1. Introduction

The Rule of Law Institute of Australia congratulates the Honourable Brendan O'Connor MP, the Federal Minister for Privacy and Freedom of Information, for publishing the Issues Paper on whether or not the Australian Parliament should enact a statutory privacy tort.

This Institute is an independent and not-for-profit body. It does not receive any government funding.

The objectives of the Institute include:

- • Fostering the rule of law in Australia, including the freedom of expression and the freedom of the media.
- Reducing the complexity, arbitrariness and uncertainty of Australian laws.
- Promoting good governance in Australia by the rule of law.
- Encouraging truth and transparency in Australian Federal and State governments, and government departments and agencies.
- Reducing the complexity, arbitrariness and uncertainty of the administrative application of Australian laws.

The Institute makes this submission on the Issues Paper.

2. Summary

Privacy is notoriously hard to define because it covers a range of different issues.

The major issue is the extraordinary growth in the electronic storage of private information and the ability to electronically transmit that information. This has created a major challenge to the privacy of ordinary Australians.

That challenge can only be properly dealt with on a comprehensive basis by Federal legislation which covers:

- Ensuring robust security for the storage of the private information.
- Limiting the collection of private information.
- Limiting access to electronically stored private information.
- Limiting the use of electronically stored private information.
- Progressive deleting of electronically stored private information.
- Compulsory notifying individuals of what private information about them is electronically stored.

The other privacy issues require tailored solutions and it is considered that the conferral of a statutory privacy tort is not one of them.

At best, a statutory privacy tort is a blunt instrument for a limited number of rich or famous Australians, who have the time, fortitude and the resources to go to court; all of which the public underwrites by funding the high cost of our court system.

A privacy tort necessarily entails an individual going to court with all of the litigation consequences –

- uncertainty
- risks of losing
- high legal costs
- court delays
- time of the party concerned
- use of expensive and limited court resources

and perhaps more importantly, with privacy litigation, the prospect of greater publicity to the matter which the person concerned wants to keep private.

It is considered that Australia should agree with the 2010 Report of New Zealand Law Reform Commission and leave the development of a privacy tort to the courts for the reasons that:

- The common law has the great advantage that in a fast moving area judges can make informed decisions on actual cases as they arise.

- Privacy is particularly fact-specific. As has been said in the UK each case requires an intense focus on the individual circumstances. The common law is well suited to that task.

- The common law is flexible and can thus develop with the times.

- A statutory privacy tort has the risk that what is enacted today may be out of date tomorrow (with the long waiting time for the enactment of new legislation in Australia, this presents a major problem to quickly amend a statutory privacy tort to address changed circumstances).

- To avoid the problem of statutory privacy tort being quickly out of date, it would have to be drafted in open-ended terms and this might end up being a straight jacket for judicial development or judicial censorship of the freedom of expression and the media.

- There is no evidence that the current state of Australian common law is causing practical difficulties to anyone.

3. The threshold issue

The threshold issue stated by the Honourable Brendan O 'Connor MP, the Minister for Privacy and Freedom of Information, in his Foreword to the Issues Paper is whether the enactment by the Australian Parliament of a statutory privacy tort is warranted.

In considering whether it is warranted, it is necessary to consider:

- What is the major challenge to the privacy of ordinary Australians?
- What can the Australian Parliament do to meet the challenge?
- Is the enactment by Parliament of a statutory tort of privacy the way to go?
- What evidence exists that in practice there is a need for a statutory privacy tort?
- Will a statutory privacy tort encroach on the freedom of speech presently enjoyed by every Australian and the freedom of the Australian press?

4. What is the major challenge to the privacy of ordinary Australians?

It is unquestionably true that the extraordinary growth in the electronic storage of private information and the ability to electronically transmit that information has created a major challenge to the privacy of ordinary Australians.

Professor Anupam Chander in his book "Securing Privacy in the Internet Age" has written:

> "A child **born** i**n 2008** will have many of the major and minor events of her life recorded in digital form. Her performance as a rabbit in a primary school play will be filmed on digital video cameras. Her school papers will be submitted and the grades recorded on digital media. The forms she fills out during her life will often be stored electronically. Doctors will dictate or type notes from her visits on computers.
> Radiologists in distant offices will interpret many of the tests ordered by her doctors. Computers might even sequence her genome and test if for disease susceptibility. Her running shoes might record her daily local running regimen, while her mobile phone provider records her travels across town and the identities of her friends. Security cameras will record her activities in public and private spaces. She will share the photos from her vacations online. Her parody of a favourite professor in a law school skit may find its way onto YouTube. Her emails and instant messages to friends may linger on computer servers. She will do much of her banking and buying online. This twenty-first-century child will face a lifetime's worth of personal events that will be catalogued, compiled, and digested by remote computers. In a networked, digitized world, as Lawrence Lessig presciently warned, "Your life becomes an ever-increasing record"."

