

Episode 52

The New Tort - Invasion of Privacy

Intro

This is Risk on Air by Lawcover, with a public conversation about the new Privacy Tort.

Julian: Welcome to Risk on Air, I'm Julian Morrow and today we are discussing Australia's brand new statutory tort of serious invasion of privacy and the risk implications for solicitors - because the new Schedule 2 of the *Commonwealth Privacy Act* entered into force on the 10th of June 2025.

Joining us today for this discussion is Christien Corns, partner at K&L Gates. Christien predominantly practices in professional negligence defence, acting for solicitors and barristers facing civil claims. Christien, welcome to Risk on Air.

Christien: Thanks very much, Julian, pleased to be here.

Julian: Well, happy new tort, Christien. How did we get here? What's the background to this new tort?

Christien: Look, it does have quite a history. I suppose many people would be surprised to hear that until last month, in fact, Australians have not had a right to obtain damages for serious invasions of their privacy, for example sharing intimate images on social media. And the new tort I think you could really trace it back to the early 2000s when the High Court in the well-known case of the ABC v Lenah Game Meats opened up the possibility of a tort for privacy being introduced, but it's never really been developed or fully recognised in Australia, and so other causes of action, such as trespass and nuisance, defamation and breach of confidence have had to be relied upon to a more limited extent, to protect people's privacy. The lawyers listening might recall from law school Lenah Game Meats involved the ABC, which was using illegally obtained footage of what was happening in a possum abattoir, and the owners of the abattoir failed to convince the high court that it could sue for breach of privacy. Perhaps a more salacious case going back some years was the Australian Rugby League player, Andrew Ettingshausen, who sued the mainstream media for defamation after it published a naked photo of him in the dressing room without his permission. He was able to convince the court that the magazine depicted him as someone who promoted having his genitals published to the world at large.

Julian: Which shows you the sort of gymnastics that were required to vindicate a privacy right.

Christien: Absolutely. So he had to rely on defamation, he was awarded \$100,000, but that was a classic case of someone whose privacy had clearly been breached but had to rely on defamation law in a fairly novel way. So, parliament and the politicians, to their credit recognised that this was a problem, and so in 2006, we had the Australian Law Reform Commission commencing an inquiry into the extent to which the *Commonwealth Privacy Act* actually gave protection to people whose privacy had been seriously invaded. And there was a series of further reports and commissions until 2023, when the *Privacy Act Review Report* was handed down, and that found fairly conclusively that there were gaps which had to be addressed through the introduction of a new statutory tort. And so, on the 10th of June this year, the new statutory tort has come into force.

Julian: So how's the new tort supposed to work, Christien?

Christien: Well, look, there's five elements to make out a claim for invasion of privacy. Firstly, the defendant has to have invaded the plaintiff's privacy, either by what's called intruding upon their seclusion or misusing their information. Secondly, it has to be proved that a person in the plaintiff's position would have had a reasonable expectation of privacy, the invasion has to be intentional or reckless, so it is a fault-based tort, as opposed to the lesser test of negligence, for example. It also has to be a serious invasion and, importantly, any public interest in the invasion of privacy has to be outweighed by the public interest in protecting the plaintiff's privacy. So it's very much a balancing exercise when it comes to what is in the public interest.

Julian: Oh yes, I can feel a torrent of litigation coming on with almost every sentence that you utter in that description, Christien. Okay, let's drill down a little bit more, then, into the essential elements of the tort, what we know about it, I suppose, from the language of the statute, and what else we might be able to glean from the discussion that's led us to this point..

Christien: Sure, so I guess starting with the invasion itself, there's those two elements either intrusion upon seclusion or misusing information. Intrusion upon seclusion involves watching or listening or recording an individual's private activities or affairs, so the classic example would be spying on someone in their home, for example. Misusing information has a fairly broad definition, so that actually includes collecting or storing or modifying, using or disclosing information. So clearly this includes the deliberate sharing of information about a person - that's really at the heart of misusing information. Turning then to whether someone has a reasonable expectation of privacy, the court will take into account a very large number of factors, and none of them are actually determinative, but they include things like the nature of the information - so is it intimate information? Is it medical, financial? Those things point towards someone having a reasonable expectation of privacy. The place where the intrusion occurred, so was it in a private home or was it in a public place? Where the information was stored, so was it stored securely or was it just sort of stored haphazardly? The attributes of the plaintiff, and this is an interesting one. So, for example, public figures such as sports stars and politicians probably have a lesser expectation of privacy than the suburban mum and dad.

