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# *Enhancing Press Freedom through Greater Privacy Law: A UK Perspective on an Australian Privacy Tort*

Paul Wragg\*

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## *Abstract*

In light of previous inquiries identifying areas of concern in Australia's privacy law provisions, the Australian Law Reform Commission ('ALRC') recently devised a new tort that, if implemented, would better protect individuals from serious invasions of privacy. Although the tort was designed principally with new technologies in mind, there has been vociferous concern that such a tort might unduly inhibit press freedom. This response is familiar to United Kingdom ('UK') commentators who have seen the press, in particular, react similarly to common law developments in privacy law. Yet that experience has not been entirely unfavourable to the UK press; indeed, the jurisprudence discloses a generous treatment of the term 'public interest', which has kept interference with press activity to a minimum. In light of the reference to press freedom within the ALRC's proposed tort, and given the absence of an express constitutional provision protecting Australian press speech, this article argues that the UK experience shows how, counterintuitively, the ALRC's proposed tort could actually enhance, rather than diminish, press freedom protection in Australia.

New technologies enable perpetrators to invade a victim's privacy in ways not previously possible. These serious invasions of privacy are multi-dimensional and complex. We would caution against a simplistic description of such acts as being 'revenge porn'. [They include] the use of GPS to monitor victim's movements ... monitoring her contacts and abusing her friends and family.

Women's Legal Service Victoria and  
Domestic Violence Resource Centre Victoria<sup>1</sup>

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For the ALRC to argue that there are gaps in [the law] is unconvincing ... [The ALRC] also fails to recognise that invasions of privacy are not such a big issue in Australia ... [An Australian Commonwealth privacy tort is] likely to lead to many legal actions against the media. There is little doubt that this would have a chilling effect on the media.

Peter Bartlett, Minter Ellison<sup>2</sup>

## I Introduction

The protection of individual privacy in the digital era is a global concern.<sup>3</sup> Privacy-invading technologies are ubiquitous: high quality cameras on mobile phones are widely available and images can be easily uploaded to the internet, surveillance devices in public spaces are the norm and there is a lucrative market in private data.<sup>4</sup> Similarly, the prevalence of social media platforms creates cultural pressure to disclose private information in order to conform.<sup>5</sup> Successive inquiries in Australia have identified substantial shortcomings in the law's capacity to adequately and reliably protect individuals from serious invasions of privacy resulting from these new technologies.<sup>6</sup> In light of this, the Australian Law Reform

<sup>1</sup> Women's Legal Service Victoria ('WLSV') and Domestic Violence Resource Centre Victoria ('DVRCV') Submission No 97 to the ALRC, *Serious Invasions of Privacy in the Digital Era: Discussion Paper (DP80)*, 12 May 2014, 3.

<sup>2</sup> Bartlett P, Submission No 79 to the Australian Law Reform Commission ('ALRC'), *Serious Invasions of Privacy in the Digital Era: Discussion Paper (DP80)*, 9 May 2014, 1–2.

<sup>3</sup> The issue has been considered in different contexts in the UK by the Leveson Inquiry: Lord Justice Leveson, *An Inquiry into the Culture, Practices and Ethics of the Press: Report*, HC 780 (2012) ('Leveson Report'); by the Joint Committee on Privacy and Injunctions: Joint Committee on Privacy and Injunctions, *Report of the Joint Committee on Privacy and Injunctions*, House of Lords Paper No 273, House of Commons Paper No 1443, Session 2010–12 (2012); and by the House of Lords Communications Committee, which held a short inquiry into the adequacy of existing criminal law to protect individuals from the phenomena of 'revenge porn': House of Lords Communications Committee, *Lords Question Facebook and Twitter on Social Media Offences* (9 July 2014) <<http://www.parliament.uk/business/committees/committees-a-z/lords-select/communications-committee/news/smo-dps-acpo-fb-twitter/>>. In Europe, the Court of Justice of the European Union recently held that Council Directive 95/46 EC provides individuals with a qualified right to be forgotten on the internet, *Google Spain SL v Agencia Española de Protección de Datos (AEPD) (C-131/12)* [2014] QB 1022. The New Zealand Law Commission recently considered threats to privacy caused by the press and new media in its report, New Zealand Law Commission, which, among other things, led to the Harmful Digital Communications Bill (NZ): *The News Media Meets 'New Media': Rights, Responsibilities and Regulation in the Digital Age*, Report No R128 (2013). In Canada, the Office of the Privacy Commissioner has been pressing for wholesale reform of the Privacy Act for some time in order to tackle current privacy issues: Jennifer Stoddart (Privacy Commissioner of Canada) 'The Necessary Rebirth of the Privacy Act' (Speech delivered at the Library of Parliament, Ottawa, Ontario, 29 November 2013) <[https://www.priv.gc.ca/media/sp-d/2013/sp-d\\_20131129\\_02\\_e.asp](https://www.priv.gc.ca/media/sp-d/2013/sp-d_20131129_02_e.asp)>.

<sup>4</sup> Katina Michael and Roger Clarke, 'Location Privacy under Dire Threat as 'Uberveillance' Stalks the Streets' (2012) 108 *Precedent* 24; Bruce Baer Arnold and Benjamin. Smith, 'Private Faces and Public Spaces: Privacy and the Victorian Sexting Inquiry' (2013) 10(2) *Privacy Law Bulletin* 18; Thomas Crofts and Murray Lee, "'Sexting", Children and Child Pornography' (2013) 35(1) *Sydney Law Review* 85.

<sup>5</sup> See, eg, Stephen Estcourt, 'Social Media and the Lawyer' (2013) 117 *Precedent* 24; Cheryl Cassidy-Vernon, 'Cyber Bullying' (2013) 40(7) *Brief* 20.

<sup>6</sup> ALRC, *For Your Information: Australian Privacy Law and Practice*, Report No 108 (2008); NSW Law Reform Commission, *Invasion of Privacy*, Report No 120 (2009); Victorian Law Reform

Commission ('ALRC') was tasked recently with devising 'innovative ways' in which the law might be improved.<sup>7</sup> In its report, the ALRC recommends the creation of a new tortious cause of action (by means of an Australian Commonwealth statute) to guard against serious invasions of privacy.<sup>8</sup> As the ALRC admits, and as will be discussed, the design of this tort has been strongly influenced by the UK's well-established common law misuse of private information claim,<sup>9</sup> derived from the House of Lords decision in *Campbell v MGN*<sup>10</sup> ('the *Campbell* jurisprudence').

As part of its inquiry, the ALRC invited submissions from stakeholders and received, in the main, two types of responses. In the first category were those who broadly supported the ALRC's proposal for its potential application to novel methods of privacy invasion brought about by modern living, of which the submission by the Women's Legal Service Victoria and Domestic Violence Resource Centre Victoria, noted above, is exemplary. To these stakeholders, the necessity of such a tort seemed obvious and pressing. In the second category were those who doubted the necessity of the tort and tended to express grave concern about its prospective adverse impact on press freedom,<sup>11</sup> of which Bartlett's submission, noted above, is representative. Such responses tended to be dismissive, reactionary and demonstrated a distinct unwillingness to engage with the problem.

To be sure, the ALRC's proposed cause of action is not directed primarily at the press. There is ample recognition within the report that the Australian press does not exhibit the same cultural malpractices that prompted the Lord Justice Leveson's well-known inquiry into UK press practices.<sup>12</sup> Similarly, the ALRC could not have been clearer that any prospective interference with press freedom would be minimal given that only claims concerning serious *and* unjustified invasions of privacy could succeed under the tort. It may also be noted that the ALRC's recommendations are unlikely to be implemented given the Attorney General's reported response to publication of the discussion paper: 'The government has made it clear on numerous occasions that it does not support a tort of privacy'.<sup>13</sup>

Notwithstanding this, the purpose of this article is to challenge the view that the ALRC's proposed cause of action would inevitably damage Australian press

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Commission, *Surveillance in Public Places*, Report No 18 (2010); Law Reform Committee, Parliament of Victoria, *Inquiry into Sexting*, Parliamentary Paper No 230, Session 2010–13 (2013).

<sup>7</sup> ALRC, *Serious Invasions of Privacy in the Digital Era*, Report No 123 (2014), 5 (Terms of Reference) ('ALRC Privacy Report').

<sup>8</sup> *Ibid* 59 [4.1].

<sup>9</sup> *Ibid* 22 [1.27].

<sup>10</sup> *Campbell v MGN Ltd* [2004] 2 AC 457.

<sup>11</sup> The terms 'press' and 'press freedom' are used throughout and refer to the traditional print and broadcast media. This terminology distinguishes individual expression since the free speech arguments for the protection of such may be of a different nature to the press. See, eg, Leveson Report, above n 3, vol I, 71–5 [2.4]–[3.13].

<sup>12</sup> See, eg, ALRC Privacy Report, above n 7, 21 [1.19]–[1.21].

<sup>13</sup> 'Brandis Rejects Privacy Tort Call', *The Australian* (online), 4 April 2014 <<http://www.theaustralian.com.au/business/legal-affairs/brandis-rejects-privacy-tort-call/story-e6f97x-1226873913819?nk=10ee36860543821fd6c05af86c202754>>.

freedom, as Bartlett and others suggest.<sup>14</sup> Drawing upon the ALRC's recommendation that Australian courts might have regard to the *Campbell* jurisprudence when deciding cases involving the tort,<sup>15</sup> it will be argued that, counterintuitively, the new law might not only protect press freedom, but also enhance it. Consequently, it will be argued that the collectively dismissive response by the press to the ALRC's inquiry represents a significant missed opportunity. As the ALRC warns, the common law may develop organically to better protect privacy interests.<sup>16</sup> As will be argued, this prospect presents the obvious risk that press interests are not as fully protected as they would be under the ALRC's proposals.

