Privacy: Are the Media a Special Case?

Jennifer Mullaly argues that finding the balance between the media's dissemination of information to the public and individual privacy requires the media to asume a dominant role in education and standards for its members.

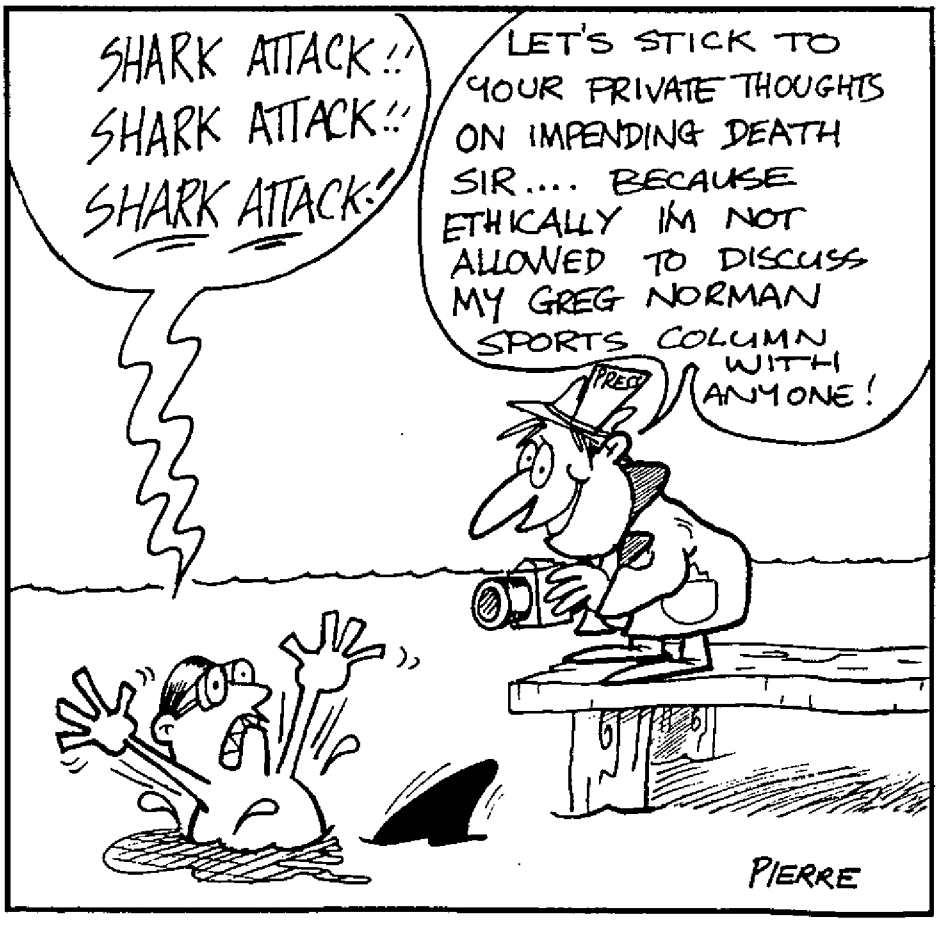
The multi-dimensional nature of privacy is particularly relevant when considering the issue of the media and privacy. Privacy includes not just information privacy but privacy of the body, privacy of personal space and place, and freedom from eavesdropping, surveillance and spying. The media have the potential to breach each of these zones of privacy in the process of newsgathering and by publication. For example, through walk-ins, surreptitious filming and recording, stake outs, the pursuit of individuals for photo opportunities, the use of telephoto lenses and hidden cameras, the publication of personal information and the insensitive reporting of death, crime and tragedy.