Every day more and more private information about each of us is being collected by government and non-government bodies, stored, and used.

The frightening thing is that we frequently do not know what has been collected on us, nor are given no opportunity to correct the information, nor know how that information is being used.

This is occurring in every aspect of our lives, including seeking a new job where prospective employers may be provided with wrong information about us, looking for a loan to buy a new home, our sexual preference or our medical history.

Experience shows how, even with the best will in the world, stored information may be inaccurate or incomplete. Yet that information may be relied upon without our knowledge to make adverse decisions about us.

The concern of the ordinary Australian is not to get further publicity on a private matter by going to court. Rather he or she is looking to Parliament to provide reasonable protection in respect of the electronic collection, storage and use of private information. That is the challenge facing the Minister for Privacy and Freedom of Information.

The challenge can only be properly dealt with on a comprehensive basis by Federal legislation which covers:

- Ensuring robust security for the storage of the private information.
- Limiting the collection of private information.
- Limiting access to electronically stored private information.
- Limiting the use of electronically stored private information.
- Progressive deleting of electronically stored private information.
- Compulsory notifying individuals of what private information about them is electronically stored.

In addition, there needs to be specific solutions to the specific privacy issues outside of that challenge.

5. The essence of a statutory privacy tort is to confer on an individual the right to go to court in respect of a claimed invasion of the individual's privacy and seek orders in respect of the particular circumstance of the invasion

As a starting point in considering whether the Australian Parliament should enact a statutory tort of privacy it is necessary to recognise that the purpose of a statutory privacy tort is to confer on an individual the right to go to court for a court order in respect of a claimed invasion of his or her privacy. It is individual specific; and specific to the claimed invasion of that person's privacy.

It necessarily entails an individual going to court with all of the litigation consequences

- Uncertainty
- risks of losing
- high legal costs
- court delays
- time of the party concerned
- use of expensive and limited court resources

and perhaps more importantly, with privacy litigation, the prospect of greater publicity to the matter which the person concerned wants to keep private.

At best, a statutory privacy tort is a blunt instrument for a limited number of rich or famous Australians, who have the time, fortitude and the resources to go to court; all of which the public underwrites by funding the high cost of our court system.

It is true that a statutory privacy tort might have a general deterrent effect on others without going to court, but such deterrence will rapidly disappear without a steady stream of successful court cases (a toothless tiger, whether a statutory tiger tort or not, is still a toothless tiger).

It is suggested that in considering whether a statutory privacy tort is warranted, even for a select few of the rich or famous Australians, it is necessary to recognise the limitations of such a right and the limitations on likely court orders, even if the plaintiff is successful. For example, in the Max Mosley case in the UK Mr Mosley obtained £60,000 in damages but incurred legal costs in excess of £500,000. In ordering damages the court recognised that no amount of damages could compensate Mr Mosley for the harm suffered by him from the invasion of his privacy but still only ordered the newspaper to pay £60,000 in damages. The Mosley case involved an invasion of privacy unrelated to the major challenge previously noted, but to an apparently contrived sex story by the UK media on a high profile person. If the facts were different and Mr Mosley had not had his contract renewed because the racing organiser had received an email detailing Mr Mosley's sexual activities, he may never

have known about the email and thus never had the opportunity to sue. But if he subsequently found out about the email, it is highly unlikely he would then have instituted a public court case on a matter on which he wanted no publicity.

The collectors, storers and users of electronic information are hardly likely to be deterred by a tort of privacy (statutory or otherwise) which involves the individual concerned taking public court proceedings on a matter which the individual wants to keep private, particularly when there is only a very low risk that the individual will ever know about the invasion of his or her privacy by such collection, storage or use of private information.

This raises the question whether providing an individual with a statutory tort of privacy will solve any privacy issue.

6. The current position in Australia

The current position in Australia with legislation is that there is no comprehensive legislation:

- Ensuring robust security for the storage of the private information.
- Limiting the collection of private information.
- Limiting access to electronically stored private information.
- Limiting the use of electronically stored private information.
- Progressive deleting of electronically stored private information.
- Compulsory notifying individuals of what private information about them is electronically stored.

The current position in Australia with the common law is that there are existing torts which protect privacy i.e. breach of confidence, nuisance and trespass, but the High Court has not yet had the opportunity to develop a separate tort of privacy.

