CRIME AND CORRUPTION COMMISSION

TRANSCRIPT OF INVESTIGATIVE HEARING

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(DURATION: 1HR 8MINS)

LEGEND

PO Presiding Officer – ALAN MACSPORRAN QC
CA Counsel Assisting – JULIE FOTHERINGHAM
HRO Hearing Room Orderly – KELLY ANDERSON
W Witness – BARBARA McDONALD
LR Legal Representative – .

HRO All rise. This hearing is resumed.

PO Good morning.

CA Good morning, Chair. I call Professor Barbara McDONALD.

PO Good morning.

W Good morning.

PO Would you prefer to take an oath or affirmation?

W Affirmation.

PO Affirmation, thank you.

HRO Just repeat after me. I solemnly affirm and declare.

W I solemnly affirm and declare.

HRO That the evidence given by me.

W That the evidence given by me.

HRO Shall be the truth.

W Shall be the truth.

HRO The whole truth.

W The whole truth.

HRO And nothing but the truth.

W And nothing but the truth.

HRO Thank you, take a seat.

PO You can be seated, thanks.

W Thank you.

CA Good morning, Professor.

W Good morning.

CA You were provided an attendance notice for today?

W Yes.

CA Yes. May Professor be shown the attendance notice?

W Yes.

CA Thank you. I tender that document.

PO Exhibit 74.

ADMITTED AND MARKED EXHIBIT 74.

CA Professor, you are the Professor at the University of Sydney Law School?

W Yes.

CA And a Fellow at the Australian Academy of Law?

W That's right.

CA You teach foundations of law, torts and torts and contracts for undergraduates?

W Yes.

CA And advanced obligations and remedies, comparative media, law and statutory foundations and negligence in the postgraduate program?

W That's right.

CA You served as a Commissioner on the Australian Law Reform Commission in Sydney where you headed the Inquiry into Serious Invasions of Privacy in the Digital Era?

W That's right.

CA The inquiry was completed in June 2014 and the final report tabled in Federal Parliament on the 3rd of September 2014.

W Yes.

CA You are a Graduate of the University of Sydney in Arts and Law?

W Yes.

CA After several years in employment in a litigation department of a large Sydney commercial law firm you completed a Master of Laws at the University College, London, in 1980, and joined Sydney Law School as a lecturer in 1982.

W Yes.

CA You were the Visiting Professor at the University of Texas, Austin, in 2000, teaching American tort law?

W Yes.

CA You were the Dean of Sydney Law School from 2002 to 2004?

W The Pro-Dean.

CA The Pro-Dean.

W Of Sydney law school.

CA And you have been a Visiting Professor in Law to the New College of the Humanities in London?

W Yes.

CA Thank you. You have several publications on privacy law. Would you just like to detail those for the Commission?

W Yes. I have a long interest, as you can see, in privacy, coming out of my great interest in the law of the torts, ever since I started teaching and almost my postgraduate studies. But I really got into the privacy sphere, I suppose, in 2006 when I started looking at the cases brought in the European Court of Human Rights and comparing that with other cases brought to the then House of Lords by Naomi Campbell, which was really the beginning of the privacy and protection in the UK.

I co-wrote a book on Celebrity and the Law with responsibility for the chapters on defamation and privacy, with some colleagues in 2010. And then since then I think probably perhaps my most influential article would be one that I wrote that was published in the Australian Bar Review called "A Statutory Action for Breach of Privacy: Would it Make a Beneficial Difference?" Looking at, you know, what is the benefit of a statute at a common law development and what would such a statute need to deal with. And I think that probably assisted in my appointment, I don't know, but probably made me one of the eligible people to be appointed as Commissioner to the Australian Law Reform Commission. But that report, I suppose, and the work we did in that report has led me to a continuing interest. So, for example, I gave a paper to the UK Law Commission on Reform in Private Law, again, looking at the role of statutes and reforming private law compared with common law cause of action.

And then I've been interested in a number of aspects of the classification of any such new action at common law in the absence of a statutory tort, because, as you'll know, the rights in the United Kingdom have arisen out of the action for

a breach of confidence, which is an equitable action, transformed by the Human Rights Act 1998 in the United Kingdom. But they're now calling it a tort. And so I've been really interested in how does something turn from being an equitable action into a tort and what are the substantive and remedial consequences of that, what differences does it make to other aspects of the law.

CA Thank you.

W And then apart from that I've also, you know, I've done the Fleming Chapter on Privacy; I've looked just at what tort law does from a very classic point, but that was back in 2011. So I think my most recent publication was that one in the book Remedies for Breach of Privacy, which dealt with the remedial consequences.

CA Thank you. Now, with the 2014 Australian Law Reform Commission report, there were several recommendations pertinent to the Terms of Reference for this inquiry, the misuse of information.

W Yes.

CA May Professor be shown the excerpts from the final report, Serious Invasions of Privacy in the Digital Era 2014?

W Yes.

CA I tender that document.

PO Exhibit 75.

ADMITTED AND MARKED EXHIBIT 75.

