THE PRIVACY IMPERATIVE IN THE INFORMATION AGE 'FREE-FOR-ALL'

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4 August 2010

The Centre for Advanced Journalism at the University of Melbourne invited Paul Keating to give an address about public policy as it related to journalism. The subject Paul Keating chose was not political journalism or issues relating to the media generally but rather something he felt strongly and urgently about; namely, the right of an individual not to have their privacy shredded in what he calls the information age free-for-all. In what was his magnum opus address of 2010, Paul Keating repudiates the view that privacy in modern times is dead, asserting that individuals have a right to be left alone and in the event they are not, to enjoy a right of remedy at law—a right of action rather than merely a right to complain. Paul Keating argues in favour of the recommendations of the Australian Law Reform Commission urging the government to move beyond piecemeal common-law case exploration to a statutory cause of action for breaches of privacy arising from media excesses and runaway technological capability.

'The press is overstepping in every direction the obvious bounds of propriety and of decency. Gossip is no longer the resource of the idle and of the vicious, but has become a trade, which is pursued with industry as well as effrontery. To satisfy a prurient taste, the details of sexual relations are spread broadcast in the columns of the daily papers. To occupy the indolent, column upon column is filled with idle gossip, which can only be procured by intrusion upon the domestic circle. In this, as in other branches of commerce, the supply creates the demand. Each crop of unseemly gossip, thus harvested, becomes the seed of more, and, in direct proportion to its circulation, results in the lowering of social standards and of morality. Even gossip apparently harmless, when widely and persistently circulated, is potent for evil. It both belittles and perverts. It belittles by inverting the relative importance of things, thus dwarfing the thoughts and aspirations of a people. When personal gossip attains the dignity of print, and crowds the space available for matters of real interest to the community, what wonder that the ignorant and thoughtless mistake its relative importance.'

Some of that language is a give-away—that it wasn't written by me, or written yesterday. But the content is highly relevant to a discussion about privacy and the media, as a trip to the local newsagent, or time spent in front of the television, or online will quickly affirm.

The quote is from *The Right to Privacy* by Boston lawyers Samuel Warren and Louis Brandeis, published in the *Harvard Law Review* in 1890, perhaps the most famous attempt at a definition of privacy.

Warren and Brandeis wrote about the 'right of the individual to be let alone', a right they put alongside 'the right not be assaulted or beaten, the right not be imprisoned, the right not to be maliciously prosecuted, the right not to be defamed'. They of course acknowledged that the right to be let alone was not absolute, and must on occasion give way to a higher or general public interest.

However, they said:

'The design of the law must be to protect those persons with whose affairs the community has no legitimate concern, from being dragged into an undesirable and undesired publicity and to protect all persons, whatsoever; their position or station, from having matters which they may properly prefer to keep private, made public against their will. It is the unwarranted invasion of individual privacy which is reprehended, and to be, so far as possible, prevented.'

Warren was said to have been prompted to write after a newspaper published the guest list of an 'A'-list dinner party he hosted in Boston. Brandeis went on to become a justice of the Supreme Court.

Both writers would turn in their respective graves at developments in the 120 years since. Whole industries now revolve around so-called celebrity, fame, rumour and gossip; often more correctly straight fiction which is published these days, often by media organisations. These organisations proclaim the importance of free speech in the dissemination of news, but clearly are more at home in the entertainment business.

The Warren and Brandeis concept of privacy strongly influenced the development of the law in the US and elsewhere, although as others have pointed out, 'the right to be let alone' as a bald statement is meaningless (a person engaged in criminal activities has no such right), and is difficult to distinguish from other legal concepts, such as assault, nuisance and interference with bodily integrity.

Privacy has been enshrined as an internationally recognised human right in the Universal Declaration of Human Rights, and the International Covenant on Civil and Political Rights. And Australia is a party to both. Article 17 of the Covenant states:

'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.'

Freedom of expression is also an internationally recognised human right in Article 19 of the Covenant.

These rights are not absolute, sometimes conflict, and often need to be balanced and reconciled. ‘Importantly, free speech means freedom governed by Law.’

Privacy in a broad sense is under attack these days on a range of fronts. Electronic surveillance, terrorism laws, growing police powers, business practices associated with information mining and marketing, and new technologies.

And the battle Warren and Brandeis fought against the evil of gossip has been well and truly lost with the passage of time.

