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Privacy, Free Speech and Ruthlessness: The Australian Law Reform Commission's Report,  
*Serious Invasions of Privacy in the Digital Era*

Thomas D C Bennett\*

The scrutiny, revision and development of legal protections for privacy-related interests have been proceeding apace in recent years across the common law world. In the UK, the common law has embraced a new legal wrong known as 'misuse of private information'.<sup>1</sup> One Canadian province has recently added a new 'intrusion' tort to its existing privacy protections,<sup>2</sup> and New Zealand has followed suit with a virtually identical doctrine.<sup>3</sup> We might see in these developments a growing recognition of the importance of protecting the amorphous 'right to privacy' from these two types of violation in particular. Whilst the USA has long recognised four distinct privacy torts, other common law nations have, until recently, shown limited enthusiasm for embracing those categories of tortious privacy violation.<sup>4</sup> Yet we have seen a rapid acceleration in this field during the last decade. Moreover, it is plain that sensitivity to the importance of freedom of speech is an important theme within these developments. It is against this background of increased (if still somewhat cautious) recognition of privacy as a field ripe (and perhaps overdue) for legal innovation that we ought to approach scrutiny of the Australian Law Reform Commission's (ALRC) recent report, *Serious Invasions of Privacy in the Digital Era*.<sup>5</sup>

Protection under the common law for privacy interests in Australia is currently patchy. Much like pre-*Campbell* English law, equitable confidentiality provides one, limited route of redress for certain informational privacy violations. The High Court case of *Lenah Game Meats Pty Ltd v Australian Broadcasting Corp* left open the possibility for the recognition of

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\* Newcastle Law School. I am grateful to Richard Mullender for a useful discussion on the themes of this comment and to Wenying Li for her helpful comments on an earlier draft.

<sup>1</sup> *Campbell v Mirror Group Newspapers Ltd* [2004] UKHL 22, [2004] 2 AC 457

<sup>2</sup> *Jones v Tsige* 2012 ONCA 32, 108 OR (3d) 241

<sup>3</sup> *C v Holland* [2012] NZHC 2155, [2012] 3 NZLR 672

<sup>4</sup> William Prosser, 'Privacy' (1960) 48(3) *Cal LR* 383; *Restatement of the Law (Second): Torts* (2d), vol 3 (American Law Institute 1977) at 376.

<sup>5</sup> *Serious Invasions of Privacy in the Digital Era* (ALRC Report 123) (hereafter 'Report')

a more general common law right to privacy, but stopped short of confirming it.<sup>6</sup> Judicial support for developing a common law tort of intrusion has been very limited, though not entirely absent. In *Grosse v Purvis*, an ‘intrusion’ tort was recognised by the Queensland District Court.<sup>7</sup> However, this decision has not been given the support of the higher courts, and the ALRC saw no likelihood that it would be followed in the near future.<sup>8</sup> In *Kalaba v Commonwealth of Australia*, the Federal Court declined to follow *Grosse*, although regrettably no detailed reasoning was provided for this decision and the court appeared to rely simply on the absence of earlier authority.<sup>9</sup> Likewise, although the question of whether an intrusion tort ought to be recognised was raised by the Victoria Court of Appeal in *Giller v Procopets*, the Court declined to comment on it, since the claim was amenable to disposition on other grounds.<sup>10</sup> Moreover, Australia’s traditionally conservative approach to elaborating novel tort doctrine weighs in against the likelihood of the judicial development of such a cause of action in the near future. Given this rather patchy common law background, the apparent desirability of legislative intervention to broaden and clarify the scope of privacy protection is understandable.

However, the ALRC report was not commissioned to offer recommendations on whether or not Australia *ought* to legislate to improve legal protections for privacy interests. Indeed, three previous reports had already answered that question in the affirmative, including one by the ALRC itself.<sup>11</sup> Rather the ALRC’s remit in this report was to recommend the *form* that such legislation, should it be enacted, ought to take. The report thus provided the Commission with an opportunity to consider in detail questions of tort design, and in particular how an ‘ideal’ privacy-protecting framework might look. Of particular concern was how to strike the appropriate balance between privacy interests and countervailing concerns, most notably freedom of expression. It is upon this issue that the major part of this comment

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<sup>6</sup> [2001] HCA 63, (2001) 185 ALR 1

<sup>7</sup> [2003] QDC 151

<sup>8</sup> Report (n 5) para 3.56. A decision similar to *Grosse* was made by the Victoria County Court in *Jane Doe v Australian Broadcasting Corporation* [2007] VCC 281. In that case, in which the defendant had broadcast the identity of a rape victim in breach of a statutory prohibition, a County Court judge held that, following *Lenah* (n 6), a tort of invasion of privacy existed in Australia. However, since the case was amenable to disposal on other grounds, this aspect of the judgment was arguably *obiter*. Moreover, it was a first-instance decision and the appeal was settled before an appellate court could weigh in.

