

## Privacy and the Media

The Hon Justice Peter Applegarth  
University of Southern Queensland School of Law  
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The phone hacking scandal that has engulfed the Murdoch Empire in Britain has added a new dimension to the debate about the right to privacy. We see on the news images of celebrities emerging with their lawyers from the Royal Courts of Justice in London following the reading of an apology in open Court by a Murdoch lawyer and after being paid some compensation for their legal claim. All great theatre. But what legal claim have they just settled? And who created the legal rights that they pursued to the doors of the Court? The answer to the second question is judges, dare I say it, activist judges, doing what judges have done in our thousand year legal tradition of judge-made law.

The answer to the first question is more problematic. Most folk would say that the right that was invoked, and which has been vindicated in legal proceedings, is the “right to privacy”. But what do we mean when we speak of the right to privacy? Does Australian law recognize it? If not, should it, and, if so, should it be created by Australian judges or only by democratically elected Parliamentary representatives? These are the questions that I will discuss tonight.

In 1980, when I was a law student, I read a provocative article in the *Law Quarterly Review* titled “The Poverty of ‘Privacy’”. In it Raymond Wacks concluded:

“‘Privacy’ has grown into a large and unwieldy concept. Synonymous with autonomy, it has colonised traditional liberties, become entangled with confidentiality, secrecy, defamation, property, and the storage of information. It would be unreasonable to expect a notion so complex as ‘privacy’ not to spill into regions with which it is closely related, but this process has resulted in the dilution of ‘privacy’ itself, diminishing the prospect of its own protection as well as the protection of the related interests.

In this attenuated, confused and overworked condition, ‘privacy’ seems beyond redemption. Any attempt to restore it to what it quintessentially is – an interest of the personality – seems doomed to fail for it comes too late. ‘Privacy’ has

become as nebulous a concept as ‘happiness’ or ‘security’. Except as a general abstraction of an underlying value, it should not be used as a means to describe a legal right or cause of action.

It is submitted that a more honest, effective and rational course is to approach the subject from the standpoint of the protection of ‘personal information’.”<sup>1</sup>

As overworked as the concept of “privacy” was in 1980 and still is today, it wields a huge influence. It has been recognised as a human right. For instance, article 17 of the *International Covenant on Civil and Political Rights* provides:

- “1. No one shall be subjected to arbitrary or unlawful interference with his **privacy**, family, home or correspondence, nor to unlawful attacks on his honour and reputation.
2. Everyone has the right to the protection of the law against such interference or attacks.”<sup>2</sup>

The United Nations Human Rights Committee has stated that privacy includes a “sphere of a person’s life in which he or she can freely express his or her identity, be it by entering into relationships with others or alone”.<sup>3</sup>

But in what form should our legal system confer a legal right or cause of action for what can loosely be called an invasion of privacy?

In 2001 the High Court, in the *Lenah Game Meats* case<sup>4</sup>, cleared the path for a tort of invasion to privacy to emerge. But Chief Justice Gleeson warned that “the lack of precision of the concept of privacy” was a reason for caution in declaring a new tort. Caution also was required because privacy interests could be protected by the development of recognised causes of action like breach of confidence.

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<sup>1</sup> (1980) 96 LQR 73 at 88.

<sup>2</sup> *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, [1980] *Australian Treaty Series* 23, art 17 (generally entered into force for Australia 13 November 1980) (“ICCPR”) (emphasis added)

<sup>3</sup> *Coeriel and Aurik v The Netherlands* United Nations Human Rights Committee, 52nd sess, UN Doc CCPR/C/52/D/453/1991, [10.2] (1991).

<sup>4</sup> *Australian Broadcasting Corporation v Lenah Game Meats Pty Ltd* (2001) 208 CLR 199; [2001] HCA 63.