However, the right to what I might call privacy remains an issue, particularly where to draw the line between freedom of expression and any remaining right an individual has to have some control over the gathering and publication of information about personal aspects of their life. And what can or should be done when that line is crossed.

I take issue with and repudiate those who assert that privacy in modern times is dead and, that we should get over it. And with those who claim the current framework within which the media deals with privacy issues and concerns is effective and works well. It is, of course, ineffective and works, in the main, to the benefit of media organisations.

I also want to lend support to the case made strongly and convincingly in two Law Reform Commission reports that you won’t see widely reported or subject to objective analysis in the media: that ‘the law should provide recourse, in the event of an unwarranted serious breach of an individual’s privacy by the media’—or anyone else for that matter.

These issues are topical, owing to obvious examples of questionable calls about balancing privacy and freedom of expression. They are there for all to see. Some leaders of the industry and the profession dismiss errors as unfortunate, inevitable and rare, and claim a strong and continuing commitment to ethics and values that include respect for privacy. I know many good editors and journalists struggle with these issues, conscious of their responsibility to get it right, and the harmful effect of getting it wrong.

But many like me have the impression that ‘the tone at the top’ and the practice of journalism in many media organisations is driven by other more pressing values. Of course it’s hard to generalise, but Margaret Simons, who authors *The Content Makers* suggests, and research by Denis Muller for his PhD at this university in 2005 and with 27 years’ experience in the profession confirmed, ethics does not enjoy a high profile in the newsroom. Indeed, many of those involved apparently have little more than a passing knowledge of the issues. Ethical considerations can complicate life for those keen to get the story. Muller described it as a ‘sorry picture’.

Or, as Professor Mark Pearson puts it:

‘The reality is that editors and news directors are motivated as much by circulation and ratings as by a public duty to deliver the news . . . There may be a range of profits or costs resulting from a story involving a privacy intrusion, including gained or

lost circulation or ratings, advertising, syndication rights, corporate reputations, legal damages and court or regulator costs . . . there is little doubt journalists go through such a process, either formally or informally, when deciding to run with a story that pushes the privacy margins.'

Often questionable calls involve people in the news for other reasons: photographs claimed to be of a red-headed woman engaged in politics, scantily clad in a motel room with someone else 30 years ago; of an apparently happily married government minister leaving a gay men's haunt; or of a so-called celebrity in the shower. The rights and wrongs of these calls tend to become topics of public discussion themselves.

Probably much more frequently—although no-one seems to keep tabs—individuals going about their daily life or momentarily caught in the spotlight then become subject of a questionable call: those leaving court, particularly where they react angrily to being filmed, always seems to have news value; as did a full-frontal front-page photo of a family that heard the news of the death of a family member for the first time in Victoria's bushfires last year.

Then there was the photo in the Sydney papers last year of two small children (faces not visible) of a murderer just convicted, one wearing a school uniform on the way to school.

And in another, a badly injured and distressed son whose parents had been killed in a boating accident, angrily seeking to avoid a camera recording his stretcher-borne arrival at hospital.

Just about any day in the tabloids and any night on *A Current Affair* or *Today Tonight* you will see examples, including foot-in-the-door interviews claimed to be necessary and justified by the media's right to know, and to publish just about anything they like.

The issue of the media and privacy is also topical, owing to proposals in a 2008 report by the Australian Law Reform Commission on Australia's privacy laws. The report, the result of two years' research, consultation and analysis, runs to 2700 pages in three volumes. It put forward 295 recommendations for change with the general aim of modernising, simplifying and streamlining laws that are generally seen to be dated, complex, confusing, fragmented and full of gaps and inconsistencies.

Four recommendations are of direct relevance to the media. None have yet received a response from the government. They propose changes to, but continuation of, the largely self-regulatory arrangements that are a condition for *the exemption* media organisations enjoy from privacy law. The ALRC argued changes were necessary because of 'ongoing concerns about the capacity of a self-regulatory system to preserve the tenuous balance between the public interest in freedom of expression and the public interest in adequately safeguarding the handling of personal information'.

This important report also recommended legislation ‘to establish a general statutory cause of action for breach of privacy’ subject to a number of qualifiers to ensure the protection of other public interests. One of the reasons given was to create more certainty for everyone—the media included—as to legal rights, rather than leave the issue entirely to case law with judges developing the common law.

