PRIVACY AND AUSTRALIAN LAW

Thesis submitted to the Faculty of Law of the University of Adelaide, South Australia, for the degree of Doctor of Philosophy.

Susan Jennifer Gibb
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ABSTRACT OF THESIS

This thesis is divided into six parts. Part I examines the socio-political concept of privacy and proposes new definition. For the reasons which are discussed in that Part, the 'control' notion of privacy is rejected. Rather privacy is defined in terms of the 'circulation' (defined stipulatively) of information as that condition which arises when the circulation of intimate (also defined stipulatively) information about an individual is limited to those persons (organisations, institutions etc.) to whose actual or constructive knowledge of that information the subject does not object, or would not object were that circulation brought to the individual's cognizance.

Part II then considers whether privacy as defined is under threat, and, if so, whether such threat is significant. This examination also considers the relationship between privacy and information management.

Part III turns to an examination of the law. This consideration is not an exegesis of existing legal protections. In view of the information-based definition which is proposed in Part I, this examination considers the degree to which interests already protected by Australian Law are allied to, and compatible with, privacy (as defined), in order to ascertain the degree to which privacy receives protection against interference, and the availability of remedies.

Part IV considers the international obligations to protect privacy applying in Australia. These inevitably influence both the assessment of the adequacy of existing legal protection, and consideration of whether, and if so, how, specific protection might be provided to privacy.

Part V starts from the assumption that privacy should be recognised in Australian law, and considers the case against this. It then moves on to consider the OECD Guidelines Governing the Protection of Privacy and Transborder Flows of Personal Data.

Finally, in Part VI, the examination turns to a consideration of how privacy might be accorded express protection in Australian law. Although the precise definition of a cause of action is beyond the scope of the thesis, Part VI briefly considers the remedies which could be provided and the defences which could be recognised.
This thesis contains no material which has been accepted for the award of any other degree or diploma in any University and, to the best of my knowledge and belief, contains no material previously published or written by any other person, except where due reference is made in the text of the thesis.

I consent to the thesis being made available photocopying and loan if applicable if accepted for the award of the degree of Doctor of Philosophy.

Susan J. Gibb.
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INTRODUCTION

Privacy has been invoked to justify abortion, euthanasia, suicide, the use of contraceptives, opposition to telephone interception and identity cards, and the 'right to reproduce as many children as you please', to cite just a few examples. One writer abandoned the concept of privacy in disgust, describing it as 'unmanageable and to a large extent unintelligible.' Another suggested that few concepts are as 'vague or less amenable to definition and structural treatment than privacy'.

Philosophers have attempted to define privacy in terms of 'personhood', 'sanctuary', 'repose', and 'autonomy'. Their definitions have been open to a variety of interpretations and applications, and have been substantially ignored by lawyers, who have viewed these metaphysical definitions as being of little practical use.


4. Artz, D.E., 'Privacy Law in Massachusetts: Territorial, Informational and Decisional Rights', (1986) 70 Mass L. Rev. 173, esp. @ 175, makes a similar point.
In turn, lawyers have proffered practical definitions, such as 'the claim of individuals, groups, or institutions to determine for themselves when, how, and to what extent information about them is communicated to others', which have been as unsatisfactory to the philosophers as theirs' have been to the lawyers.5

Arthur Miller described privacy as:

difficult to define because it is exasperatingly vague and evanescent, often meaning strikingly different things to different people. In part this is because privacy is a notion that is emotional in its appeal and embraces a multitude of different "rights," some of which are intertwined, others often seemingly unrelated or inconsistent.6

The object of this thesis is to identify the concept, or concepts, of privacy; to ascertain whether it is protected by Australian law; whether this is adequate; and whether privacy could or should be provided with additional protection. Accordingly, the first part of this thesis examines the notion of privacy (in so far as it may exist), the way in which it has been defined or categorised by

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other writers, contrasts privacy with the concepts to which it is allied; and attempts to identify and define it.

The view taken in this thesis is that privacy may be defined, albeit not with the degree of mathematical exactitude claimed by some. It is, essentially, a condition of ignorance. In a sense, people have privacy only to the extent to which others are ignorant about them. This ignorance, however, may be neither accidental nor unintentional. A person may be capable of learning about another but may refrain from doing so - for whatever reason. It may be less of an ignorance than an abstention - in a sense, a condition of immunity.

Consequently, the definition postulated is that privacy is that condition (state of affairs) of an individual which arises when the circulation of intimate (personal) information about that individual is limited to those persons, or organisations, and/or institutions (governmental or otherwise) to whose actual or constructive knowledge of that information the individual does not object, or would not object were the fact of that circulation to be brought to the individual's cognizance.

The condition of privacy is passive. It arises out of the existence of limitations upon the circulation of information. It does not depend upon that limitation being achieved by any particular means. Consequently, privacy is not dependent upon the information-subject controlling the circulation of information.
It is argued that privacy is distinguishable from autonomy and freedom as such. Privacy is, however, dependant, upon the recognition of what Bazelon described as a division 'between the individual and the collective, between self and society.' The relationship between the drawing of this line and the recognition of privacy is discussed in Part I.

The second part of this thesis discusses whether privacy, as defined in this thesis, is under threat. As the definition of privacy advanced is information based, this examination centres upon information management practices and their connection with privacy.

Chapter 7 examines the ways in which the circulation of apparently innocuous information may affect individual privacy. Consequently, it discusses the ways in which technological and economic changes have affected individual privacy. In order to illustrate these effects, chapter 8 contains a brief discussion of the implications for individual privacy of the record systems which have developed to support the 'cashless society'.


The third part of this thesis turns to the legal recognition of privacy and the extent to which it may be recognised in Australian law in the sense in which it has been defined in Part I.

Some have claimed that privacy (in whatever sense this term may be used) is actually disregarded. One commentator, Lucas, suggested that this disregard is in:

part at least ... because Australia has no systematic and enforceable law of privacy.9

On the other hand, Campbell and Whitmore put what seems to be a better view of the situation. They acknowledge that restrictions of the invasion of privacy do exist in Australian law. However, they view these restrictions as inchoate:

Such restrictions on invasion of privacy as do exist in Australia might fairly be described as a ragbag of Common Law and statutory provisions developed primarily to achieve other purposes.10

Similarly, the Australian Law Reform Commission concluded that '[p]rivacy interests are relatively well protected by the existing law...'.11


11. A. L. R. C., supra n. 7, @ 144, para. 1307.
As will be seen from the discussion in Part III, many of the reasons for the view expressed by Campbell and Whitmore may be found within the fabric of Anglo-Australian judicial techniques. Privacy concepts and perceptions have been fitted, and occasionally contorted, into the already acknowledged forms of legal principle. As a consequence, the 'ragbag' to which these authors refer consists of common law and statutory forms of law which have come to encompass notions which are closely allied to what has been defined as privacy, or which are practically indistinguishable from it.

Part III is not a full exegesis of all forms in which privacy as defined may attract the protection of the law. It focuses upon what seem to be the important, or at least widespread and significant, circumstances in which interests which are legally protected are akin to, or even (practically) indistinguishable from, privacy as defined. What emerges is that, while wide-ranging, the common law protection of 'personality' rights is ad hoc and incomplete.12

In recent times, the notion of privacy has also come to have an international overlay creating a potential, wider-ranging, more inclusive basis for the recognition of privacy in domestic law. Australia accepted an international obligation to protect privacy

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by ratifying the International Covenant on Civil and Political Rights. Article 17 of that Covenant provides that:

1. No one shall be subjected to arbitrary or unlawful interference with his privacy, family, home, or correspondence, nor to unlawful attacks on his honour or reputation.

2. Everyone has the right to the protection of the law against such interference or attacks.

Consequently there is a new influence upon the development of domestic law in this regard. The international obligation to protect privacy is one of the factors which must influence whether, and if so, the manner in which and extent to which Australian law should protect privacy.

The fourth part of the thesis examines the nature and extent of this obligation. As will be seen, the history of the international recognition of human rights, the construction and application of similar clauses in the European Covenant on Human Rights, provides a necessary background to and guidance in determining, at least for the present, what might be expected in Australia.

Given that the existing forms in which privacy is recognised in Australian law are scattered and sporadic, the fifth part moves on to discuss whether privacy, as defined, can or should be defined as a discrete legal interest. The International Covenant might
seem to assume this but for purposes of this discussion the onus has been reversed. Chapter 23 examines the case against the recognition of privacy as a discrete interest.

This discussion is complemented by chapter 24. This chapter discusses some legislative proposals for the recognition of privacy: the Australian Bill of Rights Bill 1985, the Privacy Bill 1986, and the Privacy (Consequential Amendments) Bill 1986.

The Australian Bill of Rights Bill 1985 was discharged from the Senate Notice Paper on 28 November 1986. Had it been enacted, it would have created a general legal right to privacy. However, as is discussed in chapter 24, this may not have been a particularly extensive right.

The Privacy Bill 1986 and the supporting Privacy (Consequential Amendments) Bill 1986 both lapsed upon the dissolution of the Commonwealth Parliament on 5 June 1987. (So also did Senator Michael Macklin's Privacy Protection Bill 1987 which was substantially modelled upon the Privacy Bill 1986.) The Bills were largely modelled upon the OECD Guidelines Governing the Protection of Privacy and Transborder Flows of Personal Data which are reproduced as appendix II to this thesis. The Bills and the OECD Guidelines are discussed in chapters 24 and 25 respectively.

As discussed in Part II of the thesis, information management practices possess implications for a wider range of interests than
mere privacy. In general, the primary interest which may be affected by information management practices is 'fairness' - in which privacy is merely one consideration.

The OECD Guidelines Governing the Protection of Privacy and Transborder Flows of Personal Data would, if applied in Australia, regulate information management practices. As is discussed in chapter 25, their application, mutatis mutandis, to Australian record-systems may provide extensive protection to privacy. Consequently, enacting legislation modelled upon the Privacy Bill 1986 would promote fair information management practices.

However, enacting legislation of this type would do little to protect privacy against ad hoc interferences - such as occur when trespassers read personal diaries or newspapers publish personal information against the wishes of the subjects.

Given the definition espoused here, Part VI explores the nature and extent to which privacy might be protected, whether by way of specific acknowledgment, recognition within the framework of other legal forms, or extra-legal protection. Chapter 26 discusses what, if any, elements should be treated as conditions precedent to the recognition of any cause of action for interference with privacy; and to what defences or justifications it should be subject. Although not strictly within the purview of the thesis, chapter 26 concludes with a brief examination of the types of remedies which should be available in respect of complaints of interferences with privacy simpliciter.
PART I: CONCEPT OF PRIVACY
DEFINITION OF PRIVACY

There is no single definition of privacy which is universally accepted. To some extent this is symptomatic of the nature of the subject-matter, particularly when it is viewed in its socio-political context. The definition most commonly used is 'the right to be let alone'.¹ This alluring, if not very helpful, phrase was first used by Warren and Brandeis in their article 'The Right to Privacy' in 1890.² Sparkes described this phrase as having an:

impressive sound, an impressiveness enhanced by the familiarity and superficial simplicity of its component words.³

In view of the extraordinary influence which Warren and Brandeis' article has exercised over the Anglo-American literature about privacy, it is as well to examine it carefully.⁴

². Ibid.
⁴. The continental approach to privacy, especially as exemplified by the French (moral rights) and German (personality rights) literature is very different. This discussion focuses
It has become customary, if not necessarily accurate, to credit Warren and Brandeis with having introduced the concept of privacy into American law. Their article has been applauded by numerous writers - one went so far as to describe it as 'perhaps the most influential law journal piece ever published'. Despite this, there is some truth in Barron's allegation that their article is 'seldom read'. Their article may be more of a symbol than something which gives deep substance to the ultimate recognition of privacy.

upon concept of privacy as it is perceived in the English-speaking and common law world. According to Markesinis, B.S., 'The Right To Be Let Alone Versus Freedom of Speech', [1986] Public Law 67, there are some themes common to the American, English and German approaches - see esp. @ 68 - 70. See also Handford, P.R., 'Moral Damage in Germany', (1978) 27 I.C.L.Q. 849.


8. Barron, J.H., 'Warren and Brandeis, The Right to Privacy, 4 Harv. L. Rev. 193 (1890): Demystifying a Landmark Citation', (1979) 13 Suffolk L. Rev. 875, @ 877
Warren and Brandeis' article has become something of a 'bible' to the advocates of privacy. Because of this, it is necessary to examine the article for both its actual thesis and its effects upon the political and philosophical discussions of privacy.

This Part examines the political, or philosophical, interest(s) which is (are) characterised, or perhaps perceived, as privacy. This is preliminary to any analysis of any legal interest in privacy. Equally, it is necessary to determine whether it is possible to isolate any distinct interest or interests, and what this, or these, may be, before examining the concept of privacy (if there is any such concept).

Much of the influence which Warren and Brandeis' article has exercised over the privacy literature is attributable to perceptions, and in some cases misconceptions, about both the political conditions of the 1890's and the authors' intentions. Because the influence of these beliefs, wrong as some of them may be, has sometimes overborne the authors' intentions, it is necessary to examine legends which surround 'The right To Privacy'.
1.1. 'The Right to Privacy'

Four legends have grown up around 'The Right to Privacy'. Some may be apocryphal.

1. Warren and Brandeis were the first publicists and the first jurists either to consider the question of privacy or to advocate its recognition in law.  

2. Their article was inspired by the outrageous conduct of the press of the day, and in particular by its treatment of the Warren family.

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9. eg. Weisman, supra n. 5, @ 732, 'The first legal scholars...'


3. Judge Cooley had earlier defined privacy as the right 'to be let alone'.


Most of these statements are false. They do, however, warrant consideration since they go to the heart of the notion of privacy as it is most commonly perceived in both Anglo-American literature and the common law cases.

1.1.1. The first publicists

The right 'to be let alone' which Warren and Brandeis contemplated appears to have been forged out of an amalgam of two distinct interests: what 'The Nation' had described as the "natural and inalienable" right of everybody to keep his

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affairs to himself...';\textsuperscript{15} and the right of a person to 'immunity in his home against the prying eyes of government and the protection of person, property and papers against even the processes of the law, except in a few specified cases,'\textsuperscript{16} which Cooley had identified. Both writers and courts of law had addressed themselves to these issues before Warren and Brandeis published their article.

(i) Publicists

As early as 1869 'The Nation', one of the most influential American periodicals of its day, had taken issue with tax-assessor's records. It saw them as infringing a person's right to 'keep his affairs to himself'.\textsuperscript{17} Godkin, the editor of 'The Nation', was also a consistently vocal critic of the (alleged) excesses of the press and the perceived diminution of privacy.\textsuperscript{18}

\begin{center}
\textsuperscript{15} 'The Way It Ought Not to be Collected', (1869) 9 The Nation 453, @ 453.
\end{center}

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\textsuperscript{17} Supra n. 15.
\end{center}

\begin{center}
\textsuperscript{18} Edwin L. Godkin, was editor of the Nation and Evening Post for 38 years. Others critics included Henry James (novelist), who
\end{center}
In 1880, he addressed himself to what Henry James termed 'newspaperization'.\textsuperscript{19} Godkin warned:

\begin{quote}
the community has a great deal to fear from what may be called excessive publicity, or rather from the loss by individuals of the right to privacy.\textsuperscript{20}
\end{quote}

He repeated these fears in July 1890, five months before Warren and Brandeis published their article.\textsuperscript{21}

Glancy,\textsuperscript{22} among others,\textsuperscript{23} suggested that it was Godkin's article which provided the inspiration for Warren and Brandeis - a claim used (coined?) the term 'newspaperized' in his preface to 'The Reverberator, Madame de Mauves, A Passimate Pilgrim and Other Tales', [(1908) 1936. Charles Scribner's Sons. N.Y.], \@ xv; John Bascom (philosopher and one time president of the University of Wisconsin), who mourned excesses of the press in 'Public Press and Personal Rights', (1884) 4 Educ. 604, esp. \@ 604-605; and Camp, editorial, 'Journalists and Newsmongers', (1890) 40 (July) Century Magazine 313, \@ 315, called for laws to better protect 'private rights and public morals'.

\begin{footnote}{19} Ibid. See also Godkin, E.L., 'Libel and Its Legal Remedy', (1880) 12 J. Soc. Sci. 69\end{footnote}

\begin{footnote}{20} Ibid. \@ 82\end{footnote}

\begin{footnote}{21} Godkin, E.L., 'The Rights of the Citizen - IV - To his Own Reputation', (July 1890) 8 Scribers Magazine 58; Warren and Brandeis' article (supra n.1) was published on 15 December 1890.\end{footnote}

\begin{footnote}{22} Glancy, supra n. 11, \@ 9 et. seq.\end{footnote}

\begin{footnote}{23} Eg. Adams, E., 'The Right to Privacy and the Relation to the Law of Libel', (1905) 39 Am. L. Rev. 37, \@ 37; Barron, supra n. 8, esp. \@ 887 - 888.\end{footnote}
which Brandeis specifically rejected. Glancy noted that Warren and Brandeis had 'expressly disavowed the suggestion that the Godkin article' had prompted them to write theirs. However, Glancy suggested that 'Godkin's influence on Warren and Brandeis is apparent in numerous ways'. In so doing, Glancy relied upon the fact that both articles contained a:

sweeping panorama of the historical development of
human sensitivity, culminating in the right to
privacy.

(ii) Jurists

Whilst the writers were particularly concerned with unwanted publicity and the disclosure of 'private' information, the nineteenth century courts had been confronted with an increasing


25. Glancy, supra n. 11, @ 9.

26. Ibid.

27. Holbrook, J., 'Ten Years Among the Mail Bags' (notes from the diary of a special agent of the Post Office Department), [1888. Loomis National Library Assoc. N.Y.], @ 6: 'The laws of the land are intended not only to preserve the person and material property of every person sacred from intrusion, but to secure the privacy of his thoughts, so far as he sees fit to withhold them from others.'
number of complaints of intrusions into, and interferences with the enjoyment of, property, both real and personal.

During the nineteenth century, courts dealt with an increasing number of cases in which defendants' actions or behaviour evidently went beyond a simple trespass and in some sense affronted the then prevalent conception of the enjoyment of property. In some circumstances, courts, at least in America, appear to have offered protection to persons against interferences with their personal affairs. The views of one American court in 1831 exemplified this in respect of real property. According to the judge:

No man has the right ... to pry into the secrecy of your own home.28

In 1874, Judge Cooley articulated what he saw to be the purpose of the Michigan constitutional prohibition on unreasonable search and seizure. In doing so he appeared to extend the legal protection traditionally accorded to property to some situations involving individuals:

28. Commonwealth v. Lovett, 6 Pa. L.J.R. 226 (1831), @ 227. The English courts appear to have taken a similar attitude. See eg. Merest esq. v. Harvey, (1814) 5 Taunt 442, 443; 128 E.R. 761, @ 761 per Gibbs C.J. referring to an intruder who 'walks up and down before the window of [a] ... house, and looks in while the owner is at dinner'. In that case the court upheld an award of damages for trespass against the defendant who had entered the plaintiff's property 'searching, hunting, and beating for game' (id). The relationship between the interest protected by the action for trespass and privacy is discussed below in chapter 11.
to make sacred privacy of the citizen's dwelling and person against everything but process issued upon a showing of legal cause for invading it. 29

The views expressed by Bradley J. in the U.S. Supreme Court in 1886 were consistent with this expanding notion of the inviolability of property and the incipient protection it could provide to personal affairs. 30 In an extensive discussion of the sanctity of private property, Bradley J. quoted at length from Lord Camden's condemnation of general warrants in Entick v Carrington. 31 Prefacing his quotations with the statement that Lord Camden's:

great judgment ... is considered as one of the landmarks of English liberty ... the true and ultimate expression of constitutional law, it may be confidently asserted that its propositions were in the minds of those who framed the Fourth Amendment to the [U.S.] Constitution, ... 32

29. Wiemer v. Bunbury, 30 Mich. 201 (1874 Michigan Supreme Court), @ 208, discussing Michigan State Constitution, Art. VI, s. 26. The explanation may lie in the treatment of the person as property.


32. Supra n. 30, @ 626-627.
Judge Bradley quoted from Lord Camden's judgment:

The great end for which men entered into society was to ensure their property. ... By the laws of England, every invasion of private property, be it ever so minute, is a trespass. ... where private papers are removed and carried away the secret nature of those goods will be an aggravation of the trespass, and demand more considerable damages in that respect.33

Judge Bradley concluded:

It is not the breaking of his doors, and the rummaging of his drawers, that constitutes the essence of the offence; but it is the invasion of his indefeasible right of personal security, personal liberty and private property, where that right has never been forfeited by his conviction of some public offence.34

This was a property-based notion of privacy which encompassed both real and personal property. This property-orientation is further emphasised by the report of an homicide trial by 'The Chicago Mail' newspaper in 1890. Discussing the acquittal of a man

33. Ibid., @ 627-628. The possibility that there will be an increase in damages is also noted in below in chapter 11, page 227, text accompanying n. 2.

34 Ibid., @ 630. See also De May v. Roberts, 9 N.W. 146 (1881), esp. per Marston C.J. @ 149.
charged over his shooting of an official who had forcibly entered
the defendant's home without a warrant, the newspaper commented:

Any citizen has a right to defend his privacy to
whatever extent he may find necessary...35

These views may have been extreme even in their day. (It appears
from 'The Chicago Mail' report that the defendant may have been
convicted on a previous occasion.36) However, it is impossible
to ignore the evidence: privacy, property-oriented as it may have
been, was far from being an alien value in the late 1800's. In a
recent article, one writer examined the nineteenth century law
with respect to privacy. The conclusion is interesting:

The picture that emerges by 1890 is one of ample
and explicit protection of privacy in its own
right.37

35. 'A Man's House His Castle', reproduced from 'The Chicago
Mail' (newsp.), (1890) 9(15) Public Opinion 342, @ 342.

36. Ibid. @ 342. - 'a fresh decision by Judge Collins'.

37. Note, 'The Right to Privacy in Nineteenth Century America',
(1981) 94 Harv. L. Rev. 1892, @ 1894. But cf. Zelermyer, W.,
'Invasion of Privacy', [1959. Syracuse Univ. Press. N.Y.], @ 25:
'The searcher may find an occasional reference to privacy in cases
decided before 1890, but today there is veritable agreement that,
as currently conceived, the right of privacy owes its inception to
the brilliance of an article published in that year'. 
1.1.2. Conduct of the press

Barron examined the newspapers from 1883 to 1891 in detail. He was aware that this was the era of the 'yellow press' and the emergence of scandal sheets. Barron was aware of the difficulties inherent in any attempt to 'evaluate, through the eyes of the hypothetical nineteenth-century reasonable man, the press-privacy conflict in Boston' in the 1890's. However, Barron does not appear to have been as satisfied as Glancy that the disgust at excessive newspaper discussion of private matters had grown into a sense of outrage at yellow journalism's encroachments on the private lives of individuals.

Barron emphatically rejected the suggestion that the Warren family had been the victim of intrusive publicity. However, Zimmerman suggested that the authors may have taken exception to what she described as 'restrained' reports in two newspaper gossip columns describing the wedding breakfast which Warren had held for a cousin and her new husband.

38. Barron, supra n.8.
39. Ibid., @ 884.
40. Glancy, supra n. 11, @ 10.
41. Barron, supra n. 8, @ 891-907.
Barron also refuted the suggestion that there had been an offensive report of the wedding of Warren's daughter. At most, the daughter could have been only seven years of age in 1890.43

Criticism of the press seems to have been common in the latter part of the nineteenth century.44 It may be that Warren and Brandeis simply wished to contribute their ideas to the contemporary debate. Alternatively, Glancy may have been correct when she suggested that their motive may have been partially commercial: an attempt to advertise the name of the firm.45 Barron offered an unflattering conclusion:

The unromantic reality appears to be that the origin of the Warren-Brandeis article lies to a great extent in the hypersensitivity of the patrician lawyer-merchant and verbal facility and

291, @ 296. See also Barron, supra n. 8, @ 893 - 894.

43. Barron, supra n. 8, @ 893. This explanation was advanced by several writers. See for eg. Kalven, supra n. 7, @ 329, and Prosser, supra n. 11, @ 383.


45. Glancy, supran. 11, @ 6
ideological ambivalence of his friend and former law partner.46

It is futile to ascribe a motive to Warren and Brandeis today. The standards by which to assess publications have changed in the past century so that a publication which today is viewed as being innocuous may have been viewed as offensive in 1890.47 The evidence is ambivalent. Perhaps they really were concerned about 'newspapermongering'.48 It is evident that 'newspapermongering' was a serious matter at that time. Whatever its motivation, the article must stand on its own merits.

The Warren and Brandeis article occupies the central place in the English language privacy literature. It may be, for the reasons discussed earlier, that its importance has been unjustifiably exaggerated. However, it must stand or fall upon its intrinsic merits. It is too important an article to be explained away as a product of offensive newspaper (or 'yellow press') journalism, or viewed as merely an expression of outrage. It may have been intended as such - but the evidence in support of this is equivocal. Even if this was its object, numerous writers,

46 Barron, supra n. 8, @ 907. Warren & Brandeis had been partners from 1879 to 1889 when Warren retired from the partnership to manage the family business after his father's death. But the firm name was not changed until 1897.

47. Barron, ibid, @ 891 - 907, also makes this point.

48. Camp, supra n. 18, @ 315
including one of its authors in his judicial pronouncements, have reconstructed it into an articulation of general principle.

1.1.3. Judge Cooley's definition

Judge Cooley used the phrase 'to be let alone'.\(^49\) He did not offer this as a definition of privacy. He used it in the context of an analysis of assault, in reference to personal security. He was referring to neither of the earlier mentioned interests: neither to freedom from publicity nor to security against governmental intrusion.\(^50\) As confirmed by reference to battery, he was simply referring to the correlative of the law of assault and battery: the 'right' of persons to be free of the fear of personal harm and the fear of bodily injury.

It is certainly possible to extend this thesis to justify the protection of privacy. Warren and Brandeis may have been justified in doing so. However, this involves a considerable extension. In a sense, Warren and Brandeis appear to have used Cooley twice-over.

\(^{49}\) 'A Treatise on the Law of Torts', supra n. 12, @ 29.

\(^{50}\) This point is also emphasised by Finighan, W.R., 'Privacy in the Community: Lessons from the American Experience', [1978, CSIRO, Australia], @ 18.
In the first instance, Warren and Brandeis relied upon Cooley's analysis of assault and its correlative — the freedom from assault — to identify the right to be free from harm. In the second instance, they relied upon this initial premise as evidence of the correctness of their conclusion: that the law was developing in such a way as to protect the right to enjoy life.

Glancy suggested that Warren and Brandeis had viewed 'the right to privacy' as both an important attribute of, as well as a vital protection for, individualism.51 This is consistent with their dual use of Cooley's thesis.

At one level, Warren and Brandeis treated the freedom from assault as being a minimal condition for the enjoyment of life, and assumed that the content of what should be defined as an 'assault' would expand beyond the fear of merely physical harm. At the second level, and simultaneously, Warren and Brandeis seem to have viewed the individual as being defined by something more than mere physical immunity.

Warren and Brandeis appear to have invoked these two assumptions to justify their final premises that the law of assault would expand to provide protection to the individual; and that it would be possible to maintain, or retain, individualism, and thus to enjoy life in a manner analogous to the Lockian state of nature, only if the law were to provide protection to and support for

51. Glancy, supra n. 11, ¶ 22.
individuals' control over their 'thoughts, sentiments and emotions
... personal appearance, sayings, acts, and ... personal
relations, domestic or otherwise.'

The passage from Cooley's 'Treatise on the Law of Torts' to which
Warren and Brandeis referred in their article reads as follows:

**Personal immunity.** The right to one's person may
be said to be a right of complete immunity: to be
let alone. The corresponding duty is, not to
inflict an injury, and not, within such proximity
as might render it successful, to attempt the
infliction of an injury. ... There is consequently
abundant reason in support of the rule of law which
makes the assault a legal wrong, even though no
battery takes place.53

Judge Cooley extended the notion of injury to encompass the fear
of injury within the law of assault - itself an extension of the
law of battery. He consciously extended the notion of personal
injury, and its correlative, personal immunity, to include matters
other than actual bodily harm. His focus was upon freedom from
injury, and freedom from fear of injury, rather than upon the
enjoyment of life in the expanded sense for which Warren and
Brandeis are now seen as authority.

52. Warren and Brandeis, supra n. 1, @ 198, 213. See also
Glancy, supra n. 11, @ 22 et seq, on this point.

53. Supra n. 12, @ 29 (Cooley's emphasis).
This point is underlined by Cooley's use of the term "privacy" in his 'Treatise on Constitutional Limitations'.\textsuperscript{54} He used the term in the context of an extensive discussion of the importance of the security of person and private property against search and seizure during which he referred at length to Lord Camden's judgment (noted above).\textsuperscript{55}

Warren and Brandeis recognised this in their article. They noted that 'it has been found necessary from time to time to define anew the exact nature and extent' of the 'full protection' to person and property which they claimed was provided by the common law.\textsuperscript{56} They described the action of assault as having grown out of the action for battery; the law of nuisance as having developed in order to protect persons 'against offensive noises and odors [sic]',\textsuperscript{57} and the law of slander and libel as developing to protect reputation. According to Warren and Brandeis this latter development was particularly significant. It was evidence that:

\begin{quote}
regard for human emotions ... extended the scope of
\end{quote}

\textsuperscript{54.} Cooley, T.M., 'A Treatise on The Constitutional Limitations Which Rest Upon The Legislative Power of the States of American Union', supra n. 16.

\textsuperscript{55.} Ibid., vol.1, @ 610-636. See earlier discussion accompanying nn. 31-34, @ page 11 et seq.

\textsuperscript{56.} Warren & Brandeis, supra n. 1, @ 193.

\textsuperscript{57.} Ibid., @ 194.
personal immunity beyond the body of the individual.58

Warren and Brandeis seized upon this expansion to posit even greater protection. They did this quite explicitly. They commented:

Recent inventions and business methods call attention to the next step which must be taken for the protection of the person, and for securing to the individual what Judge Cooley calls the right "to be let alone".59

1.1.4. Warren and Brandeis' argument

Warren and Brandeis explicitly adopted Cooley's phrase 'to be let alone'. They did not proffer it as a definition of privacy. They used it, as Sparkes noted,

precisely as Cooley [did] ... : as a characterisation of that general right to immunity and protection which it is the business of the law to protect. They argue[d] that the right to privacy should be recognised "as a part of the more

58. Ibid.

59. Ibid, @ 195.
general right to immunity of the person, - the right to one's personality".60

In a sense, the authors seem to have expanded the notion of injury rather than the notion of immunity. Cooley had expanded the notion of injury to include the fear of injury. Warren and Brandeis further expanded the notion of fear of injury from merely fear of bodily harm to include fear of injury to intangibles, such as fear of interference with 'civil privileges', '[t]houghts, emotions, and sensations'.61 Accordingly, they expanded the notion of 'immunity of the person - [to] the right to one's personality'.62

In Warren and Brandeis' article, the 'right to be let alone' was equated with the right to enjoy life. Privacy, they argued, was one of the attributes of the enjoyment of life.63 Consequently, it was necessary to protect privacy in order to secure the right to enjoy life.

60. Sparkes, supra n. 3, @ 63. The quotation is from Warren and Brandeis, supra n. 1, @ 207. See also Gavison, R.E., 'Privacy and Its Legal Protection', [1975, D. Phil. (unpublish.), Oxford], @ 46.

61. Warren & Brandeis, supra n. 1, @ 193 - 195.

62. Ibid., @ 207. In a sense, their article may be seen as an exemplar of the common law tradition: the development of new rights and causes of action by the expansion of otherwise recognised, but not necessarily related, legal remedies.

63. Ibid., @ 207
Warren and Brandeis appear to have approached their argument from two premises - neither of which they considered it justified in any detail. On the one hand, they assumed that the common law was designed to protect the individual from harm. On the other hand, they assumed that the object of the common law was to regulate society to promote the maximum enjoyment of life. They regarded these two premises as being the obverse of each other. They assumed that the reason why people should be protected from harm was to promote the maximum enjoyment of life.

In a sense, Warren and Brandeis appear to have relied upon a third premise to justify these first two assumptions. They assumed that the common law readily adapted to changed circumstances. In this, they appear to have been influenced by the emerging views espoused by some American jurists of the time. As they stated it:

Political, social, and economic changes entail the recognition of new rights, and the common law, in its eternal youth, grows to meet the demands of the society.64

Warren and Brandeis' schematic depiction of the interests which they saw as requiring protection was never intended to stand simply as an argument for the adoption of any particular definition of privacy. They argued that the common law inevitably responded to the changing social, political and economic conditions; and that it was thus inevitable that it would develop

64. Ibid., @ 193.
to protect people's feelings and their enjoyment of life in addition to the more prosaic elements of person and property.

Pratt took exception to this. Asserting that 'the authors' rhetoric exceeds their logic', he accused Warren and Brandeis of glibly sliding from the right to life to the right to enjoy life. This may be so. In Australia and England, the common law has not developed in the way that Warren and Brandeis envisaged; and it may be that it was not doing so in 1890. However, Warren and Brandeis' article was a product of American jurisprudence rather than English legal theory.

Warren and Brandeis' argument was not that the common law was developing so as to protect privacy, defined as being 'let alone'. Rather, their argument took the following scheme: (i) as a matter of history, the common law has evolved to protect an increasingly wide range of interests; (ii) it was developing to protect a general right to enjoy life as well as the right to life itself; (iii) the 'right to be let alone' was an essential attribute of the enjoyment of life; (iv) the recognition of privacy was one of the elements of the enjoyment of life because one of the ways in which people were let alone was by the recognition of their privacy; therefore (v) the common law would evolve to protect

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privacy because this was one of the elements of the right to be let alone.66

Pratt claimed that the first and second premises were wrong. He may be correct in this. Writing eighty-one years after Warren and Brandeis published their article, Fleming remarked that there were:

many situations in which a person is left without redress against conduct drastically violating prevailing standards of taste and propriety.67

Pratt may have taken Warren and Brandeis' rhetoric rather more seriously than the authors had intended. They contented that the right 'to be let alone' would develop into the right to enjoy life. However, they did not use the two phrases inter-changeably. Consequently, the fact that the right to life may in some circumstances conflict with the right 'to be let alone', as Pratt noted, does not prove that Warren and Brandeis were wrong.68

Warren and Brandeis did not equate privacy with the ultimate goal which the recognition of privacy was supposed to promote. The

66. See Kacadan, supra n. 12, for a discussion of the early English and American cases which Kacadan considered reflected the 'adaptability of the common law' (ibid, @ 354). Warren and Brandeis may be assumed to have been familiar with at least some of these cases.


68. Pratt, supra n. 65, @ 21.
authors equated being 'let alone' with privacy only to the extent that they considered it was possible to 'be let alone' only when privacy was secured. They viewed privacy as being an attribute of personal immunity. A person's immunity would be infringed equally by an interference with privacy and an assault. Consequently, to the extent that privacy was not respected, the right 'to be let alone' was infringed.

This was not because the authors regarded the two interests as one and the same. They viewed the protection of privacy as being necessary for the enjoyment of life: an interference with a person's privacy was as much an interference with that person's right 'to be let alone' as was an ordinary assault or battery.

Incorrect as it is, the belief that Warren and Brandeis (if not Judge Cooley) defined privacy as the right to be let alone runs deep.69 It is reinforced by Brandeis' reiteration of this phrase 'right to be let alone' in his much publicised dissent in Olmstead v. U.S.70 That case concerned the admissibility of evidence obtained by an illegal telephone tapping - an action Justice


Brandeis described as an 'unjustifiable intrusion by the Government upon the privacy of the individual...'\textsuperscript{71}

Warren and Brandeis appear to have assumed that the right 'to be let alone' was one of the interests which is fundamental to the existence of what they regarded as a liberal political system. To the extent that they viewed the recognition of privacy as a logical pre-condition for the recognition of a comprehensive right 'to be let alone', the recognition of privacy itself was regarded as fundamental to the existence of a liberal political system, just as was the freedom from assault or arbitrary arrest. Consequently, the authors appear to have viewed the legal recognition of privacy as a pre-condition for, or at least an attribute of, the legal recognition of a right 'to be let alone'.

This was not because Warren and Brandeis viewed privacy as co-extensive with 'being let alone'. They appear to have viewed the legal recognition of privacy as being "necessary" to secure the right 'to be let alone' in the same way as the legal right to marry may be viewed (by some) as being "necessary" to the legal recognition of the right to found a family.

The right 'to be let alone' was consequently treated as the universal maxim, to follow Sparkes in the adoption of Kantian terminology.\textsuperscript{72} It is the principle which Brandeis saw as being

\textsuperscript{71} Ibid., @ 478.

\textsuperscript{72} Sparkes, supra n. 3, @ 66 et seq.
fundamental to the U.S. Bill of Rights;\textsuperscript{73} and which Warren and Brandeis had earlier seen as underlying any system of civil or criminal law which purported to protect individuals from the abusive exercise of power by either government or fellow citizens.

CHAPTER 2

PRIVACY: DISCRETE INTEREST OR UNIVERSAL MAXIM?

The phrase 'to be let alone' is patently inapt as a definition of privacy. It is 'absurdly wide';¹ and far exceeds any interest(s) or right(s) which could reasonably be claimed by any individual living in an organised society'.² There are few interests (or rights) which might not be contained within this description: an assault is pre-eminently a case of not letting a person alone. Further, as Pratt noted, the right to be 'let alone' may sometimes conflict with the right to life itself.³

Freund described privacy defined in this way as 'too greedy a legal concept'.⁴ It is difficult to disagree. The phrase 'to be let alone' is far too expansive to be a functional juristic


². 'Report of the Committee on Privacy', Chairman Sir Kenneth Younger [1972, HMSO, London], Cmdn. 5012, @ 10, para. 37.


concept. It is reflective of the European 'right of personality' embodied in the American Bill of Rights, which, in turn, reflects the influence of the French enlightenment.

Warren and Brandeis were conscious of the breadth of the phrase 'to be let alone'. As was noted previously, they advocated the recognition of privacy to secure the 'next step' in the development of a legal system which had as its object the securing to the individual of the right 'to be let alone'.

Griswold acknowledged this when he described the 'right to be let alone' as the 'underlying theme' of the American Bill of Rights. However, some writers have taken Warren and Brandeis literally. Donald Madgwick described the right to privacy as stated 'in its simplest form, ... the "right to be let alone"'.

Nonetheless, the phrase has begun to colonize. In 1973, Justice Douglas of the U.S. Supreme Court claimed:

5. See discussion at pages 21 - 28 above, esp. n. 59.


the right "to be let alone" ...includes the privilege of an individual to plan his own affairs, for, "outside of plainly harmful conduct, every American is left to shape his own life as he thinks best, do what he pleases, go where he pleases." 8

Other courts have seen 'the right to be let alone' as a core concept of liberty. They have seen it as providing 'total personal immunity from governmental control', 9 and the freedom to do as one pleases, subject only to the rights and welfare of other members of society. 10 (This appears to be precisely how Brandeis saw the right: as a universal maxim.)

This was recognised by the Massachusetts' Supreme Judicial Court in an advisory opinion delivered in 1978. The court suggested that the US Supreme Court had extended the (American) constitutional 'zones of privacy':


only to fundamental matters relating to marriage, procreation, contraception, family relationships and child-rearing and education.11

As Artz commented, the qualifier 'only' seems to understate the usage of the 'zones of privacy'.12 The American courts have developed a wide ranging body of case-law concerning what Artz called 'decisional privacy' - the freedom of personal choice. This category of cases seems to be primarily concerned with autonomy.13

Some legislatures appear to have been as taken with the phrase 'to be let alone' as have some of the courts. The Florida (State) Constitution was amended in 1980 to include the following provision:

Right of Privacy. - Every natural person has the right to be let alone and free from governmental intrusion into his private life, except as otherwise provided herein. This section shall not be construed to limit the public's right of access


13. Ibid., @ 193.
This development has justified Davis' criticism that privacy, viewed essentially as the right to be let alone, is nothing more than a distillate of other more explicit causes of action: a 'sociological notion and not a jural concept at all'. However, it does not follow from the fact that it is not a jural concept that it may not become one.

Davis' criticism rests upon the assumption that Warren and Brandeis were intending to create a specific jural concept. It is not certain that this was their intention. As was noted above, an analysis of the socio-political foundation of privacy is preliminary to an analysis of a legal right to privacy. It is arguable that Warren and Brandeis were merely attempting to sketch the broad thrust of the development of the law: to identify the directions in which the law should develop. Despite having noting the limits which should constrain their 'right to privacy', the authors did not attempt to formulate a precise cause of action.


15. Davis, F. 'What Do We Mean by "Right to Privacy"?', (1959) 4 S.D.L.R. 1, @ 19.
Nonetheless, if Warren and Brandeis were correct to treat the recognition of privacy as one of the attributes of a society in which people have the right to enjoy life— in their terms, are 'let alone'— then privacy could have been defined as 'being let alone' only if Warren and Brandeis were defining the ends in terms of the means. They were not. The authors were arguing for the 'next step' in the development of legal protection.¹⁶

Privacy must be examined as a component part of 'being let alone', whether the object is a study of privacy per se or a study of the ultimate goal—a comprehensive right 'to be let alone' as Warren and Brandeis suggested. However, the object here is an analysis of the notion of privacy—which may be only one element of Warren and Brandeis' being 'let alone'. Adopting, as some have suggested,¹⁷ the phrase 'to be let alone' as a definition of privacy, would amount to an attempt to explain the part by reference to the whole.

The international treatment of privacy seems to support this view. Privacy is one of the interests listed in the Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights. The word privacy is used in neither

¹⁶. Warren, S.D., and Brandeis, L.D., 'The Right to Privacy', (1890) 4 Harv. L. Rev. 193, @ 195. See also discussion on pages 19 – 20 above.

¹⁷. See supra n. 7. This has also been suggested by some English judges. See, for example, the partially dissenting opinion by Judge Walsh in the Dudgeon case, (1982) 45 Series A, judgments & decisions of the European Court of Human Rights, @ 41, para. 8.
of these instruments to refer to the entire range of interests which may be described as comprising the notion of being 'let alone'.

Privacy is merely one of the many interests recognised by the international human rights instruments which have been adopted by the Members of the United Nations in an attempt to give substance to the notion of 'human rights and fundamental freedoms' which they have undertaken to promote and protect.

Strangely enough, adopting this definition would exclude from consideration many of the injuries most commonly complained of in the name of privacy. For instance, C's surreptitiously observation of A in A's bedroom would be viewed by most people as a paradigm of privacy intrusion. Yet it may not involve any abrogation of A's right to be let alone. Indeed, the object of the exercise would be to let A alone: to observe A in A's natural state as it were. A would be 'not let alone' only if A were aware of the observation.

Compiling a comprehensive personal dossier without the dossier-subject's knowledge would not automatically interfere with a right

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18. See the discussion of the international recognition of human rights in Part IV below.


20. Sparkes, supra n. 1, ¶ 61, offers a similar example.
'to be let alone'. It could be an invasion of privacy. As McCloskey pointed out:

Privacy can be totally invaded throughout the whole of a person's life, without his knowledge, without his liberty being in any way restricted, and without the person becoming any less a person qua person.

2.1. Some approaches to the definition of privacy

It follows from this that the phrase 'to be let alone' is useless as a definition. Confronted with this conclusion there are four different types of responses evident in the literature:

(1) attempts to refine the phrase: to 'repair' its failings;
(2) the adoption of a series of 'non-definitional' categories in place of the one universal definition;

21. Any use of the information in the dossier, or even informing the subjects of the existence of the dossier, may interfere with their rights 'to be let alone'. But the compilation or keeping of the dossier, let alone its use, should probably be viewed as an invasion of the subject's privacy.

(3) forswearying the task of definition at all; and/or
(4) attempts to postulate a completely new definition.

2.1.1. Refinements of 'to be let alone'

The most widely acclaimed of the modifications of the 'to be let alone' formula is the one which was adopted by the Nordic Conference of Jurists in 1967.23 The variant which they postulated was:

The Right to Privacy is the right to be let alone
to live one's own life with the minimum degree of interference. In expanded form, this means:

The right of the individual to lead his own life protected against: (a) interference with his private, family and home life; (b) interference with his physical or mental integrity or his moral or intellectual freedom; (c) attacks on his honour and reputation; (d) being placed in a false light; (e) the disclosure of irrelevant and embarrassing facts relating to his private life; (f) the use of his name, identity or likeness; (g) spying, watching and besetting; (h) interference with his correspondence; (i) misuse of his private communications, written or oral; (j) disclosure of information given or received by him in circumstances of professional confidence.

Not content with this, the conference nominated a non-exhaustive list of twelve matters which this definition of the right to privacy was intended to cover.24

This approach does not appear to be particularly helpful. It merely describes the various ways in which the conference thought that privacy might be affected. It does not offer any guide to what privacy is, nor to how privacy may be defined. To some extent, this category of rights illustrates the consequences of treating privacy as an all embracing and generalised right to be let alone meaning "all things to all" people. It is a list of some obnoxious interferences with the rights of individuals to

live as they choose. However, there is not necessarily any common element between the various injuries.

These attempts to refine the 'being let alone' definition do not overcome the deficiencies inherent in the attempt to define privacy in terms of the universal goal which it may promote, as was discussed earlier. It may aggravate those deficiencies by shifting the focus away from the nature of the interest injured to the means by which the injury is effected.

In the following pages, in the course of the attempt to formulate a new definition of privacy, a distinction is essayed between injuries to privacy, and injuries to closely related interests. For the reasons which are given in that discussion, most of the injuries which the Nordic Conference nominated do not really affect privacy.

2.1.2. Non-definitional categories

Prosser is traditionally credited with having differentiated the four distinct injuries which are commonly complained of in the name of privacy.25 However, his categories follow closely those

of an earlier writer. In 1936, Dickler postulated three distinct interests:

- The unwarranted, unprivileged, intentional intrusion on the personal lives of others so as to cause them mental distress and/or physical pain – analogous to the law of trespass.

- The unwarranted, unprivileged, intentional disclosure of personal thoughts, habits, manners, affairs, appearance and history of others so as to occasion them emotional disturbance – analogous to the law of libel.

- The unwarranted, unprivileged, intentional appropriation of another's name, likeness, appearance, history or reputation for the purpose of profit or gain – analogous to the law of property.²⁶

Prosser nominated four categories.

1. Intrusion upon the plaintiff's seclusion or solitude, or into his private affairs.

2. Public disclosure of embarrassing private facts about the plaintiff.

3. Publicity which places the plaintiff in a false light in the public eye. [and]

4. Appropriation, for the defendant's advantage, of the plaintiff's name or likeness.27

These four categories are little more than a refinement of those proposed by Dickler.

Like the attempts to refine the phrase being 'let alone', this categorisation approach tends to focus attention upon the means by which any given injury is effected. In so doing, it obscures the analysis of the concept as a whole.

This may not be accidental. Prosser concluded that there was no single privacy interest. He described his four categories as being:

- tied together by the common name, but otherwise
- hav[ing] almost nothing in common except that each
- represents an interference with the right of the plaintiff to "be let alone".28

Prosser's categories are unobjectionable, but unhelpful in this context. (However, these categories are noted in the discussion in Part III below. They are illustrative of some of the ways in which privacy may be invaded, and thus indicate some of the,

27. Prosser, supra n. 25, @ 389. Prosser was merely attempting to make sense of the American jurisprudence, and his categories may have succeeded in this. Some writers have suggested that an examination of the American cases would not be helpful. Kalven, H., 'Privacy and Tort Law - Were Warren and Brandeis Wrong?', (1966) 31 L. & Contemp. Probs. 326, @ 327, describes the American cases as unbeatably trivial.

otherwise legally recognised, interests with which privacy is allied.)

It is argued throughout this thesis that it is possible to identify some common element by which to distinguish privacy: that privacy is not simply a 'cluster of rights'. The categorisation-rather-than-definitional approach is rejected because it merely illustrates different types of interferences with autonomy, some of which also interfere with privacy.

2.1.3. Forswearing definition

The focus of this discussion is upon the concept of privacy, not the legal right to privacy. This distinction is important. Even where the attempt to define privacy is abandoned, privacy may be recognised and protected by law. A stipulative definition may be adopted for the purposes of legal analysis.

It is possible to distinguish between those states of affairs which give rise to liability and those which do not, by the adopting formal standards. In legal analysis, this generally

29. Thompson, J.J., 'The Right to Privacy', (1975) 5 (4) Philos. & Public Aff. 295, @ 306. See also Gerstein, R.S., 'California's Constitutional Right to Privacy: The Development of the Protection of Private Life', (1982) 9 Hastings Const. L. Q. 385, esp. @ 414: 'The difficulty ... is that there is no clear substantive concept lying behind the word "privacy" ...'
involves drawing 'conceptual lines and hence, using legal definitions'. To this extent, the use of definitions has been described as a 'salient feature of the legal reasoning process'.

There are at least four types of legal definition: syntactical, lexical, stipulative, and analytical. In general, a syntactical definition generally designates a legal term as a shorthand description; a lexical definition provides information about how a term is or has been used; a stipulative definition specifies how a word is to be used in a given context or in the future; and an analytical definition is intended to give 'directions as to how a term of art is to be applied to certain types of factual situations'.

It is the latter type of essence-stating definition which is sought here. Sparkes noted that

The essence-stating Socratic type of definition is usually not available. Most of our concepts simply do not have the requisite structure: Instead of a "common core", there is a "family resemblance". Sometimes the unifying element(s) is/are even more


31. Ibid., @ 377.

32. Ibid., @ 381.
complex and even less available to direct empirical sensing.\textsuperscript{33}

Thus far it has been patently lacking in the case of privacy. There is not the pool of identifiable and uncontroversial data from which to extract a clear statement of principle. As is indicated throughout this thesis, there is little unanimity about the types of action which may interfere with privacy and even less as to what types of injury should be treated as privacy-injuries. Some students of privacy, among them the Australian Law Reform Commission, laboured mightily in an attempt to produce a definition of privacy, and then conceded defeat.\textsuperscript{34}

But McCloskey, for one, has suggested that a failure to define privacy is not automatically a defeat:

Privacy is an ordinary language word, an ordinary language concept, not a finely honed philosophical or legal concept. This means that we may well find incoherences, inconsistencies in the ordinary concept such that, to be made a clear, coherent, useful concept, it needs to be clarified, modified,

\textsuperscript{33} Sparkes, supra n. 1, @ 58 (citations omitted).

\textsuperscript{34} Australian Law Reform Commission, Report No. 22, 'Privacy', [1983. AGPS. Canberra], vol. 1, @ 10 - 11, para. 20: according to the Commission, 'the term privacy [is] used to describe a genus of interests ... [and the Commission] stayed as close as possible to the ordinary language concept.' The A.L.R.C. studied privacy for seven years. See also Stephen, J.F., 'Liberty, Equality, Fraternity', [(1874) White, R.J. (ed), 1967. Cambridge Univ. Press. London] @ 120: 'To define the province of privacy is distinctly impossible but it can be described in general terms.'
and made to be such. However, if this is done in a very radical way, the new concept may lose its relevance to the ordinary language concept. I suggest, therefore, that the concept may be explicited as closely as possible to the ordinary language usage concept, and then, if privacy so understood seems in certain respects not to merit, or not to lend itself to, legal protection and assistance, this be said.35

The Australian Law Reform Commission professed to agree with him.36 Similar observations may be made about the term 'negligence'.

This approach should be rejected. It is vital to elucidate what is actually meant by privacy - what it is that is common to those injuries complained of in the name of privacy. The way that this phenomenon differs from other, perhaps overlapping, interests should be examined. In the result the ordinary language concept may have to be modified. This would not be so revolutionary a result: the ordinary language usage of a word frequently reflects, inter alia, its technical meaning.

In many cases, the technical definition departs from the ordinary language usage of a word. This is especially so where the


36. Ibid.
alternative is to formulate a technical definition upon the basis of the lowest common denominator usage of the word in ordinary parlance.\[37\]

The definition which is adopted will control the analysis of the obligation. Richard Bilder commented \textit{a propos} the concept of human rights:

The issue of definition is not trivial. For what we think human rights really are will inevitably influence not only our judgment as to which types of claims to recognize as human rights, but also our expectations and programs for implementation and compliance with these standards.\[38\]

This is particularly true of a common law based analysis. Similarly, the way in which facts are viewed and the fulfilment or breaches of obligations assessed may be determined by the forum in which they are mooted.

\[37\] Anology may lie to the interpretation of the Constitution of the Commonwealth of Australia. See esp. Attorney-General for N.S.W. \textit{v.} Brewery Employees Union of N.S.W. (the Union Label case), (1908) 6 C.L.R. 469, per Higgins J. @ 611-612; Jumbunna Coal Mine N.L \textit{v.} Victorian Coal Miners' Association, (1908) 6 C.L.R. 309, esp. per O'Connor J. @ 367-368; Australian National Airways Pty. Ltd. \textit{v.} Commonwealth (the Airlines case), (1945) 71 C.L.R. 29, esp. per Dixon J. @ 85; R. \textit{v.} Coldham; ex parte Australian Social Welfare Union, (1983) 153 C.L.R. 297, per curiam @ 314.

Bilder's remarks are clearly applicable to privacy. However, defining privacy will not resolve all of the difficulties surrounding the concept. As Weyrauch commented in another context, definitions frequently fail to yield the desired clarification.39

Privacy is not a precisely defined term in either legal or political discourse. As McCloskey pointed out, privacy is an ordinary language word. There is little point in analysing the concept in splendid isolation if the definition then postulated is inconsistent with the generally accepted meaning of the word. It would then be of little assistance as a juridical concept.

That is not to say, however, that the definition must be entirely consistent with the common usage. Perhaps analogy may lie to the word 'family' - an ordinary language word of variable breadth according to the context in which it is used; yet capable of bearing a distinct juridical meaning for certain purposes, such as in the law of succession. Similarly, consider the term 'sabbath': a word with a clear cultural meaning yet capable of applying to any one of several days according to the speaker's culture.

Schafer commented:

The most important criterion of adequacy for any definition is that the definition should "fit" the data. The data in this case would consist of our
shared intuitions of when privacy is or is not gained or lost, respected or violated.¹

These 'shared intuitions' are legion; and, because they are intuitive, they may be contradictory. However, it is helpful to contemplate briefly the ways in which the concept of privacy is invoked and the functions commonly assigned to it.

Privacy is a social practice² - a creature of life in society.³ It has been influenced by philosophical traditions such as those said to have been based upon natural law in its various guises. It reflects, and is largely dependent, upon the notions of individualism inherent in the 'lives, liberties and estates' postulated by writers such as Locke as being part of the private preserve and immune from public interference.⁴

Like all social practices, privacy is evolutionary in nature. In this sense, Warren and Brandeis appear to have been correct.


² Reiman, J.H., 'Privacy, Intimacy and Personhood', (1975) 6 Philos. & Public Aff. 26, @ 38.

³ Gross, H., 'The Concept of Privacy', (1967) 42 N.Y.U.L. Rev. 34, @ 36

Privacy concerns arise in a society only after bodily integrity and security of property have been secured. In the state of nature when life was 'solitary, poor, nasty, brutish, and short' there was little time to be concerned with 'spiritual nature, ... feelings and ... intellect'. The Oxford English Dictionary offers a definition which harks back to 1450: Privacy is the state or condition of being withdrawn from the society of others, or from public interest; seclusion.

It is difficult to argue with Altman's phenomenological characterisation of privacy as:

a boundary control process whereby people sometimes make themselves open and accessible to others and sometimes close themselves off from others.

In general, the reason behind a complaint that a person's privacy has been violated appears to be that the person's wishes in regard


to the drawing of this boundary line have been thwarted in some fashion. The question is whether this complaint should be entertained in the first instance.

The extent to which persons may wish to be 'open and accessible' may be thwarted when a stranger enters the public park in which they are relaxing; or when an errant correspondent fails to reply to letters; or when a creditor writes with a reminder of an outstanding debt. It would stretch credulity, however, to suggest that these circumstances should give rise to any right to complain, let alone to seek a remedy in some form involving the law.

The significance of this boundary control process has long been recognised. The problem is how, and where, to strike a balance between the societal and the individual interest - not a novel problem. This dilemma is not new. There are several distinct questions: should such a balance be struck (ie. should individuals be provided with defences against their society at all)?: how should it be struck (ie. by what mechanisms, procedures etc.)?: and where should it be struck? The long running debates over the third question will probably never end.

The first question is less controversial in a democratic society. It is an article of faith in a liberal democracy that the interests of the individual must be recognised to be in some respects distinct, or at least distinguishable, from those of the society at large.
The reason most commonly advanced in support of this distinction is that its recognition promotes (or is a sine qua non of) individual autonomy; and a democracy exists only if its citizenry retains at least some autonomy or independence.\textsuperscript{9} This factor - autonomy - is generally nominated as the answer to the second question: the way in which the balance is struck is by the recognition of the citizens' autonomy. However, there is a degree of circularity in this reasoning. To some extent, a democracy is defined as a society in which individuals are autonomous.

In the view of most privacy theorists (nearly all, if one were to disregard the Posnerian economists\textsuperscript{10}), privacy is integrally related to autonomy: one of the functions of privacy most commonly explicated is that of the promotion of autonomy.\textsuperscript{11} A brief examination of this function may be of some assistance in the elucidation of the concept of privacy, although it must be


\textsuperscript{10} Posner, R.A., 'Privacy, Secrecy and Reputation', (1979) 28 Buffalo L. Rev. 1, and 'The Right of Privacy', (1978) 12 Geo. L. Rev. 393, offers an economic-based analysis. According to Posner, one aspect of privacy is the concealing or withholding of information. 'This aspect is of particular interest to the economist now that the study of information has become an important field of economics.' (12 Geo. L. Rev. 393, @ 393.)

\textsuperscript{11} Gavison, R.E., 'Privacy and the Limits of the Law', (1980) 89 Yale L.J. 421, @ 448 et seq.
remembered that a description of what privacy does, is not a description of what privacy is.12

Many of the autonomy-based analyses of privacy rest upon Kantian theory. Essentially, they postulate that privacy is integral to ethical systems in which people are treated not as means, but as ends in themselves.13 Benn was one of the recent exponents of this thesis.14 He argued that a 'principle of non-inference' is derived from a commitment to a minimum principle of mutual respect where that respect means 'the recognition of an equal'.15 According to the Benn thesis, this general principle of privacy (ie. non-interference):

12. See Weisman, supra n. 9, @ 734.

13. Kant, I., 'The Philosophy of Kant', D.J. Friedrich (ed.), [1977. Modern Library Inc. N.Y.], @ 178: 'Act so as to treat man, in your own person as well as in that of anyone else, always as an end, never merely as a means'.


15. Benn, 1978, @ 605.
bars A from intentionally observing, reporting on, or otherwise participating in B's activities except at B's invitation or with his agreement.\textsuperscript{16}

This argument focuses attention upon the means according to which individuals' wishes in the boundary control process are disregarded, and centres upon that disregard, rather than upon the intrusion itself. In some senses at least, this must leave the analysis vulnerable to the criticism that it is of no practical use.

A society can recognise interests defined by reference to their possessors' subjective wishes only by requiring every member of the society to act at their peril. Members of the society are thus denied any means by which to determine in advance whether any given action, or omission, may give offence to another member of the society other than actually seeking the consent of every other member of the society. In practice, this is not satisfactory. Simply by the fact of membership of society, individuals must be said to recognise that their wishes cannot invariably prevail.

The autonomy-based concept of privacy appears to adopt a McCullum style concept of freedom.\textsuperscript{17} It views freedom as being

\textsuperscript{16} Ibid.

\textsuperscript{17} MacCullum, G.C. (jr), 'Negative and Positive Freedom', (1976) 76 Philos. Rev. 312.
freedom (of people defined as ends in themselves and inherently worthy of respect), from some constraint or restraint of some type (here an unwanted intrusion, observation etc.), to do or become something (here an autonomous individual). 18

Kelvin appears to have rested his analysis of privacy upon an analogous concept. He saw privacy as being a condition which was essentially the obverse of the condition under which an individual is subject to social power. 19 Kelvin described this latter as being the position of persons under the influence of another (or others) who forces them to act in a manner in which they would have been unlikely to act in the absence of that other. 20

However, Kelvin noted a crucial distinction: mere privacy (ie. the condition of a person not subject to social power) will not suffice to secure autonomy. Kelvin pointed out that people must be aware of this immunity:

18. Ibid., @ 314.


20. Ibid., @ 251.
Psychologically, privacy is *perceived privacy*, just as freedom is perceived freedom.21 (Kelvin's emphasis.)

If this is so, then it is not the boundary control process which is central to autonomy. It is the recognition of this boundary control process, however this recognition is secured, which is central to autonomy. In a sense, privacy itself may be irrelevant. Autonomy is primarily dependent upon perceptions.

It may be that the individual's knowledge or belief that the society at large recognises and respects the boundary control process is sufficient to secure the required autonomy. The fact that the boundary control process is actually disregarded may be irrelevant if the individual's perception is to the contrary.

Kantian theorists may consider that this duplicity of itself implies a disrespect for persons because respect is a fundamental requirement in its own right, not merely because it promotes (or may promote) autonomy. However, Kelvin's thesis may be borne out by an examination of the functions attributed to privacy.

21. Ibid., @ 252. This view was endorsed by Sundstrom, E., Burt, R.E., & Kamp, D., 'Privacy at Work: Architectural Correlates of Job Satisfaction and Job Performance', (1980) 23 (1) Academy of Management Journal 101, @ 101-102. See also Simmel, A., 'Privacy', in Sills, D.L. (ed), 'International Encyclopaedia of the Social Sciences', [1968. McMillan Co. & Free Press. N.Y.], Vol. 11, 480, @ 482: 'The greater the (perceived) probability than an action will be observed, the greater the probability that the action will be in compliance with the perceived social norms of the observer'. 
If it is true that people continually adjust their behaviour to take account of the presence of another, then each must be aware of the other's presence and of the type (if not the actual identity) of that other in order to make the appropriate adjustment. It is the knowledge or belief, however incorrect, that a person is free from observation, either generally or by some particular person as the case may be, which serves to remove the relevant inhibition - or perhaps to waive it temporarily.

3.1. 'Being-apart-from-others'

The condition of 'being-apart-from-others' appears to have two distinct functions. First, it provides the individual with an 'off stage' area in which to relax and rehearse the various


25. See Schwartz, supra n. 23, for a discussion of this.

social roles which people perform in their social lives. Secondly, it provides the society at large with 'some quotient of ignorance' which is, according to Moore and Tumin, necessary for the continuation of any social group.

The first of these functions has been seized upon by the defenders of privacy as demonstrating the importance of privacy in a democratic society. No longer are they restricted to pious philosophical claims such as

Privacy is a social ritual by means of which an individual's moral title to his existence is conferred.


29. Ibid. See also Merton, R.K., 'Social Theory and Social Structure', [1964. Free Press. N.Y.], @ 343 et seq.

The claim that individuals must be free to choose their 'masks' in order to be free may now be couched in socio-political terminology. This argument has considerable force in a democratic society.

It would seem that it is the recognition of an 'off stage' area which distinguishes a democratic society from a totalitarian one. There is thus some substance in Ryan's claim that 'the concept of a constitutional democracy has [historically] presupposed individual privacy in its widest sense'. Henkin, among others, has written elegantly upon the importance of individuals having the right to reserve some aspect of life to themselves in a political system which presupposes limited government.


32. See supra nn. 25 - 29, and accompanying text.

33. Ryan, E.F., 'Privacy, Orthodoxy and Democracy', (1973) 51 Can Bar Rev. 84, @ 85; Donnelly, J., 'Cultural Relativism and Universal Human Rights (1984) 6 Human Rights Q. 400, @ 416, comments: 'Privacy is of great value to the relatively autonomous individual, it helps to promote his individuality. It is, however, fundamentally foreign to traditional, communitarian societies as we can see even in English in the etymological connection between privacy and privation.'

Henkin, and Ryan, among others, have treated privacy as a pre-
condition for the existence of liberal democracy. There is
nothing novel in the proposition that some degree of separateness
must be recognised if the individual is to be given an opportunity
to exercise free and independent judgment in participating in the
decision-making processes of society.35 Consider, for example,
(in its simplest form) the argument for secret ballots.

This is not an argument for compulsory separateness. In some
contexts, individual separateness may be antithetical to
participation in the decision-making processes. (The decision-
making process is dependent upon a mixture of collective and
separate participation.) In this sense, privacy has come to stand
squarely in the civil libertarian tradition, the main thrust of
which is to declare certain areas of human activity (eg. religion,
speech and press) outside of the sphere of governmental
control.36

Random House. N.Y.], @ 546.

353, @ 373.
3.2. Related notions

Privacy is not the only phenomenon typified by an absence of unwanted access by others - a 'being apart from others'. Solitude, seclusion, secrecy and confidentiality also involve separateness. These related notions may, and often do, overlap. There is nothing strange about this: there are many grey or overlapping areas of philosophical discourse. However, these concepts are not synonymous. It is possible to differentiate between them in general terms.

Some preliminary distinctions must be drawn before examining these concepts in any detail. All these concepts have an adjectival element. Thus, for instance, a place may be secret; an item of information may be a confidence secretly communicated; or a person may withdraw into a secret place in order to be secluded, or to impart a confidence. For the purposes of the comparison with privacy, this discussion focuses upon the person and the activity, not upon the physical location.

37. Weinstein, supra n. 24. Some writers have focused upon this aspect to define privacy. For instance Skala, S.M., 'Is There a Legal Right to Privacy?' (1977) 10 Uni. Qld. L. J. 127, @ 127, describes the right to privacy as the 'claim of the individual to be protected from unjustifiable intrusions by the media and various governmental agencies.'

38. Simmel, supra n. 21, @ 480.
If the location were the primary factor distinguishing between these concepts, many private or secluded actions or communications would be classed as secret. The focus is thus upon the human perception and the human activity: not the place in which it happens to occur.

The focus is therefore upon the personal activity which is to be characterised, and where possible, irrelevant (frequently locational) considerations which otherwise might colour the transaction are disregarded. Thus, for instance, in considering the status of any given communication, the contents of the communication, and the motives or conduct of the persons privy to it should be examined, but the examination should not unduly influenced by the place in which the communication was made (unless there is some evidence that the location was chosen for reasons allied to the motives of the persons privy to the communication).

Solitude, seclusion, secrecy and confidentiality are all conditions of 'not being open to or shared with public'. These are different ways of being apart from others. Solitude is

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39. Wellman, C., 'A New Conception of Human Rights', paper No.8, delivered @ the World Congress on Philosophy of Law and Social Philosophy', 14-21, August, 1971, Sydney - Canberra, @ 15. He suggested that privacy is 'the opposite of being public', and the 'state of being unobserved or unknown, confidential, undisturbed or secluded'. Moore, B.(jr), 'Privacy: Studies in Social and Cultural History' [1985. M.E. Sharpe. N.Y.], took a similar view. Perhaps the distinctions drawn here are a product of a twentieth century democratic economy.
essentially a condition of being alone: it is the condition of the last person on earth, straddling the border between isolation (and loneliness) and Thoreau’s seclusion. It may be the condition of the contemplative recluse, or of the paranoid schizoid, or of Robinson Crusoe. It is a condition into which a person may withdraw, or into which a person may be impelled by superior force. It is a condition of 'aloneness' and isolation, but not necessarily peaceful retreat.

Seclusion is closely related. Unlike solitude, the term seclusion lacks negative connotations. Like privacy, seclusion is an interactive concept: it is a condition into which a person may withdraw, either alone or in the company of a chosen few. Seclusion requires a isolation in the sense of 'apartness', but not necessarily 'aloneness'. Like solitude, seclusion is a

40. Guntrip, H., 'Schizoid Phenomenon, Object Relations and the Self', [1968. Hogarth Press. London], @ 205, argued that 'being alone may involve either isolation or privacy'.

41. Uniacke, S., 'Privacy and the Right to Privacy', [1976-77] A.S.L.P. 1, @ 20, suggested that it is meaningless to describe such a person as having privacy. See also Fried, supra n. 14, @ 482.


43. Kelvin, supra n. 19, @ 253: 'solitude may be regarded as a special case of isolation'.

44. Finighan, W.R., 'Leave Me Alone, But ...', (1978) 22(10) Hemisphere 16, @ 17; Laufer and Wolfe, supra n. 27, @ 33; and Gross, supra n. 3, @ 35.

45. Uniacke, supra n. 41.
condition into which a person may withdraw; but, unlike solitude, it is not a condition which befits a 'cheereles[sic] mood'.

An intrusive, external noise or evidence of an oppressive presence may violate seclusion as effectively as the intrusion of an unwanted third party. Seclusion is a condition which is sought as an escape: 'Oh blest seclusion from a jarring world, Which he, thus occupies, enjoys'. It is typically a condition into which a person retreats in search of peace, or relief: not a condition into which a person is impelled. Expressed briefly, the distinction is that seclusion involves being away from others, but not necessarily alone; whilst solitude involves being alone, but not necessarily away from others.

Either solitude or seclusion may serve some of the functions ascribed to privacy: each provides individuals with opportunites


for role-rehearsal and relaxation, and each offers relief from exposure to social power. However, in neither case does the circulation of information about them affect their existence. (The circulation of information may affect the use to which solitude or seclusion is put, or the valued placed upon it.) Thus, for example, Thoreau's seclusion was not impaired when he, or others, wrote about his experiences.49

Secrecy, confidentiality and privacy are closely related notions, and, in turn, all three are closely related to seclusion and solitude. A person may enjoy seclusion by withdrawing into a secret place; or may be involuntarily confined in solitude in a secret place.

In some cases the term selected may be chosen casually. In other cases, the selection may have been deliberate, the choice being governed by the connotations desired. As Gavison commented, secrecy has an 'unpleasant sense'.50

49. Supra n. 42. Some writers have viewed privacy as being very similar to seclusion — eg. Winfield, P.H., 'Privacy', (1931) 47 L.Q.R. 23, @ 24: 'infringement of privacy is unauthorized interference with a person's seclusion of himself or of his property from the public.' See also O'Brien, 'Privacy and the Right of Access: Purposes and Paradoxes of Information Control', (1978) 30 Admin. L. Rev. 45, @ 63: 'Privacy denotes the seclusion or withdrawal of an individual from public affairs'; and Note, 'Protecting Privacy Under the Fourth Amendment', (1981) 91 Yale L. J. 313, @ 330, fn. 85.

50. Gavison, R.E., 'Privacy and its Legal Protection', [1975. D.Phil. thesis (unpublish.), Oxford]. The relevant sections of her thesis were published in (1980) 89 Yale L.J. 423 (supra n. 11). References are made to that article, see @ 434, fn. 40. See also Warren, C., & Laslett, B., 'Privacy and Secrecy: A Conceptual Comparison', (1977) 33 J. of Soc. Issues 43, @ 44: 'Secrecy implies the concealment of something which is negatively valued by the excluded audience and, in some instances, by the perpetrator
Both secrecy and confidentiality involve the notion of selective disclosure.\textsuperscript{51} However, regardless of the reason for the concealment, the notion of secrecy connotes a desire for concealment \textit{simpliciter}, whilst the notion of confidence connotes the imposition of conditions upon knowledge and well as a desire for concealment.

Information is confidential because of the conditions relating to its acquisition: because it was communicated literally 'with trust'. Thus, for example, information is described as confidential where it is communicated by virtue of employment (eg. upon condition that it will not be used or relied upon in circumstances outside of those directly related to its communication); or is voluntarily imparted upon the condition that the recipient will not disseminate it further (for instance, where it is imparted in private upon a mutual understanding of confidentiality).

