

Critically assess the common law position and the law reform recommendations in respect to a personal privacy cause of action.

I. Introduction

The right to privacy in modern society is becoming increasingly amorphous and has radically shifted from accepted societal normalities observed at the turn of the 21st century. Such a shift is highly correlated to the escalating use and reliance on technology which has brought about a transformative change in the manner that information is transmitted and disseminated. Indeed, and as is expected, the political reaction to such change has been slow and the intensifying commentary from both the judiciary and the wider populace has subsequently gyrated the political focus onto this issue. Of course, the balance between parliament and the media is one which is fraught with danger as the former attempts to preserve and advocate against invasion of privacy while the latter attempts to consistently drive its economic profit from the exploitation of it. Evidently, any anticipated change to privacy laws by parliament will attract the extreme attention of the media who will vehemently oppose the introduction of laws which in any way restrict their journalistic freedoms.

Notably, the right to privacy is a fundamental human right and is enshrined within *The Universal Declaration of Human Rights*¹ and the *International Covenant on Civil and Political Rights*² which both provide that ‘no one shall be subjected to arbitrary or unlawful interference with his privacy’.³ Unfortunately, the ICCPR does not form part of the common law in Australia and although it has been suggested in the past that its ‘[p]rovisions will inevitably influence the future common law of Australia’⁴ – such influence has never transpired into the Australian legal jurisprudence. Interestingly, in Victoria, the *Charter of Human Rights and Responsibilities Act 2006 (Vic)*⁵ provides at section 13 that a person has the right

- ‘(a) not to have his or her privacy, family, home or correspondence unlawfully or arbitrarily interfered with; and
- (b) not to have his or her reputation unlawfully attacked.’⁶

While the VCHR itself cannot create or introduce new legal rights in any sense, it does compel the Victorian parliament to comply with the VCHR in the introduction of any new legislation. Unfortunately, the proposal for a Federal Charter of Human Rights was recently rejected⁷ by the Australian Government which infers that, at least at a Federal level, such obligations do not exist currently.

¹ *Universal Declaration of Human Rights 1948*, United Nations, <http://www.un.org/en/documents/udhr/index.shtml>, Viewed 24th September 2010 [hereinafter UDHR].

² *International Covenant on Civil and Political Rights*, adopted Dec. 19, 1966, 999 U.N.T.S. 171 (entered into force Mar. 23, 1976) [hereinafter ICCPR].

³ UDHR – Article 12; ICCPR – Article 17.

⁴ The Hon Justice Michael Kirby AC CMG, *Privacy in the Courts*, University of New South Wales Law Journal, 2001, Volume 24(1), 247 at [24].

⁵ *Charter of Human Rights and Responsibilities Act 2006 (Vic)* [hereinafter VCHR].

⁶ *Ibid* – s13.

⁷ Honourable Robert McClelland MP, *Address to the National Press Club of Australia – Launch of Australia’s Human Rights Framework*, 21st April 2010, <http://bit.ly/9mE5CW>, Viewed 24th September 2010 – ‘that a legislative charter of rights is not included in the Framework as the Government believes that the enhancement of human rights should be done in a way that, as far as possible, unites rather than divides our community.’

In this context, a significant review of Australian privacy law was conducted by the Australian Law Reform Commission⁸ in May 2008⁹ which provided an overview of the current legal status of a personal right to privacy in Australia and abroad. The ALRC report concluded that ‘there was strong support for the enactment of a statutory cause of action for a serious invasion of privacy’¹⁰ with numerous proponents suggesting that the requisite need was evident as

‘it is unacceptable that people who suffer flagrant invasions of their territorial or bodily privacy or the privacy of their communications have virtually no recourse under existing privacy laws.’¹¹

The report provided that such a cause of action should exist at the Federal level and contain a ‘non-exhaustive list’ of the types of invasion that would otherwise fall within the relevant cause of action.¹² Notably, the ALRC stated that it was entirely undesirable, in any manner, to frame such a statutory action around the types of acts which are considered ‘[h]ighly offensive, or to a standard that a reasonable person of ordinary sensibilities’¹³ would deem unacceptable. In this regard, the report contends that a Federal statutory cause of action would give ‘complainants access to a broader range of civil remedies to redress the invasion of their privacy.’¹⁴

Subsequent to the release of the ALRC report, the New South Wales Law Reform Commission¹⁵ released a response to the ALRC in April 2009 with their views in respect to a statutory cause of action for privacy.¹⁶ Principally, the NSWLRC ‘[u]ltimately agreed with the ALRC that there ought to be a statutory cause of action for invasion of privacy in Australia’¹⁷ and the primary basis for their conclusion was the fact that current information privacy legislation ‘fails to empower individuals to mount private law actions for invasions of privacy’.¹⁸ Following the NSWLRC report, the Commonwealth then issued a statement in mid-October 2009 regarding the ALRC recommendations and provided neither acceptance nor rejection of a statutory cause of action for serious invasion of privacy and deferred commentary until it had consulted ‘extensively with the public and private sectors before responding to the stage two recommendations’.¹⁹ Following this statement, the Victorian Law Reform Commission²⁰ released its report²¹ in May 2010 which included a significant

⁸ Australian Law Reform Commission [hereinafter ALRC], <http://www.alrc.gov.au/>, Viewed 24th September 2010.

