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An Update on Privacy Tort Reform with Professor Barbara McDonald

Tim Senior of Banki Haddock Fiora interviews Professor Barbara McDonald

Barbara McDonald is a Professor at the Faculty of Law at the University of Sydney and a Fellow at the Australian Academy of Law. She recently served as a Commissioner of the Australian Law Reform Commission (ALRC) where she headed the Inquiry into Serious Invasions of Privacy in the Digital Era.

Tim Senior is a specialist media lawyer at Banki Haddock Fiora, who regularly advises some of Australia's largest broadcasters and publishers.

TS: Professor McDonald, we are excited to hear your thoughts about developments in privacy tort reform since your ALRC report was published in 2014. It was observed by Gleeson CJ in *ABC v Lenah Game Meats Pty Ltd (2001) 208 CLR 199* that 'there is no bright line which can be drawn between what is private and what is not'. What does the concept of privacy mean to you?

BM: A surprisingly difficult question. I may now be too imbued with legal discussions - and the various uses to which the concept of privacy has been put in legal contexts – to separate out an ordinary use of the term. Essentially I think privacy refers to the state of keeping one's body and thoughts, aspects of one's life and information about oneself behind certain boundaries. These boundaries may be self-imposed or arise from expectations relating to our interactions with others in our private or public lives. In its 2008 Report For your Information: Australian Privacy Law and Practice, the ALRC noted four concepts of privacy: information privacy, bodily privacy, privacy of communications and territorial privacy (paragraph 1.31). This is a useful summary and directed to key privacy interests. In the 2014 Report we did not attempt to define privacy but rather concentrated on what test the law should use to determine whether particular information or activities should be characterised as private.

TS: The ALRC and recent New South Wales Standing Committee inquiries focused on the impact of

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digital or technology related invasions of privacy. In what way do such privacy breaches most commonly occur, and do you think they are on the increase?

BM: The two types of invasion of privacy that we concentrated upon were invasions by intrusion upon a person's physical or informational privacy and by the unwanted dissemination of private information. New technologies make both types of invasion easier and more intrusive or more damaging. New technologies from phones to drones to spyware allow instant or remote or automatic surveillance and recording of people, and their activities, movements, and communications with others. The internet enables widespread and almost uncontrollable aggregation and dissemination of private information. In our Inquiry we heard from people concerned with neighbourhood security cameras, public CCTV cameras, aggregation of data for commercial purposes, surveillance by activist groups, media intrusions and revelations, and the increasing phenomenon of "revenge porn", harassment and bullying by unwanted online revelations of private information.

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TS: A statutory cause of action for invasion of privacy does not presently exist in Australia. In the UK and other jurisdictions, causes of action for serious invasions of privacy have developed through the common law, including via the extension of the equitable action for breach of confidence. Although there have been some cases in Australia where an action for breach of confidence has been brought to redress an invasion of privacy (for example *Giller v Procopets [2008] VSCA 236* and *Wilson v Ferguson [2015] WASC 15*), why hasn't the law here developed in the same way? Are we just waiting for the right case to come along?

BM: To a certain extent we are waiting for the right case to come along but it needs more than just a fact situation to arise for the common law to develop: it needs litigants and lawyers prepared to take a case to trial and through the appeal process, as well as courageous judges, for new law to be made and developed. There is some anecdotal evidence that litigants prefer to rely on settled principles such as breach of confidence if they can while media defendants would prefer to settle meritorious claims than have new law on privacy develop in the courts. We are a smaller population than the UK so perhaps we don't see the volume of case law that allows law to develop, although NZ courts in a smaller country with a similar legal heritage have shown their independence in fashioning a new tort. We also do not have a Human Rights Act such as the UK 1998 Act nor a Bill of Rights such as in NZ which have underpinned the developments in both of those countries.

TS: There have been a number of recent inquiries into the adequacy of existing remedies for breaches of privacy, including the ALRC inquiry you headed. Each of those inquiries has supported the enactment of a statutory cause of action for serious invasions of privacy, and yet there have been no changes to the law. Why do you think that is? Does it just come down to a lack of appetite from government?

BM: Yes I think so, but also from ignorance of what is being proposed. All statute law depends on political interests and priorities. That entails getting at least a modest consensus for change, and dealing with powerful lobby groups which may want to block change. Governments listen to business interests and some have made a case that they are already overregulated on privacy. They are usually referring in fact to the data-protection regimes such as in the *Privacy Act 1988* which does regulate the collection and storage and dissemination of some personal information for certain entities or under regimes governing state and territory government entities. The statutory cause of action would have a different context and would entail positive conduct that invades others' privacy in certain ways. Governments are often reactive and it may only be when there is an egregious case for which there is no existing remedy that a government will show interest in responding to a public outcry. Legislators are also reluctant to enact laws if they are uncertain as to how they will operate and whom they will affect: that is why we tried in the ALRC Report to be as specific as we could in our recommendations and why we limited the proposed cause of action to the two most troublesome types of invasions of privacy and to intentional or reckless conduct.

