



1. Introduction
2. Privacy in a digital age
3. Invasion of privacy by revenge pornography
4. Criminal law
5. Civil law
6. Conclusion

Revenge pornography, privacy and the law

by Tom Gotsis

1. Introduction

Privacy issues are currently on the agenda of public debate, largely as a consequence of technological developments which have created new avenues for the invasion of privacy.

On 24 June 2015 the Legislative Council agreed to a Motion by Mick Veitch MLC for the Standing Committee on Law and Justice to inquire into remedies for the serious invasion of privacy in NSW.¹ The [terms of reference](#) of the Inquiry are:

- (a) the adequacy of existing remedies for serious invasions of privacy, including the equitable action of breach of confidence;
- (b) whether a statutory cause of action for serious invasions of privacy should be introduced; and
- (c) any other related matter.

In a media release issued by the Standing Committee on Law and Justice, the Committee Chair, Natasha Maclaren-Jones MLC, made reference to the issue of revenge pornography, stating:²

The proliferation of social media has meant that invasions of privacy through online forums, such as the alarming trend of jilted lovers posting sexually explicit photographs of ex-partners on the internet, has immediate and vast reaching repercussions.

It is in this context that this paper considers:

- The role of the criminal law in respect to revenge pornography, particularly in light of new offences against revenge pornography introduced in South Australia, Victoria and the United Kingdom.
- The adequacy of existing civil law remedies for serious invasions of privacy by means of revenge pornography, including the equitable action of breach of confidence.

2. Privacy in a digital age

Privacy is the fragile boundary between self and society. That fragile boundary, as Callinan J recognised in *ABC v Lenah*

Game Meats, is indispensable for human autonomy and development:³

the ability to expose in some contexts parts of our identity that we conceal in other contexts is indispensable to freedom. Privacy is necessary for the formation of intimate relationships, allowing us to reveal parts of ourselves to friends, family members, and lovers that we withhold from the rest of the world. It is, therefore, a precondition for friendship, individuality, and even love.

The need for the law to protect privacy against the impact of technology was foreshadowed by Justice Rich back in 1937, in the High Court case of *Victoria Park*.⁴ The technological innovation that his Honour had in mind was, obviously, not social media;⁵ nor was it surveillance by drones⁶ or the ability of corporations or security agencies to access the trail of “big data”⁷ we generate each day as we increasingly live within the “Internet of Things”.⁸ Rather, the technological innovation his Honour had in mind was television:⁹

Indeed the prospects of television make our present decision a very important one, and I venture to think that the advance of that art may force the courts to recognize that protection against the complete exposure of the doings of the individual may be a right indispensable to the enjoyment of life.

Neither the advent of television, nor the increasingly invasive technologies that have followed, have seen the development in Australia of a right to privacy. This is despite the existence of a right to privacy at international law since the adoption of the Universal Declaration of Human Rights in 1948.¹⁰ Both the NSW Law Reform Commission¹¹ and the Australian Law Reform Commission¹² have recommended the introduction of a statutory cause of action for invasion of privacy.

Indeed, it has been argued that the increasing value placed by governments, business and consumers on transparency and connectedness in the digital age, and the enjoyment of the many ensuing benefits, has led to a corresponding decrease in the value placed on privacy.¹³

3. Invasion of privacy by revenge pornography

Privacy is an issue that arises in different factual contexts, but most recently in Australia it has arisen in the context of “revenge pornography”. Revenge pornography involves a disgruntled ex-partner distributing on the internet, without the consent of the former partner (the victim), a photograph or video depicting the victim naked or engaged in a sexual act. The image may be distributed broadly using social media, such as Facebook,¹⁴ or targeted to the victim’s family or employer, either by email, text or in hard copy.¹⁵ Typically the image has been taken by the offender with the consent of the victim or taken by the victim and then provided to the offender, as part of what Mitchell J in *Wilson v Ferguson* described as “the not uncommon contemporary practice of couples engaging in intimate communications, often involving sexual images, by electronic means”.¹⁶ However, in some cases, the image may have been taken surreptitiously, without the victim’s consent.¹⁷

Overseas experience suggests revenge pornography is a growing concern. The American Psychological Association has reported on a survey of American adults which found that: 36% of survey participants planned to send “sexy” or “romantic” photographs to their partners via email, text and social media on Valentine’s Day; 10% of ex-partners have threatened to post sexually explicit photographs online; and about 60% of those threats became a reality.¹⁸ It has also been reported that “at least 3,000 porn websites around the world feature the revenge genre”.¹⁹

In Japan, over the period 2008 and 2012, the number of alleged incidents of revenge pornography reported to police more than tripled to 27,334.²⁰ In England and Wales 149 revenge pornography allegations were recorded by police between January 2012 and June 2014, with six people cautioned or charged;²¹ in the six months to April 2015, 139 revenge pornography allegations were recorded, with 13 people charged.²²

Australia is clearly not immune to such developments.²³ As Adam Searle MLC said in the NSW Legislative Council on 23 June 2015:²⁴

Last week the *Adelaide Advertiser* revealed that police were investigating after hundreds of Australian women and teenagers had their nude images shared on a United States “revenge porn” website. The women ... had shared their photos with former partners who, in a gross breach of confidence and privacy, had displayed them online.

4. Criminal law

Criminal law can either specifically prohibit revenge pornography or prohibit a broader category of offence that encompasses revenge pornography offences. The United Kingdom,²⁵ South Australia and Victoria are examples of jurisdictions with offences specifically tailored towards revenge pornography. The UK offence refers to “private sexual photograph”, the South Australian offence refers to “invasive image”, while the Victorian offence refers to “intimate image”. In contrast, the broader NSW offence refers to “indecent article”.

4.1 United Kingdom

Earlier this year the United Kingdom introduced a new offence prohibiting revenge pornography, as part of a suite of measures enacted by the [Criminal Justice and Courts Act 2015 UK](#).²⁶ Parliamentary debate focused on the prevalence of the offence, the ease with which it can be committed and the harm inflicted on victims. As Lord Marks of Henley-on-Thames said:²⁷

[T]he term “revenge pornography” refers to the publication, usually but not always, on the internet, of intimate images of former lovers without their consent. ... Obtaining such images has become more common and much easier with the prevalence, popularity and sophistication of smartphones, with their ability to take or record high quality images, still and video, instantly and simply, with accompanying sound in the case of video. It is set to become even easier to take such images with the advent of cameras installed in glasses and yet further improvement in high definition video cameras in phones.

The widespread publication of such images causes, and is generally intended to cause, distress, humiliation and embarrassment for the victim—

hence the name “revenge porn”. She or he—the victims are usually but not exclusively women—face the humiliation of their most private moments being exposed to family, friends, employers and the world at large. It is entirely predictable that such exposure can cause serious psychological and emotional damage even to those with robust personalities. Suicides as a result of such publications have been recorded. Worse still, the damage may often be increased because it follows the trauma of relationship breakdown and is caused by someone with whom the victim had previously been close. Publication can cause havoc in personal and family relationships and in relationships at work. The betrayal and the hurt it causes could hardly be worse. Such behaviour has been characterised by academics in the field as a form of abuse and I suggest that such characterisation is entirely accurate.

Section 33(1) of the [Criminal Justice and Courts Act 2015 UK](#) provides:

It is an offence for a person to disclose a private sexual photograph or film if the disclosure is made:

- (a) without the consent of an individual who appears in the photograph or film, and
- (b) with the intention of causing that individual distress.

The maximum penalty for the offence is: on summary conviction, imprisonment for a term not exceeding 12 months and/or a fine;²⁸ or, on conviction on indictment, imprisonment for a term not exceeding 2 years and/or a fine.²⁹

A photograph or film is “private” if it shows something that is “not of a kind ordinarily seen in public”.³⁰ A photograph or film is “sexual” if: it shows all or part of an individual’s exposed genitals or pubic area; it shows something that a reasonable person would consider to be sexual because of its nature; or its content, taken as a whole, is such that a reasonable person would consider it to be sexual.³¹ The definitions of “private” and “sexual” can encompass digitally altered photographs and videos.³² Disclosure occurs when, “by any means”, a person gives, shows or makes available an image to another person.³³

The offence requires establishing the mental element specified in s 33(1)(b); that is, the intention of causing distress to the person who appears in the photograph or film.³⁴ This requirement stems from s 33(8), which provides:

A person charged with an offence under this section is not to be taken to have disclosed a photograph or film with the intention of causing distress merely because that was a natural and probable consequence of the disclosure.

