

(2) A defence under subsection (1)(e) is defeated if the plaintiff proves that the publication of the matter was actuated by malice.

(3) In this section:

subordinate distributor has the same meaning as in section 32 of the *Defamation Act 2005*.

76 Remedies

(1) In an action under this Part for the invasion of a plaintiff's privacy, the court may (subject to any jurisdictional limits of the court) grant any one or more of the following remedies, whether on an interim or final basis, as the court considers appropriate:

- (a) an order for the payment of compensation,
- (b) an order prohibiting the defendant from engaging in conduct (whether actual, apprehended or threatened) that the court considers would invade the privacy of the plaintiff,
- (c) an order declaring that the defendant's conduct has invaded the privacy of the plaintiff,
- (d) an order that the defendant deliver to the plaintiff any articles, documents or other material, and all copies of them, concerning the plaintiff or belonging to the plaintiff that:
 - (i) are in the possession of the defendant or that the defendant is able to retrieve, and
 - (ii) were obtained or made as a result of the invasion of the plaintiff's privacy or were published during the course of the conduct giving rise to the invasion of privacy,
- (e) such other relief as the court considers necessary in the circumstances.

(2) Without limiting subsection (1), the court may decline to grant a remedy under that subsection if it considers that an adequate remedy for the invasion of privacy exists under a statute of an Australian jurisdiction that is prescribed by the regulations.

77 Compensation for non-economic loss limited

- (1) The maximum amount of compensation for non-economic loss that a court may order in an action for invasion of privacy under this Part is \$150,000 or any other amount adjusted in accordance with this section from time to time that is applicable at the time compensation is awarded.
- (2) The Minister is, on or before 1 July 2010 and on or before 1 July in each succeeding year, to declare, by order published in the *Gazette*, the amount that is to apply, as from the date specified in the order, for the purposes of subsection (1).
- (3) The amount declared is to be the amount applicable under subsection (1) (or that amount as last adjusted under this section) adjusted by the percentage change in the amount estimated by the Australian Statistician of the average weekly total earnings of full-time adults in Australia over the 4 quarters preceding the date of the declaration for which those estimates are, at that date, available.
- (4) An amount declared for the time being under this section applies to the exclusion of the amount of \$150,000 or an amount previously adjusted under this section.
- (5) If the Australian Statistician fails or ceases to estimate the amount referred to in subsection (3), the amount declared is to be determined in accordance with the regulations.

(6) In adjusting an amount to be declared for the purposes of subsection (1), the amount determined in accordance with subsection (3) is to be rounded to the nearest \$500 (with the amounts of \$250 and \$750 being rounded up).

(7) A declaration made or published in the Gazette after 1 July in a year and specifying a date that is before the date it is made or published as the date from which the amount declared by the order is to apply has effect as from that specified date.

78 Monetary order in the nature of exemplary or punitive damages cannot be made

A court cannot make a monetary order under section 76 that is in the nature of exemplary or punitive damages.

79 Action does not survive death

(1) A cause of action for the invasion of an individual's privacy arising under this Part does not survive the individual's death.

(2) Subsection (1) has effect despite section 2 of the *Law Reform (Miscellaneous Provisions) Act 1944*.

80 Relationship of cause of action to other laws

(1) To the extent that the general law recognises a specific tort for the invasion or violation of a person's privacy, that tort is abolished.

(2) Subject to subsection (1), the right of action for invasion of privacy under this Part and the remedies under this Part are in addition to, and not in derogation of, any other right of action or other remedy available otherwise than under this Part.

(3) Without limiting subsection (2), subsection (1) does not operate to abolish or otherwise limit any of the following kinds of causes of action at general law to the extent that they provide for a remedy for the invasion or violation of an individual's privacy:

- (a) an action for defamation,
- (b) an action for trespass,
- (c) an action for a breach of confidence,
- (d) an action for negligence,
- (e) an action for nuisance,
- (f) an action for injurious falsehood,
- (g) an action for passing off,
- (h) an action for intentional infliction of harm,
- (i) an action for breach of a statutory duty.

(4) Nothing in this Part requires any compensation awarded in an action for invasion of privacy under this Part to be disregarded in assessing compensation or damages in any other proceedings arising out of the same conduct giving rise to the invasion of privacy.

[Proposed savings and transitional provisions omitted.]

Schedule 2 Amendment of Limitation Act 1969 No 31

[1] Section 14C

Insert after section 14B:

14C Invasion of privacy

An action on a cause of action for an invasion of privacy under Part 12 of the *Civil Liability Act 2002* is not maintainable if brought after the end of a limitation period of 1 year running from the date on which the cause of action first accrues.