<sup>9</sup> [2004] FCA 763

<sup>10</sup> [2008] VSCA 236, (2008) 79 IPR 489

<sup>11</sup> See Victorian Law Reform Commission, *Surveillance in Public Places*, Report 18 (2010); NSW Law Reform Commission, *Invasion of Privacy*, Report 120 (2009); *For Your Information: Australian Privacy Law and Practice* (ALRC Report 108).

focuses. For upon scrutiny, it becomes clear that the Commission's proposals strongly prioritise the protection of free expression over individual privacy.

Whilst the judiciaries in other parts of the common law world (such as England, Canada and New Zealand) have given attention to this balance in the course of decisions to elaborate the law, those courts clearly did not have the opportunity to engage in the level of detailed consideration of how to design such a rights-balancing framework that the Commission was afforded. Its conclusions are the result of lengthy consideration and flow from the receipt of substantial amounts of evidence. They are therefore of considerable significance, irrespective of whether or not they are ever adopted as the basis for a new statutory tort in Australia.

## THE REPORT'S MAIN RECOMMENDATIONS

At the outset, it is worth taking the opportunity to summarise the main recommendations from the ALRC's report. First and foremost, it recommends that a new, statutory privacy tort ought to be enacted in a Commonwealth Act (that is, an Act of general application across Australia). It recommends the creation of a single tort of 'invasion of privacy'. Liability under this tort may arise as the result of the commission of either of two tortious wrongs: 'intrusion upon seclusion' or 'misuse of private information'.<sup>12</sup> The two proposed heads of 'invasion of privacy' have distinct elements. Nevertheless, the Commission preferred a single tort with two 'sub-categories' of liability rather than two distinct torts.<sup>13</sup> The tort is thus designed to adopt the same elements for both sub-categories so far as possible.

The tort proposed by the ALRC includes a threshold test of 'seriousness', which the plaintiff must satisfy in order for a claim to be actionable.<sup>14</sup> Moreover, the plaintiff bears the onus of proving from the outset that the public interest in her privacy claim outweighs any countervailing public interest (for instance, in freedom of expression).<sup>15</sup> The Report recommends that the defendant bear the burden of adducing evidence of countervailing public interest considerations, but that the 'onus' remains on the plaintiff to satisfy the court that the public interest in privacy prevails over them.

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<sup>12</sup> The Report (Recommendation 5-2) recommends that for the purposes of misuse of private information claims, 'information' includes untrue, as well as true, information 'but only if the information would be private if it were true' (at p 83).

<sup>13</sup> Report (n 5) para 5.80

<sup>14</sup> Report (n 5) ch 9

<sup>15</sup> Report (n 5) para 9.6

In order to found a claim, the plaintiff must prove:

- a) either an intrusion upon seclusion or a misuse of private information;<sup>16</sup>
- b) that she had a reasonable expectation of privacy in all the circumstances;<sup>17</sup>
- c) that the invasion was ‘serious’;<sup>18</sup>
- d) that the public interest in her privacy outweighs any countervailing public interests.<sup>19</sup>

Despite opposition from a number of stakeholders, the ALRC made plain its belief that ‘a discrete seriousness threshold, in addition to the public interest balancing test’, was desirable.<sup>20</sup> This was, it said, to ‘further ensure the new tort does not unduly burden competing interests such as freedom of speech’.<sup>21</sup> The ALRC also recommended that the tort must have been committed either intentionally or recklessly; negligence would not suffice.<sup>22</sup> The tort would be actionable *per se*, and provision would be made for damages to be awarded for emotional distress.<sup>23</sup> Other recommendations concerning remedies, procedure and access to justice, feature in the report but will not be considered in detail here; we will focus on the basic framework proposed for the invasion tort itself.<sup>24</sup>

We can see that the design of the proposed tort takes on the familiar shape of a multi-factorial balancing exercise. This is a common method to adopt not just in privacy torts but in many other heads of tort liability,<sup>25</sup> for it provides a mechanism by which the judiciary can engage

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<sup>16</sup> Report (n 5) ch 5

<sup>17</sup> Report (n 5) ch 6

<sup>18</sup> Report (n 5) ch 8

<sup>19</sup> Report (n 5) ch 9

<sup>20</sup> Report (n 5) para 8.15

<sup>21</sup> Report (n 5) para 8.15

<sup>22</sup> Report (n 5) ch 7

<sup>23</sup> Report (n 5) ch 8

<sup>24</sup> These can be found in the Report (n 5) at chs 10, 12 and 16. Of these, the most notable is the recommendation to include apology orders and correction orders within the remedial framework available to successful plaintiffs, which features in ch 12.