A secret may be discovered by, or known only to, one person. Alternatively, a secret may be known jointly or severally by a number of people who may not be acquainted with each other or even

\begin{quote}
... Privacy, by contrast, protects behaviour which is either morally neutral or valued by society as well as the perpetrators.'
\end{quote}

know of one another's existence. By contrast, a confidence arises out of a particular relationship - one in which one person communicates information to another. Consequently, there must always be at least two persons who know the information which is the substance of the confidence - although the confidence may continue after the death of all save one of the persons.

Similarly, when information is held in confidence between a number of persons, each must be acquainted with all of the other persons privy to the confidence. As between those persons who are not acquainted with each other and/or the fact that the information is commonly (and covertly) held, the information is secret.

Something may be secret so long as it is not known to the world at large. The degree of secrecy may be affected by the number of the person's privy to it. However, something may remain a secret when it is learned by a third party contrary to the wishes of the persons privy to it, provided that the third party does not publish the information to the world at large or at least does not inform the particular individual from whom it is intended to be kept secret.52 For this purpose, it is irrelevant how the third party learns the information, and why that third party elects not to publish it.

52. But contra: Benn, supra n. 47, @ 603 (although the example Benn postulated is consistent with the suggestion that something remains secret if it is not disclosed to the person from whom it was intended to be concealed).
By contrast, a confidence exists only by the agreement of the persons privy to it. A confidence may be breached when one of the persons party to it communicates it to a third person, or uses it, in derogation of the terms under which it was communicated.

Where the confidence is learnt by a third party who is not party to the confidential arrangement, and is thus immune from the obligation of confidence, the 'confidence' may be a secret vis-a-vis that third party, whilst remaining a confidence as between the persons party to the confidential arrangement. This may be so even where the third party is obliged to keep the 'confidence' secret.

In theory, although very rarely in practice, the obligations attaching to a confidence may remain after the information has been communicated to the world at large. Suppose, for instance, A communicates information to B in confidence upon the condition that B will not use that information in some specified manner. If the information is subsequently revealed to the world at large, although neither A nor B has breached the confidence, any third party who discovers the information lawfully may use the information in any lawful manner. However, the obligation of confidence may still preclude B from using the information in the manner originally specified until A releases B from B's undertaking since, as between A and B, the information remains a 'confidence'.

53. In practice, of course, in these circumstances A would be likely to release B from the undertaking. If A were to decline to release B, it is unlikley (in the absence of special circumstances) that a court would compel B to comply with the
In this hypothesis, the position would have been different if A had communicated the information to B as a secret. Where (through no fault of either A or B), the information is disseminated to the world at large, it would cease to be a secret, and either A or B would be free to use the information as they choose.

Privacy is akin to secrecy in that information may be known to only the one person. Privacy is akin to confidence in that it may be violated whenever a stranger learns the information contrary to the privacy-claimant's wishes, yet information will remain private notwithstanding that it has been discovered by or communicated to the world at large. The communication may interfere with a person's privacy; but privacy does not cease to exist as a result. Were this not so, a person could not complain of an invasion of privacy after an initial invasion.

It must be emphasised that the examination of the socio-political privacy interest(s) is(are) distinct from, and preliminary, to an examination of any legal interest in privacy. Consequently, Parent's definition of privacy as excluding the 'knowledge of documented personal information' is rejected.54 If this were to be accepted, in many cases people would be unable to complain of an invasion of privacy after the initial invasion.

undertaking.

Parent appears to have fused an analysis of what privacy is with an analysis of the circumstances in which a person may be liable for invading the privacy of another. Consequently, Parent attempted to exclude from the notion of privacy anything which had entered into the public domain, regardless of how that occurred.

Parent relied upon the Sidis case55 to justify his distinction:

Suppose that A is browsing through some old newspapers and happens to see B's name in a story about child prodigies [or convicted felons] ... Should we accuse A of invading B's privacy? An affirmative answer needlessly blurs the distinction between the public and the private. What belongs to the public domain cannot without glaring paradox be called private and consequently should not be incorporated within a viable conception of privacy.56

As is discussed below in chapter 26, there may be many circumstances in which people who (intentionally or otherwise) invade others' privacy should be immune from legal action in the name of privacy. However, this raises considerations distinct


56. 2(3) L. & Philos., @ 308, supra n. 54. See also 20 Am. Phil.Q., @ 347, supra n. 54 (convicted felons used as the illustration).
The terms secret and confidential may overlap in many circumstances. Where information relates to a thing, the thing may be a secret, whilst the communication is confidential. Yet in casual parlance, the communication may be described as 'secret' rather than 'confidential', especially when pejorative connotations are intended. Alternatively, the communication may be described as being of a secret in confidence. For example, if B tells C in confidence what B has bought D for D's birthday, the gift may be a secret, whilst the communication, made 'with trust' that C will not divulge it, may be confidential. The communication is thus a 'secret', or at least information about a secret, communicated in confidence. The information about the gift (the secret), was itself secret when known only to B; it became a confidence as well as a secret only when it was imparted to C upon the understanding that C would keep it to C.

Whereas a communication may be either a confidence or a secret, in general, only a communication can be confidential - or a confidence. However, where the communication gives notice of a thing, this latter may be a secret. It follows from this that a secret may be either a thing or a communication.

In general, a communication is either secret or confidential because of the way in which it was acquired or generated, or the
effects upon others of its dissemination, or the conditions under which the recipient was initiated into its possession.

Privacy has a different focus. Unlike secrecy and confidentiality, privacy is determined by the substance of information, regardless of the number or nature of the persons privy to it. It is not because of the obligations surrounding or arising out of the circumstances in which the information is communicated that private information should not be publicized.

Information is private because it is of a type which, by its nature, is non-public in that there is no reason for the society at large to be made privy to it.\footnote{57} This is so regardless of circumstances which may justify a given third party from disregarding, or overruling, the subject's wishes and obtaining access to that information.\footnote{58}

However, human curiosity is widespread; and societies have an interest in the conduct of their members. Perhaps the essence of privacy is to be found in what Uniacke described as the 'nobody else's business' overtones of its assertion.\footnote{59}

\footnote{57. Shils, E.B., 'Privacy: Its Constitution and Vicissitudes', (1966) 31 L. & Contemp. Probs. 281, @ 283, fn. 1: 'In secrecy, disclosure or acquisition beyond the boundary is prohibited, ... In privacy, disclosure is at the discretion of the possessor ...'

58. This distinction is reflective of the distinction between privacy and the right to privacy. See the discussion in chapter 26 below of the possible defences to an action for privacy.

The problem is how to determine what it is that is 'nobody else's business' without relying exclusively upon the wishes of the privacy-claimant. For the present, it is presumed that this is possible. The criteria by which this determination may be made are discussed in detail below.  

Closely related as they may be, these concepts may be divided into two types: those presupposing some form of physical separateness (seclusion and solitude); and those not bearing any such presupposition (secrecy and confidentiality). Privacy appears to be of the latter category. A person may enjoy the same amount of privacy whilst standing in a crowded room, as whilst enjoying a stroll in a forest. Conversely, privacy may be abrogated by the same act, regardless of whether the person is in a crowded room or alone in a forest.  

For example, Thoreau's privacy would have been invaded if person C had learned some intimate detail about Thoreau's relationship with his parents which Thoreau did not want C to learn, even though the information was communicated to no-one. (C may have deduced the information without it having been communicated by anyone else.) If C did not reveal this information, it may have been a secret,  

60. See page 108 et seq. below.  

61. But see Winfield, P.H., 'Privacy', (1931) 47 L.Q.R. 23, esp @ 24 for a contrary view: 'infringement of privacy is unauthorized interference with a person's seclusion of himself.'
which was also known by Thoreau. (It may also have been a secret which was not known to Thoreau.) However, only C would have held this secret - it was not a confidence which C shared with Thoreau because Thoreau did not impart it to C (and would not have done so 'with trust' if Thoreau objected to C's learning the information). However, neither Thoreau's solitude nor his seclusion would have been affected by C's learning the information. Nor would Thoreau's seclusion or solitude have been affected if C had published the information to the world at large. However, this publication would have exacerbated the invasion of privacy which had occurred when C learnt the information), and vitiated the secret. The fact that Thoreau's privacy had already been interfered with by C learning the information would not mean that C's subsequent dissemination of the information constituted any less of an invasion of Thoreau's privacy.
In the earlier discussion, it was emphasised that only actual physical intrusion affects solitude. Actual physical intrusion does not include the glint of binoculars nor the flash of a camera globe. Consider the situation hypothesized in chapter 2 when intruder, C, observed person, A, in A's bedroom without A's knowledge or consent, and assume further that A had not consented to the intruder's observation. A's solitude (assuming that A was alone) was not affected by the intruder's observation, and it would not be affected until C actually entered the room. By contrast, the value of A's seclusion may have been undermined the instant that A became aware of that observation.

To the extent that seclusion is subjective, A's seclusion would have been affected only if A were aware of the unwanted presence or observation. A's seclusion would not have been affected by mere observation. It would be affected by A's knowledge that A was no longer screened from view. If A were to remain ignorant of the observation, A's seclusion would be unimpaired. In this sense, seclusion is similar to perceived privacy. However, A's solitude would be unaffected by either the fact of observation, or A's knowledge of the observation. In the paradigm solitude case -
that of the isolated prisoner - the subject is frequently aware of some (occasionally unknown) observer.

Suppose that A had agreed to the observation. A's seclusion would not have been affected by the presence of an observer to whose presence or observation A had consented. A's solitude may not have been affected by A's knowledge of the observation. However, A's solitude would have been affected by C's presence, regardless of whether A was aware of, or consented to, the presence. The fact that the observer, C, subsequently describes to another, or to the world in general, what C observed whilst watching A in A's seclusion will not destroy that seclusion or solitude ex post facto, regardless of A's opinion of that disclosure.

The position in respect of privacy is different. If A had consented to the observation, the observer would not have invaded A's privacy by observing A. Were C subsequently to describe to another, or to the world at large, what C observed, that disclosure would invade A's privacy, unless A consented to that disclosure. The distinction between solitude and seclusion on the one hand, and privacy on the other, is thus that the latter is affected by the circulation of information, whilst the former is affected only by the actual presence or observation of others.

This distinction is compatible with the autonomy-based function of privacy which was discussed above on pages 52 - 56. Roles cannot be relaxed or rehearsed 'in private' if a description of that
process is to be made available to the people before whom the relaxation or rehearsal is thought (by the individuals concerned) to leave them vulnerable.

If this approach is correct, then the concept of privacy must have some connection with the circulation of information; or at least with the circulation of some type(s) of information. This is confirmed by Alan Westin's analysis of privacy which has been almost as influential as that by Warren and Brandeis.

Westin focused upon the significance of the circulation of information to postulate the following definition:

Privacy is the claim of individuals, groups, or institutions to determine for themselves when, how, and to what extent information about them is communicated to others.2

Westin's analysis has been widely accepted, albeit with the addition of 'glosses' or the expression of minor


2. Ibid., @ 7. Note that the Report of the Canadian [Parliamentary] Standing Committee on Justice and Solicitor General on the Review of the Access to Information Act and the Privacy Act, 'Open and Shut: Enhancing the right to know and the right to privacy', (Chairman, Blaine A Thacker, M.P.) [March, 1987. Report presented to (and available from) the Canadian House of Commons. To be issued as a Canadian Parliamentary Paper?], @ 58, para. 5.24, recommends that this definition should be added to section 3 of the Canadian Privacy Act.

3. Eg. Lusky, L., 'Invasion of Privacy: A Clarification of Concepts', (1972) 72 Col. L. Rev. 693, @ 695; Beardsley, E., 'Privacy, Autonomy, and Selective Disclosure', in Pennock J., and
reservations. His central assumption, that privacy consists of 'selective disclosure'5 and control of the circulation of personal information,6 is fundamental to many of the analyses of privacy.

Chapman, J. (eds), Nomos XIII, 'Privacy', [1971. Atherton Press NY.], 56, esp. @ 65; Ballard, D.P., 'Privacy and Direct Mail Advertising', (1979) 47 Fordham L. Rev. 495, @ 495, described a primary privacy concern as being the capacity of individuals to control how information is used; Note, 'Protecting Privacy Under the Fourth Amendment', (1981) 91 Yale L. J. 313, @ 329, suggests that the essence of privacy is two-fold: the ability to keep personal information unknown to others and to keep self separate from others; Clouse, G.R., 'The Constitutional Right to Withhold Private Information', (1982) 77 NW. U. L. Rev. 536, @ 537, suggests that the right to privacy is the right to make personal decisions and not to disclose private (personal) information.


privacy. Privacy is affected by the circulation of personal information. Loaded as it is, the notion of the 'personal' seems to be central to Westin's concept of privacy.7

The introduction of this qualification - personal - adds a value bias. As Dunlap noted, the description 'personal' is never value free: it involves at least some reference to phenomena external to the person, be they natural, social, or political.8 Presumably Westin would accept this. In his comprehensive study of privacy, he emphasised that democratic societies are characterised by a 'fundamental belief in the uniqueness of the individual'.9

Technology Report, 'Privacy and Behavioural Research, [1967, U.S. Govt Printer, Washington D.C.], @ 2; Gross, H., 'Privacy and Autonomy' in Pennock & Chapman (eds.), supra n. 3, @ 169: control over acquaintance with one's personal affairs; Rosenberg, J.M. 'The Death of Privacy', [1969. Random House. N.Y.], @ 193, 194: right to determine 'how, when, and to what extent data about oneself are released to another person'; Griesser, G., (ed.), 'Data Protection in Health Information Services', [1980. North Holland. Amsterdam], @ 2 (1.1.1.); most of the papers in Rowe, B.C., (ed.), 'Privacy, Computers, and You', [1972. NDL. London] exemplify this approach. Walker, G. de Q., 'Information as Power', (1986) 16 Qld. L. Soc. J. 153, @ 161; Murdock, L.E., 'The Use and Abuse of Computerized Information', (1980) 44 Albany L. Rev. 589, @ 600 comments that this is the definition of 'information privacy'. But see the discussion below as to the validity of this distinction.


8. Dunlap, ibid, esp.@ 50-52.

9. Westin, supra n. 1., @ 33.
The determination of the ambit of the 'personal' is difficult. It goes to the crux of the Hart/Devlin debates. Ultimately, the view taken on this issue will determine what is privacy. The wider the notion of the 'personal', as it may variously be defined, correlatively the more expansive is the notion of privacy. The converse is equally true.

Accordingly, in a society which Westin would describe as a 'modern democratic state', Dunlap's observation is applicable:

The narrower and more restrictive the "personal" is considered to be, the less government is accountable for claims of deprivation of privacy. And the more expansive and broader the "personal" is considered to be, the more accountable government becomes for such claims.

Westin treated privacy as a claim. He described privacy as being:

neither a self-sufficient state nor an end in itself, even for the hermit and the recluse. It is basically an instrument for achieving individual goals of self-realization.

10. Ibid. See generally chapter 6 below.

11. Dunlap, supra n. 7, @ 51.

12. Westin, supra n. 1, @ 39. His reference to the hermit and recluse suggests that Westin treats as 'privacy' states of 'being-apart-from-others' such as solitude or seclusion.
However, he seemed to be somewhat equivocal about this.

Westin described many 'claims to privacy or expectations of receiving privacy ... [as arising] out of certain statuses - rich man, university professor, corporation executive, lawyer, and the like.'\textsuperscript{13} Substituting his definition for the word privacy, Westin would have been referring to 'claims to the claim...' It is unlikely that this is what he meant.

Westin conceived of privacy as performing four functions for individuals in democratic societies: 'personal autonomy, emotional release, self-evaluation, and limited and protected communication'.\textsuperscript{14} He appears to have applied the term privacy to all of the states of 'being-apart-from-others' which were discussed in the previous chapter. There are a number of problems in his approach.

First, Westin's characterisation of privacy as a claim seems to be incorrect. As was discussed earlier, and is evident from Westin's analysis, one of the functions served by privacy is the provision of some form of social insulation. To this extent, privacy must be a condition: something which may exist in the absence of any affirmative action on the part of a beneficiary. In this sense, privacy cannot be a claim: a claim exists only when it is made by its claimant. It requires a deliberative act.

\textsuperscript{13} Ibid., @ 40.

\textsuperscript{14} Ibid., @ 32.
It is possible to make a claim only after the interest claimed has been identified. Westin recognised this when he noted that the way in which individuals 'claim reserve' is central to privacy and varies from culture to culture.\(^\text{15}\) However, unless there is some culturally accepted area of reserve, an individual's claim may rest upon nothing more than the claimant's social power. Westin suggested that even the hermit and the recluse have privacy, and he saw privacy as being linked to the 'uniqueness' of the individual. Presumably, therefore, he considered that it was possible to identify some minimum content of privacy.

Westin described privacy as protecting the individual's 'core self'.\(^\text{16}\) This appears to rest upon rather circular reasoning. According to Westin, a free society leaves to individuals the right to decide for themselves, 'with only extraordinary exceptions in the interests of society', when and on what terms their acts should be revealed to the general public.\(^\text{17}\)

However, this begs the question of what is a 'free society'. If one individual wishes to conceal actions from a society, is that society 'free' if there is no overwhelming interest in their being

\(^{15}\) Ibid., @ 29.

\(^{16}\) Ibid., @ 33.

\(^{17}\) Ibid., @ 42.
revealed, and they are revealed? What constitutes an 'extraordinary exception in the interest of the society'?

Westin insisted that the basic point is that individuals must, 'within the larger context of ... culture,... status,... and personal situation' continually adjust between their need for 'solitude and companionship; for intimacy and general social intercourse; for anonymity and responsible participation in society; for reserve and disclosure'. However, his definition provided no criterion by which to make this adjustment other than the individual's wishes.

In the earlier discussion, the point was made that a society cannot recognise an interest which is defined exclusively by reference to its possessor's subjective wishes. One consequence of describing privacy as a claim is to pre-empt the question whether, and, if so, to what extent, privacy should be recognised.

To some extent, Westin's analysis appears to have been confused by a fusion of two different enquiries. He attempted to define an abstract privacy-interest by describing the circumstances in which a person's claim to reserve should be recognised, for whatever reason. Rather than identifying distinctly the interest (privacy), and the circumstances in which a person should be heard to complain of its abrogation (the right to privacy), Westin appears to have fused his analysis so as to describe privacy as

18. Ibid.
the thing asserted. He thus failed to address those circumstances in which an otherwise acceptable claim to reserve may be overridden by societal interest; and how that social interest may be recognised. Consequently, he does not appear to have provided any criteria by which to assess the worth of any 'claim by individuals ... to determine ... when, how, and to what extent information about them is communicated to others.'

Lusky was one of the first writers to take issue with Westin's definition. He accused Westin of confusing by oversimplifying. Lusky attempted to illustrate this criticism by sketching two quite different situations which would fall within the Westin definition, each of which would involve an invasion of privacy on the Westin analysis: (i) the Time Inc v. Hill situation in which people who had been held hostage were subsequently unable to escape from publicity about the incident; and (ii) the position of a credit applicant damned by the 'confidential' report of an erstwhile creditor which stated that the applicant failed to pay a bill on a previous occasion but omitted to disclose the reason for the non-payment.

These examples were well chosen. In the first instance, Time Inc. v. Hill, the objection was not to the circulation of information that hostages had been taken per se, but to the plaintiffs' identification as those hostages. It was this latter item of

19. Lusky, supra n. 3.
information which, in their view, was private in the sense that there was no reason why it should have been published.

The second situation, on the other hand, is different. The credit applicant's objection was not to the circulation of information per se, it was to the circulation of information which was connotatively false. The applicant did not fail to pay the bill: the credit applicant refused to pay because the creditor, in the view of the debtor at least, failed to discharge his contractual obligations, or failed to discharge them properly. The objection was thus to a misrepresentation which unjustly injured the debtor's reputation. The complaint was not of invasion of privacy: it was of defamation - a claim based upon the circulation of insufficient information which, by its omissions, misrepresented the position of the debtor.

Lusky's two examples were of situations in which the two interests were clearly distinct. However, there are situations in which it is not so easy to differentiate between the interests underlying the objections to the circulation of information. This is illustrated by some of the situations which are examined below in Parts II and III of the thesis.

To the extent that Lusky's examples are a fair application of Westin's definition, they illustrate its primary defect. It fails to contemplate the distinction between the circulation of false information and circulation of privacy-relevant information. It
offers no criterion by which to identify the types of information, which, if circulated, may affect privacy.

Information is neutral. The consequences attributed to information derive less from information in the abstract than from the way in which information may be used, not used or communicated etc. Consequently, the focus of this analysis is upon the circulation of information.

The word circulation is used here stipulatively. If person C discovers information X about person A, and that information was not previously known by any person, the information can not be said to have been communicated to C. If C then records that item of information and person T steals, or otherwise without C's knowledge or consent, learns the information from person C, it may not be possible to say that C communicated X to T. However, whether the information is accidentally discovered, deduced, communicated, or stolen, information X may be said to have been circulated to the person by whom it was learnt.

Similarly, if C consciously communicates information to person T, the information may be said to have been circulated to T. The word circulate is thus used to complement the word learn. However, for the reasons which are discussed in Part II, the two terms are not identical. Information X may be said to have been circulated to person C when it is deduced from raw data by C's

21. See the discussion of the types of legal definition above - chapter 2, page 43, text accompanying n. 32.
computer and then used indirectly by C, who may never be cognizant of all of the information 'known' to the computer. C cannot be said to have learnt information X because it may never come to C's actual knowledge - although C may be said to have constructive knowledge of X. This point is discussed in chapter 7 below. 22

An objection to the circulation of false information is unlike an objection to the circulation of private information. The first objection is not to the circulation of the information should not be circulated (either generally or to particular persons). It is an objection to the fact that the information circulated is false: that the subject of the information is being misrepresented in some sense.

This distinction may be illustrated by an example. Consider the complaint that a person has been incorrectly described as homosexual. The complainant may object to the discussion of sexual orientation on the grounds that this is a private matter, and the circulation of any information about it is therefore objectionable and interferes with privacy. The second, distinct, objection is that this particular item of information is false: not merely that the matter should not have been discussed, but that the discussion is injurious because it is false.

The one statement - that person A is an homosexual - may therefore provide the grounds for two quite distinct complaints: invasion of

22. See discussion below at page 155 et seq.
privacy (circulation of information about a private matter), and
defamation (the false and damaging allegation). The common ground
of these complaints does not mean that they are identical.

This point may be illustrated by reversing the example. Suppose
that the false allegation is that person A is an heterosexual.
The fact that this allegation is not injurious (in the sense
contemplated by the law of defamation), and thus does not provide
grounds for a complaint of defamation, may not derogate from the
complaint that privacy has been invaded if the shared community
expectation is that sexual conduct is a private matter and A
subscribes to this.

4.1. Control over the circulation of information

Westin used the term 'communication' of information in a manner
similar to the way in which the term 'circulation' is used in this
thesis. Most of the writers who adopted the Westin thesis appear
also to have adopted this use of the word communication. In
general, they appear to have assumed that the person who has
control over the communication of information is able to control
the learning of that information by third parties, whether by
deduction, accidental discovery or actual communication.
Lusky accepted Westin's primary contention that privacy subsists in the control of (the circulation of) information. However, he rejected Westin's treatment of privacy as a claim. He argued that the 'basic term' should describe the interest which is under consideration but should not carry any legal connotations. Accordingly, Lusky re-worked Westin's definition to 'begin' as follows:

Privacy is the condition enjoyed by one who can control the communication of information about himself.23

This revision was adopted by Miller, among others.24 However, it does not overcome the second problem implicit in the Westin definition. It offers no means by which to identify the types of information about people, the circulation of which may affect privacy, nor in what circumstances the circulation of this information should be limited.

Parker developed this latter point in 1974. He pointed out that:

Not every loss or gain of control over information about ourselves is a loss or gain of privacy.25

23. Lusky, supra n. 3, @ 709 ('begin' is Lusky's description of what he was doing); See also Schafer, A., 'Privacy: A Philosophical Overview', in Gibson, D. (ed), 'Aspects of Privacy Law', [1980. Butterworths. Toronto], 1, @ 9.

24. Supra n. 5.

Rather than attempting to identify the type, if there is any particular type, of 'information about ourselves', the circulation of which may affect privacy, Parker forswore the notion of information at all. He agreed that privacy is:

> often used to control the circulation of information about ourselves,\(^26\)

but postulated a new, sensory-based, definition. He argued that privacy is control over when and by whom the (physical) parts of us (as identified persons) can be seen or heard (in person or by the use of photographs, recordings, TV., etc.) touched, smelled, or tasted by others.\(^27\)

Parker's postulate is similar to Westin's in so far as Parker assumed that the control over the sources of information was tantamount to control over the information itself. However, Parker's concept of privacy appears to have been wider than Westin's. If Westin's definition were applied, privacy would be invaded whenever a person communicated, or used, information about another person contrary to that other's wishes, regardless of how that information was learnt. If Parker's definition were to be applied, people would interfere with privacy whenever they deduced, or even faintly suspected, any information about each other.

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\(^{26}\) Ibid., @ 281

\(^{27}\) Ibid., @ 283 - 284.
Lusky's example of the problems inherent in the Westin notion of privacy may be adapted to illustrate the deficiencies in the Parker concept. Under the Westin definition, privacy may be:

invaded, or at least affected somehow, if my one neighbor[sic] tells my second neighbor (without my consent) that I am a vegetarian, or that I am suffering from spring fever, or that I like oysters.28

The Parker view would take this one step further. Privacy would be lost not by one neighbour telling another that the subject is a vegetarian; but by that first neighbour 'sensing' that the second is a vegetarian.

If this is so, privacy may exist only where the subject has complete control over the spatial environment - something which is rather difficult to envisage in any society. As Gerety noted:

No two people [could]... pass in the street without invading each other's privacy'.29

The Parker definition seems to suffer from the same defect as Warren and Brandeis' slogan: it is both too broad and too narrow. Taken literally, privacy as defined by Parker would subsume virtually every form of legal injuria involving 'a bodily

28. Lusky, supra n. 3, @ 695.

sensation of another', 30 yet fail to embrace some of the more commonly accepted examples of invasion of privacy.

Consider, for instance, the position of people about whom dossiers are compiled by the collation of various disparate items of information so as to reveal information which the subjects wished to conceal (either generally or from the particular dossier holder). 31 This may be done without in any way 'sensing' the subjects or any of their parts. (Parker defines 'parts' so broadly to include 'objects very closely [spatially] associated with us ... [which] we usually keep with us or locked up in a place accessible only to us ... [such as] the contents of our purse, pocket, or safe deposit box, or the pages of our diaries'. 32) Strictly applied, the Parker definition does not treat compiling a dossier as involving any loss or invasion of privacy. Parker was aware of this deficiency. He attempted to remedy it by describing the practice of gathering information about individuals as threatening or lessening the value of privacy. 33

At the beginning of his discussion, Parker nominated as one of the three requirements of any definition that it should 'fit the

30. Ibid., @ 267.

31. See also Schafer, supra n. 23, @ 12, on this point.

32. Parker, supra n. 25, @ 281.

33. Ibid., @ 284-285.
His postulate does not do so. It fails to take into account one of the widely accepted examples of interference with privacy (compiling dossiers). This deficiency cannot be remedied by tagging on to the definition a new category - activities which lessen the value of privacy.

Gavison offered the view that:

privacy is a situation (or a condition) of an individual vis-a-vis others, which is related to the extent to which X is known to others, is physically accessible to others, and is the subject of others' interests or attention.\(^{35}\)

According to Gavison's analysis, individuals lose privacy when they become the subject of attention, or others gain physical access to them. As in the case of the Parker definition, this assumes that 'perfect privacy ... is impossible in any society'.\(^{36}\)

The object of identifying privacy is to ascertain under what circumstances an individual may be heard to complain of an injury (an invasion of privacy) of which the law may (or should?) be cognizant. This being so, it seems to be important to be able to

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34. Ibid., @ 276


36. Gavison (1980), ibid., @ 428.
distinguish between a reduction of the ambit of privacy and an invasion of privacy. Just as a caress is not necessarily an assault (although it does reduce 'spatial aloneness'), so the exposure of a person may not invade privacy.

The Gavison view does not seem to permit this distinction. Individuals lose privacy as defined by Gavison whenever they enter society, and any given action, condition or circumstance simply aggravates this. Thus, according to Gavison's thesis, A loses privacy when C enters a room in which A is present and C becomes 'aware' of A's existence. C's knowledge of A's presence in the room aggravates this loss of privacy; and this loss of privacy is further aggravated if C talks to A.

This is not a particularly helpful approach. It is more useful to identify the circumstances in which the quantum of privacy a society allows to each of its members, in the abstract, is reduced. There does not appear to be much point in commencing this analysis by hypothesising a theoretical world in which people possess perfect privacy and treating each social transaction as reducing this privacy.

There must be some way in which, first to balance this notion of 'perfect privacy' against the dictates of the society in order to determine the quotient of privacy permitted to each member of that society; and secondly, to determine whether this has been impaired. What is needed is some criterion by which to identify objectionable losses of, or invasions of, privacy. This criterion
must not itself determine whether the invasion of privacy should occur.

Gavison claims that privacy is lost whenever 'a stranger ... chooses to sit on "our" bench even though the park is full of empty benches'.\(^\text{37}\) This cannot be correlated with the earlier discussion of the function(s) of privacy. The individual's 'spatial aloneness has been diminished'.\(^\text{38}\) It is possible that seclusion or solitude has been reduced. However, privacy is not necessarily affected in any way.

Further, as Fried noted, privacy is not always affected by all types of information about people. Fried illustrated the difficulties which may arise out of treating all information about persons similarly with the following example:

We may not mind that a person knows a general fact about us, yet feel our privacy invaded if he knows the details. For instance, a casual acquaintance may confidently know that I am sick, but it would violate my privacy if he knew the nature of my illness. Or a good friend may know what particular illness I am suffering from, but it would violate my privacy if he were actually to witness my

\(^{37}\) Ibid., @ 433.

\(^{38}\) Ibid.
suffering from some symptom which he must know is associated with the disease. 39

4.2. Characteristics of privacy

Before embarking on a new definition of privacy, it may be of some assistance to the reader to restate briefly the conclusions which have been drawn from the foregoing discussion. It should be emphasised that this Part of the thesis examines the concept of privacy as a socio-political interest, not a legal right. It is not possible to attempt to identify what should be the content of any political (encompassing social, economic etc.) interest or any legal right to privacy until the nature of the privacy interest has itself been identified.

Consequently, this chapter has concentrated upon the nature or concept of privacy. The object is thus to identify (i) the state of 'being-apart-from-others' which may be characterised as privacy; and (ii) in what circumstances individuals should be entitled to resist the encroachment of others into that state of 'being-apart-from-others'.

For the sake of simplicity, these conclusions are expressed in the form of nine propositions:

1. Privacy is a condition or state of affairs\textsuperscript{40} - an 'existential condition'\textsuperscript{41} - which may be understood only in the context of social interaction.\textsuperscript{42}

2. A person who enjoys the possession of this condition is in some way insulated from the socio-political pressures which are inherent in social interaction.\textsuperscript{43} As MacCormick noted: To have privacy is in some respect to be in fact free from a given form of supervision or intrusion.\textsuperscript{44}

\begin{itemize}
\item \textsuperscript{40} Lusky, supra n. 3; Swanton, J., 'Towards a Definition of Privacy, (1975) 6 Justice (Aust. I. C.J.) 13, @ 15,
\item \textsuperscript{41} O'Brien, D.M., 'Privacy and the Right of Access, Purposes and Paradoxes of Information Control', (1978) 30 Ad. L. Rev. 45, @ 79.
\item \textsuperscript{42} See discussion at pages 49 - 57 above. See generally Weisstub, D.N. & Gotlieb, C.C.,'The Nature of Privacy', [1971. A Study for the Privacy and Computer Task Force, Department of Justice. Canada], @ 38.
\item \textsuperscript{43} Storey, H., 'Aspects of the Rule of Law and the Right of Privacy', (1975) 6 Justice (Aust. I.C.J) 1, @ 1; Berlin, I.,'Two Concepts of Liberty', [1958. Clarendon Press. Oxford]., @ 51 where he comments that 'there are frontiers not artificially drawn, within which men should be inviolable...'
\item \textsuperscript{44} MacCormick, D.N., 'A Note Upon Privacy', (1973) 89 L.Q.R. 23, @ 24.
\end{itemize}
3. This condition is negatively defined. It is characterised by an absence, a lack of something such as the presence, observation, intrusion etc. of some third party.45

4. This condition is in fact susceptible to invasion.46 For the purposes of this analysis, those privacy conditions which are physically (or logically) immune from interference are disregarded. The object of this enquiry is to ascertain whether there are criteria by which to determine when a given action unjustifiably interferes with privacy; and if there are, to identify them.

5. A's privacy may be violated by C's failure to respect the limits which A has set on C's acquaintance with (personal) information about A.47

45. McCloskey, H.J., 'Privacy and the Right to Privacy', (1980) 55 Philos. 17, @ 21. It is possible that a lack of a right to knowledge is equally characteristic of privacy - such as A's lack of right to know the colour of B's desk. However, introducing this element into a definitional analysis may result in petitio principii. McCloskey, H.J., 'The Political Ideal of Privacy', (1971) 21 Philos Q. 303, esp @ 310, comments that there may be a lack of a right to knowledge in respect of many non-personal matters. See also Bok, S., 'Lying: Moral Choice in Public and Private Life', [1978. Harvester Press. Hassocks], esp. chapter 5, discussing 'white lies' and the idea that information should not be made available simply because it is not private vis-a-vis the information-seeker.

46. To the extent that privacy is immune from invasion, article 17 of the International Covenant on Civil and Political Rights (which is discussed below in Part IV) can imply no particular obligation, and there is little need for legal protection. However, see the discussion below @ pages 140-141.

47. Gross, supra n. 6, @ 171.
6. Privacy may be affected by the circulation of certain types of 'information about ourselves'. Writers disagree with the limitation of the types of personal information the circulation of which may affect privacy. Fried and Westin, both of whom take as their focus control of information, speak of 'information about' ourselves. Both appear to contemplate that information about 'ourselves' is relevant to privacy. However, Fried recognises that different types of information may have differing effects upon privacy.

7. The term circulation is used here to mean the communication of information, or the learning of information without it having been actually communicated to anyone, or the unconscious generation of information (as may be the case where the information is deduced by a person's computer and indirectly used by that person). Consequently, the previous conclusion (no. 6) may be rendered: privacy may be affected by the communication of, or the learning of, or the (constructive) deduction of some, but not all, types of personal information.

8. A person enjoying privacy does not always have control over the circulation of the relevant types of personal


49. See above text accompanying n. 39.
information. This may be demonstrated by an example. If C
seizes A's diary containing personal information of the
relevant type about A (ie. of the type, which, if circulated,
may affect A's privacy), which A does not wish to reveal to
C, A is thereby placed in peril of an invasion of privacy by
C. C does not actually invade A's privacy until the
information (as distinct from the possession of the
information) is actually circulated to C - ie. until C
actually opens and reads the diary. The situation may be
more complex. Suppose that A does not wish C to know that A
keeps a diary. Suppose further that information about
whether A keeps a diary is information of a relevant type. C
may invade A's privacy as soon as C identifies the diary as
belonging to A, even though C never learns anything of the
diary's contents. However, if A does not mind C knowing that
A keeps a diary, and C learns this, C may not have invaded
A's privacy. Yet to the extent that C knows this
information, it is beyond A's control.

9. The circulation of information from or about a person affects
privacy. The circulation of information to a person does not
affect the recipient's privacy. Consequently A's receipt of
the information (correct or incorrect) that C has read A's
diary does not affect A's privacy, although it may affect A's
perceived privacy. A's privacy is affected the instant that
C reads the diary regardless of A's knowledge of that fact.
The receipt of information, no matter how unwanted - such as
"junk mail" - does not automatically affect the recipient's
privacy, although it may provide a ground for some other complaint, such as of harassment, for example where the recipient is deluged with (unwanted) mail or receives threatening letters.

These last two propositions require some elaboration. Thompson took issue with the notion of control as being central to privacy. She hypothesised the situation in which a neighbour had acquired an X-ray device:

then I should imagine that I thereby lose control over who can look at me: going home and closing the doors no longer suffices to prevent others from doing so. But my right to privacy is not violated until my neighbour[sic] actually does train the device on the wall of my house. It is the actual looking that violates it, not the acquisition of power to look.\(^\text{50}\)

However, Thompson's perceived privacy might have been adversely affected by the knowledge that the neighbour had acquired an X-ray device.

The ninth proposition, that the circulation of information to a person does not automatically affect privacy, is dictated by the earlier discussion of the functions served by privacy. The receipt of additional information will not of itself necessarily inhibit autonomy. For example, if C writes to A informing A that

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\(^{50}\) Thompson, J.J., 'The Right to Privacy', (1975) 5(4) Philos & Public Aff. 295, @ 305, fn. 1.
C will publish certain information about A if A carries out action X, and C's letter is intended to prevent, or at least discourage, A from doing X, it is arguable that A's autonomy will be increased by the receipt of the information in so far as A is better informed and thus better equipped to make an informed decision whether to perform action X.

In some circumstances, a person's autonomy may be enhanced by the receipt of additional information, even if that information is unwelcome. In general, people are better equipped to make reasoned, independent judgments when better informed.

As was discussed above, privacy is a state of 'being-apart-from-others'. It is typified by withdrawal or concealment in some sense. When people receive information they may be made aware that others are conscious of their location, or of certain aspects or attributes of their lives. Armed with this information, they may be better able to determine to what extent their privacy has been respected by others. The receipt of something, including information, does not necessarily affect the state of 'being-apart-from-others'; although it may advise the recipients of the degree to which they are, in fact, 'apart-from-others'. Rather than violating the recipients' "apartness", the thing received may inform the recipient of the degree to which that "apartness" has

51. The actual receipt of the item containing the information may be an intrusion regardless of its contents. See eg. Ballard, D.P., 'Privacy and Direct Mail Advertising', (1979) 47 Fordham L. Rev. 495, @ 508, where he applies a Prosser style analysis to direct mail advertising and examines the intrusiveness of direct mail advertising sent to private homes.
been respected. Perceived privacy may be impaired by evidence that 'apartness' is less than had been thought: but this is merely evidence of the lack of 'apartness' - not the thing which vitiates it.

The circulation of information to a person may affect perceived privacy as distinct from privacy. A person may enjoy perceived privacy long after privacy has been violated. The converse is equally true. Receipt of information indicating that privacy has been violated may affect perceived privacy. However, since perceived privacy is distinct from (am be independent of) privacy, this information need have no effect upon privacy.

The receipt of certain types of information may inhibit the recipient's autonomy - as for example where the information takes the form of a threat. In many circumstances, the resulting complaint may have no connection with the invasion of privacy. For example, the complaint may be of duress, or of blackmail, or threatened assault, or threat of invasion of privacy.

The information received may be unhelpful or obnoxious because of its quantity even where its content is innocuous. No matter how annoying receipt of the information may be, it does not invade its recipient's privacy. It may, as is often the case in respect of "junk mail" or unsolicited telephone calls, interfere with the recipient's enjoyment of home or property. The complaint provoked
is not of an invasion of privacy as such: it is of nuisance, or harassment, or interference with the recipient's autonomy.  

As was emphasised earlier, it is the circulation of only certain types of personal information which necessarily affects privacy. The problem is how to determine criteria by which to determine a priori which types of information are relevant. The problem is therefore to determine a means of identifying the types of information which, when circulated, may affect privacy without actually consulting the information-subject.

The information-subject's wishes or actions with respect to privacy may be relevant to some extent, but not at the initial, threshold, level in determining whether circulated information may affect privacy. To affirm otherwise without having established an a priori determination of what type(s) of circulated information may affect privacy would be to beg the question whether the information should be treated as private.

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Unless there is some identifiable, objective threshold test, it will be impossible to determine *a priori* whether any given circulation of information may affect, or interfere with, a person's privacy without seeking in advance the person's views upon the circulation of the information. If that were the case, each person would be left to act at peril of invading each other person's privacy. As was discussed earlier, this is not a particularly realistic way to regulate social intercourse.

The information-subject's wishes are relevant to the non-threshold determination of whether any given circulation of information interferes with privacy. For the reasons discussed earlier, they should not be determinant of whether privacy has been invaded: but they may determine whether an otherwise established interference with privacy is objectionable.

There must be a two-tier test. This first requirement is a threshold requirement. It requires a determination whether the information in question is of the kind, which, if circulated, may affect privacy - an objective test determining *a priori* whether the circulation of information in question may invade privacy.
This test focuses upon the subject-type of the information. It ignores the actual subject-matter of the information.

It does not follow from the fact that information is of a type, which, if circulated, may affect privacy, that the circulation of all information of that type necessarily interferes with privacy. In some cases, the information-subject may directly or indirectly waive any potential objection to the circulation of the information by placing the information in the public domain despite its subject-type. The information-subject may even actively promote the circulation of information of a type, the circulation of which would otherwise be privacy-intrusive.

The object of creating this two-tier test is to (i) establish criteria by which to determine whether information is of a type which may affect privacy; and (ii) then place upon the would-be publicist the onus of obtaining the information-subject's consent to the circulation of the information. As is discussed below, the information-subject's consent need not be explicit: it may also arise by implication.

The second level of the test concerns the determination whether the subject of the information actually objects to the particular circulation of the information in question. This is a subjective test determining whether the circulation of the information which may affect privacy has actually done so. At this second level, the focus is upon the subject-matter of the information. The sole question at this level is whether the subject objects to the
circulation of the information. The reason why the information-
subject objects (or does not object) is irrelevant.

This view of privacy is analogous to Godkin's. He saw privacy as
arising out of the individual's ability to 'draw a line between his
life as an individual and his life as a citizen'. However, it
is not identical with Godkin's view. Godkin suggested that the
individual should be able to determine 'how much and how little
the community should see'.

The view advanced here is that there should be a \textit{prima facie}
(objective) determination of where Godkin's line may be drawn.
Once the minimum, or threshold determination had been established,
individuals should be able to determine whether and to what extent
they wish to take advantage of this. In many cases, people may
not object to the circulation of information of a type which is
\textit{prima facie} on the 'individual', ie. private, side of Godkin's
line.

1. Godkin, E., 'The Rights of the Citizen - IV - To his Own
Reputation', (1890) 8 Scribner's Magazine 58, @ 65. See also
Millar v. Taylor, (1769) 4 Burr 2303, 2379; 98 E.R. 201, per Yates
J. (diss) @ 242.

2. Godkin, ibid.

3. For some early discussions of the differing values which
were attributed to privacy during Godkin's time see 'The Task for
Privacy and Publicity', (1888) 61 Spectator 782; 'Secrecy',
(1840) 60 New Monthly Magazine 244, which were referred to by
Siepp, D.J., 'English Judicial Recognition of a Right to Privacy',
(1983) 3 Ox. J. Leg. Studies 325, @ 332, fn. 60.
5.1. Objective test: subject-type

It is not easy to identify the criterion to satisfy the first, threshold, level test. Gerety introduced the concept of intimacy. This may be of some assistance, although intimacy is, as Gerety himself recognised, something of a weasel word. Gerety noted Stephen's view that privacy 'is largely a matter of shared expectations and sensibilities', and conceded that there is an 'irreducible looseness' about concepts such as intimacy.4

This is not a fatal flaw. The content of what is recognised as 'intimate' varies as between societies. As is discussed below in Part IV, conceptions of human rights are frequently dependent upon societal perceptions, and are therefore variable. As was discussed earlier, the concept of the 'personal' is inextricably interwoven with the concept of human rights in general (and privacy in particular), and is never value free. It is reflective of the societal perception of the nature of the relationship between the state and the person. Inevitably therefore, it is in constant flux.

The problem is whether the concept of intimacy is too restrictive. It may not be sufficiently broad to encompass what Lusky described as that:

area of individual non-accountability, in which one can think and speak and act without having to justify to Big Brother or anyone else.\(^5\)

As Gerety noted, one of the benefits of introducing the concept of intimacy into the analysis of privacy is that this helps to differentiate between privacy and confidentiality: 'standards of intimacy, unlike standards of confidentiality, cannot be created simply by mutual agreement.'\(^6\)

Schoeman attempted to clarify the ambiguities inherent in the notion of intimacy by drawing an analogy with our attitude towards a holy object - something that is appropriately revealed only in special circumstances. To use such an object, even though it is a humble object when seen out of context, without the idea of its character in mind is to deprive the object of its sacredness, its

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6. Gerety, supra n. 4, @ 282. See also @ fn. 175, where Gerety notes the possibility that the concept of intimacy may be too restrictive.
specialness. Such an abuse is regarded as an affront, often requiring ritual procedures to restore the object's sacred character. (Note that there are certain uses which are permitted even though not devotional in nature: use for educational purposes, for example.)

Consistent with this analogy, Schoeman suggested that people could violate their own privacy.

The two-tiered privacy test advanced in this thesis is intended to serve two different functions. On the one hand, the threshold test (intimate information) may introduce some certainty into, or at least reduce the uncertainty in, the notion of privacy by identifying the types of information the circulation of which may affect privacy.

On the other hand, the subjective test (the individual's views) enables people to circulate information about themselves as they choose. A person may choose not to assert any privacy interest (the subjective level of the test), and may permit, or even initiate, the circulation of information which could be characterised as intimate.


8. Ibid., @ 407. If this is so, the 'invasion' would probably fail the second level of the test - presumably the subject could be treated as having consented to the 'invasion'.

9. The [New Zealand] Information Authority, 'Personal Information and the Official Information Act: Recommendations For
In a sense, privacy seems to be located in a complex middle-ground between the publicly espoused values of a society and the positive exercise of the rights which that society accords to its citizens. One way — and it is emphasised that it is only one way, not the only way — to secure the conditions for the exercise of some of those rights, is by the recognition of individual privacy. This may ensure the existence of conditions sufficient for the exercise of many of those rights. It is does not follow that privacy is a necessary condition.\(^\text{10}\)

This may be illustrated by an example. Consider the position of A, who is refused employment on the grounds of religious affiliation. Assume that the society at large values the freedom of religion, and treats discrimination on the basis of religion as offensive. If information about religious belief is classed as intimate, it may be possible to suppress its circulation on the basis of recognising privacy.

One effect of doing this may be to immunise A against discrimination on the basis of religious belief — it is very

\(^{10}\) Gertstein, R.S., 'Intimacy and Privacy', (1978) 89 Ethics 76, @ 76, suggested that 'Intimacy and privacy seem to go together.' He argued that intimate relationships would be impossible without privacy. But see Reiman, J.H., 'Privacy, Intimacy and Personhood', (1976) 6 Philos. & Public Aff. 26.
difficult to discriminate on the basis of information which one does not have. However, when the employer uses this information to discriminate, A suffers two distinct injuries: one to privacy arising out of the circulation of the information; and a second, distinct injury to freedom of religious belief arising out of the act of discrimination itself (not out of the basis of the action—the knowledge of the relevant information).

If the concept of intimacy may be invoked to determine in advance whether an invasion of privacy has occurred, the test would take the following form:

(i) is the item of information in question properly described as intimate, personal information? and
(ii) does the subject of that information object to its being circulated in the manner at issue?

This view of privacy may be clarified by an example. Suppose that A and B are in a public park. They have esconced themselves on a bench which they know is visible to their fellow patrons but which is out of their earshot. A is confiding the sins of the past week to B. The conversation is occurring upon the mutual understanding that (i) it is confidential; and (ii) no one else can hear it. A and B may be said to be enjoying privacy, and this is not necessarily lost by their attracting the attention of the other park users (they may be the only couple in the park not shouting at each other). Nor does the circulation of information such as 'A was talking to B in the park at lunch-time' necessarily affect their privacy.
In general, it seems that information about what is done in public like this will have little effect upon a person's privacy. The description 'intimate' is indicative of this: few actions or events which occur in public could be described as intimate. It is unlikely that people who wish to restrict the circulation of intimate information will deliberately place it in the public domain. Nevertheless, some 'public' actions or events should be characterised as intimate.

This may be illustrated by an example. As A and B's conversation occurred in public, it follows that they must have consented to the circulation of information about the fact of that conversation. It does not follow that they should be viewed as having consented to the circulation of all information about that conversation. They may object to the circulation of information about the substance of that conversation, although to the extent that they conducted the conversation in public they may be said to have acquiesced in the overhearing of parts of it by casual passers-by.

The fact that a given action or event occurred in a public place is thus only one of the factors which may be taken into account for the purposes of this objective, threshold requirement. This point is developed in greater detail below.

In some circumstances the circulation of information about a public act may affect a person's privacy. Suppose that A was not
in a public park, but in a war memorial (probably as public a place as the public park). The circulation of information that 'A was kneeling in a war memorial' may affect A's privacy. Yet it is information about A's activities in a public place.

The situation may be more complex. Suppose that C is also in the park. If C has a parabolic microphone, C may eavesdrop surreptitiously. If C does this, C invades A and B's privacy. This is so regardless of whether or A or B or both are aware of C's actions. Before C actually uses the microphone, A and B have privacy. However, neither A nor B actually has control over the information which is the subject of the discussion. They may think that they do; but C really has control. C is able to decide whether to permit A and B to keep the information confidential; or to eavesdrop and acquire the information, and then (a) to either keep that information secret (to C), or (b) use or disseminate the information as C chooses.

C's informing T that A and B were conversing in the park at lunchtime is unlikely to invade their privacy. It would be difficult to describe this information as intimate regardless of how much A and B wish to keep it to themselves. The circulation of the information which C has obtained by the use of the microphone must be considered carefully. The circulation of information about the sandwiches they consumed, or the small talk they exchanged before the confession may involve a breach of confidence, or a lapse of manners, or simply be gratuitously offensive. It is not necessarily an invasion of privacy.
The circulation of only some of the information affects privacy. The circulation of any information which C has obtained surreptitiously may be offensive *ipso facto*. This offence lies more in the method of acquisition than in the nature of the information actually circulated. It is offensive because of the fact of C's unwanted intrusion - much in the same way as 'junk mail' may be offensive.

5.1.1. Intimate information

There is no simple means by which to identify privacy-intrusive information. It is difficult to determine the characteristics which determine that certain types of information are intimate. However, it seems that intimate information will generally relate to the area of life in respect of which people are entitled to 'be apart from others' in the sense discussed above in chapter 3.

This area of life will vary according to the dictates of the society at large, and in particular according to the society's conception of the 'personal'. In this sense, Burns is correct:

"privacy" is really a cultural state, or condition, directed towards individual or collective self-realization, varying from society to society.\(^{11}\)

\(^{11}\) Burns, P., 'The Law and Privacy: The Canadian Experience', (1976) 54 Can Bar Rev. 1, @ 3 (citation omitted).
It may be that this area of life, like the elephant, is easier to recognise than it is to describe. The Justice Committee suggested that there is an area of life:

Which, in any given circumstances, a reasonable man with an understanding of the legitimate needs of the community would think it wrong to invade.12

Consequently, the threshold requirement must be determined by reference to factors which are recognised by the society at large as determining its prerogatives in respect of its members generally. Some of these may be embodied in legislation, some in international instruments to which any given state may be a party, whilst some will remain at the level of tacit social understandings. However they are expressed, these standards will vary with the changing conditions and expectations of the larger society.

12. Justice Committee, Report on 'Privacy and the Law', [1970. Stevens and Sons. London], @ para. 19. The Australian Law Reform Commission, Report No. 11, 'Unfair Publication: Defamation and Privacy', [1979. AGPS. Canberra] @ 124, para. 236, suggested the following definition of the area of life which should be subject to privacy claims: 'For the purposes of this Part [of the ALRC's Draft Bill - see @ 214, cl. 19(1)], a person publishes sensitive private facts concerning an individual where the person publishes matter relating or purporting to relate to the health, private behaviour, home life or personal or family relationships, of the individual in circumstances in which the publication is likely to cause distress, annoyance or embarrassment to a person in the position of that [first mentioned] individual.'
However these standards are evidenced, they must not pre-empt the society's determination of how, or to what extent, those prerogatives are defined in any given circumstances. This must thus be reflective of factors which are considered by the society at large to characterise, or define, the limits of the state's jurisdiction.

The various legislative, executive and judicial prohibitions upon adverse discrimination may be viewed as a priori evidence of what it is that the community's 'shared expectations and sensibilities' deem to be 'off stage'.\footnote{This point is discussed further in chapters 17, 24 and 26 below. In chapter 26 in particular, the relationship between these prohibitions and privacy is one of the factors which is relied upon to criticise the establishment of an independent statutory officer for the protection of privacy.} In Australia, there are legislative prohibitions upon adverse discrimination on the basis of 'race, colour, descent or national or ethnic origin', 'political opinion', and 'sex, marital status, or pregnancy',\footnote{Racial Discrimination Act 1975 (Cth), s.9(1); Human rights and Equal Opportunity Commission Act 1986 (Cth), definition of discrimination in s. 3; and Sex Discrimination Act 1984 (Cth), ss.3(b), 5, 6, & 7, respectively.} and the Australian Constitution expressly provides for separation of state and religion.\footnote{Constitution of the Commonwealth of Australia, s. 116. See also The Church of the New Faith v. the Commissioner for Pay-roll Tax, (1983) 154 C.L.R. 120.}

A general prohibition upon discrimination on the basis of any given human attribute may be cogent evidence that a society treats
that attribute, and hence information pertaining to its members in that respect, as being 'off stage'. However, not all prohibitions upon the use of particular types of information may be indicative that the society views the areas of life to which the information relates as being 'off limits'.

A specific prohibition upon the use of any given item of information by a particular decision-maker for a particular purpose does not necessarily have the same implication. It may simply reflect the view that consideration of information of that type would distort the decision. For instance, the rule restricting a prosecutor from advising a jury that the defendant has a prior conviction is designed not to protect the defendant from discrimination generally, but to ensure that there is an absence of prejudice in what is promised to be a fair trial.

This examination should not be myopic. It should not be restricted to the precise terms of any given prohibition. Rather, the object should be to determine whether there is any common element or whether the various prohibitions may be assembled so as to identify any particular area of life.

In a very general sense, the Universal Declaration of Human Rights may offer some guidance. The Declaration was adopted by the General Assembly of the United Nations, of which Australia is a Member, in 1948. It purports to list, in broad terms at least, (some of) the 'human rights and fundamental freedoms' which the
Members of the United Nations have pledged themselves to respect.\textsuperscript{16}

The New Zealand Law Revision Sub-Committee on Computer Data Banks and Privacy noted that privacy had been recognised in the Universal Declaration of Human Rights and the United Nations Covenant on Civil and Political Rights. The Sub-Committee commented that, at its widest, privacy is a condition which both draws its existence from, and serves to re-inforce, the basic conditions which are considered to be necessary for the individual or collective self-realization: the human rights and fundamental freedoms which are necessary in order 'to preserve the human dignity of the individual and his[/her] effective freedom to develop and exercise full human personality.'\textsuperscript{17} The Preamble to the International Covenant on Civil and Political Rights expressed this as the 'ideal of free human beings enjoying civil and political freedom ...'

Despite the generality of such international instruments which contain references to privacy, especially the Universal Declaration of Human Rights, they have a common theme. They list criteria according to which people may be discriminated against, or in favour of, in societal activities. It is arguable

\textsuperscript{16} United Nations Charter, arts. 55, 56.

\textsuperscript{17} N.Z. Law Revision Commission, Report of the Sub-Committee on 'Computer Data Banks and Privacy', April, 1973, Appendix G, \# 68. (Copy of report held in the Commonwealth Attorney-General's Department Library. No details of source of publication evident. An in-house publication by the Law Revision Commission?)
that privacy may be relied upon to help to secure the conditions for the free exercise of these rights (or freedoms) by ensuring the suppression of the information about those factors.

It does not follow that a decision which is made in reliance upon any one of the factors listed in any of the international instruments which expressly recognise privacy will interfere with privacy. Nor does it follow from the fact that a given area of life is protected from discrimination that it should be shrouded in secrecy. A prohibition upon discrimination may be designed to confer upon individuals the right to determine whether or how much publicity they desire about this aspect of their lives. A prohibition is thus relevant only to the first level of the privacy test: determining whether the subject-type of the information is intimate.

A prohibition upon the use of a particular type of information may affect the second level of the privacy test in either of two ways, depending upon the individual concerned. On the one hand it may encourage people to consent to the circulation of information to which they might otherwise object on privacy grounds by assuaging their fears about the abuse of the information. It may thus be viewed as a quid pro quo for the non-assertion of privacy.

On the other hand, it may arm people with the basis upon which to object to the circulation of information. This may be a sufficient deterrent to prevent people from seeking access to information which is regarded as being within a recognised
category where they would, by virtue of having sought that information, be left open to possible allegations of (unlawful) discrimination.

Intimacy is a variable, and, to a considerable extent, culturally specific, concept. Consequently, it largely takes its content from the society at issue. It may be partially reflective of the international society of which each nation is a member. This itself, however, is reflective of the values of each of its member nations.

It was noted earlier that one common theme which emerges from the international human rights instruments (to some of which Australia is a party) is the proscription of adverse discrimination upon the basis of certain attributes. If this is both reflective of and influential upon the values of the signatory nations (including Australia), it may be evidence of a general recognition that certain personal attributes should be regarded as immune from the prerogatives of the state in so far as it regulates and assesses the behaviour of its members.

The dominance of Western nations in the development of post-World War II international relations, particularly during the early years of the United Nations when several major human rights instruments were drafted, and the relationship between the contents of those instruments and the constitutions or bills of rights of some of those Western nations, may illustrate the inter-relationship between the values of the Member nations and the
values of the international society. Many of the values of the Member nations influenced the shaping of the principles recognised by the international society; and, in turn, the values of the latter have influenced the values of its Member nations - including those of the once dominant Western, democratic societies.18

The factors upon which adverse discrimination is proscribed (both in international instruments and in Australian law) share a common theme. In general, they are concerned with personal relationships, religious belief (or the lack thereof), and ethnic, racial or cultural identity. To some extent, this common thread is reflective of what Westin described as the 'fundamental belief in the uniqueness of the individual' and identified as typifying democratic societies.19

5.2 Privacy and discrimination

As was implicit in the earlier discussion, much information which may be characterised as intimate relates to human attributes upon

18. See the discussion of the possible value bias in Universal Declaration of Human rights in chapter 20 below.

19. Westin, A.F., 'Privacy and Freedom', [(1967) 1970. The Bodley Head. London], @ 33: 'In democratic societies there is a fundamental belief in the uniqueness of the individual, ...'. See also below discussion in chapter 20 and chapter 23.
which adverse discrimination is proscribed. Consider the earlier hypothesis of A who was refused employment on the basis of religious affiliation. The fact that A's society prohibits discrimination on the basis of religion may be relied upon to characterise religion as one of the 'off stage' areas of life into which intrusion is thought 'to be wrong', as the Justice Committee suggested. It follows from this that information about this subject may be characterised as intimate (the objective test).

This raises a further complication. Religious activities are frequently conducted in public places. Consequently, information about A's religion may also be information about A's activities in a public place. This is one of the reasons why the term intimate, but not the term public, has been introduced into the analysis.

Some attributes, such as colour, are inevitably publicly manifested. However, they may be simultaneously characterised as intimate. The fact that a given action or event occurs in public may be relevant to the second, subjective test. It may be indicative of an acquiescence in the circulation of information of a type which would be privacy intrusive had the information-subject not sought or acquiesced in the initial publication of the information by performing the action publicly. Were this not so, the test would be whether the information relates to an activity or attribute of a particular type conducted or existing in private.
The connection between privacy and discrimination seems to support this. There is nothing inherent in prohibitions upon adverse discrimination which requires that the relevant (proscribed) human attributes should be capable of concealment. Some human attributes, such as colour, could hardly be other than publicly manifested.20

5.2.1. Use of information

The way information is used does not determine whether its circulation interferes with privacy. (Of course, the reason why a person may object to the circulation of a particular item of information may be precisely because of how it will be used.) The invasion of privacy occurs at the instant that information which satisfies the initial, threshold test, is circulated to a person contrary to the information-subject's wishes. The invasion is not dependent upon whether, or how, the information is used.

There is a distinction between privacy and discrimination. Privacy is invaded when intimate information is learnt. However, discrimination rests upon the use of information. Thus, for example, C invades A's privacy when C learns intimate information

20. The relationship between privacy and discrimination is relevant to the protection which Australian law provides to privacy, and the ways in which additional protection could be provided. See chapters 17 and 26 below.
about A (eg. about A's religion). A's privacy is invaded when (i) the information may be characterised as intimate; (ii) A objects to C knowing the information; and (iii) C learns the information. The reason why A does not want C to know the information is irrelevant; as is the way C uses the information. Consequently, it is irrelevant that A's fear of (possible) adverse discrimination underlies A's assertion of a privacy.

The terms 'learn' and 'know' are used here to refer to both actual knowledge and constructive knowledge. A's privacy may be equally invaded by C actually knowing the information in question, and by C's computer generating and 'knowing' the item of information. It is thus used to mirror the meaning of the term circulated - as was discussed previously. Everything which C knows is said to have been circulated to C. Conversely, all information circulated to C is said to be known by C.

C discriminates against A on the basis of A's religion when C uses information about A's religion to make a decision affecting A. (It is irrelevant whether the discrimination is negative or positive. Positive decisions in favour of A arrived at on the basis of information about A's religion are negative decisions against non-A because of non-A's lack of that religion.) In order to discriminate, C must (i) obtain the item of information (ie. learn it or enter it into the 'mind' of the artificial intelligence system which C uses); and (ii) actually use the information in C's decision-making, whether directly or via a
given artificial intelligence system, in a way which discriminates for or against A.

Discrimination is thus distinct from interference with privacy, although (adverse) discrimination may, in practice, depend upon an interference with privacy. A person does not have to object to another learning a relevant item of information in order to be discriminated against on the basis of that information. In fact, the existence of prohibitions upon discrimination may assuage objections to the circulation of information of this type. This effect may be ironic. The existence of prohibitions upon discrimination may influence the characterisation of the information, and simultaneously encourage people to acquiesce in the circulation of that information.

Where both discrimination and an invasion of privacy occur, they occur consecutively. Privacy is invaded when the intruder learns the information. Discrimination occurs only after the information has been learnt, when the intruder uses the information. 21

If a person does not object to another person learning intimate information (the subjective test), a subsequent offensive use of that information cannot ex post facto render the circulation of that information an invasion of privacy. The way information is used raises distinct issues - in this case, questions of

21. As is discussed below in chapters 17, 24, and 26, attempts to protect privacy by providing avenues of appeal against the contents of record systems may simultaneously provide a means to mount collateral challenges against discrimination.
discrimination. Alternatively, the use of the information may be an abuse of privilege or office, or a breach of confidence, if the circulation of the information was permitted because the information-subject thought (wrongly) that the information would not be used in this way.

The same may be true of discrimination on the basis of sexual orientation - an injury which is frequently complained of in the name of privacy. Discrimination on the basis of sexuality, or anything else, is not, of itself, an invasion of privacy. The protection afforded by privacy is not of the choice of sexuality, or religious belief, etc. That is the protection afforded by the prohibition upon discrimination.

The protection afforded by privacy would be to the information about the fact of sexuality, or religion, etc., whatever the choice made. The community's 'shared expectation' that something - be it sexuality, or religion etc - is a private matter, something which relates to the 'off stage' area of a person's life, arises only after the society has determined that its members are entitled to choose how they conduct themselves in regard to that matter.

In general, this determination is manifested by a prohibiting adverse discrimination upon the basis of the choice made in respect of a given type of behaviour or conduct etc. - eg. religion selected etc. It follows that when information about a a given type of behaviour or conduct may be characterised as
intimate, this characterisation attaches to the information of that subject-matter generally. Whether people take advantage of this immunity to suppress the circulation of information about conduct 'off-stage', is a matter of individual choice - the subjective element of the test. At this level, it matters little how information is used once it is in circulation. That may, or may not, provide the grounds for complaint in its own right.

The position of discrimination on the basis of sexual orientation highlights a peculiarity which is an unavoidable consequent of this analysis. It may be that discrimination upon the basis of homosexuality, for example, is not considered to be objectionable by the community at large - that is to say that this form of discrimination does not offend the community's shared expectations and sensibilities. At the same time, it may be said that sexuality is a 'off limits'. The only way to resolve this conundrum is by a rigorous examination of this latter assumption. Sexuality cannot be described as 'off limits' -i.e. private - if certain types of sexuality are prohibited, or are offered less protection under the law than others.

One way to resolve this seems to be to seize upon the unrealistically narrow nature of this analysis: privacy claims are not so one-dimensional. The nature of information is not determined solely by its content. There are shared expectations not merely as to the freedom (or lack of freedom) of choice in respect of sexuality etc., or as to the moral status of sexuality etc.; but also as to the sanctity of the home, or the
confidentiality of transactions between consenting persons, or such like.

Socio-political factors (such as time and context, etc.) surrounding information may influence the initial, threshold characterisation of that information. The circumstances surrounding any given information may affect its ultimate characterisation in the particular situation. For example, information about a given act of religious worship may be information about a consensual transaction between persons in confidence — and thus be characterised as intimate. However, information about the public display of religious belief may not be characterised as intimate because of the nature of the manifestation. Thus, for example, information about a religion which, by its own terms, requires the public manifestation of religious ritual may be, because of that condition, non-intimate.

The invasion of privacy may lie not so much in the circulation of information about religion, as in the circulation of information about a private transaction (eg. a confidential dealing between consenting persons). The way information is used is a different matter. That use of information is not illegal, or does not of itself give rise to a separate cause of action, will not derogate from the fact that its circulation may have interfered with privacy.

Here again there appears to be a problem. How does the position of confidential, consensual worshippers differ from that of
closeted, consensual forgers who are practising their art? The distinction between these two situations lies in the characterisation of the information about the activities. In the first case, the information is about secret, or confidential, consensual religious conduct. Further, religious conduct itself may be characterised as conduct affecting personal relationships. If the society treats confidential, personal relationships as part of a person's 'off stage' life, it may be that this information should be characterised as intimate despite the fact that it relates to conduct which is socially disapproved.

In the second case, the information is about secret or confidential, financial dealings or fraud. Financial dealings, no matter how unobtrusive or discrete, are generically different from the types of matters which characterise 'off stage' life. They influence relations with third parties, even if only indirectly. Consequently, they are not part of 'off stage' conduct, regardless of the legality of the activity planned.

Information about matters such as financial dealings may be confidential or secret. It may be directly relevant to autonomy. It also falls into the category of matters which are sometimes characterised as being 'nobody else's business' in the sense referred to earlier. However, matters such as financial dealings are rarely, if ever treated as being 'off limits', despite the careful securing of individual confidentiality.

22. See discussion at page 72 above.
Consequently, information about these matters is not characterised as intimate.

5.3. Natural and corporate persons

One consequence of characterising information by reference to society's recognition that certain areas of life are 'off limits' is that only natural persons may be said to have privacy. Non-natural persons, such as corporations, are defined stipulatively. They exist only to the extent that they comply with certain prescriptions. Further, corporations must have a public aspect by the very nature of their creation. Consequently, no aspect of their existence may be said to be 'off limits' to the society at large.

Nonetheless, some aspects of the operations or activities of legal persons may fall within the 'nobody else's business' classification. Many corporate activities may be confidential or secret.

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23. As is noted below in chapter 17 at page 331 n. 18, the phrase 'personal affairs' which is used in the Freedom of Information Act 1982 (Cth), s. 41(1), has been interpreted as excluding corporations: News Corporation Ltd. v. National Companies and Securities Commission, (1984) 52 A.L.R. 277.
Thus far, this thesis has examined the socio-political privacy interest to determine the characteristics identifying and defining it. Chapter 3 examined various states of 'being-apart-from-others', of which privacy is one, to clarify privacy by drawing comparisons between related notions. One theme which emerged from that discussion was that privacy is affected by the circulation of information.

The characteristics identifying the types of circulated information which may affect privacy were discussed in some detail in chapter 5. The concept of intimacy was introduced in order to provide a means of identifying the types of information, which may, if circulated, affect privacy. As was discussed earlier, the concept of intimacy is used partially stipulatively, and partially in its ordinary language sense.

There are some human attributes (such as colour) upon which discrimination is prohibited which must, as a matter of fact, be publicly manifested. Assuming, as is argued here, that the content

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1. It should be noted that The [New Zealand] Information Authority, 'Personal Information and the Official Information Act: Recommendations for Reform', [1987. Information Authority. Wellington. N.Z.] @ 21 also invokes the notion of intimacy.
of the notion of intimacy (minimally) includes those personal attributes upon which discrimination is prohibited, it follows that the notion of intimacy as used here must be said to include some personal attributes which are publicly manifested.

It is difficult to identify precisely what are the shared expectations of the community. However, it may be no more difficult to identify the community's shared expectations than it is to identify allegations which may lower people in the repute of their fellows for the purposes of a defamation claim.

The mere likelihood of embarrassment resulting from the circulation of an item of intimate information does not mean that that circulation invades privacy. Were that the case, thick-skinned individuals would inevitably have less privacy than their more sensitive neighbours.

If that were so, privacy would have to be treated as a mere matter of personal taste. The object of the earlier discussion has been to demonstrate that privacy is a social interest which relates to the extent to which people are publicly accessible regardless, and independently, of the consequences of that accessibility.

Consequently, there is a threshold requirement for any assertion that privacy has been invaded. The complainants must be able to demonstrate that the information circulation is intimate.
The second level of the test is designed to permit individual assertions of privacy to be adjusted to take into account of the degree of accessibility desired. It therefore rests upon the privacy-claimant's objections to the circulation of information. This is intended to prevent people from being constrained by their privacy, and to ensure that they are able to set the level of disclosure with which they feel most comfortable. This is subject to the limits determined by the first level of the test which determine the maximum extent to which people may divorce themselves from their societies.

People may be said to have privacy to the extent to which there is ignorance of intimate information about them except on the part of persons, organisations, or institutions, to whose knowledge the subjects do not object, or would not object if they were aware of the knowledge.² This condition could be described as an 'immunity' in Hohfeldian terms.³ People cannot have the right to demand the ignorance of others. However, people may be entitled to require that others respect the limits which society imposes against intrusions.

². This view that privacy may be invaded by a third party learning information is directly contrary to the view advanced by Thompson, J.J., 'The Right to Privacy', (1975) 4 Philos. & Public Affairs 295, and Tucker, D., 'Privacy as a Right', (1981) 13 Melb. J. Politics 3, esp. @ 7.

Consequently, where privacy is recognised, people are able to resist requests to provide intimate information, and, in the appropriate circumstances, to prevent others from using or circulating that information. People may be unable to complain where a third party accidentally learns that same information. But they may be able to prevent the third party from further disseminating or using that information.

It is only after the concept of privacy has been identified, and the way it may be interfered with determined, that it is possible to consider whether there should be a legal right, and, if so, how it should be limited.

Accordingly, this chapter proposes a definition of privacy as a socio-political interest, and considers its application. It does so on the basis of the two-tiered test discussed in the previous chapter.

The first level of the test is essentially a reasonable person test. Information is characterised (as intimate) by reference to society's recognition that certain areas of life are 'off limits' by virtue of shared expectations about individual non-accountability. This recognition may be manifested in a variety of ways - for example, in legislation, in international instruments, or by tacit social understandings.
These must be apparent in the sense that Lord Atkin's good neighbour could deduce the reasonable standard of care. Like standards of care, these standards of disclosure are not static. However, formal procedures may be required in order to alter some of these standards. Characterisation of information is thus objective only to the extent that it is possible for the reasonable person to deduce the appropriate characterisation - intimate or non-intimate.

