12. Breach of confidence actions for misuse of private information

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Summary

12.1 This chapter makes two proposals dealing with existing protections of privacy at common law and with a view to the likely development of the common law if a statutory cause of action is not enacted.[1]

12.2 In addition to and separate from the detailed legal design of a statutory cause of action for serious invasion of privacy, the Terms of Reference require the ALRC to make recommendations as to other legal remedies to redress serious invasions of privacy and as to innovative ways in which the law may reduce serious invasions of privacy.

12.3 The Terms of Reference also direct the ALRC to make recommendations as to the necessity of balancing the value of privacy with other fundamental values including freedom of expression and open justice.

12.4 The first proposal is intended to redress uncertainty in the community as to whether Australian law provides a remedy for emotional distress suffered as a result of a breach of privacy which takes the form of the disclosure or misuse of private

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1 In this chapter, the ALRC does not consider the possible development at common law of a new or separate tort for harassment or intrusion into seclusion, because it considers that, in the absence of a statutory cause of action for serious invasion of privacy, a *statutory* action for protection against harassment is the more appropriate way for the law to be developed: see Ch 14. If, however, the common law were to develop a tort of harassment or a tort of invasion of privacy by intrusion into seclusion, it would be necessary for the courts expressly to identify its elements, including whether: it was actionable per se, by analogy with trespass to the person; required damage in the usual sense of psychiatric or physical illness; or required damage but including emotional distress.

(possibly confidential) information.[2] The first proposal is that courts be empowered to award compensation for emotional distress in such cases.

12.5 The ALRC also proposes that countervailing public interests, including freedom of expression, be considered by a court in an application to prevent publication of private information. This may be particularly important if the tort proposed in this Discussion Paper is not enacted, and greater protections against disclosure of private information instead develop at common law. It is unclear what principles should govern the exercise of the court's discretion in any action to protect merely private (not confidential) information. Australian case law provides only a very limited role for public interest considerations as a justification for restraining the breach of an obligation of confidence. By contrast, defamation law incorporates well-established principles which protect freedom of speech. The ALRC considers that there should be protections for freedom of speech in applications to prevent the disclosure of private, but not confidential, information.

The likely future development of the action for breach of confidence

12.6 In *ABC v Lenah Game Meats* Gleeson CJ appeared to foreshadow that the equitable action for breach of confidence may be the most suitable legal action for protecting people's *private* information from disclosure, stating:

> [E]quity may impose obligations of confidentiality even though there is no imparting of information in circumstances of trust and confidence. And the principle of good faith upon which equity acts to protect information imparted in confidence may also be invoked to 'restrain the publication of confidential information improperly or surreptitiously obtained'. The nature of the information must be such that it is capable of being regarded as confidential. A photographic image, illegally or improperly or surreptitiously obtained, where what is depicted is private, may constitute confidential information …
>
> If the activities filmed were private, then the law of breach of confidence is adequate to cover the case … There would be an obligation of confidence upon the persons who obtained [images and sounds of private activities], and upon those into whose possession they came, if they knew, or ought to have known, the manner in which they were obtained …
>
> The law should be more astute than in the past to identify and protect interests of a kind which fall within the concept of privacy.
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> 55. For reasons already given, I regard the law of breach of confidence as providing a remedy, in a case such as the present, if the nature of the information obtained by the trespasser is such as to permit the information to be regarded as confidential.[3]

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2 This proposal would not, therefore, apply to cases involving commercial information or the like. In this chapter, the ALRC intends 'private' information to mean information as to which a person in the position of the plaintiff has a reasonable expectation of privacy in all of the circumstances.

3 *Australian Broadcasting Corporation v Lenah Game Meats Pty Ltd* (2001) 208 CLR 199, [34], [39], [40], [55].

12.7 Gummow and Hayne JJ, with whom Gaudron J agreed, considered a broader range of privacy invasions and left open the direction that the future development of the law protecting privacy may take:

> In the present appeal Lenah encountered … difficulty in formulating with acceptable specificity the ingredients of any general wrong of unjustified invasion of privacy. Rather than a search to identify the ingredients of a generally expressed wrong, the better course, as Deane J recognised [in *Moorgate Tobacco Ltd v Philip Morris Pty Ltd (No 2)*[1984] HCA 73; (1984) 156 CLR 414, 444-445], is to look to the development and adaptation of recognised forms of action to meet new situations and circumstances …
>
> Lenah's reliance upon an emergent tort of invasion of privacy is misplaced. Whatever development may take place in that field will be to the benefit of natural, not artificial, persons. It may be that development is best achieved by looking across the range of already established legal and equitable wrongs. On the other hand, in some respects these may be seen as representing species of a genus, being a principle protecting the interests of the individual in leading, to some reasonable extent, a secluded and private life, in the words of the *Restatement*, 'free from the prying eyes, ears and publications of others'. Nothing said in these reasons should be understood as foreclosing any such debate or as indicating any particular outcome.[4]

12.8 Despite this influential and open invitation to the courts to develop further protection, there has been only isolated development at common law of further privacy protection in Australia, as discussed in Chapter 3 above, making it difficult to predict the precise direction of future developments.[5] Both of the proposals in this chapter assume that, in the absence of a statutory cause of action, the development of the equitable action for breach of confidence is the most likely way in which the common law may, in time, develop greater protection of privacy in relation to disclosure of private information.

