



Griffith Journal
of Law & Human Dignity

GRIFFITH JOURNAL
OF LAW & HUMAN DIGNITY

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Volume 1(1) 2013

Published in March 2013, Gold Coast, Australia by the *Griffith Journal of Law & Human Dignity*

ISSN: 2203-3114

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PRIVACY PROTECTION AND MEDIA IN AUSTRALIA: UNFINISHED BUSINESS*

HON MICHAEL KIRBY AC CMG**

In this article the author surveys the development of legal protections for privacy in publication in jurisdictions of the common law. He explains how, in 1937, the High Court of Australia in Victoria Park Racing and Recreation Grounds Co Ltd v Taylor (1937) declined to endorse a new legal protection for privacy despite developments favourable to that course in United States courts. He then discusses the advent of universal human rights that include privacy protection and work that he performed in the 1970s and 80s in the Australian Law Reform Commission and Organisation for Economic Co-operation and Development, proposing improved privacy protection. Controversies in the courts, including in Australian Broadcasting Corporation v Lenah Game Meats Pty Ltd (2001) are described, followed by an analysis of recent controversies about media excesses in England and Australia resulting in the Finkelstein Report (2012) and the Leveson Inquiry (2012), both recommending improved protections for privacy. Now the Australian Government is once again considering a federal statutory tort. Would this be desirable or would it be an unjustified burden on free expression in Australia? The author concludes, with some telling illustrations, why protection of privacy is needed, and why the rule of self-regulation on this score should now be ended.

* Based on a talk given at a meeting of the Boston, Melbourne, Oxford, Vancouver *Conversazioni* on Culture and Society in Melbourne on 21 November 2012.

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I PRIVACY: AN ELUSIVE AND CHANGING CONCEPT

Notions of privacy are bound up in ideas of human uniqueness and the importance of solitude and personal space. Privacy engages the individual human mind and reflections on the significance of one's existence in relation to others, to one's community and the surrounding world. In that sense, the idea of individual privacy can probably be traced back to ancient times and to early Biblical reflections upon the human relationship with God and with the world. Precise notions of what are private tend to vary from one culture to another. The English are a famously private people. Their culture is generally one of reserve and understatement. It is a common jest that an Englishman's idea of paradise is an empty railway carriage. There he can be left alone. Yet such cultural norms probably exist also in Australia. I confess to always being happy when the seat beside me in a plane is left empty. And I am referring to First Class.

Writings about privacy in the law began long before the era of the modern media. In the English law, and in its derivatives in the United States of America, Canada, and Australia, the right to be left alone was usually dealt with under the remedies provided for other purposes, such as tort of nuisance or the civil remedy afforded for breach of confidence.¹ In the United States, constitutional notions of privacy took a long time to develop. In

¹ *Prince Albert v Strange* (1849) 41 ER 1171; *Duchess of Argyll v Duke of Argyll* [1967] Ch 302; *Attorney-General v Guardian Newspapers Ltd [No.2]* [1990] 1AC 109, 260, 268.

Griswold v Connecticut,² Justice Hugo Black described privacy as a 'broad, abstract and ambiguous concept'. This imprecision has meant that, in the law of English-speaking peoples, privacy commonly refers to a variety of notions, only loosely linked together. Accordingly, for lawyers, it has been an enduring source of controversy, including as to the extent that the national constitution and law provide it protection.³ This feature of the legal concept of privacy has led commentators to conclude that the legal protection of privacy tends to reflect particular intellectual trends within the liberal political tradition. The meaning and scope of privacy will 'always be in flux'.⁴

The purpose of this contribution is not to explore at length the history, philosophical underpinnings, and conceptual framework of the notion of privacy. Nor is it to explore all of the varied aspects of privacy protection, such as physical intrusion or data protection. Instead, it is to look at the practical developments that have occurred in the Australian, and related, legal systems in respect of privacy invasion by the public media, so as to provide a few staging posts by which we might understand where we have come from, in relation to privacy and publication, where we have arrived at, and where we might be going. To do this, I intend to trace my own journey in considering the notion of privacy and, ultimately, explore how that value might be better protected in our society. Of course, there are many other ways in which the issue might be addressed. But this is the way I have chosen. I hope that it will be helpful for those who later come to read about the issues we explored at this time.

As chance would have it, this article was written on the brink of the publication in England of the Leveson Report, authored by Lord Justice Leveson of the English Court of Appeal. That report grew out of shocking revelations in England concerning flagrant and deliberate intrusions into individual privacy by print and electronic media, led by tabloid newspapers published by the News Group. That masthead originally traced its origins to the Murdoch stable of newspapers, originally created in Adelaide, Australia. I am sure that my deliberations would have been more fruitful if it had enjoyed the benefit of considering the recommendations of the Leveson inquiry.

² *Griswold v Connecticut* 381 U.S. 479 (1965).