The term intimate is used to identify a priori the types of information, which, if circulated, may affect privacy. It is the information type which is a sine qua non of an invasion of privacy. Individuals' wishes are the second condition, taken into account only after the characterisation of the information.

If these requirements were to be reversed, it would be virtually impossible to determine in advance whether an individual's consent should be sought before circulating any given item of personal information. It is almost impossible to identify a priori what information is central to individuals' idiosyncratic perceptions of self; let alone what may cause them embarrassment.

Privacy is defined as that condition (or state of affairs) of persons about whom the circulation of intimate (personal) information is limited to that person(s), or organisation(s), and/or institution(s) to whose (constructive or actual) knowledge

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of that information the information subjects do not object, or would not object were they aware of that knowledge.5

There are several assumptions inherent in this definition.

1. Privacy is chosen by individuals: it is not forced upon them.

2. There is no distinction between actual and constructive knowledge for the purposes of the invasion of privacy. The invasion of A's privacy is the same whether C (to whose knowledge of X item of intimate information A objects) personally knows X or whether C's computer, or other artificial intelligence system "knows" X.

3. Possession of information does not necessarily imply 'knowledge' of it, as was discussed at page 99 (point 8) above.

4. Individuals' views may be influenced by the nature or identity of the entity to whom the information is to be circulated. Thus person A may acquiesce in the circulation

5. This definition has some similarity to the early definition advanced by Gross, H., 'The Concept of Privacy', (1967) 42 N.Y.U.L. Rev. 34, @ 34-36: 'condition ... in which acquaintance with a person or the affairs of his life which are personal to him is limited'. In 1971 Gross re-defined privacy as a condition in which 'there is control over acquaintance ...': Gross, H., 'Privacy and Autonomy', in Pennock, J. R. and Chapman, J.W (eds), 'Privacy', Nomos XIII, [1971. Atherton Press. N.Y.], 169, @ 169.
of information to person C because C agreed to receive it in confidence. A may not acquiesce in the circulation of the information to anyone else. C's knowledge of the information does not invade A's privacy. However, if C circulates the information to third party, T, C breaches A's confidence. If T is a person to whose knowledge of the information A objects, T's learning the information invades A's privacy.

5. Privacy does not depend upon people approving of the knowledge of the information by each entity by whom it is learnt. It is necessary only that they do not object to that knowledge. People do not lose privacy when intimate information is circulated to someone to whose knowledge they are indifferent. Consequently, privacy is not affected by the circulation of information which is intimate according to the shared expectations of the community, but for which the subjects desire publicity, or in respect of which they have no particular preference as between publicity and confidentiality.

6. It is immaterial how the circulation of information is limited. It is the limitation of the circulation of information to a certain class of people (to whose knowledge the subject does not object) which is central to the existence of privacy.

7. The circulation of information may be limited to this class by one or more of a number of factors. For instance, the
subjects may have complete control over the information because it is known only to them, and no one is capable of acquiring it without their consent; or because the action, condition, circumstance, or experience to which the information relates is actually shielded from view from any person other than those who are bound to treat it in confidence, and who do so. Alternatively, third parties physically capable of learning (and/or circulating) the information contrary to the wishes of the subject may be constrained from doing so by moral, social, political etc. considerations, and/or legal constraints.

8. It is essential to distinguish between (i) the condition of privacy - the subject of this definition; (ii) the means by which privacy may be achieved in practice - see (7); (iii) the extent to which there is social recognition of the interest in privacy - i.e. the extent to which people may invoke the support of general socio-political standards or legal principles to enforce limits upon the circulation of information; and (iv) the extent to which there is a legal right to privacy - i.e. the extent to which the law does or should regulate the circulation of intimate information.

9. There is a distinction between privacy and perceived privacy. It may be that the two are not consistent. To the extent that people are aware of legal, moral, social, political etc. constraints upon third parties, they may have perceived privacy, assuming that they think that the constraints are
effective. This is so even where the individuals know that they lack control over the circulation of information. This is related to the means of securing privacy— not to the definition of privacy.

Some writers, among them O'Brien and Garrett, contend that it is wrong to assume that all privacy is chosen. They argue that privacy is a condition of limited access in which people find themselves involuntarily, as well as voluntarily, as a result of the general (physical) limitations upon communication. However, in an examination of privacy where the object is to ascertain the criteria to determine when privacy has been invaded, it seems reasonable to ignore those criteria according to which necessary or inevitable privacy may be identified or determined.

The definition postulated here is quite narrow. It is probably narrower than Parent's 'condition of not having undocumented

6. In this sense, privacy may be secured by giving people 'the means to control information about' themselves as is suggested by Plannery, J.P., 'Commercial Information Brokers', (1972) 4 Col. Human Rts. L. Rev. 203, @ 205. Similarly, see Note, 'Privacy and the First Amendment', (1973) 82 Yale L.J. 1462, @ 1475: control over information about oneself is the essence of privacy. Gavison, R.E., 'Privacy and the Limits of the Law', (1980) 89 Yale L.J. 421, @ 423, notes that 'Our interest in privacy... is related to our concern over our accessibility to others ...'


personal information known by others'. As was discussed earlier, the circulation of information, previously undocumented as it may have been, which the subject would have preferred were not circulated, is not of itself a sufficient criterion for the invasion of privacy.

There must be some additional requirement: the shared expectation of the community that this type of information will not be so circulated. Without this additional requirement, it does not appear possible to identify a priori what might constitute an invasion of privacy. Virtually any publicity may be greeted by the complaint that the subject did not want the information to be generally known, and that there was no reason for the publicity.

It may also be broader than Parent's definition. The circulation of 'documented' material may in some circumstances violate the community's shared expectations. This may be illustrated by the case of Melvin v. Reid; the plaintiff would not have been heard to complain of the publicity at the time of the trial; she was heard to complain later because of the shared expectation that, all other things being equal, she was entitled to a "fresh start" - precisely the reasoning which is relied upon when it is argued that criminal records should be expunged after a certain period of


time so that the rehabilitated defendant may be given an opportunity to start afresh.\textsuperscript{12}

The circulation of otherwise non-intimate information may also invade privacy. A number of unconnected, non-intimate items of information may be assembled to reveal intimate information about a person. It may be that information-subjects may object to the circulation of an assemblage of non-intimate items of information which, when viewed in entirety, reveal intimate information, even though they have no objections to the independent circulation of the individual items of information. This issue is discussed further in Part II of this thesis.

The definition chosen must permit the existence of a privacy 'no-mans land' as it were - where the circulation of personal information is not sought by the subjects, but does not interfere with privacy.

An example of this might be the publication by a newspaper of a photograph of people sitting on a park bench. They may not have wanted this publicity, and they may be embarrassed by it. Nonetheless, by sitting on a bench in a public park they must be deemed to have accepted the risk of the publicity of that type.

\textsuperscript{12} See generally Buethe, L.S., 'Sealing and Expungement of Criminal Records: Avoiding the Inevitable Social Stigma', (1979) 58 Nebraska L. Rev. 1087, for a comment on some of the issues which arise in this context. See also the discussion below pages 154 et seq. for a consideration of the implications of today's information technology and information management practices, and page 260 re. the expungement of 'spent' convictions.
They must be treated as having admitted photographers, in their capacity as any other park users, to that class of persons, organisations, or institutions to whose knowledge of the information that the subjects were sitting on the park bench they do not object, even though, given the choice, they would not agree to the publicity. The photographer's use of the photograph may be regrettable, or even objectionable, but it does not necessarily invade privacy. (However, the use of the photograph may provide grounds for complaint, such as defamation, or passing-off, or blackmail etc.)

6.1. Photographs

Photographs have attracted many of the complaints about the invasion of privacy in America. In the main, they have been treated as sui generis. This seems to be a mistake. Photographs are simply one means of conveying information. Photographs may be a more effective medium than conversation or writing, but this is not significantly distinction. However, since photographs have attracted particular concern in America, it may be helpful to consider how taking or publishing photographs may affect privacy.

Taking and publishing photographs raise different issues. First, taking photographs may be objectionable because the subjects object to being photographed *per se* (Some people simply do not like being photographed.); and/or because the subjects consider themselves to be secluded when they are photographed, and the photograph is an intrusion *per se* (it is tantamount to the intrusive presence of the photographer). Alternatively, publishing a photograph may be objectionable because it draws attention to its subjects and thrusts them into the public gaze against their will (i.e. the subjects object to the fact of publicity *per se*); and/or because the photograph implicitly conveys information about the subjects that they do not want circulated in this way (as, for instance, in the case of the photograph of an accident victim's parents).

Some of these objections are not privacy-based. An objection to being photographed as such is not necessarily because the taking of a photograph invades the subject's privacy. A photograph is simply a tangible embodiment of the photographer's visual perception. People's privacy cannot be said to be invaded every time someone else looks at them.

Taking photographs may sometimes invade privacy. This was illustrated by the Justice Committee's example of a photograph taken from outside of the subject's property by a photographer armed with a telephoto lens which showed the subject in his back garden kissing his wife.14

The objection in these circumstances is not to the fact of being photographed per se; it is to being photographed in the particular circumstances. It is analogous to trespass as an intrusion into seclusion. Although probably not a trespass recognised by law, the photograph may be construed as the constructive presence of the photographer; and the basis of the objection is the intrusion — the photographer's entry (albeit constructively) upon the subject's property.

There is an invasion of privacy only if there is some additional element to the intrusion: the circulation of intimate information to which the subjects would deny the photographer access were they given the opportunity. In the Justice Committee's example, information was obtained about the subject's marital relationship, could probably have characterised as intimate. Taking the photograph, i.e. learning the information, therefore may have invaded privacy. Had the photograph depicted the subject's unwashed car parked behind the house and out of sight of the public, it is unlikely that it would have invaded privacy.

Taking a photograph invades privacy only where this circulates intimate information about the subject of the photograph. This is unlikely to be the case where a photograph is taken of people's public activities — as in the case of people sitting on a park bench. In this latter case, the subjects of the photograph may object to being photographed. However, they may be treated as
having acquiesced to the circulation of information about their activities in a public place.

Publishing photographs may raise different issues. People may object to any publicity per se, regardless of the information is involved. This objection, however genuine, is not related to the nature of the information and is thus not privacy-based. It is tantamount to an assertion of a general right to obscurity: a right to live free from publicity.

The minimum requirement for the recognition of privacy is society's acceptance that certain subject-matters are 'off limits' as regards the society at large: that they are matters for the individuals and their consciences. Once these have been identified, individuals may invoke privacy to secure their protection. As was discussed in chapter 5, it begs the question to define them in terms of privacy.

It follows that publicity per se is not objectionable upon privacy grounds, no matter how objectionable it may be on other grounds. If the publicity is not defamatory, and does not involve the offensive circulation of intimate information, the subject may have no grounds of complaint, regardless of what embarrassment may result. In a sense, objections to being thrust into the public gaze may be analogous to a dislike of loud music, or to government subsidies for modern art, or one's neighbour's morals.
6.2. False information

Particular difficulty arises where false information is circulated about matters on which the community's 'shared expectation' is that publicity is inappropriate. The resolution of this type of complaint is a two-stage process. Where the allegation injures its subjects, they may be heard to complain of defamation. Where they are have to reveal intimate information in order to prove the falsity of the allegation, they may also have grounds for complaint for invasion of privacy.

This may be illustrated by the chapter 4 example of a false allegation of homosexuality. The allegation may provide grounds for an action for defamation. Where rebuttal of the allegation requires the subject to reveal information about sexuality, and this latter is treated by the community at large to be a 'off stage', there may be also be grounds to complain of invasion of privacy.

6.3. A passive concept of privacy

Like Parent's definition, privacy as defined here would not provide grounds to challenge a law prohibiting the use of
contraceptives.\textsuperscript{15} But this definition may provide grounds for complaint that the way that non-compliance with such a statute is detected invades privacy. Alternatively, the existence of such a statute may be evidence of society's view that certain matters (eg. sexual conduct) are not 'off limits'. This is compatible with the earlier discussion of privacy and its functions. Prohibiting the use of contraceptives (or abortion etc.) restricts freedom (autonomy). Privacy exists only because, and to the extent that, a community permits its members licence (freedom) in certain respects. Privacy does not define that licence.\textsuperscript{16}

The application of this, or any other, definition of privacy will not necessarily be simple. This is not surprising in view of the complexity of the notion of privacy. However, this view of privacy may be clarified by the consideration of a hypothetical situation. Returning to the earlier example of A and B conversing in the park, suppose that A has exclusive possession of an item of intimate personal information (about A), X. A knows that A has exclusive possession. Suppose that C is capable of acquiring X without A's knowledge or consent. C is free to do this if, and when, C pleases (C is the possessor of the parabolic microphone and is also in the park). As between A and C, therefore, it is C


\textsuperscript{16} See the discussion of the relationship between privacy and discrimination at pages 122 - 131 above.
who has control over the circulation of X. There are six possible privacy-perceived privacy positions.

(1) Before C learns X, A has privacy because the circulation of X is limited to a person to whose knowledge A does not object; and A has 'perceived privacy' because (i) A either does not know of C's existence, or if A knows this, does not know of C's capacity; or (ii) A knows of C's capacity, but also knows that C has not exercised it (A may perceive A's privacy to be threatened); or (iii) A does not object to C's learning X, or if A knew of C's existence would not object (C's exercise of power is thus immaterial).

(2) Alternatively, before C learns X, A's privacy is not invaded, but A thinks that C has invaded A's privacy because (i) A knows of C's capacity; and (ii) A objects to C's learning X; and (iii) A does not know that C has not exercised C's power.

(3) After C has learnt the information, A's privacy is not affected and A has 'perceived privacy' because A does not object to C learning X (or A would not object were A to know of C's existence).

(4) After C has learnt the information, A's privacy is invaded but A has perceived privacy because A does not know that C had invaded A's privacy.
(5) Alternatively, after C has learnt the information, A's privacy is invaded because A objects to C learning X, and A has perceived 'not privacy' because A knows that C has learnt X.

(6) It does not seem to be possible for A's privacy not to have been invaded if C has learnt X, and A has perceived 'not privacy', unless A actually does not object to C's learning X, but for some reason A thinks that A does object.

In three possible cases, A retained privacy. Although A may have thought that A had control over X in all three cases, this was not so. In one case in which A had privacy, A did not know this. It seems therefore, that neither control nor knowledge of the possibility of invasion are necessary for the existence of privacy. However, perceived control may be necessary to perceived privacy. (It may be that A's failure to object to C's possible learning X was because, inter alia, A believed that C would not pass X to some entity to whose knowledge A objects: that is to say that to some extent C would permit A to control C's use of X.)

Since perceived privacy is important to privacy as an instrumental value, it may be convenient to refer to privacy as a 'control

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17. An instrumental value is one which is a precondition for the existence of another (ultimate) value. Whether privacy is an instrumental or ultimate value is controversial. See for eg. Uniacke, S., 'Privacy and the Right to Privacy', [1976-77] A.S.L.P. @ 3; and the discussion above at page 55 et seq. regarding the Kantian perspective of privacy. Bloustein, E.J., 'Privacy is Dear at any Price: A Response to Professor Posner's Economics Theory', (1978) 12 Ga. L. Rev. 429, @ 442. Gavison (1980), supra n. 6, @ 442 fn. 67 commented: 'There are important instrumental and ultimate values which privacy serves, the most
However, this is a misleading description, and tends to distort the analysis by shifting the focus away from the circulation of information.

6.4. Conclusion

Privacy is defined as that condition (or state of affairs) of persons about whom the circulation of intimate (personal) information is limited to that person(s), or organisation(s), and/or institution(s) to whose (constructive or actual) knowledge of that information, the subjects do not object, or would not object were they aware of that knowledge.

It is thus dependent upon two factors. First, the information must be characterised as intimate. Secondly, the privacy-claimant's must object to the circulation of this intimate information. In practice, it may be presumed that the information-subject objects to the circulation of intimate information unless there is some ground upon which to imply

Important of which are a sense of individuality and human dignity'. This point is also discussed below in chapter 23, & n. 26, and accompanying text.

18. Finighan, W.R., 'Privacy, People and Property', (1979) 22 (11) Archit. Sc. Rev. 2, @ 4, describes privacy as 'an interactive concept... an informational concept... a communicational concept...[and] a control concept...'
consent, or at least acquiescence, to the possibility of the circulation of the information.
PART II : IS PRIVACY AT RISK?
CHAPTER 7

THE INFORMATION AGE: EFFECTS OF A NEW TECHNOLOGY

The record systems which people maintain and rely upon complement their personal knowledge. In many cases, record systems have completely replaced personal knowledge. In practice, information contained in, or generated from, the combination of data recorded in the information management systems each person relies upon may be indistinguishable from personal knowledge.

Consequently, when examining the effects of the circulation of information for its implications for personal privacy, it is reasonable to treat as identical information which is recorded in a file, whether computerised or not, and information actually known to its possessor. People may therefore be said to 'know' all of the information about another of which they either have personal knowledge or upon which they rely in their dealing with that other, regardless of whether they are personally aware of each or any of the individual items of information in question.

There are two preliminary matters of terminology which should be clarified before examining the ways in which record-keeping may affect personal privacy. First, the meaning of the term information. Secondly, why actual and constructive knowledge are equated for the purposes of the definition of privacy.
7.1. Concept of information

The concept of information is selected here in preference to that of knowledge, even though both are essentially composed of combinations of data. The terms 'information' and 'data' have been the subject of extensive consideration by the communications specialists. There is no need to enter into this controversy here. It is sufficient to follow Marc Porat in defining information as 'data that have been organised and communicated'.¹ According to this thesis, data are the raw, factual components of any record. Information is the intelligible content or the message conveyed by that data.² Sieghart suggested that the distinction between information and data was that a datum is necessarily a part or unit of information:

"John Smith" is a datum. So is "45". But the statements that "John Smith has 45 criminal convictions" or that "John Smith is 45 years old" constitute information: They have a significance to


2. Groshan, R.M. 'Transnational data flows: is the idea of an international legal regime relevant in establishing multilateral controls and legal norms?', (1981) 14(4) Law-Technology 1, esp. @ 2-3.
an intelligent being far greater than that (if any)
which the data can convey independently.3

In order, for a combination of data to be capable of having a
meaning, there must be some entity capable of appreciating that
meaning. It is virtually tautologous to note that that entity
must be an intelligent being. However, it does not follow that
that entity must be human. It may be a human or non-human animal,
or a (sufficiently sophisticated) combination of computer software
and hardware.

It is essential not to underestimate the significance of this
relationship between information and data when considering the
implications for privacy posed by the circulation of information.
Any given item of information may be reduced to its constituent
elements (data) and these re-organised or combined with other data
so as to generate an entirely new item of information. A trivial
change in context, or environment, or the addition of some other
apparently quite innocuous datum, may radically change the quality
of the information generated. An apparently innocuous item of
information, when combined with other apparently innocuous
information, may yield information which is directly relevant to
its subject's privacy.

This may be illustrated by an example. Suppose that C is a
record-keeper. Among the items of information that C possesses

(1977) 125 J. of Roy. Soc. of the Arts 456, @ 458.
are the following: 'A has a child B', 'A has never left geographic area Z', and 'there have never been any marriages celebrated in geographic area Z'. Viewed severally, each of these items of information is innocuous (assuming that A has not sought to conceal the fact that A has a child B). It is unlikely that anyone would object to their circulating freely. Combined, they may reveal new information: 'A has never married', and either 'B is illegitimate', or 'B is not a natural child of A'. C may be said to possess this new item of information as soon as C obtains possession of the several data whose combination reveals it. C may never know this. It does not necessarily follow from the fact that C possesses information about A or B that C has any knowledge about A or B. In general, before C may be said to 'know' the new information C must believe that it is true; have reasonable grounds for this belief; and be correct in this belief: it must be true.

Strictly applied, the requirement of belief in truth probably limits to human beings the class of intelligent beings who may 'know' information. It is unlikely that a computer may be said to believe in the truth of any item of information which it appreciates as being conveyed by a combination of data, no matter how logically compelling that meaning may appear.

However, for the purposes of this discussion, the term 'knowledge' is used to encompass both information which people actually know and information which people may be said to know constructively in that has been generated by an artificial intelligence system upon
which they rely and which they may use. In this sense, the word knowledge is applied stipulatively to include information about which no person holds any relevant belief.

7.2. Actual and constructive knowledge

As was illustrated by the chapter 4 hypothesis in which C had seized but had not opened, A's diary, possessing information about a person does not necessarily affect privacy. However, it may place the subject of the information in peril of an invasion of privacy, and it may affect the subject's perceived privacy. In the situation hypothesised earlier, C may never realise that the various items of information which C possesses may be combined so as to reveal the new information. It is not necessary that C actually know the new information in order to use it.

Suppose that C is the owner of a sophisticated computer system into which C has entered all the data C possesses. Suppose further that C programmes the computer, which is being used to process applications, to reject applications from convicted criminals, unmarried persons, and ex-nuptial children. Suppose the computer receives and rejects applications from both A and B. Unless C's programme also instructs the computer to indicate the

4. See above at page 100 (point 8).
reasons for its decisions, C may not realise which reason motivates any particular rejection, and therefore cannot be said to 'know' the (new) information which has been generated by the combination of the hitherto innocuous data and relied upon by the computer. However, in this example, C uses this new information, even though personally unacquainted with it. The new information is thus said to be within C's constructive knowledge.

Mere possession of information does not affect its subject's privacy. In some formal sense the information must be brought to the cognizance of its possessor. It does not follow from this that the information must be personally known to its possessor. The possessors may never be personally aware of that possession, or may not believe in the truth of the information in question. Yet they must do more than simply possess it in order to invade its subject's privacy. When the information is entered into and used by the information management systems which people maintain, they may be said to be, formally at least, cognizant of it: to know it constructively.

The significance of the adoption of this constructive notice principle may be illustrated by expanding the earlier example. Suppose that the society in which A and B reside treats as intimate information about a person's legitimacy, adoption etc. Suppose also that this is reinforced by legislative prohibitions against the circulation of information of this type. If B objects to informing C that B is not the natural or legitimate child of A, it seems to follow that C's learning this is invades B's privacy.
As was discussed earlier, the content of the word 'intimate' is largely governed by the values of the society in which the subject resides. Thus, if A or B would have a right of action _ex post facto_ for the use of information of the type which C's computer generated, it follows that the information is of a type which could be characterised as intimate. Consequently, the unauthorised circulation of the information may invade their privacy.

7.3. Record-keeping and privacy

It follows that record-keeping is as relevant to privacy as is personal observation. There is nothing novel about the existence of records. The earliest known examples of writing, in Egypt and Babylon, were predominantly records of business, legal, and religious affairs. Dossiers containing personal information, if marginally younger than those documenting astronomical or

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natural events, have existed in some form almost as long as has human social organisation. It seems that by nature, human beings are prone to hoard information about the world they inhabit and their fellow inhabitants.

Trite as it is, the aphorism that information is power is repeated here. The circulation of personal information confers power upon those who gather, possess, document, supply, or possess information over those who are the subject of it. This power is unlike that conferred by the possession of non-personal information. Possession of non-personal information may carry with it power over people generally, or power over certain people by virtue of their membership of some particular class, group, organisation etc. For instance, possession of information about the financial future of corporation A may provide its possessor with some power over persons identified by their relationship with that corporation. The possession of information about people inevitably provides the possessor of that information with some quantum of power over those people by virtue of their identity.


9. Murdock, L.E., 'The Use and Abuse of Computerized Information: Striking a Balance Between Personal Privacy Interests and Organizational Information Needs', (1980) 44 Albany L. Rev. 598, @ 591, commented: 'Extensive record-keeping of personal characteristics and activities may inhibit the individual in
This is not the appropriate place to enter into an analysis of the way in which the possession of information confers power. For the present, it is sufficient to note that this is so. For this reason, if no other, no society can afford to ignore its information management practices.10

There is one element of the relationship between information and power which must be explored carefully in a privacy-oriented discussion: the elemental nature of information. It is not sufficient to focus upon the meaning which may be appreciated as being conveyed by any particular combination of data, or the extent to which it has been published in the community at large;

making decisions if, for example, he wishes to present a favourable "record-image". It may encourage a person to temper his political expressions, for fear that his opinions will be recorded, filed, and later used to deny him some economic benefit, such as employment." (citations omitted). Thomas, U., OECD, Informatics Studies No.1, 'Computerized Data Bases in Public Administration', [1971. OECD. Paris], @ 61. Spence, A.M., 'An Economist's View of Information', (1974) 9 Ann Rev. of Information Science & Technology 74, @ 74.

nor even whether its possessors appreciate the social significance of either that meaning or the fact of their possession of it. Further, since any given item of information may, when added to a pre-existing store of data, be used to generate an entirely new item or quality of information, the significance of any given item of information must be assessed in light of the information store to which it may be added. It is therefore unreasonable to treat any given item of personal information as a priori irrelevant to its subject's privacy. 11

The nature and scope of record keeping has developed as the social economy has evolved. In the days when society amounted to little more than an amalgam of decentralised and agriculturally-oriented communities, people's passage through life was evidenced by little more than the records narrating their birth, marriage, procreation, and death. 12 However, it may be as well to remember that privacy was not at its zenith in those halcyon pre-industrial villages for all their lack of records.

11. Ballard, D.P., 'Privacy and Direct Mail Advertising', (1979) 47 Fordham L. Rev. 495, @ 501, commented: 'One major privacy concern presented by direct mail lists is the possibility of merging and comparing different lists to compile dossier-type data on an individual.' See also ibid., @ 501, fn. 45.

12. Privacy Protection Study Commission, Supra n. 7., @ 3. However, the early development of records is illustrated by the Domesday Book - two volumes (and associated documents) recording William I the Conqueror's survey of land holdings in the majority of English villages and towns in England which was carried out by seven or eight panels of commissioners in 1086. This record appears to have been in general use in England by the mid-12th century.
In many places, decentralised, rural economies of the early nineteenth century have been replaced by urban economies operating across enormous geographic tracts.\textsuperscript{13} Commercial transactions are routinely conducted between strangers, frequently in reliance upon credit provided by third parties.\textsuperscript{14} In many ways personal privacy has been increased by the development of the social economy. To compensate for this 'depersonalization of society', there has been a substantial increase in the formalized recording of information.\textsuperscript{15} Not surprisingly, personal information has become a major item of exchange.

In their study of American data bases, Westin and Baker suggested that the modern record keeper had succeeded to the role of the fates of Greek mythology.\textsuperscript{16} There is some truth in this. Today's decision-makers are frequently in awe of their tools: records. Implicit, and sometimes unreasoned, faith is placed in records, and information is frequently retained long after the purposes for which it was gathered have been discharged. Perhaps because information about persons has come to assume

\begin{itemize}
\item \textsuperscript{13} Ottensmann, J.R., 'The Changing Spatial Structure of American Cities', [1975. Lexington Books. Toronto], @ 7: 7.2\% of the population resided in urban areas in 1820; as compared with 25.7\% in 1879; and 73.5\% in 1970.
\item \textsuperscript{14} Mestone, E.G., 'How Technology will Shape the Future', in Westin, A.F., (ed) 'Information Technology in a Democracy' [1971. Harv. Univ. Press. Mass.], @ 153.
\item \textsuperscript{15} Ruggles, R., 'On the Needs and Values of Data Banks', (1968) 53 Minn. L. Rev. 211, @ 211 - 212.
\item \textsuperscript{16} Westin & Baker, supra n. 5, @ 3.
\end{itemize}
increasing value, there is some evidence of a reluctance to expunge information from records.\(^\text{17}\)

It is far from original to note that each person's life is evidenced by a trail of records.\(^\text{18}\) The number and variety of these records is frequently overlooked. For the sake of convenience, these records may be arbitrarily divided into six categories: educational, economic, professional, governmental, welfare, and recreational.\(^\text{19}\)

Educational records, may commence before birth, and document progress from nursery school up to and including graduation from tertiary training and vocational skills classes, and the results of intellectual, psychological, physical and vocational examinations. Economic records narrate credit arrangements, hire purchase contracts, mortgages; and identify the various financial, mercantile, banking, insurance etc. agencies, with which each person deals. Employment records list the various employers, professional contacts, worker's compensation claims, business trips etc. which are part of working life. Governmental records

\(^\text{17}\) In some cases records may also contain false information. As is discussed below, this raises issues of fairness, not merely privacy.

\(^\text{18}\) See for instance Baran, testimony to the Subcommittee of the Committee on Government Operations, supra n. 10, @ 123; Miller, R.I., 'Computers and the Law of Privacy - No Where to Hide', (1968) 5 Lex et Scienta 18, @ 19

\(^\text{19}\) Some writers amalgamate some of these categories. For instance, Wheeler, S. (ed), 'On Record', [1962. Russell Sage Foundation. NY], organised his discussion into 4 categories: educational, economic, governmental, and welfare.
may document civil service employment, national service, security assessments, police assessments, and the various contacts with social security and civil administration which are inevitable in modern life. A range of welfare records may be created by the various medical and para-medical, psychological and social welfare organisations consulted by people. A random selection of recreational records may document holidays, tours, hotel reservations, airline tickets, library memberships (sometimes library borrowings), journal subscriptions, political affiliations and activities, etc. In addition, a variety of public records contain details about matters such as birth, residential address, citizenship, admission to various professional occupations, marriage, divorce, and death.

As Miller commented, there is a type of Parkinson's law in operation. Increasing technological capacity to acquire, collate, and manipulate data has prompted the belief that more extensive data is necessary in order to understand or predict human behaviour, and together these have served to increase the demand for more and more detailed dossiers. Any given individual may be the subject of up to, if not in excess of, one hundred different files documenting social, domestic, economic, professional and recreational activities.

As population and mobility have increased, so too has the incentive to centralise these records, or, at least, to interconnect them. Individual record-subjects may be ignorant of the existence of the majority of these records; let alone of their contents. Frequently, they may only guess at the contents of those files of whose existence they are cognizant, and know little about, sometimes not even the identity of, the various persons, bodies, or organisations maintaining the records.

In many ways, the relative ignorance of the subject vis-a-vis the record-keeper demonstrates the power of modern archivists. When resident of a small decentralised community, individuals may not have enjoyed much privacy - their entire lives were available to the community as a whole to scrutinise and assess. However, the record systems, diffuse networks of gossip as they may have been, were equally accessible to the subjects of the information. People knew (or could hazard a guess about) who knew what about them. They were probably as equally as well informed about the activities of other people.


22. Ruggles, supra n. 15, @ 211.

23. Sieghart, supra n. 3; Ware, W.H., 'Handling Personal Data', (1971) 23(10) Datamation 83, @ 83.

There is a temptation to attribute the emergence of the information industry to the computer. Some have succumbed, as is evidenced by the existence of groups such as the International Society for the Abolition of Data Processing Machines.25 Seductive as this explanation is, it is unfounded.

Computing technology has simply made the risks inherent in the use of records more visible, and hence more urgent.26 Perhaps it should be credited with drawing attention to a problem which has long existed but which has been ignored. Computing technology has provided a way to transcend previously insurmountable logistical limitations. But it has not changed the scope or the nature of the fundamental issue, even if it has exacerbated it. As Ruggles pointed out, privacy may be threatened by the collection, and use (or misuse) of personal information irrespective of whether the information is centralised in the one location.27

Computing and telecommunications technologies have changed the dimensions of the threat posed to privacy by the use of personal information. In pre-computer days, personal privacy was affected


26. Turkle, S., 'Computer as Rorschach', (1980) 17(2) Society 15, @ 17; Goldsworthy, A., 'Data Banks and Privacy', (1972) 5 Proceedings of Aust. Computing Conf. 16, @ 16; Harter, supra n. 6, @ 83.

27. Ruggles, supra n. 15, @ 218.
by (paper) records containing personal information — just as much as it is today when information is encrypted onto a micro-chip. However, the quantities of data manipulated by microcomputers (ie. personal computers) in the 1980's, let alone by large scale ('main-frame') data-bases, were inconceivable as recently as 1940.28

No record keeping system is complete without some method of acquiring information in the first place. Much information contained in record systems is provided by the subjects: each person fills out a myriad of forms disclosing personal information.

However, not all record-keepers content themselves with self-serving statements. Technological development has provided the means to acquire personal information without the subject's knowledge. Would-be intruders are no longer confined to 'listening under walls or windows, or the eaves of a house'.29 There is an increasing range of sophisticated devices from infra-red cameras, to minute listening devices ("bugs") and wire-taps


which may be used to obtain information covertly. One American judge described these devices as 'frightening paraphernalia'.

This is not the place to examine this technology. The existence of this technology is more significant than is its detail. The object here is simply to note the existence of this technology, and that it is likely to become increasingly effective in the future. One of the more ominous assessments of its significance was provided by Professor Brzezenken in 1971. He suggested that it would:

soon be possible to assert almost continuous surveillance over every citizen.

It is not likely that this trend towards increasing scrutiny of the population will be reversed. Professor Miller's conclusion

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33. Brzezenken, Z., 'Moving into a Techtronic Society', in Westin, A.F. (ed), 'Information Technology in a Democracy', supra n. 14, @ 163.
that modern Americans are scrutinised more closely than ever before is undoubtedly as true of Australians as it is of citizens of the United States of America.\textsuperscript{34} The increasing capacity of record-keepers to maintain and manipulate data is likely to produces a corresponding need for increasing quantities of raw data. Further, the need for formalised record-keeping has increased as people have become increasingly peripatetic, and social relations increasingly complex.

Records, including records containing personal information, are not objectionable \textit{per se}. Each society needs information about its members, just as those members need information about both their societies and their fellow members. Nonetheless, the growth of record keeping has produced a degree of social unease, in some cases approaching a feeling of insecurity.

Concern appears to centre around several issues: the quantities of information possessed by record-keepers; the accuracy and fairness of recorded information; to whom information is being made available, for what purposes, and how is it actually being used; and whether record-keepers know a given item of information or should be entitled to learn information of that subject-type.\textsuperscript{35}


Where recorded information is intimate, its subject's concern about the inclusion of the information in a record is primarily one of privacy. The broader question – whether record-keepers should be provided with information of that subject type – relates to the recognition of privacy in the society at large. However, it is not realistic to consider only this issue. The quantity of information which record-keepers possess is as significant to privacy. As was discussed above, it is possible to manipulate a vast mass of otherwise innocuous information to generate an entirely new quality of (sometimes privacy-relevant) information.

7.4. Identity cards

Disquiet about the quantities of information record-keepers possess underlies, and has focused, opposition to the proposed Australian national identification card. According to the Parliamentary 'Joint Select Commitee on an Australia Card':

One of the major fears about the proposed national identification system is that it is a necessary first step towards the creation of a national dossier system.36

36. Australia, Parliament, 'Report of the Joint Select Committee on an Australia Card', (Chairman: Senator T. Aulick), [1986. AGPS. Canberra], @ 16, para. 3.17
There is widespread concern that once a national identification system has been adopted, governments will be unable to resist the temptation to amalgamate or link otherwise innocuous databases.37

The Australia Card Bill 1986 failed in the Senate on 10 December 1986 and again on 2 April 1987.38 On 27 May 1987, the Prime Minister, Mr R.J. Hawke, informed the House of Representatives that he had advised the Governor-General 'to exercise his power under section 57 of the Constitution and dissolve both the Houses of Parliament'.39 The Governor-General accepted this advice, and both House of Parliament were dissolved on 5 June 1987. The election is to be held on 11 July 1987.

The Australia Card Bill 1986 was the "trigger" bill for this double dissolution. Consequently, if the A.L.P. is returned to


38. (10 December 1986) 160 Jo. of the Senate 1584-1588; and (2 April 1987) 180 Jo. of the Senate 1759 respectively.

39. House of Representatives, Hansard, 27 May 1987, @ 3431.
Government, and, after re-introduction, the Australia Card Bill 1986 again rejected by the Senate, the Governor-General may convene a joint sitting of the members of the Senate and the House of Representatives. If the majority in the House of Representatives is sufficient to compensate for any lack of numbers in the Senate, the Australia Card Bill 1986 will be passed.

Whatever the result in the July 1987 election, it is likely that some universal identifier will be introduced in the near future. If the Australia Card Bill 1986 is not re-introduced, or fails to pass, it is likely that an alternative national identification numbering system will be introduced, for example by the development of the Australian Taxation Office tax file numbers.40 Whatever the method eventually adopted, if it is adopted universally, it will facilitate the linkage of records held by different record-keepers in different places with a degree of certainty which is currently lacking.41 (Of course, even in the absence of a universal identifier, records may be linked.)


41. See Pounder C., 'Police Computers and the Metropolitan Police - Part III: data protection and the control of police computers', (1986) 8(1) Info. Age 3, for a discussion of some of the ways a universal identifying number promotes the linkage of records.
Record linkage may be beneficial in many ways. Many of the benefits may accrue to the record-subjects. (Equally, linkage may be desirable as a means of reducing fraud - one of the commonly claimed benefits of the proposed Australia Card.) However, one result of the linkage of diverse record systems will be increasingly detailed records about individuals. If Miller's Parkinson's law is correct,\(^\text{42}\) adopting a universal identification system will result in the development of increasingly extensive personal dossiers.

This may be so even if in the absence of a formally centralised data base. One of the witnesses before the Joint Select Committee on the Australia Card, Mr Chris Bushell, the Governor of the Community Affairs Board of the Australian Computer Society, made the following comment:

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\text{... there seems to be the feeling that there will be no centralised data base set up by the Government. ... The problem is that the minute you have a common number which appears in a number of different files or data bases - call them what you will - whether you like it or not, you have a centralised data base if the links exist, whether or not it is physically centralised. There is quite a common concept in the computing world of}
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\(^{42}\) See supra n. 20, and accompanying text.
distributed data bases but it has no difference in use from a centralised data base.43

In general, the problem is less one of intention that it is of temptation. Professor Walker suggested that:

Once the system is established, it will be virtually impossible to resist demands to make it available to a wider range of agencies. As governments become involved in more and more areas of what was once private life, they are able to argue that they cannot function efficiently without this kind of information.44

Many of the problems arising from the linkage of records or the compilation of increasingly detailed dossiers are not privacy problems. This point is discussed further in chapter 8.

43. 'Report of the Joint Select Committee on the Australia Card', supra n. 36, Addendum by Senator Christopher Pupilick, @ 176, para 45, quoting from the hansard of evidence taken by the Committee @ 2928-2929.

IMPACT OF LARGE SCALE DATA MANIPULATION UPON PRIVACY

As was discussed in the previous chapter, record systems must be considered in entirety in order to assess the implications for privacy of any given item of personal information held in a record store. This includes all the other records with which it is possible to integrate the record system under consideration.

In some cases, little or none of the information recorded may be intimate. The five-yearly Census conducted by the Commonwealth Government may illustrate this type of data collection. Each individual item of information may be made available freely by its subject, who may have no objection to the unrestricted circulation of each item of information severally. Carefully assembled, these otherwise innocuous items of information may reveal the 'intimacies' of the subject's life. Consent to the circulation of the individual items of information does not necessarily imply acquiescence in the creation of a detailed picture revealing the intimacies of a person's life.

As has been emphasised above, the context of information affects its characterisation. Information which is not intimate in one context may assume a complexion in another. Thus a record system which containing comprehensive portraits of people may reveal intimate information about them, even though no single item of the information recorded, viewed in isolation, may be so described.

Many of the problems posed by the potential misuse of personal information are unrelated to privacy. Improper or unauthorised use of personal information is not _ipso facto_ an invasion of privacy as defined here. Consequently, it is fallacious to contend that because the collection or use of a particular type of personal information is unauthorised or improperly prejudicial, it is an invasion of privacy.² There are other social interests, such as freedom of association, which are at least as important.

Joiner raised this point in his discussion of the long term implications of computers for privacy. He commented that in the past, individuals, including those suspected of criminal activity, have been able to elude detection:

². This type of argument tends to rest upon the 'control' concept of privacy. See for eg. Marshall, A., 'The "Australia Card": A Survey of the Privacy Problems Arising from the Proposed Introduction of an Australian Identity Card', (1986), 2(1) J. of L. & Info. Science 111, @ 122: 'The possible indiscriminate amalgamation of ... files under the "Australia Card" proposal would clearly violate the data-subject's information privacy [by] ... making control of that data, by that subject, even more difficult.'
We have relied on the passage of time and our ability to forget and our imperfect ability to follow, to solve the moral problems that we would face only when some escapee was caught who had lived an exemplary life. Now with the computer fully activated and operational in a system utilising all information in all other computers, there is no escape, and moral judgments will have to be made.³

Some of these are not privacy-based problems. Other interests, such as freedom of association, may be affected adversely by the circulation of personal information in some circumstances.⁴

This coincidence of interests has been recognised by other writers. The following comment appeared in the UNESCO Courier in July, 1973:

There is a recognizable reciprocal relationship between respect for the privacy of the individual and the protection of certain other human rights, the effect being one of mutual reinforcement. This interaction is not new but has been receiving renewed attention lately in view of the increased

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⁴ Some writers treat privacy as including some or all of these (on this thesis, related) interests. Eg: Steinman, J., 'Privacy of Association: A Burgeoning Privilege in Civil Discovery', (1982) 17 Harv. C. R. C. L. L. Rev. 355, discussed 'associational privacy'.

opportunities for violations of privacy afforded by recent scientific and technological developments.  

In many circumstances, recognising privacy will ensure that the conditions exist for the exercise of some other, distinct, political right, such as the freedom of association. Thus, for instance, privacy may be invoked by a person who wishes to remain anonymous at a religious gathering. The interest secured by invoking privacy in this context is the religious freedom.

In some circumstances, however, there is a compelling case for collecting personal information, whether by government, citizen or private organisation. For instance, it is difficult to argue with the law officer who commented:

if someone is out there plotting a riot or bombing,
I think you will agree that it is better for society if we know about it and can act to head it off.  

However, societies which value their members' freedom must balance demands for information with a recognition of the threats to


individual freedom inherent in the collection of personal information. Frank Costigan Q.C. addressed himself to this issue during his testimony to the Parliamentary Joint Select Committee on the Australia Card. He commented:

You can only justify ... an intrusion if, on balance, the evil that you are attempting to correct and the cost of doing it are justified. ... there is a necessary balance to be struck between the proper non-infringement of civil liberties on the one hand and the abuses which may be taking place in the community on the other, and where you strike the balance changes from time to time, decade to decade.7

Similar observations may be made about the Mt Vernon experiment.8 No doubt the incidence of crime was reduced when a television cameras capable of reading motor vehicle registration plates over a distance in excess of half a mile were installed. It is unlikely that freedom was promoted. The most model citizens are likely to be inhibited at the knowledge that their conduct is being videotaped by police. In many cases, otherwise reasonable surveillance, when viewed in combination with other social...

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practices, may form the basis 'of a terribly oppressive society'.

It is not only governmental records which pose a threat to privacy. According to the U.S. Privacy Protection Study concluded in 1977:

The substitution of records for face-to-face contact... is what makes the situation today dramatically different from way in which it was even as recently as thirty years ago. It is now commonplace for an individual to be asked to divulge information about himself for use by unseen strangers who make decisions about him that directly affect his every-day life. Furthermore, because so many of the services offered by organizations are, or have come to be considered, necessities an individual has little choice but to submit to whatever demands for information about him an organization may make. Organizations must have some such substitute for personal evaluation in order to distinguish between one individual and the next in the endless stream of the otherwise anonymous individuals they deal with, and most

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organizations have come to rely on records as that substitute.10

8.1. Electronic Money - the 'cashless society': an illustration of the effects of large scale data manipulation capacity.

This point may be made more effectively in the context of a particular type of records system. One with which a large section of the Australian community has regular, if not daily, contact is that which has evolved to support commercial transactions. At its most complex, the cashless society is a world-wide record system, largely facilitated by multinational credit organisations (such as American Express, Diner's Club, Mastercard etc.), multinational banking, international finance networks, and multinational businesses.11

The cashless society is typified by two types of transaction: credit (in particular by the use of a universal credit card such as a Bankcard, American Express or Mastercard); and electronic


funds transfer (EFT), especially at the point of sale (POS). A centralised, efficient and comprehensive record system is both a sine qua non of the cashless society, and an inevitable result. Although the resulting trail of records is the same whether the transaction is by credit or EFT, credit systems are distinguished by the existence of records predating transactions. In the case of EFT, some records are also created in advance of transactions. However, these tend to be less comprehensive than credit records because the nature of the transaction is such that only the parties to it are likely to suffer should either (or both) default.

8.1.1. Credit

Credit is no longer an arrangement between individuals who are largely familiar with each other's business. The provision of credit is now an industry in its own right. The credit provider and debtor may not reside in the same country; let alone be personally acquainted. There are two primary sources of credit records: those maintained by credit providers, such as Bankcard; and those maintained by credit reference bureaux such as Credit

Credit providers usually obtain their initial information from the applicants. (In general, applicants are asked to disclose information about their annual income, residence, prior residence, current employer, financial liabilities, dependents etc.) Credit providers may supplement this information by consulting credit reference bureaux, banks, landlords, estate agents, employers, relatives and personal associates etc. In addition, credit reference bureaux (which are generally independent of credit providers), usually maintain records of people's credit history, present and recently past addresses, debts and defaults, involvement in legal proceedings etc.

Universal credit cards are operated by credit corporations (such as Bankcard), which guarantee the merchants party to the scheme that all debts incurred upon presentation of one of their credit cards will be honoured by that credit corporation upon its receipt of the appropriate record; unless, of course, a merchant fails to comply with one or more of the requisite formalities.14

13. See Australian Law Reform Commission, Report No. 22, 'Privacy', [1983. AGPS. Canberra], vol.1, @ 212 et seq. for a discussion of the provision of credit in Australia.

14. Merchants are generally required to comply with a number of formalities such as ensuring that the customer's signature matches the specimen displayed on the card, and seeking specific authorisation from the credit corporation where the amount of the transaction exceeds some previously specified 'floor limit', etc.
Universal credit cards are the accepted medium of exchange in a wide range of commercial transactions. In the 1980's it is the object of comment if a universal credit card is not accepted, whereas in the 1960's universal credit cards were virtually unknown in Australia. They have largely fulfilled their promise: many merchants prefer to rely on the security of universal credit cards rather than upon unguaranteed personal cheques; and consumers have been relieved of the necessity to carry cash.

This form of credit has largely ceased to be viewed as a privilege - a resource from which people may freely abstain.\(^\text{15}\) Credit has become, or at least come to be considered as, one of the necessities which the U.S. Privacy Protection Study Commission identified as relying upon record systems. In Australia, as in America, computerised 'credit record credit card systems have become an integral part of ... daily' life.\(^\text{16}\) There are more than eight and a half million credit card holders in Australia.\(^\text{17}\)

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15. It is, of course, open to dispute whether credit should be viewed in this way. For the present purpose, it is simply assumed that this is so.


Between them, credit providers and credit reference bureaux assemble records containing a wide range of personal information. It is not sufficient, however, to consider either of both of these record systems in isolation. Several issues arise: whether each item of information recorded is accurate; whether the net effect of the combinations of the information is accurate; whether records contain intimate information; whether the picture created by the entire mass of information invades privacy or is fair (although this question is not confined to privacy issues); to whom the information is or should be made available, either in part or in entirety; and how information is or should be used.¹⁸

Accuracy is always an issue in record systems. Where information is obtained from sources other than the subjects themselves, there is at least some potential for inaccuracy. (This may be equally true where the record is exclusively based upon information provided by the subjects.)

However, recording inaccurate information does not necessarily raise only privacy problems. It also raises questions of misrepresentation.¹⁹ Similarly, problems may arise when a record

¹⁸ Fitzgerald, K. J., 'Privacy and the Computer Age', (1981) 51 A.N.Z.A.S. Conference papers (section 33/757) @ 2, suggests that there are five areas of concern. His categories were similar to the four presented here: possible errors; lack of security and confidentiality; linking of information; timeliness of destruction of data; and the use of information for purposes other than those for which was originally intended. See also Marshall, supra n. 2, @ 115.

¹⁹ See above discussion @ pages 85 - 88.
(viewed in its entirety) provides an inaccurate or misleading picture of its subject, although no single item of information contained in the record is actually false.\textsuperscript{20} Inaccurate records – whether the inaccuracy lies in an individual item of information or in the implications to be drawn from the combination of information as a whole – raise questions of misrepresentation.

Misrepresentation is better addressed as such, rather than under the veil of privacy. This is so even where the only way to correct the misrepresentation involves a second (distinct) injury to the invasion of the subject’s privacy. (As was noted above in chapter 6, privacy problems may also arise where the only way to correct the inaccuracy is by supplying intimate information which, given a choice, the subject would have withheld from the record-keeper.) Although factually coincident, the injuries – misrepresentation (or defamation, or injurious falsehood), and invasion of privacy – are distinct.

This point may be clarified by analogy. If C makes a false statement that ‘A is dead’, C may be liable under two distinct tortious heads of action: for injurious falsehood in the Wilkinson v. Downton sense\textsuperscript{21} (the injury being constituted by the damage to

\begin{itemize}
\item [\textsuperscript{20}] Burnham, D., 'The Rise of the Computer State', [1980. Weidenfield & Nicholson. London], @ 35, instances the case of a tenant whose tenancy record disclosed that she had been served with an eviction notice but failed to reveal that this had been struck out by a court of law. The information recorded was true; but the inferences to which it gave rise were false.
\item [\textsuperscript{21}] [1897] 2 Q.B. 57. See generally Handford, P. R., 'Wilkinson v. Downton and Acts Calculated to Cause Physical Harm', (1985) 16
\end{itemize}
A's business, or to any other business dependant on A being alive), and for the negligent or wilful infliction of nervous shock to A's spouse or children etc. Notwithstanding this factual coincidence, the two torts are distinct.

The most obvious threat to privacy is posed by quantum: the more personal data assembled in a record, the more likely it is that the record will affect privacy in either or both of two ways. First, some of the recorded information may be intimate, personal information of the type which the subject would prefer were not to be made available to that particular record-holder. Secondly, the overall effect of the entire record may reveal the intimacies of the subject's life, even though possession of no single item of that information could be said to interfere with privacy.

As was discussed previously, intimate information is characterised by reference to the community's expectations and the various legislative and non-legislative instruments which avowedly evidence the values of that community. For instance, in a community which provides for the expungement of criminal records after a certain period, say ten years, information disclosing a 'spent' conviction of more than ten years standing may be intimate, and its retention on the record may interfere with privacy. The record may also be 'unfair' in that it may expose the subject to prejudice from which the expungement statute is intended to provide protection.

U. W. A. L. Rev. 31.
Fairness is broader than privacy. Fairness is not restricted to the circulation of intimate information. The fairness of a record may depend upon, *inter alia*, the accuracy, type, relevance, and potentially prejudicial nature of the information recorded. The intimacy of the information may be only a relatively minor consideration - or may be irrelevant in particular circumstances. However, privacy and fairness may be related. The reason why privacy should be protected in record systems may be because, in practice, this will promote fairness. It does not follow that every unfair entry in a record will interfere with privacy.

A common complaint about the dissemination of information contained in credit records is that names and addresses of credit subjects have been made available to third parties for the purpose of mail or telephone solicitation.\(^{22}\) The circulation of the names and addresses of people listed on a particular credit provider's books may involve, or result in, interferences with privacy. However, in general, this type of objection is to the circulation of information rests upon the complainant's view, that the information should be treated as having been provided in confidence. (As was discussed earlier, privacy and confidentiality are related.)

In some cases, where information is supplied for a particular purpose (eg. to obtain credit from a particular credit provider)

\(^{22}\) See Australian Law Reform Commission, supra n. 13, @ 39, para. 88, and @ 122, para. 252 et seq.
the information-subject/supplier may have reason to believe that the information will be retained in confidence. If the information is then provided to a third party without the authority of the person whom originally supplied it, there may be grounds for an action for breach of confidence.

Similar observations may be made about many information exchanges involving credit records. According to the Australian Law Reform Commission, both credit reference bureaux and credit providers supply information to landlords, estate agents, governments (particularly taxation and police officials), and other credit providers etc. Although some information supplied may be intimate, the problem appears to be primarily one of confidentiality. Information is supplied persons or organizations who could require the subject to supply it to them, even though it is intimate information, and to whom the subject would supply it, albeit reluctantly. Rather than approach the person directly, they obtain it from a source to whom it has been previously provided in confidence. The objection is less that the information was supplied to the particular third party, than that information which was supplied in confidence has been distributed without the subject's consent or, frequently, knowledge.

23. See A.L.R.C. Report on 'Privacy', supra n. 13, @ 211 (para. 469) - 222 (para. 500).
Electronic funds transfer systems operate differently from credit systems. EFT is a genre of instantaneous transactions involving the use of electronic impulses generated and interpreted by computers to rearrange credits and debits between specified accounts.24 The type of EFT most attractive to retailers is EFTPOS - electronic funds transfer at point of sale. EFTPOS operate by automatically debiting the amount of the bill from the purchaser's account and simultaneously crediting it to the vendor's account.25


8.1.3. EFT and credit - the same result

EFT and credit transactions have one significant similarity. They both generate some record, however ephemeral, of the transaction, necessarily identifying the parties, the amounts involved, and (often) the subjects of the transaction. Perhaps the best evidence of this is found in the advertisements for the use of credit cards: "You always have a permanent record of what you spend - where, what, why, for whom and how much." So does the credit or EFT system database.26

The trail of information, each individual item of which may be innocuous, is the cause of some concern. Given a sufficiently sophisticated means of manipulating this enormous quantity of data, such as may be supplied by a computer, it is possible to re-organise these items of information so as to generate a new quality of information. It may be possible to extract from the mass of data detailing a myriad of individual transactions, information showing a consumer's daily movements, purchasing preferences, political affiliations, etc.

It is this ability to reorganise a vast quantity of data about people so as to create revealing portraits which may threaten

privacy. The intimacies of a person's life may be revealed far more cogently by a compilation of a thousand trivial details than by any single item of personal information. Justice William O. Douglas commented a propos cheques:

In a sense a person is defined by the checks[sic] he writes. By examining them [a person may] ... get to know his doctors, lawyers, creditors, political allies, social connections, religious affiliation, educational interests, the papers and magazines he reads and so on ad infinitum.27

More recently, Justice Kirby addressed himself to this issue:

As Australia moves to the cashless society, centralised records will exist not only of buyer preferences and habits but also of buyer travel and movement. Should law enforcement offices have access to the records of book shops to discover all persons purchasing books or magazines on themes perceived by someone to be antisocial? Should police, faced with difficult problems of investigation, be able to scrutinise, with the aid of computers, the buying patterns of citizens in a particular district? Should they be entitled to scrutinise the movements of citizens by reference

to the "credit trail" collected by the records of electronic fund transfers?28

Justice Kirby's statement could be regarded as a little exaggerated. (Some EFT transactions record only the category of goods purchased etc - not a precise description of each item.) However, the issue which he raised is real. It is possible to monitor and record the trivial details of people's lives, and to manipulate this information so as to generate information about the 'intimacies' of their lives. The issue is whether there should be any restrictions placed upon this ability, and if so, what they should be.

The third part of this thesis examines the way in which the Australian legal system may protect or provide remedies to individuals whose complaint is about the use or abuse of information.

PART III : RECOGNITION OF PRIVACY IN AUSTRALIAN LAW
Legal Recognition of Privacy

There are, at least, some threats to privacy. There is, however, some question whether and, if so, to what extent, Australia law provides protection against and remedies for interferences with privacy. Further, it is questionable whether this is adequate. To some extent, the latter question must be answered by reference to the standards set by the international obligations which Australia has accepted. The relevant obligations are discussed below in Part IV.

It may be useful to re-cast the first question. To what extent may people invoke Australian law to prevent others to whose knowledge of any given item of intimate information about them they object, from learning that information, or, after that event, to seek redress against that circulation?

For the purposes of this discussion, the corollary of this question - what circumstances justify disregarding people's wishes in respect of the circulation of intimate information - is ignored. It is discussed below in chapter 26 in the context of an examination of defences to complaints about interferences with privacy.1

1. See below chapter 26, at page 555 et seq.
Australian law does not recognise privacy as an independent legal interest. This contrasts with American law. The American courts developed a right to privacy which was influenced by the arguments put forward by Warren and Brandeis. As was noted in chapter 1, the authors largely based their case for legal recognition of privacy upon English case law. The American common law was later augmented by legislation in many jurisdictions.

The failure of the Anglo-Australian courts to develop a specific remedy for interferences with privacy is consequently somewhat surprising. Fleming suggested that Commonwealth courts lack in boldness: that they

have been content to grope forward cautiously along the grooves of established legal concepts, like nuisance and libel, rather than make a bold commitment to an entirely new head of liability.

However, Australian law has not completely failed to protect privacy. It protects a range of interests which are related to privacy. Many actions which result in interferences with privacy

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provide grounds for action under some (other) recognised head of action under Australian law. Similarly, the outcome of some causes of action may be influenced by interferences with privacy. As is discussed below, some of these interests are akin to privacy.

Rather than developing any express protection for privacy, the Australian common law, like the Canadian common law, has: tended to shift on a case-by-case basis in a way that does not cause major dislocation of existing rights and relationships at any given time.

This approach may be unadventurous. However, it does not mean that the common law has ignored privacy. The Anglo-Australian judicial technique has been to attempt to fit complaints for the

4. For instance, courts have a discretion to decline to admit evidence which has been illegally or unconscionably obtained. As is discussed below in chapter 24, this discretion tends to be exercised only in extreme cases. See generally Skala, S.M., 'Is There a Right to Privacy?', (1977) 10 Univ. Qld. L. J. 127, @ 141; Olmstead v. U.S., 277 U.S. 438 (1928), per Brandeis J.

5. According to Baxter, J.D., 'Privacy in Context: Principles Lost or Found?', (1977) 8 Cambrian L. Rev. 7, @ 7: 'English law is in the process of moving from the incidental to the comprehensive protection of privacy.'

invasion of privacy into already recognised heads of action.\textsuperscript{7} Campbell and Whitmore described this development at follows:

Such restrictions on invasion of privacy as do exist in Australia might fairly be described as a ragbag of common law and statutory provisions developed primarily to achieve other purposes.\textsuperscript{8}

Professor Fleming came to a similiar conclusion. However, he considered that there are 'many situations in which a person is left without redress against conduct drastically violating prevailing standards of taste and propriety'.\textsuperscript{9} Many of these situations do not interfere with privacy. Indeed, in 1983, the Australian Law Reform Commission concluded that privacy was 'relatively well protected by the existing law.'\textsuperscript{10}

\begin{footnotesize}

\textsuperscript{8} Campbell, E., & Whitmore, H., 'Freedom in Australia', [1973. 2nd ed. Sydney Univ. Press. Sydney], @ 372.

\textsuperscript{9} Fleming, J.G., 'The Law of Torts' [1971. 4th ed. Law Bk Co. Sydney], @ 532 (see generally @ 526-533). See similarly, 6th. ed, supra n. 3, @ 568 -575.

\textsuperscript{10} Australian Law Reform Commission, Report No. 22, 'Privacy', vol. 2., @ 144, para. 1307.
\end{footnotesize}
Frequently, people may seek to protect privacy to secure another interest, and/or to pre-empt the infliction of another injury (e.g. discrimination on the basis of religion) for which they would otherwise be able to seek relief *ex post facto*. For instance, people treat information about religion as intimate, and attempt to limit its circulation under the guise of privacy, in order to ensure they will not suffer adverse prejudice on account of their religion in circumstances where they are entitled to be free from adverse discrimination. In this sense Stoljar may have been correct in asserting that privacy:

> harbours ideas which closely connect, morally and legally, with all manner of personal torts.\(^{11}\)

The relationship between privacy and discrimination was discussed in chapter 5. It is discussed in a legal context in chapter 17 below. In some cases, the relationship between freedom of information and privacy, and in turn, between privacy and the use of information, means that a (commonly described as) privacy-style right to seek amendment (or annotation) of records under the Freedom of Information Act 1982 (Cth) may be invoked to mount collateral challenges to decisions affecting substantive rights (such as entitlements to pensions or benefits) having no direct relationship with privacy.

\(^{11}\) Stoljar, S., 'A Re-examination of Privacy', (1984) 4 Legal Studies 67, @ 67. This is not limited to 'personal torts', as is evident from discussion below.
An analysis of some heads of action which may be invoked where privacy is affected is presented below. However, an overriding issue must be considered: whether it is satisfactory to provide an ad hoc list of remedies which may depend upon how that privacy is invaded?

The cause of action in terms of which an action is framed inevitably determines the way it is resolved. This may introduce an element of arbitrariness into the resolution of factually similar, but legally dissimilar, injuries. Further, an ad hoc series of remedies tends to focus enquiry upon how information is circulated. This may obfuscate the privacy issue: whether the intruder should have learnt the information.

An example of this confusion is presented by arguments over the use of polygraph machines. Westin argued these machines interfere with 'the individual's sense of personal autonomy ... [stripping citizens] of what made them feel like independent persons in a free society.'\textsuperscript{12} However, this (autonomy-based rather than privacy-based) assessment is not the only objection to their use.

There are at least three other (not necessarily consistent) objections to the use of polygraph machines. First, they are unreliable. Secondly, the use of polygraph machines exposes people to the risk of (adverse) discrimination on the basis of race, religion, sexuality, etc by providing an added

\textsuperscript{12} Westin, A.F., 'Privacy and Freedom', [(1967) 1970. The Bodley Head. London], @ 238.
psychological pressure to provide information about which people might otherwise dissemble, or refuse to answer. Thirdly, by increasing questioners' ability to analyse answers for dissemblance etc., they increase questioner's ability to create an detailed image of the subject. In turn, this increases the likelihood that the questioner will learn information which might otherwise have been withheld - in some cases because it is intimate.

None of the objections to the use of polygraph machine are peculiar to these machines. Further, how the machines operate is irrelevant to whether privacy is invaded. The use of polygraph machines raises the same questions as were noted previously in the Part II consideration of records. From a privacy point of view, it is irrelevant whether intimate information is obtained by the use of a polygraph machine, a truth serum, torture, or old fashioned snooping. It is the learning of the information which is relevant: not the means employed.

The following examination of the Australian law which may directly or indirectly protect privacy interests is not an exegesis of types of actions or behavior which may attract legal sanction.\footnote{13. For a discussion of some of the relevant law see the Australian Law Reform Commission, Report No. 22, 'Privacy', [1983, AGPS. Canberra], esp. vol. 1; and McBride, T.J., 'Privacy Review', [1984. N.Z. Human Rights Commission. N.Z.].} It focuses upon the interests protected, or advanced, by the
various prohibitions or remedies, to determine to what extent these interests are consistent or compatible with privacy. 14

Causes of action are considered in general terms in order to identify the interests with which they are primarily concerned. The examination therefore ignores the availability of specific causes of action and remedies (such as actions for breach of contract) which may arise on the facts of any given interference. Further, where the details of rights of action differ in the Australian jurisdictions, or depend upon varying statutes, the discussion remains general, concentrating upon the common elements of the causes of action and, where appropriate, Commonwealth legislation, to identify the interest primarily promoted by the cause of action and contrast this with privacy. Similarly, the examination substantially disregards privileges or immunities which may be raised during the course of proceedings, such as the privilege against self-incrimination or crown privilege etc. 15

14. Consequently this discussion does not consider causes of action which, although having no connection with privacy, may provide some indirect protection. One example of this type of cause of action is the action for contempt of court. According to Bulmer, M., & Bell, J, 'The Press and Personal Privacy - Has It Gone Too Far?', (1985) 56 Pol. Q. 5, @ 16, English journalists regard the 1981 English amendment to the law of contempt as restrictive in this regard - but the authors suggest that it has provided little privacy protection. Similarly, the discussion ignores the availability of actions for breach of contract which, in some circumstances, may serve to protect privacy.

The examination is presented in three parts:

1. Chapters 10 to 15 consider the interests secured by civil (ie. not exclusively tortious)\textsuperscript{16} causes of action which may be available where privacy is affected;

2. Chapter 16 examines criminal prohibitions directly or indirectly attaching to behaviour, conduct, or actions which may invade privacy; and

3. Chapter 17 considers judicial and non-judicial administrative remedies which protect or promote privacy-allied interests.

In the chapter 2, Prosser's four categories were rejected as being of little assistance in identifying and defining privacy as a socio-political interest.\textsuperscript{17} Only the first, and to a lesser extent the second, of Prosser's categories describe interferences with privacy as defined in this thesis. The other two categories describe interests which are generically different from privacy as defined here.

In some cases, securing some of these other interests, such as providing a remedy against publicity which places the subject in a false light, may indirectly protect privacy.\textsuperscript{18} It does not follow that these interests are co-extensive with privacy. For

\textsuperscript{16}. Chapter 13 considers the action for breach of confidence, which is of equitable rather than common law origin.

\textsuperscript{17}. Prosser, W.L., 'Privacy', (1960) 48 Calf. L. Rev. 383, @ 389. See above discussion @ page 40 et seq.

\textsuperscript{18}. Ibid., @ 389, - category 3.
instance, an objection to having been portrayed in a false light is essentially an objection to having been misrepresented, or defamed. The interest impugned is reputation, not privacy. As was indicated by the chapter 4 discussion of the false allegation of homosexuality, reputation and privacy, may be closely, even causally, related. However, they are not identical. Attempting to vindicate the one under the guise of securing the other is productive only of confusion.

The focus of the definition of privacy posited here is upon the circulation of intimate information. Consequently, each of these three discussions has been further sub-divided so as to concentrate the analysis upon dealings with information. In theory, although less so in practice, three ways of dealing with information may be distinguished. To the extent that these types of dealing with information may be (physically) separated, the discussion is focused around:

- heads of action or sanctions pertaining to the initial circulation of (ie. physical access to) information;
- heads of action or sanctions pertaining to the manipulation or processing of (ie. learning 'new') information; and
- heads of action or sanctions pertaining to the use of information.

19. See above @ pages 87-88.

20. Glover, R.G., 'The Right to Privacy', (1983) 2 Cantab. L Rev 57, esp @ 57-62, offered a similar discussion of the ways in which the individual's private life can be invaded. However, he distinguished between the collection of information by actual surveillance and collection by skilful data-manipulation. And he treated the recipient of false information as a victim of a privacy intrusion.
The statement that Australian common law does not recognise privacy is slightly misleading. It is more accurate to say that there:

is no reported English decision which determined authoritatively whether or not an independent cause of action in tort for invasion of privacy exists.¹

One Australian case, *Victoria Park v. Taylor*, is frequently cited as having rejected the existence of such a cause of action.²

*Victoria Park v. Taylor* did not decide that there was no cause of action for the invasion of privacy: it decided that 'no authority was cited which shows that any general right of privacy exists'.³

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2. *Victoria Park Racing and Recreation Co Ltd. v. Taylor* (1937) 58 C.L.R. 479. The Justice Report (ibid) is among the papers which takes this view. See also Note, 'The Invasion of Privacy', (1961) 35 A.L.J. 61, @ 61, which misquotes Latham C.J., as saying that no general rights of privacy exists, rather than 'no authority was cited' to show that a general right of privacy existed. Nygh, P.E., 'The Protection of Privacy in English and Australian Law', (1961) 14 Aust. Lawyer 126, @ 126.

3. *Victoria Park v. Taylor*, ibid, per Latham, C.J., @ 496.
Victoria Park v. Taylor was a commercial case. The plaintiff's complaint was that the first defendant, who owned the adjoining land, had permitted the Commonwealth Broadcasting Corporation Ltd to place an observer on a platform erected on the first defendant's land, and the Commonwealth Broadcasting Corporation Ltd had broadcast descriptions of the races conducted on the plaintiff's racecourse without the plaintiff's permission. The plaintiff argued that the defendants' actions constituted a nuisance, an unnatural use of adjoining land, and interfered with the plaintiff's propriety right in the spectacle created by the plaintiff and conducted on his land.

However else the information which the defendant was broadcasting may be characterised, it was not intimate upon the criteria which were advanced in chapter 5. Further, the plaintiff did not object to the defendants witnessing the events as such. On the contrary, the plaintiff was only too happy to sell the information.

The plaintiff objected to the fact that the defendants did not purchase the information: they effectively stole it. To compound the injury, the defendants then sold the 'stolen' information,
thus unjustly benefitting from the plaintiff's labours and permitting the second defendant's audience to benefit from the spectacle the plaintiff was staging without paying the plaintiff.

The primary question in Victoria Park v. Taylor was a commercial one: who should benefit from a spectacle the plaintiff had created? The plaintiff objected to the defendants' overlooking his racecourse and describing the events occurring thereon.

It is thus surprising that the minority (Rich and Evatt JJ.) used this case as the vehicle to voice their concern for privacy. It is inconsistent to campaign for the recognition of 'protection against the complete exposure of the doings of the individual ... [as] a right indispensable to the enjoyment of life', whilst recognising that the gist of the case was the defendant's attempt to 'reap where it ha[d] not sown' — a case of unjust enrichment.

Justice Evatt, in dissent, took the strongest position against the legal recognition of privacy. He asserted positively that 'there is no general right to privacy'; whilst the majority simply noted that:

4. Victoria Park v. Taylor, supra n. 2, per Rich, J. (dissenting), @ 505.

5. Victoria Park v. Taylor, ibid, per Evatt, J. (diss) @ 518, quoting from the majority decision in International News Service v. Associated Press, 248 U.S. 215 (1918) @ 240.

6. Evatt, J., (diss), ibid, @ 521.
However desirable some limitation upon invasions of privacy might be, no authority was cited which shows that any general right of privacy exists. In many ways, *Victoria Park v. Taylor* was an unfortunate decision from the point of view of an analysis of the common law protection of privacy. It did not really decide anything. The majority took the view that there was nothing before them to show that there was any general, legal right to privacy; counsel for the plaintiff conceded from the outset that he would not argue for a right to privacy; and the case did not concern any privacy interest.

It should be noted, however, that this interpretation of *Victoria Park v. Taylor* is unorthodox. Swanton, for one, described this case as 'a paradigm case of invasion of privacy'. She based her analysis upon a 'control' notion of privacy, according to which any abrogation of individuals' capacities to control information about themselves is treated as an invasion of privacy.

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7 *Victoria Park v. Taylor*, supra n. 2, per Latham CJ. @ 496.

8. *Victoria Park v. Taylor* (1936) 37 SR (NSW) 322, per Nicholas, J. @ 341.

9. Swanton, J., 'Towards a Definition of Privacy', (1975) 6 Justice (Aust. ICJ) 13, @ 16. See also Seipp, D.J., 'English Judicial Recognition of the Right to Privacy', (1983) 3 Ox. J. Leg. Studies 325, @ 368, commenting *propos* this case that the 'Australian High Court rejected a right to privacy in 1937'; Dworkin, G., 'The Common Law Protection of Privacy', (1967) 2 Univ. Tas. L. Rev. 418, @ 423: 'Even if the High Court was right to hold that there was no right to privacy at Common Law ...'
For the reasons discussed earlier, this control-based analysis is rejected.

10.2. General duty to do no harm

It is moot whether the civil law is concerned with any one general interest. Further, it is open to dispute whether there is one: fundamental general principle that it is wrongful to cause harm to other persons in the absence of some specific ground of justification or excuse, or [are there] ... a number of specific rules prohibiting certain kinds of harmful activity and leaving all the residue outside the sphere of legal responsibility.10

The broad view of tortious liability was advanced, inter alia, by Pollock and Winfield. They maintained that there was a: general duty ... to do ... no hurt without lawful cause or excuse,11

10. 'Salmond on the Law of Torts', [1973, 16th ed. by Heuston, R.F.V., Sweet & Maxwell. London], @ 15. According to Williams, G.L., 'The Foundations of Tortious Liability', (1939-1941) 7 Cam. L.J. 111, @ 111, this is the traditional formulation of this question.

and that it is untenable to describe tortious law as 'cribbed, cabined, and confined in a set of pigeon holes'.