Damages for emotional distress in action for breach of confidence

> **Proposal 12–1** If a statutory cause of action for serious invasion of privacy is not enacted, appropriate federal, state, and territory legislation should be amended to provide that, in an action for breach of confidence that concerns a serious invasion of privacy by the misuse, publication or disclosure of private information, the court may award compensation for the claimant's emotional distress.

4 Ibid [110], [132].

5 *Hosking v Runting* (2005) 1 NZLR 1, [56]–[59] (Gault P and Blanchard J): 'The recent High Court of Australia decision in *Australian Broadcasting Commission v Lenah Game Meats Pty Ltd* does little to clarify the future direction of Australian jurisprudence'. The Australian cases dealing with issues relating to invasions of privacy are set out in Ch 3.

12.9 There are several arguments in favour of the ALRC's proposal. First, if legislation clarified or confirmed that compensation could be awarded for emotional distress, the *existing* action for breach of confidence would more readily be seen as a useful response to serious invasions of privacy, and be more attractive to potential claimants.[6] This is particularly important in the event that the statutory cause of action is not enacted. Secondly, the effectiveness and availability of the remedy may deter invasions of privacy involving disclosures of private information. Thirdly, this proposal would be an effective way of addressing a significant gap in existing legal protection of privacy while being more limited and directed than the introduction of a new statutory cause of action. Fourthly, this provision would also indicate that Australian legislatures intended that the action for breach of confidence could be relied on to remedy these kinds of invasions of privacy.

12.10 In traditional claims for breach of confidence in Australia, claimants have generally sought one of three remedies: an injunction to restrain an anticipated or continuing breach of confidence; compensation for economic loss due to a breach; or an account of the anticipated profits derived from a breach. This has been so, whether the relevant confidence concerned commercial, governmental or personal information.

12.11 However, where a breach of confidence in relation to *personal* confidential or private information has already occurred and an injunction is futile, the consequence that a claimant is most likely to suffer is emotional distress, rather than harm in the nature of economic loss.[7] Professor Michael Tilbury has noted that 'the very object of the action [for invasion of privacy] will be to protect plaintiffs against [mental or emotional distress], at least in part.'[8]

12.12 The Law Institute of Victoria submitted that 'harm caused by breaches of privacy is more likely to be harm such as embarrassment, humiliation, shame and guilt. Given the centrality of privacy to identity, these harms should not be seen as insignificant, even though they are not physical or financial'.[9]

12.13 While the limited circumstances for the recovery of compensation for 'mere' emotional distress, even intentionally caused, has been a perennial issue for the law of

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6 Normann Witzleb, 'Giller v Procopets: Australia's Privacy Protection Shows Signs of Improvement' (2009) 17 *Torts Law Journal* 121, 123–124: 'Considering that breach of confidence will, until more specific protection is in place, continue to act as Australia's quasi-privacy tort, courts need to afford adequate protection against emotional distress.'

7 A claimant may suffer some other harm that the law accepts as actual damage, such as personal or psychiatric injury.

8 Michael Tilbury, 'Coherence, Non-Pecuniary Loss and the Construction of Privacy' in Jeffrey Berryman and Rick Bigwood (eds), *The Law of Remedies: New Directions in the Common Law* (Irwin Law, 2010) 127, 140. Note also: *Privacy Act 1988* (Cth) s 52(1) provides that the Information Commissioner investigating a complaint concerning a breach of that Act may make a determination that the complainant is entitled to compensation for loss, which is defined to include injury to the complainant's feelings or humiliation suffered by the complainant.

9 Law Institute of Victoria, *Submission 22*.

torts,[10] the issue of recovery in equity had not been raised in Australia until the case of *Giller v Procopets,*[11] decided by the Supreme Court of Victoria Court of Appeal in 2008. In that case, Neave JA noted: 'The Australian position appears to be at large on this issue. I am not aware of any appellate court decision which has considered it.'[12] Ashley JA stated: 'No Australian authority was cited at trial or on appeal to support the proposition that, in the context now under discussion, equitable compensation or equitable damages … can be awarded for mental distress alone.'[13]

12.14 In *Giller v Procopets* the court held that the claimant could recover damages for emotional distress in her equitable claim for breach of confidence. The claim was clearly one for breach of confidence, as the material that had been disclosed by the defendant, a videotape of intimate activities, had been created by the claimant and defendant while in a de facto relationship. The court unanimously agreed that the claimant could recover compensation for her consequent emotional distress as equitable compensation. Neave JA, with whom Maxwell JA agreed, also upheld the award as damages under the Victorian equivalent of *Lord Cairns' Act*,[14] s 38 of the *Supreme Court Act 1986* (Vic).[15] An application by Procopets to the High Court of Australia for leave to appeal was rejected.[16]

12.15 There are several reasons why it would be desirable for legislation to clarify the courts' powers to award compensation for emotional distress, notwithstanding the judgment in *Giller v Procopets.*

12.16 First, at the time of this Discussion Paper, *Giller v Procopets* remains the sole appellate authority for the recovery of compensation of emotional distress in a breach

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10 Unlike the position in the United States, Australian courts, like those in the United Kingdom and elsewhere, do not recognise a cause of action for wilful infliction of emotional distress. The tort action for wilful infliction of nervous shock, known as the action under *Wilkinson v Downton* (1897) 2 QB 57 is an 'action on the case', and like an action in negligence, requires proof of actual damage, such as a recognised psychiatric illness: *Giller v Procopets* (2008) 24 VR 1 (Neave JA & Ashley JA, Maxwell P dissenting); *Nationwide News Pty Ltd v Naidu* (2007) 71 NSWLR 417; *Wainwright v Home Office* [2004] 2 AC 406. See further, Barbara McDonald, 'Tort's Role in Protecting Privacy: Current and Future Directions' in James Edelman, James Goudkamp and Degeling (eds), *Torts in Commercial Law* (Thomson Reuters, 2011).