## II Australian Privacy Law

Given the purpose of this article, there will be no extensive discussion about the scope of Australian privacy law generally or whether a new specific privacy law is necessary. Instead, the discussion in this section focuses on those actions relevant to the press. Presently, the Australian common law is an unreliable source of protection. As the ALRC notes, although the traditional breach of confidence cause of action may be a useful means of preventing information from being disclosed by the press, it is less effective after the event given that the availability of damages for emotional distress is unclear.<sup>17</sup> Historically, breach of confidence has been a troublesome claim to maintain because of the requirement to establish a pre-existing confidential relationship.<sup>18</sup> As the ALRC also notes,<sup>19</sup> the courts in the UK and Australia have softened their approach to this issue so that the claim may succeed if it is established that the information is confidential in nature and was imparted in circumstances importing a duty of confidence.<sup>20</sup> Although personal information is likely to be treated by the courts as confidential, particularly where it relates to intimate aspects of a person's life,<sup>21</sup> there is a distinction between private information and confidential information — and it is possible that the information could lose its confidential status, where, say, it is publicly known, despite being private.<sup>22</sup>

Significantly, though, unlike in the UK, the Australian approach to breach of confidence recognises no public interest defence and the possibility of adopting such has been consistently rejected.<sup>23</sup> As Rolph, Vitins and Bannister note,

<sup>14</sup> See below nn 27–8 and accompanying text.

<sup>15</sup> ALRC Privacy Report, above n 7, 94 [6.14].

<sup>16</sup> *Ibid* 23 [1.33].

<sup>17</sup> *Ibid* 52 [3.50].

<sup>18</sup> *Coco v A N Clark (Engineers) Ltd* [1968] RPC 41.

<sup>19</sup> ALRC Privacy Report, above n 7, 51 [3.48] citing *Attorney General v Guardian Newspapers Ltd (No 2)* (1990) 1 AC 109 ('*Spycatcher*') and *Australian Broadcasting Commission v Lenah Game Meats Pty Ltd* (2001) 208 CLR 199, 224 (Gleeson CJ).

<sup>20</sup> See, eg, *Douglas v Hello! Ltd (No 3)* [2006] QB 125, [83].

<sup>21</sup> *Stephens v Avery* [1988] 1 Ch 449.

<sup>22</sup> See discussion in Mark Warby, Nicole Moreham and Iain Christie, *The Law of Privacy and the Media* (Oxford University Press, 2<sup>nd</sup> ed, 2011), 548–57.

<sup>23</sup> See discussion in David Rolph, Matt Vitins and Judith Bannister, *Media Law: Cases, Materials and Commentary* (Oxford University Press, 2010), 619–20.

Australian courts have doubted the wisdom of adopting the UK approach to breach of confidence given the risk of ‘ad hoc judicial idiosyncrasy’ associated with the task of balancing the public interest in maintaining confidences against the public interest in breaching them.<sup>24</sup> Yet even if this position changed, in the UK the presence of a public interest does not provide a complete defence for the press: as Rolph, Vitins and Bannister also note, ‘even if there is a public interest justifying disclosure ... it does not necessarily follow that the disclosure in the mass media is justified. Some other more limited or targeted disclosure ... may be more appropriate’.<sup>25</sup> This issue is now less significant in the UK given the protection afforded to public interest expression in misuse of private information claims (which many plaintiffs now rely upon instead of the traditional breach of confidence claim). Yet the ALRC suggests it may be a live issue in Australia since the lack of an adequate defence in breach of confidence claims may be causing the Australian press to actively settle claims against them in order ‘to avoid litigation, publicity and the setting of a precedent’.<sup>26</sup>

The precarious nature of the Australian press’s position in breach of confidence claims makes its collective refusal to engage meaningfully with the ALRC’s proposals all the more surprising and, it is submitted, ill-judged. Rather than embrace the ALRC’s consistent recognition that any new privacy law must respect press freedom, there was little more than a blanket response from those representing press interests (including the Media & Communications Committee of the Law Council of Australia, News Corp Australia, SBS, ASTRA, ABC, and Guardian News & Media Ltd and Guardian Australia) that the proposals, if implemented, would seriously impact on press freedom and could not be countenanced. Some submissions were more vociferous than others. Bartlett (a prominent media lawyer), for example, argued that the proposed tort would jeopardise press freedom by upsetting ‘the present balance between freedom of speech and a persons [sic] rights to privacy’.<sup>27</sup> News Corp Australia offered an even more extreme view:

The threat to freedom of speech and communication posed by a cause of action, regardless of how it is structured, will undermine our ability to report in the public interest, to the detriment of the Australian public and Australia’s democracy.<sup>28</sup>

This claim is difficult to fathom, particularly without any accompanying commentary to justify the bald statement. Admittedly, it is understandable that the introduction of a new privacy law would adversely affect newspapers financially since they would be required to expend resources (monetary and administrative) defending claims that they may not otherwise have to defend.<sup>29</sup> However, it will be argued, the ALRC’s proposals represent a more press-friendly alternative to the

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<sup>24</sup> Ibid 620.

<sup>25</sup> Ibid 619.

<sup>26</sup> ALRC Privacy Report, above n 7, 21 [1.21].

<sup>27</sup> Bartlett, above n 2.

<sup>28</sup> News Corp Australia, Submission No 112 to the ALRC, *Serious Invasions of Privacy in the Digital Era: Discussion Paper (DP80)*, 12 May 2014, 1.

<sup>29</sup> Although the press must abide by the standards set by the Australian Press Council (‘APC’), which includes provisions protecting privacy, the APC has no power to award damages.

current breach of confidence cause of action or the prospective development of the common law to fill the privacy law gap.

The ALRC's proposed cause of action has five parts, each of which would have to be satisfied for the claimant to succeed. Thus, the claimant must establish:

- a) that the invasion of privacy resulted from an intrusion into their seclusion or through misuse of personal information,
- b) in circumstances giving rise to a 'reasonable expectation of privacy',
- c) which was caused intentionally or recklessly (negligence is excluded),
- d) and was serious (though it need not cause actual damage),
- e) and was not justified by a countervailing public interest.

As noted above, this test has been influenced by the *Campbell* jurisprudence, which establishes a two-part test in which: first, the claimant must satisfy the court that the information generates a reasonable expectation of privacy (this is a threshold test and the claim will fail if it is not satisfied); and, second, that the public interest in privacy is not outweighed by the public interest in disclosure. However, unlike in the UK, the ALRC recommends, significantly, that while the press bears the legal burden of adducing evidence to establish the public interest in the expression, it is the claimant who has the 'legal onus to satisfy the court that the public interest in privacy outweighs any countervailing public interest'.<sup>30</sup>

Consequently, press freedom is safeguarded in four significant ways under the ALRC proposal. First, the claimant must establish a 'reasonable expectation of privacy', otherwise the claim fails at the first hurdle. In the UK, this requirement has limited claims to those where something 'essentially private' about the claimant is disclosed by the information and, so, has prevented the cause of action from overreaching. Thus, for example, Sir Elton John could not show that photographs taken of him outside his London home met this threshold: the Court found there was nothing essentially private about them.<sup>31</sup> Significantly, as this case shows also, there is no requirement for the press to justify everything it prints in public interest terms: it does not matter that there may be no public interest in the story if a reasonable expectation of privacy cannot be established.<sup>32</sup> Second, not only must there be an invasion of privacy, but also the invasion must be *serious*. The *Campbell* jurisprudence already incorporates a seriousness standard within the reasonable expectation of privacy — the claim will not progress to stage two (the balancing act) unless a 'certain level of seriousness' has been established.<sup>33</sup> In light of this and given the ALRC's view that the Australian courts should have regard to the *Campbell* jurisprudence when determining cases, there is a danger of the seriousness standard being applied twice if not three times: first, through the 'reasonable expectation of privacy' test where the UK standard (which already excludes non-serious intrusions) is taken as the benchmark; second, as a means of limiting interferences to those that not only satisfy the threshold standard, but also may be said to be a serious breach of that standard (so as to be highly offensive, for example); and, third, (potentially) through the use of the balancing approach

<sup>30</sup> ALRC Privacy Report, above n 7, 11 (Recommendation 9-3).

<sup>31</sup> *John v Associated Newspapers Ltd* [2006] EMLR 772.

<sup>32</sup> *Ibid* 776 [8].

<sup>33</sup> *R (Wood) v Commissioner of Police of the Metropolis* [2010] 1 WLR 123, 136 [22].

should the court conclude that the intrusion must not only be serious but also so serious as to outweigh everyone else's rights (ie, the relevant public interest). Clearly, it would work to the press's advantage if the Australian court concluded that the instruction to have regard to the *Campbell* jurisprudence (where there is no overt mention of seriousness in the test) and the explicit reference to seriousness in the Australian model were intended to convey more limited protection for privacy invasion than the UK approach. Third, the press is protected by the explicit recognition that public interest expression justifies, in principle, intrusions into privacy. As noted above, this is more advantageous than the current breach of confidence cause of action (even that applied in the UK), where the presence of a public interest is less significant. Fourth, the press is further protected by the requirement that the burden of proof falls upon the claimant to show that the public interest in privacy outweighed the public interest in expression.

