PRIVACY – IN THE COURTS

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I OVER THE FENCE

When I was a boy, in the 1940s, I would be taken to visit my mother's father. Opposite his home, in Dowling Street, Kensington, was a high paling fence. Beyond was a large area of open space. This was the Victoria Park Racecourse. A small boy had no hope of seeing what went on there.

My mother would gently scold her father for sometimes taking a ladder and peering over the fence, training his binoculars on the horse races. She thought that this was not quite fitting; these were other people's grounds. If he wanted to see the spectacle within, he should pay sixpence and pass through the turnstiles. My grandfather was a learned man, and I have no doubt that he knew of the case which marked a turning-point, in the courts, for the Australian law of privacy.

The case concerned the racing calls made for the Wireless Station 2UE by a talented broadcaster, Cyril Angles. He too would get on a ladder, in the property of a Mr Taylor, near my grandfather's home. With unerring accuracy, he would call the races without paying the Victoria Park so much as a halfpenny.

In 1936, the Park owners sought an injunction in the Supreme Court of New South Wales against Messrs Taylor and Angles. Their claim was dismissed.[1] An appeal was immediately lodged to the High Court of Australia. The law in Australia reached one of those critical turning points.

By majority, the High Court dismissed the Victoria Park appeal in *Victoria Park Racing and Recreation Grounds Co Ltd v Taylor* (*'Taylor's Case'*).[2] Had it been otherwise, the law of privacy in Australia would have been very different. The courts would have undertaken the task, case by case, of building a body of law to protect privacy and to afford guidance on the countervailing values that need to be weighed in extending that protection.

The Victoria Park Company had attempted to induce the High Court to embrace a 'new fangled' legal concept. It was one that had already engaged

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1 *Victoria Park Racing and Recreation Grounds Co Ltd v Taylor* (1936) 37 SR (NSW) 322; 54 WN (NSW) 141.

2 (1937) 58 CLR 479 (Latham CJ, Dixon and McTiernan JJ; Rich and Evatt JJ dissenting).

commentators in England[3] and the United States.[4] The creative spirit had been encouraged by the then recent decision of the House of Lords in *Donoghue v Stevenson*.[5] In that case, Lord Esher had uttered his famous dictum: 'any proposition the result of which would be to show that the common law of England is wholly unreasonable and unjust, cannot be part of the common law of England'.[6]

In *Taylor's Case*, Rich and Evatt JJ dissented because they thought that it was time for the common law of Australia, as declared by the High Court, to propound a new remedy that would have the effect of defending the privacy of the individual from serious, unwanted intrusion. Justice Rich was obviously shocked by a 'curious' 1904 English case in which a family in Balham, by placing in their garden an arrangement of large mirrors, had been able to observe with impunity everything that went on in the surgery of the neighbouring dentist. The dentist had failed in his legal challenge; Rich J clearly thought he should have succeeded. Interestingly, in 1937, Rich J looked ahead to the advances of technology that he could foresee:

> [I]t is easy to believe that half a century later [the mirror owners] would be able to do all they desired by means of television. Indeed the prospects of television make our present decision a very important one, and I venture to think that the advance of that art may force the courts to recognise that protection against the complete exposure of the doings of the individual may be a right indispensable to the enjoyment of life.[7]

Justice Evatt, the other dissentient, suggested that the question was not *why* a remedy should be provided in such cases but why it should *not*. He too denounced the outcome of the Balham case, and even hinted that it did not represent Australian law.

But those were the days when the Privy Council hovered over the High Court, capable of striking down legal innovations, even those apt for a new society with somewhat different values. Chief Justice Latham reflected the approach of legal deference in his opinion:

> However desirable some limitation upon invasions of privacy might be, no authority was cited which shows that any general right of privacy exists. [8]

Justice Dixon might have wavered in favour of innovation. Boldness, he said, could have been possible 'if English law had followed the course of development that has recently taken place in the United States'.[9] But Australia remained

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3 See, eg, Percy H Winfield, 'Privacy' (1931) 47 *Law Quarterly Review* 23.

4 *International News Service v Associated Press*, 248 US 215 (1918), noted by Dixon J in Taylor's Case (1937) 58 CLR 479, 509.

5 [1932] AC 562.

6 *Emmens v Pottle* (1885) 16 QBD 354, 357-8, cited in *Donoghue v Stevenson* [1932] AC 562, 608-9; also noted by Evatt J in Taylor's Case (1937) 58 CLR 479, 519.

7 *Taylor's Case* (1937) 58 CLR 479, 504-5.

