Commissioner for Privacy and Data Protection

Personality and Privacy in Australia

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UN Special Rapporteur's Conference on Privacy, Personality and Flows of Information
New York University Faculty of Law
New York 19 and 20 July 2016

As an Australian I deliver a paper on privacy rights with a sense of diffidence. There are two reasons for this.

First, the traditional owners of my country, the Australian Aboriginal and Torres Strait Islanders, the inheritors of the oldest continuous culture on earth – had a sophisticated understanding of privacy that is now almost obliterated by colonisation. As I am not an Aboriginal Australian, I feel ill equipped to describe aspects of their culture that are so inextricably bound with their dreaming.

Secondly, as colonised, my country is the only western democracy not to have a Bill of Rights that provides constitutional protections for human rights, including the right to privacy.

The purpose of this paper is to provide an account of why this is so.

Privacy and the first Australians

My account begins by noting that although Aboriginal culture is a collective culture, it provided for individual and collective privacy rights.

The eminent Australian anthropologist, WH Stanner, said this:

> The suggestion is that privacy can be expressed in four basic things: *solitude* (in the sense of freedom from observation by other people), i*ntimacy* (in the sense of privacy for members of small self-chosen groups, such as families), *anonymity* (in the sense of freedom from public surveillance and accountability), and *reserve* (in the sense of a right to withhold one's *essential self* from public disclosure). There is a further suggestion of consequent basic needs -- a need for personal autonomy (the right to choose privacy when and if it is desired); a need for emotional release from unbearable pressure through solitude, intimacy, or anonymity; a need for periods of self-evaluation to ponder and decide the course of future behavior, and to establish psychological and social *distance* from others; a need for determining when and what information one should make available to others about oneself…Although Aboriginal languages may not have verbalized concepts of *privacy* in the European sense, they do have concepts which taken together cover much the same ground…My general contention is that in spite of the relatively collectivist emphasis of Aboriginal society, there was – and still is – an intrinsic concern with the *essential self* of individual persons, and therefore with the

private personality, the inner most idea of privacy.[1]

As with many aspects of culture, today's Australians have much to learn from the traditional Australians. Stanner's description of Aboriginal privacy is almost unknown in Australian privacy discourse.

Turning from the colonized to the colonizers, an initial examination of Australia's record on rights seems respectable enough.

It played an important international role in the development of human rights. It was a founding member of the United Nations and was one of the eight countries that Eleanor Roosevelt chose to develop the Universal Declaration of Human Rights. The Australian ambassador to the UN, the former High Court judge, Dr Herbert Evatt, played an influential role in the drafting process. Later, in 1948 as the President of the UN General Assembly, Evatt oversaw the adoption of the Universal Declaration.

From 1978 to 1980, the eminent Australian jurist, Michael Kirby, was the Chair of the expert group of the Organization for Economic Co-Operation and Development (OECD) on trans-border data flows and the protection of privacy. The Principles for the Fair Handling of Personal Information and Trans-border Data Flows of 1980, revised without fundamental change in 2013, have served as a durable international benchmark for protecting information privacy.

Australia has ratified many of the international human rights instruments including the *International Covenant on Civil and Political Rights* in 1980 and both of its optional protocols. It ratified the *International Covenant on Economic, Social and Cultural Rights* in 1975.

However, Australia's international human rights posture has not translated to the domestic sphere. The strongest human rights protections are those that are constitutionally entrenched so that they prevail over other laws. Australia does not have a constitutionally embedded Bill of Rights.

Australia's constitution does protect some rights, but they are a curious mix. It:

- prevents the Commonwealth (that is, the federal government) from making laws to establish a religion, or for religious observance, or for prohibiting a religion or to establish a religious test for the holding of an office
- guarantees freedom of interstate trade and commerce
- guarantees that property acquired by the Commonwealth must be acquired on just terms
- Includes an implied right of political free speech

In the absence of constitutional guarantees, human rights in Australia are protected by a patchwork of Commonwealth, State and Territory legislation. Examples include anti-discrimination laws in relation to race, sex, disability and age. Other legislation establishes

[1] W.E.H. Tanner, 'Privacy and the Aboriginal People' in *People from the Dawn: Religion, Homeland and Privacy in Australian Aboriginal Culture,* pp. 151. Solas Press, 2001.

universal health care and compulsory universal education and can be characterized as addressing some economic, social and cultural rights.

Article 17 of the ICCPR, the right to privacy, is not protected either constitutionally or by legislation,[2] except for information privacy.

Information privacy, which is individual control over the collection, use and disclosure of personal information, is regulated under Commonwealth and some State and Territory legislation. These are based on the OECD Principles. But there are significant gaps. Coverage of the private sector is limited to only the largest corporations: about 90% of Australia's private sector is not covered. One third of the States do not have public sector information privacy laws.