There is at least one High Court case which may support the broad view of tortious liability. In Beaudesert Shire Council v. Smith, the High Court offered a very broad formulation of the action on the case:

independently of trespass, negligence or nuisance but by an action upon the case, a person who suffers harm or loss as the inevitable consequence of the unlawful, intentional and positive acts of another is entitled to recover damages from that other.

If this is so, there may be a general principle of liability for the intentional infliction of harm, although, perhaps, not in as broad a form as Pollock and Winfield maintained.

In the few courts where Beaudesert Shire Council v. Smith has been cited, it has been viewed with suspicion. Academics have been

(1935) 51 L.Q.R. 249, @ 249.


no less hostile. Dworkin and Harari examined the case and concluded that:

the Beaudesert proposition could not be correct as stated, nor could it be accepted as new law.\textsuperscript{15}

10.3. Specific duties to do no harm

The narrow view of tortious liability has traditionally been championed by Salmond and his later editors. According to this view:

the law of torts consists of a body of rules establishing specific injuries'.\textsuperscript{16}


Much of the controversy over the basis of tortious liability is attributable to confusion about its aims. At different times, and to differing degrees, tortious law has been thought to be designed to compensate victims, punish tort-feasors, deter prospective tort-feasors, appease victims, or redistribute losses equitably. Blackburn and George suggested that:

the object of the law of torts is to define the circumstances in which a claimant or plaintiff can recover damages for a wrong done to him by a wrongdoer or defendant.

This is a circular definition. In practice, tortious law seems to compensate those who have suffered harm rather more than it punishes wrongdoers. Whether it does so to compensate victims, or to appease them is moot. (Perhaps the view which one takes on this is more indicative of one's view of humanity and human motivation than it is of anything else.) The deterrence aim seems to be the one which is the least successfully implemented. As


Williams remarked: the 'law of tort is least successful in checking casual acts of inadvertent negligence'.

10.4. Expansible duty of care

Glanville Williams suggested that:

there is no comprehensive theory of liability;
there is simply a wide and expansible theory.

The various heads of action are capable of independent growth. Consider, for instance, Lord Atkin's formulation of the 'neighbour principle' in Donoghue v. Stevenson. Perhaps, as some commentators have claimed, the common law is moving towards 'a generalised law of obligations'. The tort of negligence is extraordinarily broad. Milner commented that the tort of negligence represents a:

20. Williams, supra n. 17, @ 150.

21. Williams, supra n. 10, @ 132, see also @ 114. This view is also endorsed by Dias & Markesinis, supra n. 17, @ 18.


23. Veitch, E. & Miers, D., 'Assault on the Law of Tort', (1975) 38 Mod. L. Rev. 139, @ 141; Gilmore, G., 'The Death of Contract', [1974. Ohio State Univ. Press. Ohio], esp. @ 87;
fluid principle of liability, infinitely adaptable by the controlled manipulations of its elements of duty of care, breach of duty and damage. 24

It is not unlimited, even if its categories of harm are not fixed.

10.5. Nervous shock

Either of two broad causes of action may lie where the use of information is alleged to have caused injury to another — action for wilful or negligent infliction of nervous shock. Both depend upon the plaintiff sustaining a legally recognised injury.

The action for the wilful infliction of nervous shock is generally considered to have derived from Wilkinson v. Downton. 25 The action is largely a latterday adaptation of the action on the


case, according to which the law protects lawful activities from the deliberate, unlawful and positive actions.

The action for negligence occasioning nervous shock is a sub-class of the tort of negligence and, therefore, arises from breach of the general duty to 'take care to avoid acts or omissions which you can reasonably foresee would be likely to injure your neighbour'.

Consequently, plaintiffs must establish both that they have suffered some injury recognised by the law, and that the defendant was under a duty not to injure them. Justice Deane of the High Court, commented in Jaensch v. Coffey:

It is not and never has been the common law that the reasonable foreseeability of risk of injury to another automatically means that there is a duty to take reasonable care with regard to that risk of injury.

The particular injury which resulted need not have been foreseeable, but it must be a 'consequence of the same general character' as was foreseeable. However, foreseeability and


reasonable proximity have been applied to constrain this cause of action. (Courts appear to have been inhibited from expanding this course of action both by a fear of being inundated with fraudulent or trivial claims,\textsuperscript{30} and by a general aversion to excessively overburdening human enterprise.) Consequently, the action for negligent infliction of nervous shock may be of limited assistance where the primary complaint is of invasion of privacy.

10.5.1 Nervous shock as a legally recognised injury

In a sense, the discussion of \textit{Victoria Park v. Taylor} incidentally revealed that the tort of negligence provides little assistance to people who complain of invasion of privacy. In order to sustain a claim of negligence, plaintiffs must demonstrate, \textit{inter alia}, that they have suffered an injury recognised by law. To the extent that privacy is not an interest

\begin{quote}
\end{quote}


recognised by law, invasion of privacy will not, ipso facto, give rise to an injury recognised by law.

The position is not as simple as this statement suggests. The common law is slowly evolving to recognise injuries to 'thoughts, emotions and sensations' as Warren and Brandeis claimed. Nonetheless, people do not act at their peril in this regard. Unless the law recognises privacy as a discrete interest which may be injured, a mere invasion of privacy, without more, will not constitute an injury for the purposes of the action for the negligent or wilful infliction of nervous suffering.

The injury recognised by the law which most closely approximates to that of privacy is ('mere') psychiatric injury. Psychiatric injury may evidence a disturbance to a person's 'peace of mind' - the generic interest to which privacy is kin. However, not every disturbance of 'peace of mind' is manifested by psychiatric injury. Consequently, not every injury to 'peace of mind' necessarily constitutes nervous shock in the eyes of the law.


32. Warren, S.D., & Brandeis, L.D., 'The Right to Privacy', (1890) 4 Harv. L Rev. 193, @ 195. See the earlier discussion @ page 22 et seq.

33. In Jaensch v. Coffey, supra n. 27, Justice Deane frequently used the phrase 'mere psychiatric injury' - see for eg. @ 445, 456, 447, 448, 449, 450, 451, 452.
The courts view nervous shock with an unease bordering upon suspicion. They are shy of recognising mere humiliation, indignity, or affront: something more tangible is required. Perhaps the best evidence of this scepticism is found in the oft recurring description of 'mere psychiatric injury' with which the courts stigmatise claims of this type.

The objection which is sometimes raised, that the courts are unable to assess the quantum of damages to award for nervous shock, is something of a red herring. The remedy sought may be equitable in character rather than based upon the common law, eg. declarations or injunctive orders rather than an award of damages.

Although courts have been grudging, to say the least, in their treatment of actions for nervous shock, judicial scepticism seems to be diminishing. Pound may have been correct in suggesting that legal recognition of this type of injury largely reflects the

34. Jaensch v. Coffey, supra n. 27, per Brennan J. @ 433: 'Curial wariness of vague notions is, as Sir Owen Dixon said, perhaps the "reason that scorn of the law is more widespread among psychiatrists than anatomists": Jesting Pilate (1965), p. 18.' See for example Guay v. Sun Publishing Co., supra n. 30, esp per Estey J. @ 585-589. See Fricke, G.L., 'Nervous Shock - The Opening of the Floodgates', (1981) 7 Univ. of Tas. L. Rev. 113.

35. Veitch, E., 'Interests in Personality', (1972) 23 No. Ire. L. Q. 423, esp @ 441-442.

36. See eg. Jaensch v. Coffey, supra n. 27, esp per Deane J. @ 445, who analyses the cause of action.
advances in the science of mental pathology and psychology. As Australian scepticism about psychiatric injury diminishes, courts may become increasingly willing to entertain claims for what Justice Deane described as 'mere psychiatric injury'. Indeed, in Janesch v. Coffey, Justice Brennan noted that:

The foreseeability of shock-induced psychiatric illness has gained a more ready acceptance by Australian courts during the last half century.

10.5.2. Action for nervous shock as a means of vindicating an invasion of privacy

As was noted previously in chapter 6, the circulation of information does not invade privacy merely because it causes embarrassment. Protecting privacy by actions for nervous shock may tend to treat privacy as a subjective matter of personal taste or preference. There are no (nervous shock) grounds to complain about the circulation of intimate information unless it can be


38. Supra n. 33.

39. Jaensch v. Coffey, supra n. 33, per Brennan J. @ 433.

40. See above in chapter 6, at page 133.
shown that this has caused injury in the form nervous shock. To
the extent that susceptibility to nervous shock varies as between
people, reliance upon actions for nervous shock will provide
varying protection to privacy. This is not compatible with the
objective (intimate information) test of privacy which was
advanced in chapter 5.

Privacy, as defined here, is independent of 'peace of mind'.
However, to the extent that privacy and perceived privacy are
related, interferences with privacy may affect 'peace of mind'.
To the extent that 'peace of mind' may be injured by, or as a
result of, an interference with a socio-political interest (such
as privacy), action for nervous shock will provide a remedy.

In this sense, action for nervous shock is as suited to the
protection of privacy as it is to the protection of freedom of
association or freedom of speech. It provides remedies where
interference with an interest valued in itself (whether for itself
or for the ends it facilitates), also (simultaneously or
consequentially) causes an injury which is objectional per se,
regardless of the associated interference. (For this purpose, it
is assumed that 'peace of mind' is an interest which should be
protected from injury in the same way as is bodily integrity.)
ACCESS TO INFORMATION

Not all methods of gaining access to personal information are intrusive. Information may be learnt by seducing third parties into breaching confidences, analysing or manipulating data, or casual observation. The ways of obtaining information may be (loosely) divided into several general categories: intrusion; surveillance (whether explicit or covert); analysis of otherwise acquired data to 'discover' new information; or by supply by third parties. This last category of information circulation is not discussed here. It is discussed below from the viewpoint of the information supplier - i.e. in the context of the use or publication of information. ¹

11.1. Intrusion

Where information is acquired by actual intrusion, such as by entering the subject's home, or car, or by picking up and reading private correspondence etc, a complainant is likely to succeed in an action for trespass to land or chattels.
Once this cause of action was quite sufficient to secure a person's privacy. When owners or occupiers of property were secure within the walls of their homes, or their chattels securely within their possession, there was little likelihood that anyone could obtain information about, or from, that property, or those chattels without actually entering the property and/or physically interfering with those chattels. In an age of infra-red cameras, telephone interceptions and parabolic microphones, it is rarely necessary to actually interfere with property in order to gain information from it.

Where a privacy-intruder also interferes with a property right, the resulting right of action may be ill-suited to the protection of privacy. To the extent that the two interests co-incide - i.e. to the extent that information is property -, privacy may be distinguished from property by the intimacy tier test which was discussed in Part I above.²

Privacy claims are independent of objections to unauthorised dealings with property. As was discussed in Part I, privacy is invaded by the (objectionable) circulation of particular types of information, regardless of how the circulation occurs. Similarly, interferences with property are not less objectionable because the intruders do not learn anything from the property with which they interfere.

¹. See below discussion of the action for breach of confidence etc. and chapters 13, 14, and 15.
However, interferences with privacy committed by, or during, a trespass, (eg. circulations of information by trespass to - actual interference with - private correspondence or diaries) may exacerbate property injuries. As Bradley J. noted in Boyd v. U.S. (discussed in chapter 1 above), in such circumstances, plaintiffs may recover additional damages for the invasion of privacy.³

According to Seipp, English judges have explicitly invoked a right to privacy in a variety of cases to the extent that privacy law 'is a new doctrinal category in the making' in England.⁴ However, in England, as in Australia, remedies for interference with privacy remain dependent upon some physical interference with property or breach of confidence etc.

The protection offered to privacy by the action for trespass is largely fortuitous. This may be illustrated by the example which was postulated by the Younger Committee.⁵ Where C picks up and

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² In general, information which is characterised as intimate is unlikely to be simultaneously treated as property.

³ Boyd v. U.S., 116 U.S. 616 (1886), @ 627 - 628, discussed above at page 12 et seq. See also Greig v. Grieg, [1966] V.R. 376 (punitive damages for trespass to compensate for affront); Williams v. Settle, [1960] 1 W. L.R. 1072. In Merest v. Harvey, (1814) 5 Taunt 442; 128 E.R. 761, the court upheld an award of exemplary damages against a trespasser for action disregarding the 'every principle which actuates the conduct of a gentleman' - per Gibbs C.J. @ 443, 761. See also Burdett v. Abbott, (1811) 14 East 1, @ 154-155; 104 E.R. 501, @ 560.

reads A's letter without permission, A may have recourse against C for trespass against chattels. However, if C reads the same letter without actually touching it, A has no basis for an action for trespass. In each case C may obtain information. If it is intimate information which A does not want C to learn, there is no privacy distinction between the two situations. Yet C's decision to read the letter as it lies on the table rather than to pick it up will affect the liability in trespass.

Since Bernstein of Leigh (Baron) v. Skyviews & General Ltd, it has been accepted that photographing a person's home, even from an overflying aeroplane, is not a trespass. Further, there are numerous circumstances in which the common law may imply a licence to enter upon property, although the licence may be revocable at the will (or whim) of the occupier.

Nonetheless, the action for trespass may provide increasing protection to privacy. In Lincoln Hunt Australia Pty Ltd v. Willesee, Justice Young (sitting in the Equity division of the NSW Supreme Court) held that the plaintiff's implied invitation for the public to visit its premises should be construed as being limited to

5. Younger Committee: 'Report by the Committee on Privacy' (Chairman: Sir Kenneth Younger), [1972. HMSO. London] Cmdnd 5012, Appendix I, @ 290-291, para. 15.

6. Bernstein of Leigh (Baron) v. Skyviews & General Ltd, [1978] 1 Q.B. 479. See also the discussion below, page 237, n. 29, and accompanying text.
members of the public bona fide seeking information or business ... but not to people, for instance, who wished to enter to hold up the premises or rob them or even to people whose motives were to go into the premises with video cameras and associated equipment or a reporter to harass the inhabitants by asking questions which would be televised throughout the State.8

This was only a single judge decision, and it is not clear whether it will be followed in other courts, or in other Australian jurisdictions. However, if Young J.'s views were to be applied widely, the law of trespass might provide protection against some the types of action which frequently result in interferences with privacy.9

The common law once viewed private property as so 'sacred that no man [could] set foot upon his neighbour's close without his leave'10. (There is at least one High Court Justice who appears to consider that it still does.11) In several cases in the late


nineteenth and early twentieth centuries, people recovered in trespass for activities which adversely affected the enjoyment of their property by threatening their privacy. However, Baron Bramwell's statement that 'it is to be remembered that privacy is not a right. That intrusion onto or into it is no wrong or cause of action' seems to be as accurate a summary of twentieth-century law as it was of nineteenth-century law.

Including where protection is extended to chattels, legal liability centres upon overt, physical interference with property-rights. Thus private nuisance may lie only in respect of (tangible, physical) interferences with enjoyment (in a narrow sense) of land, and public nuisance in respect of interferences with the exercise of public rights.


12. Walker v. Brewster, (1867) LR 5 Eq 25; Baccleuch (Duke) v. Metropolitan Board of Works, (1872) LR 5 E & I App 418; Harrison v. Rutland (Duke), [1893] 1 Q.B. 142. (One cannot help wondering whether the status of some of the plaintiffs was significant.)

13. Jones v. Tapling (1862) 31 LJCP (n.s.) 342, per Baron Bramwell @ 347; aff'd sub nom Tapling v. Jones (1865) 11 HLC 290, @ 305; 11 E.R. 1344, 1350 per Lord Westbury LC: "invasion of privacy by the opening of windows" is not treated by the law as a wrong for which any remedy is given'. See also Turner v. Spooner (1861) 30(1) LJ Ch (n.s.) 801, per Kindersley V-C. @ 803.

This was apparent from the earlier discussion of *Victoria Park v. Taylor*, where the plaintiff failed in an action against defendants who overlooked his racecourse and broadcast descriptions of the races without the plaintiff's authority.\(^{15}\) Chief Justice Latham commented:

> the defendants have not interfered in any way with the use and enjoyment of the plaintiff's land. The effect of their actions is to make the business ... less profitable. ... [But] the racecourse is as suitable as it ever was for use as a racecourse.\(^{16}\)

Like trespass, nuisance provides only indirect protection to privacy. Privacy claimants have grounds for action only where they are able to hitch the privacy injury to a property-based injury, or the abrogation of a public right. Factual co-incidence of the interests, such as that the one action effecting both injuries, camouflages the disparity between them.

The enjoyment of an occupational interest in land or chattels is a property-based right.\(^{17}\) Privacy is independent of property concepts. It is equally independent of the enjoyment of public

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15. See discussion in chapter 10 above, page 207 et seq.


17. See McLaren, J.P.S., 'Nuisance Law and the Industrial Revolution - Some Lessons from History' (1983) 3 Ox. J. Leg. Studies 155, for a discussion of the developments in the law of nuisance. However the notion of property enjoyment has developed, it remains rooted in the notion of private property and private rights.
rights. (As was discussed in Part I, privacy is allied to conceptions of 'personal' and 'self'. In Australia, this is substantially a product of people's self-perception of themselves as independent individuals,¹⁸ but not necessarily as property-holders.)

In general, resting the protection of socio-political interests (such as privacy and freedom of association) upon property rights is conceptually and politically unsatisfactory. It tends to distort the recognition of such interests by taking into account (conceptually irrelevant) factors such as economic capacity. It shifts the focus of the analysis to the means of interference (whether property rights have been injured), and away from the interest affected. And it provides protection in proportion to (conceptually irrelevant) rights or interests.

As defined here privacy is depend upon (and limited by) community expectations and standards, not upon occupation or possession of property. Learning intimate information about squatters by lawfully entering their squat is no less injurious to their privacy than is unlawfully entering into the home of a property-owner and learning information of the same type.

Action for trespass to the person is sometimes said to protect privacy. To some extent, this rests upon confusion between

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¹⁸. As is discussed below in chapter 20, the content ascribed to privacy in any given society is primarily determined by that society's cultural and political history. This analysis is inevitably Western in its orientation.
privacy and autonomy (in the sense of physical capacity to act freely). This may be traced to Warren and Brandies' use of Judge Cooley's writing. As was discussed in chapter 1, his phrase, 'to be let alone', was (originally) used to describe the right to 'personal immunity': the right to be free from assault or battery.  

Although privacy may be invaded by an action which simultaneously invades bodily integrity, the interests are not co-extensive. The paradigm case is that of torture. Where people are tortured to reveal information, they are subjected to assault, or battery. It does not follow that privacy is invaded. The information which they are compelled to reveal may not be intimate. 

No amount of individual reluctance to disclose information can change its characterisation from 'non-intimate' to 'intimate'. Torturing people to compel them to reveal secret or confidential information may constitute an assault, and interfere with autonomy. It does not necessarily invade privacy. 

However, to the extent that access to information may depend upon (physical) interference with person or property, trespass and nuisance may provide some protection to privacy. This is only


limited protection, and depends upon the, often fortuitously determined, way that information is circulated. Further, it provides little protection against subsequent circulations of the information.

11.2. Surveillance

The term surveillance describes a range of ways of obtaining information. Homes, telephones, vehicles, or offices may be 'bugged'; daily activities may be monitored; movements shadowed etc. But these activities do not invariability provide grounds for civil suit.

In general, surveillance gives rise to suit only where it is apparent to the subject. Thus action for watching and besetting, which is a version of the action for nuisance, may lie where surveillance is oppressive in some sense.21

This cause of action may not be confined to activities pertaining to the complainant's home. The Ontario High Court of Justice

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21. Action for watching and besetting is usually considered to be available against a person who watches people in their homes with a view to compelling or influencing them to act, or to refrain from acting, contrary to a manner in which they are legally entitled to refrain from acting, or to act, as the case may be. See Lyons & Sons v. Wilkins, [1899] 1 Ch. 255; Bird v. O'Neal, [1960] A.C. 907 (PC); Tynan v. Balmer, [1967] 1 Q.B. 91; Torquay Hotels Co. Ltd v. Cousins, [1969] 2 Ch. 106, per Stamp J. @ 119.
issued an injunction against the Toronto Harbour Police restraining them from unlawfully following, watching and besetting the plaintiffs or unlawfully interfering with the plaintiffs' rights of navigation ... upon the ... harbour of Toronto.22

Even if the scope for watching and besetting is broader than has been traditionally thought, it is of little assistance where the real injury is to privacy. The crux of the action for watching and besetting is oppression: a constant and threatening presence which interferes with the enjoyment of property, or perhaps, the exercise of some public right (such as the right of passage), where the presence or surveillance complained of is motivated by an intent to encourage or discourage certain forms of conduct. Privacy is invaded when intimate information becomes known to a person or body whom the subject does not want to learn that information. It does not depend upon the intruders' reason for learning the information.

There are points of coincidence. The tortfeasor may be seeking to dissuade the plaintiff from engaging in a course of conduct about which the victim does not want the tortfeasor to learn. Consequently, the plaintiff may desist from that conduct to prevent the tortfeasor from learning about it.

22. Poole & Poole v. Ragen and the Toronto Harbour Commissioners [1958] O.W.N. 77, per McLennan J. @ 79.
Newart advocated expanding the tort of watching and besetting to provide protection against interferences with privacy:

There is also a strong case for the resuscitation of the tort of besetting, which goes back to the days of Fitzherbert: it would be a very effective weapon against the news-vultures who descend on any family who has suffered a great calamity.\(^{23}\)

However, this would not necessarily provide much protection to privacy. To some extent, it confuses privacy with a property interest. People who suffer from such 'news-vultures' suffer two injuries. First, they are deprived of the full enjoyment of their property. Secondly, they are placed in peril of intimate information about them being learnt by a person whose knowledge of that information is thought to be obnoxious, and which may expose them to the threat of future revelations of that information to other people from whom they wish to conceal that information.\(^{24}\)

In turn, the presence of such a 'news vulture' may affect perceived privacy. (For instance, people may be uncertain about

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24. Remember that this writer does not accept that the communication of information to people affects their privacy, regardless of how obnoxious is that communication - see page 100 (point 9) above. Consequently the development of tort of watching and besetting to provide a remedy to people who were the subject of constant harassment by nuisance telephone calls to them at their home (eg. Motherwell et al v. Motherwell, (1976) 6 W.L.R. 550) is not discussed here. This is a development of protection for the enjoyment of property, rather than the enjoyment of privacy.
what the 'news vulture' has learnt about them, or think, (rightly or wrongly) that intimate information has been circulated.)

In these circumstances, people wish to secure three interests. First, they wish to remove the 'oppressor' from the doorstep, and thus to regain the free and full (lawful) enjoyment of their property uninhibited by the fear that their actions will be reported. To some extent, this is a property-based interest.

Secondly, they wish to prevent a particular person from obtaining information by observing them at home as such. This is, in a sense, an assertion of 'personhood' in a wider sense than merely an assertion of privacy. It is the same type of objection as was considered in respect of unwanted photographs in chapter 6. The observation is objectionable because it is oppressive, in part because they object to being observed in their home without their consent per se. In this context, observation yielding non-intimate information about the type of wood that they burn in the their log fire is as offensive as observation yielding information about marital relationships or religion.

Thirdly, they wish to suppress the circulation of the intimate information by preventing the 'news-vulture', or any other person, from learning (and hence circulating to others) information about activities in their home because it is intimate information which they do not want circulated amongst strangers. They would be equally interested in preventing the circulation of that information by people who were not 'oppressing' them in this way.
A successful action for watching and besetting will partially achieve these objects. It will remove the oppressor from the door-step, and thus advance the plaintiff's 'peace of mind' and enjoyment of property. In some cases, it will also inhibit a defendant's ability to learn information. For instance, where the defendant is a reporter who wishes to report the plaintiff's reaction to some news item, removing the reporter from the plaintiff's proximity may preclude the reporter from learning about the plaintiff's reaction.

However, defendants are prevented only from learning information by direct observation. They are free to secure the information by other means - such as persuading a person properly privy to it into revealing it. The plaintiff's assertion of privacy - the attempt to suppress the circulation of the relevant intimate information - is thus only partially secured.

People who are watched surreptitiously have no grounds for an action for watching and besetting. If they are unaware of the surveillance, they may not complain of oppression, and therefore lack a basis upon which to invoke this head of action.

The may be illustrated by the unlawful interception of telephone conversations. (By unlawful is meant the interception of telephone communication without the authority of a warrant.) There is no express common law right of recovery for this type of surveillance; although there may be statutory remedies
available. (It is arguable, of course, that there may consequently be grounds for an action for breach of statutory duty.) It may be that 'wire-tapping is nothing more than eavesdropping by telephone'. However, if Malone v. Metropolitan Police Commission is good law, English civil law provides no remedy. The same if probably true of Australia.

Nor does surveillance per se give rise to any action; even where a person is photographed at home. As was discussed earlier, Bernstein of Leigh (Baron) v. Skyviews & General Ltd established that it is no trespass to pass over another's land at a high altitude, as for instance by aircraft, nor to photograph a person's home and activities from an aircraft. (The position may be different if the photographing amounts to a harassment.)

25. See the discussion of prohibitions upon the use of listening devises and telephone interception below in chapter 16, page 300 et seq.


27. Katz v. U.S. 389 US. 347 (1967) per Black, J. (diss), @ 366


29. Bernstein v. Skyviews and General Ltd., supra n. 6, and discussion on page 226 above.
The common law is not concerned with how people store or manipulate data lawfully under their control. However, the lawful possession of legitimately acquired information may affect privacy where it is intimate, or may be manipulated to generate intimate information. (As was discussed in Part I, it will affect privacy only if it is brought to the cognizance of its possessor and the subject objects to this knowledge.)

It does not necessarily follow from the freedom to manipulate data that people are free to publish or use information at will. The civil law recognises several causes of action where people complain of the improper use or circulation of information.

In addition to the general heads of action which are discussed in the next four chapters, there is a variety of statutory prohibitions upon particular uses of information, and upon the use and dissemination of information of particular subject-types or which has been received in particular circumstances.

For instance, statutory prohibitions upon discrimination on the basis of race or gender may discourage the processing or manipulation of information in particular ways. Thus, for example, a prohibition upon discrimination upon the basis of religion may discourage people from manipulating their data so as to ascertain details about religion.

In addition, where people deal with information contrary to a statutory prescription, there may be grounds for a tortious action for breach of statutory duty. Although the explicit basis of the action would be failure to comply with the statutory duty, the resulting action may provide a direct or indirect remedy for an invasion of privacy. In some circumstances, the policy underlying the relevant statute may be consistent with, or designed to promote, the recognition of privacy.

2. See the discussion of administrative remedies for discrimination in chapter 17 below.
As was noted in the previous chapter, lawful possession of information does not confer an unrestricted right to circulate, use or publish information. Several heads of action may be available to prevent or remedy dealings with information. The widest of these are the actions for the breach of confidence and breach of copyright. Action for confidence depends upon both the quality of the relationship in which the information was imparted and the nature of the information, whilst action for breach of copyright is primarily dependent upon the quality of the information.

13.1. Confidential information

It is easier to say how courts have dealt with actions for breach of confidence than it is to define the cause of action itself. It is not a tort, although some writers argue that it is becoming one.¹ It is not a property-based action, although some writers

argue that it is heading that way.\textsuperscript{2} Hammond described confidence as a 'concept which defies intrinsic definition'.\textsuperscript{3}

Consequently, it is difficult to identify any single interest as being served by the law of confidence. Jones described the action for breach of confidence as being based upon 'a broad equitable principle of good faith, namely that he who has received information in confidence shall not take unfair advantage of it.'\textsuperscript{4} This wide view was supported by Wacks who claimed that:

There is no single purpose which the law on breach of confidence seeks to realise. It not only upholds the propriety and morality of relationships, but it promotes an atmosphere of trust.\textsuperscript{5}


\textsuperscript{5} Wacks, R., 'Breach of Confidence and the Protection of Privacy', (1977) 127 New L.J. 328, @ 328.
This view also seems to have been supported by Justice Mason of the High Court. According to (now Chief) Justice Mason, the action for breach of confidence is founded upon:

The equitable principle [which] has been fashioned to protect the personal, private and proprietary interest of the citizen ... 6

These descriptions are not offered in place of a definition of breach of confidence. They are presented to describe the focus of the action - upon the relationship between the complainant and the person about whose use of information the complaint is made, and the nature of the information. 7

Glasbeek suggested that:

the action for breach of confidence can ... be analysed as having two discrete aspects: the nature of the information protected and the nature of the relationship in which the information was divulged [by the complainant to the defendant.] 8

In order to found an action for breach of confidence, the plaintiff must also prove that the defendant has breached the obligation of


7. See also Moorgate Tobacco Co. Ltd. v. Philip Morris Ltd. [No. 2], (1984) 156 C.L.R. 414, per Deane J. @ 438.

confidence in some way - such as by an unauthorised use of the information.9

In practice, action for breach of confidence may be a convenient way to litigate a privacy injury. However, the privacy protection provided by this head of action is limited by the requirement that there must have been a 'confidential' communication of the information to the defendant.10

As was discussed in chapter 3, privacy and confidence are not co-extensive. The latter depends upon the sharing of information. However, some intimate information will be known only to the one person, and is thus likely to receive no protection from the law of confidence.11

The requirement that the (confidential) information 'must not be something which is public property and public knowledge' is consistent with the protection of privacy.12

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10. Dunn J.'s view of the action for breach of confidence in Franklin v. Giddins, [1978] Qd.R. 72, which is discussed below at pages 245 - 247, might be sufficiently broad to apply in this situation. But contra: Wacks, supra n. 5.

11. This may be subject to some exceptions. See below discussion of Franklin v. Giddins, ibid.

this type is unlikely to be characterised as intimate. (In some
circumstance this may not be true. For instance, where intimate
information is unjustifiably (and against its subject's wishes)
published to the world at large, the circulation of that
information may still invade privacy.)

The second requirement - that the information was imparted in
circumstances which imposed an obligation of confidence upon the
defendant - is equally consistent with the protection of
privacy.\(^{13}\) Whether this obligation is express (eg. a contractual
term, as is typically the case where information is received in
the course of employment\(^{14}\)), or implicit (eg. in the relationship
between the parties), it may influence the characterisation of the
commonly held information. Thus, for instance, information
confidentially communicated between spouses may be more likely to
be characterised as intimate because of that communication, than
would have been the case had the information been communicated to
a casual acquaintance.

In some circumstances, courts have permitted confidential
information to be 'traced', and have enjoined its use by innocent
third parties who have learnt it without notice of the original

\(^{13}\) This obligation may be implied in some circumstances - eg: Parry-Jones v. Law Society, [1969] 1 Ch. 1, per Lord Diplock @ 9.

\(^{14}\) But see Bowers, J., 'Protecting Confidential Information; (1985) 4(3) Litigation 107, on the difficulties of applying this
in practice.
breach of confidence.15 Again, this is compatible with the protection of privacy. As was discussed earlier, privacy does not cease to exist as a result of an interference. The circulation of intimate information may interfere with privacy, regardless of whether it has been circulated (and privacy invaded) previously.

The extension of the action for confidence to third party recipients seems to have been influenced more by notions of unjust enrichment than by considerations of privacy.16 This may explain the result in Franklin v. Giddins.17 Consequently, courts may be reluctant to permit information to be 'traced' solely because of an interference with privacy.

If Dunn J.'s reasoning in Franklin v. Giddins was correct, the relationship between the parties does not necessarily determine the outcome of actions for breach of confidence. In that case, Dunn J. permitted recovery against a person who had stolen the information in question. Dunn J. commented that he was unable to accept that a thief who steals a trade secret, knowing it to be a trade secret, with the

15. Printers and Finishers Ltd v. Holloway (No. 2), [1964] 3 All ER 731, per Cross J. @ 737.

16. Courts are less likely to permit recovery ('tracing') where innocent third parties have expended time, effort, or money in reliance upon the information than where they have engaged in 'reprehensible conduct' to learn or exploit the information: Jones, supra n. 4, @ 482-483. See generally Lord Ashburton v. Pape, [1913] 2 Ch. 469.

17. Supra n. 10.
intention of using it in commercial competition 
with its owner, to the detriment of the latter, and 
so uses it, is less unconscionable than a 
traitorous servant. 18

Were this view to be adopted generally, the action for breach of confidence would provide considerable protection to privacy as defined here. Underlying Dunn J.'s statement about the 'thief who steals a trade secret knowing it to be a trade secret' appears to rest upon an a priori characterisation of the nature of the information as inherently 'secret' (independently of the circumstances of its communication).

In order to be functional, any such characterisation must be presumptive. Therefore, it must be possible to say that a 'reasonable person', knowing of the circumstances surrounding the information, such as that people are privy to it do not make it generally available, should have known that it was 'secret'. (Without this presumption, Dunn J.'s thieves may be able to immunize themselves from suit by the consciously failing to discover how the possessors of the information deal with it.)

The criteria affecting the characterisation of information are analogous to a 'reasonable person' test. It is probable that some information which would be characterised as 'secret' in the sense which could invoke Dunn J.'s wrath could also be characterised as

18. Franklin v. Giddins, supra n. 10, per Dunn J. @ 80.
intimate upon the criteria which were established in the earlier part of this thesis.

However, Franklin v. Giddins seems to stand outside of the mainstream of breach of confidence cases. In the Commonwealth v. John Fairfax, the plaintiff invoked Franklin v. Giddins in an attempt to support the contention that the information which was the subject of the case was confidential. However, the presiding Justice, Mason J. of the High Court, did not refer to this argument. He applied the traditional confidence principles and quoted from Coco v. A.N. Clark (Engineers) ltd, commenting that the:

plaintiff must show, not only that the information is confidential in quality and that it was imparted so as to import an obligation of confidence, but also that there will be "an unauthorised use of that information to the detriment of the party communicating it".

The value of the action for breach of confidence as a means of protecting privacy may be further complicated by the emergence of a distinction between the position of official information and

19 Commonwealth v. John Fairfax & Sons, supra n. 6, Argument by L.J. Priestley Q.C. on behalf of the Commonwealth @ 44.

20. Commonwealth v. John Fairfax, ibid., @ 51. quoting Coco v. A.N. Clark (Engineers) ltd., supra n. 12, @ 49. See also G. v Day, [1982] 1 N.S.W. L. R. 24.
officially (ie. government) held private information. According to Mason J (as he then was), the court will determine the government's claim to confidentiality by reference to the public interest. Unless disclosure is likely to injure the public interest, it will not be protected.

Privacy differs from confidence in that interferences with privacy are determined by the nature of the information circulated, not by the identity or status of the persons privy to the information. Nonetheless, many privacy injuries may be vindicated in the name of confidence. For instance, where information (which is not in the public domain) which the subjects wish to keep to themselves and/or a few selected confidants, is disclosed to people to whose knowledge of that information they object, by someone to whom they confided it, they may have grounds for an action for breach of confidence. The Duchess of Argyll v. The Duke of Argyll is the paradigm of this type of case.

21. Nettheim, G., 'Private Information in Public Hands: Confidentiality, Court Disclosure and the Public Interest', (1979) 10 Fed. L. Rev. 329, @ 360. However, it should be noted that the breach of confidence exemption in the Freedom of Information Act 1982 (Cth), s. 45, which is noted below in chapter 17, has been interpreted as being wider than the common law action for breach of confidence - eg. see Re Maher & Attorney-General's Department (No. 2), (1986) 4 AAR 266; and Re Witheford & Department of Foreign Affairs, (1983) 5 ALD 534, esp. @ 542.

22. Commonwealth of Australia v. Fairfax, supra n. 6, @ 52.

23. [1967] 1 Ch. 302.
There were two injuries inflicted in Argyll. First, there was a breach of trust, i.e. the breach of confidence by the defendant's publication. Secondly, there was an invasion of privacy by the circulation of information of a type which, according to the prevailing community standards, may have been intimate, and therefore, should have been circulated only with its subject's agreement. (The invasion of privacy would have been same whether the information was learnt by the third parties as a result of the defendant's breach of confidence or through independent research.) In the absence of such community standards, there would have been no invasion of privacy. However, the publication would not have ceased to be a breach of confidence because of the lack of such community standards.

In Argyll, the invasion of privacy resulted from the breach of confidence. Where this is the case, the action for breach of confidence, provides extensive protection to privacy. Where a plaintiff recovers damages for the breach of confidence, the award is likely to include a component for the invasion of privacy. Alternatively, or additionally, where a plaintiff seeks an injunctive order to prevent or reduce a breach of confidence, the likelihood of a resulting invasion of privacy will strengthen the case for the order.

Although invasions of privacy of privacy may be factually coincident with breaches of confidence, they are not necessarily synonymous. This may be illustrated by Foster v. Mountford &
Rigby Ltd. In that case, the defendant anthropologist had been given information in confidence which the plaintiffs did not want published to the world at large. Whether or not the point was made expressly at the time of the original communication, it seems to be clear that the defendant would not have been given the information if the plaintiffs had not thought that it would be treated as confidential. They objected to publication because (1) the information was of a type which should not be published to the world at large; and (2) publication would breach of their confidence: two notionally distinct but factually coincident injuries. The plaintiffs would have been equally anxious to suppress the publication if the defendants had deduced the information independently.

Action for breach of confidence may preclude consideration of whether a privacy claim should succeed in the particular circumstances. In effect, there are two questions. First, the confidence question is whether the defendant should be required to account for the unauthorised use or circulation of information. Secondly, the privacy question is whether the information should be circulated in the way disputed.

Frequently, in confidence cases, the first question depends upon a judgment whether defendants should be permitted to profit from the work of another to which they have been made privy upon the

understanding that they will not appropriate it. The second question, however, depends upon the information type.

To some extent, reliance upon actions for breach of confidence may distort the consideration at the second level. As Glasbeek commented, relying on the action for breach of confidence may produce ad hoc determinations which do not permit proper debate about 'the serious questions of what public interests are worthy of protection'.

It is, as Finn noted, hazardous to generalise about the law of confidence. Nonetheless, there does appear to be a long term trend towards the development of a public interest test or defence to the action for breach of confidence. Although this is more readily apparent from the decisions of English courts than it is from those of Australian courts, it is possible that the Australian court may follow this trend. However, as a

25. Glasbeek, supra n. 8, @ 270.


27. See the cases cited by Finn, supra n. 24. See also H.M.'s Attorney-General for the UK v. Heinemann Publish. Aust. Ltd. [the Wright case], (unreported) Supreme Court of NSW (Equity Div), 13 March 1987, esp. @ 268-269 of judgment by Powell J.

consequence of the uncertainty about the basis of the action for breach of confidence, the scope and availability of this defence is uncertain. According to Cripps:

If the action for breach of confidence is regarded as equitable, as distinct from contractual, proprietary or tortious, in nature, it is more likely that the courts will be prepared to hold that the public interest defence to the action operates as a defence in the true sense of that word rather than as a factor which has the effect of preventing the formation of an obligation of confidence.29

The availability of a public interest defence is not, in principle, inconsistent with the protection of privacy. (This point is discussed further in chapter 26 below.) However, the application of a public interest defence to an action framed in confidence may militate against consideration of the subject-type of information, and thus the protection of privacy.

13.2. Literary works

The law of copyright imposes some restrictions upon the circulation of information. However, the law of copyright is primarily concerned to ensure fair dealing in 'literary, dramatic or musical works': in the material form in which ideas or information are embodied, or 'dressed'.

Rather than protecting ideas or information as such, the law of copyright is largely designed to protect an author's knowledge, skill, labour or judgment in presenting the idea or information. Despite this, the interest protected


32. Fraser v. Evans, [1969] 1 Q.B 349, per Lord Denning @ 362.

33. LB (Plastics) Ltd. v. Swish Products Ltd., (1978) 4 F.S.R. 32 (CA), esp. per Buckley L.J. @ 39: 'A may use the idea embodied in a copyright work of B's in any way he choses so long as he does not make use of B's labour and skill employed in presenting that idea in the copyright work.' Catterns, D., 'Writers and Copyright', in Ovenden, B.(ed), 'The Australian and New Zealand Writers Handbook', [1975. A.H. & A.W. Reid. Sydney], 83, esp @ 84. Such protection as there is for information or ideas is provided by the law of confidence: Talbot v. General Television Co. Pty Ltd, [1980] V.R. 224.

34. Ladbroke (Football) Pty Ltd v. William Hill (Football) Pty Ltd, [1964] 1 W.L.R. 273 (HL), esp Lord Evershed @ 282; McNally, P.T., 'Non-book Materials and Copyright', (1978) 27 Aust. Library J. 314, @ 324. See also LB (Plastics) Ltd v. Swish Products Ltd, (1977) 3 F.S.R. 87, per Whitford J, @ 91: 'Copyright ... is concerned to stop one man's skill and labour being taken by
cannot be limited literally to the text, else a plagiarist would escape by immaterial variations.\textsuperscript{35}

The focus upon form rather than substance (or type) of information, distinguishes the interest protected by the law of copyright from privacy. It makes no difference to a privacy claimant whether the way intimate information is expressed is plagiarized or cast in an original form. However, in some circumstances (eg. where the invasion of privacy is by the circulation of information contained in a diary or letter), breach of copyright may exacerbate a privacy injury.

The protection provided to privacy by the law of copyright is thus limited. Inventive intruders will be able to evade liability for breach of copyright no matter how intimate the information they circulate.\textsuperscript{36} In addition, the law of copyright recognises a number of non-privacy conscious defences, such as fair dealing for the purposes of study or research, or criticism, or review, or the

\begin{quote}
\textit{another for profitable exploitation ...} It may also be available where the work is of 'industrial but not cultural significance': Gibbs, H.T., 'Opening Address of the Intellectual Property Colloquium of Judges' (April 1985) 9 Intellectual Property in Asia & the Pacific 8, @ 9.
\end{quote}

\textsuperscript{35} Nichols v. Universal Pictures Corp., 45 F.2d 119 (1930), per Learned Hand J. @ 121 (Cert. denied: 282 U.S. 902 (1931)).

reporting of news. It may also recognise a defence of public interest.

In some circumstances, of course, copyright and privacy may co-incide. The extent to which plagiarism of ideas may constitute an infringement of copyright will depend upon the nature of the work plagiarized and the form of the plagiarism.

In some circumstances, an idea or information may be so inextricably interwoven with the form of its expression that any expression of it necessarily infringes copyright.

As was discussed in Part II above, information management practices are directly relevant to individual privacy. Because of the increasing trend towards the computerisation of records, the extent of legal protection for computer data is relevant to the

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37. Commonwealth v. Fairfax, supra n. 6, per Mason J. @ 56.

38. Ibid., @ 56 - 57. See also 'Information as Property - Copyright and Confidential Interest', (1985) 3 (2) Copyright Reporter 1, @ 35, and Catterns, D., 'Information as Property', in Longman Professional Seminar, 'Directions in Media Law', [1985. Longmans Professional Seminars, Sydney.], @ page 4 of paper.

39. Lahore, J.C., 'Intellectual Property in Australia - Copyright', [1977. Butterworths. Sydney], @ para. 1121. See also Bauman v. Fussell reported in 'The Times' (newsp.), 19 May 1953, and discussed in Copinger & Skone James on Copyright', [1973. 11th ed. by Skone James, E.P., Sweet & Maxwell. London], @ para. 117, in which the Court of Appeal considered whether the copyright in a photograph of a cock-fight was infringed by a painting admittedly derived from it. It was held that it did not, but Rommer L.J. provided a strong dissent.
The statutory definition of literary work now includes computer programmes, and considerable attention has been directed to the protection of computer software in the literature. However, it is far from clear how extensive is, or should be, the protection of computer software.

It is may be possible to differentiate between a computer programme - the structural arrangement established, or designed, by the author of the programme -, and the raw data which is

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40. The latter body of law is virtually irrelevant from the point of view of privacy.

41. Copyright Amendment Act 1984 (Cth). This amendment was intended to protect computer software. Whether it did so is moot. See also Stern, S., 'Computer Software Protection After The 1984 Copyright Statutory Amendments', (1986) 60 A.L.J. 333.


manipulated by that programme. The formalised structure which has been designed by the author would probably be protected by the law of copyright. However, the raw data around which the programme has been written may not be so protected.\(^{44}\) This latter is more akin to the raw idea which inspires a novel or a painting, than to the actual literary work: the material form in which the idea has been clothed. However, the raw data may be directly relevant to privacy.

This differentiation does not clarify the status of information which is generated by the use of the programme. It is not clear whether analogy may lie to the 'message' which is conveyed by a novel when read in entirety. It is difficult to disagree with Lahore's conclusion that:

> The applicability of copyright law to computer programs\(^{[sic]}\) is neither clear nor satisfactory.\(^{45}\)

For this, and other reasons discussed here, the law of copyright provides only indirect, and largely ad hoc, protection to privacy. Even where the source of intimate information is within

\(^{44}\) Consequently it may fall foul of the rule that there 'is no copyright in information or ideas, but only in the manner of expressing them': Elanco Products Ltd, v. Mandops (Agrochemical Specialists) Ltd, (1979) 5 F.S.R. 46 (CA), per Goff LJ. \(\oplus\) 52.

the protection provided by the law of copyright (eg. a diary), little protection is provided to the information itself.
In some circumstances, publishing information may give rise to an action for either passing off or defamation. The compatibility of the interests protected by these two causes of action and privacy are discussed in the next chapter. Before examining the protection which either or both of these causes of action may provide to privacy, there is one further type of circulation which must be considered: circulation of information on the public record or about activities performed publicly.

As was discussed earlier, people may be treated as having consented to the circulation of information about their public acts simply by the fact of performing them publicly. It does not follow that all circulations of information pertaining to actions which have been performed publicly, or which are deemed to have been performed in public by legislative or other direction, are necessarily authorised. For example, the time which has elapsed between the doing of the act which is the subject of the information and the circulation at issue may be relevant. Other factors, such as the connections or similarity between the action

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1. See also Taylor, G.D.S., 'Privacy and the Public', (1971) 34 Mod. L. Rev. 288, @ 293.
or event which is the subject of the information and the position or circumstances of the information-subject may also be relevant.

The use of information on the public record is subject to the ordinary processes of law to the same extent as is the use of information not so recorded. Thus, for instance, in a society which prohibits discrimination upon the basis of gender, people may be liable for discrimination if, having discovered information about someone else's gender from the record of births or the electoral roll, they use that information to discriminate against the information-subject. The alleged discriminator would be unable to rely upon having learnt the information from the public record as a defence.

14.1. Circulation of 'public' information about convictions

Information about 'spent' criminal convictions presents special problems for a privacy analysis. A criminal conviction is a public act, and the principles of a system of law in which justice must be seen to be done opposes the idea of treating information about criminal convictions, no matter how embarrassing, as intimate.²

The status of information of this type depends upon the distinctions which were drawn in the first part of this thesis. Characterisation of information depends upon the society's recognition of particular areas of life as being 'off limits'. (It does not depend upon individuals' concern or possible embarrassment over the circulation of information.) This may be affected by the way that it is recorded.

The emphasis here is upon the nature of record, not the existence of records. Information is not non-intimate because it is documented. It is non-intimate because it is documented in a public - i.e. an official - records. As was noted in Part I, the circulation of 'documented' material may involve an invasion of privacy.

Whilst a criminal conviction remains on the public record, information about it cannot be characterised as intimate. The fact of its entry into a public record is conclusive evidence to the contrary. However, if a society provides for the expungement of records after some specified criteria have been met, that provision may be indicative of the society's view that, after

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3. See Stevens, 'Living it Down', [1972. Justice, Howard League for Penal Reform, National Assoc. for the Care and Resettlement of Offenders. London], @ 3, for an illustration of how information contained public records may affect individuals' perceptions or security.

4. See above discussion at page 140 et. seq. But pace Parent's analysis referred to on page 141, fn. 10 above.
those criteria have been satisfied, information about the event in question should be characterised as intimate.\footnote{5} 

Markesinis commented that the idea that criminals should have the right to have their pasts 'forgotten' was slow to gain acceptance in England.\footnote{6} The same may be said of Australia.\footnote{7}

However, some jurisdictions have legislated for the expungement of criminal convictions after a specified period of time.\footnote{8} The reasons underlying these provisions may be varied. This may reflect a belief that people should be entitled to resume their places in society unencumbered by the stigma of a 'spent' conviction.

\footnote{5} The position is complicated by the existence of convictions which necessarily remain publicly available after the formal expungement. Thus, for example, old newspapers or newsreels may reveal (expunged) convictions. Unless the expungement statute simultaneously prohibits any publication about the expunged convictions, the plaintiff may be forced to rely upon defamation-style remedies to suppress the circulation of information of this type.


\footnote{7} It should be noted that there is still some argument that the expungement of convictions is undesirable: vide Greenslade, B., '"Eyes open" policy: Employment of a person with a criminal record', [1986] N.Z. L. J. 386. But see A.L.R.C. Report No. 37, supra n. 2.

\footnote{8} Eg. Crimes Act 1900 (NSW), s.579, provides that offences shall be disregarded after 15 years; Child Welfare Act 1939 (NSW), s.16, prohibits the publication of information identifying a juvenile defendant. See also Child Welfare Ordinance 1957 (ACT); the Children's Court Act 1973 (Vic); Child Welfare Act 1958 (NT); Children's Services Act 1965 (Qld); Juvenile Courts Act 1931 (SA); Child Welfare Act 1947 (WA).
Whatever the reason underlying a provision for the expungement of criminal records, there is a strong inference that after the expiry of the specified time, information about that spent conviction should be characterised as intimate. After that time has elapsed, people may be entitled to view the circulation of information about 'spent' convictions as invasive of privacy.

In a society which does not provide for the expungement of its records of criminal convictions after a particular period of time, there does not seem to be any privacy-based objection to the circulation of information about 'spent' convictions. Where a society does not limit the life of its public records, information contained in them may not be classed as intimate.

To some extent, this illustrates the limited nature of the privacy interest hypothesised in this thesis. The concept of privacy as defined here is passive. It is determined by reference to societies' recognition of their own limitations: that their members are entitled to some 'off limits' area. Privacy does not determine a society's limits. That rests upon the society's recognition of the autonomy of its citizens.

9. It does not necessarily follow, however, that all informal records of expunged convictions (eg. newspapers, newsreels) should be simultaneously expunged. It may be sufficient to prohibit the circulation of that information other than by actually reading/viewing etc. those records, and to prohibit the use of that information (including by people who learn it by reading/viewing etc. those records).
There are many reasons why societies elect to provide for the expungement of records after a specified time. For instance, it may be to increase the protection of privacy, or to improve the rehabilitation of discharged criminals who have served their sentences. However, even where the expressed motive is to increase the protection of privacy, this is not because the expungement of records is dictated by privacy. Expunging records effectively re-classifies information (e.g. about criminal convictions) from the public domain to the non-public, and may therefore characterise the information as intimate. It may thus be added to the category of subjects which a society view as 'off limits'. In turn, this increases the scope of privacy claims.
CHAPTER 15

FALSE OR DAMAGING PUBLICATION OF INFORMATION

Actions for passing off and defamation share a common theme. They depend upon publication of information about the plaintiff. However, there are significant distinctions between the two causes of action. Consequently, they are discussed separately in this chapter.

15.1. False publication: appropriation of name or likeness

Prosser's fourth category of invasions of a person's right 'to be let alone' listed actions which appropriate 'for the defendant's benefit or advantage, ... the plaintiff's name or likeness'.

This is a fair, if somewhat loose, description of the grounds of the action for passing off. It is not a description of the grounds of complaint for the invasion of privacy as privacy is defined in this thesis.

1. Prosser, W.L., 'Privacy', (1960) 48 Calif. L. Rev. 383, @ 401, 389 (see above @ page 40). See also the discussion of the right 'to be let alone' at pages 29 - 37 above.
People whose names or likenesses are published in association with another, and/or another's business or products, may object to the association because they:

(i) object to becoming the focus of attention, i.e. they object to the publicity *per se*;
(ii) object to the implication that they would endorse anyone else's business or products;
(iii) object to the implication that they have endorsed the particular person, business, or product with whom/which they have been associated;
(iv) object to the use of their names, likenesses, or reputations without permission; and/or
(v) object to use of their names, likenesses, or reputations without payment.

As was discussed in Part I, privacy is not invaded merely by unwanted publicity. In this sense, privacy (as defined here) is not simply the obverse of publicity. However, to the extent that an objection to unsolicited and unwanted publicity *per se* includes objections to the circulation of particular types of information, this objection may be partially privacy-based. This class of objections is conspicuously ignored by the action for passing off.

The law of passing off provides remedies only where the plaintiff is actually associated with the defendant and/or the defendant's business, goods, or services. Consequently, it does not

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2. Action does not lie for passing off where the plaintiff's reputation is invoked, but not actually associated with the
provide a remedy against publicity per se, nor against particular subject-types of publication. In American jurisprudence, the action for passing off has merged into a tortious action for a 'right of publicity' in the sense of an exclusive right to exploit the publicity value of name, reputation, or personal attribute. In some ways, this is a more accurate name for the action.

However, in part because of Prosser's analysis, the law of passing off is often treated as privacy-protective. Although it is not so on the analysis of privacy provided in this thesis, this chapter examines the interests secured by the action for passing off in some detail. The way that (non-privacy based) objections to particular types of publicity vary because of the subject-matters of publications may illustrate the differences between privacy and non-privacy based objections to the circulation of (personal) information.

An action for passing off may lie where a defendant falsely or misleadingly represents that the plaintiff is in some way associated with the defendant or the defendant's business, goods

defendant's business, goods or services.


4. Samuelson, P., 'Reviving Zacchini: Analyzing the First Amendment Defences In Right of Publicity And Copyright Cases', (1983) 57 Tulane L. Rev. 836, @ 836; and Fleming, ibid., @ 675.
or services. The interference, or attempted interference, with
the plaintiff's 'business or commercial goodwill, however flexible
that latter concept is, provides the grounds for the action. Consequently, it is not a defence that the attempt to appropriate
the plaintiff's name or likeness failed. Nor is it a defence
that the plaintiff is in a completely different field from the
defendant. It is sufficient to show that a substantial number
of people have been deceived by the use of the name, or image
equally, or by the inference that the plaintiff is associated with
the defendant and/or the defendant's business or products.

The primary aim of the action for passing off, (assuming that one
can be identified) is thus to limit, or at least to remedy, unfair

Maxwell. London], @ 72.

Rev. 224, @ 226. See also Libling, D.F., 'The Concept of
Property: Property in Intangibles', (1978) 94 L.Q.R. 103, @ 111.

(HL), per Lord Parker of Waddington @ 283 -284.

576. See generally Pannam, C.L., 'Unauthorized Use of Names or
Photographs in Advertisements', (1966) 40 A.L.J. 4, @ 7-8.

R.P.C. 163. See also The Cricketer Ltd v. Newspress Pty Ltd,
(London), Ltd, [1938] Ch. 414; Sales Affiliates Ltd v. Le Jean,
Ltd, [1947] Ch. 295.

2 Sydney L. Rev. 50. See also Street, H., 'The Law of Torts',
'theft' of their goodwill - of their 'commercially saleable reputation'. It provides people with some measure of security in the enjoyment of business, commercial, professional, or public reputations. It is a property oriented action.

As a result, the less well-known complainants are, the less likely it is that they will succeed in an action for passing off where their complaints are for the publicity *per se* - for the use of their images, names, likenesses or reputations, regardless of the purposes to which they may have been put. Pannam commented:

> Even this reinvigorated version of passing-off will not protect a person who does not have commercially saleable reputation. John Citizen can be pressed into unwilling service for a toothpaste but not Bill Well-Known.

This is the cogent evidence of the unsuitability of the action for passing off as a means of protecting privacy.

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12. Libling, supra n. 6.

13. There may be grounds for action for breach of confidence, or infliction of nervous shock, or defamation etc.

14. Pannam, supra n. 8, @ 8.
In the second class of objections, the complaint is analogous to defamation: or misrepresentation. The plaintiffs object to the implication that they would endorse anyone else's business, goods, or services.

Tolley v. Fry illustrates this type of objection. Tolley objected to the publication of a caricature of him playing golf with a packet of the defendant's chocolate protruding from his pocket because of the implication that he had lent himself to a scheme for advertising. Tolley was a amateur golfer, and therefore was not permitted to engage in any form of advertising without surrendering his amateur status. Greer L.J. commented:

"The plaintiff's real objection was that he thought that he was being accused of receiving money for advertising Fry's chocolate, and that this would damage him in his reputation as an amateur golfer."  

The plaintiff's objection was to the inference which may be drawn from the publicity - that he was prepared to be party to advertising. Had the advertisement included a statement to the effect that the subject did not agree to lend his name or reputation to the endorsement, and had derived no benefit from the publicity, he would not have objected to the advertisement (at

15. Tolley v. J.S. Fry & Sons, [1930] 1 K.B. 467. (This decision was reversed on different grounds by the House of Lords - see [1931] A.C. 333.)

16. Ibid., per Greer L.J. @ 481.
least, not on these grounds). That the plaintiff did not object to the publicity *per se* did not derogate from his objection to the exploitation of his reputation for the purposes of advertising.

The third type of objection, to a particular association, is more directly a complaint about passing off. It is an objection to the implication that the plaintiffs are associated with the defendant or the defendant's business or products, or have endorsed the (particular) defendant's business, goods, or services where to provide such an endorsement would adversely affect their reputations. This latter objection is akin to defamation. It arises out of the (possible) consequences of the publication (eg. damage to reputation).

An objection to a association with a particular product or defendant etc. is both for the 'theft' of something which might otherwise have been sold (the unauthorised use of the plaintiffs' reputations), and for the disregard of the plaintiffs' rights to determine the way that they will use (exploit) their reputations. The objection thus reflects the concern that improper use may devalue the plaintiff's property (reputation). It is irrelevant that, in the particular circumstances, the plaintiffs might have refused to 'sell'.

Analogy may lie to the theft of a racing car. If A possesses a car which B (a rival driver) wishes to purchase, and B steals it, B is no less guilty of theft because A would have refused to sell it to B had B attempted to purchase it. If B then uses the stolen
car in competition with its lawful owner (A), the injury is aggravated. Similarly, if the defendant who appropriates the complainant's reputation is a competitor, a rival trader, this simply compounds the injury.

The fourth and fifth classes of objection are closely related. If the plaintiffs' objections are to the use of their names, likenesses, or reputations without permission, it is akin to the previous type. The objection is to the interference with the plaintiff's right to determine the how they will use their names, likenesses, or reputations, and the 'theft' of something which the plaintiffs alone are entitled to alienate or lend.

An illustration of this might be the position of a monk who has taken a vow of poverty and has an established reputation as a teacher. Suppose that B, who manufactures educational toys, associates the monk with B's products without the monk's permission. The monk may have no objection to the publicity, and had he been asked, he might have been willing to promote the toys for no charge. However, because B did not seek his permission for the association, the monk may be heard to complain of passing off. It in no way derogates from his complaint that he could not and would not have received payment for the advertising had he agreed to it.

The fifth class of objections, to the use of the plaintiff's name or reputation without payment, falls into an uncomfortable middle-ground between unjust enrichment and theft. The complaint is not
for the publicity; nor for the implication that the plaintiffs are prepared to lend their names or reputations for the purposes of advertisement; nor even about the particular association. It is for the failure to pay for the use of something which the plaintiffs were entitled to sell: their reputations and/or the use of their names. In this sense, plaintiffs do not complain of damage in the usual sense of 'harm consequential upon the act done'.

The complaint is for the loss of a fee: just as people who are in the business of renting out cars might complain when someone used one of their cars without paying. The plaintiffs claim that their property (ie. reputations as items of trade created through their endeavours) has misappropriated by a defendant to whom they might otherwise have 'sold' the use of their reputations.

An objection of this type is not a complaint for an invasion of privacy. Indeed publicity-shy plaintiffs are unlikely to recover anything under this head of action since they are unlikely to have developed a commercially saleable reputation.

The aims of the action for passing off have been clarified by the creation of a statutory cause of action for misleading or

17. Irvine, supra n. 11, @ 215.

deceptive conduct in trade or commerce under section 52 of the Trade Practices Act 1974 (Cth). This statutory cause of action complements the action for passing off. The Trade Practices Act provides remedies to people who deal with a dishonest trader, whilst the action for passing off provides remedies to the person whose reputation has been imperilled by the dishonesty.19 As Barwick C.J. commented:

Section 52 is concerned with conduct which is
deceptive of members of the public in their
capacity as consumers of goods or services: it is
not concerned merely with the protection of the reputation or goodwill of competitors in trade or commerce.20

This latter is the province of the action for passing off. It has little to do with the protection of privacy. On the contrary, it runs counter to privacy. It protects information which is in the public domain by its definition: business, commercial, professional, or public reputations.


20. Hornsby Building Information Centre Pty Ltd v. Sydney Building Information Centre Ltd., (1978) 140 C.L.R. 216, per Barwick C.J., @ 220. For some discussions of the action under s.52 see Blakeney, M., & McKeough, J., 'Recent Developments in Passing Off', (1984) 12 Aust. Bus. L. Rev. 17; and Blakeney, M., 'Old Wine in New Bottles: Influence of the Common Law on the Interpretation of Section 52 of the Trade Practice Act', (1984) 58 A.L.J. 316. It should be noted the Murphy J. in Hornsby took the view that 'passing off is a classical example of misleading or deceptive conduct which may be dealt under' s. 52 (ibid, @ 234.)
15.2. Damaging publication: defamation

Prosser's third category of privacy torts consisted of 'publicity that places the plaintiff in a false light in the public eye'.21 The civil remedy of defamation largely addresses itself to this problem. Superficially, at least, defamation is one of the more privacy-conscious heads of action recognised in Australian civil law.

The law of defamation may be an inefficient vehicle by which to remedy invasions of privacy for four reasons. First, the interest with which the law of defamation is directly concerned is reputation. This is not necessarily the identical with privacy.

Secondly, no action for defamation may lie in the absence of publication. However, privacy may be invaded when intimate information is circulated, even in the absence of a publication in the sense contemplated by the law of defamation.

Thirdly, action may lie for defamation only where the publication is damaging to the plaintiff's reputation. The focus of the law of defamation is thus upon the precise subject-matter of the

21. Prosser, supra n. 1, @ 398.
information. As was emphasised earlier in the discussion of the concept of privacy, characterisation of information as intimate is primarily dependent upon the subject-type of the information, not upon its subject-matter. The actual subject-matter of any given item of information may affect the second level of the privacy test: the subjective test of whether the information subject objects to the circulation of the information.

Fourthly, some of the defences available to an action for defamation, especially the truth justification, would ordinarily be available to a person who is sued for defamation by a person whose real complaint is of an invasion of privacy.

15.2.1. Reputation

The traditional rationale of the law of defamation is the protection of a person's: "valid" or "deserved" reputation against injury affecting one's honor, prestige, and economic success. A reputation created by fraud or subterfuge is not deemed deserving of protection.22

In jurisdictions which have abolished the truth simpliciter defence, the rationale underlying the law of defamation is less clear. It may be more closely allied to the premises underlying the recognition of privacy.

As was discussed earlier, privacy, and particularly perceived privacy, is generically akin to 'peace of mind'. Lummus J, of the Massachusetts Supreme Court, proffered the following statement in 1940:

The fundamental difference between a right to privacy and a right to freedom from defamation is that the former directly concerns one's own peace of mind, while the latter concerns primarily one's reputation, although the damages may take into account mental suffering.23

As this statement implies, there is an overlap between these two interests. 'Peace of mind' may be adversely affected by the knowledge, or suspicion, that reputation has been imperilled. Further, or in some circumstances alternatively, 'peace of mind'


may be affected by the knowledge of the way in which a person's reputation has been imperilled.

Like 'peace of mind', reputation is a rather ephemeral commodity. In general, it is the estimation in which people are held: the character which is imputed to them by their acquaintances. One American court which was confronted with the question of what types of questions to permit in cross-examination of a witness defined reputation by contrasting it with character. Character is made up of the things an individual actually is and does. If character were in issue, specific acts of conduct might be proven to rebut evidence of a man's good character. Reputation is a different thing. It is what people think an individual is and what they say about him.24

To the extent that reputation is an ectoceptive phenomenon, the relationship between reputation and peace of mind is monodirectional. 'Peace of mind' may be affected by the knowledge that reputation has been injured. But reputation will not be directly affected by the fact that 'peace of mind' has been disturbed.

People's 'peace of mind' may be affected either by the knowledge that intimate information has been circulated to people to whose knowledge of information of that type they object (regardless of

its actual content), or by the knowledge that information which adversely affects their reputations has been published. Only the first ground is privacy-based. The second is more general. It is analogous to the disquiet which flows from the knowledge that one's car has been stolen, or that one's shares have plummeted in the stock-market. (As has been noted before, the phrase 'peace of mind' is far broader in its scope than is the word privacy.)

This analogy may be apposite. Reputation is a marketable commodity in both a social and an economic sense. It is akin to educational qualifications in some ways: it is something which exists in, and derives its value, from the society in which its possessor resides. Ultimately, it is an item of barter; but one which is vulnerable. It is thus not surprising to discover that reputation is an interest which has long been recognised as deserving of legal protection.25

Reputation and 'peace of mind' are closely related. Consider the Melvin v. Reid26 situation. The plaintiff objected to the publication of the information about her earlier life as a prostitute and the murder charge of which she had been acquitted for two reasons. First, it would damage the reputation which she had established in the years since the events it described. She had, according to the pleadings, 'abandoned her life of shame and

25. Note, 'Developments in the Law - Defamation', (1956) 69 Harv. L. Rev. 875, @ 877, esp. @ fn.1.

... entirely rehabilitated'. Secondly, publication of the information would invade her privacy because the information had effectively vanished from the public mind by lapse of time and she wanted it to remain so.

As was discussed earlier, it does not follow from the fact that the plaintiff argued that the publication would invade her privacy that it would have done so upon the criteria advanced in this thesis. Although the publication may not have invaded the plaintiff's privacy, it did affect her 'peace of mind'. Her 'peace of mind' rested upon the fact that, since the events disclosed by the objectionable publication, she had rehabilitated herself and earned a good reputation. The publication to which she objected injured that reputation. In turn, this affected her 'peace of mind'.

The publication of information about matters on the public record, such as 'spent' criminal convictions, was noted in chapter 14 above. In some circumstances, unauthorized publications of information of this type may invade privacy. As was discussed in chapter 14, privacy may be affected by the publication of information about 'spent' convictions in jurisdictions which provide for the statutory expungement of criminal convictions.

27. Ibid. See also Palmer, G., 'Defamation and Privacy Down Under', (1979) 64 Iowa L. Rev. 1209, @ 1235.

28. Whether the information was intimate would depend upon the community standards at the time. It would also be influenced by the existence of expungement statutes in the way noted in the previous chapter.
after the elapse of a given period of time. The period of time having lapsed, the information may be characterised as intimate, and its unauthorised circulation may therefore constitute an invasion of privacy.

The connection with reputation is close: the defamation-based objection also rests upon the age of the information. It is based upon the contention that in the intervening years the plaintiff has developed a reputation which it would be 'unfair' to tarnish on the basis of information relating to an past action for which the plaintiff has since atoned.

The resolution of these disputes depends upon a policy choice. The question is whether people should be permitted to claim the benefit of 'new' reputations, without conceding that the 'new' reputations may be inconsistent with reputations which resulted from earlier conduct, albeit in a 'different life'. The choice to be made is analogous to that which must be made in respect of the recognition of privacy: whether a person should be entitled to regard information about some particular aspect of life as necessarily 'off limits' because of its subject-type.
15.2.2. Publication

Fleming noted,

The essence of ... defamation lies in the communication of the disparaging statement to someone other than the person defamed.\(^{29}\)

Privacy, on the other hand, may be invaded whenever intimate information is circulated to a person to whose learning of that information the information-subject objects. This may occur when an intruder learns intimate information about another person contrary to that person’s wishes but does not subsequently publish this information to anyone else. The lack of publication does not obviate the invasion, although it does mean that the intruder cannot be sued for defamation.

15.2.3. Damaging information

Privacy, may be affected by the circulation of information of a particular type: intimate information, such as information about a person’s sexuality or religion. Reputation, on the other hand, may be affected by the circulation any type of information which is damaging, regardless of the subject to which it relates. In

this sense, privacy is both broader and narrower than reputation. Privacy is broader in that it is affected by the circulation of any information of a particular type, regardless of whether it is neutral, injurious, or advantageous to its subject. Privacy is narrower in that it is affected by the circulation of information only of a certain type: intimate information.

This may be demonstrated by two examples. First, consider the false allegation of homosexuality which was discussed in chapter 4. The allegation is probably defamatory. If A objects to the circulation of information of this type, it may also invade A's privacy (in so far as the information is intimate). A's reputation may be restored by the refutation (or withdrawal) of this allegation. However, in principle, A's privacy would be equally invaded if the information being circulated been that A is heterosexual or 'not homosexual'. Secondly, consider Tolley v Fry. Tolley's privacy was not interference with by the

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30. See chapter 4, page 87 above.

31. If it has a tendency to lower reputation in the estimation of 'right thinking' members of society, or disparage a person in the 'eyes of the average sensible citizen': Tolley v. Fry, [1930] 1 K.B. 467, per Greer L.J. @ 479. Other courts have phrased the test in terms of the estimation of an ordinary person of 'fair average intelligence' (Slatyer v. Daily Telegraph Newspaper Co. Ltd, (1908) 6 C.L.R. 1, per Griffith C.J. @ 7), or whether it cause people to be shunned or avoided by their fellow; or hld up to hatred, ridicule or contempt. See generally 'Gatley on Libel and Slander', [1981. 8th. ed. by Lewis, P. Sweet & Maxwell. London], @ 21, para. 42; Sawyer, G., 'A Guide to Australian Law for Journalists, Authors, Printers, and Publishers', [1968. 2nd ed. Melb. Univ. Press. Melb.], @ 14.

32. Ibid. See also discussion above @ page 270 et seq.
allegedly defamatory publication. The subject-matter of the allegation was not intimate.

15.2.4.1. Defences: truth

Truth simpliciter is a defence to an action for defamation in only four of the Australian jurisdictions - Victoria, South Australia, Western Australia, and the Northern Territory.33 In these jurisdictions, this tort is of little assistance to the protection of privacy. It offers no protection where the publication is true, no matter how intimate the information published.

15.2.4.2. Defences: truth plus public interest/benefit

In three jurisdictions, Queensland, Tasmania, the Australian Capital Territory, there is the additional requirement that the defendant adduce evidence that the publication was 'for the public benefit'.34 In the fourth, New South Wales, the defendant must

33. These jurisdictions have retained the common law position in respect of the civil action for defamation.

34. Qld: Criminal Code 1899, s.376; Tas.: Defamation Act 1957, s.15; ACT.: still applying the Defamation Act 1901 (NSW), s.6. This qualification appears to have been derived from a recommendation contained in the 'Report on the Law of Defamation and Libel', by the Select Committee of the House of Lords (Eng.) in 1843.
demonstrate that the publication 'relates to a matter of public interest or is published under qualified privilege.'

Neither 'public interest' nor 'public benefit' are susceptible of precise definition. Although they 'do not necessarily differ in substance', their application may produce different results. As Fleming pointed out, the concept of 'public interest' is a formulation which is familiar to the law of defamation from the defence of fair comment and is a question of law. Public benefit, on the other hand, is a question of fact.