In understanding the current position with the common law it is irrelevant to compare the position in 1937 (when a narrow majority of justices in the High Court of Australia considered that the Australian common law at that time did not recognise a separate tort of privacy) with the position today.

The judicial position and the privacy context is dramatically different today to that in 1937. The meaningful comparison is with the position today in Australia at common law and by statute, and compare it with the existence today of privacy issues.

The current position at common law in Australia is summarised below.

Prior to 2001 the common law position in Australia, UK and New Zealand was much the same. There was in none of those countries a separate common law tort of privacy.

In 2001 the High Court of Australia in the Australian Broadcasting Corporation v Lenah Game Meats Pty Ltd [2001] 208 CLR 199 made it clear that the court was open to develop the common law in Australia to give greater protection to privacy.

But in that case (which involved whether an abattoir should keep private its killing methods) the abattoir was held not entitled to such privacy.

Significantly Gleeson CJ said at [407]:

> "*The law should be more astute than in the past to identify and protect interests of a kind which fall within the concept of privacy.* As Rehnquist CJ recently observed

in a case in the Supreme Court of the United States concerning media publication of an unlawfully intercepted telephone conversation:

> "Technology now permits millions of important and confidential conversations to occur through a vast system of electronic networks. These advances, however, raise significant privacy concerns. We are placed in the uncomfortable position of not knowing who might have access to our personal and business emails, our medical and financial records, or our cordless and cellular telephone conversations.""
>
> (emphasis added)

Gummow and Hayne JJ were two of the High Court judges in that case who today remain on the High Court. They reviewed the privacy law in the UK and the USA as well as the 1937 decision in Victoria Park and stated:

> "For these reasons, Lenah's reliance upon an emergent tort of invasion of privacy is misplaced. Whatever development may take place in that field will be to the benefit of natural, not artificial, persons. It may be that development is best achieved by looking across the range of already established legal and equitable wrongs. On the other hand, in some respects these may be seen as representing species of a genus, being a principle protecting the interests of the individual in leading, to some reasonable extent, a secluded and private life, in the words of the Restatement, "free from the prying eyes, ears and publications of others"(269). Nothing said in these reasons should be understood as foreclosing any such debate or as indicating any particular outcome. Nor, as already has been pointed out, should the decision in Victoria Park."

Callinan J noted in that case at [321]:

> "It is well recognised in the United States how fragile privacy, if unprotected by a legal remedy, can be."

His Honour went on to state at [322] to [324]:

> "Rosen concludes his work by saying that invasions of privacy in the United States, where there is, as will appear, some protection of privacy by legal process, have reached a point of crisis:
>
> > "The invasions of privacy I have discussed in this book are part of a larger crisis in America involving the risk of mistaking information for knowledge in a culture of exposure. We are trained in this country to think of all concealment as a form of hypocrisy. But we are beginning to learn how much may be lost in a culture of transparency: the capacity for creativity and eccentricity, for the development of self and soul, for understanding, friendship, and even love. There are dangers to pathological lying, but there are also dangers to pathological truth telling. Privacy is a form of opacity, and opacity has its values. We need more shades and more blinds and more virtual curtains. Someday, perhaps, we will look back with nostalgia on a society that still

> believed opacity was possible and was shocked to discover what happens when it is not."

In the United States, a tort based upon the right to privacy has been developed and is still evolving in response to encroachments upon privacy by the media and others . The history of its development is traced in *Prosser and Keeton on the Law of Torts.* As early as 1960, William Prosser said:

> "It is not one tort, but a complex of four. The law of privacy comprises four distinct kinds of invasion of four different interests of the plaintiff, which are tied together by the common name, but otherwise have almost nothing in common except that each represents an interference with the right of the plaintiff, in the phrase coined by Judge Cooley, 'to be let alone'. Without any attempt to exact definition, these four torts may be described as follows:
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> 1. Intrusion upon the plaintiffs seclusion or solitude, or into his private affairs.
>
> 2. Public disclosure of embarrassing private facts about the plaintiff.
>
> 3. Publicity which places the plaintiff in a false light in the public eye.
>
> 4. Appropriation, for the defendant's advantage, of the plaintiffs name or likeness."

Prosser's categorisation has been accepted by the United States Supreme Court and the *Restatement of the Law Second, Torts.*

In *Cox Broadcasting Corporation v Cohn,* White J, delivering the opinion of the Supreme Court of the United States, said this:

"More compellingly, the century has experienced a strong tide running in favor of the so-called right of privacy. In *1967,* we noted that '[i]t has been said that a "right of privacy" has been recognized at common law in 30 States plus the District of Columbia and by statute in four States'. We there cited the 1964 edition of *Prosser's Law of Torts.* The 1971 edition of that same source states that '[i]n one form or another , the right of privacy is by this time recognized and accepted in all but a very few jurisdictions' ...