³ Stephen Levinson, 'Privacy' in Kermit Hall et al (eds), *The Oxford Companion to the Supreme Court of the United States* (Oxford University Press, 1992) 671.

⁴ *Ibid* 678.

II AN AUSTRALIAN REJECTION (1937)

Whilst scholars and courts in the United States of America were struggling to give content to the legal concept of privacy in the early decades of the 20th Century, the placid waters of Australian law rarely ventured upon such challenges. When I was a boy in the 1940s, I would sometimes visit my grandfather, William Knowles. He was a journalist in the Fairfax interests. He came to Australia from Northern Ireland. In accordance with the values common to his ethnicity, he was an extremely private person.

My grandfather's home was in South Dowling Street, in Sydney, now a main expressway feeding the Sydney Airport. A large concrete barrier (designed to minimise noise) now separates my grandfather's old home from the busy road in front of it. But in those days, opposite the home and very prominent, was a high paling fence. It boarded a horse racing facility which I now know was Victoria Park, named like so many other places large and small after the late Queen Empress. Accidentally, that park, today replaced by high-rise apartments, factories, and other developments, entered the law books in a leading case on privacy protection.

The case was *Victoria Park Racing and Recreation Grounds Co Ltd v Taylor*.⁵ A reporter, operating beyond the paling fence and outside the racing ground, began reporting on the horse races taking place within the grounds. The racing facility was up-in-arms. It sued for an injunction and for damages. Its cause of action framed in nuisance was rejected. But then its counsel argued an alternative case. They argued that a new legal right to privacy should be expressed by the High Court of Australia. At that time, decisions of that court were subject to appeal to the Judicial Committee of the Privy Council. English law had not then developed a tort of invasion of privacy. So far as Chief Justice Latham was concerned, that was the end of it. Australian law could not recognise such a right. In the course of his reasons, he said:

The claim under the law of nuisance has also been supported by an argument that the law recognises a right to privacy that has been infringed by the defendant. However desirable some limitation upon invasion of privacy might be, no authority was cited which shows that any general right of privacy exists.⁶

⁵ *Victoria Park Racing and Recreation Grounds Co Ltd v Taylor* (1937) 58 CLR 479 ('Taylor').

⁶ *Ibid* 495–496.

Justices Rich and Evatt dissented from this opinion, believing that there was no obstacle in the path of the High Court of Australia fashioning a remedy for the kind of invasion of the racecourse's privacy that had occurred. Evatt, in particular, was familiar with the growing United States discussion of this notion. However, the dissentients did not prevail. The *Taylor* case has been taken to be one of those wrong turnings that sometimes occur in the law when timorous judicial souls prevail over judicial bold spirits. For decades, the decision in the *Taylor* case was seen as an insurmountable barrier against any advancement in the common law for the general protection of privacy in Australia. Any such advancement would have to come not from the courts, but from the legislature. And the legislatures of Australia were very slow to move. In part, this was because of the complexity of the problem. In part, it may have had something to do with the power of media interests that strongly opposed a provision of remedies for privacy invasion. Legislators and the media have long enjoyed a symbiotic relationship in Australia. Each needs the other for the other's purposes. In the result, each tends to feed, and rely upon, the other. Defying the media, or acting contrary to its interests, is a rare event amongst politicians in Australia.

It may be a trick of the memory, but I seem to remember my grandfather telling me about the journalists intruding into the privacy of the racing ground opposite his home. As a journalist himself, he would doubtless have celebrated the wisdom of the High Court's rejection of any remedy of privacy intrusion on this kind. Journalists tend to see only the merits of free expression. Their sympathy for competing values is ordinarily very limited.

III UNIVERSAL HUMAN RIGHTS (1948-66)

My next encounter with privacy happened when I was in primary school. In 1948, the self-same Dr H.V. Evatt, who, as a Justice, had dissented in the *Taylor* case, was by then President of the General Assembly of the new United Nations Organisation. That body was created in 1945 to provide a new world order out of the ashes that followed the Second World War. Dr Evatt had played a significant part in its foundation. Its *Charter* rested, essentially on three principles: the assurance of peace and security in the world; the attainment of greater economic equity; and the protection of universal human rights.

The last mentioned objective of human rights was placed in the hands of a consultative body chaired by Eleanor Roosevelt, widow of the war-time president of the United States. In 1948, that committee delivered its draft for the *Universal Declaration of Human Rights* ('UDHR').⁷ That Declaration was adopted by the General Assembly, with Australia's Dr Evatt in the chair. Early in 1949, my teacher, Mr Redman (we did not know their first names in those days) provided us all with a copy of the UDHR. It was printed on airmail paper, a rarity in those days. It carried the as yet unfamiliar logo of the United Nations, printed in blue. Our teacher taught us the reason behind seeking to express universal human rights. This was because of the shocking deprivations of fundamental rights that had occurred before and during, and had led to, the recent War. Unless human rights were universally respected, there was a fear that the new atomic weapons would be used to destroy humanity.

