

## **'The gentlest of predations': Photography and privacy law**

**Christa Ludlow**

In December 2004, Peter James Mackenzie, a labourer from the beachside suburb of Coogee in Sydney, pleaded guilty before a magistrate to a charge of offensive behaviour for photographing women who were bathing topless at the beach without their knowledge or consent. He forfeited his expensive Nokia mobile camera phone and the images he had taken. '[The women] were quite horrified by what you were doing ... Women are not objects of decoration for men's gratification,' said Magistrate Lee Gilmour as she fined him \$500 (*The Sydney Morning Herald* 2 December 2004).

In a simultaneous outbreak of public concern, steps were taken to ban mobile phones with inbuilt cameras from changing rooms in gyms, pools and sports centres because of fears of their misuse. The Royal Life Saving Society warned that the phones 'allow those with devious minds to record images electronically, or to transmit these images directly onto their personal computer or even the internet'. The Federation of Parents and Citizens Associations announced that parents should have to seek permission from schools to film and photograph their child at swimming carnivals, school plays and other events, saying parents had a right to know who was photographing or videotaping their child (*The Sydney Morning Herald* 22 February 2005).

More recently, in the London bombings on 7 July 2005, closed circuit TV cameras used to keep streets and transport networks under surveillance were used to track the alleged bombers' routes and to reveal

## Ludlow

their faces to the world. Commuters on the trains which were attacked used their mobile phone cameras to record and transmit images and footage of the aftermath. Police appealed for such images to be sent in to help in the investigation, while the media made similar appeals. 'No one knows where this is going to take us,' BBC news director Helen Boaden said. 'The gap between the professional and non-professional news gatherers is getting narrower' (*The Australian* 12 July 2005).

In August 2005 the Standing Committee of Attorneys-General in Australia released a discussion paper on options for reform to address the issue of unauthorised publication of photographs being made available on websites, and the related privacy issues. This was triggered by the discovery of a website containing photographs of teenage school boys in sporting activities, taken without consent (Standing Committee of Attorneys-General 2005: 5).

The technology of phone and digital cameras and their ability to transmit images via phone or internet may be new, but the concept of a hidden camera is not. The first cameras which became available in the mid-19th century were large and cumbersome and were largely restricted to the wealthy and professionals, but improvements in design, together with the invention of dry plate photography and later, roll film, allowed cameras of smaller size and easier use to be sold to an eager public. The popularity of the camera led to a fashion for candid street photography; photographers rediscovered the city streets and their inhabitants, as well as what went on behind closed doors. What was more, they circulated their images — to shock, to stir to action, to titillate and to educate.

As recognised by the late Susan Sontag, photography of this kind was often a form of 'middle-class social adventurism':

Social misery has inspired the comfortably-off with the urge to take pictures, the gentlest of predations, in order to document a hidden reality, that is, a reality hidden from them ... The photographer is an armed version of the solitary walker reconnoitering, stalking, cruising the urban inferno, the voyeuristic stroller who discovers the city as a landscape of voluptuous extremes. Adept of the joys of watching, connoisseur of empathy, the flaneur finds the world 'picturesque' (1977: 55).

## The gentlest of predations

Recent reports like those cited above and the strong reactions they induced, caused me to reconsider the history of the ‘gentle predation’ of photography. Worldwide, the BBC reported that in 2003 more camera phones were sold than digital cameras. This paper examines that history and what implications changes in photographic technology have for the public debates about privacy. What relationship does legal regulation of this perceived ‘new’ threat to privacy and morality have to the public’s fears and assumptions about personal privacy in its multiple contexts?

## The photographer as detective

‘The slums, fair grounds, street trades, outdoor markets, etc, all provide scope for the wide awake photographer,’ Australian camera enthusiasts were advised in 1896, the same year that the compact Pocket Kodak arrived in Sydney (Coulthurst 1896: 180). The arrival of small, easy to use cameras caused concern even in the 1890s — with reports of an innovation on the more traditional Sydney larrikin, ‘photographic cads’, who snapped women at the beach (Davies 2005: 46, citing *Australian Photographic Review* 20 March 1897).

