

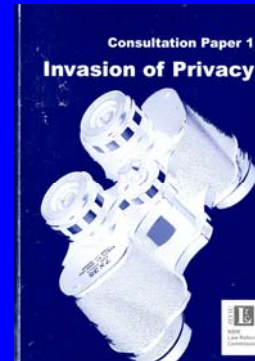
WHO WILL BE PROTECTED BY A PRIVATE RIGHT OF ACTION FOR INVASION OF PRIVACY?

Professor Michael Tilbury
NSW Law Reform Commission

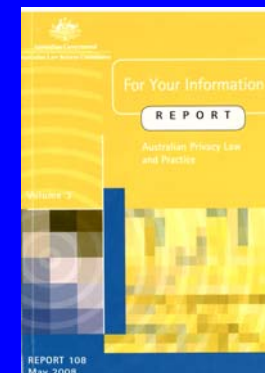


Private right of action = statutory cause of action

- *Invasion of Privacy*
(Consultation Paper 1, May 2007)



- *For Your Information* vol 3 ch 74
(Report 108, May 2008)



Who is protected?

- Individuals (not artificial persons)
- Privacy protects interests in autonomy, dignity and freedom

(Consider *ABC v Lenah Game Meats* (2001) 208 CLR 199, [125] (Gummow and Hayne JJ))

What Acts or Conduct Are Covered ?

Examples are where:

- there has been an interference with an individual's home or family life;
- an individual has been subjected to unauthorised surveillance;
- an individual's correspondence or private written, oral or electronic communication has been interfered with, misused or disclosed;
- sensitive facts relating to an individual's private life have been disclosed.

The Elements of a Cause of Action

- expectation of privacy
- public interest

Reasonable Expectation of Privacy

Claimant must show that in the circumstances:

- there is a reasonable expectation of privacy, and
- the act or conduct complained of is highly offensive to a reasonable person of ordinary sensitivities

(Consider *Hosking v Runting* [2005] 1 NZLR 1; *Campbell v MGN* [2004] 2 AC 457; *Andrews v TVNZ* [2006] NZHC 1586)

Public Interest

Does public interest in maintaining the plaintiff's privacy outweigh other matters of public interest (including the interest of the public to be informed about matters of public concern and the public interest in allowing freedom of expression)?

Defences

- act or conduct was incidental to the exercise of a lawful right of defence of person or property
- act or conduct was required or authorised by or under law or
- publication of the information was, under the law of defamation, privileged

Balancing privacy and freedom of expression

[The] modern approach is ... obviously incompatible with making broad generalisations of the kind to which the media often resorted in the past such as, for example, “Public figures must expect to have less privacy” or “People in positions of responsibility must be seen as ‘role models’ and set us all an example of how to live upstanding lives”. Sometimes factors of this kind may have a legitimate role to play when the “ultimate balancing exercise” comes to be carried out, but generalisations can never be determinative. In every case “it all depends” (ie upon what is revealed by the intense focus on the individual circumstances).

Mosley v News Group Newspapers Ltd [2008] EWHC 1777 (QB), [12] (Eady J)