The means to obtain the information - so data hacking and surreptitious recordings, for example, obviously are a big factor there, and the purpose of the disclosure. So was it malicious, or perhaps was it well-intentioned, whether the information was already in the public domain and the conduct of the plaintiff; so did the plaintiff himself or herself actually invite publicity? You might think about TikTok influences and reality TV contestants probably have a less expectation of privacy than your average Joe.

Julian: So that list of things that a court would take into account Christien, are they listed things in the statute that it's mandatory for the court to consider?

Christien: Well, yes and no. They're certainly listed in the statute and the provision basically says the court will take into account a number of factors, but I stress, none of them are determinative. There are factors that Parliament has said that the court should turn its mind to, but there will be other factors, no doubt, that might influence the court's thinking.

Julian: And so you've told us that negligent invasions of privacy aren't going to be sufficient. Intentional invasions probably seem like a clearer category, but what about reckless invasion of privacy?

Christien: Yeah, look this is a really interesting one, and I think this will lead to some very interesting case law down the track. So what the parliament has said is that recklessness in this context is to be defined to mean where someone is aware of a substantial risk that a result will occur, and they know about that risk and they know that it's unjustifiable to take the risk, but they take it anyway. So, dare I say it, if you feed your family some suspicious looking mushrooms and they turn out to be poison, that's reckless. In a similar way, if someone haphazardly leaves private information about another person in a publicly accessible location, that's also reckless, and I'll come back to this later in our discussion, Julian. But I think this concept of recklessness, or this element, does pose probably the greatest risk for lawyers falling foul of the new tort in their day-to-day practice.

Julian: Yeah, I can imagine, because lawyers obviously have higher professional obligations on them and you can see those expectations running into this idea of reckless invasions of privacy. Have you got to show damage in this tort, Christien?

Christien: No, you don't. So this is the major shift, I suppose, away from torts such as defamation and personal injury. There is no requirement to show damage, and that's largely reflected in the fact that this is really a tort to protect intangible interests and the dignity of the plaintiff. So it is actionable without proof of actual damage; but the invasion itself must be serious, and that is an objective test. And so the court will take into account a number of factors, including the degree of the offence or distress or harm that the invasion is likely to cause, whether it was malicious, the nature and the extent of the intrusion and how sensitive was the personal information involved, so there is that threshold. It does remind us of the fairly new threshold in defamation law where to sue for defamation nowadays is you must show that you have or you will likely suffer serious harm to your reputation. So there is a threshold, and it is designed to weed out otherwise trivial claims, there's no doubt about that.

Julian: I was hoping you were going to say that if comedians invade your privacy, that's okay, but apparently not.

Christien: Well, I'll come to that I'll come to that...

Julian: I'll live in hope. Let's move on then, Christien, because there is another element of the tort that you mentioned, which is the public interest. That again sounds like a test that's going to involve a whole lot of considerations.

Christien: Absolutely. So, the new tort certainly contemplates that public interest in freedom of political communication is to be given considerable weight. Again, this borrows from defamation law concepts, where it's long been the case in Australia that publications concerning political matters are largely protected. It does beg the question though, for example, what about a photograph of a politician engaged in drug taking in their backyard? Is that information in the public interest? Is it sufficiently connected to political matters? Which politician are you talking about here, Christien? I'm not going to name names, Julian, but the legislation also highlights the public interest in freedom of artistic expression. So that's obviously something close to your heart and it is highly relevant. So there must be freedom of artistic expression for society to operate. Also, public health and safety is relevant, and national security so being able to report the suspicious private activity of individuals - there has to be some protection in that regard.

Julian: Yeah, so we can see some very fine balancing exercises on their way... all right, well let's imagine that some of those exercises have happened and they've been found in favour of the person who's had a serious breach of their privacy. What remedies are available to them?

Christien: There's a wide range of remedies. Some of them are again very familiar from defamation law but, for example, interim injunctions and permanent injunctions, typically restraining the publication of private information. Damages can be awarded it can be an account of profits, so giving back to the plaintiff any money that's been made out of the invasion of their privacy. There can be an order requiring an apology or a correction to be published. That's something new to the law - in defamation the court doesn't have that power, so that is something new. Destroying or delivering back to the plaintiff their private information.