The requirements of respectability and law enforcement made it necessary that ‘undesirable’ street behaviour should be reduced, or at least concealed. Serious Victorian photographers, too, found that their appearance on the street with a camera attracted a retinue of idlers and street urchins (Smith 1975: 135). Hence, the advent of the smaller detective camera, to allow photographers to pursue their ‘prey’ in secret (Westerbeck et al 1994: 95ff).

The detective camera is a fascinating cultural artefact, a response to many anxieties and passions of the Victorian era. Unlike modern mobile phone cameras, these were cameras made to be concealed — disguised as brown paper packages, binoculars, books or pocket watches, hidden in bowler hats or behind vest buttonholes. The desire to know about the social ‘other’, through slum visiting, sensational journalism and detective novels, also appears in literary and dramatic works of the time. Charles Dickens’ *Our Mutual Friend*, Mary Elizabeth Braddon’s *Lady Audley’s Secret* and Robert Louis Stephenson’s Dr

## Ludlow

Jekyll and Mr Hyde feature hidden scandals and double lives. Newspapers printed dramatic accounts of crime and sordid city life, positioning the journalist and the reader as privileged urban spectators who can read the city and its inhabitants. These stories fed upon middle class anxiety about control of public spaces and social unrest in an era when the growth of the metropolis and its attractions caused the intermingling of classes and genders (Ludlow 1998).

The pioneer of concealed photography was the London photographer Paul Martin, who took up this pastime in 1890. He followed the working classes to markets, Bank holiday festivities and the seaside with a camera disguised as a leather satchel. His aim was to capture 'people and things as the man in the street sees them' (Westerbeck et al: 96).

Other street photographers followed, whose work ranged from pictorialism to social documentary. Jacob Riis used a hand camera and the new flashlight technology to take spontaneous photographs of the dark slums and sweatshops of New York for his 1890 book *How the Other Half Lives*. Eugene Atget produced haunting images of the deserted streets of Paris. In 1904 Sydney photographer Harold Cazneaux used a Midge box quarter-plate camera to take striking outdoor photographs in the pictorialist style. His early images of wharfies, ships at the Quay, city streets and people on their way to work captured a city on the cusp of modernity (*Australian Observer*, Dupain 1978). He too led a double life: working as a conventional camera operator for one of the large studios by day and engaging in his own preferred style of photography on his way to and from work.

As photographic technology became more refined, and cameras more common, detective cameras lost their allure. Ordinary cameras became more lightweight and as the 20th century progressed the viewfinder was no longer viewed from above but held before the eye, making it less easy to conceal the act of taking a picture. As historical documents, however, the early photographs have immense value. They record the people, lives, work, streets and activities of the past. The passage of time has made them less immediate. They are captured in the moment of not knowing, before the camera shutter closed.

### In the eye of the beholder

However 'artistic' a photograph, photographers take images for their own ends. So the significance of an image will depend upon who created it and for what purpose. A photograph of a child in a swimming costume may be an innocent snapshot if taken by a parent at the local swimming pool, but could become child pornography if taken by a paedophile loitering at the same pool. Images that do not seem to meet legal criteria of indecency or offensiveness may take on a different aspect in the eyes of the viewer.

Users of camera phones do not need to lead 'double lives' — their technology is widely understood and the social impact of documentary photography has lessened over time. Yet as the examples at the beginning of this article concerned with the improper use of mobile phone cameras demonstrate, there are boundaries, often unwritten, to what is acceptable to the 'reasonable person', and there may be disjunctions between legal regulation and popular expectations.

In fact we have never had legal ownership of our own images. As recently as 2001 the High Court made clear that the common law in Australia has not traditionally recognised a right to privacy (*Australian Broadcasting Corporation v Lenah Game Meats Pty Ltd*). However it held that *Victoria Park Racing and Recreation Grounds Co Ltd v Taylor* should no longer be seen as standing in the way of a development of a law of privacy in Australia, as it had in the past.