<sup>25</sup> Australian courts are particularly experienced in dealing with this sort of exercise, since something similar arises under the test used in Australia to determine the existence of duties of care in negligence, although the ALRC’s proposed formulation is significantly more tightly structured. This duty test is the ‘salient features’ approach outlined in *Sullivan v Moody* [2001] 183 ALR 404 which incorporates reference to both doctrine and policy considerations. Indeed the ‘salient features’ test eschews the more rigidly structured guidance issued by the House of Lords in *Caparo Industries Plc v Dickman* [1989] QB 653, 703 per Lord Bingham, suggesting a particular keenness to ensure all relevant factors are considered. (See further n 51.)

with a pervasive difficulty: the problem of incommensurability.<sup>26</sup> Many tort claims fall against a backdrop of ‘competitive pluralism’,<sup>27</sup> in which multiple significant interests (for instance, personal security and freedom of action) each provide compelling but ‘incompatible grounds on which to respond to the same practical problem’.<sup>28</sup> The background to privacy claims is likewise often one featuring competing, valuable but incommensurable interests. But in privacy cases, two oft-competing interests tend to evoke particularly strong moral and political sentiments: personal privacy and freedom of speech. Whilst each of these interests are of considerable value (whether on a deontological or utilitarian calculus), it is difficult (if not impossible) to rank them relative to one another in the absence of a common metric. Having pointed up this difficulty, we will now outline some comparable judicial methods for engaging with the privacy-free speech conflict. Upon examination of these, it is clear that, whilst the Commission took cognisance of them, it preferred a very different approach. We will at that point be in a position to scrutinise the way in which the ALRC proposes to deal with this issue of incommensurability.

### ‘BALANCING’ PRIVACY AND FREE SPEECH

The ALRC, in deciding to adopt a framework that talks of balancing (but which in fact prioritises free expression) took account of privacy tort models from across the common law world.<sup>29</sup> The English tort of ‘misuse of private information’ (MPI), recognised by the House of Lords in *Campbell v MGN*,<sup>30</sup> is a clear source of guidance for the Commission, which has gone so far as to adopt the English nomenclature for the first of its actionable types of ‘invasion of privacy’. However, the ALRC does not adopt a key feature of MPI – the ‘ultimate balancing test’ employed by the English courts.<sup>31</sup> In England, the courts set out to strike a ‘balance’ between the Article 8 (ECHR) right to private life and the Article 10 right to freedom of expression using this method. Under this approach, in which ‘neither article has *as such* precedence over the other,’<sup>32</sup> the courts engage in a fact-sensitive analysis of the particular circumstances of the case.<sup>33</sup> At a formal level, then, the English MPI tort does not

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<sup>26</sup> Joseph Raz, *The Morality of Freedom* (Oxford University Press 1986) 329

<sup>27</sup> *ibid* 404

<sup>28</sup> Richard Mullender, ‘English Negligence Law as a Human Practice’ (2009) 21(3) *Law & Literature* 321, 328

<sup>29</sup> Report (n 5) ch 1.24-1.31

<sup>30</sup> *Campbell* (n 1)

<sup>31</sup> *Re S (A Child)* [2004] UKHL 47, [2005] 1 AC 593, [17]

<sup>32</sup> *ibid* (emphasis is original)

<sup>33</sup> *Mosley v News Group Newspapers Ltd* [2008] EWHC 1777 (QB), [2008] EMLR 20, [10]

accord presumptive priority to either interest, but instead relies on ‘weighing the relevant competing ... rights [of the parties] in the light of an “intense focus” upon the individual facts of the case.’<sup>34</sup>

