



MONASH University
Castan Centre for Human Rights Law

Castan Centre for Human Rights Law

Monash University

Melbourne

**Submission on Commonwealth Government's Issues Paper:
A Statutory Cause of Action for Serious Invasion of Privacy**

October 2011

Prepared by Adam Fletcher

Introduction

The Castan Centre for Human Rights Law seeks to promote and protect human rights through public scholarship in international and domestic human rights law. The Centre's interest in the present proposal for a statutory right to privacy is that it involves Australia's international human rights obligations under the International Covenant on Civil and Political Rights (ICCPR, articles 17 and 19),¹ and has implications for their analogues in the ACT's and Victoria's human rights legislation.

On the broad question of the Issues Paper – whether a cause of action is justified – the Centre is of the opinion that the protection of many human rights in Commonwealth law is inadequate, including the right to privacy. The fact that the right to privacy may sometimes be in tension with other rights (eg freedom of political expression) does not justify eschewing legal protection – it simply means that such protection must in its terms give the courts latitude to conduct an appropriate balancing exercise.

As for the detail of how such a cause of action should be framed, the Issues Paper mentions some jurisprudence under article 8 of the European Convention² and under article 17 of the ICCPR.³ In this submission, the Centre draws the Government's attention to other relevant jurisprudence on privacy and related rights from the UN Human Rights Committee, the European Court of Human Rights, the Inter-American Court of Human Rights, the South African Constitutional Court, the High Court of Ireland and the Supreme Court of the Philippines. The Centre is not in a position to present detailed suggestions on the exact form the legislation should take,⁴ but we hope that this jurisprudence will assist in the drafting process. Short answers to some of the specific questions posed in the Issues Paper can be found at Attachment A.

Finally, as a general point of context, the Centre notes that much of the relevant law (both human rights law and common law) was developed in an age before electronic surveillance, social networking and other technology had made invading others' privacy almost trivially easy. As the Issues Paper acknowledges, the existing jurisprudence must therefore be considered in light of these and other related technological developments if the proposed law is to be relevant in the present era.

It is submitted that a cause of action alone will not suffice to protect the right to privacy in an era when the largest gatherers of personal data are corporations – corporations which have vast resources (both monetary and legal) and no obligation to behave as 'model litigants.'⁵ Experience in

¹ 999 UNTS 171

² Issues Paper, 16.

³ Issues Paper, 25.

⁴ For such detailed advice we would refer the Government to Dr Normann Witzleb's recent article 'A Statutory Cause of Action for Privacy? A critical appraisal of three recent Australian law reform proposals,' (2011) 19 *Torts Law Journal* 104, as well as the very specific recommendations of the Australian Law Reform Commission in its Report 108 *For Your Information: Australian Privacy Law and Practice*, available at: <http://www.alrc.gov.au/publications/report-108> (see in particular Chapter 74).

⁵ Contrast the position of the Australian Government, which must comply with the *Legal Services Directions 2005*.

Europe and elsewhere has shown that privacy authorities (such as the Australian Information Commissioner) need to have strong powers to complement any private cause of action.

Part I – Relevant Jurisprudence

This Part presents jurisprudence on the right to privacy not canvassed in the Issues Paper for the Government's consideration. It shows that various jurisdictions (in addition to those mentioned in the Paper) have grappled with the idea of how best to protect the right to privacy, taking into account the (at times countervailing) right to freedom of expression and differing national contexts.

UN Human Rights Committee

Much of the Human Rights Committee's jurisprudence on privacy to date has been focussed on interferences with correspondence or telecommunications.⁶ However, there are also Communications dealing with incursions into private life such as laws prohibiting sexual relations between men (even in the home),⁷ prohibitions on the changing of one's own name⁸ and serious interferences with the family or the home.⁹

To prompt a finding that article 17 of the ICCPR has been violated, a complainant must generally present the Committee with evidence of unjustifiable intrusions into his or her private affairs (for example phone tapping without a legitimate law enforcement purpose) or disproportionate interferences in family life (for example, in some circumstances, deporting a person with dependants).

The Committee has clarified these requirements in two relevant General Comments. General Comment 16¹⁰ on the right to 'respect of privacy, family, home and correspondence, and protection of honour and reputation,' sets out the nature of State parties' obligations under article 17 of the ICCPR. The most relevant aspects are set out below:

- Interferences with privacy should be prevented, regardless of whether they emanate from private entities or the State itself;

⁶ See eg *Pinkney v Canada* (27/1977, Views of 29 October 1981); *Estrella v Uruguay* (74/1980, Views of 29 March 1983); *JRT v Canada* (104/1981, Views of 6 April 1983); *Pinto v Trinidad & Tobago* (512/1992, Views of 16 July 1996); *Tomlin v Jamaica* (589/1994, Views of 16 July 1996); *Polay Campos v Peru* (577/1994, Views of 6 November 1997); *Howell v Jamaica* (798/1998, Views of 21 October 2003), and *Van Hulst v The Netherlands* (903/2000, Views of 1 November 2004).

⁷ See *Toonen v Australia* (488/1992, Views of 31 March 1994).

⁸ See *Coeriel & Aurik v The Netherlands* (453/1991, Views of 31 October 1994).