Many of the most popularly known examples of media invasions of privacy involve the British media and members of the Royal Family: the publication of photos of Princess Diana working out in a gym; the publication of photos of the Duchess of York "communing in the sun with her financial adviser" to adopt one British commentator's memorable description of the incident;[1] and the publication of transcripts of intercepted telephone conversations between Princess Diana and a male friend and Prince Charles and Mrs Camilla Parker-Bowles, dubbed "Dianagate" and "Camillagate" respectively. Such examples are not particularly helpful when considering the issue of media invasions of privacy in the Australian context. The British Royal Family are really in a class of their own when it comes to media coverage. You cannot compare their experiences with those of, say, ordinary people who experience the apocryphal 15 minutes of fame, often because they are involved in a newsworthy event involving tragedy or disaster.[2]

A few Australian examples will suffice to illustrate how the media can breach privacy. Recently, we have seen the publication of photos of Senator Bob Woods and his wife, Dr Jane Woods, who were photographed in the backyard of their family home in the course of a private discussion. It has been reported that the photographer stood on the roof of a car for eight hours, peering into the backyard, and photographed the pair for thirty minutes before he was noticed. In 1994, when Australian David Wilson and his travelling companions were being held hostage in Cambodia, journalists besieged the Wilson family home seeking interviews, one going so far as to climb on the roof. In 1991, a Melbourne newspaper disclosed that the late Kelvin Coe had AIDS, against the wishes of Coe and his partner. The distress occasioned by the disclosure was conveyed vividly when Coe's partner hurled red paint on the journalist responsible. Another striking example, relating to failure to respect private grief, was the insensitive use of television re-enactments of the death of a female diver who was killed by a shark.

Developments in news cultures, technology and communications tend to encourage media invasion of privacy. The factors are complex and I merely wish to sketch some of them. They include:

- The blurring of the distinction between news and entertainment, captured by the term "infotainment", which places greater emphasis on personality oriented stories and accounts of disaster and tragedy.
- Technology, which has increased significantly the potential for journalistic intrusions into privacy. Moreover, the speed with which technology permits images and information to be gathered and broadcast robs media decision-makers of the time for reflection necessary to ethical decision-making.
- Competition, which may push the boundaries of what is acceptable. The media may seek to justify breaches of privacy on the grounds that public demand drives content: that they are merely giving the public what it wants.



- Finally, lack of training in relation to victim sensitivity and the impact of media coverage, together with the youth of many journalists assigned to cover situations involving death and tragedy, may contribute to insensitive reporting and intrusion on private grief.

Invasion of privacy is one of the major ethical dilemmas for journalists. Why does it matter so much and why does it earn the media so much opprobrium? I am reminded of the memorable words of Lord MacGregor, former Chairman of the Press Complaints Commission in England, when he condemned what he described as "an odious exhibition of journalists dabbling their fingers in the stuff of other people's souls in a manner which adds nothing to legitimate public interest".[2] Breach of the right of privacy inflicts harm on the individual and most likely those around them and any others implicated in the disclosure. The individual feels violated because he or she has lost control over personal information or experiences and the right to define her or his circle of intimacy. It is an obvious point, but one worth making, that privacy, once breached, cannot be restored by more speech - to do so repeats the breach and may compound the harm suffered. So prevention is particularly important in the case of media intrusions on privacy.

Why are the media a special case?

The media are a special case because they play a unique role in facilitating the free flow of information and exercise of the right of free speech and, as the Fourth Estate, provide an additional check on the exercise of power. In consequence, the media can claim to be acting in the public interest and in furtherance of the right to know in defence of breaches of privacy.

At the heart of the issue of privacy and the media lies the tension between freedom of speech and privacy. The media, as the main source of information for most citizens, are recognised as playing a special role in animating the value of free speech. However, free speech theorists are quick to point out that the media serve other functions, such as that of entertainment, and that much of what they publish does not count as "speech" for the purposes of the various rationales for the protection of speech.

There is an obvious tension between the exercise of free speech through journalism, whose primary task is disclosure, and privacy, which is best protected by preventing the publication of private information in the first place. Privacy may be invoked to prevent access to, or the publication of, certain information.