CA Professor, could you please go through in summary, and then we can go into a little bit more detail in various parts recommendations 4, 5, 9, 13 and 16.

W Yes. Yes, I have those in front of me.

CA Yes. If you could just take let us know what they are.

W Take you through those.

CA Yes, and why they're there.

W Okay. Could you just give me those numbers again. 4, 5.

CA 9, 13 and 16.

W Good. Well, the first one recommendation number 4, was that if a statutory cause of action for serious invasion of privacy is to be enacted it should be

enacted by an the Commonwealth in a Commonwealth Act. And the second part of that recommendation was that the cause of action should be described in the Act as an action in tort. So just dealing with really why we came to those recommendations.

The first one, that if there is to be a statutory cause of action to be enacted it should be enacted by the Commonwealth in a Commonwealth Act. Our primary reason for that is that we are relatively a small country in terms of population, even though we have a number of different jurisdictions from the legal point of view. But we felt that it was important that protection of a statutory cause of action should be available to everybody in Australia, regardless of where they lived. And it would also mean that there was consistency of treatment of people across the country.

There's great efficiency, we felt, in having a single cause of action across the country in that there is only one law there. I mean, it's a law which of course has a lot of interaction with other laws, but nevertheless there would be one right, one lot of defences, one lot of remedies, and that would make it much easier to navigate for entities which operate across State boundaries. It would seem to us rather absurd, as is the case currently with surveillance devices legislation, that a different law applies if you're on one side of Albury to whether you're on another side of Albury, whether in Victoria or in New South Wales, as is currently the case with surveillance devices, for example. Because there's quite significant variations between the Victorian and the New South Wales law, and no doubt New South Wales and Queensland. So that was the primary reason, for consistency across the country, and simplicity and efficiency. We feel it is important that law is understandable to people and inconsistent laws do less in understanding.

The other aspect of it, that the cause of action should be described in the Act as a tort, was for more technical reasons. But really, in order to avoid unnecessary litigation and uncertainty as to how the new statute would operate in terms of things like choice of law across boundaries, perhaps the sorts of remedies that would be available, the issues of vicarious liability, there's some uncertainty as to how vicarious liability operates in an equitable context, but it's well known how it operates in the law of tort, even though it is in a state of continual development.

So we felt there were a number of reasons why it would be just good to settle that. It's a tort-like action that we'd be talking about. It's analogist to existing torts and we felt that it would be helpful to people and desirable for it to be described as an action tort. We really couldn't see any downside to it being an action tort.

I do note, for example, that that wasn't the recommendation of the New South Wales Law Reform Commission some years ago when it looked at it, it didn't recommend it to be a tort. But that was because it felt that then the remedies would be limited to tort remedies. But as our design of the action also set out

the remedies that would be available, we didn't see that that was a problem. A statutory tort does not have to be limited to common law tort remedies. There might be other things such as an account of profits, for example, a take-down order in respect of internet invasions which could be catered for in the legislation itself.

CA With the statutory tort, that wasn't taken up by Federal Parliament and it has not-

W No. Our report was tabled, I have to say, without comment in the Federal Parliament.

CA There have been other reports requesting and other inquiries that have formed the conclusion there should be a statutory tort. Would you like to go through-

W Yes, there have been a number of other inquiries over the years. The Australian Law Reform Commission undertook an extremely expansive inquiry in 2008 which deals with data protection, and the recommendations of which are reflected in the current privacy legislation of the Commonwealth. But in the course of that inquiry, the Law Reform Commission recommended that Commonwealth legislation should provide for a statutory cause of action for serious invasions of privacy, without going into the detail of its design or content, with some recommendations about what it should cover.

The New South Wales Law Reform Commission, as I mentioned, held an inquiry. They also recommended that a general cause of action for invasion of privacy was required. I think we can say that our recommendations are probably more detailed than the recommendations of that report, primarily because we were required in our Terms of Reference to make recommendations on a whole lot of matters such as limitation periods, defences, remedies and so on. But there are some key differences in our recommendations from those of the Law Reform Commission of New South Wales.

In 2010 the Victorian Law Reform Commission issued a report on Surveillance in Public Places, concerned with workplace privacy and privacy in public places. So very much directed at surveillance and intrusion more than perhaps misuse of private information, which ours covered as well.

Then in 2011, the Department of the Prime Minister and Cabinet released an issues paper on the Statutory Cause of Action for Invasion of Privacy. That, I have to say, was very obviously and notably expressly, prompted by a number of high profile privacy breaches in the United Kingdom, particularly the widespread phone hacking by journalist and their sources that led to the Leveson Inquiry in the United Kingdom and the Leveson Report and eventually, you know, the closure of a well-known newspaper in the United Kingdom. So there was great concern at that time about whether or not media were overstepping the line in terms of privacy breaches.

And then, lastly, the Law Reform Institute of South Australia also initiated an inquiry and the Law Reform Commission of Victoria early 2013. And then most recently the ACCC has recommended that the Law Reform Commission's report be enacted.