The Commission (supported in argument by a separate report by the NSW Law Reform Commission in 2008) made clear that the proposal for a statutory cause of action is not aimed specifically or solely at the media. The proposal is for a right to seek redress for a serious interference to privacy including interference with an individual’s home or family life; unauthorised surveillance; or where an individual’s correspondence or private written, oral or electronic communication has been interfered with, misused or disclosed. Of special interest to the media, of course, is that it would also extend to an interference with privacy involving disclosure of sensitive facts relating to an individual’s private life, subject to a rider concerning the public interest in people being informed about matters of public concern, and the public interest in freedom of expression.

Reaction to the ALRC report—not limited to the proposed cause of action—took on an ‘end of the world as we know it’ tone in some media circles. The report and the recommendations were dismissed by industry leaders such as John Hartigan of News Limited, and the Australia’s Right to Know coalition on the basis that ‘the current media privacy framework is effective and working well’.

Hartigan asserted ‘there are very few complaints, investigations and breach findings against the media for breaches of privacy’. *The Australian*’s Legal Affairs Editor Chris Merritt labelled the report ‘outrageous’. On the cause of action, an editorial in The Australian set up a marvellous straw man:

‘Privacy is important. But it would be a serious mistake to remake the rules governing the operation of the media by enshrining privacy as an inalienable right which, at all times and in all circumstances, trumps all other considerations.’

This, despite the fact that the ALRC specifically stated the cause of action should only be available for a serious breach, and ‘privacy interests are not to be privileged over other rights and interests’.

There were confident predictions from some that the proposal, if acted upon, would put an immediate end to investigative journalism, notwithstanding that the ALRC concluded that the proposal ‘should not hinder legitimate investigative journalism as described by media groups to this Inquiry. For example, allegations of misconduct or corruption in public life would not fall within the (proposed) zone of protection’.

Some media voices called for calm consideration, suggesting a need to get the house in order before jumping to the barricades.

Jack Waterford, Editor at Large at the *Canberra Times*, while mindful of the need to protect freedom of the press and freedom of speech, commented about the wave of criticism of the ALRC report, particularly in News Limited publications. With an eye for self-interest when he saw it running, Waterford said:

‘The public ought to be quite cynical (of) the fact that some sections of the commercial media thrive and profit from invading the privacy of celebrities, starlets, models and sometimes ordinary non-consenting members of the public who have stumbled into a public spotlight. Trivial gossip has become bigger and bigger business in most cases with the implicit consent of most of the ‘victims’ but has very little to do with the public interest, or with reasons why the media can, or ought to be able to, claim that in respect of its monitoring of the exercise of public power it is acting in the public interest. ‘

Matthew Ricketson in *The Age* thought some of the claims for free speech for the media celebrity industry were simply laughable:

‘In the weeks leading up to the release of the Australian Law Reform Commission’s massive report on privacy, the Right to Know coalition has been sounding the alarm at the prospect of a new law against invasion of privacy. ‘Privacy threat to celebrity coverage’ was the headline in the Media supplement of *The Australian* on July 31 2008 for its lead story, which began: ‘the celebrity media industry could be thrown into turmoil by moves to restrict reporting on public figures’. Am I the only person who thinks this reads rather like an item in the satirical American newspaper *The Onion* or an out-take from the *Chaser*?‘

Well, no, Matthew you’re not.

Another prominent industry leader, Mark Scott of the ABC, also broke ranks in suggesting that the media should seek to negotiate a suitable outcome on the proposed statutory cause of action rather than leave the development of the law in the hands of the courts.

But let me return to those questionable calls for a moment.

News Limited’s Sydney *Daily Telegraph* conceded that the redhead alleged to be in those photos published last year in the lead-up to the Queensland election—the ‘other redhead’, Pauline Hanson—wasn’t her, and according to reports settled a legal action she commenced soon thereafter. The Deputy Editor’s first go at defending the publication of what at the time the *Telegraph* insisted were photos of Hanson was the ‘public interest’. When questioned about the precise public interest involved, she said, ‘That’s for our readers to tell. That will be determined by the number of people that buy the paper’. A bit similar to the line by the then editor of the same paper who at the time defended the publication online of a photo taken by a phone camera of Sonny Bill Williams and actress Candice Falzon in flagrante in a toilet cubicle with the door closed at a Sydney hotel. He told Monica Attard: ‘it is currently the second highest read story of the year so far. The readers clearly loved it.’ There we have it then.

