

PRIVACY, MYSPACE,
YOUTUBE AND
FACEBOOK: CAN THE
LAW COPE?

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VICTORIAN PRIVACY COMMISSIONER

PRIVACY ORATION

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The Hon Michael Kirby AC CMG

CAUGHT IN A HURRICANE

Last week I travelled to Halifax in Canada to speak at a conference on Family Law. I arrived at New York's airport on time and waited patiently for the plane to Halifax. Unfortunately, Hurricane Bill had disrupted plane timetables. My flight was cancelled. Wondering how I would get in and out of Halifax, I spent time as the airline searched for the solution. Only computers, containing a huge amount of personal data and weather information could sort things out.

To while away the anxious moments, I logged on to the free internet available in the airport lounge. Given that New York was founded by the Dutch, I thought I would see what the profile of my partner, Johan van Vloten was. So I googled his name. Half way across the world, up it came with a story in an Australian newspaper. The coverage, in a gossip column, projected an image of an intelligent, prudent and admirable Australian citizen that was, frankly, false. It attributed to an unnamed lawyer the remarkable information that, twenty years ago,

when Johan owned a newsagency business on the North Shore of Sydney, someone in Mosman had seen an aged driver throwing newspapers for him and recognised me to be the 'delivery boy'. His astonishment that the then President of the NSW Court of Appeal was caught 'moonlighting' to help his domestic partner out, was recorded in all of its salacious detail. Over the past decade or so, we have seen this story repeated both in the popular and the gay press.

It would certainly be a trifle irregular for a senior judge to be delivering newspapers in the early hours of the morning, even to help a domestic partner. Maybe in an emergency such a thing might happen. People have come up to us and told us that they found the tale endearing. It was a kind of early-morning affirmation of love that one sees in television soap operas. Anyone who would roll out of bed at 4am to deliver newspapers deserves sympathy not condemnation.

The only problem with this story is that it has not a skerrick of truth to it:

- * I have never learned to drive. Odd though that may be, it is the truth. When I was young my parents had no money for a car and I never learned. Still can't do it.
- * My partner's shop was not in Mosman but in Willoughby, many kilometres away. He would have been delighted to have a Tammany Hall paper run that stretched over five kilometres. But it just didn't happen.
- * Remarkably enough, the job I held down was a high-pressured judicial post leaving no time for delivery boy duties.

Endearing or not, the story is just false. But like other stories, it has got into the media and it is impossible to dig it out. People will chuckle or

tut-tut, as they are inclined. But there is nothing we can do to correct the record. We can jump up and down, make a fuss, complain, demand correction. Nothing happens. I will go to my State Funeral, and it will probably be in my official obituaries. Of course, it was intended as a put down.

But does this capacity of the new technology to spread and repeat false facts of a personal kind really matter? There is no doubt that the story was published as trivial gossip in a newspaper and one cannot erase the record. In that respect, it is like the false accusations made against me by a federal senator in the national parliament. Despite their demonstrable falsity, his withdrawal, his apology and the demotion of the accuser, my name will always be linked with those false claims. Can't get away from them. Damage done. A nasty association. But should I care? Should my partner and my family care?

Well, they do. You see, people still value their privacy, their reputation and the way other people perceive them. In the age of the internet, stories that once would have been wrapping the fish and chips and been forgotten a few weeks or months or years later, are preserved forever. Anyone wanting to relive them can just google a name at JFK airport, and there is it, once again. Immortal, invisible, a new God to project personal details worldwide.

