Privacy protection

A balancing act under the Privacy Act

By Peter Turner

Asking people on the street what privacy means to them is likely to prompt a range of responses. A lot of these emerge in the press, where newspapers frequently raise privacy issues directly—for example, through reports of telephone tapping, accidental or deliberate disclosure of personal information, unwanted surveillance in the home or the workplace; or indirectly—such as by discussing the investigative powers of government bodies and how those affect citizens' rights. A recent National Phone-In (conducted by the ALRC over 1-2 June 2006 as part of its current inquiry into Australian privacy laws) turned up a wide array of experiences of privacy, both positive and negative.

Reflecting the fact that privacy concerns arise both directly and indirectly. Australian law gives direct and indirect protection to a person's privacy. The ALRC's current inquiry is wide in scope and is examining all these laws.

This article draws basic distinctions between:

(i) moral or ethical privacy concerns not enforceable by law (a weak form of privacy 'right');

(ii) privacy rights that are legally enforceable, and that might give expression to moral or ethical privacy concerns; and

(iii) the means by which a privacy concern or right (whether legally enforceable or not) is enforced.

The purposes of this article are to offer some examples of how laws directly or indirectly work to enforce particular moral or ethical privacy concerns; to emphasise that different moral or ethical privacy concerns exist, whether protected under Australian law or not; and to emphasise that 'remedies' (meaning legal and non-legal sanctions) for infringement of any privacy concern or right need to be tailored to fit the nature of that particular privacy concern or right sought to be insulated. The outcome of this overview will be to highlight the various balances required to be struck in order for formulate useful privacy laws.

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Indirect privacy protection

Privacy receives some indirect protection from judge-made law on confidential information. A person who has imparted confidential information to another in circumstances where the second person knew, or ought to have known, that the information was communicated on a confidential basis, has legally enforceable rights to have that confidence maintained. Personal information can be protected by these principles. Unauthorised use or disclosure of the information entitles the confider to sue the person who breached the confidentiality for financial loss suffered, or strip them of any profits made by the wrongful use or disclosure of the information, or to prevent them from further wrongful behaviour by injunction.

In some respects, the protection given to confidential information is strong. In many cases, for instance, the confider can obtain an injunction to prevent the confidant from wrongfully using or disclosing the information, even though nothing unlawful has yet been done. However, information can lose its confidential quality relatively easily. Once that

happens, the law on confidential information has nothing to say.

Looking elsewhere at indirect protections, legislation plays a role. Laws regulating government secrecy and the integrity of telecommunications are examples.

Direct privacy protection

More important for present purposes is direct privacy protection. In Australia, this comes from legislation and, at the Commonwealth level, one looks to the *Privacy Act 1988*. The operation of the *Privacy Act* falls at the centre of the ALRC's current inquiry. Selected features of the Act will be sketched in basic terms.

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Where a person wishes to complain that he or she has rights to privacy—as conferred by the Act—that have been infringed, the Act allows for several responses. An important avenue of recourse is for the person to complain to the Office of the Privacy Commissioner that an agency or organisation has infringed his or her privacy rights. Provided the person has first complained to the respondent agency or organisation, the Act provides for the Commissioner to investigate the complaint. If the Commissioner considers it appropriate to do so, he or she may attempt, by conciliation, to effect a settlement of the matters that gave rise to the investigation.

Whereas the laws on confidential information can only be enforced by court action, the intention behind the provisions in the *Privacy Act* is to provide a less formal, more accessible and inexpensive means of enforcing privacy rights. In cases where the respondent to the complaint is a Commonwealth agency and the Commissioner determines that the individual's privacy rights have been infringed by the agency, the Commissioner has power to declare that the complainant is entitled to be paid compensation and expenses by the offending agency or the Commonwealth. The Commissioner has a similar power where the respondent is not a Commonwealth agency but whereas in the former case the declaration makes the amount of compensation a debt due from the agency or the Commonwealth to the complainant, in the latter case the determination is not final or binding between the parties.

