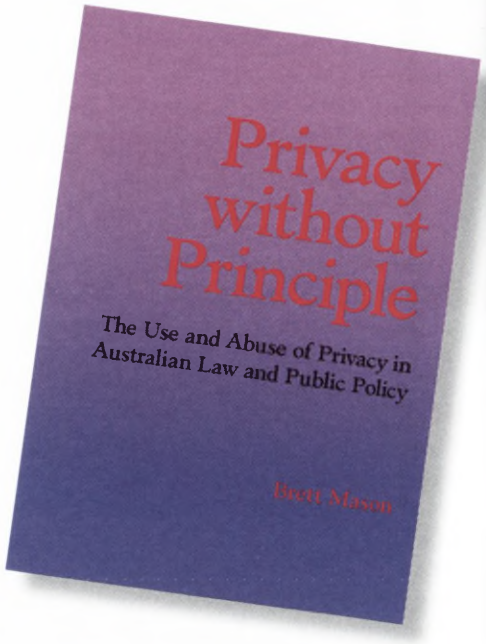
Brett Mason
Privacy without Principle
The Use and Abuse of Privacy in Australian Law and Public Policy
Australian Scholarly Publishing, 2006



By Penelope Watson

Mason's central thesis is that privacy is an amorphous and ambiguous concept, capable of being virtually all things to all people, but incapable of precise definition. For this reason, it is frequently subject to political manipulation and invoked in an unprincipled fashion when it serves specific ideological or political purposes, suffocating rational public policy debate.

The book is topical and timely, drawing on the human rights debate, including Australia's international obligations as regards privacy. Brett Mason is a former barrister, academic and, since 1999, Liberal Senator for Queensland. He chairs the Senate's Finance and Public Administration Legislation Committee, which recently considered the government's counter-terrorism legislation,[1] with its dramatic implications for privacy.

Mason's political perspective strongly informs and colours his views so that, not surprisingly, his concept of privacy centres on the interface between citizen and state. He begins by examining, and rejecting, the concept of a public/private divide, as espoused by classical liberal theorists such as Berlin,[2] who define 'private' as that which is free from state regulation. In Mason's view, 'it is the public sphere that ... determines those areas to be regulated. If one is unable to remove private activities from the legitimate scrutiny of state power, they are axiomatically public issues.'[3] Any interest or right is inherently public in this sense, but this does not mean that the state in its role as watchdog and protector of civil liberties and rights cannot actively restrain itself from intrusion into areas deemed 'private'. Existing search and seizure regulation is a case in point. Given the enormous challenges posed to privacy, personal autonomy and civil liberties by technology, the mass media, global information capabilities, computerisation and concerns about national security and terrorism, regulation, including regulation of the state, is absolutely essential in modern society.

The first half of the book offers a theoretical critique of privacy, including a useful discussion of various definitions and alternative theoretical constructs, and outlines current protection under the common law and legislation. The multi-faceted nature of privacy has been the subject of much judicial and academic comment, explaining the High Court's caution in refusing to recognise a tort of privacy invasion in *Australian Broadcasting Corporation v Lenah Game Meats Pty Ltd*.[4] The US experience in interpreting privacy under the 14th amendment and in tort law has clearly demonstrated the ambiguity and breadth of the concept. Mason's conclusion – that no clear, concise and persuasive definition of privacy exists – adds nothing new to the debate, nor does it necessarily discredit privacy as a valid factor in evaluating legislation.

The remainder of the book is devoted to case studies on the *Human Rights (Sexual Conduct) Act* 1994 (Cth), and the Australia Card Bill 1986 (Cth) which, he claims, illustrate the inconsistent and subjective way in which privacy has been invoked and manipulated to advance specific political agendas. In relation to the first, the Hawke government passed legislation invalidating s122 of the Tasmanian *Criminal Code* 1924, which criminalised homosexual acts between consenting males in private. This followed the first Australian 'communication' by an Australian citizen[5] to the United Nations Human Rights Committee under procedures[6] established in the *International Covenant on Civil and Political Rights* (ICCPR). The Committee upheld the complaint, and in the face of the Tasmanian government's refusal to repeal the section, it was overridden by federal legislation to comply with Australia's international legal obligations.