⁹ ALRC, *Australian Privacy Law and Practice*, Volume 3, Report 108, May 2008, http://www.alrc.gov.au/sites/default/files/pdfs/publications/108_vol3.pdf, Viewed 24th September 2010 [hereinafter ALRC Report].

¹⁰ *Ibid*, Page 2257.

¹¹ Public Interest Advocacy Centre, *Submission PR 548*, 26 December 2007.

¹² ALRC Report, Pg. 2536.

¹³ *Ibid* at Pg. 2569.

¹⁴ *Ibid* at Pg. 2571.

¹⁵ New South Wales Law Reform Commission [hereinafter NSWLRC], <http://www.lawlink.nsw.gov.au/lrc>, Viewed 24th September 2010.

¹⁶ NSWLRC Report, *Invasion of Privacy*, Report 120 April, 2009, http://www.lawlink.nsw.gov.au/lawlink/lrc/ll_lrc.nsf/pages/LRC_r120pdf, Viewed 24th September 2010 [hereinafter NSWLRC Report].

¹⁷ NSWLRC Report, Pg 10.

¹⁸ *Ibid* at Pg 16.

¹⁹ Australian Government, *Enhancing National Privacy Protection: First Stage Response to the Australian Law Reform Commission Report 108 ‘For Your Information: Australian Privacy Law and Practice’*, http://www.dpmc.gov.au/privacy/alrc_docs/stage1_au_govt_response.pdf, October 2009, Viewed 24th September 2010, Recommendation 5-3; 15-3.

²⁰ Victorian Law Reform Commission [hereinafter VLRC], <http://www.lawreform.vic.gov.au/>, Viewed 24th September 2010.

discussion of both the ALRC and the NSWLRC reports in addition to further commentary in the Victorian context. Importantly, the VLRC was required to consider the implications of section 13 of the VCHR – an aspect which prior reports were not required to consider. The VLRC concluded that two statutory causes of action are appropriate and these are discussed below.

Consequently, this paper intends to provide a critical overview of the common law position in respect to a cause of action for invasion of privacy and juxtapose such a position against that advocated in support of the statutory equivalent. It will focus on the lead common law authorities in Australia in respect to breach of confidence and the development of a tort cause of action and contrast these positions to those in the United Kingdom and New Zealand. It will then examine the recommendations provided by the ALRC and the relevant differences proposed by that of the NSWLRC. An examination of the VLRC position will then be contrasted against both these views and an opinion as to the most appropriate statutory construction will consequently be formed. This paper will then close with an examination in respect to the consequential divide between parliament and the media and a conclusion as to the most appropriate judicial forum to house a cause of action for a breach of privacy.

²¹ VLRC, *Surveillance in Public Places – Final Report 18*, http://www.lawreform.vic.gov.au/wps/wcm/connect/36418680438a4b4eacc0fd34222e6833/Surveillance_final_report.pdf?MOD=AJPERES, May 2010, Viewed 24th September 2010, Chapter 7 [hereinafter VLRC Report].

II. A Common Law Affair

The judicature of Australia have largely refused to take the next pragmatic step towards the seemingly enviable development of a common law cause of action in respect to privacy. Some commentators have suggested this primarily due to the fact that Australian courts are comfortable to

‘groped forward cautiously along the groove of established legal concepts, like nuisance and libel, rather than make a bold commitment to an entirely new head of liability.’²²

Indeed, such a statement is undoubtedly true and reflected in modern procedural law in Australia as it is evident that many justices simply refuse to develop – or lack the confidence in their lower court stature – to take the preverbal ‘next step’ – preferring rather to await direction from the High Court in this regard. The adoption of such an attitude is confusing – particularly, when the verification of a right to privacy was tentatively expounded in *ABC v Lenah Game Meats*²³ where it was considered that

‘the time is ripe for consideration whether a tort of invasion of privacy should be recognised in this country, or whether the legislatures should be left to determine whether provisions for a remedy for it should be made.’²⁴

Notably, Gleeson CJ postulated that privacy actions could be incorporated as part of the doctrine of breach of confidence and do not necessarily have to be framed within a new tortious privacy concept. In this regard, His Honour stated that if activities are truly

‘[p]rivate, then the law of breach of confidence is adequate to cover [such cases]. I would regard images and sounds of private activities ... as confidential. There would be an obligation of confidence upon the persons who obtained them, and upon those into whose possession they came, if they knew, or ought to have known, the manner in which they were obtained’²⁵

Such a contention seemingly reversed the some 60 year position held by the High Court in *Victoria Park Racing and Recreation Grounds Co Ltd v Taylor*²⁶ that no cause of action exists at law or in equity for a general right of privacy.²⁷ Although Kirby J later contended in this light that

‘the general development of civil remedies for privacy invasion which, in Australia, was largely stillborn after a possibly erroneous misreading of the decision of the High Court in *Victoria Park*’.²⁸

²² Professor John G Fleming, *The Law of Torts*, 9th edition, 1998, LBC Information Services, New South Wales, Australia, Pg 664 – 665.

²³ *ABC v Lenah Game Meats Pty Ltd* [2001] HCA 63 [hereinafter *Lenah Game Meats*].

²⁴ *Ibid* at [335] per Callinan J.

²⁵ *Ibid* at [39] per Gleeson CJ.

²⁶ *Victoria Park Racing and Recreation Grounds Co Ltd v Taylor* [1937] HCA 45; (1937) 58 CLR 479.