There is a need for caution because simply harnessing a concept such as “privacy” in declaring a new tort is a recipe for analytic confusion and uncertainty in the law. Philosophers can debate whether “privacy” is a value and whether it can be equated with personal autonomy. Lawmakers, including judicial lawmakers in writing the 21<sup>st</sup> Century chapter of the common law and in moulding equitable doctrines and remedies, should proceed cautiously by recognising certain specific “privacy interests” that deserve protection and defining the extent of their protection, rather than giving legal protection to an amorphous “right to privacy”.

The US experience in tort law is instructive. Building upon Professor Prosser’s work<sup>5</sup> the “Restatement on Torts”<sup>6</sup> says that the right to privacy may be invaded in four ways. The first is “Intrusion upon Seclusion”. The second is “Appropriation of Name or Likeness”. The third is “Publicity given to Private Life” and the fourth is identified as “Publicity Placing Person in False Light”. This analysis demonstrates how amorphous the concept of privacy is. Many of us regard cases on appropriation of name or likeness as having more to do with the right to publicity than the right to privacy. If anything, it is about a right of property, and preventing unjust enrichment by the misuse of someone else’s goodwill, or a commodity called celebrity.

The development of a tort of privacy in Australia, by either a statutory cause of action or a judge-made tort is likely to focus upon two of these categories: the first is intrusion upon seclusion or solitude. The second is public disclosure of private facts.

Senior Judge Skoien recognised the existence of a tort based upon intrusion upon privacy or seclusion in the 2003 case of *Grosse v Purvis*.<sup>7</sup> The tort requires a willed act which intrudes upon privacy and seclusion in a manner which is “highly offensive to a reasonable person of ordinary sensibilities” and which causes the plaintiff detriment in the form of mental, psychological or emotional harm or distress, or which prevents or hinders the plaintiff from doing an act which he or she is lawfully entitled to do.

Tonight I wish to address a different emerging tort which is concerned with the public disclosure of private facts. The need for protection is all too apparent. The public’s thirst for gossip and

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<sup>5</sup> W L Prosser “Privacy” (1960) 48 California Law Rev 383.

<sup>6</sup> Restatement of the Law, Second, Torts, 652 (1977) American Law Institute.

<sup>7</sup> [2003] QDC 151 ; (2003) Aust Torts Reports 81-706

scandal is insatiable, but it has always been so.<sup>8</sup> In 1891 Oscar Wilde in *The Soul of Man under Socialism* observed:

”The public have an insatiable curiosity to know everything, except what is worth knowing. Journalism, conscious of this, and having tradesman-like habits, supplies their demands.”

What is different today, and what makes the need for protection more pressing, is modern technology. Not just the telephoto lens which can capture images from a distance without committing a trespass. Modern mobile phones make everyone who owns one an amateur photographer, and easy access to the internet makes each of these amateur photographers a potential global publisher. They have a potential readership beyond the imagination of William Randolph Hearst or Lord Beaverbrook.

An example of the potential of modern technology to invade privacy occurred a few years ago when a football superstar, Sonny Bill Williams, was captured on a mobile phone image during a consensual encounter with an equally fit sportswoman in a men’s toilet cubicle at a Sydney hotel. The photos found their way onto the internet, and then into the pages of the Murdoch press.

How should the law restrict the public disclosure of sensitive private facts? English courts have done so without declaring a tort of privacy invasion. Instead, they have adapted the action for breach of confidence to provide a remedy where private information is disclosed in circumstances where a person disclosing information knew or ought to have known that there was a reasonable expectation that the information would be kept confidential or private. Some would say it is akin to a tort of privacy invasion except in name only. Still, the House of Lords in *Wainwright*<sup>9</sup> declared that there was no tort of invasion of privacy. Professor Wacks in an essay titled “Why there will never be an English common law privacy tort” gives seven reasons for this conclusion, and the first is the advance of the equitable remedy for breach of confidence.<sup>10</sup>

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<sup>8</sup> Warren and Brandeis “The Right to Privacy” (1890) 4 Harv Law Rev 193 were concerned with press excesses and the right to privacy was formulated as a protection against gossip.

