

## PRIVACY: DISCLOSURE OF PRIVATE FACTS

### Introduction

Every individual feels the need to be able to limit the disclosure of those attitudes and affairs which he feels are vital to the preservation of his privacy. But he also feels the need to communicate with and to befriend others, to participate in society's activities and to be informed of matters of public interest. This interest is reflected in the ideal of a free, open and enlightened society channelled through a free press. Individuals, then, must balance their desire to be let alone with the restraints necessarily imposed upon them by community living. Unlike the United States, neither English nor Australian law recognises any general right to privacy, and although privacy is incidentally protected under the existing heads of tortious liability, the protection so afforded is incapable of ever striking the desired balance<sup>1</sup>. By failing to afford privacy adequate protection, the door has been left wide open to abuse, and at present the forces are such that there is an imminent threat that the individual's right of privacy<sup>2</sup> will be completely subordinated to the countervailing demands of our increasingly sophisticated society.

The impetus for the creation of the United States tort was provided by Warren and Brandeis in their seminal article entitled "The Right to Privacy"<sup>3</sup>, and today the tort is recognised by an overwhelming majority of the American States<sup>4</sup>. However, owing to the amorphous quality of the right of privacy, the United States courts and writers have had great difficulty in isolating and articulating the interest to be protected, and have consequently arrived at a balance which is very heavily weighted against the individual.

Dean Prosser views privacy as a general term describing four separate and distinct interests of potential plaintiffs, and has classified the tort under the following four heads<sup>5</sup>:—

- (1) Intrusion upon the plaintiff's seclusion or solitude, or into his private affairs.
- (2) Public disclosure of embarrassing private facts about the plaintiff.
- (3) Publicity which places the plaintiff in a false light in the public eye.
- (4) Appropriation, for the defendant's advantage, of the plaintiff's name or likeness.

Prosser's fourfold classification has been criticised on the basis that it overlooks the real interest seeking protection, namely an individual's dignity

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1. See e.g. Dworkin, "The Common Law Protection of Privacy" (1967) 2 *U.Tor.L.J.* 418; Yang, "Privacy: A Comparative Study of English and American Law" (1966) 15 *I.C.L.Q.* 175.

2. Article 12 of the Universal Declaration of Human Rights, adopted by the General Assembly of the United Nations in 1948, states that, "[n]o-one shall be subjected to arbitrary interference with his privacy . . .".

3. (1890) 4 *Harv. L.R.* 193. The article was primarily concerned with excesses of press publicity.

4. See Prosser, "Privacy" (1960) 48 *Calif. L.R.* 383, at pp.385-386.

5. *Id.*, at p.389.

and identity<sup>6</sup>. However, it submitted that as each area poses a number of different problems, requiring different solutions, the division is amply justified<sup>7</sup>.

Since in an article of this length it is not possible to give a full and complete analysis of each of these different areas, it is proposed to deal only with those invasions of privacy which fall within the second Prosser category, commonly known in the United States as the disclosure tort. This issue of unwanted publicity in the press and through broadcasting was the first specific matter considered in the Younger Committee's recent Report on Privacy<sup>8</sup>, and the account of their investigations and findings occupies about one-sixth of the entire report<sup>9</sup>. The Morison Committee have also made a number of proposals in this area<sup>10</sup>. Both the Morison Committee and the majority of the Younger Committee<sup>11</sup> submit three main reasons to support their conclusion that legislative interference in this area would be undesirable. First, it would necessarily impinge on the freedom of speech and press; secondly, the interest seeking protection is too difficult to formulate; and thirdly, the desired balance can be attained by other means.

It is proposed to assess the weight of each of these assertions and, accordingly, to determine whether the disclosure of an individual's private affairs should be denied legal protection.

### **1. Conflicting Interests: Privacy v. The Freedom of Speech and Press**

In drawing the conclusion that a legal right of privacy would be an undesirable fetter upon the freedom of speech and press, it is surprising that both Committees paid so little attention to both the nature of privacy and its various functions, and the goals to be realised through speech and press freedom, discussion of which is vital to our understanding of the problem at hand.

#### **(A) NATURE AND IMPORTANCE OF PRIVACY**

Since privacy is largely a subjective, emotive right, difficult to identify and incapable of measurement<sup>12</sup>, the Younger Committee gave up the attempt to define it for the purposes of their investigations<sup>13</sup>; whilst the Morison Committee preferred to view it as a condition rather than a right<sup>14</sup>. When it is remembered that these Committees were concerned to formulate a comprehensive definition covering all aspects of privacy, their dilemma is put

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6. Bloustein, "Privacy as an Aspect of Human Dignity: An Answer to Dean Prosser" (1964) 39 *N.Y.U.L.R.* 962.
  7. See Storey, "Infringement of Privacy and its Remedies", Law Council of Australia, Seventeenth Legal Convention, (Perth, July 1973) p.111.
  8. *Report of the Committee on Privacy*, Cmnd 5012 (London 1972) (referred to hereafter as the Younger Report).
  9. *Id.* at pp.35-71.
  10. *Morison Report on the Law of Privacy* (New South Wales 1973), paras. 11-21 (referred to hereafter as the Morison Report).
  11. Lyon and Ross gave minority reports: see Younger Report pp.208 and 213 respectively.
  12. See Ruebhausen and Brim, "Privacy and Behavioural Research" (1965) 65 *Col. L.R.* 1184, at p.1186; Justice, *Privacy and the Law* (London: Stevens 1970), at p.51 (referred to hereafter as the Justice Report).
  13. Younger Report, paras, 58 and 63.
  14. Morison Report, para. 4. Cf. Lusky, "Invasion of Privacy: A Clarification of Concepts" (1972) 72 *Col. L.R.* 693.

into perspective, yet, even so, it is submitted that a greater attempt to grapple with the problem should have been made.

In the area of the disclosure cases it is the *control* we have over information about ourselves rather than its simple dissemination that is important, and since any definition of the right<sup>15</sup> must reflect the resultant duality between "the right to be let alone"<sup>16</sup> and the right to share and communicate, it is not surprising that the task of defining privacy has proved a difficult one. Nonetheless, for present purposes it is submitted that the definition given by most sociologists<sup>17</sup>, philosophers<sup>18</sup> and psychiatrists<sup>19</sup> — that the right to privacy includes the freedom of the individual to choose for himself the circumstances and extent to which his attitudes, beliefs, behaviour and opinions are to be revealed or withheld from others<sup>20</sup> — sufficiently defines the nature of the interest seeking protection.

Having defined the nature of privacy, it is necessary to discuss its various functions and its importance for physical and mental well-being. Professor Westin has grouped the various functions under four heads, namely personal autonomy, emotional release, self-evaluation, and limited and protected communication<sup>21</sup>. In his experience, an accepted way of representing the individual's need for an ultimate core of autonomy is to describe his relations with others in terms of a series of "zones" or "regions" of privacy leading to a "core-self"<sup>22</sup>. This core-self is pictured as an inner circle, sheltering the individual's "ultimate secrets", surrounded by a series of larger concentric circles, only the outer circles being open to all observers. The most serious threat to the individual's autonomy is that someone will penetrate the inner zone and learn his ultimate secrets. Hence the individual's sense that it is he who decides when to "go public" is a crucial aspect of his feeling of autonomy, and the consequent development of his individuality and independence<sup>23</sup>.