²⁷ *Ibid*, Dixon J at 510.

²⁸ Michael Kirby, *25 Years of Evolving Information Privacy Law: Where Have We Come From and Where are We Going?*” *FOI Review*, 2003, Vol 34 at 105.

Subsequent to *Lenah Game Meats* case, only two Australian Courts have recognised some form of invasion of privacy. In *Grosse v Purvis*,²⁹ a Queensland District Court provided both aggravated and exemplary damages for a breach of the plaintiff's privacy with Skoien SDCJ stating, in light of the *Lenah Game Meats* case, that it 'was a logical and desirable step ... to recognise a civil action for damages based on the action right of an individual person to privacy.'³⁰ Perhaps most pertinent to this case, was the manner in which Skoien SDCJ structured the essential elements of the cause of action:

1. a *willed act* by the defendant;
2. which *intrudes upon* the privacy or *seclusion* of the plaintiff;
3. in a manner which would be considered *highly offensive* to a *reasonable person of ordinary sensibilities*; and
4. which *causes the plaintiff detriment* in the form of mental, physiological 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.³¹ [emphasis added]

Interestingly, Skoien SDCJ ignored the requisite need for the inclusion of a public interest element instead noting that 'no such concept was involved in this case'³² and His Honour did not explore the doctrine of confidentiality in any capacity. In comparing Skoien SDCJ's decision with that of Hampel J in *Doe v Australian Broadcasting Corporation*,³³ Hampel J preferred that the 'development of a tort of invasion of privacy is intertwined with the development of the cause of action for breach of confidence'³⁴ with Her Honour including a public interest element.³⁵ In this context, Neave JA in *Giller v Procopets*³⁶ discussed the doctrine of confidentiality and accepted that once confidential information had been released

'[t]he damage has been done in this respect, not providing judgment recovery of damages for mental distress caused by breach of confidence, when no other substantial remedy is available ... would illustrate that something was wrong with the law.'³⁷

Neave JA preferred to envelope any privacy cause of action into the doctrine of confidentiality and utilise an existing – rather than create a new – limb of law.³⁸ However, Her Honour merely provided, in obiter, that only two main approaches seemingly exist in respect to a tort of privacy –

1. '[T]he first – epitomised by *Lenah Game Meats* in English courts ... is the impetus for the expansion of the action for breach of confidence to provide remedies.'³⁹
2. 'The second approach ... exemplified by the decision of New Zealand Court of Appeal ... is to recognise a tort of invasion of privacy.'⁴⁰

²⁹ *Grosse v Purvis* [2003] QDC 151.

³⁰ *Ibid* at [442].

³¹ *Ibid* at [444].

³² *Ibid* at [447].

³³ *Doe v Australian Broadcasting Association* [2007] VCC 281.

³⁴ *Ibid* at [148].

³⁵ *Ibid* at [163].

³⁶ *Giller v Procopets* [2008] VSCA 236.

³⁷ *Ibid* at [423].

³⁸ *Ibid* at [431].

³⁹ *Ibid* at [448].

⁴⁰ *Ibid* at [449].

Some critics⁴¹ have taken the view that that the Court of Appeals deferral of a decision in respect to a tort of privacy is consistent with the broader judiciary's postponement on the decision whether a cause of action for breach of privacy should develop – particularly if plaintiffs can be sufficiently protected through other existing causes of action. Notably, the Court of Appeal did not award punitive damages primarily because no prior authority existed for the award of such damages and also due to the Courts view that the respondent had already been adequately punished. In this context, the Court of Appeal did not rule out the possibility that such damages could be awarded in the future.⁴² Thus at common law, the question becomes whether it is possible to incorporate a new limb of privacy within the existing doctrine of breach of confidentiality as the English Courts have done, or whether an entirely new tortious cause of action is required as New Zealand has adopted.

In the United Kingdom, the lead authority is *Campbell v MGN Ltd*⁴³ whereby the House of Lords effectively extended the doctrine of confidentiality to circumstances which reflect an obligation of confidence rather than pre-existing relationship of confidence. That is, if a person reasonably knows or expects the information they have received is private or confidential,⁴⁴ and there is no countervailing public interest to override the expected level of privacy of such information – then the information should be considered private. Most recently, UK Courts have sought to clarify information that attracts a reasonable expectation of privacy to include

‘information of a strictly personal nature concerning, for example, sexual relationships, mental or physical health, financial affairs or the claimants family or domestic affairs’⁴⁵

While the restriction has attempted to narrow the applicability of some claims, the evident difficulty is the determination of what is ‘reasonably’ private and what public interest factor can otherwise override such ‘reasonable expectations’ of privacy. Recently, Gleeson CJ stated extrajudicially in light of the *Lenah Game Meats* case that

‘The ground seems to me to be shifting under the concept of privacy. I wrote a judgment a few years ago in which I said there seemed to me to be certain things that were self-evidently private. I'm not sure about that any more. When you look at the kind of information that people publish about themselves it makes you wonder. I used to think that having a telephone conversation was normally private, but you can't walk down the street without hearing a number of telephone conversations.’⁴⁶

In this regard, the changing nature of privacy expectations in modern society is shifting the notion of what is ‘reasonable’. The UK Courts usage of the doctrine of confidentiality has drawn criticism⁴⁷ regarding the utility and distinction of information that is considered ‘private’ and that which is ‘confidential’. Such criticisms were discussed in the leading New

⁴¹ Normann Witzleb, *Giller v Procopets: Australia's privacy protection shows signs of Improvement*, *Torts Law Journal*, 2009, Vol 17 No 2. at 123 – 125.

