

COMMENTS ON CULTURES OF PRIVACY & SURVEILLANCE IN AUSTRALIA***Current Legal Issues Seminar Series,*
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I am going to focus on the extent to which Australian society has changed, arguing that the changes warrant the development of the common law by the formulation of a tort of breach of privacy, and then talk about the Queensland Law Reform Commission's recommendation for new legislation regulating the use of surveillance devices.

I begin with a disclaimer. The views I am about to express are my own. I do not have authority to speak on behalf of the QLRC, although of course I shall be referring to what is in its report on *Civil Surveillance*, which is accessible online.¹

Our population has risen to 26.5 million.² It is relatively much more urbanized than it once was: Sydney and Melbourne each have more than 5 million people, and south-east Queensland has 3.8 million.³ We are much more ethnically and culturally diverse than we have ever been. We are no longer cut off from cultural, political and economic developments overseas: indeed we have graphic real-time exposure to what is happening in many parts of the world.

In our daily lives we are subjected to more surveillance than previously, but there is some ambivalence in our attitudes to it.

We accept some degree of surveillance as the price we pay for the benefits we are told it brings. For example, CCTV cameras in our streets and parks, our public buildings, commercial premises, airports – the list seems endless - are now par for the course. We accept that they provide at least some protection against violence, theft, property damage and the entry of prohibited imports. When we are travelling by car, we rely on GPS technologies to lead us to our chosen destinations.

It is incontestable that digital technologies have wrought permanent changes in our daily lives.

Sometimes consciously, but more often without even momentarily turning our attention to it, we submit to the collection of data about our online activities on an unimaginable and certainly unprecedented scale. If prompted to do so, we blithely 'accept the Ts & Cs' to hasten our journey to the online world.

Increasingly, however, we have no real choice in the matter because the information we want and the goods and services we need are accessible only through digital technologies.

¹ Queensland Law Reform Commission, *Review of Queensland's laws relating to civil surveillance and the protection of privacy in the context of current and emerging technologies* (Report No 77, February 2020). <[QLRC-Report-77-online.pdf](#)> ('QLRC, *Civil Surveillance*').

² Australian Bureau of Statistics <[Population | Australian Bureau of Statistics \(abs.gov.au\)](#)>.

³ PopulationU <[Sydney Population 2023 \(populationu.com\)](#)>; PopulationU <[Melbourne Population 2023 \(populationu.com\)](#)>; Steven Miles, 'South East Queensland is growing' (Queensland Government Media Statement, 31 July 2023) <[South East Queensland is growing - Ministerial Media Statements](#)>.

As well as ourselves being surveilled, we can surveil others online. Social media provides endless opportunities for users to keep watch on others. Because of the persistent quality of material that is posted online we can search for and retrieve information about others on our phones and other devices - information that would once have been really difficult to find. And it is very easy to copy what we find, to comment on it, and send it on to others without a moment's thought about privacy.

But when something goes wrong and our personal data is exposed, whether as a result of a weakness in the technology, malevolent hacking or some failure on the part of, say, banks, utilities or bureaucracy, or a social media post going viral, we express our concern and outrage in terms of breach of privacy as well as the potential for financial or other harm.

We are generally more assertive about privacy than we once were. Professor Richardson has referred to the recent *Australian Community Attitudes to Privacy Survey*. This is probably indicative of privacy's underlying values of dignity and autonomy ranking more highly among our values than they used to.

Three Australian jurisdictions, Queensland, Victoria and the ACT, have human rights legislation expressly giving natural persons rights to privacy.⁴ These statutory rights have to be considered in the interpretation of legislation,⁵ and it seems likely that Courts will have regard to them in developing the common law, but they are not expressly obliged to do so.

It has always been a function of the Courts to develop the common law in light of changes in society and technology.⁶

The changes I have just described have already occurred.⁷ They warrant development of the common law by the formulation of a tort of breach of privacy. I have the impression that when an appropriate case comes before the High Court, there will be a clear majority, if not unanimity, in support of natural persons having a right to privacy - breach of which is directly actionable as a tort. In *Lenah*,⁸ which was decided more than 20 years ago, the information did not have the necessary quality of confidence and the claimant was a corporation. In *Smethurst*⁹ the journalist and the media organisation did not argue that the common law should be developed in this way. *Farm Transparency*¹⁰ concerned the interpretation of a legislative provision and the implied freedom of political communication.

