Is there a tort of privacy in Australia?

Maureen Tangney discusses the need for a common law response to privacy issues

Exactly 100 years ago Samuel Warren and Louis Brandeis announced, in the Harvard Law Journal, their discovery of an actionable right to privacy. Their article was prompted by Warren's disgust at the 'flagrant breaches of decency and propriety' committed by the local press against his wealthy and party-loving family.

Warren and Brandeis found their tort of privacy in a lot of old English case law about defamation, infringement of property rights, breach of confidence and breach of contract. Their discovery opened up a new and fertile territory for American law, which has developed in tandem with the recognition of certain constitutional protections for privacy.

Australian and English courts have failed to make a similar discovery, though there has been some activity in tort and other areas of the law which affords some incidental and limited protection to privacy. Compared to the development of American privacy law, the Australian and English legal systems have been timid and reluctant.

We can ill afford to take our time. Technological developments, particularly in the last 10 years, have radically altered our social environment. The right to privacy, and the freedom it implies, is threatened now as it never was before, and we must use every weapon at our disposal, including the common law, to protect it.

What is privacy?

The simplest, and perhaps the most enduring, definition of privacy is that endorsed by Warren and Brandeis: 'the right to be let alone'.

Another popular definition, advanced by Professor Alan Westin in *Privacy and Freedom* (1967) is:

"the claim of individuals, groups or installations to determine when, how, and to what extent information about them is communicated to others".

Although some argue that the concept of privacy has become as nebulous as those of 'happiness' or 'security', 'privacy' is no more difficult to handle than the concepts of 'reasonableness' and 'property'. It has deep common law roots in private property and confidential communications, and there are many cases available to help draw its boundaries.

Privacy is recognised as a human right in many international instruments, including the *International Covenant on Civil* and *Political Rights*, the *Universal Declaration on Human Rights*, and the *European Convention on Human Rights*.

The direct relationship between freedom and privacy is not difficult to discern. How free is an election without a secret ballot? How free is speech when all private words are recorded, for example, by telephone taps? How free is travel, when every movement is monitored?

One of the most disturbing aspects of the about the Australia Card was how easily people accepted the Orwellian argument that 'If you have nothing to hide, you have nothing to fear'.

How is privacy threatened today?

Thirty years ago, an entire room was needed to house a computer - now all that is required is a lap. Computers can 'think' with artificial intelligence, they can 'relate' to one another (relational databases); and, most importantly, they can 'remember' practically limitless amounts of information.

Great quantities of data can be collected, collated and analysed very quickly and cheaply, and cross-matched with data from other sources. Remote camera and video systems, satellite surveillance, powerful communication interception devices, miniature tape recorders and cameras, night vision devices and motion detectors are available. Integrated services digital networks (ISDN) and fibre optics are about to transform the telecommunications industry, making it possible to transmit the equivalent of the entire contents of the Encyclopedia Britannica along a single optic fibre in about eight seconds.

The price for these benefits is frequently paid in privacy and individual liberties.

Generally, the common law provides only limited and incidental protection for privacy, for example, in the law relating to trespass, nuisance, passing off, injurious falsehood, breach of confidence and defamation. This protection is far from comprehensive, although there have been some recent law reform proposals.

Reform of the common law

In May 1990, the Legal and Constitutional Committee of the Victorian parliament, in its report on *Privacy and Breach of Confidence*, expressly rejected the statutory modification of the action for breach of confidence recommended by the Australian Law Reform Commission (ALRC) in its 1983 report on privacy on the basis that this "would be to approach the self-evident need for enhanced privacy protection indirectly and peripherally...(w)hat is needed is a direct and comprehensive approach consistent with international standards".

The Committee instead recommended that the Attorney General urgently consider the introduction of comprehensive privacy/data protection legislation. It also recommended:

- the award of damages for mental or physical distress suffered by a plaintiff whose confidence has been breached;
- a range of remedies sufficiently flexible to permit the courts to take into account all of the circumstances of the cases before them; and
- a clarification of the law relating to the applicability of the action in circumstances where information has been unlawfully or improperly obtained.

The Victorian Committee's report recognises that attempting to address modern privacy problems by tinkering with individual common law actions is simply not good enough. It is no good stretching the law of trespass, nuisance, defamation and breach of confidence in an effort to meet all the challenges of information technology. If the common law is to respond at all, it must do so unambiguously and unreservedly.

The recommendations put forward in the discussion paper on reform of defamation law (1990) by the Attorneys General of New South Wales, Queensland and Victoria also deserve a mention.

The discussion paper focusses attention on the role of defamation in balancing the competing interests of freedom of speech and the protection of privacy.

The Attorneys considered whether it would be appropriate to adopt a public figure test so that public figures would receive no damages or less than those awarded to private individuals, and unanimously concluded:

"that the reputation of public figures should not be afforded less protection than other persons in the community. The choice to become a public figure should not mean that the public has an unmitigated right to scrutinise every

facet of such a person's life."