In New Zealand, a private facts tort was recognised by the Court of Appeal in *Hosking v Runting*.<sup>35</sup> Whilst the New Zealand court preferred openly to label the action a tort of privacy, demurring from the UK terminology which was (then) couched in the language of equitable confidentiality, the action is very similar to its English counterpart.<sup>36</sup> The Court of Appeal made clear that a defence of legitimizing publication of privacy facts must exist where there is ‘legitimate public concern in the information’.<sup>37</sup> But like the English courts, the Court of Appeal rejected the notion that the plaintiff should be burdened with the task of proving that there was no applicable defence:

[I]t is more conceptually sound for this to constitute a defence, particularly given the parallels with breach of confidence claims, where public interest is an established defence. Moreover, it would be for the defendant to provide the evidence of the concern, which is the appropriate burden of proof if the plaintiff has shown that there has been an interference with his or her privacy ...<sup>38</sup>

In instances of intrusion, it seems that the potential for conflict between privacy and free speech interests is less pronounced than in cases of wrongful publication of private information. However, the potential for such a conflict is clearly recognised as real and has been proactively attended to. In the 2012 case of *Jones v Tsige*, the Ontario Court of Appeal became the first court in Canada to recognise a distinct tort of ‘intrusion upon seclusion’ at common law.<sup>39</sup> Sharpe JA set out the tort’s elements in the following way:

[F]irst ... the defendant’s conduct must be intentional [or reckless]; second, ... the defendant must have invaded, without lawful justification, the plaintiff’s

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<sup>34</sup> *ibid*

<sup>35</sup> [2004] NZCA 34, [2005] 1 NZLR 1

<sup>36</sup> *ibid* [247]

<sup>37</sup> *ibid* [129]

<sup>38</sup> *ibid*

<sup>39</sup> *Jones* (n 2)



private affairs or concerns; and third, ... a reasonable person would regard the invasion as highly offensive causing distress, humiliation or anguish.<sup>40</sup>

In elucidating the elements of this tort, Sharpe JA was acutely aware of its potential to conflict with freedom of speech. He made plain that, in instances of conflict between these two significant interests, a balance would need to be struck on the particular facts of each case:

[N]o right to privacy can be absolute and many claims for the protection of privacy will have to be reconciled with, and even yield to, such competing claims.<sup>41</sup>

Likewise, when the New Zealand High Court followed suit just eight months after *Jones*, recognising a novel ‘intrusion upon seclusion’ tort (in very similar terms), Whata J was attentive to the need to balance both privacy and free speech interests:<sup>42</sup>

A right of action only arises in respect of an intrusion that is objectively determined, due to its extent and nature, to be offensive by causing real hurt or harm. A legitimate public concern in the information may provide a defence to the privacy claim.<sup>43</sup>

The incorporation of a defence for conduct benefiting the public interest is consonant with the earlier ruling in *Hosking*, and it is clear that, in *Holland*, Whata J regarded the recognition of an intrusion tort as an incremental extension of the principles expounded in *Hosking*.<sup>44</sup>

Three comparable common law jurisdictions have, then, recently adopted methodologies that endeavour to accommodate both the interests of privacy and free speech without expressly according either presumptive priority. The ALRC’s proposed tort, however, bucks this trend and accords formal, methodological priority to freedom of expression.

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<sup>40</sup> *ibid* [71]

<sup>41</sup> *ibid* [73]

<sup>42</sup> *Holland* (n 3)

<sup>43</sup> *ibid* [96]

<sup>44</sup> *ibid* [86]

## INCOMMENSURABILITY, 'BALANCING' AND RUTHLESSNESS

When one strips away much of the rhetoric surrounding its basic elements, the proposed tort plainly tilts the scales 'in favour of free expression and other public interests'.<sup>45</sup> The ALRC admits as much, though in stating that the scales are tilted only 'slightly' towards free expression, it downplays the extent of the imbalance. In each of the elements that the plaintiff must prove, countervailing free speech (and other) interests are brought to the foreground, either explicitly or by implication.

Given the incommensurability of these interests, it quickly becomes apparent that, from the litigants' perspective, balance is not achievable. For the sphere of tort litigation is traditionally the arena of bilateral disputes in which the courts are the arbiters.<sup>46</sup> One interest must ultimately triumph over the other; courts do not have the luxury of being able to hold the interests in perfect equilibrium. Given this, there are three options facing a decision-maker (either a common law judge or the designer of legislation). Presumptive priority can be accorded to either the privacy or the free expression interest. Alternatively, a 'balancing' method can start from the basis that the interests are presumptively of equal importance and move to engage in highly fact-sensitive adjudication, which will lead to disposal of each matter on a case-by-case basis and avoid laying down sweeping rules of general application.