The arguments that lead to the enactment of information privacy laws in Australia were not founded on a rights approach. Initially a Commonwealth public sector information privacy law was enacted to provide political damage control for the public backlash against a failed proposal to introduce a national identity card in the 1980s. Since then privacy has been closely linked to economic arguments, particularly the development of information and communications technologies. Lack of privacy protection was identified early as inhibiting the development of the internet and of e-commerce. A wave of information privacy laws was introduced as part of the public policy infrastructure to support economic development in the information age.

There is no civil law (or equivalent) right to privacy in Australia. Although some Australian courts have left open the question of recognition of a tort of privacy infringement or, more recently, a cause of action based on the UK's extended action for breach of confidence, judicial progress has been glacially slow.

Repeatedly, Australian governments have rejected recommendations from law reform commissions to legislate for a tort of serious invasions of privacy. In response to the most recent calls for reform in 2014, Australia's Attorney General said that 'The government has made it clear on numerous occasions that it does not support a tort of privacy.'[3]

Against a background where there are no overarching privacy rights in Australia and legislative protections are limited to information privacy its not surprising that discourse about privacy as a right to personality is limited. In Australia it is best to seek enhanced privacy protection using an economic case. Arguments based on a rights approach are virtually ignored.

Why, then, in a prosperous, modern, democratic nation such as Australia is there such a disjunction between its declared international obligations and their domestic status?

There are a number of reasons that can be broken down into historical, geographical, media, constitutional and legal reasons.

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[2] Except to the extent that they are covered by the *Charter of Human Rights and Responsibilities Act 2006* (Vic) and the *Human Rights Act 2004,* (ACT)

[3] See http://www.theaustralian.com.au/business/legal-affairs/brandis-rejects-privacy-tort-call/story-e6frg97x-1226873913819 [Accessed on 18 July 2016]

Australia's history

Although concepts of rights pre-date the Enlightenment, the international human rights framework was developed out of it and the carnage of two world wars. Although Australia was one of the most significant participants in both on a per capita basis, its national experience of the causes of those conflicts differs from almost all of the other participants, perhaps with the exception of New Zealand.

The historian Niall Ferguson controversially identifies ethnic conflict, economic turbulence and the decline of empires as the major contributing causes for 'the extreme violence of the twentieth century.'[4] If these are the factors that gave rise to the armed conflicts that then led to the development of the international human rights framework, to what extent do they inform Australia's domestic human rights posture? Although Ferguson's analysis is contested, it provides a useful lense through which to view the Australian situation.

With the exception of the first Australians, Australia's population was one of the most homogenous on earth until very recently. Overwhelmingly, Australia was settled by, and drew its immigrants from 'the mother country' as Great Britain was referred to. This monocultural, Anglo/Celtic population was protected from immigration by strict immigration laws. The 'White Australia policy' was the first legislation passed by the newly federated Australia to protect the nation from 'the yellow peril.' The policy was finally dismantled as late as the 1970s and, although clearly racist, the cultural uniformity it produced was not fertile ground for popular demands for rights in a country steeped in the traditions of the common law.

For much of this time, the traditional owners of Australia - who would have benefitted from access to rights - were so dispossessed dislocated and mistreated that it was thought they faced obliteration. Although Australia is now one of the world's most multi-cultural nations, this has not yet translated into a widespread movement in favour of human rights.

Almost since settlement in the late eighteenth century, Australia has been prosperous. During an extended period of gold rushes in the mid to late nineteenth century, my hometown was known as 'Marvelous Melbourne.' A generation after being established it had become the second largest city, after London, in the British Empire. Although Australia's economy has boomed and busted and concerns mount about growing inequality, overall economic and social conditions for the middle and working classes were (and remain) fairly high.

Finally, rather than being experienced in Australia as a collapse, the British Empire faded away, almost imperceptibly. Although its vestiges live on – the Queen of Great Britain and Northern Ireland remains the Queen of Australia and the prerogative rights of the English crown remain part of domestic law, for Australia's young, multi-ethnic population talk of 'the Empire' is more likely to lead to a discussion about Star Wars.

Geography: the tyranny of distance

[4] Niall Ferguson, *The War of the World: Twentieth-Century Conflict and Descent,* Penguin, 2006

This phrase, first coined by the Australian historian, Geoffrey Blainey, in the 1960s is used to refer to the fact that Australia's remoteness and distance from its colonizer, Great Britain, had a significant impact on its culture and the attitudes of its population. Rights were for other less fortunate people who did not bask in the embrace of the empire, enjoy the benefits of British institutions and rely on the incrementalism of the common law. If Britain didn't need constitutionally embedded rights, nor did Australia.

The configuration of political power

It is rare for a Commonwealth government to have a majority in both houses of parliament. In Australia, voting is compulsory. Elections for the lower house, where government is determined, are based on electoral divisions determined by population using a preferential system of voting. The more populace a State, the more representatives it elects. Members are elected for three years.

The composition of the upper house, the Senate, is determined by each State voting as one electoral division using a proportional voting method. Each State elects twelve Senators irrespective of population size, for six years. Originally designed to protect State rights, this system is more likely to see smaller political parties elected and to thwart some of the government's most controversial laws.