These are impressive credentials for a right of privacy".

And in *Dietemann v Time Inc,* Hufstedler J said that "[t]he First Amendment is not a license to trespass"."

We have quoted extensively from some of the judgments in the Lenah case so it can be seen how ready the High Court is to develop a tort of privacy.

Since the 2001 decision in the Lenah case the High Court has not had the opportunity to develop the common law because no case has come before it which raises the tort

of privacy. Of course the High Court cannot develop the common law except in respect of an actual case before it which raises the issue.

However, in two lower court decisions, the first in 2003 (Grosse v Purvis [2003] QDC 151) and in the other 2007 (Doe v Australian Broadcasting Corporation [2007] VCC 281) a tort for privacy was recognised by trial courts as existing in Australia.

Further, there are a number of Australian court decisions where the court has refused to strike out proceedings on the basis that the Australian common law did not recognise a right to privacy. For example, in Dye v Commonwealth Securities Ltd [2010] FCA 720 Katzmann J in the Federal Court of Australia refused to strike out a claim based on common law right to privacy. And in Gee v Burger [2009] NSW SC 149 McLaughlin ASJ considered that the existence and common law of a tort of privacy was arguable.

In Giller v Procopets [2008] VSCA 236 the Victorian Court of Appeal (Maxwell P, Ashley and Neave JJA) Ashley stated at [167] and [168] :

> "[167] The existence of a generalised tort of unjustified invasion of privacy has not been recognised by any superior court of record in Australia. The development of such a tort would require resolution of substantial definitional problems. This, of itself, might contraindicate such a development. It has been suggested that a better approach may be the `development and adoption of recognised forms of action to meet new situations and circumstances.
>
> [168] In the present case, a claim founded in breach of confidence was, as I have concluded, available to the appellant. It conferred upon her an entitlement to equitable compensation. This case, like Lenah, is therefore one in which it is unnecessary to consider whether a generalised tort of invasion of privacy should be recognised. It is also an instance of the way in which the law has otherwise developed to address a particular situation. That may provide a good reason why, if a tort of invasion of privacy did come to be recognised, it would not extend to a case of the present kind."

In the New South Wales Court of Appeal in 2002 TCN Channel Nine Pty Ltd v Anning [2002] NSWA 82 (Spigelman CJ, Mason P and Grove J) considered the protection of privacy in the context of the tort of trespass.

Spigelman CJ said:

> "The protection of privacy interests has long been recognised as a social value protected by the tort of trespass. Privacy is specifically referred to as such an objective in the joint judgment of Gaudron and McHugh JJ in Plenty v Dillon at 647, which I have quoted above."

The issue in Australia for the High Court when the matter comes before it is not so much whether a tort of privacy should exist, but the highly technical issue whether it should be grafted on to another tort i.e. breach of confidence or be recognised as a distinct tort. This has been a subject to judicial tussle between the judges in the UK

and New Zealand as the judges have progressively developed the common law in those countries to protect privacy.

Whilst there is some uncertainty as to how this will play out in Australia, it is reasonably clear that one of those approaches will be adopted by the High Court and it will recognise the right of an individual to sue for an invasion of his or her privacy.

It is significant that over the last 10 years no case raising the tort of privacy has gone on appeal in Australia. This suggests that in practice there is little demand for such a development of the law in Australia.

7. What evidence exists that during the last 10 years Australians have been disadvantaged by the High Court not having the opportunity to decide whether there is a common law right to privacy

As earlier pointed out, the real challenge which is required to be urgently addressed is the danger to privacy by the extraordinary growth in the electronic storage of information and the ability to electronically transmit information.

If that problem is recognised and comprehensibly dealt with by legislation as suggested earlier, it leaves invasions of privacy which fall outside the problem area of the Internet Age to be considered.

One of the notable examples of the non-Internet Age invasion of privacy is the aggressive approach taken by the UK media in personally invading the privacy of high profile individuals (as illustrated by the Naomi Campbell and Max Mosley cases).

As far as we are aware the Australian media has been much more constrained then the UK media and the Australian media provide no reason to have a statutory privacy tort in Australia**.**

In case there are instances with the Australian media which we were not aware of, the Rule of Law Institute wrote to the Minister on 30 September 2011 and said:

> "In the meantime, we note that you state that the threshold question is whether the introduction of the statutory cause of action is warranted.
> In responding meaningfully to the threshold question as regards the printed media, it is necessary to identify past newspaper articles which warrant the introduction of such cause of action and where there was no existing cause of action available to prevent publication or obtain damages.
> This analysis could be done from several leading newspapers over, say, a two year period, nominating those which depict situations that warrant the need for the new statutory action. In this way parties making submissions are able to see the evidence of need and the type of article to be caught by new tort.
> It would be desirable for the analysis to be done prior to the closing date for submissions so that there would be time to examine them and comment.
> Would you please let us know as soon as possible, preferably before mid-October 2011, as to whether this analysis is something that you are prepared to undertake."

