Bond Law Review

Volume 12 | Issue 2 Article 5

2000

At Last – Enforceable Privacy Rights in Australia? The Potential for Treaties to give Protection Against Uninvited Media Attention

Terry Gygar
Bond University, tgygar@bond.edu.au

At Last – Enforceable Privacy Rights in Australia? The Potential for Treaties to give Protection Against Uninvited Media Attention

Abstract
Even textbook writers are now recognising public sentiment in favour of more comprehensive protection for personal privacy and are predicting movements in the law of Australia. However, given the inevitable campaign of 'righteous indignation' that media interests would mount against any government proposing general privacy laws aimed at legislatively restricting 'freedom of the press', it would be naive to expect our politicians to champion this cause.

Therefore it seems that, in the absence of anything other than the so far glacial advances by the common law in Australia, progress will most probably only be made by the judicial recognition of rights contained in international agreements and treaties, leading to the enforcement of those rights even in the absence of specific legislation. This paper examines the potential for treaty rights to be invoked in the courts to curb media excesses by enforcing rights to personal privacy in Australia.

Keywords
personal privacy, protection, treaty rights

Cover Page Footnote
The critique, advice and suggestions of Prof John Farrar and Assoc Prof Gerard Carney in the preparation of this article are gratefully acknowledged.

AT LAST – ENFORCEABLE PRIVACY RIGHTS IN AUSTRALIA?
THE POTENTIAL FOR TREATIES TO GIVE PROTECTION AGAINST UNINVITED MEDIA ATTENTION

By Terry Gygar[*]

Personal Privacy in Australia

It seems almost compulsory for Australian courts considering privacy issues to start with the categorical statement in *Kaye v Robertson*[1] that 'It is well known that, in English Law there was no right to privacy and accordingly there is no right of action for breach of a person's privacy',[2] or the dicta in *Victoria Park Racing and Recreation Grounds v Taylor*[3] that '..freedom from view…is a characteristic which is not a legally protected interest'.[4]

This legal environment has encouraged an 'anything goes' attitude in some sections of the 'tabloid press' and has led to excesses such as home invasions by camera wielding TV journalists, a culture of stakeouts by paparazzi with telescopic camera lenses and media entrapment of celebrities such as the Duchess of Wessex.

The courts however appear uncomfortable with the proposition that these types of privacy abuses will not be subject to legal sanctions and have not seemed reluctant to seek ways for the law to give plaintiffs redress in appropriate circumstances.[5] However, despite the recognition in New Zealand, at least by a single judge, that there is a discrete cause of action for breach of

---

* Terry Gygar, RFD, LLB (Hons), Assistant Professor, Bond University School of Law. The critique, advice and suggestions of Prof John Farrar and Assoc Prof Gerard Carney in the preparation of this article are gratefully acknowledged.

1 [1991] FSR 62 (UK).
2 Ibid, per Glidewell LJ, in the leading judgment.
3 (1937) 58 CLR 479.
4 Per Dixon J.
5 Eg as in *Chappel v Channel 9* (1988) 14 NSWLR 153 and *Ettinghausen v Australian Consolidated Press* (1991) 23 NSWLR 443.

privacy[6] and similar approaches in the United States,[7] the Australian courts have not been so daring. Here the only protections the common law has extended have been by way of the established torts of defamation, breach of confidence, trespass and nuisance. In these areas, initially conservative approaches are apparently being challenged by a more creative willingness to give remedies to those whose privacy has been trampled underfoot by the media, however the incremental (though often creative) advances which have occurred fall short of offering comprehensive protection of privacy under the common law.

The perceived deficiencies in the common law in Australia have led to numerous calls for the right to personal privacy to be given statutory recognition. These calls have however been significantly undermined by the recommendation of the Australian Law Reform Commission that tortious remedies were the appropriate response to the disclosure of private facts and appropriation, as well as data misuse.[8] Though legislation has been introduced to give privacy rights in certain situations and relief from some aggressive and blatant abuses,[9] this legislation has mainly imposed duties on data collectors, especially public authorities, or concentrated on activities which are arguably criminal, such as stalking.