⁴² *Giller v Procopets* [2008] VSCA 236 at [435 – 437].

⁴³ *Campbell v Mirror Group Newspapers* [2004] 2 AC 457.

⁴⁴ *Ibid* at [14]-[15].

⁴⁵ *The Author of a Blog v Times Newspapers Limited* [2009] EWHC 1358 (QB) [9] (Eady J).

⁴⁶ Nicola Berkovic, *Why Privacy isn't what it used to be*, *The Australian*, 22 August 2008 <http://www.theaustralian.news.com.au/story/0,25197,24219643-17044,00.html>, Viewed 4th October 2010.

⁴⁷ Des Butler, *A Tort of Invasion of Privacy in Australia?*, *Melbourne University Law Review*, 2005, Vol. 29, 339, 352.

Zealand case of *Hosking v Runting*⁴⁸ where the New Zealand Court of Appeal ('NZCA') provided that

'Privacy and confidence are different concepts. To press every case calling for a remedy for unwarranted exposure of information about the private lives of individuals into a cause of action having as its foundation trust and confidence will be to confuse those concepts.'⁴⁹

In this regard, the Gault P and Blanchard J of the NZCA argued that the English authorities have seemingly misinterpreted prior English cases⁵⁰ which focused on confidential information where the relevant information was 'obviously confidential' despite no confidential relationship existing. In this regard, their Honours contend that breach of privacy is a separate and distinct cause of action to that of confidential information which would 'lead to confusion in trade secrets and employment fields'.⁵¹ Notably, confidentiality involves a distinct relationship built on integrity, trust and confidence whereas privacy deals with control over the extent to which ones information is accessible to others.⁵² To remove the requisite relationship of trust and confidence distinctly strains the boundaries of the doctrine of confidentiality and creates a new definitional problem for establishing how an obligation of confidence arises.⁵³ In this context, the NZCA agreed⁵⁴ and provided a new common law tort for protecting privacy by publicising private information such that

1. The existence of facts in respect of which there is a reasonable expectation of privacy; and
2. Publicity given to those private facts that would be considered highly offensive to an objective reasonable person.⁵⁵

The new two-limbed test removed the operation of the doctrine of confidentiality and provided a significantly higher standard such that the publication of the facts must be highly offensive to a reasonable person. The NZCA specified a relevant defence of 'legitimate public concern'⁵⁶ which would otherwise permit the publication of the information if it is 'justified by a legitimate public concern in the information'.⁵⁷ The use of the 'public concern' rather than a 'public interest' test ensures that matters of 'general interest or curiosity to the public'⁵⁸ are also enveloped into the definition.

Some commentators⁵⁹ have further suggested that the most appropriate place to protect privacy is not within a breach of confidence action at all but rather within the confinements of either the tort of trespass or negligence. Of course, any action which is wrapped in a tortious

⁴⁸ *Hosking v Runting* [2005] 1 NSLR 1.

⁴⁹ *Ibid* at [48].

⁵⁰ *Attorney-General v Guardian Newspapers Ltd (No. 2)* [1990] 1 AC 109 per Lord Goff who provided the original obiter regarding the possible extension of a breach of confidence action.

⁵¹ *Ibid* 48 at [49].

⁵² David Lindsay, *Playing Possum? Privacy, Freedom of Speech and the Media Following ABC v Lenah Game Meats Pty Ltd, Part II*, *Media and Arts Law Review*, 2002, Vol. 7(3) 161 at 174–178.

⁵³ Katrine Evans, *Reverse gear for NZ's privacy tort: the Hosking decision*, 2003 PLPR, <http://www.austlii.edu.au/au/journals/PLPR/2003/35.html#FootnoteB16>, Viewed 4th October .

⁵⁴ *Ibid* 48 at [45]-[53].

⁵⁵ *Ibid* 48 at [117].

⁵⁶ *Ibid* 48 at [130].

⁵⁷ *Ibid* 48 at [129].

⁵⁸ *Ibid* 48 at [133].

⁵⁹ Paul Telford, *Gross v Purvis: its place in the common law of privacy*, *Privacy Law and Policy Reporter*, 2003, Vol 36, <http://www.austlii.edu.au/au/journals/PLPR/2003/36.html>, Viewed 4th October.

cause of action for trespass or negligence would require the essential components of intention and detriment. In this regard, it may be difficult to actually determine whether a breach of privacy was ‘intentional’ or a ‘mere’ accident. Further, whether a tortious action in privacy should include actionable proof with, or without, detriment would have a significant impact on the operation and applicability of the tort. The concept at common law hasn’t been fully discussed and in the authors opinion it is unlikely that an Australian privacy cause of action would be framed within either of these existing torts due to definitional and structural uncertainties and would rather follow the model evinced in *Hosking v Runting*.⁶⁰

