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**KEYNOTE ADDRESS, INDIAN NATIONAL BAR ASSOCIATION ANNUAL
CONFERENCE: 68TH CONSTITUTION DAY, NEW DELHI, INDIA**

**“A COMPARATIVE PERSPECTIVE ON PRIVACY LAW: THE AUSTRALIAN
EXPERIENCE”**

SATURDAY 25TH NOVEMBER, 2017*

INTRODUCTION

1. Good morning to you all, and once again, welcome to the Indian National Bar Association Annual Conference. I was so pleased to be asked to deliver an address at this Conference, in celebration of the 68th Constitution Day. I thank the organisers for the kind invitation to what I am sure will be an engaging and informative day.
2. In this address I intend to focus on the theme of this Conference, celebrating the 68th Constitution Day, and in particular on the role of constitutional law in the realm of Privacy Law, as I know the Supreme Court of India has recently delivered a landmark judgment, declaring that the right to privacy is constitutionally guaranteed by Article 21. Now, I don't intend to speak in any depth about this case, as I am obviously ill-qualified to comment on Indian law, and the next technical session will offer the opinions of eminent legal thinkers from this country on “Decoding the Supreme Court Judgment” and other privacy issues.
3. Instead, I propose to offer a comparative perspective on the topic of privacy, by briefly exploring the way in which the right to privacy has been dealt with in Australian law. I will firstly offer my perspective on the right to privacy, the values it serves and the challenges of protecting it in the modern world. I will then

* I express thanks to my Judicial Clerk, Ms Naomi Wootton, for her assistance in the preparation of this address.

consider the different ways the issue can be legally protected – including constitutionally, legislatively and by the common law, and hopefully offer you a perspective that will be of some interest as India faces similar legal challenges.

INDIA AND AUSTRALIA: COMPARATIVE PERSPECTIVES

4. Firstly, however, you are perhaps wondering, why an Australian judge is proposing to address an Indian conference of Indian lawyers on Australian law – you are obviously, and quite rightly, attending this conference to learn more about Indian legal principles. So, at the outset, I want to outline the importance, in my view, of the ongoing study by Australian and Indian legal professionals of each other's laws, traditions, and perspectives as we look to the development of our respective laws.
5. In 1996, the Honourable Justice Michael Kirby, a former justice of the High Court of Australia, and President of the Court of Appeal of New South Wales, the Court on which I sit, addressed the Indo-Australian Public Policy Conference. His Honour commented that the neglect by Indian and Australian lawyers of each other was “as tragic as it is puzzling”.¹
6. The fact is, while there are obvious differences between India and Australia – socio-economic, cultural and historical – there is a convergence of common interests in areas such as education, regional security, energy and resources and international trade.² In addition to this, we are both common law countries, federations, we live by the rule of law, we are governed democratically, we have parliamentary constitutions, and in our different ways, we protect fundamental human rights and basic freedoms.³
7. In growing recognition of these similarities, over the 21 years since His Honour's remarks, many things have changed for the better in Indian-Australian legal

¹ Michael Kirby, 'India and Australia: A Neglected Legal Relationship and a Plan of Action' (Indo Australian Public Policy Conference, New Delhi, India, 23-24 October 1996).

² Shaun Star, 'Introduction' in Shaun Star (ed), *Australia and India: A Comparative Overview of the Law and Legal Practice* (Universal Law Publishing, 2016) ix.

³ Kirby, above n 1.

dialogue. In the judicial sphere, Justices of the High Court of Australia and the Supreme Court of India have met every few years over the last decade in either Delhi or Canberra, to discuss legal topics of interest to both Courts.⁴ At the annual LAWASIA Conference, which I have attended five times during my time at the Court, lawyers from India, Australia and other countries in the region come together to discuss topics of mutual interest.

8. Perhaps most significantly, in 2016, a book was published offering a comparative overview of the law and legal practice in Australia and India, with each chapter co-authored by eminent legal scholars from both countries. It canvasses areas as diverse as capital markets and securities, litigation and civil procedure, environmental law and public health law.⁵
9. So, it is in the spirit of this growing mutual understanding that I propose to address you this morning on regulation of privacy law in Australia. Now privacy can be divided into different categories – informational, communicative – and the more traditional forms – bodily and territorial.⁶ It is the former of these – privacy as to personal information and communications, which I will be focusing on this morning.