Although the concept of public interest is familiar to lawyers, it eludes definition in the law of defamation just as it does in other areas of law. However, it is generally accepted that public interest refers to matters of 'legitimate and proper interest as

35. NSW Defamation Act 1974, s. 15(2)(b).


37. See the Australian Law Reform Commission, Report No. 11, 'Unfair Publication: Defamation and Privacy', [1979. AGPS. Canberra], @ 117, para. 225 fn.3, for comment upon the difficulty of identifying the interpretations which are placed upon the terms 'public benefit' and 'public interest'.

38. Fleming, supra n. 29, @ 527.
contrasted with an interest which is due to idle curiosity or a desire for gossip. Fleming added the qualifier that: it does not follow that the publication of all matters of public interest is in the public interest.

The concepts of public interest and public benefit may be more than jurisprudentially different. Applying the concepts of 'public benefit' and 'public interest' may produce different results. A publication could 'relate to a matter of public interest' but not be 'for the public benefit'. The requirement that the publication be 'for the public benefit' may import some requirement that it should in some way advance the public weal. If this is so, this is a more stringent requirement than the NSW requirement that the publication 'relate to a matter of public interest'.

In those jurisdictions in which truth simpliciter is not a complete defence, the action for defamation may offer wide protection to privacy. Fleming commented that the protection sought by the [public interest/benefit] formula is really for privacy rather than reputation, and is needed as much for non-defamatory as for defamatory allegations. But in


40. Fleming, supra n. 29, @ 540 (Fleming's emphasis).
the absence of an independent action for invasion of privacy against unjustifiable public disclosure of private facts, it serves at least as second best.41

Where the question is whether a publication relates to a matter of public interest, courts will consider the subject-matter of the precise allegation. The same may be true where a court, or jury, is required to determine the factual question of public benefit. However, questions of fact are rather less susceptible to a priori tests than are questions of law.

Determinations whether publications relate to a matter of public interest (or, mutatis mutandis, are for the public benefit), may involve some consideration of subject-type and whether publications of information of the relevant type are for the public benefit, or in the public interest. This question is akin to the privacy question: whether the information is intimate.

Theoretically, the answers to these two questions may differ. In practice, courts are unlikely to decide that publications of the relevant type are not in the public interest or for the public benefit (the privacy-style question), but that the particular publications are justified in the public interest or for the public benefit. However, the criteria by which courts will determine whether publications are in the public interest or for

41. Fleming, supra n. 29, @ 527.
the public benefit are not necessarily the same as the criteria affecting the characterisation of information for the purposes of privacy.

Unless courts accept that the recognition of some 'off stage' area of civic life is, in itself, desirable, they will not necessarily consider that the extent to which publications relate to information of a type generic to such an 'off stage' area of civic life is a factor to be taken into account in the weighing of the public interest, or benefit. Conversely, until courts accept that the extent to which publications relate to information of a type generic to such an 'off stage' area of civic life is a factor to be taken into account in the weighing of the public interest, or benefit, they will not accept that recognition of such an 'off stage' area of civic life is desirable.

To return to the correction of chapter 4 false allegation of homosexuality. The privacy question is whether information about a person's sexuality (ie. 'A is not homosexual') should be classed as 'intimate' and thus denied circulation where its subject objects to information of that type being circulated. The defamation question is whether the particular publication relates to a matter of public interest, or its publication is for the public benefit. Because the questions differ in focus, the answers may differ. (In this case, the analysis may be distorted because the publication is intended to restore an improperly damaged reputation and to give the lie to a previous publication.)
15.2.4.3. Defences other than truth and public interest/benefit

The other defences which are available to an action for defamation - fair comment, privilege, or triviality - offer some guide as to the conflicting interests served by defamation law: freedom of speech and the protection of reputation.

The civil action for defamation evolved from conflicting sources. On the one hand, there was the ecclesiastical notion that bearing false witness is a sin, and as such a matter for the ecclesiastical courts. On the other, there was the more prosaic concern that the inevitable result of leaving people

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42. At common law triviality is a defence to slander only. However, the Code included a special provision establishing a defence where the plaintiff was 'not likely to be injured' by the publication - Qld: The Criminal Code 1899, s. 382; W.A.: The Criminal Code 1957, s. 362; Tas: Defamation Act 1957, s. 9(2). See also the Australian Law Reform Commission Report on 'Unfair Publication', supra n. 37, @ 100, para. 190.

43. Gibson, D., 'Common Law Protection of Privacy', in Klar, L. (ed), 'Studies in Canadian Tort Law', [1977. Butterworths. Toronto], 343, @ 360, suggested that 'Canadian and Commonwealth courts have tended to accord a much greater relative weight to the privacy-reputation interest than their American counterparts, which have tended to favour freedom of speech.'

44. Note, supra. n. 25. It seems that the Star Chamber took a different view of this. Riesman, D., 'Democracy and Defamation: Control of Group Libel', (1942) 42 Col. L. Rev. 727, @ 735, commented: 'Truth, of course, was no defence.'
exposed to slurs upon their names without providing any avenue for legal redress would be breach of the peace.\textsuperscript{45} Consequently, false statements which actually cause harm to their subject are likely to result in liability unless there is some overriding reason why freedom of speech should prevail, such as that the publication was made on an occasion of privilege, such as in a parliamentary publication.\textsuperscript{46}

Defamation is not the only head of action which may be invoked by people who object to publications. If a publication is false, it may be possible to institute proceedings for injurious falsehood; negligent or wilful infliction of nervous shock; negligent or wilful misrepresentation. In order to invoke any of these various heads of action, the plaintiff must have actually suffered some injury of a kind which is recognised by the law.\textsuperscript{47} None is likely to be of any real assistance to a plaintiff when the law does not recognise that an invasion of privacy is an injury \textit{per se}.

\textsuperscript{45} Note, supra n. 25, @ 877; Veeder, V.V., 'The History and Theory of the Law of Defamation', (1903) 3 Col. L. Rev. 546, @ 559-560, 567; Carr, F., 'The English Law of Defamation', (1902) 18 L.Q.R. 255, 388, @ 388.

\textsuperscript{46} In all Australian jurisdictions 'Hansards' are covered by qualified or absolute privilege.

\textsuperscript{47} The tort of injurious falsehood consists of making a false statement with the intention of causing injury to another, for an improper, dishonest, or malicious motive and as a result of which the plaintiff does in fact suffer some actual loss or damage: Re Lewis' Declaration of Trust, [1953] 1 All E.R. 1005; and Wilkinson v. Downton, [1897] 2 Q.B. 57. See also the articles listed above on page 216, n. 25.
Triviality is the defence which is most directly hostile to the protection of privacy by the action for defamation. This is available to defendants under common law and by statute in several of the Australian jurisdictions48 where the circumstances of the publication are such that the plaintiff was 'not likely to suffer harm'.49 Since the law does not recognise an invasion of privacy as an injury in its own right, this defense militates against the value of this head of action as a means of remedying injuries to privacy.

15.2.5. Defamation law and privacy

The tort of defamation is of only limited assistance as a means of protecting privacy. It may be invoked only where the invasion results from a defamatory publication. It may not be invoked where the alleged invasion of privacy arises out of an unpublished acquisition of intimate information or a non-disparaging publication.

48. See n. 42, above. Qld.: Defamation Law 1889, s.20; Tas.: Defamation Act 1957, s.9(2). See 'Gatley on Libel and Slander', supra n. 31, @ 72, para. 141 et seq., for a discussion of the distinction between libel and slander. WA: Criminal Code 1913, s.362 (which probably applies only to criminal proceedings); ACT: Defamation Act 1901 (NSW), s.4.; NSW: Defamation Act 1974, s.13.

49. Defamation Act 1974 (NSW), s. 13. See generally Fleming, supra n. 29, @ 523-524.
In four jurisdictions, truth simpliciter is a complete defence, leaving privacy virtually devoid of any shelter under this cause of action. In the case of injuries to privacy, it seems that Lord Mansfield's dictum is most appropriate: 'the greater the truth, the greater the' injury.50 One of the four jurisdictions which does not recognise truth simpliciter as a defence, offers the defendant a defence if the publication 'was not likely to ... [cause the plaintiff] harm'. Three of the others recognise triviality as a defence against actions for slander.

It is unlikely that a mere invasion of privacy would be recognised as 'damage' for the purpose of defamation in any of the Australian jurisdictions. It is an injury of a very different type. It is an injury to the plaintiff's 'peace of mind' and sense of autonomy. As Wade commented, it is 'a part of the larger tort of ... infliction of mental suffering'.51 It is more akin to the injury done to a person when job security is gratuitously threatened, than it is to an injury to marketability, as is the case when a person's reputation is impugned.

To some extent, protection of privacy is preliminary to the protection of reputation. By securing privacy, it may be possible

50. The dictum 'the greater the truth, the greater the libel' is said to have been coined by Lord Mansfield: see Riesman, supra n. 44, @ 735, fn.38.

51. Wade, J.W., 'Defamation and the Right of Privacy', (1962) 15 Vand. L. Rev. 1093, esp. @ 1125. Wade saw the tort as one of intent. It is this writer's view that privacy may also be invaded unintentionally.
to determine *a priori* what types of matters should, or more accurately should not, affect reputation.52

In turn, the law of defamation protects reputation against unjustifiable attacks. Perhaps the words of article 17 of the International Covenant on Civil and Political Rights (which is discussed below in Part IV) offer a guide as to the way in which these interests differ: privacy (like other immunities) requires protection against interference; reputation (like other types of property) needs protection against attacks.

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52. In N.S.W. defamation law at least, legal recognition of privacy as defined may mean that the publication of intimate information would be presumed to be contrary to the public interest for the purposes of the law of defamation. The effect of such a presumption may vary where public benefit arises as question of fact.
CHAPTER 16

CRIMINAL PROHIBITIONS

Justice Kirby commented that 'Australia already has legislation which seeks to protect and advance privacy "rights"'.¹ To some extent this is true. There is no specific prohibition upon the invasion of privacy. However, a number of criminal prohibitions imposed by various State, Territory and Commonwealth laws directly or indirectly protect privacy.

16.1. Access to information

The most direct way to gain information about people is to ask them for it. By and large the criminal law pays little attention to this type of acquisition of information so long as it does not involve any threat or blackmail. If it does, the aggressor may be guilty of assault, or threatened assault, or bribery or blackmail etc.² In general, however, it is no offense to ask a person for


² See for eg. Crimes Act 1958 (Vic), ss. 37, 87; Summary Offences Act 1966 (Vic), ss. 23, 24; Criminal Code 1899 (Qld), ss. 245, 415, 416; Criminal Code 1913 (WA), ss. 398, 397.
information — so long as in so doing the questioners do not insult, or scandalise, or abuse, or assault the person from whom they request the information.3

There are many circumstances in which people may be induced to, or pressured into, divulging intimate information about themselves which they would prefer not to reveal. For instance, people may not wish to reveal information about their domestic arrangements, but they may be unable to secure an insurance policy without revealing the names of the other residents of the house. If they want, or need, an insurance policy, there is no choice but to divulge this information.

One of the few restrictions the criminal law imposes in this context is found in the Lie Detectors Act 1983 (NSW), which prohibits the use of lie detectors (polygraphs) or voice stress evaluators in certain contexts — such as in respect of contracts, or employment, or insurance claims, or the investigation of crimes, or applications for financial accommodation. (The position of information relating to the grounds of discrimination which are specifically prohibited by law is discussed below in the context of the administrative and quasi-judicial law affecting matters related to privacy.)

3. Eg. prohibitions upon the use on insulting language: Police Offences Act 1892 (WA), s.59; Sumary Offences Act 1966 (Vic), s. 17.
There is a variety of prohibitions upon surreptitious methods of learning information. However, overt methods of gaining access to information which the subject has declined to volunteer, or to which the subject has denied the information-seeker access are largely ignored by the criminal law.

16.1.1. Indirect access to information

Most of the prohibitions which have, in the past, served to protect privacy, were intended to secure the inviolability of property. In general, it is an offense to enter upon property, or at least into dwelling-houses, without permission, or to remain upon that property after it is clear that the owner, or occupier, objects to the intruder's continued presence.4

All the Australian jurisdictions have empowered particular officials to enter upon premises in the discharge of their various

4. Police Offences Act 1892 (WA), s. 82A; Vagrancy Act 1966 (Vic), s. 7(i); Invasion of Privacy Act 1971 (Qld), s. 48A; Inclosed Lands Protection Act 1901 (NSW), ss.4 and 4A; Police Offences Act 1935 (Tas), s.14B; R. v Jones & Smith, (1976) 63 Crim. App. 47 (CCA), esp. per James LJ. @ 52; Crimes Act 1900 (NSW), s. 547C; The Inclosed Lands Act 1854 (Vic), s. 1; Trespassing on Land Act 1951 (SA), s. 5. There are also a number of specific prohibitions upon particular classes of persons entering upon or conduct upon private property; eg. Hawkers Act 1943 (SA), s. 13; Door to Door (Sales) Act 1964 (WA), s. 7A; Door to Door Sales Ordinance 1967 (NT), s. 8, Door-to-door Sales Ordinance 1969 (ACT). The common law of trespass also applies in some jurisdictions. See also Halliday v. Nevill, (1984) 155 C.L.R. 1, esp. per Justice Brennan in dissent, @ 9.
statutory duties regardless of the consent of the occupier. The Western Australian Law Reform Commission published a 'Working Paper and Survey on Privacy and Statutory Powers on Intrusion' in 1981. It included a 105 page table of the statutory powers of intrusion recognised under the laws in force in Western Australia. Parallel provisions exist in most of the other Australian jurisdictions.

In most jurisdictions, door-to-door selling and the distribution of unsolicited goods are regulated so as to limit the extent to which persons are entitled to intrude into their customer's enjoyment of their homes. A range of statutes regulate the activities of private or commercial agents in respect of entry upon premises and approaches to citizens, and their activities generally.

5. Project No. 65, Law Reform Commission of Western Australia, [October 1981. WA. L.R.C. Perth].

6. Eg. Unsolicited Goods and Services Act 1974 (NSW); Consumer Affairs Act 1972 (Vic); Unordered Goods and Services Act 1973 (Qld); Unordered Goods and Services Act 1972 (SA); Unordered Goods and Services Act 1972 (NT); Unsolicited Goods and Services Act 1973 (WA); Unordered Goods and Services Act 1973 (Tas); Trade Practices Act 1974 (Cth), ss.60-65; Hawkers Ordinance 1936 (ACT); Door-to-door Sales Ordinance 1969 (ACT); Door to Door (Sales) 1964 (WA); Door to Door Sales Act 1967 (NT); Door to Door Sales Act 1971 (SA); Door to Door Sales Act 1967 (Tas); Door to Door Sales Act 1966 (Qld)

It is not clear how far prohibitions upon intrusion onto property protect privacy. As was discussed earlier, seclusion and solitude are important attributes of social life. They are also closely related to the enjoyment of property.

Unlike seclusion and solitude, a person's privacy is not necessarily affected by the circulation of information to that person. It is affected by the circulation of information about that person to others. Consequently, provisions which are designed to prohibit intrusions into a person's property may be of very little relevance to privacy as such. Rather, they secure a person's seclusion, or solitude, or the enjoyment of property free from harrassment. This is a desirable end in itself: but it is one which has no necessary connection with privacy.

Prohibitions upon intrusion into property do offer some indirect protection to privacy. To the extent that intruders learn information from places intruded into and (about) the people resident or present, intruders may invade the privacy of the residents or people present in the place intruded into. To this extent, prohibitions upon intrusion may offer some protection to privacy.

Regardless of the desirability of blanket prohibitions upon unauthorised intrusions into private property, these prohibitions provide random protection to privacy. It is no longer necessary
to enter upon a person's property in order to spy upon that person. An intruder may stand miles away and observe through a powerful telescope, or take photographs from a satellite. There is no criminal prohibition upon the use of optical surveillance devices either surreptitiously or blatantly.

Consequently, prohibitions upon unauthorised intrusions into a property offer only selective protection to privacy. They protect privacy only in those rare circumstances in which the only way in which a person can obtain intimate information about another is by violating property rights, such as by peering through the curtains. But, as has been emphasised before, it is rarely necessary to intrude into a person's home in order to gain information about that person.

It is an offense to steal property - including diaries or private correspondence. If the only way to learn the contents of another's correspondence is by stealing the correspondence, a prohibition upon theft may secure privacy to some extent. However, such a prohibition attaches to the embodiment of the information, not the contents. The intruder must intend to 'permanently deprive' the property-owner of the letter, or diary

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etc., in order to commit an offense. Where intruder is merely seeking information, it is unlikely this intention will exist.

16.1.2. Interception of communications and/or the use of listening devices

One class of prohibitions upon methods of learning information requires special attention: prohibitions upon interception or monitoring of communications and/or the use of listening devices. These prohibitions, like those pertaining to intrusions into property generally, are of only limited assistance to the protection of privacy: they merely prevent people from learning information by a particular means. They are silent about learning information by more devious means. In practice, they provide very limited protection to privacy.

There are three types of prohibitions which are relevant in this context: prohibitions upon:
1. unauthorized interception of, or interference with, postal articles or any mail (correspondence) under the Postal Services Act 1975 (Cth), Part VII;

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9. See the definition of stealing: Criminal Code 1899 (Qld), s.391; Criminal Code 1913 (WA), s.371; Crimes Act 1958 (Vic), s.72; Criminal Law Consolidation Act 1975 (SA), Part V.
2. Unauthorized interception of, or interference with, telecommunications under the Telecommunications Act 1975 (Cth), Part VII, and the Telecommunications (Interception) Act 1979 (Cth), s. 7; 10 and

3. Unauthorized use of listening devices under the Australian Security Intelligence Organization Act 1979 (Cth); Customs Act 1901 (Cth); Listening Devices Act 1969 (NSW); The Invasion of Privacy Act 1971 (Qld), Part IV; the Listening Devices Act 1969 (Vic); the Listening Devices 1978 (WA); and the Listening Devices Act 1972 (SA).

The operative word in all of these statutes is unauthorized. None of them prohibit all interceptions or eavesdropping. They prohibit the unauthorized interception of correspondence, or telecommunications, or the unauthorized use of listening devices. They implicitly, if not explicitly, provide the authority for the authorized interception or monitoring of communications. In general, of course, such an interception or monitoring of a communication must be authorised by warrant. 11

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10. The Telecommunications (Interception) Act 1987 (Cth), which is discussed below on page 309, n. 15 et seq, extended the effect of the section 7 prohibitions. See also Hilton v. Wells, (1985) 157 C.L.R. 57.

11. The warrant may be issued under the Act itself, or the authority of some other Act, such as the Australian Security Intelligence Organisation Act 1979 (Cth); or the Customs Act 1901 (Cth). See the A. L. R. C. Report on 'Privacy', supra n. 7, ¶ 351-367 (para. 753-785), for a discussion of these provisions.
Nothing about privacy which requires that it should be granted absolute protection. So the fact that it may, in some circumstances, be lawful to intercept a communication or to monitor a conversation under the authority of a warrant is not necessarily inconsistent with the recognition of or protection of privacy.

These prohibitions are designed to protect communications from monitoring, interference or interception per se. They are not concerned with the nature of the communications protected. The communication may be about the growing of tomatoes for all it matters. The prohibitions serve to shore up the boundaries of confidence or secrecy, or perhaps personal security and immunity from intrusion as such.

Ultimately, these prohibitions focus upon methods of learning information - regardless of its subject-type. Their focus is thus different from that of privacy. That is not, of course, to say that they are of no relevance to the protection of privacy. It is merely to suggest that their value as a means of preventing objectionable circulations of intimate information is slight.

The prohibitions were originally set out in three groups. However, there is no significant difference in their focus. The enactment of separate State and Federal laws reflects merely the constitutional division of powers which characterises the Australian federation.
The Commonwealth, lacking the power to regulate the monitoring of communications generally, has prohibited the interference with or interception of particular types of communications — those which it has the constitutional authority to regulate: primarily postal, telegraphic, and telephonic communications.12 The States have enacted complementary legislation prohibiting the unauthorised monitoring of other communications: generally private conversations between persons not conducted via telephonic means.13

The statutory prohibitions which have been enacted in the various jurisdictions are not identical. Some prohibit all third party recording, whilst others may permit a third party to record a conversation with the consent of one of the parties to the conversation. The rationale in these circumstances seems to be that if one of the parties intends that the conversation should be recorded, it is not a private conversation.14


13. All of these Acts are limited to the monitoring of private conversations. Although the definitions vary, the object appears to be to exclude public discussions or conversation conducted casually in public.

14. See in particular the Listening Devices Act 1969 (Vic), s.4; the Listening Devices Act 1978 (WA), s. 4; Invasion of Privacy Act 1971 (Qld), s. 43; and Elliott, I.D., 'Listening Devices and the Participant Monitor: Controlling the Use of Electronic Surveillance in Law Enforcement', (1982) 6 Crim. L. Rev. 327. But cf. Listening Devices Act 1972 (SA), s.4; Listening Devices Act 1969 (NSW), s. 5.
Statutory prohibitions upon the interception of mail or telecommunications or the monitoring of private conversations serve, in the first instance, to protect correspondence or conversation against attack. They may incidentally serve to secure a distinct interest: confidence or secrecy according to the nature of the communication.

Prohibitions upon monitoring or intercepting communications are ultimately intended to protect the fact of the communication. The ability to communicate freely, and if necessary in confidence, is a valuable interest; and one which deserves and needs express protection. It may be that this protection also serves to offer some protection to privacy - but this is largely incidental. The primary protection offered is to the security of the communication.

For instance, ASIO's surveillance of Ivanov and his dealings with David Combe which culminated in Combe's objection to the interception of his conversations with Ivanov was not necessarily because of the subject-matter of those conversations; nor because the intruder's thereby gained access to any particular information. It was because of the interference with the right to speak freely without fear of eavesdroppers, even if the conversation concerned only the weather.
Frequently, the two interests may co-incide. People may object that a third party who has (a) secretly monitored the communication and thus intruded into a relationship of the confidence, and (b) breached the confidence which the parties thought that they enjoyed, has *ipso facto* learnt intimate information and thus invaded the information subject's privacy.

Only the second of these complaints relates to privacy. The protection offered is thus to a particular type of relationship: one between the writer and the recipient of a letter, or the parties to a conversation. The interest secured is confidence, or perhaps secrecy: determined primarily by the relationship or agreement between the parties.

These prohibitions may be divided into two categories: those which prohibit all monitorings of private conversations; and those which prohibit the monitoring of conversations unless the person monitoring the conversation is, or has the consent of, one of the parties to that conversation. Prohibitions of the first type are more directly protective of privacy than are those of the second: but only very slightly so. Third parties who are prohibited from secretly eavesdropping upon a conversation, are free to seek to induce the parties to the conversation to divulge what they have learnt. (Of course, this is subject to prohibitions on bribery etc.) This difference is not significant for the purposes of privacy.
From a privacy point of view, there is no difference between the position of people who induce others to disclose information upon the false undertaking that they will keep it secret and then repeat the conversation verbatim to a third party, and the position of people who secretly record conversations. Neither category of prohibitions upon the use of listening devices attempts to prevent anyone from repeating conversations verbatim.

In many cases, of course, parties to a conversation may not include the person who is the subject of the intimate information. In these cases, the prohibitions upon the use of listening devices may serve to prevent further invasions of privacy, but they do nothing to prevent the invasion which is constituted by the fact of the initial communication.

For instance, if C telephones or writes to T informing T that A is a Moslem, the fact that third parties are prohibited from intercepting this communication is largely irrelevant to A whose privacy may have been invaded by T learning about A's religion. Where this information is of the type which C and T hold, or should hold, in confidence, possibly with A's consent, the fact that other persons are prohibited from 'stealing' it from them may incidentally serve to secure privacy. However, this protection is purely incidental. It is the relationship of confidence which is directly protected.

Where the communication is by, or to, the subject of the intimate information, prohibitions upon third party interception may offer
more direct protection to privacy. It offers only temporary protection. The prohibition upon monitoring or intercepting or interfering with communications carries with it nothing to inhibit information recipients from then disseminating it at will, subject to the laws of defamation etc. Nor is there any prohibition upon any third party later reading the letter or diary entry, or record of the conversation which has been left open carelessly.

These prohibitions complement, and facilitate, the civil action of a breach of confidence. They provide the framework within which the relationship of confidence may be enjoyed by prohibiting the intrusions, into that relationship. Like the action for breach of confidence, they protect an interest akin to privacy. The framework of protection which they provide is wider than merely protection for confidence: it also protects casual conversations, telephone calls, or letters.

The interest thus secured is none the less valuable for its breadth. The enjoyment of confidential conversation (where the word confidential is used loosely) is an independent social interest.
16.2. Manipulation and processing of data

By and large, the criminal law is not concerned with the processing and manipulation of data which is lawfully held. Thus a person who is lawfully possessed of information about another may re-organise that data at will, and may generate new, and possibly intimate, information about that other person.

However, some restrictions upon the use or publication of information are supported by criminal prohibitions. These may indirectly affect the way that people seek, manipulate or process data.

16.3. Use or dissemination of data

There are some criminal prohibitions attaching to the use of information as distinct from the circulation of information. There are fewer prohibitions upon the circulation (or publication) of information.

In general, the criminal law ignores the use or communication of information unless it involves criminal defamation, espionage (industrial or national), blackmail (in which case the focus is in the threat rather than the use of the information), or in some
sense approximates to an assault. The Telecommunications (Interception) Amendment Act 1987 (Cth) introduced further prohibitions upon the communication, use or recording of information which has been obtained contrary to the Telecommunications (Interception) Act 1979 (Cth) which was noted above on page 301.\textsuperscript{15}

Most restrictions upon the use or dissemination of personal information, or for that matter any other type of information, in a manner which injures, or threatens to injure, the subject of that information are sound in administrative and quasi-judicial proceedings - for instance under the Racial Discrimination Act 1975 (Cth). There are several administrative measures which, although lacking the force of law, may offer some protection to persons about whom information has been compiled. The Australian Law Reform Commission Report on Privacy identified the proposed guidelines by the N. S. W. Health Commission as representing one of the few initiatives being undertaken in this area.\textsuperscript{16}

However, there are a number of general criminal prohibitions upon the unauthorised use or disclosure of information to third

\textsuperscript{15} But see the 10th Report of the Senate Standing Committee for the Scrutiny of Bills, dated 3 June 1987, [June 1987. Parliament of the Commonwealth of Australia. Canberra], 181, @ 185-186 discussing the use of information obtained by the unlawful interception of telecommunications.

\textsuperscript{16} N.S.W. Department of Health, 'Confidentiality of Health Records in Hospitals and Community Health Service', Circular No. 82/369, quoted by the A.L.R.C. Report on 'Privacy', supra n. 7, @ 374, para. 799.
parties. In most Australian jurisdictions it is an offence for public officials to disseminate or use, for personal purposes, information received in a public capacity. For instance, Regulation 19 of the Public Service (Governor in Council) Regulations 1974 (Vic), prohibits officers from communicating, 'directly or indirectly' information officially acquired to persons 'not officially entitled thereto'. Substantially similar provisions apply in each of the other Australian jurisdictions - for instance, see section 70 of the Crimes Act 1914 (Cth) and regulation 34 of the Public Service Regulations (Cth).

At the Commonwealth level, these restrictions are bolstered in respect of personal information by the statement which appears in the 'Guidelines on Official Conduct of Commonwealth Public Servants': officers are charged with the:

- responsibility to protect the privacy of those to whom [personal information] relates ... [and to]

17. See also Public Service Act 1974 (Vic), s. 59(l), which provides that any breach of the (Victorian) Public Service Regulations is an offence.

18. Pursuant to Public Service Act 1922 (Cth), s. 97(k). See also regulations under Public Service Act 1974 (Vic), s. 73; Criminal Code 1899 (Qld), ss. 84-86 and Public Service Act 1922 (Qld), s.32(l)(viii); Criminal Code 1913 (WA), s.81 and Public Service Regulations 1964 (WA), reg. 40(a); Cortis v. R., [1979] W.A.R. 30 as to what it is that 'it is [a public servant's] ... duty to keep secret'; Criminal Code 1983 (NT), s.76; Public Service Act 1967 (SA), s. 58(i) & (j); Public Service Act (Tas), 1973, s. 71(l)(g), and Criminal Code 1924 (Tas), s.10; Public Service Act 1979 (NSW), s.85(b), and NSW Public Service Board, 'Staff and Personnel Handbook', [March 1985. NSW Gov't Printer. Sydney], para. 4, entitled: 'Code of Conduct and Ethics', para. 4.1.9., & Public Service Regulations (NSW), reg. 17(6), 23.
ensure that records of individuals are collected, maintained, used and disclosed in a way that is as fair as possible to the individual concerned.19
(This latter provision has no direct force from the criminal law. It is more in the nature of a general statement of principle.)

In addition to general prohibitions, a variety of specific prohibitions are imposed upon the disclosure of particular types of personal information which appear in Federal, State and Territory law. See for example, the Income Tax Assessment Act 1936 (Cth), s. 16; the Health Insurance Act 1973 (Cth) s. 130, Consumer Credit Act 1972 (SA), s. 11; Credit Administration Act 1984 (Vic), s. 15; and the Consumer Protection Act 1969 (NSW), s. 16E.

Further, provisions guaranteeing the confidentiality of information are frequently incorporated into statutes requiring the supply of information to government (either State or Federal). Similar provisions are generally inserted into legislation which regulates the communication of information.20

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20. Eg. the Telecommunications Act 1975 (Cth), s. 82; and the Overseas Telecommunications Act (Cth) 1946, s.33A(1). These Acts also provide for the disclosure of this information in certain circumstances: ss. 82(2)(d) & 33A(2) respectively. These provisions may also be given force by the Freedom of Information Act 1982 (Cth), s. 38 and Part IV generally.
Although, these provisions provide little protection to privacy, they provide an avenue for redress in the event of an authorised disclosure or use of information which has been supplied for a particular purpose. This protection is important, but not necessarily on privacy grounds. Information supplied for a particular purpose, even, or perhaps especially, if it is supplied in order to comply with some other legal requirements, may be held in confidence by that recipient. Disclosure of it may breach the obligation of confidence, as well as invading privacy.

These types of prohibitions do offer some, albeit indirect, protection to privacy. However, they focus upon a more specific phenomenon: confidentiality. Much intimate information which should not be circulated to the community at large must be made available to particular persons, or authorities, for various reasons.

One way to ensure that information is concealed from people who have no lawful right to demand access to it is to impose and enforce obligations of confidence upon people who are lawfully privy to that information. The imposition of criminal prohibitions upon unauthorised use or disclosure is one way in which to do this. But the prohibitions focus upon the unauthorised dissemination of information. They provide no protection against authorised (or official) circulations or uses of intimate information.
Where objectionable publications or uses are officially sanctioned, complainants have only three avenues of complaint in the law. They may allege that the publication or use is:
(a) defamatory, under either the criminal or the civil law;
(b) unlawful (eg. under the Sex Discrimination Act 1984 (Cth));
and/or
(c) ultra vires (eg. breaches the rules of natural justice, or may be impugned under the Administrative Decisions (Judicial Review) Act 1977 (Cth).

16.3.1 Criminal defamation

Criminal defamation may be alleged in all of the Australian jurisdictions. It is a common law offence in Victoria and the Northern Territory, and a statutory offence in Queensland, Western Australia, Tasmania (the Code States), and South Australia,21 New South Wales and the Australian Capital Territory. The Northern Territory Criminal Code provides a revised definition of the offence of criminal defamation: it is an offence to publish defamatory matter with intent to cause a breach of the peace,

21. Criminal Law Consolidation Act 1935 (SA), s. 246. This section prohibits the malicious publication of defamatory libels. Does it leave the non-malicious publication of defamatory libel a common law offence? This seems to be unlikely. But the A.L.R.C. Report No. 11, 'Unfair Publication', [1979. AGPS. Canberra], @ 102 (para. 194) commented that criminal defamation is covered by the common law in South Australia.
interfere with the exercise of a political right, or the performance of a duty, or any other act which a person is lawfully entitled to do, or to interfere with or influence any investigation or judicial proceeding.\textsuperscript{22}

The gist of the offence (other than the Northern Territory) is the unjustified publication of a defamatory statement - i.e. one which is injurious to the complainant's reputation. In the common law States and South Australia, only written (i.e. libellous) publications may give rise to criminal proceedings for defamation.\textsuperscript{23} (Slanderous statements are not actionable in the criminal law unless they amount to blasphemy, or are seditious, or tend directly to provoke a breach of the peace, or are obscene.) The Code States substantially reproduce the common law prohibition, but do not seem to confine it to written statements: they prohibit the publication of 'defamatory matter concerning another'.\textsuperscript{24}

In none of these jurisdictions is truth alone a defence to a prosecution for criminal defamation. The defendant must

\textsuperscript{22} Criminal Code Act 1983 (NT), ss. 204 and 205 in respect of threatened or actual criminal defamation by way of blackmail.

\textsuperscript{23} See the [UK] Law Commission Working Paper No. 84, on 'Criminal Libel', [1982. HMSO. London], for a discussion of the history and substance of the law of criminal libel. See also Criminal Law Consolidation Act 1975 (SA), s. 246. (But query the effect of s. 161 & Wrongs Act 1936 (SA), s. 5?)

\textsuperscript{24} Criminal Code 1899 (Qld), s. 380; Criminal Code 1913 (WA), s. 360; Defamation Act 1957 (Tas), s. 9.
demonstrate that the publication was privileged, or fair comment, or true and made for the public benefit etc.\textsuperscript{25} The position in South Australia, New South Wales and the Australian Capital Territory is substantially similar, but there is the added requirement that the publication must have been made maliciously or 'with intent to cause serious harm', or with the knowledge of the probability that it would cause serious harm.\textsuperscript{26}

Consequently, the criminal action for defamation provides greater protection to privacy than does the common law defamation tort which applies in some Australian jurisdictions.\textsuperscript{27} However, like the civil action, it focuses upon the complainant's reputation, not 'peace of mind' nor privacy. To the extent that the action for criminal defamation focuses upon objectionable publications, not upon the subject-type of publications, it protects an interest which is both broader and narrower than privacy.

The action for criminal defamation provides remedies against publications which have nothing to do with privacy in that they do not involve the circulation of intimate information. Conversely, it offers no protection against the circulation of intimate

\textsuperscript{25} Criminal Code 1899 (Qld), s. 370; Criminal Code 1913 (WA), s. 350; Defamation Act 1957 (Tas), s. 8.

\textsuperscript{26} S.A.: Criminal Law Consolidation Act (SA) 1975, s. 248 (re. libel); ACT: Defamation Act 1901 (NSW), ss. 11 and 12; NSW: Defamation Act 1974 (NSW), s. 50(1).

\textsuperscript{27} As was noted earlier, in some jurisdictions, truth simpliciter is not a complete defence to a civil action for defamation. See pages 284 et seq above.
information which is not adverse to reputation. For instance, in Australia, publishing information that a person is a lapsed Catholic is unlikely to be classed as defamatory. However, information about religious beliefs probably should be characterised as intimate in so far as it relates to the 'off stage' area of life, (the objective test for privacy). Consequently, where a person objects to the indiscriminate circulation of information about religious belief (the subjective test), a publication about religious belief, or the lack of religious belief, may invade privacy.

The criminal action for defamation does offer some protection to privacy. As was noted above in chapter 15, on page 287, it is difficult to consider a defence that publication is in the public benefit without contemplating, however briefly, whether publications of the type at issue may be 'for the public benefit' or 'in the public interest' in any circumstances.
CHAPTER 17

ADMINISTRATIVE AND QUASI-JUDICIAL REMEDIES

A number of administrative and quasi-judicial remedies directly or indirectly protect privacy. However, these provisions are not readily susceptible to the access/processing/circulation differentiation which was adopted in the earlier discussion of the civil and criminal provisions affecting privacy.

Unlike the civil and criminal provisions, administrative and quasi-judicial remedies tend to focus upon the effects or consequences of actions rather than upon actions. Consequently, the one remedy may sound in more than one of the classifications adopted in this Part of the thesis. For instance, administrative and quasi-judicial remedies in respect of the use of information may affect the entire information management process, from acquisition to processing and manipulation to use or publication. Similarly, provisions affecting the acquisition of information may directly or indirectly affect the way in which otherwise acquired information may be used. This is particularly significant in respect of the Human Rights and Equal Opportunity Commission, the (lapsed) privacy legislation and the (abandoned) Australian Bill of Rights Bill 1985,¹ which are discussed below.

1. See statement incorporated into Senate Hansard by Senator G. Evans, 26 November 1986: [1986] Senate Hansard 2758-2761, @ 2759.
17.1. **New South Wales Privacy Committee Act, 1975**

Only one statute explicitly provides for the protection of privacy: the New South Wales Privacy Committee Act, 1975. (Despite its title, the Queensland Invasion of Privacy Act 1971 does not create a general right to privacy.)

The New South Wales Privacy Committee Act applies only in that State. This statute defies the access/prosessing/circulation paradigm which was applied in the previous chapters. It creates remedies which may be invoked by people who complain of invasions of privacy whether by the acquisition, manipulation, use or communication of information.

Established in 1975, the Privacy Committee is empowered, inter alia, to

- receive and investigate complaints about alleged violations of the privacy ... [and is empowered to]

... 

- conduct such inquiries and make such investigations as it thinks fit.²

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² Privacy Committee Act 1975 (NSW), s.15 (d), and (g).
Under by sub-section 16(1), the Committee is expressly empowered to require people to provide statements or to produce documents.

Under the N.S.W. Privacy Committee Act, people may approach the Committee and seek its assistance to investigate a record system, or a given action etc. where they allege that their privacy has been invaded. The Privacy Committee is not restricted to the investigation of record systems: it has a broad brief to receive and investigate complaints about alleged violations of privacy. It may therefore be of assistance to people who complain of the invasion of privacy by acquisition, retention, processing, manipulation, or the use or dissemination of information.

The Committee's power is limited to making reports and recommendations. If the person or body or organisation whose practices or record system etc. is investigated chooses to disregard the recommendation or report of the Privacy Committee, the Committee can do not more than produce an adverse report to the New South Wales Government.

3. Privacy Committee Act 1975 (NSW), s. 15.
17.2. Access to information

Few administrative or quasi-judicial provisions directly affect the access to or learning information as such. The limitations which do apply to obtaining information are primarily found in the civil or criminal law. Some of the more privacy-relevant limitations were discussed in the previous chapters.

The remedies which are discussed below, such as judicial review of administrative action, indirectly affect access to and learning information. There is little point in collecting information of a type which may not be used. Thus, for instance, the existence of remedies against adverse discrimination upon the basis of race or marital status may indirectly serve to prohibit obtaining information about race or marital status.

As was noted earlier, some criminal prohibitions and civil causes of action focus upon actual intrusions, or interferences with personal and physical immunity which may yield information (such as trespass). Similarly, some licensing provisions, some of which contain criminal sanctions, also secure the 'right of complete immunity [: of being] ... let alone' from objectionable intrusion into one's seclusion or personal immunity from harm.4

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4. Eg: Hawkers Act 1934 (SA), requires people who wish to carry business as hawkers to obtain a licence, and prohibits entry onto (or remaining on) premises without the owners permission. Breach of such a prohibition may, in turn, affect eligibility for a licence.
17.3. Manipulation or processing of information

Few administrative provisions affect processing or manipulating information as such. However, many of the provisions affecting the use of information may indirectly affect the processing or manipulation of information. If it is unlawful to use, or to consider, particular items or types of information, there is as little point in manipulating data to reveal information of that type as there is in collecting that item or type of information.

17.4. Access to records: fair information management

Statutes in several Australian jurisdictions create rights of access to record systems. In general, these provisions are concerned to promote fairness or accuracy. Recording inaccurate or misleading information may generate any number of problems, not all of which are identical with the privacy concern. Some of these problems are, logically at least, distinct from privacy.

The class of administrative provisions regulating the maintenance of record systems does not directly regulate the processing or
manipulation of information. Rather, these provisions require disclosure, in certain circumstances, of what information is recorded, and, in some cases, entitle people to seek the amendment or annotation of that information.

As was discussed above in chapter 8, privacy is a sub-class of the 'fairness' issue. (Privacy is also a discrete issue.) If privacy is not of concern in any given society, the privacy-intrusiveness of information contained in any record system in that society is irrelevant to the question of fairness. Similarly, the accuracy of records is irrelevant if the society considers that there is no need for decisions to be based upon accurate information.

Where privacy is recognised by a society, privacy will be relevant to the 'fairness' of the information contained in any given record. Records may be 'unfair' if they contain intimate information to which record-keepers would be denied access if privacy were respected.

The narrowest of these provisions are contained in the Fair Credit Reports Act 1974 (SA), s. 8, the Credit Reporting Act 1978 (Vic), s. 4, and the Invasion of Privacy Act 1971 (Qld), s. 18. In addition to these statutory provisions there are voluntary agreements in force in Victoria and New South Wales. In Western Australia, there is agreement in principle upon the adoption of a voluntary scheme to entitle consumers to have access to their
credit records. Its implementation has been delayed pending the amendment of the Western Australian defamation laws.5

These provisions are not comprehensive. In those jurisdictions where the agreements are voluntary, not all credit bureaux are party to the agreements. In all jurisdictions, the provisions are confined to credit records.

To the extent that these access arrangements are applicable to any given record system, they merit some note. Each of these sets of provisions requires credit reporting agents or agencies to which it applies shall, upon request by people to whom the information relates, disclose to the applicants the nature and substance of the information held about them.

These provisions do not relate to privacy directly in that they do not necessarily empower consumers to demand the expungement of intimate information from the record. In general, however, these provisions empower people to challenge, and demand the correction of, inaccurate or misleading personal information which is contained in the record.6


6. Fair Credit Reports Act 1974 (SA), s. 9; Credit Reporting Act 1978 (Vic), s. 6; Invasion of Privacy Act 1971 (Qld), s. 8. This capacity does raise some difficulties. In some cases, challenging the accuracy of personal information may be an indirect way to to
In New South Wales, of course, people are able to approach the Privacy Committee. As was indicated earlier, the Privacy Committee's power is limited to the making of reports and recommendations.

17.4.1. Freedom of information legislation

Freedom of information legislation regulates access to record systems maintained by the Commonwealth and Victorian governments: the Freedom of Information Act 1982 (Cth), and the Freedom of Information Act 1982 (Vic). Substantially modelled upon the American freedom of information legislation, the Commonwealth and Victorian Acts are broadly similar.

Consequently, only the Commonwealth Act is discussed here. Observation made about the Commonwealth Act will, in general, apply mutatis mutandis to the Victorian Act, which is necessarily restricted in its application to information in the possession of the Government of Victoria and other bodies constituted under the law of Victoria.7

challenge some substantive right, the determination of which rests upon that information. This point is discussed further below in section 17.4.2, and chapter 24.

Freedom of information legislation affects privacy indirectly. The primary object of the legislation is to create a general right of access to documents in the possession of Ministers and 'agencies'. Under the Commonwealth Freedom of Information Act, the term agencies is defined to include 'prescribed', generally statutory, authorities, and public service departments.8

According to sub-section 3(1) of the Commonwealth Freedom of Information Act, the object of the legislation is 'to extend as far as possible the right of the Australian community to obtain access to information in the possession of the Government'. Consequently, the Act confers upon 'every person' a right of access to government and Ministerial documents. It then subjects this right of access to a series of exemptions contained in Part IV of the Act.9


8. See Freedom of Information Act 1982 (Cth), s. 3, esp. definition of 'agency', 'enactment', and 'prescribed authority'.

The Freedom of Information Act 1982 (Cth) affects privacy in several ways. First, the Act empowers people to learn about the types of information collected by the government by entitling people to obtain access to some of that information. This may influence people's perceptions about the extent to which they have privacy. Secondly, the Act exempts from disclosure several categories of documents which may contain personal information and may thus limit the circulation of privacy-relevant information in the possession of the government.

Thirdly, Part V of the Act confers upon 'Australian citizens' a limited right to seek the amendment or annotation of incorrect, incomplete, or out of date information. This Part of the Act is somewhat at odds with the remainder of the legislation, and raises distinct issues. Consequently it is discussed separately below in section 17.4.2.

17.4.1.1. Freedom of information and privacy

The U.S. Privacy Protection Study Commission suggested that privacy and freedom of information are 'complementary aspects of a
coherent public policy concerning public records'. That is a rather optimistic view.

Perhaps the better view is that they are natural adversaries: but adversaries who may assist each others' causes. One primary privacy concern is about what information is held by whom about a person. Freedom of information legislation may reduce this concern. Another equally significant concern, is about the people who have access to that information. In this respect, freedom of information legislation may be antipathetic to privacy.

In some circumstances, freedom of information legislation may undermine privacy both by authorising the disclosure of documents containing personal information, and, by not prohibiting the disclosure of 'exempt' documents, including documents which may involve the 'unreasonable disclosure of information relating to the personal affairs of any person'. (Where exempt documents are released this disclosure does not attract the ordinary protections of the Freedom of Information Act.)


Further, the Freedom of Information Act may limit the effectiveness of the prohibitions upon the disclosure of government information which were discussed above. To the extent that the Act creates a right of access to information, it may 'authorise' the release of information which would otherwise be prohibited by section 70 of the Crimes Act 1914 (Cth). However, the better view appears to be that section 70 of the Crimes Act applies to prohibit the disclosure of information which falls outside of the Freedom of Information Act and for which there is no authority for disclosure.

As was discussed in Part I, a society's recognition that certain areas of people's lives are 'off limits' sets the a priori standards determining whether information of a given subject-type is intimate. Official, (ie. governmental) information management practices are directly relevant to this determination. In general, the more that is known about governments' information practices, the more likely it is that they will reflect, or shape, societies' expectations as to whether information relates to 'off stage' conduct.

13. When the Senate Standing Committee on Constitutional and Legal Affairs reported on the Freedom of Information Bill 1978, [1979. AGPS. Canberra], the Committee appears to have taken this view. It recommended that section 70 of the Crimes Act should be amended to limit the categories of information to which it applied. However, according to one Deputy Secretary in the Commonwealth Attorney-General's Department, Mr. L. Curtis, it is 'always open to the Minister or secretary of a department or the chief officer to authorise that making available of information...': Evidence to the Senate Standing Committee on Constitutional and Legal Affairs on its inquiry into the operation and administration of the freedom of information legislation, 19 June 1986, Hansard of Evidence, ¶ 140.
This is a two-way process. Societies' views as to the characterisation of information will be affected by their government's information management practices. Thus where governments collect and record information of a particular type, it is unlikely that societies will treat information of this type as intimate. Conversely, where governments refrain from collecting or storing information of a particular type, this may influence societies' to characterise that information type as intimate. To the extent that freedom of information legislation causes governments to disclose their information management practices, the legislation affects the characterisation of information.

The Freedom of Information Act does not entitle people to gain access to all information about themselves in the possession of the government. (Access may be barred by one or other of the exemptions referred to below.) However, the Act will affect perceived privacy by informing people about the types, and, in some cases, the extent, of personal information collected and manipulated by their government.

Freedom of information legislation would not directly protect privacy unless it entitled people to demand the deletion of intimate information from government records. Neither the Commonwealth nor the Victorian Acts confer this right.
17.4.1.2. 'Exempt documents'

Part IV of the Freedom of Information Act 1982 (Cth) provides for the exemption of documents which, *inter alia*, affect national security, defence, international relations, or are classified as Cabinet or Executive Council documents, or are internal working documents, or affect the enforcement of law or public safety, or affect the financial or property interests of the Commonwealth, or business or personal affairs, or are subject to legal professional privilege, or some specific statutory obligation of secrecy, or undertaking of confidence.14

Section 41(1) contains the exemption which is most directly concerned with privacy. This section exempts from disclosure documents which unreasonably disclose 'information relating to personal affairs'.

In addition, the exemptions in respect of confidential or secret information may also protect privacy.15 As was noted a propos

14. Freedom of Information Act 1982 (Cth), s. 22 provides for release of copies of edited documents where this is possible by the deletion of exempt material. Consequently, privacy-relevant information may be deleted in some cases, and the remainder of the document released.

the civil action for breach of confidence and the criminal prohibitions upon the unauthorised interception of telephone communications and the disclosure of information by government employees, much of the information which is communicated in confidence is intimate. One consequent of protecting obligations of confidence may be to protect privacy.16

17.4.1.2.1. 'Information relating to personal affairs'

The Freedom of Information Act does not define the phrase 'personal affairs'. According to Deputy President Hall in the Administrative Appeals Tribunal, the phrase is 'inherently incapable of precise or exhaustive definition'.17 The phrase appears to be used in the Act in contradistinction to the phrase 'business and professional affairs'.18


17. Re Anderson & the Department of Immigration and Ethnic Affairs, (1986) 4 AAR 414, per Deputy President A.N. Hall, ¶ 430.

The exemption is generally considered to be available in respect of information about any matter of private concern to an individual,19 ie. information relating to medical, domestic, or financial affairs such as information about academic progress, family or sexual relationships, income, assets, liabilities, etc.20

Both the Administrative Appeals Tribunal and the Federal Court have interpreted the phrase 'personal affairs' broadly. They have treated information about personal affairs as extending to records of matters of opinion.21 However, the phrase may not be as wide as the definition of personal affairs contained in clause 6 of the (lapsed) Privacy Bill 1986 (Cth):

information or an opinion, whether true or not, and whether recorded in a material form or not, about a natural person whose identity is apparent, or can

19. Submission by the Commonwealth Attorney-General's Department to the Senate Standing Committee on Constitutional and Legal Affairs' inquiry into the operation and administration of the freedom of information legislation, Hansard of Evidence, supra n. 13, @ 17, para. 3.2.2.2.

20. Attorney-General's Department, 'Revised Freedom of Information Memorandum No. 23', (Update No. 1 of F.O.I. Memorandum No. 23), 'FOI Act Provisions in Respect of Documentys Containing Information Relating to Personal Affairs', [available from the Commonwealth Attorney-General's Department, Robert Garran Offices, Canberra], @ 4, esp. para. 7.

21. Hansard, supra n. 13, @ 22, 23, & 152.-154.
reasonably be ascertained, from the information or opinion.\textsuperscript{22}

Whatever its limits, the phrase 'information relating to personal affairs' is wider that the category of intimate information the circulation of which directly affects privacy according to this thesis. Much personal information which is likely to be incidentally included in documents is likely to be non-intimate, such as names and addresses or job titles.

In the main, much of this type of information is already in the public domain, or at least there is no real objection, upon privacy grounds, to it becoming so. (There may, of course, be objections to its publication upon other grounds.) However, as was discussed above in Part II, the circulation of apparently innocuous information may have privacy implications. Consequently, a broad exemption is necessary in order to protect privacy.

17.4.1.2.2. 'Unreasonable disclosure'

According to the orthodox interpretation of the Freedom of Information Act 1982 (Cth), disclosure under the Act is disclosure

\textsuperscript{22} See also forthcoming report of the Senate Standing Committee on Constitutional and Legal Affairs, supra n. 9.
to the world at large. A variety of factors is considered to be relevant to the determination whether the disclosure is 'unreasonable'. There are generally said to include: inter alia the nature of the information and the circumstances in which it was obtained; the extent to which the public interest in disclosure may outweigh the invasion of privacy; 'the degree of personal sensitivity of the information' and the extent to which it is already a matter of public knowledge; the public prominence of the person to whom the information relates; the nature and age of document containing the information; and the relationship between the freedom of information applicant and the information-subject.

Bayne has suggested that applicants' particular interest or circumstances may also be relevant. Bayne's view may derive some support from the Administrative Appeals Tribunal's decision in Re Actors Equity and the Australian Broadcasting Tribunal. In that case, the Tribunal noted that agencies should not ignore an applicant's special interest in obtaining access to particular

23. Re Williams & Registrar of the Federal Court of Australia, (1985) 8 ALD 219, esp. @ 224.

24. Re Chandra & Department of Immigration and Ethnic Affairs, (1984) 6 A.L.N. 257, esp. per Deputy President Hall @ 259. See generally the Attorney-General's Department, Revised Memorandum, supra n. 20, @ 6 - 8, para. 13 - 23.

25. Bayne, supra n. 9, @ 183. See also Bayne, P.J., 'Freedom of Information Legislation', in (forthcoming) Aronson, M., & Franklin, N. (eds), 'Review of Administrative Action', [1987. 2nd. ed. Law Book Co. Sydney], esp. @ 321. See similarly, the Attorney-General's Department's Revised Memorandum, supra n. 20, @ 8, para, 22 & 23.
information. Further, in Re Simons & Victorian Egg Marketing Boards, the Victorian Administrative Appeals Tribunal released documents under the Victorian Freedom of Information Act 1982 in reliance upon undertakings as to the way in which the information would be used.

However, Bayne's suggestion is not consistent with the "disclosure to the world at large" orthodoxy, and the Commonwealth Administrative Appeals Tribunal has not expressly applied reasoning analogous to Simons.

As was noted above, the extent to which an information subject is a public figure may affect the determination whether a given disclosure is 'unreasonable'. If this were to be applied in the same way as the American courts have applied their 'public figure' defence to defamation actions, the Freedom of Information Act may undermine the privacy of people to have obtained some social prominence.

26. (1984) 1 A.A.R. 226. See also Re Z and the Australian Taxation Office, (1984) 6 ALD 673, and the comments in the Revised Memorandum, supra n. 20, ¶ 8, para. 22. See the submission by the Attorney-General's Department to the Senate Standing Committee on Constitutional and Legal Affairs, supra n. 13, and forthcoming report by that Committee, supra n. 9.


The 'public figure' defence has been recognised by American defamation law in respect of publications which have little, if anything, to do with the complainant's official conduct. Virtually any publication about a person who is a public figure, whether by election, appointment to public office, or act of heroism (as in the case of the Marine who foiled the assassination attempt on President Ford in 1975), has been justified in the absence of evidence of 'actual malice'.

17.4.1.2.3. American freedom of information jurisprudence

As was noted earlier, Australian freedom of information legislation departs from its American model in some respects. The section 41 exemption of document unreasonably disclosing information relating to the personal affairs is one such

30. See New York Times v. Sullivan, 376 U.S. 254 (1964) per Brennan J. delivering the opinion of the court, @ 279 - 280 for the original formulation of the 'public figure' defence. In America, truth is a complete defence to actions for defamation.

departure. Nonetheless, the American jurisprudence may provide some indication as to how freedom of information legislation may affect privacy.

The American Freedom of Information Act exempts disclosures which involve a 'clearly unwarranted invasion of personal privacy'. In Department of the Air Force v. Rose, the United States Supreme Court expressly adopted the views of the United States Senate Report No. 813:

The phrase 'clearly unwarranted invasion of privacy' enunciates a policy that will involve a balancing of interests between the protection of an individual's private affairs from unnecessary public scrutiny, and the preservation of the public's right to governmental information.32

The phrase 'information relating to ... personal affairs' probably excludes information relating to work performance.33 The American phrase appears to be broader. In Columbian Packing Co. Inc. v. United States Department of Agriculture, the U.S. Court of Appeals (First Circuit) treated the disclosure of information

32. Department of the Air Force v. Rose, 425 U.S. 352 (1976), per Brennan J. delivering the opinion of the court, @ 372; quoting from the U.S. Senate Report No. 813, @ 9. On this point see also Re Jamieson & Department of Aviation, (A.A.T., No. V83/180, unreported, 18 October 1983) noted in Attorney-General's F.O.I. Memorandum No. D12, and the Revised Memorandum, supra n. 20, @ 4, para. 7.

33. See Re Williams, supra n. 18. But contra: Re Wiseman, supra n. 18.
contained in the personnel records of two former meat inspectors who had been involved in bribery, as involving an invasion of privacy. Accordingly, the question was whether this invasion was 'unwarranted'. The court commented:

Ordinarily the individual careers of public servants would be of small general interest ... but the scandal ... was far-reaching and of great notoriety. To forstall similar occurrences, the public has an interest in discerning how the officials conducted themselves prior to their discharge for bribery, how well they were supervised, and whether [the agency] ... or any of its other personnel were chargeable with any degree of culpability for their crimes.34

As has been emphasised, it is not necessary that privacy should be immune from every invasion in order for privacy to be said to be recognised by the society at large as a distinct interest. There are circumstances in which privacy must yield to other interests. Freedom of information may have to take precedence over privacy in some circumstances - such as those in Columbia Packing.

34. Columbia Packing Co. Inc. v. United States Department of Agriculture, 563 F.2nd. 495 (1977), per Campbell J. delivering the opinion of the court, @ 499.
17.4.2. Amendment or annotation of personal records

Part V of the Freedom of Information Act contains a series of provisions entitling people who have secured access to documents containing information about their personal affairs to apply for the amendment of the record of that information on the ground:

(a) that it is incomplete, incorrect, out of date, or misleading; and

(b) that [it] has been used, or is being used or is available for use by the agency or Minister for an administrative purpose.35

Part V is similar to the fair credit provisions which were discussed earlier. Further, the (lapsed) Privacy (Consequential Amendments) Bill 1986 (which is discussed below in chapter 25) would, if re-introduced and enacted, extend this right to seek amendment or annotation. In addition, the Information Privacy Principles contained in the (also lapsed) Privacy Bill 1986 (which is also discussed in chapter 25) may affect the way in which Part V is applied. The Information Privacy Principles are intended to regulate Commonwealth government record-systems and may therefore set standards determining when information is 'incomplete, incorrect ... or misleading'. In particular, Information Privacy Principle 3 requires that information should

35. Freedom of Information Act 1982 (Cth), s. 48. See Re Page & Director General of Social Security, [1984] ADMN 92-023, esp. per Gallop J (presiding as the AAT), @ 70,174, for a discussion of this section.
be 'relevant to ... purpose' and 'does not intrude to an unreasonable extent upon the personal affairs of an information-subject'.

The Administrative Appeals Tribunal has not confined Part V to records containing purely factual information (assuming that it is possible to identify such a category). The Tribunal has considered requests for the amendment or annotation of records containing professional judgements, opinions, and personnel evaluations.

This may raise difficulties. In some cases, the amendment or annotation of a record may be requested as a means of bringing a collateral challenge to a substantive decision or determination. For instance, amendment of an inaccurate record

36. As is discussed the the forthcoming report of the Constitutional and Legal Affairs Committee, supra n. 9, it is difficult to draw a precise demarcation between fact and opinion in this context. For instance, a medical report by a qualified doctor that a person has a broken leg may be called as factual, whilst a report by the same doctor that the same patient has sustained a specific back injury, or a report by a qualified psychiatrist that the same patient is suffering from a nervous disorder may be a professionally controversial expression of opinion.


38. See for eg. Re Olsson & Australian Bureau of Statistics, (A.A.T., No. Q85/147, unreported) 18 April 1986. Note that the American courts have rejected attempts to attack agency determinations collaterally under the (US) Privacy Act [5 USC 552a]: Pellerin v. Veterans Administration, 790 F. 2d. 1553 (11th., Cir. 1986), esp. @ 1555; Rogers v. United States Department of Labor, 607 F. Supp. 697 (D.C. Cal. 1985), esp. @
about a person's marital status may have a consequential effect upon that person's entitlement to various benefits under the Social Security Act 1947 (Cth). 39

It is not certain how extensive this right to seek amendment or annotation is or should be under the Freedom of Information Act. It is difficult to determine criteria to ensure that remedying errors or inaccuracies in records will neither result in Winston Smith style revisionism nor indirectly alter substantive rights by (in some cases retrospectively) altering the 'facts' upon which decisions are based. 40

Despite the practical difficulties which may flow from the Part V provisions for the amendment or annotation of records, it seems that Part V serves to create a climate which is conducive to the recognition of privacy by promoting the fairness of information management practices.

699-700.

39. See Re Resch, supra n. 37, and Re Leverett, supra n. 37, esp. @ 386-387. See also Bayne, 1987, supra n. 25, @ 346 - 348.

40. The resolution of this problem (and others - such as the use of requests for amendment appeals to attract ancillary jurisdiction to Tribunals or Courts lacking the jurisdiction to resolve the substantive issues -) is beyond the scope of this thesis. However, there are considerable practical difficulties which must be confronted by any set of rules regulating information management practices.
17.5. Use or dissemination of information: administrative fairness

Some uses of personal information may give rise to proceedings under administrative law or before quasi-judicial tribunals. In general, the courts and quasi-tribunals are required to examine processes for their observance of natural justice or procedural regularity etc. Consequently, the examination of any given complaint does not focus upon any particular action or event in the abstract. Rather, it ranges over the entire process. Privacy may be addressed only to the extent that a given dealing with intimate information may be thought to be unfair.

Before discussing the statutory administrative and quasi-judicial remedies affecting the discriminatory use of information, the review of administrative action is considered.

17.5.1. Judicial review of administrative action

In the Commonwealth sphere, the review of administrative decisions has been formalised by the Administrative Decisions (Judicial Review) Act 1977. The common law principles still apply to a range of State and Territory public and and non-public bodies,
such as trade unions, clubs, societies, tribunals and authorities.\textsuperscript{41}

Where it is alleged that a decision has been influenced by a consideration of irrelevant (in the judicial review sense), intimate personal information, it may be possible to seek the judicial review of that decision. It may thus be possible to secure an order of the court directing a decision-maker to disregard that information.

This remedy is not designed to prevent people from learning any particular type of information. Nor is it designed to remedy an objectionable circulations of intimate information. Rather, it serves to prevent, or to provide a remedy for, the use, that is to say the consideration of, information which is properly viewed as being irrelevant to the making of the decision under review.\textsuperscript{42}

However, the factors which affect determinations of 'irrelevance' 


\textsuperscript{42} See the following papers which were presented at the Seminar on Administrative Law: Retrospect and Prospect, 15 - 16 May 1987, Australian National University, Canberra: Wilcox, M., 'Judicial Review and Public Policy'; Goldring, J., 'The Values Inherent in Judicial Review'; Bennett, D., 'The Assimilation of Judicial Review to Review on the Merits'.
in this context are likely to be resemble those which were nominated in as guiding the characterisation of information in the discussion in Part I above.

The effects of this type of remedy are two-fold. First, there may be a limited ex post facto remedy for the circulation of intimate information which has been improperly used. Secondly, it may quell objections to the circulation of intimate information by militating against the fear that this will be disadvantageous.

The availability of judicial review may have indirectly affect the acquisition of information. It may prevent, or at least deter, some decision-makers from acquiring intimate information. If the consideration, or use, of a particular type of information in course of the making of some given decision may result in a court overturning that decision for having taken into account irrelevant considerations, it may be that decision-makers will be inhibited from seeking to acquire information of that type.

In practice, once it has been demonstrated that the information has been acquired, the onus may shift to the decision-maker to prove that the information was not taken into account. Similarly, people may be deterred from manipulating data to reveal information of a type which may invalidate a decision.43

43. See Brennan, F.G., 'The Purpose and Scope of Judicial Review', in Taggart, M. (ed), 'Judicial Review of Administrative Action in the 1980's: Problems and Prospects', [1986. Oxford Univ. Press. Auckland], 18, @ 18. Justice Brennan offers a social contract-styLe analysis of judicial review, suggesting that it is dependant upon community confidence. To some extent this may suggest that judicial review is dependant upon the community recognition of standards and the desirability of judicial
In this context, statutory rights of access (discussed earlier) may be significant. It may be possible to ascertain what information is included in the decision-maker's records by lodging an application under the relevant freedom of information statute, or by approaching the N.S.W. Privacy Committee, or by making an application under one of the Fair Credit Reporting Acts. Alternatively, given that judicial review is a judicial remedy, it may be possible to gain access to records to which there is no ordinary right of access through the processes of discovery which are available to the parties to an action in a superior court.

17.5.2. Non-judicial review of administrative action

A range of administrative and quasi-judicial bodies supervise administrative action. For instance, the Commonwealth Administrative Appeals Tribunal is a non-judicial body which reviews Commonwealth administrative action, and where appropriate, may substitute its own decision.44 The Tribunal may consider whether a decision has been influenced by consideration of information of a type which should not be taken into account — enforcement of those standards in a manner analogous to the recognition of standards of intimacy which was discussed in above in Part I.

44. Administrative Appeals Tribunal Act 1975 (Cth), s.43(1). Similarly, Administrative Appeals Tribunal Act 1984 (Vic).
such as about matters which are protected from discrimination by, for example, the Racial Discrimination Act 1975 (Cth). In turn, this may provide a limited review of the circulation of information of that type. (See the discussion below in section 17.5.3).

These administrative and quasi-judicial bodies are most numerous at the Commonwealth level.\textsuperscript{45} However, non-judicial administrative review is also available in some State and Territory jurisdictions.\textsuperscript{46} In each of the Australian jurisdictions, there is a statutory Ombudsman with prescribed, but not necessarily comprehensive, powers to receive, investigate and report upon complaints made about the administrative actions of government agencies and prescribed authorities.\textsuperscript{47}

\textsuperscript{45} See for eg. Administrative Appeals Tribunal Act 1975 (Cth) (which also created the Administrative Review Council) and the Ombudsman Act 1976 (Cth). See also the Social Security Appeals Tribunal, the Veteran's Review Board etc. Some of these are discussed by Bayne, P.J., 'Background Paper: The Commonwealth System of Non-Judicial Review', paper prepared for the Seminar 'Administrative Law: Retrospect and Prospect', 15 & 16 May 1987, A.N.U., Canberra.

\textsuperscript{46} Eg. Victorian Administrative Appeals Tribunal, and Police Complaints Authority. In addition, there are Residential Tenancies Tribunals, Crimes Compensation Tribunals, Estate Agents Boards, Motor Accidents Boards, Planning Appeals Boards, etc. in various jurisdictions.

\textsuperscript{47} See Ombudsman Act 1976 (Cth); Ombudsman Act 1974 (NSW); Ombudsman Act 1973 (Vic); Ombudsman Act 1978 (Tas); Ombudsman Act 1972 (SA); and Ombudsman (Northern Territory) Act 1977 (NT). In W.A and Queensland the Ombudsmen are styled 'Parliamentary Commissioners'. See Parliamentary Commissioner Act 1971 (WA); and Parliamentary Commissioner Act 1974 (Qld).
The powers of the various Ombudsmen are limited, and localised according to the jurisdictions vested by the various empowering Acts. They are, however, all based upon similar principles. Only the powers of the Commonwealth Ombudsman are considered here. As in the case of the freedom of information legislation, this examination applies *mutatis mutandis* to the powers of the State and Territory Ombudsmen.

The Commonwealth Ombudsman is empowered to investigate and report upon actions, decisions, recommendations, or omissions which are alleged to have been, *inter alia*, unreasonable, unjust, oppressive or improperly (i.e. adversely) discriminatory, erroneous, influenced by improper or irrelevant factors, contrary to law etc. 48

Like courts exercising judicial review, Ombudsmen focus upon the consequences of the use, rather than upon access to or learning of information. 49 This may deter decision-makers and/or record-keeping from seeking intimate information which is irrelevant

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because of the possibility that their actions or decisions may be impugned for the consideration of irrelevant, or prejudicial, or discriminatory information once it is discovered that they have such information in their possession. (The Ombudsman is empowered to 'obtain information ... and make such inquires, as he thinks fit.' Consequently he is able to examine files in order to determine what information is available to the decision-maker or record-keeper under investigation.)

Similarly, the availability of remedies for the improper use of information may quell objections to the circulation of intimate information by assuaging the fears of harm resulting from its circulation.

17.5.3. Unlawful discrimination

A variety of statutes prohibit discrimination upon specified grounds. The Human Rights and Equal Opportunity Commission Act 1986 (Cth), and Racial Discrimination Act 1975 (Cth), apply throughout Australia. The Sex Discrimination Act 1984 (Cth),

50. Ombudsman Act 1976 (Cth), s. 8(3).

51. Human Rights and Equal Opportunity Commission Act 1986 (Cth), s. 3 definition of 'act' and 'practice' applies the Act to acts or practices by or on behalf of the Commonwealth or an agency of the Commonwealth, wholly or partly within a Territory, or under a Commonwealth or Territory enactment.
which also applies throughout Australia, attaches only to actions by trading or foreign corporations, in the course of banking or insurance extending beyond the limits of any one State, international and inter-State trade or commerce, and trade or commerce between the Territories and/or a Territory and a State, and actions by or on behalf of the Commonwealth of Australia or the Administration of a Territory.\(^5\) The Sex Discrimination Act (Cth) is complemented by legislation in four of the States: the Anti-Discrimination Act 1977 (NSW); the Equal Opportunity Act 1984 (Vic); the Equal Opportunity Act 1984 (S.A.); and the Equal Opportunity Act 1984 (W.A.).\(^5\)

The Human Rights and Equal Opportunity Act 1986 (Cth) is the most general of these Acts. The Act provides, inter alia, for a Human Rights and Equal Opportunity Commission to exercise functions under the Race Discrimination Act 1975 (Cth) and the Sex Discrimination Act 1984 (Cth). The Commission is generally empowered to 'inquire into any act or practice that may be

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52. Sex Discrimination Act 1984 (Cth), s. 9. Note that on 21 May 1987, Justice Spender sitting in the Federal Court of Australia in Brisbane referred an appeal against a decision of the Human Rights Commission (as it then was) which had been made in November 1986 against Mr Grant Booth, to the federal and state attorney-generals inviting them to consider whether the case should be referred to the High Court for consideration of the validity of the Sex Discrimination Act. See report 'Validity of sex bias law placed in doubt', in the Canberra Times (newsp.), 22 May 1987, @ 7.

inconsistent with or contrary to any human right’. The Human Rights and Equal Opportunity Act 1986 (Cth) proffers a broad definition of discrimination which included distinctions on the basis of 'race, colour, sex, religion, political opinion, national extraction or social origin'.

As was discussed above in chapter 5, privacy and discrimination are closely related. Consequently, the availability of remedies against discrimination in the manner contemplated in the Racial Discrimination Act 1975 (Cth), the Sex Discrimination Act 1984 (Cth) and the Human Rights and Equal Opportunity Commission Act 1986 (Cth) may promote privacy by deterring the circulation of information relating to race, colour, sex, marital status, pregnancy, religion, political opinion, national extraction or social origin.

As was discussed in Part I, legislation of this type influences the characterisation of information. It also protects privacy by providing remedies against the use of information which, largely because of the legislation's prescriptions, is seen to relate to aspects of life which should be treated as 'off stage'.


55. Ibid., s. 3(1).
17.6. Administrative remedies for the use of information and privacy.

Like the availability of judicial or administrative review, prohibitions upon the use of nominated categories of information, may deter people from seeking to acquire, or from manipulating data to reveal, information of this type. They may therefore provide some ex post facto remedies against an objectionable circulation of intimate information.

In practice, it may be difficult to distinguish between objections to the way in which the information has been used and objections to the circulation of information. In many cases, people object to the circulation of particular classes of information because of their objections to the way in which it may be used.

As was discussed in chapter 5, objections to, or injuries resulting from, the use of information are distinct from objections to the circulation of that same information because of its type. As has been noted, the availability of remedies against the use of information (such as prohibition upon discrimination) may quell objections to the circulation of information.

Equally, the fact that people do not discriminate against others despite knowing information upon which they may discriminate, does not derogate from an invasion of privacy if (i) the information is
intimate; and (ii) the information-subject objects to that third party learning the information.

One effect of administrative and quasi-judicial remedies against discrimination, or the consideration of irrelevant factors etc. may be to prevent the collection or storage of certain types of intimate information. They may thus discourage the circulation of information of that type - and in so doing protect privacy.

These prohibitions establish a framework of fair information management practices. In this, they are similar to the freedom of information legislation. They tend to create a climate which is conducive to the recognition of privacy as an additional, and discrete, interest to be taken into account in the determination of the wider question of fairness.