CA When was the ACCC-

W That was earlier this year, the ACCC report, earlier this year. It mainly concerned with internet invasions of privacy by large internet based organisations such as Facebook and so on, but not only in Facebook. And then I should mention also that the Law and Justice Committee of the New South Wales Legislative Council in, I think, sorry I should know this precisely, but I think it was 2015, possibly 2016, also recommended that the Australian Law Reform Commission's recommendations be enacted in New South Wales.

CA So there's been a lot of requests and it seems to have fallen on deaf ears to date. In your view, if Queensland were to enact a tort would you be supportive of that and have you heard from anyone else that it would be something that other States might then follow in a similar-

W Yes. I've been at events in New South Wales as well where this has been considered and I gave evidence to the New South Wales Law and Justice Committee on this, as to whether New South Wales should take action. I think in the absence of a Commonwealth Act then it is up to the States to take action. I really hope that if they do, there is a very large measure of consistency in the wording and provisions of the Acts around the country so that there's not conflict and inconsistency and so then choice of law really will become a very relevant consideration if there is a large variation.

And I'm also very much in favour, obviously, that if a statutory action is to be enacted it should be as precise in terms of its protections as is appropriate. I'm not in favour of the view that certain fundamental features of a statutory cause of action should be left up to the courts to decide, because the courts need guidance from a legislature as to their Parliamentary intention. Now, obviously there's a limit to that, and you don't want to limit the capacity of courts to develop appropriate coverage and so on and application of an Act, and obviously courts have to interpret wording, and sometimes wording can be problematic. But I do think it is important that certain key aspects should be set out. I think we should make an attempt, for example, to define, well, what sort of privacy invasions are we talking about.

CA In your report you talk about two types of invasion, and one of them is for misuse of private information, including disclosure, would you like to expand on that?

W Yes. We were very conscious that classically, and particularly reflected in Professor Prosser's classification of privacy back in California in the 60s, a very influential tort writer, as you would know, in the United States, that there was

said to be four types of privacy invasions; intrusion, misuse, appropriation of someone's image and portraying someone in a false light.

We decided to concentrate on the two that we have specified, intrusion upon seclusion and misuse of private information. Because looking at the privacy actions that had occurred around the world those were the two types of classic privacy invasions that courts have been concerned with, that people were concerned with, intrusion and misuse of private information.

In addition to that we felt that the other two types of privacy invasion nominated by Professor Prosser, portraying somebody in a false light was already taken care of in our law by defamation, if it is false and defamatory, and because we actually make specific provision for false statements about someone's private life in the way we have recommended the tort develop. So false light is taken care of.

The last one appropriation of someone's image, look, I think there is work to be done on that, particularly in Facebook and other social media eras. The tort of passing off gives some protection but only to people with a trading reputation already and many ordinary people don't have trading reputations. But we felt that any inquiry into appropriation of someone's image really needed to be done in the context of our general intellectual property protections in Australia and that was beyond, really, our capacity or time. But I suppose most importantly we felt that the two that we had selected were the key invasions that people had suffered and litigated about around the world, so we concentrated on those.

CA Just going back to your proposal for there to be a new statutory tort, during your inquiry in 2014 you confirmed that there exists the constitutional power to do so. Would you just like to expand on that?

W Yes, we sought advice on that. And obviously any constitutional matter is obviously subject to challenge and I'm by no means an expert on constitutional law. But we sought advice that there would be constitutional power to enact such a statutory cause of action by reference, not just, for example, for the corporations power and so on, but a broader tort by reference to the external affairs power because Australia is a signatory to the International Covenants relevant to international covenant.

CA Thank you.

W Yes.

CA Could you just briefly outline where the common law has reached for development of a tort?

W Yes. The common law does protect privacy in a number of different ways. And the article that I wrote back in 2011, Torts Role in Protecting Privacy covered the various ways in which the common law protects privacy. And we also, I

think, set that out very briefly in chapter 3 where we give an overview of the current law, existing common law actions and how they protect privacy. So the common law, the trespass to land, it's well known, everyone man's home is his castle, that sort of notion, protects privacy, trespass the person, protects privacy, but only to a certain extent. There actually has to be direct contact with the person and that is not always the way in which there is intrusion on a person.

Trespass to land is limited by requirements of title to sue, so it only protects the occupier and not other people who might also be on the land. It only protects people within their land, it doesn't protect them when they're out in the street, for example. And yet I think there is recognition that people may be engaging in private acts in the street or in public, they don't expect them to be broadcast all around the world. And of course, there's the very significant difficulty for homeless people who don't have a home. You know, a park bench might be their home and trespass doesn't give them any protection. So, yes, there is common law protect, but it's very piecemeal, it generally is incidental to the primary interest that the law is protecting.

CA The High Court left open the possibility of a common law tort in Australia for invasion of privacy.