The Minister replied on 27 October 2011 and stated:

> "In relation to your proposal for an analysis of media articles, the Government does not propose to undertake such an identification exercise. As I have noted publicly, a SCOA would be directed at providing remedies for serious invasions of privacy, rather than at the media or at printed news articles in particular. In any event, it would not be possible to identify circumstances or articles that would be `caught' by a SCOA until the elements of the cause of action are determined. At this stage the Government is seeking comment upon the proposals for those elements. As you and your Institute would also appreciate, it

would not be appropriate for the executive government to adjudge which cases would be caught by any SCOA that may be pursued."

Absent the Government identifying newspaper articles in Australia over the last 2 years which are considered to warrant the introduction of a statutory privacy tort, it is difficult to see in what instances there is a need for a statutory privacy tort. Perhaps those who consider that there is a real need as regards the Australian media may carry out the analysis referred to in our letter and make it available in their submissions.

It is important to identify actual newspaper articles which it is claimed would have infringed the tort. Without such identification it is difficult to see that there is a practical need for the tort in Australia. The identification would not only go to demonstrate any need, but the type of articles which the proposed tort was planned to catch.

If the past activities of Australian media provide no warrant for a statutory privacy tort it might be asked what other areas exist which establish the need.
One area is security cameras used by neighbours or in offices. It is suggested that is an area which is best left to tailored solutions such as the conferral of relevant powers to control such on local councils or Fair Work Australia. The conferral of a right of an individual to go to court is considered not to be a satisfactory way of addressing such problem.

8. More litigation is not the answer

Australia is awash with litigation and it certainly does not want to encourage more litigation with its high cost to the public purse - unless it is the only way to solve the problem.

The reality is that very few Australians can afford the monetary cost to commence litigation to protect their privacy - nor can afford the exposure cost of the publicity of someone on their behalf going to court.

For the reasons previously outlined we consider that the privacy issues posed by the Internet Age are a major challenge that can only be dealt with by comprehensive legislation.

Privacy issues outside of the Internet Age are better dealt with by tailored solutions not by facilitating more legal actions where the risks are high, the legal costs high, the likely damages low and for the ordinary Australian a public court case would generate even more publicity on a matter he or she may want to keep private.

Australians are looking to the Minister for Privacy and Freedom of Information to address the challenge - not to avoid the problem by passing it via a privacy statutory tort to them -- particularly when the privacy genie is then out of the bottle.

9. The difficulties of drafting a statutory tort of privacy

Privacy, as a concept, is notoriously difficult to define. One commentator has described it as a "concept in disarray" because nobody can articulate precisely what it means (Solove DJ "A Taxonomy of Privacy (2000) 154 UP L.Rev 477).

The UK House of Commons Committee 2007 Report stated:

> "To draft a law defining a right to privacy which is both specific in its guidance but also flexible enough to apply fairly to each case which would be tested against it could be almost impossible."

No doubt a draftsman would treat no drafting task as impossible. But as the House of Commons Committee recognised it is not a matter of producing words but of providing words for a statutory privacy tort which are specific to provide guidance and flexible to apply fairly.

A general rule of thumb for draftsmen is that the harder it is to draft something, the more the utility of drafting that something is questioned.

In drafting a statutory tort of privacy the two major issues are, firstly, drafting the primary cause of action and then, second, drafting the exclusions and defences (because privacy is not absolute nor isolated from ever changing facts with different justice requirements).

For example, who will be excluded from the tort:

- Politicians
- Government agencies i.e. the ATO, ASIC, ASIO etc
- Employers

If so, why should they be so favoured?

And what defences will be available to the tort:

- Truth and fair comment
- Whistle blowers etc

However the statutory tort is drafted, it will not provide instant certainty because invasions of privacy are circumstance-specific and the tort can only be applied by courts in real cases. It will take many years for the courts to give real guidance on the meaning of a statutory privacy tort.

A privacy statutory tort which is uncertain is bad for the rule of law. It may either result in the law not being applied (thus held in contempt) or judicial censorship of the freedom of expression (with all that entails, including closure of open courts to the public and the media).

10. Why should Australian courts be denied the opportunity of developing the common law relevant to Australian conditions as the courts in the UK and New Zealand have had for their local conditions?