<sup>9</sup> *Wainwright v Home Office* (2004) 2 AC 406.

<sup>10</sup> Wacks “Why there will never be an English common law privacy tort” in Kenyon and Richardson (eds) *New Dimensions of Privacy Law: International and Comparative Perspectives* (2006). In summary, the seven factors are:

1. The advance of the equitable remedy for breach of confidence;
2. The impact of the *Human Rights Act* 1998;
3. The dominance of freedom of expression;
4. The impact of the Data Protection Act 1998;
5. Media self-regulation;

Things have come a long way since *Kaye v Robertson*.<sup>11</sup> In that 1991 case, the actor, Gordon Kaye, was recovering from serious head injuries in a private room of a hospital from which most visitors were explicitly barred. He was in no condition to consent to a press interview. A reporter and photographer from the *Sunday Sport* shamefully invaded the hospital room. In that case the English Court of Appeal adopted the assumption of counsel that English law recognised no right of privacy.<sup>12</sup>

In the last decade English courts, influenced by the UK *Human Rights Act* 1998, have adapted the action for breach of confidence to protect privacy interests. We have actors Michael Douglas and Catherine Zeta Jones largely to thank for developing the law. The case arose out of their wedding at the Plaza Hotel in New York. In the same vein as Prime Minister Howard's slogan in the 2001 election the actors declared:

“We decide who will come to our wedding and the terms upon which they will come to it.”

But an enterprising photographer captured some unauthorised shots and a magazine that bought them threatened to spoil the exclusive rights to publish authorised photos that had been sold by the actors to a rival magazine. Perhaps it is only millionaires like the happily married couple who can afford litigators to make new law. The celebrity couple succeeded in an action for breach of confidence, with English courts recognising the underlying value that the law protects is human autonomy – the right to control the dissemination of information about one's private life.

Sedley LJ declared:

“What a concept of privacy does ... is accord recognition to the fact that the law has to protect not only those people whose trust has been abused but those who simply find themselves subjected to an unwanted intrusion into their personal lives. The law no longer needs to construct an artificial relationship of confidentiality between intruder and victim: it can recognise privacy itself as a legal principle drawn from the fundamental value of personal autonomy.”<sup>13</sup>

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6. Incoherence of the concept of privacy;

7. Judicial preference for legislation.

<sup>11</sup> [1991] FCR 62.

<sup>12</sup> Glidewell LJ said as much when giving the leading judgment.

<sup>13</sup> *Douglas v Hello! Ltd* [2001] QB 967 at 1001 [126].

The course of adapting the law of confidence comes with its problems, and a member of the Queensland Bar, Mark Johnson, has published an article questioning whether the “square peg of privacy” should be forced into the “round hole of confidence”, or whether we should look to a new tort.<sup>14</sup>

If Australian courts look to a new tort, then they can look to formulations of a tort against disclosure of private information, as established by judges in New Zealand.<sup>15</sup> But judicial lawmaking comes with its problems.

It was a simple, but bold, move in 2007 for a Victorian County Court Judge to hold that a tort of invasion of privacy exists in Australian law.<sup>16</sup> The facts of the case were simple. ABC Radio broadcast the identity of a rape victim in breach of a statutory prohibition. It could not justify the publication of that sensitive, personal information.

But finding a tort for breach of the plaintiff’s privacy was not necessary in order to fill a gap in the protection the law provided to the plaintiff. The judge already had held that the plaintiff should be awarded damages for breach of statutory duty, more controversially, for breach of a duty of care that the ABC was found to owe the plaintiff and also for breach of confidence.

Judge Hampel did not explain why it was necessary in that case to declare a tort of privacy when other laws, including the law of breach of confidence, as developed by English courts in recent years, adequately protected the plaintiff’s privacy interests against the public disclosure of personal information. Her Honour did not consider it appropriate to define the elements of the new tort since, in the case in hand, the plaintiff had a reasonable expectation that the information would remain private and there was no competing public interest in it being published.