In the *Lenah Game Meats* case, trespassing animal rights activists filmed the slaughter of brush tail possums for meat processing. The film was to be broadcast by the Australian Broadcasting Corporation. The meat processing company sought an injunction to prevent the broadcast. It was clear that the trespassers had acted illegally to obtain the footage. Gleeson CJ referred to *Hellewell v Chief Constable of Derbyshire* in which Laws J had said:

If someone with a telephoto lens were to take from a distance and with no authority a picture of another engaged in some private act, his subsequent disclosure of the photograph would, in my judgment, as surely amount to a breach of confidence as if he had found or stolen a letter or diary in which the act was recounted and proceeded to publish it.

## Ludlow

The Chief Justice agreed with that proposition, subject to Constitutional considerations, but said in the present case it was the existence of ‘a private act’ that was missing. An act was not private merely because it was carried out on private property. He suggested as a test of what was private, something of which disclosure or observation would be ‘highly offensive to a reasonable person of ordinary sensibilities’ and said:

If the activities filmed were private, then the law of breach of confidence is adequate to cover the case. I would regard images and sounds of private activities, recorded by the methods employed in the present case, as confidential. There would be an obligation of confidence upon the persons who obtained them, and upon those into whose possession they came, if they knew, or ought to have known, the manner in which they were obtained (at [39]).

His Honour also referred to the case of *Donnelly v Amalgamated Television Services* and said that film taken by police of a man in his underwear in the bedroom of his house would also have the necessary quality of privacy to warrant the application of the law of breach of confidence. This allowed the granting of an injunction preventing the police, who took the film, from using it for purposes other than investigation and prosecution. It was a relevant factor in the *Lenah Game Meats* case that the ABC was not a knowing participant in the trespass and had been given the footage later. Also, the respondent was a corporation, not an individual, and there was authority that corporations could not benefit from a common law right to privacy, where one existed (per Hayne and Gummow JJ at [190]).

Despite the caution of the High Court in the *Lenah Game Meats* case, their reluctance to deny the possible future existence of a tort of breach of privacy was relied upon two years later by Skoien J of the Queensland District Court in *Grosse v Purvis*. Skoien J held that the plaintiff had a cause of action against the defendant for breaching her privacy and took the ‘bold step’ of holding that there can be a civil action for damages based on the actionable right of an individual to privacy (at [442]).

Significantly, however, the defendant’s conduct in *Grosse v Purvis* involved a sustained pattern of serious harassing conduct over a number

## The gentlest of predations

of years. This is reflected in the passage of Skoien J's judgment in which he set out the 'essential elements' of an actionable breach of privacy:

- (a) a willed act by the defendant,
- (b) which intrudes upon the privacy or seclusion of the plaintiff,
- (c) in a manner which would be considered highly offensive to a reasonable person of ordinary sensibilities, and which causes the plaintiff detriment in the form of mental psychological or emotional harm or distress which prevents or hinders the plaintiff from doing an act which she is lawfully entitled to do.

The decision in *Grosse v Purvis* left open the possibility that a single incident involving a particularly serious breach of privacy might be actionable. However, the degree of harm which must be suffered by the plaintiff in order to be actionable was relatively severe. Later decisions by superior courts have not followed *Grosse v Purvis*, concluding that the law had not yet developed to a state in Australia where a tort of breach of privacy existed (*Kalaba v Commonwealth, Giller v Procopets*). In New Zealand the law has developed along those lines, however, with the New Zealand Court of Appeal recently formulating elements of a tort which echoed Gleeson CJ's test: 'publicity given to private facts which would be considered highly offensive to an objective reasonable person' (*Hosking v Runting*).

Whether a cause of action for breach of privacy develops in Australia, and whether it does so as a branch of tort law, or as some have suggested, an emanation of equity's power to protect privacy by restraining a breach of confidence (Dean 2004) remains to be seen. However a common requirement would seem to be that the reasonable person would regard the conduct in question as 'highly offensive' (tort) or unconscionable (equity).