The discussion paper also considers the adoption of 'truth alone' as a defence without further requirement of public interest or public benefit, and concludes that, if it were to be adopted, appropriate measures would need to be introduced to protect individuals from unjustified revelations about their private affairs.

One measure under consideration to discourage unjustified invasions of privacy is a provision contained in the ALRC's uniform draft bill. This would render the defence of substantial truth unavailable where the published matter related to the health, private behaviour, home life or personal or family relationships of the subject, unless it is proved that the material:

- was the subject of government or judicial record available for public inspection; or
- was published reasonably for the purpose of preserving the personal safety, or protecting the property of any person; or
- was relevant to a topic of public interest.

It was suggested that the defence should apply where the plaintiff has consented to publication of the sensitive private facts, the publication was authorised by law, or was made reasonably for the protection of the defendant's property, or was a fair, accurate and contemporaneous report of any parliament or similar tribunal.

The Attorneys expressed little interest in the ALRC's recommendation that a new tort of unfair publication of private facts be created to apply to publication of material relating to a person's health, private behaviour, home life, personal or family relationships which was likely to cause distress, annoyance or embarrassment to that person.

Australian and English courts have specifically rejected a general tort of privacy: see the Australian High Court in *Victoria Park Racing Co.* v *Taylor* (1937), and the more recent English decision of Megarry VC in *Malone* v *Metropolitan Police Commissioner* (1979).

Both countries' law reform agencies have been as reluctant as judges to discover or recommend a general tort of privacy. The ALRC decided it was inappropriate to create a general tort of invasion of privacy 'at this stage', considering it ill advised to commit such a vague, nebulous and unstable concept to the courts.

Legislative protection of privacy

The ALRC's main recommendation was that appropriate legislative standards should be enacted for the protection of privacy, particularly in relation to the collection and use of personal information. However, just as there are gaps in the protection given to privacy by the common law, there are 'black holes' in the legislative protection of privacy.

The New South Wales Parliament passed the Privacy Committee bill in 1975 on the basis that action had to be taken to ensure that the new technology being applied within government, business and the community was subject to appropriate rules and standards and that privacy interests were protected. It was thought that by setting up the Privacy Committee these rules and standards would be formulated and applied and this would ultimately lead to the best protection for the individual and his rights. Fifteen years later we are not even close to providing the 'best protection' for privacy rights.

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In its latest annual report, the Privacy Committee identified a large number of projects that it cannot address including the review of:

- police computerised information systems, including crime intelligence databases;
- telephone technology (including caller identification);
- computer matching;
- video surveillance in the community;
- use and disclosure of criminal records, and the issue of spent convictions;
- use and disclosure of information generated by Electronic Funds;
- Transfer at Point of Sale (EFTPOS) systems.

These projects cannot be addressed because the Committee is hopelessly under-resourced. It has a full-time staff of just six officers to investigate complaints, provide advice, undertake research and recommend privacy policies for the public and private sectors.

The Privacy Act

At the Commonwealth level, the *Privacy Act* now governs the collection, security, use and disclosure of records of personal information maintained by Commonwealth agencies. The Act also sets out a number of provisions relating to the use of tax file numbers.

The Commonwealth Office of the Privacy Commissioner does not suffer the same funding difficulties as the NSW Committee, but there are other significant limitations on its capacity to deal with privacy problems.

First of all, the *Privacy Act* is misnamed. It is, in essence, a data protection statute concerned with the collection, handling and dissemination of records of personal information. Other types of privacy problems associated with surveillance technology (eg telephone tapping) are not addressed, nor are physical intrusions into privacy (such as the taking of urine and blood samples for drug testing purposes). The Commonwealth Act is further limited to the enforcement of privacy standards in the Commonwealth sector (except for the special case of tax file numbers).

However, a significant extension of the Act is likely with the passage of the Privacy (Amendment) bill 1989, which will broaden the jurisdiction of the Commonwealth office to include credit reporting practice and procedure.

A number of other statutes also contribute to the protection of privacy. For example, officers of the Department of Social Security, the Australian Tax Office and the Australian Bureau of Statistics and many other Commonwealth and State agencies are subject to strict statutory prohibitions on disclosure of personal information.

Other laws regulate the exercise of powers of entry and search and the use of telephone taps and listening devices and Freedom of Information legislation upholds the right of the subject to have access to information which relates to him or her.

Conclusion

The protection of privacy is an old problem but the threats to privacy and liberty posed by information and surveillance technology are new.

We must understand what the new technology can do, so that we can make informed decisions about how we wish it to be used. When these uses are identified, we must employ the regulatory mechanisms at our disposal -such as legislation and the common law - to define the boundaries of impermissible intrusion and surveillance.

At the moment, those boundaries are not well defined by either the common law or by statute. Indeed, in some cases the boundaries do not exist.

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