Even textbook writers are now recognising public sentiment in favour of more comprehensive protection for personal privacy and are predicting movements in the law of Australia.[10] However, given the inevitable campaign of 'righteous indignation' that media interests would mount against any government proposing general privacy laws aimed at legislatively restricting 'freedom of the press', it would be naive to expect our politicians to champion this cause.

Therefore it seems that, in the absence of anything other than the so far glacial advances by the common law in Australia, progress will most probably only be made by the judicial recognition of rights contained in international agreements and treaties, leading to the enforcement of those rights even in the absence of specific legislation.

---

6 *Bradley v Wingnut Films Ltd* [1993] 1 NZLR 415 per Gallen J.

7 See D Butler and S Roderick, *Australian Media Law* (1999) at 278.

8 Australian Law Reform Commission, *Privacy and Personal Information*, Discussion paper No 14 (1980) & *Unfair Publication* (1979) para 124.

9 Eg the *Privacy Act 1988* (Cth) and the *Privacy Amendment (Private Sector) Act* 2000 (Cth) which takes effect from 21 December 2001.

10 Eg Fleming and G John, *The Law Of Torts* (9th ed, 1998) 664-665.

This paper examines the potential for treaty rights to be invoked in the courts to curb media excesses by enforcing rights to personal privacy in Australia.

Treaty Rights in Australian law

The International Convention on Civil and Political Rights

The *International Convention on Civil and Political Rights*, which was accepted by the United Nations in New York on 19 December 1966,[11] entered into force generally (except for Article 41) on 23 March 1976 and in Australia (except for Article 41) on 13 November 1980.[12]

The privacy rights protected in the Convention are given in Article 17:

> 1. No one shall be subject to arbitrary or unlawful interference with his privacy, family, home or correspondence, nor unlawful attacks on his honour and reputation.
>
> 2. Everyone has the right to the protection of the law against such interference or attacks.

The treaty also obliges the State parties to the Convention 'to respect and to ensure to all individuals within its territory…the rights recognised in the present Convention' and '..to take the necessary steps, in accordance with its constitutional processes…to adopt such legislative or other measures as may be necessary to give effect to the rights recognised in the…convention.'[13] This is the same Treaty provision which became the foundation for the *Human Rights Act 1998* (UK) and the *European Convention on Human Rights*, which were central to the decision in the *Douglas & Zeta-Jones* Case.[14]

The European Convention on Human Rights

The privacy provisions of the International Convention have been given domestic legislative effect in Europe via the European Convention on Human Rights. While Article 10(1) of the Convention asserts a right to freedom of expression, Article 10(2) says this may be restricted by laws preventing the disclosure of information received in confidence or for the protection of the

---

11 General Assembly Resolution 2200A (XX1), 21 UN GAOR Supp (No 16) at 52, UN Doc A/6316 (1966), 999 UNTS 171.

12 Australian Treaty Series 1980 no 23, *International Convention on Civil and Political Rights*, available at <http://www.austlii.edu.au/au/other/dfat/treaties/1980/23.html> (1 April 2001).

13 *International Convention on Civil and Political Rights*, Article (2).

14 *Michael Douglas, Catherine Zeta-Jones and Northern & Shell plc v Hello! Limited*, Court of Appeal (UK) Civil Division 21 Dec 2000.

reputation or rights of others. This is balanced by Article 8(1) of the Convention,[15] which creates a right to have private and family life respected, but Article 8(2) appears to infer that this right is only actionable against public authorities which interfere with these rights. Therefore, though the rights enunciated in Article 8(1) appear universal in application, Article 8(2) seems to limit their practical enforceability.

The European Commission on Human Rights decided in *A v United Kingdom*[16] that Article 1 of the European Convention gave individuals a right of action against a national government which failed to abide by its treaty undertakings. In this case, a child sought to hold the UK Government responsible after he had been hit with a garden cane by his stepfather. It was pleaded that Article 1 of the European Convention obliged all the High Contracting parties to secure for everyone within their jurisdictions the rights and freedoms defined in the convention. Here the beating was said to be in contravention of Article 3, which prohibits torture or inhuman or degrading treatment or punishment, including such ill treatment administered by private individuals. It was submitted that the boy was therefore entitled to make a complaint against the UK Government for its failure, in breach of Article 1, to secure his Article 3 rights.