Because of the need ultimately to choose to protect one interest or the other in any given case, talk of 'balancing' in the litigation sphere is problematic. The work of philosopher and political theorist Isaiah Berlin can assist us in reframing the issue; rather than seeking to balance interests which cannot be ranked on a common scale, decision-makers tasked with choosing between them ought to seek to take each interest sufficiently seriously.<sup>47</sup> As Mullender puts it, 'societies can respond to the problems thrown up by ... incommensurability by accommodating the relevant values in ways that give expression to "the general pattern of life" in which their members believe.'<sup>48</sup> We might thus attribute to the term 'balancing' a particular meaning in the context of approaching privacy cases. The term ought to be used to describe a method for disposing of cases involving conflicting rights in a

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<sup>45</sup> Report (n 5) para 9.31

<sup>46</sup> Ernest J Weinrib, 'Understanding Tort Law' (1989) 23 *Valparaiso University Law Review* 485, 494

<sup>47</sup> Isaiah Berlin, 'The Pursuit of the Ideal' in *The Crooked Timber of Humanity: Chapters in the History of Ideas* (Pimlico 2003).

<sup>48</sup> Richard Mullender, 'Human Rights, Responsibilities and the Pursuit of a Realistic Utopia' (2010) 61(1) *NILQ* 33, 47, citing Isaiah Berlin, *Four Essays on Liberty* (Oxford University Press 1969) lv.

manner which shows sufficient sensitivity to the importance of each, such that the decision-maker can be seen to take both rights seriously.

### **The ‘onus’ on the plaintiff**

The presumptive imbalance (i.e. the tilting towards free expression) in the proposed tort was raised in submissions to the ALRC. One scholar suggested that a plaintiff may actually need to prove at three different points in the course of making out her claim that her privacy interest was sufficiently serious to outweigh countervailing concerns.<sup>49</sup> It is regrettable that, whilst noting this submission, the Commission did not directly address it. Rather than brushing the issue aside, one response the ALRC could have offered would have been to highlight the considerable experience that the courts have in dealing with this sort of multifactorial balancing exercise in tort law. Instead of actually considering the seriousness of the plaintiff’s claim in triplicate, the courts might well adopt a less rigidly structured approach, embracing the entirety of the plaintiff’s arguments on the weight to be accorded to her claim in a single, all-encompassing assessment. For whilst the formal elements of tortious causes of action often overlap, the courts tend not to get bogged down by them.<sup>50</sup> This is especially true in Australia, where the use of the ‘salient features’ approach resolves duty questions in negligence.<sup>51</sup>

This might have led the ALRC to clarify that, in apparently setting up three points where the balance between the plaintiff’s rights and the public interest may be considered, the proposed tort is simply giving the courts discretion as to the manner in which they conduct that test. The Commission might further have indicated that the design of the tort aims to keep the importance of free expression at the forefront of judges’ minds throughout the decision-making process. However, the ALRC did not see fit to respond directly to this criticism and

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<sup>49</sup> Paul Wragg, Submission to ALRC (Submission 73), para 3.3

<sup>50</sup> See, in the English context, *Caparo* (n 25). C.f. *James McNaughton Paper Group Ltd v Hicks Anderson & Co* [1991] 2 QB 113, 123-4 per Neill LJ.

<sup>51</sup> This ‘salient features’ approach was developed as a tool to ensure incremental development of the Australian common law, and reflected a rejection of the tests adopted in the English cases of *Ann v Merton LBC* [1978] AC 728, [1977] 2 WLR 1024, and *Caparo* (n 25). It eschews the more rigid structure of the two- and three-stage tests (in *Ann* and *Caparo*, respectively) and instead requires the court to undertake ‘... a close analysis of the facts bearing on the relationship between the plaintiff and the ... tortfeasor’, *Caltex Refineries (Qld) Pty Limited v Stavara* [2009] NSWCA 258, (2990) 75 NSWLR 649, [102] per Allsop P. The test has its roots in the case of *Graham Barclay Oysters Pty Ltd v Ryan* [2002] HCA 54, 211 CLR 540, 194 ALR 337, and contains a non-exhaustive list of ‘salient features’ which the court may take into account. These factors are set out usefully in *Caltex* at [103].

so we are left without a clear idea of the Commission's view as to how the courts will deal with it.

