Would a Statutory Privacy Tort in Australia Harm Valuable Free Speech?

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The Australian government is currently looking at reform of Australia's privacy laws including the introduction of a statutory tort for serious invasion of privacy. Australia is one of the few Western democracies that does not expressly provide general legal protection of privacy. Why in a country that seems to value civil and political rights should there be so much resistance to the idea that individuals or groups should be able to bring an action in court specifically for serious attacks on their privacy?

Parts of the media in Australia have long been against the tort on the basis that it would harm valuable speech, as those authoring this opinion piece (all academics involved in privacy law reform) can well recall. In 2011, when the Australian Law Reform Commission was considering the question of a statutory tort for serious invasion of privacy, Chris Merritt argued in *The Australian* that the ALRC's statutory privacy tort was a "hate-filled strike on liberal democracy". This position had a ready ear in the conservative Coalition government that received the report. As then Opposition legal affairs spokesman George Brandis said when the reference was given to the ALRC by the Gillard Labor Government, the push for a privacy tort was part of a "gradual, Fabian-like erosion of traditional rights and freedoms in the name of political correctness". When the Report was handed down, *The Guardian* reported that a spokesman for Attorney-General Brandis said: "The government has made it clear on numerous occasions that it does not support a tort of privacy". Yet now the question of a privacy tort is back on the Government's agenda along with other privacy reforms. Why is this?

An immediate reason is that the Australian Competition and Consumer Commission in its Digital Platforms Inquiry Report recommended that the tort be introduced along with a raft of reforms to the Privacy Act, which contains Australia's federal data protection laws. That plus the fact that 83% of those responding to the Australian Community Attitudes to Privacy Survey 2020 "would like the government to do more to protect the privacy of their data". The ACCC reasoned that a statutory privacy tort would "lessen the bargaining power imbalance between consumers and entities collecting their personal information, including digital platforms" and provide a deterrent and remedy against "harmful data practices". But the proposed tort is not restricted to digital platforms or data misuses and would extend to all types of privacy invasion, including by the media. It would go further than the Privacy Act, where "journalism" currently enjoys a broad exemption from compliance with general data protection standards. Kudos to the ACCC for throwing its support behind a tort that primarily protects dignitarian values rather than economic welfare, which is the traditional concern of the ACCC. The ACCC was content to adopt the "careful analysis and extensive consultation conducted over numerous past inquiries" into the need to introduce a privacy tort, as well as conducting its own consultation. (Some of us were involved in those consultations.) Yet, the Government merely "noted", rather than accepted, the recommendation and initiated another review into the issue.

Indeed, as the ALRC Report's principal author (and one of our number) Barbara McDonald has pointed out in an article in *The Sydney Morning Herald* in November last year, why the need for a further inquiry and consultation from the Government when the ALRC had already "read hundreds of formal submissions", tapped the expertise of an advisory panel "with representatives from privacy groups on one side and media groups on the other, and lawyers and academics in between", and carried out "dozens of interviews with stakeholders and held roundtables with legal experts, including the judges who would have to apply the proposed laws, and the media industry, who would be bound by them"?

It is not for want of cases pointing to the benefits of stronger privacy protection including *vis-à-vis* media, even taking into account the limited opportunities for people in Australia (unlike those in other comparable countries) to directly protect their own interests. Consider, for instance, *Jane Doe v Australian Broadcasting Corporation* in 2007 where the national broadcaster published the name of a rape victim in breach of the Victorian Judicial Proceedings Reports Act. She was awarded $234,190 by way of damages for lost income, medical expenses and post-traumatic stress syndrome resulting from the broadcaster's admitted breach. Judge Hampel relied on several grounds including a common law tort of invasion of privacy – but the latter radical legal step of recognising a new tort was not supported by later courts. Or consider *Wilson v Ferguson* in 2015 where Neil Ferguson posted intimate images and videos of his girlfriend and workmate on Facebook in retaliation for her breaking off with him. As the information was confidential and either imparted in confidence or surreptitiously obtained, Mitchell J could rely on the doctrine of breach of confidence (broadly construed) to give a remedy for this breach of Wilson's privacy. A total of $48,404 was awarded in compensation for the lost wages and distress she suffered before and after the post was taken down – by Ferguson (after she begged him) not the social media platform which remained on the sideline.