JUSTICE SCALIA'S ENCOUNTER

One of the most famous judges of the US Supreme Court is Justice Antonin Scalia. He tends to be on the conservative side of things. But he is a robust character and usually gives as good as he takes. Early this year he was very dismissive about the idea of better privacy

protection. He tends to be gung-ho about everything. He does not much like government interfering in privacy protection. Early in 2009, he made public comments that appeared to question the need for more protection for private information. This got under the skin of a law professor at Fordham University in the United States. Joel Reidenberg set his students the task to see how much private information was available on the internet about Justice Scalia. The class turned in a fifteen page dossier. It not only included Justice Scalia's home address, that was supposed to be private for security reasons. (In the United States, following decisions that Scalia has always supported, many people buy and carry guns.) The dossier also carried home telephone numbers, details about the value of his home, details on his food and movie preferences, his wife's personal email address, photos of his grandchildren and much else besides.¹

Professor Reidenberg justified his class project on the basis that it was intended to spark discussion about the need for better protection for privacy in American law. Justice Scalia responded admitting that the project was "perfectly legal" but claiming that it showed "abominably poor judgment". I just hope that the dossier did not contain demeaning and false data alleging that the judge was moonlighting in some unusual way – perhaps delivering pizza for a family business. Because if it does, I can tell, he will never get it out of the record. People believe that the internet is infallible. They tend to believe everything they find there is gospel. We are losing control over the projection of our persona. Reidenberg responded to Scalia:

"Where there are so few privacy protections for secondary use of personal information, that information can be used in many

¹ Marta Neal, "Fordham Law Class Collects Personal Info About Scalia", *ABA Journal*, April 29, 2009.

troubling ways. A class assignment that illustrates this point is not one of them. Indeed, the very fact that Justice Scalia found it objectionable and felt compelled to comment underscores the value and legitimacy of the exercise.”

MYSFACE, YOUTUBE AND FACEBOOK

Media reports bombard us with stories of privacy issues in the new social networking outlets of the internet. For many of the problems that are presented, the law offers no, or no effective, solution.

- * In Missouri recently, it emerged that a troubled 13 year old, Megan Meier, had engaged in an online dialogue with a purported boyfriend who was actually a neighbour and the mother of one of Megan’s school friends. From a happy correspondence, the exchanges turned to calumny and Megan hanged herself in her bedroom wardrobe. A jury found the neighbour guilty of telecom offences, but the verdict was vacated. Now a Megan Meier Cyber-bullying Prevention Bill is pending in the US Congress. But it is too late for the young girl.²
- * Every day 65,000 videos are uploaded onto YouTube. These contain a lot of harmless material. Sometimes people lose out. An ambitious 23 year old student at Yale University, Aleksey, applied to UBS Bank for a job using a weird and arrogant video as his CV. It showed every reason why he should be rejected. But then the video turned up on YouTube. One media website in the United Kingdom declared that his video was “the greatest CV ever filmed”. It was a “six minute ego-mercial”. Aleksey became the laughing stock of America and the world. There are many such stories.

² “Cyberbullying and the courts. Megan’s Law”, *Economist*, 11 July, 2009, p42.

How the video was leaked from UBS was not disclosed. Aleksey's remedies were limited.³

- * In mid-July 2009, the Canadian Privacy Commissioner took Facebook to task, alleging "serious privacy gaps" in its huge service, which is the world's largest social network with 250,000,000 users. Essentially, the Canadian Commissioner told Facebook to introduce changes to increase users' privacy by (a) alerting users to third party access to their personal data, (b) controlling the retention of user information after an account has been de-activated, (c) terminating the retention of email addresses of non-users who were invited to join the site but declined; and (d) generally enhancing privacy controls in favour of users. American commentators criticised the "staggering silence in the US on emerging privacy issues" affecting these new sites. In fairness, Facebook declared that it was working with the Canadian Privacy Commissioner's office because it shared "the common goal of making the internet more privacy friendly for Canadian and users across the world".⁴

The media is full of stories of this kind and those experts who have examined them agree that there is a need to enhance user awareness (often in inexperienced, young and immature persons) of the decisions they make which may affect them seriously, down the track. Quite clearly, the new facilities in cyberspace are fulfilling a huge need that old media and earlier networks did not adequately serve. But, somehow, the new facilities must be promoted under conditions that assure respect for individual control over personal data and an entitlement, where

³ Daniel J. Solove, *The Future of Reputation*, Vail-Ballou, US, 2007, p171.