11 *Giller v Procopets* (2008) 24 VR 1.

12 Ibid [419].

13 Ibid [133].

14 A statute following *Lord Cairns' Act* (21 & 22 Vict c 27) *1858* generally provides, in brief, that where a court has power to grant an injunction or to order specific performance, the court may award damages to the party injured either in addition to or in substitution for the injunction or specific performance. An example of the common form is s 68 of the *Supreme Court Act 1970* (NSW). Section 38 of the *Supreme Court Act 1986* (Vic) has different wording: 'If the Court has jurisdiction to entertain an application for an injunction or specific performance, it may award damages in addition to, or in substitution for, an injunction or specific performance'.

15 Ashley JA in *Giller v Procopets* (2008) 24 VR 1 at [141] did not agree that s 38 empowered the award: 'I should next say that, upon the question of the availability of damages for mental distress, the common law would provide no assistance to the appellant even if s 38 was treated as making common law remedies available in a case within the exclusive jurisdiction. With few exceptions, the common law has turned its face against awards of damages for distress.' Later at [148]: 'But that does not mean that equity must do so'. He supported the award of compensation under the exercise of equity's inherent jurisdiction.

16 *Procopets v Giller (M32/2009)* [2009] HCASL 187.

of confidence action, over five years after it was decided. The position reached in that case has not been further tested or applied in Australia. Prior to that decision, a county court judge in Victoria, in the 2007 case of *Doe v Australian Broadcasting Corporation,* awarded equitable compensation of $25,000 for breach of confidence, for 'hurt, distress, embarrassment, humiliation, shame and guilt', as part of a larger award for other wrongs.[17] The case was settled before appeal.

12.17 Secondly, s 38 of the *Supreme Court Act 1986* (Vic), relied upon to justify the award of compensation in *Giller v Procopets*, differs from the form of *Lord Cairns' Acts* in other jurisdictions[18] where there is still controversy as to whether *Lord Cairns' Act* applies in aid of purely equitable rights such as breach of confidence.[19]

12.18 Thirdly, even if *Lord Cairns' Act* or s 38 of the *Supreme Court Act 1986* (Vic) does apply, this does not explain the basis on which equity can award compensation, in the form of common law compensatory damages and aggravated damages, for emotional distress arising from the breach of an equitable wrong. Regardless of the wording of the statute, it is problematic to have an equitable grant of compensation or 'damages' by analogy with tort law: as Ashley JA points out, 'with few exceptions, the common law has turned its face against awards of damages for distress'[20] and, as the majority held, tort law would not have provided a remedy in the circumstances. This point is *not* an argument that the judgment undesirably fuses law and equity.[21] Rather it is an argument based on the need for legal coherence.

12.19 Fourthly, if the award for emotional distress in *Giller v Procopets* is better treated as an award of equitable compensation, there remains an unsettling lack of precedent for the decision. Further it is arguably inconsistent with another decision in which a state appellate court rejected a claim in an equitable action for punitive damages, previously only given at common law.[22] While the courts of the United Kingdom, starting with *Campbell v MGN Ltd* in 2004, have routinely awarded

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17 *Doe v Australian Broadcasting Corporation* [2007] VCC 281, [186].

18 *Supreme Court Act 1970* (NSW) s 68; *Supreme Court Act 1935* (SA) s 30; *Supreme Court Act 1935* (WA) s 25; *Supreme Court Civil Procedure Act 1932* (Tas) s 11; *Judicature Act 1876* (Qld) s 4; RP Meagher, JD Heydon and MJ Leeming, *Meagher, Gummow and Lehane's Equity: Doctrines and Remedies* (LexisNexis Butterworths, 4th ed, 2002), [23–030]. See above n 14.

19 Tanya Aplin et al, *Gurry on Breach of Confidence* (Oxford University Press, 2nd ed, 2012) [19.11] states that some courts 'have taken the view that *Lord Cairns' Act* could, and should, apply to confidence claims', but that 'leading commentators continue to argue that *Lord Cairns' Act* had no effect on causes of action which were purely equitable (such as breach of confidence), rather in such cases equitable compensation should be awarded.' See also Ibid [19.15] and *Cadbury Schweppes v FBI Foods* [2000] FSR 491.

20 *Giller v Procopets* (2008) 24 VR 1, [141].

21 Aplin et al, above n 19, [17.13] notes the 'acceptance by the courts in most common law jurisdictions that (in relation to remedies at least) the rules of equity and law can be moulded to do practical justice means that the availability of remedies for breach of confidence are not, and should not be, confined by the nature of the jurisdiction upon which the claim is based. Rather the approach the court adopts should be flexible with the full panoply of remedies being available in appropriate cases. Nevertheless, this approach is not at present acknowledged by the Australian courts, and there is some indication that fusion has not been fully embraced elsewhere.'

