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GRIFFITH JOURNAL OF LAW AND  
HUMAN DIGNITY

The Hon. Michael Kirby AC, CMG

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## PRIVACY: AN ELUSIVE AND CHANGING CONCEPT

Notions of privacy are bound up in ideas of human uniqueness and the importance of solitude. Privacy engages the individual human mind and reflections on the significance of one's existence in relation to others, to one's community and the surrounding world. In that sense, the idea of individual privacy can probably be traced back to ancient times and to early and Biblical reflections upon the human relationship with God and with the world.

Precise notions of what are private tend to vary from one culture to another. The English are a famously private people. Their culture is generally one of reserve and understatement. We all know the common jest that an Englishman's idea of paradise is an empty railway carriage. There he can be left alone. Yet such cultural norms probably exist also in Australia. I confess to always being happy when the seat beside me in a plane is left empty. And I am referring to First Class.

Writings about privacy in the law began long before the era of the modern media. In the English law, and in its derivatives in the United States of America, Canada and Australia, the right to be left alone was usually dealt with under the remedies provided for other purposes, such as tort of nuisance or the civil remedy afforded for breach of confidence<sup>1</sup>. In the United States, constitutional notions of privacy took a long time to develop. In *Griswold v Connecticut*<sup>2</sup>, Justice Hugo Black described privacy as a "... broad, abstract and ambiguous concept". This imprecision has meant that, in the law of English-speaking peoples, privacy commonly refers to a

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\*\* One time Justice of the High Court of Australia (1996-2009); President of the New South Wales Court of Appeal (1984-1996); Judge of the Federal Court of Australia (1983-84); and Chairman of the Australian Law Reform Commission (1975-84).

<sup>1</sup> *Prince Albert v Strange* (1849) 1MAC & G 24 [41ER 1171]; *Duchess of Argyll v Duke of Argyll* [1967] Ch 302; *Attorney-General v Guardian Newspapers Ltd [No.2]* [1990] 1AC 109 at 260, 268.

<sup>2</sup> 381 US, 479 (1965).

variety of notions, only loosely linked together. Accordingly, for lawyers, it has been an enduring source of controversy, including as to the extent that the national constitution and law provide it protection<sup>3</sup>. This feature of the legal concept of privacy has led commentators to conclude that the legal protection of privacy tends to reflect particular intellectual trends within the liberal political tradition. The meaning and scope of privacy will “always be in flux”<sup>4</sup>.

The purpose of my contribution is not to explore at length the history, philosophical underpinnings and conceptual framework of the notion of privacy. Instead, it is to look at the practical developments that have occurred in the Australian, and related, legal systems, so as to provide a few staging posts by which we might understand where we have come from, in relation to privacy and publication. Where we have arrived at. And where we might be going. To do this, I intend to trace my own journey in considering the notion of privacy and, ultimately, explore how that value might be better protected in our society. Of course, there are many other ways in which the issue might be addressed. But this is the way I have chosen. I hope that it will be helpful for our *Conversazione* and for those who later come to read about the issues we have gathered to explore at this time.

As chance would have it, our meeting is convened on the brink of the publication in England of the Leveson Report, authored by Lord Justice Leveson of the English Court of Appeal. That report grew out of shocking revelations in England concerning flagrant and deliberate intrusions into individual privacy, by print and electronic media, led by tabloid newspapers published by the News Group. That masthead originally traced its origins to the Murdoch stable of newspapers, in Adelaide, Australia. I am sure that our deliberations would have been even more fruitful if we enjoyed the benefit of considering the recommendations of the Leveson inquiry.

## AN AUSTRALIAN REJECTION (1937)

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<sup>3</sup> S. Levinson, “Privacy” in KL Hall (Ed.) *The Oxford Companion to the Supreme Court of the United States*, (OUP, Oxford, 1992) 671.

<sup>4</sup> *Loc. cit.*, 678.

Whilst scholars and courts in the United States of America were struggling to give content to the legal concept of privacy in the early decades of the 20<sup>th</sup> Century, the placid waters of Australian law rarely ventured upon such challenges. When I was a boy in the 1940s, I would sometimes visit my grandfather, William Knowles. He was a journalist in the Fairfax interests. He derived from Northern Ireland. In accordance with the common values of his ethnicity he, was an extremely private person.

My grandfather's home was in South Dowling Street, now a main expressway feeding the Sydney Airport. A large concrete barrier (designed to minimise noise) now separates my grandfather's old home from the busy road in front of it. But in those days, opposite the home and visible, was a high paling fence. It boarded a horse racing facility which I now know was Victoria Park, named like so many other places after the late Queen Empress. Accidentally, that park, now replaced by high-rise apartments, factories and other developments, entered the law books in a leading case on privacy protection.