Privacy also provides for emotional release, whereby the individual may withdraw to escape the pressures of playing particular social rôles. In this way privacy protects minor noncompliance with social norms, functions as a "safety-valve" for the release of emotions, provides for the management of bodily and sexual functions, and plays an important part in individual life at times of loss, shock or sorrow<sup>24</sup>. Privacy also gives an individual the opportunity for self-evaluation, to integrate his experiences into a meaningful pattern and exert his individuality on events. It thus provides for a time "to anticipate, to recast and to originate"<sup>25</sup>, and allows for the making of a

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15. Here the word "right" is referred to as a human right.
  16. *Cooley on Torts* (2nd ed. 1888), p.29.
  17. E.g. Shils, "Privacy: Its Constitution and Vicissitudes" (1966) 31 *L.&C.P.* 281.
  18. E.g. Konvitz, "Privacy and the Law: A Philosophical Prelude" (1966) 31 *L.&C.P.* 272.
  19. E.g. Jourard, "Some Psychological Aspects of Privacy" (1966) 31 *L.&C.P.* 307.
  20. Cf. definition given by Westin, "Science, Privacy and Freedom" (1966) 66 *Col. L.R.* 1003.
  21. *Id.* at pp.1022-1029.
  22. As expressed by theorists like Simmel, Park, Lewin and Goffman. See Westin, *op. cit.*, at p.1022, n.52.
  23. Westin, *op. cit.*, at pp.1023-1024. See also Konvitz, *op. cit.*, at pp.272, 277.
  24. Westin, *op. cit.*, at pp.1025-1027.
  25. Park and Burgess, *Introduction to the Science of Sociology* (1921) 231. This is particularly true of creative persons.

mental and emotional inventory, whereby an individual can organise himself and decide to what extent he should disclose his private affairs<sup>26</sup>. The final function is that of limited and protected communication. This provides the individual with the opportunities he needs for sharing confidences and intimacies with those he trusts<sup>27</sup>. The act of sharing also simultaneously erects a boundary which separates the community of the sharers, such boundaries being drawn not only in the most intimate relations but in the most public<sup>28</sup>.

Hitherto the discussion of privacy has mainly been centred around "the right to be let alone", but this right is neither a self-sufficient state nor an end in itself<sup>29</sup>. Individuals also have a countervailing need for disclosure and companionship, and the opportunity to extend themselves by sharing with others. Yet, somewhat ironically, there is more insistence on privacy before those whom one "knows" or "knows of" than before complete strangers. Clearly, then, the extent to which the choice between disclosure and non-disclosure is exercised will not only vary with each individual but will vary in the same individual from day to day, in differing circumstances<sup>30</sup>. The opposing force in the conflict is given by the needs of modern society; in return for many of the benefits society offers, the individual must surrender part of his freedom of choice and adjust his psychological balance accordingly<sup>31</sup>.

It therefore seems that to achieve a proper balance:

"each individual must, within the larger context of his culture, his status, and his personal situation, make a continuous adjustment between his need for solitude and for companionship; for intimacy and for general social intercourse; for anonymity and responsible participation in society; for reserve and disclosure<sup>32</sup>. A free society leaves this choice to the individual, for this is the core of the 'right of individual privacy'<sup>33</sup>.

It is hoped that the above analysis has shown that the right of privacy is both deserving of and in need of legal recognition; and this is further borne out by the finding of the public attitudes survey commissioned by the Younger Committee that "protecting people's privacy" ranked as the *most* important of a number of civil rights issues<sup>34</sup>. This being so it is necessary to consider the Younger and Morison Committees' main reason for deciding against the creation of a legal right of privacy, namely that it would interfere with the freedom of speech and press.

26. Westin, *op. cit.*, at pp.1026-1027.

27. Cf. Fried, "Privacy" (1968) 77 *Yale L.J.* 475. His thesis is that in developed social contexts love, friendship and trust are only possible if persons enjoy and accord to each other a certain measure of privacy.

28. Westin, *op. cit.*, at pp.1028-1029; Shils, *op. cit.*, at p.282.

29. Westin, *op. cit.*, at p.1029.

30. Shils, *op. cit.*, at p.303.

31. Justice Report, p.4.

32. Privacy in the sense of being "let alone" encompasses four different relations between an individual and those around him. These are the states of solitude, intimacy, anonymity and reserve. See Westin, *op. cit.*, at pp.1020-1022.

33. Westin, *op. cit.*, at p.1031 n.1.

34. A shortened version of the survey report is reproduced at Appendix E of the Younger Report. The total weighted sample consisted of 1,596 adults.

## (B) THE FREEDOM OF SPEECH AND PRESS

In contending that it was not possible to reconcile the right of privacy with the freedom of speech and press, one would have expected the two Committees to have investigated the legitimate limits of that freedom in some detail, and to have balanced the scales accordingly; yet, apart from a discussion of "the powerful and weighty evidence"<sup>35</sup> presented by the press, the problem was simply glossed over. To assess the validity of their somewhat bald assertion, it will be helpful to examine the present relationship between the United States First Amendment to the Constitution, which guarantees that "Congress shall make no law . . . abridging the freedom of speech or of the press", and the law of privacy.

Whilst the majority of the United States Supreme Court have consistently maintained that not all speech is protected by the guarantee of speech and press freedom, they have nonetheless found it difficult to fit the right of privacy in as a limitation of that freedom<sup>36</sup>. This is vividly illustrated by the much-debated decision of *Time, Inc. v. Hill*<sup>37</sup>, and its sweeping extension of the famous *New York Times* rule<sup>38</sup> to the law of privacy. In that case the majority laid down that where the subject disclosed is a matter of public interest, in the absence of a reckless disregard for the truth, or proof that the disclosure was knowingly false, there can be no recovery<sup>39</sup>.

Although the decision in *Time, Inc. v. Hill*<sup>40</sup> was expressly limited to newsworthy cases involving fictionalised reports in articles about private individuals<sup>41</sup>, it appears that its logic would extend *a fortiori* to newsworthy cases involving true accounts<sup>42</sup>. This indicates that "newsworthiness" is to be interpreted in a descriptive sense, as descriptive of the fact that the public are interested in the matter. For this reason it has been stated that *Time, Inc. v. Hill*<sup>43</sup> has substantially destroyed the right of privacy, for no media publisher will publish something which he believes is of no interest to his audience<sup>44</sup>. Enlightened self-interest will see to that<sup>45</sup>. The case, therefore, vividly exposes the difficulties involved in creating a legal right of privacy

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35. Per Ross, Younger Report, p.214.