Establishing fair information management practices may also assuage concerns about interferences with privacy. As was discussed earlier, privacy concerns are closely related to fear of adverse discrimination. Where the fear of discrimination is obviated, objections to the circulation of intimate information may be waived, and concerns about the circulation of intimate information may diminish.

56. See Australian Law Reform Commission, Report No. 22, 'Privacy', [1983. AGPS. Canberra], vol. 1, esp @ 304 (para. 657), 327-341 (para. 705-733), for a discussion of some of the considerations and laws applicable to the establishment of fair information management practices.
If it desirable to institute and regulate fair information management practices, it is necessary to determine: (i) the criteria which should be applied to the determination of the issue of fairness (eg. accuracy) and (ii) the mechanisms by which this may be achieved - eg. judicial scrutiny or by the intervention of independent arbiters etc.

It is only when privacy is (independently) recognised by the society at large that privacy should be taken into account as one criterion relevant to the wider question of the fairness of any given set of rules regulating information management.
PART IV: INTERNATIONAL RECOGNITION OF PRIVACY
CHAPTER 18

INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS

The International Covenant on Civil and Political Rights (the Covenant), with the exception of article 41, entered into force on the 23 March 1976 in accordance with sub-article 49(1), 'three months after the date of the deposit with the Secretary-General of the United Nations of the thirty-fifth instrument of ratification or instrument of accession'.

The requirement of thirty-five acceptances had been adopted as a compromise: the Commission on Human Rights had proposed that twenty acceptances should suffice; and the French delegate to the Third Committee had argued for acceptance by a minimum of one half of the Members of the United Nations, or preferably two thirds.


3. 18 G.A.O.R. (Third Committee) 1963, UN doc A/C.3/SR.1274, @ para 21. As is noted below on page 406 n. 34, the Covenant has now been accepted by more than one half but less than two thirds of the Members of the United Nations.
Australia signed the Covenant on 18 December 1972. This was one of the earliest acts by the newly elected Whitlam Labor Government.

De Stoop suggested that December 1972 marked an important change in Australia's attitude to international human rights obligations.4 This may be so. However, this change in attitude has not be confined to Labor governments. Perhaps it was less of a change of attitude than it was a return to an earlier attitude – the internationally active one which had characterised the pre-Menzies era.

Australia was an active participant in the human rights debates in the 1940's and 1950's. In 1946, Australia had been a forceful advocate for the establishment of a world court of human rights – a new type of international judicial body to be empowered to hand down binding decisions.5

Ratification of the covenant was delayed for almost eight years. Mr Andrew Peacock, the Foreign Minister under the Fraser Liberal Government signed Australia's ratification of the Covenant on 4 August 1980, and it was received by the Secretary-General nine days later.


The Covenant entered into force for Australia on 13 November 1980: 'three months after the date of the deposit of the ... instrument of ratification' in accordance with sub-article 49(2) of the Covenant.

The Covenant appears to have bi-partisan support in Australia. However, the degree of commitment to the Covenant may differ between the political parties.

The 1980 ratification was accompanied by a series of reservations to articles 2, 10, 14, 17, 19, 20, 25 and 50 and a general declaration limiting Australia's undertakings in respect of articles 2(1), 14, 18, 19, 24, 25 and 26. The reservation which was entered in respect of article 17 bore some resemblance to article 8(2) of the European Convention on Human Rights (Convention for the Protection of Human Rights and Fundamental Freedoms). The text read:

Australia accepts the principles stated in Article 17 without prejudice to the right to enact and administer laws which, insofar as they authorise action which impinges on a person's privacy, family, home or correspondence, are necessary in a democratic society in the interests of national security, public safety, the economic well-being of the country, the protection of public health or

6. See [1980] No. 23 Aust. T.S. @ 18 - 20 for the text of these reservations etc.
morals, or the protection of the rights and freedoms of others.  

According to the Australian Initial Report submitted in 1981, this reservation was included because of the uncertainty which attached to the word 'arbitrary' in article 17. This uncertainty is discussed in some detail below in chapter 22, especially at page 443 et seq.

This reservation was withdrawn in 1984. Mr Bill Hayden, the Foreign Minister for the Hawke Labor Government, withdrew most of the Liberal Government’s reservations on 20 October 1984 with effect from 6 November 1984.

Most reservations were withdrawn in entirety. However, some were retained in a modified form, particularly the reservations in respect of article 10 (segregation of juvenile and adult accused persons), article 14 (compensation for wrongful conviction); and articles 19 (freedom of expression and opinion), 21 (right of peaceful assembly), and 22 (freedom of association) were deemed to be interpreted in accordance with the article 20 prohibitions on

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7. [1980] No. 23 Aust. T.S., @ 19. Note the resemblance between this reservation and art. 8(2) of the European Convention on Human Rights which is quoted on page 441 below.


9. [1984] No. 1 Aust. T.S., @ 12.
propaganda for war and advocacy of national, racial or religious hatred.

The revised reservations entered in 1984 were prefaced by the statement (not amounting to a formal reservation) that:

Australia has a Federal Constitutional system in which legislative, executive and judicial powers are shared or distributed between the Commonwealth and the constituent States. The implementation of the treaty throughout Australia will be effected by the Commonwealth, State and Territory authorities having regard to the respective constitutional powers and arrangements concerning their exercise.

The revised reservations may not be permanent. The Minister assisting the Minister for Foreign Affairs, Senator Gareth Evans, advised the Commission on Human Rights in early 1985 that some reservations had been retained for 'practical reasons, but their removal will be further considered'.

10. Evans, G., 'Australia's Approach to Human Rights', speech to the Commission on Human Rights, 7 February 1985, (1985) 56(2) A.F.A.R. 82, esp @ 84. He also noted that consideration was being given to making a declaration under article 41 of the Covenant and acceding to the Optional Protocol.
18.1. Obligations incurred under the Covenant

Under sub-article 2(1) of the Covenant, each State Party undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the ... Covenant, without any distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

This is an obligation of result rather than one of intent. The obligation is to achieve a particular end. However, the means or conduct by which that end must be achieved are not specified.11

Article 2, precludes the States Parties from merely asserting that they recognise and respect the rights and freedoms listed in the Covenant. They are required to do something to embody them in their domestic legal processes. Each State Party must provide the means for people who complain of injuries to their rights or freedoms under the Covenant some means by which to have those rights:

11. Schachter, O., 'The Obligation of the Parties to give Effect to the Covenant on Civil and Political Rights', (1979) 73 Am. J. of Int'l L. 462, @ 462. See also UN. Doc CCPR/C/SR. 402, dated 27 October 1982, esp. @ 5, para. 29, commenting upon the (then) Australian reservations and the requirement that the Covenant be given immediate effect.
determined by competent judicial, administrative or legislative authorities, or by any other competent authority provided for by the legal system of the State, and to develop the possibility of judicial review.12

Not all of the States Parties have taken the requirements of article 2 seriously. Many of them have reported to the Commission on Human Rights (under article 40) that all the rights listed in the Covenant are recognised and 'ensured' in their countries so that no additional measures are necessary. As Schachter remarked, 'the assertions that all necessary measures have been taken in certain countries may seem bizarre in light of their actual practices'.13

The Australian legal system does not completely satisfy the standards of the Covenant, even if it is closer to doing so than many others.14 Mr Lionel Bowen, M.P., the (then) Commonwealth Attorney-General, noted at a University of New South Wales seminar on human rights protection:

12. Article 2(3)(b).

13. Schachter, supra n. 11, @ 463.

While Australia is one of the few relatively good respecters of human rights, there is no excuse or reason for complacency and Australia's voice will carry more weight in international forums if our own house is in order.15

Article 41 of the Covenant empowers the States Parties to complain to the Commission of Human Rights about each others conformity (or non-conformity) with the international standards established by the Covenant. (Of course the adage about glass houses may be pertinent.) However, the Commission may act upon complaints only where both the complainant and the alleged non-conforming State have accepted its jurisdiction. Australia has not yet accepted the obligations under article 41. Consequently, Australia is formally immune for criticism for any failure to fulfil its obligations under this Covenant.

Although article 41 is, as it were, an optional extra, its inclusion in the Covenant is remarkable. It is one of the clearest embodiments of the rationale underlying the Covenant, and indeed the entire approach to international human rights instruments. As it is stated in the preamble to the Covenant:

recognition of the inherent dignity and the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world.

Article 2 of the Covenant does not seem to be as specific in its requirement as article 1 of the European Convention on Human Rights, an otherwise very similar instrument. The European Convention requires that its signatories (called the High Contracting Parties) 'shall secure to everyone within their jurisdiction the rights and freedoms defined in section 1' of the Convention (writer's emphasis). This is a more stringent requirement than the generalised obligation to take 'the necessary steps'.

States Parties may therefore ratify the Covenant before amending their legal systems so as to comply with its provisions. It is, of course, necessary that they intend so to do. There is considerable difference between agreeing to intend to amend a legal system, or even agreeing to amend a legal system, and actually undertaking so to do.

16. Covenant, art. 2(2), ibid.

18.2. Implementation of the Covenant

Although a federal state, there is no doubt that Australia possesses both international personality and the capacity to sign and ratify international agreements such as the International Covenant on Civil and Political Rights. However, the contents of this Covenant do raise special problems. Many of the rights and freedoms listed in the Covenant fall within the category of matters which have traditionally been viewed as being within the province of the States. It was for this reason that ratification was so long delayed. For some years, federal governments elected to pursue a policy of co-operation and consultation with the various States, rather than, as one Commonwealth Attorney-General, Senator Durack, Q.C., put it 'riding roughshod over' them.18

18.2.1. Federal states

The Covenant does not contain a federal clause. Article 50 provides that

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18. Senator Durack, replying to a question from Senator George Georges, (1978) 77 Hansard, Senate Debates @ 2549. See also UN doc E/CN4/Sub.2/452 (17 June 1980).
The provision of the ... Covenant shall extend to all parts of federal States without any limitations or exceptions.

This clause was not inserted casually. Several states, among them Australia, Canada and the United States of America, had argued strongly in favour of the insertion of a federal clause during the debates over the Covenant in the early 1950's.19

Presumably it was because of this omission that the original reservations entered by Australia contained a broad Federal clause. None of the other States Parties to the Covenant exercised their right to object to this reservation. Its validity seems to have been accepted.20 However, the Secretary-General did ask for an explanation of its meaning, and some of the delegates at the seventeenth session of the Human Rights Committee in 1982 commented upon the 'lack of compatibility' of the Australian reservations with the Covenant.21


The 1984 withdrawal of this reservation left merely a caveat alerting the other States Parties to the Covenant of Australia's federal nature and distribution of powers. If the original federal reservation was accepted, this caveat is virtually certain to be acceptable. It is merely a statement of fact, however lamentable that fact may be. It is not an attempt to evade the obligations contained in the Covenant.

18.2.2. Constitutional authority to implement the Covenant

The human rights obligations of Members of the United Nations are now recognised to be 'a proper subject for international action'. Former Chief Justice Gibbs, who was in the minority in both Koowarta v. Bjelke-Petersen and The Tasmanian Dam Case appeared to accept that the Commonwealth Parliament has the power to implement the Covenant. In the eleventh Wilfred Fullagar Memorial Lecture, he remarked:


23. Ibid.

It may appear from the decisions of the majority ... that, subject to no very restrictive qualifications, the Commonwealth Parliament also has power under s. 51(xxix) (the External Affairs power) to give effect to an international convention to which Australia is party and which provides for the recognition and enforcement of civil rights.25

Australia's constitutional authority to implement its international obligation derives in the main from section 51 (xxix) of the Constitution - the external affairs power. Justice Stephen's judgment in Koowarta v. Bjelke-Petersen is probably the least controversial statement of the ambit of the external affairs power to date.26

It may be treated as the lowest common denominator of the majority judgements in Koowarta, a case in which the High Court divided four-three. This seems to have been the way in which Justice Mason viewed it in The Tasmanian Dam Case.27 According to Justice Stephen's view, the external affairs power may be invoked


26. supra n. 22.

27. Commonwealth v. Tasmania, (The Tasmanian Dam case), supra n. 24, per Mason J. @ 122 et seq.; Burmester, H., 'Federal Clauses: An Australian Perspective', (1985) 34 I.C.L.Q. 522, @ 528 - 529.
to support legislation which gives effect to obligations imposed
by bona fide international treaties to which Australia is a party
where the subject matter of that treaty (and therefore the
legislation) is of 'international concern'.

The subject-matter of the Covenant is human rights and the
Covenant is certainly a bona fide international agreement. It is
no mere pretext invented in an attempt to extend the
Commonwealth's jurisdiction. Consequently, section 51(xxix) of
the Constitution may provide authority for Commonwealth
legislation, and section 109 would ensure that the Commonwealth
legislation prevailed in the event of inconsistency.

However, the Covenant addresses an enormous range of matters. If
the Commonwealth Government attempted to discharge its
international obligations by legislating upon the entire range of
interest listed in the Covenant, the Commonwealth might exercise
jurisdiction in so many areas that it imperiled the existence of
the States. And it may be argued that the Constitution appears to
contemplate the continuance of the States.

In an article written before the Koowarta decision, Crawford took
the view that the wholesale implementation of the Covenant might
exceed the Commonwealth's constitutional authority as not being
incidental to Australia's international obligations.28 However,
the case for a wider interpretation of the external affairs powers

is far stronger in the wake of Koowarta and The Tasmanian Dam case. The justices of the High Court were divided in both of those cases. Nonetheless, it is probable that (at the least) a specific attempt to rectify particular lacunae in the Australian (ie. Commonwealth, Territorial and States's) protection of human rights and freedoms would be upheld.

This issue is beyond the scope of this thesis. The object here is merely to note the controversy over the Commonwealth's constitutional capacity to discharge its obligations under the Covenant. It must be noted that the Covenant provides for minimum standards. It does not require that they be achieved in any particular manner. The Commonwealth could, therefore, discharge its international obligations by legislating for the minimum protection required, and leaving to the States the day-to-day administration of the protection of human rights.


18.3. Article 17 of the Covenant

Article 17 of the covenant states:

1. No one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence, nor to unlawful attacks upon his honour and reputation.

2. Everyone has the right to the protection of the law against such interference or attacks.

The first constraint upon the interpretation of article 17 arises from the Covenant itself. Article 5 of the Covenant provides that

1. Nothing in the present Covenant may be interpreted as implying for any State, group or person any right to engage in any activity or perform any act aimed at the destruction of any of the rights and freedoms recognized herein or at the limitation to a greater extent than is provided for in the present Covenant.

Further, article 5 specifically prohibits any derogation from any of the rights it articulates on the 'pretext that the ... Covenant does not recognize such rights or recognizes them to a lesser extent.'

The article 5 constraints may significantly influence the extent to which privacy, or for that matter any other interest listed in the Covenant, should be protected in law. Some of the other interests contained in the Covenant conflict with one another. For instance, Article 19 may conflict with article 17. Article 19 provides for the right for freedom of opinion and expression. However, article 19 expressly recognises that freedom of expression must be subject to, inter alia, the 'respect of the rights or reputations of others'.

The starting point for the interpretation of any treaty is sub-article 31(1) of the Vienna Convention on the Law of Treaties:

A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.

Nowhere is this injunction more important than in the context of human rights treaties.

Article 32 of the Vienna Convention on the Law of Treaties provides that it is permissible to look behind the text of the treaty, particularly to the travaux preparatoires, where the

32. Ibid., art. 19(3)(a).

literal reading of the text of the treaty produces a result which is ambiguous, obscure, unreasonable, or manifestly absurd.34

Consequently, the next chapter examines the history of article 17. In order to place this history into context, the first part of chapter 19 discusses (briefly) the changing attitudes to the recognition of human rights in international law.

CHAPTER 19

HUMAN RIGHTS IN INTERNATIONAL LAW

Broad international concern with the protection and promotion of human rights is a recent phenomenon. Before the twentieth century, there was no general recognition of universal human rights regardless of historical, cultural, ideological, economic, or other differences.

Further, to some extent, human rights may be an 'artifact of modern Western Civilization'. They appear to have been


influenced by and, to some extent, to reflect, Western preoccupation with individualism and natural law traditions.\(^4\) However, it does not necessarily follow,

that human rights are in any important sense arbitrary, wrong, misguided, or in need of any basic rethinking.\(^5\)

International concern with human rights was not completely unknown before the twentieth century.\(^6\) The 'neat world'\(^7\) of the positivist international lawyer had vanished by the end of the nineteenth century, if it ever really existed.

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5. Donnelly, supra n. 3, @ 303.


According to Sohn & Buergenthal, from the ninth century on, a number of international agreements, both bilateral and multilateral, expressly recognised the existence of principles of justice and recognised a limited right to make reprisals in cases of denial of justice.\(^8\)

International law never completely endorsed the doctrine of humanitarian intervention. However, the doctrine was occasionally invoked,\(^9\) especially by European powers avowedly intervening on behalf of religious minorities during the late seventeenth century.\(^10\)

States which justified their actions on the basis of the doctrine of humanitarian intervention did not necessarily recognise universal human rights. Their concerns were generally directed to the position of particular persons, usually identified by their religious or national affiliation. Thus, for instance, the Berlin Treaty, which concluded the war between Turkey and Russia in 1878

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8. Sohn, L.B., & Buergenthal, T.(eds), 'International Protection of Human rights', [1973. Bobbs-Merrill Co. Inc. N.Y.], @ 31 et seq. It should be noted that these agreements typically contemplated reprisals for denials of justice to one country's citizens who were aliens resident in the second country.


10. Phillimore, Lord., 'Commentaries Upon International Law', [1879. 3rd ed. Butterworths. London], vol. 1, esp @ 621-622. See also Sohn, & Buergenthal, supra n. 8, @ chapter 3, discussing a number of cases of humanitarian intervention.
specifically provided for freedom of worship and required that there be no discrimination on the basis of religious belief in the exercise of civil and political rights or in eligibility for public employment.11

Further, there seems to have been some recognition that occurrences within a country might be of international concern. In 1894, representatives from England, France and Russia were permitted to accompany a commission of enquiry into the Turkish massacres in Armenia.12

This trend became more marked after the First World War. In 1929 a private body, the Institute for International Law, promulgated a 'Declaration of the Rights of Man'.13 In October, 1939, H.G. Wells proposed an International Bill of Rights. One year later, Wells convened a committee, chaired by Lord Sankey, which published a 'Declaration of the Rights of Man in the Twentieth Century.'14

11. (1877-1878) 69 British & Foreign State Papers 749-767, esp. @ 753. The treaty was based upon the Preliminary Treaty of Peace dated 13 July 1878 between Turkey & Russia signed at San Stefano on 19 February 1878 - ibid., 732 - 744.


The atrocities which accompanied the Second World War accelerated and focused international concern upon human rights. This was apparent early in the war. In 1942, the Atlantic Charter, as the 'Declaration of the [then] United Nations' was known, proclaimed, inter alia, that a 'complete victory ... [was] essential ... to preserve human rights and justice.' Consequently, Henkin's claim appears to be justified: the international human rights movement was born in, and out of the Second World War.

19.1. The United Nations and human rights

Early drafts of the Charter of the United Nations echoed the Atlantic Charter's concern for the preservation of rights and


justice. One, proposed by the United States Department of State in 1942, provided for a bill of rights: 'a common program of human rights'.

Subsequent drafts lent differing emphases to the protection of human rights - one merely empowered the General Assembly to initiate studies and make recommendations concerning the observation of human rights. However, the idea was never completely abandoned. Among the Dumbarton Oaks proposals was the affirmation that

the Organisation should ... promote respect for human rights and fundamental freedoms.

The Charter which emerged from the San Francisco Conference in 1944 did not contain a Bill of Rights. It seems that the omission of a Bill of Rights was attributable more to a lack of time than to any real lack of inclination. There was a general

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18. Sohn & Buergenthal, supra n. 8, @ 507. According to Russell & Muther, supra n. 16, @ 324, the draft bill was never considered by the higher committee in relation to the 'Draft Constitution', as the Charter was then described.

19. 3 UNClO docs 637, @ 690: Doc 288 (English), G/38, 14 May 1945, chapt IX, Section A. See also Russell & Munther, supra n. 16, @ 1026. (Appendix I); see 1041-1028 for a discussion of the 'Dumbarton Oaks Proposals for the Establishment of a General International Organization', 7 October 1944.

expectation that one would be forthcoming in the immediate future. President Truman of the United States of America remarked:

Under this document [the U.N. Charter] we have good reason to expect an international bill of rights, acceptable to all the nations involved. That bill of rights will be as much a part of international life as our own Bill of Rights is part of our [American] Constitution. The Charter is dedicated to the achievement and observance of human rights and fundamental freedoms. Unless we can attain those objectives for all men and women everywhere - without regard to race, language or religion - we cannot have permanent peace and security. 21

John Humphrey, the first director of the Division of Human Rights in the United Nations secretariat, commented:

It is a matter for regret therefore that the opportunity provided by the San Francisco conference, when the bill might have been adopted on a wave of enthusiasm, was lost. 22


22. Humphrey, J.P., 'The UN Charter and the Universal Declaration of Human Rights', in Luard (ed), supra n. 12, 39 - 58, @ 47
Nonetheless, the Charter of the United Nations, which was signed by 50 Nations, Australia among them, on 26 June 1945, represented a 'radical departure' from the earlier attempts to formalise the protection of human rights.

It was radical because all of the earlier attempts to protect human rights under international law had been ad hoc. In general, they had occurred at the instigation of private bodies or as a result of unilateral national actions. For the first time, the notion of human rights was the subject of formal attention; and the observation of human rights expressly stated to be of critical concern to international law.

There are numerous references to the protection and promotions of human rights in both its preamble and its text. Much of this concern is attributed to the war which had preceded it, as is apparent from the inclusion of the human rights provisions in the Paris Peace Treaties of 1947. One of the amendments proposed

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23. United Nations, 'Multilateral Treaties Deposited with the Secretary-General, Status as at 31 December 1985', [1986. U.N., N.Y.] @ 3. It should be noted that Poland signed the Charter on 15 October 1945, nine days before it came into force.


by the four Sponsoring Governments which formed the basis for the discussion at the San Francisco conference was:

With a view to the creation of stability and well-being which are necessary for the peaceful and friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples, the Organization should facilitate solutions of international economic, social, cultural and other humanitarian problems and promote respect for human rights and for fundamental freedoms for all without distinction as to race, language, religion or sex.26

19.2. United Nations Charter

The first, and most general reference to the promotion and protection of human rights occurs in the Preamble to the Charter:

We The Peoples of The United Nations Determined...

to reaffirm faith in fundamental human rights, in the dignity and worth of the human person, in the equal rights of men and women and of nations large and small,...

Have Resolved To Combine Our Efforts To Accomplish These Aims.27

Lippman suggested that it was ironic that this provision was adopted largely out of deference to Field-Marshal Smuts. The then Premier of South Africa proclaimed that:

We [the Allied Peoples] have fought for justice and decency and for the fundamental freedoms and rights of man, which are basic to all human advancement and peace.28

Article 1 of the Charter re-iterates the sentiments embodied in the Preamble. Among the 'Purposes of the United Nations' it cites 3. To achieve international co-operation in solving international problems of an economic, social, cultural, or humanitarian character, and in promoting and encouraging respect for human rights and for fundamental freedoms for all without distinctions as to race, sex, language, or religion.29


28. 6th Planary Session of the San Francisco Conference, 1 May 1945, quoted by Ezejiofor, supra n. 4, @ 56. See also Lippman, supra n. 17, @ 459.

29. Charter, art. 1(3).
Article 13 requires General Assembly of the United Nations to initiate studies and make recommendations concerning the realization of human rights and fundamental freedoms. Articles 56 and 55 (respectively) provide that:

All members [of the UN] pledge themselves to take joint and separate action in co-operation with the Organization for the achievement ... [of, inter alia] universal respect for, and observance of, human rights and fundamental freedoms...30

There was some controversy over the wording of the pledge. The original proposal, put forward by Australia, had appeared to include an undertaking to take separate action in addition to pledging co-operation with the Organization.31 The United States of America resisted this. One of the American delegates argued that:

Such an addition might imply that the International Organization could intervene in domestic affairs.32

30. Arts. 55(a) & 56.

31. 3 UNCIO Docs, doc 543 (@ 546): Doc 2, G/14(1), 5 May 1945, para. 15: 'All members of the United Nations pledge themselves to take action both national and international. See also Sohn & Buergenthal, supra n. 8, @ 572-574, Russell & Munther, supra n. 16, @ 786f.

32. Sohn & Buergenthal, supra n. 8, 513, quoting an unnamed delegate from the United States of America.
According to Edward Stettinius, then U.S. Secretary of State and the Chairman of the Delegation of the United States, the text which was eventually adopted,

pledges the various countries to co-operate with the organization by joint and separate action in the achievement of the economic and social objectives of the organization without infringing upon their right to order their national affairs according to their own best ability, in their own way, and in accordance with their own political and economic institutions and processes.33

There is dispute over the effect of these provisions.34 They may require that the Members of the United Nations respect human rights and fundamental freedoms on pain of inquiry by the General Assembly. Alternatively, they may be merely a statement of general concern.

A 'lively debate' has erupted over whether a New International Order has emerged since 1945 under which respect for human rights has become one of the principles of general international law. Those who argue the affirmative side of this debate have been criticised as confusing what international law ought to be with what it actually is.35

33. Sohn & Buergenthal, supra n. 8, @ 514, quoting from Secretary Stettinius' report on the San Francisco Conference.

34. See Ganji, supra n. 9, esp. @ 113 - 139.

Even if international law does not give individuals rights against the state, the Charter's emphasis upon respect for human rights is manifest. This emphasis has been described as one of its 'most innovative features'.\footnote{36} Humphrey saw it as a revolutionary development in international law and practice: a public and deliberate affirmation of international concern.\footnote{37}

This emphasis has been given substance by the various Declarations and Conventions expressly devoted to the protection of human rights which have been adopted by the United Nations. One writer commented that the proliferation of human rights instruments is 'a characteristic phenomenon of contemporary international life.'\footnote{38}

In many ways the shift of focus towards the recognition of human rights which has characterised international life since the United Nations was first contemplated is more important than the detailed


\footnote{38. Meron, T., 'Norm Making and Supervision in International Human Rights: Reflections on Institutional Order', (1982) 76 Am. J Int'l. L. 754, @ 754. See Appendix III of the Senate Standing Committee on Constitutional and Legal Affairs, Exposure Report, 'A bill of rights for Australia?', [1985. AGPS. Canberra], esp. @ 104 et seq. for a list of the human rights treaties to which Australia is a party.}
content of those rights themselves. In the years since the creation of the United Nations, this has crystallised into a firm and abiding concern. There is little dispute now that human rights have become, as Justice Stephen commented in *Koowarta v. Bjelke-Petersen*, a 'legitimate subject of international concern'.

19.3. International human rights

The Preamble to the United Nations Charter 'reaffirms faith in fundamental human rights'. In article 55(c), the Charter lists as one of the objects of the United Nations, the promotion of 'universal respect for, and observation of, human rights and fundamental freedoms ...'

The Tentative Proposals for General International Organization submitted to the Dumbarton Oaks Conference by the United States of America in 1944 referred to 'basic human rights'. It is not clear how the phrase 'human rights and fundamental freedoms' differs from the phrase 'basic human rights', if at all. Kelsen

39. *Koowarta v. Bjelke-Petersen*, (1982) 153 C.L.R. 168, @ 219. It should be noted that Stephen J. was quoting from Judge de Arechaga (1978) 178 Recueil des Cours @ 177.

suggested that "freedoms" are human rights,41 and other writers have suggested that little importance should be attached to the distinction between 'fundamental rights' and 'human rights' in the Charter.42

Meron examined the 'quest for a hierarchy of international human rights'.43 He concluded that the:

use of hierarchical terms in discussing human rights reflects the quest for a normative order in which higher rights could be invoked as both a moral and a legal barrier to derogations from and violations of human rights.44

Some observers contend that there is a substantial difference between 'fundamental human rights' and other human rights. However, it is difficult to determine criteria by which to differentiate the various rights in this manner.45


42. Cot, J. & Pellet, A.(eds), 'La Charte Des Nations Unies' (1985) @ 1371, quoted by Meron, supra n. 40, @ 5, fn. 22.

43. Meron, supra n. 40, @ 1.

44. Meron, supra n. 40, @ 21.

45. Meron, supra n. 40, @ 6.
One reason why writers may seek to categorise some human rights as fundamental may be to bring them within the doctrine of jus cogens. However, as Meron pointed out, international jurisprudence provides only equivocal support for this approach.

Legal rights are generally described as being 'fundamental' if they are expressed or guaranteed by the pre-eminent laws of the relevant legal system, or if their existence is crucial to the existence of, or the content of, other legal rights created by that system. In this sense, the right to vote might be a fundamental in a democracy, whereas the right to select one's own doctor might not.


47. Meron, supra n. 40, @ 18 et seq.


49. Lackland, T.H., 'Towards Creating a Philosophy of Fundamental Human Rights', (1974-1975) 6 Col. Human Rts L. Rev. 485, @ 489: 'If a right is arguably necessary to the freedom of an individual, it is fundamental. If is is not necessary, it is not fundamental'. He suggested that the right to marry or to have children is fundamental, whilst the right to own a gun is not.
The concept of human rights has had a long history, especially in Western countries.50 (The idea that human rights may be invoked equally by men and women is rather more recent.) Cranston, among others, has suggested that human rights is simply the 'twentieth-century name for what has traditionally been known [in Western society] as natural rights or, 'the rights of man'.51

The concept of human rights reflected in the Charter has been influenced by the notion of rights deriving from the fact of personhood as such. The Preamble, in particular, reflects concern for the worth of persons qua persons - 'in the dignity and worth of the human person'.

The notion of natural rights has many critics. It is arguable that there is no such thing.52 Some writers have attempted to reconstruct the system of rights contemplated by the United Nations charter in secular terms, such as in the social justice model.53


Whatever the derivation of the concept of human rights - theology, political science or economics - it is now well established, even if its intellectual and philosophical respectability is, as Wasserstrom says, 'newfound'. He suggested that human rights are rights that may be enjoyed by each person, by virtue of being human, and may be claimed equally against any and every other human being.

It is not clear what standard is established by the United Nations. The United Nations Charter may require the protection and promotion of minimum standards, or culturally specific norms. The recognition of universal human rights may be an attempt to restructure the world so as to recognise individual human worth, or it may be merely a statement of basic needs and interests. The least controversial view of the Declaration is that it sets the standards by which to judge the observance of human rights by Member nations.


19.4. Assumptions underlying the Charter

The United Nations Charter invokes, but does not define the concept of 'human rights and fundamental freedoms'. However, as is discussed in the next chapter, the Declaration, which is intended to provide the content to this concept, appears to reflect some typically Western concerns.

The characteristic which is most often nominated as representing the key difference between the two approaches is the emphasis that Westerners place upon individualism. It is greater than in the non-Western traditions. Westerners tend to place individuals and the individuals' interests at the centre of social and political theory. This propensity, generally termed 'liberalism', is generally considered to be the leading ideological influence in Western thought.


60. Murphy, C.F. (jr), 'Objections to the Western Conceptions of Human Right', (1981) 9 Hofstra L. Rev. 433, esp @ 436.
In this context, the article 56 pledge by the Member nations to undertake joint and separate action for the achievement of, *inter alia*, universal respect for human rights and fundamental freedoms is significant. The pledge applies equally to all of the Member Nations. The Charter does not appear to contemplate excusing from compliance those countries to whom the notion of individual rights is novel.

The point of membership of the United Nations is that the Members, by virtue of their membership, undertake to recognise and respect individual human rights. The United Nations Charter does not require the adoption of any particular philosophy. Nor does it necessarily require the adoption of any particular concept, or conception, of human rights.

Many of the original signatories to the Charter were not Western countries. Western notions of human rights may have been foreign to some of those countries. Yet, by signing, they accepted the standards established by the Charter. As Henkin noted, it does not follow that they are required to accept any particular philosophy. They are merely required to implement those standards.61

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All that the Charter requires is that the Member nations promote respect and observance of human rights and fundamental freedoms:

With a view to the creation of conditions of stability and well-being which are necessary for peaceful and friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples.62

It may be open to some countries to claim that the notion of human rights contemplated in the Charter, and articulated in the Universal Declaration of Human Rights, is foreign to their way of life or at least to their legal systems, or is beyond their reach. This is not an excuse for non-compliance. At best, it may be an explanation for tardiness.

In Australia, there is no conflict of traditions. This country stands squarely within the liberal Western tradition. Its legal, social, political, and economic structure is a direct lineal descent of the tradition which produced Locke, Hobbes, Magna Carta and the American Declaration of Independence.63


CHAPTER 20

UNIVERSAL DECLARATION OF HUMAN RIGHTS

In its first session, the General Assembly of the United Nations recommended the commencement of work towards the formulation of an international bill of rights.¹ In June 1946, the Economic and Social Council, consisting of 18 members of the United Nations elected by the General Assembly,² set as the first item on the agenda of its Commission on Human Rights the preparation of 'an international bill of rights.'³

Some of the members of the Commission on Human Rights were opposed to the creation of an internationally binding instrument.⁴ Consequently, in its second session, the Commission resolved to undertake the drafting of two separate

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² Charter of the United Nations, art. 61(I).


instruments: a Declaration and a Convention. Only the second of these was intended to be a 'legally binding instrument.'

The Declaration was adopted by the General Assembly on 10 December 1948. As a Declaration, it is not formally binding upon the Members of the United Nations.

According to the U.N. Office of Legal Affairs, a Declaration is a formal and solemn instrument, suitable for rare occasions when principles of great and lasting importance are being enunciated ... [But] it cannot be made binding upon Member states, in the sense that a treaty or convention is binding upon the parties to it ...

The countries which voted in favour of the Declaration made it clear at the time of voting that they did not consider themselves to be placed under any specific legal obligations by the


Declaration. The fact that the United Nations drafting group immediately commenced work upon drafting the International Covenant by which they intended to give legal force to the Declaration re-inforces this assessment.

However, in the years since 1948, there have been numerous attempts to revise the status of the Declaration. Some writers argue that it has become 'a binding instrument in its own right', or that it has become part of 'the general principles of law recognised by nations'. Others, presumably relying

8. See for instance the remarks by Elenour Roosevelt, Chairman of the drafting group and the American Representative, to the General Assembly, 'General Assembly Adopts Declaration of Human Rights', (1948) 19 Dep't of State [US] Bull. 751, esp @ 751; and at the 88th meeting of the Commission on Human Rights on 30 September 1948; See also Lauterpacht, H., 'International Law and Human Rights', [(1950) 1968 Archon Books reprint. Conn.], esp @ 397, 404; and Carey, J., 'United Nations Protection of Civil and Political rights', [1970. Syracuse Univ. Press. NY], @ 9.

9. At this time it was generally assumed that there would be only the one covenant - see below page 412. See generally Henkin, 'Introduction', (@ 16), and Schachter, O., 'The Obligation to Implement the Convention in Domestic Law', in Henkin, L., (ed) 'The International Bill of Rights', [1981. Columbia Univ. Press. N.Y.], @ 311 et seq.


upon some generalised concept of morality governing international
relations, have maintained that the Declaration is, at the very
least, morally binding upon those nations who voted for it.12

Humphrey is one who takes this view. He seems to treat the
Declaration as a sort of delegated legislation, treating it as
deriving its authority from the Charter's pledge and effectively
supplementing it in much the same way as regulation made under
statutory authority may supplement their empowering statute.13

The Humphrey view seems to be wrong. The Declaration does not
impose any direct legal obligations,14 although it may have
acquired some 'quasi-legal status', as a norm-setting
instrument.15 As one United States ambassador remarked twenty

12. Lauterpacht, supra n. 8, @ 408 et seq. discusses this view.
Humphrey, J.P., 'The Universal Declaration of Human Rights: Its
History, Impact and Judicial Character', in Ramcharan, B.G., (ed)
'Human Rights: Thirty Years After The Universal Declaration',
[1979. Martinus Nijhoff. the Hague], 21, esp. @ 37.

Rights Law', (1978) 24 N.Y. L. S. L. Rev. 31, @ 33. See also
Lillich, R.B., 'Invoking International Human Rights Law in
Domestic Courts', (1985) 54 Cinc. L. Rev. 367, @ 394-395.

Conn.], @ 114.

15. Carey, J., 'UN Protection of Civil and Political Rights',
[1970, Syracuse Univ. Press. N.Y.], esp @ 9; and U. Thant, in UN
years after its adoption: the Declaration 'has received universal recognition, but it remains just that, a declaration'.16

The Declaration has assumed a central political position, and to some extent, it may be said to command the attention of world public opinion.17 However, it does no more than its Preamble proclaims: it establishes a common standard of achievement for all peoples and all nations...

It neither seeks to, not does it, impose any binding obligations.

Despite its lack of legal force, the adoption of the Universal Declaration was a remarkable achievement. U Thant described the Declaration as 'perhaps the boldest innovation of the Charter'.18

The Declaration is widely accepted by the international community as spelling out the content in the rights contemplated in the

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Charter. However, the foundations of the Declaration may reflect a degree of Western cultural chauvinism, even imperialism.

For instance, Article 1 of the Declaration states 'All human beings are born free and equal in dignity and rights'. It is impossible to ignore the echoes of the Virginian Declaration of Rights in 1776 - 'All men are by nature equally free and independant, and have certain rights' - and the American Declaration of Independance - it is 'self-evident that all men are created equal'\textsuperscript{19} - and the French Declaration of 1789 that all 'Men are born and remain, free and equal in respect of rights'.\textsuperscript{20}

20.1. A Western-based notion of human rights?

The discussion of privacy presented in Part I above, largely rested upon a Western conception of human rights. To some extent, it assumed the recognition of the worth of the individual \textit{qua} individual, and depended upon a societal and individual recognition of a concept of 'self'. If the concept of privacy invoked in the Declaration, and subsequently in the Covenant

\textsuperscript{19} Virginian Declaration of Rights, 1776, Art. 1.; American Declaration of Indepandence, 1776, para 1.

\textsuperscript{20} Declaration of the Rights of Man and of the Citizen, 1789, Art. 1.
is similarly dependant upon the Western concept of human rights, the definition advanced in Part I may be applicable to the article 17 obligation to protect privacy.

Morsink noted that the first twenty-one of the Declaration's thirty articles are devoted to the classical eighteenth-century civil and political rights. The social and economic rights seem, to a casual reader at least, to be tacked on at the end, like nineteenth- and twentieth-century grafts on what is basically an eighteenth-century tree. And that same casual reader cannot help but notice certain key eighteenth-century fighting words. The preamble speaks of "inherent dignity" and of "equal and inalienable rights." Article 1 asserts that "[a]ll human beings are born free and equal in dignity and rights". It further claims that all are "endowed with reason and conscience". The "spirit of brotherhood" to which it refers has the familiar ring of eighteenth-century fraterité.21

Western nations exercised rather greater influence over the development of the United Nations in the early years of that Organization than in the case in the 1980's. In addition, some of the most influential members of the committee responsible for

drafting the Declaration were as Morsink commended, 'well versed in' Western eighteenth century philosophy. Consequently, it is not surprising that the Declaration resembles a non-sexist, secular version of the classical eighteenth-century declarations of independence. Indeed the members of the Third Committee seem to have been conscious of this. However, the rights listed in the Declaration, and subsequently in the Covenant, are not merely international paraphrases of domestic Western rights.

As Murphy noted in his 'Objections to Western Conceptions of Human Rights', human rights researchers have a tendency to reify their own conceptions, working zealously for the implementation of human rights 'as they understand them'. Further, it is difficult to avoid value judgments in this area because it is difficult to conceive of a right without content. The sorts of things one perceives as rights shape the abstract definition of rights.

22. Mosink, ibid., @ 311.


24. Murphy, C.F. (jr), 'Objections to Western Conceptions of Human Rights', (1981) 9 Hofstra L Rev. 433, @ 435 (Murphy's emphasis).

It is difficult to analyse the concept of human rights without a clearly defined concept of a right. This is lacking. There is no definition of the concept of a right which commands universal acceptance within the common law tradition, let alone in both Non-Western and Western traditions.

In addition, there are marked differences between the Western and non-Western approaches to human dignity. This does not necessarily undermine the value of the Declaration. As Panikkar remarked, it does not follow from the fact that the concept of human rights 'is not universal, that it should not become so' (Panikkar's emphasis). Renteln took this argument further. She suggested that it is:

not advisable to attempt to prove or disprove that a narrow concept of human rights is found in traditional societies. Instead, the focus should be on the possibility of universalizing human rights.

The question whether the recognition of the concept of human rights is universal is not neutral. To some extent, it assumes that the notion of human rights is indispensible as a guarantee of human dignity, then asks whether, or to what extent, other (ie.

26. Panikkar, R., 'Is the Notion of Human Rights a Western Concept?', (1982) 120 Diogenes 75, @ 84.

27. Renteln, supra n. 25, @ 539.
non-Western) cultures have such a notion. The problem lies in the attempt to formulate the concepts of one culture in the constructs of another.

Panikkar attempted to illustrate this problem in his article 'Is the Notion of Human Rights a Western Concept?'

Human Rights are one window through which one particular culture envisages a just human order for its individuals. But those who live in that culture do not see the window. For this they need the help of another culture which sees through another window. Now I assume that the human landscape as seen through the one window is both similar to and different from the vision of the other. If this is the case, should we smash the windows and make of the many portals a single gaping aperture - with the consequent danger of structural collapse - or should we enlarge the viewpoints as much as possible and, most of all, make people aware that there are - and have to be - a plurality of windows?

The Declaration appears to embody two of the three Western values which Sinha argued are reflected in many of the current formulations of human rights. First, it assumes that individuals

28. Panikkar, supra n. 26, esp @ 76-77.

29. Supra n. 26, @ 78 - 79.
are the fundamental social units, not families. Secondly, it attempts to secure them (individuals) by creating rights, not duties. (The third of Sinha's indicia of Western values - securing rights through legalism not reconciliation, repentance, or education - is reflected in the Covenant although not in the Declaration which does not specify enforcement procedures.)

Ronald Dworkin suggested that a concept is what something means as distinct from a conception, which is the particular and concrete, as it were, specification of that concept. Applying this distinction to fairness, Dworkin commented:

When I appeal to the concept of fairness I appeal to what fairness means, and I give my views on that issue no special standing. When I lay down a conception of fairness, I lay down what I mean by fairness, and my view is therefore the heart of the matter. When I appeal to fairness I pose a moral issue; when I lay down my conception of fairness I try to answer it.

It may be possible to view the notion of human rights as both a concept and a conception. On the one hand, it may be viewed as a conception, where the dominant concept is that of human dignity.


The conception of human rights being one view of the way in which to realize the notion of human dignity.

On the other hand, the notion of human rights may be viewed as a concept, where human dignity is viewed as the conception. In this sense, the way in which human rights are interpreted depends upon the way in which human dignity is viewed. This issue was been examined by Donnelly, in particular in his paper on 'Human Rights and Human Dignity: An Analytic Critique of Non-Western Conceptions of Human Rights'.

Donnelly's analysis appears to rest upon a narrow definition of human rights. He defined the concept of human rights as being those rights which a person has by virtue of being a person: those rights which, in the language of the International Covenant on Civil and Political Rights, 'derive from the inherent dignity of the human person'. Donnelly contended that some of the non-Western approaches to the realization of human dignity challenge the idea that there are rights which one has merely because one is a human being. The latter notion is fundamental to the Western conception of human dignity. Consequently, he suggested that the ideas of 'rights', 'persons', and '(inherent) human dignity' should be explicated as conceptions.


33. Ibid., esp. @ 304.
This may be one way to neutralise the Western orientation of the Declaration. However, regardless of the cultural biases inherent in its wording, the Declaration now commands virtually universal respect, at least in theory, and has set the tenor for numerous human rights covenants adopted since.

Two of its progeny, the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights, have each been accepted by more than ninety nations - more than one half of the members of the United Nations.34

Only five (Denmark, Finland, Federal Republic of Germany, Norway and Sweden) of the original thirty-five states party to the International Covenant on Civil and Political Rights were Western. One, Cyprus, falls into a strange middle ground, being generally described as Asian but being a member of the Council of Europe. Ten belonged to the Soviet bloc; twelve were Asian; and seven were also members of the Organisation of African States.35

34. United Nations, 'Multilateral Treaties Deposited with the Secretary-General: Status as at 31 December 1985', [1986. U.N. N.Y.], @ 116, 126. Note the suggestion that the Covenant should enter into force only after having been accepted by at least half, or preferably two thirds, of the Members of the U.N. - see page 355, n. 3, above.

20.2. Article 12 of the Declaration

Article 12 of the Declaration is the prototype for article 17 of the Covenant. Consequently, a brief examination of the development of article 12 may throw some light upon the meaning of article 17.

The draft outline of an International Bill of Rights which was prepared by the Division of Human Rights of the Secretariat of the United Nations contained an expanded version of the text which was eventually adopted as article 12 of the Declaration:

No one shall be subjected to arbitrary searches and seizures, or to unreasonable interferences with his person, home, family relations, reputation, privacy, activities or personal property. The secrecy of correspondence shall be respected.36

Not all of the versions considered by the drafting committee (of which Australia was a member) contained references to privacy.37 However, it was among the articles suggested by the United States


37. See for example the draft offered by Lord Dukeston, the UK representative: UN Doc E/CN.4/AC.1/3 Annex 1; reproduced on Annex B [1947] UN Yb on Human Rights 487-492.
of America for inclusion in the Declaration. A slightly different version was submitted by the French representative, Professor Cassin:

Private life, the home, correspondence and reputation are inviolable and protected by law.

Unable to choose as between the versions, the drafting committee submitted two alternative drafts to the Commission on Human Rights in its working paper for a preliminary draft of an International Manifesto or Declaration on Human Rights. Among the suggestions were the following draft articles:

The privacy of the home and of correspondence and respect for reputation shall be protected by law

or alternatively

The inviolability of privacy, home, correspondence and of reputation shall be protected by law.

At its second session, and after considering the observations, suggestions and proposals made by various Governments on the draft International Declaration, the drafting committee prepared, and forwarded to the Commissioner on Human Rights, a new draft Declaration. This draft contained the provision that


Everyone is entitled to protection under law from unreasonable interference with reputation, family, home or correspondence.\textsuperscript{41}

For the time being at least, it seemed that privacy had been abandoned.

A month later, privacy was resurrected. In the draft declaration which was submitted to the Commission after the third session of the drafting committee the following clause appeared:

No one shall be subjected to unreasonable interference with his privacy, family, home, correspondence or reputation.\textsuperscript{42}

Debate over this article did not end in the Commission. The Third Committee of the General Assembly of the United Nations devoted some eighty-four meetings to considering the draft Declaration and made numerous changes. During the one meeting in particular, this article was substantially revised.\textsuperscript{43}

\textsuperscript{41} UN Doc E/CN.4/95, 21 May 1948. See also UN Docs E/CN.4/AC.1/SR 20-44 for reports of the meetings, and UN Doc E/CN.4/82/Rev. and E/CN.4/82/Add 1-10, for the comments made upon the earlier draft.

\textsuperscript{42} UN Doc E/800, 28th June 1948. See also UN Docs. E/CN.4/SR 46-81 for reports of the meetings. Reports of the 3rd Sess of the Commission on Human Rights. See also [1948] UN Yb on Human Rights 463.

\textsuperscript{43} 3(1) G.A.O.R. (third Committee), (1948), Meeting No. 119.
'Arbitrary' was substituted for the Commission's choice of 'unreasonable', largely out of deference to the representatives of the Netherlands, the USSR and the UK. At the instigation of the Uruguayan representative, the text was expanded to include a reference to honour.44 The text which emerged from the 119th meeting read:

No one shall be subjected to arbitrary interference with his privacy, family, home or correspondence, nor to attacks upon his honour and reputation. Everyone has the right to the protection of the law against such interference and attacks.

At the end of the 119th meeting this paragraph was adopted by a vote of 27 in favour, 7 against and 4 abstentions.45

This article was adopted unanimously in the vote upon the text of the Declaration as a whole. The Declaration as a whole was then submitted to the entire General Assembly, where it was endorsed by a vote of 48 to nil, with 8 abstentions.46

44. See in particular the 119th Meeting of the 3rd Committee of the General Assembly in 1948 when the then art. 10 was drafted. The substitution of the word 'arbitrary' was the cause for some disquiet later. At the 176th meeting of the 3rd committee the vote was 34/2 and 5 abstentions - the abstainers cited the word 'arbitrary' on having prompted their action.

45. Ibid.

Article 12 does not require that privacy should receive absolute protection, whatever is or was meant by the word 'privacy'. Other articles provide for the protection of competing interests such as the freedom of opinion and expression; and the Declaration contains the overall proviso that the 'rights or freedoms may in no case be exercised contrary to the purposes and principles of the United Nations'.

Further, the Declaration qualifies itself. Sub-article 29(2) provides that:

In the exercise of his rights and freedoms, everyone shall be subject only to such limitations as are determined by law solely for the purpose of securing due recognition and respect for the rights and freedoms of others and of meeting the just requirements of morality, public order and the general welfare in a democratic society.

Like the instrument of which it is a part, article 12 seems to be rather vague. There is little point in attempting to pin down article 12 to a precise statement. It is, after all, a part of a Declaration - a general statement of intent and hope; not a precise legal instrument. As Lauterpacht remarked:

It may be idle to interpret the nuance of meaning of an article when the article as a whole is not

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47. Declaration, art. 19.

48. Declaration, art. 29(3).
binding, when its application is subject to "just requirements of morality, public order and the general welfare in a democratic society", and when every State is the exclusive judge of these requirements.49

CHAPTER 21

DRAFTING THE COVENANT

When the drafting committee resumed work after completing the Declaration, it intended to produce a single covenant to give legal force to the rights and freedoms listed in the Declaration. This idea was soon abandoned. Less than three years later, the General Assembly authorised its Economic and Social Council to draft two covenants: one dealing with political rights and the other with economic and social rights.

These two instruments were more difficult to draft than the Declaration had been. The Commission on Human Rights prepared drafts within two years, by 1954. However, these drafts were debated and revised by the Third Committee of the General Assembly for a further twelve years. They were not adopted by the General Assembly until December 1966: more than twenty years after the Charter had come into force, and eighteen years after the adoption of the Universal Declaration.

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3. The ECOSOC transmitted the draft Covenants to the G.A. by Res 548 B(XVIII) and the G.A. first considered them @ the 9th session of the 3rd committee. G.A. Res 2200 (XXI), 21 UN G.A.O.R.
The Philippines proposed a version of the text which was to become article 17 at the ninth session of the Commission. It was substantially similar to article 12 of the Declaration, and according to its proposer, modelled upon that provision.4

Australia abstained from the vote upon this provision, and was clearly unhappy about its inclusion. Its representatives saw this article as embodying ideas about the specific protection of human rights which were foreign to the common law tradition. According to the briefing notes of the Australian delegation, the Australian representatives pointed out that the citizen was protected from unjustified interference by the state through the doctrines of the common law system and that the text was in any case framed in broad and imprecise terms, the precise legal implications of which were not clear. This article raises the whole question of what countries with a common law system are to do when faced with the obligation of article 2(2) to adopt "legislative or other measures to give effect to the rights recognised in the Covenant". The common law protection would be considered adequate by them


4. UN Doc E/2447. See also UN Doc E/2256, assess II, Chap III, para 65-71, in which a similar proposal had been approved by the United States of America, but without the word 'family': see also UN Doc E/CN.4/L.265
but it would be doubtful whether other governments would agree that the obligation of the governments with a common law system had been discharged in the absence of statutory provisions. This point might be discussed with other governments with a similar common law background and, if it is considered appropriate, attention drawn to the general issue in the Commission.5

The Phillipines' proposal was not accepted without modification. Although there was some opinion that the concept of 'family' was implicit in the proposed text (which did not mention it expressly), the motion to add the word family to the draft was adopted unanimously.6

The majority of the debate revolved around the selection of the terms 'arbitrary' and 'unlawful'. Australia shared in the concern over the meaning to be ascribed to these words.7 There was

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5. Australian Foreign Affairs File No. 856/13/10/9 Part 3, held in Australian Archives, Briefing notes G.A.9Supplementary. See also page 372, n. 8 above. One reason why Australia entered the original reservation in respect of article 17 was the uncertainty which attached to the word 'arbitrary': U.N. Doc CCPR/C/14 Add.1., @ 99, para. 318.

6. See generally the (1960) 15(1) G.A.O.R. (Third Committee), Meetings No. 1014 - 1020. The word family was added at the 1020th. meeting. See especially, the comments by Schweb, secretary of the 3rd committee and Eshel, of Israel @ 1014th and 1015th Meetings; Farhadi (Afghanistan) and Yasseen (Iraq) @ the 1016th Meeting; Dennis (Liberia) @ the 1018th Meeting; and Kano (Nigeria) @ the 1019th Meeting: U.N.docs. A/C.3/SR.1014 - A/C.3/SR.1020.

7. See chapter 22 below for a discussion of these terms. See also page 358, n. 8, above.
some, rather brief, discussion about the meaning of, and the
selection of, the word privacy. In retrospect, it is
surprising there was so little debate over this.

In English, although not in French, it is possible to
differentiate between the terms 'privacy' and 'private life'. In
French the phrase 'la vie privee' serves both meanings. Much
of the discussion focused upon this distinction. Some of the
delegates recognised that the English permitted this choice but
they argued over the selection of which term. One of the
points of disagreement was as to which of the two terms was the
broader.

Perera, the representative of Ceylon came close to articulating
the distinction when he suggested that the:

expression 'private life' was very ambiguous.
Those who were in public life had to expect
criticisms of their private lives. What the

8. See the discussion at meetings 1015-1017, supra n. 6., U.N.

9. See also the remarks made by Beaufort (Netherlands) meeting
#1017, supra n. 6, Hoare (UK) meeting #1018, and Dadzie (Ghana)
meeting #1019, ibid, and U.N. docs A/C.3/SR.1018, and
Co. London], English - French volume, @ 955.

10. Others were more sceptical as to the existence of this
distinction. See for example the remarks by Thomsen (Denmark) @
meeting #1017, supra n. 6; Kasliwal (India), @ meeting #1016;
and Lamey (USA) @ meeting #1018, ibid.
article was trying to do was to protect a fundamental freedom: it was not concerned with the type of private life a man led. The word 'privacy' conveyed that concept clearly...11

Whilst one might argue with Perera's view that the word privacy conveys anything clearly, Lamey, the United States representative, took a similar view. He suggested that 'privacy' implied the possibility of a state of seclusion, whereas 'private life' referred to an individual's personal and family life as opposed to his public and business life...12

He thought that the term 'private life' was the more appropriate one for use in this context.

This view appears to have been supported by The Netherlands. That country proposed a version which stated, \textit{inter alia}, 'Everyone has the right for respect of his private and family life, his home and correspondence.'13 By contrast, Hoare, the United Kingdom representative, favoured the selection of the term privacy, taking


12. Lamey, meeting #1018, supra. n. 6.

13. UN. doc A/C.3/L: 460, Working Paper by the Secretary-General (1955), 10 G.A.O.R. Annexes, Agenda Item 28 (Part I), @ 15. This proposal selected virtually the same words as were adopted in sub-article 8(1) of the European Convention on Human Rights - ibid.
the view that what required protection was intimate life: not life as a private individual.  

In the end, Hoare's view prevailed. The English text containing the term 'privacy' was endorsed by the Third Committee of General Assembly at its 120th meeting in November, 1960. (The French text retained the phrase 'la vie privee'.) The vote was 70/0 with the United Kingdom, United States of America and Cuba abstaining. Six years later this text was endorsed by the General Assembly as article 17 of the International Covenant of Civil and Political Rights.

21.1. 'Privacy' or 'Private Life'

The selection of the term privacy in preference to the phrase 'private life' was rather unusual. The Universal Declaration had adopted this term. However, it was not selected in any of the other international conventions which adopted clauses similar to, and probably based upon, article 12 of the Declaration.

14. Sir Samuel Hoare, meeting #1018, supra n. 6.

15. 1020th meeting, supra n. 6. Australia voted for this article: (1960) 15(1) G.A.O.R. (Third Committee), @ 194.
The American Declaration of the Rights and Duties of Man adopted in 1948 contained article V:

Every person has the right to the protection of the law against abusive attacks upon his honor, his reputation, and his private and family life.

The American Convention on Human Rights, which was adopted in 1969 and entered into force in 1978, contained article 11:

(2) No one may be the object of arbitrary or abusive interference with his private life, his family, his home, or his correspondence, or of unlawful attacks on his honor or reputation.

The Council of Europe Convention for the Protection of Human Rights and Fundamental Freedoms, which was adopted in 1950 and entered into force in 1953, contained article 8:

(1) Everyone has the right to respect for his private and family life, his home and his correspondence.

It is possible to over-emphasise the choice of the term 'privacy' rather than the phrase 'private life'. Writing about the European Convention, Robertson suggested that the European choice of the phrase 'private ... life' did not:

reflect any difference in substance, ... but rather an attempt to secure concordance between the English and French texts.16

The first clue as to the meaning of the word privacy as it is used in both the Declaration and the Covenant lies in its context: in association with family, home, and correspondence. There may be an inference that it relates to the non-public attributes of a person's life.

As was noted earlier, sub-article 17(1) of the Covenant is similar to sub-article 8(1) of the European Convention. Jacobs commented that sub-article 8(1) contained a 'somewhat disparate' collection of interests. This is equally true of sub-article 17(1).

Jacobs suggested that the fact of the grouping of these disparate interests may increase their content. According to this argument, the phrase 'privacy, family, home, or correspondence' should be read as a composite description of a particular aspect of social life - one which may extend beyond the parameters of any one of these interest identified severally. That is, sub-article 17(1)


may, when read as a whole, guarantee a broad interest which arises from the grouping of these interests which, taken as a whole, 'may be read together as guaranteeing collectively more than the sum of their parts'.

In Malone v. United Kingdom, the European Court held that telephone conversations are covered by the notions of "private life" and "correspondence" within the meaning of article 8, although it has permitted the secret surveillance of post and telecommunications in some circumstances where it is justified under article 8(2).

This decision in Malone suggests that Jacobs may be correct. The interests grouped in article 8 may, when read as a composite, provide more extensive protection than they would provide individually. The same may be true of article 17 of the International Covenant on Civil and Political Rights.

However, reading sub-article 17(1) in this way may narrow the interest. In his dissenting judgment in the Marckx case, Sir Gerald Fitzmaurice read 'private and family life ... home and

18. Ibid.

19. Malone v. United Kingdom, (1984) 82 Series A, Judgments and Decisions of the European Court of Human Rights, esp. @ 30, para. 64. In a concurring opinion, Pettiti J. referred only to 'private life'.

... correspondence' together to identify the sphere of application of article 8, and concluded that sub-article 8(1) excluded matters which the majority of the court decided that it included. The majority had focused upon the phrase 'family life'.

Judge Fitzmaurice may have been influenced by common law principles such as the maxim *ejusdem generis*. Judge Walsh, who partially dissented from the majority decision in the Dudgeon case, expressly relied upon this maxim:

> If the *ejusdem generis* rule is to be applied, then the provision should be interpreted as relating to private life in ... [the family life] context...22

During the debate on Lord Mancroft's Right of Privacy Bill in the House of Lords in 1961, the then Lord Chancellor, Viscount Kilmuir, applied an equally narrow view to the interpretation of article 8. He argued that article 12 of the Universal Declaration and article 8 of the European Convention on Human Rights (and therefore presumably article 17 of the Covenant) were primarily aimed at 'physical interference, such as the activities of secret police and other officers of a public authority.'


It is not consistent with the Vienna Convention obligation to interpret treaties in good faith and in accordance with the ordinary meaning to be given to the terms of the treaty to constrain the interpretation of article 17 by the application of technical common law rules of statutory interpretation. Consequently, this method of interpretation is rejected.

The version of article 12 of the Declaration which Cisneros, one of the members of the Third Committee which debated the text of the Declaration, favoured might have been less ambiguous. He recommended

that the article should be divided into three separate articles. The first article would ensure man's moral inviolability, which was based on two factors: a subjective factor, honour, and an objective factor, reputation. The second article would be expressly concerned with the principle of the inviolability of the home. The third article would guarantee not only the inviolability of correspondence but would supplement that concept by the concept of free circulation of correspondence.24

Another member of the same committee, MacDonnell, took the view that article 12 of the Declaration was unnecessary: that the

provision enshrining the liberty and security of the person rendered it otiose. This was a minority view. The majority of the members saw article 12 as extending and 'concretising' the underlying ideas of that provision.

Of the four interests grouped together in article 17, only correspondence, and to a lesser extent home, are susceptible to uncontroversial definition. Perhaps 'family' is the next most 'definable' of the concepts. Privacy was discussed and defined in part I of this thesis. As Miller remarked, it is:

difficult to define because it is exasperatingly vague and evanescent, often meaning strikingly different things to different people. In part this is because privacy is a notion that is emotional in its appeal and embraces a multitude of different "rights", some of which are intertwined, others often seemingly unrelated or inconsistent.

Privacy has been invoked to justify abortion, euthanasia, suicide, the use of contraceptives, opposition to carrying identity cards, and the criticism of telephone interception by the police, to cite


just a few examples. One writer abandoned the entire concept in
disgust, describing it as 'unmanageable and to a large extent
unintelligible.'\(^{28}\) Another suggested that few concepts are as
'vague or less amenable to definition and structural treatment
than privacy.'\(^{29}\)

Robertson claims that the phrase 'private ... life' as it is used
in the European Convention has substantially the same meaning as
the term 'privacy' in article 17. The European Commission on
Human Rights does not appear to agree. It takes the view that the
phrase 'private life' is rather broader than the term 'privacy'.

In **X v. Iceland**, the Commission commented:

> For numerous anglo-saxon and French authors the
right to respect for 'private life' is the right to
privacy, the right to life, as far as one wishes,
protected from publicity ... 

> In the opinion of the Comission, however, the right
to respect for private life does not end there.\(^{30}\)

Consequently, it is instructive to consider the way in which this
phrase has been interpreted. Even if its meaning is wider than
that of privacy, the interpretation of the phrase 'private life'
may provide some guidance as to the meaning of article 17.


\(^{29}\) Dixon, R.G. (jr), 'The Griswold Penumbra: Constitutional
197, @ 199.

\(^{30}\) **X v. Iceland**, 6825/74, 5 D. & R. 86, @ 87.
21.3. 'Private ... life' in the European Convention

Professor Velu presented a detailed analysis of the article 8 requirement of respect for private life, home and communications to the Third International Colloquy about the European Convention on Human Rights which took as its theme 'Privacy and Human Rights'. He did not offer any precise definition of private life. Rather, he suggested that it should be seen to incorporate at least five elements:

1. an individual's physical and mental inviolatibility, and an individual's moral and intellectual freedom;
2. an individual's honour and reputation;
3. an individual's name, identity, or likeness against unauthorised use;
4. an individual's freedom from being spied upon, watched or harrassed; and
5. the freedom from compulsion to disclose information covered by the duty of professional secrecy.31

The five classes of interests which he identified are very similar to, and appear to have been largely modelled upon, Prosser's categories which were noted in chapter 2 above. This approach was also adopted by Martin, an English delegate to the Colloquy. It tends to support Robertson's suggestion that the phrase 'private ... life' was intended to bear the same meaning as 'privacy'.

Both Velu and Martin postulate an interest which is extremely broad. For the same reasons as the Prosser categories were rejected in chapter 2, the Velu/Martin approach is eschewed. Velu's second category has nothing to do with privacy - except to the extent that honour and reputation are contained in the same paragraph as privacy in article 17. Velu's third and fifth categories relate to property and professional interest rather than to any interest in privacy. The fourth category contains elements of the 'being let alone' conception of autonomy.

The European Commission of Human Rights has defined the 'right to respect for ... private...life' broadly. In Bruggemann and Scheuten v. the Federal Republic of Germany, the Commission found that:

32. See chapter 2, page 40 above.

33. Martin, A., 'Privacy in English Law', in Robertson (ed), supra n. 31, @ 95-106.
The right to respect for private life is of such a scope as to secure to the individual a sphere within which he can freely pursue the development and fulfilment of his personality. To this effect, he must also have the possibility of establishing relationships of various kinds, including sexual, with other persons. In principle, therefore, whenever the State sets up rules for the behaviour of the individual within this sphere, it interferes with the respect for the private life and such interference must be justified in the light of Article 8(2).\textsuperscript{34}

However, the Commission has limited the scope of this right. In X v. Iceland, the Commission could not:

accept that the protection afforded by Article 8 ... extend[ed] to relationships of the individual with his entire immediate surroundings, insofar as they do not involve human relationships and notwithstanding the desire of the individual to keep such relationships within the private sphere.\textsuperscript{35}

\textsuperscript{34} (1977) 3 E.H.R.R. 244 @ 252, para. 55. See also Deklerck v. Belgium, 8307/78, 21 D. & R. 116, @ 124; and X v. Switzerland, 8257/78, 13 D. & R. 248. See also below discussion of art. 8(2) on page et seq.

\textsuperscript{35} Supra n. 30, 6825/74, 5 D. & R. 86, @ 87.
(In that case, the Commission declined to interpret article 8 as securing the right to keep a dog.)

In X v. the Federal Republic of Germany, the Commission expressly differentiated between private and non-private actions. The case concerned the refusal to provide official recognition for the 'new' sex of a transexual. The Commission commented that the application concerned:

not only the applicant's private sphere, but - on the contrary - her legal status in public and in society. Thus a violation of the applicant's private life protected by Article 8(1) of the Convention was out of the question.

The application of the criteria advanced in Part I of this thesis would have produced a similar result. Consequently, if the word 'privacy' in sub-article 17(1) has a meaning which is substantially similar to that given to 'private...life' article 8(1) of the European Convention, the definition advanced in Part I is apposite.

The European Court of Human Rights has also interpreted the phrase 'private ... life' broadly. In X and Y v. the Netherlands, the court described:


37. Ibid., @ 21.
'private life', [as] a concept which covers the physical and moral integrity of the person, including his or her sexual life.38

The seizure of private documents, the disclosure of, and the incidental acquisition of, information contained in criminal records or relating to people's health, physical condition, or personality, have all been treated as constituting interferences with 'private ... life', although they may have been justifiable in the circumstances under sub-article 8(2).39 The use in evidence of intimate photographs and the retention of records, including documents, photographs, and fingerprints has been viewed as interfering with 'private ... life', although justifiably so.40

38. (1985) 91 Series A, Judgments and Decisions of the European Court of Human Rights, @ 11, para. 22.


ARTICLE 17 OF THE COVENANT

Sohn eulogised the International Covenant on Civil and Political Rights, claiming that it articulated 'more carefully the obligations of states with respect to human rights' and contained 'specific obligations for [their]... enactment and enforcement.'

This is an optimistic view. Even if the interests protected in article 17 - privacy, family, home, honour and reputation - had precise definitions, the protection offered is against 'arbitrary or unlawful interference': not a specific description.

At the other extreme, Robertson described the definitions adopted in the Covenant as being

so general or imprecise that the texts appear to be
more statements of political principle or policy
than legally enforceable rights.


The Secretary-General of the United Nations referred to this ambiguity in his 'Annotations on the Text of the Draft of the International Covenants on Human Rights.' He noted that different views had been expressed about the meaning and scope of article 17 and commented:

the article ... was couched in general terms, merely enunciating principles, leaving each State free to decide how far these principles were to be put into effect.

The Secretary-General commented that there had been two schools of thought regarding the manner in which articles on substantive rights should be drafted: one favouring brief clauses of a general character; and the other favouring precise statements articulating the obligations of the State, and the scope, substance and limitations upon each right articulated.

Various articles were influenced to differing degrees by the two schools. In the discussions about article 17, the drafters, and latterly the various nations' representatives at the Third Committee meetings, were conscious of the difficulties which would be involved in translating, the general principles enunciated in

3. UN Doc A/2929 (1/July/1955), @ 132-134, para. 100-102.

4. Ibid., @ 133, para. 100.

5. UN doc. A/2929, @ 24, para. 13.

6. UN doc. S/2929, @ 27, para. 23, concedes this.
article 12 of the Declaration into precise legal terms. In the end, they seem to have elected to lay down a general rule, leaving the states party to determine how best to incorporate into their domestic law the protection of 'privacy, family, home and correspondence'.

It does not follow from this that any of these rights should be entitled to absolute protection. The Covenant does not require that they should be immune from all limitations; nor that they should be immune from bona fide and reasonable limitations consonant with public order and communal life.

In order to determine the nature and extent of the obligation to protect privacy which is imposed by article 17, there are three terms which must be clarified: 'arbitrary', 'unlawful', and 'privacy'. The term 'interference' is reasonably clear.

22.1 'Arbitrary'

The United Kingdom representative in the Third Committee meetings described the selection of the terms arbitrary and unlawful as

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7. UN Doc. A/2929, @ 132, para. 100.

8. UN doc. A/2929, @ 132-133, para. 100.
being particularly unsatisfactory as regards a particular person's interference with the privacy of another.9

The word arbitrary is somewhat elastic, as the Greek representative at the Third Committee debates commented.10 But it is not meaningless; even if it is undefined as the Australian government argued,11 or 'undefinable' as the United Kingdom representative claimed.12

The Third Committee considered that the concept of arbitrary was 'larger and wider than the concept of "unlawful"'.13 Yaseen, the representative of Iraq, expressed the view that its inclusion strengthened the text.14 However, there was no substantive discussion of what he meant by this.

9. 10 GAOR Annex Item 28 (Part I) @ 10; UN Doc A/4045, para 46 (1958). See also UN Doc A/2910/Add.1: Note verbal from the Government of the UK dated 12 July 1955.


11. 10 G.A.O.R. Annexes, Agenda Item 28 (Art I) @ 13; U.N. doc A/2910/Add 1: Note Verbal from the Government of Australia dated 20 June 1955 - comment in respect of Art. 9. See also page 358, n. 8. above.


13. MacEntee, Irish Representative at the Third Committee Meetings, supra n. 10, @ Meeting # 1018, @ 182; U.N. doc. A/C.3/SR.1018, @ para. 8.

14. Yaseen, the Iraq representative at the Third Committee Meeting No. 1016, supra n. 10, @ 175; U.N. doc A/C.3/SR.1016, para. 18.
The United States representative suggested that arbitrary was wider than unreasonable; but that its proximity to 'unlawful' may result in it being read down to bear a meaning close to that of unreasonable. Yet according to the Secretary-General of the General Assembly, the reason why the term arbitrary was selected in preference to the term 'unreasonable' was that arbitrary was narrower than 'unreasonable'. Both arbitrary and unreasonable connotate capriciousness. However, conduct could be unreasonable without being arbitrary.

Arbitrary certainly means illegal, and contrary to law; but it also connotes despotic, uncontrolled, tyrannical, imperious or capricious. As the Secretary-General noted, some of the Third Committee delegates had distinguished between 'unlawful' interference by private persons and 'arbitrary' interferences by public authorities. However, the term arbitrary is equally applicable to legislation, regulation, executive or private acts, and the exercise of executive discretion.

15. Lamely, USA Representative, Third Committee meeting, supra n. 10, @ meeting 1018, @ 183; U.N. doc A/C.3/SR. 1018, @ para. 11.

16. 'Annotations on The Text of the Draft International Covenants on Human Rights', prepared by the Secretary-General of the G.A., UN Doc A/2929 (1955) @ para 101, 10 G.A.O.R., Annexes, Agenda Item 28 (Part II), @ 47.