It needs to be noted that the common law in Australia, the UK and New Zealand was much the same in 2000. None of those countries had at that time a specific common law tort of privacy. Then, largely because of the aggressive media in the UK and too a lesser extent in New Zealand, the UK courts and New Zealand courts had to deal with whether the common law should be developed to embrace a tort of privacy in their respective countries.

As mentioned earlier in 2001 the High Court made it clear that it was not opposed to the development of the common law - but since then it has had no opportunity to do so. Of course the High Court cannot unilaterally develop the common law. It can only do so when it has a case before it which raises the issue.

The UK has recognised the crucial role of courts in developing the common law as justice requires.

In 2003 the UK Government said:

> "The weighing of competing rights in individual cases is the quintessential task of the courts, not of Government, or Parliament. Parliament should only intervene if there are signs that the courts are systematically striking the wrong balance; we believe there are no such signs."

Protecting privacy requires a difficult balancing act having regard to the particular issues and circumstances of a particular case. For instance, in the Lenah case the cameraman trespassed on private land and filmed the activities of the abattoir. The High Court held that the abattoir had no legal right to stop the showing of the film made by the cameraman. No doubt a different result would have happened if the cameraman had trespassed on the premises of the Governor General and shown her in the shower.

There is no basis to suggest that Australian judges, unlike UK judges, might be unfit to develop the common law. Nor is there any reason to suggest that they will not wisely develop the common law on privacy in a way tailored to Australian conditions. It might be asked rhetorically why should they be denied the opportunity by creating a statutory privacy tort?

11. The UK has refused to enact a statutory tort of privacy

A Committee of the UK House of Commons in 2007 and then another Committee again in 2010 recommended that the UK not have a statutory tort of privacy.

In its 2010 Report the Committee stated:

> "60. We subsequently examined the subject of press intrusion in our 2007 Report *Se f regulation of the press.* We found that the case had not been made for a law of privacy:
>
> > "To draft a law defining a right to privacy which is both specific in its guidance but also flexible enough to apply fairly to each case which would be tested against it could be almost impossible. Many people would not want to seek redress through the law, for reasons of cost and risk. In any case, we are not persuaded that there is significant public support for a privacy law."
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> 61. The development of a generalised 'respect for privacy' by the courts, as required under the Human Rights Act, has inevitably been piecemeal and is likely to remain so for a considerable time given the low number of privacy cases which go to trial. Almost all cases are settled between parties without trial. Only two have been heard in the High Court since January 2008, one of which was Mr Mosley's and the other was not against a defendant in the media and was settled five days into the trial.[63] The low number of substantive privacy cases is not surprising, given the deterrent effect that the prospect of a public trial can have on claimants who are by definition concerned about privacy. Mark Thomson, then of Carter-Ruck, told us: "I have a number of claims where the client would have won, but given that they [the press] published the article, which was deeply embarrassing, they just did not want to go to court and face the full publicity of an action."
>
> 62. The high costs of litigation combined with the legal uncertainty, owing to the small amount of case law, undoubtedly discourages the media from contesting privacy cases. Sean O'Neill of *The Times* told us that in many cases a newspaper lawyer would ask: "We think we would win on public interest, but this privacy law is so uncertain, we don't know where we are going, and is this the one on which we want to make our stand?" While critical of the 22 operation of the current law on privacy, media witnesses were divided on the need for legislation on privacy. Many thought that it would do more harm than good. Paul Dacre said: "unequivocally I would not be in favour of a Privacy Act. I believe it would have a very deleterious effect, a chilling effect, on the press and the media in general."
>
> 67. The Human Rights Act has only been in force for nine years and inevitably the number of judgments involving freedom of expression and privacy is limited. We agree with the Lord Chancellor that law relating to privacy will become clearer as more cases are decided by the courts. On balance we recognise that this may take some considerable time. We note, however, that the media industry itself is not

> united on the desirability, or otherwise, of privacy legislation, or how it might be drafted.
> Given the infinitely different circumstances which can arise in different cases, and the obligations of the Human Rights Act, judges would inevitably still exercise wide discretion. We conclude, therefore, that for now matters relating to privacy should continue to be determined according to common law, and the flexibility that permits, rather than set down in statute."

The UK favours the development by the courts of the common law tort of privacy.

It might be claimed that the position is different in the UK because its courts had by 2007 developed the common law to provide a privacy tort. However, there is no reason to think that the Australian High Court will not do the same when presented with the opportunity to do so.

The UK rightly recognises that the courts are the proper place to develop the law on privacy and Parliament should only intervene if the courts refuse to do so, or get it wrong. There is no evidence in Australia that our courts have refused to develop the law on privacy or have got it wrong.