In section IV (below), it will be argued that there is further cause for press optimism under the ALRC's proposed model if the *Campbell* jurisprudence were adopted in Australia, given the generosity of the UK courts' interpretation of the term 'public interest'. In light of these claims, the apparent view of the Australian press that the status quo is preferable merits scrutiny. The view expressed by Bartlett and others<sup>34</sup> that the cause of action is unnecessary because there is no comparable privacy-invading press culture in Australia compared to the UK is, as the ALRC notes,<sup>35</sup> entirely circular: if the law does not guard against such invasions and regulatory bodies are unable to award damages then victims face a significant disincentive from turning to either for help. Also, Bartlett's claim — that there is 'no evidence of such outrageous behaviour occurring here'<sup>36</sup> like the phone-hacking scandal that prompted the Leveson Inquiry — may be overstated. First, the same was true of the UK prior to the scandal: there was no evidence of such 'outrageous behaviour'. Second, the Leveson Inquiry unearthed far more problematic press behaviour than phone-hacking and instead cast light on a troubling and prevalent culture of widespread disregard for the dignity of others (including, significantly, ordinary members of the public) — not only in the stories themselves, but also in the newsgathering process.<sup>37</sup> Further, it also brought to public attention the often cosy relationships between the press and the police, as well as the press and politicians.<sup>38</sup> The absence of any outward evidence of scandalous press behaviour happening in Australia, therefore, is no guarantee that similar malpractices do not occur and the Leveson Report should be more accurately understood as a cautionary tale against complacency about press freedom.

<sup>34</sup> Similar points were also made in the following submissions to the ALRC Inquiry: News Corp Australia, above n 28, 2; Media and Communications Committee of the Business Law Section of the Law Council of Australia, Submission No 124 to the ALRC, *Serious Invasions of Privacy in the Digital Era: Discussion Paper (DP80)*, 14 May 2014; Guardian News & Media Ltd and Guardian Australia, Submission No 80 to the ALRC, *Serious Invasions of Privacy in the Digital Era: Discussion Paper (DP80)*, 9 May 2014.

<sup>35</sup> ALRC Privacy Report, above n 7, 21 [1.22].

<sup>36</sup> Bartlett, above n 2, 2.

<sup>37</sup> See Paul Wragg, 'Leveson and Disproportionate Public Interest Reporting' (2013) 5(2) *Journal of Media Law* 241.

<sup>38</sup> See Jacob Rowbottom, 'Politicians, the Press and Lobbying' (2013) 5(2) *Journal of Media Law* 253; Andrew Scott, 'Tales of the Unexpected: Reflections on the Application of the *Bribery Act* to Chequebook Journalism' (2013) 5(2) *Journal of Media Law* 276.



Moreover, such submissions do not sit well with the findings of previous law reform inquiries that identified several ways in which the present law fails to protect privacy interests.<sup>39</sup> Regardless of the merits of these findings, the possibility exists that the common law may develop in order to address these shortcomings. Indeed, the ALRC comments that:

Australian law is unlikely to stand still, given developments in other countries with similar legal systems and principles. Although Australia does not have a Human Rights Act, Australia is a signatory to the *International Covenant on Civil and Political Rights*, which requires countries to protect the privacy of its citizens ... It will be increasingly difficult to justify denying legal redress to people whose privacy has been seriously invaded, when other countries offer such redress.<sup>40</sup>

As the ALRC notes,<sup>41</sup> the High Court of Australia ‘[left] open the possibility’ of developing a privacy law in *Australian Broadcasting Corporation v Lenah Game Meats Pty Ltd*.<sup>42</sup> Similarly in *Grosse v Purvis*, a decision that took up the cudgels of *Lenah Meats*, the Queensland Court found that to succeed in such a claim, the plaintiff would need to show there had been:

- a) a wilful act by the defendant,
- b) that intruded upon their privacy or seclusion,
- c) in a manner that would be considered highly offensive by a reasonable person of ordinary sensibilities,
- d) and that caused the plaintiff detriment (physically or emotionally) or which prevented the plaintiff from acting in a manner to which they were entitled.<sup>43</sup>

Noticeably, the test contains no public interest defence. Subsequent courts have been reluctant to follow *Lenah Meats* or apply this decision, even in Queensland.<sup>44</sup> Admittedly, as the ALRC notes, the prospect of a common law privacy right has received a distinctly mixed reception, in which courts have variously accepted,<sup>45</sup> rejected<sup>46</sup> or otherwise sidestepped<sup>47</sup> the proposition. In more recent cases, the courts have timorously echoed the possibility of a common law privacy tort without firm commitment either way.<sup>48</sup> The ALRC concludes, mildly, that the law is ‘at best, uncertain’<sup>49</sup> but this judgement is, frankly, far too kind: the law is a mess.

<sup>39</sup> These shortcomings are summarised in the ALRC Privacy Report, above n 7, 51–3 [3.50].

<sup>40</sup> *Ibid* 23 [1.33].

<sup>41</sup> *Ibid* 53–4 [3.53].

<sup>42</sup> *Australian Broadcasting Corporation v Lenah Game Meats Pty Ltd* (2001) 208 CLR 199, 328 [335] (*‘Lenah Meats’*).

<sup>43</sup> *Grosse v Purvis* [2003] QDC 151 (16 June 2003), [444].

<sup>44</sup> See Paul Telford, ‘If Only There was a Privacy App!’ (2012) 108 *Precedent* 10.

<sup>45</sup> *Doe v Australian Broadcasting Corporation* [2007] VCC 281 (3 April 2007).

<sup>46</sup> *Kalaba v Commonwealth of Australia* [2004] FCA 763 (8 June 2004), [6].

<sup>47</sup> *Chan v Sellwood* [2009] NSWSC 1335 (9 December 2009), [34]; *Giller v Procopets (No 2)* (2008) 24 VR 1.

<sup>48</sup> See ALRC Privacy Report, above n 7, 54–5 [3.55].

<sup>49</sup> *Ibid* 55 [3.56].

As the Australian experience shows, relying on the common law to develop comprehensively is risky. The common law can only develop according to the facts before it and neither a coherent strategy, nor a sufficiently responsive set of principles, can be guaranteed.<sup>50</sup> This sort of strategy has had, in some cases, disastrous consequences in the UK — as when s 127 of the *Communications Act 2003* (UK)<sup>51</sup> was employed with too much vigour and too little rigour to ‘offensive’ messages broadcast through social networking sites like Twitter. At its nadir, s 127 was used to prosecute a frustrated airline passenger who had complained online that he would ‘blow-up’ an airport if it did not ‘get [its] shit together’.<sup>52</sup> Prompted by prosecutorial decision-making like this, and the sheer volume of potential prosecutions that would occur if this represented the standard, the Director of Public Prosecutions swiftly issued guidance reminding his prosecutors that only *serious* threats should be taken to court.<sup>53</sup>

Perversely, the absence of a privacy-invading culture might work to the disadvantage of the Australian press should the common law develop organically. The early privacy claims after the *Human Rights Act 1998* (UK) (‘HRA’) — which led to the *Campbell* decision — and most since, involved complaints against the press. The UK’s misuse of private information cause of action occurred not only due to the (then) recent introduction of the HRA,<sup>54</sup> but also due to the willingness of legal pioneers to risk (comparatively) vast fortunes (in their own legal fees and, prospectively, their opponent’s) so as to challenge the compatibility of existing common law actions with the right to respect for privacy under art 8 of the *ECHR*. Thus, Naomi Campbell succeeded<sup>55</sup> where others had enjoyed distinctly mixed success, to name a few: Catherine Zeta-Jones and Michael Douglas,<sup>56</sup> Garry Flitcroft (a footballer),<sup>57</sup> Jamie Theakston (a TV personality),<sup>58</sup> David and Victoria Beckham<sup>59</sup> and Heather Mills.<sup>60</sup> Importantly, though, the press has had a significant say in how these principles developed and their interests have been well-represented in the principles that emerged. Australia’s privacy pioneers, however, have been, so far, citizens bringing claims against other citizens. If this trend continues, then principles may develop with little or no contemplation of their prospective effect on press freedom. In this light, the ALRC’s proposals are

<sup>50</sup> Thomas D C Bennett, ‘Emerging Privacy Torts in Canada and New Zealand: An English Perspective’ (2014) 36(5) *European Intellectual Property Review* 298.

<sup>51</sup> A provision with a lineage traceable to s 10(2)(a) of the *Post Office (Amendment Act) 1935* (UK), which protected telephone operators from any sort of indecent, offensive or menacing messages: *Chambers v DPP* [2013] 1 WLR 1833, [27].

<sup>52</sup> *Ibid.*

<sup>53</sup> Crown Prosecution Service, ‘DPP Publishes Final Guidelines for Prosecutions involving Social Media Communications’ (Latest News, 20 June 2013) <[http://www.cps.gov.uk/news/latest\\_news/dpp\\_publishes\\_final\\_guidelines\\_for\\_prosecutions\\_involving\\_social\\_media\\_communications/](http://www.cps.gov.uk/news/latest_news/dpp_publishes_final_guidelines_for_prosecutions_involving_social_media_communications/)>.

<sup>54</sup> Among other things, the HRA gave further effect to the *European Convention on Human Rights: Convention for the Protection of Human Rights and Fundamental Freedoms*, opened for signature 4 November 1950, 213 UNTS 221 (entered into force 3 September 1953) (‘ECHR’).