36. The Supreme Court has repeatedly failed to appreciate that even though privacy is more of an individual interest than freedom of the press, society still has an interest in protecting it. Cf. *Entick v. Carrington*, 19 Howell, *State Trials*, s.1066.

37. 385 U.S. 374 (1967).

38. *New York Times Co. v. Sullivan* 387 U.S. 254, at pp.279-280. The Court laid down that, at least where defamatory speech is directed against a public official, such speech is protected by the First Amendment unless the speech is made "with knowledge that it was false or with reckless disregard of whether it was false or not."

39. *Op. cit.*, at p.388.

40. *Loc. cit.*

41. *Op. cit.*, at p.390.

42. See e.g. Bloustein, "Privacy, Tort Law and the Constitution: Is Warren and Brandeis' Tort Petty and Unconstitutional as Well?" (1968) 46 *Tex. L.R.* 611; Pedrick, "Publicity and Privacy: It is Any of our Business?" (1970) 20 *U.Tor.L.J.* 391, at p.404.

43. *Loc. cit.*

44. Kalven, "Privacy in Tort Law—Were Warren and Brandeis Wrong?" (1966) 31 *L.&C.P.* 272, at p.284. The Court hints as much by quoting Kalven to this effect in *Time*, *supra* n.37, at p.383, n.7.

45. See Comment, "The Right to Privacy: Normative—Descriptive Confusion in the Defense of Newsworthiness" (1963) 30 *U. Chi. L. Rev.* 722, at p.725.

without hindering the freedom of the press; and if (as the Court may be read as implying) freedom of the press necessarily involves the press being able to publish everything it deems newsworthy, then it may also indicate the impossibility of accommodating the right to privacy.

It is submitted, however, that to allow the press to be "the final arbiters of newsworthiness"<sup>46</sup> is *not* a corollary of the purposes underlying the freedom of speech and press<sup>47</sup>. These purposes have been comprehensively analysed by Dr. Meikeljohn<sup>48</sup> and, generally speaking, his views have received widespread acceptance<sup>49</sup>. He contends that the guarantee was meant to protect and facilitate the achievement of rational ends among free and ordinarily intelligent people, and that its chief function is to serve the political needs of an open and democratic society<sup>50</sup>. But freedom to express one's mind is an individual right as well as a means to social goals; and the social goals to be realised through free expression are much broader than the strictly political. They include the whole range of objects of the human mind and the advance of truth, science, morality and the arts<sup>51</sup>. In other words the test for the freedom of speech and press is whether publication of a given subject matter contributes to the public understanding essential to self-government<sup>52</sup>.

From this one can construct a hierarchy of kinds of speech and publication established by the ends of the First Amendment. These ends are not themselves all of equal rank, nor are all expressions equally related to them, hence the hierarchy<sup>53</sup>. Clearly, taken as an end in itself, freedom of expression must rank lower than the promotion of social and political needs. "These ends can be subsumed under 'the great end,' which is to liberate the human mind to pursue through thought and communication all the objects that it can propose to itself as goals of rational endeavour"<sup>54</sup>. Applying this reasoning it would seem that the unjustified revelation of embarrassing or offensive details of an individual's private affairs is an "abuse"<sup>55</sup> of freedom of speech and press, and therefore should not be protected. Such a revelation can only be justified if it also serves "the great end for which the First Amendment stands"<sup>56</sup>.

46. Kalven, *op. cit.*, at p.336

47. For this reason the decision in *Time*, *supra* n.37, has been widely criticised. See e.g. Bloustein, *loc. cit.*; Shapo, "Media Injuries to Personality: An Essay on Legal Regulation of Public Communication" (1968) 46 *Tex. L.R.* 650, at p.659; Nimmer "The Right to Speak from *Times* to *Time*: First Amendment Theory Applied to Libel and Misapplied to Privacy" (1968) 56 *Calif. L.R.* 935.

48. "The First Amendment is an Absolute" (1961) *Sup. Ct. Rev.* 245. Cf. Weiler, "Defamation, Enterprise Liability, and Freedom of Speech" (1967) 17 *U.Tor.L.J.* 278.

49. The Supreme Court has been significantly influenced by his works, although it has not always interpreted them correctly, e.g. *Time*, *supra* n.37.

50. Cf. Brennan J. for the Court in *Time*, *supra* n.37, at pp.370, 389.

51. Meikeljohn, *op. cit.*, at pp.256-257, 262-263.

52. *Id.* at p.255.

53. See Canavan, *op. cit.*, at pp.119, 125, 126, and 134. Hence too, different degrees of protection will be afforded to different kinds of expression. The degree of protection granted will depend on the strength of the countervailing social interests.

54. *Id.* at pp.125, 126, and 134.

55. *Id.* at p.102. It is an abuse in the sense that it is a positive hindrance to the ends of the First Amendment. Cf. harmless gossip which, although not of "governing importance", is still not an abuse of speech and press freedom.

56. *Id.* at p.134.

Fortunately in Australia, where there is no constitutional guarantee of speech and press freedom<sup>57</sup>, we are in a position to start with the premise that since privacy is a fundamental human value in need of protection, the press should be asked to justify their interference with it. Looked at in this light it may be possible to grant privacy greater protection than it is presently being accorded by the United States courts. It is submitted that if the criterion of "public interest" is interpreted in the sense of "governing importance", and not in the sense of "newsworthiness", it may be possible for our legal system to accommodate the right of privacy. As will be shown later<sup>58</sup>, the practicability of enacting such a defence will be of vital importance. The view expressed by the Younger and Morison Committees that the lines between "permissible" and "impermissible" speech are difficult to draw warrants considerable attention, but it is submitted that the problems created by a right of privacy are not insurmountable, and that if the "meritment" is to be separated from the "mud", and the standard of our newspapers is to be improved, legal guidance is clearly necessary.

## 2. Formation of a Statutory Disclosure Tort

Since both the Committees were concerned with the problem of formulating a general right of privacy, wide enough to cover all its various aspects, they did not specifically grapple with the practicability of enacting a disclosure tort. Nonetheless, their reasons for objecting to the creation of a legal right of privacy are very pertinent in the area of the dissemination cases, and must therefore be considered.

Both Committees draw attention to the American tort to support their contention that legislation in this area would be totally impracticable and unworkable, and would introduce uncertainties into the law the repercussions of which upon free circulation of information could be substantial<sup>59</sup>. The Younger Committee further fears that it would involve judges in the determination of controversial questions of a social and political character<sup>60</sup>, but this simply begs the question. The judiciary are frequently required to answer questions of this nature, which, it is submitted, are quite appropriate for judicial determination<sup>61</sup>. Similarly, the Committee's objection to a body of case law growing up "only gradually"<sup>62</sup> carries little weight, since this is precisely the way in which our legal system has in general operated satisfactorily<sup>63</sup>.

To elucidate the difficulties involved in formulating a disclosure tort, it may be helpful to consider Professor Kalven's views of the American disclosure tort. He argues, in a sceptical and cynical article<sup>64</sup>, that the Warren

57. However, it is still a recognised value.

58. *Infra*, text to notes 83-117.