W Yes, it did. In the case of *Australian Broadcasting Corporation v Lenah Game Meats* back in 2001, the High Court left the door open. Importantly what it did say, the High Court said that the much older case of *Victoria Park Racing v Taylor* where there had been statements by the High Court that there is no general right of privacy under the common law, should not stand in the way of development of further protection. The judges there all recognised that the law should be more protective of privacy than it has been in the past, but they left it open. And there were two possible ways in which they thought that the law could proceed, the common law could proceed in the absence of statute; one was to develop existing cause of action, such as the law of confidential information and equitable right, and the other was by developing a whole new tort of invasion of privacy.

But they said very clearly, "By these reasons we are not indicating one way or the other the way this should go." Importantly they couldn't go any further in that case because the claimant was a corporation and the High Court made it very clear that if there is to be a right of invasion of privacy it wouldn't be a right that would help corporations. Privacy is about personal feelings, personal space, personal feelings, personal information. Corporations can use the action of breach of confidence because much corporate information is confidential, but they wouldn't have an action for invasion of privacy.

CA I believe there have been two lower court decisions in Queensland and Victoria which haven't been determined at the appellate level.

W Yes, two cases, *Grosse v Purvis*, which was in the District Court in Queensland and *Doe v Australian Broadcasting Corporation* in Victoria, the Country Court.

Both very interesting decisions involving, in one case intrusion and in the other case disclosure of somebody's identity, in unlawful disclosure of someone's identity by the ABC, by the media. But both of those cases settled, I gather, before the respective defendants' appeals could be heard. So to that extent they're not strong authority at this stage.

CA Yes. And recently, last year, you published a chapter "Remedial Consequences of Classification of a Privacy Action: Dog Or Wolf, Tort Or Equity?"

W Yes, that's right.

CA I'll just show you a copy of that.

W Yes, thank you. I've got a copy.

CA I tender that.

PO That's Exhibit 76.

ADMITTED AND MARKED EXHIBIT 76.

CA So just on the first page you talk about another case Google Incorporated, a Court of Appeal case where misuse of private information has become a tort for the purposes of the Civil Procedure Rules.

W Yes, that's right. That was an unusual case and it is possible that it's a fairly limited case. But it certainly got a lot of attention because in that case Justice Tugendhat, who had done a lot of the privacy cases in the United Kingdom, held that whatever the origin of the new action for misuse of private information might be, he concluded that it was a tort within the meaning of a section of the Civil Procedure Rules for service outside the jurisdiction.

Now, it may be that you could read that case as simply being one of statutory interpretation of those procedure rules and whether they were intended to cover the cause of action that the plaintiffs had regardless of its nature. Because you could have argued that the Civil Procedure Rules were just concerned with civil wrongs as opposed to torts and so on, so that an equitable wrong would also be brought within its meaning as a matter of interpretation.

However, I have to say that commentators haven't treated it as being limited to that. I don't know whether later courts will. And interestingly, the Court of Appeal affirmed Justice Tugendhat's decision that misuse of private information was a tort for the purposes of the Civil Procedure Rules and was distinct from the equitable cause of action for breach of confidence, even though it had originated. And in *Campbell v MGM* the House of Lords had used the equitable action of breach of confidence to give Ms Campbell protection against the misuse and disclosure of her private information.

They had used that equitable action saying that given the passage of the Human Rights Act 1988 in the UK which required public authorities to give protection in accordance with the European Convention Of Human Rights that the courts needed to develop greater protection for privacy than they had before this. And that was the basis in which the law has developed since 2004 in the United Kingdom, that it is now very well-entrenched and it doesn't look as though, despite Brexit, if and when it happens, it doesn't look as though at the moment as if the UK are going to repeal the Human Rights Act or the fact that they are signatories for European Convention. So it doesn't look as though there's going to be any possible change of basis for that action in the UK

We were interested in it because, perhaps more so than English commentators or English lawyers, we've grown up, I think, in our legal system with differences in equitable obligations and common law obligations and differences in remedies. And our courts haven't taken what I would call the smorgasbord approach to remedies where you borrow a remedy from another cause of action and apply it to a cause of action where it hasn't been used before. That the attempts to do so haven't been successful in a number of cases. And our High Court has tended to keep the distinction between equitable relief and common law relief quite specifically.

So we thought that there were remedial consequences of calling something a tort or calling it a right in equity. In fact the Court of Appeal recognised in their judgment, which we quote, I think, that it may be relevant in another case, there may be aspects to it which will have to be explored, what will the consequence of calling it a tort be and they mentioned I think vicarious liability as one of the issues and remedial consequences. We considered other things as well such as choice of law and vicarious liability and the right to an injunction, for example. The differences between common law protection and equitable protection in terms of a right to an injunction.

CA As far as a tort arising out of the common law that would be on an incremental – that the common law develops on an incremental basis?

W Yes, that's right. And interestingly the High Court just very recently, in a case called *Glencore International v Commissioner of Taxation*, which was in the High Court judgment in August 2019, High Court of Australia 26 is the citation. Interestingly, the High Court at paragraph 7 noted that the corporate plaintiff did not seek to expand any area of the law such as any tort of unjustified invasion of privacy referring to *ABC v Lenah Game Meats* in the footnote. Now, that was interesting because the claimant in this case was a corporation. So as I've said, even if there was a tort of invasion of privacy it wouldn't assist the claimant on the authority of *ABC v Lenah Game Meats* unless of course the High Court wanted to re-open that point.