⁴ See Robert French, 'Foreword' in Shaun Star (ed), *Australia and India: A Comparative Overview of the Law and Legal Practice* (Universal Law Publishing, 2016) v.

⁵ Shaun Star (ed), *Australia and India: A Comparative Overview of the Law and Legal Practice* (Universal Law Publishing, 2016).

⁶ David Benisar and Simon Davies, 'Global Trends in Privacy Protection: An International Survey of Privacy, Data Protection, and Surveillance Laws and Developments' (1999) 18(1) *Journal of Computer and Information Law* 1, 6.

DEFINING PRIVACY

10. Firstly, what is the right to privacy? As early as 1890 it was famously described by Warren and Brandeis, citing Judge Cooley, as the “right to be let alone”.⁷ With astounding perspicacity, they commented on the effects of modern technology, lamenting that “instantaneous photographs and newspaper enterprise have invaded the sacred precincts of private and domestic life”.⁸ I wonder if they could have imagined the extent to which subsequent generations would use Facebook and “Insta-stories” to broadcast their every meal, sometimes every move, to hundreds or thousands of “virtual” followers. As we have all seen, in the one hundred and twenty-seven years since that article was published, new technologies have challenged our conception of personal privacy in ways they could not have imagined.
11. Organisations now have the ability not only to collect, store and use personal information but to track the physical location of individuals, keep their activities under surveillance, use information they post on social media, intercept emails and text messages, and to aggregate data from a wide variety of sources that ultimately paints a complete picture of one’s life.⁹
12. Naturally, our individual understandings of privacy and the legitimacy of these practices, differs according to our values and cultural backgrounds. This may mean that the rationales for privacy protection, or its legal manifestation, differ across different countries. At a high level of generality, however, both India and Australia are parties to the Universal Declaration of Human Rights,¹⁰ and the

⁷ Samuel D Warran and Louis D Brandeis, ‘The Right to Privacy’ (1890) 4 Harvard Law Review 193, 195.

⁸ Ibid.

⁹ Australian Law Reform Commission, *Serious Invasions of Privacy in the Digital Era*, Report 123 (2014) 21.

¹⁰ Universal Declaration of Human Rights, GA Res 217A (III), UN GAOR, 3rd sess, 183rd plen mtg, UN Doc A/810 (10 December 1948), art 12.

ICCPR,¹¹ which recognise that no-one should be subjected to arbitrary interferences with their privacy, and that everyone has the right to protection of the law against such interferences.

13. In terms of its accepted rationale in Australia, the Australian Law Reform Commission has stated that privacy is fundamental to “human dignity”, and is a necessary component of freedom of association, movement and expression.¹² We see a similar understanding in the Supreme Court of India’s recent judgment,¹³ in which the plurality reasons, delivered by Justice Chandrachud, declared that privacy of the individual is “an essential aspect of human dignity”, human dignity in turn being a “constitutionally protected interest” that the Court considered “inseparably intertwined” with the concept of human freedom.¹⁴

14. Indeed, our ability to control information about ourselves and “maintain a zone that is free from scrutiny by others” enhances freedom by allowing individuals to protect themselves from retribution for their personal behaviours and beliefs.¹⁵ The protection of privacy “operates against ... abuse[s] of power in an era where information is integral to the effective exercise of power”.¹⁶

15. In terms of its relationship with freedom of expression, Professor Eric Barendt has observed that privacy is essential to freedom of speech – giving individuals the space within which to develop their identity, “free from observation and interference by Big Brother, or even by a liberal democratic state essential to

¹¹ International Covenant on Civil and Political Rights, opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976), art 2(3).

¹² Australian Law Reform Commission, *Serious Invasions of Privacy in the Digital Era*, above n 9, 30.

¹³ *Puttuswamy v Union of India* (Writ Petition (Civil) No 494 of 2012).

¹⁴ *Ibid* 243.

¹⁵ Moira Paterson, *Freedom of Information and Privacy in Australia* (LexisNexis Butterworths, 2nd ed, 2015) 24.