22 *Harris v Digital Pulse Pty Ltd* (2003) 56 NSWLR 298.

damages for emotional distress in the so-called 'extended' action of breach of confidence which protects against disclosures of private information, they are clearly underpinned by the requirements of the *Human Rights Act 1998* (UK), which provides a very different remedial framework from that in the Australian legal system.

12.20 However, equity is traditionally seen as having a great deal of remedial flexibility and, provided the award is seen as consistent with broad equitable principles and doctrines, a lack of precedent may not be a significant problem.[23] Gummow J has contrasted the approach of equity to the common law:

> The common law technique … looks to precedent and operates analogically as a means of accommodating certainty and flexibility in the law. *Equity, by contrast, involves the application of doctrines themselves sufficiently comprehensive to meet novel cases.* The question of a plaintiff 'what is your equity?'[as posed by Gleeson CJ in *ABC v Lenah Game Meats Pty Ltd*[24]] thus has no common law counterpart.[25]

12.21 Further, there is much strength in the simple point made by Neave JA, that '[a]n inability to order equitable compensation to a claimant who has suffered distress would mean that a claimant whose confidence was breached before an injunction could be obtained would have no effective remedy.'[26] On these grounds, it is strongly arguable that compensation for emotional distress *should* be part of the armoury of remedies available to a court of equity when determining a claim for breach of confidence through the disclosure of private information.

12.22 It may well be that courts will arm themselves with this power by following the lead of *Giller v Procopets* in the future. However, the position would be rendered more certain, and there would be less room for argument and expensive litigation along the way, if legislation were the source of that power. As Gurry has commented, '[a]ny discussion of the application of the remedy of damages in breach of confidence cases is fraught with difficulty at the outset'.[27] It is therefore highly desirable that there be *some* legislative clarification.

Injunctions, privacy and the public interest

Proposal 12–2 Relevant court acts should be amended to provide that, when considering whether to grant injunctive relief before trial to restrain publication of private (rather than confidential) information, a court must have particular regard to freedom of expression and any other countervailing public interest in the publication of the material.

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23 *Harris v Digital Pulse Pty Ltd* (2003) 56 NSWLR 298, 304 (Spigelman CJ), quoted in *Giller v Procopets* (2008) 24 VR 1, [436] (Neave JA).

24 *Australian Broadcasting Commission v Lenah Game Meats Pty Ltd* (2001) 208 CLR 199, 216.

25 *Roads and Traffic Authority of New South Wales v Dederer* (2007) 324 CLR 330, [57] (emphasis added).

26 *Giller v Procopets* (2008) 24 VR 1, [424]. Cf [168]–[169] (Gillard J).Ibid [424], ibid [168]–[169].

27 Aplin et al, above n 19, [19.02].

12.23 An interlocutory injunction is the most significant remedy to prevent a threatened invasion of privacy, such as the broadcast or publication of private information. However, of all remedies, an interlocutory injunction restraining publication is also the most significant restriction on freedom of speech and the freedom of the media to report on matters of public interest and concern.

12.24 There is a strong and justifiable concern that undue restrictions upon freedom of speech and the freedom of the press might arise from unmeritorious claims to prevent the disclosure of allegedly 'private' information in which there is a legitimate public interest.

12.25 The ALRC proposes that courts should be directed by appropriate legislation to consider countervailing interests in freedom of expression and other matters of public interest when considering the award of an interlocutory injunction to restrain the publication of private information.

12.26 Several stakeholders supported this proposal.[28] The ALRC would welcome further comment on the desirability and practicability of the proposal and the form and content of the proposed provision.

12.27 The statutory tort for serious invasion of privacy proposed in this Discussion Paper itself provides for a public interest balancing process.[29] In addition to this, the statute could further provide that courts must have particular regard to freedom of expression, when considering whether to grant injunctive relief. The experience in the United Kingdom, as discussed later in this chapter, would be relevant to the function and desirability of such a provision.

12.28 However, this proposal would arguably be of particular benefit, on its own, if the statutory cause of action is *not* enacted. As set out below, there is some uncertainty as to the approach that a court should take to applications for injunctive relief in some cases. The question is whether it would be desirable for legislation to direct or guide the approach that the courts should take.

12.29 This may be justified to promote not only coherence but also the balancing of freedom of expression and other public interests with privacy protection. The following sections set out the complex legal principles and issues that underpin this proposal.

12.30 In a privacy case, perhaps even more so than in other cases such as cases for defamation,[30] the stakes are high for both parties. Privacy in information, once lost,

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28 RSPCA, *Submission 49*; Women's Legal Service Victoria and Domestic Violence Resource Centre Victoria, *Submission 48*; ABC, *Submission 46*; Telstra, *Submission 45*; Arts Law Centre of Australia, *Submission 43*; Pirate Party of Australia, *Submission 18*.