59. Younger Report, para. 664. Their contention is attacked by Ross in his Minority Report, Younger Report, p.214. See also (1972) 122 *New L.J.*, pp.645-646, 666-667.

60. Younger Report, para. 653. The Committee contend that the questions involved in defamation and breach of confidence cases are less difficult and less controversial.

61. Ross, Younger Report, p.214; (1972) 122 *New L.J.* 645, at p.646.

62. Younger Report, paras, 663 and 665.

63. (1972) 122 *New L.J.* 666, at p.667.

64. Kalven, *supra* n.44.

and Brandeis tort<sup>65</sup> "has no legal profile", and that tort law's effort to protect the right of privacy has been a mistake: "[w]e do not know what constitutes a prima facie case, we do not know on what basis damages are to be measured, we do not know whether the basis of liability is limited to intentional invasion or includes also negligent invasion, and even strict liability"<sup>66</sup>. Since Kalven is only castigating the United States tort, which is set against the background of the constitutional guarantee of speech and press freedom, it may be that his objections are not fatal to the creation of a statutory disclosure tort in Australia<sup>67</sup>.

#### (A) FORMULATION OF THE TORT

It is submitted that to be both workable and fair, any formulation of the disclosure tort must satisfy four criteria. It must elucidate the interest seeking protection; explain the purpose of affording such protection; state clearly what amounts to actionable conduct on the part of the defendant; and take account of the publication that is opposed to the interest seeking protection. There has only been one successful attempt made to enact a statutory disclosure tort, and that is Lord Mancroft's much praised Right of Privacy Bill, 1961<sup>68</sup>. The object of the Bill is to protect persons from unjustifiable publication of their private affairs, and the explanatory memorandum expresses the problem in terms of the need for a balance between the maintenance of personal dignity and the right of the public to information on matters in which the public may reasonably be concerned<sup>69</sup>. To achieve these ends the Bill provides in s.1 that:—

"A person shall have a right of action against any other person who without his consent publishes of or concerning him in any newspaper or by means of any cinematograph exhibition or any television or sound broadcast any words relating to his personal affairs or conduct if such publication is calculated to cause him distress or embarrassment."

"Words", "cinematograph exhibition", "television broadcast" and "newspaper" are defined in s.5<sup>70</sup>.

It is submitted that with minor amendments this formulation fulfils the conditions required for the tort to be both workable and fair. First, since it is expressly limited to publications by the media, it should be extended to cover the disclosure of private facts by anybody. Secondly, to require the plaintiff to prove that he did not consent to the invasion would be casting an unfair advantage on the defendant. It is therefore submitted that the words "without his consent" should be deleted and the burden of proving consent

65. I.e. the disclosure tort.

66. *Op. cit.*, at p.333. These problems were almost completely ignored by Warren and Brandeis.

67. Even if there were no practical difficulties involved in introducing a common law tort of privacy through the courts, the piecemeal and haphazard development of the American tort suggests that it would be undesirable to do so.

68. The Bill is set out at Appendix F of the Younger Report.

69. On its second reading the Bill obtained a large majority of 74 votes to 21, but was later withdrawn. It has been praised by Fleming, *The Law of Torts* (4th ed., 1971), at p.533; Cowen, *op. cit.*, at p.27, Neill, "The protection of Privacy" (1962) 25 *M.L.R.* 393, at p.394.

70. See Younger Report, p.274.



placed on the defendant<sup>71</sup>. Thirdly, the word "calculated" is ambiguous. It is submitted that by analogy with the *Wilkinson v. Downton* tort<sup>72</sup>, "calculated" should be construed as meaning that the publication was likely to cause a reasonable man distress and embarrassment. Ensuring that the publication must be one which is likely to upset a reasonable man will safeguard against the bringing of trivial claims and provide for the attainment of a fair balance between the two competing interests. Admittedly, in some cases, it will be difficult to know where to draw the line, but the courts have worked out what is "reasonable" in other areas of the law, so why should they not here<sup>73</sup>? So construed the formulation avoids using the sensibilities test<sup>74</sup> which, as the United States experience demonstrates, is not really in keeping with the nature of privacy. Fourthly, it is submitted that embarrassment of itself is not a serious threat to an individual's independence and dignity, and, therefore, that the words "distress and embarrassment" should be substituted for "distress or embarrassment".

## (B) THE DEFENCES

The main difficulty in creating a legal right of privacy is to know how far it should extend, and where to draw the line between 'permissible' and 'impermissible' speech. Where, for example, the publication complained of can be justified by reference to the purposes of the freedom of speech and press as information which has "governing importance"<sup>75</sup>, or by reference to the plaintiff's condonation, the right to privacy should be subordinated. Since the success of the tort is likely to depend on the interpretation and practicability of such defences, it is absolutely vital that they be framed in clear and workable terms. Thus, they should be formulated so as to state as clearly as possible the circumstances in which disclosures will be protected; ensure the maintenance of a fair balance between the two competing interests; and be flexible and keep apace with changing conditions.

### 1. Innocent Infringement

Lord Mancroft's Bill provides for a defence of innocent infringement by stating in s.2(a) that it shall be a defence to an action for invasion of privacy if the defendant proves, "that he did not intend to refer to the plaintiff". It is submitted that the formulation should be amended so as to ensure that protection will only be granted if the defendant uses reasonable care<sup>76</sup>.

### 2. Consent

Since Lord Mancroft's Bill places the burden of consent on the plaintiff, no provision is made for the defence of consent. It is submitted that the

71. See *infra*, B(2).

72. [1897] 2 Q.B. 57.

73. This overcomes Kalven's main objection to the tort, that we do not know what constitutes an "unreasonable disclosure": Kalven, *supra* n.44, at pp.333-334. But see the Morison Report, para. 29.

74. That the matter made public must be one which would be offensive and objectionable to a reasonable man of ordinary sensibilities: see *Prosser on Torts* (3rd ed.), p.835.

75. See *supra*, text following n.57.

76. Cf. S3(a) of the Justice Committee's Draft Right of Privacy Bill which states that it is a defence for any defendant to show that, "having exercised all reasonable care, [he] neither knew nor intended that his conduct would constitute an infringement of the right of privacy of any person".

Justice Committee's formulation which provides that it shall be a defence for any defendant to show that "the plaintiff, expressly or by implication, consented to the infringement,"<sup>77</sup> is quite adequate.

Whilst the defence of express consent has caused the United States courts little concern, the defence of implied consent, being closely associated with the public-private distinction<sup>78</sup>, has been the subject of considerable debate and confusion<sup>79</sup>. The American cases do, however, indicate that the defendant may be able to rely on the defence if he can prove that the public did see or hear, or that there was a reasonable likelihood of the public seeing or hearing, the plaintiff's activities<sup>80</sup>. The American experience further indicates that as each case will depend on factors such as whether the place is usually frequented by the public, the number of people about at the time, the status of the plaintiff and the activity he is engaged in<sup>81</sup>, it would be most desirable to formulate the defence in terms similar to those stated by the Justice Committee.