Or consider blogger Andie Fox who gave a critical account of her lived experience of the Government's controversial Centrelink Robodebt system in an article for Fairfax media in 2017. (This flawed system automatically raised debts for alleged, but often ill-substantiated, overpayments of social security, causing thousands of vulnerable community members financial harm and significant distress.) In response to this criticism, the Department of Human Services released some of Ms Fox's personal details, along with some concerning her former partner, to Fairfax journalist Paul Malone who published them in a follow-up article countering Fox's claims. The (then acting) Privacy Commissioner, in response to Fox's complaint that the DHS breached the Privacy Act, decided that such sharing of personal information with media was reasonably to be expected by those who took it on themselves to publicly complain about the Government's error-prone automated system – a decision that some legal experts have critiqued – but without making a formal determination, so there was no avenue of appeal.

Particularly worth noting in these cases is not just the scale and range of harms but the ignorance or indifference of the agents involved in perpetrating them, as well as the limited and obscure legal mechanisms for addressing the conduct (and the limited remedies available for breach). A statutory tort would help to alleviate these problems.

Often it is said (including by some media companies) that celebrities and politicians would be principal beneficiaries of a privacy tort while the public would be losers. But the Doe, Wilson and Fox cases show that individuals without celebrity or public power can benefit from a privacy tort. Conversely, the Government's dispute with the ABC over its November 2020 *Four Corners* episode "Inside the Canberra Bubble" alleging that Cabinet Ministers Christian Porter and Alan Tudge had personal relations with staffers shows that celebrities and politicians may not succeed in privacy claims where there are free speech arguments on the other side. In a letter to the ABC's Chair Ita Buttrose, which he posted on Twitter, Communications Minister Paul Fletcher demanded an explanation of how the ABC's airing of allegations did not breach its Code of Practice – asking: "How is this consistent with the stated importance of respect for privacy in the Code of Practice, including whether intrusion into private lives was proportionate in the circumstances?". As reported in *The Australian*, Buttrose's response was to state that "[p]oliticians and their families certainly have a right to privacy" but, as elected representatives, their office was highly relevant "when considering the public interest".

Under the ABC Code of Practice, an "[i]ntrusion into a person's private life without consent must be justified in the public interest and the extent of the intrusion must be limited to what is proportionate in the circumstances". Similarly, the ALRC's privacy tort is only available where "the public interest in privacy outweighs any countervailing public interest" including in freedom of speech.

The ALRC recognises, in framing its privacy tort to allow for balancing between privacy and free speech, that in general there is public interest in promoting free speech and there is public interest in protecting privacy. Sometimes these may come into conflict. But, as distinguished media scholar Eric Barendt has pointed out, gone are the days when we should see privacy and free speech as necessarily opposed. Indeed, the threat of publication of personal information can have a "chilling effect" on those wanting to criticise government agencies and other powerful figures.

The Four Corners and the Fox disputes both concerned what may fairly be described as investigative journalism – *viz* investigation and reporting on matters of public concern and importance. But we see that a major difference between those cases is that in the former the public interest arguably favoured free speech over privacy, whereas in the latter it arguably favoured privacy as a vehicle for free speech. The line may be difficult and contentious to draw in a particular case, but a statutory tort would provide a structured and carefully crafted mechanism to balance competing and coextensive interests.

We therefore do not accept the criticism that a statutory privacy tort, as currently being discussed in Australia, would disproportionately harm valuable free speech. We support calls on the government to introduce such a tort as part of the forthcoming privacy law reform package.