By Article 19 of the UDHR, it was provided:

Everyone has the right to freedom of opinion and expression; this right includes the freedom to hold opinions without interference, to seek, receive and impart information and ideas through any media and regardless of frontiers.

However, Article 12 provided:

No one shall be subjected to arbitrary interference with his *privacy*, family, home or correspondence, nor to attacks upon his honour and reputation. Everyone has the right to protection of the law against such interference or attacks (emphasis added).

By Article 29.2 of the UDHR, it was provided:

In the exercise of his rights and freedoms, everyone shall be subject only to such limitations as are determined by law solely for the purpose of securing due recognition and respect for the rights and freedoms of others and of meeting the just requirements of morality, public order and general welfare in a democratic society.

⁷ *Universal Declaration of Human Rights*, GA Res 217A (III), UN GAOR, 3rd sess, 183rd pen mtg, UN Doc A/810 (10 December 1948).

These expressions were clarified, enlarged, and potentially made justiciable in the *International Covenant on Civil and Political Rights* (ICCPR).⁸ In that treaty, the right of protection of individual privacy was stated in Article 17. It reads:

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.

In Article 19 of the ICCPR, there was also a provision upholding freedom of expression. However, this too mentioned the need to respect the rights and reputation of others:

1. Everyone shall have the right to hold opinions without interference.
2. Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice.
3. The exercise of the rights provided for in paragraph 2 of this article carries with it special duties and responsibilities. It may therefore be subject to certain restrictions, but these shall only be such as are provided by law and are necessary:

(a) For respect of the rights or reputations of others;

(b) For the protection of national security or of public order (*ordre public*), or of public health or morals.

Back in 1949, Australian school children were taught about these fundamental concepts. However, as time has passed, the instruction has tended to fall away. The absence in most parts of Australia of any general charter, or statute, of fundamental rights has discouraged the teaching of such notions of citizenship. Most especially, it has meant that succeeding Australian generations have grown up without the clear guidance that exists in other societies (such as the United States) of the need to recognise the important rights associated with freedom of expression and the important rights associated with (relevantly) the protection of 'privacy, family, home or correspondence'.⁹

⁸ *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976).

⁹ UDHR, UN Doc A/810, art 12.

Although Australia in the 1960s took an important part in the negotiations of the terms of the ICCPR and later, in the 1980s, signed the First Optional Protocol to the ICCPR (giving Australians the entitlement to complain about derogations to the United Nations Human Rights Committee in New York), no ‘protection of the law’ against (relevantly) interference in privacy has,¹⁰ in the context of media intrusions, been enacted. There has been legislation to provide for defamation. However, that concerns the somewhat different values reflected in the provisions of Article 17 of the ICCPR relating to ‘unlawful attacks on...honour and reputation’. For the separate concern of subjecting persons to unlawful interference of their ‘privacy, family, home or correspondence’,¹¹ no specific laws have been enacted. It remains, legally speaking, *terra nullius*.

IV OECD EXPERT GROUP AND PRIVACY REFORMS (1978-80)

By 1975, I had been appointed by a great reforming Attorney-General of Australia, Lionel Murphy QC, to be the Inaugural Chairman of the Australian Law Reform Commission (‘ALRC’). After the Whitlam Government was dismissed, another reforming Attorney-General took office, the Hon. Bob Ellicott QC. In its election commitment in December 1975, the Fraser Government undertook to refer to the Law Reform Commission an investigation into the protection of privacy in the law of Australia. This was entirely consonant with the values of individual freedom and dignity espoused by that government. The Commission embarked upon its investigation. In the midst of its inquiry, the Organisation for Economic Co-operation and Development (‘OECD’), in Paris, established an expert group to develop guidelines on a particular aspect of privacy, namely transborder data flows. Because of the Commission’s privacy enquiry, I was sent to the OECD as Australia’s representative. I was then elected to chair the expert group. By 1980 it developed the privacy guidelines. These have proved enormously influential throughout the world. They became the basis of the key principles of the federal *Privacy Act 1988* (Cth).¹²

¹⁰ ICCPR, art 17.

¹¹ UDHR, UN Doc A/810, art 12.

¹² Organisation for Economic Co-operation and Development, *Guidelines on the Protection of Privacy and Transborder Data Flows* (OECD Publishing, 2012).

Coinciding with these developments, in 1979 the ALRC published a report on the issues of defamation law reform and the protection of privacy in the context of publication.¹³ That report espoused, as a major objective, rationalisation and unification of the Australian law of defamation.

Until that time, in Australia, the defence of justification varied as between the several sub-national jurisdictions. In some jurisdictions (such as New South Wales) to justify publication, the publisher had to establish that it was both true and for the public benefit/interest that the matter complained of should be published. In other parts of Australia (such as Victoria) truth alone was the defence of justification.