[2] Part 3, Division 2B

Insert after Division 2A:

Division 2B Invasion of privacy

56E Extension of limitation period by court

- (1) A person claiming to have a cause of action for invasion of privacy under Part 12 of the *Civil Liability Act 2002* may apply to the court for an order extending the limitation period for the cause of action.
- (2) A court must, if satisfied that it was not reasonable in the circumstances for the plaintiff to have commenced an action in relation to the matter complained of within 1 year from the date on which the cause of action first accrued, extend the limitation period mentioned in section 14C to a period of up to 3 years running from that date.
- (3) A court may not order the extension of the limitation period for a cause of action for invasion of privacy under Part 12 of the *Civil Liability Act 2002* other than in the circumstances specified in subsection (2).

56F Effect of order

If a court orders the extension of a limitation period for a cause of action under section 56E, the limitation period is accordingly extended for the purposes of:

- (a) an action brought by the applicant in that court on the cause of action that the applicant claims to have, and
- (b) section 26 (1) (b) in relation to any associated contribution action brought by the person against whom the cause of action lies.



56G Costs

Without affecting any discretion that a court has in relation to costs, a court hearing an action brought as a result of an order under section 56E may reduce the costs otherwise payable to a successful plaintiff, on account of the expense to which the defendant has been put because the action was commenced outside the original limitation period.

56H Prior expiry of limitation period

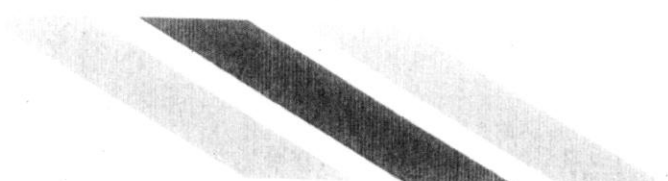
An order for the extension of a limitation period, and an application for such an order, may be made under this Division even though the limitation period has already expired.

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Appendix C – Victorian Law Reform Commission recommendations

CREATING STATUTORY CAUSES OF ACTION

22. There should be two statutory causes of action dealing with serious invasion of privacy caused by misuse of surveillance in a public place.
23. The first cause of action should deal with serious invasion of privacy by misuse of private information.
24. The second cause of action should deal with serious invasion of privacy by intrusion upon seclusion.
25. The elements of the cause of action for serious invasion of privacy caused by misuse of private information should be:
 - a. D misused, by publication or otherwise, information about P in respect of which he/she had a reasonable expectation of privacy; and
 - b. a reasonable person would consider D's misuse of that information highly offensive.
26. The elements of the cause of action for serious invasion of privacy caused by intrusion upon seclusion should be:
 - a. D intruded upon the seclusion of P when he/she had a reasonable expectation of privacy; and
 - b. a reasonable person would consider D's intrusion upon P's seclusion highly offensive.
27. The defences to the cause of action for serious invasion of privacy caused by misuse of private information should be:
 - a. P consented to the use of the information
 - b. D's conduct was incidental to the exercise of a lawful right of defence of person or property, and was a reasonable and proportionate response to the threatened harm
 - c. D's conduct was authorised or required by law
 - d. D is a police or public officer who was engaged in his/her duty and the D's conduct was neither disproportionate to the matter being investigated nor committed in the course of a trespass
 - e. if D's conduct involved publication, the publication was privileged or fair comment
 - f. D's conduct was in the public interest, where public interest is a limited concept and not any matter the public may be interested in.

- 
28. The defences to the cause of action for serious invasion of privacy caused by intrusion upon seclusion should be:
 - a. P consented to the conduct
 - b. D's conduct was incidental to the exercise of a lawful right of defence of person or property, and was a reasonable and proportionate response to the threatened harm
 - c. D's conduct was authorised or required by law
 - d. D is a police or public officer who was engaged in his/her duty and the D's conduct was neither disproportionate to the matter being investigated nor committed in the course of a trespass
 - e. D's conduct was in the public interest, where public interest is a limited concept and not any matter the public may be interested in.
 29. The remedies for both causes of action should be:
 - a. compensatory damages
 - b. injunctions
 - c. declarations.
 30. Costs should be dealt with in accordance with section 109 of the [Victorian Civil and Administrative Tribunal Act 1998 (Vic)].
 31. Jurisdiction to hear and determine the causes of action for serious invasion of privacy by misuse of private information and by intrusion upon seclusion should be vested exclusively in the Victorian Civil and Administrative Tribunal.
 32. These causes of action should be restricted to natural persons. Corporations and the estates of deceased persons should not have the capacity to take proceedings for these causes of action.
 33. Proceedings must be commenced within three years of the date upon which the cause of action arose.