Defining the elements of the new privacy tort has been left for future cases and, in the meantime, uncertainty will prevail. For instance, in *Lenah Game Meats* Gleeson CJ asked whether the disclosure would be “highly offensive to a reasonable person”. In the *Naomi Campbell* case some members of the House of Lords regarded that test as too strict. What test is a trial judge in Australia to choose from the judicial smorgasbord?

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<sup>14</sup> Johnson “Should Australia force the square peg of privacy into the round hole of confidence or look to a new tort?” (2007) 12 MALR 441.

<sup>15</sup> *Hosking v Runting* [2005] NZLR 1.

<sup>16</sup> *Jane Doe v Australian Broadcasting Corporation* [2007] VCC 281. The ABC appealed on various grounds including against the finding that the tort of invasion of privacy existed in Australia. The appeal was settled in March 2008.

There are big issues to be resolved about defining the cause of action for public disclosure of private facts, and when the privacy interest trumps other interests.

Is it enough for a plaintiff to simply prove circumstances where there is a reasonable expectation of privacy? Should they have to prove also that publicity would be highly offensive to a reasonable person? How should the new privacy tort accommodate competing interests like freedom of communication? Should the plaintiff have to prove that the information is not of legitimate concern to the public? Or should it be for a defendant to prove some public interest justification?

What are “private facts”? What are public and private places?

What reasonable expectation of privacy does a public figure have?

What defences should be available?

Is it a defence, as in a breach of confidence action, that the information is in the public domain? Does information on a public record cease to be “private”?<sup>17</sup>

Should there be a defence akin to a *Lange* defence where the matter involves the discussion of government or political matters?

Without human rights instruments like a *Human Rights Act* as exists in the UK, how does the court balance competing interests? Do privacy interests have a priority over other interests such as freedom of speech?

The answers to these questions cannot necessarily be found in cases from other countries, where legal analysis turns on “rights” to freedom of communication found in constitutions like the US Bill of Rights or in human right statutes like the UK’s *Human Rights Act*, 1988. In Australia, the only constitutional guarantee on freedom of a communication is a limited right to communicate about government and political matters, and only Victoria and the ACT have Human Rights Acts.

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<sup>17</sup> For example, The United States Court of Appeals has held that the fact that information is on public record about applicant’s HIV status did not become a matter of public record so as to bar an action for privacy.

The hazards of judicial law making in this area make us look to a statutory cause of action in the interests of greater certainty. But even with a more precise statutory cause of action, there will be uncertainty, and therefore the potential for plenty of litigation.

Celebrities, sporting stars and other public figures will be left to guess whether the new tort of privacy will protect them from unwanted disclosure of personal information. In the UK, the sexual indiscretions of star footballers and other supposed “role models” are not necessarily protected by the law of confidence, partly because the other participants in the star’s sexual exploits are said to have a right to disclose information relating to the relationship.<sup>18</sup> Can Australian sporting stars expect their one night stands in hotel rooms whilst on tour to be better protected by Australia’s new privacy tort?

In the UK, supermodel Naomi Campbell, who falsely claimed that she had “never had a drug problem”, was able to recover damages against a newspaper that reported that she was attending meetings of Narcotics Anonymous and published photographs taken of her in the street as she left a meeting of NA.<sup>19</sup> This was despite the fact that she conceded that it was legitimate for the media to set the record straight and report that she was attempting to deal with her drug problem. English law may not protect celebrities like Ms Campbell from being photographed when they pop down to the shop to buy a pint of milk, but it did protect her from the publication of photos of her leaving the Narcotics Anonymous meeting. This result was reached by a 3:2 majority of the House of Lords, which overruled a Court of Appeal bench of three that took the opposite view. So much for certainty.