The “public benefit/interest” element came to be included in local statutes in colonial times in part because of the stigma attached to former convicts and children or grandchildren of convicts. Whilst it was true to say this of those persons, it was felt that it was not necessarily in the public interest, or to the public benefit, and hence the additional element should be required. This additional element provided some protection for privacy in the context of media publications in particular. If, as the ALRC proposed, the nation moved to a uniformed defence of truth alone, this would set back the cause of privacy protection. Hence, the Commission suggested a new concept of unfair publication. To achieve protection of this concept, a new notion of privacy invasion was recommended. It would provide a remedy where:

A person publishes sensitive private facts concerning an individual where the person publishes matter relating or purporting to relate to the health, private behaviour, home life or personal or family relationships of the individual in circumstances in which the publication is likely to cause distress, annoyance or embarrassment to an individual in [that] position.¹⁴

Various defences were proposed for such a cause of action. These included consent; triviality; accident; legal authority; privileged or protected dissemination; fair, accurate, and contemporaneous reports; reasonable self-protection; or proof of the public interest. A right of action for appropriation of the name, identity, or likeness of an individual was also proposed. However, the powerful interests of the media, whilst naturally supporting the ALRC’s acceptance of the defence of justification in terms of

¹³ Australian Law Reform Commission, *Unfair Publication: Defamation and Privacy*, Report No 11 (1979).

¹⁴ *Ibid* ch 17, s 214.

truth, resolutely opposed the concurrent proposal for remedies for breach of privacy.¹⁵ In the end, this media opposition succeeded in defeating the parliamentary adoption of the ALRC recommendations. Important protections were secured for individual privacy in the context of information flows. However, those protections did not extend to media invasions of privacy. When, later, a uniform defamation law was adopted in the sub-national jurisdictions of Australia, it did not contain provisions for privacy protection.¹⁶ Any such claim to privacy protection, in that context, had to run the gauntlet of the decision of the High Court of Australia in *Taylor*.

V DECISIONS OF THE COURTS (1984-2009)

When I left the Australian Law Reform Commission and returned to the courts, my duties occasionally saw me participating as a judge in cases that concerned prospects of what might be envisaged as invasions of privacy. Sometimes the questions were dealt with under the umbrella of the cause of action in defamation.¹⁷ Sometimes they were dealt with in the tort of nuisance or breach of confidence.¹⁸ Occasionally, a claim was made seeking remedies for invasion of privacy as such. In one such case, the complaint related to the installation of cameras in a meat processing establishment involved in the slaughter of native Australian animals.¹⁹ In the end, no remedy was afforded in that case for breach of privacy, although several of the High Court Justices (including myself) indicated their minds were open to revisiting the decision in *Taylor* and to considering the development of a common law principle for invasion of privacy by media. It was my view *Lenah* was not a suitable case in which to explore that notion. This was because the claimant there was a corporation and the universal principles of human rights upholding privacy were, by their terms, addressed to individual privacy, for the protection of human subjects. This was different from the concept of corporate privacy, for the protection of inanimate legal persons with no body to feel or soul to be damned.²⁰

¹⁵ See, eg, Michael Cameron, 'Libel Law Danger to Free Press', *The Australian* (Sydney), 5 August 2004, 22; Mark Day, 'Save Freedom of Speech in Unifying Defamation Code', *The Australian* (Sydney), 12 August 2004, 22.

¹⁶ See, eg, *Defamation Act 2005* (Vic) s 25 (defence of justification: 'substantially true').

¹⁷ *Ettingshausen v Australian Consolidated Press Ltd* (1995) 38 NSWLR 404.

¹⁸ *Attorney-General (UK) v Heinemann Publishers Australia Pty Ltd* (1987) 10 NSWLR 86. This decision was upheld in *Attorney-General (UK) v Heinemann Publishers Australia Pty Ltd* (1988) 165 CLR 30.

¹⁹ *Australian Broadcasting Corporation v Lenah Game Meats Pty Ltd* (2001) 208 CLR 199 ('*Lenah*'); *Dow Jones & Co Inc v Gutnick* (2002) 210 CLR 575.

²⁰ *Lenah* (2001) 208 CLR 199, 279 [190] (citations omitted).

In *Lenah I* endeavoured to indicate reasons why, in fashioning any future remedy for privacy protection in the context of publication, considerable care had to be observed. Sometimes, facts can be embarrassing. But on the other hand, the publication of facts can also reveal the world as it is, not as surrounding society might prefer it to be. Whereas Justice Callinan in *Lenah* had mentioned, with apparent praise, the restraint exercised by the media in the United States (and other countries) in publicising the physical impairments of President F. D. Roosevelt which kept him, for the most part, in a wheelchair after he had suffered poliomyelitis in the 1920s, it is at least arguable that revelation of the truth might have been in a higher public interest:

With hindsight, it is arguable that such restraint was misconceived. The ability and character of the President overcame his physical restrictions. Had they been reported and discussed in the media, this might well have contributed to more informed attitudes to physical impairment generally.²¹ At least this would have been a legitimate subject to be weighed in the balancing exercise required by the application for the provision of injunctive relief and mandated, in such a case, by the considerations implied from a constitution such as ours.²²

The net result of these encounters with the cases was that my public legal career finished without having an opportunity finally to contribute to a modern and effective remedy for serious invasions of privacy. Yet was such a remedy really necessary in Australia?