But I notice also at the end of their judgment the Full Court of the High Court in a joint judgment, note that – reject the way in which the plaintiffs wanted to use the immunity for legal professional privilege as the basis of a new actionable

right, respecting privilege documents which would be different from confidential information rights. And then they commented this "This is not how the common law develops. The law develops by applying settled principles to new circumstances by reasoning from settled principles to new conclusions or determining that a category is not closed. Even then the law as developed must cohere with the body of law to which it relates."

Now, it may be that this shows a caution or a reluctance of the High Court to do more than perhaps extend the action for equitable action for breach of confidence and to say that it should apply to private information, whether or not that information is still confidential, which would be an important protection I think. But, look, perhaps I'm just trying to infer some meaning and some direction from these words which might simply be just statements of traditional judicial reasoning. But certainly it sounds as though we have to find the basis for protection in settled principles and extend them to new circumstances rather than starting again.

CA Thank you. With statute, what are the positives for statutes as opposed to the common law?

W Well, although we weren't asked to make any recommendations or finding as to whether or not a statutory cause of action should be enacted, and I have to say that a number of submissions wanted us to do that; I think partly because they were vehemently against any development, further development of the law of privacy, regardless of what we were recommending, I have to say. That was not our task.

Our task was to design a statutory cause of action, not to consider whether or not a statutory cause of action should be enacted. That had been the subject of the inquiry by the department that I referred to before, the 2011 I think it was inquiry following the phone hacking by the Department of Cabinet. That had been the focus of that inquiry. But the 2008 Law Reform Commission Report has said we should have an action, a statutory action, so the terms of reference just simply asked us to design it.

And I think that was, personally, again a very important step. To me, people can't make a considered judgment about whether or not a statute is a good idea until they see what is in the statute. To me I use the analogy with a republic; there's unease about agreeing to a republic unless people knew what that republic was going to look like. And that was clearly an issue when we had the referendum about whether we should become a republic without knowing a model. And I thought it very like this. I personally would not have supported the model that the New South Wales Law Reform Commission recommended, and I am on record as having said that in articles that I wrote, because I felt it left too much uncertainty, would mean too much litigation for the courts to work out what Parliament was intending to mean and I feel that Parliament should give some guidance as to its intention.

So we felt that if we could actually show people what the statutory action would look like and what protections were given to both plaintiffs and potential defendants they would actually see whether or not they thought this was going to be a good law or a bad law and whether or not they would support it. So we also pointed out, although we weren't asked to do so, at one point in our report, if I can just – I'll see if I can find you the spot while we're talking – but at one point in our report we do talk about what are the advantages of statute over the common law, and we point out that statute does have the advantage that the legislature can limit the operation of a statute. It could, for example, place caps on damages. It can make provision for remedies, which the common law can't provide. It can provide for defences. It can provide for exemptions or exceptions. It can set all these out so that everybody knows what their obligations and rights are rather than having to wait for a court to declare them when facts turn up.

So to that extent, you know, legislation does what it's meant to do, it legislates for a range of situations rather than just reacting to one situation, which is all the courts can do. Courts can only decide cases on the facts before them, they can't legislate for a range of facts which is something that legislation can do. So there is a section which I'm happy to refer you to later or draw your attention to that later.

CA I believe it's page 23 and 24, you talk about-

W -Yes, a common law statutory tort. You're quite right. Yes. So paragraph 132 following.

CA Yes.

W We talk about many benefits of statutory reform. Parliament can act on its own motion. A statute can legislation for a range of situations. It can be more flexible. It's not bound to follow precedent. It can select the most appropriate elements and, importantly, it can enact caps on damages, thresholds and so on. And it can enact, for example, a threshold requirement, as we do, that the action is only actionable if it's a serious invasion of privacy. And so there's quite a bit of emphasis given to – I mean we were asked to recommend that so, therefore, we had to deal with seriousness, but we also felt that seriousness was an important threshold.

CA And for serious invasion of privacy would that include, for example, a domestic violence victim concealing their address from an ex-partner if that information was disclosed?

W Yes, absolutely. I mean a serious invasion of privacy, obviously we have to leave it to the courts to determine what is serious, but we give various factors I think in the chapter on that aspect-

CA Yes.

W -on what we mean by "serious". Let me see, that is – that's after "fault", I think.

CA I think that's 132.

W Yes, seriousness and proof of damage. The need for a threshold. Certainly – I mean the requirement that the UK courts and that the New Zealand courts and some of the Canadian courts and legislatures have used in relation to seriousness is that the invasion be highly offensive to a person of ordinary sensibility. So it is an objective test that the court would be using. But was the invasion highly offensive to a person of ordinary sensibilities having regard to the plaintiff's position? So it is an objective test. It is not just on what someone personally feels; it is what the court considers a reasonable person in that person's position would feel and whether or not it was highly offensive.

