Journalism, The Arts and Data Protection:
The Potential Reach of the Privacy Act

Sally McCausland considers the application of data protection laws to media and arts content in Australia and the United Kingdom. She raises the possibility that a person aggrieved by the use of their personal information in media, artistic or literary content may seek relief under the Australian Privacy Act.

In the United Kingdom, newspapers, biographers and other content producers and creators have been sued for breach of privacy by the subjects of their work. While many of these claims are based in the common law tort of invasion of privacy, increasingly, claimants are seeking relief under the United Kingdom's Data Protection Act 1998 ("UK DPA").

Australia does not yet have a common law tort of invasion of privacy. However, it does have a local equivalent of the UK DPA; the *Privacy Act* 1988 (Cth) (the "Act"). The Act was originally introduced to regulate the handling of individuals' personal information by Commonwealth government and agencies. (State legislation[1] regulates state government agencies along similar lines).

The scope of the Act has significantly expanded since its introduction. It now covers medium to large Australian businesses[2] and overseas operators carrying on business or collecting personal information in Australia.[3] Consequently, there are many more producers and publishers of "media", or journalism, and of the "arts" (including literary, dramatic, digital and visual arts) operating in Australia who are potentially subject to the Act.

It is commonly assumed that the Act has no application to media or the arts. This assumption is outdated, if ever it was true. To date there have been no successful claims under the Privacy Act involving this kind of content. However, if potential claimants begin to successfully use data protection laws as they have in the UK, then we may see the Act being cited by persons whose personal information is used in media and artistic content. This would seem to be an inadvertent, rather than intentional, outcome of the parliamentary drafters.[4] However, unlike in the UK, the Act has no broad public interest exception for media and the arts. Further, remedies under the Act have been strengthened, and it is now established that a breach of the Act can ground a claimant's right to seek direct injunctive relief in the Federal Court of Australia.

This article briefly compares data protection laws and their application to media and arts content in Australia and the United Kingdom. It then explores the possibility that a person aggrieved by the use of their personal information in media or artistic content may potentially seek relief under the Privacy Act, with consequences for freedom of expression.

1. Application of the Act to media and arts producers and publishers

While individual journalists, writers and other artists are generally not subject to the Act, many entities which produce or publish their work are. The public broadcasters, and various Commonwealth museums and arts bodies are covered, as are larger media publishers, production companies, galleries and distributors. An entity which is subject to the Act is an "APP entity" and amongst other things must display a compliant privacy policy on its website.

Whether global content companies such as Netflix are APP entities depends on whether they have an "Australian link" as defined in section 5B of the Act. Despite numerous opportunities for legislative refinement, the geographical and jurisdictional nexus provisions of the Act can still be described as "sketchy" and difficult to interpret.[5] There is also a further question as to whether international content aggregators, such as Facebook and Google, are APP entities, or relevantly to this paper, are "media organisations" engaged in "journalism".

APP entities must comply with the "Australian Privacy Principles" ("APPs").[6] The APPs govern the collection, use, storage and publication of "personal information" about natural living individuals. Breach of an APP is deemed to be an interference with the privacy of an individual.

"Personal information" is now defined in section 6 of the Act as:

> *information or an opinion about an identified individual, or an individual who is reasonably identifiable:*
>
> *(a) Whether the information or opinion is true or not; and*
>
> *(b) Whether the information or opinion is recorded in a material form or not.*

1 Eg in New South Wales, the *Privacy and Personal Information Protection Act* 1998 (NSW).

2 Privacy Act, ss6C, 6D, 6DA (inserted by *Privacy Amendment (Private Sector) Act* 2000) provides that that a range of Australian business entities are defined as "organisations", but excludes businesses with an annual turnover of less than $3 million.

3 Privacy Act 1988 (Cth), section 5B(3) inserted by *Privacy Amendment (Private Sector) Act* 2000 ("2000 Amendment"), See also amended by Act no. 49, 2004; no 197, 2012.

4 It appears that the media exemption in section 7B of the Act, introduced by the 2000 Amendment, was intended to exempt "journalism" as practiced by traditional media organisations at the time. However, the impact of the Act on artistic or literary freedom of expression appears not to have been considered.

5 Leonard, Peter, "An Overview of Privacy Law in Australia: Part 1" 33(1) [2014] *Communication Law Bulletin* 1.

6 The APPs are set out in Schedule 1 of the Act.

This definition is broad. Personal information can include a photograph taken in public or a person's date of birth or address. There is no qualification that personal information must be private (eg not previously published or in the public domain).