Recent amendments (commenced March 2005) to the *Criminal Code Act 1995* (Cth) use a similar test. They create an offence relating to the use of a telecommunications network or 'carriage service' in a way that reasonable people would regard as being, in all the circumstances, menacing, harassing or offensive. 'If a person takes an unauthorised picture of another person, for instance getting undressed

## Ludlow

when they are unaware, and sends that picture to another phone or to an internet site, this possibly, and I think reasonably, could be considered an offensive use of the camera service', the Minister was reported to have said (*The Age* 22 September 2004).

Could the women sunbathing on a public beach and snapped by Peter James Mackenzie's mobile phone camera have relied upon an action in breach of confidence? Their acts seemed to lack the required element of privacy. Yet section 21G of the *Summary Offences Act* 1988 (NSW) potentially makes any place into a place where one is entitled to privacy. It provides:

### **21G Filming for indecent purposes**

- (1) Any person who films, or attempts to film, another person to provide sexual arousal or sexual gratification, whether for himself or herself or for a third person, where the other person:
  - (a) is in a state of undress, or is engaged in a private act, in circumstances in which a reasonable person would reasonably expect to be afforded privacy, and
  - (b) does not consent to being filmed,

is guilty of an offence.

Maximum penalty: 100 penalty units or imprisonment for 2 years, or both.

- (2) For the purposes of this section:
  - (a) a person **films another person** if the person causes one or more images (whether still or moving) of another person to be recorded or transmitted for the purpose of enabling himself or herself, or a third person, to observe those images (whether while the other person is being filmed or later), and
  - (b) a person is **engaged in a private act** if the person is engaged in using the toilet, showering or bathing, carrying on a sexual act of a kind not ordinarily done in public or any other like activity.

Section 21G was only recently inserted into the *Summary Offences Act* by the *Crimes Legislation Amendment Act* 2004 (NSW). It imposes the objective 'reasonable person' test, in order to determine whether one is in a space where one would 'reasonably expect to be afforded privacy'. It is easy to see that minds may differ on this issue, as they may differ over what is a public place. Can anyone really 'expect to be

## The gentlest of predations

afforded privacy' on a public beach in full view of other beachgoers? Is it the fact that you are partially undressed that indicates to a 'reasonable person' that you expect privacy? In what other places would a reasonable person expect privacy? What about driving in your car on a public road, or on the balcony of your home, in view of the street?

The law of trespass may prevent a person from taking a photograph on certain premises, if it is a condition of entry that no photographs are permitted without consent. The basic effect of a condition of entry is that it makes the visitor's lawful presence on that property conditional on the visitor continuing to observe the conditions. Accordingly, when a visitor breaches one of the conditions of entry, the occupier's consent to the visitor's presence is withdrawn and the visitor becomes a trespasser on the property (*Horkin v North Melbourne Football CSC*, *Plenty v Dillon*). A trespasser may be removed using reasonable force, following a request to leave the property (*Polkinhorne v Wright*, *Hemmings v Stoke Poges Golf Club*). The occupier would also be entitled to sue the trespasser for damages.

Another consequence of the visitor being classified as a trespasser by reason of breaching a condition of entry is that the owner of the premises may be able to seek an equitable injunction preventing the visitor from publishing or distributing the inappropriate images (*Rinsale Pty Ltd v Australian Broadcasting Commission*, *TCN Channel Nine Pty Ltd v Anning*, *Lincoln Hunt Australia Pty Ltd v Willesee & Ors*).

In the cases which have attracted media attention, our understanding of privacy appears to be affected by moral precepts and challenged by new developments in technology. We are understandably concerned at the thought of unknown persons secretly photographing women and children for sexual gratification. Yet how do we distinguish between 'innocent' photography and the other kind? The choice of the 'reasonable person', it seems, will be informed by public morality. Despite the dramatic advances in technology which have caused this moral panic, in some respects we have not journeyed so far from the 'photographic cads' who snapped women in the 1890s; but in the 1890s the woman, too, would have been regarded as behaving offensively by being in a state of undress in public.