### 3. Privilege

Section 2(b) of Lord Mancroft's Bill states that it shall be a defence if the defendant proves, "that the words were published on an occasion of absolute or qualified privilege". It is submitted that to avoid confusion the defence should be stated to be available in the same circumstances as an action for defamation<sup>82</sup>.

### 4. Public Interest

Since the paramount problem in providing a legal right of privacy is to ensure that the social interest in the free disclosure of information and views on matters essential to the development of an informed, enlightened, open society is adequately safe-guarded, great care must be taken to formulate a satisfactory defence of public interest<sup>83</sup>. To be consistent with the purposes of the freedom of speech and press all publications of "public interest"<sup>84</sup> should be entitled to protection, regardless of whether they invade an individual's privacy. Thus, since "public interest" is likely to be the determining factor in the majority of cases, it is essential that the defence embodies a workable definition of "public interest", one that is both consistent with the purposes of the freedom of speech and press, and conducive to the attainment of a fair balance between the two competing interests. If this cannot be achieved then the practicability and desirability of enacting a statutory disclosure tort may seriously have to be considered.

77. S.3(b). See Justice Report, p.60.

78. The American tort requires that the facts disclosed must be private facts, and not public ones. This is consistent with s.1 of Lord Mancroft's Bill.

79. See e.g. Taylor, "Privacy and the Public" (1971) 34 *M.L.R.* 289, at p.290.

80. Thus a photograph taken with the aid of a telephoto lens of a courting couple in a deserted public park would be beyond the scope of the implied consent. *Cf. Gill v. Hearst Publishing Co.* 40 Cal. 2d 224; 253 P. 2d 441 (1953), where it was held that as the plaintiffs' "kiss" was exchanged in a place open to the public, namely their shop, they had impliedly consented to the taking of the photograph.

81. See e.g. *Gautier v. Pro-Football Inc.* 304 N.Y. 354; 107 N.E. 2d 485 (1952); *Metter v. Los Angeles Examiner* 35 Cal. App. 2d 304; 95 P. 2d 491 (1939).

82. See *Gatley on Libel and Slander* (6th ed., 1967), pp.174-316.

83. See *supra*, text to n.57-9.

84. See *supra*, text to n.57-9.

Lord Mancroft's Bill divides the defence into two limbs. Section 2(c) states that it shall be a good defence if the defendant proves "that at the time of the publication the plaintiff was the subject of reasonable public interest by reason of some office or position then held by him or by reason of some conduct of the plaintiff, and that the words published related solely to matters which, having regard to such office, position or conduct of the plaintiff, were the subject of reasonable public interest or were fair comment thereon."

Section 2(d) states that it shall be a good defence if the defendant proves "that at the time of the publication the plaintiff was the subject of reasonable public interest by reason of some contemporary event directly involving the plaintiff personally, and

- (i) that it was reasonably necessary to disclose the identity of the plaintiff, and
- (ii) that the words published related solely to matters which having regard to the event and the position of the plaintiff were the subject of reasonable public interest, or were fair comment thereon."

So framed, the defence appears to dichotomize between public and private figures, and to recognise that different standards should be applied to each. It therefore accords with the division reached in the United States<sup>85</sup>. Not surprisingly, the main point that emerged from the House of Lords debate is that of the difficulty of deciding what is of "reasonable public interest"<sup>86</sup>. It is submitted that by failing to define the words "reasonable public interest", there is a chance that our courts will interpret it in the same way as the United States courts have done. Consequently the Bill should be amended so as to embody the test of "governing importance" suggested earlier<sup>87</sup>. It is further submitted that since public figures must, by virtue of their position in society, be entitled to less privacy than private individuals, the division between public and private figures should be maintained and that, with minor amendments, the two limbs of the defence adequately state the circumstances in which the defence can be made out.

#### *Comments on Section 2(c)*

So expressed, the formulation will embrace the types of people falling within the United States branch of "public figures"<sup>88</sup>; yet, unlike the American tort<sup>89</sup>, it ensures that the disclosure of the plaintiff's private affairs will only be protected if it is related to the plaintiff's public activity. Bearing in mind the difficulties the United States courts have been confronted with and the unsatisfactory way in which they have handled them, is it possible to determine what matters will be entitled to protection under s.2(c)?

During the House of Lords debate on s.2(c) and (d) it was suggested that the decision of what are matters of legitimate public interest was no more than courts were constantly making in defamation cases, when deciding what is fair comment upon a matter of public interest<sup>90</sup>. It is submitted, however, that

85. See *Prosser on Torts* (3rd ed. 1964), p.884; Brittan, "The Right of Privacy in England and the United States" (1963) 37 *Tul. L.R.* 236, at p.246.

86. Brittan, *op. cit.*, at p.265.

87. *Supra*, text to n.52.

88. See Prosser, "Privacy", *op. cit.*, at p.411. An exhaustive definition of "public figures" has been attempted: Comment, "Extension of the Sullivan Rule to Non-Official Public Figures" (1967) 42 *Wash. L.R.* 654, at p.661.

89. See e.g. *Cason v. Baskin* 155 Fla. 198; 20 So. 2d 243 (1944); 159 Fla. 31; 30 So. 2d 635 (1947), where the biographical sketch of a private citizen's life was denied protection.

the underlying rationale of the fair comment defence, "that a man who appeals to the public must be content to be judged by the public"<sup>91</sup>, is only applicable to the public figure cases, and that wholly different considerations arise in connection with private individuals who, although involved in a matter of public interest, can not fairly be said to have "challenged public attention".

It is therefore submitted that by analogy with the fair comment defence the problems involved in the interpretation and application of s.2(c) will be neither atypical nor insupportable<sup>92</sup>. It is, however, important to note that the classification of matters which "ask" to be judged and commented on, such as political and state matters, the administration of justice, works of art and entertainment<sup>93</sup>, is controlled by the object rather than the actor. Accordingly, it is submitted that s.2(c) should be amended so as to ensure that the object rather than the actor will be the controlling factor; and that the amended formulation should read, ". . . the plaintiff was the subject of a matter of reasonable public interest. . . ."

Even so, bearing in mind that in privacy actions the court's decision is a more naked expression of a value judgement than in defamation actions<sup>94</sup>, great care will need to be taken in the interpretation of s.2(c). Most probably there will be two classes of persons falling within its ambit. Firstly, it will embrace anyone who by his accomplishments, fame or mode of living, has arrived at a position where public attention is focussed upon him as a person<sup>95</sup>. Secondly, it will embrace cases where it is not the status or conduct of the individual, but society's interest in his welfare, which is in issue.