III. The Statutory Need?

In light of Part II of this paper, the ALRC, NSWLRC and VLRC all rejected the notion that a cause of action for privacy can be incorporated into either an existing – or a new – cause of action at common law and all contend that a Federal statutory alternative is essential. In rejecting the common law notion, each essentially agrees with the arguments presented by the NZCA in *Hosking v Runting*⁶¹ in respect to the doctrine of confidentiality such that ‘confidentiality and privacy are different concepts’⁶² and ‘equitable intervention does not fasten on the intrinsic value of the information itself’.⁶³ In the authors view, the extension of a breach of confidence action to include that information which has a ‘degree of confidence’ despite lacking the traditionally high standard of a ‘relationship of confidence’ is to misuse the core purpose of the breach of confidence action. In this regard, the author agrees with the fundamental pretext that is rationalized in each of the respective commission’s reports regarding the doctrine of confidentiality being an inappropriate cause of action to ‘wrap’ a new privacy cause of action in.⁶⁴ Notably, all the commissions reports come to a differing conclusion regarding the most appropriate statutory cause of action for invasion of privacy despite their purported similarities.

Each commission contends that the creation of a new statutory tort for invasion of privacy must occur at either a Federal level – which will then constitutionally remove the power of any conflicting State and Territory laws – or through a collaborative Federalist approach which ensure that both the Commonwealth and the States and Territories implement similar actions. In this context, the evident need for homogeneity is paramount to ensuring that the implementation of any plausible statutory action is consistently applied throughout all States and Territories to mitigate change in uniformity over time. Relevantly, the primary justification by each commission was the purported lack of consistency if the development of a cause of action is left to procedural law. Such a notion is relevantly supported by the evidently ‘formless’ nature in defining the scope of privacy and the widely overextended generalisations that have been so-far adopted by both the House of Lords⁶⁵ and the New Zealand Court of Appeal.⁶⁶ This is particularly true in respect to the rapid and changing nature of technology and the constantly shifting manner in which information is now broadcast and disseminated. Further, the commissions provide that a risk of the common law development of such a cause of action is the plausible imbalance that particular cases and circumstances will invoke on the development of any such action.⁶⁷ Relevantly, it is

⁶⁰ *Hosking v Runting* [2005] 1 NSLR 1.

⁶¹ *Ibid.*

⁶² VLRC Report, Refer 7.31.

⁶³ NSWLRC Report, Pg 16-17.

⁶⁴ VLRC Report, Refer 7.28-7.33; ALRC, Refer 74.2, 74.27, 74.113; NSWLRC, Refer 4.8, 4.12, 4.17.

⁶⁵ *Wainwright v Home Office* [2004] 2 AC 406 (Lord Hoffmann).

⁶⁶ *Hosking v Runting* [2005] 1 NZLR 1 (Gault P and Blanchard J); See also Gleeson CJ comments at *Ibid* 48 above.

⁶⁷ VLRC Report at 7.122.

contended that the common law development of privacy may be influenced by the economic capabilities of a few wealthy applicants who are equipped to proceed through numerous stages of litigation in an attempt to achieve a desired outcome which may reduce the applicability and scope of the law.⁶⁸

Both the ALRC and the NSWLRC reports contend that a singular broad statutory cause of action is required – with the former proposal being narrower in application than the later. The ALRC provides that in order to establish liability, an applicant must demonstrate they

1. had a reasonable expectation of privacy in the circumstances; and
2. the act or conduct complained of is highly offensive to a reasonable person of ordinary sensibilities.⁶⁹

The use of the language ‘highly offensive’ is an evident attempt by the ALRC to raise the presumptive standard to include only that material which causes direct ‘humiliation and distress’⁷⁰ – in line with the NZCA approach in *Hosking v Runting*.⁷¹ In contrast, the NSWLRC provides that

1. there are facts in respect of which there is a reasonable expectation of privacy in all circumstances of the case; and
2. having regard to any relevant public interest (including the interest of the public in being informed about matters of public concern).⁷²

There are evident differences in the approaches proposed by the ALRC and the NSWLRC such that the NSWLRC only requires an individual to have a reasonable expectation of privacy in *all circumstances* with respect to any public interest component. The proposal by NSWLRC in this regard is significantly boarder in application in comparison to the ALRC construction as the NSWLRC lacks any limiting ‘highly offensive’ element. The NSWLRC state that the inclusion of such an element is ‘unwarranted in principle’⁷³ and the need for such a high burden would unduly diminish the operation of the ‘reasonable expectation’ element. In the author’s opinion, the scope of the NSWLRC proposal is far too wide-ranging in its permissible application such that the first limb of the proposed test is applicable whenever a person has a ‘reasonable expectation’ of privacy in *any* circumstance. The NSWLRC attempt to balance such a broad application by requiring the court to consider at least nine different factors including the nature of the subject matter and whether it should be private, the relationship between the applicant and alleged wrongdoer, the vulnerability of the applicant and effect of the conduct on the individual.⁷⁴ Unfortunately in the authors view, this later construction adds significantly more complexity and requires the Court to consider the competing interests while ‘having regard’ to the balancing public interest – a seemingly lower standard than that of the ALRC proposal which requires the invasion of privacy to ‘outweigh’ *all other* matters of public interest. Additionally, the NSWLRC proposes the nine considerations form part of the statutory body of the privacy cause of action which seemingly reduces the flexibility of the Court to determine which factors are most appropriate.

⁶⁸ VLRC Report at 7.123.

⁶⁹ ALRC Report at Rec 74-2.

⁷⁰ *Hosking v Runting* [2005] 1 NSLR 1 at [128].