Ellery, Jacqueline

From: Sengstock, Elsa
Sent: Tuesday, 9 October 2012 10:55 AM
To: Ellery, Jacqueline
Cc: LegislationProgram
Subject: Social media law reform [SEC=UNCLASSIFIED]

Follow Up Flag: Follow up
Flag Status: Completed

Categories: Jackie

UNCLASSIFIED

Hi Jac

There has been some media reporting over the weekend of possible reforms (not clear whether they will be policy/administrative or legislative) in relation to social media and court cases (triggered by the murder of Jill Meagher and concerns about the trial being compromised). Grateful if you could keep a watching brief on this one. I'll then have a chat to you about reaching into AGD to make sure that AFP is engaged on any proposals / work related to this.

Thanks,
Elsa



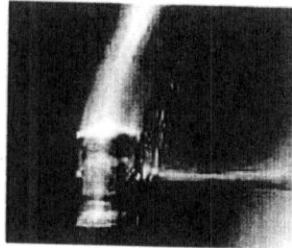
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THE SUNDAY AGE



Social media users are not above the law.

HERE is a feeling, prevalent among a certain type of internet user, that anything goes in the online world. That the blanket of anonymity means any remark, no matter how vile or slanderous, is acceptable, or at least unpunishable. That the rules that govern the real world — rules regulating such transgressions as defamation, racial and religious vilification, and stalking and bullying — do not apply in the virtual one. It is an easy mistake to make, but there is no doubt it is a mistake.

For despite the internet's jurisdiction spanning nature, publishing online does not confer immunity from the laws of the land. There have already been several high profile cases of online defamation in this country, and on Friday the states' attorneys-general gathered to consider how the internet could be regulated to prevent social media postings interfering with criminal trials.

That meeting came after a week of authorities pleading with the public not to post prejudicial remarks about, or photographs of, Adrian Ernest Bayley, the man charged with killing ABC employee Jill Meagher. Victorian Police Commissioner Ken Lay was scathingly critical of Facebook after it refused to take down pages containing hate material about Bayley.

"If they're going to make a lot of money out of the community, they've got to invest in the community too, and that's to behave appropriately and ensure that Facebook doesn't incite hatred or doesn't act in a way that undermines the legal system," Mr Lay said.

It is not the first time this has happened in Australia. In July, there was a similar response after Sydney man Kieran Loveridge was charged with the murder of teenager Thomas Kelly, prompting some commentators to wonder if our laws had been left behind by changing communications technology.

In defamation law, there can be no doubt that comments posted on social media can be

the basis of litigation. In the highest profile such case, Melbourne man Joshua Meggitt successfully sued columnist Marieke Hardy after she incorrectly named him as the author of a hate blog. Mr Meggitt then took the fight further, taking action against Twitter, where the defamatory remark was most widely publicised. That case is ongoing.

Even so, there are some who feel that our laws should go further. This point has been exercising the public mind recently, following the cruel Twitter persecution of celebrity Charlotte Dawson and the distressing taunt made to NRL player Robbie Farah.

Many, including Farah himself, have advocated stronger curbs for online trolls — those who use their anonymity to launch sustained and vicious attacks on others. But while the outrage over trolling is understandable, there is in truth no need for new legislation to deal with it: the law prohibiting the use of a carriage service to threaten or harass has been used in the successful prosecution of at least two people in recent years.

It would be salutary, then, for users of social media to remember that what they post may well come back to haunt them, and to think for a second before hitting send. A comment on the internet is not like a comment to a friend in conversation. It is a permanent document that could potentially be seen by millions of people, and could have serious legal repercussions. And even if it breaches no laws, it is worth considering what purpose insulting and abusing strangers actually serves.

As Mr Lay said on Friday, it is the users of social media who ultimately control its tone and content. While criticising Facebook, he praised those who heeded calls to stop posting about Bayley. "We've seen some positive signs from the Victorian community in the social media space . . . and I just wonder when the users will say, 'Enough's enough and this shouldn't be tolerated.'"



Labor to
state the
proceeds
of crime

ACT could lead way on privacy litigation

By Noel Towell

The ACT could become the only Australian jurisdiction in which citizens can sue for breach of privacy.