17. Annotations, ibid, @ 46 - 47.

Its inclusion in article 17 is thus significant. More than any other single word in the article, the word arbitrary signals that a primary object of this provision is to protect individual privacy against the abuses of arbitrary government.19

Hassan studied the meaning of the word arbitrary in great detail. In short, his conclusion was that it meant both illegal and unjust.20 McDougal criticised Hassan's analysis for failing to recognise that arbitrary is 'commonly employed to summon up all the complementary interests to a particular right and hence, does not offer us much succour in attaching a reference to unjust'.21

However, introducing the concept of justice into the analysis is a good starting point. It is consistent with the views of the Third Committee of General Assembly which suggested in its report in 1958 that the word 'arbitrary' was used as a:

safeguard against the injustices of States, because it applied not only to laws but also to statutory


regulation and to all acts performed by the executive. An arbitrary act was any act which violated justice, reason or legislation, or was done according to someone's will or discretion or which was capricious, despotic, imperious, tyrannical or uncontrolled.22

In 1950, Eleanor Roosevelt, the chairperson of the Commission on Human Rights, attempted to have the Commission formally record its opinion that arbitrary meant both illegal and unjust.23 She failed to achieve this. However, some of the other delegates apparently had in mind a similar meaning. The United Kingdom representative at the Third Committee debates on the draft Declaration had suggested that arbitrary could be defined to mean 'any action taken at the will and pleasure of some person who could not be called upon to show cause for it.'24

Perhaps the most useful guide to the meaning of the word arbitrary lies in the nature of the instruments in which it is to be found. The reason why the creation of an international bill of rights was thought to be so important was that it was seen to be one of the ways by which to prevent the recurrence of the abuses which had been perpetrated by the totalitarian regimes in pre-1945 Europe.


23. UN doc. E/CN.4/SR 147, @ para. 43 (1950).

The object of the exercise was to protect the rights of individuals against the encroachment of tyrannical governments. An address to the third regular session of the General Assembly by the then United States Secretary of State and Chairman of the U.S. Delegation, provided some indication why international protection of human rights was seen to be necessary.

Systematic and deliberate denials of basic human rights lie at the root of most of our troubles and threaten the work of the United Nations. It is not only fundamentally wrong that millions of men and women live in daily terror of secret police, subject to seizure, imprisonment, or forced labor without just cause and without fair trial, but these wrongs have repercussions in the community of nations. Governments which systematically disregard the rights of their own people are not likely to respect the rights of other nations and other people and are likely to seek their objectives by coercion and force in the international field.

25. Hassan, P., 'The International Covenants on Human Rights: An Approach to Interpretation,' (1969) 19 Buffalo L. Rev. 35, @ 40, also makes this point. It was also emphasised to this writer during discussions with Mr Ralph Harry, the alternative delegate from Australia at the drafting committee meetings.

That, at the end of the drafting process, some of the parties had had in mind the activities of the Soviet rather than the Nazi government does not derogate from this.

The debates over the words arbitrary and unlawful were not particularly illuminating. Whilst they were extensive, they were also confused and confusing. Volio suggested that the reason that both terms were used was that:

privacy ... is essential to individual dignity, which is in the care of legal order, and its violation cannot and should not be sanctioned by law. Illegality, then, is itself contrary to human rights. Arbitrariness is even more odious because it departs from the idea of law, creating an abyss between force and reason, between political power and the institutions which control and limit that power. Action may be arbitrary even when it is not in violation of positive law if the legislation is itself unreasonable and capricious.

It may be that it is easier to recognise what constitutes arbitrary interference than it is to define the word 'arbitrary'.

27. See generally UN Doc A/4625, esp @ para 36 et seq. One of the delegates suggested that arbitrary was a procedural term: that 'to act in an arbitrary manner [means] to act unreasonably where reasonable behaviour is required'. See especially (1960) 15 G.A.O.R. (Third Committee) (part 1.), Meetings No. 1014 - 1020, and the text accompanying notes 3-10 above.

28. Volio, supra n. 18, @ 191.
Unfortunately, this does not make it a particularly useful criterion - it rather puts one in mind of the judge who could not define obscenity, but knew what it was when he saw it.29 Perhaps greater precision would be difficult.

The meaning of arbitrary may never be susceptible of precise definition. However, in practice, the American representative's view that 'arbitrary' is 'unlikely to be misinterpreted' was correct.30 Much of the debate over the application of the description 'arbitrary' involves disagreement as to the facts, rather than the meaning of the term.

22.1.1. Sub-article 8(2) of the European Convention

This view is supported by the way in which the European Court of Human Rights has approached the interpretation of article 8 of the Council of Europe Convention for the Protection of Human Rights and Fundamental Freedoms. That article is similar to article 17, but does not contain the term 'arbitrary'. Instead, article 8(2) prescribes the conditions under which an interference with privacy by a public authority is permitted.


30. US representative, UN Doc E/AC.7/SR 153, @ 16. See also UN Doc E/AC.17/SR 148, @ 17.
(2) There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.

In the Airey case, the European Court described the object of article 8 as:

essentially that of protecting the individual against arbitrary interference by the public authorities.\(^{31}\)

Both the European Court and the European Commission of Human Rights have been concerned to identify the circumstances in which an interference with 'private ... life' may be justifiable. The way in which article 8 has been applied may illustrate the protection against 'arbitrary' interference which is offered by article 17.

In the case of Klass and others, the court noted the necessity of striking a balance between 'defending democratic society and

\(^{31}\) Airey case, (1979) 32 Series A, Judgments and Decisions of the European Court of Human Rights, ¶ 17, para. 32.
individual rights'. In that case, the European Court decided that secret surveillance was 'necessary in a democratic society in the interest of national security and for the prevention of disorder or crime.'

The European Commission has attempted to define the limits of the personal sphere. In Brüggemann and Scheuten, the Commission commented:

However, there are limits to the personal sphere. While a large proportion of the law existing in a given State has some immediate or remote effect on the individual's possibility of developing his personality by doing what he wants to do, not all of these can be considered to constitute an interference with the private life in the sense of Article 8 of the Convention. In fact, as the earlier jurisprudence of the Commission has already shown, the claim to respect for private life is automatically reduced to the extent that the individual himself brings his private life into


contact with public life or into close connection
with other protected interests.34

In that case, the Commission upheld laws prohibiting abortion,
commenting that 'not every regulation of the termination of
unwanted pregnancies constitutes an interference with the right
to respect for the private life of the mother.' (Commission's emphasis).35

The European Court agreed with the Commission that a law
proscribing homosexual activities with persons under the age of
consent which interfered with 'private ... life' may, in some
circumstances, be upheld as being necessary for the protection of
the rights of others (see art.8(2)).36 For similar reasons the
Commission also rejected complaints about the denial of a
prisoner's conjugal rights and the close surveillance of the
visits of another prisoner's wife and children.37 However, the

34. Bruggemann & Scheuten v. Federal Republic of Germany,
(6959/75), (1977) 3 E.H.R.R. 244, @ 252-253, para. 56. See also
Clarendon Press. Oxford], @ 313, where he endorses the
qualifications articulated by the European Commission.

35. Bruggemann & Scheuten v. Federal Republic of Germany, ibid, @
253, para. 61.

105); Court: (1981) 45 Series A, Judgments and Decisions of the
European Court of Human Rights.

Federal Republic of Germany, (3603/68) 31 CD 48, 13 Yb 332; X v.
United Kingdom, (6564/74) 2 D. & R. 105; X v. United Kingdom,
(8065/77) 14 D. & R. 246. In addition, see Wemhoff v. Federal
Republic of Germany, (3448/67) 30 CD 56 regarding the unannounced
European Court struck down a statutory prohibition on all homosexual conduct between males for interference with the right to respect for the private lives, interpreted to include the sexual lives of persons of homosexual orientation.38

22.2. **Unlawful**

The Third Committee delegates did not have much difficulty with the term unlawful. Obviously it means contrary to law. The Oxford English Dictionary defines it as meaning:

1. Contrary to law; prohibited by law; illegal.
2. Not permissible; contrary to moral standard or spiritual principles.

...  
4. Contrary to rule; irregular.39

examination of a prisoner’s personal effects; and McFeeley v. United Kingdom, 8317/78 (1980) 3 E.H.R.R. 161.


It is a term which is familiar to lawyers. Stroud's Judicial Dictionary suggests that:

A thing may be unlawful in two senses, (1) as unenforceable by law, (2) as punishable by law.40

Black's Law Dictionary concurs:

that which is contrary to, prohibited, or unauthorised by law.41

22.2.1. European Convention and 'lawful' interference.

The article 17 term 'unlawful' is more restrictive that the European Convention phrase 'in accordance with law and is necessary in a democratic society in the interests of national security ...' etc. (article 8(2)).

The European Court has interpreted article 8 so as to entitle it to examine the justification for the law - whether it is 'necessary' for national security or public safety etc. The court commented in Dudgeon that:


"necessary" in this context does not have the flexibility of such expressions as "useful", "reasonable", or "desirable", but implies the existence of a "pressing social need" for the interference in question.42

The European Court has been prepared to nominate minimum requirements for domestic laws relied upon to justify an interference under article 8 — they must be 'adequately accessible' and 'formulated with sufficient precision to enable an individual to regulate his conduct, if need be with appropriate advice'.43

Further, there is some suggestion that the European Court is prepared to go behind the 'lawfulness' of an action where it considers that the Convention imposes requirements 'over and above conformity with domestic law'.44 In Malone, the European Court interpreted the phrase 'in accordance with the law' as relating to the quality of the law, requiring it to be

42. Dudgeon case (1981), supra n. 36, @ 21, para 51 (citation omitted).


44. X v. the United Kingdom, (1982) 46 Series A, Judgments and Decisions of the European Court of Human Rights, @ 25, para. 57.
compatible with the rule of law, which is expressly mentioned in the preamble to the Convention. 45

In that case, the Court found that the:

minimum degree of legal protection to which citizens are entitled under the rule of law in a democratic society ... [was] lacking. 46

Article 17 does not articulate any criteria other than 'arbitrary' by which to judge the 'lawfulness' of domestic laws. Further, the inclusion of the qualification 'arbitrary' appears to imply that a law may be 'lawful' for all its arbitrariness. Article 17 addresses itself to interferences as such - to the action rather than the authority under which the action is performed.

Article 17 requires that people should be protected from interferences with their privacy which are either unlawful (although not necessarily for reasons of privacy), or, even if lawful, arbitrary. Unless article 17 is partially tautologous (ie. because privacy should be protected by the law, attacks upon it should be unlawful), 47 the requirement that privacy should be protected from unlawful interferences supports the views expressed in Part I of this thesis. Individual privacy is ascertained by


46. Ibid, @ 36, para. 79.

47. See the comments by Capotorti, the Italian representative at the Third Committee meetings, supra n. 10, @ 178; meeting No. 1017; U.N. doc A/C.3/SR.1017, para 9.
reference to the society's recognition that certain areas of life are 'off limits' for reasons other than the recognition of privacy.

22.3. Arbitrary or unlawful interference

Article 2(3)(a) of the Covenant, requires the States Parties to provide remedies to people whose rights have been violated 'notwithstanding that the violation has been committed by persons acting in an official capacity'. The inference is that the Covenant requires the States Parties to take such legislative or other measures as are necessary to provide protection against arbitrary or unlawful interference with, inter alia, privacy by either private persons or public authorities.

In ordinary parlance, the descriptions 'arbitrary or unlawful' are applied equally to private and public actions. Further, in X and Y v. the Netherlands, the European Court of Human Rights commented:

the object of article 8 [of the European Convention] is essentially that of protecting the individual against arbitrary interference by public authorities, it does not merely compel the State to abstain from such interference; in addition to this primarily negative undertaking, there may be
positive obligations inherent in an effective respect for private or family life ... These obligations may involve the adoption of measures designed to secure respect for private life even in the sphere of the relations of individuals between themselves.\textsuperscript{48}

This view of the European Convention is supported by the Consulatative Assembly of the Council of Europe. In Recommendation 582 (1970), the Assembly sought:

an agreed interpretation of the right to privacy provided for in article 8 of the Convention ..., by the conclusion of a protocol or otherwise, so as to make it clear that this right is effectively protected against interference not only by public authorities but also by private persons or the mass media.

Article 17 of the Covenant is, as has been noted previously, similar to article 8 of the European Convention. The primary distinctions between the two articles lie in the prescription of the grounds upon which a law may interfere with 'private ... life' etc. in sub-article 8(2) of the Convention as opposed to the use of the terms 'arbitrary or unlawful' in sub-article 17(1), and the omission from sub-article 8(1) of honour and reputation.

\textsuperscript{48} X & Y \textit{v.} the Netherlands, (1985) 91 Judgments and Decisions of the European Court of Human Rights, @ 11, para. 23.
The result of these distinctions is that *prima facie*, article 8 appears to be less directly concerned with private interferences with 'private ... life' than is article 17. Consequently, if article 8 imposes obligations to protect 'private ... life' against private interference as the European Court suggests, it follows *a fortiori* that article 17 requires the States Parties to the Covenant to protect privacy against private actions which arbitrarily or unlawfully interfere with privacy.
PART V: AUSTRALIAN RECOGNITION OF PRIVACY
CHAPTER 23

RECOGNITION OF PRIVACY

Thus far the discussion has concentrated upon the concept of privacy in an attempt to ascertain what it is; to what extent it is implicitly recognised in and protected by Australian law; and whether privacy requires any additional protection. The focus has been upon the socio-political concept of privacy, as distinct from the right to privacy.

It does not follow from the fact that it is possible to isolate and define privacy, that the law should recognise and protect an independent right to privacy, nor that the amount of privacy which should be recognised by the law should be co-extensive with the definition of privacy advanced in this thesis.¹

The common law protection of interests which are closely allied with, and in some circumstances, virtually indistinguishable from, privacy was discussed in Part III. As was evident from that discussion, this protection is extensive. The Younger Committee's conclusion that:

¹ See also MacCormick, D.N., 'Privacy: A Problem of Definition', (1974) 1 Br. J. Law & Soc. 75, @ 75, 76.
the existing law provides more effective relief from some kinds of intrusion into privacy than is generally appreciated\(^2\)
is as true of Australian law as it is of English.

In Australia, the statutory and common law is developing so as to provide increasing protection to interests by reference to which privacy is determined and with which it is allied. This was particularly evident from the discussion of the prohibitions upon adverse discrimination and the extension of the actions for the wilful or negligent infliction of nervous shock.

Seipp reached a similar conclusion after examining the developments in English law since the late nineteenth century. He concluded that:

Privacy is a new doctrinal category in the making. In England and elsewhere it is coming to be perceived as a unified body of rules determining the boundaries which we may rely upon to keep out an intrusive world.\(^3\)

Part IV above examined Australia's international obligation to provide effective remedies to people who are 'subjected to arbitrary and unlawful interference with' privacy. As was noted in

\(^2\) Report of the Committee on Privacy, Chairman Sir Kenneth Younger, [1972. HMSO. London], Cmnd. 5012, @ 203, para. 657.

\(^3\) Seipp, D.J., 'English Judicial Recognition of a Right to Privacy', (1983) 3 Ox. J. of Legal Studies 325, @ 369-370.
chapters 21 and 22, this obligation may be similar to the article 8 obligation imposed upon the signatories to the European Convention on Human Rights.

It does not follow necessarily that privacy should be recognised as a distinct legal interest. The international obligation may be discharged by the provision of a series of otherwise unrelated legal protections and remedies which, when viewed en masse, protect privacy. The 'ragbag' of protections which were discussed in Part III may suffice to discharge this obligation.4

Australian domestic law provides ad hoc and incomplete protection to privacy. Various heads of action have been extended to meet particular extingencies and to provide remedies where interferences with privacy arise out of, co-incide with, or result in otherwise recognised legal injuries. Thus remedies are available where an interference with privacy arises out of, or co-incides, with a trespass to person or property, involves a breach of statutory duty, or results in an otherwise recognised legal injury, such as nervous shock. However, privacy complainants' lacking title, or resistent to ('mere') psychiatric injury, may

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have no grounds for action regardless of the intimacy of the information circulated.

Many interferences with privacy will not provide grounds for action. Thompson would lack grounds for legal action against her hypothetical neighbour for using an X-ray device to look through her walls unless the neighbour used the information, or intended to influence her behaviour, or, perhaps, if she developed nervous shock as a result. It is not satisfactory to rest a right of action upon psychological or psychiatric stability, even though the measure of the remedy may be satisfactorily determined by this.

Morison, Sharwood and Pannam make a similar point in their discussion of Greig v. Greig. In that case, the plaintiff succeeded in an action for trespass against a defendant who had entered the plaintiff's home and placed a microphone in the living-room. Had the defendant used a parabolic microphone (which it would not have have been necessary to actually place upon the plaintiff's property), the plaintiff would have had no ground for action in trespass. However, the invasion of privacy would have been the same regardless of the type of microphone used.

5. See above, chapter 4, page 101 et seq. See also the discussion of nervous shock, chapter 10, page 216 et seq., and the discussion of watching and besetting, chapter 11, page 232 et seq.

The decision in Berstein of Leigh (Baron) v. Skyviews and General Ltd. (noted previously in chapter 11) might have been different had the plaintiff been able to demonstrate that the photographing of his house amounted to harassment. However, the Anglo-Australian courts have been less adventurous than their American counter-parts in the fashioning of new remedies.

The common law of trespass may develop to provide remedies for interferences with privacy. During the debate upon Lord Mancroft's (unsuccessful) Right of Privacy Bill, Lord Denning argued that the common law is open to this type of development:

The Court of the United States gave a remedy in damages, and enunciated the principles of the right of privacy in a way which would surely do justice to anybody at Common Law. They said:

the unwarranted ... publicising of one's private affairs with which the public has no legitimate concern, or the wrongful intrusion into one's private activities, in such a manner as to outrage or cause mental suffering, shame or humiliation to a person of ordinary sensibilities ...


8. Palmer, G., 'Defamation and Privacy Down Under', (1979) 64 Iowa L. Rev. 1209, @ 1209. This point was discussed previously in chapter 9, page 198 et seq.
That is the law as evolved in the United States from our Common Law. Why cannot we have something similar? I am not in despair. The Judges may well do it. There is nothing in any decision of this House, judicially, which prevents it, in that whenever any grievous cases come up we find that the lawyers produce a remedy.\textsuperscript{9}

There are several disadvantages to leaving the development of privacy protection to the courts. First, there may be little attempt made to identify \textit{a priori} the concept of privacy. Courts tend to view all intrusions similarly, regardless of whether (or what type of) information is circulated as a result. This was evident from the range of cases Seipp cited to illustrate his contention that the common law is developing so as to protect privacy.\textsuperscript{10}

The majority of the cases which Seipp discussed concerned the inviolability of property (especially home), or person, rather than any particular aspects of the individual's life identified by reference to its 'off limits' nature. The cases tended to focus upon the confidential or secret nature of the transactions into which the defendants were alleged to have intruded rather than

\textsuperscript{9} (13 March 1961) 229 (5th Series) H.L. Parliamentary Debates, 638 - 639.

\textsuperscript{10} See Seipp, supra n. 3, esp. @ 362-369.
upon the nature of the information circulated as a result of the intrusion.

As was discussed in Part I, if privacy is defined or determined by the degree of the complainant's objection to the intrusion, and/or the intruder's lack of authority, it will be difficult to determine a priori whether any given item (or type) of information should be freely circulated. Rather, it will be necessary to enquire into the manner by which the defendant learnt the information in question. An innocent defendant, who accidentally learns intimate information about another person would not be an 'intruder', and therefore may be free to circulate the information at will.

Seipp's analysis of the trends in the common law may rest upon a confusion between the proper limits of government, the '[a]uthority for limiting the intrusions of the State'11 and privacy. According to the analysis advanced in Part I, the limitations upon the intrusions of the State arise out of a society's recognition that, in principle, certain aspects of life are 'off limits'.

In turn, and to the extent that, states recognise limits upon their jurisdiction over their members, privacy may be recognised. States recognise privacy because they have a limited right to regulate their members lives. They do not restrict their right to

11. Supra n. 3, @ 365.
regulate because they recognise privacy. It is therefore necessary to determine first whether, in principle, there are any areas of life which the state may not regulate, and secondly, what are those areas.

The second disadvantage to leaving to the courts the development of privacy protection is that courts may make a series of ad hoc decisions. As was discussed above in chapter 9, Commonwealth courts have tended to 'grope forward cautiously', and determine matters on a 'case-by-case basis' that does not not involve radical changes of direction or re-assessments of underlying principles. Consequently, conflicts between different interests may be resolved summarily on the facts of individual cases without there being any opportunity to establish, in principle, priorities as between the various competing interests.

Thirdly, until the courts have developed and applied specific principles by which to protect privacy, there may be considerable uncertainty about the consequences of any given circulations of information.

The disadvantages of leaving to the courts the development of protection of privacy without having first defined the factors


which should govern the recognition of privacy are illustrated by the American case law on privacy. The American cases do not appear to possess any particular theme. They range across an array of matters from the 'right to die', intrusions in property or home, the acquisition of evidence, and sexual and family matters.14 One commentator on the American case law adapted the traditional description of equity to suggest that as 'the judges' own values vary, so does the scope of the Fourth Amendment.'15 Further, many of the case are, as Kalven commented, 'unbeatably trivial'.16


15. The author of this description is not apparent from the article from which the quote is taken: Note, 'Protecting Privacy Under the Fourth Amendment', (1981) 91 Yale L. J. 313, @ 329, fn. 81, quoting from a source which appears to have vanished from the author's footnotes (the cross-reference cited in unhelpful).

As was noted above in chapter 2, after an extensive examination of
the American case, Prosser concluded that the cases lacked any
common elements.\textsuperscript{17} Gerety endorsed this view and suggested that
'any legal rule will grow like a beanstalk unless it is vigorously
pruned'.\textsuperscript{18} This view has some judicial support. Chief Justice
Burger, of the United States Supreme Court commented in \textit{United
States v. 12 200-Ft Reels of Film}:

The seductive plausibility of single steps in a
chain of evolutionary development of a legal rule
is often not perceived until a third, fourth, or
fifth "logical" extension occurs. Each step, when
taken, appeared a reasonable step in relation to
that which preceded it, although the aggregate or
end result is one which would never have been
seriously considered in the first instance.\textsuperscript{19}

Whether, and to what extent, privacy should be protected is a
question of public policy. To the extent that privacy is a

\textsuperscript{17} See above page 41, n. 28. Prosser, W., 'Handbook on the Law
804, 814.

\textsuperscript{18} Gerety, T., 'Redefining Privacy', (1977) 12 Harv. C. R. C.
L. L. Rev. 233, @ 234, fn. 9.

\textsuperscript{19} \textit{United States v. 12 200-Ft Reels of Film}, 413 US 123 (1973),
per Burger C.J. @ 127. According to Chief Justice Burger, 'Mr
Justice Holmes had this kind of situation in mind when he said:
'All rights tend to declare themselves absolute to their logical
extreme. Yet all in fact are limited by the neighborhood of
principles or policies which are other that those on which the
particular right is founded, and which become strong enough to
hold their own when a certain point is reached.' \textit{Hudson County
Water Co. v. McCarter}, 200 US. 349 (1908), @ 355.
condition of ignorance on the part of others, including the
government, the express recognition of privacy as an independent
interest must involve a conscious recognition and acceptance
(including by the government) that certain areas of life are
beyond the bounds of government regulation: that there are 'off
limits' aspects of each individual's life which are immune from
official control.

It does not follow from the fact that the judiciary is, as Justice
Brennan commented, 'the arbiter of legal propriety in the process
of administration', that it should always be for courts to
determine the bounds of executive authority. Ison suggested
that:

judicial cries for the protection of the citizen
against the state may be no more that special
pleading for the power and privilege of judicial
law-making and its supremacy over the democratic
process.

To the extent that the Australian constitutional system recognises
the supremacy of the legislature, it may be more appropriate

in Taggart, M. (ed.), 'Judicial Review of Administrative Action in
Auckland], 18, @ 19.

Adel. L. Rev. 1, @ 11.

22. See Brennan, supra n. 20; Galligan, B., 'Judicial Review in
the Australian Federal System', (1979) 10 Fed. L. Rev. 367, Ong,
D.S.K., 'The Separation of Powers and the Exercise of Ancillary
Powers through the Supervision of the Commonwealth Executive',
for the legislature to determine the criteria identifying the circumstances in which people may complain of interferences with privacy. It is for courts, or other appropriate tribunals, to determine whether those criteria have been satisfied.

Legislative recognition of privacy is less susceptible to the vagaries inherent in the judicial recognition of privacy. The statutory specification of rights involves the a priori determination of the criteria defining those rights, and these criteria may provide the basis upon which to determine the priorities as between competing interests. Further, the statutory determination of a legal right may be consistent with far greater legal certainty than may its ex post facto judicial determination.

It does not necessarily follow from the fact that Australian law does not provide sufficient protection to privacy to discharge the obligations implied by ratifying the International Covenant on Civil and Political Rights that Australian law should be modified. It may be undesirable to recognise privacy as an independent interest or right.

After an exhaustive examination of English law, the Younger Committee concluded that it was undesirable to recognise a 'blanket declaration of a right to privacy'. The Committee commented that:

the repercussions ... upon free circulation of information are difficult to forsee in detail but could be substantial.23

The same may be true of Australia.

The merits of recognising an independent right to or interest in privacy should be considered explicitly. It cannot be assumed that it follows from the existence of an international obligation to protect privacy that privacy is ipso facto desirable. It may be that the international obligation should be repudiated in whole or in part.

If this is so, it may be that a(nother) reservation should be (re-)entered in respect of article 17 of the Covenant. The terms and extent of any such reservation would, of course, depend upon the reason why the recognition of privacy is undesirable.

The remainder of this chapter examines the case against privacy. Because of the international obligation to protect privacy, the discussion proceeds from the assumption that privacy should be

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23. Younger Committee, supra n. 2., @ 206, para. 664.
recognised, and examines the force of the case against legal recognition of privacy.24

23.1. Case against legal recognition of privacy

Privacy is both an ultimate value and an instrumental value. Expressed briefly, the distinction is that an ultimate value is one which is desirable in and for itself - such as love - , whereas an instrumental value is one which is a logical pre-condition for, or an aid to, the achievement of some other value.25 Thus the interest in enjoying good health is an instrumental interest if good health is perceived as being a pre-condition to the enjoyment of life; or an ultimate interest if the enjoyment of good health is viewed as a goal in itself.

It is possible to divide many of the writers about privacy into two rather arbitrary categories: those who treat privacy as an

24. This assumption colours the remainder of this chapter. It is not an uncommon starting point. As was noted by Prickett, M.D.S., 'The Right to Privacy: a Black View of Griswold v. Connecticut', (1980) 7 Hastings L.Q. 777, @ 777, most articles about privacy proceed upon the assumption that 'The value of this ethereal thing called privacy is ... obvious and beyond dispute.'

25. Uniacke, S., 'Privacy and the Right to Privacy', [1977-78] A.S.L.P. 1, @ 14 , proffers this as the definition of an instrumental value.
ultimate value, in particular Benn, Bloustein and Fried, and those who treat privacy as an instrumental value.26

This latter category has attracted numerous adherents, and an enormous range of interests have been advanced as being dependent upon the enjoyment or privacy. Benn, Bloustein, and Fried should also be included in this category since they treat privacy as an indispensible attribute of the autonomous person - and a precondition for the existence of an autonomous, or 'whole' person.

Privacy has been said to serve numerous ends, so many, that Gavison remarked:

It appears that privacy is central to the attainment of individual goals under every theory of the individual that has captured man's imagination.27


27. Gavison, R., 'Privacy and the Limits of the Law', (1980) 89 Yale L.J. 421, @ 445. See also Uniacke, supra n. 25, and Moore, R.N., 'Report of the Workshop on Privacy', (1971) 21 (4) Philos. E. & W. 513, esp. @ 520 :'our privacy is in some sense a general repository of our values'. It is arguable that the Bloustein/Fried view treats privacy as an instrumental value.
This discussion is divided into two parts. It first considers some of the criticisms of privacy *per se*. Secondly, it considers the merits of some of the functions which some writers contend are served by privacy. If the ends facilitated by privacy are undesirable, it is may follow that privacy is undesirable. To some extent, this latter examination, therefore, considers the relationship between privacy and the ends which it is said to serve.

23.1.1. Privacy *per se*

This part of the examination considers the case against privacy on the assumption that privacy is an ultimate value in the sense described earlier.
23.1.1.1. A novel, and fashionable, interest

It is sometimes said that privacy is a novel and fashionable interest, which was unknown in the state of nature, tribal society, or even last century. Thus Burns suggested that:

Modern concern for privacy is the product of the rise of the middle class which in turn is the result of the drift from village to urban life during the industrial revolution.

As was noted in Part II, concern with privacy may be relatively recent, and largely reflective of technological developments. However, it is irrelevant whether privacy has a lengthy pedigree. The question is whether it is desirable to recognise and protect privacy in a twentieth century, technological society. Whether privacy is a 'neolithic invention' is beside the point.


To some extent this argument reflects the view that privacy embodies the modern (deplorable) pre-occupation with individualism. This type of criticism is not peculiar to privacy. As was discussed above in chapter 20, the notion of, or at least the conception of, human rights may be reflective of (Western) cultural pre-occupations with individualism. 31

The definition of privacy which was advanced in Part I does not prescribe the ambit of privacy in any given place or time. It is designed to permit fluctuations in the content (conception in the Dworkin sense) to be ascribed to privacy at any given time. The definition rests upon otherwise articulated community standards and expectations. Consequently, recognising privacy in the sense defined in this thesis will not necessarily commit a society to any particular view of individualism, nor to any particular view upon how 'much of human life should be assigned to individuality, and how much to society'. 32

31. See the discussion in chapter 20 above, page 399-405.

23.1.1.2. An inherently anti-social interest

As was discussed in Part I, privacy is a distancing mechanism. It is thus both an ultimate and an instrumental value. It is an ultimate value if the drawing of distinctions between societies and their members is, of itself, a desirable end. It is an instrumental value if the drawing of these distinctions is desirable because it promotes some other goal, such as autonomy.

 Democracies are generally typified by the recognition of distancing mechanisms. However, not all of these mechanisms are or should necessarily be recognised by law. This is frequently ignored when the presenting the case for the legal recognition of human rights in general, and privacy in particular. The argument seems to take the following form: democracies must recognise that their members need, and therefore should have the right to employ, distancing mechanisms; privacy is one such distancing mechanism; therefore democratic societies must recognise privacy; therefore there should be a legal right to privacy.

The fourth proposition is a non sequitur. There are a great many attributes of life in any society, democratic or otherwise, which are not directly recognised by law. It is not self-evident that they should be so recognised. Law is a rather clumsy instrument;

33. Bazelon, D.L., 'Probing Privacy', (1977) 12 Gonzaga L. Rev. 587, @ 588, appears to define privacy in terms of this function: 'privacy [is] ... the unitary concept of separation of self from society.'
and it is not the only institution which constrains social conduct. It may be that distancing mechanisms, including privacy, are better secured by social regulation, by the constraints of good manners or morality, than by the law.

The thesis advanced here is that the limits of individual privacy are established by the society's recognition that certain areas of life are 'off limits'. (They are not 'off limits' because an individual alleges that intrusion into those areas will interfere with privacy _per se_. Privacy depends upon a society accepting that it may not regulate its citizens' lives in entirety. It depends upon an acceptance that the members of a society are entitled to some independence vis-a-vis that society.)

To some extent, the criticism that privacy is inherently anti-social is a product of the definition proffered. If privacy is defined subjectively, then it is inevitably anti-social. Unless the definition of privacy contains within it some element by which to limit its application, the recognition of privacy may be undesirable. However, if privacy is defined by reference to some objective criterion, as is suggested in this thesis, then privacy is not necessarily anti-social.
One effect of explicitly protecting privacy will be the imposition of restrictions upon the circulation of certain types of information. This will encroach onto the right of free speech. Some consider that this is a reason why privacy should not be recognised.

Pullan argues that free speech is essential in a democracy. He maintains that although a democratic state is entitled to regulate action, 'it does not have the same right to regulate speech.'

Regal examined the justifications for free speech in the context of an examination of the prohibition of hate propaganda. Although he did not consider Pullan's writing, his comments are apposite:

some writers infer that since freedom of speech is necessary in a democracy, such freedom should enjoy preferential status over other rights and freedoms. This is an unwarranted inference because it is contingent upon the presumption that freedom of speech is the only necessary right or freedom in society, which clearly is not true.

Free speech is protected as part of an attempt to optimize the levels of freedoms and rights enjoyed.

by each individual in society, and to ensure the proper functioning of our democratic political system.35

Restrictions upon the exercise of free speech are not ipso facto unjustifiable. They are undesirable when they unnecessarily or excessively restrict the right to freedom of speech. A variety of constraints and conflicting interests already restrict freedom of speech. Several legally protected interests are inconsistent with an unlimited right to the freedom of speech.

Pullan's argument that speech should be completely free would, if accepted, deny any protection to reputation. However, reputation may be an item of trade as much as any physical attribute. For many members of the society reputation is both more significant and more vulnerable than any physical attribute. It is not necessarily desirable to withdraw protection from any interest simply because it conflicts with another - this is equally true of reputation. A balance may be struck between these competing interests without undermiming either.36

If freedom of speech is viewed as the pre-eminent civil right, virtually any restriction upon it may be treated as unnecessary or

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excessive. If, on the other hand, privacy is viewed as an otherwise desirable interest, freedom of speech too may be balanced against the recognition of privacy, and there may be no objection, in principle, to imposing some restrictions upon freedom of speech.

This analysis starts from the position that privacy is at least *prima facie* desirable. Consequently, that limitations will be placed upon freedom of speech by the recognition of privacy is merely one factor affecting the extent to which privacy should be recognised.

The degree of privacy recognised in any society depends upon a balance being struck between the conflicting interests of that society. It does not follow from the conclusion that privacy should be confined within certain limits, that privacy should not be recognised.

23.1.1.4. An exclusively bourgeois interest

Privacy has been criticised as a 'trivial middle class value'\(^{37}\) of concern of interest only to those:

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whose circumstances do not rivet their minds exclusively on survival.38

If privacy is a middle (and upper) class concern, then it may be exploited to enhance the social position of the more privileged sections of the community against the less. This criticism is defended by adopting the fall-back position that, even if the under-privileged sections of the community do derive some benefit from privacy, and hence would derive some advantage from its express legal recognition, the more privileged sections already derive disproportionately greater benefit, and will derive disproportionately greater advantages from its recognition.

The desirability of the legal protection of privacy is accorded a far higher priority amongst those who are less pre-occupied with the more mundane aspects of survival, such as the source of the next meal.39 This is not entirely surprising.

In some senses at least, the privileged sections of the community are more directly threatened by the non-recognition of privacy. As the Canadian Report on Telecommunications commented: the less


privileged one's position; the less one has to fear from an abrogation of privacy.

The rich and powerful may also have more to hide; for information that might destroy a career in some walks of life could be a matter of indifference in others. 40

The rich and powerful will inevitably derive disproportionately greater benefit from the explicit recognition of privacy. This is true of the recognition of many socially defined interests. However, it does not follow that those interests should be abandoned.

Similarly, it does not follow that the poor and powerless will derive no benefit from the explicit recognition of privacy. Unlike the better placed members of the community, they are less able to exploit the indirect avenues of protection (such as property-based causes of action). The explicit protection of privacy may thus secure for the underprivileged the baseline as is currently secured by the rich and powerful through more devious means.

For instance, indigent people cannot secure their physical immunity from trespassers by invoking the law of trespass if they have no land in the first place. Their rich cousins may — and may

indirectly secure their privacy. Yet it is the privacy of the powerless which is most frequently abrogated: it is they who are required to bargain their privacy in return for government largesse or credit.41

The objection that privacy is a middle-class concern is motivated, in part, by fear that pre-occupation with the recognition of privacy will divert attention from other (arguably more important) social concerns, such as poverty or unemployment. In its most extreme version this argument asserts that nothing short of wholesale change is acceptable: band-aids merely reinforce the existing, objectionable, social order. This may be so. But the Revolution does not seem imminent.

In its more moderate form, this argument is simply a claim for a different set of priorities: to the amelioration of which particular societal evil should one devote one's energies: the eradication of poverty, the elimination of domestic violence, the elimination of illiteracy or the prevention of intrusions into privacy? The recognition of privacy is not necessarily antithetical to any of these interests.

41. See for eg. Harrington, M., 'Privacy and the Poor', [1971] 2 Univ. Ill. L. Forum 168, esp @ 169, commenting upon 'bureaucratic intrusions'.
23.1.2. Privacy as an instrumental condition

If the case for providing explicit protection for privacy is rested upon the merits of the goals or interests which privacy facilitates, these must bear independent scrutiny. It may be that the objects fostered by privacy are anti-social. Some of these are discussed below.

23.1.2.1. Alienation

The distancing function of privacy was noted earlier. It is not an unmixed blessing. As Bettleheim noted, 'modern alienation results from how distantly people live from each other.'

The distancing function of privacy operates in a number of different ways. It serves to set individuals apart from society as a whole; it isolates individuals from one another; and it sets apart groups of individuals. Bettleheim suggested that the more class structured a society becomes, the more privacy do its privileged members demand.

42. Bettleheim, B., 'The Right to Privacy is a Myth', (1968) 24 (27 July 1968) Saturday Evening Post (newsp. USA), 6, @ 9.

43. Ibid.
This was supported by Mumford. In his historical analysis of 'The Culture of Cities', he discussed the various architectural developments which reflected, or perhaps promoted, the increasing withdrawal of individuals from each other within those classes. However, it does not necessarily follow from this separation that the individuals (and classes) are thus alienated from each other.

Privacy is not a sine qua non of alienation. The classic illustration of an alienated person is provided by the prisoner in solitary confinement. However, in some circumstances, privacy may exacerbate alienation. In these circumstances, it may be desirable to limit privacy.

This does not prove the case against privacy. It is an argument for the selective recognition, or non-recognition, of privacy. As in the earlier discussion, the issue is where the balance is to be struck. Further, as was discussed in Part I, the concept of privacy under examination in the thesis is essentially voluntary - it is not a condition forced upon people.


23.1.2.2. Minor deviance

Westin advanced as one of the primary virtues of privacy, that it permits an individual to engage in minor breaches of social norms. This, Westin claimed, is a distinguishing characteristic of life in a free society. As Gavison noted, this argument may equally be viewed equally as an argument against privacy.

Marshall stated this objection bluntly:

A quite natural response to the assertion of a right to be let alone is the query "to do what":
to go on battering the baby, or cheating the Inland Revenue, or poisoning the customers?

The argument is more complex than this. Some role-deviation may be desirable. That this liberty may be abused is not, of


48. Marshall, supra n. 28, @ 243. The reference to being let alone is a reference to the Warren and Brandeis argument which was discussed in chapter 1.

itself, a sufficient ground to abrogate it. Nor is it a
sufficient ground upon which to refuse to recognise privacy in
Australia's legal system. Virtually any liberty is susceptible to
abuse. Perhaps this is one of the tests of any right or liberty:
whether it is one to which a claim must be respected even when the
claim is made by a person with no redeeming qualities.50

23.1.2.2.1. Emotional release and role rehearsal

Privacy is commonly said to provide opportunities for emotional
release. According to Westin, 'both physical and psychological
health demands periods of privacy for various types of emotional
release' and this is provided, _inter alia_, by relief from the
pressure of playing social roles.51 This opportunity for rest
and recreation is said to be desirable because it (i) permits the
development of individuality and intimate personal relationships;
and (ii) fosters mental health.

50. Walker, supra n. 44, @ 339, commented: 'The right to privacy
must include the right to use one's privacy wrongly and to the
detriment of oneself and one's society: it cannot otherwise be
privacy.'

51. Westin, supra n. 30, @ 34.
(i) Individuality and intimate personal relationships

Bloustein is one of the primary advocates of privacy as being essential to the development of 'individuality and human dignity'. Without an off-stage existence, Bloustein and Fried argue, love and friendship are impossible. This may be so. Both authors (among others) argue their case persuasively.52 However, it is difficult either to support or to refute these claims empirically.

Posner took issue with Bloustein by suggesting, inter alia, that if people were forced to conform their private to their public behaviour ... people would be better behaved if they had less privacy.53

This is not a convincing argument. 'Better behaviour' is not necessarily the result of greater uniformity of behaviour, except, of course, in a very narrow sense. This depends upon the assumption that conduct conforming with public social norms is ipso facto 'good'.54

52. See the references above @ n. 26. See also Bazelon, supra n. 23, @ 589. In this context it is debatable whether privacy is being treated as an ultimate or an instrumental value, or perhaps both.


(ii) Mental health

Jourard argues that complete conformity with the norms of society causes mental illness: a form of self-alienation.\(^{55}\) This contention is related to the Bloustein/Fried argument. In a sense, it substitutes the notion of mental health for that of individuality. As in the previous case, this argument is difficult either to substantiate or to refute. Gavison commented that this argument has the advantage of simplicity, but that it fails to account for the fact that most people live in societies which exert a considerable amount of pressure to conform without losing their mental health.\(^{56}\)

Neither the individuality nor the mental health argument is susceptible to empirical proof or disproof. Each depends upon a assumptions, such as the notion of mental health, and the concept of individuality. They are made completely unverifiable by the

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55. Jourard, S.M., 'Some Psychological Aspects of Privacy', (1966) 31 L. @ Contemp. Probs. 307. See also Benn, (1971), supra n. 26, esp. @ 24-25.

not infrequent addition of a further contention: that privacy, in some form, is to be found in all human societies.

23.1.2.2.2. Choice and autonomy in a democracy

Some citizen participation in the decision-making processes of society is inherent in the definition of a democracy. It is necessary that this participation be both active and independent. Benn argued that this was not possible without privacy. He claimed that autonomy is possible only where the individual is able to practice independent judgment in private.57

This is a development of the Bloustein/Jourard thesis discussed earlier. It asserts that (i) privacy is a safeguard against conformity; (ii) conformity is the inevitable result of constant observation; and (iii) this conformity is inimical to democracy, or individuality in Bloustein's terms, or mental health in Jourard's.

57. Benn, 1971, supra n. 26, esp. @ 24-26.
Behaviour is frequently inhibited by public observation.\textsuperscript{58} As was noted above in chapter 7, fear of tarnishing 'record images' may undermine autonomy or independence.\textsuperscript{59} However, private autonomy does not necessarily result in public autonomy.

(i) Complete citizen autonomy

Democracies, like all structured societies, assume the right to enforce certain rules against their members and, in some circumstances, individuals' wishes in respect of the circulation of personal information must be overridden. For instance, it is unlikely that anyone would suggest that people should be free to lie to prospective employers about qualifications or experience on the basis that disclosing the true information would interfere with privacy. (As has been emphasised above, the notion of privacy contemplated in this thesis is not dependant upon its claimant's wishes.)


To the extent that democracies presuppose some citizen autonomy, they must recognise their citizens' rights to invoke distancing mechanisms to some degree. It does not follow, however, that this right should be unlimited.

(ii) The result of private autonomy

Benn, among others, insists that privacy is a *sine qua non* of public autonomy. This may be so. However, this does not mean that autonomy will necessarily be secured by the fact of protecting privacy: privacy may be not provide sufficient conditions for autonomy.

Privacy may not be a necessary condition for democracy. Ideal citizens are not publicly compliant but privately defiant. They are publicly independent, but law-abiding. The recognition of privacy may be one of practical ways in which to secure the conditions necessary for the exercise of certain other (arguably more important) rights, such as the freedom from discrimination on the basis of religion. However, the emphasis lies upon the word practical. It may not be a logical pre-condition for the enjoyment of any or these rights; nor indeed for the existence of autonomy.
It is possible recognising privacy may produce dual standards and institutional hypocrisy. If people are free to defy the social norms in private without fear of detection, there is no reason why they should solicit public condemnation by broadcasting this fact. They are likely to be publicly compliant and thus secure the benefits of conformity. As Gavison remarked:

Why will the individual risk himself and expose himself to sanctions if he can avoid mental disease by being "autonomous" only in relative seclusion?60

If public autonomy does not follow from the recognition of privacy, there are a number of problems.

As was noted earlier, the middle and upper classes probably enjoy far more privacy than do the poor and powerless. Even if privacy does receive explicit recognition and protection, it is inevitable (if regrettable) that this will continue to be the case. It may follow that the middle and upper classes therefore enjoy proportionately more autonomy.

If privacy arms citizens with the ability to surreptitiously disregard the social norms, and no public demonstration of this results, one consequence may be that the social norms which are, for whatever reasons, objectionable to some elements of the community (although publicly endorsed by that same section), will

60. Gavison, supra n. 56, ¶ 87.
be mandatory only upon those who are least able to agitate for reform.

Neither autonomy nor the freedom to disobey social norms, is valued in a democracy solely for itself. They are instrumental values. In theory at least, they serve several functions in a democracy. They permit and promote participation in the decision-making processes of the society; and they facilitate the gradual, i.e. non-disruptive, evolution of new social norms.

In theory, if any given social norm is regularly flouted by one person, or a class of persons, a new norm will result, unless the behaviour which disregards the norm is completely random. According to democratic theory, if this new norm is more attractive to the majority of persons by whom it could be adopted, it should be substituted for the disdained norm. This will occur only if the new norm is demonstrated to the society at large.

Three benefits are said to follow from the ability to surreptitiously deviate from established social norms. First, social disruption is minimised by the opportunity to (privately) rehearse, and thus to test, new norms, which it is assumed will result from the conduct distaining the old norm. This assumes that only the final version of the (new) norm will be released. The community at large is thus spared the chaos of having to react to the various 'first drafts' which may be rejected as unsuitable by their players.
Secondly, it is assumed that conformity with particular norms will be excessively harsh, at least in some circumstances. Consequently, recognising an 'off stage' area in which conduct is not scrutinised for its conformity with those norms will ameliorate the harshness of this requirement of conformity. Thirdly, according this limited privilege to the citizens benefits the society at large. The society gains the benefits which result for social tolerance by according de facto recognition to social divergence, whilst retaining its public homogeny.

Surreptitiously deviation from established social norms is beneficial to a community only if a new norm is generated and rehearsed, and the private divergence (production of the new norm) is followed by publicity. As Gavison noted, it is not self-evident that this will follow.61

If some sections of the community may adopt a new norm without disclosing it to the community at large, only people who are deprived of privacy, or deprived of sufficient privacy to exploit the new behaviour mode, will be required to comply with the old norm.

It is probable, although not logically necessary, that the reason for the development of the new norm will be that the old one is, or is rapidly becoming, inappropriate in changing social conditions. People who are unable to reject the old norm

61. Supra n. 60.
surreptitiously may thus be compelled to comply with it until compliance it becomes intolerable. At this point rejection of the old norm may be abrupt, and possibly random since there will have been no opportunity for these later dissidents to rehearse their new course of action.

This is a variant on the 'privacy is anti-social' argument. It is equally likely that the norm rehearsed in private may be one which would be unacceptable to the wider community.

The second and third benefits claimed may also be arguments against privacy. Where privacy is not available to temper the severity of social rules, societies may be forced to examine their rules, and the consequences of their enforcement, with more care.

However, some writers argue that some measure of 'being-apart-from-others' is essential to the maintenance of esprit de corps.\(^{62}\) Non-totalitarian societies always concede some licence to their members. Further, such societies frequently permit minor deviance provided that it is not manifested to the society at large in such a way that the society is required to respond to an apparent challenge. As was suggested previously (on page 470),

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this argument may rest upon the fallacy that distancing mechanisms require legal protection.

There will always be some rules with which compliance may be unjustifiably onerous in some circumstances, or with which complete compliance may be actually undesirable. It may therefore be desirable to recognise some means of mitigating the consequences of the publicly endorsed requirement of conformity.

However, recognising privacy is only one of the ways of doing this. It may be preferable to develop and incorporate into social prescriptions, standards expressly limiting the ambit of those prescriptions. It may be desirable to expressly recognise the availability of a 'justifiable in the circumstance' defence to be determined on the facts. Alteratively, rules more honoured in the breach than the observance may have to be abandoned. As Gavison commented:

if no form of inquiry into breaches of the rule is acceptable, the rule should not be adopted in the first place.63

If this reasoning had been to be applied to the Griswold situation,64 American privacy jurisprudence might have been different. That case concerned an 'uncommonly silly' prohibition

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63. Gavison, supra n. 56, @ 82, fn. 43.

upon the use of contraceptives. Had the question been whether the prohibition should be enforced, given that it could be enforced only by forcibly entering into the accused's bedroom (privacy American style), and not whether it should be enforced in a manner which abused the sanctity of the accused's bedroom, the rule may have been abandoned rather than a barrier erected against its enforcement.

The third benefit claimed - that the explicit recognition of privacy develops social tolerance - also appears to be fallacious. Recognition of privacy does not necessarily entail an assumption that people are entitled to please themselves in any particular respect. Limited government (ie. government lacking authority to regulate all aspects of life within its geographic domain), is not identical with tolerance.

A society is tolerant when it recognises that not all of its members will, or even should, comply with certain of its norms - typically its religious or moral precepts. This occurs when the fact, although not necessarily the details, divergence from these norms is publicly acknowledged. Whilst this divergence is concealed beneath the shield of privacy, a society is not tolerant. It is ineffective in the enforcement of its norms. Similarly, unless a society recognises that it is undesirable to enforce all, or certain, of its social norms, that society cannot be said to recognise the desirability of the distancing mechanisms.

65. Ibid., per Stewart J. (dissenting) @ 527.
which insulate its citizens against the requirement of conformity with those norms.

Consider this in the context of a religiously pluralist society. A society is religiously pluralist when it does not require compliance with any particular type of religious worship, or it recognises several alternative and equally legitimate norms. It is pluralistic because of its recognition of the equal legitimacy of the alternative norms; not because of its inability to enforce its avowed norms. Privacy may offer a way in which to evade the consequence of recognising religious freedom. By recognising privacy a society may gain the best of both worlds: it may be able to claim that it does not interfere with the freedom of religion, so long as it is in private; and simultaneously enshrine certain forms of religious worship as its 'official' religion.

In many cases, the immunity which is conferred by the recognition of privacy may make a society less tolerant. Again, consider the position of religion. If a society which prohibits all non-Christian religions it cannot be described as religiously tolerant. Yet those practices may exist under the veil of privacy; and that privacy may even receive explicit protection. If these practices are pursued in public, the society must make a choice. Either it must abolish them, or it must abolish the rules which prohibit them. If the society is in fact tolerant, it must abolish the rules, thus removing the fear of arbitrary prosecution. When it does so, it may be described as tolerant. However, privacy may obscure the need to repeal these rules.
(assuming that privacy does facilitate some social divergence in this respect), and thus perpetuate the formal expression of intolerance.

There is a flaw in the argument that the recognition of privacy may be antithetical to social tolerance. In practice, many of divergences which will be accepted in tolerant societies appear only if they are first rehearsed in private. New norms will not spring Minerva-like from Jupiter's head. Before being disclosed to society at large, they must be rehearsed. Privacy may provide the 'space' for these rehearsals. If Benn is correct, and public performance does follow from private divergence, privacy may increase social tolerance.

23.2. Conclusion

As was discussed above in chapter 3, psychologically at least, privacy is perceived privacy. To the extent that privacy is instrumental in achieving particular ends, it may do so only to the extent that it is perceived to exist. In a curious application of the theory that what people 'think the facts are is

more influential than the actual facts', 67 privacy may exist; but unless people are convinced of this, they may not rely upon it. (The threats to privacy which were discussed in Part II above may be indicative of increasing unease about the value of privacy.) They may thus be unable to exploit the benefits which flow from privacy.

It is not certain that the ends which are said to be facilitated by privacy have any logical, or even practical, connection with privacy. (Some of the strongest arguments are unverifiable because they are not susceptible to any objective proof or disproof. Although it may be possible to test them empirically, it is difficult to contemplate just how this would be done.) However, if privacy is desirable because of the merits of the ends it facilitates, it may be desirable to provide some express legal recognition of privacy.

Chapter 24

Legislative Proposals for Privacy Protection

During 1985-1987 several bills introduced into the Commonwealth Parliament were intended to provide express legal recognition to privacy. None of these were enacted. Three, Privacy Bill 1986, Privacy (Consequential Amendments) Bill 1986, and Privacy Protection Bill 1987, were before the Parliament when it was dissolved on Friday 5 June 1987. Accordingly, they lapsed on that day.

The Australian Bill of Rights Bill 1985 was withdrawn by the Government after it had been passed by the House of Representatives and partially considered by the Senate. On 28 November 1986 the Australian Bill of Rights Bill 1985 was formally discharged from the Senate Notice Paper.

The Privacy Bill 1986 and the Privacy (Consequential Amendments) Bill 1986 had remained on the Notice Paper after the failure of the Australia Card Bill 1986. However, they were dependant upon that Bill and, after second reading, consideration of them was deferred.¹

¹ [1986] Senate Hansard 3762.
If enacted, these Bills would have affected the degree of protection provided to privacy by Australian law, and they illustrate some of the types and degrees of protection which may be provided to privacy.

24.1. Australian Bill of Rights Bill 1985

There is considerable debate over both the desirability and the effectiveness of protecting or promoting rights by the enactment of a bill of rights. In 1985 the Australian Senate attempted to diffuse some of this controversy by referring to the Senate Standing Committee on Constitutional and Legal Affairs, inter alia:

The desirability, feasibility and possible content of a national Bill of Rights for Australia ...³

The Constitutional and Legal Affairs Committee, composed of three Liberal Party (Opposition) and three Australian Labor Party (Government) parliamentarians, did not expressly recommend the enactment of a bill of rights: its report did not contain any recommendations. However, it did favour the enactment of a bill of rights substantially based upon the the International Covenant on Civil and Political Rights.⁴

Those opposed to enacting a bill of rights frequently quote the statement attributed to the then Chief Justice Gibbs:

If a society is tolerant and rational, it does not need a bill of rights. If it is not, no Bill of Rights will preserve it.⁵

³ (19 April 1985) No. 18 Journals of the Senate, @ 181.

⁴ Australia, Parliament, Senate Standing Committee on Constitutional and Legal Affairs, Exposure Report, 'A bill of rights for Australia?', [1985. AGPS. Canberra], @ 88, para. 6.13.

⁵ Quoted in the Sydney Morning Herald (newsp.) 17 September 1981, @ 12. There is no other record of the comment, and Sir Harry Gibbs does not actually recall having made it, although he considers that it is possible that he did so. [Source: conversation with Sir Harry Gibbs.] The comment is similar to one by Jackson, R.H. 'The Supreme Court in the American System of Government', [(1955) 1963 Harper Torchbook. N.Y.], @ 80: noting that he knew 'of no modern instance in which any judiciary has saved a whole people from the great currents of intolerance, passion, usurpation, and tyranny which have threatened liberty and free institutions'.
This comment embodies attitudes which are similar to those of the critics of the so-called New International Order which were referred to above in chapter 19, page 384. Watson characterized human rights treaties as 'statement[s] of intent', and commented:

Either a state already has the motivation to observe human rights, in which case a treaty adds nothing, or a state does not have such motivation in which case a treaty cannot provide it.6

This is a 'neat aphorism', but it is not sufficient to deny the desirability of either a bill of rights or an international convention.7 As was apparent from the earlier discussion in chapter 22, many of the cases brought before the European Court of Human Rights, and the European Commission on Human Rights, have concerned domestic laws which have failed to comply with the standards expected of laws enacted by states party to the European Convention.

In appropriate cases, compensation has been awarded to applicants against the states by whose laws they have been affected. Consequently, the governments of the states party to that Convention have been forced to bear in mind the international obligations to which they are subject when enacting domestic law.

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7. The Constitutional and Legal Affairs Committee made the same remark about the comment attributed to the Chief Justice - see the Exposure Report, supra n. 4, @ 1, para. 1.4.
Futher, domestic courts have considered relevant international instruments when interpreting domestic laws. For instance, in Macarthys Ltd v. Smith, Lord Denning M.R. commented that he assumed that [the] ... Parliament, whenever its passes legislation, intends to fulfil its obligations under the Treaty. 8

The minimum effect of a bill of rights may be similar. It may be viewed as a:

general statement which is meant to be a parliamentary intention or legislative intention and it can be viewed as a bench-mark with which to judge things across the board as opposed to ad hoc pieces of parliamentary legislation. 9

24.1.1. Australian Bill of Rights Bill 1985, art. 12, Div. 4

Division 4, article 12, of the (withdrawn) Australian Bill of Rights Bill 1985 provided that:

8. [1979] 3 All E.R. 325, @ 329.

9. Evidence of A.L. Seyford, on behalf of the Victorian Division of the Young Liberal Movement, to the Senate Standing Committee on Constitutional and Legal Affairs, quoted in the Exposure Report, supra n. 4, @ para. 1.9.
1. Every person has the right to -
   a) protection of privacy, family, home and correspondence from arbitrary or unlawful interference; and
   (b) protection from unlawful attacks on honour and reputation.

2. For the purpose of giving effect to the right referred to in paragraph 1 and without limiting the nature and extent of that right, a search or seizure is unlawful unless - [authorised by warrant, or pursuant to law, or necessary to protect life or public safety, or made where there is a compelling need for immediate action, or made with consent].

Paragraph 1 of article 12 was similar to sub-article 17(1) of the International Covenant on Civil and Political Rights. Paragraph 1 or article 12 of the Australian Bill of Rights Bill did not define the word 'privacy'. However, paragraph 2 of article 12 may have imported a new factor into the interpretation of article 12: paragraph 2 referred to the 'right referred to in paragraph 1'.

As was noted in chapter 21, common lawyers have been tempted to apply the ordinary rules of statutory interpretation to the European Convention. Two dissenting judgments in which the maxim *eiusdem generis* was applied were noted on page 422 above. It would be equally inappropriate to apply this maxim to the interpretation of a provision in a bill of rights which is
expressed to be intended to implement the International Covenant on Civil and Political Rights.

Clause 12 of the Australian Bill of Rights 1985 provided that the Bill of Rights should prevail over inconsistent legislation, including subsequent legislation. Regardless of how effective this provision may have been, it manifested the intention that the Bill of Rights was to be read and applied as broadly as possible - not confined and distinguished in accordance with the narrow rules of statutory interpretation.¹⁰

No matter how sternly courts are instructed to remember that they are interpreting a bill of rights, judges are unlikely to completely forget the ordinary tools of statutory interpretation - especially the rule ejusdem generis. Where that bill of rights directs courts (as article 12 would have, had the Bill been enacted) to read a list of interests as 'the right', the temptation to invoke common law tools to identify 'that right' may be irresistible.

Paragraph 2 of article 12 stated that it was not to be read as limiting the interpretation of paragraph 1. However, inevitably courts, and perhaps jurists generally, would have looked to the provisions of this second part of article 12 when attempting to interpret the article.

¹⁰ Hanks, P., 'Who Makes the Law?', (1986) 5(3) Australian Society 16, @ 18, suggested that sub-clause 12(4) 'will probably not do the work expected of it'.
Paragraph 2 focused upon the methods of acquiring information, not the types of information acquired. It was thus more protective of property values than it was of privacy. It tended to shore up the physical boundaries of person and property: the Cooley notion of being 'let alone' which was discussed earlier.\footnote{11. See earlier discussion @ pages 19 - 21.}

24.1.2. Extent of 'the right' in article 12

Article 12 was constrained by the mechanical provisions of the Australian Bill of Rights Bill 1985. According to the then Attorney-General, the object of the Australian Bill of Rights 1985 was to act as 'a shield, not a sword'.\footnote{12. Explanatory Memorandum accompanying the Australian Bill of Rights (Cth), 1985, and circulated by the Hon. Lionel Bowen, M.P., Deputy Prime Minister and Attorney-General, [1985. Parliament of Australia, 15405/85 Cat. No. 85 4815 4], @ 34.} Sub-clause 17(1) of the Bill provided that:

\begin{quote}
Nothing in the Bill of Rights confers on a person any right of action in respect of the doing of any act that infringes a right or freedom set out in the Bill of Rights.
\end{quote}
Nor, according to sub-clause 17(2), did it render any person liable to criminal proceedings.

If it had been enacted, the Australian Bill of Rights Bill 1985 would have provided remedies against some types of acquisition of information. However, it is questionable whether, in practice, it would have provided much protection to individual privacy.

Article 12 would have applied in two different contexts. First, sub-clause 16(1) directed courts (subject to certain exceptions) to refuse to admit evidence in criminal proceedings when that evidence had been obtained by breaching 'a right or freedom' set out in article 12 (or Division 6) of the Bill of Rights. Secondly, under clause 25, the Human Rights and Equal Opportunity Commission was to be empowered, inter alia, to 'inquire into any act or practice that may infringe a right or freedom set out in the Bill of Rights'.

24.1.2.1. Admission of evidence

Sub-clause 16(1), directed courts to 'refuse to admit [in criminal proceedings] evidence' which had been acquired in a manner which breaches article 12 (or certain other sections of the Bill), unless the court was satisfied that its admission would:
(a) ...substantially benefit the public interest in the administration of the criminal justice; and
(b) that benefit would substantially outweigh any prejudice to the rights and freedoms of any person, including the defendant, that has occurred or is likely to occur as a result of the infringement or the admission of evidence.

Sub-clause 16(2) empowered courts
subject to sub-section (1), make such order as ... [considered] appropriate and just in all the circumstances to ensure that the administration of justice is not brought into disrepute by reason of that infringement.

As was discussed above in Part III, a variety of statutes require that people be expressly authorised by law, warrant, or the subjects' consent before telephones or correspondence may be intercepted, listening devices deployed, homes or people searched and/or property seized. The common law permits courts to refuse to receive evidence which has been obtained illegally (i.e. in breach of these requirements), if its admission would be unduly prejudicial.

If enacted, the Australian Bill of Rights Bill 1985 might have added to the existing law a general, statutory statement about the impropriety of obtaining evidence unlawfully. However, it may also have circumscribed the courts' common law discretion to refuse to admit evidence which has been improperly obtained. The
Bill of Rights Bill required courts to consider whether the admission of the evidence would have 'substantially benefit[ed] the public interest in the administration of criminal justice'.

The primary criterion by which common law courts exercise their discretion to refuse to admit unlawfully obtained evidence is whether its admission would be unduly prejudicial to the accused. In practice, this is not a simple test. Courts weigh the public interest in convicting offenders against the public interest in protecting defendants from unlawful and unfair treatment.13

It is possible to over-emphasise courts' concern over unlawful or unfair treatment. In Bunning v Cross, Justices Stephen and Aichin noted that the judicial discretion to exclude evidence:

by no means takes as its central point the question of unfairness to the accused. It is, on the contrary, concerned with broader questions of high public policy, unfairness to the accused being only one factor which, if present, will play its part in the whole process of consideration.14

One factor taken into account is the undesirable effects of giving curial approval, or even encouragement, to unlawful conduct by


those whose enforce the law.\textsuperscript{15} Consequently, the consciousness of the illegality by the errant law enforcers is taken into account.\textsuperscript{16}

Another factor taken into account is the ease with which the evidence might have been obtained in accordance with the law and the existence of any legislative intention to restrict powers to procure evidence. (In this context, article 12 paragraph 2 of the Bill of Rights Bill might have been relevant.)

Underlying the common law discretion to reject improperly obtained evidence is the belief that convictions 'may be obtained at too high a price.'\textsuperscript{17} Consequently,

\begin{quote}
...it may be that acts in breach of a statute would more readily warrant the rejection of the evidence as a matter of discretion.\textsuperscript{18}
\end{quote}

The object of the failed Australian Bill of Rights Bill 1985 may have been merely to codify the common law discretion, or perhaps

\textsuperscript{15} Ibid., esp. per Stephen & Aitkin JJ. with whom Barwick C.J. agreed.


17. R. v. Ireland, supra n. 13.

18. R. v. Ireland, supra n. 13, per Barwick C.J. @ 334. See also Einfeld, M., 'Evidence Illegally and Improperly Obtained: Has the Pendulum Swung Too Far?', and Spender, J., 'A Comment on the Paper by Marcus Einfeld Q.C.', papers delivered at the 7th National Conference of Labor Lawyers, 2-4 August 1985, in Melbourne.
to remind courts of their inherent discretion. Unless it is intended to, and would have weighed the balance in the favour of the defendant rather more than is the case at present, this provision might have been nothing more than a pious platitude.

24.1.2.2. Human Rights and Equal Opportunity Commission

The Human Rights and Equal Opportunity Commission was noted previously in chapter 17. It was established by the Human Rights and Equal Opportunity Commission Act 1986, which was enacted after the then Government had decided not to proceed with the Australian Bill of Rights Bill 1985. The Commission which was eventually established in 1986 is less ambitious than had been contemplated when the Australian Bill of Rights Bill 1985 was introduced.

The interests listed in Part II of the Australian Bill of Rights Bill 1985 (including article 12) were to have been protected by the (more ambitious) Human Rights and Equal Opportunity Commission.19 The Commission was to be empowered, inter alia, to receive complaints about and to inquire into actions or

19. Intended to have been created (and developed out of the existing Human Rights Commission) by the Human Rights and Equal Opportunity Commission Bill (Cth), 1985, also discharged from the Senate Notice Paper on 28 November 1986.
practices which breach the rights or freedoms set out in Part II of the Australian Bill of Rights Bill 1985.\textsuperscript{20}

The powers of the Commission were limited to attempting to effect settlements through conciliation and reporting to the Minister. It was thus similar to the New South Wales Privacy Committee which was discussed in chapter 17. However, the Commission's reports were to have been tabled in the Commonwealth Parliament in some circumstances, and this might have ensured the possibility of debate.\textsuperscript{21}

The Commission may have been able to do no more than report that it had 'endeavoured without success to effect such a settlement'. At most, the Commission would have been able to recommend the payment of compensation or other action to remedy or reduce loss or damage suffered by a person as a result of the act or practice.\textsuperscript{22}


\textsuperscript{21} Ibid., cl. 42.

\textsuperscript{22} The Australian Bill of Rights Bill 1985, cl. 41(2)(b)(ii); and cl. 41(2)(e)(i) and (ii).
Both the Privacy Bill 1986 and the Privacy (Consequential Amendments) Bill 1986 lapsed upon the dissolution of the Commonwealth Parliament on 5 June 1987. However, if the A.L.P. is returned to government after the July 1987 election, and succeeds in enacting the Australia Card Bill 1986 (the "trigger" bill for the election), it is likely that the Privacy Bills will be reintroduced into the new Parliament.

The Privacy Bill 1986 was to have applied inter alia, to public service departments, and bodies created for public purposes. These were defined as agencies. Clause 17 of the Privacy Bill 1986 deemed acts or practices which breach an 'Information Privacy Principle' listed in the Bill interferences with privacy. Sub-clause 16(1) of the Privacy Bill 1986 prohibited agencies from interfering with privacy.

Part III of the Privacy Bill 1986 listed eleven 'Information Privacy Principles'. These were intended to create a code by which to regulate the collection, storage, processing, use and disclosure of personal information. 'Personal information' was defined as:

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24. Ibid., cl. 17.
information or an opinion, whether true or not, and whether recorded in a material form or not, about a natural person whose identity is apparent, or can reasonably be ascertained, from the information or opinion.25

Sub-clause 16(2) of the Privacy Bill provided that interference with privacy would 'not, of itself, give rise to criminal liability, or to civil liability in damages.' Enforcement of the 'Information Privacy Principles' was to have been left to the Data Protection Agency which was to have been established by the (failed) Australia Card Bill 1986. Like the Human Rights and Equal Opportunities Commission, the Agency would have been empowered only to investigate and report to Ministers who, in turn, were required to table these reports in the Commonwealth Parliament.26

The Data Protection Authority would have been granted greater powers in respect of requests for the amendment of documents requested under the Freedom of Information Act 1982 (Cth). In some circumstances, the Authority would have been empowered to 'direct' an agency (stipulatively defined in the Privacy Bill 1986) to 'add to the document an appropriate notation'.27

25. Privacy Bill 1986, c1.6(1)


27. Privacy Bill 1986, c1. 23(1). See cl. 6(1) for the definition of an 'agency'.

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Bill defined amendment to include 'correction, deletion or addition'.

As was noted in chapter 17, in some circumstances, 'correcting' records may have consequential effects upon (other) substantive rights. This issue has been addressed by the Administrative Appeals Tribunal in the context of the Freedom of Information Act 1982. The introduction of the 'Information Privacy Principle 7' obligation to correct records might have complicated the matter.

The Authority's power to require agencies to add notations may have lead it into exercising jurisdiction over substantive questions otherwise outside of its jurisdiction. Where the Authority had determined that a record should be amended, and had required such annotation, this would have been meaningless if the agency had been entitled to use its (in the Authority's view, wrong) version in decision-making. This might have exacerbated the difficulties arising out of collateral challenges to


29. See discussion on page 338 et seq., esp. @ n. 38.

30. Eg. Suppose a person disputed the accuracy of information about marital status. Suppose the record described the applicant, who had been married in another country, as 'single', and the applicant wanted the recorded amended to 'married'. In order to determine which description was correct, the status of the foreign marriage under Australian law would have to be considered. This may raise substantive questions which have no connection with privacy, and which may not be within the jurisdiction of the Data Protection Authority.

31. See below discussion on page 576.
substantive decisions under the guise of Freedom of Information Act requests for amendment or annotation.

In the absence of the Australia Card Bill 1986, the Privacy Bill 1986 was toothless. However, the Privacy Bill could have been adapted to include provision for its own enforcement. Senator Macklin of the Australian Democrats introduced the Privacy Protection Bill 1987 into the Senate shortly before the dissolution of the Parliament on 5 June 1987. This Bill was substantially similar to the Privacy Bill 1986, but contained additional clauses providing for the establishment of a Data Protection Authority.

Alternatively, if the Australia Card Bill 1986 were to be abandoned, and a Privacy Bill modelled upon the Privacy Bill 1986 introduced, additional functions could be conferred upon the Human Rights and Equal Opportunities Commission. However, if an administrative body were to empowered to investigate alleged breaches of the 'Information Privacy Principles', the method of, and extent of protection provided to privacy is unlikely to be very different from that envisaged in the lapsed Privacy Bill 1986.

The 'Information Privacy Principles' were largely uncontroversial. They were designed to establish fair information management practices ensuring that accurate, relevant, up to date personal information was collected and maintained for lawful purposes which were generally known to the information-subjects who were to be
entitled (generally under the Freedom of Information Act 1982) to gain access to the records, and to seek its amendment or annotation where it was alleged to be irrelevant, out of date, misleading, or inaccurate. They were also intended to ensure that personal information was stored securely, kept confidential, and used only for purposes for which it was collected and is relevant.

There are two difficulties inherent in the Privacy Bill 1986 scheme. The first has already been noted - the problems of collateral challenge. A second arises from the assumptions which appear to underlie the 'Information Privacy Principles'. They appear to assume that information is collected for a pre-defined, specific purpose which does not change; that there is a direct relationship between the applicant and the record to which access is sought; and that the record-keeper is identifiable, and both responsible for the data and authorised to alter ("correct") it.32

The first assumption is increasingly less realistic, and may raise considerable practical problems. In 1986, Greenleaf and Clarke commented:

With more recent relational databases it is possible to retrieve information about a particular person not only from records which contain an

identifier to that person (and are therefore explicitly "about" them) but also from records which contain no identifiers to that person. This is made possible by the "rules of the system" which posit relations between data items held in different records. ... Such information [which includes deductive information] about the person can be said to be "stored implicitly" in the database.33

To the extent that records fall into this category, the 'Information Principles' may be of little assistance. Their value may have been further undermined by the relationship between the (lapsed) Privacy Bill 1986 and the Freedom of Information Act 1982. This latter Act applies to 'documents', not information. To some degree at least, the Freedom of Information Act presupposes 'hard copy', or, at least, discrete files.34 Consequently, it may have been difficult to apply the 'Information Principles' to relational, and largely computerised, files, particularly those in which data is stored in various (unrelated) fields and combined only in response to queries.