Section 33 provides for specific defences to a charge of disclosing private sexual photographs and films with intent to cause distress. The defences relate to the investigation of crime;³⁵ the publication of journalistic material that is reasonably believed to be in the public interest;³⁶ and to a photograph or film that had previously been disclosed for reward with the consent of the person depicted in the images.³⁷ The defences do not affect the operation of the offence in respect of typical cases of revenge pornography.

4.2 South Australia

In 2013 South Australia prohibited the distribution of “invasive images” of another person without that person’s consent. This occurred by means of the [Summary Offences \(Filming Offences\) Amendment Act 2013](#) (SA),³⁸ which introduced s 26C(1) into the [Summary Offences Act 1953](#) (SA). As stated in the Second Reading Speech for the Bill:³⁹

[As to] invasion of privacy, the Bill creates a new offence of distributing an invasive image. With the use of filming devices now commonly available, it is easy for people to film themselves or each other in any situation. Often, these images may be obtained by consent, as where two people in a relationship take consensual film of their sexual activity, or one may take pictures of himself or herself that are sent to the other perhaps using a mobile phone. In and of itself that is not unlawful, although if the person photographed is under 17, the images could be child pornography and in that case their possession or transmission would be seriously unlawful. Assuming the participants are adults, and assuming they send the images to one another privately and by consent, this law is not concerned with that. What this law is concerned with, however, is the wider distribution of those images without consent.

The Bill proposes to make it an offence to distribute these invasive images in a situation where the distributor knows, or should know, that the person depicted did not consent to the distribution. That is likely to capture, for example, the boyfriend who, unknown to the girlfriend, passes on to his friends the pictures that the girlfriend may have sent him or may have posed for, intending them to be seen only by him. It is not intended that the offence capture third parties who distribute images without having any reason to know that the subject objects to that distribution.

Section 26C(1) of the [Summary Offences Act 1953](#) (SA) provides that:

A person who distributes an invasive image of another person, knowing or having reason to believe that the other person:

- (a) does not consent to that particular distribution of the image; or
- (b) does not consent to that particular distribution of the image and does not consent to distribution of the image generally,

is guilty of an offence.

An offence against s 26C(1) carries a maximum penalty of \$10,000 or imprisonment for 2 years.

“Distribute” includes: communicate, exhibit, send, supply, upload or transmit; and make available for access by another.⁴⁰ “Invasive image” means a moving or still image of a person engaged in a “private act”, or in a state of undress “such that the person’s bare genital or anal region is visible”.⁴¹ “Private act” means a “sexual act of a kind not ordinarily done in public” or using the toilet.⁴²

It is a defence to a charge of distribution of an invasive image that the conduct constituting the offence was undertaken for a law enforcement, medical, legal or scientific purpose; or the image was filmed by a licensed investigation agent and distributed in connection with a claim for compensation, damages or other benefit.⁴³

4.3 Victoria

In 2014 Victoria prohibited the distribution of an “intimate image”. It also prohibited the threat to distribute an intimate image. These new offences were introduced by the *Crimes Amendment (Sexual Offences and Other Matters) Act 2014* (Vic),⁴⁴ which inserted ss 41DA and 41DB into the *Summary Offences Act 1966* (Vic). As stated in the Second Reading Speech, the new offences were introduced because:⁴⁵

Currently, the law provides limited protection against non-consensual distribution of intimate images. This behaviour can cause considerable harm, particularly if an image “goes viral”. This Bill creates two summary offences designed to protect individuals against such harm.

For the purposes of the offences created by ss 41DA and 41DB,⁴⁶ s 40 defines an “intimate image” to be a moving or still image that depicts: a person engaged in sexual activity; a person in a manner or context that is sexual; or the genital or anal region of a person or, in the case of a female, the breasts. Section 40 defines “distribute” to include:

- (a) publish, exhibit, communicate, send, supply or transmit to any other person, whether to a particular person or not; and
- (b) make available for access by any other person, whether by a particular person or not.

4.3.1 Distribution of intimate image

Section 41DA(1) of the *Summary Offences Act 1966* (Vic) provides that the offence of distribution of an intimate image is committed if:

- (a) A intentionally distributes an intimate image of another person (B) to a person other than B; and
- (b) the distribution of the image is contrary to community standards of acceptable conduct.

An offence against s 41DA(1) carries a maximum penalty of 2 years imprisonment.⁴⁷

Section 41DA(1) provides the following example of conduct constituting an offence against its provisions:

A person (A) posts a photograph of another person (B) on a social media website without B's express or implied consent and the photograph depicts B engaged in sexual activity.

The offence created by s 41DA(1) does not apply to intimate images of adults who have “expressly or impliedly consented, or could reasonably be considered to have expressly or impliedly consented” to the “distribution of the intimate image” and the “manner in which the intimate image was distributed”.⁴⁸

4.3.2 Threat to distribute intimate image

Section 41DB(1) prohibits the making of threats concerning the distribution of intimate images. As provided by s 41DB(3), a threat “may be made by any conduct and may be explicit or implicit”.

A person (A) commits an offence against s 41DB(1) if:

- (a) A makes a threat to another person (B) to distribute an intimate image of B or of another person (C); and
- (b) the distribution of the image would be contrary to community standards of acceptable conduct; and
- (c) A intends that B will believe, or believes that B will probably believe, that A will carry out the threat.

An offence against s 41DB(1) carries a maximum penalty of 1 year imprisonment.⁴⁹

A key policy consideration underlying the introduction of s 41DB(1) was that threats to distribute an intimate image constitute a form of abuse and can be used to coerce victims to remain in abusive relationships.⁵⁰

4.4 New South Wales

It has been reported in the media that “[t]here are currently no laws against revenge porn in NSW”.⁵¹ That statement, while correct in respect of criminal law offences specifically targeting revenge pornography, is incorrect in respect of more general offences whose ambit may encompass revenge pornography offences.

Under s 578C(2) of the *Crimes Act 1900*, a “person who publishes an indecent article is guilty of an offence”. The maximum penalty for the offence against s 578C(2) is: in the case of an individual 100 penalty units (\$11,000) or imprisonment for 12 months (or both); and in the case of a corporation, 200 penalty units (\$22,000).

“Indecent” is not defined in s 578C or elsewhere in the *Crimes Act 1900*. In the context of censorship law, “indecent” has been interpreted using a community standards test that operates in respect of the “reasonable, ordinary, decent-minded, but not unduly sensitive person”.⁵² Further, “indecent” is not synonymous with “obscene”, in that “obscene” denotes a higher degree of offensiveness than “indecent”.⁵³ In the context of indecent assaults contrary to s 61L of the *Crimes Act 1900*, “indecent” has been defined to mean “contrary to the ordinary standards of respectable people in this community”⁵⁴ and requiring a “sexual connotation or overtone”.⁵⁵ Given the highly sexually explicit nature of images in revenge pornography cases, such images are likely to be “indecent” for the purposes of s 578C.⁵⁶

“Article” is defined in s 578C(1) to include, relevantly, any thing that contains or embodies matter to be read or looked at; is to be looked at; or, is a record. The definition of “record” includes:⁵⁷

... a film, and any other thing ... on which is recorded a sound or picture and from which, with the aid of a suitable apparatus, the sound or picture can be produced

Digital photographs and films are clearly articles for the purpose of s 578C(2).

“Publish” is defined in s 578C(1) to include: “distribute, disseminate, circulate, deliver, exhibit, lend for gain, exchange, barter, sell, offer for sale, let on hire or offer to let on hire. It also includes possessing or printing an indecent article for such a purpose.

Unlike the United Kingdom offence of disclosing private sexual photographs and films with intent to cause distress, where a person can disclose the images “to a person”;⁵⁸ the South Australian offence of distribution of invasive image, where the distribution can occur by the act of sending an email or uploading an image, or making an image “available for access by another”;⁵⁹ and the Victorian offence of distribution of intimate image, where “distribute” can include sending an image “to any other person, whether to a particular person or not”;⁶⁰ it is unclear whether the definition of “publish” in s 578C requires more than one immediate recipient. For instance, in *Burrows v Commissioner of Police; Giardini v Commissioner of Police*,⁶¹ Boland J considered that sending an image over the Internet to a single person did not fall within the definition of “publish” in s 578C(1) of the *Crimes Act 1900 (NSW)*.

