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THE PRIVACY COMMISSIONER, NEW SOUTH WALES

AFFINITY INTERCULTURAL FOUNDATION

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WHAT'S HAPPENING ~OR NOT~ IN PRIVACY

Dr Elizabeth Coombs

NSW Privacy Commissioner

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Dr Elizabeth Coombs, NSW Privacy Commissioner

I wish to acknowledge the traditional custodians of the land on which we meet and pay my respects to their elders past and present.

Distinguished guests, thank you for attending and I also wish to acknowledge Mr Chris Puplick, former Privacy Commissioner who was instrumental in the introduction of NSW privacy legislation amongst other reforms.

My thanks also to Ahmet Polat and the Affinity Intercultural Foundation for the invitation to speak today.

Privacy means many and different things to individuals, cultures and religions but plays an important role for each.

And it is not an easy topic to compress into 20 – 25 minutes.


In a world where anyone with a smart phone can become an overnight internet sensation by uploading an image with the click of a button, its timely to consider just what privacy means to us, what is acceptable and what can be done to protect privacy.

Yes, there are differences in perceptions of privacy across generations. For older people, privacy tends to mean the ability to control access to oneself. Whereas for the young, it's said the young person feels private when freely available digital information about them – much of which they or their peers have uploaded, cannot be connected to

him or her specifically.¹

A precise definition of privacy is elusive. But typically, we would understand it to be a state in which one is not observed or disturbed by other people. Or, in information privacy terms, where the individual is able to determine whether, when, how, and to whom, one's personal or health information is to be revealed.

I won't try and define the many meanings of privacy but instead refer to the Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights. As you know, these statements of human rights arose out of the horrors of the Second World War.



International Covenant on Civil and Political Rights


Article 12

1. Everyone lawfully within the territory of a State shall, within that territory, have the right to liberty of movement and freedom to choose his residence.
2. Everyone shall be free to leave any country, including his own.
3. The above-mentioned rights shall not be subject to any restrictions except those which are provided by law, are necessary to protect national security, public order (ordre public), public health or morals or the rights and freedoms of others, and are consistent with the other rights recognized in the present Covenant.
4. No one shall be arbitrarily deprived of the right to enter his own country.

Article 17

1. No one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence, nor to unlawful attacks on his honour and reputation.
2. Everyone has the right to the protection of the law against such interference or attacks.

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¹ O'Hara, K. *Transparent Government, Not transparent Citizens. A Report on Privacy and Transparency for the Cabinet Office.* University of Southampton, Ued Kingdom, 2011, pps 28-29.

Australia was instrumental in the drafting of the 1948 Universal Declaration of Human Rights and was among those countries voting for its adoption.

Australia has ratified many of the international human rights instruments including the International Covenant on Civil and Political Rights in 1980.

My talk today is to address what is and what isn't happening in the privacy space.

How I intend to approach this task is by necessity selective, and I will address first what is happening internationally with the United Nations some 68 years since the Declaration of Human Rights and then, recent events here in NSW.

It's interesting to look at what is happening internationally and at the United Nations as these developments ultimately influence what occurs here in Australia and within NSW.

As a result of a number of pressures including the revelations made by Edward Snowden, the concerted efforts of civil society organisations and concerned member countries, in July 2015, the Human Rights Council established the first-ever position of Special Rapporteur on the Right to Privacy.

The UN's establishment of this position shows that privacy is anything but dead.

Professor Joseph Cannataci of Malta University was appointed as the first Special Rapporteur on the Right to Privacy.²

Professor Cannataci brings 33 years in privacy and related areas (technology law, information law and anthropology) to the role having written on topics as challenging as 'Privacy, Technology Law and Religions across Cultures'³.

² A Special Rapporteur is an independent expert appointed by the Human Rights Council to examine and report back on a specific human rights theme; in this case, the right to privacy.