One of the problems with privacy is that it is not an absolute value or an absolute freedom, if you like. I mean very few freedoms are, really. But we make the point that privacy is very much a relative matter. There are some situations where unfortunately privacy is just thrown out the window, you know, when you're in intensive care being treated for a serious car incident, then clearly privacy may not be the key concern of dealing with the seriously possibly fatally injured person. In other cases, law enforcement, for example, terrorist attacks, those sorts of things. There are many situations where privacy has to give way to other serious public interest concerns. So it is a relative value.

But you asked about victims of domestic violence. We had a lot of submissions from various entities and groups about the way in which electronic intrusions and electronic collection of information, misuse of information, disclosure of information, was often a precursor to domestic violence. Excuse me. So, undoubtedly, everybody's entitled, no matter who they are, to protection of their privacy. And obviously the more so when there is a risk to their life and health and safety.

CA Thank you. Just moving on to one of our areas of focus ahead of the Human Rights Act in Queensland coming into force for actions taken as of 1st January next year, where a claim can be piggy-backed on to a cause of action.

W Yes.

CA So for members of the general public where an agency seems to have not protected their information sufficiently so that a staff member discloses it and/or accesses it-

W Yes.

CA -there's a misuse of information by an employee at a public sector agency, what are the causes of action open to a member of the public to make a claim against that agency for that staff member's actions?

W Well, I would have thought that the most obvious action would be some sort of claim for misuse of confidential information. I'm leaving to one side at the moment any remedies that would be available under the privacy principles or any means of complaint that might be available as a result of breach of privacy principles that affect public entities-

CA -UI for personal breach by the agency and then the vicarious liability-

W -Yes, okay, fine.

CA -Did you want to explain those two avenues?

W Yes. Sure. Okay. All right. If we're talking – well it depends on what we're talking about, I think. If we're talking about an action for breach of confidence, an equitable action for breach of confidence, that depends, I think, on whether or not there has been a misuse of information. So I'm just going to something first before I come back to the vicarious liability point. That depends on whether there's been a misuse of confidential information which has been imparted for a particular purpose to an entity. If it's used – if it's misused or used or disclosed for a purpose other than for which it's given you could argue very safely I think that that is a misuse of confidential information by the agency itself. And in those sorts of cases it seems that the act of the employee is attributed to the agency. It seems to be an example of attribution of an act to the entity itself rather than looking at it through the lens of vicarious liability. And if the member of the public wanted to rely on the equitable action, there is an interesting issue as to whether or not merely seeking or looking at information is misuse. Misuse sounds as though you're doing something with it. You're using it for your own purposes, you're disclosing it. Disclosing is clearly misuse. Using it for your own business is clearly misuse. But is looking, is snooping, simply misuse of confidential information?

Now, there is a decision of the English Court of Appeal. And I'm happy to give you the name of this – or spell it – shall I spell the name? Because I don't know how to pronounce it. T-C-H-E-N-G-U-I-Z versus I-M-E-R-M-A-N 2010 EWCA 908, a decision of the English Court of Appeal. It went on appeal to the UK Supreme Court but on a different point. And in that case Lord NEUBERGER talks about snooping, getting access to information, as being a form of misuse of confidential information. So I think that would be helpful if our courts follow that lead. I think snooping could also be seen as a breach of the equitable obligation. And in that case it seems, I think, that the act of the employee is simply attributed to the agency, so it is not concerned so much with vicarious liability.

But if there were a tort, then the issue much more clearly comes up as to whether or not the agency is vicariously liable or personally liable, or both, for the snooping or use of the employee – of someone else's personal information without any lawful authority or reason.

So there are two bases on which I think an authority, an agency could be liable. It could be liable personally because it personally has failed to do what it has to do.

CA What do you mean failed? Do you mean failed to provide proper safety standards?

W Yes. Fail to provide-

CA -Could you expand on the reasonable steps that an agency should do?

W Yes, I think it means fail to have proper processes. It is a little bit analogous say to an employer who has to provide a safe system of work for an employee. You know, you have got to provide proper equipment, proper methods, systems and so on. So you'd have to have proper up-to-date systems, reasonable systems for protection in terms of software and hardware, you'd have to be reasonably available and affordable I suppose security systems, up-to-date security systems. You'd have to have training of staff, supervision of staff, selection of staff. You'd have to follow-up reports of problems, you'd have to have disciplinary consequences and so on.

So an employer, therefore, is charged with supervising and ensuring taking reasonable steps. It is never a guarantee. I mean if we're talking about negligence there will never be a guarantee that things don't happen, but it is a matter of taking reasonable steps. And if the employer fails to do any of those things they would be personally liable. You could also argue that many of those duties are what we call non-delegable duties. Non-delegable duties. So in other words it's not appropriate for the entity to outsource any of this to someone else. If the someone else, even an independent contractor, does it in a way which is not reasonable, not sufficient, the agency itself will be in breach of its own personal obligations. That is quite separate to vicarious liability. That's quite separate to vicarious liability which is where the agency, the employer, is vicariously liable for a tort committed by an employee in the course of employment. And there are various tests now for what is in the course of employment.