29 See Ch 8.

30 Defamation is essentially concerned with *false* and derogatory statements: David Rolph, 'Irreconcilable Differences? Interlocutory Injunctions for Defamation and Privacy' (2012) 17 *Media & Arts Law Review* 170. The distinction may not be clear cut: damage to reputation may be difficult to repair, and some false slurs will inevitably leave a residual doubt in people's minds, so that the harm is in fact irreparable: *Hill v Church of Scientology of Toronto* (1995) 2 SCR 1130, [166]. However, many false statements of 'fact' can be proved to be false.

may be lost forever,[31] and no amount of compensation will render the information entirely private again.[32] Equally, by the time the entitlement of the defendant to publish is adjudicated in a final hearing, the appropriate opportunity to reveal the relevant information or contribute to a public debate may be lost as the information's novelty, relevance or interest is overtaken by other events.

12.31 As with all court orders, the ultimate efficacy of an injunction will depend on the jurisdiction of the court over the apprehended conduct, as well as the location of the respondent. The court will not grant an injunction where it would be futile to do so, and one ground for futility may be the wide publicity already given to the relevant information.[33]

12.32 According to equitable principles, as set out by the High Court of Australia in *Beecham Group v Bristol Laboratories Pty Ltd*[34] and reaffirmed in *ABC v O'Neill*,[35] before the court will exercise its discretion to award an interlocutory injunction, an applicant must satisfy the court that:

- there is a prima facie case, in the sense that there is a serious question to be tried as to the plaintiff's entitlement to relief, and a sufficient[36] likelihood of success to justify the preservation of the status quo pending trial;

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31 *Prince Albert v Strange* (1849) 1 Mac & G 25, 46 (Lord Cottenham): 'In the present case, where privacy is the right invaded, postponing the injunction would be equivalent to denying it altogether.' See also *Tchenguiz v Imerman* [2010] EWCA (Civ) 908, [54] (Lord Neuberger MR). Lord Nicholls made the same point as to confidentiality in *Cream Holdings Ltd v Banerjee* (2004) 1 AC 253, [18]. See also Eric Barendt, *Freedom of Speech* (Oxford University Press, 2nd ed, 2007) 136.

32 The court may, however, decide that damages would be an adequate remedy, and thus, on the threshold equitable test, refuse the injunction: see *Lincoln Hunt Australia Pty Ltd v Willesee* (1986) 4 NSWLR 457, where Young J refused the plaintiff's claim for an injunction to restrain the broadcast of footage obtained while trespassing on this ground, obviating the need to consider public interest.

33 *Candy v Bauer Media Limited* [2013] NSWSC 979, [20]; *Mosley v News Group Newspapers* [2008] EWHC 687 (QB), [36]. See Normann Witzleb, '"Equity Does Not Act in Vain": An Analysis of Futility Arguments in Claims for Injunctions' (2010) 32 *Sydney Law Review* 503. A related question of fact is whether, for the purposes of the equitable obligation, the information had the quality of confidence or whether it is at the relevant time in the public domain. Where publication is not widespread, there may still be some point to restricting further publication: *Johns v Australian Securities Commission* (1993) 178 CLR 408, [460]–[462] (Gaudron J); *Australian Football League v The Age Company Ltd* (2006) 15 VR 419, [428]–[429]; *Attorney General v Guardian Newspapers Ltd (No 2)* (1990) 1 AC 109. Contractual obligations of confidence raise different considerations: see *Massingham v Shamin* [2012] NSWSC 288 (23 March 2012) and cases referred to therein.

34 *Beecham Group v Bristol Laboratories Pty Ltd* (1968) 118 CLR 618.

35 *Australian Broadcasting Corporation v O'Neill* (2006) 227 CLR 57. See further David Rolph, 'Showing Restraint: Interlocutory Injunctions in Defamation Cases' (2009) 14 *Media & Arts Law Review* 255; Benedict Bartl and Dianne Nicol, 'The Grant of Interlocutory Injunctions in Defamation Cases in Australia Following the Decision in Australian Broadcasting Corporation v O'Neill' (2006) 25 *University of Tasmania Law Review* 156.

36 'The requisite strength of the probability of ultimate success depends upon the nature of the rights asserted and the practical consequences likely to flow from the interlocutory order sought… [such as the fact that] the grant or refusal of the interlocutory application would dispose of the action finally': *Australian Broadcasting Corporation v O'Neill* (2006) 227 CLR 57, [71]-[72] (Gummow and Hayne JJ).

- the plaintiff is likely to suffer injury for which damages will not be an adequate remedy;[37] and
- the balance of convenience favours the granting of an injunction.[38]

Injunctions in defamation and breach of confidence

12.33 Applications for injunctive relief to restrain publication are commonly made in defamation and breach of confidence cases.

12.34 In actions for defamation, an applicant faces additional hurdles to those set out in *Beecham,* when seeking an interlocutory injunction. The so-called rule in *Bonnard v Perryman* is derived from Lord Coleridge CJ's statement in that case that defamation cases require 'exceptional caution in exercising the jurisdiction to interfere by injunction before the trial of an action to prevent an anticipated wrong'.[39] In particular, if a defendant asserts that it will defend the defamatory statement as true, then, 'in all but exceptional cases',[40] the courts will exercise their discretion to refuse the injunction, leaving the defendant to publish and risk liability for damages.