VI RECENT AUSTRALIAN RECOMMENDATIONS (2008)

A number of proposals for the creation of a tort of privacy were advanced in Australia early in the present century. Reports of the ALRC, joined by recommendations of the NSW and Victorian Law Reform Commissions, recommended the creation of a statutory right to privacy.²³ The proposal rested upon established instances, up to that time, and the perceived need to strengthen the rights of individuals against the powerful and largely self-regulated decisions of media outlets.

²¹ Neither Prime Minister W.M. Hughes nor J.W. Howard made any secret of their hearing impediment and Prime Minister Howard discussed it openly on national television.

²² *Lenah* (2001) 208 CLR 199, 288 [219] (Kirby J), cf 336 [377] (Callinan J); Cf *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520.

²³ Australian Law Reform Commission, *For Your Information: Australian Privacy Law and Practice*, Report No 108 (2008), pt K. See also New South Wales Law Reform Commission, *Invasion of Privacy*, Report No 120 (2009).

It was at this time that a number of developments started to occur that have come together in the situation in which we now, find ourselves. Those developments include decisions of the courts in England, addressing what were seen as unacceptable reporting of private facts and which were held to give rise to remedies that were specifically expressed in terms of protection of personal privacy. These decisions have included:

- *Douglas v Hello*;²⁴
- *A v B Plc*;²⁵
- *Naomi Campbell v MGN Ltd*;²⁶ and
- *Mosley v News Group Newspapers*.²⁷

The *Mosley* case is a good illustration. Mr Max Mosley was president of the International Motor-Racing Federation. A video film was taken, by a camera concealed in the jacket of a woman, known only as “E”, concerning activities that the News Group in its tabloid papers called a ‘Sadomasochistic Nazi Orgy’.²⁸ Mr Mosley described the event as nothing more than a private party. The now defunct *News of the World*, then published by News Group, presented the story in a sensational way. However, “E”, who was to have been their star witness, failed to attend court to give evidence. The public interest defence pleaded by the publisher relied on the suggested theme of a Nazi concentration camp. In consequence of the absence of the star witness, Mr Mosley succeeded and News Group failed. Mr Mosley was awarded £60,000 damages. The trial judge’s “long and dispassionate judgment” attracted strong press criticism for what was described as “his moral relativism” or worse.²⁹ However, no appeal was brought against it. And as the world knows, *News of the World* was closed, by decision of the principal of the News Group, Mr Rupert Murdoch.

The events surrounding that closure were instructive for the attitude that had been exhibited in England by News Group and reflected in media houses forced to compete with its salacious approach to the private lives of celebrities. The final straw was presented when News Group’s publications (to put it at its lowest) took advantage of

²⁴ *Douglas v Hello* [2001] QB 967 (Sedley LJ).

²⁵ *A v B Plc* [2003] QB 195, [4]–[6].

²⁶ *Naomi Campbell v MGN Ltd* [2004] 2 AC 457.

²⁷ *Mosley v News Group Newspapers* [2008] EMLR 20.

²⁸ Lord Robert Walker, ‘The English Law of Privacy — an Evolving Human Right’ (2011) 1 *Victorian Bar Review* 1.

²⁹ *Ibid.*

illegal telephone hacking of the mobile phone of a murder victim, Milly Dowler. At the same time, it was revealed that a cohort of reportedly 4000 victims had suffered serious and sometimes harrowing invasions of their privacy and intrusions into their private conversations and relationships. It was the revelation of these activities that led to demands for redress, both in England and Australia.

Some of the journalists in the employ of News Group were unrepentant. A former deputy editor of *News of the World*, Paul McMullan, expressed his views thus:

“Privacy is for pedos”.³⁰

McMullan said he had little sympathy for celebrities such as Hugh Grant, who have complained about media intrusion.

‘Privacy is the space bad people need to do bad things in. Privacy is evil. Privacy is for pedos. Fundamentally, nobody else needs it,’ said McMullan, who was one of the several journalists giving evidence in London today.

McMullen said reporters at the paper routinely hacked people’s voicemails and did so for their editors and because it was in the public interest.³¹

Such was the outcry that arose in the British Parliament at the revelation of this arrogant abuse by media of its power to invade the privacy of individuals that a number of things happened. A Parliamentary Committee of Inquiry was established by the British Parliament before which, famously, Rupert Murdoch, his son, and senior officers attended to eat humble pie. “Never”, declared Mr Rupert Murdoch, had he felt so “humble”. It was clear that he could smell the newly resolute decision of Members of Parliament in all parts of the House, to cast aside their fear of the media and to take strong action. For example, the British Deputy Prime Minister, Mr Nick Clegg, reportedly warned both the media and his Conservative Party Coalition partner in the United Kingdom, not to pre-empt or reject the recommendations of the Leveson inquiry. He has indicated that he would work with the British Labour Party to implement the Leveson recommendations, so long as they were ‘proportionate’.³²

³⁰ An abbreviation for paedophiles.

