



Do Australians have a legal right to privacy?

The advent of the Internet and mobile phones have made communication easier and quicker, but the change is not necessarily for the best. This is illustrated, among other things, by recent media reports about the misuse of mobile phones, particularly camera phones (or ‘phonecams’).¹

In October 2004, for example, a man pleaded guilty to using a mobile phone to photograph women in change rooms in a fashion store.² Then in December 2004, another man pleaded guilty to using a mobile phone to photograph topless women at Coogee Beach.³ Similarly, as Edward Mandla, National President of the Australian Computer Society, wrote in June 2004 (when calling for tighter controls and guidelines for mobile phone use):

When you invite a tradesperson into your home to quote on a job, you look at the phone clipped to his belt and call it a tool of trade. But consider that he could now record and send to the Internet the contents of your closet or your drawers or the way you live.⁴

While these examples raise issues about individual morality, they also raise issues about the sufficiency of the law to protect the community from breaches of privacy. This Research Note briefly examines the law of privacy in Australia—both legislation and common law—to highlight the fact that while the law offers some protections, there is currently no legal *right* to privacy in Australia—although the courts are moving towards recognising such a right.⁵

Legislation

There is no constitutional right to privacy in Australia, but there are some pieces of legislation which afford certain but incomplete protections. On 1 February 2005, for example, the Waverley Council (a Sydney local council) voted 7:5 to ban cameras from its council-run changing rooms at places like Bondi.⁶ While this decision will presumably become enshrined in a local by-law, it illustrates the need for better legal protection of personal privacy for society as a whole.

At state level, there are various laws which have the effect of protecting privacy, particularly criminal laws, but nothing affords a right to privacy *per se*. For example, the man mentioned above who took photos of women in a fashion store was charged with ‘filming for an indecent purpose’, not with any invasion of the women’s privacy.⁷ Likewise, the man who photographed the women on Coogee Beach was charged with ‘behaving offensively in a public place’—an offence that could cover a multitude of behaviours.⁸ Other laws, such as the *Neighbouring Land Act (No. 2) 2000* (NSW), acknowledge the desirability of people living in

harmony, but do not confer an absolute right to privacy on any individual.⁹

Certainly, legislation such as the *Privacy Act 1988* (Cwlth) and its state counterparts provide a regime for the collection, correction, use and disclosure of personal information. However, such Acts do not always afford sufficient legal protection to prevent the invasion of privacy—although they may in some circumstances. Thus, it may be time for the enactment of legislation addressing such concerns, particularly if recent comments by the High Court of Australia about whether Australians have (or should have) a common law right to privacy are any indication of the direction the law should take.¹⁰

Common law

Although the position has not yet been settled in a definitive way, recent Australian cases indicate that Australians *may* have a common law right to privacy.¹¹

Australian Broadcasting Corporation v Lenah Game Meats Pty Ltd (2002) 208 CLR 199

In this case, the High Court of Australia was concerned with the issue of whether the secret filming of operations at a possum processing factory provided sufficient grounds for granting an interim injunction to prevent the ABC from broadcasting the film. In a series of individual judgments, a majority of the Court held that the injunction should not have been granted because it was not possible to identify any underlying legal or equitable right.

In so deciding, Justices Gaudron, Gummow, Hayne and Callinan held that the decision in *Victoria Park Racing and Recreation Grounds Company Ltd v Taylor & Others (1937) 58 CLR 479* did not prevent a court from finding that there is a tort (or legal cause of action) of *unjustified invasion of privacy*—although they did not find that it existed on the facts of the case before them. Further, their Honours (except Justice Callinan) held that the tort would be limited to natural persons (that is, it would not extend to corporations or other legal entities).

In relation to the finding that there might be a tort of invasion of privacy, specific reference should be made to a paper published in 1960 by an American professor, William Prosser, and quoted by Justice Callinan at paragraph 323. Prosser was of the view that the law of privacy comprises ‘four distinct kinds of invasion’ of the plaintiff’s interests:

1. Intrusion upon the plaintiff’s seclusion or solitude, or into his private affairs.

2. Public disclosure of embarrassing private facts about the plaintiff.
3. Publicity which places the plaintiff in a false light in the public eye.
4. Appropriation, for the defendant's advantage, of the plaintiff's name or likeness.

Grosse v Purvis [2003] QDC 151

In this case, Senior Judge Skoien (District Court of Queensland) heard a claim for damages based on a number of torts (or legal wrongs) which essentially arose from the fact that the defendant stalked or harassed the plaintiff for a number of years. Among other things, the plaintiff sought damages for invasion of privacy.