CA Could you explain those tests, please?

W Yes. The traditional test was based on, it is called the Salmond test, based on an English tort scholar in the early 1900s, Professor Salmond on Torts, who put forward the approach that something will be in the course of employment either if it is an authorised act or an improper mode of committing or conducting an authorised act. It will only be outside the course of employment if it is an entirely separate act that has no relationship to what the employee was employed to do. And that's been the law for decades, the law that's been applied by the common law courts for decades, since the early 1900s.

It's only when it's said that the employee is on a frolic of his or her own that the employer is not liable and importantly an act may still be in the course of employment even if the employee is carrying out the work in a prohibited manner. And that was applied and affirmed by the High Court of Australia in a case culled *Bugge v Brown* in, I think, it was 1919 – but I could be wrong on that – earlier last century.

More recently, courts around the world have reformulated the approach to what can be in the course of employment. Because of the difficulty of dealing with cases of child abuse or sexual abuse of vulnerable people in institutions. So sexual abuse or other abuse of children in schools or other homes, residential homes, perhaps sporting facilities and so on, and also obviously patients or other people in medical facilities, aged care and so on. It simply seemed inappropriate to say that abuse of someone in your care is merely a mode of doing what you're employed to do when quite clearly you're employed partly to protect people; teachers and pupils, for example. Part of a teacher's role is to protect children, not to abuse them.

And obviously there has been great difficulty in many cases of finding personal failings on the a part of institutions many years ago and with varying standards at different times. And courts have had to deal with whether or not the old Salmond test was the appropriate way of looking at whether or not something was in the course of employment. I suppose because courts and communities felt that what the claimant had suffered was something that should be perhaps be the employer's responsibility. That's a very open issue. That's a, you know, very difficult issue of who should be responsible.

So the courts had developed another approach to course of employment to deal with these cases. And the High Court recently, in the case of *Prince Alfred College v ADC*, the case I refer to in our article on vicarious liability, the High Court of Australia set out around about paragraph 80 of its decision what the approach should be for cases of this kind. They were dealing with a historical sexual abuse case, brought by a man who had been a young boy at a school who had been abused by a teacher and had many years later brought an action against the school based on vicarious liability. And that had required the High Court to set out the approach that courts in Australia should now take.

And just very briefly I think I summarised it at page 254 of our article last year, the High Court requires each court to look at whether the employee was placed in a position of power and intimacy over the claimant, the victim, and whether the employer provided not merely the opportunity for the tort to be committed but also the occasion for the tort.

Now, what's uncertain, I suppose, is whether the High Court by saying the approach to be taken "in cases of this kind" was limiting this new approach to cases of abuse, physical abuse, or mental abuse, or whether it was actually treating "cases of this kind" as including serious criminal conduct by an employee, deliberate serious criminal conduct by an employee in the workplace.

Whether or not this new approach could be also applied to such activities, such as gaining – deliberately gaining access to private information for an ulterior purpose.

CA What we're dealing with here is section 408E of the Criminal Code, which is misuse of the restricted computer-

W Yes.

CA -that's what we are dealing with here.

W Yes. So you're dealing with a criminal offence. We're talking obviously in all these cases about deliberate; deliberate misuse, deliberate actions-

CA -For not a work related-

W -That's right. For someone to go looking for; to go looking for private information. A different matter obviously, I suppose, if somebody comes across private information in the course of looking for other things, it is a perfectly legitimate, I would imagine, perfectly legitimate incidence of where, without looking for it, they're just made aware of information, obviously then they come under an obligation of confidence to keep that information private and so then the focus would move not to the actual collection of the information, but to the use and storage or disclosure of that information, which is a different matter.

CA So with the 2016 Prince Alfred College Incorporated case, did that extend the, in our case, agency's liability to cover criminal actions taken by the-

W -Well I think it's arguable. Look, it is the sort of thing I suppose that we as academics look at when we're looking at a decision. Where, you know, we're looking at, well, you know, what is the consequence of this and what does this say for the traditional test? When should people, lawyers, use the traditional test, when should courts use the traditional test, and when should they use this new approach? And what did the High Court mean by "in cases of this kind"? It may be that there are other aspects of the decision which give clarity but I didn't see them.

CA Thank you.

W Yes.

CA Just one last matter. Just going to the recommendations of your report, Recommendation 16, it talks about a new regulatory mechanism.

W Yes.

CA Could you expand on that UI?

W -Yes, that's right. This was as a result of our discussions with the Privacy Commissioner and with submissions that the Privacy Commissioner's Office made, I have to say, quite late in our process. We were actually given 11 months to do this inquiry. We had to do an issues paper setting out the issues and asking for questions, a discussion paper with draft recommendations and then a final report with final recommendations. And that is actually a very tight timeframe for such a wide investigation involving so many different entities and so many different contexts in which privacy is relevant.

