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The University also acknowledges and is grateful to the Traditional Owners, Elders and Knowledge Holders of all Indigenous nations and clans who have been instrumental in our reconciliation journey.

We recognise the unique place held by Aboriginal and Torres Strait Islander peoples as the original owners and custodians of the lands and waterways across the Australian continent, with histories of continuous connection dating back more than 60,000 years. We also acknowledge their enduring cultural practices of caring for Country.

We pay respect to Elders past, present and future, and acknowledge the importance of Indigenous knowledge in the Academy. As a community of researchers, teachers, professional staff and students we are privileged to work and learn every day with Indigenous colleagues and partners.

In making this Acknowledgment of Country we commit to respectful and responsible conduct towards all others according to the Traditional lores of this land, particularly at times of formal ceremony.



# Reasonable Expectation of Privacy : supporting or undermining trustworthy health governance?

Mark J Taylor, PhD  
Professor of Health Law and Regulation  
Melbourne Law School

Australasian Association of Bioethics and Health Law Conference (AABHL)  
12.00 – 12.20 7<sup>th</sup> December 2025  
Christchurch, New Zealand

# 3 simple claims



1. The Reasonable Expectation of Privacy test is normative
2. Trustworthy health data governance is (also) normative
3. In so far as they are normatively aligned, the REP test may support trustworthy health data governance – but normative alignment cannot be assumed

# Reasonable Expectation of Privacy – Common Law



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

A central question was whether the secret filming recorded some ‘private act’: “if the activities filmed were private, then the law of breach of confidence is adequate to cover the case”

Gleeson CJ cautioned “there is no bright line which can be drawn between what is private and what is not”, but suggested

Certain kinds of information about a person, such as information relating to health, personal relationships, or finances, may be easy to identify as private; as may certain kinds of activity, which a **reasonable person, applying contemporary standards of morals and behaviour**, would understand to be meant to be unobserved. The requirement that disclosure or observation of information or conduct would be highly offensive to a **reasonable person of ordinary sensibilities** is in many circumstances a useful practical test of what is private.

# Reasonable Expectations of Privacy – Common Law



## ***Jane Doe v ABC [2007] VCC 281***

Hampel J found that the information broadcast by the ABC – concerning as it did sexual assault – fit into the category of “easy to identify as private”, but noted also

...the information is personal or confidential information which the plaintiff had a reasonable expectation would remain private, and clearly private. Its disclosure was plainly something which an individual was **entitled to decide for herself**.

Hampel J also indicated it was relevant to a reasonable expectation of privacy that “**public confidence in the criminal justice system is eroded if victims are discouraged from reporting criminal offences**” and that “**the fact that the publication of such information is prohibited by the judicial proceedings Reports Act gives it a private character**”

# Reasonable Expectation of Privacy - Statute



## ***Belling v North Sydney Council [2018] NSWLEC 1656***

Adam AC said: “in deciding what is the reasonable expectation of privacy by occupants the expectation is that of a theoretical broader population and is not limited to consideration of any special desired requirements unique to the applicant. The question to be addressed is whether the privacy expectations of the Applicants are those which most potential occupiers would share. If they are they might be considered reasonable “

# ALRC's 2014 report *Serious Invasions of Privacy in the Digital Era* (ALRC Report 123).



“Expectation of privacy has for this reason been called a **normative** rather than a descriptive standard.”

The report noted :

The ‘reasonable expectation’ test was supported by a number of stakeholders. It was said to be flexible and able to adapt to new circumstances. This is important, because **community expectations of privacy will change between cultures and over time**. The Office of the Information Commissioner, Queensland, submitted that the reasonable expectation of privacy test ‘would reflect both community standards and provide sufficient flexibility for the modern range of social discourses’.

6.9, p93

# Reasonable Expectation of Privacy – Privacy Act 1988 (Cth)



## **statutory tort for serious invasions of privacy**

provides an individual with a cause of action in tort against another person if:

- (a) the defendant invaded the plaintiff's privacy by doing one or both of the following:
  - (i) intruding upon the plaintiff's seclusion;
  - (ii) misusing information that relates to the plaintiff; and
- (b) a person in the position of the plaintiff would have had a reasonable expectation of privacy in all of the circumstances; and
- (c) the invasion of privacy was intentional or reckless; and
- (d) the invasion of privacy was serious; and
- (e) the public interest in the plaintiff's privacy outweighed any countervailing public interest.