Declarations - these can be a powerful tool, I suppose, where the court declares that someone has committed a breach and then there's my favourite catch-all, which is any other remedy the court considers appropriate. So I don't know how that's going to play out. But, as I've said, the plaintiff doesn't need to prove actual economic loss to bring a claim. Obviously, the greater the harm, the more damages they'll be awarded. But interestingly, the court can award damages (that is, general damages), for what is colloquially known as mere emotional distress, whereas in personal injury claims, for example, to recover damages for mental harm you need to have suffered a recognised psychiatric illness. So the threshold for recovering damages in the new tort is certainly lower than that.

Julian: I was just going to say, in terms of damages, is there scope for exemplary or punitive damages?

- Christien:** There is. Certainly there is exemplary damages available to punish really egregious conduct such as sharing intimate images for financial gain. I think this is an example where exemplary damages could be awarded. But I'd also note that the general damages are capped at the same rate as they are for defamation general damages, which is about \$480,000 in Victoria, where I am at the moment. So there is some cap, but that's reserved for the most extreme cases.
- Julian:** And so that cap Christien. Does that just apply to general damages, or would exemplary and punitive damages be capped in the same way?
- Christien:** No, the legislation makes it clear that exemplary damages form part of the overall cap for damages.
- Julian:** All right. Well, before people start signing checks, let's find out what defences are available, because there's quite a few.
- Christien:** There are a few, and again, some of them draw on defamation law concepts and we see that throughout the new tort, I must say, for example, where the invasion was required by law or by a court. So typically, as the lawyers will know, in litigation process we have to make discovery of documents. It's a compulsory process. We have to respond to subpoenas or indeed our witnesses have to give evidence in court, so that will be fully protected if there is otherwise a privacy breach in that regard, where the invasion was with the express or implied consent of the plaintiff.
- Julian:** ...And that's interesting, because express consent would be clear, presumably, but implied consent? Again, I'm sensing grey.
- Christien:** Yeah, absolutely some grey there. I'll be interested to see how that plays out. I think there will be lots of examples where you might be acting for a client, and within the scope of your authority you are expected to take certain steps on behalf of your client without having to check each and every time. Obviously, you want to err on the side of caution, but there will be some interesting case law, I think, coming out of that for sure.

There's another defence where the defendant reasonably believed that the invasion was necessary to protect someone's safety. So perhaps there's an imminent risk of self-harm and the defendant reasonably believed that that had to be notified. Similarly, where the invasion was incidental to protecting one's right of defence of person or property, making a report to the police is an obvious example.

And then, finally, picking up again on defamation law, there's a defence which basically says that where the defendant would be able to rely on certain defamation defences if the privacy invasion was also a defamation, then those defences are available and the ones that are cited - absolute privilege, which applies to things said or published in court or parliament, publications of public documents, so parliamentary papers, court judgments, things of that nature and fair report of proceedings of public concern. So if the media, for example, reports on what was said in a court or not just the media but anyone reports on what was said in a court that is protected as well.

Julian: You mentioned journalistic coverage. Are there specific exemptions for journalists?

Christien: Yeah, so look this is a really major issue. It's fair to say that journalists have been well and truly looked after in this new legislation. In my view, it really means that the new tort is a toothless tiger when it comes to our friends in the media. The tort does not apply to the collection, preparation or publication of what's called journalistic material by a professional journalist or their employers or their employees. Journalistic material is really defined as something that has the character of news, current affairs or a documentary or commentary or opinion about news, current affairs or a documentary. So, it is incredibly broad in my view. News, current affairs or a documentary is not defined and it really, I think, gives wide scope to journalists to be afforded this exemption, even where their conduct is frankly, morally reprehensible or indeed breaches their own professional standards. And in fact, the legislation has a specific provision that says that it's immaterial whether a journalist has breached professional standards - they still have this exemption. Now we've seen in Victoria this has become relevant because Sam Groth, who you may know was a champion Australian tennis player, he's now a senior member of the Victorian Liberal Party. He was the subject of a publication in the Victorian media recently which essentially alleged that he had sexual relations with his now wife at a time when she was underage and he has engaged lawyers and senior counsel to take steps to sue the relevant media organisation for not just defamation but for breach of this new privacy tort. And when you look at the exemption for journalists, I've got no doubt that the media organisation in question will say that this was journalistic material - it was a publication of news, current affairs or documentary and therefore they're exempt.

