

Carolyn Doyle and Mirko Bagaric

Privacy Law in Australia

The Federation Press, Sydney, 2005

By Simon Rice

To read this book is to read two different accounts of privacy law in Australia: on the one hand, the book is about the laws that regulate and protect privacy in Australia, and on the other it is about the validity of a rights-based approach to privacy. The two parts of the book scarcely inform each other, limiting its usefulness.

The book begins and ends with a philosophical discussion of privacy. The authors' thesis is that a person's right to privacy is at worst illusory, and at best insignificant, and that privacy is therefore not deserving of protection through new and separate causes of action. The authors set out their preference for utilitarianism as the best method for accommodating competing claims and interests in society. Specifically, the authors' preference is for classical 'hedonistic act utilitarianism', which identifies morally correct conduct as that which results in the greatest happiness and least pain.

The authors reject human dignity and autonomy as valid bases for any right, and ask instead 'are [people] likely to be happier with or without the right to privacy?' On this test, the authors conclude that 'the so-called right to privacy does not rank highly – it is well down on the list of interests that are conducive to human flourishing'.

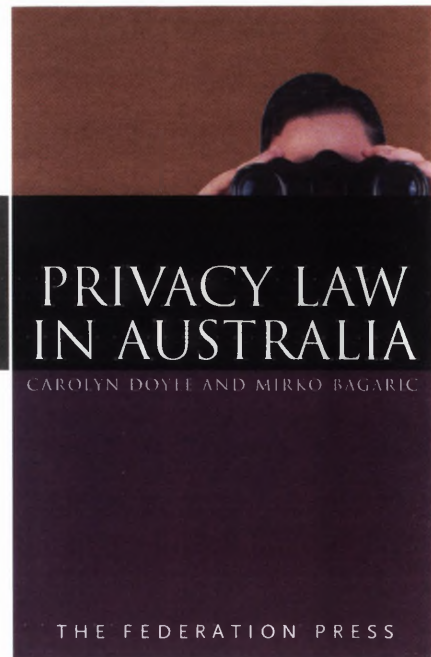
Between the theoretical start and finish, the book is a detailed account of the sufficiency of common-law protection of privacy, and an overview of legislative arrangements in Australia that is neither complete nor wholly accurate.

Understandably, developments since 2005 – such as Victoria's 2006 *Charter of Human Rights and Responsibilities Act* – are not covered, but the authors also fail to mention Tasmania's 2004 *Personal Information and Protection Act*, the ACT's ground-breaking *Human Rights Act*, and the Human Rights and Equal Opportunity Commission's 2004 Discussion Paper, *Discrimination in Employment on the Basis of Criminal Record*.

Their explicit exclusion of any discussion of laws relating to freedom of information (FOI) is also odd. Although privacy is a recognised basis for limiting the scope of documents available under FOI laws, the authors identify 'the main area of overlap' between privacy and FOI laws as a person's right to amend information. They don't discuss at all the substantial issue of the disclosure of personal information to a third party. It would not have been difficult to add to the descriptive overview of privacy laws a similar account of FOI laws.

The clearest indication that the book is in two unrelated parts is that the overview of privacy laws seems completely uninformed by the authors' theoretical critique. A reader wanting to know about the theory underpinning the making and operation of privacy law in Australia will therefore find little in this book.

The authors' rejection of the mainstream 'rights' view of privacy means that they avoid engaging in any rights-based analysis. Consequently, the book fails to engage in the current debates about Australia's privacy laws, and to meet the need in Australia for a critical analysis of how the prevailing



view of privacy as a right is to be understood and managed – what, for example, is its relationship with the fundamental freedoms of speech and of access to state information?

For those who intend to participate in the Australian Law Reform Commission's current review of the *Privacy Act 1988* (Cth) and related laws, better accounts of privacy are given in commercially available loose-leaf services; in the country report on Australia in the online text at global text, 'Privacy & Human Rights', at <www.privacyinternational.org/phr>; and in Moira Paterson's book, *Freedom of Information and Privacy in Australia: Government and Information Access in the Modern State*, LexisNexis/Butterworths, 2005.

For what it is worth in current debates about privacy, the book does provide an overview of the authors' arguments – set out in more detail in articles they have written – for favouring hedonistic utilitarianism over rights theory as a theoretical basis for privacy law and policy. ■

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