8 Ibid 496 (referring to *Chandler v Thompson* (1811) 3 Camp 80; 170 ER 1312, and *Turner v Spooner* (1861) 30 LJ Ch 801, 803).

9 Ibid 508.

chained to the English law, so the safe course was to reject the head of claim. Justice McTiernan reached the same conclusion.[10]

If only one of the majority in *Taylor's Case* had switched sides, Australian law would have been very different (assuming that the Privy Council had not intervened). Years later, in the Australian Law Reform Commission ('ALRC')[11] and in the Organisation for Economic Co-operation and Development ('OECD'),[12] it was to fall to me to participate in national and global efforts to fill the void which earlier legal responses had left in the defence of privacy.

II INTO THE BREACH

When the ALRC investigated privacy in 1983 it discovered the broad character of the claims of right that loosely collect under this head. Historically, the law had started by protecting the immediate bodily privacy of the individual (for example, by criminal laws to redress homicide, assault and battery). It quickly expanded to protect various property interests. It then took in the more nebulous 'information privacy' interests, providing redress for the disclosure of information about a person that was defamatory, inaccurate, of a confidential nature, in breach of contractual terms, negligently reported, deliberately false or contrary to some statutory secrecy requirement.[13] It would therefore be quite wrong to assume that, because of the negative answer in *Taylor's Case*, no remedies existed in the Australian courts for the defence of what could loosely be described as individual privacy.

The question confronting the ALRC was whether it should recommend a general statutory right to privacy.[14] Such a statutory tort would have had certain advantages, which the ALRC acknowledged. It would have permitted courts eventually to cover almost all privacy situations, including those which had not yet become apparent. It would have given a remedy to people seriously prejudiced by intrusions into privacy. It would have allowed judges and juries to declare contemporary standards. It would have grounded effective remedies for unreasonable conduct. And it would have brought Australian law into full conformity with the *International Covenant on Civil and Political Rights* ('*ICCPR*').[15]

Despite three earlier attempts to introduce such a general 'right to privacy' by statute into Australian law,[16] the ALRC was unconvinced. It regarded the idea as

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10 Ibid 524.

11 See Australian Law Reform Commission, *Privacy*, Report No 22 (1983).

12 See Organisation for Economic Co-operation and Development, *Guidelines Governing the Protection of Privacy and Transborder Flows of Personal Data* (1980).

13 Australian Law Reform Commission, above n 11, vol 1, [55].

14 Cf United Kingdom, Committee on Privacy, *Report* (Cmnd 5012, 1972) noted in Australian Law Reform Commission, above n 11, vol 2, [1078]. Such legislation was enacted in Canada: Privacy Act 1968 (BC), Privacy Act 1978 (Manitoba).

15 Opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976).

16 See Privacy Bill 1974 (SA); Privacy Bill 1974 (Tas); Human Rights Bill 1973 (Cth).

> too vague and nebulous. It would need to be worked out case by case as courts and administrative tribunals grappled with particular fact situations that came before them. In time, perhaps, a set of principles might be developed through this process. The limits of the tort would ultimately be fixed. How it would affect the freedom of the press, of speech and of information would only then be clear.[17]

The Commission concluded that these dangers were too serious to countenance.[18]

Prior to the ALRC report on privacy, in 1980 I participated in the work of an Expert Group of the OECD concerned with a new and urgent aspect of privacy protection: information privacy. The work was rendered urgent by the powerful capacities of new information technology (for example, computers, surveillance devices and telephonic intercepts). The OECD prepared *Guidelines Governing the Protection of Privacy*,[19] which became the foundation for Australian legislation.[20] A key provision of this legislation, reflecting the OECD Guidelines, was the right of the individual ordinarily to have access to data about himself or herself.[21] This right opened a new dimension to privacy protection, which has proved most beneficial. In a number of court cases I have called upon the OECD 'Information Privacy Principles', by analogy, to develop the judge-made law.[22]

Useful as these Principles have undoubtedly been for establishing a coherent regime for the protection of privacy in the context of information systems, serious problems have begun to emerge by reason of the astonishing advances in information technology since 1980. Some of these problems were addressed in a second OECD Group (which I chaired) on Security of Information Systems.[23] But many other problems remain. To uphold human values in the context of new technologies (such as cyberspace and genomics), it will be vital to renew and refurbish the old principles.[24] Each one of them has to be tested against the extraordinary capacity of technology today to offer fresh ways of invading

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17 Australian Law Reform Commission, above n 11, vol 2, [1081].

