PRIVACY REFORM and the MEDIA

By Lyn Kemmis

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In March 2002, a sentencing hearing was held in Melbourne, Victoria. It concerned the trial of a husband who had been convicted of raping his estranged wife, 'Jane Doe'.

Three ABC Radio news reports of the hearing were broadcast between 4pm and 6pm that same day. All named the husband, and stated that the crimes had occurred within marriage (thereby effectively identifying Jane Doe). One bulletin referred to Jane Doe by name as the victim.

The broadcasts were a clear breach of the relevant law relating to the publication of information identifying a sexual assault victim. The court commenced criminal proceedings against the journalist and sub-editor responsible for the reports, and both pled guilty.

In ordinary circumstances, that is where this matter might have ended. But Jane Doe brought a personal, civil action against the journalist, the sub-editor and the ABC. Among her claims, she alleged that she had a right to privacy under Australian law, and that the actions of the defendants amounted to a breach of that right. Hampel J agreed:

> '. . . this is an appropriate case to respond, although cautiously, to the invitation held out by the High Court in *Lenah Game Meats* and to hold that the invasion, or breach of privacy alleged here is an actionable wrong which gives rise to a right to recover damages according to the ordinary principles governing damages in tort.'[1]

Jane Doe v ABC has created a bit of a legal anomaly. It has not been appealed, but it is yet to be endorsed by any higher court in subsequent cases. This means that the question of whether there is a right to privacy in Australia – and if so, what that actually means – is still very much open to debate.

This article considers the status of privacy law from the media perspective and how the balance is struck between private and public interests. It examines the current legal protections relating to private information; recent common law developments both in the UK and under domestic law; and the recent Australian Law Review Commission (ALRC) privacy review.

UK DEVELOPMENTS: JK ROWLING AND ARTICLE 8

The UK has proved a particularly fertile ground for cases dealing with privacy over the last ten years. This development is not part of an organic trend originating in the common law; but stems from the passage of the *Human Rights Act* of 1998, which incorporates the provisions of the European Convention on Human Rights into British law.

Article 8 of the Convention provides that '*[e]veryone has the right to respect for his family and private life*'. Article 10 provides the counterbalance: '*[e]veryone has the right to*

freedom of expression', and goes on further to limit the right of expression as 'subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society . . . for the protection of the reputation or rights of others.'

The adoption of Article 8 into domestic UK law meant that judges needed to wrestle with the concept of how to translate into a legal right the idea of respect for 'private life' – and, further, how to manage the balancing act between this right to privacy and the right to freedom of expression under Article 10. The UK cases interpreting Article 8 have construed this privacy right within the umbrella of the previously existing common law action of 'breach of confidential information', which has been extended to cover the move novel formulation of 'misuse of private information'.

Three major privacy decisions were handed down in 2008. In *Ash v McKennitt*,[2] the court restricted the publication of a memoir by a former friend of singer, Loreena McKennitt, which discussed aspects of the singer's life (including her health, her state of mind after the death of her fiancé, and the details of a private property dispute with the author of the memoir). The court accepted on appeal that the defendant owed a duty of confidence in relation particular types of private information disclosed in the book.

Max Mosley v News Group Newspapers Ltd[3] concerned a high-profile member of the motor sports scene, who was the subject of a *News of the World* article titled 'F1 Boss has sick Nazi Orgy with 5 Hookers'. The decision debunked the link drawn by the defendant between the plaintiff's S&M activities and Nazi themes. The judge further denied the defendant's claim that, even without this link, publication of such material was in the public interest, no matter how unusual the plaintiff's proclivities: as 'people's sex lives are to be regarded as essentially their own business'.[4]

But probably the most concerning case for the media was the court of appeal decision of *Murray v BPL*.[5] Mrs Murray (or, as she is better known, JK Rowling) and her husband commenced an action on behalf of David Murray (their infant son), claiming that photographs taken by a BPL photographer were an infringement of David's right to privacy under Article 8. The photographs were taken with a long-angled lens from across the road on a public street, and depicted the son with his mother. It was not argued that the photographs contained any additional private information, or that the child suffered any anxiety or distress from being photographed.