<sup>55</sup> *Campbell v MGN Ltd* [2004] 2 AC 457.

<sup>56</sup> *Douglas v Hello! Ltd (No 1)* [2001] QB 967.

<sup>57</sup> *A v B plc* [2003] QB 195.

<sup>58</sup> *Theakston v MGN Ltd* [2002] EMLR 398.

<sup>59</sup> *Beckham v MGN Ltd* (Unreported, England and Wales High Court, Queen’s Bench Division, Eady J, 28 June 2001).

<sup>60</sup> *Mills v News Group Newspapers Ltd* [2001] EMLR 41.

even more attractive for the greater certainty they provide that press interests are recognised and thoroughly accounted for. Moreover, it will be argued that if Australian courts closely followed the *Campbell* jurisprudence, press freedom would be not only protected, but also positively enhanced. In order to establish that claim though, the following section will show how this accommodation might be achieved, allowing for the obvious fact that Australia does not have a comparable *HRA* or *ECHR* at work in the background.

### III Accommodating UK Privacy Laws

In its submission, the Australian Privacy Foundation ('APF') was particularly critical of the ALRC's recommendation that the courts might usefully refer to the UK case law on misuse of private information.<sup>61</sup> It argued that this would be inappropriate because, first, the UK cause of action is equitable not tortious; and, second, the UK approach follows from its obligations under the *HRA* of which there is no comparable Australian provision.<sup>62</sup> These are both important points, although the first may be less significant given a recent first instance decision where the tortious status of the claim was confirmed by the courts.<sup>63</sup> As noted in that decision, the UK courts have consistently referred to the misuse of private information claim as a tort.<sup>64</sup>

As for the second point, the absence of comparable constitutional provisions akin to the *HRA* or *ECHR* need not prevent the Australian courts incorporating principles from the *Campbell* jurisprudence into the common law. The proposed Act would, of itself, provide legislative confirmation of a right to privacy and freedom of expression, and of the need to balance the two together. The obligations imposed by the *HRA*, or the *ECHR* underpinning it, are no more onerous than this: both simply confirm, in bald terms, the existence of the two rights but say nothing about how clashing rights disputes should be resolved. Similarly, while Australia has no express constitutional provisions, the courts have demonstrated considerable versatility and aptitude in developing and protecting a range of implied constitutional rights — including the implied right of political communication (see below) — so they are not entirely unfamiliar with rights discourse.

Further, in its treatment of press freedom at least, the influence of the obligations under the *HRA* and *ECHR* on the UK courts' approach should not be overstated. There is a rich tradition within the common law of protecting press freedom generously which pre-dates the *HRA*.<sup>65</sup> A particularly vivid example of

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<sup>61</sup> APF, Submission No 110 to the ALRC, *Serious Invasions of Privacy in the Digital Era: Discussion Paper (DP80)*, 12 May 2014, 1.

<sup>62</sup> *Ibid* 5–6.

<sup>63</sup> *Vidal-Hall v Google Inc* [2014] EWHC 13 (QB) (16 January 2014), [70]; cf *Mosley v News Group Newspapers Ltd* [2008] EWHC 1777 (QB) (24 July 2008), [181]–[197] where Eady J is more circumspect.

<sup>64</sup> These cases are discussed in *Vidal-Hall*, *ibid* [53]–[69].

<sup>65</sup> See, eg, *In Re X (A Minor) (Wardship: Jurisdiction)* (1975) Fam 47; *Woodward v Hutchins* [1977] 1 WLR 760.

this can be seen in *R v Central Television Plc*, where Lord Justice Hoffmann (as he then was), in the Court of Appeal, noted:

Publication may cause needless pain, distress and damage to individuals or harm to other aspects of the public interest. But a freedom which is restricted to what judges think to be responsible or in the public interest is no freedom. Freedom means the right to publish things which government and judges, however well motivated, think should not be published. It means the right to say things which ‘right-minded people’ regard as dangerous or irresponsible. This freedom is subject only to clearly defined exceptions laid down by common law or statute. The principle that the press is free from both government and judicial control is more important than the particular case.<sup>66</sup>

Similarly, in *R v Beck*,<sup>67</sup> the Court of Appeal spoke of a press ‘right to report criminal trials’ unless prevented by statute. Given how easily the UK judiciary utilised the language of rights prior to its inception, it cannot be said that implementing the *HRA* has entailed a radical shift in thinking, particularly since the House of Lords has previously found the common law and *ECHR* approach to freedom of expression to be coterminous.<sup>68</sup> In *Spycatcher*, Lord Goff said that this feature was ‘scarcely surprising, since we may pride ourselves on the fact that freedom of speech has existed in this country perhaps as long as, if not longer than, it has existed in any other country in the world’.<sup>69</sup> His Lordship noted that:

the only difference is that, whereas Article 10 of the Convention, in accordance with its avowed purpose, proceeds to state a fundamental right and then to qualify it, we in this country (where everybody is free to do anything, subject only to the provisions of the law) proceed rather upon an assumption of freedom of speech, and turn to our law to discover the established exceptions to it.<sup>70</sup>

The Australian common law’s receptivity toward implied rights provides cause for optimism that it would not find the rights discourse in the *Campbell* jurisprudence overwhelmingly alien — albeit, as discussed below, the Australian approach to press freedom is markedly different from the UK’s. Moreover, there are pragmatic grounds for employing the *Campbell* jurisprudence in Australia, as the ALRC notes. Since it provides a ready-made source of principles for the courts to apply, Australia’s privacy pioneers do not have to spend vast sums to bring test cases, as happened in the UK. For example, Naomi Campbell incurred costs of around £500,000 (roughly \$900,000) and, we might imagine, her opponents spent about the same.<sup>71</sup> Millions more have been spent developing the principles.

<sup>66</sup> *R v Central Independent Television plc* (1994) Fam 192, [204].

<sup>67</sup> *R v Beck ex parte Daily Telegraph Plc* (1992) 94 Cr App R 376, 381.

<sup>68</sup> *Spycatcher* (1990) 1 AC 109, 181 (Sir John Donaldson MR), 283 (Lord Goff); *Derbyshire County Council v Times Newspapers Ltd* (1993) AC 534.

<sup>69</sup> *Spycatcher* (1990) 1 AC 109, 283.

<sup>70</sup> *Ibid.*

<sup>71</sup> Campbell had retained her legal advisors on a conditional fee agreement (‘CFA’) which allowed for a 95% success fee, recoverable from her opponents. The rules on CFAs have since changed. See discussion in Kirsty Hughes, ‘Balancing Rights and the Margin of Appreciation: Article 10, Breach of Confidence and Success Fees’ (2011) 3(1) *Journal of Media Law* 29.

Admittedly, there is merit in a cautious approach to the UK art 8 jurisprudence. It is fair to say the *HRA* experiment has not lived up to its frenzied anticipation<sup>72</sup> and, at times, has placed the courts in an uncomfortable position where the line between politics and law has sometimes become distinctly blurred<sup>73</sup> — and, at other, times positively overstepped.<sup>74</sup> The judiciary has found the right to respect to family and private life particularly challenging to accommodate. It has been relied upon in areas as varied as assisted suicide,<sup>75</sup> confidentiality,<sup>76</sup> housing,<sup>77</sup> immigration,<sup>78</sup> unlawful detention,<sup>79</sup> surveillance,<sup>80</sup> and the principle of open justice.<sup>81</sup> Putting it mildly, the right has become ‘difficult to delineate’.<sup>82</sup> This is due, in part, to the use of ‘human dignity’ and ‘autonomy’ as means of determining its parameters: principles that want for clarity and coherence in a practical context.<sup>83</sup> Unsurprisingly, the wide-ranging application of art 8 has contributed to the popular dislike of both the *ECHR* and *HRA*,<sup>84</sup> and while at least some of these misgivings are due to the impact on press freedom,<sup>85</sup> it has also been attributed to a failure by the judiciary (and supporters) to sufficiently recognise that it is a qualified (rather than absolute) right.<sup>86</sup> These issues have been less pronounced in the *Campbell* jurisprudence, however the scope of the claim has been kept within manageable limits by a restricted reading of the privacy right, albeit the press has disliked the claim immensely, for obvious reasons.<sup>87</sup>

The compatibility of the *Campbell* jurisprudence with the ALRC’s proposed tort may be doubted further given that the two claims, despite the considerable likeness between them, are not identical. First, as the APF rightly notes,<sup>88</sup> the UK’s misuse of private information claim does not extend to intrusion into seclusion, at least not in a satisfactorily explicit way (as the ALRC notes, there is an arguable

<sup>72</sup> See, eg, sustained criticism by Ewing: K Ewing, ‘The Futility of the *Human Rights Act*’ [2004] *Public Law* 829; K D Ewing and Joo-Cheong Tham, ‘The continuing futility of the Human Rights Act’ [2008] *Public Law* 668.

<sup>73</sup> See, eg, D Nicol, ‘Law and Politics after the *Human Rights Act*’ [2006] *Public Law* 722.

<sup>74</sup> See, eg, D Campbell, ‘The Threat of Terror and the Plausibility of Positivism’ [2009] *Public Law* 501.

<sup>75</sup> *R (Pretty) v DPP* [2002] 1 AC 800.

<sup>76</sup> *Douglas v Hello! Ltd (No 1)* [2001] QB 967.

<sup>77</sup> *Harrow LBC v Qazi* [2003] UKHL 43.

<sup>78</sup> *Huang v Secretary of State for the Home Department* [2007] 2 AC 167.

