



Opinion by Centre
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A Right to Privacy in Australia?

On 21 July this year, the Minister for Privacy, Brendan O'Connor, announced that the Federal Government would seek the public's views on introducing a right to privacy in Australia. A background paper is to be issued, "canvassing the prospect of introducing a statutory cause of action for serious invasions of privacy."

For now, the closest Australian law has come to a right to sue for breaches of privacy has been a whiff of a suggestion by Callinan J in *ABC v Lenah Game Meats* in 2001, and a decision in *Gross v Purvis* to award damages in the District Court of Queensland in 2003 (which is not binding on other State and Territory courts).

The issue has clearly been bubbling away, with tensions between the media and those who believe the media has too much leeway to violate their privacy. Members of Parliament, celebrities and others have all had cause to complain, but at present can only sue if there's another associated wrong such as defamation.

Is there no recourse at all for the breaches of privacy themselves? Well, there's the Press Council of Australia's complaints mechanism. Paul Keating, speaking on the ABC's Lateline in June, said that "self regulation by the media is a joke. A joke.... People shouldn't have a right to appeal about invasions of their privacy to somebody funded by newspapers; they should have a right at law." To be fair, the Council does rule against the profession's worst excesses, but by its own admission it struggles to achieve real reform and needs to take a more proactive approach.

To rights advocates, this is an interesting debate for two reasons. First, it involves the interplay of two human rights protected by the International Covenant on Civil and Political Rights (ICCPR) – the right to privacy (article 17) and the right to freedom of expression (article 19). The right to privacy is limited to what is 'demonstrably justified in a free and democratic society.' In the context of the right to privacy, this effectively means it sometimes has to give way to the right to freedom of expression. On the other hand, there are also limitations on the right to freedom of expression in article 19 of the ICCPR. The treaty says the right "carries with it special duties and responsibilities" – for example to "respect the rights or reputations of others" or to protect "national security or...public order...or...public health or morals." Freedom of expression is further limited by article 20 of the ICCPR, which bans propaganda for war and what is commonly known as hate speech.

Second, since we don't have a Bill of Rights, consideration of this issue in Australia usually fails to take advantage of the huge body of international opinion and jurisprudence which has built up around the interplay between these articles of the ICCPR, and is the poorer for it compared with the debate in, say, Canada, the US or Germany. In these countries, Constitutional rights to privacy have driven the common law to keep pace with societal developments (such as improved technology for snooping), whereas in Australia the common law has developed exceedingly slowly and struggled with the very meaning of the word privacy. Some eminent commentators have memorably characterised the Australian (and, to a lesser extent, UK) courts' approach to this issue as "cautious groping."

In any case, the debate is also interesting because it often involves the rights and freedoms of (more or less) equally powerful groups – public personalities and media organisations. Minister O'Connor's promise came in the wake of the News of the World phone hacking scandal in the UK. The scandal erupted when it was reported that murder victim Milly Dowler's phone had been hacked. The list of victims (allegedly up to 4000 people) also included influential public figures such as Gordon Brown, John Prescott, Sienna Miller and Steve Coogan.

In July, News Ltd's *Australian* newspaper criticised Minister O'Connor's idea of a privacy tort in vituperative terms. Railing against the "extremist rights agenda" and "lawyer controlled courts," the *Australian's* Economics Editor Michael Stutchbury seems to fear that free speech (which, apparently, he doesn't see as a human right) will be completely eliminated. Free speech, at least as it pertains to politics, is already protected by law in Australia, so why should the equally important right to privacy not be? If the real answer is that it would get in the way of the very profitable business of unjustified muckraking and other unethical journalistic practices, then opponents should admit that rather than complaining about a potential "lawyers' picnic."

The *Australian* article also refers to the Australian Law Reform Commission (ALRC), which has recommended that there be a cause of action for serious invasions of privacy. The ALRC says its "recommended formulation sets a high bar for plaintiffs, having due regard to the importance of freedom of expression and other rights and interests." There would most likely also be a defence relating to the public interest to any privacy tort, which would give the defendants plenty of opportunity to explain why the Australian public has a Right to Know (oddly, the freedom to "seek, receive and impart information and ideas of all kinds" in article 19(2) of the ICCPR is seldom raised). Sometimes the media have a point about the public/private distinction being tricky, but this doesn't mean there shouldn't be adequate protections for victims when they get it badly wrong (one example being the John Marsden case).

A final argument in favour of a privacy tort is that it might help to stamp out the sort of unedifying spectacle we saw recently during the coverage of the Madeleine Pulver affair, where journalists followed Madeleine and her family everywhere for days and made a mockery of their human right to privacy. Surely this alone would make it worthwhile.

In summary, the Australian Government should be congratulated on attempting to move this issue forward, despite the inevitable scare campaign from those who argue it would mean an end to freedom of speech. Now, if we could just have a chat about a few other rights which need protecting...