BPL applied for summary judgment, and the judge found in favour of BPL and struck out the claim. The Murrays appealed.

In the process of deciding whether BPL had a case to answer, the Court of Appeal set out in full the relevant test. The first question is 'whether there is a reasonable expectation of privacy'. This is a broad question, which takes into account all the circumstances of the case, including:

> 'the attributes of the claimant, the nature of the activity in which the claimant was engaged, the place at which it was happening, the nature and purpose of the intrusion, the absence of consent and whether it was known or could be inferred, the effect on the claimant and the circumstances in which and the purposes for which the information came into the hands of the publisher.'[6]

On considering the above factors, if a court finds that there is a reasonable expectation of privacy, it must then turn to the second question: *'how the balance should be struck as between the individual's right to privacy on the one hand, and the publisher's right to publish on the other.'*[7]

Ultimately, the Court of Appeal found for the Murrays, striking out the finding of summary judgment and remitting the matter for trial. But, although the matter is yet to be heard, this is of itself a highly concerning finding for the media: that a photograph taken in a public street may contain enough 'private information' to enable legal action.

AUSTRALIAN CASE LAW: *JANE DOE v ABC*

In Australia, the potential for a right to privacy at common law was first seriously considered (in obiter) in *ABC v Lenah Game Meats*.[8] Gleeson J posited a test: that a tort of 'breach of privacy' could occur where disclosure of information would be considered 'highly offensive' to a person of ordinary sensibilities.[9]

The first case that took up the suggestion to re-examine 'breach of privacy' was the 2003 Queensland District Court case *Grosse v Purvis*.[10] This case did not concern the mainstream media, but cast 'stalking' behaviour towards >>

Far from representing a 'trend' in common law, privacy law in the UK has developed as a direct consequence of the UK *Human Rights Act*.

a woman by her ex-partner as an invasion or breach of privacy which could be the subject of a civil action (in addition to other criminal sanctions that might also apply). Skoien CJ said that the appropriate test to determine whether privacy had been breached was the 'highly offensive to a person of ordinary sensibilities' test articulated by Gleeson J in *Lenah Game Meats*.

The *Jane Doe* case was handed down three years later in the County Court of Victoria. In relation to the publication of the identity of the plaintiff, Hampel J found that this was a breach of statutory duty (for which the defendants were personally responsible to the plaintiff), a breach of duty of confidence, and a breach of privacy. In relation to the latter two actions, her honour reasoned that although there was no personal relationship between the plaintiff and the defendants in the traditional sense – the statutory rule protecting the identity of a victim of sexual assault meant that both defendants should have been on notice that Jane Doe's identity was both confidential, and something to be kept private.

But the judgment in this case still contains some conceptual difficulties as regards whether a right to privacy can or should be established in Australian common law. First, the reasoning for the existence of the privacy right as a tort in Australia is difficult to follow, beyond the argument that the time is ripe for such a development. Hampel J states: '*Lenah Game Meats and the UK cases . . . demonstrate a rapidly growing trend towards recognition of privacy as a right in itself deserving of protection.*'[11] But this reasoning is problematic. Far from representing a 'trend' in the common law, UK developments in privacy law are a distinct consequence of the passage of the UK *Human Rights Act*, which brings Article 8 into domestic British law. Without the passage of a similar law here in Australia, there is no basis for Australian decision-makers to use these cases as a reason to follow a similar judicial path.

Second, the reasoning of this judgment does not explain why this *particular* case amounts to a breach of privacy. The publications made by the defendants clearly should not have been made, evidenced by the contempt of court finding. But, reading *Jane Doe*, it is hard to make the connection between the conduct of the defendants on one hand, and the finding of breach – a connection that could be expected to provide some guidance as to other circumstances in which the media might be in breach of such a right. The ABC has elected not to appeal this decision; which means that no elucidation in relation to this case is forthcoming.