<sup>79</sup> *Secretary of State for the Home Department v JJ* [2008] AC 385.

<sup>80</sup> *R (Privacy International) v Revenue and Customs Commissioners* [2014] EWHC 1475 (Admin) (12 May 2014).

<sup>81</sup> *Re S (A Child)* [2005] 1 AC 593.

<sup>82</sup> A Young, ‘Is Dialogue Working under the *Human Rights Act 1998*?’ (2001) *Public Law* 773, 776.

<sup>83</sup> It is often justified on the basis of human dignity, a principle that McCrudden has expertly scrutinised in a range of contexts and legal cultures and has found wanting — although, despite that, he believes it to be a valuable principle in determining rights cases: Christopher McCrudden, ‘Human Dignity and Judicial Interpretation of Human Rights’ (2008) 19(4) *European Journal of International Law* 655.

<sup>84</sup> Nicolas Bratza, ‘Living Instrument or Dead Letter — The Future of the *European Convention on Human Rights*’ (2014) *EHRLR* 116.

<sup>85</sup> Paul Dacre, ‘The Threat to Our Press’, *The Guardian* (online), 10 November 2008 <<http://www.theguardian.com/media/2008/nov/10/paul-dacre-press-threats>>.

<sup>86</sup> See, eg, criticism by David Campbell, ‘Human Rights and the Critique of the Common Law’ (2005) *Cardozo Law Review* 791.

<sup>87</sup> See Dacre, above n 85.

<sup>88</sup> APF, above n 61, 5.

claim that the extension of the action to photographs touches on seclusion-type claims).<sup>89</sup> However, as the ALRC also notes,<sup>90</sup> the *Protection from Harassment Act 1997* (UK) covers at least some instances of seclusion-type claims<sup>91</sup> and it is not unusual to find privacy and harassment claims pleaded together.<sup>92</sup> Second, the *Campbell* test does not employ an explicit seriousness standard. Third, the burden of proof under the ALRC scheme is different to that found in the *Campbell* jurisprudence. Arguably, these differences are not as significant as they may otherwise appear (for the following reasons) and so ought not to prevent judicial engagement with the *Campbell* jurisprudence in Australia.

Although the UK system does not apply to intrusions into seclusion (a move that has disappointed some commentators),<sup>93</sup> the UK courts have used imaginative methods to extend the notion of ‘information’ so as to capture photographs of the plaintiff, even when engaged in anodyne behaviour. For example, the UK Court of Appeal accepted, in principle, that a photograph of JK Rowling’s infant son, being pushed down a busy Edinburgh high street, was capable of generating a reasonable expectation of privacy on the basis that a child’s expectations of privacy should be greater than an adult’s given a child’s comparative vulnerability.<sup>94</sup> This principle was successfully applied to photographs of musician Paul Weller’s children, captured enjoying a family day out<sup>95</sup> and in *RocknRoll v News Group Newspapers Ltd*,<sup>96</sup> which related to photographs of Edward RocknRoll, husband of actress Kate Winslet, obtained from a Facebook account (viewable by 1500 ‘friends’ of the account holder) and depicting Mr RocknRoll in a state of undress at a party. The England and Wales High Court found little difficulty in holding that the information disclosed a reasonable expectation of privacy and that the privacy claim ought to succeed. Similarly, the Court has suggested that intrusions into seclusion are incompatible with art 8 rights, albeit without expressly extending the scope of the misuse claim.<sup>97</sup> In *Mosley*, Eady J commented that ‘the very fact of clandestine recording may be regarded as an intrusion and an unacceptable infringement of Art 8 rights’.<sup>98</sup> Indeed, in a recent and important article, Moreham persuasively argues that, in light of cases like these, the UK common law could (and should) be extended to cover intrusions into seclusion.<sup>99</sup> Even if the UK law did not develop in this way, at the very least these cases confirm there is an underlying compatibility between art 8 and the protection of intrusions into seclusion.

<sup>89</sup> ALRC Privacy Report, above n 7, 76–7 [5.17]–[5.20], referring, in particular, to N A Moreham, ‘Beyond Information: Physical Privacy in English Law’ (2014) 73(2) *CLJ* 350.

<sup>90</sup> ALRC Privacy Report, above n 7, 80 [5.32].

<sup>91</sup> *Bayer CropScience Ltd v Stop Huntingdon Cruelty* [2009] EWHC 3289 (QB) (22 December 2009).

<sup>92</sup> See, eg, *AMP v Persons Unknown* [2011] EWHC 3454 (TCC) (20 December 2011); *AVB v TDD* [2014] EWHC 1442 (QB) (12 May 2014).

<sup>93</sup> See, eg, Richard Mullender, ‘Comment: Privacy, Imbalance and the Legal Imagination’ (2011) 19 *Tort Law Review* 109.

<sup>94</sup> *Murray v Express Newspapers plc* [2009] Ch 481, 502–4 [36]–[39].

<sup>95</sup> *Weller v Associated Newspapers Ltd* [2014] EWHC 1163 (QB) (16 April 2014).

<sup>96</sup> *RocknRoll v News Group Newspapers Ltd* [2013] EWHC 24 (Ch) (17 January 2013).

<sup>97</sup> See, eg, *R (Wood) v Commissioner of Police of the Metropolis* [2010] 1 WLR 123, 139–40 [34].

<sup>98</sup> *Mosley v News Group Newspapers Ltd* [2008] EWHC 1777 (QB) (24 July 2008), [17].

<sup>99</sup> ALRC Privacy Report, above n 7, 76–7 [5.17]–[5.20].

Similarly, as noted above, although the *Campbell* test does not explicitly employ a seriousness standard, it is clear from the case law that trivial interferences with privacy will not meet the threshold required to advance the claim to the second part of the test (the balancing act). For example, in *Author of a Blog*, the Court found that an anonymous blogger could not rely upon the misuse of private information claim to prevent disclosure of his identity because ‘blogging is a public activity’.<sup>100</sup> Moreover, in more recent cases, the courts have readily accepted the existence of a seriousness threshold in privacy claims. In *McKennitt v Ash*,<sup>101</sup> the UK Court of Appeal found that the interference with private life must be ‘of some seriousness’ before art 8 engages. This principle has been applied, and embellished, in subsequent cases to find that art 8 ‘is not a guarantee of a comfortable life or a certain standard of living’,<sup>102</sup> that a distinction should be drawn between information revealing the existence of a relationship and that which describes the nature of it (since the former is not generally a private matter);<sup>103</sup> and that, if a seriousness threshold were not employed, the right might otherwise become ‘unreal and unreasonable’.<sup>104</sup> Consequently, it is arguable that the *Campbell* jurisprudence and the ALRC’s proposals both require the plaintiff to show a serious invasion of privacy has occurred.

Finally, there are subtle but meaningful differences in the manner claims are decided. Under the ALRC proposals, the plaintiff is burdened with persuading the court that the privacy claim is stronger than the public interest claim (albeit the defendant must provide evidence of the public interest said to be at stake).<sup>105</sup> This suggests that the court can adopt, in effect, a passive role in the process; that determinations are based on no more than what the plaintiff and defendant present to justify their respective positions. In the UK, however, the courts’ role is more active. This is, for example, evident in its approach to balancing — in which, given the presumptive parity between the two rights, the court must decide whether it is necessary and proportionate to interfere with the privacy right while simultaneously deciding whether it is necessary and proportionate to interfere with the free speech right.<sup>106</sup> Similarly, the burden of proof in the UK is neutral since where neither party advances a public interest defence (the defendant may simply wish to fight the case solely on the merits of the privacy claim),<sup>107</sup> the courts must determine the public interest in expression, as part of its obligations under the *HRA*.<sup>108</sup> Also, the courts will not award interim non-disclosure orders simply because the parties agree, since the court must consider the impact on the public’s freedom of expression rights.<sup>109</sup> Whether this difference has any significant practical implication is debatable. In principle, however, it means that the UK

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<sup>100</sup> *Author of a Blog v Times Newspapers Ltd* [2009] EWHC 1358 (QB) (16 June 2009), [11], [33].

<sup>101</sup> *McKennitt v Ash* [2007] 3 WLR 194, 201 [12].

<sup>102</sup> *AAA v Associated Newspapers Ltd* [2012] EWHC 2103 (QB), [87].

<sup>103</sup> *Trimingham v Associated Newspapers Ltd* [2012] EWHC 1296 (QB), [285].

<sup>104</sup> *Weller v Associated Newspapers Ltd* [2014] EWHC 1163 (QB) (16 April 2014), [27].

<sup>105</sup> See ALRC Privacy Report, above n 7, 159–62.

<sup>106</sup> *Re S (A Child)* [2005] 1 AC 593, 603 [17].

<sup>107</sup> See, eg, *TSE v News Group Newspapers Ltd* [2011] EWHC 1308 (QB) (23 May 2011), [7], [23], [27].

<sup>108</sup> *Ibid.*

<sup>109</sup> *JIH v News Group Newspapers Ltd* [2011] EWCA Civ 42, [21]; Practice Guidance (Interim Non-Disclosure Orders) [2012] 1 WLR 1003.

courts can safeguard audience interests in the expression in a manner that, prospectively, the Australian courts seem unable to. Yet, given the vested interest of the press in protecting expression, the vulnerability of public interest expression may be more theoretical than substantial.