³¹ Karen Kissane, ‘At last, a reporter’s insight into life under the ‘criminal-in-chief’’, *Sydney Morning Herald* (Sydney), 1 December 2011, 3.

³² Patrick Wintour, ‘Media victims deserve reforms to be taken seriously, says Clegg’, *Sydney Morning Herald* (Sydney), 25 September 2012, 7.

The Leveson Inquiry itself undertook an unprecedented investigation into a large number of complaints that together (and looked at as a whole) tend to illustrate the supreme arrogance on the part of a power in the land that felt it was beyond legal or political control. Mr Clegg declared that the test for the British Government's response to the Leveson proposals would be:

Can we look Milly Dowler's mother and father in the eye, whose privacy was so outrageously abused at a moment of extraordinary grief?³³

In Australia, the events occurring in England were also followed by local action. In December 2011, the Federal Government constituted an Independent Inquiry into the Media and Media Regulation. This inquiry was chaired by the Hon. Ray Finkelstein, QC, a former Federal Court judge, assisted by Professor Matthew Ricketson. Although not specifically concerned with privacy, the inquiry addressed particular problems in Australia of regulating media in differential ways. Electronic media has been thought to lie within federal constitutional power over telecommunications. There, significant regulations exist and the abuse of power has been more confined. On the other hand, print media, thought to be largely beyond regulation by the Federal Parliament, has been substantially a law-free zone, so far as protection of privacy was concerned. At least it was so if no other head of peripheral remedy could be discovered, such as an action for defamation, nuisance, or breach of confidence. A number of instances of irresponsible reporting of private matters in Australia were noted by the Finkelstein report when it was later delivered in February 2012:

- 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 deaths is compounded by the news media.

³³ Ibid.

- 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.³⁴

In addition, instances were cited of other examples of serious privacy invasions and undue harassment by journalists:

Exhibit A is the Madeline 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 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'.³⁵

In addition to the Finkelstein inquiry, and stimulated by the newfound interest in privacy protection deriving from the wide reportage of the instances of abuse in Britain, an issues paper was published on behalf of the Australian Government, reviving the earlier ALRC proposals for relief in the form of a new federal statutory remedy for invasions of privacy. Although the issues paper on this proposal was announced by the Federal Minister for Privacy and Freedom for Information (the Hon. Brendan O'Connor), and came down in favour of the introduction of a right of privacy in Australia, the actual initiator of the issues paper, on behalf of the Federal Government, was the Department of Prime Minister and Cabinet.³⁶ The paper recommended that a new federal statutory cause of action for the protection of privacy could, and should, be adopted. It proposed that, to establish such a right of action, the claimant might be obliged to prove that:

- There is a reasonable expectation of privacy in the circumstances;

³⁴ Raymond Finkelstein, *Report of the Independent Inquiry into the Media and Media Regulation* (Commonwealth of Australia, 2012). For a critique of this report see Daniel Ward, 'Breaking News: An Assessment of the Finkelstein Report's News Media Council' (2013) 17 *Media & Arts Law Review* 337.

³⁵ Margaret Simons, *How the Fink Nailed the Media Inquiry* (5 March 2012) Crikey <<http://www.crikey.com.au/2012/03/05/simons-how-the-fink-nailed-the-media-inquiry/>>.

³⁶ Department of the Prime Minister and Cabinet, 'Commonwealth Statutory Cause of Action for Serious Invasions of Privacy' (Issues Paper, Department of the Prime Minister and Cabinet, September 2011).

- The act or conduct complained of was highly offensive to a reasonable person of ordinary sensibilities; and
- The public interest in maintaining the claimant's privacy outweighed other matters of public interest.³⁷

The issues paper contemplated a number of defences to the proposed federal privacy action. These included:

- That the act or conduct was incidental to the exercise of a lawful right of defence of the person or of property;
- That the act or conduct was required or authorised by or under the law; or
- That the publication of the information was, under the law of defamation, privileged.³⁸

The issues paper also recommended a list of remedies, including an award of damages; an account for profits; the provision of injunctions; the publication of a correction order; and the making of a declaration. These and other issues are raised by the federal paper.³⁹ Following the issues paper, a Bill for the better protection of privacy in Australia was introduced into the Federal Parliament. However, this Bill dealt with other subjects of privacy (such a credit reporting) but not privacy in the context of media publication. Whilst the media waited in nervous anticipation for the recommendations of the Leveson Inquiry in Britain and the Australian Government's response to the issues paper and Finkelstein report, newspapers, particularly those belonging to News Limited, conducted a strident, one-sided, and unrelenting continuation of their campaign against any legal protection for privacy in the context of Australia's media publications, including most relevantly its own.⁴⁰

³⁷ Discussed in Andrea Beatty, Abhishek Bansal and Jennifer Engle, 'A Privacy Stocktake — Where are we up to?' (2011) 8(4) *Privacy Law Bulletin* 62, 63.