⁹ See eg *Mónaco v Argentina* (400/1990, Views of 3 April 1995); *Hopu et al v France* (549/1993, Views of 29 July 1997); *Rojas Garcia v Colombia* (687/1996, Views of 3 April 2001); *Coronel et al v Colombia* (778/1997, Views of 24 October 2002); *Bakhtiyari v Australia* (1069/2002, Views of 29 October 2003); *Madafferi v Australia* (1011/2001, Views of 26 July 2004); *Ngambi v France* (1179/2003, Views of 9 July 2004), and *Nystrom v Australia* (1557/2007, Views of 18 August 2011).

¹⁰ CCPR/C/GC/16, available at: <<http://www2.ohchr.org/english/bodies/hrc/comments.htm>>.

- Article 17 requires States parties not only to prohibit serious interferences with privacy but also to take measures to protect privacy;
- Article 17 protects people from “unlawful or arbitrary” interferences with their privacy. The Committee points out that, even if there are exceptions for lawful purposes (such as police powers), these purposes must comply with the provisions, aims and objectives of the Covenant. If an interference is authorised by law but is nevertheless unreasonable in the relevant circumstances, it may still be considered arbitrary and therefore in violation of article 17;
- “Even with regard to interferences that conform to the Covenant, relevant legislation must specify in detail the precise circumstances in which such interferences may be permitted.”¹¹ Surveillance and interception of communications must be strictly confined to necessary incidents of purposes such as law enforcement.
- Searches of the home and/or the person should never be used for the purpose of harassment, and should be conducted in a way which preserves people’s dignity.
- Data gathering and retention should be regulated by law so that the data is kept confidential. However, individuals should be able to access and control data about themselves retained by others.¹²

The Commonwealth *Privacy Act 1988* creates a scheme to regulate the collection and handling of personal data, but it is hardly a full implementation of article 17¹³ and (as the Issues Paper acknowledges¹⁴) Australians’ privacy is also protected by a hotchpotch of other laws including defamation, breach of confidence, trespass and telecommunications legislation. In the Centre’s view, this assemblage of laws constitutes a relatively strong regime for the protection of privacy, but leaves a significant gap when it comes to redress for violations which do not fit within the categories created by the existing law.

The Centre applauds the Issues Paper’s acknowledgment of article 2(3) of the ICCPR and the need to provide an effective remedy for all breaches.¹⁵ At present, invasions of privacy resulting from the misuse of personal data may be compensated through Part V of the *Privacy Act 1988*, but other invasions do not currently give rise to a right of redress (unless they amount to defamation, trespass

¹¹ Ibid, [8].

¹² See also, on freedom of information, the Committee’s General Comment 34 (CCPR/C/GC/34) on Freedoms of Opinion & Expression, discussed below and available at: <http://www2.ohchr.org/english/bodies/hrc/comments.htm>.

¹³ See ALRC Report 108, above n 4, [74.15].

¹⁴ Issues Paper, 7.

¹⁵ Issues Paper, footnote 86.

or breach of confidence). Examples may include electronic spying by journalists on board meetings¹⁶ or surveillance by security officials with invalid or improper authorisation.¹⁷

The Human Rights Committee's General Comment 34 on freedoms of opinion and expression¹⁸ also contains relevant guidance:

- The freedoms of expression and opinion are indispensable in a democratic society. They are essential for transparency and accountability and the maintenance of a human rights culture.
- Freedom of opinion is absolute.¹⁹ However, freedom of expression may legitimately be restricted under article 19(3). As with restrictions on any other human rights, they must be provided by law, and be necessary and proportionate to the legitimate aim to be achieved.
- Laws restricting free expression must be "formulated with sufficient precision to enable an individual to regulate his or her conduct accordingly."²⁰ These laws must not only comply with article 19(3) but also be broadly compatible with the aims of the ICCPR.
- Laws should generally not restrict freedom of political expression. Neither offence caused to political figures nor criticism (however trenchant) of Government policy can justify restriction under article 19(3).
- Restrictions imposed by, for example, defamation law should be subject to a defence of public interest. Penalties should not be excessive, and there should be "reasonable limits on the requirement for a defendant to reimburse the expenses of the successful party.... [T]he application of the criminal law should only be countenanced in the most serious of cases and imprisonment is never an appropriate penalty."²¹

Clearly, it is considered legitimate to restrict freedom of speech where it threatens to damage reputations or puts lives in danger, and Australian law already reflects this. However, article 19(3) also provides that it may be restricted 'for respect of the rights...of others.' Prominent examples of such restrictions include anti-vilification laws (which exist in Victoria²²) and laws protecting people's private lives from unjustified public exposure. The present proposal for a right of action for invasions of privacy would fall into the latter category.

In summary, the jurisprudence of the Human Rights Committee urges States parties to strike a balance between privacy and competing rights such as freedom of expression or considerations such

¹⁶ See eg *R v Broadcasting Standards Commission, ex parte the BBC* [2000] EWCA Civ 116.

¹⁷ See eg the Law Institute of Victoria's recent letter to Victoria Police regarding the use of unsworn affidavits: <http://www.liv.asn.au/getattachment/ee6685e1-813b-4f74-9c80-ac02b8c55d34/Unsworn-affidavits-submitted-in-support-of-Applica.aspx>.

¹⁸ As above, n 12.

¹⁹ *Ibid*, [9].

²⁰ *Ibid*, [25].

²¹ *Ibid*, [47].

²² See eg the *Racial and Religious Tolerance Act 2001* (Vic).

as organisations' (both State and private) requirements to collect personal data for legitimate service delivery purposes. The Centre recommends that any right of action for breaches of privacy in Australia be drafted with the principles above in mind.