But potential uncertainty is not a *sufficient* reason to not enact a law to control the public disclosure of sensitive private facts. If uncertainty was a sufficient reason to do nothing, then Parliaments would not have enacted statutory causes of action for breach of vaguely worded statutory duties, and courts would not have developed the modern law of negligence. But we have to limit the scope for uncertainty, lest the law fall into disrepute and any cause of action become the exclusive plaything of the rich and famous.

To be realistic, and if English experience is a guide, any new cause of action is likely to be used, and misused, by the rich and famous, more than the ordinary citizen. This is because the public’s thirst for gossip about, and unguarded images of, celebrities is enormous. Readers demand to see what film stars look like without their makeup, dressed in tracky dacks as they

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<sup>18</sup> *A v B plc* [2003] QB 195.

<sup>19</sup> *Campbell v MGN Ltd* [2004] 2 AC 457.



pop down to the shop to buy a pack of fags. Readers of *New Idea* like to look at images of aging supermodels emerging from the surf, and to see signs of cellulite. Perhaps it's the search for the authenticity. Maybe, as Wilde said, it is insatiable curiosity to know everything, except what is worth knowing.

Some of us would like to have the freedom to be protected *from* too much information about celebrity marriages and images of cellulite. But we can exercise that freedom by reading the *Law Quarterly Review* rather than *New Idea*.

Celebrities and corporations like to control images and stories, lest it diminish the value of a commodity called celebrity. Under the guise of protecting the value of personal autonomy or “a right to privacy” in the form of the right to control disclosure of private information, the law inadvertently may create an image right or a right to publicity. The risk is very real, since in applying the traditional action for breach of confidence to information that was already in the public domain, Lord Hoffmann and the majority in *Douglas v Hello (No 3)*<sup>20</sup> effectively created an image right, or a right to publicity.

Oscar Wilde famously wrote:

“We are all in the gutter, but some of us are looking at the stars.”<sup>21</sup>

The English barrister, Christine Michalos, in discussing *Image Rights and Privacy after Douglas v Hello* cleverly observed:

“...as the market shows, we may not all read the gutter press, but we all want to look at the stars.”

This public demand prompts the media to photograph and film celebrities from a distance through telephoto lenses or from closer range. This raises interesting issues for the law. The first is whether taking photographs and doing so with a telephoto lens should be treated any differently to images captured by the naked eye. The second is the issue of expectations of privacy in public places.

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<sup>20</sup> [2008] 1 AC 1; [2007] UKHL 21; [2007] 2 WLR 920  
<sup>21</sup> *Lady Windemere's Fan*.

In 1765 Lord Chief Justice Camden stated:

“the eye cannot by the laws of England be guilty of trespass.”<sup>22</sup>

Our common law adopted the general rule that what one can see one can photograph. That approach came to be questioned in the mid-1990’s when an English judge stated:

“If someone with a telephoto lens were to take from a distance and with no authority a picture of another engaged in some private act, his subsequent disclosure of the photograph would, in my judgment, as surely amount to a breach of confidence as if he had found or stolen a letter or diary in which the act was recounted and proceeded to publish it.

In such a case, the law would protect what might reasonably be called a right to privacy, although the name accorded to the cause of action would be breach of confidence.”<sup>23</sup>

That view was taken in the absence of legislative guidance in the form of a Human Rights Act, and simply through the development of the general law to suit modern circumstances. Modern jurisprudence in England following the enactment of the Human Rights Act in 1998 has further developed the action for breach of confidence, and treats photographs as more intrusive than verbal accounts of what was seen by the human eye.

As for photographs taken in a public place, the English Court of Appeal treated as arguable that the child of Ms Murray (better known as J K Rowling) had a reasonable expectation of privacy being pushed along a street in a pram. But generally, individuals, including the rich and the famous, have no right to restrain a photograph being taken of them in public. This was the outcome in New Zealand in *Hosking v Runting*. And so it is, that models cannot complain when they are photographed down the shop looking unglamorous in their tracky dacks, and Sir Elton John could not complain when he was photographed taking rubbish out to the bin. With some exceptions, such as a homeless person who attempted to commit suicide in a public place,<sup>24</sup> the fact that the claimant was in a public place, or could be seen from a public place, when they were photographed has been practically decisive against a claim for invasion of privacy.