TS: Does Australia actually need a statutory cause of action for invasion of privacy? What's wrong with the current protections and remedies that exist, for example the State and Commonwealth information privacy legislation and common law actions like breach of confidence?

BM: There are numerous gaps in the protection currently offered by information privacy legislation (it only affects certain entities) and by common law actions which were developed with privacy as only an incidental interest to be protected: we set these out in Ch 3 of our Report. Importantly the common law makes it difficult to claim compensation for even acute distress which is the most common consequence of an invasion of privacy.

TS: Do you see any risks or potentially negative consequences in introducing a blanket statutory cause of action for serious invasions of privacy? For example, opponents of a privacy law suggest that it may have an adverse effect on freedom of speech, including the media's ability to report stories of legitimate public concern, or lead to a flood of UK style super-injunc-

tions. What measures could be included in a statutory cause of action to ensure a fair balance between the protection of privacy and free speech?

BM: Yes I think we first need to avoid a statutory tort which is drafted in too general, unspecific, terms. We also need to build strong protection of these other interests into the design of the action itself which is what we did in our Report. We recommended that a serious invasion of privacy not be actionable unless the court was satisfied that the public interest in protecting the claimant's privacy outweighed any countervailing public interest. In other words countervailing public interest such as freedom of speech and the freedom of the media would have to be determined at the outset of the action rather than merely as a defence. It was disappointing that many, although not all, media interests were so intent on blocking and disparaging any discussion of further privacy protection that they did not recognise the benefits to their interests of this recommendation. Nor that legislation can have the real advantage of making specific protection for countervailing interests in a way that may not happen in common law development. Further recommendations that would enhance the protection of media interests under existing law were made in Chapter 13.

TS: Speaking of super-injunctions, what's your view on the recent judgment of the UK Supreme Court in the matter of *PJS v News Group Newspapers Ltd [2016] UKSC 26*, in particular the Court's decision to maintain the injunction notwithstanding that the identity of the appellant had been widely published and was known to many people in other jurisdictions? More generally, what do you think about the way privacy law has developed in the UK?

BM: On the *PJS* case, one of the interesting contrasts between privacy and confidentiality is that although the latter might be lost by information coming into the public domain, this is not necessarily the case with information that is private. For example, a picture or footage of someone naked in a shower, taken against her wishes, will always be "private" in nature unless she chooses to disclose it. It may not lose its private nature because it's been passed around by her boyfriend of the time or published on the internet and there should not be carte blanche to everyone to continue to invade her privacy by publishing the footage to new audiences, although obviously the fact that it has been published may affect causation and the level of compensation. Privacy invasions may be cumulative and ongoing. Legislation could consider a first publication rule as exists now in UK defamation law but this would not protect everyone who renewed the invasion. Interestingly, privacy litigation in the UK seems to have developed rapidly but become relatively settled in the very short time since the Naomi Campbell case in 2004. While compensation is modest (in contrast to the large sums given in settlement of phone-hacking claims), there has been some impact on the amount of gossip and personal trivia the media now publish. I have not heard of it restricting the publication of matters of *real* public importance. I am told that their broad *Data Protection Act* is providing a steadier stream and basis for action than the privacy cause of action. There are still a number of legal oddities – for example, the characterisation of the equitable claim as a tort, without full consideration of the implications of this - but English judges and academic commentators are far less concerned with precedent and classification than their Australian counterparts.

TS: The New South Wales Standing Committee released its report into remedies for serious invasions of privacy in March this year. The report recommended that a statutory cause of action be introduced in New South Wales based on the model set out in the ALRC 2014 report. The State government has until September this year to respond to the Standing Committee's report. What do you think the impact will be if the government adopts the recommendation and enacts a privacy law in New South Wales? Will the other States and Territories follow suit or will New South Wales become the privacy capital of Australia? How would you recommend preventing the possibility that we could end up in a situation, similar to the PJS case in the UK, where someone's identity is supressed in New South Wales because of the new privacy legislation, but is publishable and known in other States and Territories that have not enacted the same law?

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BM: The ALRC took the view that a nationwide federal action would be preferable to ensure both equal protection for all Australians and also, importantly, consistency for business and other entities across the country. Inconsistent legislation would create complex and therefore expensive jurisdictional and practical issues. Separate state Acts would reflect the bad old days before the uniform Defamation Acts of 2005. South Australia may be the state most likely to follow suit if New South Wales takes the lead because of the recent report by the South Australian Law Reform Institute supporting an action and because South Australia has often led the way on social reforms. On the issue of suppression orders or injunctions in different states, courts will not grant injunctions that are futile but I also assume that a NSW statute could be given some extraterritorial operation for media and internet organisations before a court in NSW. Again, invasions of privacy in one place or time may not cease to be invasions just because they have also occurred in other places or times.

TS: Thanks for your thoughts, Professor McDonald.