I am encouraged by Courts' increasing references to human rights legislation and international conventions even where they are not obliged to take these into account and their increasing references to the

⁴ *Human Rights Act 2019* (Qld) s 25; *Charter of Human Rights and Responsibilities Act 2006* (Vic) s 13; *Human Rights Act 2004* (ACT) s 12.

⁵ For example, in *Hogan v Hinch* (2011) 243 CLR 506 the High Court took into account the human rights prescribed by ss 13 and 15 of the *Charter of Human Rights and Responsibilities Act 2006* (Vic) in construing s 42 of the *Serious Sex Offenders Monitoring Act 2005* (Vic).

⁶ *Lange v ABC* (1997) 189 CLR 520, 565-6; *PJS v News Group Newspapers Ltd* [2016] AC 1081, 1111 [70]; Lord Neuberger, 'Has the identity of the English Common Law been eroded by EU Laws and the European Convention On Human Rights?' (Lecture, Faculty of Law, National University of Singapore, 18 August 2016) 18 [50]-[51] <<https://www.supremecourt.uk/docs/speech-160818-01.pdf>>.

⁷ 'The common law develops with the people, not ahead of them. The latter is for Parliament.' A comment made by Justice Kos of the NZ Supreme Court after delivering a lecture entitled 'Parallel Universes: The Curious Dearth of Trans-Tasman Citation' (James Merralls Fellowship in Law Lecture, Melbourne Law School, 7 March 2023).

⁸ *Australian Broadcasting Corporation v Lenah Game Meats Pty Limited* (2001) 208 CLR 199.

⁹ *Smethurst v Commissioner of the Australian Federal Police* (2020) 272 CLR 177.

¹⁰ *Farm Transparency International Ltd v NSW* (2022) 96 ALJR 655.

works of leading scholars. I can understand the careful references to ‘privacy interests’ until a common law right is judicially defined.

Development of the common law is an incremental process. A well-resourced person (perhaps one with pro bono legal representation) with determination and mental stamina would have to take a case all the way to the High Court for there to be judicial recognition of a common law privacy tort. Litigation can be a stressful experience.

A common law privacy tort, or two torts – one relating to misuse of private information(‘information privacy’) and the other relating to intrusion upon seclusion (‘physical privacy’), would be preferable to a statutory tort in that the inherent flexibility of the common law would allow it to meet new circumstances not envisaged by such legislation. And it would be applicable across Australia, enforceable in all State, Territory and Federal courts subject to the statutory limits on their respective jurisdictions.

In the meantime I think we are likely to see Courts expressly acknowledging that privacy is genuinely and legitimately highly valued in contemporary Australian society, more statutory provisions prescribing privacy as a relevant consideration and Courts more regularly taking privacy into account in making evaluative judgments and exercising discretions in many areas of law (both judge-made law and statute law).

I turn now to the Queensland Law Reform Commission’s *Review of Queensland’s Laws relating to Civil Surveillance and the Protection of Privacy*.¹¹

Queensland’s legislation in this area is the *Invasion of Privacy Act 1971* which regulates the use of listening devices to overhear, listen to, monitor or record private conversations and the communication or publication of information obtained from such use. Unlike legislation in other Australian jurisdictions, it does not extend to other types of surveillance devices. In common with legislation in other Australian jurisdictions it prescribes only criminal prohibitions and enforcement – it does not provide any civil law mechanism for regulating the use of a surveillance device. Prescribed penalties for breach of the use prohibition and the communication or publication prohibition are low: up to 2 years imprisonment or a maximum fine of 40 penalty units (currently \$6,192) for a natural person, and a maximum fine up to 5 times that for a corporation.¹² Very few people have been convicted of offences under the Act. In its Consultation Paper, the QLRC noted information provided by Queensland’s Department of Justice and Attorney-General – that between 2001-2002 and October 2018 fewer than 18 persons had been charged with offences under the Act and fewer than 10 convictions had been recorded.¹³

The QLRC recommended new legislation to replace the 1971 Act and provided a draft Bill implementing its recommendations.¹⁴

Like the legislation in other jurisdictions, the draft Bill provides separate offences for ‘recognised categories’ of surveillance devices: listening devices, optical surveillance devices, tracking devices, and data surveillance devices. ‘Surveillance device’ is defined as including a device that is a combination of two or more of the defined categories (eg a phone).¹⁵

¹¹ QLRC, *Civil Surveillance* (n 1).