Hanson would not have succeeded under the proposed cause of action because she claimed, and News publications eventually conceded, it was not her in the photos, so there was no serious breach of her privacy. Whoever was in them has not stepped forward—perhaps with an eye to maintaining privacy concerning happenings 30 years ago. The public apology by the *Telegraph* Editor to Hanson was that the

photos were of someone else, suggesting that had they been of Hanson, the public interest lay in their publication, despite the passage of time and the irrelevance of the event to her campaign for office.

Peter Meakin of the 7 Network initially defended the outing of NSW Transport Minister David Campbell through footage taken from the street of Campbell leaving Ken's of Kensington as in the public interest, because of the government car Campbell used to drive there. This was quickly dropped when it turned out there had been no breach of any rules or guidelines for use of vehicles, so other claims about the public interest in knowing the details of the private life of a minister of the Crown were quickly rolled out.

The incident of course raises the issue of whether anything done in public—leaving a gay haunt through the front door, visible from the street, for example, can be regarded as private. Mark Day, for example, argues that everything done in public is open slather to the media. Expectations of complete privacy in a public space for any of us have to be lower than ten years ago and those of someone in public life even lower, but all of us should have a right to go about entirely personal business in the public domain.

On privacy in the shower, the AFL cleared Brendan Fevola in March over his part in the publication of a nude photo of Lara Bingle in *Women's Day* and elsewhere, on the ground there was 'insufficient evidence' to show he had distributed the photograph, taken while the pair were having an affair in 2006. It was reported in March that Bingle was suing Fevola for breach of privacy, defamation and misuse of her image, prompting News Limited lawyer Justin Quill to almost chortle while offering his free legal advice in an op-ed published in the *Herald Sun*.

'There is no right to privacy in Australia', Quill said.

'I can write that a few different ways if you'd like, but it won't change the position. You hear a lot of people talking about their right to privacy. But unless they're talking about some moral right to privacy, they're talking about something that doesn't exist in this country . . . Taking a photo of a woman in the shower and distributing it is unquestionably reprehensible. On any view. But we shouldn't feel so sorry for Bingle that we demand a privacy law.'

Quill acknowledged she might possibly have a claim for breach of a confidence, but on privacy rights, nothing—and right from the relevant authority in the land, the News Limited lawyer.

The framework of media self-regulation

Managing privacy is part of a broader framework concerning ethics and values in journalism; an essential framework given the media's exercise of significant public power, privilege and the potential to cause harm. This framework is, in fact, key to 'the conditional exemption' media organisations enjoy from the Privacy Act.

The Privacy Act was introduced by the Hawke government in 1988. It initially applied only to the federal public sector and to credit reporting.

In 2000 the Howard government extended the Act to cover big business. Media organisations were granted a conditional exemption for acts and practices in the course of journalism. The fact that an exemption was given reflected the importance attached to the public interest in freedom of expression and the free flow of information in our democratic society. The imposition of conditions was an attempt to balance the public interest in freedom of expression and the public interest in adequately safeguarding the handling of personal information. Significantly, all that is required to enjoy the exemptions is 'for a public commitment by a media organisation to observe standards of privacy' in the course of journalism, and that those standards be published in writing. That's it.

Most print and all broadcast media seek to satisfy these conditions through codes or principles that apply to the conduct of their functions, under the auspices of an industry group. In the case of broadcast media, there are a number of industry bodies that operate in a co-regulated system under the Broadcast Services Act administered by the Australian Communications and Media Authority (ACMA). Seven separate codes apply to commercial television and other forms of broadcasting. Non-compliance with a registered code may give rise to issues concerning the continuation of the licence, or the imposition of licence conditions. The ABC and SBS have their own codes.

The print media is self-regulating, with most of the industry members of the Australian Press Council subject to its Statement of Principles and Standards.

Members of the Media Entertainment and Arts Alliance, but not other journalists, are bound by its Code of Ethics. Estimates of MEAA coverage vary from the Alliance's claim of 80 per cent, to estimates of 50 per cent by others. Some large media organisations have their own code and train to a standard that may differ from the MEAA Code.

Commercial television stations through Free TV Australia undertake to comply with the 2010 Code of Practice, registered as a code under the Broadcasting Services Act:

'In broadcasting news and current affairs programs, licensees: must not use material relating to a person's personal or private affairs, or which invades an individual's privacy, other than where there is an identifiable public interest reason for the material to be broadcast (4.3.5). The broadcast of material relating to a person's personal or private affairs may be warranted where the broader public interest is served by the disclosure of the material. When making this judgment stations need to consider the public interest in the broadcast of the particular material. Public interest in a story as a whole, may not justify use of particular material that intrudes on the privacy of an individual.'