An issue for revenge pornography cases in NSW is whether the definition of “publish” in s 578C(1) would encompass the facts of every case, especially cases where an image is sent freely to a person operating a revenge pornography website? In such cases, the sending of an image to one person is done for the express purpose of facilitating subsequent global distribution. As was recently argued in a United Kingdom privacy case:⁶²

It is all very well saying [the fax] has only been sent to one person but when that was the editor of the News of the World, the fax was being sent to the biggest-selling Sunday tabloid in the country, which adds to the grossness of the misuse of the private information.

4.4.1 Usmanov revenge pornography case

Section 578C of the *Crimes Act 1900* was applied to the revenge pornography case of *Usmanov* at first instance in the Local Court⁶³ and on appeal in the District Court.⁶⁴

Local Court: Mr Usmanov and the complainant had been in an intimate relationship for several years, during which time they had lived together. After the complainant moved out of the premises they had shared, Mr Usmanov, in order to “get back” at his former partner, posted six images of her on his Facebook page.⁶⁵ The images posted show the complainant “while she is nude in certain positions and clearly show her breasts and genitalia”.⁶⁶ Mr Usmanov then sent the complainant an email saying “Some of your photos are now on Facebook”. The complainant’s housemate also told her that she saw the photographs on Facebook.

The complainant immediately confronted Mr Usmanov but he refused to remove the photographs from his Facebook page. The complainant then went to the police. At a first meeting with police Mr Usmanov showed that the photographs of the complainant had been removed. But the complainant soon afterwards informed police that Mr Usmanov had reposted the photographs on his Facebook page and had sent a Facebook friend request to an acquaintance of the complainant. Mr Usmanov was then arrested and pleaded guilty to an offence of publishing an indecent article, contrary to s 578C(2).

In the Local Court Deputy Chief Magistrate Mottley commented on the novel use of s 578C(2) in revenge pornography cases:⁶⁷

Despite an extensive search, no NSW reported decisions could be located that assist with the approach to be taken in a matter such as this where the material has been published on Facebook or the Internet. Nor are there any NSW reported decisions where the material published is indecent but does not constitute child pornography.

The only decision found which touches upon these issues is from judge Becroft of the Wellington District Court in New Zealand on 12 November 2010. In the matter of *Police v Joshua Ashby*, Mr Ashby had posted a nude photograph of his ex-girlfriend on Facebook. Not only did he log into her account and upload the image, which showed her to be naked in front of a mirror, he then unblocked her privacy settings and changed her password. The image remained online for a period of 12 hours before the police and Facebook authorities shut down the account. Mr Ashby received a full time sentence of imprisonment for a period of 4 months.

In *Usmanov* her Honour found that the offence involved some premeditation and that the number of images posted, their removal, reporting and sending of the Facebook friend invitation to the complainant's acquaintance elevated the seriousness of the offence.⁶⁸ As to the extent to which the photographs were published, her Honour found that there was evidence that the images were seen by the housemate and an acquaintance at, respectively, 9.45am and 5.00pm on the day of the offence; but it was not known what privacy settings, if any, existed for the Facebook page and how many people, if any, may have been able to access that page while the images were posted.⁶⁹

Her Honour specifically commented on the need to deter people from using social media in such revengeful ways.⁷⁰

This is a particularly relevant consideration in a matter such as this where new age technology through Facebook gives instant access to the world. Facebook as a social networking site has limited boundaries. Incalculable damage can be done to a person's reputation by the irresponsible posting of information through that medium. With its popularity and potential for real harm, there is a genuine need to ensure the use of this medium to commit offences of this type is deterred.

The incalculable damage to which her Honour referred was identified as embarrassment, humiliation, anxiety caused by persons known to the victim viewing the images and anxiety caused by the prospect of persons unknown to the victim viewing the images.⁷¹ On this last point her Honour said:⁷²

It can only be a matter for speculation as to who else may have seen the images, and whether those images have been stored in such a manner which, at a time the complainant least expects, they will again be available for viewing, circulation or distribution.

After applying a 25% discount for the early plea of guilty, Deputy Chief Magistrate Mottley sentenced Mr Usmanov to six months imprisonment, to be served by way of home detention.⁷³ In doing so, her Honour emphasised that “a suspended sentence is not an appropriate penalty”.⁷⁴

District Court: On appeal, the District Court confirmed the defendant’s sentence of imprisonment for six months but quashed the Home Detention Order and suspended the sentence.⁷⁵

When suspending the sentence of six months imprisonment imposed in the Local Court, Blanch J (the then Chief Judge of the District Court) said:⁷⁶

In fact there have been other cases before the court and I know that I determined one case where the posting was more serious than this matter and in that matter I imposed a suspended sentence. ...

His Honour emphasised that the case “involved a twenty year old with no prior criminal history and an otherwise respectable and responsible background.”⁷⁷ Ultimately, according to Blanch J, while the magistrate correctly assessed the offence as requiring the imposition of a gaol sentence, “the matter can equally be dealt with by way of a suspended sentence”.⁷⁸

4.4.2 Victims compensation

If an alleged perpetrator of revenge pornography is convicted of an offence against s 578C(2), the victim may receive compensation for losses incurred as a result of the offence. As provided by s 97(1) of the *Victims Rights and Support Act 2013*, a court which convicts a person of an offence may direct the offender to pay compensation to any “aggrieved person” for any “loss” sustained through, or by reason of, the offence. Pursuant to s 97(2), a court can issue a direction for compensation on its own initiative or following an application by an aggrieved person.

“Loss” could include counselling expenses and/or loss of earnings. For example, in the Western Australian case of *Wilson v Ferguson*⁷⁹, the victim of revenge pornography was unable to attend work for almost 3 months and suffered a loss of wages of \$13,404.⁸⁰

5. Civil law

The Australian Law Reform Commission and the NSW Law Reform Commission have both recommended the enactment of a statutory cause of action for invasion of privacy.⁸¹ To date, neither the Commonwealth Parliament nor the NSW Parliament have legislated to that effect.⁸² In the absence of a statutory cause of action for invasions of privacy, victims of revenge pornography have to rely on the courts to develop remedies for the invasion of privacy they have suffered.

5.1 Common law — Privacy tort

The issue of whether a common law tort protecting invasion of privacy should be developed was considered by the High Court of Australia in 2001 in *Australian Broadcasting Corporation v Lenah Game Meats Pty Ltd*.⁸³ Before *Lenah* it was generally assumed that the 1937 decision in *Victoria Park Racing and Recreation Grounds Co Ltd v Taylor*⁸⁴ precluded the development of a privacy tort in Australia. But as Gummow and Hayne JJ (with whom Gaudron J agreed) said, although the circumstances in *Lenah* did not call for the development of a privacy tort.⁸⁵

Nothing said in these reasons should be understood as foreclosing any such debate or as indicating any particular outcome. Nor, as already has been pointed out, should the decision in *Victoria Park*.

However, as the Australian Law Reform Commission said in its June 2014 report, *Serious Invasions of Privacy in the Digital Era*:⁸⁶

A common law tort for invasion of privacy has not yet developed in Australia, despite the High Court leaving open the possibility of such a development in *Australian Broadcasting Corporation v Lenah Game Meats Pty Ltd* in 2001.

This contrasts with the position in the United States, where the courts have developed four distinct sub-species of privacy tort: intrusion upon seclusion; appropriation of name or likeness; publicity given to private life; and publicity placing a person in a false light.⁸⁷

As to the prospects of Australian courts following US developments and introducing a privacy tort, the Australian Law Reform Commission determined in June 2014 that such a prospect “is, at best, uncertain.”⁸⁸ The Commission found that, while privacy torts were recognised at first instance by the Queensland District Court in 2003 in *Grosse v Purvis*⁸⁹ and by the County Court of Victoria in *Doe v Australian Broadcasting Corporation*⁹⁰ in 2007, both of these cases were settled before appeals by the respective defendants were heard.⁹¹ Further, several cases suggest that the common law is “unlikely to recognise the tort in the foreseeable future”.⁹² As the Commission noted, however, other cases have left the future development of a privacy tort open.⁹³

In short, as the law presently stands, Australian victims of revenge pornography cannot rely on a common law tort to seek remedies for “invasion of privacy”.

5.2 Equity — Breach of confidence

In addition to their common law heritage, courts in Australia have inherited a rich jurisdiction in equity, one that derives from the principles established in the English Court of Chancery in the late 14th and early 15th Centuries.⁹⁴ In NSW this dual jurisdiction, or “concurrent administration”,⁹⁵ is expressly recognised in s 57 of the *Supreme Court Act 1970*, which provides: “The Court shall administer concurrently all rules of law, including rules of equity”.