⁴ D. Gelles, "Canada privacy watchdog warns Facebook", *Financial Times*, London, 17 July 2009, p3.

appropriate, to retrieve information that is false, damaging or presented in a wrong light.

Captured images, in particular, have a measure of permanency which is something that fleeting memories lack. Video voyeurism may simply be a generational shift; but it may be necessary to protect immature users against irrevocable decisions that haunt them for the rest of their lives. Until now, the usual answer given to such complaints is an appeal to the “binary” distinction between public and private space. If it gets into the public space, it is said to be beyond control. Once there, it has become public property. In particular, if you put it there, you cannot really complain. Even if you did not put it there, but were in public when the information was captured, you are said to have no legitimate complaint.

Writers on this subject point to the capacity of search engines like Google to explore the epidermis of the web and to discover lots of content that has previously been unknown. The search engines are improving all the time. More and more information is uploaded. One respected commentator in a book *The Future of Reputation*, Daniel Solove⁵ has declared that the developments in cyberspace make him “giddy with excitement ... but also a bit frightened”. He concludes:

“Although the internet poses new and difficult issues, they are variations on some timeless problems: the tension between privacy and free speech, the nature of privacy, the virtues and vices of gossip and shaming, the effect of new technologies on the spread of information, and the ways in which law, technology and norms interact. New technologies do not just enhance freedom, but also alter the matrix of freedom and control in new and challenging ways.

⁵ Above n3, p205.

The questions are immensely complex, and there are no easy answers. Just when we think we are smoothing problems out, new technology adds another wrinkle. But we can take steps to protect privacy if we make an effort. We must. After all, it is just the beginning.”

THE VICTORIAN COMMISSIONER’S OFFICE

It is here that we must be glad that in Australia we have federal and state privacy guardians to take up the challenges of privacy invasions of the modern age. In Victoria, the Privacy Commissioner has special responsibilities over what in Europe is called data protection. Helen Versey heads a dedicated office that scrutinises particular privacy concerns that arise in this State.

These concerns include issues such as the following:⁶

- * *Ultramet*. A proposed major information, technology and data access project designed to connect students, teachers and parents, and to allow remote electronic access to curriculum assessment, progress, attendance and administrative information. A tender to develop the project is being developed in the Victorian Department of Education. Fortunately, that Department continues to provide information to the Privacy Commissioner on the project and to seek advice on the way in which ultramet should be developed.
- * *The Victorian Student Number (VSN)*: Legislation was enacted by the Victorian parliament early in 2008 to provide for a VSN. This is a unique student identifier to be used on first enrolment in any Victorian school, public and private. It will follow the student through school and any TAFE career, up to the age of 24. Again,

⁶ See generally Privacy Victoria, Office of the Victorian Privacy Commissioner, Annual Report 2007-2008, Melbourne 2008.

there have been ongoing consultations between the Department of Education and Privacy Victoria designed to incorporate privacy safeguards into the final form of the VSN. Ensuring that students and their families know the use that it is being made of the VSN and have access to the information collected, so far as possible, to understand the way in which the students are being projected to the world and users is the key to the application of privacy principles in this new administrative tool.

- * *Myki* – the new electronic ticketing system for Melbourne public transport: This new system is designed to provide a durable, reusable smart card that stores money, travel days or both. Following consultation and input from Privacy Victoria, most people using myki will have the choice of purchasing and using an anonymous myki, limited and publically declared information will be provided concerning the usage to which the information will be put. The transport authorities continue to consult on the privacy issue. And this is the consequence of having in place legislation establishing a privacy guardian, propounding privacy principles and ensuring that developments conform to those principles or, if they do not, that the exceptions are known and explanations are afforded.
- * *Electronic health records and a universal health identifier* appears to be coming following the agreement of the Council of Australian Government (COAG) to implement and operate a system of individual and health care provider identifiers. Privacy Victoria has been participating in the consultations over this development and the Australian Health Ministers Conference has promised robust and effective legislative protection for the privacy of personal information whilst achieving the health care benefits that can be

gained through better sharing of health information. Privacy protection is never absolute. It always involves seeking a balance against other fundamental rights and benefits.