The case was *Victoria Park Racing and Recreation Grounds Co Ltd v Taylor*<sup>5</sup>. A reporter, operating beyond the paling fence and outside the racing ground, began reporting on the races taking place within the grounds. The racing facility was up-in-arms. It sued for an injunction and for damages. Its cause of action framed in nuisance was rejected. But then its counsel argued an alternative case. They argued that a new legal right to privacy should be expressed by the High Court of Australia. However, at that time, that court was subject to appeal to the Judicial Committee of the Privy Council. English law had not then developed a tort of invasion of privacy. So far as Chief Justice Latham was concerned, that was the end of it. Australian law could not recognise such a right. In the course of his reasons he said:

“The claim under the law of nuisance has also been supported by an argument that the law recognises a right to privacy which has been infringed by the defendant.

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<sup>5</sup> (1937) 58 CLR 479.

However desirable some limitation upon invasion of privacy might be, no authority was cited which shows that any general right of privacy exists.”<sup>6</sup>

Justices Rich and Evatt dissented from this opinion, believing that there was no obstacle in the path of the High Court of Australia fashioning a remedy for the kind of invasion of the race course’s privacy that had occurred. Evatt, in particular, was familiar with the growing United States discussion of this notion. However, the dissentients did not prevail. The *Taylor* case has been taken to be one of those wrong turnings that sometimes occurs in the law when timorous judicial souls prevail over judicial bold spirits. For decades, the decision in the *Taylor* case was seen as an insurmountable barrier against any advancement in the common law for the protection of privacy in Australia. Any such advancement would have to come not from the courts, but from the legislature. And the legislatures of Australia were very slow to move. In part, this was because of the complexity of the problem. In part, it may have had something to do with the power of media interests which strongly opposed a provision of remedies for privacy invasion. Legislators and the media have long enjoyed a symbiotic relationship in Australia. Each needs the other for the other’s purposes. In the result, each tends to feed, and rely upon, the other. Defying the media, or acting contrary to its interests, is a rare event in Australia.

It may be a trick of the memory, but I seem to remember my grandfather telling me about the journalists intruding into the privacy of the racing ground opposite his home. As a journalist himself, he would doubtless have celebrated the wisdom of the High Court’s rejection of any remedy of privacy intrusion on this kind. Journalists tend to see only the merits of free expression. Their sympathy for competing values is ordinarily very muted.

## UNIVERSAL HUMAN RIGHTS (1948-66)

My next encounter with privacy happened when I was in primary school. In 1948, the selfsame Dr H.V. Evatt, who, as a Justice, had dissented in the *Taylor* case was by then President of the General Assembly of the new United Nations Organisation.

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<sup>6</sup> Ibid at 495-496.

That body was created in 1945 to provide a new world order out of the ashes that followed the Second World War. Dr Evatt had played a significant part in its foundation. Its *Charter* rested, essentially on three principles: the provision of peace and security in the world; the attainment of greater economic equity; and the protection on universal human rights.

The last mentioned objective of human rights was placed in the hands of a consultative body chaired by Eleanor Roosevelt, widow of the war-time president of the United States. In 1948, that committee delivered its draft for the *Universal Declaration of Human Rights (UDHR)*<sup>7</sup>. That Declaration was adopted by the General Assembly, with Australia's Dr Evatt in the chair. Early in 1949, my teacher, Mr Redman (we did not know their first names in those days) provided us all with copy of the UDHR. It was printed on airmail paper, a rarity in those days. It carried the as yet unfamiliar logo of the United Nations, printed in blue. Our teacher taught us the reason behind seeking to express universal human rights. This was because of the shocking deprivations of fundamental rights that had occurred before and during, and had led to, the recent War. Unless human rights were universally respected, there was a fear that the new atomic weapons would be used to destroy humanity.

In Article 19 of the UDHR, it was provided:

“Everyone has the right to freedom of opinion and expression; this right includes the freedom to hold opinions without interference, to seek, receive and impart information and ideas through any media and regardless of frontiers.”

However, Article 12 provided:

“No one shall be subjected to arbitrary interference with his *privacy*, family, home or correspondence, nor to attacks upon his honour and reputation. Everyone has the right to protection of the law against such interference or attacks.

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<sup>7</sup> *Universal Declaration of Human Rights*, GA Res 217A (III), UN GAOR, 3<sup>rd</sup> sess, 183<sup>rd</sup> pen mtg, UN Doc A/810 (10 December 1948).

By Article 29.2 of the UDHR, it was provided:

“In the exercise of his rights and freedoms, everyone shall be subject only to such limitations as are determined by law solely for the purpose of securing due recognition and respect for the rights and freedoms of others and of meeting the just requirements of morality, public order and general welfare in a democratic society.”