Mason argues that 'sexual privacy' rather than homosexual rights was selected as a politically expedient and 'saleable'[7] justification for the government's action in overriding state law, to contain vocal homophobic elements in the community, rather than on any principled basis. Purporting to follow the argument through that sexuality is an integral aspect of autonomy and individual identity, he contends that privacy offers no foundation for excluding other sexual conduct such as bestiality, sado-masochism, and

especially incest from similar protection, making it difficult to distinguish conduct that should be subject to the criminal law from that which should not. Similar concerns about privacy being used to screen the domestic sphere from public scrutiny, to the detriment of women and children in situations of oppression or violence, have been voiced in feminist scholarship.[8]

At the heart of Mason's criticism of privacy is his view that privacy alone cannot predict or determine when policy or legislative intervention should occur, but instead functions as a justification that can be invoked to support differing points of view. If privacy were conceived of as an absolute right, rather than as a right – or interest – operating in tension with competing rights, Mason's argument would be correct. In reality, rights and the appropriate balance to be struck between them are moral as well as legal and political questions, and the *Sexual Conduct* legislation does no more than reflect shifts in community moral perceptions regarding homosexuality but not incest, underlining the limits of individual privacy.

The second case study uses the defeat of the Australia Card Bill 1986 to argue the case for collection and storage of personal data in the Access Card, a proposal currently under consideration by the Howard government.[9] It would govern an individual's entitlements to health and social security services, and would be linked to personal data, financial information, records on the use of subsidised pharmaceutical services, information on dependants, and more. The proposed card would hold far more information than the Australia Card, which was originally conceived of as both a national identification card and a means of cross-checking personal identification from a variety of sources ('data matching') for purposes such as minimising tax evasion and welfare fraud. In contrast with the Access Card, the ID card aspects of the proposed Australia Card were dropped early on. According to Mason, the dramatic decline in popular support for the card in 1987 'represents one of the most massive shifts in public opinion ever seen in Australian politics'.[10] He attributes this to 'privacy rhetoric', suggesting that 'as soon as opponents [of the card] had captured and harnessed "privacy", competing interests were unable to obtain political traction'.[11] In Mason's view, opponents' ability to characterise the card as 'the state's sword and "privacy" as the individual's shield',[12] and to frame the debate in terms of 'Aussie battler against the bureaucracy', triumphed over rational debate. He concludes that the defeat of the Australia Card at least arguably 'weakened social justice' and reduced people's rights to health, welfare and education by reducing the information available about them, as well as making it more difficult to prosecute welfare and tax fraud and detect criminal offences.

Mason's view is that, even had the Australia Card threatened to increase state capacity for surveillance, the real issue is whether its benefits outweighed its disadvantages – rather than the 'false dichotomy' of individual privacy versus state power. He contrasts Australia with civil law countries, arguing that many have ID cards as well as strong regimes protecting rights. The words of the Treasurer, Peter Costello, speaking at the launch of Mason's book, are instructive:

> 'the advent of terrorism ... changed our expectations and changed our tolerance of intrusion at the sporting field, on the airlines, as we enter buildings, as we deal with public officials... [it has] also changed our perception as to how far our right to privacy extends. My view is that the public is much more tolerant of intrusions these days because of the perceived security threat.'[13]

But while the concept of privacy may be plagued with difficulties, it is not justifiable to abdicate civil liberties in the name of equally ill-defined threats. Mason's book does nothing to prove the contrary. ■

Notes: **1** *Australian Security Intelligence Organisation Legislation Amendment (Terrorism) Act* 2003 (Cth); *Anti-Terrorism Act (No. 2)* 2005 (Cth); *Telecommunications (Interception) Amendment Act* 2006 (Cth). **2** Isaiah Berlin, *Two Concepts of Liberty*, Oxford University Press, 1958, p9, quoted in Mason, p10. **3** Mason, p2. **4** [2001] HCA 63. **5** Mr Nick Toonen, 1991. **6** First Optional Protocol. **7** Mason, at p100, quoting Peter O'Keefe, former Clerk of Senate. **8** For example, Catherine MacKinnon. **9** See article by Graham Greenleaf in this edition of *Precedent*, p34. **10** Mason, p127. **11** *Ibid*, p118. **12** *Ibid*, p119.

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