European Court of Human Rights

The Issues Paper mentions that the extent of 'private life' under the European Convention on Human Rights remains unclear after the 2004 case *Von Hannover v Germany*.²³ On 13 October 2010, the Grand Chamber of the European Court heard arguments in *Von Hannover v Germany (No 2)*²⁴ in conjunction with *Axel Springer v Germany*²⁵ - another case concerning respect for private life.

Von Hannover (No 2) has been initiated by the original plaintiff Princess Caroline of Monaco and her husband Prince Ernst August, claiming *inter alia* that the German courts have failed to take into account the European Court's 2004 decision in subsequent privacy cases brought by them against magazine publishers.²⁶ The royal couple's representative pointed out during the hearing²⁷ that the photographs of them on a skiing holiday did not "make any contribution to a debate in a democratic society" or matter to the "function of the press as a public watchdog." "By allowing even the most trivial information to justify paparazzi pictures," the representative argued, "the German courts reduced the protection of privacy to a degree which is even lower than before the court's decision." He went on to say "...the applicants and other victim[s] of the so-called tabloid press need to know exactly when and where they are in a protected sphere" and called on the court to clear up the "great legal uncertainty and confusion" surrounding this issue.

Axel Springer is a case brought by the publisher of the German newspaper *Bild-Zeitung*, claiming a violation of the right to freedom of expression in relation to a ban on publication of compromising photos of a television star taking drugs. The publisher submitted that the commission of a crime was, in its very nature, a public act and the subject of the salacious articles in question had therefore relinquished his right to privacy when he took cocaine. In any case, it was argued, he was a famous actor and had already spoken on the record about his drug habits, further weakening his claim.

The German Government's representative argued that the pleadings in the two cases effectively contended that privacy rights were simultaneously over- and under-protected in Germany. In *Von Hannover*, the private lives of celebrities were said to be insufficiently protected, whereas the plaintiff in *Axel Springer* would have the Court believe that German newspapers are unfairly restricted in reporting on celebrities. The Government said that the German courts have had to perform a difficult balancing exercise between articles 8 and 10 of the European Convention, and that the present cases show they have struck the right balance – favouring neither privacy nor freedom of expression unduly.

²³ *Von Hannover v Germany* [2004] ECHR 294.

²⁴ Application 60641/08.

²⁵ Application 39954/08.

²⁶ See: <<http://cmiskp.echr.coe.int/gentkpps/pr.asp?40660/08>>.

²⁷ The hearing is reported at: <<http://inform.wordpress.com/2010/10/14/grand-chamber-hearing-von-hannover-no-2-and-springer-v-germany>> (the transcripts do not appear to be available on the official site).

Although the Grand Chamber has yet to issue a decision in these major joint cases, it may well do so during the development of an Australian right to sue for invasions of privacy, and the decision should help to clarify the European position.

Incidentally, the Centre notes that the European Court's jurisprudence effectively distinguishes between 'good' and 'bad' media – broadly speaking, it puts broadsheets with 'quality journalism in the public interest' in the former category and tabloids (used in the generic sense) in the latter.²⁸ Although the Court justified this distinction on the (arguably valid) basis that tabloid stories are often obtained "in a climate of continual harassment,"²⁹ the Centre would not necessarily endorse the adoption of such a distinction in Australian law. Rather, whether a particular article is in the public interest should be decided on a case-by-case basis. Similarly, the Court has made distinctions between prominent and less prominent public figures which raise difficult issues of equality before the law.³⁰ Whether the Grand Chamber will maintain these distinctions in the present cases remains to be seen.

Finally, an earlier European Court decision in *Hatton & Ors v The United Kingdom*³¹ is instructive as to how privacy protection operates in a different context. It concerned the UK Government's policy on night flights to/from Heathrow Airport, which the complainants said had adversely affected their sleeping patterns. The Grand Chamber (overturning the finding of the lower chamber) found no violation of article 8, holding that the Government had struck a "fair balance between the right of the individuals affected by [the relevant regulations] to respect for their private life and home and the conflicting interests of others and of the community as a whole."³²

Council of Europe

Although Resolutions of the Council of Europe are not, strictly speaking, jurisprudence, they are nonetheless influential in the European jurisdiction. Resolution 428 (1970) of the Consultative (Parliamentary) Assembly of the Council of Europe, which contains the *Declaration on mass communication media and human rights*, defines the right to privacy as follows:

The right to privacy consists essentially in the right to live one's own life with a minimum of interference. It concerns private, family and home life, physical and moral integrity, honour and reputation, avoidance of being placed in a false light, non-revelation of irrelevant and embarrassing facts, unauthorised publication of private photographs, protection from disclosure of information given or received by the individual confidentially. Those who, by their own actions, have encouraged indiscreet revelations about which they complain later on, cannot avail themselves of the right to privacy.³³

Considering this resolution was drafted more than 40 years ago, it provides a good working definition of privacy, although the meaning of 'given or received...confidentially' and 'encouraged

²⁸ See *Von Hannover v Germany*, above n 23, [59-60]

²⁹ *Ibid.*

³⁰ *Ibid.*, [73-75].

³¹ Application 36022/97.

³² *Ibid.*, [129].

³³ Full text available at: <http://assembly.coe.int/main.asp?Link=/documents/adoptedtext/ta70/eres428.htm>.

indiscreet revelations' may be cast into doubt in the context of social media and the modern culture of publicity (see further Part II below).