Ludlow

### Is a photograph 'personal information'?

Governments collect information, including images of individuals, as part of their regulation of society. Speed cameras photograph cars on the roads. Workplaces have surveillance cameras. CCTV cameras monitor activities in government buildings. Prisoners and persons under investigation are photographed. In New South Wales this government activity is regulated by the *Privacy and Personal Information Protection Act 1998* (NSW) (hereafter the *PPIP Act*) administered by Privacy NSW. The regulation of private sector activity in NSW and elsewhere is the province of the Commonwealth Government which has enacted the *Privacy Act 1988* (Cth).<sup>1</sup>

In 2002–3 the Office of the Privacy Commissioner (NSW) recorded that approximately 10 per cent of the total enquiries received were about surveillance but only 0.6 per cent were about the taking of photographs. Other forms of surveillance such as CCTV, listening devices, email monitoring, location tracking, etc made up the balance of complaints in that area.

However despite all this activity, it has never been made absolutely clear whether the *PPIP Act* regulates images. It nowhere refers to images as a form of personal information. The *PPIP Act* regulates the collection, holding, use and disclosure of 'personal information' by public sector agencies. Personal information is defined in section 4(1) as:

information or an opinion (including information or an opinion forming part of a database and whether or not recorded in a material form) about an individual whose identity is apparent or can reasonably be ascertained from the information or opinion.

(The definition of 'personal information' follows that in the Commonwealth *Privacy Act* and the two are almost identical.)

This definition contains the first problem faced in determining whether photographs are covered by the legislation. If the person in the photograph is not identified by name in or on the photograph, is their identity 'reasonably identifiable from the information', that is, from the photograph itself? If not, does the definition allow reference to other material which might identify the person?

## The gentlest of predations

Visual or photographic images are not expressly referred to in the *PPIP Act*'s definition of 'personal information'. No reference to such images was made in the relevant Second Reading Speech to indicate whether or not it was Parliament's intention that such images should be regarded as falling within the definition of 'personal information'. Accordingly, the question of whether photographs contain personal information must be determined by an examination of the purpose and language of the legislation.

It seems clear that photographs and videos can contain information about an individual, such as what they were doing at a particular time, who they were with, etc. Thus far they contain 'personal information'. Where a person is photographed from a distance and their face cannot be seen it would seem that their identity is not apparent, nor could it be reasonably ascertained from the photograph alone. Where the face is visible their identity may be reasonably ascertainable from the photograph alone — but only to those who know the person by sight. It is unclear whether the identity is 'reasonably ascertainable' from the photograph if recourse to other information is needed.

The use of the word 'reasonably' suggests an objective test. However the exact application of the test has not been determined in the Administrative Decisions Tribunal of New South Wales at the time of writing. In *Re Pasla and Australia Postal Corporation*, a decision of the Commonwealth Administrative Appeals Tribunal, a film was held to be 'personal information' under the Commonwealth *Privacy Act*. However, no reasons were given for so holding. In *Smith v Victoria Police* it was not disputed that a 'mugshot' photograph of a convicted person constituted 'personal information' within the meaning of the *Information Privacy Act 2000* (Vic). The definition in that Act is also almost identical. See also *Ng v Department of Education* and *SW v Forests NSW*.

A similar provision was examined in the Freedom of Information context in *Police Force of Western Australia v Ayton*, a decision of the Supreme Court of Western Australia. The definition of personal information considered in that case referred to 'information about an

## Ludlow

individual whose identity is apparent or can reasonably be ascertained from the information’.

