

## 5.0 CIVIL REMEDIES

In determining whether criminalising certain types of behaviour is an appropriate course to take, it is necessary to understand what civil remedies are currently available to Territorians for the disclosure and distribution by another of images which, when taken, were meant to be kept confidential. Suffice to say that this is an area that has received considerable attention by law reform and parliamentary bodies in recent years,<sup>14</sup> and, therefore, the topic will be addressed only briefly in this report.

Currently, at a Commonwealth level, there is no statutory cause of action for a ‘serious invasion of privacy’, although such a cause of action has been recommended by the Australian Law Reform Commission (ALRC) in two reports.<sup>15</sup> Further, no State or Territory has yet enacted such legislation, although in March 2016, the New South Wales Legislative Council Standing Committee on Law and Justice<sup>16</sup> (Standing Committee) recommended that such a cause of action be enacted based on the model outlined by the ALRC in its report titled ‘Serious Invasions of Privacy in the Digital Era’.<sup>17</sup> No such cause of action exists currently in the Northern Territory, and to the Committee’s knowledge, a statutory cause of action for a serious invasion of privacy is not being considered currently by the Northern Territory Parliament.

Actions available at common law to address the type of conduct under consideration in this inquiry fall into two broad categories: an action in tort for invasion of privacy; and an action in equity for breach of confidence. The first is at an embryonic stage of development in Australia, whereas the second is more established.

### 5.1 Invasion of privacy

Before 2001, the generally held view was that a common law right to privacy was not recognised in Australian law. This view was based on an interpretation of the High Court decision in *Victoria Park Racing and Recreation Grounds Co Ltd v Taylor* (1937) 58 CLR 479.<sup>18</sup>

In *Australian Broadcasting Corporation v Lenah Game Meats* (2001) 208 CLR 199, the High Court left open the possibility of the development at common law of an action in tort for invasion of privacy. Justices Gummow and Hayne, with whom Gaudron J agreed,<sup>19</sup> noted at [106]-[107]:

‘Lenah suggested in its submissions that to date the Australian courts most probably had not developed “an enforceable right to privacy” because of what generally was taken to follow from the failure of the plaintiff’s appeal in *Victoria Park Racing and Recreation*

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<sup>14</sup> *Australian Privacy Law and Practice* (ALRC Report No 108, 2008) Ch 74; *Invasion of Privacy* (NSWLRC Report No 120, 2009); *Surveillance in Public Places* (VLRC Report No 18, 2010); *A Commonwealth Statutory Cause of Action for Serious Invasion of Privacy* (Issues Paper, Dept of PMC, 2011); *Too Much Information: a Statutory Cause of Action for Invasion of Privacy*, (SALRI Issues Paper 4, 2013); Parliament of Victoria, *Inquiry into Sexting* (Parliamentary Paper No 230, 2013); *Serious Invasions of Privacy in the Digital Era* (ALRC Report No 123, 2014); Standing Committee on Law and Justice, Parliament of New South Wales, *Remedies for Serious Invasion of Privacy in New South Wales* (2016).

<sup>15</sup> *Australian Privacy Law and Practice* (ALRC Report No 108, 2008) Rec 74-1; *Serious Invasions of Privacy in the Digital Era* (ALRC Report No 123, 2014) Recs 4-1 and 4-2.

<sup>16</sup> Standing Committee on Law and Justice, Parliament of New South Wales, *Remedies for Serious Invasion of Privacy in New South Wales* (2016) at Recs 3 and 4.

<sup>17</sup> *Serious Invasions of Privacy in the Digital Era* (ALRC Report No 123, 2014).

<sup>18</sup> For a discussion of the *Victoria Park Racing* case see: D Butler, ‘A Tort of Invasion of Privacy in Australia?’ (2005) 29 *Melbourne University Law Review* 339 at 341.

<sup>19</sup> *Australian Broadcasting Corporation v Lenah Game Meats* (2001) 208 CLR 199 at [58].

*Grounds Co Ltd v Taylor. Victoria Park* does not stand in the path of the development of such a cause of action.’

To date, the invitation extended by the High Court to develop a tort of invasion of privacy in Australia has been taken up by only two lower courts: the Queensland District Court in *Grosse v Purvis* [2003] QDC 151; and the Victorian County Court in *Doe v Australian Broadcasting Corporation* [2007] VCC 281. No appellate court has recognised such a tort, leading the ALRC to conclude that the ‘cases suggest that the future development of the common law [tort of privacy] is, at best, uncertain’.<sup>20</sup>

## 5.2 Breach of confidence

A more fruitful common law remedy to address in a civil action the conduct under consideration in this report is the equitable action for breach of confidence. In *Commonwealth of Australia v John Fairfax & Sons* (1980) 147 CLR 39 at 50, Mason J enunciated the equitable principle relating to the disclosure of confidential information as follows:

‘The principle is that the court will ‘restrain the publication of confidential information improperly or surreptitiously obtained or of information imparted in confidence which ought not to be divulged’ (Lord *Ashburton v Pape*,<sup>21</sup> per Swinfen Eady LJ).’