Inter-American Court of Human Rights

In 2009 the Inter-American Court handed down a judgment in *Escher v Brazil*,³⁴ a case about the tapping of two NGOs' telephone lines by military police. The police had sought a judicial warrant for the wiretaps, but the complainants alleged the warrant was issued without following the proper procedural safeguards. In June 1999, the police played extracts from the recordings they had made on a national news program and distributed transcripts of the NGOs' conversations to journalists.

The Office of the Public Prosecutor was not involved in the police investigation, and in fact issued a formal opinion stating that it was politically motivated and violated the NGOs' rights to intimacy, privacy and freedom of association under the Brazilian Constitution. The Inter-American court agreed, holding that Brazil had violated (*inter alia*) the NGOs' right to privacy, honour and reputation as recognised in Article 11 of the American Convention on Human Rights, by unlawfully intercepting, recording and disseminating their telephone conversations.³⁵

The standard human rights law test applied. Firstly, were the actions in question legal? If so, were they necessary and proportionate to a legitimate aim? The court found that the military police had not complied with domestic procedural requirements, and so fell at the first hurdle. Even if they had been authorised by law (as the Brazilian courts' dismissals implied), it found that the monitoring was improperly motivated and handled.³⁶

According to the Center for Human Rights and Humanitarian Law, *Escher v Brazil*:

...expands the scope and applicability of Article 11 of the ACHR to take scientific and technological progress into consideration. Importantly, the Court demands that the State adapt traditional means to protect the right to privacy as the fluid nature of information makes privacy more susceptible to abuse. While wiretapping was a widespread law enforcement mechanism at the time the ACHR was drafted, the Court appears to create legal precedent that will allow the Court to deal with other technologies in subsequent cases.³⁷

The Center also notes that *Escher* does not "invalidate the State's authority to limit privacy rights for the common good, as it firmly states that the right to privacy is not absolute" – it is just that the interceptions in question "served no legitimate law enforcement purpose."³⁸

The *Escher* case brought the Inter-American jurisprudence into line with that of the European Court in such comparable phone-tapping cases as *Halford v UK*³⁹ and *Liberty & Ors v UK*,⁴⁰ creating a solid

³⁴ Petition 12.353, Judgment of July 6 2009, English version available at: <http://www.corteidh.or.cr/docs/casos/articulos/seriec_200_ing.pdf>.

³⁵ *Ibid*, [164].

³⁶ *Ibid*, [162-163].

³⁷ See: <<http://hrbrief.org/2009/11/iacthr-expands-jurisprudence-on-right-to-privacy-in-the-americas>>.

³⁸ *Ibid*.

³⁹ Application 20605/92.

⁴⁰ Application 58243/00.

body of jurisprudence from the most prominent regional human rights courts from which the Australian Government could draw in devising a domestic action for invasion of privacy.

South Africa

South African courts have produced significant jurisprudence on privacy⁴¹ which could provide another useful reference – particularly since the incorporation of a right to privacy in South Africa's 1996 Constitution. The Constitutional Court delivered a judgment in 2007 in the case *NM v Smith*.⁴² This case concerned a biography of an HIV/AIDS rights campaigner in which the names of HIV positive people were disclosed without their consent. The three women in question sued the both the author and the subject of the biography, as well as the publisher, claiming *inter alia* that their right to privacy had been violated. Although this was a case concerning a book publisher, the court discussed the obligations of writers and publishers in the wider media as well.

The court held that publication of the biography in the knowledge that the women had not consented to the disclosure of their identities violated their right to privacy, and the defendants were ordered to pay damages accordingly.

The South African Freedom of Expression Institute submitted an amicus curiae brief arguing that negligence as a basis for fault unduly limited the right to freedom of expression. The court found that a simple measure such as the use of pseudonyms could have been taken by the author to protect the plaintiffs' privacy and dignity, and it could not be shown that the public interest demanded otherwise.⁴³

Chief Justice Langa warned that the common law must be developed with media defendants in mind, but concluded by agreeing with the majority that negligence was an appropriate standard (and that the defendants had indeed been negligent). Members of the media, he said, may make assumptions about facts such as the plaintiffs' consent, but these assumptions must be reasonable.⁴⁴

O'Regan J dissented, holding that neither the author nor the publisher was in fact negligent, but agreed with the majority on the general principles – paragraph 178 of His Honour's judgment bears repeating:

The nature of obligations imposed however is merely a requirement that the media establish that the publication is reasonable in the circumstances or that it is not negligent. Such obligations require the media to consider the constitutional rights at play and be persuaded that publication is nevertheless appropriate. The effect on the media, therefore, is to require them to act in an objectively appropriate fashion. In determining whether they have so acted, a court will bear in mind the particular constraints under which the media operate and will not impose a counsel of perfection in circumstances where it would not be realistic. The effect of such a rule would be to require editors and journalists to act with due care and respect for the right to privacy, prior to publishing material that infringes that

⁴¹ See Burchell, 'The Legal Protection of Privacy in South Africa: A Transplantable Hybrid,' *Electronic Journal of Comparative Law*, Vol. 13.1 (March 2009), available at: <<http://www.ejcl.org/131/art131-2.pdf>>.

⁴² *NM and Others v Smith and Others* (CCT69/05) [2007] ZACC 6.

⁴³ Per Madala J, [45].

⁴⁴ Per Langa CJ, [94-97].

right. It will require them to ask the question: is the publication of this information, although it is private information, nevertheless reasonable in the circumstances?

