Privacy Law
Bulletin

Interview with the Honourable Michael Kirby AC CMG

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Bulletin: ***Those of us involved in the area will know there is no general right to privacy. You have, however, been pushing for reform in this area, particularly in NSW context. Why is the issue so important to you?***

Kirby: I was appointed in 1975 as the inaugural Chairman of the Australian Law Reform Commission (ALRC). That Commission received a reference in 1976 to propose laws for the protection of privacy. The proposals were made and have been made now on four occasions by the ALRC. On each of these occasions, they have suggested that there should be a general remedy to fill the cracks in the legislation that has been enacted in Australia for the protection of privacy.[1] The High Court in the *Victoria Park Racing*[2] case in 1937 held that there was no general right to privacy enforceable in the courts. That approach has been reaffirmed or recognised in later cases in the High Court. It does not appear as if this is a matter that can be efficiently and quickly corrected by the courts.

Meantime, the new technology that is available to us and is in use in Australia has increased the need for protection of privacy. Accordingly, this is something where our law has a gap. The ALRC and state law reform bodies have repeatedly suggested that the gap be filled. The time has come for something to be done. The only reason for making the latest suggestion, in the context of NSW, is that a parliamentary committee in NSW has specifically recommended that a statutory remedy for privacy should be enacted.[3] That is on the table of the Parliament of NSW. It would be good if that Parliament could give the lead as it did back in 1973 in adopting the legislation for the establishment of the Privacy Commissioner now the Privacy Commissioner's Office in NSW.[4]

Bulletin: ***Can you share with us some of the situations you have faced where you think the law is being inadequate in protecting people's privacy?***

Kirby: This is not only an issue that came before the High Court. It was an issue that arose in a number of cases that came before me when I was President of the NSW Court of Appeal from 1984 to 1996.[5] In the High Court the issue of privacy arose directly or indirectly in a number of cases. One of those cases was the *Gutnick* litigation[6] which concerned the law that would be applicable on the subject of international defamation, in the context of the internet. That case made it clear that there would be a number of problems in protecting privacy in the context of the new information technology by which information is now spread throughout the world, not just in a local district or national context.

The main case that concerned privacy was the *Lenah Game Meats* case.[7] That was a case in which there was a specific argument that the High Court should revisit the decision in the *Victoria Park Racing* case of 1937. It was argued that we should belatedly recognise a common-law remedy for the wrong of serious invasion of privacy. I was sympathetic to that submission. So were other justices of the High Court. However, there were two possible impediments. One of them was the impediment that with the Law Reform Commission repeatedly suggesting that there should be legislation to provide a remedy for privacy and with the failure of federal and state Parliaments to enact that legislation, a question arose in the minds of some of the justices as to whether, in the face of such refusal to act by Parliaments, the court, the High Court, would be acting properly in the judicial manner by proceeding to find and declare a remedy for privacy from the judicial bench.

That was not an impediment that would ultimately have restrained me, because the High Court is the highest court in the land. It has the responsibility for the common law of Australia. The common law is judge-made law. The *Victoria Park Racing* case was a judge-made decision on the law. What the judges make they can unmake.[8] What they fail to make, they can belatedly make. Therefore, I would have been willing to consider a remedy for privacy.

However, the problem that we immediately faced was that the proponent of the remedy and privacy was not an individual but a corporation, Lenah Game Meats. The human right to privacy is declared in international human rights law to which Australia is a party or which it observes (the Universal Declaration of Human Rights (UDHR) and the International Covenant on Civil and Political Rights (ICCPR)) is a right of individual human beings.[9]

In both of those instances, the right is expressed in terms of the right of the human individual and not of a corporation, which is a legal fiction, a legal person. Therefore, it did not seem to me, and to other judges, that *the Lenah Game Meats* case was a suitable test case for declaring and defining the common law right to privacy. Accordingly, I said that would have to wait for another case where the person propounding it was a human individual. That type of case has not yet come back to the High Court. Therefore, in the state of uncertainty that now exists in Australia, with courts indicating that they think there should perhaps be such a remedy and that they would be open to considering it, it would be entirely appropriate in my view for the Parliaments of Australia to proceed to act. If they don't do so, then I would expect, before too long, the courts will do so.

It used to be said that one of the advantages of the federal system of government was that you could experiment with developments in the law. That you could enact a law on a subject in one state, see how it operates, and then other states could follow if the law was seen to be operating justly and efficiently. However, we seem to have got out of the habit of experimentation with law reform in different states. It's about time we revived that habit. It was the way in which, in Australia, we reformed other areas of the law which were found wanting. These included the law on homosexual offences, the law on environmental protection, the law on consumer protection, and other such matters. Privacy is such an area of the law. It is an area which is important to citizens in Australia. It's about time that our Parliaments took steps to remedy the defect which has been shown since the *Lenah Game Meats* case and earlier since the *Victoria Park Racing* case.