This was an appeal from a decision of the Western Australia Information Commissioner who had held that the definition meant that the information would only be personal information if ‘anyone reading the disputed document could reasonably ascertain the identity of the author from a reading of that document’. The identity of the author was the personal information in dispute. Wheeler J said:

However, as I understand the ground, it was really directed to the assumption that the information was only protected if a person reading the Confidential Comments document could ascertain the identity of the person from a reading of that document on its own. Put this way, there is substance in the ground, since the definition of personal information refers to an individual ‘whose identity is apparent’. No doubt there would be borderline cases, and no doubt documents will not contain personal information merely because a person about whom information is recorded can be identified, not from the document itself, but from some obscure and lengthy process of cross-referencing and deduction from other materials. However, where it is widely known that two particular individuals are authors of a document, then if disclosure of the opinions contained in the document would be disclosure of information ‘about’ the authors, I think it must be accepted that the disclosure would be disclosure about an individual whose identity is apparent from the document, notwithstanding that reference must be made to other sources to ascertain the names of those individuals (at [38]).

This decision, although in a different context, indicates that the definition may not exclude the possibility that identity can be ascertained by reference to extrinsic material, although an obscure and lengthy process may not be ‘reasonable’. If this were followed, whether an individual’s identity is reasonably ascertainable may depend on the context and whether the person’s identity is ‘widely known’ in that context.

In an interesting recent development, the test of whether a person’s identity ‘can reasonably be ascertained’ in the Commonwealth *Privacy Act* has been criticised for lacking in certainty and failing to deal with the threat of computer ‘spyware’ programs. These programs can collect information about a person via their computer; for example their internet use, their emails and usernames. However that information is not

## The gentlest of predations

‘personal information’ and hence not regulated by the *Privacy Act* if the computer user’s identity is not ascertainable in the sense above from the information (Clapperton 2005).

However there is another point to be noted with regard to photographic images. Section 9 of the *PPIP Act* states that a public sector agency must collect personal information ‘directly from the individual to whom the information relates’ unless the individual has authorised collection from someone else or the individual is under 16 years and the information has been ‘provided by’ a parent or guardian. Sections 10 and 11 also refer to a public sector agency collecting personal information ‘from an individual’.

This wording is not compatible with the collection of photographic images if ‘collection’ equates to creation of the photograph. A photograph is not collected directly from an individual nor does the individual provide it. The camera merely records what is before it. The individual need not be aware of the creation of the image, therefore how can it be collected ‘from’ that person? There is no definition of ‘collection’ in the *PPIP Act* but section 4(5) provides:

For the purposes of this Act, personal information is not collected by a public sector agency if the receipt of the information by the agency is unsolicited.

The word ‘unsolicited’ indicates that the agency passively receives the information, which is not the case here. The definition is not exhaustive however and it could be the case that information is not ‘collected’ within the meaning of the Act if it is merely the record of what is observed and is not collected from a person. Alternatively section 9 could have been drafted with information rather than images in mind and perhaps the *PPIP Act* was not intended to apply to images.

## Privacy and the body politic

Despite these ambiguities, the Privacy Commissioner and the NSW government have both acted as if the *PPIP Act* applies to images. One case which attracted a great deal of attention concerned the convicted serial killer, Ivan Milat. The Department of Corrective Services arranged

## Ludlow

for X-rays to be taken of Milat following his swallowing razor blades and other objects in prison. When, in the words of the Minister for Corrective Services, the X-rays 'made their way into the public arena' in late 2001 (they were released to the media and published in Sydney newspapers) Milat complained to the NSW Privacy Commissioner. As described by the Minister:

Members of this Chamber would be interested to hear that it now appears likely that the Privacy Commissioner is taking up his case — I am not kidding; this is true. If the Privacy Commissioner takes up the case, and champions the call of this inmate, he may inadvertently bring the role of the Privacy Commissioner into disrepute. He could see himself playing a key role in handing over \$40,000 in compensation to this unrepentant mass murderer under the Privacy and Personal Information Protection Act (Hansard, Legislative Assembly, 29 October 2002: 6022).