There are other possible advantages of proceeding under the Act. Should the complainant initiate proceedings in the Federal Court or the Federal Magistrates' Court, an interim injunction may be awarded to maintain the status quo. Notably, whereas in confidential information cases the applicant would have to give an undertaking to pay compensation for damage incurred by the respondent as a result of the granting of the injunction (in the event that it turns out the injunction ought not to have been granted), no undertaking as to damages is required where an injunction is sought under the Act in relation to privacy protection.

Limits of the Privacy Act

Yet the direct protection given by the Act has limits. The Commissioner has power to award compensation and expenses in favour of a complainant who establishes that anyone other than a Commonwealth agency has infringed his or her privacy rights, but lacks power to compel the respondent to pay that amount. Looking at the Act more widely, certain agencies and organisations are not subject to the Act because of their size, the activity they engage in or for other reasons. More widely again, an important feature of the Act is its focus on regulating the use of data and information, but not areas such as 'physical privacy'. Though perhaps tempting, it is dangerous to reason that, simply because the Act has limits, it is necessarily inadequate. Additional factors are necessary to reach that view. The adequacy or otherwise of the Act's coverage is currently being investigated by the ALRC.

What is clear, is that these limits reflect specific privacy concerns of an ethical or moral kind, and decisions about how to enshrine those concerns in legislation as legally enforceable rights. Balances are struck. Privacy theorists point to a range of other concerns caught up in the notion of 'privacy', which the National

Interested in The Privacy Inquiry

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For more information please contact the ALRC or visit the ALRC website.

Phone: (02) 8238 6333
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Phone-In responses, referred to earlier, have also revealed. Ought federal privacy legislation be expanded to protect other privacy concerns? Expressing the question in more concrete terms, ought the *Privacy Act* (or other Commonwealth legislation) protect privacy in ways that extend beyond data protection? Further, ought the protection already given to data be extended or modified, to better reflect particular concerns within the concept of privacy? Since decisions are to be made about the appropriate extent of any such protection, what are those decisions? How is it to be decided what is the appropriate extent of protection?

Privacy values outside the Act

There are arguments both for and against proposals to extend or modify the *Privacy Act*. Whether extension or modification is desirable or not, it is helpful to note some of the privacy concerns currently falling outside the Act that are, in other countries, given legal expression.

To focus on one area, the common law in the United States contains 'four relatively discrete torts' following the adoption of Dean Prosser's scheme into the American *Restatement, Torts*. These comprise torts concerning:

(1) intrusion upon the plaintiff's seclusion or solitude, or into his or her private affairs;

(2) public disclosure of embarrassing facts about the plaintiff;

(3) publicity that places the plaintiff in a false light in the public eye; and

(4) appropriation, for the defendant's advantage, of the plaintiff's name or likeness.[1]

Recently, British law has moved towards what might be a more robust law on confidential information with a tort flavour. British law has been said now to contain two themes: one on which the newly modified action helps to preserve an individual's dignity, autonomy, personality and well-being; and another on which the concern of the law is with the emotional and psychological impact of the privacy invasion on the claimant.[2]

Taking only those examples, it is seen that they support not only information privacy, but also some forms of what has been called *physical* privacy. The activities of a Peeping Tom may offend ethical concerns to do with physical privacy, but cannot naturally be characterised as offensive to *information* privacy concerns. A decision for, or against, extending the *Privacy Act,* to include the protection of privacy concerns currently outside it, must be conditioned by awareness of the full panoply of privacy concerns, including those just referred to and numerous others, and of possible ways of protecting each concern.