Bulletin: ***Some people might assume that the Commonwealth Privacy Act[10] gives people protection in this area, but unfortunately it only applies to government agencies, larger private businesses, and businesses in the areas of health and finance. It does not deal with privacy more generally. Is there a gap in what people think the law is and what it actually covers?***

Kirby: That is a good point. I believe most Australians value their privacy. Getting total agreement on what that value is and what constitutes the boundaries of protectable privacy is a matter of some controversy. For ordinary people, securing their privacy is something which is cherished by them. As I have said, Australia has ratified the International Covenant on Civil and Political Rights which contains the requirement of respecting the privacy of individuals. Most people are not familiar with the detail of the law, even of fundamental law or important principles and foundations of the law. In part, this is because in Australia we don't have a home-grown bill of rights, neither in our federal or state constitutions nor in legislation which has been enacted to incorporate the principles of universal human rights in our jurisprudence.

Only in Victoria[11] and in the ACT[12] are there such statutes. The absence of either a constitutional bill of rights or a statutory statement of fundamental rights is that we don't have the tools that can be used to educate citizens at schools and after school about the fundamental rights by which we live together in Australia. Therefore, there is a great deal of ignorance about the state of the law. If many citizens were informed about the decision in the *Victoria Park Racing* case and the *Lenah Game Meats* cases, they would be truly shocked that the courts and the law in Australia have withdrawn their protection from a deeply felt need of legal protection for privacy that will uphold the integrity and dignity of each individual in the country.

Bulletin: ***Do you think there is a need to create a uniform privacy law across Australia, or do you think the experimental law reform approach is more appropriate?***

Kirby: My own preference would be for a uniform or federal law if that can find an appropriate foothold in the federal constitution. However, if we wait for that to happen, we may wait forever. After all it's now nearly 80 years since the *Victoria Park Racing* case was decided. Nothing has been done. It would seem to me that the appropriate way forward would be in the adoption by one State of a comprehensive protection of privacy measure which would be founded on the *International Covenant on Civil and Political Rights.*[13] Some critics suggest that that would lead to uncertainty in the law, that it would lead to troublemakers bringing litigation, and that would not be a good thing.

However, going to court to enforce your privacy is not an easy thing to do. The very nature of the claim for privacy is such that many people would hold back from going to court, because of necessity involved that you would have to wash the dirty linen in public. Yet that is what you are objecting to. On the other hand, experience in England in recent years, since the use of the European Convention on Human Rights provisions on privacy which have been incorporated in English law by the Human Rights Act 1998 (UK),[14] has shown that there are some people who are just fed up. They're fed up of being harassed. They're fed up of being abused by media invading their privacy. They are willing to go to court to seek remedies that not only are important for them but which will set the standards in the courts for conduct of media and other privacy invaders in the future.

The best way forward would seem to be to have a court decision which would be a uniform throughout Australia. However, because that has not happened in 80 years, the next best way forward, it seems to me, would be for one state of Australia to take the lead. The parliamentary committee report in NSW[15] gives the opportunity to the NSW Parliament to do that. They were the first state to introduce the privacy committee legislation back in the 1970s. I think that is the best chance that is on the horizon for the adoption of effective privacy legislation in Australia.

Bulletin: ***Might there ever be an occasion where Commissioners, as opposed to the courts, will be ones dealing with privacy complaints against private individuals? And can this possibly be done in a setting away from the public eye?***

Kirby: Not only getting away from the public eye in upholding privacy, but another reason is to providing low-key, accessible, and inexpensive remedies. There is also the issue of costs. If you go to court, that is going to cost the average litigant tens of thousands of dollars. Many ordinary citizens cannot afford that. Experience teaches that some invaders of privacy are serial offenders. They are sometimes very opinionated. At present they are in a position where they can effectively be judge, prosecutor, and jury in their own case. They may therefore need the strong decision of a court to bring them into line. That's why, in my view, you need both remedies.

You need the low-key remedy of an official who is easily approached and is inexpensive to invoke. But you also for the recalcitrant offender or the repeat offender of privacy invasion need the remedies in the courts which can be enforced by judicial process and which ultimately will bring the message of the boundaries of permissible privacy invasion to the attention of the rich and powerful.