Like Milat, the convicted rapist Bilal Skaf also became an exhibit in the privacy versus law and order debate. Security footage of his mother visiting him in prison and allegedly hiding a piece of paper he had given her was released to the media. Those who tried to condemn this use of surveillance footage for purposes of government 'spin' ran the risk of being seen as defenders of people who undoubtedly committed shocking crimes and for whom the public feels little sympathy ('Rapist jail photos spark privacy fury' *Sydney Morning Herald* 16 September 2002).

There could be little purpose in the Department revealing the footage, however, except to stir up righteous indignation over an already heated court case and to prove that the New South Wales prison system is not soft on rapists. Moreover, the outcome suggested by the Minister, that such persons could obtain compensation for breach of privacy, was unlikely. The Privacy Commissioner cannot 'hand over' compensation to a person whose privacy has been breached. This can only occur by way of an order of the Administrative Decisions Tribunal where the conduct of a public sector agency is reviewed by the Tribunal. Nevertheless, the government then introduced the Privacy and Personal Information Protection Amendment (Prisoners) Bill to ensure that prisoners could never obtain compensation for the privacy breaches

## **The gentlest of predations**

the government itself had committed. Not only prisoners, but their spouses, partners and relatives were (and still are) prevented from obtaining a compensation award.

In the Legislative Council, one Opposition Member tried to point to some lesser known facts behind the Bill:

I do not think it was an accident that this legislation was introduced a weekend or two after the publication by the Sun-Herald of photographs of the family visit to Bilal Skaf. I have no sympathy for Bilal Skaf: what he did was utterly dreadful and he is receiving the punishment he deserves, but the same does not apply to his family. Sadly, the photographs released by the Department to the newspaper for publication include not only a photograph of Mr Skaf's mother, who allegedly carried out a crime, the investigation into which I have no objection, but a photograph of his father, who apparently has not committed a crime. This bill refers to the families of people, not just the prisoners. Even worse, there were pictures of two children playing in the corner while their mum and dad were visiting Bilal Skaf.

... The department has discovered it has done something that all Australians would regard as wrong: it has put up for scrutiny two young children ... This bill is founded upon a rotten and wrong premise (speech of the Hon John Ryan, Hansard, Legislative Council, 3 December 2002: 7575).

## **Conclusion**

To return to the questions I posed at the beginning of this article, photography does not seem such a 'gentle predation', if it ever did. This flows from the nature of photography itself and the intensity of our reactions to it. A photograph of oneself is part of oneself, an associated likeness which communicates something about us to the viewer. The person who controls the camera controls us. And so we are outraged to think of photographs taken without our knowledge, which may be used in perverted or humiliating ways. In the photography/privacy debate the photographer is a predator.

In the cases of Milat and Skaf, however, the tables were turned so that the predator became the person in the photograph, the very person

## Ludlow

who lacked the power to control his own image. Their loss of privacy was justified because of their prior acts.

In examining these controversies we can see how understandings of privacy depend very much on context, but also technological, moral and political factors. They can be shaped by debate and are too fluid to be defined in legal terms. The difficulties in defining what a 'reasonable person' regards as privacy was recognised by the issues paper for the Standing Committee of Attorneys-General which noted:

While an individual's expectation of privacy may in some instances extend to controlling images of themselves, privacy is a concept which is not easily defined and hence boundaries are frequently blurred (2005: 7) .

Privacy is subject to ongoing debate and inquiry. The Australian Law Reform Commission received terms of reference for an inquiry into the effectiveness of the *Privacy Act* in January 2006. The NSW Law Reform Commission is conducting a similar inquiry, including the desirability of introducing a statutory tort of privacy.

The Milat and Skaf cases show how privacy also relates to control not only of the individual image, but also of the individual. The publication of the images with their self-serving commentary gave the high moral ground to the government and may have given the public some perception of control over these men who had so appallingly breached the moral code. Perhaps it was also a measure of control that the victims of the London bombings felt as they communicated their own images of the disaster on their mobile phones. At some time in the future, such photographs, like those of Riis and Cazneaux, will be of merely historical interest, but in our time the debate will be about who controls the image.