12.35 This caution in defamation cases is well-established in Australian law, although the defendant must go further than merely *raising* the defence.[41] In *ABC v O'Neill*, Gleeson CJ and Crennan J noted that, in defamation cases, particular attention will be given to the public interest in free speech when considering whether an interlocutory injunction should be granted.[42] Gummow and Hayne JJ referred to the need for the judge to consider 'the … general and … profound issue involved in the policy of the law respecting prior restraint of publication of allegedly defamatory matter'.[43]

12.36 Gummow and Hayne JJ also emphasised that claims for interlocutory injunctions in defamation in Australia, although reflecting the principle in *Bonnard*, are 'but one of a species of litigation to which the principles in *Beecham* apply'.[44] That

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37 This second factor is not necessary if the application is in the exclusive equitable jurisdiction of the court, for example to restrain the breach of an equitable duty of confidence: Meagher, Heydon and Leeming, above n 18, [21–345].

38 *Australian Broadcasting Corporation v O'Neill* (2006) 227 CLR 57, [19] (Gleeson CJ and Crennan J); Ibid, [65]–[72] (Gummow and Hayne JJ).

39 *Bonnard v Perryman* [1891] 2 Ch 269, 283-285. Gummow and Hayne JJ point out in *Australian Broadcasting Corporation v O'Neill* (2006) 227 CLR 57, [80] that the court in *Fleming v Newton* [1848] 9 ER 797 was wary both of usurping the role of the jury at trial and of constraining the liberty of the press after the lapsing of a statutory system of press licensing.

40 *Bonnard v Perryman* (1891) 2 Ch 269, 285.

41 *National Mutual Life Association of Australasia Ltd v GTV Corpn Pty Ltd* [1989] VR 747; *Chappell v TCN Channel Nine Pty Ltd* (1988) 14 NSWLR 153; *Clarke v Queensland Newspapers Pty Ltd* [2000] 1 Qd R 233; *Jakudo Pty Ltd v South Australian Telecasters Ltd* (1997) 69 SASR 440, [442]–[443].

42 *Australian Broadcasting Corporation v O'Neill* (2006) 227 CLR 57, [19].

43 *Australian Broadcasting Corporation v O'Neill* (2006) has been applied in several cases: *AAMAC Warehousing & Transport Pty Limited v Fairfax Media Publications Pty Limited* [2009] NSWSC 1030 (28 September 2009); *Crisp v Fairfax Media Ltd* [2012] VSC 615 (19 December 2012); *Allan v The Migration Institute of Australia Ltd* [2012] NSWSC 965 (13 August 2012); cf *Tate v Duncan-Strelec* [2013] NSWSC 1446 (27 September 2013).

44 *Australian Broadcasting Corporation v O'Neill* (2006) 227 CLR 57, [75].

broader species includes cases where the disposal of the interlocutory application would effectively determine the case in its entirety, but also, presumably, applications for interlocutory injunctions in the auxiliary jurisdiction in general.

12.37 In direct contrast to defamation cases, courts considering injunctions to restrain a breach of confidence do not exercise any special caution in the interests of free speech or other broadly defined public interests. Both in claims for breach of an *equitable* obligation of confidence, which lie in equity's exclusive jurisdiction,[45] and perhaps even more so in claims to restrain the breach of a *contractual* obligation of confidence,[46] which lie in the auxiliary jurisdiction,[47] authority in Australia takes a narrow approach to public interest considerations that would justify a breach.

12.38 The principle of general application, where the court is considering an injunction to restrain the breach of an equitable obligation of confidence, was stated by Gummow J in *Re Corrs Pavey Whiting and Byrne v Collector of Customs of Victoria and Alphapharm Pty Ltd*:

> That principle, in my view, is no wider than one that information will lack the necessary attribute of confidence if the subject matter is the existence or real likelihood of the existence of an iniquity in the sense of a crime, civil wrong or serious misdeed of public importance, and the confidence is relied upon to prevent disclosure to a third party with a real and direct interest in redressing such crime, wrong or misdeed.[48]

12.39 The current Australian approach differs from the much broader approach to public interest taken in the United Kingdom in such cases.[49] In a later case, Gummow J stated:

> (i) an examination of the recent English decisions shows that the so-called 'public interest' defence is not so much a rule of law as an invitation to judicial idiosyncrasy by deciding each case on an ad hoc basis as to whether, on the facts overall, it is better to respect or to override the obligation of confidence, and (ii) equitable principles are best developed by reference to what conscionable behaviour demands of the

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45 The exclusive jurisdiction arises where a court of equity is dealing with equitable claims: Meagher, Heydon and Leeming, above n 18, [21–015].

46 *Re Corrs Pavey Whiting and Byrne v Collector of Customs of Victoria and Alphapharm Pty Ltd* [1987] FCA 266 (13 August 1987) [57].

47 The auxiliary jurisdiction of equity arises where the court is considering equitable remedies in aid of common law wrongs or to prevent the unconscionable reliance on common law rights: Meagher, Heydon and Leeming, above n 18, [21–345].

48 *Re Corrs Pavey Whiting and Byrne v Collector of Customs of Victoria and Alphapharm Pty Ltd* [1987] FCA 266 (13 August 1987) [57].