The more recent case – *Giller v Procepts*[12] – demonstrates a development in a different direction: expansion of privacy-like rights under the auspices of an action for breach of confidential information. This case concerns an estranged husband and wife. After the break-up of their relationship, the husband showed videos of the couple engaged in sexual activity to several of his wife's work colleagues and relatives. Among other actions, the wife argued that the husband's conduct amounted to either a breach of confidence, or breach of privacy.

Neither the trial judge, nor the Court of Appeal, took the opportunity to establish whether in their view, breach of privacy is actionable at common law. However, the Court of Appeal found for the plaintiff that breach of confidence is actionable even if the harm suffered amounts solely to – distress – and awarded damages to the wife on this basis. Some commentators have argued that this reflects an expansion of the breach of confidence action along the lines of the UK decisions; allowing breach of confidence to apply to plaintiffs who have suffered only hurt and embarrassment where confidential information has been misused.

LAW REFORM: A STATUTORY CAUSE OF ACTION?

In 2007, the ALRC began an extensive review on privacy. Given the uncertainty created by cases like *Jane Doe*, it is not surprising that one of the questions on the agenda was whether there should be a statutory cause of action for privacy.

The final report was tabled on 11 August 2008.[13] Tucked away in Recommendation 74 was a recommendation that a cause of action for a 'serious invasion of privacy' be introduced by federal legislation. The ALRC also provides a brief outline of how this right should be formulated. Prospective claimants should be required to show that:

(a) there is a reasonable expectation of privacy; and
(b) the act complained of is 'highly offensive' to a 'reasonable person of ordinary sensibilities'.

The ALRC also offered the view that, in determining when the cause of action is made out, courts should be required to weigh any right to privacy against any countervailing 'public interest' in publication.

The government has responded to the ALRC report, and announced an initial stage of reform scheduled over the next two years, during which many of the recommendations from the report will be implemented. However, the statutory cause of action remains in limbo – part of a second stage of reform that the government has agreed to consider; but with no timetable set for deliberation or implementation.

SUPPORT FOR THE STATUS QUO: CURRENT LEGAL PROTECTIONS FOR PRIVATE INFORMATION

The best articulation of the media position is to be found in the Australia's Right to Know[14] coalition's public statements and submissions to the ALRC, many of which are quoted in the ALRC's final report.[15] The basic argument of the media

is that the status quo in relation to privacy is working. A regulatory model currently deals with privacy issues raised by mainstream media, and the volume of complaints related to privacy is extremely low.[16] This suggests that at least in relation to the mainstream media's practices, there is no 'gap', or demonstrable need for the creation of such a statutory right.

While there is no law solely dealing with privacy in Australia, it should also be noted that many laws operate to protect private information. Some laws relate to the means by which information is gathered; restricting the use of cameras or listening devices to record private conversations.[17] Others relate to types of intrusion, such as trespass or nuisance. There are also extensive restrictions in publishing any information about proceedings in the family court, including details about divorce settlements, and arrangements for the custody of children.[18] It is also prohibited to publish any information that identifies a child as involved in criminal proceedings, adopted, or subject to an order of a child protection agency.[19]

Breach of confidence, already mentioned in this article, has been used to restrict the media from publishing material. In *AFL v The Age*,[20] publication of the names of three AFL players who had tested positive for drugs was prohibited by the court. The media at large was also put on notice that the identity of any player who had tested positive under the relevant illicit drugs policy was confidential.

Defamation law also has some fascinating overlaps with privacy. In *Ettingshausen*,[21] a prominent footballer was photographed naked in a change room. While this case was argued through the vehicle of defamation, the end result penalised the publication of a revealing photo, thereby granting the subject of that photo a kind of *de facto* privacy.

Before the uniform defamation laws came into effect in 2006, another area of overlap between defamation and privacy used to exist in four states under the 'truth' defence.[22] In these states, defendants relying on the argument that the imputations in their story were true also needed to establish that publication was 'in the public interest' or 'to the public benefit'. This meant that stories that were completely accurate, but unrelated to someone's public life, might not be defensible – clearly a layer of protection for private life. But on the passage of the uniform law, it was the alternate test ('truth alone') that became the national standard. Evidently, in this context, legislators did not think that there was much to gain from drawing a line between public and private activity in determining what should be published.