¹⁶ *Ibid* 23-4.

enable us to read, contemplate and formulate thoughts”.¹⁷ In one sense we can see that privacy is a necessary aspect of maintaining freedom of speech, and by extension, democracies.

16. By the same token, the legitimate expectation we all have of a right to privacy is not absolute. There are matters of public interest that necessarily come into play – including freedom of speech itself. As you may know, the Australian *Constitution* does not contain enumerated rights as found in Part III of the Indian Constitution, and there is no explicit guarantee of freedom of speech. The High Court has, however, held that there is an “implied freedom of political communication” which operates to invalidate laws that impose a disproportionate burden on discussion about political matters.¹⁸ This might perhaps mean that public officials do not enjoy privacy in circumstances where the operation of constitutional government requires disclosure.¹⁹

17. The Supreme Court of India, which I understand is currently dealing with a case concerning the Aadhar card scheme, is faced with a similar issue of balancing the right to privacy with other legitimate government goals. From my limited understanding, the goals of the Aadhar programme include streamlining social welfare programs and reducing the incidence of these funds being lost to corruption. As Justice Chandrachud noted in the August judgment, the constitutional right it is not absolute, and may have to accommodate such legitimate state aims – but those aims must be achieved in a manner which is lawful and proportionate.²⁰

18. While modern technology can significantly improve efficiencies in the conduct of government and business, it also represents one of modern society’s “weakest

¹⁷ Eric Barendt, ‘Privacy and Freedom of Speech’ in Andrew T Kenyon and Megan Richardson (eds), *New Dimensions in Privacy Law: International and Comparative Perspectives* (Cambridge University Press, 2006) 11, 30-31.

¹⁸ *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520.

¹⁹ Dan Meagher, ‘Freedom of Political Communication, Public Officials and the Emerging Right to Personal Privacy in Australia’ (2008) 29 *Adelaide Law Review* 175, 178.

²⁰ *Puttuswamy v Union of India* (Writ Petition (Civil) No 494 of 2012), 264.

links” in privacy protection.²¹ Data breaches such as the infamous “Ashley Madison” website hack, can make public the intimate details of individual’s lives, with potentially devastating consequences. These are challenges that also face government – an Australian government department has recently faced scrutiny by the Information Commissioner for an accidental breach of the private details of over 9000 asylum seekers.²² No doubt these concerns face Indian government departments also – although the sheer volume of citizens, and therefore data, makes it even more challenging in this country. I believe the issues of data and cyber security will be discussed in the next session this morning.

19. Finally, there is also the competing public interest in national security, which has been of particular government concern over the last decade due to the threat of terrorism. In Australia, legislation came into effect earlier this year, amidst some public concern, giving effect to a national metadata retention scheme.²³ The scheme requires carriage service providers to retain information, commonly known as metadata, about all the communications carried by them – though not the actual content of those communications.²⁴

20. This data is obviously extremely important for law enforcement in the digital age – French law enforcement, for example, utilised metadata to locate the apartment occupied by perpetrators of the 2015 Paris attacks.²⁵ Australian research has shown a general public willingness to forgo personal privacy for the sake of

²¹ Ahrani Ranjitkumar and Andrew Moore, ‘Do you have a right to privacy?’ (2017) 14(2) *Privacy Law Bulletin* 22.

²² See generally Emma Gorrie, Kaelah Ford and Tracy Lu, ‘Big Brother is definitely watching you, but who is watching Big Brother?’ (2017) 14(2) *Privacy Law Bulletin* 33.

²³ *Telecommunications (Interpretation and Access) Amendment (Data Retention) Act 2015* (Cth).

²⁴ See *Telecommunications (Interpretation and Access) Act 1979* (Cth) s 172.

²⁵ ‘The terrorist in the data’ *The Economist* (online) (26 November 2015) <<https://www.economist.com/news/briefing/21679266-how-balance-security-privacy-after-paris-attacks-terrorist-data>>.

national security.²⁶ Nevertheless, it is clear at least from the European jurisprudence on data retention laws in the *Digital Rights Ireland*²⁷ and *Tele-2*²⁸ decisions, that a legitimate state aim of combatting serious crime does not necessarily validate “general and indiscriminate retention”.²⁹ The difficult balance between the competing interests is the task that faces courts in jurisdictions where privacy is constitutionally protected, when even defining privacy is no easy feat.