The court concluded that the UK had violated the Convention because neither its common law nor Statutes prohibited such physical chastisement of children. Therefore, by analogy, any failure by the law of the United Kingdom to adequately protect Article 8(1) rights to privacy is actionable in the European Commission on Human Rights.

Actions Before International Tribunals

This finding and the action taken in the *Toonen* Case,[17] show that extraterritorial bodies may also have a role to play in determining the scope and adequacy of domestic Australian laws.

---

15 The origin of this provision lies in Article 12 of the *Universal Declaration of Human Rights*: 'No one shall be subject to arbitrary interference with his privacy, family, home and correspondence nor to attacks on his honour and reputation. Everyone has the right to the protection of law against such interference or attacks.'

16 27 EHRR 61.

17 The Tasmanian Homosexual Laws Case, *Toonen v Australia*, UN Human Rights Committee, 31 March 1994. See A Funder, 'The *Toonen* Case' (1994) 5 *Public Law Review* 156 and discussion later in this paper.

The overall impact of treaties on Australian domestic law was specifically considered by the High Court in *Kioa v West*[18] in which Gibbs CJ said; '…treaties do not have the force of law unless they are given that effect by statute.'[19] However Treaties which are not enacted into domestic statutes may still impact on the making and enforcement of domestic law in several ways.

Questions also arise as to whether a person whose privacy rights are breached would have an action against the Federal government before the UN Human Rights Committee for failing to protect those rights in accordance with the government's obligations under Article 2 of the International Convention on Civil and Political Rights.

As Gleeson CJ, Gaudron, McHugh, Gummow, Hayne and Callinan JJ said in their joint judgment in *Re East & Ors; Ex parte Nguyen:*[20]

> If it is not afforded by Australian courts, in a proper case, where a breach of Australia's obligations under the ICCPR can be shown,[21] persons affected have the right to communicate their complaint to the Human Rights Committee of the United Nations and to seek redress there.[22] (footnotes in judgment)

Following the UNHRC decision in *Toonen*, the Federal Government stated that it was obliged to meet its international obligations, and introduced legislation to guarantee the rights that were held by the UNHRC to arise under the International Covenant on Civil and Political Rights.[23] Though the decision to introduce such legislation was discretionary, the UNHRC decision was decisive in creating a political imperative which the government found irresistible.[24]

Impact on Executive Decision Making Processes

---

18 (1985) 159 CLR 550.

19 Ibid, at 570.

20 [1998] HCA 73 (3 December 1998) at para 81.

21 ICCPR, Art 14. See *Human Rights and Equal Opportunity Commission Act 1986* (Cth), Sched 2.

22 This was done in *Toonen v Australia*, UN Human Rights Committee, 31 March 1994, Communication No 488/1992 (UN Doc CCPR/C/50/D/488 (1992)) extracted in Martin et al, *International Human Rights Law & Practice*, (1997) at 675-684. Following the Committee's decision the *Human Rights (Sexual Conduct) Act 1994* (Cth) was enacted. See generally *Croome v Tasmania* (1997) 191 CLR 119.

23 *Human Rights (Sexual Conduct) Act* 1994 (Cth).

24 See below for more detailed discussion of the *Toonen* Case.

The High Court considered the status and effect of treaty rights on the processes of executive decision making in *Minister for Immigration and Ethnic Affairs v Teoh*.[25] The case concerned the application of the United Nations Convention on the Rights of the Child in respect to a deportation order. Though Australia is a party to the Convention, it had not been incorporated into the domestic law of Australia by any Act of the Australia Parliament. The court had to consider whether the applicant was entitled to have the obligation under the Treaty to have regard to the 'best interests of the child' taken into account in the consideration of the proposed deportation.

