

Establishing a Right to Privacy in Australia: What Would it Look Like, and How Would it Work?

By Richard Leder (Partner) and Sanjay Schrapel (Senior Associate) Corrs Chambers Westgarth.

Sir Cliff Richard's overwhelming success in his recent battle with the BBC and the South Yorkshire Police in the High Court of England and Wales (*Richard v British Broadcasting Corporation* [2018] EWHC 1837 (Ch)) (*Richard v BBC*) indicates that recognising a tort of privacy in Australia could have potentially troubling consequences.

On 14 August 2014, the BBC commissioned a helicopter to hover over Sir Cliff Richard's home in Sunningdale, Berkshire. It recorded what would turn out to be a highly publicised raid and search of his home by the South Yorkshire Police (SYP) in relation to allegations against Sir Cliff relating to an incident of child sexual abuse at a Billy Graham rally in the 1980s.

How the BBC came to know the time and location of the raid, and its decision to record and publicise it in such a prominent way, has been the subject of a 454-paragraph decision by his Honour Mann J in the High Court of England and Wales, handed down on 18 July 2018.

In his decision, Mann J roundly criticised nearly every aspect of the BBC's conduct in the lead-up to and following its report of the raid, and made some concerning conclusions about how the operation of the tort of privacy — which exists as part of the common law of the United Kingdom pursuant to the European Convention on Human Rights and the *Human Rights Act 1998* (UK) — might affect press reporting of criminal investigations in the future.

In this article, we take an in-depth look at the judgment itself and the novel conclusion that it makes in relation to whether information about a person being the subject of a criminal investigation would

ordinarily be covered by the tort. We also look at what the concerning consequences of that conclusion are, both in the United Kingdom, and, if a tort of privacy were to be developed here, in Australia.

Richard v BBC: A closer look

How the BBC learned of the investigation and the raid

Justice Mann found that, in June 2014, BBC journalist Daniel Johnson received an anonymous tip-off about a police investigation into Sir Cliff arising from Operation Yewtree, the name given to a group of investigations of historic child sex abuse being conducted by the Metropolitan Police.

Following the tip-off, Mr Johnson approached SYP media officer Carrie Goodwin and explained to her that he knew SYP was investigating Sir Cliff. Then, in circumstances that were hotly contested between the BBC and SYP, the SYP agreed to provide Mr Johnson with certain information about its investigations, including when and where it would be conducting a raid of Sir Cliff's home.

The BBC's decision to publish

Armed with this information, the BBC commissioned a helicopter and recorded vision of SYP officers entering the premises and searching it, including by capturing footage, using a telephoto lens, of officers in the process of rifling through Sir Cliff's belongings.

The BBC then published 44 television broadcast stories which identified that Sir Cliff was the subject of the investigation and detailed that the investigation related to allegations of child sexual abuse which were said to have occurred during a Billy Graham rally. Many of the broadcasts included either the helicopter footage or footage of a BBC reporter

stationed near Sir Cliff's vineyard in Portugal, where the BBC believed he was located at the time. The BBC also broadcast headlines confirming that Sir Cliff was the subject of a historical sexual abuse investigation in its rolling 'news ticker' on its television news channels across the UK.

Before publishing its stories, the BBC approached Sir Cliff's PR team for comment, but apparently did not provide them with sufficient details to enable the PR team to decide whether or not to respond. Sir Cliff's chief PR consultant, Philip Hall, gave evidence to say that he did not want to communicate with the BBC because he believed they were trying to coax information out of him to support its story. Had the BBC told him that the raid was about to occur, or about the involvement of SYP more broadly, Mr Hall claimed he would have taken a different tack.

Immediately following the BBC's initial coverage, the story was published by other news providers both within the UK and across the world.

The SYP ultimately decided not to charge Sir Cliff with any offences relating to the investigation the subject of the raid and the BBC coverage in June 2016.

What is the UK tort of privacy?

The tort of privacy exists in the United Kingdom by virtue of the European Convention on Human Rights (the **Convention**), which itself has been ratified into the law of the United Kingdom in the *Human Rights Act 1998*.