⁷¹ *Ibid* at [1].

⁷² NSWLRC, *Appendix A: Civil Liability Amendment (Privacy) Bill*, http://www.lawlink.nsw.gov.au/lawlink/lrc/lr_c.nsf/pages/LRC_r120appA, Viewed 5th October 2010, s74(2).

⁷³ NSWLRC Report at 7.94.

⁷⁴ *Ibid* at 5.21.

Notably, in the ALRC proposal the cause of action requires conduct that is either intentional or reckless and not ‘merely negligent’. The latter conduct is relevantly excluded by the ALRC because it would extend the reach of the cause of action for ‘negligent or accidental acts in all invasions’ of privacy and would go too far.⁷⁵ Unfortunately, the ALRC does not state who would bear the onus of ascertaining the requisite intention or recklessness – that is, whether it would form part of the applicants onus or whether it is a defensive burden placed upon the defendant and is only required once it has been established by the applicant. By contrast, such an unclear onus has led some commentators⁷⁶ to suggest that the NSWLRC proposal does not require any fault element and instead relies on the defendant to prove the defence of innocent disseminator. The NSWLRC defensive provision⁷⁷ is structured similarly to defamation actions⁷⁸ and places a substantial onus on the responding party to otherwise overcome which, in the author’s opinion, is undesirable.

In a somewhat contrasting view to the ALRC and the NSWLRC, the VLRC proposes that two unique statutory causes of actions should be available to, at the very least, Victorians as

‘it is not desirable for there to be one statutory cause of action for all serious invasions of privacy because the concept of privacy is too broad and imprecise to be of use when creating legal rights and obligations.’

In this regard, the VLRC stated due the operation of s13 of the VCHR that multiple statutory actions are required to fill the current void.⁷⁹ The VLRC proposed a

1. cause of action which would deal with serious invasion of privacy by misuse of private information;⁸⁰ and
2. cause of action should deal with serious invasion of privacy by intrusion upon seclusion.⁸¹

Evidently, the creation of two distinct actions adequately narrows the otherwise broader attempt to frame a single cause of action by the ALRC and the NSWLRC and is relevantly preferred by author of this paper. The two VLRC causes of action replicate the ‘highly offensive’ element of the second limb of the ALRC model which ensures that ‘overtly sensitive’ plaintiffs will in all likelihood fail in their action unless the detriment is substantial.⁸² This is in direct contrast to the NSWLRC proposal, and in the author’s opinion, is a distinctly more favourable solution to adopt in order to restrict the operation of actions to those of primarily of ‘significant’ detriment. In contrast to the ALRC and in agreement with

⁷⁵ ALRC Report at 74.163.

⁷⁶ Peter G Leonard, *Proposals for a statutory cause of action for invasion of privacy in Australia: A brief comparison*, Privacy Law Bulletin, February 2010, Vol 6, Pg 46.

⁷⁷ NSWLRC, *Appendix A: Civil Liability Amendment (Privacy) Bill*, http://www.lawlink.nsw.gov.au/lawlink/lrc/ll_lrc.nsf/pages/LRC_r120appA, Viewed 5th October 2010, s75(1)(d).

⁷⁸ *Ibid* at s75(1)(d) – (i) the defendant published the matter merely in the capacity, or as an employee or agent, of a subordinate distributor, and (ii) the defendant neither knew, nor ought reasonably to have known, that the publication of the matter constituted an invasion of privacy, and (iii) the defendant’s lack of knowledge was not due to any negligence on the part of the defendant.

⁷⁹ VLRC Report at 7.106.

⁸⁰ VLRC Report at 7.143 – D (the defendant) misused, by publication or otherwise, information about P (the plaintiff) in respect of which he/she had a reasonable expectation of privacy; and a reasonable person would consider D’s misuse of that information highly offensive.

⁸¹ VLRC Report at 7.144 – D intruded upon the seclusion of P when he/she had a reasonable expectation of privacy; and a reasonable person would consider D’s intrusion upon P’s seclusion highly offensive.

⁸² VLRC Report at 7.138.

the NSWLRC, the VLRC rejects the need to expressly exclude ‘negligent acts’⁸³ and instead opts to leave their operation and interpretation to the Courts⁸⁴ – a view supported by the author as the common law is relevantly equipped to determine whether the applicability of negligence is ‘mere’ or ‘gross’ in respect to invasion of privacy.⁸⁵

The second cause of action primarily focuses on spatial privacy and essentially replicates the onus owed in the first proposed VLRC cause of action. The VLRC propose that the intrusion upon a person’s seclusion is most adequately determined by ‘an objective test’⁸⁶ although they fail to adequately frame how such a test might be structured other than to conclude that a Court ‘should consider values and attitudes widely held throughout the community before deciding whether the conduct was highly offensive’.⁸⁷ Indeed, it would seem apparent that the majority of actions which fall within the operation of this cause of action would otherwise be of a criminal nature and this second statutory action aims to equip a defendant with a further civil action against the offender.⁸⁸ In the authors view, this later reasoning – combined with inclusion of the ‘highly offensive’ restrictive element – provide a reasonable basis for supporting such a cause of action. In light of the defences to this action,⁸⁹ the author only disagrees with the second defence such that it should be restricted to a ‘public officer’s act or conduct as authorised by or under law’. The inclusion of ‘not disproportionate to the matter being investigated’ seemingly invites plausible abuse by public officers and a subsequent legal basis to intrude on a person’s privacy.

