

Keeping pace

By Anna Johnston

This edition of *Precedent* focuses on the complexities and subtleties of the public/private dichotomy posed by both privacy and freedom of information (FOI) law and jurisprudence.

The prospect of a tort of invasion of privacy has garnered much media attention recently, particularly in the wake of the phone-hacking revelations in the UK. Much of this discussion has focused on one particular type of privacy breach, anomalous to breach of confidence: the public disclosure of 'private' facts. But how might a tort of privacy also address other types of privacy harms, such as the public disclosure of misinformation, intrusions into our physical privacy, or incursions into our private movements through public spaces?

Paul Telford's article provides a succinct overview of the progress in common law countries towards a cause of action for privacy, with all of its false starts and conflicting views. He argues for common law development rather than a statutory cause of action.

A disturbing vision of the challenges posed to our locational and behavioural privacy by 'smart surveillance' is presented by Dr Katina Michael and Dr Roger Clarke. Moving beyond overt surveillance such as CCTV cameras into the realm of near real-time tracking of individuals' locations via their smart phones allows a secretive 'uberveillance'. The 'uber analytics' generated are of intense interest to marketers, as well as law enforcement and intelligence agencies. However, where the latter agencies generally require warrants to track individuals' movements, Michael and Clarke contend that owners or operators of shopping centres and airports are using this technology now, without warrants and without

consumer consent, because of the absence of a clear legal framework covering locational privacy.

David Rolph provides an insight into how the development of a tort of privacy – whether statutory or common-law driven – might impact on defamation law. Taking the dignitary rights of privacy and reputation as his starting point, Rolph notes that historically the common law has worked to place a high value on reputation, but very little value on privacy. In seeking to redress this balance through law reform, Rolph argues the need to tread carefully, so as not to upset the delicate balance between the protection of dignitary rights on one hand, and freedom of expression on the other.

Dr Juliet Lucy's article provides a useful introduction for those new to the area of information privacy (or 'data protection') law. She notes that the recent growth in jurisprudence is helping to clarify how 'fuzzy law' privacy principles apply to real-world scenarios, but she also highlights the regulatory gaps within our federal system of government.

These gaps are likely to become real-world problems with the advent of a national electronic health record, accessible across state and territory boundaries. Janine McIlwraith's review of the proposed 'personal controls' aspect of the national design, released in September 2011, suggests a tension between patient privacy and safety, and queries who will be held accountable for any flaws in the system.

The potential impacts of inaccurate information in large databases is also a theme of Nigel Waters' review of the credit-reporting scheme in Australia. His article looks at the proposed regulatory reforms to move towards 'comprehensive reporting', and at a number of additional protections



sought by consumer and privacy advocates as a trade off. These developments will be important for consumers not only of financial services, but all those with accounts with telecom and utility providers. Improved transparency for consumers will no doubt be seen as a critical benchmark of the reforms.

The quest for greater transparency is also a theme of the two articles on FOI law in this edition. Peter Timmins' article offers an overview of recent FOI reforms around the country, and practical advice for lawyers seeking to use FOI mechanisms on behalf of their clients, whether pre-litigation or as a complement to formal discovery. Moira Paterson provides further detail on the 2010 amendments to the Commonwealth *FOI Act*, focusing on the operation of a number of key exemptions. Both writers conclude that despite considerable progress in recent years, further work can be done to improve FOI laws and their application in practice.

And so the wheels of law reform continue to turn. We trust that this edition of *Precedent* provides a useful introduction to the fast-developing areas of FOI and privacy law. ■

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