An example is the controversial case of *Commonwealth v. Wiseman*<sup>96</sup> which concerned the filming of the daily routine of the criminally insane inmates of a correctional institution<sup>97</sup>. To restrain the showing of the film commercially<sup>98</sup> the Commonwealth of Massachusetts sought injunctive relief as *parens patriae* on behalf of the affected inmates<sup>99</sup>. Reasoning that the film represented a grievous and indecent intrusion into the private lives of the inmates, the Court held that the showings of the film were to be limited to select audiences with a specialised interest in the rehabilitation of the inmates<sup>100</sup>. In so doing the Court was really invoking the "mores" test fashioned in *Sidis v. F-R.*

90. 299 H.L. Deb. (5th ser.) (1961) 607, at p.622 per Lord Goddard.

91. Gatley, *op. cit.*, at p.344.

92. 299 H.L. Deb. 607, at p.622 per Lord Goddard. See Cowen, *op. cit.*, at p.25.

93. Gatley, *op. cit.*, at pp.338, 339, 342, 344.

94. Brittan, *op. cit.*, at p.265.

95. Such figures are, of course, numerous and include public officers, entertainers and well-known sportsmen.

96. 249 N.E. 2d 610 (Mass. 1969). The case is better known as the "Titicut Follies" case.

97. The film showed an apparently random series of grim scenes, ranging from masturbation, to nudity, to forced nose-feedings.

98. Despite the fact that the film had won first prize at the Mannheim Film Festival as the best documentary film of the year: see Comment, "The 'Titicut Follies' Case: Limiting the Public Interest Privilege" (1970) 1 *Col. L.R.* 359, at p.361.

99. It is interesting to note that no inmate or relative testified at the trial against exhibition of the film. Since the Commonwealth was responsible for the disgraceful conditions it would not be an unreasonable deduction that it was seeking to protect its own interests: Comment, "The 'Titicut Follies' Case", *op. cit.*, at pp.361, n.8, 364.

100. Comment, "The 'Titicut Follies' Case", *op. cit.*, at pp.361-362.

*Publishing Corp.*<sup>101</sup>: when revelations are so intimate as to outrage the community's notions of decency, the privilege afforded to the press is transgressed<sup>102</sup>.

The case has been severely criticised for failing to take account of a more important interest, namely the education of society so that archaic and dehumanising conditions which persist because of public ignorance and apathy will be eradicated<sup>103</sup>. This aspect of the case was, however, accorded little attention by the Court, though had it directed itself in accordance with the "governing importance" of the film instead of its offensiveness or indecency, it is submitted that it would at least have approached the case in a way more consistent with the purposes of the freedom of speech and press. This is not to say that the case would have been decided differently, or more easily, for the nature of the intrusion was such as to require that any justification be convincingly made out; but the Court would have been able to take into account more easily factors relevant to the case (including the conflicting rôles of the Commonwealth as *parens patriae* and neglectful authority) which emphasis on the "mores" test tended to obscure. The case therefore highlights the importance of framing a test of "public interest" which is not controlled by considerations of taste and decency<sup>104</sup>.

*Comments on Section 2(d)*

Section 2(d) purports to embrace those individuals who can in no sense be called public figures, and is therefore of much wider import than s.2(c). As mentioned above, the fair comment defence invoked by the courts in defamation cases is wholly unsuited to private individuals, and therefore clear and workable criteria will need to be established to guide the courts<sup>105</sup>.

Since the purpose of enacting a defence of public interest is to preserve the freedom of speech and press in the interests of an informed society, it would seem logical to construe matters of "public interest" as meaning matters of "governing importance". To be consistent with Meikeljohn's analysis, such matters should be interpreted as matters which can fairly be said to concern the public, as distinct from matters which interest the public, or matters which involve the promotion of the good of the common weal. To adopt the "newsworthiness" test would be tantamount to destroying the right of privacy<sup>106</sup>, whilst the "public benefit" test would involve the courts in determining the objects of society in some detail, together with the means by which these objects are to be obtained<sup>107</sup>. Will it then be possible for the courts to maintain a middle position without drifting too far towards either the "newsworthiness" or the "public benefit" boundary, or even the "mores" test boundary?

101. 113 F. 2d 806 (2nd Cir. 1940).

102. *Id.* at p.809. Cf. *Melvin v. Reid* 112 Cal. App. 285; 297 Pac. 91 (1931).

103. Comment, "The 'Titicut Follies' Case", *op. cit.*, at pp.364-365, 369, 371.

104. Such considerations may, however, make the intrusion more or less serious and have a considerable bearing on what precisely it is that the public interest justifies disclosing.

105. *Supra*, text to n.48-52.

106. See Taylor, *op. cit.*, at p.297; Pedrick, "Publicity and Privacy: Is it Any of Our Business?" (1970) 20 *U.Tor.L.J.* 391, at p.402.

107. Taylor, *op. cit.*, at p.299. The public benefit requirement that is present in the defamation codes of some of the Australian States has been criticised for this very reason: see e.g. Law Reform Committee (N.S.W.), *Working Paper on Defamation*, s.174 (1968).

It is submitted that provided it is appreciated that matters of governing importance are not limited to the strictly political, but are extended to cover any matters which serve some identifiable or definable public purpose<sup>108</sup>, the desired balance can be attained; and, furthermore, that as long as the required interest is present it should make no difference whether the protected publication concerns news, education, information or entertainment<sup>109</sup>.

To ensure that the public interest defence will be interpreted in this way it is submitted that the words, "the subject of reasonable public interest" should be substituted by the words, "the subject of a matter of reasonable public concern", otherwise there is every chance that the courts will drift towards the "news-worthiness" boundary. It is further submitted that with this slight amendment Lord Mancroft's formulation overcomes many of the failings of the United States tort.

For instance, the presence of the word "contemporary" prevents any raking up of an individual's past life, as happened in the famous cases of *Melvin v. Reid*<sup>110</sup> and *Sidis v. F-R Publishing Corp.*<sup>111</sup> Also, since the defence states that it must be "reasonably necessary to disclose the identity of the plaintiff", it recognises that, contrary to the American indication, it is possible to separate the actor and the event. Furthermore, the requirement that the event must involve the plaintiff personally attacks such practices as the harrowing of the bereaved, and is therefore a welcome addition.

To assess the practicability of the defence of public interest it may be helpful to consider some hypothetical examples.

(a) A politician overturns his car, thereby killing his passenger. A full feature story is published, revealing not only the details of the accident but certain aspects of the politician's private life<sup>112</sup>. There may be a number of issues on which continuing press coverage may be justified: for example, the safety of the road where the tragedy occurred, and the fitness of the politician for his present (or higher) office. Hence the disclosure of his private affairs may serve some public purpose, and, though deeply distressing to both him and the families concerned, be proper subjects of newspaper reporting.

(b) Would the above situation be any different if a private citizen were involved? Since it may be the sole practical way of informing those who knew the deceased, the public would seem to have a legitimate interest in the disclosure of his name and address<sup>113</sup>, but not, however, in the disclosure of his private affairs.