These expressions were clarified, enlarged and potentially made justiciable in the *International Covenant on Civil and Political Rights* (ICCPR)<sup>8</sup>. In that treaty, the right of protection of individual privacy was stated in Article 17. It reads:

“No-one shall be subjected to arbitrary or unlawful interference with his *privacy*, family, home or correspondence, nor to unlawful attacks on his honour and reputation.

2. Everyone has the right to the protection of the law against such interference or attacks.

In Article 19 of the ICCPR, there was also a provision upholding freedom of expression. However, this too mentioned the need to respect the rights and reputation of others:

“1. Everyone will have the right to hold opinions without interference.

2. Everyone shall have the right of freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice.

3. The exercise of the rights provided for in paragraph 2 of this Article carries with it special duties and responsibilities. It may therefore be subject to certain restrictions, but these shall only be such as are provided by law and are necessary:

(a) For respect of the rights or reputations of others;

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<sup>8</sup> *International Covenant on Economic, Social and Cultural Rights*, opened for signature 16 December 1966, 993 UNTS 3 (entered into force 3 November 1976).

(b) For the protection of national security or of public order (*ordre public*) or of public health or morals.

Back in 1949, Australian school children were taught about these fundamental concepts. However, as time as passed, the instruction has tended to fall away. The absence in most parts of Australia of any general charter or statute for fundamental rights has discouraged the teaching of such notions of citizenship. Most especially, it has meant that succeeding Australian generations have grown up without a clear guidance that exists in other societies (such as the United States) of the need to recognise the important rights associated with freedom of expression and the important rights associated with (relevantly) the protection of “privacy, family, home or correspondence”.

Although Australia in the 1960s took an important part in the negotiations of the terms of the ICCPR and later in the 1980s signed the first optional protocol to the ICCPR (giving Australians the entitlement to complain of derogations to the United Nations Human Rights Committee in New York), no “protection of the law” against (relevantly) interference in privacy has, in the context of media intrusions, been enacted. There has been legislation to provide for defamation. However, that concerns the somewhat different values reflected in the provisions of Article 17 of the ICCPR relating to “unlawful attacks on... honour and reputation”. For the separate concern of subjecting persons to unlawful interference of their “privacy, family, home or correspondence”, no specific laws have been enacted. It remains, legally speaking, *terra nullius*.

## OECD EXPERT GROUP AND PRIVACY REFORMS (1978-80)

By 1975, I had been appointed by a great reforming Attorney-General, Lionel Murphy QC, to be the Inaugural Chairman of the Australian Law Reform Commission (ALRC). After the Whitlam Government was dismissed, another reforming Attorney-General took office, Bob Ellicott QC. In its election commitment in December 1975, the Fraser Government undertook to refer to the Law Reform Commission an investigation of protection of privacy in the law of Australia. This was entirely

consonant with the values of individual freedom and dignity espoused by that government. The Commission embarked upon its investigation. In the midst of its inquiry, the Organisation for Economic Co-operation and Development (OECD), in Paris, established an expert group to develop guidelines on a particular aspect of privacy, namely transborder data flows. Because of the Commission's privacy enquiry, I was sent to the OECD as Australia's representative. I was then elected to chair the expert group. In 1980 it developed the privacy guidelines. These have proved enormously influential throughout the world. They became the basis of the federal *Privacy Act 1988 (Cth)*<sup>9</sup>.

Coinciding with these developments, in 1979 the ALRC published a report on the issues of defamation law reform and the protection of privacy in the context of publication<sup>10</sup>. That report had, as a major objective, rationalisation and unification of the Australian law of defamation.

Until that time, in Australia, the defence of justification varied as between the several sub-national jurisdictions. In some jurisdictions (such as New South Wales) to justify publication, the publisher had to establish that it was both true and for the public benefit/interest that the matter complained of should be published. In other parts of Australia (such as Victoria) truth alone was the defence of justification.

The "public benefit/interest" element came to be included in local statutes in colonial times in part because of the stigma attached to former convicts and children or grandchildren of convicts. Whilst it was true to say this of those persons, it was felt that it was not necessarily in the public interest, or to the public benefit, and hence the additional element should be required. This additional element provided some protection for privacy in the context of media publications in particular. If, as the ALRC proposed, the nation moved to a uniformed defence of truth alone, this would set back the cause of privacy protection. Hence, the Commission suggested a new concept of unfair publication. To achieve protection of this concept, a new notion of privacy invasion was recommended. It would provide a remedy where:

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<sup>9</sup> OECD, *Guidelines on the Protection of Privacy and Transborder Data Flows* (OECD, Paris, 1980).

<sup>10</sup> Australian Law Reform Commission, *Unfair Publication: Defamation and Privacy* (ALRC 11), 1979.

“A person publishes sensitive private facts concerning an individual where the person publishes matter relating or purporting to relate to the health, private behaviour, home life or personal or family relationships of the individual in circumstances in which the publication is likely to cause distress, annoyance or embarrassment to an individual in [that] position”<sup>11</sup>.