12. New Zealand has refused to enact a statutory tort of privacy

In 2010 the New Zealand Law Commission issued its Report on the Invasion of Privacy: Penalties and Remedies: Review of the Law of Privacy Stage 3.

The Commission concluded that there should not be a statutory tort of privacy in New Zealand.

Its Report entailed the following statement:

> "7.8 In the issues paper we noted the many gaps and uncertainties in the existing tort, and asked whether it should be enacted in statutory form. A statute would render the law more accessible than the common law (an advantage in itself), fill some of the gaps in the current law, and render some of the criteria more certain than they currently are. The common law is dependent on the accidents of litigation and develops slowly.
> Statute law can present a complete and coherent whole straight away.
>
> 7.9 However, after careful deliberation we have decided that the tort should be left to develop at common law. The common law has the great advantage that in a fast-moving area judges can make informed decisions on actual cases as they arise. Privacy is particularly fact-specific. As has been said in the United Kingdom, each case requires an intense focus on the individual circumstances. The common law is well-suited to that task. The common law is also flexible, and can thus develop with the times. Statute creates a risk that what is enacted today may be out of date tomorrow. To avoid this dilemma, any privacy statute would have to be drafted in open-ended terms, and might end up being little advance on the common law.
>
> 7.10 Nor is there any evidence that the current state of the law is causing practical difficulties to anyone. We had wondered whether the media might want greater certainty than the law currently gives them. But our consultations with representatives of the media reassured us that they are comfortable with the broad and general direction the common law currently provides."

It is considered that Australia should agree with the conclusion reached by New Zealand for the reasons stated by its Law Reform Commission, namely:

- The common law has the great advantage that in a fast moving area judges can make informed decisions on actual cases as they arise.

- Privacy is particularly fact-specific. As has been said in the UK each case requires an intense focus on the individual circumstances. The common law is well suited to that task.

- The common law is flexible and can thus develop with the times.

- A statutory privacy tort has the risk that what is enacted today may be out of date tomorrow (with the long waiting time for the enactment of new

legislation in Australia, this presents a major problem to quickly amend a statutory privacy tort to address changed circumstances).

- To avoid the problem of statutory privacy tort being quickly out of date, it would have to be drafted in open-ended terms and this might end up being a straight jacket for judicial development or a complete lack of certainty.

- There is no evidence that the current state of Australian common law is causing practical difficulties to anyone.

13. The News of the World hacking scandal

It was in the UK, not in Australia, that the outrageous and embedded culture of hacking into private information by the UK media apparently flourished and was tolerated.

The News of the World hacking scandal involved alleged serious criminal conduct which, if not deterred by the threat of criminal proceedings, hardly would have been stopped by a slap on the wrist from a statutory privacy tort.

Australia already has criminal laws which make such conduct a crime.

The News of the World hacking scandal cannot be used as an excuse for the enactment of statutory privacy tort in Australia. There is no relevant connection.

14. Encroachment on Australians' freedom of speech and Australia ' s freedom of the press

The President of the USA, Barack Obama, has said:

> "Democracy, rule of law, freedom of speech, freedom of religion – those are not simply principles of the West to be foisted on [other] countries, but rather, what I believe to be universal principles that they can embrace and affirm as part of their national identity."

In the first editorial to the first edition of the original "Australian" newspaper the editor Robert Wardell wrote in 1824:

> "A free press is the most legitimate, and, at the same time, the most powerful weapon that can be employed to annihilate such [individual] influence, frustrate the designs of tyranny, and restrain the arm of oppression."

He went on to state in words, that Thomas Jefferson would have been proud, that the new newspaper would be:

> "`Independent, yet consistent free, yet not licentious – equally unmoved by favours and by fear - we shall pursue our labours without either a sycophantic approval of, or a systematic opposition to, acts of authority, merely because they emanate from government.'"

Freedom of the press, freedom of speech, freedom to converse, is not limited to talking about "serious matters" nor matters which find favour with the majority nor an outspoken minority; but includes chatting about the childest, the crude, the crass or the critical, as well as matters which no one else may have the slightest interest in or be in any agreement. Nor is it precondition to talking or, for that matter, writing, privately or publicly that the speaker or writer has legally admissible evidence to prove what he says or writes, or even know what he is talking or writing about (when did you last see a spectator shouting to the referee that he had missed a particular player breaking such and such rule whilst holding up the relevant page of the rule book?). If it were otherwise nearly all conversations, whether in the pub or at a sporting event or otherwise, would consist of a series of grunts.