Thus, although the UK's misuse of private information claim arose from the law's obligations under the *HRA*, its principles are sufficiently distinct that meaningful inferences may be drawn from the case law by Australian courts. Admittedly, the ALRC's proposed tort would create privacy rights not previously recognised in Australia. However, it will be argued in the final section, this statute may also strengthen press rights which, of themselves, are currently poorly recognised in the Australian legal system.

#### IV Enhancing Press Freedom

As is well known, there is no equivalent right in Australia to the right to freedom of expression under art 10 of the *ECHR* or the First Amendment of the US Constitution. As the High Court has said, '[u]nlike the Constitution of the United States, our Constitution does not create rights of communication'.<sup>110</sup> Instead, Australian press freedom comprises of two elements: a residual liberty to speak on any topic, occupying those areas that statute leaves untouched,<sup>111</sup> and a narrow 'implied right to political communication'.<sup>112</sup> Whether there is a meaningful difference between the UK and Australia in practice is debatable.<sup>113</sup> However, in principle, the differences seem stark for although the Australian approach bears comparison to the UK position before the *HRA*,<sup>114</sup> it will be argued that the Australian approach to public interest expression appears much weaker than its UK counterpart (even before the *HRA*).

The implied right of political communication has been consistently described as a limitation on state power, rather than a personal entitlement.<sup>115</sup> Since it does no more than 'support the constitutional imperative of the maintenance of representative government',<sup>116</sup> the court needs only to be satisfied that the law does not have 'a "direct", rather than "incidental", burden upon that communication'.<sup>117</sup> Chesterman has previously argued that the law's approach to political expression has been particularly 'unbalanced' in prioritising overtly political expression concerning Parliament and public sector affairs (especially those involving the

<sup>110</sup> *Levy v Victoria* (1997) 189 CLR 579, 622.

<sup>111</sup> *Brown v Classification Review Board* (1997) 154 ALR 67, 76.

<sup>112</sup> *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520.

<sup>113</sup> For example, compare the distinctly similar approaches of the UK and Australian courts to cases involving the 'Occupy' movement despite the existence of a 'right' to free speech in one jurisdiction and a liberty in the other: *The Mayor of London v Samede* [2012] 2 All ER 1039 and *O'Flaherty v City of Sydney Council* (2014) 221 FCR 382.

<sup>114</sup> Rolph, Vitins and Bannister, above n 23, 32 note the House of Lords view then that there was no real difference between rights under art 10 and the common law's treatment of freedom of speech given the range of circumstances under art 10(2) in which the right may be interfered with: *Attorney General v Guardian Newspapers Ltd (No 2)* (1990) 1 AC 109, 178 (Sir John Donaldson MR).

<sup>115</sup> See most recent statement in *Unions NSW v New South Wales* (2013) 304 ALR 266, 276–7 [36].

<sup>116</sup> *Attorney-General (SA) v Corporation of the City of Adelaide* (2013) 249 CLR 1, 73–4 [166].

<sup>117</sup> *Hogan v Hinch* (2011) 243 CLR 506, 555–6 [95].



Commonwealth), leaving him to conclude that Australian free speech rights are distinctly ‘delicate’.<sup>118</sup>

More recently, though, the High Court has declared that ‘the class of communication protected by the implied freedom in practical terms is wide’.<sup>119</sup> This view is rather cryptic or else seems to require a particularly generous treatment of the word ‘wide’. To support this claim, the Court referred to three other High Court decisions, but it is difficult to see how they substantiate the claim. The first is *Hogan v Hinch* and, in particular, the finding that the phrase ‘governmental and political matters’ extends, potentially, beyond ‘the current functioning of government’ to ‘arguably’ the ‘social and economic features of Australian society’.<sup>120</sup> This seems an underwhelming indication of a ‘wide’ meaning; this is no more than an ordinary understanding of the term ‘political’. Similarly, the second reference to the various judgments in *Levy v Victoria*<sup>121</sup> does not seem particularly helpful since the case concerned an unsuccessful claim that entering a prohibited area to protest against the hunting of game birds constituted a form of political communication within the meaning of the implied right. Although the decision is useful in clarifying that there is some latitude in the term ‘communication’ (ie, the means by which information and ideas are disseminated) so as to capture this sort of protest, and that ‘false, unreasoned and emotional communications’ may be included as well,<sup>122</sup> the decision says nothing about the potential elasticity of the term ‘political’ and, therefore, nothing about the breadth of categories of speech falling within the implied right. The final reference is to the *Theophanous* decision and it seems strangest of all; here the Court decided there was ‘nothing’ in the law to provide ‘a private constitutional right to communicate at all times’ about the performance of Members of Parliament (‘MPs’) or their suitability for office.<sup>123</sup> The concession in this case that ‘entertainment and politics’ may, on occasion, ‘merge’<sup>124</sup> is also not as liberalising as it may otherwise appear, given the examples that the Court provides of such merging are confined to a television personality commenting on legislation or an actor seeking election — in other words, there is no merge, there is simply political expression through the medium of an entertainer.

Although the Australian approach to freedom of speech appears parsimonious,<sup>125</sup> especially from a comparative perspective, recognition of it as a residual liberty provides some protection, at least. Obviously, in principle, threats to

<sup>118</sup> Michael Chesterman, *Freedom of Speech in Australian Law: A Delicate Plant* (Ashgate, 2000), 60–63; see also Adrienne Stone, ‘Rights, Personal Rights and Freedoms: The Nature of the Freedom of Political Communication’ (2001) 25 *Melbourne University Law Review* 374.

<sup>119</sup> *Attorney-General (SA) v Corporation of the City of Adelaide* (2013) 249 CLR 1, 43–4 [67].

<sup>120</sup> *Hogan v Hinch* (2011) 243 CLR 506, 543–4 [49].

<sup>121</sup> *Levy v Victoria* (1997) 189 CLR 579.

<sup>122</sup> *Ibid* 623.

<sup>123</sup> *Theophanous v Herald & Weekly Times Ltd* (1994) 182 CLR 104, 206.

<sup>124</sup> *Ibid* 123.

<sup>125</sup> See criticisms in Anne Twomey, ‘The Application of the Implied Freedom of Political Communication to State Electoral Funding Laws’ (2012) 35(3) *University of New South Wales Law Journal* 625; T. Campbell and S. Crilly, ‘The Implied Freedom of Political Communication, Twenty Years on’ (2011) 30(1) *U Queensland LJ* 59; cf Adrienne Stone, ‘Insult and Emotion, Calumny and Invective: Twenty Years of Freedom of Political Communication’ (2011) 30(1) *University of Queensland Law Journal* 79.

freedom of speech (and press freedom), arise where the law protects behaviour that adversely affects expression (directly, eg, defamation, or indirectly, eg, regulation of highways affecting public demonstrations) without adequate judicial protection of speech. As is well recognised, the residual liberty approach is weak where the law does not protect ‘important’ expression<sup>126</sup> or expression that does not cause sufficient harm to others.<sup>127</sup> Although the national uniform defamation law allows for the protection of public interest expression as part of the qualified privilege defence,<sup>128</sup> the concern expressed by stakeholders, such as News Corp Australia, that the proposed privacy law would damage press freedom is understandable given the judicial attitudes toward freedom of speech discussed above. Yet News Corp’s major argument that the ALRC’s privacy tort would ‘prioritise’ the privacy interest and seriously threaten free speech because ‘freedom of speech in Australia is not enshrined in a legislative right, and it would not have an equivalent legal right to that which privacy would have under a cause of action’<sup>129</sup> is far from persuasive. It is difficult to penetrate the logic of this concern because the ALRC’s proposal, if transposed to law, *would* enshrine the right to freedom of expression (and press freedom) in law through the explicit mention of the right.

It may be of some concern, though, to News Corp Australia, and others, that privacy-invading expression would not be treated by the courts as public interest expression, sufficient to outweigh the privacy interest. Australia may not have the same press culture of privacy invasion as the UK (or US), but a survey of the adjudications by the Australian Press Council (‘APC’) adequately demonstrates that privacy invasion still occurs. The APC has upheld 19 complaints of privacy invasion since January 2005. In the same period, the UK Press Complaints Commission (‘PCC’) upheld 33 complaints. Thus, despite the claim that the two cultures are markedly different, these two figures are surprisingly similar. Admittedly, there may be a number of explanations to account for this similarity — for example, the PCC may have been less receptive to privacy complaints than the APC is. The Leveson Report was particularly critical of the PCC’s lack of independence from industry.<sup>130</sup> However, it shows, at least, that it would be wrong to say Australia has *no* culture of invading privacy. Moreover, the APC’s approach to privacy complaints appears robust: its general principles state that the press should ‘[a]void intruding on a person’s reasonable expectations of privacy, unless doing so is sufficiently in the public interest’. However, its adjudications demonstrate a preparedness to uphold complaints which overstep the mark, the most egregious of which concerned the organiser of a protest blocking Sydney’s roads at rush-hour. *The Daily Telegraph* published his mobile phone number and urged readers to complain to him personally by phone call or text message.

<sup>126</sup> See, eg, Frederick F Schauer, *Free Speech: A Philosophical Enquiry* (Cambridge University Press, 1982).

<sup>127</sup> See, eg, Ronald Dworkin, ‘Is There a Right to Pornography?’ (1981) 1(2) *Oxford Journal of Legal Studies* 177.

<sup>128</sup> See discussion in David Rolph, ‘A Critique of the National, Uniform Defamation Laws’ (2008) 16(3) *Torts Law Journal* 207; Andrew T Kenyon, ‘Six Years of Australian Uniform Defamation Law: Damages, Opinion and Defence Meanings’ (2012) 35(1) *University of New South Wales Law Journal* 31.