This case is a good example of how a right to privacy might work in practice in Australia, and demonstrates that courts can use such a right to develop the common law in a way which prioritises neither free speech nor privacy unduly.

Ireland

Although the Irish Constitution of 1937⁴⁵ does not contain an explicit right to privacy, an implied right has been recognised by the Irish courts, notably by the High Court in *Kennedy & Arnold v Ireland*,⁴⁶ in relation to article 40 (entitled 'Personal Rights').

In *Kennedy & Arnold*, the court held that the illegal wiretapping of two journalists was in violation of the constitution, stating:

The right to privacy is one of the fundamental personal rights of the citizen which flow from the Christian and democratic nature of the State The nature of the right to privacy is such that it must ensure the dignity and freedom of the individual in a democratic society. This cannot be insured if his private communications, whether written or telephonic, are deliberately and unjustifiably interfered with.⁴⁷

Interestingly, the Irish Government introduced a Privacy Bill in 2006 aiming to create a statutory right to sue for violations of privacy.⁴⁸ Section 2 of this Bill provided that '[a] person who, wilfully and without lawful authority, violates the privacy of an individual commits a tort (to be known, and in this Act referred to, as the "tort of violation of privacy," and that the tort was to be 'actionable without proof of special damage.'⁴⁹ 'The privacy to which an individual is entitled,' the Bill provided in section 3, 'is that which is reasonable in all the circumstances having regard to the rights of others and to the requirements of public order, public morality and the common good.' We note that the more stringent 'highly offensive to a reasonable person' standard propounded in *ABC v Lenah Game Meats*⁵⁰ was not adopted in this section. Defences (in section 5) included authorisation by law and 'fair and reasonable' news-gathering 'done in good faith' and 'for the public benefit.'⁵¹ This Bill, along with its Explanatory Memorandum⁵² and Working Group Report,⁵³ could be a useful precedent for an analogous Australian law.

⁴⁵ Text available at: <[http://www.taoiseach.gov.ie/attached_files/html_files/Constitution_of_Ireland_\(Eng\)Nov2004.htm](http://www.taoiseach.gov.ie/attached_files/html_files/Constitution_of_Ireland_(Eng)Nov2004.htm)>.

⁴⁶ [1987] IR 587.

⁴⁷ Ibid, per Hamilton P.

⁴⁸ See: <<http://www.justice.ie/en/JELR/Pages/PR07000903>>.

⁴⁹ Full text available at: <<http://www.justice.ie/en/JELR/PrivacyBill06.pdf/Files/PrivacyBill06.pdf>>.

⁵⁰ [2001] HCA 63.

⁵¹ Ibid.

⁵² See <<http://www.justice.ie/en/JELR/PrivacyBillExpMem.pdf/Files/PrivacyBillExpMem.pdf>>.

⁵³ See <<http://www.justice.ie/en/JELR/WkgGrpPrivacy.pdf/Files/WkgGrpPrivacy.pdf>>.

The Centre notes this Bill does not appear to have passed the Irish Seanad,⁵⁴ and the latest news update we have been able to find suggests opposition from media organisations is the reason.⁵⁵

The Philippines

In 1998, the Supreme Court of the Philippines decided *Ople v Torres*,⁵⁶ in which it called privacy “one of the most threatened rights of man living in a mass society,” threatened by “governments, journalists, employers, social scientists etc.”⁵⁷ In this instance, the court struck down an executive order requiring the submission of private data for the provision of government services without sufficient safeguards for the use of such data.

Like South Africa, the Philippines has an explicit right to privacy in its Constitution, albeit one limited to the privacy of “communication and correspondence.”⁵⁸ The Supreme Court pointed to several other Constitutional protections (of the person, home and property) to hold that the right to privacy implicitly extends further to protect citizens from all sorts of unjustified invasions. Additionally, the Court noted that the Philippines “Civil Code provides that ‘[e]very person shall respect the dignity, personality, privacy and peace of mind of his neighbors and other persons’ and punishes as actionable torts several acts by a person of meddling and prying into the privacy of another.”⁵⁹

In 2006 the Supreme Court heard a case against the Government’s proposal for a national ID card.⁶⁰ In contrast to *Ople*, the majority decided that the data requirements (personal particulars plus a photograph and thumbprints) were reasonable and did not violate the right to privacy identified in earlier case. In reaching this conclusion, the Court compared the requirements with others that had been held to ‘embarrass or humiliate’ in US jurisprudence, implying that such a test was appropriate in determining the ‘respect for dignity, personality, privacy and peace of mind’ required by the Civil Code. This case helped to set the boundaries of the right to privacy in Philippines law, and is a further indication of how Australian courts might approach the issue (if a comparable right to privacy were to be included in our law).

⁵⁴ See <<http://www.oireachtas.ie/viewdoc.asp?DocID=6061&&CatID=59&StartDate=01%20January%202006>>.

⁵⁵ See <<http://www.irishtimes.com/newspaper/ireland/2009/0511/1224246255312.html>>.

⁵⁶ GR 127685, 23 July 1998.

⁵⁷ Per Puno J, final paragraph of His Honour’s judgment.

⁵⁸ 1987 Constitution of the Republic of the Philippines, article III(3).

⁵⁹ Referring to article 26 of the Civil Code.

⁶⁰ *Uno et al v Director-General, National Economic & Development Authority et al* (GR 167798 of 19 April 2006), heard concurrently with *Muna et al v Ermita et al* (GR 167930).