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<sup>22</sup> (1765) 19 *Howell's State Trials* 1030 at 1066

<sup>23</sup> *Hellenwell v Chief Constable of Derbyshire* [1995] 1 WLR 804

<sup>24</sup> *Peck v United Kingdom* [2003] All ER (D) 255 (Jan).

However on 7 February 2012, in *Von Hannover v Germany (No 2)*<sup>25</sup> the European Court of Human Rights gave some support to the idea that there can be an expectation of privacy in a public place. Princess Caroline of Monaco complained about the publication in a magazine of photographs taken of her and her family on a skiing holiday. It stated:

“There is thus a zone of interaction of a person with others, even in a public context, which may fall within the scope of private life.”

Whilst courts in England, other parts of the common law world and other parts of Europe grapple with issues of expectations of privacy in different contexts, Australian law remains unsettled as to whether a tort of privacy should exist under the common law of Australia, or in the form of a statutory cause of action.

In 2008 the Australian Law Reform Commission, after careful consideration of the issue, recommended that federal legislation should provide for a statutory cause of action for a serious invasion of privacy, and contain a non-exhaustive list of the types of invasion that fall within the cause of action. Its recommendations met with a predictably hostile response from some sections of the media, which treat the idea of a legally enforceable right to privacy, as something akin to poison. The ALRC’s proposal met with a lukewarm response from the federal government, and sunk almost without trace.

Three years later the phone hacking scandal that engulfed the News of the World and News International, led to police investigations, inquiries by Parliamentary committees and the Leveson Inquiry, which was established in July 2011.

In September 2011 the federal government announced an Independent Inquiry into the Media and Media Regulation, by retired Federal Court Judge The Hon Ray Finkelstein QC, assisted by Professor Matthew Ricketson. The Finkelstein Inquiry was not specifically concerned with privacy, and its establishment was not prompted by any evidence that the Australian media has conducted phone hacking on the industrial scale practised in England. Still, both the ongoing Leveson Inquiry and the now completed Finkelstein Inquiry dealt with the same vexed issue of what form of regulation should exist for the media in its different forms. Both have been concerned about the need for a swift and efficient process for the resolution of complaints, given the expense and delay associated with litigation and concerns about the effectiveness of

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<sup>25</sup> [2012] ECHR 228.

voluntary regulatory bodies, the Press Complaints Commission in the UK and the Australian Press Council.

The Finkelstein Report was completed on 28 February and released soon after. It is a massive report, and I cannot do justice to it. In very short summary it proposes a government funded News Media Council, established by statute to set journalistic standards and review complaints. It envisages a very speedy conciliation process, and remedies that include an order to publish an apology, correction, retraction or right of reply. Some media reaction to the report treated the report as a monster which imperiled freedom of the press. Some “reporting” and commentary about the report would make one think the report was written by Frankenstein rather than Finkelstein. I commend to you the more thoughtful commentary of journalists like Richard Ackland and Margaret Simons, and Professor Mark Pearson.

Tonight’s topic is big enough without my taking on the bigger topic of media regulation. Relevantly, Mr Finkelstein addressed market failure, concentration of ownership, community distrust of the media and its lack of accountability. He instanced as examples of irresponsible reporting:

- “A minister of the Crown has his homosexuality exposed. He is forced to resign.
- A chief commissioner of police is the victim of false accusations about his job performance fed to the news media by a ministerial adviser. Following publication of the articles, he is forced to resign.
- A woman is wrongly implicated in the deaths of her two young children in a house fire. Her grief over her children’s death is compounded by the news media.
- Nude photographs said to be of a female politician contesting a seat in a state election are published with no checking of their veracity. The photographs are fakes.
- A teenage girl is victimised because of her having had sexual relations with a well-known sportsman.”<sup>26</sup>

Margaret Simons makes the following observation about these cases, and the invasion of privacy of the privacy of a young victim of crime, Madeleine Pulver:

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<sup>26</sup> Hon R Finkelstein QC, *Report of the Independent Inquiry into the Media and Media Regulation*, 28 February 2012 at 11.11.