The High Court held that, in the absence of a statutory or executive statement to the contrary, Australia's becoming party to a Convention creates a legitimate expectation that decision-makers will act in conformity with their apparent obligations under the Convention. If the Convention's principles are not to be followed, the Court held that procedural fairness required that the individual affected must be given notice of this and an opportunity to be heard in relation to the matter. Almost immediately following the *Teoh* decision, the then Labor Government issued an Executive Statement on 10 May 1995[26] intended to counteract the effect of the decision and also introduced the *Administrative Decisions (Effect of International Instruments) Bill* 1995 (Cth) to legislate this intention. This Bill lapsed upon the prorogation of the Parliament before the 1996 election, which saw the defeat of the Keating Government.

On 5 Feb 1997 the Minister for Foreign Affairs[27] and the Attorney General[28] in the first Howard Liberal/National Government jointly issued an '*Executive Statement on the Effects of Treaties in Administrative Decision Making*'[29] which replaced the earlier statement by the Labor Government.
The statement reiterated the High Court statement that such an expectation cannot arise when there is either a statutory or executive indication to the contrary and asserted that the *Teoh* Case effectively gave treaties an impact on Australian domestic law that they did not previously have. The statement expressed the view that:

> …this development is not consistent with the proper role of Parliament in implementing treaties in Australian law. Under the Australian Constitution, the Executive Government has the power to make Australia

25 (1995) 183 CLR 273.
26 'International Treaties and the High Court Decision in *Teoh*', *Ministerial Document Service* No 179/94-95, 11 May 1995, 6228-30.
27 Hon Alexander Downer.
28 Hon Daryl Williams – Attorney General and Minister for Justice.
29 *Commonwealth of Australia Gazette* No S 69, 26 February 1997. Text available at (1997) 8 *Public Law Review* (June 1997) 120.

> a party to a treaty. It is for Australian parliaments, however, to change Australian law to implement treaty obligations.[30]

Following this surprisingly frank acknowledgment of the legislative supremacy of the Parliament over the Executive government, the statement sought, by a clear statement in accordance with the parameters set by the High Court, to ensure that Treaty rights would not become part of Australian administrative decision making except by direct legislative endorsement.

> Therefore we indicate on behalf of the Government that the act of entering into a treaty does not give rise to any legitimate expectations in administrative law which could form the basis for challenging any administrative decision made from today. This is a clear expression by the Executive Government of the Commonwealth of a contrary indication referred to by the majority of the High Court in the Teoh case.[31]

The Howard Government subsequently introduced the *Administrative Decisions (Effect of International Instruments) Bill* 1999 (Cth)[32] with the intention of enshrining this principle in legislation, but this Bill has been given a low legislative priority and, at the time of writing, 17 months after its introduction in the House of Representatives (where it stayed on the table for seven months), it is still languishing in the Senate.

Given the clear wording of the High Court in the *Teoh* decision and the subsequent 'executive statement to the contrary' it would seem that treaty rights will not be regarded by the Courts as being relevant considerations in the making of executive decisions by the organs of the state in either the Commonwealth or the states.

Treaties and the Validity of Acts

Despite the concerted efforts of Governments to overturn the *Teoh* principle, the whole question of the status of treaty rights in domestic law cannot be regarded as completely settled. The potential for the Commonwealth to intervene, on constitutional grounds, when an Act of a State Government is inconsistent with a Commonwealth law passed to implement treaty obligations is well settled

---

30 'Executive Statement on the Effects of Treaties in Administrative Decision Making' (June 1997) Volume 8, *Public Law Review,* 120 at para 3.

31 Ibid at para 6.

32 Introduced into the Parliament by the Attorney General 13 Oct 1999, passed by the House of Representatives 11 May 2000 , Introduced into Senate 5 June 2000, currently before the Senate.

since the *Tasmanian Dams Case*.[33] However the immediate effect of treaty provisions on the validity and the general interpretation of Australian laws was not considered in detail in that case.

In *Kruger v Commonwealth (The Stolen Children Case)*,[34] the High Court was asked to determine whether the provisions of the Convention on the Prevention and Punishment of Genocide, which entered into force on 12 January 1951[35] but was not implemented by Australian legislation, could invalidate the *Aboriginal Ordinance* 1918 (NT). This case was decided after the Executive Statement was issued by the Howard government and, presumably, the court had its previous decision in *Teoh* and the statement in mind when it considered the effect of the Genocide Convention on Australian domestic law.