As Dr Ian Spry, Queens Counsel and author of *The Principles of Equitable Remedies*, said:⁹⁶

Equitable principles have above all a distinctive ethical quality, reflecting as they do the prevention of unconscionable conduct. They are of great width and elasticity, and are capable of direct application, as opposed to application merely by analogy, in new circumstances as they arise from time to time. Thus at law a court is required to operate largely by analogy when presented with new situation. But in equity ... the application of an equitable doctrine may arise in any circumstances at all, whether or not similar circumstances have come about previously, provided that the case falls within the general principles that originated in the Court of Chancery.

The capacity of equity to respond to novel situations was emphasised in *Lincoln Hunt Australia Pty Ltd v Willesee*⁹⁷ by Justice Young, former Chief Judge in Equity of the Supreme Court of NSW. As his Honour said, the establishment and consistent application of equitable principles over hundreds of years:⁹⁸

does not mean that when unconscionable situations exist in modern society which do not have an exact counterpart in history, that this court just shrugs its shoulders and that as no historical example can be pointed to as a precedent the court does not interfere. This court still continues both in private and commercial disputes to function as a court of conscience. What is unconscionable will depend to a great degree on the court's view as to what is acceptable to the community as decent and fair at the time and in the place where the decision is made.

In *Australian Broadcasting Corporation v Lenah Game Meats Pty Ltd* Justices Gummow and Hayne (with whom Gaudron J agreed), while leaving the development of a privacy tort open, suggested that, rather than developing new causes of action, privacy may best be protected by “looking across the range of already established legal and equitable wrongs.”⁹⁹

Chief Justice Gleeson in *Lenah* specifically referred to the capacity of breach of confidence to protect activities filmed in private and to extend to third parties who end up in possession of the images:¹⁰⁰

If the activities filmed were private, then the law of breach of confidence is adequate to cover the case... There would be an obligation of confidence upon the persons who obtained [the images and sounds of private activities], and upon those into whose possession they came, if they knew, or ought to have known, the manner in which they were obtained.

The equitable doctrine of breach of confidence has been used by courts in Australia on two occasions to provide remedies for victims of revenge pornography. The most recent, in January 2015, was the Western Australian case of *Wilson v Ferguson*.¹⁰¹ The first, in 2008, was the Victorian case of *Giller v Procopets*.¹⁰²

5.2.1 *Giller v Procopets*¹⁰³

Giller v Procopets represents a decisive step towards courts relying on equity, rather than a common law privacy tort, to protect privacy in Australia. As Professor Butler explains:¹⁰⁴

the Victorian Court of Appeal in *Giller v Procopets* held that a generalised tort of unjustified invasion of privacy *should not be recognised* where there was an existing cause of action that could be developed and adapted to

Revenge pornography, privacy and the law

meet new circumstances. Such a position accords with the need to preserve coherency in the law.

Mr Rivette, Counsel for Ms Giller in the Victorian Court of Appeal, also suggested that *Giller v Procopets* represents a turning point in the development of privacy law, one whose scope for protecting privacy is yet to be fully realised:¹⁰⁵

Advocates of a tort of privacy may have been disappointed with the Court of Appeal's refusal to explore what had been described as the "emerging tort of privacy", especially given that the High Court's refusal to grant special leave may well have sounded the death knell for a privacy tort. However, the Court of Appeal's decision in *Giller* has, in my opinion, provided a foundation for the protection of an individual's privacy that is arguably far greater than that offered in privacy tort countries.

Facts: Ms Giller and Mr Procopets had been in a violent and abusive relationship, which had involved them living together and parenting two children. In November 1996 Mr Procopets used a hidden camera to secretly record the sexual activity between himself and Ms Giller. Ms Giller became aware of the camera and acquiesced to its use.¹⁰⁶ A month later, when their relationship deteriorated further, Mr Procopets threatened to show, and then attempted to show, videos depicting their sexual activity to Ms Giller's family and friends, and told her employer he had a video of her engaged in sexual activity with a client.¹⁰⁷

Trial: In the Supreme Court of Victoria Ms Giller claimed damages for breach of confidence based on the showing of the sexually explicit videos. The trial judge found that the sexual relationship between the parties was confidential and Mr Procopets had breached that confidence. However, his Honour held that Ms Giller could not recover damages for breach of confidence because: firstly, Ms Giller had not sought an injunction; and, secondly, Australian law did not permit an award of damages for breach of confidence for mental distress falling short of psychiatric injury.¹⁰⁸

Appeal: In 2008¹⁰⁹ the Victorian Court of Appeal unanimously upheld the action for breach of confidence and, by majority, awarded Ms Giller the sum of \$40,000, including \$10,000 for aggravated damages.¹¹⁰ The aggravated damages were awarded because the court was satisfied that Mr Procopets had deliberately breached his duty of confidence in order to humiliate, embarrass and distress Ms Giller.¹¹¹

The fact that Ms Giller had not sought an injunction to restrain Mr Procopets from showing or distributing the video did not deprive the court of its power to award damages because "[t]hat power exists so long as a court has jurisdiction to grant an injunction".¹¹² In other words, "it is both necessary and sufficient that an injunction could have been brought".¹¹³

Moreover, the trial judge erred in holding that damages for breach of confidence could not be awarded for "mere distress" not amounting to psychiatric injury.¹¹⁴ Neave J said there is "no barrier"¹¹⁵ to courts with equitable jurisdictions ordering monetary compensation for embarrassment or distress suffered as the result of the breach of an equitable duty of confidence.¹¹⁶ As his Honour further said:¹¹⁷

An inability to order equitable compensation to a claimant who has suffered distress would mean that a claimant whose confidence was breached before an injunction could be obtained would have no effective remedy.

5.2.2 *Wilson v Ferguson*¹¹⁸

Facts:¹¹⁹ Ms Wilson and Mr Ferguson were fly-in/fly-out workers at a mining site in Western Australia called Cloudbreak. They had been in a romantic relationship since 2012, living together in the defendant's house when they were off-site and living in separate apartments when they were on-site. Over the course of their relationship they used their mobile phones to send each other photographs of themselves naked or partly naked. Mr Ferguson also took explicit photographs of Ms Wilson with her knowledge and consent.

Ms Wilson also used her mobile phone to take videos of herself while naked and, at least on one occasion, engaging in sexual activity. The video became a point of contention between the parties after Ms Wilson had left her phone in Mr Ferguson's presence for a short time and, on her return, he told her he had used her phone to email the videos to himself. Ms Wilson became upset and an argument ensued, during which Mr Ferguson agreed that no one else would see the videos. He also later sent her text messages to the effect that "he wouldn't be showing them to his friends or anything like that".

Ms Wilson came to suspect that Mr Ferguson was being unfaithful. At approximately 11.50 am on 5 August 2013 she sent Mr Ferguson a text message saying she was ending the relationship. Soon after that message was sent Mr Ferguson posted 16 explicit photographs and two explicit videos of Ms Wilson on his Facebook page, and made them available to his approximately 300 "Facebook friends". He also posted various abusive comments on Facebook, including "Let this b a fkn lesson". Mr Ferguson then sent Ms Wilson abusive text messages about the images being on Facebook and her anticipated distress, including: "All in fb so fk u...Hahaa" and "Cant wait to watch u fold as a human being."

At about 6.10pm on 5 August 2013 Ms Wilson sent Mr Ferguson text messages asking him to take the photographs and videos off his Facebook page, which he did about an hour later.

In the Supreme Court of Western Australia Mitchell J found that Mr Ferguson deliberately intended to cause Ms Wilson "extreme embarrassment and distress", with the harm being compounded by the fact that Cloudbreak was a male-dominated workplace. His Honour also found that when Ms Wilson became aware of the disclosure of the images she became "horrified, disgusted, embarrassed and upset," and anxious about the prospect of returning to work. She developed problems with sleeping, required counselling sessions and could not return to work until 30 October 2013, during which time she was required to take leave without pay and suffered a loss of wages of \$13,404.

Principal underlying breach of confidence: Tracing the development of the equitable doctrine of breach of confidence from the 1913 English case of *Lord Ashburton v Pape*¹²⁰, to the 1980 case of *Commonwealth of Australia v John Fairfax & Sons Ltd*,¹²¹ Mitchel J said:¹²²

The principle applied by the courts in proceedings asserting a breach of confidence ... is that the court will restrain the publication of confidential information improperly or surreptitiously obtained or of information imparted in confidence which ought not to be divulged.