Various defences were proposed for such a cause of action. These included consent; triviality; accident; legal authority; privileged or protected dissemination; fair, accurate and contemporaneous reports; reasonable self-protection; or proof of the public interest. A right of action for appropriation of the name, identity or likeness of an individual was also proposed. However, the powerful interests of the media, whilst naturally supporting the ALRC’s acceptance of the defence of justification in terms of truth, resolutely opposed the concurrent proposal for remedies for breach of privacy<sup>12</sup>. In the end, this media opposition succeeded in defeating the parliamentary adoption of the ALRC recommendations. Important protections were secured for individual privacy in the context of information flows. However, those protections did not extend to media invasions of privacy. When, later, a uniform defamation law was adopted in the sub-national jurisdictions of Australia, it did not contain provisions for privacy protection<sup>13</sup>. Any such claim to privacy protection in that context had to run the gauntlet of the decision of the High Court in *Taylor*.

## DECISIONS OF THE COURTS (1984-2009)

When I left the Australian Law Reform Commission and returned to the courts, my duties occasionally saw me participating in cases that concerned prospects of what might be envisaged as invasions of privacy. Sometimes the questions were dealt with under the umbrella of the cause of action in defamation<sup>14</sup>. Sometimes there were dealt with in the tort of breach of confidence<sup>15</sup>. Occasionally, a claim was made

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<sup>11</sup> *Ibid*, 214 (draft legislation).

<sup>12</sup> See, eg, Michael Cameron, ‘Libel Law Danger to Free Press’, *The Australian* (Sydney), 5 August 2004, 22; Mark Day, ‘Save Freedom of Speech in Unifying Defamation Code’, *The Australian* (Sydney), 12 August 2004, 22.

<sup>13</sup> See, eg, *Defamation Act 2005* (Vic)s25 (defence of justification: ‘substantially true’).

<sup>14</sup> *Ettingshausen v Australian Consolidated Press Ltd* (1995) 38 NSWLR 404.

<sup>15</sup> *Attorney-General (UK) v Heinemann Publishers Australia Pty Ltd* (1987) 10 NSWLR 86. This decision was upheld see *Attorney-General (UK) v Heinemann Publishers Australia Pty Ltd* (1988) 165 CLR 30.

seeking remedies for invasion of privacy as such. In one such case, the complaint related to the installation of cameras in a meat processing establishment concerned with the slaughter of native Australian animals<sup>16</sup>. In the end, no remedy was afforded in that case for breach of privacy, although several of the High Court justices (including myself) indicated that their minds were open to revisit the decision in *Taylor* and to consider the development of a common law principle for invasion of privacy by media. It was my view that *Lena Game Meats* was not a suitable case in which to explore that notion. This was because the claimant there was a corporation and the universal principles of human rights upholding privacy were, by their terms, addressed to individual privacy, for the protection of human subjects. This was different from the concept of corporate privacy, for the protection of inanimate legal persons with no body to feel or soul to be damned<sup>17</sup>.

In *Lena I* I endeavoured to indicate reasons why, in fashioning any future remedy for privacy protection in the context of publication, considerable care had to be observed. Sometimes, facts can be embarrassing. But on the other hand, the publication of facts can often reveal the world as it is, not as surrounding society might prefer it to be. Whereas Justice Callinan in *Lena* had mentioned with apparent praise the restraint exercised by the media in the United States (and other countries) in publicising the physical impairments of President F.D. Roosevelt that kept him, for the most part, in a wheel chair after he had suffered poliomyelitis in the 1920's, it is at least arguable that revelation of the truth might have been in a higher public interest.<sup>18</sup>

“With hindsight, it is arguable that such restraint was misconceived. The ability and character of the President overcame his physical restrictions. Had they been reported and discussed in the media, this might well have contributed to more informed attitudes to physical impairment generally.”<sup>19</sup> At least this would have been a legitimate subject to be weighed in the balancing exercise required by the application

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<sup>16</sup> *Australian Broadcasting Corporation v Lena Game Meats Pty Ltd* (2001) 208 CLR 199 (‘Lena’); *Dow Jones & Co Inc v Gutnick* (2002) 210 CLR 575.

<sup>17</sup> *Lena* (2001) 208 CLR 199, 279 [190] (citations omitted).

<sup>18</sup> *Lena* (2001) 208 CLR 199 at 288 [219]; cf. *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520.

<sup>19</sup> Neither Prime Minister W.M. Hughes nor J.W. Howard made any secret of their hearing impediment and Prime Minister Howard discussed it openly on National television.

for the provision of injunctive relief and mandated, in such a case, by the considerations implied from a constitution such as ours.<sup>20</sup>

The net result of these encounters with the cases was, by that, my public legal career finished without having an opportunity finally to contribute to a modern and effective remedy for serious invasions of privacy. But was such a remedy really necessary in Australia?