The Court firmly rejected any notion that any Treaty, merely by its adoption by the Australian government, could invalidate an Act of Parliament. This was true even when the treaty provisions were clearly an expression of well accepted international law and common law. This position is illustrated by the comments of Gauldron J when she agreed that the Genocide Convention 'gives expression to an enduring peremptory norm of international law',[36] but stated that

> …The notion of genocide…is so fundamentally repugnant to basic human rights acknowledged by the common law that, by reason of well settled principles of statutory interpretation, an intention to authorise acts falling within that definition needs to be clear beyond doubt before a legislative provision can be construed as having that effect.

Other members of the Court clearly endorsed that view[37] and proceeded to examine the effect of the treaty on the interpretation of the Statute in question.

Treaties and the Interpretation of Statutes

In *Kruger* Dawson J, with whom Gummow J appeared to agree on this point, noted[38] the existence of:

---

33 *Commonwealth v Tasmania* (1983) 158 CLR 1. See also *Toonen*, the Tasmanian homosexual laws case.
34 (1997) 146 ALR 126.
35 Parliamentary approval of the ratification was given by the *Genocide Convention Act* 1949 (Cth).
36 Ibid at 187-188.
37 Eg Toohey J at 174.
38 Ibid at 161.

> …a presumption that the legislature intends to give effect to Australia's obligations under international law, where the statute or subordinate legislation is ambiguous it should be construed in accordance with those obligations, particularly where they are undertaken in a treaty to which Australia is a party.
>
> …there is another principle that legislation is to be interpreted and applied, so far as its language admits, in accordance with established rules of international law. It was suggested in Teoh [183 CLR at 287-8] that perhaps the two principles should be merged so as to require courts to favour a construction, to the extent that the language of the legislation permits, that is in conformity and not in conflict with Australia's international obligations.

Toohey J had a similar approach, if not so strongly stated, when he suggested that, the *Teoh* decision remained valid in so far as it decided that:

> The provisions of the Genocide Convention do not form part of Australian municipal law since they have not been incorporated by statute. At the same time, resort may be made to the convention, as with any international instrument to which Australia is a party, to throw light on the proper construction of a statute or subordinate legislation which is ambiguous.[39]

Gaudron J did not discuss these aspects, but, as noted above, responded to argument that the Genocide Convention 'gives expression to an enduring peremptory norm of international law',[40] and stated that

> ...an intention to authorise acts falling within that definition (Genocide) needs to be clear beyond doubt before a legislative provision can be construed as having that effect.

Her Honour made further references to this approach, but limited her strong statements to the principle that laws would not be interpreted in ways that were 'in gross violations of human rights and dignity contrary to established principles of common law'.[41] and to interpretations which were 'fundamentally abhorrent to the principles of the common law'.[42] This emphasis on rights and principles arising not from treaties but from the common law could be interpreted as a more conservative approach to the reading down of statutes and powers than that urged by Dean, Toohey and (apparently) Gummow J.

---

39 Ibid at 174.
40 Ibid at 187-188.
41 Ibid at 189.
42 Ibid at 190.

However it could equally be characterised as a deft avoidance of the difficulty in this particular case identified by Dawson J - that the treaty post-dated the creation of the ordinance.

Brennan CJ declined to consider this issue on the grounds that the actions complained of did not constitute genocide, a point with which the other justices also agreed.

It would seem therefore that, at least some members of the High Court consider that Treaties have a significant role in the interpretation of all statutes, particularly if those statutes relate to a treaty to which Australia is a party.

