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Privacy Law in Australia: Changing of the Status Quo and Implications for Media Organisations

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Traditionally Australian law has not recognised any general "right to privacy". A number of existing areas of law deal with different aspects of what might generally be regarded as an individual's "private life". These include defamation law, certain criminal laws such as those relating to stalking and harassment, legislation dealing with personal information such as the *Privacy Act 1988*, and laws relating to misleading and deceptive conduct. Unless an action can be brought within the requirements of one of these defined areas of law, there is no established right on which an individual may take action for invasion of their privacy generally.

In a media context, this means that there is no "property" as such in a person's name, image or personal information and background. A person cannot, for instance, prevent a third party taking their photograph, even if it is taken while the person is engaged in some "private" activity, although the person may be able to prevent or take action over certain uses of the photograph under the laws referred to above. Celebrities in particular have in the past successfully prevented the use of unauthorised images of themselves under trade practices law, where they can show that their personal indicia have a commercial value, and the unauthorised use of those indicia stand to mislead the public into believing that the celebrity has endorsed or permitted the particular use, or that some other association exists between the celebrity and the person publishing their image. In that sense, people with high public profiles are in a somewhat different position to private individuals, in terms of their right to respond to actions that might generally be regarded as breaching general notions of "privacy".

The landscape of Australian privacy law is however changing, with a number of court decisions opening the possibility for a general right to privacy to become part of the law. This possibility has now been fast-tracked by the recent recommendation of the Australian Law Reform Commission (ALRC) to enact an express statutory cause of action for a serious invasion of privacy[1].

The *Jane Doe* Case

The most significant decision in recent times is the case of *Jane Doe v ABC*, a decision of the Victorian County Court handed down in April 2007. The plaintiff in that case, who had been the victim of a rape, had her name broadcast on national radio after the verdict convicting her attacker was handed down. Her attacker was also her estranged husband. The act of the journalists in question is a criminal offence in Victoria, however the judge found that the act of broadcasting the victim's name was also an actionable infringement of her civil rights and awarded her $234,000 in compensation.

The judge arrived at her decision on a number of grounds. Radically, she found that there was authority to support a tort of invasion of privacy in Australian law, and that such a tort had in fact been committed in the circumstances of the case. She also followed a line of UK cases (discussed below) to find that the circumstances of the disclosure by the journalists and the ABC constituted a breach of confidence under existing law relating to confidentiality. The direct implications of this case on the development of privacy law in Australia may not be great, given that it is a decision of a lower court which other courts are not bound to follow. The circumstances of the case need to be borne in mind when assessing the wider application of these principles, in particular the extreme sensitivity of the information concerned, which is evidenced by the fact that the acts in question amounted to a criminal offence. Nevertheless the case was considered by the ALRC, whose formulation of a statutory cause of action included many of the considerations raised by Judge Hampel in the *Jane Doe* case.

[1] *For Your Information: Australian Privacy Law and Practice* (ALRC 108), released 11 August 2008.

UK Media Cases and the European Context

Several UK privacy cases involving prominent celebrities have, like the *Jane Doe* case, drawn on and expanded the existing law regarding breach of confidence. Traditionally this area of the law required some pre-existing relationship between the parties concerned, for example that the parties were business partners, or in an employer-employee relationship. In *Campbell v Mirror Group Newspaper Limited*, Naomi Campbell successfully sued the *Mirror* for publishing photos of her leaving Narcotics Anonymous. Given the private nature of what she was doing at the time the photographs were taken, and despite no pre-existing relationship between Campbell and the photographers or the newspaper, the court held that the photographs were taken in "circumstances reflecting an obligation of confidentiality". That obligation was breached by the Newspaper when it published the photographs. Michael Douglas and Catherine Zeta-Jones similarly sued *Hello!* magazine for the publication of photos of their privately-held wedding which had been taken by an unauthorised photographer (*Douglas and Zeta Jones v Hello! No. 6*).

The UK cases were also decided in the context of Article 8 of the *European Convention of Human Rights* which enshrines that "everyone has the right to respect for his [sic] private and family life". Article 8 was successfully relied upon by Princess Caroline of Monaco in the European Court of Human Rights (*Von Hannover v Germany*) in action taken against a number of German newspapers. The newspapers had published photographs of the Princess engaged in a number of private activities, albeit that many of those activities took place in a public context (e.g. shopping, playing sport).

In July 2008 Max Mosley, president of Formula One motor sport's governing body, won a high-profile privacy battle against the News of the World on similar grounds in the UK High Court. The News of the World had published details of Mosley's involvement in an orgy. It has been reported[2] that, despite winning his case in the UK, Mosley is currently applying to the European Court of Human Rights in Strasbourg for a change in the law that would make it compulsory for newspapers to inform people before they publish private information about them. His argument is based on Article 8 of the Convention. Significantly Australia does not have any equivalent charter of human rights.

The Future and its Implications for both Individuals and Media Organisations

It will be interesting to see how higher Australian courts analyse and apply the kind of arguments raised in the *Jane Doe* case, and in particular how freedom of speech considerations will be taken into account. The circumstances of *Jane Doe* did not warrant any detailed consideration of freedom of speech, as the publication in question was specifically prohibited. On the other hand the law in this area now seems likely to be fast-tracked if the recommendations of the ALRC are implemented. While the ALRC has not been prescriptive about the elements that would comprise a cause of action for "serious invasion of privacy", they have suggested that it should apply in circumstances in which:

• there has been an interference with an individual's home or family life;

• an individual has been subjected to unauthorised surveillance;

• an individual's correspondence or private communication has been interfered with; or

• sensitive facts about an individual's private life have been disclosed.

The cause of action would only apply where the individual had a "reasonable expectation of privacy", and the act complained of was "highly offensive" to a reasonable person.

Obviously media organisations stand to be significantly effected by any such changes in the law. Accepted practice regarding intrusive or celebrity journalism in particular is likely to be put under serious scrutiny. Whether the law evolves through the courts, or is implemented by government legislation, it appears that Australian law is slowly but inevitably moving towards the European way of

[2] *Press Gazette* 6 October 2008.

thinking, namely that of privacy being a basic human right. It is arguable that this shift is a reaction, at least in part, to changes in other areas of the law which have swung the private rights v. free speech balance back the other way, in favour of the media. The uniform defamation laws that were introduced across most Australian States at the beginning of 2006 may be one example of this. Those laws removed the requirement, at least in so far as the position in New South Wales had been, that a defendant arguing a justification defence to a defamation action be required to prove that the publication in question was in the public interest, in addition to being substantially true. Under the new laws, substantial truth alone is a sufficient defence. Whatever the underlying socio-legal currents may be, the circumstances giving rise to a "reasonable expectation of privacy" is sure to be the subject of no small debate, and will in any event itself change over time as the attitudes and morality of society changes.

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