<sup>129</sup> News Corp Australia, above n 28, 5.

<sup>130</sup> Leveson Report, above n 3, vol IV, 1515–16 [1.5].

In upholding his complaint, the APC noted that it was ‘difficult to imagine a more grievous invasion of individuals’ [sic] privacy’.<sup>131</sup>

If the prospective treatment of privacy-invading expression is a concern for the press, then it may be misplaced if the UK experience is indicative of how the Australian system would develop. To be sure, the UK courts have interfered with press freedom where there is no discernible justification for the interference with privacy<sup>132</sup> or no convincing one, as in the paradigm case of *Mosley*.<sup>133</sup> In *Mosley*, the Court systemically deconstructed the newspaper’s weak claim that the graphic (in all senses of the word) portrayal of Max Mosley’s private encounters with five sex workers was in the public interest because it showed a fetish for Nazism. Similarly, the courts have been unpersuaded that exposure of adultery, for example, is, by itself, a matter of public interest.<sup>134</sup>

Nevertheless the courts have been exceedingly generous toward press freedom in this context. First, they have interpreted the term ‘public interest’ broadly. This treatment began in *Campbell v MGN Ltd*,<sup>135</sup> where the House of Lords found that there was an ‘undoubted [public] right to know that [model Naomi Campbell] was misleading the public when she said that she did not take drugs’ (but that details of her treatment was of ‘a much lower order’ than this information).<sup>136</sup> Although subsequent decisions suggest a judicial inclination to pare back this right, through casual inclusion of a condition that any deception must be ‘serious’,<sup>137</sup> this qualification has not been universally applied and, in any event, is unpersuasive — for what is ‘serious’ about knowing that a model lied about an aspect of her private life? In *Hutcheson v News Group Newspapers Ltd*,<sup>138</sup> the UK Court of Appeal found that the public right not to be misled was at stake in a publication concerning an ongoing feud between celebrity chef Gordon Ramsay and his father-in-law, Christopher Hutcheson, which informed readers that Mr Hutcheson had, for some time, kept a second family without his first family’s knowledge.<sup>139</sup> This principle was also applied in *Ferdinand v MGN Ltd*<sup>140</sup> on the basis that Premier League footballer, Rio Ferdinand, had misled the public, through his autobiography, into believing he was a reformed character who no longer cheated on his long-term partner.

The courts have also found that an individual’s role model status may count as public interest expression where the individual acts in an unbecoming manner. The most extreme application of the principle can be found in *A v B plc*,<sup>141</sup> where

<sup>131</sup> Australian Press Council, *Adjudication No. 1344: Robinson/The Daily Telegraph* (February 2007) <<http://www.presscouncil.org.au/document-search/adjudication-no-1344-robinson-telegraph-feb-2007/>>.

<sup>132</sup> See, eg, *TSE v News Group Newspapers Ltd* [2011] EWHC 1308 (QB) (23 May 2011).

<sup>133</sup> *Mosley v News Group Newspapers Ltd* [2008] EWHC 1777 (QB) (24 July 2008)

<sup>134</sup> *Ntuli v Donald* [2011] 1 WLR 294; *CDE v MGN Ltd* [2010] EWHC 3308 (QB) (16 December 2010).

<sup>135</sup> *Campbell v MGN Ltd* [2004] 2 AC 457.

<sup>136</sup> *Ibid* 490 [117].

<sup>137</sup> See, eg, *CTB v News Group Newspapers Ltd* [2011] EWHC 1232 (QB) (16 May 2011), [25]; *Lord Browne of Madingley v Associated Newspapers Ltd* [2008] QB 103, 119–20 [49]–[50].

<sup>138</sup> *Hutcheson v News Group Newspapers Ltd* [2011] EWCA Civ 808 (19 July 2011).

<sup>139</sup> *Ibid* [43].

<sup>140</sup> *Ferdinand v MGN Ltd* [2011] EWHC 2454 (QB) (29 September 2011), [66]–[68].

<sup>141</sup> *A v B plc* [2003] QB 195.

the Court of Appeal found that there was a public interest in the plaintiff's private life since, as a footballer, he was a 'role [model] for young people and undesirable behaviour on [his] part can set an unfortunate example'.<sup>142</sup> Although this finding has been heavily criticised in the academic commentary<sup>143</sup> and by the courts,<sup>144</sup> it was resurrected recently in *Ferdinand*, where it was accepted that the plaintiff's role as England Football Club ('FC') captain made his off-field behaviour a matter of public interest.<sup>145</sup> Similarly, it was accepted in *Goodwin v News Group Newspapers* that an affair between a powerful businessman and junior colleague would be 'of concern to an audience much wider than the work colleagues of either partner in the relationship' and that 'there may be a public interest if the sexual relationship gives rise to conflicts with professional interests or duties'.<sup>146</sup>

Furthermore, the courts have accepted that the press enjoys a wide 'freedom to criticise ... the conduct of other members of society as being socially harmful, or wrong'.<sup>147</sup> The Court of Appeal in *Hutcheson* described this as a 'powerful' argument in favour of privacy-invading expression.<sup>148</sup> It was also used in *Ferdinand*<sup>149</sup> and, more recently, *McClaren v News Group Newspapers Ltd* to justify a story revealing that former England FC manager, Steve McClaren, was having an adulterous affair with the former lover of the England manager previous to him.<sup>150</sup> Although the limits of this potentially broad justification have yet to be fully tested,<sup>151</sup> clearly there is tremendous scope for much speech expressing moral indignation to fall within it. These broad devices, collectively, show that privacy-invading expression commenting on the moral behaviour of individuals may fall within the definition of public interest.

Second, it is not only judicial generosity toward the meaning of public interest that has assisted press freedom in this area. The courts' approach to (and, arguably, adaptation of) the *Campbell* methodology has also assisted since the courts have found that the existence of a public interest in the expression is the 'determinative factor' (according to the UK Court of Appeal)<sup>152</sup> and that, where there is a public interest at stake, the law 'scarcely' permits interference (according to the UK Supreme Court).<sup>153</sup> This type of approach ought to address News Corp Australia's concern that the proposed tort would inevitably 'privilege' privacy interests: the UK experience shows, indisputably, that this is not the case. Third, the UK courts have similarly found that the privacy claim cannot be used to protect

<sup>142</sup> Ibid [43(vi)].

<sup>143</sup> See, eg, Helen Fenwick and Gavin Phillipson, *Media Freedom under the Human Rights Act* (Oxford University Press, 2006), 799.

<sup>144</sup> *McKennitt v Ash* [2007] 3 WLR 194, 217 [65].

<sup>145</sup> *Ferdinand v MGN Ltd* [2011] EWHC 2454 (QB) (29 September 2011), [87]–[93].

<sup>146</sup> *Goodwin v News Group Newspapers Ltd* [2011] EWHC 1437 (QB) (9 June 2011), [103].

<sup>147</sup> *Terry v Persons Unknown* [2010] EWHC 119 (QB) (29 January 2010), [104].

<sup>148</sup> *Hutcheson v News Group Newspapers Ltd* [2011] EWCA Civ 808 (19 July 2011) [29].

<sup>149</sup> *Ferdinand v MGN Ltd* [2011] EWHC 2454 (QB) (29 September 2011), [63].

<sup>150</sup> *McClaren v News Group Newspapers Ltd* [2012] EWHC 2466 (QB), [19].

<sup>151</sup> See Paul Wragg, 'The Benefits of Privacy-Invading Expression' (2013) 64(2) *Northern Ireland Legal Quarterly* 187.

<sup>152</sup> *ETK v News Group Newspapers Ltd* [2011] 1 WLR 1827, 1835 [23].

<sup>153</sup> *Re Guardian News and Media Ltd* [2010] 2 AC 697, [51].

against the disclosure of ‘bare facts’. This principle is apparent in *Campbell* and subsequent cases<sup>154</sup> and further addresses News Corp’s concern.

Finally, it should be noted that the UK courts have not found against the press in circumstances where a public interest, narrowly conceived, has been at stake.<sup>155</sup> The nearest that the courts have come to doing so was in *Greencorns Ltd v Claverley Group Ltd*,<sup>156</sup> which involved a news story about a care home for troubled teenagers. Following newspaper publication of an intended location for the home, an angry mob (with shades of Mill’s classic example)<sup>157</sup> descended upon the address and violently protested. Although the Court accepted that there was a ‘high public interest [in] how such children should be cared for’, it did not find this interest to be at stake in the contested expression (the publication of the address), but instead found it raised ‘a series of private interests’ concerning the location of the home and whether ‘there will be such a house next door or in their street’.<sup>158</sup>

In addition to this doctrinal justification for an enhanced reading of press freedom, the UK courts’ approach may also be defended on normative grounds. As is well recognised in the academic literature, the justification(s) for the special treatment of press freedom (and free speech generally) is controversial.<sup>159</sup> Broadly, there are three dominant arguments that seek to defend freedom of expression for its contribution to democratic participation,<sup>160</sup> or the process of discovering ‘truth’ (in the Enlightenment sense of self-discovery or self-fulfilment),<sup>161</sup> or in recognition of the autonomous nature of individuals.<sup>162</sup> The UK courts’ treatment of public interest plainly recognises speaker (and audience) interests in broader terms than simply democratic participation, and, in particular, seems to give greater recognition to the self-fulfilment value as well.<sup>163</sup> This, of itself, would be a departure from the Australian courts’ approach which, as others have noted,<sup>164</sup> has tended to stick closely to narrow conceptions of the democratic participation value.