Attorney General Simon Corbell will announce today that if re-elected, ACT Labor will explore making a serious breach of privacy a "statutory cause of action", allowing people to pursue compensation payments through the courts.

The federal government is concerned about technologies like smart phones which allow images, sounds and other information to be recorded, stored and uploaded on to social media websites, posted on the internet, or distributed by email or instant messaging. The Commonwealth has published an issues paper on the problem, but Mr Corbell's proposal would be the first time an Australian jurisdiction has offered "civil remedies" for invasions of privacy.

While criminal laws already deal with the most serious invasion of privacy behaviour, there is no right to sue through the civil courts anywhere in Australia.

The territory's Human Rights Act provides the right to privacy but it is not legally enforceable and the



FIRST: Simon Corbell's plan could see Canberrans sue for privacy breaches.

public sector is covered by the Commonwealth's Privacy Act.

"The protection of privacy is also an element of ACT Labor's commitment to the progressive realisation of human rights in the ACT," Mr Corbell said. "ACT Labor believes it would be desirable to look at introducing a statutory cause of action for privacy, something not yet covered in Australian jurisdictions. A statutory cause of action to protect against serious invasions of privacy would provide an additional remedy for breaches of privacy and would be a practical additional mechanism for the protection and promotion of privacy in the ACT."

"Such a statutory cause of action may also help to establish social norms as to what is acceptable and unacceptable behaviour, particularly in relation to the use of new technologies."

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Push to rein in the web

PETER ROLFE

NATIONAL guidelines to stop social media jeopardising criminal trials are a step closer following a meeting of federal and state law-makers yesterday.

A proposal submitted by Victorian Attorney-General Robert Clark seeking an Australia-wide approach to concerns that comments on websites such as Twitter and Facebook could ruin a trial was adopted at a meeting of attorneys-general in Brisbane.

The Standing Council on Law and Justice meeting agreed on a concerted push towards safeguards against social media influencing juries in the wake of Jill Meagher's death.

Social media was flooded with comments in the wake of the tragedy, raising concerns the trial of alleged rapist and killer Adrian Ernest Bayley could be jeopardised.

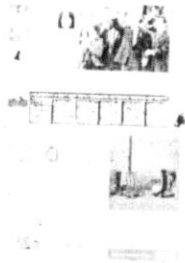
The council yesterday commissioned the development of guidelines for use by social media organisations, protocols and procedures for removing material, and warnings regarding jurors accessing prejudicial material.

The push came as Victoria Police Chief Commissioner Ken Lay said Facebook had a social responsibility to the community.

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back



States to tackle social media laws after alarm over fair trial for accused

Jane Lee
and Dan Oakes

THE Victorian Attorney-General, Robert Clark, will lead a group to create national guidelines on social media after fears that comments on Facebook and Twitter could jeopardise the trial of the man accused of killing the ABC journalist Jill Meagher.

Australia's attorneys-general met in Brisbane yesterday - the day of Ms Meagher's funeral - to discuss social media's impact on the right to a fair trial.

The standing council on law and justice agreed to Mr Clark's proposal for a working group, which will comprise mainstream and social media representatives, judicial officers and police.

The group will make recommendations on how to regulate the spread of prejudicial material on social media, including warnings for users (which courts and police could issue on Facebook or Twitter) and protocols for social media companies.

It will also propose directions that courts can give to juries on social media, examine laws that detail juror offences and assess what research was needed to determine how social media affected jurors' decisions.

It is unknown when the group will start working.

The NSW Attorney-General, Greg Smith, said the group needed to develop protocols with international social media companies to ensure they comply with local suppression order laws. Such companies needed to comply when the state ordered them to remove potentially prejudicial material from their websites to prevent damage to criminal trials.

The working group was formed hours after the Victorian Police Commissioner, Ken Lay, savaged Facebook, declaring that it incited hatred and undermined the state's legal system by hosting pages that could preju-

dice the trial of the man who allegedly raped and murdered Ms Meagher.

He said Facebook's arguments about why it could not remove the pages - some of which call for the accused, Adrian Ernest Bayley, to be executed - were "a nonsense", and that the company lacked a sense of social responsibility.

It was reported this week Facebook had removed the pages, but Mr Lay said it was the creator of the page who did.

"To me it's just a nonsense that someone who is sucking an enormous amount of money out of the community isn't prepared to invest in that community by helping it stay safe and act in an appropriate manner."

Mr Lay said the pages in question were "offensive garbage" and police and MPs were working on ways to force Facebook to remove offensive pages on request.

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