The bigger problem here, however, is not how many times the plaintiff might be required to prove that the balance ought to come down in favour of her privacy. It is rather that *she* is required to prove this *at all*. For the ALRC could have instead placed the onus either on the defendant to prove that a pressing public interest outweighed the plaintiff's right to privacy, or, alternatively, it could have left it to the court to identify any public interest considerations (as is the English approach under the *Re S* guidance).<sup>52</sup>

In its proposed formulation, the ALRC's privacy tort prioritises one particular socially beneficial goal, the protection of free expression in the public interest from subjugation to the privacy claims of individuals. In so doing, the tort lays groundwork for the courts to pay more attention to these free speech interests than individuals' privacy claims. Indeed it may be that very little attention is given to individuals' privacy other than in 'obvious' cases. For Berlin, this would not be an adequate response to the problem of incommensurability. Whilst it is inevitable in a world of incommensurable interests that hard choices will need to be made between them, an adequate response would see 'none of the relevant factors ... ignored.'<sup>53</sup> Yet that is precisely what is at stake for individual privacy under the proposed tort.

The design calls to mind Thomas Nagel's concept of 'ruthlessness'.<sup>54</sup> According to Nagel, those concerned with 'public morality' (as distinct from the 'private morality' which leads to a greater concern with individuals' interests), place emphasis on securing publicly beneficial outcomes. They exhibit 'ruthlessness' when they are inattentive (or less attentive) to the interests of minorities in pursuit of these goals. In cases involving freedom of speech, and particularly that of the media, instances of ruthlessness are not uncommon. Indeed, Richard Mullender has identified ruthlessness as a doctrinal theme in public interest defences to defamation across the common law world.<sup>55</sup> It is apparent, for example, in the USA's *Sullivan* rule which virtually extinguishes the chances of bringing successful libel claims for

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<sup>52</sup> *Re S* (n 31)

<sup>53</sup> Berlin, 'The Pursuit of the Ideal' (n 47) 19

<sup>54</sup> Thomas Nagel, *Mortal Questions* (Cambridge University Press 1979) ch 6

<sup>55</sup> Richard Mullender, 'Defamation and Responsible Communication' (2010) 126 *LQR* 368

an entire class of claimants.<sup>56</sup> Given that the ALRC's proposed tort is yet *more* restrictive than *Sullivan*, there can be little doubt that it is 'ruthless' in much the same way.<sup>57</sup>

### Privacy as 'public interest'

A related but distinct concern about the ALRC's proposed formulation is that the 'balance' it aims to strike between the two incommensurable interests of privacy and free expression actually purports (troublingly) to identify a common metric by which they may be ranked. This is a matter upon which the Commission changed tack between its Discussion Paper and the Report:

In the Discussion Paper, the ALRC proposed that a court should be satisfied that 'the plaintiff's interest in privacy outweighs the defendant's interest in freedom of expression and any broader public interest'. However, the ALRC now recommends that the focus be on balancing the *public interest in privacy* with any countervailing public interests.<sup>58</sup>

It explained its decision thus:

Privacy is not merely a private interest, but also an important public interest. The private interests of the parties, such as in privacy or free expression, will generally reflect the broader public interests at stake.<sup>59</sup>

Consequently, the plaintiff must 'satisfy the court that the *public interest* in privacy outweighs any countervailing *public interest* that is raised in the proceedings.'<sup>60</sup> The ALRC is asserting here that both sides of the argument may be measured in terms of their respective 'public interest' value. In other words, they are *not* incommensurable. As such, the ALRC's

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<sup>56</sup> *New York Times v Sullivan* 376 US 254 (1964). Under *Sullivan*, a plaintiff who is a public figure must demonstrate 'actual malice' (that is, actual knowledge of falsity or reckless disregard for the truth) on the part of the defendant. If he fails to do so, his claim will not be actionable.

<sup>57</sup> See n 75 and accompanying text.

<sup>58</sup> Report (n 5) para 9.72 (emphasis is original)

<sup>59</sup> *ibid*

<sup>60</sup> Report (n 5) p 158, (Recommendation 9-3) (emphasis added). See also ch 2.

formulation downplays the extent to which these interests may inherently conflict with one another.<sup>61</sup>

The ALRC takes its cue on this from the judgment of Lord Goff in *Spycatcher*, wherein he stated that:

although the basis of the law's protection of confidence is that there is a public interest that confidences should be preserved and protected by the law, nevertheless that public interest may be outweighed by some other countervailing public interest which favours disclosure.<sup>62</sup>

However, it takes a significant leap to translate Lord Goff's *dicta* on this point into a general rule for application in cases of individual privacy. First, *Spycatcher* concerned the law of confidentiality, not a law of privacy as such. Although equitable confidentiality had the ability indirectly to protect privacy, and had been mobilised by imaginative counsel to that end on occasion,<sup>63</sup> its main focus had always been on the 'public interest' in ensuring relationships of confidence were maintained. Second, in *Spycatcher* itself, a particular type of confidential information was in issue – state secrets relating to matters of national security. There was no individual privacy interest at stake, and indeed the entirety of the interest in maintaining the 'confidentiality' of the material derived from the public interest in preserving official secrets. The ALRC's use of *Spycatcher* stretches the ruling far beyond its own factual and legal matrix, and thus appears at best ill-considered, and at worst rather disingenuous.