In other words, courts will remedy a breach of an “obligation of conscience” arising from the circumstances in which the information was communicated or obtained.¹²³

Essential elements of breach of confidence: Mitchell J identified three essential elements of an action in equity for breach of confidence:¹²⁴

1. The information was of a confidential nature.
2. The information was communicated or obtained in circumstances importing an obligation of confidence.
3. There was an unauthorised use of the information.

The first element was satisfied because the images of Ms Wilson were “clearly” confidential,¹²⁵ as was evidence by their explicit nature and the circumstances in which she provided them to Mr Ferguson.¹²⁶ Not only were the images in this case confidential, “intimate photographs and videos taken in private and shared between two lovers would *ordinarily* bear a confidential character”.¹²⁷

The second element was satisfied because the circumstances in which the images were obtained were such as to impose on Mr Ferguson an “*obligation of conscience* to maintain the confidentiality of the images”.¹²⁸ Those circumstances included statements made by Ms Wilson as to their private nature and Mr Ferguson agreeing in response. They also included Mr Ferguson’s use of Ms Wilson’s mobile phone without her knowledge and consent, which Mitchell J said “would of itself ordinarily import an obligation of confidence”.¹²⁹

The third element, an unauthorised use of the images, was established by the act of Mr Wilson posting them on his Facebook site, where they could be viewed by hundreds of his friends, including colleagues of Ms Wilson.¹³⁰ That misuse of the images was not undertaken for any innocent purpose but was deliberately intended to cause Ms Wilson embarrassment and distress.¹³¹ Further, to the extent that it was necessary for Ms Wilson to demonstrate the disclosure was to her detriment,¹³² she proved that the posting of the images on Facebook was deeply distressing to her and necessitated her taking time off work and receiving counselling.¹³³

As all three elements were established, Mr Ferguson’s conduct in posting the photographs and video of Ms Wilson on his Facebook page involved a breach of the equitable obligation he owed to Ms Wilson to maintain the confidentiality of the images.¹³⁴

Remedy by way of injunction: The first remedy sought by Ms Wilson was an injunction to prevent any further publication of the images.

As to the power of the court to grant an injunction, and the reasons why the granting an injunction was appropriate in this case, Mitchell J said:¹³⁵

It is well established that a court exercising equitable jurisdiction may restrain the publication, or further publication, of information in breach of an equitable obligation of confidence. ...

[t]here is no discretionary reason to deny [Ms Wilson] the injunctive relief which she seeks. The past conduct of [Mr Ferguson] in publishing the images of [Ms Wilson] gives rise to a reasonable apprehension that the conduct might be repeated. While there has been a prior publication by [Mr Ferguson], it was for a short period of time ... there is no evidence that the distribution of the images has been so widespread that the grant of injunctive relief would serve no utility at this stage, or that the images have lost their confidential character by reason of the extent of their publication so that the grant of an injunction would not prevent further detriment to [Ms Wilson]. [Ms Wilson] has not unreasonably delayed seeking injunctive relief and has not been shown to have engaged in any conduct which would otherwise provide a basis for exercising my discretion to refuse relief.

Mitchell J ordered a permanent injunction prohibiting Mr Ferguson from either directly or indirectly publishing, in any form, any photographs or videos of Ms Wilson engaging in sexual activities, or in which Ms Wilson appears naked or partially naked.¹³⁶ As his Honour said, failure to comply with an injunction is a serious matter that can constitute contempt of court.¹³⁷

Remedy by way of equitable compensation: Ms Wilson also sought equitable compensation in respect of loss sustained as a result of Mr Ferguson's breach of his equitable obligation of confidence.¹³⁸

As Mitchell J said, equity provides courts with an "inherent jurisdiction to grant relief by way of monetary compensation for breach of an equitable obligation, whether of trust or confidence".¹³⁹ The purpose of an award of equitable compensation for breach of confidence is, as far as possible, to put the innocent party "in the position he or she would have been in had the misuse of the confidential information not occurred".¹⁴⁰

It was pointed out by Mitchell J that the Victorian case of *Giller v Procopets* was the only decision of an Australian superior court to have held that equitable compensation can be awarded to compensate a plaintiff for non-economic loss comprising the embarrassment and distress occasioned by the disclosure of private information in breach of an equitable obligation of confidence.¹⁴¹

Mitchell J said that while aspects of *Giller* that dealt with the effect of Victorian legislation could be distinguished from the case before him, the Victorian Court of Appeal's reasoning relating to the inherent equitable jurisdiction to award compensation for breach of an equitable obligation "cannot be distinguished".¹⁴² Moreover, as his Honour continued:¹⁴³

In *Farah Constructions Pty Ltd v Say-Dee Pty Ltd*, the High Court held that intermediate appellate courts and trial judges in Australia should not depart from decisions in intermediate appellate courts in another jurisdiction in relation to non-statutory law unless they are convinced that the interpretation is plainly wrong.

Rather than considering *Giller* to be "plainly wrong", Mitchell J expressly agreed with the Victorian Court of Appeal that the equitable doctrine of breach of confidence should be developed by:¹⁴⁴

extending the relief available for the unlawful disclosure of confidential information to include monetary compensation for the embarrassment and distress resulting from the disclosure of information (including images) of a private and personal nature.

As his Honour said, in contemporary Australian society, where the Internet, portable devices and social media are so pervasive, and the verb “sexting” has entered the English lexicon, *Giller* represents:¹⁴⁵

an appropriate incremental adaptation of an established equitable principle to accommodate the nature, ease and extent of electronic communications in contemporary Australian society.

For the significant embarrassment, anxiety and distress suffered by Ms Wilson, and taking account of the fact that the impact of the disclosure was aggravated by being an act of retribution, Mitchell J ordered Mr Ferguson to pay Ms Wilson \$35,000 in compensation plus \$13,404 for the economic loss incurred while Ms Wilson was on unpaid leave.¹⁴⁶ Mr Ferguson was also ordered to pay Ms Wilson’s legal costs.¹⁴⁷

Broader significance: As to the broader significance of *Wilson* in influencing the development of equity, and the protection of privacy, across Australia, Barrister Susan Gatford recently said:¹⁴⁸

[I]f *Giller* became widely applicable and accepted in Australia then it would effectively fill the first and arguably most important hole in common law protection of privacy, namely, the need to protect the unauthorised disclosure of private information. *Wilson v Ferguson* is a clear step in that direction.

6. Conclusion

In NSW, s 578C(2) of the *Crimes Act 1900* can and has been used to prosecute revenge pornographers.¹⁴⁹ Following a conviction for an offence against s 578C(2), a court may order, pursuant to s 97(1) of the *Victims Rights and Support Act 2013*, that offenders compensate victims for any loss occurred as a result of the offence. Whether a more specific offence, like those recently introduced in South Australia, Victoria and the United Kingdom, is better suited to deal with revenge pornography is an issue that is likely to be considered by the current Legislative Council committee inquiry into remedies for serious invasions of privacy.

In the civil law area, following the Victorian case of *Giller*¹⁵⁰ in 2008 and the Western Australian case of *Wilson*¹⁵¹ in early 2015, NSW victims of revenge pornography have a stronger footing upon which to seek remedies in equity for breach of confidence. Whether the development of equitable remedies is an adequate response to the issues at hand, or whether a statutory cause of action for invasions of privacy needs to be introduced, is another issue likely to be considered by the Legislative Council Standing Committee on Law and Justice.

¹ NSWPD, 24 June 2015, p 1 (M Veitch).

² Legislative Council Standing Committee on Law and Justice, [Media Release: Serious Invasions of Privacy in NSW—How adequate are our remedies?](#), 6 July 2015

³ *Australian Broadcasting Corporation v Lenah Game Meats Pty Ltd* [2001] HCA 63 at [321], citing J Rosen, *The Unwanted Gaze: The Destruction of Privacy in America*, 2000, Random House, New York, p 11.

⁴ *Victoria Park Racing and Recreation Grounds Company Ltd v Taylor* (1937) 58 CLR 479.

⁵ S Trepte and L Reinecke (Eds), *Privacy Online: Perspectives on Privacy and Self-disclosure in the Social Web*, 2011, Springer, New York.

⁶ D Butler, [The Dawn of the Age of the Drones: An Australian Privacy Law Perspective](#) (2014) 37(2) University of NSW Law Journal 434.