Julian: So, Christien, are you telling me that working at the Herald Sun means that you are defined as a journalist?

Christien: Well, I'm not going to name names, as I say, but there is a definition of journalist in the Act. It essentially refers to professional journalists, not, for example, someone sitting in a dark room typing away.

Julian: But it is certainly the case that in the age of social media the line between publishing in print under a masthead and activities that are very journalistic-like is harder to define. But basically, if you're not subject to standards of professional conduct, you're not regarded as a journalist. Is that right?

Christien: Well, that's right. Towards the end of the passage of the bill, there were extensions to the definition of journalists, or those that are protected by this provision, to include people who engage journalists or people who are engaged by a person engaging a journalist, and so you give a very good example of people who might do this as sort of contract work, for example. So I do think this is a sweeping set of protections for people who would hold themselves out to be journalists.

Julian: All right. So journalists whoever they are, are in the clear. Are there any other categories of people who get a straight-out exemption?

Christien: There are a couple of others - so people under the age of 18 are exempt, enforcement bodies, so that's police, ASIC, organisations of that nature, intelligence agencies, they're exempt. Commonwealth agencies and state or territory authorities and their staff members are exempt, but only where, if there is an invasion, it was done in good faith in the performance of their functions or the exercise of any powers they may have.

Julian: So obviously there is a huge amount of potential for this tort. We have already seen some high-profile examples of it being invoked. How do you expect that the new tort is going to work in practice, Christien?

Christien: Look, I think there's really three levels at which I would answer that. Firstly, and probably foremost, on a human level, I think it's hoped that the new tort will help victims of things like so-called revenge porn who have intimate images of themselves shared without their consent and until now they haven't had a straightforward ability to sue for damages, so that's the first level. Secondly, there will be examples of public figures where publications overstep the mark. Now again noting that journalists are exempt, but putting to one side journalists, I think there will be added protection for those public figures. But thirdly and I think this is probably the most significant and perhaps has flown under the radar to a large degree in the commercial world, is that the new tort, I think, could be used by the ultimate victims of data leaks and hacking and cyber-attacks. So I suppose every month really, we hear about a report of a massive cyber-attack on some of Australia's biggest companies. Qantas was affected a few months ago, before that we had Optus and there's been lots of others. Even many law firms, unfortunately, do fall victim to these sorts of attacks and they often succeed, I think, because the employee of the company is tricked into clicking on a malicious link which leads to the disclosure of information to criminals, or the cybersecurity in place is just not up to scratch. I think, where these events lead to people's personal information being published without their consent, it's at least arguable that the relevant disclosure of information was reckless, and the company storing that data could then be sued under this new tort, especially where, in today's world, most of us are aware of the dangers of clicking on suspicious links. We have software that flags potentially inadvertent email recipients and the like, and so I do see this as a real risk area for companies that collect or store data, noting that the tort does cover the misuse by collecting and storing data, as well as disclosing the data.

Julian: Yeah, it's interesting, isn't it? Because so many cybersecurity breaches do involve a sort of lapse of judgment, that moment where we all know that you're not supposed to click on the thing but, for whatever reason, you miss one. There could be a lot of debate about in what circumstances that is, if you like, genuine human error and to what extent it's just reckless.

Christien: Absolutely. Yeah, I think it's going to be ripe for quite a lot of interesting test cases and I think a lot of the litigation funding companies out there that are currently suing in class actions on behalf of people whose data has been affected, they'll be very interested in this because at the moment they're relying on fairly novel causes of action to bring those class actions, but this might make things slightly easier for them.

Julian: Could you talk us through some other specific risks that you see in terms of the new privacy tort for lawyers to be considering?

