

## Debate

# Privacy versus the media and the state

One of the trendier developments in the law over the last decade has been the recognition of the tort of invasion of privacy.

By a bare majority only, the Court of Appeal confirmed that the tort formed a part of New Zealand law in the 2004 case of *Hosking v Runting* (although in that case the court declined to find the tort had actually been breached).

The facts of the *Hosking* case are well known. Then television personality Mike Hosking alleged that the media had, among other things, breached the privacy of his children when a magazine took photographs of them in their pram while going for a walk in a public space.

Put simply, the court disagreed. It held that factors such as the children's presence in a public space, the media's right to publish and its protections under the New Zealand Bill of Rights Act to freedom of expression, and the fact the publicity could not in any way be suggested to place the children in danger, were determinative. In short, a right to privacy exists, but the precise boundaries of that right remain unclear.

The country now has the perfect opportunity to address that uncertainty. The Law Commission has been tasked to examine in considerable detail the state of New Zealand's privacy law. It is doing so in four stages. Stages one and two of the review have been completed, with the commission finishing an overview of the law, the general environment within which the privacy debate should take place and a review of public registers. The findings from



**Aaron Lloyd**

those stages have been published, and await completion of the review's final stages.

In that vein, the commission last month released an issues paper as part of part three of the review, entitled *Invasion of Privacy: Penalties and Remedies*. Once part three of the review is complete, the commission will move onto the review's final stage – a comprehensive review of the Privacy Act.

The paper is one of the most impressive to be published by the commission in recent years. It starts with a comprehensive review of the current state of the law regarding invasion of privacy, commenting not only on tort liability, but also on the way in which other areas of the law impact upon the issue. It then considers the related, and often overlooked, way in which government surveillance impacts on privacy. The paper correctly identifies that it is both private and public agencies and actors in our society which may undermine individual privacy rights. In doing so, the commission seeks to engage us on the question of privacy protection in a comprehensive manner



**High-profile case:** TVNZ presenter Mike Hosking heading to the Court of Appeal in 2004 with his estranged wife Marie Hosking.

We as a community must take this opportunity to become engaged in the privacy debate if we truly think that privacy is something worth protecting. It is easy for us to sit back and criticise the media, including the

loathed paparazzi; for their seeming insensitivities, or the police or SIS for their alleged abuses of power to covertly intrude into the lives of "ordinary New Zealanders" or "political activists". But such generic

chatter has become trite.

Why is it that we think the paparazzi's hounding of people (perhaps even the business media's hounding of certain directors) is worthy of criticism? Doesn't the public deserve to know? Maybe, but know what? Doesn't everyone have a right to be free from unfair intrusion and harassment? Yes, but what amounts to unfair?

The commission has called for submissions from interested parties, with a deadline of May 29. To assist, the commission has identified 85 questions which submitters can comment upon. The questions provide a comprehensive overview of the matters identified in the paper.

It is clear the commission's work is only the beginning of what will be a long process to amend and clarify the scope of privacy law in New Zealand. The public will have a number of opportunities to comment on proposals coming out of the commission's review process, and ultimately on any legislation proposed. But we should not wait for these latter stages of law reform to become involved.

An artist never shapes a sculpture in the last few hours of his or her work. The shaping takes place at the beginning, when the raw materials are being compiled and worked on. The end of the process is one of refinement, and of detail. So it is with the law. If the public (including the media) want a say as to how this area of law will protect and restrict them in the future, now is the time to get involved.

■ Aaron Lloyd is a partner and employment law specialist at Minter Ellison Rudd Watts.