This is a broader principle than that legislated for in the *Acts Interpretation Act* 1901 (Cth) which states:

> ***15AB Use of extrinsic material in the interpretation of an Act***
>
> (1) Subject to subsection (3), in the interpretation of a provision of an Act, if any material not forming part of the Act is capable of assisting in the ascertainment of the meaning of the provision, consideration may be given to that material:
>
> (a) to confirm that the meaning of the provision is the ordinary meaning conveyed by the text of the provision taking into account its context in the Act and the purpose or object underlying the Act; or
>
> (b) to determine the meaning of the provision when:
>
> (i) the provision is ambiguous or obscure; or
>
> (ii) the ordinary meaning conveyed by the text of the provision taking into account its context in the Act and the purpose or object underlying the Act leads to a result that is manifestly absurd or is unreasonable.
>
> (2) Without limiting the generality of subsection (1), the material that may be considered in accordance with that subsection in the interpretation of a provision of an Act includes:
> …
> (d) any treaty or other international agreement that is referred to in the Act.

Therefore treaties will not only be a primary source of guidance in the interpretation of Acts which specifically refer to Treaty Rights, but will also be a guiding principle in the interpretation of all Statutory material which the

courts find to be ambiguous or obscure (both at Common law and under S15AB), or manifestly absurd or unreasonable (under s15AB).

The impact which this principle may have on the interpretation of Statutes affecting the privacy rights of individuals may be far reaching. In any Act or regulation which relates to privacy, it will be open to the courts to interpret the provisions in accordance with Treaties such as the *International Convention on Civil and Political Rights.*
An example of such Legislation is the *Privacy Amendment (Private Sector) Act* 2000 (Cth) and the obligations it places on media organisations to have codes of conduct which deal adequately with privacy.

Courts dealing with a broad range of privacy issues may also be persuaded that it would be 'manifestly absurd' that such provisions were not intended to be read in the light of these treaty commitments.

Human Rights and Equal Opportunity Commission Act 1986 (Cth)

Treaty rights are, by virtue of the *Acts Interpretation Act* 1901 (Cth) S 15AB(2)(d) directly relevant to the interpretation of Acts that directly refer to the relevant Treaty. The *Human Rights and Equal Opportunity Commission Act* 1986 (Cth) is such an Act because it incorporates by reference a series of rights treaties, including the *International Convention on Civil and Political Rights.*[43] Article 17 of that Convention provides that

> 1. No one shall be subject 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.

It would therefore seem that it is open to the Human Rights and Equal Opportunity Commission (HREOC) to accept and act on complaints of breaches of privacy. Unlike breaches of specific legislation such as the *Racial Discrimination Act* 1975 (Cth), privacy breaches will not generate a separate cause of action or automatically give the HREOC jurisdiction to investigate unless the complaint is against the Commonwealth or one of its agencies.

---

43 *Human Rights and Equal Opportunity Commission Act* 1986 (Cth), Schedule 2.

However given the broad powers of the Commission, it would seem that this would be a fertile field for complaints about intrusive journalism. The power to 'inquire into any act or practice that may be inconsistent with or contrary to human right'[44] and to 'prepare …guidelines for the avoidance of acts or practices of a kind in respect of which the Commission has a function under paragraph (f)'[45] would seem to give ample jurisdiction to the Commission to investigate, report on and publish guidelines on media intrusions into privacy.

Whilst such guidelines would not have the force of law, they could, as experience has shown, possibly influence the Courts in the development of the common law, exert significant public pressure on offenders to comply, pressure the Government to introduce appropriate legislation if offenders do not comply and/or give rise to extraterritorial claims that the Australian Government has failed to honour its commitments to support treaty rights by domestic legislation.

The potential in this area for a citizen who is sufficiently aggrieved, determined and wealthy appears almost limitless.

One such possibility is the institution of a complaint to the Human Rights Committee charging the Australian Government with failure to honour its treaty obligations by the introduction of domestic legislation.

Extraterritorial Appeals to the Human Rights Committee

The first *Optional Protocol to the International Covenant on Civil and Political Rights* came into force in Australia in 1991. Under Article 5(2)(b) of the *Optional Protocol* any Australian who has 'exhausted all available domestic remedies' may make a complaint to the United Nations Human Rights Committee[46] that their rights under the ICCPR have been infringed.