³ Cannataci, Joseph A, Privacy, Technology Law and Religions Across Cultures, Journal of Information, Law and Technology, May 2009 http://go.warwick.ac.uk/jilt/2009_1/cannataci

The appointment is for three years with the mandate to – this is the much summarised version of the mandate:

- › to make recommendations to the Human Rights Council for privacy protection by identifying obstacles to the right to privacy,
- › raising awareness of the importance of providing individuals whose right to privacy has been violated with access to effective remedy consistent with international human rights obligations;
- › to report on alleged violations, and
- › to draw the attention of the Council and the United Nations High Commissioner for Human Rights to particularly serious situations.

Recognising that Affinity seeks to nurture interfaith and intercultural learning, and to help build personal relationships between people of diverse faiths and backgrounds, I make the point that privacy is also integral to many faiths and for some worshippers, privacy is essential if they are to have freedom of worship and to be able to practise their faith safely.

The Universal Islamic Declaration of Human Rights of 1981 has at Section 22 the right to privacy and the 1990 Cairo Declaration on Human Rights in Islam, also includes the right to privacy.

The right to privacy is also established in international conventions such as the UN Convention on the Rights of the Child and the UN Convention on the Rights of People with Disabilities.

But back to the Rapporteur on Privacy; to progress his work Professor Cannataci has established five thematic priorities:

UN Special Rapporteur on Right to Privacy

Thematic Priorities:

1. Role of privacy in the development of the individual and society
2. Security and surveillance
3. Big data, data analytics
4. Health, genetic privacy
5. Use of personal information by commercial and private sectors

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Each of these thematic priorities is to be advanced by taskforces in conjunction with representatives of civil society who are putting much effort into privacy protection.

There is not enough time to speak on each of these five priorities but his first thematic priority – the importance of privacy to the development of the individual and to the development of society is very interesting and valuable.

Essentially Professor Cannataci's point is that the fullest development of the individual depends upon enjoyment of human rights including privacy, and that society in turn is enriched by its citizens developing in a climate respectful of human rights.

Privacy along with the right to freedom of expression and the freedom of access to information is important to the development of the individual and the development of society, particularly in the digital age. The right to privacy and the right to self-expression are complementary rather than in competition.

There are a number of writers on why privacy is important to the development of the individual including of course the UN Rapporteur, but also Lord Justice Leveson who led the UK Phone Hacking Inquiry.

You will recall the UK Inquiry into allegations against News of the World reporters who amongst others, were accused of hacking mobile phones of celebrities and others such as the murdered school girl Milly Dowling, to gain information for their stories.

Lord Justice Leveson came to Australia in 2012 where I met him at a conference at the University of Technology Sydney. He quite unequivocally states that there is a public interest in personal privacy – it is not just a benefit to the individual.

In his words

“the existence of a private sphere is vital for human development. It is the space in which individuals are able to experiment with preferences and build personal relationships beyond public scrutiny and judgment. Violations of the private sphere prevent individuals from obtaining these benefits.”

Where there is for example, public interest in law enforcement at the expense of individual privacy, he argues that even there, the balanced result would be a proportionate invasion of privacy, saying:

“Violation of the private sphere must always be proportionate to any larger public interest being served. The element of control over one’s personal life is never all-or-nothing, but a matter of an infinite number of degrees and decisions. Everyone is entitled to some private space and always provided that there is no countervailing public interest in exposure of that private space (for example, for exposes crime or serious impropriety) there is a public interest in preserving it.”⁴

⁴ The RT Hon. Lord Justice Leveson *Privacy and the Internet*, Communications Law Centre, University of Technology Sydney, Australia, 7 December 2012

The progress of this Taskforce will do much to advance a richer appreciation of privacy.

One of the Special Rapporteur's strategies is to promote national and regional developments in privacy protection at a global level. And Professor Cannataci has been working closely with Data Protection and Privacy Commissioners world-wide to raise the standards for privacy generally.

Big data, data analytics

I will be contributing to the Big Data Taskforce which is being chaired by a colleague, the Victorian Privacy and Data Protection Commissioner, David Watts.

In the past, the difficulties of collating, storing and manipulating personal or health information provided some of the chief protections for informational privacy. The capacity of technology to hold and manipulate vast amounts of data and which is able to be held for digital eternity has stripped away the earlier mechanical barriers and their role as ad hoc safeguards.

Since 2015, NSW has had a Data Analytic Centre (DAC) and I support the use of data to achieve public benefits – as long as the privacy of the individual is respected.