Part II – The Contemporary Context

Although the focus of the jurisprudence above is on intrusions by governments and the mainstream media, the landscape has shifted in recent years⁶¹ and any reforms to privacy law will be inadequate if they do not take this shift into account. Australians who use the Internet⁶² – in particular social media – have increasingly been compelled to strike a compromise between privacy and ‘connectedness.’ Most accounts created online require users to accept a privacy agreement,⁶³ which usually provides that the company in question may retain personal data and/or use it for marketing and associated purposes. However, not having an account with an email provider (such as Google or Microsoft) or on a social media site (such as Facebook or Google+) now means risking social isolation, especially for younger people.⁶⁴

In some cases, data is even retained and used without the user accepting any agreement or attempting to set up an account. The independent privacy authority for the German state of Schleswig-Holstein recently declared⁶⁵ that Facebook’s ubiquitous ‘Like’ button was in breach of both German and European data protection laws because websites featuring it did not declare what data was being gathered or how it would be used when a user clicked on the button. Other reports of a lack of respect for individual privacy, such as ‘personalised advertising,’⁶⁶ or the recent discovery by an Australian programmer of Facebook’s aggressive use of tracking cookies,⁶⁷ or Google, Apple and Microsoft’s encouragement to store personal files in ‘the cloud’ (ie on their servers) should also be cause for concern.

In addition, information placed online voluntarily is considered fair game by the mainstream media. Blogs, open databases and social media sources have made it far easier for journalists to do background research on people featuring in articles.⁶⁸ Such research may be perfectly legitimate for

⁶¹ See eg: <<http://www.smh.com.au/opinion/society-and-culture/facebooks-power-should-worry-us-all-20111009-1lfu0.html>>.

⁶² The latest Australian Bureau of Statistics data suggests this group comprises more than three quarters of the population - see: <<http://www.abs.gov.au/Ausstats/abs@.nsf/mf/8146.0>>.

⁶³ See eg privacy agreement for Google accounts: <<http://www.google.com/privacy/privacy-policy.html>> and Facebook accounts: <<http://www.facebook.com/about/privacy>>.

⁶⁴ See eg: <<http://www.smh.com.au/technology/technology-news/facebook-and-switching-it-off-is-it-possible-20111010-1lg96.html>>.

⁶⁵ See: <<https://www.datenschutzzentrum.de/presse/20110819-facebook-en.htm>>.

⁶⁶ See: <http://socialtimes.com/google-launches-personalized-ads-handly-feature-or-privacy-storm_b54988>.

⁶⁷ See: <<http://nikcub.appspot.com/logging-out-of-facebook-is-not-enough>>.

⁶⁸ A survey conducted by PR firm Cision and Don Bates of The George Washington University’s Master’s Degree Program in Strategic Public Relations in 2010 found that an overwhelming majority of reporters and editors now depend on social media sources when researching their stories - see: <http://us.cision.com/news_room/press_releases/2010/2010-1-20_gwu_survey.asp>. Although such a survey does not appear to have been conducted recently in Australia, anecdotal evidence suggests the results would be similar here.

the most part, but in certain cases it has the potential to violate the right to privacy (eg if it is aimed at revealing embarrassing aspects of subjects' private lives purely in the interests of titillation⁶⁹).

Finally, perhaps the most troubling privacy implication of placing so much personal information online is that it can lead to targeting by criminals – particularly of the young and vulnerable who do not fully understand the implications of sharing personal details in a publicly-accessible forum. For example, in May 2010 a man was charged with the murder of a young Sydney woman he had befriended under a false identity on Facebook,⁷⁰ and several other crimes in Australia and the UK have been linked to the site.⁷¹

It is not possible to provide a full exposition of all of the new threats to privacy which have emerged in recent years (and continue to emerge). However, even this brief overview demonstrates that the right to privacy faces ever greater pressures and requires further legal protection.

Part III – What does this mean for Australia?

In debates about rights protection, the watchword is proportionality. Any statutory right to sue for invasions of privacy in Australia should be proportionate to the aim of protecting people's private and family lives. One factor in determining the proportionality of such a measure is whether it impinges impermissibly on the rights of others. In the present case, this is likely to mean others' right to freedom of expression.

In our view, there are two principal means by which the Australian Government could ensure freedom of expression would be adequately protected after the institution of a right to sue for breaches of privacy.

One, which other Western jurisdictions have adopted, is to have a statutory right to freedom of expression which can be raised in court proceedings. It is submitted that legislation providing for a right to sue for privacy violations would present an ideal opportunity to reinforce the High Court's line of jurisprudence in *Lange v ABC*⁷² and related cases implying a freedom of political expression into the Australian Constitution.

A second option would be to legislate for a right to privacy only, but to include a robust defences provision, similar to that in the Irish Bill⁷³ or the NZ common law defence.⁷⁴ This would accord with

⁶⁹ See eg: <<http://www.pbs.org/mediashift/2009/11/young-political-candidates-confronted-by-digital-past-on-facebook321.html>> or, for Australian examples including Family Court and ABN records: Bannister, 'The Public/private divide: personal information in the public domain,' [2002] *Privacy Law & Policy Reporter* 3, available at <<http://www.austlii.edu.au/au/journals/PLPR/2002/3.html>>.

⁷⁰ See: <<http://www.abc.net.au/news/2010-05-17/teens-murder-sparks-facebook-privacy-plea/829850>>.

⁷¹ See: <<http://www.dailytelegraph.com.au/news/the-inside-story-of-the-facebook-murders/story-e6freuy9-1225854713040>>.