The importance of freedom of speech is undisputed. It is a key element of democracy and restrictions require convincing justification. But exercise of the right of free speech does not provide a mandate to override the rights of others or obviate the need for ethical considerations and accountability. Privacy is not an absolute value, for this would be incompatible with the notion of society. But nor is freedom of speech an absolute value; and it can be required to yield in the interest of protecting other important values. Privacy is one such value. Making a decision not to publish material on the basis of ethical considerations for the protection of privacy is not the same as censorship or restraint of free speech. For example, in America, a supermarket tabloid recently published graphic photos of the body of a murdered six year old, JonBenet Ramsay, known for her appearances in beauty contests. The readers' representative at the *San Diego Union-Tribune* observed that although the newspaper had a First Amendment right to publish, it should not have. In her view, the newspaper violated every standard of ethics in the annals of journalism.[3]

Media breaches of privacy can be justified where a superior public interest is served by the disclosure of the particular information. But John Hurst and Sally White, authors of *Ethics and the Australian News Media* (1994), argue that notions of the public interest and the right to know are devalued when they are invoked to justify disclosures that were in fact dictated solely by competitive pressures and public curiosity. It is a commonplace observation that a matter of public interest is not the same as something that is interesting to the public. The public interest is probably better defined in context rather than in the abstract. Nevertheless, it is possible to identify certain categories of information that meet this criterion, for example, information that the public needs to evaluate the exercise of power and fitness for office; information that assists in the exposure of crime, corruption or hypocrisy in public life and information relevant to matters that impact on the public at large.

The "public's right to know", frequently cited in justification of media breaches of privacy, also raises some interesting issues, not least of which is whether such a right exists in the first place. Justice Levine of the Supreme Court of New South Wales has described the public's right to know as "elusive of definition as well as questionable in its rationale or philosophical foundation".[4]

Usually, only individuals are able to assert human rights. But the public right to know, is, by definition, collective in nature, and it is the media who assert it on behalf of the public. I raise the questionable status of the right to know as a legal concept or as a recognised human right in order to suggest that the concept should be explained more carefully by those seeking to rely on it. Too often it is invoked in relation to any information that the media think their public would like to know. In any case, it is not a conclusive and overriding argument that can be invoked in support of any behaviour or any publication.

The publication of personal information about public figures requires practical application of these public interest considerations. The recent controversy about Senator Bob Woods is a striking illustration. The circumstances surrounding his resignation and matters brought into the public domain through the legal system may be matters of legitimate public interest, but a private discussion between the Senator and his wife in their own backyard is not. A different view was expressed by Frank Devine of the *Australian*, who defended the publication on the grounds of the public interest and the right to know.[5] It is usually asserted that public figures cannot expect the same degree of privacy as the ordinary citizen, or words to this effect. However, the issue of privacy and public figures is susceptible to shallow analysis that too readily discounts the right to privacy and justifies any intrusion. Public figures do not relinquish all privacy and public figure status is not, of itself, sufficient justification for breach of privacy. The information disclosed must be relevant to the assessment of issues in which the public has a legitimate interest, for example, in the case of a politician, assessment of fitness for office, public performance or issues of propriety. In most cases, intimate private information about matters such as sexuality, health and personal relationships would not meet this criterion of relevance.

The public interest considerations involving media disclosures are an important aspect of striking a balance between the interests of speech and

privacy. I have discussed them in a general way because they are relevant whether the debate is one of proposed legal regulation, self-regulation or journalism ethics. Important as concepts such as the public interest and the right to know may be, they merit closer and more sceptical scrutiny. By striving to give greater meaning to these concepts and avoiding their automatic invocation, privacy will be less readily compromised.

Media self-regulation in Australia

Whenever there is a perception that the media have "gone too far" in relation to invasions of privacy, the call for privacy laws to be enacted is a common response. The debate tends to become polarised into positions for and against privacy laws.

In Australia, there is no general right to privacy at common law, nor are there any signs of the development of such a right by the courts, such as appears to be occurring in New Zealand and India.[6] A number of common law actions, such as trespass, nuisance, breach of confidence and defamation, may provide indirect protection. From a privacy perspective, this is unsatisfactory, because the protection is piecemeal and incidental, is not predicated on the fact that privacy has been breached and does not provide scope for articulating the balance between the competing interests of speech and privacy.