Following the landmark decision of the House of Lords in *Campbell v MGN Ltd* [2004] 2 AC 457, the Human Rights Act has created an actionable tort of privacy with the following elements:

- Pursuant to Article 8 of the Convention, did the claimant have a legitimate expectation of privacy in relation to the information that was disseminated by the respondent?
- If so, pursuant to Article 10 of the Convention, was the party responsible for breaching that legitimate expectation of privacy justified in doing so by virtue of its right to freedom of expression?

If the answer to the first question is yes, and the second is no, then damages, (and potentially injunctive relief), follow.

This requires the Court to undertake a 'balancing exercise' between the competing rights of the holder of the privacy right, and the party seeking to breach that right (usually, but not always, a media organisation).

The application of principles to Sir Cliff's claim

Crucially, in *Richard v BBC*, Justice Mann held that Sir Cliff did have a legitimate expectation of privacy in relation to:

- the fact that SYP were investigating him for historical child sex offences and planning a raid on his home; and
- SYP's conduct of the raid itself.

As a consequence, his Honour was then required to determine whether, by naming Sir Cliff as the subject of the investigation and by broadcasting the helicopter footage of the raid into his home, the BBC was justified in so publishing by virtue of its right to freedom of expression.

Mann J held that the BBC was not so justified. Central to his Honour's reasoning was a finding that, except in 'exceptional and clearly defined circumstances', the identification of the subject of a criminal investigation would amount to a breach of that subject's legitimate

expectation of privacy and that breach would not be 'balanced' by the publisher's Article 10 right to freedom of expression.

Justice Mann did not, however, identify what those exceptional and clearly defined circumstances might be.

Having made this finding, Mann J went on to rule that the BBC's invasion of Sir Cliff's privacy rights was exacerbated by the 'sensationalist' nature of its reporting, which included stationing a reporter in Portugal and commissioning and broadcasting the helicopter footage of the search itself. Justice Mann held that the BBC's reporting exacerbated both the harm to Sir Cliff's feelings, and the damage to his reputation. Justice Mann also took into account the BBC's failure to provide Sir Cliff's PR team with the full story to enable an informed decision about whether to issue a response to the BBC's proposed story, or seek injunctive relief.

In conducting the 'balancing act', Mann J also opined that the BBC were more concerned with 'scooping' its rival news broadcasters than respecting Sir Cliff's privacy rights, which weighed against a finding that the BBC's Article 10 rights outweighed Sir Cliff's Article 8 rights. Importantly, Mann J held that, even without the sensationalistic reporting, a mere report of the investigation which named Sir Cliff would have amounted to an unjustified breach of Sir Cliff's privacy rights.¹

Justice Mann was also unimpressed with the BBC's conduct vis-à-vis SYP. The BBC maintained that the SYP had volunteered the details of the investigation to the BBC to assist the SYP to obtain publicity about it. The SYP, on the other hand, contended that it only provided the BBC with the information because it believed that it needed to ensure the BBC would not run a story which may jeopardise the investigation, and

that the provision of the information would help SYP keep the BBC from doing so. Justice Mann found in favour of SYP on this point, and decided that this formed another basis to conclude that the BBC's conduct weighed against a finding that the balancing act fell in the BBC's favour.

Damages for the UK tort of privacy

The English tort of privacy operates similarly to the tort of defamation, in that damages can be awarded for a "*per se*" breach of the tort. That is, actual loss does not need to be proved before a Court is entitled to award substantial damages for the breach.

In so doing, Mann J ruled that a Court is entitled to take into account hurt to feelings and harm to reputation – a question that was previously a relatively unsettled matter in English law. In so ruling, Mann J assessed Sir Cliff's general damages at £190,000.

Justice Mann then ruled that the BBC was liable to pay a further £20,000 for aggravated damages, on account of its decision to submit the story for the Royal Television Society's 'Scoop of the Year' award, and refusing to withdraw it upon a request being made by Sir Cliff's solicitors.²

Justice Mann also found that a number of heads of specific loss, or 'special damage' were made out by Sir Cliff in respect of legal fees incurred dealing with the fallout from the BBC publications, and the loss of an agreement to republish his book *My Life, My Way* to coincide with his 75th birthday.

Establishing a tort of privacy in Australia: What are the potential consequences of *Richard v BBC*?

Despite sputtered efforts by first-instance courts³ to find a tort of privacy in Australia, no appellate Court has found that such a cause of action exists as part of the common law of Australia.