<sup>154</sup> *Browne of Madingley v Associated Newspapers Ltd* [2008] QB 103, [59]; *Ntuli v Donald* [2011] 1 WLR 294, [55]; *Hutcheson v News Group Newspapers Ltd* [2011] EWCA Civ 808 (19 July 2011), [10]; *Goodwin v News Group Newspapers Ltd* [2011] EWHC 1437 (QB) (9 June 2011), [90]; *Trimingham v Associated Newspapers Ltd* [2012] EWHC 129 (24 May 2012) [285].

<sup>155</sup> See, eg, *Tillery Valley Foods v Channel Four Television* [2004] EWHC 1075 (Ch) (11 May 2004); *Response Handling Ltd v BBC* [2007] CSOH 102 (3 April 2007); *Long Beach Ltd v Global Witness* [2007] EWHC 1980 (QB) (15 August 2007); *Leeds City Council v Channel Four Television* [2007] 1 FLR 678; *BKM Ltd v BBC* [2009] EWHC 3151 (Ch) (2 December 2009); *Re Guardian News and Media Ltd* [2010] 2 AC 697.

<sup>156</sup> *Green Corns Ltd v Claverley Group Ltd* [2005] EWHC 958 (QB) (18 May 2005).

<sup>157</sup> J S Mill, *On Liberty in Collected Works of John Stuart Mill*, vol. XVIII, (University of Toronto Press, 1977), 260:

An opinion that corn dealers are starvers of the poor, or that private property is robbery, ought to be unmolested when simply circulated through the press, but may justly incur punishment when delivered orally to an excited mob assembled before the house of a corn dealer, or when handed about among the same mob in the form of a placard.

<sup>158</sup> *Green Corns Ltd v Claverley Group Ltd* [2005] EWHC 958 (QB) (18 May 2005), [99].

<sup>159</sup> See, eg, Schauer, above n 126.

<sup>160</sup> See, eg, Alexander Meiklejohn, ‘The First Amendment is an Absolute’ [1961] *Supreme Court Review* 245.

<sup>161</sup> See, eg, Mill, above n 157.

<sup>162</sup> See, eg, Thomas Scanlon, ‘A Theory of Freedom of Expression’ in R M Dworkin (ed) *The Philosophy of Law*, R M Dworkin (ed) (Oxford University Press, 1977) 153.

<sup>163</sup> Wragg, above n 151.

<sup>164</sup> Chesterman, above n 118.

Indeed, it has been argued that the Australian courts' approach is so narrow that even classic democratic participation arguments, such as Meiklejohn's,<sup>165</sup> could not be said to apply since Meiklejohn would have extended protection, on such terms, to philosophy, science, literature and the arts 'but it can hardly be claimed that [such speech] is "necessary for the effective operation of that system of representative and responsible government provided for by the Constitution"'.<sup>166</sup> Instead, the Australian judicial approach seems to have more in common with (US) Justice Bork's argument that, if a principled reading is to be realised, the First Amendment should protect only 'speech that is *explicitly* political'.<sup>167</sup> Greater adherence to the UK misuse of private information case law, therefore, would strengthen (prospectively) Australian press freedom through greater recognition of the broader democratic participation and self-fulfilment values at stake.

Although the Strasbourg jurisprudence envisages protection on these terms,<sup>168</sup> the UK press freedom principles discussed above have arisen independently of that jurisprudence. The notion that 'misleading the public' is a public interest matter can be traced through the common law,<sup>169</sup> and is particularly evident in cases involving intellectual property.<sup>170</sup> The law's recognition of role model status as a public interest matter is much more recent. Outside of its common usage in family and criminal law cases,<sup>171</sup> it is hard to find reference to it before the House of Lords decision in *Reynolds v Times Newspapers Ltd* (where the Court acknowledged that the concept of 'political discussion' could include speech about role models)<sup>172</sup> and the first consideration of it as a reason to interfere with privacy occurred in *A v B plc* at first instance (where the Court rejected the newspaper's argument that the claimant was a role model).<sup>173</sup> The argument was later accepted, though, in *Theakston*<sup>174</sup> and on appeal in *A v B plc*.<sup>175</sup> The Court's most recent principle that the press enjoys a freedom to criticise the immoral behaviour of others stems from the Court's view of newspapers historically,<sup>176</sup> although the more general freedom to criticise the judiciary<sup>177</sup> and government<sup>178</sup>

<sup>165</sup> Meiklejohn, above n 160.

<sup>166</sup> Dan Meagher, 'What is "Political Communication"? The Rationale and Scope of the Implied Freedom of Political Communication' (2004) *Melbourne University Law Review* 438, 451 (emphasis in original).

<sup>167</sup> R Bork, 'Neutral Principles and Some First Amendment Problems' (1971) 47(1) *Indiana Law Journal* 1, 20 (emphasis added).

<sup>168</sup> The European Court of Human Rights has consistently stated that freedom of expression 'constitutes one of the essential foundations of a democratic society and one of the basic conditions for its progress and for each individual's self-fulfilment': *Lingens v Austria* (1986) 8 EHRR 407, [41]; see also, eg, *Nilsen and Johnsen v Norway* (2000) 30 EHRR 878, [43]; *Tammer v Estonia* (2003) 37 EHRR 43, [59].

<sup>169</sup> See, eg, *Law Society v United Service Bureau Ltd* [1934] 1 KB 343, 352; *Walter v Ashton* [1902] 2 Ch 282.

<sup>170</sup> See, eg, *In re Dewhurst's Trade-mark* [1896] 2 Ch 137; *Birmingham Vinegar Brewery Co Ltd v Powell* [1896] 2 Ch 54; *Cook v Pearce* (1843) 115 ER 1171.

<sup>171</sup> See, eg, *R v Daley* [1996] 2 Cr App R (S) 212; *L (A Child) (Contact: Domestic Violence)* [2001] Fam 260.

<sup>172</sup> *Reynolds v Times Newspapers Ltd* [2001] 2 AC 127, 220.

<sup>173</sup> *A v B plc* [2001] 1 WLR 2341, 2354-5 [67].

<sup>174</sup> *Theakston v MGN Ltd* [2002] EMLR 398, [69].

<sup>175</sup> *A v B plc* [2003] QB 195.

<sup>176</sup> *Terry v Persons Unknown* [2010] EWHC 119 (QB) (29 January 2010), [104].

<sup>177</sup> See, eg, *Schopfer v Switzerland* (1996) 22 EHRR 184.

has a long history in the case law.<sup>179</sup> This evidence further strengthens the claim that the UK's approach to privacy-invading expression does not rely upon its obligations under the *HRA*. Indeed, as noted above, such generosity toward press freedom is readily apparent in the common law prior to this.

As these points demonstrate, the UK courts recognise a broader category of information to be of public interest than that falling within classic understandings of the term 'political'. Consequently, what might be dismissed initially as celebrity gossip or of prurient interest only, may be categorised, on closer inspection, as a morally driven claim about the state of celebrity milieu or society more generally. It is here that Australian press freedom might be not only better protected, but also positively enhanced through greater engagement with the *Campbell* jurisprudence. The UK judicial treatment of privacy-invading expression by the press appears much more generous than the Australian courts' interpretation of freedom of speech and, particularly, the implied right of political communication.

## V Conclusion

Australian press complaints about privacy reform seem out of touch with popular sentiment and detached from the reality of what the ALRC proposes. As is clear from the ALRC's various investigations,<sup>180</sup> there is a popular consciousness about the harm of privacy intrusion and a concern that government should provide meaningful protection against it. As the ALRC has also noted, the law is presently inadequate to cater for all of these privacy concerns. It is entirely possible that the Australian common law will develop organically to address these gaps without any involvement from press defendants. Even if that does not occur, the present most likely cause of action against the press for privacy invasion (breach of confidence) does not provide a defence that would otherwise protect press freedom. Given these two circumstances, the generally dismissive and uncooperative collective position of the press in response to the ALRC's inquiry is difficult to understand. Not only has the ALRC proposed a cause of action that is elegantly framed and eminently workable, but also it has created a tort that recognises and protects press freedom interests.

Admittedly, it is understandable that the press may feel apprehensive about prospective judicial treatment of privacy-invading expression given the courts' approach to the implied right of political communication. It is also understandable that it should have some misgivings about incorporation of the UK misuse of private information claim given the UK's mixed *HRA* experience. Yet the prospective incorporation of the *Campbell* jurisprudence is good news for the press. It allows for development of the law in terms that explicitly recognise press freedom (and on a statutory footing), and provides the courts with an established jurisprudence in which privacy-invading expression enjoys healthy protection in

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<sup>178</sup> See, eg, *Castells v Spain* (1992) 14 EHRR 445.

<sup>179</sup> See also *Losinska v Civil and Public Services Association* [1976] ICR 473 concerning the freedom to criticise unions.

<sup>180</sup> These inquiries are discussed in ALRC *Serious Invasions of Privacy in the Digital Era: Discussion Paper*, Discussion Paper 80 (DP 80) (2014), 22–3.

generous terms that extend beyond narrow conceptions of political expression to include gossip and the condemnation of immoral behaviour. Statutory recognition of press freedom would be an improvement, of itself, but recognition that privacy-invading expression exposing public figure immorality is a public interest matter, particularly in the terms used by the UK courts to express this value, represents a positive enhancement of press freedom rights. A privacy statute is a win-win for press and public alike.