21. However, this does not mean the task should be avoided – this would be to “succumb to what Lord Reid once described as “the perennial fallacy that because something cannot be cut and dried or lightly weighed or measured therefore it does not exist”.³⁰ But the question remains – how is to be legally protected – constitutionally, legislatively, by the common law, or by some mixture of them all? It is at this point I will turn to the manner in which privacy rights are currently protected in Australia.

CONSTITUTIONAL RIGHT

22. In terms of constitutionally, as I have mentioned, the Australian constitution does not contain any enumerated fundamental rights like Part III, and the right to privacy is therefore not entrenched, as in India. However, Australia’s participation in international forums recognising the right to privacy has spurred on legislative action to protect this right. The preamble to the Commonwealth Privacy Act,

²⁶ Australian Law Reform Commission, *For Your Information: Australian Privacy Law and Practice*, Report 108, 108.

²⁷ *Digital Rights Ireland v Minister for Communications, Marine and Natural Resources* [2015] QB 127 (ECJ).

²⁸ *Tele2 Sverige AB v Post- och telestyrelsen* [2017] QB 771 (ECJ).

²⁹ *Ibid* [103].

³⁰ New South Wales Law Reform Commission, *Invasion of Privacy*, Report 120 (2009) 18, quoting *Ridge v Baldwin* [1964] AC 40, 64-65 (Reid LJ).

which was introduced in 1988, specifically recognises that Australia is a party to the ICCPR and has thereby undertaken to give effect to the right to privacy.³¹

23. Similarly, one Australian State and one Territory, Victoria and the Australian Capital Territory, have enacted human rights legislation that operate within those jurisdictions. The Victorian Charter, in Article 13, in terms that reflect Article 17 of the UCCPR,³² protects people from unlawful interferences with their privacy. The Charter requires public authorities to consider human rights when enacting legislation, delivering services and making decisions.

24. The essential purpose of the Charter is however “to get things right at the planning and policy stages”³³ – it does not create a new right to bring legal action for a breach of human rights.³⁴ However, it does allow a person to raise a human rights argument along with existing remedies or legal proceedings.³⁵

LEGISLATION

25. The *Privacy Act 1988* (Cth), is however, Australia's key information privacy law. It is in the form of “principles-based regulation”.³⁶ What this means is rather than traditional detailed and prescriptive regulation, it uses “high level, broadly stated rules or principles”.³⁷ To this end, the Act contains 13 Australian Privacy Principles – known as the APP's – which regulate the collection, use, disclosure and handling of personal information.³⁸ The third APP, for example, provides that

³¹ See *Privacy Act 1988* (Cth).

³² *Jurecek v Director, Transport Safety Victoria* [2016] VSC 285, [65] (Bell J).

³³ Victorian Government Solicitor's Office, 'How Does the Charter Work?' <<http://humanrights.vgso.vic.gov.au/about-charter/how-does-charter-work>>.

³⁴ *Charter of Human Rights and Responsibilities 2006* (Vic) s 39(3).

³⁵ *Ibid* s 39(1).

³⁶ Australian Law Reform Commission, *For Your Information*, above n 26, 243.

³⁷ Julia Black, *Principles Based Regulation: Risks, Challenges and Opportunities* (2007) London School of Economics and Political Science, 3

³⁸ *Privacy Act 1988* (Cth) sch 1.

an agency should not collect personal information unless it is reasonably necessary for, or directly related to, one of its functions or activities.³⁹

26. The purpose is to shift the regulatory focus from the processes or actions that must be taken, to the outcomes that are sought – allowing management the freedom to find the most efficient way of achieving the required outcome. It also addresses the nebulous nature of regulating privacy, by providing greater flexibility, and "future-proofs" legislation to meet the challenges of new technology.⁴⁰

27. There are several complaint pathways under the Act for individuals where these privacy principles have been breached – including complaints to the Australian Information Commissioner, which can result in an investigation.⁴¹ It requires, however, that the individual has first complained to the relevant agency – giving organisations an opportunity to satisfactorily deal with complaints outside a formal process.⁴² The Commissioner has the power to make a declaration about the conduct, including that they take steps to ensure the conduct is not continued or provide compensation for damage suffered by the individual.⁴³

28. Earlier this year, an amendment to the Act was passed, establishing a Notifiable Data Breaches scheme,⁴⁴ which requires APP entities to notify individuals likely to be at a risk of serious harm by a data breach – this might occur, for example, when a device containing customers' personal information is lost or stolen or a

³⁹ Ibid sch 1, pt 2, 3.1.