⁷² [1997] HCA 25.

⁷³ Above n 45.

the recommendations of the Australian Law Reform Commission (ALRC) in its 2008 report,⁷⁵ which was mindful of the risk of encroaching unduly on competing rights such as freedom of expression⁷⁶ and the rights of corporations to collect personal information for legitimate purposes.⁷⁷

Of course, the content of concepts such as 'legitimate public concern' and 'fair and reasonable' news-gathering or law enforcement measures⁷⁸ will be contentious. However, it is likely that the defendants in a privacy case will be Government agencies or media organisations which are more than capable of advocating broad interpretations of these concepts in their defence. Indeed, what constitutes 'responsible journalism' may come to be defined by cases brought under this proposed law, just as it has under comparable English law.⁷⁹

Even with a statutory tort in place, the reality is that litigation will remain a daunting prospect for most individuals who wish to seek redress for a violation of their human rights. In addition, class/representative actions may be possible, as canvassed in the Issues Paper,⁸⁰ but they are difficult in Australia due to the limited litigation-funding culture,⁸¹ which means systemic or serial privacy violations affecting multiple victims are unlikely to be addressed by litigation. The Centre recommends the Australian Government adopt a position between that of the United States (where litigation is the primary means of seeking redress) and Europe (where the European Convention, Data Protection Directive⁸² and a proliferation of Privacy Commissioners combine to create a strong regulatory environment).

Currently, those whose privacy is infringed by a private company may complain to the Office of the Australian Information Commissioner, which is empowered under the *Privacy Act 1988* to attempt to resolve complaints by conciliation (with reference to *inter alia* human rights and the National Privacy Principles).⁸³ However, the Office cannot impose fines⁸⁴ and its jurisdiction is restricted to certain large Australian businesses.⁸⁵ These facts, in combination with the current inability to initiate legal

⁷⁴ See *Hosking v Runting and Pacific Magazines NZ Ltd* [2004] CA 101-03. NB the judges of the NZ Court of appeal differed on this point – for an overview see eg Evans, 'Hosking v Runting: balancing rights in a privacy tort,' [2004] *Privacy Law & Policy Reporter* 28.

⁷⁵ ALRC Report 108, above n 4.

⁷⁶ *Ibid*, Recommendation 5-4(c) and 263-268.

⁷⁷ *Ibid*, 263.

⁷⁸ See Irish Bill, above n 45.

⁷⁹ See eg: 'Lily Allen wins damages over Mail Online Article,' *The Guardian*, 23 March 2011, available at: <<http://www.guardian.co.uk/media/2011/mar/23/lily-allen-wins-damages-over-mail-online-article>>, or *McKennitt v Ash* [2005] EMLR 10, per Eady J (a UK case in which the court highlighted the shift taking place in that country in terms of expectations of privacy protection).

⁸⁰ Issues Paper, 49-50.

⁸¹ Funding is largely limited to commercial cases - see eg: Legg et al, 'Litigation Funding in Australia,' UNSW Law Research Paper No. 2010-12. Available at SSRN: <<http://ssrn.com/abstract=1579487>>.

⁸² Formally *Directive 95/46/EC of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data*.

⁸³ See *Privacy Act 1988* (Cth), ss 27 and 29.

⁸⁴ See: <<http://www.privacy.gov.au/complaints>>.

⁸⁵ See *Privacy Act 1988* (Cth), s 6C.

proceedings, mean an Australian whose privacy has been violated by a corporation – especially a foreign corporation – has poor prospects of receiving an effective remedy.

Therefore, while the Centre would welcome a right to sue for serious privacy breaches, we also recommend the Government put in place reforms to cover situations in which litigation is inappropriate or impossible. The Information Commissioner should be empowered to impose fines and/or compensation payments on corporations (if conciliation is unsuccessful). In its 2008 report, the ALRC discussed the powers of the Office of the Privacy Commissioner (now Information Commissioner), and recommended that further penalties be incorporated into the Privacy Act to strengthen the Commissioner's enforcement role.⁸⁶ Similarly, a Senate References Committee on Communications recommended in April this year that the Commissioner's role be bolstered to address online privacy concerns⁸⁷ (in addition to the implementation of a statutory right to privacy⁸⁸).

In view of the context discussed above and the domination of the data-collection market by foreign corporations such as Facebook and Google, the Centre also recommends that options be explored for the exercise of regulatory jurisdiction over such corporations. Obviously, enforcement would be difficult against any company which has no physical presence in Australia, but this is not true of Facebook,⁸⁹ Google,⁹⁰ Apple⁹¹ or Microsoft,⁹² which all have offices in Sydney.

Electronic Frontiers Australia (EFA), an organisation which has advocated online privacy rights for many years, stated in a submission to the Privacy Commissioner in 2004:

The fact is that, under existing Australian law, individuals have almost no privacy 'rights' in the online environment and even the few rights they allegedly have are not protected adequately and are difficult, sometimes impossible, to have enforced. The lack of rights arises from a combination of factors, including but not limited to, uncertainty regarding the definition of 'personal information'; no requirement to obtain consent before collecting personal information; use of bundled 'consents' including to disclose information to unspecified 'partners'; the small business exemption; and/or technological developments.⁹³

In our submission, this remains a reasonable characterisation of the law. Despite recommendations from inquiries conducted by the Privacy Commissioner, the Senate and three Law Reform Commissions, protection of Australians' privacy rights (both online and offline) has improved little in the intervening years. As such, and given security and commercial environments which are

⁸⁶ See Report, above n 4, at 45.23-45.24 and Chapter 50.