Under APPs 3 and 6 an APP entity may collect and publish personal information with consent. In the case of personal information excluding "sensitive information", discussed below, it may also do so if it is "reasonably necessary" for its functions or activities. In one early decision of the Privacy Commissioner, a newspaper successfully argued that its collection and publication of an individual's residential address in an article was reasonably necessary for its journalistic purposes, and did not require consent.[7]

However, there is a mandatory consent requirement where personal information is "sensitive information". "Sensitive information" includes information about matters such as a person's racial or ethnic origin, political and religious opinions and affiliations, sexual orientation and practices, criminal record and health information. In the media and artistic context, this is potentially problematic. It may not be editorially or practically feasible to obtain consent from an identifiable person. It also may not be editorially feasible to de-identify the person. Producers and publishers of media and arts content often use the "sensitive personal information" of identifiable persons without consent. Examples could include an unauthorised biopic or biography discussing a person's religious or political views; works of art, literature or journalism based on true crime; an autobiographical play or song discussing ex partner relationships; or an article which canvasses expert opinions on the health of a public figure.

Some of the other APPs might also pose practical problems in these contexts. For example:

- APP 5, requires notification of the collection to the individual;
- APP 8, governs cross border disclosure of personal information; and
- APP 12, gives individuals a right to access their personal information.

If a content producer or publisher is bound by the Act, it will need to obtain consent to collect, use or disclose sensitive personal information and otherwise comply with the APPs unless a specific exception applies.

The "journalism exemption"

The so called "journalism exemption", introduced in 2000 when the Act extended to private companies,[8] was designed to cover "traditional" media outlets existing at the time. It provides that certain journalistic activities by "media organisations" do not need to comply with the APPs. Section 7B(4) of the Act provides that an act or practice of a "media organisation" is exempt if done "in the course of journalism" and provided the media organisation is "publicly committed" to standards dealing with privacy.

The scope of the journalism exception is fairly narrow and somewhat unclear. It only covers organisations whose activities include the collection or dissemination of "material having the character of news, current affairs, information or a documentary" or of commentary or opinion on such material. "Journalism" is not defined. This leaves uncertain whether scripted content such as biopics, literary works such as biographies, or artworks such as satirical cartoons, are covered.

As noted above the journalism exception also does not apply unless the media organisation has publicly adopted standards dealing with privacy "in the course of journalism".[9] The broadcasters are covered by codes regulated by the Australian Communications & Media Authority.[10] Many print and emerging "online print" media organisations have in recent times signed up to industry codes of practice.[11] But no "standards" currently exist for entities such as larger, vertically integrated international content producers or online distributors now operating in Australia. Unless one of these entities has published its own "standards" dealing with privacy in relation to its media activities, or publicly adheres to the code of an industry body, it is not covered by the journalism exemption.

No exception for the arts or literature

There is no specific exception under the Act for organisations who are APP entities and who produce or disseminate artistic content (including literature). If the activities of these APP entities do not fall within the "journalism" exemption they are not otherwise exempted from the operation of the APPs.[12]

2. Implications of the Privacy Act for publishers and content makers

While there have to date been few legal challenges to the journalism exemption, and apparently none concerning the arts, given the trends in this area, and developments in the United Kingdom, it must be anticipated that an action against a producer or publisher for breach of the Privacy Act is possible in coming years.

The Privacy Commissioner has various powers to investigate and conciliate complaints and to award damages and other relief.[13] These powers, which have been enhanced in recent years, may be of interest to claimants seeking a low cost resolution of complaints.

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7 *U v Newspaper Publisher* [2007] *PrivCmrA* 23.

8 2000 Amendment, Id note 3.

9 See U v A Newspaper; id note 7.

10 See also Australian Media & Communications Authority, "Privacy Guidelines for Broadcasters" (current to September 2016), available at www.acma.gov.au .

11 See Australian Press Council Standards of Practice, available at www.presscouncil.org.au; Independent Media Council Code of Conduct for Print and Online Print Media Publishers, available at www.independentmediacouncil.com.au.

12 It is also unclear whether an APP entity which produces both journalistic as well as artistic or literary content would have the benefit of the s 7B exemption for all its content, or only journalism.