(c) It has been argued<sup>114</sup> that if the public have a legitimate interest in the fact of someone's death, and by obvious extension his life, it is possible to deduce that they have a legitimate interest in such disclosures as the identity

108. Pedrick, *op. cit.*, at p.405.

109. *Cf.* Harlan J., announcing the judgement of the Court in *Curtis Publishing Co. v. Butts* 388 U.S. 130, at p.147 (1967).

110. *Supra*, n.102.

111. *Supra*, n.101.

112. *Cf.* the death of Miss Mary Jo Kopechne, while riding with Senator Edward Kennedy in Chappaquiddick, U.S.A. on 18th July, 1969. See *Time*, 11th May, p.30.

113. In any case, such a disclosure would not be "calculated to cause distress and embarrassment", see *supra*, text to n. 72-5.

114. Taylor, *op. cit.*, at p.300.

of a twelve year old mother<sup>115</sup> and the identity and present mode of living of a former child prodigy<sup>116</sup>, or a reformed prostitute<sup>117</sup>. It is, however, submitted that the identity of such persons is not a matter of legitimate public concern, and that the same educational benefit can be conveyed without the use of the name.

There are bound to be cases which are not as clear cut as these and which call into play a very delicate balancing process between the two competing interests. Nonetheless, it is submitted that our courts are capable of assessing what are matters of reasonable public concern, and provided they stress in each case that the disclosure must serve some public purpose the attainment of a state of equilibrium should not be impossible.

### (C) REMEDIES

To be a complete disclosure tort, provision must also be made to compensate a successful plaintiff for the wrong he has suffered. It is submitted that since damages is the basic remedy in most tort actions, a formulation similar to that stated in the Justice Draft Right of Privacy Bill should be adopted. Section 4(2) of the Bill states that, "[i]n awarding damages the court shall have regard to all the circumstances of the case, including

- (a) the effect on the health, welfare, social, business or financial position of the plaintiff or his family;
- (b) any distress, annoyance or embarrassment suffered by the plaintiff or his family; and
- (c) the conduct of the plaintiff and the defendant both before and after the infringement, including any apology or offer of amends made by the defendant to mitigate the consequences of the infringement for the plaintiff"<sup>118</sup>.

It is also submitted that by analogy with the law of defamation, in those circumstances where an invasion of privacy is threatened by the disclosure of certain facts, an injunction should be available to the plaintiff provided first, that the court is convinced that the disclosure would result in an invasion of privacy, and secondly, that the defendant does not intend to justify disclosure by reference to the defence of public interest<sup>119</sup>.

### 3. Alternative Means of Protecting Privacy

Since, however, both the majority of the Younger Committee and the Morison Committee concluded that the desired balance between the two competing interests could not be obtained by the creation of a general right of privacy, however formulated, it is necessary to consider the attractiveness of the solutions they proffer in its place. The Younger Committee thought it better to let the "intruders" provide the appropriate balance, and accordingly looked to disciplinary measures within the press and broadcasting media to

115. E.g. *Meetze v. Associated Press* 230 S.C. 330; 95 S.E. 2d 606 (1956).

116. E.g. *Sidis v. F.-R. Publishing Corp.*, *supra* n.101.

117. E.g. *Melvin v. Reid*, *supra*, n.102.

118. *Justice Report*, pp.60-61. Cf. Lord Mancroft's Bill, s.4

119. However, the pleading must be genuine. It is submitted that the approach taken in the defamation cases should be adopted: see generally, Hayes, "Injunctions Before Judgement in Cases of Defamation" (1971) 45 *A.L.J.* 125, 181.

foster the right sense of responsibility<sup>120</sup>. In allowing themselves to be overwhelmed by the powerful and weighty evidence presented by the press, the Younger Committee simply chose to ignore the probability that the press might have exaggerated the dangers of muzzling their interests<sup>121</sup>. The press urged that the existing machinery of the English Press Council was the most appropriate body to deal with invasions of privacy<sup>122</sup>.

The Press Council consists of 25 members, 20 representatives from the profession of journalism and 5 from the general public<sup>123</sup>, and is charged with the responsibility of reviewing, *inter alia*, complaints of invasion of privacy and of establishing a body of principles which mark the bounds of acceptable journalistic practice<sup>124</sup>. Despite opposition from certain sections of the press<sup>125</sup>, the Council is said to have gained great respect and to have vastly improved the standard of journalism in England<sup>126</sup>. When dealing with complaints of invasion of privacy, the Council considers such questions as whether the information sought was a matter of legitimate and proper public interest; whether the conduct and methods employed by the reporter in obtaining it were legitimate and fair; whether the inquiries were made by newspaper representatives acting individually or collectively and so on<sup>127</sup>. If the Council considers that there has been an invasion of privacy, the offending newspaper is morally bound to publish a statement of the case against it and the Council's ruling<sup>128</sup>. The imposition of sanctions is considered both unnecessary and undesirable<sup>129</sup>.

After investigating the constitution and functioning of the Council, the Younger Committee recommended that to command public confidence in its ability to take account of the reactions of the public, one half of the Council's representation should be drawn from outside the press<sup>130</sup>; and, further-

120. Younger Report, paras. 187-189.

121. The Younger Committee's recommendations are very surprising in that more complaints were received on activities of the press than on any other subject. More specifically, complaints were received of harassment by press reporters, intrusion into schools effecting discipline, intrusion on patients of hospitals and the medical profession, unnecessary identification of persons involved in accidents, organ transplants and proceedings for criminal offences, and publication of the details of a will. See Younger Report, chap. 7.

122. Younger Report, para. 125.

123. The Council is presently under the Chairmanship of Lord Pearce. See Levy, *The Press Council: History, Procedure and Cases* (Macmillan, 1967), pp.19-24, 462-464.

124. See Levy, *loc. cit.*, generally, and particularly at pp.19-22.

125. Faced with the threat of Government intervention the Council was formed voluntarily by the press.

126. See Levy, *op. cit.*, at pp.466-467; Shawcross, "Press Freedom and Private Rights", *Eleventh Commonwealth Press Conference* (1970), p.39.

127. Levy, *op. cit.*, at p.245. Complaints upheld by the Council include the publication of the name and address of a victim of rape, and the publication of the memoirs of Miss Christine Keeler. See Levy, at p.94, and the Younger Report, para. 146. Complaints rejected by the Council include the publication of a photograph of Mrs. Kennedy mourning at the President's graveside three days after his burial, and the publication of the names of donors and recipients, and of their immediate relatives, in organ transplant cases, particularly in the heart transplant cases of 1969 and 1970. See Levy, at p.251, and the Younger Report, para. 165.

128. Levy, *op. cit.*, at pp.30-32. The complainant is required first to put his complaint to the editor of the newspaper complained about.

129. *Id.* at pp.30-32, 465-466.

130. The Press Council publicly refused to comply with the Younger Committee's suggestion. See Howard, "The Press, Privacy and the Law", *New Statesman* 8th June, 1973 p.831.



more, that the newspaper at fault should publish an adjudication with similar prominence to the original matter complained of, and that the Council should codify its adjudications on privacy<sup>131</sup>. Although the Council is reputed to be "respected, feared and obeyed"<sup>132</sup>, it has by no means fully redressed the wrong and because of its nature is, it is submitted, incapable of doing so. Even were the Younger Committee's proposals for a reformed Press Council to be implemented, the protection afforded to individuals would still be inadequate. There are three main reasons for this.