Weaknesses in the system

Commentators point to gaps (few address specific issues concerning the privacy of children), lack of transparency and independence in the investigation of complaints; overlap and differences between codes and weak enforcement mechanisms,

although ACMA can seek enforceable undertakings. ‘The Australian Press Council complaints process, for example, has no power to penalise or make an order against a publication. No one has ever been expelled from the MEAA for a breach of standards.’

Media organisations defend the arrangements arguing that any change is unwarranted and unnecessary. Australia’s ‘Right to Know’, for example, stated:

‘Media privacy issues are best managed by industry specific codes of practice. The existing media privacy framework provides all the appropriate mechanisms for dealing with privacy in the media. The current media privacy framework is effective and working well. This is evidenced by low numbers of complaints, investigations and breach findings. In addition to existing codes of practice that deal specifically with privacy, media in Australia are subject to a wide range of Federal and State laws, which protect private rights and interests. Any proposal to enhance the rigours of existing media privacy regulation must be limited to addressing specific identified public interest concerns regarding the media’s treatment of privacy issues.’

The fact is the system of self-regulation set up under the general exemption from the Privacy Act is, more or less, a set of hometown arrangements for the media companies. With print media it is established around an organisation that lacks any power of coercion or penalty and which operates, in the main, to excuse the transgressions of its members. Even the funding of the Press Council is dodgy, because it is funded by publishers on a formula based on circulation. News Limited is the major contributor. That is, the body which is adjudicating on complaints is funded by the largest newspaper group, where obviously many of the complaints must arise from its own publications. Denis Muller tells us that ‘the Press Council’s own research shows newspaper executives are much more likely to be satisfied with the outcome than complainants’. Quite so.

The former Chairman of the Press Council, Professor Ken McKinnon, said, on the occasion of his departure, that the media failed to ‘live up to its own rhetoric on ethics, privacy and independence’. A pretty damning indictment, I should have thought.

David Salter in his *The Media We Deserve* said about self-regulation:

‘It is the most astonishing yet unremarked hypocrisy of the Australian media. An industry that devotes so much of its energy to questioning the motives and morality of others, nevertheless believes it can—and should—be trusted to regulate itself. Our media wish the full force of the law to bear down without fear or favour on everyone except themselves. The faintest suggestion that the output of our print, radio and television empires might benefit from some legislative attention is invariably met with the rolling thunder of outraged editorials all protesting the evil of any such assault on the sacred freedom of the press. ‘

Salter went on to remark that ‘the philosophical justification for self-regulation stretches no further than that most over-quoted principle, the “freedom of the press” in “the public interest”’. He went on to say ‘Freedom of the press cannot also be freedom to lie, to deceive, to unlawfully incite or alarm, or to pursue a criminal

purpose. The only real regulatory power is the law and the law is usually at its best when journalism is at its worst.'

The fact is, it is naïve in the extreme to believe that a clutch of large companies—in this case, media companies—will or can conduct their affairs on some sort of trustee basis, having permanent regard for the public interest—leaving these companies to actually determine what that public interest is.

We do not do this with other large companies in respect of such issues as trade practices or competition policy.

But we do do it with media companies. They get exemption from the Privacy Act provisions which every other large company is subject to. And there is only one reason: one, 'Freedom of the Press'. Yet when the Law Reform Commission recommended that the media exemptions should be maintained but with some tweaking for accountability, the media companies moved immediately into high dudgeon. 'Everything is working well' is the constant and only public refrain.

The intellectual case for adoption of the Commission's modest recommendations is barely assailable. It's laid out in detail in Chapter 42 of the report.

The ALRC recommended two new limitations to the exemption for acts and practices in the course of journalism: that a definition of 'journalism' should be introduced for the purposes of the Privacy Act and a small change made to the definition of media organisation. The more significant recommendation was that media organisations should not be left entirely to themselves in setting standards, with the introduction of measures that 'would continue the exemption only where a media organisation was committed to adequate privacy standards developed in conjunction with the Privacy Commission and the ACMA'.

In light of the obvious shortcomings in the current system, this seems highly sensible to me.

The specific recommendation of the Commission is as follows:

'Recommendation 42–3 The Privacy Act should be amended to provide that media privacy standards must deal adequately with privacy in the context of the activities of a media organisation (whether or not the standards also deal with other matters).

