines the Oath/Affirmation of Allegiance and Office: 'I do swear that I will bear true allegiance to her Majesty Queen Elizabeth the Second, Her Heirs and Successors according to the law, that I will well and truly serve Her in the Office of Justice of the High Court of Australia and that I will do right to all manner of people according to law without fear or favour, affection or ill-will. So Help me God!'

⁹⁴ See, eg, *Equal Opportunity Act 1995* (Vic) s 6(1); *Anti-Discrimination Act 1977* (NSW) s 49ZG.

that a candidate was addicted to prescription drugs⁹⁵ or suffered from a debilitating physical or mental illness.⁹⁶ These are personal facts that may diminish a person's capacity to properly discharge their judicial duties and are relevant, then, to whether they are fit for judicial appointment by the executive government. And I would argue that disclosure is also justified if a judicial candidate had used recreational drugs such as marijuana or cocaine whilst a lawyer:⁹⁷ not because such private behaviour would necessarily diminish his or her capacity to perform the judicial role, but because it is clearly relevant to the issue of whether a person who takes illicit drugs whilst an officer of the court is a fit and proper person for judicial appointment.

The situation is, however, arguably different if the past illicit drug use by a judicial candidate occurred whilst he or she was, for example, a university student. In most cases, this would not impair his or her present capacity to properly discharge a judicial role and it was not done at a time when the person owed an allegiance to the legal profession and to the court to which he or she was admitted to practise. Its disclosure is not, then, constitutionally justified in my view. The one qualification that I would add to this is, again, if the past drug use by a judicial candidate was the subject of a criminal conviction. This must also go the question of whether he or she is a fit and proper person to be appointed to judicial office.

⁹⁵ For example, while he was Chief Justice of the US Supreme Court, William Rehnquist was addicted to a powerful prescription drug from 1971 to 1981. FBI files revealed that when he stopped taking the drug in 1981 Rehnquist became delusional: see 'FBI Files Detail Rehnquist Drug Addiction', *The Washington Post* (Washington, DC), 5 January 2007 <<http://www.washingtonpost.com/wp-dyn/content/article/2007/01/05/AR2007010500154.html>> at 15 June 2008.

⁹⁶ One example might be the serious depression suffered by Justice Vince Bruce of the New South Wales Supreme Court: see John Waugh, 'A Question of Capacity: The Case of Justice Bruce' (1998) 9 *Public Law Review* 223. Another example might be the thyroid cancer of William Rehnquist when he was Chief Justice of the US Supreme Court: see Shankar Vedantam and Charles Lane, 'Rehnquist's Illness Forces Absence', *The Washington Post* (Washington, DC), 2 November 2004 <<http://www.washingtonpost.com/wp-dyn/articles/A15459-2004Nov1.html>> at 15 June 2008.

⁹⁷ See, eg, Susan M Olson, 'Ginsburg, Douglas Howard' in Kermit L Hall (ed), *The Oxford Companion to the Supreme Court of the United States* (2nd ed, 2005) 392, which describes the case of Douglas Ginsberg — a judge of the US Court of Appeals for the District of Columbia — whose nomination to the US Supreme Court by President Ronald Reagan in 1987 was withdrawn after it was reported that he had been a frequent user of marijuana at Law School and then whilst a Law Professor at Harvard University.

2 *The constitutional relevance of private behaviour to the removal of judges by the executive government*

The arguments made above regarding the constitutional relevance of the sexuality, infidelity, health and drug use of a judicial candidate would seem logically to apply to judges in the context of removal. But this follows only if the private matters relevant to the political discussion as to whether a person should be appointed to judicial office are equally relevant to the removal of a judge. That may turn on the grounds upon which a judge can be removed.

In Australia, there are two accepted grounds for the removal of a judge: ‘proved misbehaviour’ and ‘incapacity’.⁹⁸ The definition of ‘proved misbehaviour’ has been elusive. But one reasonably broad construction is that it means ‘such misconduct, whether criminal or not, and whether or not displayed in the actual exercise of judicial functions, as, being morally wrong, demonstrates the unfitness for office of the judge in question.’⁹⁹ On the other hand, ‘incapacity’ refers to ‘physical or mental impairment which would be of such a nature or duration as to warrant removal.’¹⁰⁰ In the latter case in particular it might, for example, be argued that for the ill health of a judge to constitute ‘incapacity’ it must satisfy a higher threshold of seriousness than is otherwise the case for the health of a judicial candidate to be relevant in the political discussion regarding their appointment. That might strictly be true. And, if so, it would be more difficult to justify constitutionally the disclosure of certain private matters once a person was appointed to the bench. Consequently, judges may enjoy a greater degree of personal privacy than candidates for judicial office.

However, though the constitutional justification for disclosure in the judicial context is to secure the political communication (on possible judicial appointments and removals) necessary to ensure that the citizenry can make informed voting choices, there is an important additional reason why these private matters — when they concern judicial candidates *and* judges — ought to be in the public domain. As Sir Gerard Brennan has rightly noted, ‘[h]igh standards of judicial conduct are rightly expected by the community, for public confidence in the Courts and Judges

⁹⁸ See, eg, *Constitution* s 72(ii), which states that the Justices of the High Court and of the other courts created by the Parliament ‘[s]hall not be removed except by the Governor-General in Council, on an address from both Houses of the Parliament in the same session, praying for such removal on the ground of proved misbehaviour or incapacity.’

⁹⁹ Sir Richard Blackburn, ‘Parliamentary Commission of Inquiry Re the Honourable Mr Justice Murphy’ (1986) 2 *Australian Bar Review* 203, 221.