“And privacy? Exhibit A is the Madeleine Pulver collar-bomb case, with the television media camping outside her house for four days, and pictures published of her walking the dog, despite the fact that she was a child, a victim, and that her father had pleaded for her privacy to be respected. The news media, Finkelstein says, does a great deal of good work. Journalists and editors pursue their jobs with dedication and skill. Yet in all these cases, the media failed its own frequently proclaimed standards. People were damaged, sometimes profoundly, and in most cases had no meaningful recourse.”<sup>27</sup>

An interesting point about the Leveson and Finkelstein Inquiries is that the former, and possibly the latter, may not have come about had the phone hacking scandal not erupted over egregious breaches of privacy. Phone hacking on an industrial scale only came to light because its extent was revealed in e-mails that were bound to be discovered in civil proceedings, being e-mails that led to the settlement of Gordon Taylor’s civil action. And such a civil action was brought under judge-made law, which gave legal protection for what most folk would describe as the right to privacy.

After having sunk almost with a trace in 2008, the ALRC Report on Privacy was salvaged by the federal government, which released an Issues Paper about the Commission’s proposal to introduce a statutory cause of action for serious invasion of privacy.

Watch this space.

Yesterday the final report of the Federal Government’s Convergence Review was released. It proposes a new statutory communications regulator to address ownership, Australian content and other issues, and a non-statutory body to regulate standards and deal with complaints against the media. The latter body would eventually absorb the Australian Press Council and ACMA. This report said Mr Finkelstein’s proposal to set up a publicly-funded statutory authority to oversee news and commentary would be a “position of last resort”. Instead it recommended an industry-led body to oversee journalistic standards for news and commentary across all platforms. As the Chair of the Convergence Review, Mr Boreham, said:

“So we came to the fork: do you move print up into a statutory regime or do you move broadcasting down into industry-led regulation? We’ve opted for the latter.”

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<sup>27</sup> M Simons, “Simons: How the Fink nailed the media inquiry” *Crikey*, 5 March 2012.

If the recommendations of the Convergence Review are implemented, the new statutory regulator will not investigate and rule on complaints about journalistic conduct, such as invasions of privacy. There will be no power in the government, or even the new statutory regulator, to direct the industry-based regulator to conduct an investigation. As Mr Boreham said on ABC Radio National this morning, the Convergence Review recommends “leaving it to the industry to sort itself out”.

Meanwhile, moves are underway for the Australian Press Council to be beefed up. The Chair of the Australian Press Council, Mr Julian Disney, who has driven recent improvements to that body, welcomed the Convergence Review’s recommendations for a new industry-based body to absorb the functions of the Press Council and ACMA in regulating journalistic standards and investigating complaints against the media. He noted the need for the new body to have adequate resources and independence from the media, which will largely fund any new body.

We await with interest what new regulatory landscape for the media, both old media and new media, will evolve in the coming months and years. If the Convergence Review’s approach is adopted, rather than the Finkelstein recommendations, it will be a self-regulating body, an improved Press Council as it were, dealing with all forms of the media, not a statutory body, that will regulate media standards and deal with complaints about invasions of privacy.

Many of us who have acted as lawyers in cases involving the media wonder whether any new regulatory body, be it statutory or industry-based, will be able to resolve other than the simplest of complaints in a matter of days. A recurrent theme in the criticism of the current regulatory system is its slowness. The system of regulation has a role to play in resolving complaints about invasions of privacy. For example, the Australian Communications and Media Authority ruled against the Seven Network when it filmed former NSW Minister, David Campbell, leaving a sex-on-the-premises venue. ACMA ruled that the fact that his entry onto and exit from the premises were observable from a public place did not mean that he had no expectation of privacy.