³⁸ *Ibid* 63–4.

³⁹ *Ibid* 64, citing Australian Law Reform Commission, above n 21, 52.

⁴⁰ See eg, Natasha Bitá, 'Laws Weak in Privacy Protection', *The Australian* (Sydney), 24 May 2012, 13; 'Free Speech Must Be Protected', *The Australian* (Sydney), 24 July 2012, 13; Karen Dearne, 'Privacy Laws Place Digital Economy in Jeopardy', *The Australian* (Sydney), 24 July 2012, 30; Stephen Hornsby, 'British Model Not the Way to Go', *The Australian* (Sydney), 23 August 2012, 12; 'Concern at Media Plans', *MX Magazine* (Melbourne), 6 September 2012, 2; Chris Merritt, 'Privacy Changes Too Confusing', *The Australian* (Sydney), 18 September 2012, 9; Ainslie van Onselen, 'The Push for a Tort is Misguided and Wrong', *The Australian* (Sydney), 21 September 2012, 29.

VII WHAT IS TO BE DONE?

We have thus reached a Rubicon in our consideration of privacy protection in Australia. The die is cast. Of course, our Federal Government and Parliament might now decide to do nothing. They might decide to leave the present absence of effective legal protection for privacy in Australia, in the context of publication, unchanged. They might conclude that the community value of privacy should be included in an honour code for journalists and otherwise left to self-regulation. They might try to expand and strengthen the Australian Press Council, which has not always been effective in dealing with instances of media abuse. Or they might provide for some low level administrative remedies, as by the Commonwealth Privacy Commissioner, appointed under the *Privacy Act 1988*. They might leave it to the courts in the future to develop the tort of breach of confidence. Specifically, they might leave it to the courts to pick up the hint given by Chief Justice Gleeson in the *Lenah* case that the common law could yet develop a tort of privacy in Australia, in default of legislation.⁴¹ Already, there have been some instances of judicial developments in the Australian States.⁴² But generally the Australian courts, in the face of *Taylor*, have been unwilling to take any step towards privacy protection until the High Court does.⁴³

VIII CONCLUSIONS

After such a long journey it would not be surprising to conclude that, in Australia, nothing will be done. After all, there have been so many proposals in the past, by well-intentioned people. All have sunk without trace when they came into collision with the media iceberg.⁴⁴ Should we be troubled about such an outcome? I think we should.

In a fine paper on 'Privacy and the Media', Justice Peter Applegarth of the Supreme Court of Queensland offered many instances where serious wrongs, by way of invasion of

⁴¹ *Lenah* (2001) 208 CLR 199, 225 [39].

⁴² See eg, *Jane Doe v Australian Broadcasting Corporation* [2007] VCC 281; Cf *Hosking v Runting* [2005] 1 NZLR 1 and Mark Johnson, 'Should Australia Force the Square Peg of Privacy into the Round Hole of Confidence or Look to a New Tort?' (2007) 12 *Media & Arts Law Review* 441.

⁴³ *John Fairfax Ltd v Hitchcock* [2007] NSWCA 364.

⁴⁴ The Federal Government's proposed media reforms collapsed on 21 March 2013. Just two of six bills passed: the Broadcasting Legislation Amendment (Convergence Review and Other Measures) Bill 2013 (Cth) and the Television Licence Fees Amendment Bill 2013 (Cth). The Government withdrew the remaining four — the Broadcasting Legislation Amendment (News Media Diversity) Bill 2013 (Cth); the News Media (Self-regulation) Bill 2013 (Cth); the News Media (Self-regulation) (Consequential Amendments) Bill 2013 (Cth); and the Public Interest Media Advocate Bill 2013 (Cth) — after failing to secure sufficient support from the crossbench.

privacy by the Australian media, have occurred without any remedy. One of them, I feel, is particularly telling:

Last week “*A Current Affair*” broadcast an ambush of Clive James [the notable Australian-born author] in a Cambridge street [in England] 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 being ambushed by a film crew in pursuit of a tawdry “Kiss and Tell” story.

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’ extra-marital affair.

Mr James would probably have a cause an 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”.⁴⁵

Perhaps Channel Nine in Australia would defend its action sending a film crew to England to record the confrontation between Clive James and an alleged former partner. Perhaps it would say that she had a right to expose their private relationship in the public interest. To expose adultery, perhaps, and its prevalence? To illustrate changing social mores? To show that even famous writers and television personalities have such disturbances in their lives? If so, would it come within a public interest defence? In my

⁴⁵ Peter Applegarth, ‘Privacy and the Media’ (Speech delivered at the Public Lecture Series, University of Southern Queensland, 1 May 2012).

view, what occurred arguably represents a completely unreasonable invasion of personal privacy. Its only justification appears to be titillation, humiliation, and embarrassment of a human being over intimate, personal matters that have no true public interest value at all. But unless there were a clear cause of action, would Mr James have any legal remedy to defend his privacy from public invasion in this way? At the moment, in Australia, probably not.