¹ [318].

² [365].

³ *Grosse v Purvis* [2003] QDC 151; *Doe v Australian Broadcasting Corporation* [2007] VCC 281.

Notwithstanding the Australian Law Reform Commission's Report *Serious Invasions of Privacy in the Digital Era* published on 31 March 2014,⁴ which recommended the introduction of a statutory tort of privacy in terms similar to the UK, no Australian jurisdiction has sought to move on the issue.

If an Australian parliament was to establish a statutory tort, or an appellate Court was to find the existence of such a tort as part of the common law, it is likely that the consequences of Mann J's judgment would apply directly to Australian publishers. Two such consequences are explored below.

1. The tort would prohibit the identification of subjects of criminal investigations

The traditional position in Australia is that reporting about the subject of an investigation is constrained only by:

- the principles of defamation law (requiring reports to ensure that they make clear that the person is being investigated in relation to offences, and not that they are guilty of those offences); and
- journalistic standards (which, while not enforceable, may require media publishers to consider whether the reporting of an investigation might prejudice that investigation).

Once charges are laid, reporting is then also subject to the laws of contempt, such that any reporting on the crime the subject of the charge which might create a 'real and definite tendency'⁵ to prejudice the fair trial of that person (including by, commonly, tainting the minds of a potential jury pool) may be punishable at the court's discretion.

By contrast, the immediate and most startling consequence of

Mann J's ruling in *Richard v BBC* is that - at least in jurisdictions where a tort of privacy exists — it would appear to be no longer appropriate to identify the subjects of criminal investigations in the UK, either at all or at least until the point where they are charged (Mann J did not opine on this). Prior to his Honour's ruling, the kinds of information that would usually be protected by the tort of privacy were limited to information about a person's health, personal relationships or finances.

In reaching his conclusion on this question, Mann J identified that reporting on criminal investigations can irreparably damage the reputations and lives of the subjects of those investigations, whether or not charges are laid or convictions obtained, and that this risk is particularly acute in relation to prominent public figures accused of historical child sex offences. Justice Mann also considered that the risk of harm to such public figures is also exacerbated by the proliferation of false and unsubstantiated complaints that tend to flow on the internet about such persons once it is revealed that they are the subject of such an investigation.

Countering the position reached by Mann J is the fact that (so long as they are responsibly reported) the reporting of allegations of sexual offending is important, both as:

- a function of evidence-gathering in respect of a field of crime that is notoriously under-reported (including by encouraging further complainants to come forward): and
- a function of ensuring that the public remains informed about allegations made against prominent public people. People who might otherwise have been given unfettered access to

children, to encourage vigilance and ongoing reporting of witnessed wrongdoing.⁶

The BBC ran these arguments against Sir Cliff, and was unsuccessful in maintaining them. Particularly in relation to the second argument, Mann J considered that the public interest in Sir Cliff's case extended only to reporting on the investigation, and not to identifying Sir Cliff himself.⁷

2. The tort of privacy does not contain the safeguards of the tort of defamation

One of the more troubling aspects of the tort of privacy as it exists in the United Kingdom is that it contains none of the defences available to a defendant in a defamation action. For example, so long as a claimant can prove that he had a legitimate expectation of privacy in relation to the information published about him, it does not matter whether the private information published by a defendant is itself true, contained expressions of the publisher's honest opinion, or were otherwise published on an occasion of qualified privilege. In defence of a privacy claim, all that matters is whether a claimant's legitimate expectation that certain information about him remains private outweighs a defendant's right of 'freedom of expression'. This requires a court to conduct a 'balancing act', which is a more opaque process.

It is also potentially telling that Sir Cliff did not bring his claim in defamation, primarily because the BBC were careful to only convey the imputation that Sir Cliff was under investigation for child sex offences (which was true), rather than the imputation that Sir Cliff was actually guilty of those offences. There was evidence in the case to the effect that the BBC took the defamation risk issues seriously, and crafted its publications to abide by them.⁸

4 Australian Law Reform Commission, *Serious Invasions of Privacy in the Digital Era*, Discussion Paper No 80 (2014), accessible at <https://www.alrc.gov.au/publications/serious-invasions-privacy-dp-80>.

5 *DPP v Johnson & Yahoo!* [2016] VSC 699, [24].