Imagine a world in which it was illegal to talk or write about anything other than a "serious matter" or a matter of "public concern", such as the problems with the Australian manufacturing industry. Our communications would be controlled by the person who determined what was a "serious matter" or matter of "public concern".

Freedom of speech and freedom of the press are not limited to informing the public about matters of public concern.

Take the example of two mothers, Jane and Mary, who were having a coffee.
Jane asked Mary whether she was aware that the headmaster of the local school had a domestic violence order taken out against him.

By informing Mary of this, Jane may have invaded the headmaster's privacy and be liable to damages and an injunction. This could be so even though:

- Jane only told Mary in private and no-one else.
- She only told Mary the truth.
- She acted bona fide in making the disclosure.
- She did not obtain the information confidentially.
- The information may have been originally made public.
- It is uncertain and subjective whether the headmaster could have reasonably expected the information to be disclosed in all the circumstances, including any public interest.

In fact in that example whose privacy would be invaded, the headmasters or Jane and Mary's?

Take another example of Dr Patel, the surgeon at Bundaberg Hospital in Queensland who was found guilty of manslaughter of three patients and sentenced to seven years jail. The courage of Toni Hoffman, the nurse who stood up and sounded the alarm about Dr Patel would have come to naught without the publication of the story by The Courier-Mail and the skill of the journalist involved, Hedley Thomas.

The investigations and reporting by the Courier-Mail forced a Government inquiry and an investigation into the Queensland hospital system and ultimately to the prosecution of Dr Patel.

What would the Courier-Mail have done if Dr Patel had, right at the beginning, obtained an injunction against publishing his record as a surgeon in the USA because it was an invasion of his privacy. Whilst it is easy to see the position in hindsight, at the time without the evidence from the Commissions of
Inquiry, the newspaper was on risky legal grounds even under the existing law.

With the proposed new legislative remedy for "invading" a person's privacy the story may never have been published and Dr Patel may still be operating at Bundaberg Hospital.

It was only by reason of the investigation by a Government Inquiry hearing over 100 witnesses and examining thousands of pages of exhibits that the truth about Dr Patel came out. No newspaper had or has the time, power or resources to reach such a conclusion before publishing. The Courier-Mail had to form a judgment and take the risk of defamation and a loss of reputation for the newspaper (from time to time the press will get it wrong but you do not measure the success of Roger Federer by counting up the times he hit the ball into the net).

It would have been much worse for the community if the Courier-Mail had decided not to publish the truth about Dr Patel's record for fear of an order to pay damages for invasion of his privacy.

The Australian Constitution does not protect Australia's freedom of speech nor freedom of the press. Nor is there any Federal Statute which confers the right to freedom of speech or freedom of the press.

Since 1992 the High Court of Australia has indicated that there are implied rights to freedom of speech on matters concerning politics and government i.e. political advertising during election campaigns. But this implied freedom of speech is limited and does not extend to conferring any general freedom of speech.

Despite attempts to amend the Australian Constitution and to subsequently introduce a Bill of Rights which would have provided for freedom of speech - the right of Australians to freedom of speech and freedom of the press have no constitutional or general legislative protection in Australia.

Accordingly, those freedoms can be overridden at any time by the Australian or a state parliament. Their existence has since the establishment of Australia in 1788 been balanced on a knife edge dependent very much on the common sense of Australians, the media and the courts.

The Australian position is quite unlike the USA where its Constitution protects freedom of speech i.e. the First Amendment "Congress shall make no law ... abridging the freedom of speech, the freedom of the press" and the enactment by the UK of the Human Rights Act 1998 which provides that "everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information without interference by public authority and regardless of frontiers. The latter Act does not confer a personal right of action but requires courts to act in accordance with the right of privacy and freedom of expression set out in the European Convention on Human Rights of 1950.

In New Zealand, the right to freedom of expression is enshrined in the Bill of Rights Act 1990, which provides:

> "Everyone has the right to freedom of expression, including the freedom to seek, receive and impart information and opinions of any kind in any form."

Freedom of speech will often come into conflict with maintaining the privacy of an individual. Unlike an action for defamation the truth of what was said will provide no defence to an action for breaching a person's privacy. For example a chat with a neighbour stating the truth that a convicted paedophile has just moved in next door may well be an invasion of the paedophile's privacy and subject to a claim for damages; see Brown v AG [2006] DCR 630

The Issues Paper raises the prospect of the Australian Parliament being called upon to enact legislation to provide a right of privacy without enacting legislation to provide a right to freedom of speech.

It is critical to democracy and the rule of law in Australia that our freedom of speech and freedom of the media are not encroached upon by the threat of privacy claims.

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