This was the process followed in the *Toonen Case*,[47] where a Tasmanian homosexual complained that his right to privacy was infringed by sections of the *Criminal Code Act* 1924 (Tas) which made homosexual acts illegal. There the Human Rights Commission upheld Toonen's claim that the Tasmanian law was inconsistent with the right to privacy set out in Article 17 of the ICCPR. This finding effectively stated that the Australian Government had an obligation to use its constitutional powers to defeat the offending laws and led to the

44 Ibid, S 11(1)(f).
45 Ibid, S 11(1)(o).
46 The international body established under Article 28 of the ICCPR.
47 See A Funder, 'The *Toonen* Case' (1994) 5 *Public Law Review* 156.

enactment of the *Human Rights (Sexual Conduct) Act* 1994 (Cth) which sought, under the power given by s 109 of the Constitution, to override the Tasmanian legislation and effectively repeal ss 122 and 123 of the *Criminal Code Act* 1924 (Tas).

This objective was challenged by the Tasmanian Government in *Croome v Tasmania*[48] but the High Court found that the Commonwealth actions were a valid exercise of power.

Of equal importance to the High Court finding was the political response of the Federal government to the decision of the United Nations Human Rights Committee. The Howard Liberal Government, with the support of the opposition, asserted that the finding left them with no alternative but to fulfil Australia's international obligations by introducing legislation which implemented the decision. Though this was a political rather than legal decision, it has established a clear precedent which would be difficult for any future government to ignore. This would be particularly true if the implementation of an IHRC decision on privacy rights required legislation imposing restrictions on the media. In the absence of a US style constitutional guarantee of free speech on which to rely, any reluctant government would immediately face accusations of bowing to the wishes of specific media interests and run the risk of an enormous political backlash if the issue was pursued (as it almost certainly would be) by the opposition or an opportunistic minor party looking for a popular issue.

In practical terms, this approach would seem to be the surest way for a determined victim of media intrusion to wreak their revenge on not only their specific tormentor, but the entire Australian print and broadcast industry.

Other possible Legislation

It was reported on ABC radio on 27 March 2001 that the Federal Government proposes to introduce legislation which will prohibit the Courts from considering rights enumerated or contained in Treaties entered into by the Australian Government as a basis for lodging appeals against decisions relating to immigration or migration matters. No drafts or explanations of this proposal could be found on Internet sites in the weeks following this report.

If this report is accurate, it could signal an escalation of the present Federal Government's 'war of words' with international, particularly United Nations,

48 No H004 of 1995, (1997) 142 ALR 397.

committees and may signal a new and more aggressive rejection by the Government of the impact of international bodies on Australian law. Should this be the case, the foundations have been laid for a long running battle between the Government and the courts on this issue, particularly given the enthusiastic approach to international standards and obligations expressed by Kirby J.[49]

Conclusion

In Australia the common law remedies provide only a patchy and incomplete protection for both ordinary citizens and celebrities from the objectionable intrusions of a media which seems to have a total disregard for personal privacy and the ethical gathering of information and images.

So called self regulation by the print media and the journalists' profession have given birth to toothless platitudes which are effectively unenforceable and are completely ignored by their authors whenever they are faced with situations for which the codes of conduct and ethical guidelines were allegedly prepared. In the past two months alone a series of media privacy outrages have demonstrated the ineffectiveness of these self regulatory regimes.[50]

There seems little prospect that the common law will develop comprehensive privacy protections in the foreseeable future and even less hope that governments, fearful of media responses, will introduce effective legislation in this field.

The major hope for any comprehensive reform seems to lie in the domestic implementation of rights to privacy under international treaties to which Australia is a signatory. There are signs that the High Court would be a willing accomplice in such an endeavour and the media may well find themselves facing an unaccustomed accountability if an aggressive victim of privacy abuse is prepared, and wealthy enough, to fight for these rights through the International Human Rights Committee, the High Court and the corridors of political power.

The potential is there, it awaits a hero to take up the sword.

---

49 See, for example, Hon Justice Michael Kirby, *Through the World's Eye* (2000).

50 Eg the Powerball winners' incident, reporting of the Nicole Kidman miscarriage and the Duchess of Wessex affair.