

Checking in on

Campaigning for a statutory cause of action

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About the 2013 Leading Quill Scholarship

The LIV Young Lawyers Section (YLS), in partnership with the College of Law, offered an exclusive opportunity to one final year law student to complete their practical legal training free at the College of Law in 2014. The College of Law program is an accredited course of practical legal training for admission as an Australian lawyer in Victoria. The YLS and the College of Law congratulate Zara Lim on winning the scholarship. Details about the 2014 scholarship will be announced later this year.

The YLS thanks the College of Law for its continued generous support.

If you were running for federal Parliament, what existing or proposed law reform policy would you campaign for and why? **Leading Quill Scholarship winner Zara Lim puts her case.**

The rise of social media has innovatively changed the way people interact. With these changes comes an increasing concern for privacy. The current laws in Australia do not adequately assist with the privacy issues that have presented – and may yet present. If I were to run for federal Parliament, I would campaign for the enactment of a statutory cause of action for serious invasions of privacy.

Facebook currently has 1.15 billion monthly active users worldwide, while Twitter has 115 million monthly active users. According to LinkedIn, every second more than two new members sign up to the professional networking site. A number of unfair dismissal cases confirm the public nature of social media, not affording employees any expectation of privacy unless they have manually taken steps

social media

for serious invasions of privacy

to exclude employers from viewing their posts.¹ While such a step may seem like common sense, even then privacy is not guaranteed. As Facebook's Principles state, manual privacy controls "are not capable of limiting how those who have received information may use it, particularly outside the Facebook Service".

Facial recognition technology

In August 2013, Facebook announced proposed updates to its Data Use Policy, including that facial recognition technology would now include data from profile pictures as well as tagged photos. Facial recognition technology allows Facebook to suggest a user tag another user when a photo is uploaded. It employs an algorithm to calculate a unique number based on a user's facial features. Despite complaints after its initial implementation in 2011,² it does not appear to be going away. This means Facebook controls a database of facial biometrics about all its users. Facebook has not given any guarantee that third parties will not be able to access the data, nor has it ruled out using facial recognition technology for purposes other than tag suggestions.

Data mining

In the fourth quarter of 2012, revenue from advertising represented 84 per cent of Facebook's total revenue.³ Much of that advertising can likely be attributed to targeted advertising, which works by tracking users through cookies. A cookie is a piece of data, downloaded to the computer server when a person visits a website, capable of recognising a person's browsing history and previous preferences on the site. While advertisements on Facebook are obvious, many users may be unaware that tracking continues while they browse external websites. In 2011, Arnold Roosendaal produced a report on the Facebook "like" button,⁴ asserting that the

button, when present on external websites, is capable of tracking Facebook users outside of Facebook. The fact that Facebook also has access to information about user's real identities increases the fear of Facebook abusing such data.

Current legal framework

There is currently no statutory right to privacy in Australia. The significant laws dealing with information privacy are the equitable doctrine of confidentiality and the *Privacy Act 1988* (Cth).

The *Privacy Act* only regulates data obtained by Australian government and private organisations, not individuals acting in a personal capacity. This means individuals who post information on social media sites that invade the privacy of others are not covered. Social media sites themselves not based in Australia, such as Facebook, also fall outside the Act's scope.

A limitation of the breach of confidence action is that an invasion of privacy may occur, but an individual will have no course of action unless material is published.

Another limitation is the restriction on awarding damages for emotional distress. Instead, injunctions are usually awarded.

In *CTB v News Group Newspapers*⁵, an injunction over a newspaper failed to prevent private information going viral on Twitter.

A right to privacy

I would campaign for a statutory cause of action for serious invasions of privacy in Australia, as recommended by the Australian Law Reform Commission in 2008,⁶ to address concerns arising from social media. Such an action would be effective where an individual posts material on social media that invades the privacy of another. I would recommend claimants have to show there had been "a reasonable expectation of privacy"⁷ and that the invasion of privacy would be "highly offensive to a person of ordinary sensibilities."⁸ Damages for

emotional distress should be available, relevant where an injunction did not prevent publication of private information online.

Developments in technology will always be one step ahead of the law. To protect individuals from the potential of social media sites to invade personal privacy, I would also propose a statutory right to respect for private and family life, home and correspondence. As in the UK, courts would be required to act in a way compatible with the right.

I would further propose that Parliament be required to ensure legislation enacted is compatible with the right. This could assist Parliament in enacting specific laws to address the privacy problems that have been discussed in this paper or that may present in the future. For example, if data mining spirals out of control, the right could assist Parliament in introducing legislation similar to the *US Do Not Track Bill*.

Social media has changed the world dramatically, not without ramifications for privacy. A statutory cause of action for serious invasions of privacy and a statutory right to privacy should be enacted in Australia. ■

ZARA LIM is a law graduate from La Trobe University and the winner of the 2013 Leading Quill Scholarship. The article represents the views of the author.

- ¹ *Dover-Ray v Real Insurance Pty Ltd* [2010] FWA 8544; *O'Keefe v Williams Muir's Pty Limited T/A Troy Williams The Good Guys* [2011] FWA 5311.
- ² EPIC, EPIC Files Complaint, Urges Investigation of Facebook's Facial Recognition Technique (10 June 2011) <<http://epic.org/2011/06/epic-files-complaint-urges-inv.html>>.
- ³ Facebook Investor Relations, Facebook Reports Fourth Quarter and Full Year 2012 Results (30 January 2013) <<http://investor.fb.com/releasedetail.cfm?ReleaseID=736911>>.
- ⁴ Arnold Roosendaal, "Facebook tracks and traces everyone: Like this!" (2011) 3 *Tilburg Law School Legal Studies Research Paper Series*.
- ⁵ *CTB v News Group Newspapers Ltd & Anor* [2011] EWHC 1326 (QB), [2].
- ⁶ Australian Law Reform Commission, *For Your Information: Australian Privacy Law and Practice*, Report No 108 (2008) vol 3, ch 74.
- ⁷ Note 6 above, 2567-2584.
- ⁸ Commonwealth of Australia, Department of the Prime Minister and Cabinet, *A Commonwealth Statutory Cause of Action for Serious Invasion of Privacy* (September 2011) 32.