## Notes

The views expressed in this article are solely those of the author.

- 1 The exception is health records of both government and private health service providers. In NSW these are regulated by the *Health Records and Information Privacy Act 2002*.

## References

- Australian Observer: the photographs of Harold Cazneaux* National Library of Australia exhibition Catalogue: <[www.nla.gov.au/exhibitions/caz/cat.html](http://www.nla.gov.au/exhibitions/caz/cat.html)>
- Clapperton D 2005 'Spyware, consent and the Privacy Act' *Privacy Law Bulletin* 2/6 November
- Coulthurst S L 1896 'Hand Camera Work in the Street' *The Photographic Review* June
- Davies A 2005 *An Eye for Photography* Exhibition Catalogue, State Library of Australia Sydney
- Dean R 2004 'A right to privacy?' *Australian Law Journal* 78/2: 114
- Dupain M 1978 *Cazneaux* National Library of Australia Canberra
- Krone T 2005 *Does Thinking Make it So? Defining online child pornography possession offences* Australian Institute of Criminology April <[www.aic.gov.au/publications/tandi2/tandi2995.html](http://www.aic.gov.au/publications/tandi2/tandi2995.html)>
- Riis J 1890 *How the Other Half Lives*
- Smith R C 1975 *Antique Cameras* David and Charles London
- Sontag S 1977 *On Photography* Penguin
- Standing Committee of Attorneys-General 2005 *Unauthorised Photographs on the Internet and Ancillary Privacy Issues* Department of Justice Melbourne
- Westerbeck C and Meyerowitz J 1994 *Bystander: a History of Street Photography*
- Willis A M 1988 *Picturing Australia: A History of Photography* Angus and Robertson Sydney

## Cases

- Australian Broadcasting Corporation v Lenah Game Meats Pty Ltd* (2001) 208 CLR 199
- Donnelly v Amalgamated Television Services Pty Ltd* (1998) 45 NSWLR 570
- Giller v Procopets* [2004] VSC 113
- Grosse v Purvis* (2003) Aust Torts Reports 81-706; [2003] QDC 151

## **Ludlow**

*Hellewell v Chief Constable of Derbyshire* [1995] 1 WLR 804 and 807  
*Hemmings v Stoke Poges Golf Club* [1920] 1 KB 720  
*Horkin v North Melbourne Football CSC* [1983] 1 VR 153  
*Hosking v Runting* (2004) 7 HRNZ 301  
*Kalaba v Commonwealth of Australia* [2004] FCA 763  
*Lincoln Hunt Australia Pty Ltd v Willesee & Ors* [1986] 4 NSWLR 457  
*Ng v Department of Education (General)* [2005] VCAT 1054  
*Plenty v Dillon* (1991) 171 CLR 635  
*Police Force of Western Australia v Ayton* [1999] WASCA 233  
*Polkinhorne v Wright* (1845) 8 QB 197  
*Re Pasla and Australia Postal Corporation* (1990) 20 ALD 407  
*Rinsale Pty Ltd v Australian Broadcasting Commission* (1993) Aust Torts Reports ¶81-231  
*Smith v Victoria Police (General)* [2005] VCAT 654  
*SW v Forests NSW* [2006] NSWACT 74  
*TCN Channel Nine Pty Ltd v Anning* (2002) 54 NSWLR 333; [2002] NSWCA 82  
*Victoria Park Racing and Recreation Grounds Company Ltd v Taylor & Ors* (1937) 58 CLR 479

## **Statutes**

*Crimes Legislation Amendment Act 2004*  
*Criminal Code Act 1995 (Cth)*  
*Health Records and Information Privacy Act 2002 (NSW)*  
*Information Privacy Act 2000 (Vic)*  
*Privacy Act 1988 (Cth)*  
*Privacy and Personal Information Protection Act 1998 (NSW) (PPIP Act)*  
*Privacy and Personal Information Protection Amendment (Prisoners) Bill*  
*Summary Offences Act 1988 (NSW)*