Bulletin: ***You could argue that one person's dream of being seen by thousands online could just well be another person's nightmare. Do you think that the law can accommodate that conundrum?***

Kirby: I think there would be difficulties in having a law on privacy which was adjustable to the sensitivities of every individual. After all the law speaks to citizens, and they can't be expected to know the peculiarities or ultra-sensitivities of every individual in society. Therefore, I think it would have to be expressed according to a standard of the reasonable person. That is often the way in which privacy legislation and even judicial decisions are ordinarily expressed. Has the invasion that has occurred constituted a serious invasion which would be so regarded by the ordinary, reasonable person in that society? That is more in the nature of an objective test. It is an objective test which is defined by reference to the courts' assumption about what the ordinary, reasonable person in society would expect in the circumstances.

It allows the individual to argue that their sensitivity is one that is reasonably shared by other reasonable members of society and to contend that they reach the objective standard. In the end, I think it could not be an entirely subjective standard. That would impose obligations that might be unnecessarily burdensome on free expression and unnecessarily overprotective of privacy.

Take for example the issue of President F D Roosevelt's physical handicaps as a result of his early exposure to polio. There was a convention in the United States (US) in the 1920s–40s that they would not show him in a wheelchair. It is amazing that he spent his entire time as president of the US during the difficult times of the Depression and of the Second World War as a person with very severe physical disabilities.

He had no disability with his brain or with his tongue. He was a great leader. People who look at that case now might say they were being overly defensive of his privacy. Perhaps if they had shown his disability, maybe that would have been in the public interest, because it would have led to an understanding that people with physical disabilities, or in wheelchairs, are still human beings who have dignity and abilities and that showing that would be in the public interest in order to understand the variability of the human condition. I mentioned this in the *Lenah Game Meats* case.[16] So it's therefore something that will vary over time.

Take also sexual orientation. Twenty years ago or more everybody in Australia or almost everybody observed the principle of "Don't ask, don't tell". If you keep on observing that, then nothing gets improved in respect of a person's sexual orientation.

I don't think it would now be an invasion of privacy, in most cases at least, to say that a person was gay. This is because the laws have in many respects been changed. It's not regarded as such a private matter or such a big deal. Yet I know some people who are gay who do regard it as a very private matter. Therefore, it would be applying a public interest standard and an objective standard.

However, it would be a standard that varies over time. That is the advantage of having a remedy which is expressed in general terms. It could adapt and change to the attitudes of the public to what is, and what is not, private from one decade to the next. And what constitutes a serious invasion of privacy would vary over time.

Bulletin: ***David Watts, the Victorian Commission for Privacy and Data Protection, has spoken of having spent half an hour on the phone an insurance company that called him and then asked him to go on and prove who he was. Do you think there is a risk that the laws could go too far?***

Kirby: Yes. There's undoubtedly a risk. However that has not been our major problem in Australia. Our risk is not going far enough. Not going anywhere. Not moving at all. Standing still for 80 years. Therefore, I don't think we should get carried away with the risk of going too far. We should be much more concerned about the risk of not giving individuals any legal protection. Although respect for privacy is part of universal human rights, (it's in the International Covenant on Civil and Political Rights[17] which Australia has ratified). It is very important to most citizens in Australia, yet there is no legal remedy that is adequate to give protection to people when their privacy is invaded.

Bulletin: ***Do you know of any examples from overseas where you think they are getting the balance just right?***

Kirby: If you look at the recent decisions of the Supreme Court of the United Kingdom, I think they afford an illustration of how courts can guide the expression of the law in way that is sensitive to the right to privacy but also to the other competing rights that exist. For example, the *Naomi Campbell* case[18] in the United Kingdom (UK) where media secretly followed Naomi Campbell and followed her to a detox treatment facility where she was trying to get help for an addiction to drugs, she replied that it was a private matter. She stressed that invading her privacy would make it more difficult for others with medical conditions to seek help and that that was not in the public interest.

That was hotly contested in the UK Supreme Court. The court was divided on the matter. But it ultimately provided a remedy in the circumstances. These are issues on which there can be legitimate difference of view. However, if you don't have any remedy at all, you can play out those differences in your brain, but there is no remedy. It never gets to a court, and no judge ever decides it. The matter is decided solely by the person who elects to invade another person's privacy. That is not the way, in a country like Australia, that we normally uphold the rule of law.

Bulletin: ***There have been numerous reports and calls for change. What do you think needs to happen to push the government into action?***

Kirby: I think what is now required is for citizens to express their support for the parliamentary committee in NSW and to urge the NSW Parliament to begin the task of moving in the direction of provision of a general statutory remedy for privacy.