⁴⁰ Australian Law Reform Commission, *For Your Information*, above n 26, 235-236.

⁴¹ Ibid s 36.

⁴² Ibid s 40(1A).

⁴³ Ibid s 52.

⁴⁴ *Privacy Amendment (Notifiable Data Breaches) Act 2017* (Cth).

database containing personal information is hacked.⁴⁵ The scheme is due to commence in February 2018.

29. There are also various pieces of state and territory legislation, which apply to state and territory government agencies, in terms similar to the *Privacy Act*, and other state laws restricting surveillance through the use of listening, optical, data and tracking surveillance devices.⁴⁶ The Australian States and Territories each have general jurisdiction over criminal law, and this has too been deployed to protect privacy. In some jurisdictions, for example, there exist offences relating to photography being used for indecent purposes, or indecent filming without consent.⁴⁷

30. Finally, just earlier this year, new criminal sanctions were introduced in New South Wales, to combat the issue of unauthorised sharing of images, which provides for up to three years imprisonment for offence of distributing an intimate image of a person without consent.⁴⁸

31. As you may now be gathering, the legislative regime in Australia is a complex mix of laws, constantly adapting to meet present public concerns about privacy. It has also required the action of not only the federal parliament, but that of the states and territories, given their particular areas of jurisdictional competence. The nature of a federated country poses its own challenges for national coherence in an area of the law that defies territorial boundaries.

⁴⁵ See generally Office of the Australian Information Commissioner, 'Notifiable Data Breaches' <<https://www.oaic.gov.au/engage-with-us/consultations/notifiable-data-breaches/>>.

⁴⁶ See, eg, *Surveillance Devices Act 2007* (NSW); *Invasion of Privacy Act 1971* (Qld); *Listening and Surveillance Devices Act 1972* (SA); *Listening Devices Act 1991* (Tas); *Surveillance Devices Act 1999* (Vic); *Surveillance Devices Act 1998* (WA); *Listening Devices Act 1992* (ACT); *Surveillance Devices Act* (NT). See generally Australian Law Reform Commission, *Serious Invasions of Privacy in the Digital Era*, above n 9, 45.

⁴⁷ *Crimes Act 1900* (NSW) ss 91K–91M; *Criminal Code Act 1899* (Qld) s 227A(1); *Summary Offences Act 1953* (SA) s 26D; *Police Offences Act 1935* (Tas) s 13A; *Summary Offences (Upskirting) Act 2007* (Vic) s 41A.

⁴⁸ *Crimes Act 1900* (NSW) s 91Q(1).

THE COMMON LAW

32. One area in which Australian law has perhaps failed to keep pace with international developments, is in developing causes of action for individuals whose information is released without their authorisation, or who suffer attacks on their privacy. Traditionally, the common law has not recognised a cause of action for the invasion of personal privacy.

33. In countries with constitutional rights to privacy, the common law has been driven to keep pace with developments in technology. In the United Kingdom for example, while the Courts do not recognise a tort of invasion of privacy *per se*, the equitable action for breach of confidence has been used to address the misuse of private information since the case of *Campbell v MGN Ltd*⁴⁹ – likely aided by the Human Rights Act in that jurisdiction.⁵⁰ The law in New Zealand has also developed in the context of a human rights framework, and has seen the creation of privacy tort, with protection extending to breaches of privacy that involve publicising private and personal information, and for intrusion upon seclusion.⁵¹

34. In 2001, the High Court of Australia left open the possibility of future development of a cause of action for invasions of privacy⁵² but in the 16 years that have followed, it has not as yet been recognised. Two lower court decisions have recognised a tort of invasion of privacy,⁵³ but both cases settled before appeals were heard and no superior court has as yet considered it appropriate to recognise such a tort.⁵⁴

⁴⁹ [2004] 2 AC 457.

⁵⁰ *Human Rights Act 1998* (UK).