49 *Australian Football League v The Age Company Ltd* (2006) 15 VR 419, [72]–[94]; *Re Corrs Pavey Whiting and Byrne v Collector of Customs of Victoria and Alphapharm Pty Ltd* [1987] FCA 266 (13 August 1987), [41]; *AG Australia Holdings Ltd v Burton* 58 NSWLR 464, [173]; Meagher, Heydon and Leeming, above n 18, [41–115]–[41–125]. Cf Aplin et al, above n 19, [16.05]–[16.57] on the more recent, more expansive approach.

defendant not by balancing and then overriding those demands by reference to matters of social or political opinion.[50]

12.40 More recently, it has been said that '[i]t is true that the existence of, and /or the extent of any public interest defence to a breach of confidentiality is by no means clear and settled in Australia'.[51]

Injunctions to restrain disclosure of *private* information

12.41 Questions then arise as to what approach the courts should take, in the absence of a statutory cause of action for invasion of privacy, where they are considering a claim for misuse or disclosure of *private* (rather than confidential) information.[52] Should 'private information' cases be seen as more analogous to defamation cases or as more analogous to traditional breach of confidence cases? Should a similar caution as in defamation cases be exercised when considering applications for interlocutory injunctions to restrain publication of private information?

12.42 In many cases where there is a potential for inconsistency between different causes of action, or between common law and statutory regimes, the High Court of Australia has emphasised the need for coherence in the development of the common law.[53]

12.43 Although they may overlap, or arise concurrently, cases involving the apprehended disclosure of private information raise somewhat different issues from apprehended defamation cases. Unlike in a defamation case, a defendant in a privacy case cannot assert the truth of the disclosed information as a defence.[54] There is, however, just as strong and justifiable a concern that undue restrictions upon freedom of speech and the freedom of the press might arise from unmeritorious claims to prevent the disclosure of allegedly 'private' information in which there is a legitimate public interest. It is therefore strongly arguable that similar considerations to those in defamation cases should apply where the defendant asserts a defence of sufficient strength to justify the court taking a cautious approach.[55] The ALRC proposal reflects

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50 *Smith Kline and French Laboratories (Aust) Ltd v Secretary, Dept of Community Services and Health* [1990] FCR 73, 111. See further, *Australian Football League v The Age Company Ltd* (2006) 15 VR 419, [72]–[94].

51 *Australian Football League v The Age Company Ltd* (2006) 15 VR 419, [75].

52 *Spelman v Express Newspapers* [2012] EWHC 355 (QB) (24 February 2012), [64]: 'There is some uncertainty as to whether, and if so when, a court should refuse an injunction on the basis of *Bonnard v Perryman* when it is sought by a claimant who advances his cases only on the basis of privacy'.

53 *Sullivan v Moody* (2001) 207 CLR 562. See further, Rolph, 'Irreconcilable Differences? Interlocutory Injunctions for Defamation and Privacy', above n 29, 187-190; Tilbury, above n 7, 130 ff.

54 In the past, many claimants in Australia used the action for defamation to protect their privacy against disclosure of embarrassing private facts, because in some states, the defendant could not defend the defamation merely on the basis that the imputations were true, but also had to show a public interest or public benefit in their publication. This is no longer the case due to changes to the law by the uniform state *Defamation Acts* of 2005: C Sappideen and P Vines (eds), *Fleming's The Law of Torts* (Lawbook Co, 10th ed, 2011) 635–639.

55 There is also a concern that, if the applicable considerations or approach to be applied by the courts in defamation cases and privacy cases differed, a claimant may attempt to avoid the cautious approach in defamation cases, by framing or pleading his or her case, inappropriately, as a privacy case: *Lord Browne*

that concern, and suggests that the courts should be directed to consider countervailing public interests when dealing with an application for an injunction to restrain the publication of *private* information.

12.44 To avoid dispute and ensure consistency, any guidance by legislation should apply expressly to *any* action to prevent publication of information on the basis that it is private (rather than confidential) information. The key point is that, whether the legal protection of private information at common law in the future takes the form of a new tort or an extended action for breach of confidence, the court should be required to consider and weigh any countervailing public interests, such as freedom of expression, in its disclosure. This should apply regardless of whether the court is exercising its exclusive or auxiliary jurisdiction.

12.45 The ALRC's proposal has a similar intent to the provisions in s 12(4) of the *Human Rights Act 1998* (UK), although it is in more general terms. That provision reflects the concern that injunction applications in privacy actions may have a chilling effect on freedom of speech. Section 12(4) reinforces the requirement of the *European Convention on Human Rights* that the right to privacy in art 8 be balanced with the right to freedom of expression in art 10, when determining whether there has been an actionable invasion of privacy at all. While this balancing already takes place when determining whether there is an actionable misuse of private information,[56] s 12 provides added protection of art 10 rights:[57]

> s 12 Freedom of expression
>
> This section applies if a court is considering whether to grant any relief which, if granted, might affect the exercise of the Convention right to freedom of expression.
>
> ...
>
> (4) The court must have particular regard to the importance of the Convention right to freedom of expression and, where the proceedings relate to material which the respondent claims, or which appears to the court, to be journalistic, literary or artistic material (or to conduct connected with such material), to—
>
> (a) the extent to which—
>
> (i) the material has, or is about to, become available to the public; or

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of Madingly v Associated Newspapers Ltd [2007] EWHC 202 (QB), [28] (Eady J). This concern motivated Tugendhat J in *Terry v Persons Unknown* [2010] EWHC 202 (QB) to note at [88] that 'it is a matter for the court to decide whether the principle of free speech prevails or not, and that it does not depend solely upon the choice of the claimant as to his cause of action'. He dismissed the claimant's application for an injunction to restrain the publication of confidential and private information, at [123]: 'Having decided that the nub of this application is a desire to protect what is in substance reputation, it follows that in accordance with *Bonnard v Perryman* no injunction should be granted'. Witzleb argues that this approach is inconsistent with the requirements of the *Human Rights Act 1998* (UK); N Witzleb, 'Interim Injunctions for Invasions of Privacy: Challenging the Rule in Bonnard v Perryman?' in N Witzleb et al (eds), *Emerging Challenges in Privacy Law: Comparative Perspectives* (Cambridge University Press, 2014). Cf Rolph, 'Irreconcilable Differences? Interlocutory Injunctions for Defamation and Privacy', above n 29, on the Australian position.