This aspect of the Commission's proposal is also troubling for two further reasons. First, the ALRC's formulation further tilts the scales in favour of free expression at an evidential level. The public interest value of free expression is something that media defendants, in particular, are well-versed in evidencing. It is relatively straightforward to evidence at least *some* degree of public interest in free speech, for example by demonstrating its relevance to debate of general public importance. But it is more difficult to fathom what evidence would be needed to show that an individual's privacy has sufficient public value to *outweigh* freedom of expression. On this issue the Report provides no assistance. For not only does it not elaborate

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<sup>61</sup> Berlin, *Four Essays on Liberty* (n 48) lvi: 'One freedom may abort another; one freedom may obstruct or fail to create conditions which make other freedoms ... possible ...'

<sup>62</sup> *Attorney General v Observer Ltd (No.2) (Spycatcher)* [1988] UKHL 6, [1990] 1 AC 109, 282

<sup>63</sup> For example, *Prince Albert v Strange* (1849) 2 De Gex & Smale 652; *Stephens v Avery* [1988] FSR 510.

what factors might be relevant to determining the weight of the privacy interest, it also fails to indicate how to determine the relative value of the particular expression. The ALRC merely states that there are likely to be cases where the ‘public interest’ in the plaintiff’s privacy is ‘obvious’, but in other cases evidence will need to be adduced.<sup>64</sup>

Second, whilst it is quite correct to say that individual privacy has a public interest element,<sup>65</sup> its private elements ought not to be denied. The plaintiff’s interest is clearly *not* simply a public one (in the sense of invoking what Nagel would term ‘public morality’).<sup>66</sup> It is also (perhaps primarily) an individualistic, private interest in personal integrity (and relates broadly to Nagel’s concept of ‘private morality’).<sup>67</sup> Whilst the ALRC recognises the individualistic, private aspect of privacy,<sup>68</sup> the proposed formulation for the tort excludes this from the test of seriousness. The competing interests are painted as commensurable, but only because privacy’s individualistic aspects are literally removed from the equation.

The ALRC’s formulation invites the courts to overlook entirely the private interests in the plaintiff’s claim and to accord it weight only in so far as it promotes some broader public interest. So much is clear from its assertion that ‘the private interests of the parties ... will generally reflect the broader public interests at stake’.<sup>69</sup> This is a highly utilitarian vision of the value of privacy, and it reinforces the argument made above that this proposed tort legitimizes ruthlessness.

## CONCLUSIONS

If the Commission’s proposals are enacted, one indirect effect will be to highlight the extent to which English privacy law has been overtaken by that of comparable jurisdictions across the common law world. It is trite to state that English law has long refused to follow the American path of recognising a range of distinct privacy torts, such as the four which feature in William Prosser’s taxonomy and, as a result, in the USA’s second restatement of torts.

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<sup>64</sup> Report (n 5) para 9.78

<sup>65</sup> See, for example, Eric Barendt, ‘Privacy and Freedom of Speech’ in Andrew T Kenyon and Megan Richardson (eds), *New Dimensions in Privacy Law: International and Comparative Perspectives* (Cambridge University Press 2006) 11, 30–31; Neil M Richards, ‘Intellectual Privacy’ (2008) 87 *Texas Law Review* 387.

<sup>66</sup> Nagel (n 54) ch 6

<sup>67</sup> *ibid*

<sup>68</sup> Report (n 5) paras 2.6–2.15

<sup>69</sup> Report (n 5) para 9.72

Until recent times, English law has secured protection for informational privacy interests which is broadly equivalent to that in jurisdictions such as Canada, New Zealand and Australia. Indeed, it might even be argued that in the period of cautious development that began immediately following the Human Rights Act 1998 and which culminated in the *Campbell, Re S* and *Murray*<sup>70</sup> rulings on MPI, English law represented the cutting edge in protections at common law for informational privacy violations.