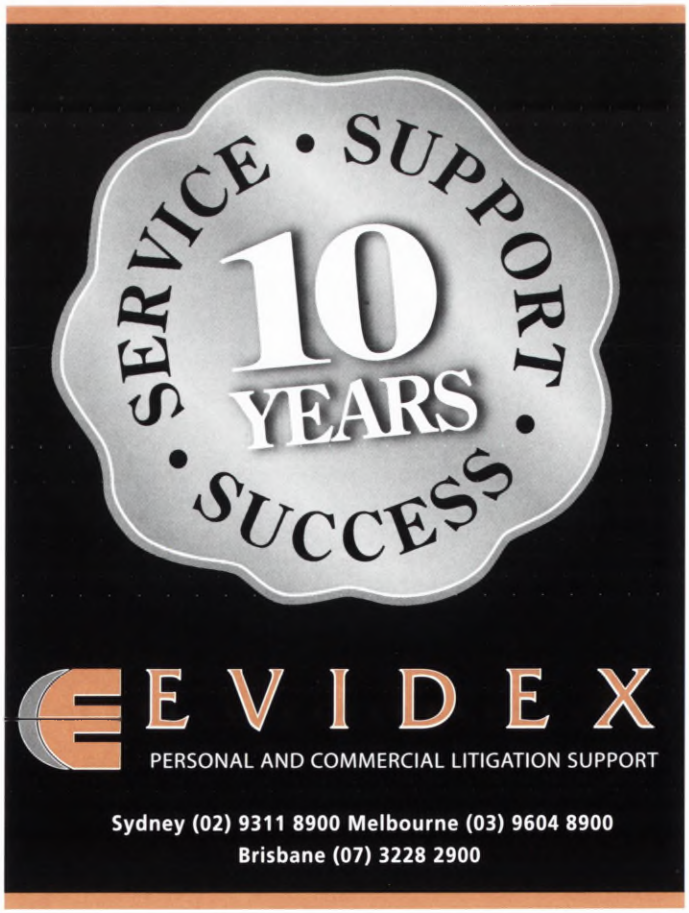
TELLING STORIES IN A PRIVATE/PUBLIC WORLD

Many people might assume that only the most salacious or exploitative tabloid-style media will be affected by the development of a privacy right. But this overlooks the vast amount of fact-based programming produced across TV, newspapers and online. There are many stories that might be covered by a news organisation, where each and every person featured in that story has not been asked to give their consent. Such stories might be responsibly researched and reported, entirely accurate, and yet vulnerable to an injunction or lawsuit, under a privacy regime, if an individual considers it intrusive. The coverage of the bushfires may well have been considered intrusive by people whose grief was captured in images or footage on national television – but these images galvanised the national and international community into action.

Three key questions will determine how prohibitive a law on privacy will be on the media:

1. how the concept of 'private' will be interpreted,
2. under what circumstances the media will be considered to be 'on notice' that something might contain private information, and
3. how the analysis balancing privacy interests against a counter-balancing public interest in publishing the information will be conducted.

The objective test for privacy referred to by the ALRC, and much of the case law, relates to material that if published would be '*highly offensive*' to a '*reasonable person of ordinary sensibilities*'. It will be interesting to see how judges define this 'reasonable person'. There are vastly disparate standards of privacy within the community. Those who participate in online networking sites like Facebook and Twitter update friends, colleagues and an ever-widening network of other individuals with minute-by-minute information about their lives and whereabouts, to a degree unthinkable even ten years ago. >>



It will often be difficult for media organisations in possession of information to decide if is private. The photos that were the subject of the *Murray* litigation would be considered completely innocuous by most people; and yet the publisher will have to answer for them at trial. By contrast, photos that might appear to be very intrusive (such as paparazzi-style grainy photographs of celebrities on a beach) can be approved by the subject.