33. Greenleaf, G., & Clarke, R., 'A Critique of the Australian Law Reform Commission's Information Privacy Proposals', (1982) 2(1) J. of L. & Information Science 83, @ 104. See also the discussion in chapter 7 above, especially the example discussed on page 157 et seq.

Further, reliance upon the second, and to a lesser extent the third, assumptions about pre-defined purposes and single, identifiable record-keepers, may have undermined the value of the 'Information Privacy Principles', and presented difficulties where they were applied to multi-purpose (or general) data-bases.

In general, the 'Information Privacy Principles' would not have had regard to the sensitivity of personal information. However, Principle 3 provided that:

the collector [of personal information] should take such steps (if any) as are, in the circumstances, reasonable to ensure that, having regard to the purposes for which the information is collected...

(d) the collection of the information does not intrude to an unreasonable extent upon the personal affairs of an information-subject.

The Privacy Bill 1986 appears to have been designed to ensure the existence of fair management practices in general, rather than to protect privacy as an independent interest. (To what extent it would have succeeded in its object is moot.) In chapter 8 (above), the relationship between record fairness and privacy was discussed in the context of the record systems which have evolved to support the 'cashless society'. As was discussed there, privacy is a narrower interest than fairness.
The potential for interference with privacy may be substantially reduced by the establishment of fair information management practices. To this extent, the enactment of the Privacy Bill 1986 would have increased the protection which Australian law offers privacy.

However, enacting the Privacy Bill 1986 would have done little to protect privacy against ad hoc interferences by trespassers who read personal diaries, or intrusive neighbours armed with binoculars, telescopes or X-ray devices, or media publications of details of domestic disputes, and such like. Consequently, if a bill modelled upon the Privacy Bill 1986 is introduced in the new Parliament and enacted, many interferences with privacy will remain immune from legal or administrative sanction.
PART VI: CONCLUSION: PROPOSALS FOR REFORM
As has been discussed in the previous chapters, privacy may be viewed in a variety of ways - immunity, privilege, right etc. The previous chapters have examined the socio-political interest in privacy and the need for legal protection of (or remedy against) interferences with privacy.

The common law traditionally recognises rights which have been precisely defined in law. The scope and application of such rights may not be mathematically certain, particularly where juries may be the ultimate determinant of their application. But, in a traditional analysis, the legal definition of a right must encompass an express duty not to injure others in prescribed circumstances. Thus, for example, in simple terms, a person may be said to have a right to vote to the extent that others are prohibited (ie. duty bound) not to interfere with or to obstruct any attempt to exercise that right.

Alternatively, some interests, colloquially referred to as rights, underlie the legal system and should be classed as 'liberties'.

1. See MacCormick, D.N., 'A Note Upon Privacy', (1973) 89 L.Q.R. 23, @ 25, for comment a propos the right to free speech and assembly. See also the discussion of the right to freedom of movement in Gerhardy v. Brown, (1985) 57 A.L.R. 472.
In some cases, these arise out of a combination of specific (otherwise recognised) rights. Thus Dicey commented in his 'Introduction to the Study of the Law of the Constitution':

The right to personal liberty as understood in England means in substance a person's right not be subjected to imprisonment, arrest, or other physical coercion in any manner that does not admit of legal justification.²

Similarly, at common law, the right of assembly arises out of the view taken by courts on the liberties of person and speech.³

Part I of this thesis examined the socio-political privacy interest. The discussion focused upon the concept of privacy in order to identify and define it with an eye to examining whether it is recognised by Australian law and, if so, whether it receives sufficient protection.

In that discussion, privacy was defined as that condition (or state of affairs) of persons about whom the circulation of intimate (personal) information is limited to that person(s), or organisation(s), and/or institution(s) to whose (constructive or actual) knowledge of that information the information subjects do not object, or would not object were they aware of that knowledge.


³. Ibid., @ 170.
As was discussed in Part IV, a number of international instruments impose obligations to recognise and protect privacy in domestic law. It is unlikely that the ad hoc 'patchwork' protection provided by Australian law which was discussed in Part III is sufficient to discharge this obligation.

25.1. OECD Guidelines and the protection of privacy

Chapter 24 discussed the Privacy Bill 1986. As was noted during that discussion, the Privacy Bill 1986 is primarily concerned to establish fair information management practices by which to regulate records containing personal information.

As was noted in chapter 24 above, fair information management practices will not provide comprehensive protection to privacy. However, they will substantially reduce the scope for interferences with privacy.

The principles governing fair information management practices were examined by the Organisation for Economic Co-operation and

Development (OECD), of which Australia is a member.\textsuperscript{5} This was part of its detailed study of the problems posed by the international transmission of data.

The OECD Guidelines on the Protection of Privacy and Transborder Flows of Personal Data are designed to establish a framework for fair information management practices within the various Member countries so that their respective information management laws may be 'harmonized' to facilitate the international communication of data.

The deliberations which preceded the Guidelines extended over several years. In 1978, an Expert Group was established to investigate the legal and economic problems relating to the trans border flow of data and to develop guidelines so as to 'facilitate the harmonization of national legislation' regulating trans border data flow and the protection of privacy.\textsuperscript{6} The Expert Group was not the first OECD body to examine the problems posed by information management practices. It had been preceded by a study:


of computer utilisation in the public sector which began in 1969.7

In 1980, members of the OECD voted to adopt the guidelines which had been devised by its Expert Group.8 Four years later, on 10 December 1984, the then Attorney-General, Senator Gareth Evans, Q.C., announced Australia's accession to the OECD Guidelines Governing the Protection of Privacy and Transborder Flows of Personal Data.9 They are reproduced below as Appendix I.

Australia was one of the last of the OECD countries to adhere to the Guidelines, despite having played a significant role in their drafting.10 Eighteen of the twenty-four members of the OECD

7. See in particular OECD doc. DSTI/ CUG/ 76.36, entitled 'The Transborder Movement and Protection of data: Principles and Guidelines'; and OECD doc DSTI/ ICCP/ 78.43 [DG-3], @ para 3.


10. The Expert Group on Transborder Data Barriers and the Protection of Privacy which drafted the Guidelines elected as its chairman Justice Michael Kirby, the then chairman of the Australian Law Reform Commission. Consequently, he was also a member of the drafting group. See OECD doc. DSTI/ ICCP/ 78.15 for a summary record of that first meeting in April, 1978. See also A.L.R.C. Seminar Document No. 1, 'Seminar on Trans Border Data Barriers on the Protection of Privacy', 26-27 June 1978, Canberra, presenting the Interim Report of the OECD Expert Group Meeting, 3-4 April 1978, Paris, esp. @ 1.
voted in favour of adopting the Guidelines when they were brought before the Council of the OECD on 23 September 1980. Australia, Canada, Ireland, Iceland, Turkey and the United Kingdom abstained from that vote. Iceland and Turkey acceded to the Guidelines in January 1981; the United Kingdom in September 1983; and Canada in June 1984.

According to both its Title and Preamble, one of the primary objects of the Guidelines is the protection of privacy. The OECD does not necessarily use the word 'privacy' in the way in which it has been defined in this thesis.

The Guidelines do not define the term 'privacy'. However, the participants at the first meeting of the OECD Drafting Group in April 1978, agreed generally that

whatever the limitations of the English word "privacy", what was at stake in the O.E.C.D. exercise ... was a very wide and important concept, deserving of protection. It was the control of the fairness, accuracy and up-to-dateness of information, upon which decisions may be made affecting, in whatever way, the lives of individuals in society.¹²

¹¹. At the 523rd. Meeting of the Council of the OECD

The word 'privacy' is used broadly in the Guidelines. Stadler suggested that neither the French nor German languages permitted of the distinction between 'privacy' (referring to the position of individuals) and 'data protection' (referring to 'the sum of all precautionary measures taken against negative consequences of modern information technologies') which may be drawn in English. This appears to be supported by the Drafting Group's use of the word 'privacy'.

The consensus of views among the members of the Drafting Group was that 'it would just have to be realised by Anglophones' that a wide concept of 'privacy' was being envisaged. The word privacy has been used to indicate the general conception of [the] limitations on individual disclosure, information-gathering, and the extension of individual rights over the collection, use, and access to personally identifiable data.


14. Supra n. 12, @ 6, para. 15. See esp. the remarks by Mr Hans P. Gassmann (of the Secretariat) and Mr C. Wait (consultant), which are referred to by Justice Kirby.

As Novotny remarked, this would be better described as 'fair information practices'. The 'First Draft Guidelines' had entitled the section including the principles governing the handling of personal data 'Title A - Fair Record-Keeping Principles'.

25.2. The Guidelines and fair information management

The Guidelines are concerned with data protection - a concept which is far wider than privacy. Privacy is only one of the interests which may be protected under the general heading of 'data protection'.

It is arguable that there could be no recognition of privacy without some measure of data protection. As was indicated earlier, the primary concern of privacy is the suppression of the

16. Ibid.


circulation of intimate information. This is possible only by the regulation of the processing, manipulation, use and circulation of information.

For instance, people may not object to their psychiatrists recording and retaining details about their mental health. But they would probably object to the circulation of this information in many circumstances, for instance, to business associates. One way to ensure that psychiatrists do not disseminate this information is by providing some means of data protection to (a) prevent psychiatrists from circulating the information; and (b) prevent other (unauthorised) people from gaining access to psychiatrists' records. (Such people's perceived privacy, of course, would be ensured only if the subjects were aware of the existence of this data protection and believed that it was effective.)

There is a further distinction which must be drawn here. The term 'data protection' is not synonymous with the term 'security'. The technical means by which data is protected are described as the security features, or safeguards, of the record-system. These are not considered in this thesis.

The Guidelines are designed to establish the standards to which any technical safeguards or security features must approximate; but not to specify in precise detail which safeguards or security features are to be adopted. Thus the Guidelines merely require
the provision of 'reasonable security safeguards'. It would be impractical to attempt to do otherwise in respect of a technology which is developing so rapidly.

Essentially, the Guidelines establish a blue-print to ensure that only relevant data is collected, for previously specified purposes; that it is protected from improper use or dissemination; and that individual data-subjects should have some right to ascertain who holds what data about them; and to challenge, and require the correction of erroneous records.

As was noted a propo the freedom of information legislation in chapter 17, and the Privacy Bills in chapter 24, a right to seek the amendment or annotation (ie. 'correction') of records may pose difficulties in practice where the 'correction' has consequential effects upon substantive rights. The Guidelines do not suggest any way to resolve these difficulties.

The Guidelines do not set up a simple, mechanical framework to be implemented in domestic law regulating data management and processing. One of the few matters on which there appears to have been no division of opinion in the Expert group was that the Guidelines 'should not be applied in a mechanistic way'.


20. As was noted previously, examination of the scope of this form of collateral challenge, the jurisdictional issues it raises, and how it may be regulated, is beyond this thesis.

21. OECD doc. DSTI/ ICCP/ 79.41, @ 13, para. 41; and OECD doc. DSTI/ ICCP/ 79.35, Parts II & III, @ para 2.
The Guidelines explicitly recognise that the Member countries will take different approaches to privacy protection. The language of the Guidelines buttresses this conclusion. They establish 'Basic Principles'; not 'Basic Rules'. The Drafting Group deliberately and explicitly adopted the term principles in preference to the term rules at its second meeting.

Consequently, the Guidelines articulate basic principles to be applied at the discretion of the member countries and to be taken 'into account in their domestic legislation ... concerning the protection of privacy and individual liberties...' It seems that one of the factors behind the adoption of this loose approach was a recognition of the difficulties which might otherwise be faced by federal states. Further, they recognise the right of the Member countries to take measures inconsistent with the

22. OECD, doc. DSTI/ ICCP/ 79.7 [DG-11], @ 2; and OECD doc. DSTI/ ICCP/ 79.41 (Rev.1), @ para. 49.

23. OECD doc. DSTI/ ICCP/ 78.46 [DG-10], @ para. 3, on the suggestion of W.L. Fishman, the U.S. representative.


Guidelines where this is necessary in the interests of national security, national sovereignty or public policy.26

The Guidelines are general. Nevertheless, as Grossman commented, they are

laudable for the progress, however modest, that they have made in establishing at least some modicum of international accord on this highly politicized issue. Never before have this many countries agreed, even as to general principles, about data protection.27

Guideline 19 embodies the obligations imposed by the OECD Guidelines. It requires:

Member countries [to] ... establish legal, administrative or other procedures or institutions for the protection of privacy and individual liberties in respect of personal data. Member countries should in particular endeavour to:

a) adopt appropriate domestic legislation;
b) encourage and support self-regulation, whether in the form of codes of conduct or otherwise;


c) provide for reasonable means for individuals to exercise their rights;
d) provide for adequate sanctions and remedies in case of failures to comply with measures which implement the principles set forth in parts Two and Three [of the Guidelines]; and
e) ensure that there is no unfair discrimination against data subjects.

The enactment of legislation similar to the (lapsed) Privacy Bill 1986 would probably discharge this obligation. The 'Information Privacy Principles' listed in the Privacy Bill 1986 appear to have been substantially modelled upon the principles articulated in the Guidelines. Alternatively, the obligation may be discharged by incorporating the principles into general law in the same way as the principles of judicial review are part of the generally recognised law. This is discussed further in the next chapter.

25.3. Information management and privacy

Although the express object of the Guidelines is to regulate the transborder flow of data, there is no reason why they cannot or should not be applied generally. Indeed, without domestic compliance the capacity to apply them internationally may be jeopardised with the growth of international record-keeping with
data moving rapidly, and routinely, from one country in another by means of satellite communications.

Domestic implementation of the Guidelines, whether by enactment of legislation resembling the Privacy Bill 1986 or by some other means, would protect privacy only against interferences by record-keepers - 'data controllers'. (It would have no effect upon interferences of privacy by neighbours, or journalists etc.)

However, there is an element of circularity in protecting privacy by establishing fair information management practices. As was noted in chapter 8, information management practices may be considered to be fair, *inter alia*, if they protect privacy; and one of the grounds upon which the fairness of any given information management practice may be assessed may be the extent to which it protects privacy.

The Guidelines focus upon the relevance and timeliness of information and the lawfulness of the method of acquiring it. In a sense, the Guidelines are both preliminary to and dependant upon the recognition of privacy. They are preliminary to the recognition of privacy because they focus upon criteria which are very similar to the concept of intimacy which, as was discussed in Part I, provides the touchstone of privacy. On the other hand, their proscription of the collection of information by unlawful or unfair methods depends upon the recognition of privacy because the extent to which privacy is recognised as an interest in the
society will affect the content to be given to the terms 'unlawful' and 'unfair'.

The Guidelines proscribe the collection of information which is irrelevant or out-of-date in the light of the purpose for which it is intended to be used. These criteria were also applied by the 'Information Privacy Principles' listed in the (lapsed) Privacy Bill 1986, particularly in Principle 8 which provided that recordkeepers should not use information unless they have ensured that it is accurate, up to date and complete.

This test is not identical to the privacy test advanced in this thesis: whether the information is 'intimate'. However, it may achieve the same result. Like intimacy, relevance and timeliness depend upon society's recognition of some matter as being 'off limits': being by nature irrelevant to the public attributes or aspects of a person's life. The requirement that information should be relevant to and timely for the purpose for which it is intended to be used, implies that not all information about people may be used in order to make decisions affecting their lives.

The content which may be given to the notions of relevance and timeliness is determined by reference to societal expectations in the same way as the content of the notion of intimacy. For instance, information about a person's ethnic origin may be 'irrelevant' in the Guidelines' sense in a society which proscribes discrimination upon the basis of ethnic origin.
If the use of information of a particular type is proscribed, it seems to follow that it should be excluded under the Data Quality Principle (Guideline 8), because its collection and retention is not relevant to the purposes for which it may be used. It may be irrelevant because it cannot be used. ('Information Privacy Principles' 9 and 10 listed in the Privacy Bill 1986 were cast in similar terms.)

It is arguable that the principles contained in the Guidelines rest upon assumptions 'have been eroded by subsequent developments in the technology and application of databases'.28 Like the Privacy Bill 1986, the Guidelines seem to assume that records are maintained for pre-defined, and consistent purposes; that there is a direct relationship between the data-subject and the record; and that there is an 'identifiable and responsible record-keeper'.29 These assumptions may undermine the practical value of the Guidelines.

The problems posed by 'relational' records were discussed in the previous chapter (on pages 514-515). The same difficulty as was identified in respect of the 'Information Privacy Principles' contained in the Privacy Bill 1986 arise in respect of the Guidelines. Where there is, no 'record' of a particular (intimate) information, merely the capacity to generate


29. Ibid.
information of that type, it is difficult to assess its accuracy or relevance to purpose etc. Further, it may not be possible to obtain 'confirmation of whether or not the data controller has data relating' to any given person or not provide access to that information to the subject. In some cases, information may be generated only in response to particular queries. In other cases, notwithstanding the capacity to generate intimate information, information of this type may never be produced. It may, therefore, be difficult, or unrealistic, to require data controllers to provide 'readily available' means of establishing 'the existence and nature of personal data'.

25.4. Status of the OECD Guidelines

The Guidelines take the form of a Recommendation by the Council of the OECD addressed to the various Member countries of the OECD. Recommendations are made by mutual agreement between the Members of the OECD and are 'not binding on any Member until it has complied with the requirements of its own constitutional procedures' under

30. Quote taken from Guideline 13(a), supra n. 8.

article 6 of the OECD Convention.\textsuperscript{32} This is prefaced by a statement that the Council, recognising, \textit{inter alia}, that, although national laws and policies may differ, Member countries have a common interest in protecting privacy and individual liberties, and in reconciling fundamental but competing values such as privacy and the free flow of information ...

that domestic legislation concerning privacy protection and transborder flows or person data may hinder such transborder flows; \textsuperscript{[is]}

Determined to advance the free flow of information between Member countries and to avoid the creation of unjustified obstacles to the development of economic and social relations among Member countries.\textsuperscript{33}

\textsuperscript{32} See art. 6(3) of the Convention, supra n. 5. See generally Schwartz, R., 'Are the OECD and UNCTAD Codes Legally Binding?' [1977] Int'l Lawyer 529.

25.5. Drafting of the Guidelines

When the Guidelines were being drafted, the Expert Group was aware that more than one-third of the Member countries of the OECD had enacted laws which were designed, inter alia,

- to protect individuals against [the] abuse of data relating to them and to give them a right of access to [that] data with a view to checking their accuracy and appropriateness.34

It was precisely because so many of the OECD Member countries were developing laws in respect of data protection and data security that the OECD had become involved in the matter in the first place.35 The Expert Group devoted considerable time to identifying and studying the relevant legislation, both existing and planned.36 It took the view that there was a number of common features to be found in the various approaches.

34. OECD doc. DSTI/ ICCP/ 79.41, @ para 4.

35. Kirby, M.D., 'Importance of the O.E.C.D. Guidelines on Privacy', paper delivered at the French Government Conference on 'Informatique et Societe', 27 September 1979, Paris, @ 7; and 'Statement to the Committee for Scientific and Technological Policy by the Honourable Mr. Justice M.D. Kirby, Chairman of the Expert group on Transborder Data Barriers and the Protection of Privacy', 21 November 1979, esp. @ para. 7 - 11.

36. See the DTSI/ICCP series of OECD documents in general. See esp. OECD docs. DSTI/ ICCP/ 78.15, and DTSI/ ICCP/ 78.45, esp. @ para. 9; See also the Final Report by Justice Kirby, on the 'OECD Expert Group on Trans Border Data Barriers and the Protection of Privacy, meeting in Paris, 3-4/April 1978', to the A.L.R.C., April 1978, esp. @ 33-34.
This study of the approaches which had been taken by the various nations was a significant factor in the drafting the substantive content of the Guidelines. The Expert Group recognised that 'one basic concern at the international level is for consensus on the fundamental principles on which protection of the individual must be based.'

25.6. Application of the Guidelines

There is no definition of 'automatic data processing' in the Guidelines, despite the reference to it in the Preamble. The original draft of the Guidelines did contain a definition. This had been the exclusive concern of the 'First Draft Guidelines on Basic Rules Governing the Transborder Flow and the Protection of Personal Data and Privacy'.

The Expert Group appears to have been fairly evenly divided as to whether or not the Guidelines should be limited to automatic data

37. OECD Doc. DTSI/ ICCP/ 79.40, @ para 8.

38. OECD doc DTSI/ ICCP/ 79.38 [DG-9] Scale E, Annex, @ 3: Guideline 1(a) 'automatic processing' means 'the processing of data largely performed by computers...'; and Guideline 2 '...the Guidelines shall apply to automatic processing...'. This draft was largely the work of Dr. Peter Seipel, of the University of Stockholm, Sweden.
processing, and the question was referred to the Drafting Group for its consideration.\textsuperscript{39} The Drafting Group decided to reduce the emphasis upon automatic data processing so as to reduce the 'computer orientation of the Guidelines'. However, it continued to identify automatic data processing as the primary cause for concern.\textsuperscript{40}

This controversy was no mere matter of semantics. It reflected a fundamental division in the approaches to the issue of information management. On the one hand, automatic data processing was regarded as being merely the 'trigger' which initiated the international concern. On the other, automatic data processing was seen to present a discrete problem which had to be dealt with on its own.

In the end the Expert Group did not to limit the application of the Guidelines to automatic data processing. However, the words which they chose are equivocal:

3. These Guidelines should not be interpreted as preventing ...

\textsuperscript{39} OECD doc. DSTI/ ICCP/ 78.45, para 23.

\textsuperscript{40} OECD doc., DSTI/ICCP/ 79.7 [DG-11], @ 2, 4, & 5. See also the 'Third Draft Guidelines Governing the Protection of Privacy and Transborder Data Flows of Personal Data', OECD doc. DSTI/ ICCP/ 79.26 [DG-12], Annex, esp. @ 1(a) for a wider definition of 'automatic data processing'.
the application of the Guidelines only to automatic processing of personal data'.

Commenting upon the application of the Guidelines, Justice Kirby noted:

The Guidelines are not, in terms, limited in their application to automatic (computerised) information systems. They apply to public and private sectors and to personal data which either because of the manner in which it is processed or its nature and content, may "pose a danger to privacy and civil liberties".

At the same time, the application of the Guidelines is not as clear as Justice Kirby's statement suggests. Unless Guideline 3(c) is interpreted widely and the Guidelines applied to both automatic and manual files, their effectiveness may be limited. In Cornford's words:

If data protection only applies to automatic files, then it is a safe bet that forbidden or sensitive

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41. Guideline 3(c). See also Explanatory Memorandum, published by the OECD in association with the 'Guidelines on the Protection of Privacy and Transborder Flows of Personal Data', [1981. OECD. Paris], @ 24-25, para. 34 - 38.

information will be held in manual files, as indeed is the case in Sweden. 43

If they are applied only to manual files, the converse is equally likely to be true.

The words which had been used in the 'Second Draft Guidelines Governing the Protection of Privacy in Relation to Transborder Flows of Personal Data' were less ambiguous:

nothing in these Guidelines shall be interpreted as preventing ... (a) the application of the Guidelines to manual and other kinds of non-automatic processing of personal data... 44

The Guidelines are intended to apply only to information about natural persons. 'Personal data' is defined broadly to mean 'any information relating to an identified or identifiable individual (data subject)'. 45 It is open to any Member country to apply similar principles to the handling of information about non-natural persons. 46


45. Guideline 1(b), supra n. 8.

46. See 'Explanatory Memorandum for the Draft Guidelines Governing the Protection of Privacy and Transborder Data Flows of Personal data', OECD doc. DSTI/ ICCP/ 79.41 (Rev.1), Scale E, @ paragraph 33.
They are intended to have a very wide operation: to apply all data moving across national borders.\textsuperscript{47} The Expert Group took the view that there was no significant distinction to be drawn between the public and private sectors for the purposes of the Guidelines.\textsuperscript{48} Consequently, Guideline 2 states:

These Guidelines apply to personal data, whether in the public or private sectors, which, because of the manner in which they are processed, or because of their nature or the context in which they are used, pose a danger to privacy and individual liberties.

The third part of the Guidelines, the 'Basic Principles of International Application: Free Flow and Legitimate Restrictions', requires that Member countries should take into account the implications for other Member countries of domestic processing and the re-export of personal data (article 15); take all reasonable and appropriate steps to ensure that transborder flows of personal data, including transit through a Member country, are uninterrupted and secure (article 16); and refrain from restricting transborder flows of personal data between itself and another Member country except where the latter does not yet substantially observe these Guidelines or where the re-export of

\textsuperscript{47} The point was emphasised by OECD doc DSTI/ ICCP/ 79.41, @ para. 40 the 'Explanatory Memorandum for the Draft Guidelines Governing the Protection of Privacy and Transborder Flows of Personal Data'.

such data would circumvent its domestic privacy legislation (article 17).

Guideline 17 may add a significant impetus to Member countries to observe the Guidelines in authorising Member countries to restrict transborder flows of data to those Member countries which do not substantially observe the Guidelines.

Article 18 of the Guidelines requires that:

Member countries should avoid developing laws, policies and practices in the name of the protection of privacy and individual liberties, which would create obstacles to transborder flows of personal data that would exceed requirements for such protection.

This may be an additional incentive to Member countries to provide protection to privacy which is compatible with the OECD Guidelines.

25.7. Privacy and record keeping

The Guidelines strike a balance between the informed decision-making and the protection of individuals against adverse discrimination on the basis of information of a type which societies permit their members to conceal or circulate at their
discretion. This balance was developed by reference to, and is intended to ensure, fairness and (in its most general sense) equity as between record keepers and record subjects.

The implementation of the Guidelines in Australia so as to apply to record-keeping practices generally would provide some (legal) protection against some interferences with privacy. It would, therefore, partially discharge the obligations imposed by article 17 of the International Covenant on Civil and Political Rights. However, this would not provide a general, legally enforceable, right to privacy. Further, unless the relevant instrument were skillfully drafted, it might provide inchoate regulation of record systems, especially those which may be described as 'relational'.

As was noted in this and the previous chapter, technological developments may have undermined the value the Guidelines, and perhaps this method of regulating information management generally. Any set of information management principles must be drafted with considerable care if it not to be evaded by sophisticated data-processing techniques. Nonetheless, it may be desirable to apply the Guidelines generally, so long as this is not be viewed as the only method of protecting privacy.
The definition of privacy advanced in this thesis indicates some of the mainfest difficulties inherent in any attempt to formulate any single, all embracing so-called right to privacy simpliciter. There are too many situation where it is just not practical to establish a single legal 'right' to prevent (and have accompanying remedies) proscribing the circulation of information any claimant wishes to exclude from the knowledge of others.

The position is further complicated by the inter-relationship between privacy and other (conceptually independent) interests, such as freedom of information, which receive some degree of legal recognition. Thus, in approaching proposals for reform, to encourage and maintain the protection of privacy as defined here, the focus of attention should be upon dealings with personal information in specified circumstances, to underline the importance of identifying situations where the circulation of intimate information is regarded as objectionable, and to devise means, in varying guises, to acknowledge and provide practical methods appropriate to protection in individual circumstances.

It is to not within the purview of this thesis to examine this in detail. But what seems to emerge from the examination is that no
single, all embracing approach to remedial action (whether by legal suit or otherwise) is to be preferred.

There is nothing inherent in the concept of privacy which suggests that it should receive protection only from interference by public authorities or only by private persons. This is particularly so as the differences between what is regarded as 'public' or not has been blurred, if not extinguished, for many purposes. This may be illustrated by the difficulties which surround the 'shield of the crown' doctrine.

In principle, if privacy as defined in this thesis should receive legal recognition or protection, this should be available regardless of the 'official' or otherwise nature of the interference. (Of course, in some circumstances, there may be justification for an 'official' interference which, if perpetrated by a private person would have have been unjustifiable.)

The practical relationship between interferences with privacy and (adverse) discrimination which was discussed in chapter 5 re-inforces this conclusion. To the extent that privacy is related to discrimination, privacy, and consequently the recognition of privacy, is allied to the defence of the 'weaker members of the political community' which Ronald Dworkin identified as underlying the recognition of rights against the government.
Dworkin's analysis of the basis of the notion of rights against the government is as applicable to the recognition of a right of privacy against governments as it is to discrimination. Without the elimination of the distinction between public and non-public activities (in this context), the ambit of any protection which might be accorded to privacy (except in special circumstances, such as national security as international instruments suggest) would be meaningless across a range of activities in modern life.

Dworkin suggested that the notion of rights against the government rests upon two distinct ideas. First, the Kantian concept of respect for persons which supposes that 'there are ways of treating a man that are inconsistent with recognising him as a full member of the human community, and holds that such treatment is profoundly unjust'. Secondly, the more familiar idea of political equality which supposes that:

the weaker members of a political community are entitled to the same concern and respect of their government as the more powerful members have secured for themselves, so that if some men have freedom of decision whatever the effect on the general good, then all men must have the same freedom.¹

In some circumstances, the state may be accorded greater authority to intrude into that 'off limits' area than private individuals.

However, where this is the case, society does not so much recognise an area as being 'off limits' except as against the state as recognise that, in some circumstances, ('official') intrusion is justified. The circumstances in which intrusions into privacy may be justified are discussed below in section 26.3.

26.1. Legal recognition of privacy

This thesis has examined the socio-political concept of privacy in order to identify and determine whether it does, or should, receive protection under Australian law. This final chapter considers the scope of legal protection which should be provided. Accordingly, the focus is upon the elements of the proposed legal recognition of privacy, the types of defences which should be acknowledged. The machinery by which this right could be enforced is considered only briefly.

The protection of privacy as discussed here is also influenced by the views which were expressed in the Australian Law Reform Commission's discussion paper on 'Privacy and Intrusions' in June 1980:

It is frankly acknowledged that the law can provide only a partial response to invasions of privacy. A determined intruder, using modern technology of ever increasing sophistication, will frequently escape detection or be detected long after great damage to privacy has been done. ... The law has an educative function, to establish and clarify acceptable conduct in society and to denounce, prevent, redress and ultimately punish unacceptable conduct. The fact that every case of wrongful intrusion into privacy is not detected and redressed or is not punished is no reason for failing to provide remedies and sanctions for unacceptable invasions of privacy which do come to notice. ... it is the obligation of the legal system to express clearly its standards, to provide machinery for their clarification and to proffer sanctions and remedies that will be available where the standards are breached, causing individual damage or social harm.3

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26.2. Elements of a right to privacy

MacCormick commented that:

the legislative conferment of rights involves, necessarily and analytically, the legislative imposition of duties; these can be defined as specifically or as generally as the legislature chooses. The definition by legislation of a right is a fundamentally different procedure and process from the elucidation of a concept. The same goes for attempts to articulate definitions of rights in academic or other discourse.4

It is, therefore, not feasible to define a specific legal cause of action for interference with privacy in this final chapter of a thesis concerned with defining privacy and ascertaining the degree to which privacy is, or should be, protected under Australian law. Rather, the object here is to postulate a right to privacy in the sense that MacCormick, following Hohfeld, termed a 'claim-right', as distinct from a 'liberty' or 'immunity' such as the right to free speech or the right to freedom of assembly.5 It is thus to determine whether, and, if so, to what extent people should have

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the right to prevent the circulation of any given item of, or all items of, intimate information. Necessarily therefore, the object is to determine the nature of any general duty not to circulate or seek to learn intimate information about others.

It is unrealistic to consider imposing a general legal duty not to learn intimate information about others. In practice, people frequently learn intimate information inadvertently, and it is not practical to require people to 'unlearn' information, even if they may be precluded from using or circulating that information.

According to the definition of privacy advanced in this thesis, why intimate information is learnt is irrelevant to an invasion of privacy. Consequently, it is impossible to frame a duty not to invade privacy in terms of the actions or motives which shape any particular knowledge of information.

This is made more complex by the fact that once a person's privacy has been invaded by one person, regardless of the intruder's culpability, other people may also invade the person's privacy innocently. For instance, where the original invasion of privacy is by a media reporter who publishes the information in a newspaper, anyone who reads that newspaper may learn that information. In principle, as argued here, each of these people would also invade the subject's privacy.

A legal right to privacy will exist only if, and to the extent that, the law recognises that the circulation of intimate
information to people who the privacy-claimant does not want to learn that information becomes, or is transformed into, an injury of which the law is or should be cognizant in the absence of accompanying injury to property or contractual rights, or economic or physical (including mental anguish) injuries etc.

This notion of the right to privacy is thus reminiscent of the Westin-Miller control concept which was discussed in chapter 4. However, the view postulated here is narrower than the Westin-Miller one. A specific right to privacy is not necessarily a right to control the circulation of all items of personal information. It would be a right to prevent, or seek a remedy against, the circulation of intimate information.

The elements of a cause of action founded upon an interference with privacy would be:

1. an item of intimate information (objective test); and
2. the circulation of that item of intimate information;

As was discussed in Past I, the onus of obtaining the information-subject's consent to the circulation of the information would fall upon the defendant once it has been established that the information in question is intimate.6 This point is discussed further below in section 26.3, under the heading of defences.

6. See page 106 et seq.
26.2.1. Intimate information: reasonable person

As was discussed in Part I, the content of the notion intimacy is ultimately determined by a society's recognition that certain matters are 'off limits' for the purposes of social regulation. Typically, matters which are 'off limits' in this way are those upon the basis of which discrimination is prohibited - such as race, or ethnic origin. The content of the notion of intimacy is not limited to these matters. They are merely the most readily identifiable.

This is essentially a reasonable person test. Information is characterised as intimate by reference to society's recognition of certain areas of life as being 'off limits' by virtue of the society's shared expectations as to individual non-accountability. This recognition may be manifested in a variety of ways - in legislation, in international instruments, by tacit social understandings and so forth.

Analogy lies to the way in which Lord Atkin's good neighbour could deduce a reasonable standard of care. Like standards of care, these standards of disclosure are not static, even though formal procedures may be necessary in order to alter some of them.

Where possible, these standards of disclosure should be formalised. Consequently, the statutory application of the OECD
Guidelines could be relied upon to determine the status of information in record systems.

26.2.2. Third party knowledge

An invasion of privacy cannot occur until the alleged intruder actually or constructively learns the intimate information in question. This was illustrated in chapter 4 by the postulating the position A whose diary had been seized, but not yet read. Before the diary is actually read, A's privacy is not invaded. (The information has is possessed by, but has not (yet) been circulated to the person who has seized the diary.) A is merely in peril of an imminent invasion of privacy.

Third parties may constructively learn information in a variety of circumstances. For instance, intimate information may be generated and used by an artificial intelligence system without any person actually learning the information. Nonetheless, in some cases this may be as injurious to a person's privacy as any actual knowledge of that information.
26.3. Defences

As is recognised in the International Covenant on Civil and Political Rights, not every interference with privacy is unjustifiable. However, as was noted in chapter 22, the qualifiers selected in the Covenant - 'arbitrary' and 'unlawful' - are not necessarily suited to common law recognition of privacy as a distinct legal interest. 'Arbitrary' is, at best, ill-defined; and 'unlawful' would be tautologous where privacy were to be recognised by law.

Once it is established that a third party has (actually or constructively) learnt a particular item of intimate information, the onus should shift to that third party (defendant) to justify this. In some form, the same defences should be available to all defendants, regardless of the nature of the remedy sought.

26.3.1. Fortuitous knowledge

In some circumstances, people learn information fortuitously. For example, a defendant may have been reading old newspapers and accidently discovered some intimate information about the privacy-claimant. It would seem unreasonable to hold such people liable in damages for interference with privacy. However, to the extent
that remedies for interferences with privacy should not sound in damages, but merely in declaratory (or, in extreme circumstances injunctive) orders about the use of information, a defence of fortuitous knowledge should not immunize people from restrictions upon dealing with information. (The remedies which should be available to privacy-claimants are discussed below in section 26.6.)

However, in practice, a defence of fortuitous knowledge may be relevant to the incidental consequences of the legal recognition of a right to privacy, such as actions for breach of statutory duty, which might flow from this. This may be complicated by the difficulties which will confront any attempt to differentiate, either conceptually or practically, between 'innocent' defendants who accidentally learn intimate information, and clever defendants who assemble otherwise innocuous items of information to 'discover' the same information.

26.3.2. Consent

It follows from the characterisation of information as intimate by reference to the society's recognition of the areas of life to which it relates as being 'off limits', that people may be assumed to object to the circulation of that information. However, this assumption may be displaced by evidence that the
information-subject has acquiesced in the circulation of the information.

Warren and Brandeis recognised the necessity of a consent defence in their article on 'The Right to Privacy'. In doing so, they noted that this defence should not necessarily be available in respect of 'a private communication or circulation for a restricted purpose'.

People may acquiesce in the circulation of intimate information in several ways. They may expressly or impliedly consent to the circulation either to the defendant or to the world at large. Similarly, they may expressly or impliedly consent to the circulation of all information of a particular type, notwithstanding that it is intimate information, either to the defendant or to the world at large.

The various ways of acquiescing to the circulation of information may be divided into two classes: implied (estoppel) and actual.

26.3.2.1. Estoppel

People may be estopped from complaining about the circulation of a particular item of intimate information because of the way in which they generally deal with information of that subject-type about themselves. The focus of this enquiry is upon the way in which the privacy-claimants treat information about themselves - not the way in which they treat information about others.

It does not follow that privacy claims should be recognised only if they are made by people who respect the privacy of others. That would amount to an assertion that rights should be recognised only to the extent that people recognise the rights of others.  

In order to determine whether privacy-claimants may be estopped from treating the circulation of a given item of information as privacy-intrusive, the way that the claimants generally treat the circulation information of that subject-type about themselves should be considered. People who encourage publicity about the "off stage" aspects of their lives, may be estopped from complaining about the circulation of information of that type despite the intimate character of that information.

For instance, if privacy-claimants deliberately cultivate publicity about their marriage or family, they may be said to

8. It may also be contrary to article 26 of the International Covenant on Civil and Political Rights.
treat information about their marital status as public, despite its formal characterisation as intimate information. They may thus be estopped from complaining about publicity about the dissolution of their marriage.

26.3.2.2. Express consent

People cannot be heard to object to third parties' learning intimate information when they have either expressly or impliedly consented to this. As was discussed on pages 124 - 131 above, the way information is used may not be relied upon to change the status of the circulation of intimate information.

Where information is used contrary the subject's wishes, there may be grounds for an action for breach of confidence or breach of contract, or discrimination etc. Thus, for instance, the Argyll case,9 which was discussed on pages 248 - 249 above, concerned a breach of confidence by the defendant and an invasion of privacy by each person to whom the information was circulated. However, the defendant's use, including his publication, of the information did not alter the status of his knowledge of the information so as to transform it into an invasion of privacy.

As was discussed earlier, the basis of an action for the invasion of privacy is that a third party has learnt some intimate information about the privacy-claimant and that privacy claimant objects to the third party's knowledge because of the nature of the information *per se*.

An objection to the way in which a person may, or does, use information, is distinct. It depends upon the consequences apprehended; not upon the characterisation of the information. It is thus distinct from an invasion of privacy, although the consequences may be factually similar.

26.3.3. Public interest

In some circumstances, it may be justifiable to disregard a privacy-claimant's views as to the circulation of intimate information. It does not follow from the legal recognition of privacy as a distinct ground upon which to base a complaint about the circulation of intimate information, that all other interests in the circulation of that information should be disregarded.
A number of interests compete with individual privacy.10 Some of these are simultaneously recognised in the international instruments which list privacy. Thus, for instance, the Universal Declaration of Human rights and the International Covenant on Civil and Political Rights expressly recognise the importance of freedom of speech.11 Similarly, the European Convention on Human Rights (Convention for the Protection of Human Rights and Fundamental Freedoms) expressly recognises restrictions upon the 'right to respect for private and family life...'. Sub-article 8(2), of the Convention provides that:

There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.

It is impossible, or at least impractical, to prescribe in advance all circumstance in which it may be justifiable to interfere with privacy. There is, therefore, need for an ambulatory defence.


Any authorised remedial action for the redress of invasions of privacy should be subject to a general 'public interest' defence. Warren and Brandeis arrived at a similar conclusion in their analysis of 'The Right to Privacy'.

In its examination of 'Unfair Publication' the Australian Law Reform Commission noted that a 'public interest' defence may create some problems in practice. It leaves the determination of whether the circulation of a given item of intimate information to a court, or any other body, which may assess the circulation of information with the benefit of hindsight. The Law Reform Commission commented a propos publication:

This would hardly be fair to publishers, who need to judge the justification of publication in advance. Secondly, the phrase 'public interest', without more, would cause uncertainty until the courts had built up some new law indicating the content to be given to the expression in this new field.

The Law Reform Commission suggested that this uncertainty might be reduced by providing a defence where publication was relevant to a

12. Warren & Brandeis, supra n. 7, @ 214.


14. Ibid.
'topic of public interest'. The Commission then nominated six categories of information which should fall within that phrase, such as 'facts related to' suitability for office, public, commercial or professional activities, enforcement of law, and 'facts otherwise of legitimate concern to the general public'.

This approach would focus the defence upon the subject-type of the information, as well as the subject-matter. (As as discussed in relation to defamation, consideration of a public interest defence may involve, at least incidentally, considering whether the publication of information of the type in question may ever be in the public interest.) In the light of the definition of privacy advanced here, this approach may not be particularly helpful. By definition, any circulation of information which may affect privacy concerns matters which should be viewed as 'off limits', and therefore not a 'topic of public interest'.

Rather, a 'public interest' defence, like an consent defence, may have to be assessed on the particular facts. Thus, once it is established that the information is intimate, and its circulation at least prima facie privacy-intrusive, the enquiry should be whether the particular circulation is justifiable.

The initial uncertainty may not be as great as the Law Reform Commission suggests. Public interest defences are recognised in a

15. Ibid., @ 133, para. 247.

16. Ibid.
variety of contexts. Some of these were noted in discussion in Part III. In this context, analogy should lie less to the defence recognised by the law of defamation (which looks to the justifiability of the publication of that particular information at large) than to the defence as it is emerging in the law of breach of confidence. In this latter case, the issue turns upon the particular circulation.

26.4. Breach of confidence and the public interest

There is some uncertainty about the application of the public interest defence in the law of breach of confidence. It is traditionally thought to be available where the information in question is of 'public concern, of which the public ought to


18. As was noted in chapter 13, the English courts appear to have developed a more extensive public interest defence to the action for breach of confidence that have the Australian courts. In Australia, there is some opinion that the courts should eschew the development of the general public interest test in the law of confidence: Meagher, R.P., Gummow, W.M.C., & Lehane, J.R.F., 'Equity: Doctrines and Remedies', [1984. 2nd. ed. Butterworths. Sydney], @ 840, para. 4125; 843, para. 4128.
The circumstances in which the defence may be raised are usually said to be divisible into three categories.

The first category is described as the inequity rule that: 'there is no confidence as to the disclosure of iniquity': there can be no confidence as to information about crime or fraud. Secondly, the law of confidence appears to recognise a 'higher duty' rule where information which is not itself wrongful threatens some injury or danger to members of the public. Thirdly, in some cases, courts, or at least English courts, appear to balance the public interest in maintaining the confidence against the public interest in knowing the truth in some cases.

Although none of these categories directly deal with the factors which characterise information, they are generically similar. In the end, they rest upon a determination that, even if the behaviour, conduct etc. disclosed by the information is 'off limits' in general, in the particular circumstances, the subject's


20. Cartside v. Outram (1856) 26 L.J Ch.(n.s) 113, per Wood V.C. @ 114. See also A v. Hayden, (1985) 156 C.L.R. 532. But see David Syme & Co. Ltd v. General Motors-Holden's Ltd, [1984] 2 N.S.W. L.R. 294, @ 297 (Street CJ), 306 (Hutley A.P), & 309 (Samuels J.A), for some differing views as to the limits of this defence.

views must be overridden. In general, these categories of public interest would be appropriate to the limitation of privacy rights.

Similarly, the Senate Standing Committee on Constitutional and Legal Affairs introduced a 'public interest' test into its report on the Freedom of Information Bill 1978 (Cth). (As was discussed in chapter 17 above, privacy and freedom of information are closely related.) Although the Committee recognised that 'public interest' was not a balancing test customarily applied by administrators, the Committee concluded that the public interest criterion should be used throughout the Freedom of Information Bill 1978.

After examining the decision in Sankey v. Whitlam and Others, the Committee commented:

The "public interest", which has been described as an amorphous concept, incapable of definition, proved to be a viable concept enabling all relevant considerations to be brought to bear. ... There is no reason for supposing that in a freedom of information case ... it would be more difficult for a tribunal to isolate factors which are related to


23. Ibid., ¶ 64, para. 5.22.
the public's interest in disclosure or 'need to know'. (Committee's emphasis)\textsuperscript{24}

The same may be said of a public interest defence to actions for invasion of privacy.

For instance, in some circumstances, people's wishes with respect to the circulation of intimate information may conflict with the general interest in law enforcement. To the extent that there is a public interest in the effective detection and prosecution of crime for example, it may be in the public interest that privacy should be overridden in some circumstances.\textsuperscript{25}

In many cases, 'relevance to purpose' will determine a public interest defence. The phrase 'relevant to purpose' should be construed as bearing the same meaning as is ascribed to it in the context of the OECD Guidelines and the Information Principles contained in the (lapsed) Privacy Bill 1986. It is thus analogous to the phrase as used in the review of administrative action which was discussed above in chapter 17. Consequently, the possession or use of intimate information cannot be held to be justifiable in the public interest as being 'relevant to purpose' if its use in

\textsuperscript{24} Ibid., @ 65, para. 5.25. Sankey v. Whitlam & Others (1978) 142 C.L.R. 1.

\textsuperscript{25} In America, the public interest defence to defamation appears to have 'degenerated into a simple newsworthiness' test (C.W., 'Defining A Public Controversy in the Constitutional Law of Defamation', (1983) 69 Va. L. Rev. 931, @ 936). This is not what is intended in this context.
the making of any given decision would result in that decision being set aside upon appeal.

The phrase 'relevant to purpose' is not proferred as a definition of the defence of public interest. It is noted here as one criterion which may be relevant to the application of the defence in the same manner as the 'higher duty' rule is relevant to the public interest defence to the action for breach of confidence.

26.5. Legal right of action

In principle, privacy is equally invaded when a trespasser examines personal diaries and learns intimate information, by the news media publication of that same information, and by the entry of that same item of information into a data base.

In practice, the actual learning or circulation of information by, for instance, news reporters and intrusive neighbours, may be distinguished from the acquisition, manipulation and use of information in record systems by, for instance, credit bureaux. Although the various types of interferences with privacy are conceptually identical, the practical consequences may be different. Similarly, the means by which the interference may be detected may differ.
Nonetheless, there should be an independent legal duty not to interfere with privacy which is designed to prevent or limit interferences, rather than to provide redress which operates retrospectively in some form.

Where people object to the circulation of intimate information, they should be able to approach an adjudicator and seek an order that (a) the information in question is intimate; and (b) consequently, it should be circulated only with the privacy-claimant's consent. At this stage, of course, the defendant should be entitled to plead justification on the grounds discussed above.

The characterisation of information and the assessment of the grounds of justification is essentially juridical in nature. Further, the possible consequences of a determination whether the circulation of information would interfere with privacy must affect future dealings with that information. It is unrealistic to suggest that a defendant may be ordered to 'unknow' intimate information. At most, a privacy-claimant may seek an order preventing a defendant from further disseminating the information or from using it.

A cause of action should be created as follows. There should be statutory provision of a right to seek a court order as to the use of intimate information which is actionable without proof of injury. The plaintiff should be entitled to initiate action where
it is alleged that the defendant has learnt a particular item of
intimate information.

The onus should rest upon the plaintiff to establish that (a) information should be characterised as intimate; and (b) the defendant has learnt that information. It should be open to the court to order that the defendant neither use nor circulate that information. In a sense, the plaintiff would thus be seeking an order that the information be treated as though it had been obtained in confidence.

As a matter of practice, any such hearings would have to be in camera. It would be counter-productive, and of little assistance to privacy-claimants, to provide a means of protecting privacy which would, whenever exercised, necessarily placed the intimate information in question in the public domain.

26.6. Remedies

In most cases, a privacy-claimant may be satisfied by preventing the defendant from using the intimate information. (As was noted earlier, the use of information does not invade privacy. However, to the extent that the (possible) use of information may affect people's views about the circulation of information, assurance that information will not be used in a particular way may assuage
objections to the circulation of information.) Alternatively, where a privacy-claimant is provided with a remedy against the injurious use of privacy-intrusive information, the privacy objection may be assuaged.

Although it is not conceptually necessary, various types of interferences with privacy should be met by remedies which are tailored to the varying types of privacy invasions which may occur in different contexts.

26.6.1. Declaratory or injunctive relief

Where it is alleged that the circulation of information interferes with privacy, it should be only possible for a court to make a declaration as to the status of the information, and, in extreme circumstances, to issue an injunction precluding the use of the information contrary to the plaintiff's wishes.

It would be unrealistic, and largely ineffective, to contemplate imposing criminal sanctions against the crown for interferences with privacy. Similarly, criminal sanctions may be of only limited assistance against corporations.26 This being so, it appears to

be inappropriate to recommend criminal sanctions against private individuals who interfere with privacy.

Any general cause of action for an interference with privacy should not sound in damages. As was discussed in Part III (particularly in chapter 10), in most of the circumstances in which an interference with privacy culminates in some distinct physical, pecuniary or ('mere') psychiatric injury, a plaintiff will have grounds for an independent right of action. There will be few cases in which a person whose privacy is invaded and, as a result, sustains some personal (including 'mere' psychiatric) or economic damage, is unable to recover damages for that injury.

The express legal recognition of a legal right to privacy, albeit a right which does not directly sound in damages, will indirectly increase the availability of remedies by, in appropriate circumstances, leaving open the possibility of an action for breach of statutory duty. There is, therefore, no necessity to create an independent tort for 'interference with privacy'.27

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26.6.2. An independent statutory regime for privacy?

The Australian Law Reform Commission concluded that there should be a specifically designated Privacy Commissioner. The Commission recommended that this Commissioner should be a full-time member of the Human Rights Commission - the body which has since been replaced by the Human Rights and Equal Opportunities Commission which was referred to in chapter 17 above. Similarly, the Australia Card Bill 1986 is intended to create a Data Protection Authority, inter alia, responsible for the administration of the 'Information Privacy Principles' contained in the Privacy Bill 1986.

As was discussed in chapter 5, privacy is defined by the otherwise recognised community values. It is not possible to characterise information in isolation. Rather, determining whether, and, if so, to what extent, privacy should be recognised in any given circumstance depends upon a general familiarity with community expectations and standards. It is thus determined by reference to the factors which a society recognises from time to time as limiting its authority over its members. Some of these factors may be embodied in legislation (such as the Racial Discrimination Act 1975), some may be contained in international instruments to which any given state is a party, and some may remain tacit social understandings.

28. Ibid., @ 14, para. 1058 et seq.
Creating an independent Privacy Commissioner or Data Protection Authority may isolate privacy determinations from other human rights considerations. In addition, as was noted in chapter 24, this may either reduce the practical worth of providing remedies for interferences with privacy, or encourage jurisdictional disputes.

As was discussed previously, in some cases privacy may be invoked to secure conditions protecting other interests. Thus, for instance, people rely upon privacy to prevent the circulation of intimate information in order to prevent others from discriminating against them on the basis of the attributes or behaviour revealed by the information. Establishing a Commissioner/Authority to investigate and adjudicate upon claims that information of this type has been circulated contrary to the privacy-claimant’s wishes will be of relatively little assistance to a claimant whose primary concern is about the (possible) use of the information. Unless the Commissioner/Authority is also empowered to deal with discrimination complaints, when discrimination has occurred, a complainant will be required to initiate a new complaint before a different (or different officer in the same) body.

If the Commissioner/Authority were to have jurisdiction over complaints about the use of the information as well as its circulation, there would appear to be no need for a specifically designated officer or office. Many complaints for interferences
with rights involve the use of information, sometimes intimate information. Consequently, a Commissioner/Authority empowered to consider complaints about the use of information would be likely to assume jurisdiction over an increasing range of matters such as discrimination, and interferences with freedom of speech and assembly.

Some of the problems arising out of requests to 'correct' records, were noted in chapters 17 and 24. Were a specifically designated Commissioner/Authority to assume responsibility for disputes in this regard, these problems may be exacerbated. In some cases, the 'accuracy' of the record is relevant only to the extent that it relates to the determination of some (other) substantive right. Consequently, complaints about the contents of records systems may raise substantive issues falling outside of the Commissioner's/Authority's jurisdiction.

Where such a Commissioner/Authority attempts to resolve disputes over the 'accuracy' of records which are, in reality, disputes about (other) substantive rights, the 'privacy' determination will either be irrelevant (in a practical sense) or may involve the Commissioner/Authority in a bid for jurisdiction in other, frequently non-privacy related, areas. It will be irrelevant if, because the Commissioner/Authority lacks jurisdiction to resolve the substantive dispute, the record-keeper 'corrects' the record, but does not 'correct' the substantive right, or the record-keeper simply records the alternative versions of the information. Alternatively, if the Commissioner/Authority asserts the
jurisdiction to resolve the substantive dispute, this collateral assertion of jurisdiction may lead the Commissioner/Authority into matters unrelated to privacy.

This may be illustrated by the example which was posed in chapter 24, page 512 at footnote 30. Suppose that the record containing the description 'single' which the applicant contests is maintained and used by the Taxation Office. Suppose further, that married people are entitled to taxation deductions which are not available to single people. If the Commissioner/Authority decides that the applicant (who was married in a foreign country) should be recorded as married, the Taxation Office may simply record this alternative determination, but not alter its view upon the applicant's entitlement to deductions. If this is the case, the determination seems to irrelevant for practical purposes. Alternatively, if the Taxation Office is required to comply with the Commissioner/Authority's determination, and to act on the basis of the version which the latter decides is accurate, the Commissioner/Authority is empowered to resolve substantive questions about the status in Australian law of marriages contracted under foreign law. Yet this subject is unlikely to have been viewed as a privacy-related in the sense contemplated when creating a specific privacy protection agent or agency.

There is no need to establish any specific administrative agency to protect privacy. On the contrary, because of the integral relationship between privacy and other interests, it is preferable that privacy protection should be integrated into the
existing legal structures. Establishing a separate legal regime for privacy will undermine "one-stop shopping" for complaints, and may greatly increase the cost of providing remedies. (Although Beasley was addressing herself to the problem of complaints against governments, this is true generally.)

In addition, establishing a separate regime for privacy may undermine the symbolic effect of any administrative protection by tending to isolate it from general administrative or community action. Selby addressed this issue in the context of governmental action at a seminar in May 1987:

"One Ombudsman unit, rather than that plus a motley collection of lesser specialists, offers cost savings, rotation of staff (which is essential), a single focus for community, and certainly more influence upon both administration and government."

These comments are equally applicable to privacy interferences by "non-public" action. To the extent that it is possible to integrate privacy protection into general domestic law, privacy will be recognised by the community at large as an interest of as much (or as little) significance as any of the interests with


30. Selby, H., 'Ombudsman Inc.: A Bullish Stock with a Bare Performance', paper delivered as the Seminar on 'Administrative Law: Retrospect and Prospect', 15-16 May 1987, Australian National University, Canberra, @ 17.
which it is allied, such as freedom from discrimination, and the interests which are generically similar, freedom of assembly. (And, of course, interferences with the latter are dealt with by general law not withstanding the lack of specific protection to which Dicey referred.)

26.6.3. Information management and privacy

Chapter 25 discussed the desirability of applying the OECD Guidelines, *mutatis mutandis*, to Australian record systems. Were this is to be done, people could complain of an invasion of privacy where intimate information is contained in a record-system in a manner contrary to the standards established by the Guidelines.

The information management principles contained in the Guidelines should be applied to record systems throughout Australia. However, this should be done by incorporating these principles into the law, in the same way as the principles of judicial review are part of, and operate within, the fabric of the existing legal system.

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31. See page 520 above.
As was discussed in chapter 24 and 25, as the spread of 'relational' records increases, the value of discrete sets of rules governing information management practice will diminish. To some extent at least, record-keeping and decision-making will become increasingly integrated as the technological capacity to produce new combinations of data specifically tailored to particular decisions develops. Where these combinations of data are not 'recorded' as such, merely the capacity to produce them retained (or obtained), they may elude the application of precise rules or information management principles. In addition, the conceptual distinctions between privacy (the circulation of information) and the use of information (eg. discrimination), will become increasingly blurred in day-to-day practice. As a consequence, the case for integrated remedies may be strengthened.

In practice, remedies may have to be applied differently as between public and non-public record-systems/decision-making. The position of the latter is complicated by statutory freedom of information regimes, and statutory codes of (administrative) practice. Further, public activities are already subjected to a range of administrative checks, many of which could be adapted to include protection of privacy. The same is not true of non-public data-bases (with the exception of those which are subject to the jurisdiction of the NSW Privacy Committee).

In Part III, judicial and quasi-judicial review of administrative action was discussed. In many cases, these remedies could be
easily adapted to consider the circulation of intimate information, to provide fora for disputes about the circulation of information, and, where appropriate, to provide a cause of action to the privacy-claimant who wishes to prevent an intruder from circulating intimate information. In some circumstances, this may also involve an attempt to prevent the intruder from using the information — not a privacy injury as such, but, in many cases, a consequential injury.

26.6.3.1. 'Tracing' privacy-intrusive information.

Although the types of remedies which may be created to protect privacy may vary according to the public or non-public nature of the data-base containing the privacy-intrusive information, it is not possible to assume that all circulations of information will fall neatly into either the public or non-public classifications. Much information is circulated between public and non-public record systems. For instance, the information about the marital status of the taxpayer whose complaint was considered earlier, may have been provided to the public record by the taxpayer, a bank, a credit bureau, another government department or a public or private security organisation.

One consequence of rejecting the establishment of a specifically tailored privacy watch-dog, is that the ordinary distinctions
between public and non-public actions will be imported into the protection of privacy. Thus administrative authorities which are empowered to review public action may be incompetent to consider non-public action. However, it would seem to be undesirable to extend the jurisdiction of such limited bodies where the complaint is for interference with privacy. Extending their authority in these circumstances would be as undesirable (for the same reasons) as would be creating a separate body.

Accordingly, the focus should rest upon the initial circulation of the information which the subject considers to be objectionable. In practice, a stipulative definition of initial circulation may have to be adopted. For these purposes, the initial circulation should be viewed as the circulation of information which is the basis of the privacy complaint. The authority of any order made in respect of the circulation of that information should be extended to 'trace' all circulations of the information which result from the circulation to which the subject objects. This should be so regardless of whether or not these circulations are amongst bodies falling on the same side of the public/non-public demarcation.

Thus, to return to the taxpayer's complaint about the description of marital status, if the taxpayer objected to the information being recorded by the Taxation Office, this may be treated as the initial circulation. Consequently, the objection would fall to be determined by bodies with jurisdiction over public action. If the information has been circulated by the Taxation Office to a bank,
credit agency and another department, the privacy determination made in respect of the Taxation Office's record should follow the information to where it has been circulated - including to the bank, credit agency, and other department.

26.6.3.2. Administrative law and privacy

As was discussed in chapter 17, disputes about privacy and freedom of information may be resolved by similar considerations. Both in principle and in practice, privacy and freedom of information are frequently opposing interests in the one transaction. Consequently, the freedom of information regimes operating at the Commonwealth sphere and in Victoria may provide useful models illustrating the way in which privacy disputes might be resolved.

By way of illustration, the Commonwealth Ombudsman could (and perhaps should) be empowered to investigate complaints about 'official' invasions of privacy by the inclusion of intimate information in record-systems in the same way as he is empowered to investigate claims of non-compliance with the freedom of information legislation. Further, the Ombudsman could be empowered to recommend the expungement of information from record systems just as he may recommend the disclosure of documents under the freedom of information legislation.
As has been noted previously, the existing law with respect to disputes about requests for amendment or annotation of records is inadequate. In the course of developing guidelines to distinguish between collateral challenges and genuine disputes about the contents of records \textit{per se}, rules should be developed and implemented to regulate the circulation of intimate information.

The Commonwealth Ombudsman is not empowered to make binding orders. Where his recommendations are disregarded, his ultimate sanction is to report to the Commonwealth Parliament under section 17 of the \textit{Ombudsman Act 1976} (Cth).\textsuperscript{32} The Ombudsman's power in respect of interferences with privacy should be no greater than his powers in respect of any other interference with any other right.

Similarly, the Freedom of Information Act 1982 Part V right to appeal to the Administrative Appeals Tribunal against a refusal to amend or annotate records could be extended, \textit{mutatis mutandis}, to privacy-claimants who allege interference with their privacy by the inclusion in records of intimate information. Here again, the power to order that records be amended or annotated could be extended to order the expungement of intimate information.

\textsuperscript{32} To date the Commonwealth Ombudsman has reported in this manner only twice. The sole action consequent upon this has been a report by the Senate Standing Committee on Constitutional and Legal Affairs entitled 'The Commonwealth Ombudsman's Special Reports', tabled 4 December 1986. That report substantially supported the Ombudsman's recommendations, but produced no action from the Government.
26.6.3.3. Non-public record systems

In principle, similar remedies, _mutatis mutandis_, should be available where privacy is affected by non-public action, including the non-public use of information in record systems and decision-making, as are available where public interferences are alleged. Once again, the remedies should be integrated into the ordinary law. Consequently administrative bodies, such as the Commissioner for Human Rights and Equal Opportunities, which are already empowered to investigate non-public action could be also empowered to inquire into privacy complaints.

In addition, non-governmental regulatory bodies, such as professional bodies, could be empowered to consider, and, where appropriate, provide remedies in respect of, interferences with privacy in the same way, and to the same extent, as they consider other matters, such as professional (mis-)conduct. The operation of the media seems to be one clear example of an area where special steps are needed.
26.6.3.3.1. Media council: non-public administrative regulation.

To the extent that recognition of privacy is reflective of the general community's recognition that certain matters should be immune from comment by others, the recognition of privacy could be promoted where the protection of privacy were to be integrated into the general jurisdiction of body intended to establish and regulate publication standards. It may be desirable, for reasons unrelated to privacy (such as the possibility of political bias in media reporting), to establish a formal media council with power to set standards for both electronic and non-electronic new media in both the public and the private sectors.

If such a media council were to be created, it could be self-funding and self-regulatory, but with the power to promulgate standards, and, inter alia, to prohibit reporting which is privacy intrusive. Thus, for instance, a media council could be empowered to prohibit the publication of information about marital disputes if the society treated these as being 'off limits' in the same way as such a council might be empowered to prohibit the imposition of bans on particular political opinions, subject to the defences noted earlier.

In addition to promulgating standards, such a media council could be empowered to receive and investigate complaints in a manner analogous to the Press Council, and to issue determinations binding upon the members of the industry. These powers should be
analogous to those possessed by other professional bodies such as law societies, bar associations, and medical associations. In order to ensure that it is effective, compliance with the media council's directions could be a condition pre-requisite for the publication of any newspaper, news periodical etc., or the broadcast of any electronic news service. (This would, of course, present special problems in view of the traditional freedom of expression of the media, and would have to be designed with some care.)

26.7. State or Commonwealth jurisdiction

A general cause of action could be created by Commonwealth legislation, by separate legislation in each of the States and Territories, by a combination of Commonwealth and State (and Territory) action. It would be preferable, however, if the same methods were to be applied throughout the country.

To the extent that privacy is related to discrimination, and the latter provided with nation-wide protection, it would seem to follow that privacy should be similarly recognised. However, this discussion has considered only some possible models for the recognition or protection of privacy. It does not purport to examine, nor to propose, precise legal causes of action. Consequently, it does not consider the jurisdictional limits
applying to the various Australian governments. The discussion has focused upon the Commonwealth law as illustrative of the general approach.


Privacy is merely one socio-political interest which may require express legal recognition. As has been emphasised before, the relationship between privacy and fairness and discrimination, means that any protection provided to privacy must be considered in a wider context than mere individual preference or injury.

As a consequence, the protection of privacy, as defined here, must be assessed in the overall context of fair dealings as between the state and the individual, and as between individuals. Where the balance is struck, and, in turn, the degree to which privacy is protected, is, in the end, determined by factors external to privacy (the notion of intimacy), and the existence of these factors gives the content to the protection that should be accorded to privacy as argued in this thesis.
APPENDIX
APPENDIX

RECOMMENDATION OF THE COUNCIL OF THE OECD
CONCERNING GUIDELINES GOVERNING THE PROTECTION
OF PRIVACY AND TRANSBORDER FLOWS OF PERSONAL DATA
(23rd September, 1980)

THE COUNCIL

Having regard to articles 1(c), 3(a) and 5(b) of the Convention on the Organisation for Economic Co-operation and Development of 14th December, 1960;

RECOGNISING:

that, although national laws and policies may differ, Member countries have a common interest in protecting privacy and individual liberties, and in reconciling fundamental but competing values such as privacy and the free flow of information;

that automatic processing and transborder flows of personal data create new forms of relationships among countries and require the development of compatible rules and practices;

that transborder flows of personal data contribute to economic and social development;

that domestic legislation concerning privacy protection and transborder flows of personal data may hinder such transborder flows;

Determined to advance the free flow of information between Member countries and to avoid the creation of unjustified obstacles to the development of economic and social relations among Member countries;
RECOMMENDS

1. That Member countries take into account in their domestic legislation the principles concerning the protection of privacy and individual liberties set forth in the Guidelines contained in the Annex to this Recommendation which is an integral part thereof;

2. That Member countries endeavour to remove or avoid creating, in the name of privacy protection, unjustified obstacles to transborder flows of personal data;

3. That Member countries co-operate in the implementation of the Guidelines set forth in the Annex;

4. That Member countries agree as soon as possible on specific procedures of consultation and co-operation for the application of these Guidelines.

Annex to the Recommendation of the Council of 23rd September 1980

GUIDELINES GOVERNING THE PROTECTION OF PRIVACY AND TRANSBORDER FLOWS OF PERSONAL DATA

PART ONE. GENERAL

Definitions

1. For the purposes of these Guidelines:

   a) "data controller" means a party who, according to domestic law, is competent to decide about the contents and use of personal data regardless of
whether or not such data are collected, stored, processed or disseminated by that party or by an agent on its behalf;

b) "personal data" means any information relating to an identified or identifiable individual (data subject);

c) "transborder flows of personal data" means movements of personal data across national borders.

Scope of Guidelines

2. These Guidelines apply to personal data, whether in the public or private sectors, which, because of the manner in which they are processed, or because of their nature or the context in which they are used, pose a danger to privacy and individual liberties.

3. These Guidelines should not be interpreted as preventing:

a) the application, to different categories of personal data, of different protective measures depending upon their nature and the context in which they are collected, stored, processed or disseminated;

b) the exclusion from the application of the Guidelines of personal data which obviously do not contain any risk to privacy and individual liberties; or

c) the application of the Guidelines only to automatic processing of personal data.

4. Exceptions to the Principles contained in Parts Two and Three of these Guidelines, including those relating to national sovereignty, national security and public policy ("ordre public"), should be:
a) as few as possible, and
b) made known to the public.

5. In the particular case of Federal countries the observance of these Guidelines may be affected by the division of powers in the Federation.

6. These Guidelines should be regarded as minimum standards which are capable of being supplemented by additional measures for the protection of privacy and individual liberties.

PART TWO
BASIC PRINCIPLES OF NATIONAL APPLICATION

Collection Limitation Principle

7. There should be limits to the collection of personal data and any such data should be obtained by lawful and fair means and, where appropriate, with the knowledge or consent of the data subject.

Data Quality Principle

8. Personal data should be relevant to the purposes for which they are to be used, and, to the extent necessary for those purposes, should be accurate, complete and kept up-to-date.

Purpose Specification Principle

9. The purposes for which personal data are collected should be specified not later than at the time of data collection and the subsequent use limited to the fulfilment of those purposes or such others as are not incompatible with those purposes and as are specified on each occasion of change of purpose.
Use Limitation Principle

10. Personal data should not be disclosed, made available or otherwise used for purposes other than those specified in accordance with Paragraph 9 except:

   a) with the consent of the data subject; or
   b) by the authority of law.

Security Safeguards Principle

11. Personal data should be protected by reasonable security safeguards against such risks as loss or unauthorised access, destruction, use, modification or disclosure of data.

Openness Principle

12. There should be a general policy of openness about developments, practices and policies with respect to personal data. Means should be readily available of establishing the existence and nature of personal data, and the main purposes of their use, as well as the identify and usual residence of the data controller.

Individual Participation Principle

13. An individual should have the right:

   a) to obtain from a data controller, or otherwise, confirmation of whether or not the data controller has data relating to him;

   b) to have communicated to him, data relating to him

      i) within a reasonable time;
      ii) at a charge, if any, that is not excessive;
iii) in a reasonable manner; and
iv) in a form that is readily intelligible to him;

c) to be given reasons if a request made under
subparagraphs (a) and (b) is denied, and to be able
to challenge such denial; and

d) to challenge data relating to him and, if the
challenge is successful, to have the data erased,
rectified, completed or amended.

Accountability Principle

14. A data controller should be accountable for complying
with measures which give effect to the principles stated
above.

PART THREE

BASIC PRINCIPLES OF INTERNATIONAL APPLICATION:
FREE FLOW AND LEGITIMATE RESTRICTIONS

15. Member countries should take into consideration the
implications for other Member countries of domestic processing
and re-export of personal data.

16. Member countries should take all reasonable and
appropriate steps to ensure that transborder flows of personal
data, including transit through a Member country, are
uninterrupted and secure.

17. A Member country should refrain from restricting
transborder flows of personal data between itself and another
Member country except where the latter does not yet
substantially observe these Guidelines or where the re-export
of such data would circumvent its domestic privacy legislation. A Member country may also impose restrictions in respect of certain categories of personal data for which its domestic privacy legislation includes specific regulations in view of the nature of those data and for which the other Member country provides no equivalent protection.

18. Member countries should avoid developing laws, policies and practices in the name of the protection of privacy and individual liberties, which would create obstacles to transborder flows of personal data that would exceed requirements for such protection.

PART FOUR
NATIONAL IMPLEMENTATION

19. In implementing domestically the principles set forth in Parts Two and Three, Member countries should establish legal, administrative or other procedures or institutions for the protection of privacy and individual liberties in respect of personal data. Member countries should in particular endeavour to:

a) adopt appropriate domestic legislation;

b) encourage and support self-regulation, whether in the form of codes of conduct or otherwise;

c) provide for reasonable means for individuals to exercise their rights;

d) provide for adequate sanctions and remedies in case of failures to comply with measures which implement the principles set forth in Parts Two and Three; and
e) ensure that there is no unfair discrimination against data subjects.

PART FIVE
INTERNATIONAL CO-OPERATION

20. Member countries should, where requested, make known to other Member countries details of the observance of the principles set forth in these Guidelines. Member countries should also ensure that procedures for transborder flows of personal data and for the protection of privacy and individual liberties are simple and compatible with those of other Member countries which comply with these Guidelines.

21. Member countries should establish procedures to facilitate:

i) information exchange related to these Guidelines, and

ii) mutual assistance in the procedural and investigative matters involved.

22. Member countries should work towards the development of principles, domestic and international, to govern the applicable law in the case of transborder flows of personal data.
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