This tort of MPI was influential in the recognition of similar, informational torts across the common law world.<sup>71</sup> But whilst these other jurisdictions might for a while have appeared to be playing catch-up, it is increasingly clear that English law is in danger of stagnating. Whilst Canada and New Zealand have now joined the USA in recognising a distinct tort of ‘intrusion upon seclusion’, English law has been ‘unwilling’ to do so.<sup>72</sup> There have been hints at the recognition of ‘intrusion’ as a legal wrong, but the courts have stopped short of developing it into a full-blown tort in its own right (i.e. distinct from misuse of private information).<sup>73</sup> The ALRC proposes to add Australia to the list of jurisdictions recognising that tort. In *C v Holland*, Whata J remarked that ‘acceptance [of an intrusion tort] in some parts of North America is not an international trend.’<sup>74</sup> But with New Zealand and, now, Australia (potentially) added to the list, the UK will look more and more like the odd nation out. Faced with this rapid about turn (Canada and New Zealand having recognised their ‘intrusion’ torts with an unexpected suddenness in 2012), English judges might understandably feel somewhat bewildered; their once cutting-edge law has been overtaken by the significantly more comprehensive protections of our common law worldly peers.

The attentiveness to the wrong of intrusion (placing of it on a footing equal to misuses of private information) is the biggest positive to come out of the ALRC’s report. However, this aspect of the proposals is overshadowed by the high hurdle facing plaintiffs in terms of establishing their case. The requirement to prove that the claim outweighs all countervailing interests is a burdensome workload indeed.

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<sup>70</sup> *Murray v Express Newspapers Ltd* [2008] EWCA Civ 446, [2009] Ch 481

<sup>71</sup> For instance, in *Hosking* (n 35).

<sup>72</sup> *Wainwright v Home Office* [2003] UKHL 53, [2004] 2 AC 406, [18] per Lord Hoffmann

<sup>73</sup> See *Goodwin v MGN Ltd* [2011] EWHC 1437 (QB), [2011] EMLR 27, [85] per Tugendhat J. In a recent essay, Moreham has highlighted this deficiency. See NA Moreham, ‘Beyond Information: Physical Privacy in English Law’ (2014) 73(2) *CLJ* 350.

<sup>74</sup> *Holland* (n 3) [87]



In requiring the plaintiff to prove that her claim outweighs any and all relevant public interests, the proposed tort goes further even than the highly restrictive *Sullivan* rule in US defamation law.<sup>75</sup> The comparison with *Sullivan* is stark. Whilst *Sullivan* imposes a high evidential burden on a limited class of plaintiffs (public figures), it stops short of requiring any plaintiff to prove that her right to reputation outweighs any possible countervailing public interest. The ALRC's proposed privacy tort, however, imposes a burden on *all* plaintiffs to show that their privacy is a more weighty consideration than any other. Moreover, it requires a plaintiff seeking to do that to frame her argument in terms of the 'public interest'. Imposing this as the metric by which privacy and free speech interests are judged has a twofold effect. First, by adopting 'public interest' as the unit of measurement, free speech is inevitably privileged. This is because the value of expression is generally judged by reference to its 'contribution ... to a debate of general interest.'<sup>76</sup> Second, it appears to remove from the court's field of vision those aspects of privacy which are valuable as purely *private* interests (such as the plaintiff's personal security and dignity).

The default position under the ALRC's proposals is that, absent compelling reasons why a privacy claim should succeed, countervailing interests (most obviously in free expression) will prevail. The proposed tort's formulation fundamentally fails to grasp the incommensurability of privacy and free speech, and its framework for dealing with both interests is inadequate. Notwithstanding that certain aspects of privacy have public interest value, much of privacy's value is individualistic. Those aspects which are individualistic are not amenable to being neatly ranked against free speech. And in failing to accommodate these individualistic aspects of privacy at all, victims of privacy invasion will rightly feel that the proposed tort does not take their interests sufficiently seriously. The ALRC's clear drive to design a tort that is sensitive to free speech has led it to prioritise free expression to a level that may be unassailable. To put it in stark, Nagelian terms, the proposed tort's design 'licenses ruthlessness'.<sup>77</sup>

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<sup>75</sup> *Sullivan* (n 56)

<sup>76</sup> *K v News Group Newspapers Ltd* [2011] EWCA Civ 439, [2011] 1 WLR 1827, [23] per Ward LJ

<sup>77</sup> Nagel (n 54) 82