⁷ S Friedland, *Privacy and democracy in the digital age*, 2015, 20(1) Media and Arts Law Review 1.

⁸ G Webb, [Does the Internet of Things mean the end for privacy?](#), 24 April 2015, ABC Technology and Games; S Diehn, ["Internet of Things" holds promise, but sparks privacy concerns](#), 26 April 2012, Deutsche Welle; J Manyika et al, [The Internet of Things: Mapping the Value Beyond the Hype](#), 2015, McKinsey Global Institute, San Francisco.

⁹ *Victoria Park Racing and Recreation Grounds Company Ltd v Taylor* (1937) 58 CLR 479 at 505.

¹⁰ Article 12 of the *Universal Declaration of Human Rights* states: "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 or attacks." Article 17 of the *International Covenant of Civil and Political Rights* is also in such terms. In the absence of Commonwealth legislation incorporating these provisions into Australian law, they do not provide for a right to privacy within Australia: *Minister of State for Immigration and Ethnic Affairs v Ah Hin Teoh* [1995] HCA 20, (1995) 183 CLR 273 at [25]; *CPCF v Minister for Immigration and Border Protection* [2015] HCA 1 per Keane J at [490]; *Koowarta v Bjelke-Peterson* (1982) 153 CLR 168 per Mason J at 225.

¹¹ NSW Law Reform Commission, [Invasion of Privacy](#), Report 120, 2009, Sydney, p 3.

¹² Australian Law Reform Commission, [For Your Information: Australian Privacy Law and Practice](#), Report 108, 2008, Canberra, [Recommendation 74–1](#); Australian Law Reform Commission, [Serious Invasions of Privacy in the Digital Era](#), Report 123, 2014, Canberra, Recommendation 4–1, see also p 25 for a discussion of other reports recommending the introduction of a statutory cause of action for invasion of privacy.

¹³ S Friedland, *Privacy and democracy in the digital age*, 2015, 20(1) Media and Arts Law Review 1 at 9–10. See also: M Jackson and G Hughes, *Private Life in a Digital World*, 2015, Lawbook Co, Sydney.

¹⁴ As occurred in [Police v Ravshan Usmanov](#) [2011] NSWLC 40 and [Wilson v Ferguson](#) [2015] WASC 15.

¹⁵ As occurred in [Giller v Procopets](#) [2008] VSCA 236.

¹⁶ [Wilson v Ferguson](#) [2015] WASC 15 at [81].

¹⁷ See, for example, [Revenge Porn Justice? A victim's Story](#), 14 July 2015, SBS, Dateline.

¹⁸ C Najdowski and M Hildebrand, [The Criminalisation of "revenge porn"](#), 2014, Vol 45(1) Judicial Notebook p 26, discussing the McAfee 2013 survey [Lovers Beware: Scorned Exes May Share Intimate Data And Images Online](#).

¹⁹ [Revenge Porn Misery Merchants: How should the online publication of explicit images without their subject's consent be punished?](#) 2014, The Economist.

²⁰ [Revenge Porn Misery Merchants: How should the online publication of explicit images without their subject's consent be punished?](#) 2014, The Economist.

²¹ C Davies, [Revenge porn cases increase considerably, police figures reveal](#), 16 July 2015, The Guardian.

²² C Davies, [Revenge porn cases increase considerably, police figures reveal](#), 16 July 2015, The Guardian.

²³ For a discussion of the experience of some Australian victims, whose images have ended up on overseas websites that can earn their operators thousands of dollars a month in advertising revenue, see: M White, [Revenge porn: caught in a web of spite](#), 7 October 2013, Sydney Morning Herald.

²⁴ [NSWPD, 23 June 2015, p 57](#) (A Searle).

²⁵ ABC News, [New law banning 'revenge porn' passes in England and Wales](#), 13 February 2015; BBC News, ['Revenge porn' illegal under new UK law](#), 13 October 2014

²⁶ The revenge pornography provision (s 33) commenced on 13 April 2015: s 3 and Schedule 1.

²⁷ UK Parliament, House of Lords, Hansard, 21 July 2014, Column 968, [Amendment 37](#).

²⁸ [Criminal Justice and Courts Act 2015 \(UK\)](#), s 33(9)(b).

²⁹ [Criminal Justice and Courts Act 2015 \(UK\)](#), s 33(9)(a).

³⁰ [Criminal Justice and Courts Act 2015 \(UK\)](#), s 35(2).

³¹ [Criminal Justice and Courts Act 2015 \(UK\)](#), s 35(3).

³² Sections 35(4) and 35(5) outline circumstances in which photographs and films that have been digitally altered or combined with other images fall within the definition of “private” and “sexual”.

³³ [Criminal Justice and Courts Act 2015 \(UK\)](#), s 34(2).

³⁴ See UK Crown Prosecution Service, [Revenge Pornography: Guidelines on prosecuting the offence of disclosing private sexual photographs and films](#).

³⁵ [Criminal Justice and Courts Act 2015 \(UK\)](#), s 33(3).

³⁶ [Criminal Justice and Courts Act 2015 \(UK\)](#), s 33(4).

³⁷ [Criminal Justice and Courts Act 2015 \(UK\)](#), s 33(5).

³⁸ The [Summary Offences \(Filming Offences\) Amendment Bill 2013](#) (SA) commenced by proclamation on 9 May 2013: [South Australian Government Gazette](#), 9 May 2013, p 1424.

³⁹ G Gago, [Summary Offences \(Filming Offences\) Amendment Bill 2013, Second Reading Speech](#), 7 February 2013, SA Parliament, Legislative Council, p 3115.

⁴⁰ [Summary Offences Act 1953](#), s 26A. However, “distribute” does not include “distribution by a person solely in the person’s capacity as an internet service provider, internet content host or a carriage service provider.”

⁴¹ [Summary Offences Act 1953 \(SA\)](#), s 26A. “Invasive image” does not include an image of a person who is or appears to be under the age of 16 years (as an image of a minor engaged in a “private act” as defined in s 26A would constitute child pornography). “Invasive image” also does not include an image of a person who is in a public place.

⁴² [Summary Offences Act 1953 \(SA\)](#), s 26A.

⁴³ [Summary Offences Act 1953 \(SA\)](#), s 26C.

⁴⁴ The new provisions were contained in Part 6 of the [Crimes Amendment \(Sexual Offences and Other Matters\) Act 2014 \(Vic\)](#). Part 6 was proclaimed to commence on 3 November 2014: [Victorian Government Gazette](#), No S 400, 29 October 2014, p 1.

⁴⁵ [Crimes Amendment \(Sexual Offences and Other Matters\) Bill 2014 \(Vic\), Second Reading](#), Hansard, Legislative Council, p 3187. See also: Victorian Parliament Law Reform Committee [Inquiry into sexting](#), 2013.

⁴⁶ As well as the other offences in Part 1 Division 4A of the [Summary Offences Act 1966 \(Vic\)](#), which is entitled “Observation or visual capturing of genital or anal region and distribution of intimate images”.

⁴⁷ [Summary Offences Act 1966 \(Vic\)](#), s 41DA(2).

⁴⁸ [Summary Offences Act 1966 \(Vic\)](#), s 41DA(3).

⁴⁹ [Summary Offences Act 1966 \(Vic\)](#), s 41DB(2).

⁵⁰ The issue was discussed by the Victorian Parliament Law Reform Committee in its report [Inquiry into sexting](#), 2013, at p 24 ff “Sexting in a family violence or coercive context”.

⁵¹ L Harris, [Inquiry into revenge porn to consider jail time to protect victims from jilted lovers](#), 5 July 2015, [The Daily Telegraph](#); L Harris, [Revenge porn gets ex-rating](#), 5 July 2015, [The Sunday Telegraph](#).

⁵² G Griffith, [Censorship in Australia: Regulating the Internet and other recent developments](#), 2002, NSW Parliamentary Library Research Service, Briefing Paper No 4/02 p 34, citing [Phillips v Police](#) (1990) 75 A Crim R 480 and [Crowe v Graham](#) (1968) 121 CLR 375 at 486; see also G Griffith, [Censorship law — questions and answers](#), 2009, NSW Parliamentary Library Research Service, e-brief 5/09.

⁵³ G Griffith, [Censorship in Australia: Regulating the Internet and other recent developments](#), 2002, NSW Parliamentary Library Research Service, Briefing Paper No 4/02 p 34, citing [Crowe v Graham](#) (1968) 121 CLR 375 at 488.

