74. Prof D Butler

Subject: Online submission to DP80: Prof Butler

Full name: Professor Des Butler

Proposal 4.1:
Proposal 4–2 :
Proposal 5–1 :
Proposal 5–2 :
Proposal 5–3 :
Proposal 5–4 :
Proposal 6–1 :
Proposal 6–2 :
Proposal 7–1 :
Proposal 7–2 :
Proposal 8–1 :

An approach in which public interest is taken into account when determining whether there was a reasonable expectation of privacy is understandable in principle. For example, in the case of either a camera mounted on an unmanned aerial vehicle (drone) that happens to film a drug deal taking place inside a neighbour's house or a camera trap set to monitor wildlife in the forest that accidentally films instead a drug cultivation operation, it would be a curious exercise to first determine whether those involved in such nefarious activities have a reasonable expectation of privacy before then considering whether there was a public interest defence in the circumstances.

However, the suggested approach may make problematic a case of what might be described as "embellished" reporting by the media, as arose in the case of *Mosley v News Group Newspapers Ltd* [2008] EWHC 1117. In that case a newspaper embellished a report concerning sado-masochistic activities involving a public figure, who was the son of a one-time leader of a fascist party in Britain, by describing them as a "Nazi Orgy". Eady J (at [140-141]) thought that there would be value in applying a test of "responsible journalism" when determining whether the publication breached privacy in the public interest (cf Lord Phillips MR in *Campbell* [2003] QB 633 at [61]). In this connection Eady J made reference to the guidelines developed by Lord Nicholls in *Reynolds v Times Newspapers Ltd* [2001] 2 AC 127 at 205. In Australia, such an approach may be more easily accommodated if public interest were regarded as a defence and formulated in a manner akin to s 30 of the uniform *Defamation Acts*, which requires that the conduct of the publisher in publishing the matter be reasonable.

Whatever the merits of the decision in the *Mosley* case itself, the facts of the case demonstrate the potential for embellished reporting, particularly in the case of high-profile figures. Embellishment might occur in different ways, including the addition of a sensational headline in the editing process or a deliberate attempt to "tell a better story". Some cases of embellished reporting may result in what would otherwise in the United States be described as an invasion of privacy in the form of "display in a false light." As the ALRC has acknowledged, in Australia such cases may properly be the province of defamation law where the embellishment amounts to damage to the

plaintiff's reputation. However, this will not account for all cases of embellishment, which while not leading others to think less of the plaintiff may nonetheless affront the plaintiff's dignity. This lacuna may be avoided if, for example, the freedom of the media to investigate, comment and inform on matters of public concern identified in guideline (b) in Proposal 8-2 were not regarded as unbridled but instead, as suggested by Eady J in the United Kingdom, were to also contemplate a requirement of responsible journalism. This would make the suggested approach consistent with Proposal 13-4, which contemplates the inclusion of a defence of responsible journalism in any uniform surveillance laws. In neither the case of a statutory cause of action nor uniform surveillance laws should free rein be given to sloppy or embellished reporting under the cover of the public interest.

Proposal 8–2 :

Consistent with my submission in regard to Proposal 8-1, I submit that guideline (b) should also include a requirement of responsible journalism.

Proposal 9–1 :
Question 9–1 :
Proposal 9–2 :
Proposal 9–3 :
Proposal 9–4 :
Proposal 9–5 :
Proposal 10–1 :
Proposal 10–2 :
Proposal 10–3 :
Proposal 10–4 :
Question 10–1 :
Proposal 10–5 :
Proposal 10–6 :
Question 10–2:
Proposal 10–7 :
Question 10–3 :

Any remedy obtained against a person using the Internet as a means of invading another's privacy may be undermined if the objectionable material continues to be available on the Internet service and constitutes a continuing affront to the plaintiff's dignity. Any safe harbour defence for Internet intermediaries should therefore be subject to a regime similar to that which applies to "prohibited content" under schedule 7 of the Broadcasting Services Act. Under that regime a person may make a complaint to ACMA, which may then issue a "take-down notice" in the case of a hosting service, a "service-cessation notice" in the case of a live contents service or a "link-deletion" notice in the case of a links service. Failing an appropriate response to such notice by the Internet intermediary within a reasonable time, that entity should be regarded as a re-publisher and face the same potential liability as the user of the service.