18 A further consideration, which was not mentioned by the ALRC, concerns a particular weakness of general judicial reforms, as distinct from detailed provisions enacted by legislatures. By the very nature of a case in which someone claims to have been wronged, there can occasionally be a tendency (if the power exists) to enlarge remedies out of sympathy for the victim of the apparent wrong-doing (cf *R v Central Independent Television plc* [1994] 3 All ER 641, 653 (Hoffman LJ)). Yet this might not always adequately reflect the countervailing arguments supporting values that compete with such claims. These values, in the context of privacy, can include national security, law enforcement, judicial process, free expression, the legitimate powers of officials to intrude upon one's space for community purposes and so on.

19 Organisation for Economic Co-operation and Development, above n 12.

20 *Privacy Act 1988* (Cth); cf John McMillan and Neil Williams, 'Administrative Law and Human Rights' in David Kinley (ed), *Human Rights in Australian Law* (1998) 63, 68. See also the *Freedom of Information Act 1982* (Cth).

21 Organisation for Economic Co-operation and Development, above n 12. The 'individual participation principle' is set out in Australian Law Reform Commission, above n 11, vol 1, [603].

22 See, eg, *Hartigan Nominees Pty Ltd v Ridge* (1992) 29 NSWLR 405.

23 See Organisation for Economic Co-operation and Development, *Guidelines for Security of Information Systems* (1996).

24 See Michael Kirby, 'Privacy Protection – A New Beginning?' (2000) 18 *Promethius* 125.

privacy,[25] and in light of new dilemmas about which suggested invasions should be allowed and which forbidden.[26] In 1999 *The Economist* declared that it was (already) too late. The law should give up; privacy was dead. 'The best advice is: get used to it.'[27] Exactly the same conclusion was reached by *Newsweek* at the dawn of the new millennium in January 2001.[28]

In some court systems, there may indeed be nothing that can be done about unreasonable invasions of privacy. But it is important to realise that in common law systems at least, it is not necessarily the case that the law will decline to intervene. The rules of the common law, and of its sister equity, have been developed over centuries by judges to respond to individual cases brought before them. If there is no settled doctrine, those judges will consider whether it is possible to derive new law, by analogical reasoning, from the old statements of the common law. It is in this way that our legal system is never, ultimately, without a solution to a legal problem. So long as it can be done consistently with the body of pre-existing legal principle,[29] and is not in breach of the *Australian Constitution*[30] or statute law,[31] judges can sometimes provide remedies in cases which their predecessors could not even imagine.

So, if need be, cases can be brought before the courts to address completely new problems concerning privacy, and sometimes, the courts will be able to provide solutions that are reasonable and just. A remedy *was* found in a case concerning a radio broadcaster in Western Australia, who was threatening to disclose the fact that a person infected with HIV had knowingly or otherwise transmitted the virus to others.[32] Justice Kennedy did not hesitate to grant an injunction in connection with an action in defamation, which the subject of the accusation had commenced. Although injunctive relief is exceptional in defamation cases, it was provided there because the defendant did not attempt to substantiate the truth of its allegations. The judge said:

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25 See E Longworth, 'The Possibilities for a Legal Framework for Cyberspace – Including a New Zealand Perspective' in United Nations Educational, Scientific and Cultural Organization ('UNESCO'), *The International Dimensions of Cyberspace Law* (2000) 9, 60, where the report of the UNESCO Experts' Meeting on Cyberspace Law is set out.

26 See Canada, Office of the Information and Privacy Commissioner, Ontario, 'Should the OECD Guidelines apply to personal data online?' (2001) 7 *Privacy Law and Policy Reporter* 158.

27 *The Economist*, May 1999, 12; cf Reg Whitaker, *The End of Privacy: How Total Surveillance is Becoming a Reality* (1999), reviewed by Joane Martel, 'The Collapse of Big Brother and the Rise of Consensual Panopticon: *The End of Privacy: How Total Surveillance is Becoming a Reality*' (2000) 5(2) *Review of Constitutional Studies* 215.

28 'The Death of Privacy', *Newsweek*, Special Issue, January 2001, 89-90.

29 *Mabo v Queensland [No 2]* (1992) 175 CLR 1, 29 (Brennan J); cf *Breen v Williams* (1996) 186 CLR 71, 115 (Gaudron and McHugh JJ).

30 *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520, 562-7.

31 *Re Refugee Review Tribunal; Ex parte Aala* (2000) 75 ALJR 52, 66 [60].