⁵⁴ Criminal Trial Courts Bench Book, [Indecent assault](#), suggested jury direction, 2015, Judicial Commission of NSW, Sydney, at [5-660] and [5-670], citing [R v Harkin](#) (1989) 38 A Crim R 296 at 301 and [R v Stevens](#) (unrep, 26/9/94, NSWCCA). See also [Eades v DPP\(NSW\)](#) [2010] 77 NSWLR 173 at [7]–[8].

⁵⁵ Criminal Trial Courts Bench Book, [Indecent assault](#), suggested jury direction, 2015, Judicial Commission of NSW, Sydney, at [5-660] and [5-670], citing [R v Harkin](#) (1989) 38 A Crim R 296 at 301 and [R v Stevens](#) (unrep, 26/9/94, NSWCCA).

⁵⁶ As was the case in [Police v Ravshan Usmanov](#) [2011] NSWLC 40 and [Usmanov v R](#) [2012] NSWDC 290, discussed at 4.3.1.

- ⁵⁷ *Crimes Act 1900*, s 578C(1).
- ⁵⁸ [Criminal Justice and Courts Act 2015 \(UK\)](#), s 34(2) [emphasis added].
- ⁵⁹ [Summary Offences Act 1953 \(SA\)](#), s 26A [emphasis added].
- ⁶⁰ *Summary Offences Act 1966 (Vic)*, s 40 [emphasis added].
- ⁶¹ [2001] NSWIRC 333 at [112].
- ⁶² [Royal Butler Paul Burrell gets go-ahead for privacy claim against Max Clifford](#), 14 July 2015, *The Guardian*.
- ⁶³ [Police v Ravshan Usmanov](#) [2011] NSWLC 40.
- ⁶⁴ [Usmanov v R](#) [2012] NSWDC 290.
- ⁶⁵ [Police v Ravshan Usmanov](#) [2011] NSWLC 40 at [3].
- ⁶⁶ [Police v Ravshan Usmanov](#) [2011] NSWLC 40 at [4].
- ⁶⁷ [Police v Ravshan Usmanov](#) [2011] NSWLC 40 at [10]–[11].
- ⁶⁸ [Police v Ravshan Usmanov](#) [2011] NSWLC 40 at [13].
- ⁶⁹ [Police v Ravshan Usmanov](#) [2011] NSWLC 40 at [13].
- ⁷⁰ [Police v Ravshan Usmanov](#) [2011] NSWLC 40 at [13].
- ⁷¹ [Police v Ravshan Usmanov](#) [2011] NSWLC 40 at [20].
- ⁷² [Police v Ravshan Usmanov](#) [2011] NSWLC 40 at [20].
- ⁷³ [Police v Ravshan Usmanov](#) [2011] NSWLC 40 at [19].
- ⁷⁴ [Police v Ravshan Usmanov](#) [2011] NSWLC 40 at [23].
- ⁷⁵ [Usmanov v R](#) [2012] NSWDC 290 at [6]; the sentence was suspended pursuant to s 12 of the *Crimes (Sentencing Procedure) Act 1999*.
- ⁷⁶ [Usmanov v R](#) [2012] NSWDC 290 at [3].
- ⁷⁷ [Usmanov v R](#) [2012] NSWDC 290 at [2].
- ⁷⁸ [Usmanov v R](#) [2012] NSWDC 290 at [5].
- ⁷⁹ [Wilson v Ferguson](#) [2015] WASC 15, discussed at 5.2.2.
- ⁸⁰ [Wilson v Ferguson](#) [2015] WASC 15 at [40].
- ⁸¹ NSW Law Reform Commission, [Invasion of Privacy](#), Report 120, 2009, Sydney, p 3; Australian Law Reform Commission, [For Your Information: Australian Privacy Law and Practice](#), Report 108, 2008, Canberra, [Recommendation 74–1](#); Australian Law Reform Commission, [Serious Invasions of Privacy in the Digital Era](#), Report 123, 2014, Canberra, Recommendation 4–1. For a discussion of the aptness of the recommended statutory cause of action to provide a remedy in cases of invasion of privacy by drone, see: D Butler, *The Dawn of the Age of Drones: An Australian Privacy Law Perspective* (2014) 37(2) *UNSW Law Journal* 434.
- ⁸² See S Gafford, *Posting Sexually explicit images on Facebook: The action for breach of confidence expands further into the privacy sphere*, 2015, 20(1) *Media & Arts Law Review* 82 at 82; R McColl, [An Australian perspective on privacy law developments](#), 2009, Media Law Resource Centre Conference, London; and R McColl, [Privacy, Business and the digital era](#), 2014, New South Wales Law Society Continuing Professional Development Seminar Series, Sydney.
- ⁸³ *Australian Broadcasting Corporation v Lenah Game Meats Pty Ltd* [2001] HCA 63.
- ⁸⁴ (1937) 58 CLR 479.
- ⁸⁵ *Australian Broadcasting Corporation v Lenah Game Meats Pty Ltd* [2001] HCA 63 at [132].
- ⁸⁶ Australian Law Reform Commission, *Serious Invasions of Privacy in the Digital Era*, Final Report (No 123), 2014, Sydney, p 53 (at 3.53).
- ⁸⁷ The position in the United States was considered by the High Court of Australia in *Australian Broadcasting Corporation v Lenah Game Meats Pty Ltd* [2001] HCA 63 at [120] per Hayne and Gummow JJ. At [123] their Honours emphasised that the issue of whether such torts develop in Australia should not be considered in isolation from other areas of the law because “in Australia, one or more of the four invasions of privacy, to which reference has been made, in many instances would be actionable at general law under recognised causes of action”. See also: J Caldwell, *Protecting Privacy Post Lenah: Should the Courts Establish a New Tort or Develop Breach of Confidence?* (2003) 26(1) *University of New South Wales Law Journal* 90.
- ⁸⁸ Australian Law Reform Commission, *Serious Invasions of Privacy in the Digital Era*, Final Report (No 123), 2014, Sydney, p 55 (at 3.56).
- ⁸⁹ [2003] QDC 151. The tort was a distinct cause of action for an “unreasonable intrusion”: D Butler, *The Dawn of the Age of the Drones: An Australian Privacy Law Perspective* (2014) 37(2) *University of NSW Law Journal* 434.

⁹⁰ [2007] VCC 281. The tort was a distinct cause of action for disclosure of private facts: D Butler, *The Dawn of the Age of the Drones: An Australian Privacy Law Perspective* (2014) 37(2) University of NSW Law Journal 434.

⁹¹ Australian Law Reform Commission, *Serious Invasions of Privacy in the Digital Era*, Final Report (No 123), 2014, Sydney, pp 53–54.

⁹² Australian Law Reform Commission, *Serious Invasions of Privacy in the Digital Era*, Final Report (No 123), 2014, Sydney, p 54: see, in particular, [Kalaba v Commonwealth of Australia](#) [2004] FCA 763 at [6]; [Chan v Sellwood: Chan v Calvert](#) [2009] NSWSC 1335 at [37]; [Sands v State of South Australia](#) [2013] SASC 44 at [614] and [Giller v Procopets](#) (2008) 24 VR 1.

⁹³ Australian Law Reform Commission, *Serious Invasions of Privacy in the Digital Era*, Final Report (No 123), 2014, Sydney, pp 54–55: see, in particular, [Maynes v Casey](#) [2011] NSWCA 156 at [35]; [Gee v Burger](#) [2009] NSWSC 149 at [53]; [Dye v Commonwealth Securities Ltd](#) [2010] FCA 720 at [290]; [Doe v Yahoo!7 Pty Ltd](#) [2013] QDC 181 at [310]–[311].

⁹⁴ D M Kerly, *An Historical Sketch of the Equitable Jurisdiction of the Court of the Court of Chancery*, 1890, Cambridge University Press. See also, J Corkery, *The English Courts and the Rise of Equity*, 2001, 7(1) *The National Legal Eagle*, article 6.

⁹⁵ “Concurrent administration” is the title of s 57 of the *Supreme Court Act 1970*.

⁹⁶ I Spry, *The Principles of Equitable Remedies* (9th Edition), 2014, Lawbook Company, Sydney, p 1.

⁹⁷ (1986) 4 NSWLR 457.

⁹⁸ (1986) 4 NSWLR 457 at 463. In *Australian Broadcasting Corporation v Lenah Game Meats Pty Ltd* [2001] HCA 63 at [175], Justice Kirby expressly referred to the influential nature of *Lincoln Hunt*.