The Parliamentary Committee of the Legislative Council of NSW was made up of members of the Council who came from all the major political parties: the Liberal Party, the National Party, the Labor Party, and the Greens. Unanimously, they recommended that action should be taken. There is cross-party support. It expresses the need for a protection of a value that is reflected in a provision that appears in all statements of universal human rights, including the UDHR and the ICCPR.

Bulletin: ***My understanding is that privacy law is not taught as a subject in its own right at an undergraduate level. What would you like to see implemented in law schools in terms of educating in relation to privacy laws?***

Kirby: The first step is to have a legal remedy. Of course, we do have some legal remedies for privacy. We have them in the federal sphere in the Privacy Act which was based on the work of the ALRC and the Organisation for Economic Co-operation and Development (OECD) Privacy Principles.[19] They have been expanded over time, so that they have moved from application to government and the public sector to application, in some circumstances, to the private sector.

There are still gaps in respect of remedies against individuals and remedies in the context of publication. Until you have those remedies, there won't be much motivation to teach this issue in law schools. Maybe it will be taught in courses on human rights. In those courses there will doubtless be reference to the decisions in overseas courts.

The decision in the US Supreme Court in *Lawrence v Texas*[20] where the right to privacy was used in order to invalidate the criminal laws against gay people in the US. Or the *Naomi Campbell* case[21] where the right to privacy was used to help elaborate the common law of England in a way that would be defensive of a celebrity who found herself being invaded in a private matter of medical treatment. Until you have a remedy, most lawyers are just not going to be interested. In law schools, until you have a general human rights statute or a constitutional bill of rights, there isn't the foundation that can be used for the teaching of privacy rights to law students.

The same goes for students generally in school education. That's why developments of this kind are important not only for the right to privacy but for human rights generally. Australia normally does respect basic human rights. However, sometimes it doesn't. We need more tools and remedies. We need to remind everybody from the top judges to school children of the fundamental principles on which we live together in peace and justice in Australia.

Bulletin: ***Are there any other comments you wanted to make for readers?***

Kirby: No, I think you've asked good questions. If I can say so with my usual modesty, I've given good answers.

Interviewed by Sharon Givoni.

Photo of Justice Kirby

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Footnotes

1. See Australian Law Reform Commission *Unfair Publication: Defamation and Privacy* ALRC Report 11 (1979); Australian Law Reform Commission *Privacy* ALRC Report 22 (1983) vol 2; Australian Law Reform Commission *For Your Information: Australian Privacy Law and Practice* ALRC Report 108

(2008); Australian Law Reform Commission *Serious Invasions of Privacy in the Digital Era* ALRC Report 123 (2014).

2. *Victoria Park Racing and Recreational Grounds Co Ltd v Taylor* (*Victoria Park* case) (1937) 58 CLR 479; 1A IPR 308; BC3700015.
3. NSW Parliament, Standing Committee on Law and Justice *Remedies for the Serious Invasions of Privacy in New South Wales* (March 2016).
4. Privacy Committee Act 1975 (NSW), s 15. See also Australian Law Reform Commission *Privacy* ALRC Report 22 (1983) vol 1 p 59 at [135].
5.. *Ettingshausen v Australian Consolidated Press Ltd* (1995) 38 NSWLR 404; BC9501648.
6. *Dow Jones & Co Inc v Gutnick* (2002) 210 CLR 575; 194 ALR 433; [2002] HCA 56; BC200207411.
7. *Australian Broadcasting Corp v Lenah Game Meats Pty Ltd* (2001) 208 CLR 199; 185 ALR 1; [2001] HCA 63; BC200107043.
8. As occurred in *Mabo v Queensland (No 2)* (The *Mabo* case) (1992) 175 CLR 1; 107 ALR 1; [1992] HCA 23; BC9202681.
9. Above n 7, at [190].
10. Privacy Act 1988 (Cth).
11. Charter of Human Rights and Responsibilities Act 2006 (Vic).
12. Human Rights Act 2004 (ACT).
13. United Nations Human Rights, Office of the High Commissioner *International Covenant on Civil and Political Rights*.
14. Human Rights Act 1998 (UK) (c 42).
15. Above n 3.
16. Discussed in *Australian Broadcasting Corp v Lenah Game Meats Pty Ltd* above n 7, at CLR 287; [219] per Kirby J and at CLR 336; [344] per Callinan J.
17. Above n 13.
18. *Campbell v MGN Ltd* [2004] All ER (D) 67 (May); [2004] NLJR 733; [2004] UKHL 22; [2004] 2 AC 457.
19. Organisation for Economic Cooperation and Development *Guidelines on the Protection of Privacy and Transborder Flows of Personal Data* (1981).
20. *Lawrence v Texas* (2003) 539 US 558 (USSC).
21. Above n 15.