Different values within the Privacy Act

Even within its current boundaries, the *Privacy Act* recognises that people's negative responses to invasions of privacy are more intense in relation to some types of information than to others. The National Privacy Principles (which are found in Schedule 3 of the *Privacy Act* and apply to the private sector) make clear that different concerns require support from one case to the next, and create legally enforceable rights of varying robustness to reflect that view. Some information is subject to general treatment under the National Privacy Principles, while a category of 'sensitive information' receives special treatment. As the label 'sensitive information' suggests, the kind of information involved and people's feelings about that information are considered to be things worth protecting. The simple fact that other information is treated generally shows that different privacy policies (and legally enforceable privacy rights) operate within the Act as it already stands.

Closer study of the *Privacy Act* provisions would reveal many further instances. In the same way that judge-made rights protecting privacy in the common law of Australia and other common law countries reflect different policy compromises struck by the courts, these statutory rights and their limits reflect different policy decisions made by the legislature.

Giving effect to privacy values

Of course, the extent to which any privacy concern—including those already within the Act and those that could be brought within its four corners—is effective to meet society's needs depends on whether and how the rights embodying those concerns are enforceable and enforced. Equally clearly, a legally enforceable privacy right expressed in careful terms to etch precisely the contours of the privacy concerns as they arise in a given area will fail to be effective (despite the care with which it is formulated) unless it is enforced appropriately.

△ Appropriate enforcement requires the design of remedies that acknowledge and reinforce the content of the particular legally enforceable right. △

Appropriate enforcement requires the design of remedies that acknowledge and reinforce the content of the particular legally enforceable right. As suggested earlier, there are even 'remedies' for infringement of purely moral or ethical privacy concerns—the chief difference between legal and non-legal 'remedies' being that the latter are not furnished by the law.

These possibilities call attention to the fact that our legal system recognises different strengths of 'right' and 'duty'. The appropriate method, or methods, of enforcing a right or duty depends on the nature of the particular right or duty in question.

△ A balance must be struck between areas that are regulated and those in which regulation is deemed to be unnecessary and undesirable. △

The late Professor JW Harris—a leading human rights and property rights theorist—distinguished between four concepts of duty. Using the example of a relationship between X and Y, the concepts can be explained very shortly as follows:

(1) X might owe a duty to Y that corresponds to Y's right against X.[3] Should X fail to perform her duty, Y could seek an injunction compelling X to fulfil the duty.

(2) X might owe a duty towards Y such that Y may obtain as redress a sanction in the form of compensation or some other remedy should X fail to perform. The criminal law could step in to displace Y's right to compensation, or to supplement it.[4]

(3) X might owe Y a duty to do an act because a rule requires X to do so where the duty is not enforced by sanction as such, but by 'strong social pressure of a non-coercive kind'.[5] Strong political pressure would likewise enforce the duty. For example, parliament or the media might discuss the activities of an organisation in such a way as to embarrass a person, agency or organisation into fulfilling this kind of duty. This is a social but not legal remedy.

(4) Finally, X might have a duty to do an act because Y, being someone with lawful authority over X, 'has expressed a wish ... that X should do that act'.[6] Here there might be no external method of enforcement at all should X not do the act hoped for by Y.

The differences between these concepts of 'duty' and 'right' are in some ways subtle. Of course, more than one kind of 'duty' or 'right' can arise in a particular context. To understand how best to remedy infringement of the various privacy rights created particularly to give *legal* recognition to equally variable ethical privacy concerns, some understanding of these differences is of great assistance. And so, the abstract examples given by Professor Harris have real, practical utility. Awareness of the possible variety of legally enforceable rights that the legal system acknowledges can be taken into account in examining how particular privacy concerns are best regulated—or even left outside a regulatory regime, and left to social regulation.

A basic idea to take away from this discussion is that enforcement of privacy concerns and rights may well mean court action, but may also mean action outside that very formal, specialised system. Experience in other areas of human affairs—such as in family law, in human rights contexts, and in criminal law where restorative justice is pursued—shows that less formal, and even very informal, ways exist of satisfactorily enforcing certain kinds of right and duty. A combination of methods can also be effective. A person might be given a choice of methods to enforce a privacy right, or might be able to seek one kind of remedy before, through an appeal process for example, pursuing an additional remedy.