I supported the legislation that established the DAC (as we call it), because the data sharing legislation requires data to be provided in compliance with NSW privacy laws. Minister Dominello, the responsible Minister, has been consistently on the record, and in practice, stating that NSW privacy laws are to be respected.

I'm also hopeful of ensuring that NSW has representation on the health taskforce. Health privacy is a particularly critical area because information about an individual's DNA reveals not only information about the individual but also information about those who are biologically related to them.

Professor Cannataci, as Special Rapporteur is bringing a renewed focus to privacy as an enabling right that facilitates the development of the individual and privacy's contribution to a democratic way of life.

In a recent Skype teleconference I had with him, he posed the question 'Where is Australia on the privacy score board relative to other countries, when it does not have:

1. a Constitutional provision for the right to privacy?
2. a Bill of Rights that sets out a right to privacy? and
3. a Common law tort, or statute for legal remedy to serious invasions of privacy?

This was a bit confronting as I regularly and proudly, point to the fact that in 1975, NSW was the second jurisdiction in the world to introduce privacy protection legislation - with the passing of the *NSW Privacy Committee Act, 1975*.

So, if I now turn to what's happening in New South Wales in privacy:

NSW Privacy law and there are two Acts – the *Privacy and Personal Information Protection Act, 1998* and the *Health Records and Information Privacy Act, 2002*, provide important privacy protections for NSW citizens in certain circumstances but I stress these are by no means comprehensive protections.

My report of 2015 on the operation of the *Privacy and Personal Information Protection Act, 1998* identified matters that need to be addressed to better meet the expectations of the community.

Chief amongst these are:

- › Comprehensive and consistent coverage for users of government services, services provided by Non-Government Organisations and those provided by State Owned Corporations.
- › Application to private individuals acting in their private, family or household capacity, as well as to employees not acting in their official capacity but who breach privacy using information obtained in their employment.
- › Relative to other States, the exemptions for Police are very broad - so broad that the NSW Law Reform Commission while recognising the important role of such agencies, indicated that privacy legislation should not be used as a 'secrecy

shield'

- › There is no explicit coverage of physical, spatial or territorial privacy rather reliance upon the reserve powers of the Privacy Commissioner.

Other legislation in NSW also has provisions relating to privacy. These can place restrictions or controls on the use, collection and disclosure of personal information. And range from surveillance laws, criminal law, child protection laws and health regulation through to laws relating to the release of images under road transport legislation.

Certain issues relevant or connected to privacy are appropriately addressed through other legislation for example behaviour that is grossly offensive or criminal in nature. And the NSW *Crimes Act, 1900* contains a range of offences that may be applicable to serious invasions of privacy.

However criminal law fails to adequately provide comprehensive coverage for serious invasions of privacy and to provide this relief in an easy and timely manner.

While some protections and remedies may be in place, some privacy invasive actions are not captured. There are gaps for example, under the NSW *Surveillance Devices Act, 2007* unauthorised audio recording without consent is a criminal offence but video recording without consent, is not.

So, existing law is piecemeal with some actions that intrude upon privacy, being illegal but others, equally intrusive, are not.

And there is no overarching civil remedy for serious invasions of privacy.

In mid-2015, the Legislative Council of the NSW Parliament established an Inquiry into remedies for the serious invasion of privacy in New South Wales. The terms of reference raised that adequacy of existing remedies, and whether a statutory cause of action for serious invasions of privacy should be introduced.

At the time the Inquiry was established there were a number of reports about social media and surveillance technologies, 'revenge porn', the sexualisation of young people, and the misuse of individuals' personal information.

The NSW Parliamentary Inquiry heard evidence from individuals, academics, legal experts, media and arts representatives as well as from privacy advocates. Many appearing before the Inquiry expressed frustration at the continued lack of action despite the number and quality of reports recommending change.

The Inquiry brought down its report in March this year and after considering issues such as national uniformity and freedom of the press, recommended unanimously that the NSW Government introduce a statutory cause of action for serious invasion of privacy, using aspects of the model proposed by the Australian Law Reform Commission in 2014.