With the advent of digital technology, and the increasing ease with which intimate personal images shared in confidence can be taken and distributed, the courts have exhibited a willingness to use the action in breach of confidence to direct that the disclosed images be removed, prohibit the further distribution of the images by a defendant and award damages to the wronged party. Two Australian cases can be used to illustrate how the action for breach of confidence has been applied in such a context.

*Giller v Procopets* (2008) 24 VR 1 dealt with the aftermath of the breakdown of a de facto relationship. Between November and December 1996, the respondent had videotaped the parties engaging in sexual activity in the privacy of their bedroom. Some of the videos were taken without the appellant’s knowledge.<sup>22</sup> She did, however, subsequently become aware of later recordings. After the relationship ended, the respondent:

‘...showed a video of the sexual activities of the parties to one person, left a video with the plaintiff’s father and threatened to show the video to a number of people including the plaintiff’s employer. He made contact with the employer on 9 December [1996]. He was taken into custody by the police early the following day. He did not attempt to show the video again until about the middle of the following year when he showed it to a female friend of his.’<sup>23</sup>

The Victorian Court of Appeal found that the actions of the respondent constituted a breach of confidence. Further, the Court held that the appellant was entitled to monetary compensation for the emotional distress caused by the release of the video tapes. Finally, the Court held that such

<sup>20</sup> *Serious Invasions of Privacy in the Digital Era* (ALRC Report No 123, 2014) at [3.56].

<sup>21</sup> *Lord Ashburton v Pape* [1913] 2 Ch 469 at 475.

<sup>22</sup> *Giller v Procopets* (2008) 24 VR 1 at [359].

<sup>23</sup> *Giller v Procopets* [2004] VSC 113 at [10] (reversed *Giller v Procopets* (2008) 24 VR 1).

compensation was available both in the exercise of the Court's jurisdiction to award damages in equity, and pursuant to the Victorian version of *Lord Cairns' Act* (21 & 22 Vic c 27).<sup>24</sup>

In the Supreme Court of Western Australia case of *Wilson v Ferguson* [2015] WASC 15, the Court summarised the issue before the court as follows:

'The issue raised is how an Australian court exercising equitable jurisdiction should respond to the publication by a jilted exlover, to a broad audience via the internet, of explicit images of a former partner which had been confidentially shared between the sexual partners during their relationship.'<sup>25</sup>

Like *Giller*, the breach at issue in *Wilson v Ferguson* involved the non-consensual distribution by the male defendant of naked and semi-naked photographs of the parties, and videos of the parties engaged in sexual activities, which images were taken on their mobile phones. The plaintiff maintained that the 'photographs and videos were intended for the exclusive enjoyment and gratification of the plaintiff and defendant for so long as their relationship lasted'.<sup>26</sup>

Following the breakup of the relationship, the defendant posted 16 explicit photographs and two explicit videos on his Facebook page. Included in the post was the defendant's comment, 'Happy to help ya boys at home ... enjoy!!'. Later the same day, the defendant also posted the following: 'Let this b a fkn lesson. I will shit on anyone that tries to fk me ova. That is all!'.<sup>27</sup> At the time of the post, the defendant had approximately 300 Facebook 'friends' who would have been able to view and download the images. Further, the damage to the plaintiff was exacerbated by the fact that the parties worked at the same mining site, and many of the defendant's Facebook 'friends' also were the plaintiff's co-workers.

In upholding the plaintiff's claim for breach of confidence, Mitchell J held that:<sup>28</sup>

- (a) the intimate nature of the images clearly had about them the necessary quality of confidence;
- (b) any reasonable person standing in the shoes of the defendant would know that the images were only for his viewing and were not to be shared;
- (c) the defendant was aware that disclosure of the images would cause immense embarrassment and distress to the plaintiff; and
- (d) the defendant's disclosure of the pictures and videos on his Facebook page was motivated by his knowledge of the embarrassment and distress the disclosure of the images would cause to the plaintiff.'

By way of remedy, the Court granted injunctive relief to the plaintiff. The injunction restrained the defendant from publishing, either directly or indirectly, the images other than on the terms specified in the order.<sup>29</sup> The Court also ordered that the defendant pay to the plaintiff equitable

<sup>24</sup> *Supreme Court Act 1986* (Vic) s 38.

<sup>25</sup> *Wilson v Ferguson* [2015] WASC 15 at [1].

<sup>26</sup> *Wilson v Ferguson* [2015] WASC 15 at [4].

<sup>27</sup> *Wilson v Ferguson* [2015] WASC 15 at [27].