56 *Campbell v MGN Ltd* [2004] 2 AC 457.

57 Joint Committee on Privacy and Injunctions, *Privacy and Injunctions*, House of Lords Paper No 273, House of Commons Paper No 1443, Session 2010–12 (2012), 19-22.

(ii) it is, or would be, in the public interest for the material to be published;

(b) any relevant privacy code.

12.46 Section 12(4) of the *Human Rights Act 1998* (UK) has been considered in a number of cases since its enactment and by a Joint Committee of the House of Lords and House of Commons in 2012. The courts rejected an interpretation that the sub-section requires them to give *greater* weight to the Convention rights to freedom of expression than to the plaintiff's interest in privacy. Lord Hope in *Campbell v MGN Ltd*:

> [A]s Sedley LJ said in *Douglas v Hello! Ltd* you cannot have particular regard to article 10 without having equally particular regard at the very least to article 8: see also *Re S (A Child) (Identification: Restrictions on Publication)* where Hale LJ said that section 12(4) does not give either article pre-eminence over the other. These observations seem to me to be entirely consistent with the jurisprudence of the European court.[58]

12.47 The House of Lords and House of Commons Joint Committee's Report stated:

> We do not think that section 12(4) of the *Human Rights Act 1998* ... means that article 10 has precedence over article 8 ... However, we support the decision of Parliament to make clear in law the fundamental importance of freedom of expression and would be concerned that removing section 12(4) might suggest that this is no longer the case.[59]

12.48 In the light of well-established principles concerning ex parte applications,[60] and the strength of the defendant's case in interlocutory proceedings,[61] it is not suggested that provisions similar to subsections (2) and (3) of s 12 of the *Human Rights Act* (UK) are necessary or desirable in Australia.[62]

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58 *Campbell v MGN Ltd* [2004] 2 AC 457, [488] (citations omitted).

59 Joint Committee on Privacy and Injunctions, *Privacy and Injunctions*, House of Lords Paper No 273, House of Commons Paper No 1443, Session 2010–12 (2012), [59]. David Price QC was quoted at [58] as having told the committee: 'If the purpose of section 12 was to give the benefit of the doubt to freedom of expression then it has certainly failed'. Professor Gavin Phillipson of Durham Law School, quoted at [55], considered that s 12(4) was not intended 'to establish priority for freedom of expression ... [and] it made more sense to read it as requiring judges to give as much weight to freedom of expression as the Convention itself allows'.

60 See further, Meagher, Heydon and Leeming, above n 18, [21–425].

61 *Australian Broadcasting Corporation v O'Neill* (2006) 227 CLR 57; *Beecham Group v Bristol Laboratories Pty Ltd* (1968) 118 CLR 618.

62 Section 12(2) and (3) of the *Human Rights Act 1998* (UK) provides: '(2) If the person against whom the application for relief is made (the respondent) is neither present nor represented, no such relief is to be granted unless the court is satisfied—(a) that the applicant has taken all practicable steps to notify the respondent; or (b) that there are compelling reasons why the respondent should not be notified. (3) No such relief is to be granted so as to restrain publication before trial unless the court is satisfied that the applicant is likely to establish that publication should not be allowed'. On the meaning of 'likely' in subsection (3), see *Cream Holdings Ltd v Banerjee* (2004) 1 AC 253 where Lord Nicholls stressed at [22] that 'likely' could mean different things depending upon its context; *ETK v News Group Newspapers Ltd* [2011] EWCA Civ 439 (19 April 2011), [6], [24]: '...likely in the sense of more likely than not'.

12.49 It should also be noted that this proposal is not intended to affect the existing law with regard to applications for injunctions to restrain the breach of an equitable or contractual obligation of confidence As explained above, particular considerations apply to the justification for a disclosure by a confidant in breach of a pre-existing obligation or by a third party who has knowledge that the information was imparted in confidence,[63] where the law, for reasons of public interest, seeks to uphold and reinforce the obligation undertaken. Arguably, different considerations should apply, when there is no such obligation as the foundation for the plaintiff's application, but the plaintiff relies merely on the nature of the information itself and the reasonable expectation of privacy that arises from the particular circumstances. In such cases, it is appropriate that greater weight be given to countervailing interests and matters of public interests.

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63 Meagher, Heydon and Leeming, above n 18, [41–115]-[41–125]. See further, *Australian Football League v The Age Company Ltd* (2006) 15 VR 419, [72]-[94]; *Re Corrs Pavey Whiting and Byrne v Collector of Customs of Victoria and Alphapharm Pty Ltd* [1987] FCA 266 (13 August 1987), [41]. Cf Aplin et al, above n 19, [16.05]–[16.57] on the recent more expansive English approach.