In response, just recently, the NSW Government announced that instead of a statutory cause of action for serious invasion of privacy, it will seek to criminalise "revenge porn", that is, the distribution of intimate or sexually explicit images without consent.⁵

I commend action to address such an extremely offensive behaviour but I believe that the failure to action the unanimous recommendations of the Inquiry is a missed opportunity. And one that would have met the expectations the community of their right to remedies for serious invasions of privacy.

Consultation will start soon on the Government's proposal for 'revenge porn'. The issues to be put to public consultation include the definition of "intimate" images, how they are shared or distributed, and what penalties should apply, including how the offence should apply to children and young people. I encourage those in the audience who are interested in this area to provide input.

However, as commendable as this proposal is, it does not assist people such as

⁵ Currently, only Victoria and South Australia make distributing intimate and sexually explicit images without consent a criminal offence. In Victoria the offence carries a penalty of up to two years in prison, while in South Australia the maximum penalty is \$10,000 or two years in jail.

Witness A to the Inquiry, who experienced a grievous invasion of her privacy in a place – a (private) health setting, where she should have had every expectation that it would be respected. And when she was alerted to the breach of her privacy, has found no recourse despite very determined efforts.

Before this Parliamentary inquiry was held there had been a number of comprehensive reports from Federal and State Law Reform Commissions. In particular:

- › the 2008 Australian Law Reform Commission report *‘For Your Information: Privacy Law and Practice’*;
- › the 2009 New South Wales Law Reform Commission report *‘Invasion of Privacy’*;
- › the 2010 Victorian Law Reform Commission report *‘Surveillance in Public Places’*;
- › the 2013 South Australian Law Reform Institute (Consultation Draft) *‘A statutory tort for invasion of privacy’*;
- › the 2014 Australian Law Reform Commission report *‘Serious Invasions of Privacy in the Digital Era’*.

There have been something like 8 reports recommending a statutory cause of action in the past decade, and two alone in 2016 – one from the Parliament of NSW and the final report from the South Australian Law Reform Institute also released in March 2016.

All of these reports supported the introduction of a statutory cause of action that would enable an individual whose privacy has been invaded to commence an action. There are some variations amongst the models recommended or proposed by each Law Reform Commission, but there is strong consensus for creating legislation that would provide an adequate remedy for serious invasions of privacy which does not obstruct the reporting of matters by the press of matters of public interest.

Despite this, the Commonwealth and State Governments have not acted on these recommendations.

As the Hon. Michael Kirby has said, a statutory approach would provide individuals with

a simple, clear way to seek a remedy. It would provide certainty to individuals that are currently experiencing or have experienced invasions of their privacy but do not have access to a remedy.⁶

We cannot rely upon the development of common law for invasion of privacy as it has been slow in development, and whether this will fully develop has been described by the Australian Law Reform Commission as ‘at best, uncertain’.⁷

I note that the NSW Opposition’s Shadow Attorney General, Mr Paul Lynch, has given leave of notice of the intention to introduce a Private Member’s Bill for a statutory cause of action. So we may see further debate, if not action, around this very important issue.

In conclusion, I would like to leave you with a set of statements based on the principles originally outlined by the Australian Law Reform Commission in its 2014 report on ‘*Serious Invasions of Privacy in the Digital Era*’. These are:

- › Privacy is a fundamental human right worthy of legal protection
- › There is public interest in protecting privacy
- › Privacy enables other rights such as freedom of expression, and is a means to secure beneficial outcomes for society
- › Privacy protection is a shared responsibility of individuals and organisations, as well as government and the Parliament
- › Australian privacy law should:
 - Meet international standards
 - Be adaptable to technological change
 - Be clear, certain, coherent and consistent
 - Be accessible to citizens irrespective of financial status

But most of all, it should provide remedies for serious invasions of privacy.

Thank you.

⁶ The Hon. Michael Kirby AC CMG *Privacy Protection in Australia – Why NSW Should Lead*, at the Launch of 2016 Privacy Awareness Month, Office of the NSW Privacy Commissioner, May 2016.

⁷ Australian Law Reform Commission *Serious Invasions of Privacy in the Digital Era*, Report 12 - 2014

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