Professor Pearson has persuasively argued against the Finkelstein recommendations, stating that Australia already has enough laws, and that it is wrong to, in effect, convert Media Codes of Ethics and in-house industry codes of practice, into rules that are enforceable, ultimately, in the courts, if someone does not comply with an order issued by the regulator. Apart from the dangers of a regulator not being truly independent, and imposing harsh determinations against small publishers and bloggers who are ill-resourced to defend themselves, Professor Pearson points to the problem of duplication. He observes:

“I have seen few serious ethical breaches that could not be handled by existing laws like defamation, contempt, consumer law, confidentiality, injurious falsehood, trespass and discrimination. There are existing mechanisms to pursue them properly through established legal processes. All of the serious examples cited at 11.11 of the report could have been addressed using other laws such as defamation, ACMA remedies or breach of confidence (or the proposed privacy tort).”<sup>28</sup>

This brings me back to the existing law of confidentiality and the proposed privacy tort. Whatever the eventual regulatory landscape post-Finkelstein, courts will continue to confront civil claims against media interests for invasions of privacy.

It will be the High Court, not a trial judge, which authoritatively rules whether Australian law should adapt the existing law of confidence, as English courts have done, or recognize a tort for the public disclosure of private facts. However, I will conclude this address with a tribute to a trial judge, who was the first Australian judge to recognize the existence of a tort based upon intrusion upon privacy or seclusion: Senior Judge Skoien who passed away in December.

His Honour was a brilliant individual, a great judge and a great person to be with. His father was a Norwegian sailor, who settled on the Downs and became a wheat farmer. His mother was one of the first women to attend the University of Queensland. Tony Skoien shone as a student and sportsman in Toowoomba, as an actor and sketch-writer at University, as a barrister and as a judge. He shone throughout his life, and so it is fitting that I dedicate this Shine Lawyers Public lecture to his memory. That includes his legacy in developing the common law of Australia to recognize a remedy in tort for serious invasions of privacy.

If our legislators do not enact a statutory cause of action for serious invasion of privacy, then judges will be asked, as Judge Skoien was, to develop the law in this area.

Last week “A Current Affair” broadcast an ambush of Clive James in a Cambridge street by an ACA film crew. Mr James, a married man aged 72, was confronted by a woman who claimed to have had an eight year affair with him. He has been battling leukaemia in recent years, so the Nine Network’s interest in filming his unexpected reunion with an alleged ex-girlfriend was particularly touching. The fact that Mr James is suffering from leukaemia is probably beside the point. The same ethical and legal issues would arise if a fit old man was ambushed by a film crew in pursuit of a tawdry “Kiss and Tell” story.

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<sup>28</sup> Pearson M, “News Media Council proposal: be careful what you wish for” *journalaw*, 3 March 2012

Whether or not Mr James had the affair is beside the point. In defamation cases truth is a defence. In privacy cases it is not. Individuals are entitled to be protected from the public disclosure of allegations about private matters, whether the allegations are true or false, or half true. There was no apparent legitimate public interest in publishing to the general public details of Mr James' alleged extra-marital affair.

Mr James probably would have a cause of action under English law if the program was broadcast in that country, and disclosed sensitive private facts without a public interest justification. Whether he has a similar remedy under Australian law remains to be seen. This episode shows that the Australian media will continue to publish "Kiss and Tell" stories in the post-Finkelstein era. Given the failure of self-regulation documented in the Finkelstein Report, and the absence of a statutory tort, Australian judges will have to pass judgment on the state of Australian law in protecting against the public disclosure of private facts. If Australian law is developed to create a tort for invasion of privacy in cases like Mr James and ACA, then many citizens will say to the Australian media: "You asked for it".