In respect to ‘invasion of privacy’, the ALRC provided three⁹⁰ defences to the cause of action – two of which relate to an ‘act or conduct’ which is otherwise lawful and all of which were supported by the VLRC in respect to invasion of privacy. Notably, the ALRC argue that most other defences – such as implied or express consent – form part of the cause of action.⁹¹ In contrast, the NSWLRC list at least five defences⁹² including two ‘lawful’ defences and the notable defence of ‘absolute privilege or fair reporting’ measured in respect to the *Defamation Act 2005*.⁹³ Interestingly, no public interest defence exist as the NSWLRC propose this is included in establishing the cause of action.⁹⁴ In contrast to the ALRC, the NSWLRC provide that the onus of consent – whether express or implied – is a defence and the burden falls upon the defendant whereas the ALRC provide that the consent would otherwise form part of whether the applicant could envisage a ‘reasonable expectation of

⁸³ VLRC Report at 7.146-7.148.

⁸⁴ NSWLRC Report at 5.57; VLRC Report at 7.147.

⁸⁵ VLRC Report at 7.148.

⁸⁶ Ibid at 7.132.

⁸⁷ Ibid at 7.132.

⁸⁸ Ibid at 7.133.

⁸⁹ Ibid at 7.150 – (i) consent (ii) where the defendant was a public officer engaged in his or her duty and acted in a way that was not disproportionate to the matter being investigated and not committed in the course of a trespass (iii) where D’s conduct was in the public interest, or if involving a publication, the publication was privileged or fair comment.

⁹⁰ ALRC Report at 74.169 – (i) where the act or conduct is incidental to the exercise of a lawful right of defence of person or property; (ii) where the act or conduct is required or authorised by or under law; (iii) where publication of the information is subject to privilege under the law of defamation.

⁹¹ ALRC Report at 74.174.

⁹² NSWLRC, *Appendix A: Civil Liability Amendment (Privacy) Bill*, http://www.lawlink.nsw.gov.au/lawlink/lrc/ll_lrc.nsf/pages/LRC_r120appA, Viewed 5th October 2010, s75(1)(a) – (e).

⁹³ *Uniform Defamation Act 2005* – s27, s29.

⁹⁴ Ibid 92, s74(2).

privacy'⁹⁵ – a more sensible construction which would assist the expedition of trial actions and reduce vexatious claims.⁹⁶

The remedial actions proposed by ALRC are structured so that a plaintiff has 'access to a wide range of remedies'⁹⁷ including

1. ordinary and aggravated damages (but excluding exemplary);
2. an account of profits;
3. an injunction;
4. an order requiring apology;
5. a correct order;
6. a order for delivery and destruction of material;
7. a declaration.

Notably, the ALRC did not stipulate a ceiling limit on a damages award instead leaving this direction in ambit of the Court. The NSWLRC ostensibly excludes remedies (4) and (5) above and rather provides that a Court must consider the pre-and-post conduct of the defendant. In this context, NSWLRC provide that actions taken by defendants may move to reduce remedial relief for the applicant.⁹⁸ The VLRC seemingly supported the majority of the ALRC proposals and equally accepted the ALRC and NSWLRC exclusion of exemplary damages. In the authors mind, a broader operation of remedial relief allows a Court to determine the most appropriate action although it is questioned how remedies (4), (5) and (7) above – when contemplated individually – would be considered 'reasonable outcomes' for a 'highly offensive' breach. In this regard, it is contended that either (1), (2), (3) and (6) above should be the de minimus level of remedial action with (4), (5) and (7) operating as ancillary relief if the 'highly offensive' element is ultimately included in the cause of action.

Importantly, the ALRC, NSWLRC and VLRC all provide that the statutory cause of action should be limited to living natural persons only and exclude corporations entirely.⁹⁹ In the authors view, it would be difficult to base the underlying rationale for statutory a cause of action in privacy on the fundamental premise of human rights obligations, if the implementation also included corporations. Indeed, corporations have a number of other legal avenues for remedial action such as the breach of contract, the doctrine of confidentiality and breach of fiduciary duty.¹⁰⁰ Additionally, each commission also excluded deceased persons – in line with the defamation law¹⁰¹ – and based on the defamation premise that a deceased person 'cannot suffer any insult to reputation or dignity or incur injury to feelings'.¹⁰² Further, the limitations of actions by NSWLRC are restricted to one year in contrast to the VLRC who proposes a three years limitation period. In the author's opinion, the VLRC

⁹⁵ ALRC Report at 74.158-74.160.

⁹⁶ By requiring the onus to fall upon the applicant, this ensures that their conduct is relatively measured against any 'reasonable expectation' of privacy they would otherwise have. For example, if the applicant uploaded multiple files to a social network and then sought relief – such actions could be relatively determinative in any consideration of the 'reasonableness of their expectation' to privacy.

⁹⁷ ALRC Report at 74.176-74.177.

⁹⁸ Including whether the defendant has undertaken (4) and (5).

⁹⁹ Arguably, it is difficult to rationalize the degree of non-economic loss that a corporation would suffer in any context particularly when other statutory enactments such as defamation expressly exclude most corporations unless they are small businesses or not-for-profits; see *Defamation Act 2005 (Cth)* – s9.

