

# Is it OK for people to take pictures of you in public and publish them?

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Jessica Lake

In Brisbane, at one of the city's main intersections, a local photographer gets into position to take snaps of the city's passing parade. In photographing people who make their way along city streets, he is of course following in the footsteps of famous artists such as [Robert Doisneau](#) and [Henri Cartier-Bresson](#). But [according to](#) some of those whose pictures have been taken, he is also invading their privacy and causing them acute embarrassment and distress.

A protest petition has been started by Change.org asking street photographers, and particularly the Brisbane photographer behind [Oh-hi.info](#), to: "stop taking unwanted photos in Brisbane City". Accompanying comments testify to many of his subjects feeling "violated and sickened".

Meanwhile, in Britain, journalist Sophie Wilkinson felt "[hurt and humiliated](#)" last month when she discovered a photograph of herself eating a salad, posted along with other images taken on the London underground of women eating, on the Facebook group for [Women Who Eat on Tubes](#).

Much comment blames new media for such intrusions, but they are not so novel. More than 100 years ago, one woman wrote in the Ladies Home Journal:

*It is difficult for some people to understand that there are those who have a strong prejudice against being promiscuously "snapped at" through a camera ... Amateur photographers have an idea that everything and everybody may be considered as fair game for their cameras, and that no-one should interpose objection.*

The annoyance of street photography is almost as old as the camera itself, as is the question it raises of who should have rights in relation to photographs – those who take the pictures or those "snapped at". Developments in online media have intensified such debates. Facebook, Instagram, Flickr and the blogosphere are festooned with photographs taken professionally or casually, published without their subjects' knowledge or consent.

New York Times columnist Thomas Friedman may have declared last week that [privacy is over](#), but technology's erosion of privacy and our calls for its legal enforcement have always gone hand in hand.

Photo sharing platforms, such as Flickr, have redefined what 'publishing' means in the 21st century.  
Flickr

In the late 19th century, the transformation of the camera from an expensive, complicated device into a relatively cheap, lightweight and easy to use consumer good led to a craze in street photography in the United States. With that came corresponding concerns about photographers publishing images of people (usually women) without their consent.

[Copyright laws](#), still in force today, gave photographers extensive rights over their images and, by doing so, denied rights to those photographed. In 1890, two Harvard Law graduates, Louis Brandeis and Samuel Warren, responded to this new development by arguing for the legal recognition of a [right to privacy](#).

They wrote:

*For years, there has been a feeling that the law must afford some remedy for the unauthorised circulation of portraits of private persons ... and the question of whether our law will recognise*

| *and protect the right to privacy ... must soon come before our courts for consideration.*

In 1900, a teenager whose photograph was taken surreptitiously and used without her consent in advertisements for flour took up Warren and Brandeis' suggestion and brought a case in the New York Supreme Court, which led to the enactment of the first "privacy" laws in the United States. Now, more than a century later, the United Kingdom, Canada and New Zealand have also recognised a "right to privacy". Australia is yet to do so.

Michael Rawle

But even if a legal right to privacy were to be enacted in Australia it would not necessarily afford individuals the capacity to control the use of their images. A right to privacy has always been weighed against the competing right to freedom of expression and has been protected by courts only in certain circumstances.

Legal formulations of a right to privacy ask whether the individual had a "reasonable expectation of privacy" in the circumstances. Cases in the US, UK and New Zealand tell us that courts will rarely rule that an individual in a public place, such as on the streets of Brisbane or the London underground, has a "reasonable expectation of privacy".

Naomi Campbell. Sebastien Nogier/EPA

The few exceptions include cases in which photographs have disclosed sensitive or medical information or involved children. In 2004, British model Naomi Campbell [won a case](#) against Mirror Newspapers in the UK for publishing photographs of her outside a Narcotics Anonymous meeting.

In 2008, a UK Court of Appeal decided that JK Rowling's infant son might have a [reasonable expectation of privacy](#) while sitting in his pram in a London street.

Privacy, as a concept and legal right, is notoriously slippery and contextual. If Australia recognises a new legal right to privacy, as reports of the [Australian Law Reform Commission \(2008\)](#), the [New South Wales Law Reform Commission \(2009\)](#), the [Victorian Law Reform Commission \(2010\)](#) and a [Victoria Parliamentary Law Reform Committee Inquiry \(2013\)](#) have recommended, future court cases will debate the limits of its power and determine when and how photographed individuals have rights in their images.

We can expect photographers and journalists will lobby vociferously against the introduction of such a right, as they did in the comparable jurisdictions of the US, UK, New Zealand and Canada, where such a right is now recognised.

Street photography has been a powerful art form for more than a century as the striking and poignant images produced by great photographers demonstrate. But it is surely timely for us to think again about people's feelings of violation and humiliation when their images are circulated to millions online without their consent.

We need to begin an informed debate in Australia about the appropriate balance of legal rights in a photograph and to adjudicate the claims of those behind the camera against those whose image is captured and published without their consent.