Recommendation 42–4 The Office of the Privacy Commissioner, in consultation with the Australian Communications and Media Authority and peak media representative bodies, should develop and publish:

(a) criteria for adequate media privacy standards; and

(b) a template for media privacy standards that may be adopted by media organisations.'

Few complaints

Hartigan and others in defending media standards claim there are only a small number of complaints and breach findings. This is true of formal complaints—the APC published 30 decisions on formal complaints between July last year and the end of May. Six concerned privacy. Two were upheld. But importantly, we don't have figures on 'how many complaints are made directly to the media organisation concerned and their resolution or the ones people feel aggrieved about but then desist from making'. Factors other than the efficacy of the system may explain the low reported numbers, if in fact it is the case.

One limitation on existing schemes is that complaints can usually only by made by the person directly affected by an alleged breach of privacy, although the Australian Communications and Media Authority has 'own motion' powers and according to reports is investigating Channel 7 regarding the David Campbell matter.

Another factor is that people don't complain because they run the risk of attracting more attention to an issue, thus compounding the problem they are dealing with in the first place. Or they believe the Press Council, despite the involvement of public members undertaking an investigation of a complaint, lacks true independence. In other words, they expose themselves, devote a tonne of time and energy, only to get the brush off.

Perhaps there are few complaints because most people wouldn't know what to do or where to go. Again, Denis Muller from his research tells us, 3 per cent of the public know of the MEAA, while only 4 per cent know of the Press Council.

The Australian Privacy Foundation wasn't far off the mark in stating that the whole system is ineffectual, and that there are relatively few complaints because there is a widely held public perception that when it comes to privacy, the media are effectively above the law.

Media Watch the most effective

Who is surprised that the one mechanism of accountability that stands out for excellence among journalists is not the industry's self-regulatory bodies but *Media Watch*? As Denis Muller told the ABC *Media Report*, in his survey of journalists:

'Media Watch scored 9.3 on an 11-point scale, and it was far and away the most admired of all the accountability mechanisms, and it's a television program, it's not a properly instituted accountability mechanism at all.'

Scope for improvement

So, moving forward, as the Prime Minister might say, what could be done to improve underlying conduct in journalism while improving the framework?

First, industry leaders and the profession should acknowledge that improvements are needed. Instead of standing aggressively behind the status quo, dressed in the cloak of the Fourth Estate, they need to talk more about responsibility, more about

the importance of ethics, more about improvement in the standards of journalism in all respects. We might not be able to do much about some online players but those in the mainstream need to provide real leadership in managing themselves and any self-regulatory system. On the issue of promoting high standards and transparency, there aren't many Australian publications or broadcasters that appear to have followed the example elsewhere of appointing an internal ombudsman or public editor with a role to champion best practice, investigate complaints generally, and with a public platform to explain or attempt to explain news judgements and questionable calls on privacy and other standards.

On enforcement of decisions arising from the investigation of complaints, those involved in self-regulation should be aware that public and private-sector organisations covered by the Privacy Act are on notice of a significant proposed step-up in enforcing compliance with the law. Minister Ludwig has announced that the government will amend the Privacy Act to introduce civil penalties—to be imposed by the Federal Court or the Federal Magistrates Court—for 'serious breaches when other enforcement measures are not sufficient'. The Minister said, 'They will be serious sanctions. It is essential we have a robust system in place to protect the privacy of individuals.'

The existing Press Council scheme, already criticised over the lack of enforcement powers, may look even weaker in comparison.

This is a separate issue from the proposed statutory cause of action, and relates to an appropriate sanction following investigation by the Privacy Commissioner of compliance with the law. An example might be the Commissioner's recent finding that Google had breached the Privacy Act by collecting unsecured WiFi payload data using Street View vehicles. Sanctions available to the Privacy Commissioner were limited to a requirement for an apology and acceptance of an undertaking to do better in future. Under what is now proposed every business with a turnover of more than $3 million a year will potentially be subject to such financial penalties, imposed by a court. This is likely to concentrate minds on the importance of compliance with privacy principles a little more than hitherto. Media organisations outside the scope of the Act need to consider whether thrashing serious breaches of privacy with a warm lettuce should continue to be all that their self-regulatory systems can deliver.

Second, media organisations would be sending an important message about where they stand on these issues if they indicated they are prepared to work with, not against, the modest reforms proposed by the ALRC for continuation of the media exemption from the Privacy Act.

Third, industry and profession leaders should get back to an issue which has defied reformers for years: the idea that with regard to ethics and standards, the media would benefit from unified arrangements, consistent principles and uniform enforcement mechanisms applying to all sides: newspaper companies, journalists, broadcasting companies and Internet service providers.