32 *X v Sattler and Western Broadcasting Services Pty Ltd* (Unreported, Supreme Court of Western Australia, Kennedy J, 31 May 1989) in John Godwin *et al*, *Australian HIV/AIDS Legal Guide* (2nd ed, 1993) 65.

> the effect of such accusations on persons infected with the AIDS virus will undoubtedly place them under severe stress. This will not only make their lives miserable but it will also be likely to worsen their condition and possibly contribute to the collapse of their immune system.[33]

It is interesting to compare the approach taken in that case with that taken fifty years earlier in *Taylor's Case*. The caution of the 1930s in responding to a novel problem would not necessarily be followed today, given that Australian law is now released from the apron-strings of the law of England.

III OCCASIONAL DISAPPOINTMENTS

Nevertheless, it should not be assumed that courts in Australia today, any more than in earlier times, will necessarily afford legal relief, simply because some aspect of the subject's privacy rights is at risk or has been abused. Take two cases for example, in which I found myself in a minority.

In the first case, *Hartigan Nominees Pty Ltd v Ridge*,[34] a beneficiary had requested access to a memorandum of wishes provided by the instigator of a discretionary trust for the use of the trustees in exercising their powers in ways that directly affected the beneficiary. I concluded that such access should be provided and that no immovable principle of equity or of the common law stood in the way. I sought to derive analogies from public law and, specifically, from readier contemporary access to government information about an individual.[35] However, a majority decided otherwise.

In *Breen v Williams*,[36] I decided that a medical practitioner was in a fiduciary position in relation to his patient and was therefore obliged, upon her request and subject to certain exceptions, to provide the patient with access to the medical records held by the medical practitioner concerning the patient. In this, I followed a decision of the Supreme Court of Canada.[37] However, a majority in the Court of Appeal decided otherwise, and the High Court dismissed the patient's appeal.[38] It held that neither the relationship, nor the facts, called forth fiduciary obligations. The law would not impose a burdensome duty that was 'prescriptive' rather than 'proscriptive'.

These and other cases[39] demonstrate the occasional limits on the capacity of the courts to express common law or equitable principles for Australia that respond to contemporary perspectives of justice, whether in relation to privacy or anything else. This is true even where the aspect of justice involved amounts to an important attribute of fundamental human rights. Privacy is one such fundamental right. It is specifically recognised in art 17.1 of the *ICCPR*, to

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33 Ibid.

34 (1992) 29 NSWLR 405.

35 Ibid 421.

36 (1994) 35 NSWLR 522.

37 *MacInerney v MacDonald* (1992) 93 DLR (4th) 415.

38 *Breen v Williams* (1996) 186 CLR 71. See Jane Swanton and Barbara McDonald, 'Patient's rights of access to medical records – A claim without a category' (1997) 71 *Australian Law Journal* 413.

39 See, eg, *Public Service Board of NSW v Osmond* (1986) 159 CLR 656.

which Australia is a party. Its provisions will inevitably influence the development of the common law, as they have already done.[40] But the provisions themselves are not part of the common law. Put simply, there are occasions when the courts do not feel able to deliver legal protection, including in respect of privacy interests. That is why pressure must be maintained on politicians to drag themselves away from the enjoyable race of the hustings and occasionally to attend to lawmaking in the field of privacy, as lately they sometimes have.[41]

IV THE GOOD NEWS

I never become discouraged about the capacity of the courts to develop and expand common law and equitable principles, including those relevant to privacy protection, where this is justified. When, occasionally, there is a reverse, one should remember that ours is a legal system measured in centuries. A decision of a court may summon forth legislative initiatives. Or the courts may (within a relatively short time) revisit an earlier decision and re-express the principle in a more desirable way.[42]

One of the most important changes in the field of privacy, so far as I am concerned, has occurred in courts and other judicial bodies established to uphold fundamental human rights. I refer to the series of decisions giving meaning to the basic right to privacy to redress the injustice of legislation imposing unwarranted intrusions on the privacy of adult sexual conduct. A series of decisions of the European Court of Human Rights on this subject[43] stimulated a determination by the Human Rights Committee of the United Nations in respect of a complaint by an Australian citizen living in Tasmania concerning the criminal law of that State.[44] The Committee's decision, adverse to Australia, led to the enactment of federal legislation,[45] and ultimately to repeal of the offensive Tasmanian laws. Let no one suggest that international human rights law is a toothless tiger.[46]

Whilst the reforms achieved in that case may be viewed as important steps for privacy rights in Australia, there are still critical voices. For example, it is unfortunate that there was no domestic constitutional means to uphold privacy rights that would have saved the need for an appeal to Geneva. The decision of the Human Rights Committee was followed on this occasion, but it is not binding on Australia, as a local court order would be. There is no regional

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40 See *Mabo v Queensland [No 2]* (1992) 175 CLR 1, 42 (Brennan J).