⁹⁹ *Australian Broadcasting Corporation v Lenah Game Meats Pty Ltd* [2001] HCA 63 at [132] (emphasis added).

¹⁰⁰ *Australian Broadcasting Corporation v Lenah Game Meats Pty Ltd* [2001] HCA 63 at [39], as quoted and applied by Neave J in [Giller v Procopets](#) [2008] VSCA 236; (2008) 24 VR 1 at [430]–[431].

¹⁰¹ [Wilson v Ferguson](#) [2015] WASC 15.

¹⁰² [Giller v Procopets](#) [2008] VSCA 236; (2008) 24 VR 1.

¹⁰³ [Giller v Procopets](#) [2008] VSCA 236; (2008) 24 VR 1.

¹⁰⁴ D Butler, *The Dawn of the Age of the Drones: An Australian Privacy Law Perspective* (2014) 37(2) University of NSW Law Journal 434, citing [Giller v Procopets](#) [2008] VSCA 236; (2008) 24 VR 1 at [167]–[168] per Ashley JA and [450]–[452] per Neave JA (emphasis added).

¹⁰⁵ M Rivette, *Litigating privacy cases in the wake of Giller v Procopets* (2010) 15 *Media and Arts Law Review* 283 at 289.

¹⁰⁶ [Giller v Procopets](#) [2008] VSCA 236; (2008) 24 VR 1 at [359].

¹⁰⁷ [Giller v Procopets](#) [2008] VSCA 236; (2008) 24 VR 1 at [360]–[368].

¹⁰⁸ [Giller v Procopets](#) [2008] VSCA 236; (2008) 24 VR 1 at [395].

¹⁰⁹ The case had taken 7 years and 6 months to come to trial and a further 3 years and 4 months to reach the Victorian Court of Appeal, where it took 16 months for the court to reach its decision: M Rivette, *Litigating privacy cases in the wake of Giller v Procopets* (2010) 15 *Media and Arts Law Review* 283 at 284 (note 4).

¹¹⁰ Neave JA; Maxwell P agreeing; Ashley JA dissenting as to the amount of equitable compensation.

¹¹¹ M Rivette, *Litigating privacy cases in the wake of Giller v Procopets* (2010) 15 *Media and Arts Law Review* 283 at 287.

¹¹² [Giller v Procopets](#) [2008] VSCA 236; (2008) 24 VR 1 at [404] per Neave J.

¹¹³ [Giller v Procopets](#) [2008] VSCA 236; (2008) 24 VR 1 at [406] per Neave J. See *Supreme Court Act 1970* NSW, s 68; [Mills v Ruthol Pty Ltd](#); [Tricon v Ruthol](#) [2004] NSWSC 547 at [61].

¹¹⁴ [Giller v Procopets](#) [2008] VSCA 236; (2008) 24 VR 1 at [408] per Neave J.

¹¹⁵ [Giller v Procopets](#) [2008] VSCA 236; (2008) 24 VR 1 at [423] per Neave J.

¹¹⁶ [Giller v Procopets](#) [2008] VSCA 236; (2008) 24 VR 1 at [423] per Neave J.

¹¹⁷ [Giller v Procopets](#) [2008] VSCA 236; (2008) 24 VR 1 at [424] per Neave J.

¹¹⁸ [Wilson v Ferguson](#) [2015] WASC 15.

¹¹⁹ [Wilson v Ferguson](#) [2015] WASC 15 at [17]–[42].

- ¹²⁰ (1913) 2 Ch 469.
- ¹²¹ (1980) 147 CLR 39 at 50 per Mason J.
- ¹²² [Wilson v Ferguson](#) [2015] WASC 15 at [43].
- ¹²³ [Wilson v Ferguson](#) [2015] WASC 15 at [45]; *Moorgate Tobacco Co Ltd v Phillip Morris (No 2)* (1984) 156 CLR 414 at 438.
- ¹²⁴ [Wilson v Ferguson](#) [2015] WASC 15 at [46].
- ¹²⁵ [Wilson v Ferguson](#) [2015] WASC 15 at [56].
- ¹²⁶ [Wilson v Ferguson](#) [2015] WASC 15 at [56].
- ¹²⁷ [Wilson v Ferguson](#) [2015] WASC 15 at [56] (emphasis added). The disclosure of the of the images satisfied the “useful practical test of what is private” set out by Gleeson CJ in *Lenah*, in that they would be “highly offensive to a reasonable person of ordinary sensibilities”: *Australian Broadcasting Corporation v Lenah Game Meats Pty Ltd* [2001] HCA 63 at [42] per Gleeson CJ.
- ¹²⁸ [Wilson v Ferguson](#) [2015] WASC 15 at [57] (emphasis added).
- ¹²⁹ [Wilson v Ferguson](#) [2015] WASC 15 at [57].
- ¹³⁰ [Wilson v Ferguson](#) [2015] WASC 15 at [59].
- ¹³¹ [Wilson v Ferguson](#) [2015] WASC 15 at [59].
- ¹³² In *Commonwealth v John Fairfax & Sons Ltd* (1980) 147 CLR 39 at 51 Mason J had regarded it as necessary to show that the divulging of the information had a detrimental effect on the party whose confidence was breached; but, as Mitchell J said, the requirement to show detriment has subsequently been doubted: *Wilson v Ferguson* [2015] WASC 15 at [43], citing *Ammon v Consolidated Minerals Ltd [No 3]* [2007] WASC 232 at [310].
- ¹³³ [Wilson v Ferguson](#) [2015] WASC 15 at [59].
- ¹³⁴ [Wilson v Ferguson](#) [2015] WASC 15 at [55].
- ¹³⁵ [Wilson v Ferguson](#) [2015] WASC 15 at [60]–[61].
- ¹³⁶ [Wilson v Ferguson](#) [2015] WASC 15 at [65] and [90].
- ¹³⁷ [Wilson v Ferguson](#) [2015] WASC 15 at [62].
- ¹³⁸ [Wilson v Ferguson](#) [2015] WASC 15 at [67].
- ¹³⁹ [Wilson v Ferguson](#) [2015] WASC 15 at [69], citing *Smith Kline & French Laboratories (Aust) Ltd v Department of Community Services and Health* [1989] FCA 384, (1990) 22 FCR 73 at 83 per Gummow J.
- ¹⁴⁰ [Wilson v Ferguson](#) [2015] WASC 15 at [70].
- ¹⁴¹ [Wilson v Ferguson](#) [2015] WASC 15 at [71] and [73].
- ¹⁴² [Wilson v Ferguson](#) [2015] WASC 15 at [74].
- ¹⁴³ [Wilson v Ferguson](#) [2015] WASC 15 at [75].
- ¹⁴⁴ [Wilson v Ferguson](#) [2015] WASC 15 at [83].
- ¹⁴⁵ [Wilson v Ferguson](#) [2015] WASC 15 at [82].
- ¹⁴⁶ [Wilson v Ferguson](#) [2015] WASC 15 at [85] and [90].
- ¹⁴⁷ [Wilson v Ferguson](#) [2015] WASC 15 at [90].
- ¹⁴⁸ S Gattford, *Posting sexually explicit images on Facebook: The action for breach of confidence expands further into the privacy space* (2015) 20(1) Media & Arts Law Review 82 at 84; commenting on remarks made by B Macdonald, *A Statutory Action for Breach of Privacy: Would it Make a (Beneficial) Difference?* (2013) 36(3) Australian Bar Review 241.
- ¹⁴⁹ [Police v Ravshan Usmanov](#) [2011] NSWLC 40 and [Usmanov v R](#) [2012] NSWDC 290.
- ¹⁵⁰ [Giller v Procopets](#) [2008] VSCA 236; (2008) 24 VR 1.
- ¹⁵¹ [Wilson v Ferguson](#) [2015] WASC 15.

Information about Research Publications can be found on the Internet at the:
[NSW Parliament's Website](#)

Advice on legislation or legal policy issues contained in this paper is provided for use in parliamentary debate and for related parliamentary purposes. This paper is not professional legal opinion.

© 2015

Except to the extent of the uses permitted under the *Copyright Act 1968*, no part of this document may be reproduced or transmitted in any form or by any means including information storage and retrieval systems, without the prior consent from the Manager, NSW Parliamentary Research Service, other than by Members of the New South Wales Parliament in the course of their official duties.

ISSN 1838-0204