## RECENT AUSTRALIAN RECOMMENDATIONS (2008)

A number of proposals for the creation of a tort of privacy were advanced in Australia early in the present century. Reports of the ALRC, joined by recommendations of the NSW and Victorian Law Reform Commissions, recommended the creation of a statutory right to privacy<sup>21</sup>. The proposal rested upon established instances, up to that time, and the perceived need to strengthen the rights of individuals against the powerful and largely self regulated decisions of media outlets.

It was at this time that a number of developments started to occur that have now come together in the situation in which we find ourselves. Those developments include first on decisions of the courts in England, addressing what were seen as unacceptable reporting of private facts and which were held to give rise to remedies that were specifically expressed in terms of protection of personal privacy. These decisions have included:

- \* *Douglas v Hello*,<sup>22</sup>
- \* *A v B Plc*,<sup>23</sup>
- \* *Naomi Campbell v MGN Ltd*,<sup>24</sup> and
- \* *Mosley v News Group Newspapers*<sup>25</sup>.

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<sup>20</sup> Cf. *Lenah* (2001) 208 CLR 199, 336 [377] (Callinan J).

<sup>21</sup> Australian Law Reform Commission, *For Your Information: Australian Privacy Law and Practice*, Report No. 108 (2008), Pt K. See also New South Wales Law Reform Commission, *Invasion of Privacy*, Report No. 120 (2009).

<sup>22</sup> [2001] QB 967, per Sedley LJ.

<sup>23</sup> [2003] QB 195, Paras [4]-[6].

<sup>24</sup> [2004] AC 457.

<sup>25</sup> [2008] EMLR 20.

The *Mosley* case is a good illustration. Mr Max Mosley was president of the International Motor-Racing Federation. A video film was taken, by a camera concealed in the jacket of a woman known only as “E”, concerning activities with the News Group in its tabloid papers called a “Sadomasochistic Nazi Orgy”<sup>26</sup>. Mr Mosley described the event as nothing more than a private party. The now defunct *News of the World*, then published by News Group, presented the story in a sensational way. However, “E”, who was to have been their star witness, failed to attend court to give evidence. The public interest defence pleaded by the publisher relied on the suggested theme of a Nazi concentration camp. In consequence of the absence of the star witness, Mr Mosley succeeded. He was awarded £60,000 damages. The trial judge’s “long and dispassionate judgment” attracted strong press criticism for what was described as “as his moral relativism” or worse. However, no appeal was brought against it. And as the world knows, *News of the World* was later closed by decision the principal of the News Group, Mr Rupert Murdoch.

The events surrounding that closure were instructive for the attitude that had been exhibited in England by News Group and reflected in media houses forced to compete with its salacious approach to the private lives of celebrities. The final straw was presented when News Group’s publications (to put it at its lowest) took advantage of illegal telephone hacking of the mobile phone of a murder victim, Milly Dowler. At the same time, it was revealed that a cohort of reportedly 4,000 victims had suffered serious and sometimes harrowing invasions of their privacy and intrusions into their private conversations and relationships. It was the revelation of these activities that led to demands for redress, both in England and Australia.

Some of the journalists in the employ of News Group were unrepentant. A former deputy editor of *News of the World*, Paul McMullan, expressed his views thus:

“Privacy is for pedos”<sup>27</sup>

McMullan said he little sympathy for celebrities such as Hugh Grant, who have complained about media intrusion.

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<sup>26</sup> Lord Walker of Gestingthorpe, “The English Law of Privacy - an Evolving Human Right”, *Victorian Bar Review*, Vol. 1, 2011, 1.

<sup>27</sup> An abbreviation for paedophiles.

‘Privacy is the space bad people need to do bad things in. Privacy is evil. Privacy is for pedos. Fundamentally, nobody else needs it’, said McMullan, who was one of the several journalists giving evidence in London today.

McMullen said reporters at the paper routinely hacked people’s voicemails and did so for their editors and because it was in the public interest”<sup>28</sup>

Such was the outcry that arose in the British Parliament at the revelation of this arrogant abuse by media of its power to invade the privacy of individuals that a number of things happened. A Parliamentary Committee of Inquiry was established by the British Parliament before which, famously, Rupert Murdoch, his son and senior officers attended to eat humble pie. “Never”, declared Mr Rupert Murdoch, had he felt so “humble”. It was clear that he could smell the newly resolute decision of members of Parliament in all parts of the House, to cast aside their fear of the media and to resolve that strong action was necessary. For example, the British Deputy Prime Minister, Mr Nick Clegg, reportedly warned both the media and his Conservative Party Coalition partner in the United Kingdom, not to pre-empt or reject the recommendations of the Leveson inquiry. He has indicated that he would work with the British Labour Party to implement the Leveson recommendations, so long as they were “proportionate”<sup>29</sup>.