¹⁰⁰ Enid Campbell and H P Lee, *The Australian Judiciary* (2001) 109.

is essential to their authority and therefore essential to the rule of law.¹⁰¹ And those standards of judicial conduct must apply ‘both in and out of court’.¹⁰²

It is imperative that public confidence in a judge’s ability to perform judicial duties properly be maintained, for it is public confidence which sustains the independence of the judiciary.¹⁰³

If this is so, then the public has a right to know about private matters that may diminish the capacity of a judicial candidate or a judge to properly discharge their his or her duties. The private facts and information relevant to the appointment and removal of judges are, then, the same. But in the removal context it is the *Constitution* and the need to maintain public confidence in the courts that provides the justification for their disclosure.

CONCLUSION

The aim of this article was to outline a theoretical framework to underpin and inform the development of the emerging right to personal privacy in Australia. In this regard my focus was public officials in Australia — both elected and unelected — and the extent to which it is possible for the law to provide them with meaningful privacy protection under the *Constitution*.

In order to do so, it was first necessary to explain how a privacy right in Australia — whether developed by the common law or recognised in statute — must be compatible with the implied right to freedom of political communication recognised by the *Constitution*. This was done in Part I in relation to ‘elected public officials’, and my analysis demonstrated that the intersection between the *Constitution* and their privacy interests is a complex one. Indeed, the extent to which the law can protect their personal privacy will turn on what conception of the implied freedom one holds. I argued that it was consistent with the *Constitution* for the law to protect facts and information for which there is a reasonable expectation of privacy such as a person’s sexuality, infidelity, health or drug use.

This kind of privacy rule — which the Australian Law Reform Commission has recently recommended that the Commonwealth enact into federal law¹⁰⁴ — can, from a constitutional perspective, apply to elected public officials. The conception of the implied freedom that I favour recognises that providing elected public officials with meaningful privacy protection may encourage meritorious candidates to stand for public office and enhance the quality of public discourse on political and governmental matters. Moreover, my analysis of the intersection between the

¹⁰¹ Sir Gerard Brennan, ‘Foreword’ to J B Thomas, *Judicial Ethics in Australia* (2nd ed, 1997) v.

¹⁰² Ibid 9.

¹⁰³ Campbell and Lee, above n 101, 111.

¹⁰⁴ Australian Law Reform Commission, above n 6, [5.75].

First Amendment and American privacy rules suggests that if elected public officials enjoy no legally enforceable zones of person privacy, then the disclosure logic that underpins this constitutional relationship may well plant the seeds of destruction of the emerging right to personal privacy more generally.

There is also no reason in principle to expect or demand that people who seek public office must surrender their privacy completely and for all time. The important interests and values that a privacy right fosters — most notably the promotion of human dignity and flourishing — are common to and valued by us all. It is, however, true that for such a privacy rule to conform to the *Constitution* that protection cannot be absolute for elected public officials. It must yield in circumstances where disclosure of private facts and information is necessary to provide the citizenry with the information needed to make free and informed voting choices. In this regard, I argued that disclosing the sexuality, infidelity, health or drug use of elected public officials was constitutionally justified if it would demonstrate the insincerity or hypocrisy of their policy agenda or if it would diminish their capacity to properly discharge their public duties.

I then turned to consider the possible scope and content of a legal right to personal privacy under the *Constitution* for ‘non-elected public officials’ and ‘judges’. This was undertaken in Parts II and III respectively. My analysis demonstrated that the implied freedom intersects with the privacy interests of ‘non-elected public officials’ in a manner similar to their ‘elected’ counterparts, but has a more limited constitutional dimension for ‘judges’. It was also observed that, as ‘non-elected public officials’ and ‘judges’ do not run for public office, the public interest in the disclosure of their private facts and information will necessarily be more limited. Indeed, it was argued that disclosure is only justified if these private matters may diminish their capacity to properly discharge their public duties. This disclosure rationale is compelled by the implied freedom for both ‘non-elected public officials’ and ‘judges’, with the need to maintain public confidence in the integrity of the courts an additional justification in the judicial context.

As noted above, the ALRC considers that ‘[i]n the absence of a statutory cause of action, the common law in this area will continue to develop.’¹⁰⁵ Australian law in this regard is increasingly attentive to and cognisant of the importance and value of protecting ‘the interests of the individual in leading, to some reasonable extent, a secluded and private life’.¹⁰⁶ But a legal rule of this kind must conform to the *Constitution*. In this article I have developed a theory as to the relationship between the implied freedom and the privacy interests of public officials in Australia. My

¹⁰⁵ Australian Law Reform Commission, above n 6, [5.64].

¹⁰⁶ *Lenah Meats* (2001) 208 CLR 199, 258 (Gummow and Hayne JJ). On the increasing attentiveness of Australian common and statute law to the interests of privacy in a range of contexts, see *Jane Doe* (Unreported, County Court of Victoria, Civil Division, Hampel J, 3 April 2007) [101]–[165]; Butler, above n 10, 357–63; Carolyn Doyle and Mirko Bagaric, *Privacy Law in Australia* (2005) 98–177.

account suggests that it is possible to provide them (and all Australians) with meaningful protection of their personal privacy without depriving the citizenry of the political and governmental information needed to make free and informed voting choices. The interests of privacy and constitutional government in Australia are by no means at odds. To secure the latter at the expense of the former would be a pyrrhic victory indeed. The law must seek to identify and jealously guard those zones of personal privacy that are the core of individual identity and source of human dignity. For that too is manifestly in the public interest.