⁸⁷ Senate Standing Committee on Communications, inquiry into the adequacy of protections for the privacy of Australians, April 2011, Recommendations 2-6. Report available at: http://www.aph.gov.au/Senate/committee/ec_ctte/completed_inquiries/index.htm.

⁸⁸ Ibid, Recommendation 8.

⁸⁹ See: <http://www.facebook.com/careers/department.php?dept=sydney>.

⁹⁰ See: <http://www.google.com/about/corporate/company/address.html>.

⁹¹ See: <http://www.apple.com/au/contact>.

⁹² See: <http://www.microsoft.com/worldwide/phone/contact.aspx?country=Australia>.

⁹³ Electronic Frontiers Australia Inc, *Submission to the Office of the Privacy Commissioner Review of the Private Sector Provisions of the Privacy Act 1988*, 22 December 2004.

increasingly prejudicial to privacy rights,⁹⁴ it is now incumbent on the Government to rectify this state of affairs.

Conclusion/Recommendations

The Centre recommends that a cause of action for serious invasions of privacy be instituted in Australia, drawing on the foreign jurisprudence and legislation outlined above as appropriate.

In addition, the Centre recommends that the powers of the Australian Information Commissioner under the Privacy Act be strengthened to address serious invasions of privacy which are systemic and/or affect those who cannot afford private legal proceedings.

The Centre acknowledges the tension between privacy and freedom of expression, but in an age when information (particularly personal information) has arguably become a form of currency, its misappropriation and misuse must be restrained. A major contraction of the private sphere as we know it is already underway – indeed, Facebook’s founder has declared privacy is no longer a ‘social norm’ – at least not online.⁹⁵ However, this trend facilitates exploitation, and individuals should be given effective means to resist it when it operates to their serious detriment.

When it comes to the mainstream media, there is certainly a strong argument to be made that journalists need to be free to comment on public figures – particularly those who seek the limelight or invite scrutiny themselves. Nevertheless, a carefully-drafted law, taking into account the balancing exercises conducted in other jurisdictions, could preserve this freedom while ensuring it is not employed as an excuse for unjustifiable incursions into people’s private lives.

⁹⁴ See eg: <<http://www.guardian.co.uk/technology/2010/jan/11/facebook-privacy>>.

⁹⁵ Ibid.

Short Answers to Specific Questions Posed in Issues Paper

Q1. Do recent developments in technology mean that additional ways of protecting individuals' privacy should be considered in Australia?

A. Yes

Q2. Is there a need for a cause of action for serious invasion of privacy in Australia?

A. Yes

Q3. Should any cause of action for serious invasion of privacy be created by statute or be left to development at common law?

A. Statutory protection would be preferable.

Q4. Is 'highly offensive' an appropriate standard for a cause of action relating to serious invasions of privacy?

A. This is a high bar to a successful claim, and if the right to freedom of expression were protected separately in the legislation, a lower bar would arguably be appropriate.

Q5. Should the balancing of interests in any proposed cause of action be integrated into the cause of action (ALRC or NSWLRC) or constitute a separate defence (VLRC)?

A. As long as the law does not unduly prioritise the right to privacy or competing rights such as the right to freedom of expression, the Centre has no firm view on this. However, the VLRC's contention that "a plaintiff should not have to prove a negative, such as the lack of a countervailing public interest" appears to have merit.

Q9. Should a non-exhaustive list of activities which could constitute an invasion of privacy be included in the legislation creating a statutory cause of action, or in other explanatory material? If a list were to be included, should any changes be made to the list proposed by the ALRC?

A. Sometimes the inclusion of such lists in legislation – even when they are expressed to be non-exhaustive – can have unintended limiting effects. After all, it is difficult to anticipate challenges to privacy that might arise in the future, given the number that have arisen in such a short time with the new technologies of the last decade. However, a list in accompanying explanatory material could be appropriate as an interpretive guide. The examples identified by the ALRC could be supplemented with examples from the international case law outlined above in Part I.

Q11. Should particular organisations or types of organisations be excluded from the ambit of any proposed cause of action, or should defences be used to restrict its application?

A. The Centre agrees with the Law Reform Commissions that no blanket exemptions would be warranted.

Q12. Are the remedies recommended by the ALRC necessary and sufficient for, and appropriate to, the proposed cause of action?

A. The ICCPR requires States parties to provide those whose rights have been breached with effective remedies (article 2(3)(a)). In the Centre's view, the range of remedies proposed by the ALRC would satisfy this requirement.

Q15. Should any proposed cause of action also allow for an offer of amends process?

A. Yes, provided the process includes a requirement that victim must freely and voluntarily accept the offer of amends.

Q16. Should any proposed cause of action be restricted to natural persons?

A. Yes – the Centre sees the proposed law as being in the nature of a human rights protection, and human rights are owed only to natural persons.

Q18. Within what period, and from what date, should an action for serious invasion of privacy be required to be commenced?

A. The Centre does not have a view on the length of the limitation period per se, but we support the notion that there should be scope for courts to extend the period if that is appropriate in the circumstances. Overly strict procedural requirements should not prevent the pursuit of genuine human rights claims.

Questions 6-8, 10, 13, 14, 17 & 19.

A. The Centre defers to the expertise of others (see above, footnote 4) on these questions.