The Leveson Inquiry itself undertook an unprecedented investigation into a large number of complaints that together (and looked at as a whole) illustrate a supreme arrogance on the part of a power in the land that felt it was beyond legal or political control. Mr Clegg declared that the test for the British Government’s response to the Leveson proposals would be:

“Can we look Milly Dowler’s mother and father in the eye, whose privacy was so outrageously abused at a moment of extraordinary grief?”<sup>30</sup>

In Australia, the events occurring in England were followed by local action. In December 2011, the Federal Government constituted an Independent Inquiry into

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<sup>28</sup> A report in the *Sydney Morning Herald*, 1 December 2011, 3.

<sup>29</sup> *Sydney Morning Herald* 25 September 2012, 7 (from *Guardian News*).

<sup>30</sup> *Ibid.*

the Media and Media Regulation. This inquiry was chaired by the Hon. Ray Finkelstein QC, a former Federal Court judge, assisted by Professor Matthew Ricketson. Although not specifically concerned with privacy, the inquiry addressed particular problems in Australia of regulating media in differential ways. Electronic media has been thought to lie within federal constitutional power over telecommunications. There, significant regulations exist and the abuse of power has been confined. On the other hand, print media, thought to be largely beyond regulation by the Federal Parliament, has been substantially a law free zone, so far as protection of privacy was concerned. At least it was so if no other head of peripheral remedy could be discovered, such as an action for defamation or breach of confidence. A number of instances of irresponsible reporting of private matters in Australia were noted by the Finkelstein report when it was later delivered in February 2012<sup>31</sup>.

- “ \* A minister of the Crown has his homosexuality exposed. He is forced to resign.
- \* A chief commissioner of police is the victim of false accusations about his job performance fed to the news media by a ministerial adviser. Following publication of the articles, he is forced to resign.
- \* A woman is wrongly implicated in the deaths of her two young children in a house fire. Her grief over her children’s deaths is compounded by the news media.
- \* Nude photographs, said to be of a female politician contesting a seat in a State election, are published with no checking of their veracity. The photographs are fakes.
- \* A teenage girl is victimised because of her having had sexual relations with a well known sportsman.”

In addition, instances were cited of other examples of serious privacy invasions and undue harassment by journalists:

“Exhibit A is the Madeline Pulver collar-bomb case, with the television media camping outside her house for four days, and pictures published of her walking the dog, despite the fact that she was child, a victim and that her father had pleaded for her privacy to be respected.” “The news media”, Finkelstein says, “does a great deal

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<sup>31</sup> Hon. R. Finkelstein, *Report of the Independent Inquiry*.

of good work. Journalists and editors pursue their jobs with dedication and skill. Yet in all these cases, the media failed its own frequently proclaimed standards. People were damaged, sometimes profoundly, and in most cases had no meaningful recourse”<sup>32</sup>.

In addition to the Finkelstein inquiry, and stimulated by the newfound interest in privacy protection deriving from the wide reportage of the instances of abuse in Britain, an issues paper was published on behalf of the Australian Government, reviving the ALRC proposals for a remedy in the form of a new federal statutory remedy for invasions of privacy.

Although the issues paper on this proposal was announced by the Federal Minister for Privacy and Freedom for Information (the Hon. Brendan O’Connor), and came down in favour of the introduction of a right of privacy in Australia, the actual initiator of the issues paper, on behalf of the Federal Government, was the Department of Prime Minister and Cabinet<sup>33</sup>. The paper recommended that a new federal statutory cause of action for the protection of privacy could and should be framed. It proposed that, to establish such a right of action, the claimant might be obliged to prove that:

- \* There is a reasonable expectation of privacy in the circumstances;
- \* The act or conduct complained of was highly offensive to a reasonable person of ordinary sensibilities; and
- \* The public interest in maintaining the claimant’s privacy outweighed other matters of public interest<sup>34</sup>.

The issues paper contemplated a number of defences to the proposed federal privacy action. These included:

- \* That the act or conduct was incidental to the exercise of a lawful right of defence of the person or of property;

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<sup>32</sup> M. Simons, “How the Fink Nailed the Media Inquiry” *Crikey*, 5 March 2012.

<sup>33</sup> Commonwealth Department of the Prime Minister and Cabinet, *Commonwealth Statutory Cause of Action for Serious Invasions of Privacy* (2011).

<sup>34</sup> Discussed in Andrea Beatty, Abhishek Bansal and Jennifer Engle, ‘A Privacy Stocktake – Where are we up to?’ (2011) 8(4) *Privacy Law Bulletin* 62, 63.

- \* That the act or conduct was required or authorised by or under the law; or
- \* That the publication of the information was, under the law of defamation, privileged<sup>35</sup>.