There are some reported indications of interest at the Press Council in broadening its scope, with new president Julian Disney. Don McKinnon seems to have given it a good but unsuccessful shot during his term. And I'd like to be a fly on the wall at the

Melbourne Writers' Festival on 2 and 3 September at the first occasion on which the people with most to do in setting and policing journalism standards are speaking on the same platform—the session, 'The Ethical Journalist Online', with Julian Disney, Australian Communications and Media Authority head Chris Chapman and the Director of Editorial Policies for the ABC, Paul Chadwick.

Fourth, more attention to guidance, education and training will continue to be an issue, especially while some senior journalists and those to whom they report claim that the public interest is anything the public might find interesting. The public interest means publication or non-publication guided by what is in the interest of the public as a whole, not what readers or an audience might find interesting or titillating. It's not always straightforward or easy to apply. But as mentioned previously, it's claimed to be at the centre of media's claimed right to publish generally and said to be a central determinant in deciding that publication of sensitive material is justified.

However, when it suits the argument, media interests seem prepared to jettison the public interest concept, and the important balancing of interests that they claim to manage and get correct every day and most of the time. It's apparently too hard, even for judges. The aforementioned News Limited lawyer, Justin Quill, writing in last Friday's *Australian*, argued the dangers to open justice from a proposed change to the law regarding suppression of court proceedings that would give judges power to impose an order where the public interest requires it.

'How could including a power that can only be exercised "in the public interest" be a bad thing?' he asked. And answered his own question: 'the main problem is "public interest" is a nebulous concept that is difficult to define and even more difficult to weigh against the circumstances of a case. It's the practical application that will cause the problems'.

Rather than abandoning the public interest, the media needs to put more time and effort into fostering a better practical understanding of the term, including the notion of a right to privacy within its own ranks.

The last suggestion for change is for the media to get on board in a sensible discussion about a cause of action for serious breaches.

A cause of action for a serious breach of privacy

The case for legislation to better define legal rights in this area is that the threats to privacy are escalating dramatically, driven largely by technological change. That the common law, case-by-case exploration of whether there is a recourse for breach of privacy is a slow, piecemeal and fragmented process likely to lead to different approaches in different jurisdictions. That legislation would give effect to our international obligations under Article 17 of the International Covenant; and that the need for better protection of privacy is being recognised in comparable countries including traditional 'peer law' countries for Australia such as the UK and New Zealand, as well as Canada and parts of the US.

The door to the development of such a cause of action at common law was opened by the High Court in 2001 in Australian Broadcasting Corporation v Lenah Game

Meats Pty Ltd. A majority of the Court accepted that a tort of privacy might be developed in the future, but the nature of privacy protection and its relationship with existing causes of action was not made clear.

To date, two lower courts have held that such a cause of action is part of the common law of Australia; one in Queensland where the defendant incessantly stalked a local council mayor, the other in Victoria where the ABC published in radio news bulletins information that identified the plaintiff—a victim of a sexual assault. This breached the Judicial Proceedings Reports Act 1958 (Vic), which makes it an offence in certain circumstances to publish information identifying the victim of a sexual offence. Judge Hampel in the County Court of Victoria held that, in addition to breaching a statutory duty owed to the plaintiff by virtue of the Judicial Proceedings Reports Act, the ABC and two of its employees were liable to the plaintiff in equity for breach of confidence, and in tort for invasion of privacy. In a few cases the courts have ruled there is no cause of action for breach of privacy.

The ALRC proposal is that the present uncertainty at law should be addressed through legislation to create a general cause of action for an unwarranted serious breach of privacy.

The ALRC recommended that a legal action should be available to remedy a serious invasion of personal privacy, where the individual:

(a) had a reasonable expectation of privacy; and
(b) the conduct complained about would be regarded as highly offensive to a reasonable person.
Further, the plaintiff would have to satisfy the court in each case that:
(c) the public interest in privacy outweighs other matters of public interest—including the interests in informing the public about matters of public concern and in allowing freedom of expression. As then President of the ALRC Professor David Weisbrot and Deputy President Professor Les McCrimmon, who conducted the review, said at the time, the proposal sets a high hurdle for success when a media organisation is involved:

‘By including the public interest test, covering only highly offensive conduct, and placing the onus of proof squarely on the person complaining of the breach, the commission has set a very high bar—taking into account the concerns of artists and media organisations about respecting freedom of the press and freedom of expression. Indeed, some privacy advocates and civil libertarians argue that we have set the bar much too high.’