Preferable by far, as it seems to me, than the development of a common law tort by the courts, would be the creation of a statutory remedy by the Federal Parliament, after receiving and considering law reform reports and governmental consultations, such as the issues paper distributed in Canberra in 2011. Whatever may have been the weaknesses and limitations of the proposed statutory tort, in regard to its limited scope and uncertain threshold, the abject surrender of the lawmaking process to the self-interested pressure of media publishers in Australia constitutes a melancholy tale.

Where serious wrongs are done to individuals, it is not usual, in our form of society, to leave judgment as to the remedies and redress for those harmed entirely in the hands of the alleged wrongdoer. Where great power is involved, it is usual in a society such as ours to submit the complaint against an alleged wrongdoer to requirements of independent accountability accordingly to pre-existing legal standards. Where very great power, able to influence and even paralyse parliamentary political power, is at stake, it is usual in our type of legal system to give access to the one branch of power in the polity that is unlikely to be frightened and willing to make independent decisions that reflect the competing social interests that are at stake. These are the competing principles explained in the UDHR and the ICCPR. Moreover, the ICCPR (which Australia has ratified) commits this country to providing protection *of the law* to those who suffer unjustifiable infringements upon their privacy, family, home, or correspondence. So far, in the context of media publications, no such protection of the law has been afforded to Australians. In England, the pathway to new protection has been provided precisely because the United Kingdom is a party to the *European Convention of Human Rights*. That Convention has been incorporated into domestic law.⁴⁶ In Australia, in part because of hostile pressure from the self-same media interests, the Rudd Government

⁴⁶ *Human Rights Act 1998 (UK)* c 42.

backed away from the recommendation of the Brennan inquiry and declined to proceed with proposals for legislation of a federal *Charter of Rights and Responsibilities*.

Of course, there are risks in anything that is done. Particularly is this so in relation to media interests that have an inescapable role in upholding freedom of the press and free expression in Australia. Such values themselves have only limited protection under the Australian Constitution.⁴⁷

Nevertheless, the need for something better in the protection of privacy than the current lack of legal remedies in Australia does seem now to be overwhelmingly established. Moreover, to the many considerations that I have mentioned must now be added the advent of the Internet, of social media, and of electronic publications. These sometimes appear to assume that they can also operate in a law-free zone. Lord McAlpine in England discovered this to his pain when he was recently falsely identified on the Internet as a paedophile, as a result of identification error. I too have discovered this to my disadvantage. When, in 2002, a Senator in the Australian Federal Parliament attacked me and invaded my privacy with allegations about my private life that were quickly shown to be false, I had few, if any, legal remedies.⁴⁸ Despite the total withdrawal of the allegations and the provision of an apology (which I accepted) the contentions remain out there in cyberspace. They continue to circulate, with all their salacious falsehood.

People who serve in public life, including in Australia, have to develop thick skins. But, they too can be hurt and wrongly damaged, even by retracted falsehoods. Moreover, if you choose to *Google* the name of my partner of 43 years, Johan van Vloten, the enquiry will revive the association of his name with the false allegations of the Senator against me. This prudent, blameless, private, good citizen is reduced in dignity in cyberspace. He too has no remedy.

Why do human beings generally think it important to protect privacy? Why are some private facts deserving of such protection? The answer to these questions is that, even in the age of the Internet, each one of us has a private zone in which we want to feel free to express our loves, our feelings, our dreams, our fantasies, and our most intimate

⁴⁷ *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520, referring to the Australian constitutional “free speech cases”.

⁴⁸ AJ Brown, *Michael Kirby: Paradoxes/Principles* (Federation Press, 2011).

thoughts. It is by revealing those feelings to a very few chosen others that we reach fulfilment as individuals and richness in our existence as human beings. When such private facts are taken over by others and revealed to all and sundry without full and proper justification, we are all diminished. The onlooker, although momentarily titillated by the salacious, is reduced to being an eavesdropper. The subject is diminished by humiliation, stigma, or worse.

Privacy is important to our fulfilment as human beings. At the moment, in Australia, there are serious black holes in the protection that our law provides for privacy, particularly in the context of publication. A consideration of the journey that our law has taken over the past 70 years suggests that the time has come to provide measured protections. That, in my view, is what has been proposed in the Federal Government's issues paper, now under consideration. In privacy matters, the profits are too great to trust the media entirely to self-regulation. Something more is needed. But will that something eventuate in our country in the face of the media's strident opposition? We have reached a moment of truth.

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