The issues paper also recommended a list of remedies, including an award of damages; an account for profits; the provision of injunctions; the publication of a correction order; and the making of a declaration. These and other issues are raised by the federal paper<sup>36</sup>.

Following the issues paper, a Bill for the better protection of privacy in Australia was introduced into the Federal Parliament. However, this Bill dealt with other subjects of privacy (such a credit reporting) but not privacy in the context of media publication. Whilst the media waited in nervous anticipation of the recommendations of the Leveson Inquiry in Britain and the Government's response to the issues paper in Australia, newspapers, particularly those belonging to News Limited, conducted a strident, one-sided and unrelenting continuation of its campaign against any legal protection for privacy in the context of Australia's media publications, including most relevantly its own<sup>37</sup>.

## WHAT IS TO BE DONE?

We have thus reached a Rubicon in our consideration of privacy protection in Australia. The die is cast. Of course, our Federal Government and Parliament might decide to do nothing. They might decide to leave the present absence of effective legal protection for privacy in Australia, in the context of publication, unchanged. They might conclude that the community value of privacy should be included in an honour code for journalists and otherwise left to self-regulation. They might try to expand and strengthen the Australian Press Council, which has not always been

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<sup>35</sup> *Ibid* 63-4.

<sup>36</sup> *Ibid* 64 citing the Commonwealth issues paper, above n 21, 52.

<sup>37</sup> See eg, N. Bitá, "Laws Weak in Privacy Protection", *The Australian*, 24 May 2012; "Free Speech Must Be Protected", *The Australian*, 24 July 2012, 13; K. Dearne, "Privacy Laws Place Digital Economy in Jeopardy", *The Australian*, 24 July 2012, 30; S. Hornsby, "British Model Not the Way to Go", *The Australian*, 23 August 2012, 12; "Concern at Media Plans" (News Limited Chief Executive Kim Williams), *MX Magazine*, 6 September 2012, 2; C. Merritt, "Privacy Changes Too Confusing", *The Australian*, 18 September 2012, 9; A. van Onselen, "The Push for a Tort is Misguided and Wrong", *The Australian*, 21 September 2012, 29.

particularly effective in dealing with instances of media abuse. Or they might provide for some low level administrative remedies, as by the Commonwealth Privacy Commissioner, appointed under the *Privacy Act* 1988. They might leave it to the courts in the future to develop the tort of breach of confidence. They might leave it to the courts to pick up the hint given by Chief Justice Gleeson in the *Lenah Game* case<sup>38</sup> that the common law could yet develop a tort of privacy in Australia in default of legislation. Already, there have been some instances of judicial developments in the States<sup>39</sup>. But generally the Australian courts, in the face of *Taylor*, have been unwilling to take any step towards privacy protection until the High Court does<sup>40</sup>.

## CONCLUSIONS

After such a long journey it would not be surprising to conclude that, in Australia, nothing will be done. After all, there have been so many proposals in the past, by well-intentioned people. All have sunk without trace when they came into collision with the media iceberg. Should we be worried about such an outcome? I think we should.

In a fine paper on “Privacy and the Media”, Justice Peter Applegarth of the Supreme Court of Queensland offered many instances where serious wrongs by way of invasion of privacy by the Australian media, have occurred without any remedy. One of them I feel is particularly telling<sup>41</sup>:

“Last week “*A Current Affair*” broadcast an ambush of Clive James [the notable Australian born author] in a Cambridge street [in England] by an ACA film crew. Mr James, a married man aged 72, was confronted by a woman who claimed to have had an 8 year affair with him. He has been battling leukaemia in recent years, so the Nine

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<sup>38</sup> *Lenah* (2001) 208 CLR 199, 225 [39].

<sup>39</sup> See eg, *Jane Doe v Australian Broadcasting Corporation* [2007] VCC 281; Cf. *Hosking v Runting* [2005] NZLR 1 and Johnson, “Should Australia Force the Square Peg of Privacy into the Round Hole of Confidence or Look to a New Tort?” (2007) 12 MALR, 441.

<sup>40</sup> *John Fairfax Ltd v Hitchcock*, CANSW [2007].

<sup>41</sup> P. Applegarth, “Privacy and the Media”, unpublished paper for University of Southern Queensland, School of Law, 1 May 2012.

Network's interest in filming his unexpected reunion with an alleged ex-girlfriend was particularly touching. The fact that Mr James is suffering from leukaemia is probably beside the point. The same ethical and legal issues would arise if a fit old man was being ambushed by a film crew in pursuit of a tawdry "Kiss and Tell" story.

Whether or not Mr James had the affair is beside the point. In defamation cases, truth is a defence. In privacy cases it is not. Individuals are entitled to be protected from the public disclosure of allegations about private matters, whether the allegations are true or false, or half true. There was no apparent legitimate public interest in publishing to the general public details of Mr James' extra-marital affair.