# Reasonable Expectation of Privacy – Privacy Act 1988 (Cth)



When determining if an individual had a reasonable expectation of privacy in all of the circumstances, the statute indicates, without limiting the matters that a court may consider relevant, that a court may consider the following:

- (a) the means, including the use of any device or technology, used to invade the plaintiff's privacy;
- (b) the purpose of the invasion of privacy;
- (c) attributes of the plaintiff including the plaintiff's age, occupation or cultural background;
- (d) the conduct of the plaintiff, including whether the plaintiff invited publicity or manifested a desire for privacy;
- (e) if the defendant invaded the plaintiff's privacy by intruding upon the plaintiff's seclusion—the place where the intrusion occurred;
- (f) if the defendant invaded the plaintiff's privacy by misusing information that relates to the plaintiff—the following:
  - (i) the nature of the information, including whether the information related to intimate or family matters, health or medical matters or financial matters; (ii) how the information was held or communicated by the plaintiff; (iii) whether and to what extent the information was already in the public domain.

# Trust / Trustworthiness



**“Most scholars seem to agree that trust embodies a **willingness to accept vulnerability under conditions of uncertainty**”**

•Rebecca M Bratspies (2009), ‘Regulatory Trust’ *Arizona Law Review* 51(3), 575-632, p589

**“reasonable trust will require grounds for ... **confidence in another’s good will**, or at least the absence of grounds for expecting their ill will or indifference”**

Annette Baier (1986) ‘Trust and Antitrust’ *Ethics* 96, 231-60 cited in Onora O’Neill, *Autonomy and Trust in Bioethics* (2009, Cambridge University Press), p13

**“Trust is most readily placed in others whom we can rely on to **take our interests into account**, to fulfil their roles, to keep their parts in bargains.”**

•Onora O’Neill, *Autonomy and Trust in Bioethics* (2009, Cambridge University Press), p25

# Public Interest and Trustworthiness

“We will only realize the benefits of medical confidentiality if individuals believe that the information they confide to healthcare professionals will only be **used in ways they value**.

“The decision-making process must be able to offer a **reasonable justification, for the vulnerabilities implied by decisions on (non)interference with medical confidentiality, to the people affected by those decisions.**”



## 2

### PUBLIC INTEREST AND TRUSTWORTHINESS

Connecting the concepts through reasonable justification for (non)interference with medical confidentiality

Mark Taylor

#### Introduction

In the trial of the Duchess of Kingston for bigamy, reported in 1776, the surgeon to the Duchess initially refused to answer questions about what he may, as surgeon to one or both, have heard of the Duchess' marriage to Lord Bristol. Lord Mansfield, cross-examining Mr Caesar Hawkins, conceded that “if a surgeon was voluntarily to reveal these secrets, to be sure he would be guilty of a breach of honour, and of great indiscretion”.<sup>1</sup> However, he continued, “but, to give that information in a court of justice, which by the law of the land he is bound to do, will never be imputed to him as any indiscretion whatever”.<sup>2</sup> The value and significance of medical confidentiality has long been recognized but the law has never recognized a health professional’s duty to preserve confidentiality to be absolute.

The limits of confidentiality are no longer determined by questions of “professional honour” nor understanding what would be imputed by others to be an indiscretion. Now, more typically (though not exclusively),<sup>3</sup> the extent of the duty and its limits are characterized around the world by reference to the concept of the public interest. The concept of public interest has been employed as both a justification for upholding confidentiality and a justification for overriding it. I will argue here that there may be merit in reconnecting with the values expressed in 18th-century England: not to the idea of professional honour, but to the idea that there are normative expectations held reasonably by patients and publics more generally of health professionals (and others such as academic researchers in whom they confide health information) that may help to enliven a modern understanding of the concept of public interest. An advantage of doing so is that it may (re)connect the

DOI: 10.4324/9781003394518-4

# 3 simple claims



- 1. The Reasonable Expectation of Privacy test is normative**
  1. Different normative standards are available: human rights; community standards (assessed with varying levels of granularity); public policy
- 2. Trustworthy health data governance is (also) normative**
  1. The risks incurred in the act of trust should be defensible relative to the norms of the party being invited to expose themselves to the relevant vulnerability
- 3. In so far as they are normatively aligned, the REP test may support trustworthy health data governance – but normative alignment cannot be assumed**
  1. Courts will need to demonstrate understanding of a data subjects' normative commitments for REP to be a safeguard relevant to a reasonable justification for (re)use of health data for them



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