However, legal regulation is not necessarily the only or the best response to media invasions of privacy. To assume that the only solution is a legal one focuses too much on the end point and assumes a sufficiently deterrent effect. But journalists themselves are vital to the achievement of meaningful change through integration of privacy considerations into the conduct and ethical standards of journalism. In this regard, effective self-regulation has an important role to play. By effective self-regulation I mean systems that enjoy the confidence of the public because they achieve a fair balance between the public and the media and provide speedy and effective recourse. Self-regulatory codes and policy documents are better suited to articulating the role of journalism and the balance to be struck between the demands of news gathering and competing interests such as respect for privacy and grief. An effectively functioning complaints system can set standards for media behaviour, create precedents for dealing with complaints and enhance media credibility. Above all, in the context of privacy, the primary task of media self-regulation is an educative and preventative one: to avoid or ease invasions of privacy. Self-regulatory mechanisms also have the advantage of providing a more accessible and immediate form of recourse for ordinary members of the public.

The various Australian self-regulatory codes governing commercial television and radio, the national broadcasters, print media and journalists all advocate respect for privacy, demonstrating at least a recognition of its importance.

I only have time to make a few observations about self-regulation today. One is that privacy protection is scattered across a number of codes and policies, each of which vary in their conception of privacy and level of complexity. Often these clauses are too brief to provide sufficient guidance, for example, those that simply require respect for privacy. In general, there is insufficient publication of the decisions of the self-regulatory bodies, apart from the Australian Press Council, which publishes its adjudications in annual reports, and the Australian Broadcasting Authority, which publishes selected investigations in its annual review of complaints procedures. A significant source of information about the interpretation and application of the self-regulatory standards thus remains largely hidden, making it difficult to evaluate the effectiveness of self-regulation. The publication of reasons for decisions would help to achieve the educative and preventative aims of self-regulation. Finally, prospective privacy complainants may feel that the self-regulatory system has little to offer, as the adjudication of complaints of invasion of privacy in effect repeats the invasion and most complaints procedures do not provide for fines or awards of compensation.

International experiences and models

United Kingdom

In the United Kingdom, the elements of a seemingly shameless tabloid press, the ruthless exposure of the marital travails of the younger members of the Royal Family and the marital infidelities and sexual exploits of politicians, and the outrage of the political and legal establishment at media excesses, gave rise to the threat of statutory regulation of the media.

In 1989, in response to growing concern that media invasions of privacy were becoming worse and more frequent, the government appointed a committee headed by Sir David Calcutt, to consider how to protect individual privacy from the activities of the press.

The Committee's 1990 report[7] recommended against the creation of a statutory tort of infringement of privacy, not because of the difficulty of crafting such a tort, but on the grounds that it was not yet necessary and that other options were available. This conclusion was predicated on the assumption that self-regulation could and would be improved by the establishment of a non-statutory Press Complaints Commission.

Despite the warning of the then National Heritage Secretary, David Mellor, that the press were "drinking in the last chance saloon", spectacular privacy intrusions continued unabated. Eighteen months after the Press Complaints Commission commenced operation, Calcutt's second report concluded that press self-regulation had not been effective: the PCC was not sufficiently independent and its code of practice was overly favourable to the press. Calcutt recommended statutory regulation and that consideration should be given to a tort of infringement of privacy.[8]

There were also reports by the National Heritage Select Committee[9] and the Lord Chancellor's Department[10] and countless articles by legal commentators. The debate was largely one about whether there should or should not be a statutory tort of invasion of privacy.

After a delay of some two years, the Major government finally responded,[11] stating its preference for self-regulation and placing its trust in its continued improvement. Its report, described as "exceedingly feeble" by Professor Barendt, made little attempt to engage seriously with the issue and seemed content to say that it was all too hard.

The sense of crisis appears to have subsided - for the moment at least. If the recent British debate amounted to little in other respects, it provided a stark illustration of the fierce opposition that any government attempting to regulate the conduct of the media in relation to privacy will inevitably face.