- * *Surveillance*: There has been extensive consultation between the Victorian Law Reform Commission and Privacy Victoria over an enquiry into surveillance in public places. In a sense, this development, and the use of CCTVs in public spaces, is a counterpart to the development of facilities on the internet. Everyone knows of the cases where CCTV records have been used in the apprehension and identification of serious criminals and the London terrorists. The Victorian Law Reform Commission has received proposals for reform advanced by Privacy Victoria⁷. Both in police surveillance and implementation of anti-terrorist laws, it is necessary to ensure that fundamental protections are preserved. Otherwise, in the name of combating crime and terrorism, we unravel the very democratic features of our society that the criminals and terrorists attack.
- * *Social networking and cyber-bullying*: Sadly, the case of Megan Meier in the United States has many parallels in Australia. In mid-July 2009, a 14 year old girl in Victoria named Chantelle, took her own life in circumstances that has focused attention on the dangers of social networking sites and the risks of cyber-bullying. Chantelle's mother blamed the suicide on the internet. The case involved the fourth suicide in six months among students at the same school. It has highlighted the severe impact that cyber-bullying can sometimes have on young people. Bullying is a significant factor in mental health problems for children and

⁷ Privacy Victoria, Office of the Victorian Privacy Commissioner, Submission to the Victorian Law Reform Commission, *Inquiry into Surveillance in Public Places* (July 2009).

adolescents. Mobile phones, instant messaging software, chat rooms and social networking sites can all be used for bullying. The internet has made it easier for free communication and harmless association to occur. But it has also promoted the opportunity for mass audience outreach and great impact on individuals. Bullying has now left the physical playground. The technology is seamless and makes it possible to extend a bullying culture into a wider community. We need to confront this “dark side” of human behaviour. Recognition of this fact has led to new explorations by Privacy Victoria into what privacy means to young people; what privacy issues affect young people; and how best they can be informed of their privacy rights and of how to protect them.

I do not pretend that it is easy to safeguard privacy in the current age. But surrendering the endeavour as just too difficult to achieve is not an option⁸. The internet is exciting and overwhelmingly beneficial. It leaps the borders of this world. It binds our species together as never before. It provides an outlet for freedom fighters everywhere. We have seen these features recently in Burma, Iran and many other places. We should be positive and optimistic about the value of the new technology. In any case, the new technology is expanding every day. And in its regulation, Australia is a very small player.

I applaud the work of Privacy Victoria. I honour the Privacy Commissioner, Helen Versey, and the Deputy Commissioner, Anthony

⁸ For current debates on the enactment of a general statutory cause of action in privacy, see NSW Law Reform Commission, *Invasion of Privacy* (NSWLRC R120) 2009, 49. Cf. R. Pellier, “A new tort. We should be able to sue”, *NSW Law Society Journal*, December 2008, p58; M. Polden, “Privacy sounds good, but ...”, *NSW Law Society Journal*, December 2008, p59.; A. Susskind, “Privacy Reform. Red-tape trivia or necessary evil?” *NSW Law Society Journal*, October 2009, p18.

Bendall. I honour those who work with them to safeguard the privacy of Victorians. I applaud the role that the *Victorian Charter of Rights & Responsibilities* plays in also safeguarding privacy and ensuring that law-makers and officials build privacy concerns into the laws and policies of this State⁹. In this respect, Victoria is certainly a leader in Australia. Good citizens know that privacy is an attribute of our fundamental human rights and freedoms. It is an assertion that, within limits that are set by law, individuals have an entitlement to protect their personal being, their immediate family and relationships, their individual space and their information penumbra. For a small agency, Privacy Victoria has achieved much. But its greatest challenges lie ahead.

⁹ *Annual Report 2007-08, above n6, pp95-96.*