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### Eyes in the sky, concerns on the ground

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# Eyes in the sky, concerns on the ground

Global, Technology

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- In the last few years, drones have literally taken flight but what are the legal implications?
  - Governments need to strike a balance between innovation, recreation and protection
  - To protect privacy, speed, height, and proximity limits can be built into drones' software
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In the last few years, drones have literally taken flight in our skies, over our parks, our beaches – and even over our homes. Aerial imaging enthusiasts are thrilled about their impact, while those who have privacy concerns may have some reservations.

But while consumer-level drones do not make the best spies – they're noisy, conspicuous, have a short battery-life, are vulnerable to jamming and have limited telephoto capability – this may change over time. With that in mind, we need to consider whether the existing causes of action provide any relief in law and, if they do not, how governments can regulate drones in a way that achieves a positive public impact by striking the right balance between their innovation, recreation and protection.

## Private – keep out?

Imagine you find a drone hovering momentarily above your backyard as you take a swim in your pool. You suspect your pictures are being taken without your permission, but you wonder how the law protects you. Not all jurisdictions recognise privacy as a distinct, enforceable right, whether under common or statutory law. Even in jurisdictions such as the US which do, the threshold for breach is high – a reasonable person must find the intrusion “highly offensive”. Does it matter that the drone was just flying by?

A similar problem exists in jurisdictions that do not recognise privacy *per se* but recognise the conceptually contiguous tort of harassment. This is because a breach usually requires some intensity and frequency in the conduct. This means that those who are spied on for short durations or on a one-off occasion do not have much hope of a real remedy. Once the cost of obtaining legal representation (and maybe even identifying the perpetrator) are factored in, litigation does not seem viable.

But if a drone flies over my property, surely I have a claim in trespass? The problem is that trespass's property roots present a double-edged sword in such a situation. Firstly, only individuals with possessory rights over land can bring a claim, so typically only the homeowner is protected. Secondly, if the drone hovers outside the property, there will probably be no recourse.

Finally, how much airspace above a property does a homeowner possess? One could fix a height limit for drones – for example, the UK's Civil Aviation Authority says that “drones should be flown at a height over the property of another person which is ‘reasonable’ in all circumstances” but – as drone-imaging technology improves – such a number would eventually offer little protection.

What about private nuisance as a legal recourse? This is similarly constrained by its property roots, in that only individuals with possessory rights can bring a claim. However, physical intrusion into a person's land is not necessary, so long as there is some unreasonable interference with the person's use or enjoyment of the land. This allows for intangible disturbances to be factored in, such as noise or dust pollution, which have been recognised in the UK. But like privacy and harassment, the shortcoming lies in the significant extent of interference required before suing seems viable.

If all else fails, confidentiality of data perhaps? But this is another case of square pegs and round holes, since breach of confidence generally only creates a duty of confidentiality when there is an initial confidential relationship between the parties – strangers flying drones over your homes will not be caught. As for data protection laws, insofar as they usually only apply to commercial uses of your data, unless you are a celebrity strangers will not be caught there either.

## Moving on the manufacturers

The sudden proliferation of consumer drones has been a regulatory quagmire for governments throughout the world. The current range of options is unpalatable. To illustrate, at one end, Swedish policymakers tried but failed to uphold outright bans of drones in the name of anti-surveillance rights; at the other, Australia's longstanding inertia in adopting laws specific to privacy breaches caused by drones has been criticised. Constant dialogue with all relevant stakeholders sounds good in principle, but sometimes the development of technology does not wait for the law to catch up.

But apart from looking again at our criminal and civil laws, perhaps the manufacturers can be persuaded (or mandated) to engineer certain features into their drones? Speed, height, distance, and proximity limits can be built into hardware and software, while geo-fencing parameters can be updated regularly to ensure that drones cannot even fly in dense urban areas, although figuring out the mechanics of creating exceptions and dispensations may be tricky.

Banning the aerial carriage of telephoto lenses in such areas is another possibility, though AI-powered image enhancement technology is breaking new ground because it reduces the need for high-resolution images. Getting buy-in from the manufacturers may not be as difficult as it seems, if it is in their commercial interests to minimise the number of drone incidents that attract negative publicity.

With this in mind, it seems clear that there is some potential for collaboration, something that will hopefully underpin future discussions and agreements. Creating new frameworks that satisfy government, privacy advocates, drone enthusiasts and manufacturers is the task at hand. Straightforward? No. Important? Yes.

*This post was partly based on our presentation at “The Future of Law” conference held at Singapore Management University, 26–27 October 2017.*

## FURTHER READING

- **Regulating Drones: Privacy and Security Issues.** This article considers some of the regulatory challenges faced in Singapore, an island city-state which has many competing uses for its airspace and where privacy rights exist only in highly compartmentalised pockets.
- **Briefing Bulletin:** Going digital – how governments can use technology to transform lives around the world
- **Going digital: how governments can pick up the pace.** When it comes to digital government, the gap between rhetoric and reality remains far too wide, says Florian Frey, but it can be closed. Here, he sets out five ways government could improve its digital deployment.
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- **Towards a smarter Singapore.** Singapore has set itself the task of becoming a Smart Nation. **Mark Lim** of its GovTech agency tells us about how they’re getting on
- **Unlocking the digital door for developing countries.** Although universal access to the internet remains some way off, **Hans Kuipers** explains what steps can be taken to bridge the enduring digital divide
- **Transforming technology, transforming government.** Rare is the policymaker who doesn’t see digital as a doorway for strengthening public services. But as **Miguel Carrasco** explains, the pace of the digital evolution means there is always more to do
- **Computer says yes.** Governments are increasingly reliant on digital technology to deliver public services – and Australia’s myGov service is a potential game-changer, says **Gary Sterrenberg**

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