This configuration of power produces, as a South African friend of mine recently observed, a system where nothing terrible ever happens but nothing ever really good ever happens.

Media concentration

Media ownership in Australia is the most concentrated of all of the OECD nations. One individual owns about seventy per cent of the print media. Although the media strongly supports a right to freedom of expression (another right not embodied in Australian law), that support does not generally extend to support for human rights in general. Any campaign for changes to the Constitution would have to overcome media opposition. Although its influence of is waning rapidly, its opposition could well be fatal because Constitutional change in Australia is not easy.

Constitutional issues

The Australian Constitution is very difficult to amend. First, the amendment must be passed by an absolute majority of both houses of the federal parliament. Then, a referendum is required. The referendum can only be passed if an overall majority of Australians vote in its favour *and* there is a majority of support for it in a majority of States. Amendments to the Constitution have been proposed 44 times. Only 8 have succeeded. Very few of these have been controversial. A 1999 referendum to establish Australia as a republic was soundly defeated. The path to a constitutional Bill of Rights in Australia faces substantial blockages due to the onerous impediments of the constitution itself.

That is not to say, however, that a *legislated* Bill of Rights is out of the question. Two Australian jurisdictions – Victoria and the Australian Capital Territory - have enacted Charters of Rights

based on the ICCPR. But neither confers an independent cause of action on individuals who consider that their rights have been violated.

However, a federal, *legislated* Bill of Rights would need to overcome a number of legal hurdles. In a short paper such as this it is impossible to explain the technical arguments that are involved. They encompass whether 'manner and form' provisions could affect the validity of subsequent Commonwealth law, issues associated with the limits of the Commonwealth's legislative power and the strict doctrine of the separation of legislative, executive and judicial powers that might restrict oversight and the availability of remedies.

The position is Australia is therefore significantly different to the UK and New Zealand. Both protect human rights but neither have a written Constitution.

Finally, there are arguments about the role of the judiciary that are used to oppose rights.

A Bill of Rights confers too much power on an unelected judiciary

This argument takes a number of forms: that judges are unelected; that judicial decision-making is unaccountable; that human rights questions are political in nature and should not be adjudicated by judges; that judges, in declaring legislation illegal on human rights grounds, will undermine the will of the people. In Australia, each of these objections to human rights have had traction in the community (and media) and continue to present impediments to any referendum on constitutional change.

But they are disingenuous arguments. The judiciary's *job* is to independently oversee and apply the rule of law. Judges are tenured and do not need to seek political or popular approval to remain in office and to exercise their powers impartially. Judges regularly rule on the legality of government action. They regularly declare Commonwealth legislation to have breached the constitution.

Judges *are* accountable. They must give reasoned judgments that are almost always subject to appeal. Their decisions are based on precedent, meaning that changes to the law are incremental. In the human rights context, an Australian Bill of Rights based on international treaty obligations, would be accompanied by years of international precedent to guide interpretation.

It is true human rights *can* be political and are often hedged by limitations that rely on tests of 'reasonableness' or 'necessity' or 'proportionality.' But these concepts are applied on a daily basis in countless courts across Australia without any apparent collapse of the rule of law or protests about undue judicial activism.

Finally, human rights issues are not invariably controversial: not every human rights dispute is politically charged. For example, the right to a fair trial – about which judges *are* the experts – is hardly a contested issue. Nor is freedom from slavery. Nor is the right to liberty and security.

Conclusion

Australia's position on human rights is unique and complex. The legal and Constitutional barriers to reform are significant and difficult to negotiate. The socio-political environment has not been conducive to human rights activism. Those who argue against a Bill of Rights have more traction in public discourse than those in its favour.

This leads me back to the focus of this conference – privacy and personality. It's too easy to look at the impediments as insurmountable.

This is the challenge for the Australians – and there are many – who see privacy as an enabling right that is vital to self-actualization, personal growth and the realization of other human rights. Our politicians will continue to do nothing unless there is a real chance that their inaction leads to their loss of office. Our judiciary *can* do nothing unless cases are brought forward for decision. I'm often puzzled by the absence of privacy test cases being brought to court in Australia. One of the reasons for this is that, unlike in the USA, unsuccessful plaintiffs in human rights cases usually have to pay the costs of the defendant, almost invariably this is the government.

It also means that Australian privacy activists need to move beyond the arguments that might resonate in Europe or the USA. They need to construct a narrative about why privacy rights need protection that resonates in an Australian context. Time and again, surveys show that Australians are concerned about privacy. These concerns need to be catalyzed from passive concern to active and sustained leadership. Consumer protection, environmental and health activists have succeeded in doing this. Privacy activists and civil society need to learn from their successes.

The appointment of the Special Rapporteur on the Right to Privacy and this UN sponsored conference at New York University's law school represent global opportunities to recast the debate. But for Australia, they open the door to new approaches, new opportunities and new actors.

I think we're up for it.

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19 July 2016