Mr James would probably have a cause an action under English law if the program was broadcast in that country, and disclosed sensitive private facts without a public interest justification. Whether he has a similar remedy under Australian law remains to be seen. This episode shows that the Australian media will continue to publish "Kiss and Tell" stories in the post Finkelstein era. Given the failure of self-regulation documented in the Finkelstein Report, and the absence of a statutory tort, Australian judges will have to pass judgment on the state of Australian law in protecting against the public disclosure of private facts. If Australian law is developed to create a tort for invasion of privacy in cases like Mr James and ACA, then many citizens will say to the Australian media: "You asked for it".

Preferable by far, as it seems to me, than the development of a common law tort by the courts, would be the creation of a statutory remedy by the Federal Parliament, after receiving and considering law reform reports and governmental consultations, such as the issues paper distributed in Canberra in 2011.

Where serious wrongs are done to individuals, it is not usual, in our form of society, to leave judgment as to the remedies and redress for those harmed entirely in the hands of the alleged wrongdoer. Where great power is involved, it is usual in a society such as ours to submit the complaint against an alleged wrongdoer to requirements of independent accountability accordingly to pre-existing legal standards. Where very great power, able to influence and even paralyse parliamentary political power, is at stake, it is usual in our type of legal system to give

access to the one branch of power in the polity that his unlikely to be frightened and willing to make independent decisions that reflect the competing social interests that are at stake. These are the competing principles explained in the UDHR and the ICCPR. Moreover, the ICCPR (which Australia has ratified) commits this country to providing protection *of the law* to those who suffer unjustifiable infringements upon their privacy, family, home or correspondence. So far, in the context of media publications, no such protection of the law has been afforded to Australians. In England, the pathway to new protection has been provided precisely because that country is a party to the *European Convention of Human Rights*. That Convention has been incorporated into domestic law<sup>42</sup>. In Australia, in part because of hostile pressure from media interests, the Rudd Government backed away from the recommendation of the Brennan inquiry and declined to proceed with proposals for legislation of a federal *Charter of Rights and Responsibilities*.

Of course, there are risks in anything that is done. Particularly is this so in relation to media interests that have an inescapable role in upholding freedom of the press and free expression in Australia. Those interests themselves have only limited protection under the Australian Constitution<sup>43</sup>.

Nevertheless, the need for something better in the protection of privacy than the current lack of legal remedies in Australia does seem now to be overwhelmingly established. Moreover, to the many considerations that I have mentioned must now be added the advent of the internet, of social media and of electronic publications. These sometimes appear to assume that they can also operate in a law free zone. Lord McAlpine in England discovered this when he was recently falsely identified on the internet as a paedophile, as a result of identification error. I too have discovered this to my disadvantage. When, in 2002, a senator in the Australian Federal Parliament attacked me and invaded my privacy with allegations about my private life that were quickly shown to be false, I had few, if any, legal remedies. Despite the total withdrawal of the allegations and the provision of an apology (which I accepted)

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<sup>42</sup> *Human Rights Act* 1998 (UK).

<sup>43</sup> *Lange v Australian Broadcasting Corporation* (1997), 189 CLR 520, referring to the Australian constitutional “free speech cases”.

the contentions remain out there in cyberspace. They continue to circulate, with all their salacious falsehood.

People who serve in public life, including in Australia, have to develop thick skins. But, they too can still be hurt and wrongly damaged, even by retracted falsehoods. Moreover, if you choose to *Google* the name of my partner of 43 years, Johan van Vloten, the enquiry will revive the association of his name with the false allegations of the senator against me. This prudent, blameless, private good citizen is reduced in dignity in cyberspace. He too has no remedy.

Why do human beings generally think it important to protect privacy? Why are some private facts deserving of such protection? The answer to these questions is that, even in the age of the internet, each one of us has a private zone in which we want to feel free to express our loves, our feelings, our dreams, our fantasies and our most intimate thoughts. It is by revealing those feelings to a very few chosen others that we reach fulfilment as individuals and richness in our existence as human beings. When such private facts are taken over by others and revealed to all and sundry without full and proper justification, we are all diminished. The onlooker, although titillated by the salacious, is reduced to an eavesdropper. The subject is diminished by humiliation, stigma or worse.

Privacy is important to our fulfilment as human beings. At the moment, in Australia, there are serious black holes in the protection that our law provides for privacy. A consideration of the journey that our law has taken over the past 70 years suggests that the time has come to provide measured protections. That, in my view, is what has been proposed in the Federal Government's issues paper, now under consideration. In privacy matters, the profits are too great to trust the media entirely to self regulation. Something more is needed. But will that something eventuate in our country in the face of the media's strident opposition? It is the moment of truth.