⁵¹ See *Hosking v Runting* [2004] NZCA 34; *C v Holland* [2012] 3 NZLR 277.

⁵² *Australian Broadcasting Corporation v Lenah Game Meats Pty Ltd* (2001) 208 CLR 199.

⁵³ *Grosse v Purvis* [2003] QDC 151; *Doe v Australian Broadcasting Corporation* [2007] VCC 281.

⁵⁴ For judicial comments on the existence or otherwise of such a tort, see generally *Kalaba v Commonwealth of Australia* [2004] FCA 763 (8 June 2004) [6]; *Chan v Sellwood*; *Chan v*

35. The future development of the common law remains uncertain, and any change would obviously require litigants with “the resources and determination both to initiate proceedings and to take these proceedings through the appeals process”.⁵⁵ One eminent commentator has humorously described the Australian courts’ approach to the issue as “cautious groping”,⁵⁶ while in *Douglas v Hello! Ltd*⁵⁷ in the United Kingdom, Sedley LJ attributed such reluctance to the “common law’s perennial need (for the best of reasons, that of legal certainty) to appear not to be doing anything for the first time”.⁵⁸
36. Because of this reluctance, there have been numerous law reform inquiries calling for the introduction of a statutory cause of action, but there has been no action at the federal level.⁵⁹ This recently led to the New South Wales State Parliament’s standing committee on law and justice to comment that “little will happen if New South Wales were continuing to wait for change at a federal level”⁶⁰ and recommend the introduction of a statutory cause of action at the state level, with the hope that other jurisdictions would follow suit. The outcome of these recommendations remains to be seen.

Calvert [2009] NSWSC 1335 (9 December 2009) [34]; *Sands v State of South Australia* [2013] SASC 44 (5 April 2013) [614]; *Giller v Procopets* (2008) 24 VR 1; *Maynes v Casey* [2011] NSWCA 156 (14 June 2011) [35]; *Saad v Chubb Security Australia Pty Ltd* [2012] NSWSC 1183 [183]; *Gee v Burger* [2009] NSWSC 149 (13 March 2009) [53]; *Dye v Commonwealth* [2010] FCA 720 [290]; *Doe v Yahoo!7 Pty Ltd* [2013] QDC 181 (9 August 2013) [310]–[311]; *WBM v Chief Commissioner of Police* (2012) 43 VR 446 [81].

⁵⁵ Australian Law Reform Commission, *Serious Invasions of Privacy in the Digital Era*, above n 9, 55.

⁵⁶ John G Fleming, *The Law of Torts*, (LBC Information Services, 9th ed, 1998) 664-5.

⁵⁷ [2001] QB 967.

⁵⁸ *Ibid* [111].

⁵⁹ Australian Law Reform Commission, *For Your Information*, above n 26; Australian Law Reform Commission, *Serious Invasions of Privacy in the Digital Era*, above n 9; Victorian Law Reform Commission, *Surveillance in Public Places*, Report 18 (2010).

⁶⁰ New South Wales Parliament Standing Committee on Law and Justice, *Remedies for the serious invasion of privacy in New South Wales* (2016) 70.

37. From my limited understanding, Indian tort law is also developing a common law cause of action, with the Supreme Court in the case of *Rajagopal* articulating that privacy law has a founding in tort law and may give rise to an action for damages against private persons.⁶¹ It will be interesting to see the manner in which this cause of action might develop in the future in India – perhaps it will provide some guidance to Australian courts continuing to grapple with whether the common law should develop to recognise a cause of action of this nature, or whether it should now be left to legislative action.

CONCLUSION

38. On that note, I come to the end of this brief foray into Australian privacy law. I hope my discussion this morning will be of some assistance to you all as you consider the recent Supreme Court judgment and the issues it has brought to the fore. For myself, I am firmly committed to the usefulness of taking a comparative perspective when dealing with novel legal challenges. Indeed, there are so many similarities between our legal systems that it would be a tragic loss of opportunity if we did not. I look forward to reading and learning from the forthcoming Supreme Court judgments on the issue. Thank you again to the Bar Association for the invitation to speak, and I hope you enjoy the conference.

⁶¹ *R. Rajagopal v State of Tamil Nadu* (AIR 1995 SC 264) [26].