¹² Ibid 16.

¹³ QLRC, *Review of Queensland’s laws relating to civil surveillance and the protection of privacy in the context of current and emerging technologies* (Consultation Paper WP No 77, December 2018) 105 <https://www qlrc qld gov au/ data/assets/pdf_file/0007/591766/qlrc-wp-no-77.pdf>.

¹⁴ QLRC, *Civil Surveillance* (n 1) Appendix F, ‘Draft Surveillance Devices Bill 2020’.

¹⁵ Ibid 37-9.

The Commission noted that a large amount of data, including location data, is generated and collected about individuals online from the use of devices such as computers, smartphones and fitness trackers. This gives rise to privacy concerns, but the collection, storage, use and protection of that sort of data is not the subject of surveillance devices legislation. For some entities those matters are regulated by the *Information Privacy Act 2009* (Qld) and the *Privacy Act 1988* (C'th).¹⁶

The Commission gave consideration to the alternative of a 'technology neutral' approach focusing on activities rather than categories of devices. However, it considered that –

- the purpose of the proposed legislation should be to protect a natural person's privacy from unjustified interference by the *use*, and the communication or publication of information obtained from the *use* of surveillance devices;
- it was important that the definition of 'surveillance device' be clear so that the legislation would be capable of enforcement; and
- the approach taken in the Bill would achieve reasonable consistency with surveillance devices legislation in other jurisdictions.¹⁷

The provisions do not apply to every use of a surveillance device (eg a phone) but only where the device is being used *without consent* in certain circumstances:

- for listening devices – to listen to, monitor or record a *private conversation*;
- for optical surveillance devices – to observe, monitor or visually record a *private activity*;
- for tracking devices – to find, monitor or record the *geographical location* of an individual or a vehicle or other thing;
- for data surveillance devices - to access, monitor or record information that is input into, output from or stored in a computer.¹⁸

The express or implied consent of the person being monitored is a key element of the draft Bill. Where there was consent, the use of the device and the communication or publication of information obtained would be lawful. In the absence of consent, it would be unlawful unless an exception applied. This would be a departure from the 1971 Act which allows participant monitoring without consent.¹⁹ Exceptions would include use for a justified purpose and where 'reasonably necessary' in the public interest.²⁰

The Commission's draft Bill goes further than legislation in other jurisdictions in that it also contains civil law 'general obligations' not to interfere with an individual's surveillance privacy (clauses 34-38) and a civil mechanism to resolve complaints about contraventions of those general obligations (clauses 39-65).

The QLRC delivered its report to the Queensland Attorney-General in February 2020. It was tabled in Parliament four months later. In April this year (2023) a public consultation paper was issued calling for feedback by 31 May 2023 'on a staged approach to considering implementing the reforms in the QLRC draft bill, starting with repealing the [1971 Act] and implementing the criminal prohibitions in the QLRC draft Bill.'²¹

¹⁶ Ibid 41.

¹⁷ Ibid 33-4.

¹⁸ Ibid 40-1.

¹⁹ Ibid 102-3.

²⁰ See *ibid* 115-20 for discussion of the public interest exception and issues relating to the media.

²¹ Department of Justice and Attorney General (Qld), *Civil Surveillance Reforms* (Consultation Paper, April 2023) 11 <<https://www.publications.qld.gov.au/ckan-publications-attachments-prod/resources/46c5d359-62b6-45c5-a399-1307afd4586c/consultation-paper-civil-surveillance-reforms.pdf?ETag=e57dd21f946b57cfc732eb79986467bd>>.

In other words, the Queensland Government apparently has little, if any, present inclination to provide for civil law obligations or their enforcement.

So far, the results of the consultation have not been made public. We know the Government is concerned to strike the right balance between allowing the use of surveillance devices for community safety and limiting their use in potentially harmful situations. We do not know whether it is waiting to see what, if anything, the Commonwealth Government does in relation to a statutory tort, whether there are resources issues in play or whether it thinks the introduction of civil obligations and a mechanism for their enforcement is simply a bad idea.

Thus, it seems likely that we will see some new legislation regulating the use of surveillance devices.