6 The BBC made reference to its 'duty' to report on similar allegations made against, and investigations into, persons such as Rolf Harris and Jimmy Savile in this context.

7 [317].

8 [111], [113].

The Australian High Court has previously ruled that a claimant who has a claim in defamation cannot re-fashion that claim as a negligence claim, because the tort of defamation, and its defences, create a sufficient platform on which to consider a claim for damage to reputation.⁹ In light of Mann J's ruling that **both** defamation and breach of privacy can provide remedies for damage to reputation, this issue would need to be addressed if a tort of privacy were established or found to exist in Australia.

Also significant is that, in England and Wales,¹⁰ a claimant only has one year from the date of the first publication of defamatory matter to bring proceedings for defamation. Sir Cliff brought his claim for breach of privacy in 2016, two years after the BBC's publications and one year after the expiry of the limitation period for defamation. By contrast, s 2 of the *Limitation Act* provides claimants in England and Wales six years from the date the breach of privacy occurred to bring a claim. In its Report,¹¹ the ALRC recommended that the limitation period for a breach of privacy claim should be

3 years, which would mean that a claimant who is out of time to bring a defamation action in Australia, may still be able to bring a claim in privacy to obtain compensation for harm to reputation.¹² A tort of privacy in Australia may therefore deprive defendants of the benefits provided by the shorter limitation period that applies to defamation claims.

The ability for a claimant to bring an action in privacy to circumvent some of the difficulties that a defamation claim would face is therefore another troubling consequence of the recognition of a tort of privacy in Australia.

Why, then, does the tort of privacy serve to provide Sir Cliff with

damages for harm to his reputation caused by the true reporting of the fact that he was under investigation for historical child sex offences, when the tort of defamation would have given no such remedy?

Unfortunately, shortly after announcing that it would appeal Mann J's decision,¹³ the BBC consequently decided it would not.¹⁴ The resolution of these questions will therefore need to await a new vehicle.

Richard Leder is a partner, and **Sanjay Schrapel** a Senior Associate, at Corrs Chambers Westgarth in the Commercial Litigation and Technology, Media and Telecommunications practice groups.

- 9 *Sullivan v Moody* (2001) 207 CLR 562. Note that the High Court's position is contrary to the view reached by the UK House of Lords on the same question in *Spring v Guardian Assurance plc* [1995] 2 AC 296.
- 10 *Limitation Act 1980* (UK), s 4A. Both the 'single publication' rule and the one-year limitation period do not apply in Scotland and Northern Ireland as the *Defamation Act 2013* and the *Limitation Act 1980* do not apply in those jurisdictions.
- 11 Above n 4.
- 12 A one-year limitation period also applies to defamation actions brought in Australia, although the operation of the limitation period differs between Australia and England and Wales because the 'multiple publication' rule applies in Australia: see *Google Inc v Duffy* [2017] SASCF 130, [359].
- 13 <https://www.bbc.com/news/uk-44961556>
- 14 <https://www.theguardian.com/media/2018/aug/15/bbc-will-not-appeal-against-cliff-richard-privacy-victory>

Communications and Media Law Association

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The Communications and Media Law Association's (CAMLA) Young Lawyers committee is calling for expressions of interest to join them in 2019.

CAMLA Young Lawyers is an official sub-committee of CAMLA of up to 15 young lawyers who represent the interests of young lawyers working in, or who have an interest in, communications and media law in Australia. CAMLA Young Lawyers also assists the CAMLA Board with fulfilling its objectives.

The CAMLA Young Lawyers committee aims to be representative of all sectors of communications and media law including private practice, in-house, government/regulatory, academia and persons with a genuine interest in the area, including students.

The committee is 'hands-on' and voluntary and all members are called on to actively participate and contribute. Committee members are asked to attend monthly meetings (in Sydney) and are required to

participate in organising events and contribute to the *Communications Law Bulletin*.

If you would like to nominate to become a 2019 CAMLA Young Lawyers committee member, please send us a brief CV and explanation as to why you would like to be part of CAMLA Young Lawyers for 2019.

Please email your expression of interest to camla@tpg.com.au with your name and organisation in the subject line by Friday 14th December 2018.

You must be an existing member of CAMLA to apply (or arrange your membership through the CAMLA website: www.camla.org.au prior to submitting your application).

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