Firstly, any such Council is unlikely to handle complaints with objectivity<sup>133</sup>. In seeking to protect what they see to be their best interests, journalists are very reluctant to censure the press and, thereby, to admit that offences against human dignity have been committed. This is hardly conducive to the attainment of a fair balance between the two competing interests. Secondly, since the Council has "no teeth" it can easily be defied, for a reprimand, however severe, is a weak substitute for a penalty that can punish and deter<sup>134</sup>. Thirdly, publishing an apology merely draws further attention to the invasion of privacy and, as such, is inadequate compensation for the damage suffered by the complainant. Lyon succinctly puts his objection to the Press Council by stating, ". . . that in those cases where an individual can be seriously damaged by a wrong judgment of the intruder, he ought to have the right to ask society at large to adjudicate. The only acceptable instrument we have devised is the law"<sup>135</sup>.

The Younger Committee dealt with the broadcasting media along similar lines to the press and recommended that complaints about invasions of privacy should be dealt with by strengthening the complaints arrangements of the British Broadcasting Corporation and the Independent Television Authority<sup>136</sup>. For reasons similar to those outlined in respect of the Press Council, it is submitted that any self-disciplinary measures in this area are incapable of affording individuals adequate protection<sup>137</sup>. In Australia the Morison Committee have recommended that any desired extension of the functions of the Australian Broadcasting Control Board, with its machinery for handling complaints and its provision for inquiries into law reform in the area, could be achieved by ministerial regulation and by the creation of a specific offence concerning intrusions of privacy along the lines of those already existing under the Commonwealth Broadcasting and Television Act dealing with offensive matter<sup>138</sup>. They also suggest that there should be liaison between the Board and any privacy committee set up<sup>139</sup>, and that this committee might request its

131. Younger Report, paras. 189-193.

132. *Id.* para. 147.

133. Ross, Younger Report, p.214.

134. See Levy, *op. cit.*, at pp.30-32, 465-466.

135. Lyon, Younger Report, p.209.

136. Younger Report, paras. 234-249.

137. See *supra*, text to notes 133-5.

138. Morison Report, paras. 120-121.

139. The Morison Committee proposes the formation of privacy committees working in Canberra and in the different States with their own authority independent from their own governments but working in co-operation for the co-ordination of policy and for the sake of division of labour in the tasks to be carried out. They recommend that each privacy committee should consist of a combination of governmental (including the Ombudsman or his delegate), business, legal and other representatives supported by a staff with legal expertise (to assist in law reform functions), and other administrative officers. See Morison Report, pp.10-12.

appointment as an advisory committee of the Board and seek delegation of functions in a particular area when desirable<sup>140</sup>.

The Morison Committee have further recommended that complaints about unwanted publicity by the press should be dealt with as part of the functions of a public media sub-committee of the privacy committee<sup>141</sup>. It is proposed that this sub-committee should consist of representatives of press and other publicity media as well as governmental and general community representation, sitting under the chairmanship of the chairman of the privacy committee; and, furthermore, that its functions should be the same as those of other sub-committees ranging from recommending reforms in the law to investigating individual complaints, and in the latter case recommending appropriate action to the privacy committee itself<sup>142</sup>.

It is submitted that there is no good reason why the subject of privacy should not be dealt with in the same way as other aspects of the law, that is through law-making by Parliament coupled with law enforcement through the courts. It is also submitted that investing a privacy body with both the power to investigate and to remedy abuses is fraught with danger, and furthermore that any body which is able to act as both "Prosecutor" and "Judge" in the same case should be provided with appropriate safeguards, including legal safeguards.

Since both the Younger and Morison Committees were concerned to find the means of protecting privacy most consonant with the attainment of a fair balance between the two competing interests, it is surprising that they found their proposals so much more attractive than legal intervention. With great respect, it is submitted that their recommendations show a fundamental disregard of the nature and importance of privacy and the pressing need to furnish it with legal protection. Admittedly, had the two Committees not been set such a difficult and demanding task, namely that of assessing the desirability of enacting legislation to protect privacy in all its various aspects, greater attention could have been given to the practicability of enacting a disclosure tort. Even so, it is unfortunate that two such learned Committees should have devoted so much time to the powerful and weighty evidence given by the press and broadcasting media which, quite understandably, grossly exaggerated the dangers a legal right of privacy would create.

### Conclusion

The purpose of this article has been to elucidate the desirability of affording individuals legal protection against the public disclosure of their private affairs, and to analyse the possibility of attaining a fair balance between that interest and the legitimate limits of the freedom of speech and press. Since both the Younger and Morison Committees rejected the creation of a legal right of privacy, however framed, great care had to be taken to articulate the nature and importance of the two competing interests, and to assess whether our legal system is capable of accommodating the right of privacy without imposing restrictions upon the freedom of speech and press, far out-balancing the alleged evils which any such right intends to cure.

140. Morison Report, para. 122.

141. *Id.* para. 119. The Morison Committee did, however, stipulate that the press should be afforded the opportunity to make representations in this area.

142. Within the limits of what the Younger Committee call "moral authority".

It was seen that privacy is a truly profound value deserving of legal recognition, as borne out by the finding of the survey of public attitudes commissioned by the Younger Committee that privacy ranked as the *most* important of a number of civil rights issues. It was further seen that the legitimate limits of the freedom of speech and press do not encompass the unjustified revelation of an individual's private affairs, and that depending on the practicability of enacting a satisfactory enclosure tort, legal intervention was amply justified.

The lesson to be learnt from the American disclosure tort was that any such statute must be framed so as to provide for a fair and workable balance between the two competing interests. It was submitted that a statute similar to Lord Mancroft's much praised Right of Privacy Bill, containing a workable defence of public interest, dichotomizing between public and private figures, would serve a dual purpose. By securing a tenable division between "permissible" and "impermissible" speech, it would not only protect the individual's right of privacy, but also raise the present standard of media reporting.

Since, however, both the Younger and Morison Committees concluded that the desired balance could best be obtained by other means, it was necessary to examine their proposals in some detail. The analysis revealed that their recommendations were unjustifiably weighted in favour of the freedom of speech and press, and that undue emphasis had been attached to the powerful evidence of the press and broadcasting media. The analysis further revealed that since privacy embraces a number of different areas, many of them involving wholly different considerations, a complete division of treatment is amply warranted, and that the creation of a blanket right of privacy would introduce uncertainty and confusion into the law.

As concluded by Cowen in his lectures, "The Private Man", "we cannot assume that privacy will survive simply because man has a psychological or social need for it". The creation of a statute similar to that envisaged by Lord Mancroft would, by securing the maintenance of a state of equilibrium between that need and the freedom of speech and press, do much towards ensuring the survival of privacy in our community.