However, perhaps of most concern to publishers is the possibility of a claimant taking direct action to restrain a potential breach of privacy. Under section 98 of the Act the Federal Court may grant an injunction to the Commissioner or "any person" to restrain a third person from engaging in conduct, or proposing to engage in conduct, which would constitute a contravention of the Act. There appears to be only one reported case concerning an attempt to injunct media activities using section 98.[14] However, the applicant in this case was unrepresented and the case was struck out for want of proper pleadings. There may be a number of reasons why section 98 injunctions are rare. First, an applicant may not be aware of a publication in time. Second, the journalism exemption will often apply. And third, an injunction application is an expensive exercise. However, some recent cases in other contexts have shown that a section 98 injunction is a potentially powerful tool in the hands of claimants.[15]

Section 98 could also potentially be invoked after publication of content.[16] For example, if no exception applies a complainant might seek orders that a producer or publisher disclose what personal information is held by it; correct inaccurate personal information in the content before further distribution, delete sensitive personal information obtained without consent, or to prevent any further distribution of it at all – a de facto "right to be forgotten".[17] It is unclear how journalists' source protections might apply in this context.

3. The UK journalism exemption compared

The UK DPA contains privacy provisions broadly similar to the APPs. The equivalent of an APP entity is a "data processor". However, its equivalent journalism exception is quite differently structured. Where "personal data" is "processed" solely for new material to be published for "journalism, artistic purposes and literary purposes", the "data processor" need not comply with a privacy principle if it "reasonably believes" that publication would be in the public interest and incompatible with compliance. [18]

Adherence to a code of practice concerning privacy is relevant to the question of the publisher's reasonable belief that publication will be in the public interest.[19]

A distinction is drawn between "journalism" which is for the primary purpose of information and analysis, and, in the television context, "entertainment programmes", such as arts, programmes, comedy, satire or dramas [which] refer to real events and people"[20] which are categorised as literary or artistic content.[21]

Cases in this developing area of law have established that damages can be claimed against the media for breach of the DPA in relation to the publication of personal information, including a photograph.[22] A DPA claim can be brought alongside a defamation claim arising out of the same publication.[23]

However, prior restraint injunctive relief is restricted under the DPA in the interests of freedom of expression. Prepublication injunctions cannot be obtained to prevent a prospective breach of the DPA in relation to new material to be published solely for the purposes of journalism, literature or art.[24] This is in stark contrast to the position in Australia as discussed above.

Conclusion

Privacy law in Australia is moving relatively slowly compared to other jurisdictions, in particular the UK. However, this may change.

If a claim is made under the Act against a media or arts publication it is far from clear how a court would balance freedom of expression and privacy interests. If the Act is further reformed, the scope of exceptions for both current and emerging forms of media and artistic and literary content should be considered to ensure that an appropriate balance is struck between these interests. Meanwhile, media and arts organisations bound by the Act who use the personal information of identifiable living persons for journalistic, artistic and literary purposes should ensure that they are compliant with the APPs or applicable codes.

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13 See eg s 52 of the Act, which permits the Commissioner to issue orders requiring a person to cease the offending conduct, to pay damages or apologise. For principles applicable to assessment of damages, see *Rummery & Federal Privacy Commissioner* [2004] AATA 1121.

14 *Rivera v ABC* [2005} FCA 661.

15 See *Seven Network (Operations) Limited v MEAA* [2004] FCA 637; *Smallbone v New South Wales Bar Association* [2011] FCA 1145.

16 Cf the orders obtained in *Smallbone, ibid.*

17 Cf, in the European Union, the so called "right to be forgotten" outlined in the *Google Spain* decision (2014) C-131/12.

18 Data Protection Act 1998 (UK) ("UK DPA") s 32(1). For a recent case discussing this exception and its balancing of privacy and freedom of expression interests in accordance with EU law see *Stunt v Associated Newspapers Limited* [2017] EWHC 695.

19 UK DPA, s 32(3).

20 Lord Williams of Mostyn, second reading speech for bill introducing UK DPA, (Hansard (HL Debates) Fifth Series Vol DLXXXV, 2 February 1998, cols 441-2_cited in *Stunt,* Id note 21 at 47.

21 See further the "Top Gear" example given by Lord Walker in *Sugar (dec) v BBC* [2012] UKSC 4 at 70; cited in Information Commissioner's Office, "Data Protection and journalism: a guide for the media" (version 1.0 4 September 2014).See in the UK context, such as Top Gear tending to fall into the "ffairs program (journalism) and moved to an entertainment form e in the UK context, such as Top Gear tending to fall into the "ffairs program (journalism) and moved to an entertainment form

22 *Campbell v MGN* [2004] 2 AC 457.

23 *HH Prince Moulay Hicham Ben Abdallah Al Alaoui of Morocco v Elaph Publishing* [2017] EWCA Civ 29.

24 DPA, s 32(2).