In discussing the relevant elements of a possible tort of invasion of privacy, his Honour reviewed the individual judgments of the High Court in *Lenah Game Meats* and concluded that the majority of the High Court was of the view that the decision in *Victoria Park Racing* did not stand in the way of a court, in an appropriate case, finding that there is indeed a tort of invasion of privacy. Thus, his Honour went on to find that such a tort does in fact exist in Australia and that it has been made out in the case before him, saying (at paragraph 442): 'It is a bold step to take ... But it is a logical and desirable step'.

In his Honour's view, the essential elements of the tort are:

- (a) a willed act by the defendant,
- (b) which intrudes upon the privacy or seclusion of the plaintiff,
- (c) in a manner which would be considered highly offensive to a reasonable person of ordinary sensibilities,
- (d) and which causes the plaintiff detriment in the form of mental, psychological, emotional harm or distress or which prevents or hinders the plaintiff from doing an act which she is lawfully entitled to do.

His Honour awarded the plaintiff \$178 000 by way of damages for breach of right to privacy.

Conclusion

While the High Court has fallen short of deciding that Australians do in fact have a common law right to privacy, their Honours did not rule out the possibility of finding such a right in the future. As Chief Justice Gleeson said in *Lenah Game Meats* (at paragraph 40):

The law should be more astute than in the past to identify and protect interests of a kind which fall within the concept of privacy.

However, while one judge at state level has taken a 'bold step' in finding that there is a tort of invasion of privacy in Australia, other judges are not bound by that decision (as a matter of legal precedent) and are entitled to reach their own conclusions. For example, in *Giller v Procopets* [2004] VSC 113, Justice Gillard (Supreme Court of Victoria) found (at paragraph 188) that the law 'has not developed to the

point where the law in Australia recognises an action for breach of privacy'. Conversely, Justice Heerey (Federal Court of Australia) considers that Australian law might recognise such an action 'provided that there were circumstances in which such an argument could reasonably be raised' (quoted by the Full Court in *Kalaba v Commonwealth of Australia* [2004] FCAFC 326 when refusing leave to appeal his Honour's decision).

Thus, as it could be some time before there is an authoritative judicial decision in favour of a legal right to privacy in Australia, Parliament might choose to legislate to grant people such a right (on a conditional or absolute basis) if it considered it to be appropriate.

1. For a discussion of related issues, see Matthew James, 'The Internet telephone: Voice over Internet Protocol (VoIP)', *Research Note*, no. 29, Parliamentary Library, Canberra, 2004-05.
2. 'Man used mobile for indecent snaps', *The Daily Telegraph*, 19 October 2004, p. 14.
3. C. Abood, 'Voyeur ads send wrong message', *The Australian*, 21 December 2004, p. 28.
4. Edward Mandla, 'Minimising Mobile Phone Misuse', *The Australian*, 29 June 2004, at <https://www.acs.org.au/news/oz290604.htm>.
5. Essentially, 'common law' is law made by courts but excludes the law of equity (which is also court-made law). It is not 'statute law' (legislation). Other nations, such as the US, Canada and the UK, are also concerned about privacy issues. On 23 December 2004, for example, President Bush signed into law the Video Voyeurism Protection Act 2004 (US).
6. 'Beach camera ban fails', *The Daily Telegraph*, 3 February 2005, p. 3, as corrected on 4 February 2005.
7. See endnote 2.
8. See endnote 3.
9. Subsection 16(1) provides that in permitting the owner of adjoining land to have access to his neighbour's land (in order to carry out repairs etc to his own land), the Local Court may impose conditions to avoid/minimise 'inconvenience or loss of privacy' caused to the neighbour. Unless the access causes 'loss, damage or injury, including damage to personal property, financial loss and personal injury', compensation is not payable under section 26 for 'loss of privacy'.
10. In this regard, it should be noted that privacy has been raised as part of public debates on anti-terrorism and workplace surveillance laws. It is beyond the scope of this paper to deal with those laws here.
11. For a discussion of earlier caselaw and international comparisons, see Dr R. Dean, 'A right to privacy'. (2004) 78 ALJ 114.

Morag Donaldson Law and Bills Digest Section Information and Research Service

Except to the extent of the uses permitted under the Copyright Act 1968, no part of this publication may be reproduced or transmitted in any form or by any means including information storage and retrieval systems, without the prior written consent of the Department of Parliamentary Services, other than by senators and members of the Australian Parliament in the course of their official duties.

This brief has been prepared to support the work of the Australian Parliament using information available at the time of production. The views expressed do not reflect an official position of the Information and Research Service, nor do they constitute professional legal opinion.

© Commonwealth of Australia 2005