The quest for privacy as a human right

Jenny Mullaly reviews a recent exploration of the British debate on privacy and the media

Raymond Wacks, Professor of Law at the University of Hong Kong, is no stranger to the issue of privacy. His works include *The Protection of Privacy* (1980), *Personal Information: Privacy and the Law* (1989) and *Privacy* (1993). In his latest book, he revisits privacy (a 'perplexing concept') in the context of media infringement.

Wacks observes the cyclical nature of the English debate on privacy and the media and the elusiveness of realistic privacy protection. The symbolic catalyst of the most recent round of English privacy law talk was the 1990 case involving the actor Gordon Kaye, who was photographed and purportedly interviewed by two journalists while he lay in a hospital bed in a coma. The media were warned that they were 'drinking in the last chance saloon', and reports on media self-regulation and privacy ensued: by Sir David Calcutt (1990 and 1993), the National Heritage Select Committee (1993) and the Lord Chancellor's Department (1993). Meanwhile, spectacular media intrusions continued unabated, mostly involving members of the royal family ('Dianagate', 'Camillagate', the Fergie photos, the Diana gym photos...) and, more recently, politicians and their sexual activities.

The publication of Wacks' latest book preceded what is likely to be the final instalment in the saga: the Major Government's July 1995 response to proposals for privacy legislation. In what Professor Barendt described as 'an exceptionally feeble document', the Government said it was not convinced by arguments for a statutory tort of infringement of privacy and that it wished to encourage the recent improvements in media self-regulation, such as the operation of the Press Complaints Commission under the stewardship of Lord Wakeham. Seemingly ignorant of the extensive English and American scholarship on privacy, the Government White Paper seemed content to say 'it's all too hard'. The tenor of the document and the inordinate delay in its apparition suggest that the Government lacked the resolve to confront the powerful press lobby.

Wacks' premise is that privacy is a human right which requires legal recognition and protection. His analysis confines privacy to the right to control personal information. He believes it is unlikely that English common law will develop an American style tort of invasion of privacy, and correctly anticipated that Government would not grasp the nettle of enacting privacy legislation, although this is his preferred option. However, he is optimistic that recent developments in the actions for breach of confidence and intentional infliction of emotional distress, and the growing influence of international recognition of privacy (especially the European Convention on Human Rights), provide scope for the courts to give greater protection against unwanted publication of personal information.

Wacks is sceptical of many media claims that publication of private information is justified in the public interest, a stance that denies those in the public eye any degree of personal privacy, camouflages commercial motives and provides a cynical justification for sensationalism.

Consideration of media infringement of privacy must take into account freedom of speech and freedom of the press. Acknowledging that these are vast and complex issues, Wacks encapsulates succinctly the major theories on the justifications for free speech. In his opinion, free speech arguments do not justify all breaches of privacy, and 'the press publishes a good deal that...is not remotely connected to these noble pursuits' [of truth and democracy].

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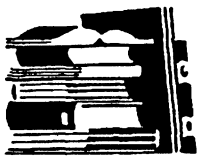
Wacks' central argument is that the action for breach of confidence 'remains the principal means by which to provide protection against the gratuitous publication of personal information'. It is 'an imperfect but workable substitute' for privacy legislation. This argument necessitates a change in his previously expressed views and a 'reappraisal of orthodoxy'. Wacks argues that developments in case law indicate that the principle of unconscionability underlies the action. The obligation of confidence arises not from a prior relationship of confidence, but from constructive knowledge of the confidential nature of the information. This would expand the scope of the action, because many instances of publication of personal information do not involve a relationship between the subject of the information and the



discloser. The issue becomes whether the nature of the information would put a reasonable person on notice that it cannot be divulged to another.

The concept of public domain can be applied to personal information by asking whether a person's conduct occurred in circumstances in which it was reasonable to expect to be unobserved. In this way, the action might protect the victim of a zoom lens. However, the action remains limited (for example, by the requirement of 'confidential information'), and would not apply to the 'archetypal privacy complaint' of unwanted publicity.

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Wacks also sees potential for development of a tort of intentional infliction of emotional distress, which could extend to media disclosure of personal information where there is a risk that nervous shock will later result from the disclosure, or even where the plaintiff merely suffers emotional distress.

Little attention is paid to defamation as a means of protecting privacy. Few privacy cases involve harm to reputation or false allegations, and the overriding concern of privacy complainants is to prevent publication, whereas defamation actions result in greater publicity for the disclosure.

In his conclusion, Wacks discusses the power of the press lobby, which even while deploring the worst excesses of tabloidism, opposes vehemently privacy legislation and weakens the resolve of politicians. Acknowledging that hopes of privacy legislation, are in vain (in England, at least), Wacks concludes that judicial action is the only solution. Optimistic of the potential for thus achieving greater privacy protection, he believes 'the campaign demands only modest judicial heroism'.

This book is an important contribution to the scholarship on privacy, particularly from one who has grappled with the issue in all its complexity over a long period, and who has, in the process, been prepared to modify his own stance. The major philosophical issues and scholarship are well signposted, and the footnotes contain a mine of reference material. The summaries of American jurisprudence are particularly useful.

This book is primarily a legal reference, focussing on careful analysis of causes of action and precedent. Given that the conduct of journalists is central to the issue, the debate would be enhanced by a cross-disciplinary approach, which takes into account the contribution of the scholarship in the fields of journalism and ethics, an example being the *Journal of Mass Media Ethics* two volume special on media and privacy in 1994.

In Australia, the debate on media and privacy has been muted, but recent developments may bring greater prominence. The Senate committee inquiry into the rights and obligations of the media is preparing a report on 'the right to privacy and the right to know' and the NSW Law Reform Commission recommended consideration of privacy laws. But given the English experience, which suggests that politicians will not risk the wrath of the press by enacting privacy legislation, those who advocate greater protection against media invasions of privacy would do well to consider the arguments of Professor Wacks. ❑

Raymond Wacks, *Privacy and Press Freedom*, (1995) Blackstone Press Limited, London.