Christien: There are a few areas. So, we've talked about data breaches - I guess solicitors collecting and handling sensitive client information makes them vulnerable to data breaches and potential privacy claims. We've talked about clicking on malicious links or being tricked into handing over private client information - it does unfortunately happen from time to time, and so this new tort, I think, poses a further area of risk for lawyers. Similarly, cyber incidents - so there's an increased focus on data security and privacy breaches due to cyber hacks. This is going to make solicitors more vulnerable as well, if the firm system is hacked, private information is disclosed. If there's poor cybersecurity in place, there is an argument that the firm was reckless and so they potentially could be sued under this new tort. Misusing client information - so, reckless or deliberate misuse of client information during the course of running a file sometimes happens in all sorts of ways and could now lead to privacy claims. All lawyers will be familiar with their Harman obligations, which is not to use information obtained in a proceeding for purposes unconnected to the proceeding. I think now, with this new tort, a lawyer in breach of their Harman obligations could also be sued under this new tort. I suppose another risk, in a roundabout way, is just the need to be aware of the new tort. The tort does create new avenues for individuals to take action, and so lawyers need to be aware of the new tort in order to advise their clients of their new rights, if you like. Otherwise, there's a risk of becoming too late once the statute of limitations runs out.

Julian: So what is the limitation period on the new privacy tort?

Christien: So it's very similar to defamation. It's 12 months after the day that the plaintiff becomes aware of the invasion of the privacy. Now, if they're not aware of the invasion, they've got three years from the date that the invasion occurred. And then if the plaintiff was under 18 when the invasion occurred, they've actually got until their 21st birthday. So there's some flexibility there for younger adults.

Julian: Yeah right, so lots of risks for lawyers to consider. It does make me wonder, Christien, should every legal practice be considering employing at least one journalist?

Christien: That's a really good point. I want to make a note of that because I might talk to my managing partner...

Julian: ...well I might speak to you after the podcast. All right, let's move on to what measures lawyers can take to protect themselves from these sorts of risks.

Christien: Well, they're all fairly straightforward and I'd be surprised if most lawyers don't have these things front of mind already. But having robust cybersecurity and data protection in place, knowing what personal information you're collecting and why you're holding it, taking steps to ensure that the information is stored securely, I think is really critical. Education is a big part of it - so training your staff about compliance, security and misuse of information, and I think also it's just a good reminder to have the proper consents in place for handling client information. So having it clear in your letters of engagement, your retainer letters, so that your client understands and consents to the way in which their information is collected and dealt with, I think is really critical as well.

I think also deleting personal information that you no longer require and scheduling regular cleanups of your data to take those steps. Reviewing your privacy practices - make sure that you've got proper documented privacy practices in place. I know we're primarily speaking to lawyers, but speak to a specialist privacy lawyer if you need to ensure your privacy practices and policies are up to scratch. And having a breach response plan so actually doing a mock-up of a breach, test it out and then you can update the plan appropriately. They're really the things I think lawyers need to be thinking about doing.

Julian: So that's interesting when you're thinking about preparing a response plan, you can easily imagine a scenario, let's say it's in that grey area of a lapse of judgment that's resulted in phishing or something like that, and means that there could be a risk of something being accused of being a reckless invasion of privacy. Is there legal risk associated with fessing up and apologising?

Christien: No, not necessarily. I mean in defamation law, for example, it's clear in the legislation that an apology is not an admission of any form of wrongdoing, and it's the same in regard to the new tort. There's a similar provision, and I think courts on the whole are very, very keen to see people apologise at an early stage in all sorts of areas of claim. It does make a difference and generally speaking, certainly in this case, it's not treated as an admission of fault or liability as such.

Julian: When we were talking about the public interest earlier on - lots of grey areas there, another thing that comes up a lot in defamation is well, what, if it's true? Does that get you out of jail?

Christien: No, no, it doesn't, and in fact, if you think about it, I mean a lot of what you might call private information...

Julian: Is very much true...

Christien: ...Is necessarily true, and so that won't constitute a defence in this case.

Julian: Well, there's a lot for practitioners to consider, both in terms of advising clients and thinking about the way the tort applies to legal practices and getting your own house in order.

Christien, it's been great speaking with you on Risk on Air. Thanks so much for joining us.

Christien: Thanks, Julian, it's been a real pleasure.

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Outro

Thanks for listening to Risk on Air by Lawcover and to stay up to date, join us for the next episode on current risks in legal practice.

Resources:

[Privacy Act 1988 - Federal Register of Legislation](#)

[ABC v Lenah Game Meats Pty Ltd \[2001\] HCA 63](#)

[Australian Consolidated Press Ltd v Ettingshausen \[1993\] NSWCA 10](#)