In Australia, to date, all the litigants in the common law privacy cases have been low-profile, ordinary individuals. This is in contrast with the UK privacy cases that have been dominated largely by high-profile, celebrity cases; at least some of which are arguably not so much about privacy, as about maintaining control over one's public image.[23] If it is possible for high-profile individuals to obtain injunctions or to pursue legal action in relation to a story with aspects they have not explicitly approved, there is a real risk of a 'chilling' effect', whereby publishers will decide that going ahead with unapproved stories or photographs is just not worth the potential cost of litigation and consequent drain of resources, even if there is a good chance that the publication is defensible.

There is also a real risk that balancing interests in privacy against the public interest will be done in a way that censors the media. A judge reviewing a story might often decide that, while the broader subject of a story is in the public interest, it could have been told in such a way as to strip out the private material, making the publication of that private material a breach of privacy. But without that detail, without the personal angle, it can be difficult to convey why a story matters, or to allow people to empathise with the individuals involved.

THE ROAD AHEAD

It's easy to cite errors of judgement or poor taste on the part of the media (such as the *Jane Doe* publications, or the recent Pauline Hanson photographs) as a reason why the media should be subject to further restrictions. It should be noted that the very concept of 'media' contains a sprawling range of organisations; and no one would claim that all of these entities, in all of their dealings with the public, strike the right balance between private and public interests. But this does not render unimportant the role the media plays in conveying information through current affairs, documentaries, and other types of fact-based programming.

It remains to be seen whether the common law will continue to develop towards a privacy right, or whether this will be trumped by the adoption of a statutory cause of action. But either approach should be carefully scrutinised to ensure that responsible publications are not curtailed.

We all have a desire to control how we are portrayed. There are often moments when our interest in a story being told by the media can sometimes be tempered with distaste at how some aspects of the coverage expose individuals to the public glare. Privacy reform essentially offers to give this feeling of distaste or inappropriateness a legal remedy. Law and policy-makers should give serious consideration as to whether such reform is really necessary. ■

Notes: **1** *Doe v Australian Broadcasting Corporation* [2007] VCC 281 at para 157. **2** *Ash v McKennitt* [2007] 3 WLR 194. **3** *Mosley v News Group Newspapers Plc* [2008] EWHC 1777 (QB). **4** *Ibid*, at para 100. **5** *Murray v Big Pictures (UK) Ltd* [2008] EWCA Civ 446 (07 May 2008) **6** *Ibid*, at para 36. **7** *Ibid* , at para 40. **8** *ABC v Lenah Game Meats Pty Ltd* [2001] HCA 63 (15 November 2001). **9** *Ibid*, at para 42. **10** *Grosse v Purvis* [2003] QDC 151. **11** *Jane Doe* at para 161. **12** *Giller v Procopets* [2008] VSCA 236. **13** ALRC Report 108, 'For Your Information: Australian Privacy Law and Practice'. **14** The 'Australia's Right to Know' coalition is a group of media organisations that includes SBS (www.australiasrighttoknow.com.au). **15** For example, 'For Your Information' Report, paras 74.88, 74.96 – 74.101. **16** For example, in relation to commercial television only, of all formal complaints lodged since 1996, privacy complaints represent about 1.3% of all complaints. **17** For example, *Surveillance Devices Act 2007* (NSW) ss7-10. **18** For example, *Family Law Act 1975* (Cth) s121. **19** For example, *Children (Criminal Proceedings) Act 1987* (NSW) s11 and the *Adoption Act 2000* (NSW) s180. **20** *Australian Football League & Anor v The Age Company Ltd & Ors* [2006] VSC 308 (30 August 2006). **21** *Australian Consolidated Press v Ettingshausen* (Unreported, CA (NSW), BC9302147, 13 October 1993. **22** ACT, NSW, Queensland and South Australia. **23** For example, *Douglas v Hello! Ltd* [2001] 2 WLR 992.

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