This is a sensible proposal. While some media voices shout ‘outrage’ at the suggestion that there should be a law blocking a cause for action for breach of privacy, others including Mark Scott think differently. Scott told the Australia’s ‘Right to Know’ conference in Sydney in March last year:

‘With digital surveillance, location tracking and genetic tracing becoming commonplace, there is a very firm case for the law to allow people to protect their privacy. It is a fundamental human right . . . the Australian Law Reform Commission proposal for a new statutory right of privacy, properly worded, is a sophisticated idea

worthy of serious debate. To dismiss even the need to address the issue—the need to have a thoughtful and comprehensive debate—doesn't seem to be in keeping with the openness and plurality of perspectives that media freedom should be about.'

Mr Scott's colleagues in the industry should pick up the point.

Conclusion

In conclusion, we know in this, the age of knowledge, the age of truly mass communications, with the ubiquity of digital tools, that the occasions for incursions into the privacy of people will continue to rise exponentially. We can take the determinist view which concedes that the privacy of all of us is now effectively gone or we can assert that an innate right of humanity, of, indeed, the human condition, is the right to individual privacy. Or as Warren and Brandeis put it over a century ago, 'the right to be let alone'.

I believe we are stronger as a society when each of us is stronger. And by stronger I mean not having important liberties shorn from us in some revelatory information 'free for all'. The social contract we are subject of involves the surrender of certain rights in exchange for other societal benefits and protections. But at the core of that contract there cannot be, and must never be, derogations such that the notion of individuality is materially or permanently compromised. The essence of the dignity of each of us goes to our individuality and our primary need to be ourselves. Not ourselves shared with billions of others, not ourselves X-rayed by the new intrusive technologies, not ourselves ground to an amorphous mass of human sameness.

For these reasons, privacy will always matter. It will matter because the right to it represents a core and inalienable human liberty. This is why it will still matter in the face of the otherwise overwhelmingly invasive technologies; in the face of the attempts by the image and news wholesalers to have us believe that we live in the age of a new normal, a normal where these astringent and corrosive facilitations are not simply to be tolerated but accepted within a framework of powerless resignation.

What the Australian Law Reform Commission has put on offer is a proposal to remove uncertain and possibly haphazard and fragmented development of the law in favour of a unitary approach flowing from national legislation; legislation to create a general cause of action for unwarranted and serious breaches of privacy.

If, in certain circumstances, people had, or believed they had, a reasonable right to privacy and that privacy was breached, people should have a right of action in law by way of remedy. Not simply a right to complain but a right of action. Not a right to complain to a media-run-and-funded industry mechanism—a right of action at law—for as David Salter reminds us, 'the only real regulatory power is the law'.

As I said, Minister Ludwig has already announced that the government will amend the Privacy Act to introduce civil penalties with serious sanctions. This will be the new standard for corporations. The notion therefore, that media corporations should continue to enjoy different self-developed and self-regulated standards instead of regulation by exemption, is simply opportunist. Every day the media is out there insisting on ever higher performance standards in the community, urging the full

force of the law be applied to transgressions, but not to itself. The hypocrisy, to use a John Hartigan phrase, is ‘stomach-churning’.

Industry leaders and the profession itself should acknowledge that the current ‘free for all’ cannot go on. That ‘invading the privacy of celebrities, starlets, models and sometimes ordinary non-consenting members of the public’, as Jack Waterford put it, has naught to do with the public interest and everything to do with the profit flowing from the implicit consent of ‘victims’ who are suborned to the revenue task.

Industry leaders and media organisations should indicate they are prepared to work with and not against the modest reforms proposed by the Australian Law Reform Commission for the continuation of the media exemption from the Privacy Act and to acknowledge that the media in general would benefit from legal clarity, consistent principles and uniform national enforcement when it comes to respect for privacy. The media’s alternative is to do what the media normally does; use its muscle to bully the government into shredding the community’s right to privacy or, more particularly, to turn a blind eye while the media shreds the community’s right to privacy.

To date, governments have been pretty wary about meddling with the media. But even wary ones will pick up the public disquiet. And in this, the age of poll-driven policy, it is likely that governments will be encouraged to act and when they do, the remedies will be sharper and more punitive. Far better for media organisations to negotiate now around the Commission’s sensible and moderate proposals than to wait for the counter-punch, which has to come.