The *Privacy Act* contains some such choices, and contains a variety of methods of enforcing privacy rights and the ethical concerns they represent. The Privacy Commissioner's powers to investigate suspected breaches of the Act of his or her own accord or as the result of a complaint, to conciliate disputes, and to declare that a complainant is entitled to have costs and expenses paid by a Commonwealth agency, are examples. The fact that these contrasting methods of enforcement exist shows that there are different ways of looking at how strong or dilute a particular legally enforceable privacy right is: it also bears out the point made at the beginning of this article—remedies designed to protect privacy concerns and rights require the nature of that particular privacy concern or right to be closely examined.

Conclusion

Effective privacy regulation requires balances to be struck on several issues. A balance must be struck between areas that are regulated and those in which regulation is deemed to be unnecessary and undesirable. Within areas that are necessary and desirable to regulate, further balances need to be struck. There must be a balanced focus not only on the primary formulation of a right, but also on its enforcement. In the area of enforcement,

there must be balance between the possible ways of enforcing rights that appropriately reflect the ethical or moral privacy concerns at stake. Lastly, there needs to be a balance between theoretical issues that shape privacy rights and very practical considerations, such as the staffing and funding of bodies given responsibility for monitoring and enforcing privacy laws.

Gymnastics aside, the fundamental question is: what are the privacy concerns that the law ought to protect across numerous areas of human activity? The ALRC inquiry will seek answers to that question (against the background of issues raised in this article) in an attempt to meet current social needs, and likely developments in society, technology and the law.

Endnotes

1. See R Wacks, *Personal Information: Privacy and the Law* (1989), 31-8.
2. N Moreham, 'Privacy in the Common Law: A Doctrinal and Theoretical Analysis' (2005) 121 *Law Quarterly Review* 628, 634–5, discussing *Campbell v MGN Ltd* [2004] 2 AC 457.
3. J Harris, 'Trust, Power and Duty' (1971) 87 *Law Quarterly Review* 31, 48–9 ('the relational concept of duty').
4. Ibid, 49 ('the sanction concept of duty').
5. Ibid, 49 ('the rule concept of duty').
6. Ibid, 49–50 ('the will concept of duty').

The Privacy Inquiry

On 31 January 2006, the ALRC received Terms of Reference from the Australian Attorney-General for an inquiry into the extent to which the *Privacy Act 1988* (Cth) and related laws continue to provide an effective framework for the protection of privacy in Australia .

The Privacy Act 1988 (Cth) is the product of a previous Inquiry started by the ALRC in 1976 and culminating in the 1983 *Privacy* report. The ALRC also examined genetic privacy as part of its internationally acclaimed report *Essentially Yours: The Protection of Human Genetic Information in Australia*.

The current Privacy Inquiry is prompted by a number of considerations, including:

- the rapid advances in information, communication, storage, surveillance and other relevant technologies;
- possible changing community perceptions of privacy and the extent to which it should be protected by legislation;
- the expansion of state and territory legislative activity in relevant areas; and
- emerging areas that may require privacy protection.

The Terms of Reference require the ALRC to consider specifically:

- relevant existing and proposed Commonwealth, state and territory practices;
- other recent reviews of the *Privacy Act 1988* (Cth);
- current and emerging international trends in other jurisdictions;
- any relevant constitutional issue;
- the need of individuals for privacy protection in an evolving technological environment;
- the desirability of minimising the regulatory burden on business in this area; and
- any other related matter.

In order to enhance harmonisation, the ALRC will develop cooperative relationships with other Australian law reform bodies that are also examining privacy issues.

As with all ALRC inquiries, there will be a strong focus on community input. The ALRC plans to produce at least two consultation papers—an Issues Paper to be released in September 2006 and a more detailed Discussion Paper in May 2007.

A final report is due to be delivered to the Australian Attorney-General by 31 March 2008 and will be publicly available after its tabling in federal Parliament.