41 See *Privacy Amendment (Private Sector) Act 2000* (Cth), noted in Graham Greenleaf, 'Private Sector Privacy Act Passed (At Last)' (2000) 7 *Privacy Law and Policy Reporter* 125. This Act envisages National Privacy Principles as the standard for handling personal and sensitive information.

42 Compare *McInnis v The Queen* (1979) 143 CLR 575 with *Dietrich v The Queen* (1992) 177 CLR 292.

43 *Dudgeon v United Kingdom* (1981) 4 EHRR 149; *Norris v Republic of Ireland* (1988) 13 EHRR 186; *Modinos v Cyprus* (1993) 16 EHRR 485.

44 *Toonen v Australia* (1994) 1(3) IHRR 97; reproduced in Henry J Steiner and Philip Alston, *International Human Rights in Context* (1996) 545-8.

45 *Human Rights (Sexual Conduct) Act 1994* (Cth).

46 A case in the High Court in which international human rights law was clearly critical was *Mabo v Queensland [No 2]* (1992) 175 CLR 1, 42.

human rights court or commission for Asia and the Pacific to uphold fundamental human rights, including privacy. Furthermore, some homosexual writers have criticised *Toonen v Australia*[47] on the footing that full equality for homosexual Australians presents a challenge to fundamental human dignity, not simply to privacy.[48] Thus the Tasmanian case illustrates both the utility of the international human rights dialogue (including as it affects privacy) and its limitations for the Australian legal landscape.

As the ALRC proposed fifteen years ago, most future laws on privacy in Australia will be made by legislatures. They will concern entirely new privacy questions, such as the privacy of genetic data.[49] Lawmaking by legislators in such novel fields is how it usually should be.[50] Privacy is commonly in competition with other values, and elected representatives are ordinarily (though not always) better placed to decide where the legal balances should be struck.

Meantime, a myriad of cases, of relevance to privacy protection, come before Australian courts in other guises. Rarely indeed since *Taylor's Case* will they be presented as 'privacy' cases.[51] Instead, they will ordinarily be catalogued and argued as cases about nuisance, trespass, battery, defamation, fiduciary duties, copyright, breach of confidence, secrecy or some other legal head. As Australian courts become more accustomed to drawing upon international statements of fundamental rights and the jurisprudence that expounds those rights, it is possible that the notion of privacy, as such, will be revived in our legal discourse. Courts will then be presented with choices. Those choices, even today, can sometimes strike down useful legal developments and withdraw the law's aid to parties with an apparently legitimate grievance. But occasionally they can also afford relief.

With so many challenges to privacy being presented by contemporary technology, there will be plenty of work for lawmakers of every kind to perform in delivering justice. And that includes, where it is appropriate, the judicial lawmakers in the courts.

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47 (1994) 1(3) IHRR 97.

48 Eg, Wayne Morgan, 'Identifying Evil for What It Is: Tasmania, Sexual Perversity and the United Nations' (1994) 19 *Melbourne University Law Review* 740; cf Janet E Halley, 'The Politics of the Closet: Towards Equal Protection for Gay, Lesbian and Bisexual Identity' (1999) 36 *UCLA Law Review* 915. Such writers fear that treating sexuality under the heading of 'privacy' interests may have a tendency to uphold only 'closeted' adult sexual expression and to reinforce stereotypes.

49 A new reference was given to the ALRC in February 2001 jointly with the Health Ethics Committee to inquire into, and report on, aspects of privacy in relation to human genetic samples and information: Australian Law Reform Commission, *Public Consultation a Priority on Genetic Information Inquiry*, Press Release (7 February 2001).

50 Cf *Jones v Bartlett* (2000) 75 ALJR 1, 42 [244].

51 In *Australian Broadcasting Corporation v Lenah Game Meats Pty Ltd* (heard by the High Court of Australia, 2-3 April 2001, judgment reserved; the transcript of the proceedings is available in two parts at <http://www.austlii.edu.au/au/other/hca/transcripts/2000/H2/1.html> and <http://www.austlii.edu.au/au/other/hca/transcripts/2000/H2/2.html> at 7 June 2001), it was argued that *Taylor's Case* should be reopened. No view is expressed here on that question. Cf Greg Taylor ,'Why is There no Common Law Right of Privacy?' (2000) 20 *Monash University Law Review* 236.