We did have a number of meetings with the Privacy Commission's Office, and we were very obviously concerned with how any statutory cause of action would dovetail with remedies which people have under the existing Privacy Act, the Commonwealth Act. One of the issues of course with the Commonwealth Act is it's limited to Commonwealth entities and to corporations with a turnover of more than $3 million. And so there are an awful lot of corporations which it does not apply, small corporations, small entities and also private people. So there was already a limitation.

But we were also asked to make recommendations about alternative dispute resolution to the courts. There's often a feeling that, obviously, that courts can be very expensive. And we made various recommendations about who should have jurisdiction to hear certain levels of complaints. I mean obviously if you're taking on Facebook you're probably going to have to go to the Supreme Court of the State. But if you're dealing with your neighbours over an encroaching camera or surveillance device on the fence we felt that local courts should be able to deal with that or even, you know, land and environment courts and so on if they deal with neighbourhood disputes.

Obviously it is going to be very helpful if people can make a non-judicial complaint and there was a way in which the Privacy Commissioner could deal with those and have them enforced in the Federal Court. We were, however, conscious that any bureaucratic process of a complaint depends on the resources available to that bureaucracy. How many complaints will they get, where are they located? Local courts are located everywhere around the country. The Privacy Commissioner doesn't have offices everywhere. Yes, obviously there can be online complaints made and so on.

But there is a real issue of workforce to deal speedily with complaints. And many privacy issues need speedy, speedy resolution, particularly in the internet age, particularly where there is a posting of information on the internet, people need it taken down quickly and the issue is who has the – who has the proper role to do that. We also looked at the obligations and powers of the Australian Communications and Media Authority so it was fairly wide-ranging, I have to say.

CA Just back to reasonable steps and vicarious liability.

W Yes.

CA In our case we're concerned all about computers and access to databases.

W Yes.

CA If an agency has a database that's fully auditable and they don't use that function, they don't conduct audits, would that be considered to be a failing with respect to taking reasonable steps?

W Well, could you just repeat that again, sorry. If they?

CA If there is a fully auditable – so it is a database that logs access.

W Yes.

CA And those logs can be audited-

W Yes.

CA -to check for the criminal misuse of information; misuse of information.

W Yes.

CA And that isn't done; there aren't any audits. So say an employee could misuse the database and it only comes to light for the agency once there's a complaint or some other way it is detected.

W Yes.

CA And they may be misusing the database for a day, or days, or months or years, so UI risk-

W -Yes, that's true. Yep.

CA Would it be considered a failing with respect to reasonable steps if a fully auditable database isn't audited?

W I would have thought so, yes. I would have that's a failure to take reasonable steps. I mean obviously employers can't be watching everywhere every day. That's the problem. That's the problem for many employers, particularly in the context of abuse in hospitals and so on and schools. Obviously employers can't check everything every day but they have systems. Now I don't know enough about computer systems.

CA No, no.

W Obviously. But I would imagine – and perhaps I've been watching too much television – but I would imagine that there are ways of having alerts for unauthorised access for certain information. I imagine-

CA -Like you mean for the more sensitive-

W -Yes, more sensitive. Yes, restricted, restricted access, special passwords that are needed for restricted access of certain information. And very clearly a record of who's or what information has been accessed by an employee. It may be that certain information such as the whereabouts of a victim of domestic violence has to be kept in a highly secure encrypted part of a database rather than in more generally accessible parts of the database, only accessible with certain passwords and so on. I don't know enough how that could be done. But I certainly think that would have to be a regular audit which is done objectively and I would imagine too by proper systems rather than by personalities.

CA And obviously with the databases, we are looking at the practicalities and the fiscal issues. So if it wasn't able to be an audit of the entire system, would you say that the reasonable step would be at least the high risk category if the agency did UI-

W -Yes, I would have thought so. I mean reasonable steps implies reasonable at the time. Reasonable at the time. And obviously new systems are invented. New systems are available. They may be at great cost, and there may be other reasons for remaining with a system without this. So it is reasonable at the time, taking into account the range of responsibilities and financial resources of a public entity.

I mean, if we were talking about a negligence claim here, then civil liability statutes around the country make special provision for public authorities in various ways. Where courts have to be very careful about getting into how public authorities allocate their resources when making determinations of negligence. So whenever we're talking about a failure to take reasonable steps we're essentially talking about negligence and negligence standard. And I would think that those sorts of discussions and considerations in other cases would be relevant or analogous.

CA Thank you. I don't have any further questions for Professor.

PO Thank you. Mr SCHMIDT? .

LR No, thank you, Chair.

PO Thank you. Thank you, Professor. Thanks for coming. You're excused.

W Not at all. Thank you very much for inviting me.

CA Thank you very much.

W And good luck with your inquiry.

PO Thank you.

W And I'm extremely pleased that somebody has read our report. Thank you.

CA Thank you.

PO So I understand you want to have a short adjournment. I'm just wondering given the time whether we should take the morning break slightly earlier before we have the next witness?

CA Yes, Chair, that would be convenient.

PO So if we come back at about 25 to 12.

HRO All stand. This hearing is adjourned.

END OF SESSION