<sup>28</sup> *Wilson v Ferguson* [2015] WASC 15 at [56]-[58].

<sup>29</sup> *Wilson v Ferguson* [2015] WASC 15 at [90]. The terms were: as required by law; to professional advisers for the purpose of obtaining professional advice; with leave of the WASC; or with the express written consent of the plaintiff.

compensation in the sum of \$48,404; which consisted of lost wages in the sum of \$13,404, and \$35,000 for the embarrassment and distress suffered by the plaintiff as a result of the disclosure of the images.

Support for an award of equitable damages for embarrassment and distress arising from a breach of confidence can be found in the decision in *Giller*.<sup>30</sup> Maxwell P, for example, after an extensive review of the relevant authorities, stated:

‘The present case involved a deliberate course of conduct on the part of Mr Procopets, intended to cause maximum distress to Ms Giller. The judge found that this conduct had caused her great distress. In my opinion, this was a separate and distinct basis in law for the award of damages of \$40,000 which Neave JA and I would make on the claim for breach of confidence.’<sup>31</sup>

It is clear from the above that the equitable action for breach of confidence is well suited to address the non-consensual sharing of intimate images; however, it is important to note that its reach is limited. In particular, the action for breach of confidence is not suited to situations where the harm suffered by the complainant related to the threat of publication of intimate images, rather than the actual publication of such images. This limitation was highlighted by Lord Justice Toulson of the Supreme Court of the United Kingdom, a co-author of a leading text on confidentiality,<sup>32</sup> in a paper written in 2007 (when his Lordship was a member of the Court of Appeal):

‘A consequence of the development of privacy within the action for breach of confidentiality is that it is presently confined to cases involving the use of information of a private nature, whether in word or pictorial form. So however strong and understandable may be the feeling of harassment of a person who is hounded by photographers when carrying out activities of a private nature, and however unacceptable the behaviour of the pack, there will be no cause of action until an intrusive photograph is published.’<sup>33</sup>

While the above observations focused on the actions of the paparazzi, in an Australian context the same would apply to the actions of jilted ex-lover. This was emphasised by the ALRC when it noted, ‘if the UK’s approach applied, the plaintiff in *Doe v ABC* would (and did on the findings of the trial judge) have a recognised cause of action for breach of confidence, but the claimant in *Grosse v Purvis* would be without a remedy’.<sup>34</sup>

### 5.3 Relevant court

The monetary limit for the Northern Territory Local Court’s civil jurisdiction is \$250,000,<sup>35</sup> which means that generally an action framed in either breach of confidence or the tort of invasion of privacy will be commenced in the Local Court. Further, with respect to an action for breach of confidence, the Local Court can award the suite of remedies usually awarded in such an action:

<sup>30</sup> *Giller v Procopets* (2008) 24 VR 1.

<sup>31</sup> *Giller v Procopets* (2008) 24 VR 1 at [36].

<sup>32</sup> R Toulson & C Phipps, *Confidentiality* (3rd ed, Sweet and Maxwell, 2012).

<sup>33</sup> R Toulson, ‘Freedom of Expression and Privacy’ (Paper presented at the Association of Law Teachers Lord Upjohn Lecture, London, 9 February 2007, 7. See also, *Australian Privacy Law and Practice* (ALRC Report No 108, 2008) at [74.114].

<sup>34</sup> *Australian Privacy Law and Practice* (ALRC Report No 108, 2008) at [74.115].

<sup>35</sup> *Local Court Act*, s 12.

monetary damages<sup>36</sup> and injunctions.<sup>37</sup> Of course, as with any civil claim, legal expertise generally will be required to draft the pleadings and to prosecute the claim. The inherent cost and time involved in civil litigation, even if commenced in the Local Court, may deter many victims of the non-consensual sharing of intimate images from pursuing such remedies.

#### **5.4 Conclusion**

It can be concluded from the above that, in appropriate cases, a person who has suffered loss, including non-economic loss for distress and embarrassment, can recover monetary damages in equity arising from the disclosure of intimate images shared in confidence. Further, the equitable remedy of injunctive relief, if appropriate, will be available in such circumstances. Finally, while some lower courts in Australia have recognised a tort of invasion of privacy, whether such an action is a viable option is still uncertain.

Of course, to avail her or himself of the remedy an equitable action in breach of confidence or the tort of invasion of privacy provides, a wronged party will have to commence proceedings in court. Such a process will inevitably be time-consuming and expensive.

#### **Recommendation 1**

**Civil remedies of injunction or damages resulting from publication or non-consensual sharing of intimate images, presently within the jurisdiction of the Local Court and the Supreme Court of the Northern Territory, should continue in force.**

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<sup>36</sup> *Local Court Act*, s 13(1).

<sup>37</sup> *Local Court Act*, s 13(2).