¹⁰⁰ VLRC Report at 7.231 - 7.234; See also Margaret Jackson, *A practical guide to protecting confidential business information*, Lawbook Co, Sydney, 2003, Pg. 25.

¹⁰¹ *Defamation Act 2005 (Vic)* – s10(a).

¹⁰² VLRC Report at 7.237.

proposition is consistent with the *Limitations of Actions Act 1958 (Vic)*¹⁰³ and the *Limitations of Actions Act 1969 (NSW)*¹⁰⁴ such that a three year limitation is adequate based on the date in which the cause of action arose.¹⁰⁵

IV. A Consequential Divide

Importantly, and in light of Part II and III of this paper, despite the purported advance of a statutory cause of action and the author's partiality towards the VLRC model¹⁰⁶ – it is important to consider the realism of such an action being introduced by Parliament. The consistent capitulation by political forces in this country to the media has armed the entire media industry with a significant vice over the Australian populace which seemingly predicates the view that the industry's primary interest is in the preservation of freedom of speech. Indeed, the economic and invasive aspects of the media's role in modern society are seemingly offset by the oft unfounded level of trust and confidence that society places in the media to expose the truth while acting within the pretences of the law. Fortunately, unlike the United Kingdom and the United States – Australia does not operate at the same level of frantic and hysterical desperation to expose and detail every aspect of celebrities and well-recognised citizen's lives. While it is true to presume that such characterisations of the Australian media industry are largely generalized, common law evidence seems to provide anecdotal evidence which elucidates that if such assertions were not true – a larger number of judicial proceedings would have attempted to test the common law in respect to privacy in this country.¹⁰⁷

Interestingly, this has not occurred and the often frenetic response by the media that any proposed statutory pretence for a right to privacy would cause a reduction in free speech is therefore, principally unfounded. Indeed, at the time *Giller v Procopets*¹⁰⁸ decision was released, The Australian newspaper stated

'The judiciary has opened a new front in the attack on free speech by expanding the scope of an old legal action. People can now sue the media whenever they are distressed by the publication of material created in confidence.'¹⁰⁹

While the view of the author is perhaps somewhat cynical in this regard, the realistic practicality of the media in this country is its vested interest in exploiting the personal and private lives of citizens. Evidently, this raises a clear conflict of interest for the media and naturally creates a diametrically opposed position which catalyses the media's political focus on this issue. The underlying premise in this regard is whether the media can significantly influence the political mechanism to reject the formulation of a statutory cause of action. As suggested in Part II of this paper, the New Zealand common law position ostensibly sets a particularly high common law bar – a position which would only adversely affect the media in extreme cases and is reflected in the VLRC proposal. However, its acceptance by

¹⁰³ *Limitation of Actions Act 1958 (Vic)* – s5(1AA).

¹⁰⁴ *Limitation of Actions Act 1958 (NSW)* – s18A(2).

¹⁰⁵ NSWLRC Report at 9.2; VLRC Report at 7.237.

¹⁰⁶ With the aforementioned relevant exceptions.

¹⁰⁷ In Australia, there have been approximately 5 main privacy cases including *Victoria Park Racing*. In Canada, only 25 [refer VLRC – 7.81]. In New Zealand, 15 cases since 1985 [refer VLRC – 7.121].

¹⁰⁸ *Giller v Procopets* [2008] VSCA 236.

¹⁰⁹ Chris Merritt, *Vic court expands scope of an old tort*, The Australian, 15th December 2008,

<http://www.theaustralian.com.au/business/media/vic-court-expands-old-tort/story-e6frg996-111118315261>, Viewed 6th October 2010; See also *Australia's Right to Know*,

<http://www.australiasrighttoknow.com.au/>, Viewed 6th October 2010.

parliament, in light of direct media opposition, may very well pitch the media directly against political forces and create ‘political suicide’ to the supporting parties.

V. Conclusion

The formulation of three distinct statutory causes of action for invasion of privacy by the ALRC, NSWLRC and the VLRC highlights the relevant importance placed on the development of such a fundamental right in line with Australia’s human rights obligations under the UDHR and the ICCPR respectively.¹¹⁰ Indeed, in the context of the media and their palpable focus on any proposed creation of a statutory cause of action for privacy – it is contended that the common law alternative proposed by the NZCA in *Hosking v Runting*¹¹¹ is a more realistic substitute which draws a higher likelihood of being developed. Notably, such a common law action provides adequate civil redress for serious breaches of privacy for which no direct cause of action is currently available. While the author favours the approach of the VLRC, there is a realistic acceptance that twin statutory causes of action are unlikely to be implemented by Federal, State or Territorial parliaments due the external stakeholder and media pressure – despite the high burden such an approach requires of plaintiffs in light of the public interest and other defences. In this regard, the author concludes that the most probable development of a cause of action in respect to the invasion of privacy in Australia will be through the judiciary and will most likely follow the ALRC and VLRC inspired ‘highly offensive’ structure.

Word Count 5,243

¹¹⁰ While the integration of a statutory cause of action would be best suited to a cooperatively Federalist model so that individual States and Territories operate uniformly, the author doubts whether the media’s focus and convergence on this issue will permit the relevant political mechanisms to realistically pass such a statutory cause of action – particularly in light of the narrow majority in the House of Representatives.¹¹⁰

¹¹¹ *Hosking v Runting* [2005] 1 NSLR 1.

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