United States

Whereas English courts have steadfastly refused to recognise a general right to privacy, American courts have done precisely that. The precursor to this development was the landmark 1890 Harvard Law Journal article by Warren and Brandeis, "The Right to Privacy". The American privacy tort comprises four limbs, including intrusion into solitude or seclusion and the public disclosure of embarrassing private facts.

It is a widely held view that the privacy tort has failed to provide adequate protection against media privacy breaches. The primacy of First Amendment rights, the general distrust of restraints on speech and the flexibility of the newsworthiness standard all reduce the effectiveness of the tort.

New Zealand

The media in New Zealand are not subject to the *Privacy Act* 1993 (NZ). This is achieved by excluding the news media from the definition of "agency", at least insofar as their news activities are concerned.[12]

The regulation of broadcasting in New Zealand provides a different model for dealing with the issue of privacy. The *Broadcasting Act* 1989 (NZ) requires broadcasters to maintain in programmes and their presentation standards consistent with the privacy of the individual.[13] Complaints about privacy can be made directly to the regulatory body, the Broadcasting Standards Authority, which can award compensation of up to $5000.[14] Although the amount is nominal, it provides a means of indicating disapproval.[15]

The BSA has formulated seven privacy principles for broadcasters, some of which are derivative of American legal precedents.[16] In summary, they relate to:

- the publication of private facts;
- the publication of facts that were once public but have become private again through the passage of time;
- intrusion upon seclusion and solitude; and
- the use of the airwaves to deal with private disputes or to disclose names, addresses and telephone numbers of individuals.

The principles are not breached where an individual consents to the disclosure, and there is a public interest defence. There is a substantial body of BSA decisions interpreting and applying the privacy principles.[17]

Concluding remarks

Subjecting the media to the obligations of general data protection legislation would be a departure from the responses, actual and proposed, seen in other jurisdictions, which include developments in the common law, attempts to achieve more rigourous self-regulation, statutory regulation, a statutory tort of invasion of privacy and broadcasting standards. Although general data protection legislation could conceivably encompass a major area of concern - the publication of private information - it would not remedy all aspects of media invasions of privacy. There is much work to be done in finding the balance between the media and privacy and the responses best suited to the Australian context. The most important work of all needs to be done at the coal face by the media themselves: that of preventing privacy breaches in the first place by educating staff about privacy and developing, maintaining and enforcing effective standards.

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1 Seymour-Ure, C., 'Privacy or Public Interest? A Report on the Press and Prurience in the United Kingdom' (1994) 73 *Media Information Australia* 88.

2 The incident which elicited this response was the newspaper serialisation of Andrew Morton's biography of Princess Diana. The impact of Lord MacGregor's statement was undermined when it was revealed subsequently that Princess Diana had participated in the provision of information for tabloid editors.

3 Gina Lubrano, Readers Representative, *San Diego Union-Tribune* 20 January 1997.

4 *Williams v John Fairfax & Sons Ltd* A Def R [52,010] at 43,075.

5 Devine, F., 'The truth will out when it suits us' *Australian* 13 February 1997 p. 11.

6 *Bradley v Wingnut Films* [1993] 1 NZLR 415; *Rajagopal v State of Tamilnadu* (1995) All India Reporter 264.

7 *Report of the Committee on Privacy and Related Matters* Cm 1102.

8 *Review of Press Self-Regulation* Cm 2135 (January 1993).

9 *Privacy and Media Intrusion* 294-I (March 1993).

10 *Infringement of Privacy* (July 1993).

11 *Privacy and Media Intrusion* Cmnd 2918.

12 Section 2.

13 Section 4(1)(c).

14 Sections 8(c), 13(1)(d).

15 Broadcasting Standards Authority, Decision 1/94.

16 Broadcasting Standards Authority, Relevant Privacy Principles, 6 May 1996.

17 Decisions may be found on the BSA's Web site at http://www.liinz.org.nz/liinz/other/bsa/