Proposal 11-1:
Proposal 11–2 :
Proposal 11–3 :
Proposal 11–4 :
Proposal 11–5 :

Proposal 11–6 :
Proposal 11–7 :
Proposal 11–8 :
Proposal 11–9 :
Proposal 11–10 :
Proposal 11–11:
Proposal 11–12:
Proposal 11–13 :
Question 11–1 :
Proposal 12–1 :

Notwithstanding the decision in *Giller v Procopets* (2008) 24 VR 1, it would be appropriate for legislation to provide that in the case of an action for breach of confidence that concerns a serious breach of privacy a court may award compensatory damages for any resulting emotional distress. As I have previously observed in Butler and Rodrick, Australian Media Law 4th ed at [8.950]:

> … the orthodox Australian view is that while the administration of common law and equity has become fused, they are nevertheless based upon different systems of justice, or as it is said "the two streams of jurisprudence, though they run in the same channel, run side by side and do not mingle their waters" (*Felton v Mulligan* (1971) 124 CLR 367 at 392). Therefore there is some degree of doctrinal angst associated with awarding compensatory damages – normally the province of the common law – for an equitable cause of action. By contrast, the English courts would seem to have less difficulty accepting a single law of obligations which integrates equity and the common law (eg *United Scientific Holdings Ltd v Burnley Borough Council* [1978] AC 904 at 924-925).

Proposal 12–2 :
Proposal 13–1 :

Four jurisdictions have retained listening devices acts that are more suited to more limited technological times now decades past. The other four jurisdictions have advanced to surveillances devices legislation, but not in uniform terms. The differences between these statutes may have significant implications in practice.

As the ALRC has noted in New South Wales the *Surveillance Devices Act 2007*, s 8 provides that a person must not knowingly install, use or maintain an optical surveillance device on or within premises or a vehicle or other object to record visually or observe the carrying on of an activity where that involves:

> (a) entry onto or into the premises or vehicle without the express or implied consent of the owner or occupier, or
>
> (b) interference with the vehicle or other object without the express or implied consent of the person having lawful possession or control of the vehicle or object.

Such provisions would be inadequate in the case of a serious breach of privacy by, for example, a camera mounted on an unmanned aerial vehicle which may be hovered over the operator's property while it observes and/or records the private

activities of a neighbour.

In Victoria the S*urveillance Devices Act 1999* (Vic), s 7 excludes from its definition "an activity carried on outside a building". It would therefore exclude, for example, activities that would normally be regarded as private, such as sunbathing in one's own backyard behind a high fence. It is also possible for private activities to be carried on in open areas such as intimate activities occurring in a secluded part of bushland.

By contrast, while *Surveillance Devices Act* (NT), s 12 and *Surveillance Devices Act 1998* (WA), s 6 word their offences in different terms, both define the concept of "private activity" as an activity carried on in circumstances that may reasonably be taken to indicate the parties to the activity desire it to be observed only by themselves, but does not include an activity carried on in circumstances in which the parties to the activity ought reasonably to expect the activity may be observed by someone else (*Surveillance Devices Act* (NT), s 4; *Surveillance Devices Act 1998* (WA), s 3).

There is no justification for the inconsistency between jurisdictions. Uniform surveillance laws should be enacted. The concept of private activity as defined in the Northern Territory and Western Australia is a more flexible concept which is not artificially restricted as in the other jurisdictions, and therefore better attuned to respond to serious invasions of privacy enabled by advances in modern technology. It should therefore form the basis of the uniform approach.

Also worth considering in this process as a measure promoting free speech are the provisions in the Western Australian statute concerning the use of surveillance devices in the public interest (ss 24-33). These sections provide for inter alia application made either upon notice or ex parte to a judge for an order allowing publication or communication in the public interest. They will not, however, be satisfied for the purposes of publishing material that may merely be of interest to the public: *Channel Seven Perth Pty Ltd v "S" (A Company)* (2007) 34 WAR 325.

Proposal 13–2 :

This is an appropriate proposal. It is not possible to anticipate future advances in technology. Limiting the definition to particular forms of technology may lead to uncertainty or lacunas in the future. Certainty may be promoted by a technology neutral definition, or at least an inclusive definition.

Proposal 13–3 :
Proposal 13–4 :
Question 13–1 :

The outdated listening devices legislation in Queensland, South Australia, Tasmania and the ACT are long-standing despite the advanced technology that is now ubiquitous in modern Australian society. Of the remaining jurisdictions Western Australia was the first to enact a surveillance devices statute in 1998, with New South Wales the last nearly 10 years later. Notwithstanding the example of existing surveillance devices regimes like that in Western Australia, later statutes like that in New South Wales have been cast in significantly different terms.

Near uniformity was achieved in defamation laws through the actions of SCAG, but

only after over 20 years of debate. While the experience with defamation laws serves as an example where uniformity is possible, the position regarding surveillance devices would appear to reflect such disparate agendas among the jurisdictions that it may be preferable for the Commonwealth to legislate to cover the field in this instance.

Proposal 13–5 :
Question 13–2 :

Proposal 14–1 :
Proposal 15–1 :

This proposal is appropriate and would contemplate the regime that I have suggested as a condition of a safe harbour exemption for Internet intermediaries (see my response to Question 10-3).

Proposal 15–2 :
Question 15–1 :
Question 15–2 :
Proposal 15–3 :

Other comments:
File 1:
File 2: