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SPECIAL CONFERENCE ISSUE
THE NEW ZEALAND BILL OF RIGHTS ACT

THIS ISSUE INCLUDES CONTRIBUTIONS BY:

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CONTENTS

SPECIAL CONFERENCE ISSUE: THE NEW ZEALAND BILL OF RIGHTS ACT

Foreword	
<i>Petra Butler and Claudia Geiringer</i>	vii
The New Zealand Bill of Rights Act 1990 – An Account of Its Preparation	
<i>K J Keith</i>	1
The New Zealand Bill of Rights Act 1990 and Constitutional Propriety	
<i>Janet McLean</i>	19
The Moral Force of the United Kingdom's Human Rights Act	
<i>Rabinder Singh</i>	39
Dissent, the Bill of Rights Act and the Supreme Court	
<i>Andrew Geddis</i>	55
The European Court of Human Rights and Religion: Between <i>Christian</i> Neutrality and the Fear of Islam	
<i>Alicia Cebada Romero</i>	75
The Interpretive Obligation: the Socio-Political Context	
<i>Kris Gledhill</i>	103
Sources of Resistance to Proportionality Review of Administrative Power under the Bill of Rights Act	
<i>Claudia Geiringer</i>	123
Property Rights and Public Law Traditions in New Zealand	
<i>Richard Boast</i>	161
Māori and the Bill of Rights Act: A Case of Missed Opportunities?	
<i>Fleur Adcock</i>	183
The Case for a Right to Privacy in the New Zealand Bill of Rights Act	
<i>Petra Butler</i>	213
The Bill of Rights after Twenty-One Years: The New Zealand Constitutional Caravan Moves On?	
<i>Rt Hon Sir Geoffrey Palmer QC</i>	257

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THE CASE FOR A RIGHT TO PRIVACY IN THE NEW ZEALAND BILL OF RIGHTS ACT

*Petra Butler**

The paper explores the difference a right to privacy enshrined in the New Zealand Bill of Rights Act 1990 would make to New Zealand's landscape. While examining the potential impact of a right to privacy, the paper discusses the different treatment privacy receives in a number of jurisdictions. The paper argues that a right to privacy would allow the courts to explore the value New Zealand society places on privacy and guidance on its treatment within New Zealand's legal landscape.

I INTRODUCTION

The right to privacy has famously been described as the "right to be let alone".¹ It is for many a nebulous concept that has manifested in several distinct rights and freedoms. Ruth Gavison has conceptualised privacy as secrecy, solitude and anonymity.² Charles Fried declared that without our privacy, we lose "our very integrity as persons."³ Thomas J summarised the strands of the right to privacy in *R v Jefferies*:⁴

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1 Thomas M Cooley *Cooley on Torts* (2nd ed, Callaghan, Chicago, 1888) at 29. This concept was further developed by Samuel D Warren and Louis D Brandeis "The Right to Privacy" (1890) 4 Harv L Rev 193 at 195.

2 Ruth Gavison "Privacy and the Limits of Law" (1980) 89 Yale LJ 421 at 428.

3 Charles Fried "Privacy" in Ferdinand D Schoemann (ed) *Philosophical Dimensions of Privacy: An Anthology* (Cambridge University Press, Cambridge, 1984) 203 at 205.

4 *R v Jefferies* [1994] 1 NZLR 290 (CA) at 319. See also the Law Commission's conception of the different elements of privacy in Law Commission *Protecting Personal Information from Disclosure* (NZLC PP49, 2002).

Privacy connotes a variety of related values ... While necessarily phrased in terms of individual values; the community has a direct interest in the recognition and protection of this broad right to privacy. It is a valued right which is esteemed in modern democratic societies.

Privacy rights have been recognised as a universal human need, worthy of protection across many jurisdictions, including New Zealand, though the outer reaches of the right to privacy are yet to be explored.⁵

Looking at historical literature, it is remarkable how ideas of privacy have shifted and mutated over time.⁶ An illustrative example is provided by a visit to Ephesus, where tourists today can set themselves down on one of numerous ancient toilet seats in a public hall where well-to-do Ephesians gathered to commune with each other, 2000 years ago, as they collectively emptied their bowels.⁷ Today, the comparison between different privacy sensibilities makes amusing dinner conversation: to the French and Germans it often seems obvious that Americans do not understand "privacy" at all. Americans, for example, have the particularly embarrassing habit of talking about salaries – an off-limit topic of conversation in Continental Europe. Whereas Americans visiting France and, in particular, Germany are astonished by the casualness with which French and Germans sunbathe nude in the middle of their cities.

As for New Zealand, German and French tourists (and lawyers) choke when opening the Dominion Post to find a list of drink driving convictions or the full names of suspected but not yet convicted "criminals" (in other words the lack of name suppression). The access to personal information through the electoral roll or the car register by private citizens, even though restricted now, is still a matter of concern to many Europeans.

In the last couple of years, along with the political fallout from the *News of the World* phone-hacking scandal and the scandal surrounding the United States National Security Agency's PRISM surveillance programme, calls for reviews of privacy laws have grown stronger.⁸ In an era where

5 Richard Clayton and Hugh Tomlinson *The Law of Human Rights* (2nd ed, Oxford University Press, Oxford, 2009) at [12.01].

6 André Bertrand *Droit à la vie privée et droit à l'image* (Litec, Paris, 1999) (translation: *The Law of Privacy and Image*) at 2 citing Jean-Claude Bologne *Histoire de la Pudeur* (Orban, Paris, 1986) (translation: *The History of Modesty*). Bertrand's article is cited in James Q Whitman "The Two Western Cultures of Privacy: Dignity versus Liberty" (2004) 113 Yale LJ 1151.

7 For communal defecation in Greco-Roman antiquity, governed by some complex social and even legal rules, see Richard Neudecker *Die Pracht der Latrine: Zum Wandel öffentlicher Bedürfnisanstalten in der kaiserzeitlichen Stadt* (Pfeil, München, 1994) at 24–39.

8 For instance, (now ex-)Australian Prime Minister Julia Gillard called in 2011 for a review of national media laws, and in the United States, Members of Congress demanded an investigation into allegations that phones were illegally hacked: see Jonathan Pearlman "Phone hacking: Julia Gillard considers review of media conduct in Australia" *The Telegraph* (online ed, United Kingdom, 14 July 2011); and Phil Mercer "News Corp Phone-Hacking Crisis Spreads to Australia" *Voice of America* (online ed, America, 15 July 2011). See

personal information is increasingly available and distributable, the right to have private information protected from access, investigation and publicity is becoming increasingly important. While the right to privacy is unlikely to have assisted the victims in the phone-hacking saga,⁹ a more explicit commitment to the right to privacy could send a message to state actors that privacy is important to New Zealanders.

This paper explores how elements of privacy may be protected and assesses whether New Zealand's privacy protections would be strengthened if the New Zealand Bill of Rights Act 1990 (the Bill of Rights Act) were amended to affirm the right to privacy. Currently, privacy is protected in piecemeal form through various statutes, judicial interpretation of those statutes and a (limited) tort of invasion of privacy. This paper will argue that the inclusion of a right to privacy in the Bill of Rights Act could add a meaningful dimension to privacy law. The courts would feel more confident in developing the common law to "fill the gaps" in legislation to protect privacy values. Furthermore, this paper argues that judicial development of a right to privacy enshrined in the Bill of Rights Act would enhance and highlight aspects of societal values and therefore contribute to building a more cohesive understanding of New Zealand society through the adjudication of privacy issues.

This paper is broadly divided into two parts. The first part of the paper examines current privacy protections in international law, New Zealand and overseas jurisdictions. It will be shown that courts in jurisdictions providing for legislative protection of a general right to privacy are better equipped to interpret the bounds of privacy in particular fact situations, and allow for a wider recognition of the differing elements of the right to privacy. The second part of the paper discusses how a general right to privacy could be included in the Bill of Rights Act, and explores several areas in which a greater recognition of privacy interests may in fact improve the balance between privacy and other conflicting rights or state powers.

II ORIGINS OF THE RIGHT TO PRIVACY

The widely celebrated case of *Entick v Carrington* was the first common law recognition of a citizen's right to privacy as against the state, providing that the Crown committed trespass against

R Finkelstein *Report of the Independent Inquiry into the Media and Media Regulation* (Commonwealth of Australia, Canberra, 28 February 2012) which discusses privacy and the media in particular at [4.56]–[4.74]; and Caitlin Dewey "PRISM data collection draws attention to consumer data tracking" *Washington Post* (online ed, Washington Post, 13 June 2013).

9 In the United Kingdom, telephone hacking is already illegal and the individuals who engaged in telephone interception face criminal charges. In regard to the state of the media in the United Kingdom, see Lord Justice Leveson *The Report into the Culture, Practices and Ethics of the Press: Executive Summary* (The Stationery Office, London, November 2012).

citizens if it entered private property without a lawful basis for doing so.¹⁰ In terms of international law, however, the first affirmation of privacy as a human right is found in art 12 of the *Universal Declaration of Human Rights* (the *Universal Declaration*) which provides:

No one shall be subjected to arbitrary interference with his privacy, family, home or correspondence, nor to attacks upon his honour and reputation. Everyone has the right to the protection of the law against such interference or attacks.

In the context of privacy, the competing right of freedom expression, also enshrined in the *Universal Declaration*, is of equal importance.¹¹ Freedom of expression is the most pertinent right seen as justifiably limiting the right to privacy in certain situations. As well as being an enduring source of human rights principles, the language of the *Universal Declaration* has informed many other international instruments. The *Universal Declaration* served as the basis for the International Covenant on Civil and Political Rights 1966 (the ICCPR), which contains a right to privacy framed in identical terms,¹² and the United Nations Convention on the Rights of the Child 1989 (UNCROC), which protects the privacy of children.¹³

In contrast to the *Universal Declaration*, the ICCPR significantly alters the parameters of freedom of expression, qualifying that right as carrying with it "special duties and responsibilities" and being subject to certain restrictions as necessary "for respect of the rights or reputations of others".¹⁴

These provisions in the *Universal Declaration* and the ICCPR reflect the differing privacy approaches that can lawfully restrict freedom of expression. The first approach treats privacy as a right that can be easily restricted by other rights. The second approach views privacy on par with other rights, especially freedom of expression. According to this latter approach, a limitation of the right to privacy has to meet a high threshold. The tension between the two approaches can be illustrated by reference to the enactment of privacy protections in different jurisdictions.

10 *Entick v Carrington* [1765] 95 ER 807. See discussion in Steven R Schlesinger and Bradford Wilson "Property, Privacy, and Deterrence: The Exclusionary Rule in Search of a Rationale" (1980) 18 Duq L Rev 225 at 228–229; and *Boyd v United States* 116 US 630 (per Bradley J).

11 *Universal Declaration of Human Rights* GA Res 217A, III A/Res/801 (1948), art 19.

12 International Covenant on Civil and Political Rights 999 UNTS 171 (opened for signature 16 December 1966, entered into force 23 March 1976) [the ICCPR], art 17. The United Nations Human Rights Committee's General Comment 16 on art 17 does not indicate the Committee's general (philosophical) stance on privacy but rather deals with definitional issues of particular phrases in art 17 like "arbitrary", "unlawful" and "family" or particular issues like data protection and personal honour: United Nations Human Rights Committee *General Comment No 16: Article 17* HRI/Gen/1/Rev9 (1988).

13 United Nations Convention on the Rights of the Child 1577 UNTS 3 (opened for signature 20 November 1989, entered into force 2 September 1990), art 16.

14 The ICCPR, art 19.

III CURRENT PRIVACY PROTECTIONS IN NEW ZEALAND

In July 2011 the Law Commission completed a major review of the New Zealand law of privacy which had commenced in October 2006. The length of the review and the number of resulting publications indicates the intricate nature of privacy. In its stage one analytical paper *A Conceptual Approach to Privacy*¹⁵ and study paper *Privacy Concepts and Issues*,¹⁶ the Commission explored the general concept of privacy. In its subsequent reports, however, the focus was on specific issues, namely public registers, penalties and remedies, and a review of the Privacy Act 1993, with little reference to the overall concepts. This approach was in line with the Commission's earlier pronouncement in its initial scoping process:¹⁷

We are saying nothing more profound than that our approach to privacy protection should be piecemeal and particularised, not generalised. Where there are demonstrable problems and abuses, intervention should be made, but not otherwise.

It is the contention of this paper that the inclusion of a right to privacy in the Bill of Rights Act would ensure that Parliament and the courts develop New Zealand law bearing in mind the underlying value of privacy, thereby allowing for a generalised approach, albeit in a slow and "piecemeal" fashion.

At present, there is a patchwork of privacy protections from various sources of law in New Zealand.¹⁸ Nevertheless, there remain many areas in which individuals' privacy is not fully protected or where the balance between privacy and disclosure may be improved if a right to privacy were recognised more strongly. The following sections set out the key sources of law applying between the state and individuals. It must be recognised, however, that often values recognised in the context of the state–citizen relationship serve another purpose: to "inform the development of the common law in its function of regulating relationships between citizen and citizen."¹⁹

A International Instruments

New Zealand has ratified the ICCPR²⁰ and UNCROC.²¹ Rather than fully incorporating the conventions into domestic law, however, they were incorporated in different pieces of legislation

15 Law Commission *A Conceptual Approach to Privacy* (NZLC M19, 2007).

16 Law Commission *Privacy Concepts and Issues* (NZLC SP19, 2008).

17 Law Commission *Privacy Concepts and Issues*, above n 16, at [16].

18 See Law Commission *Invasion of Privacy: Penalties and Remedies* (NZLC IP14, 2009) at [5] and [11].

19 *Hosking v Runting* [2005] 1 NZLR 1 (CA) at [229] per Tipping J. See also Andrew Geddis "The Horizontal Effects of the New Zealand Bill of Rights Act, as Applied in *Hosking v Runting*" [2004] 4 NZ L Rev 681.

20 The ICCPR was signed by New Zealand on 12 November 1968 and ratified on 28 December 1978.

with the result that not all their protections are fully implemented. While the state is bound by the conventions in international law, the conventions cannot be relied on directly before domestic courts against the state. Nevertheless, principles arising from ratified treaties can inform the interpretation of legislation, the exercise of judicial and administrative discretion, the development of common law and public policy considerations.²² As such, privacy values may be taken into account as part of New Zealand's obligations under international law.²³

The Court of Appeal affirmed the relevance of international law in the role of statutory interpretation in its statement that "so far as its wording allows legislation should be read in a way which is consistent with New Zealand's international obligations."²⁴ In *Tavita v Minister of Immigration* the Court stated that the executive may not be free to ignore its international obligations merely because a statute conferring discretion does not specifically refer to them.²⁵ The Court also held in *Hosking v Runting* that:²⁶

... there is increasing recognition of the need to develop the common law consistently with international treaties to which New Zealand is a party. ... To ignore international obligations would be to exclude a vital source of relevant guidance. It is unreal to draw upon the decisions of Courts in other jurisdictions (as we commonly do) yet not draw upon the teachings of international law.

Accordingly, principles of international law, while not conferring actionable rights against the state, are of significant importance to New Zealand law.

B The New Zealand Bill of Rights Act 1990

The Bill of Rights Act was initiated by the tabling of a White Paper in Parliament by the then Minister of Justice (and later Prime Minister) Geoffrey Palmer in 1985.²⁷ The White Paper set out a draft bill of rights and a commentary on the proposed provisions. One of the purposes of the draft

21 The United Nations Convention on the Rights of the Child was signed by New Zealand on 1 October 1990 and ratified on 6 April 1993.

22 For a general discussion, see Andrew and Petra Butler "The Judicial Use of International Human Rights Law in New Zealand" (1999) 29 VUWLR 173.

23 Law Commission *A New Zealand Guide to International Law and its Sources* (NZLC R34, 1996) at 24; and *New Zealand Air Line Pilots' Association Inc v Attorney-General* [1997] 3 NZLR 269 (CA) at 289.

24 *Rajan v Minister of Immigration* [1996] 3 NZLR 543 at 551.

25 *Tavita v Minister of Immigration* [1994] 2 NZLR 257 (CA) at 266. See also *Ashby v Minister of Immigration* [1981] 1 NZLR 222 (CA) where the Court held that some international obligations were so important that the executive had to take them into account when making decisions.

26 *Hosking v Runting*, above n 19, at [6] per Gault and Blanchard JJ.

27 Department of Justice *A Bill of Rights for New Zealand: A White Paper* (1985) [*The White Paper*].

bill of rights was to affirm New Zealand's commitment to the ICCPR, modelling to a certain extent the Canadian Charter of Rights and Freedoms 1982 (the Canadian Charter).

While the draft legislation mirrored several ICCPR provisions, a general right to privacy was excluded because it was seen as inappropriate to "attempt to entrench a right that is not by any means fully recognised now, which is in the course of development, and whose boundaries would be uncertain and contentious."²⁸

Several aspects of the White Paper were amended during the legislative process, most notably the proposed status of supreme law, use of entrenchment provisions and inclusion of the Treaty of Waitangi. Likewise, a right to privacy remained absent in the assented legislation, despite the Act including a right to freedom of expression framed in similar terms to that of the *Universal Declaration*.

Notwithstanding the lack of a general right to privacy, four aspects of the Bill of Rights Act indirectly protect the right to privacy. First, New Zealand's international commitments protect privacy interests. The long title provides that the Bill of Rights Act "affirm[s] New Zealand's commitment to the [ICCPR]." The long title was designed to be used as an interpretive aid to "ascertain the intention of Parliament."²⁹ The commentary in the White Paper notes that while the ICCPR is binding on New Zealand only under international law, the courts could make reference to the ICCPR in interpreting and applying the Bill of Rights Act and, in particular, "in considering what restrictions on the rights conferred by the Bill are justified."³⁰ Thus, the right to privacy in art 17 of the ICCPR will be directly relevant when considering the scope of limitations to the right to freedom of expression in s 14 of the Bill of Rights Act.

Secondly, protection of the right to privacy can be found in sections 5 and 6 of the Bill of Rights Act. Those provisions allow for privacy considerations to play a part in the interpretation of legislation and common law.³¹ The rights and freedoms in the Act may be subject to reasonable expectations of privacy as far as those expectations are "demonstrably justified in a free and democratic society" (s 5 Bill of Rights Act). Moreover, the Bill of Rights Act allows for privacy protections to be embraced by providing that interpretation of legislation (s 6 of the Bill of Rights Act) and common law is to be preferred.³²

28 *The White Paper*, above n 27, at [10.144].

29 *The White Paper*, above n 27, at [10.7].

30 At [10.13].

31 Explicitly in regard to common law, see *Hamed v R* [2011] NZSC 101, [2012] 2 NZLR 305 at [37] per Elias CJ.

32 See Elias CJ in *Hamed v R*, above n 31, at [37] where her Honour states the courts' duty: "Indeed, the New Zealand courts would fail in their obligations under ss 3 and 6 of the Bill of Rights Act if they do not ensure that the common law is consistent with the Act."

Thirdly, the right to privacy also plays an important role in assessing whether there has been a breach of one's right to be free from unreasonable search and seizure "whether of the person, property, or correspondence or otherwise."³³ The White Paper specifically acknowledged that this freedom is an aspect of the privacy of the individual.³⁴ The importance of the privacy aspect in regard to s 21 of the Bill of Rights Act is pointed out by Elias CJ in *Hamed v R* when stating: "The right [to be free from unreasonable search and seizure] protects privacy. ... It describes a 'right to be let alone',³⁵ protecting "people, not places".³⁶ Her Honour unequivocally clarified that "s 21 guarantees reasonable expectations of privacy from state intrusion."³⁷ Elias CJ further pointed to the influence of human dignity on the citizen's right to privacy when she observed that:³⁸

The values protected by s 21 are not simply property-based, as were the common law protections which preceded it. Rather, they provide security against unreasonable intrusion by State agencies into the personal space within which freedom to be private is recognised as an aspect of human dignity.

The degree of intrusion into privacy may determine what constitutes "search and seizure" and whether a search is "reasonable".³⁹

Lastly, s 28 provides that rights not expressly included in the Bill of Rights Act are not taken to be abrogated merely by their absence. The equivalent provision in the White Paper was described as ensuring that "the fact that an existing right is only partially incorporated by the Bill does not thereby destroy any wider ambit that that right otherwise has."⁴⁰ Such recognition accords with the commitment to the ICCPR expressed in the long title. Thus s 28 can be seen as recognising that the right to privacy in the ICCPR may be given effect in New Zealand.⁴¹

While the absence of a right to privacy in the Bill of Rights Act has not been fatal to its recognition by the courts, it has acted as a restraint on the development of the right. Judicial acknowledgment and development of the right to privacy is explored further below.

33 New Zealand Bill of Rights Act 1990 [Bill of Rights Act], s 21.

34 At [10.144].

35 *Hamed v R*, above n 31, at [10] citing *Olmstead v United States* 277 US 438 (1928) at 478 per Brandeis J.

36 *Hamed v R*, above n 31, at [17].

37 At [10].

38 At [11].

39 *Hamed v R*, above n 31, at [10] per Elias CJ, [163]–[164] and [172] per Blanchard J and [222]–[223] per Tipping J. However, it needs to be noted that no clear majority position as to what constitutes a search emerges from *Hamed*: see *C v Holland* [2012] NZHC 2155, [2012] 3 NZLR 672 at [22].

40 *The White Paper*, above n 27, at [10.179].

41 See for example the view of Thomas J (dissenting) in *Brooker v Police* [2007] NZSC 30, [2007] 3 NZLR 91 at [229].

C Privacy Act 1993

The Privacy Act 1993 was enacted to "promote and protect individual privacy"⁴² and was heralded as an "important milestone in the evolution of human rights legislation".⁴³ The Act protects individuals' private information, rather than other facets of privacy.⁴⁴ For reasons of scope, this paper will not set out the mechanisms of the Act exhaustively. Rather, some key features of the legislation will be discussed.

The Act protects personal information held by an "agency", which includes natural and legal persons from the public and private sector,⁴⁵ but excludes the news media in connection with their news-gathering activities, the Governor-General, Members of Parliament, courts and certain other bodies acting in a judicial capacity.⁴⁶ The Act also only protects the private information of living natural persons, rather than corporate entities or individuals who are deceased.⁴⁷

The Privacy Act also establishes the Office of the Privacy Commissioner. The Commissioner has a range of responsibilities, including investigating complaints of privacy breaches, developing codes of conduct for industries and acting as a "watchdog" for incursions into privacy which may arise from, for example, government policy or legislation.⁴⁸

One of the most significant aspects of the Privacy Act is its formulation of Privacy Principles.⁴⁹ The Privacy Principles govern the responsible collection, use and disclosure of personal information. Where any "agency" breaches a Privacy Principle, or has not complied with a code of practice, an individual may make a complaint to the Commissioner on the basis that there has been an interference with his or her privacy.⁵⁰ In this way, the Privacy Act diverts first instance privacy concerns from the judicial system. For a complaint to be successful, however, the complainant must also show that the breach caused (or may cause): loss or injury; adverse effect on his or her rights or

42 Privacy Act 1993, long title.

43 Tim McBride "NZ's Privacy Act 1993 – Part 1" [1994] PLPR 2.

44 McBride, above n 43. McBride states that focus of the Privacy Act is on protecting personal information as this is the only type of breach to which the complaint jurisdiction applies. In addition, the Act only applies to natural persons: s 2(1).

45 Section 2(1).

46 Radio New Zealand and Television New Zealand, as state-funded media organisations, are not exempted in respect of Privacy Principles 6 and 7 which relate to individuals seeking to access or correct personal information: s 6.

47 Privacy Act, s 2(1).

48 Section 13.

49 Section 6.

50 Section 66.

interests; or significant humiliation, loss of dignity or injury to feelings.⁵¹ The threshold is high: mere misuse or dissemination of personal information is insufficient for a complaint to be upheld. If the complaint is not settled, civil proceedings may be commenced before the Human Rights Review Tribunal,⁵² which has wide powers to award remedies, including declarations, injunctions and damages.⁵³

Although the Privacy Act creates substantive obligations for both state and private actors, its greatest purpose is to serve as an educative tool "to change both practices and perceptions regarding the handling of personal information".⁵⁴ As such, the ambit of the Act is limited to just that: protection of *information*, rather than other aspects of privacy.

D Other Legislation

Further domestic legislation recognises elements of the value of privacy in piecemeal form. The Broadcasting Act 1989 "fills the gaps" caused by the exclusion of news media from the scope of the Privacy Act, providing for the maintenance of programme standards and the establishment of the Broadcasting Standards Authority. The Act applies to state-owned media, as well as private television and radio, and requires broadcasters to maintain standards consistent with individuals' privacy and develop codes of broadcasting practice.⁵⁵ The Act establishes a complaints regime with reference to breaches of codes of practice: if a broadcaster fails to maintain standards consistent with individual privacy, it may be required to pay the complainant compensation.⁵⁶ Although the Act itself is silent as to what "privacy" means, the Authority has developed principles with which to measure allegations of breach of privacy.⁵⁷ In the course of the development of those principles the Privacy Commissioner was consulted to ensure compliance with the Privacy Principles encapsulated in the Privacy Act.⁵⁸

Section 216H of the Crimes Act 1961 makes everyone liable to imprisonment if they intentionally or recklessly make an intimate visual recording of another person. The Summary Offences Act 1981 prohibits the intimidation of any person, which occurs where a person threatens

51 Section 66.

52 Usually, the Director of Human Rights Proceedings will commence proceedings: s 82. However, if the Director chooses not to do so, complainants may commence proceedings themselves: s 83.

53 Section 85.

54 McBride, above n 43.

55 Broadcasting Act 1989, ss 4 and 21(2).

56 Section 13(1)(d).

57 See for instance the discussion in *Andrews v Television New Zealand Ltd* [2009] 1 NZLR 220 (HC) at [55].

58 When the Broadcasting Standards Authority develops codes of broadcasting practice with broadcasters that relate to privacy, it must consult with the Privacy Commissioner: see Broadcasting Act, s 21(4).

or follows another, deprives them of their property, loiters near their home or work, or confronts them in public with intent to intimidate them.⁵⁹ The offence protects freedom of movement and prevents unlawful interference with the home, reflecting art 17 of the ICCPR. Moreover, the Trespass Act 1980 protects the rights of occupiers of private property by making it an offence to trespass after being warned to leave; and the Harassment Act 1997 recognises privacy of one's physical body, personal space and home life by prohibiting the physical harassment of another, such as by stalking, though such behaviour must be repetitive in nature. Another example is the right to quiet enjoyment from unwanted or unauthorised intrusion into personal space or personal affairs embodied in s 38 of the Residential Tenancies Act 1986. An affirmation of the privacy concept of freedom from intrusion can also be found in the Search and Surveillance Act 2012.⁶⁰

Furthermore, the Defamation Act 1992 reformed the common law of defamation and enshrined a right to reputation in legislation (the right to reputation being linked in the ICCPR and elsewhere to the right to privacy). The 1992 Act provides civil remedies for those who are defamed. Protection is, however, limited as there are several defences to a claim in defamation, including honest opinion and truth.

E Protection of Privacy in Common Law

The pulse of the value of privacy cannot only be ascertained by the protection of the citizens' privacy against the state. The value and status of privacy within New Zealand's society is reflected by its legal protection. The value and status can also be measured by how the citizens' privacy interest (as against the interests, especially information interests, of other citizens or their agencies) is protected. In New Zealand those interests are sometimes balanced by the common law.

1 Tort of interference with privacy

The New Zealand Court of Appeal in *Hosking v Runting* recognised a tort of invasion of privacy.⁶¹ The plaintiffs in *Hosking* were in a relationship and had children together. One of the

59 Summary Offences Act 1981, s 21(1)(d). See *Brooker v Police*, above n 41, per McGrath J at [123] where in regard to the Summary Offences Act 1981 his Honour observed:

Privacy is 'an aspect of human autonomy and dignity'. Although, as a police constable, the complainant is a public official, in her private life she is entitled to enjoyment of the rights of an ordinary citizen. Her privacy interest in the present appeal is her right to be free from unwanted physical intrusion into the privacy of her home.

60 See especially Search and Surveillance Act 2012, s 46(1)(c):

Except as provided in sections 47 and 48, an enforcement officer who wishes to undertake any 1 or more of the following activities must obtain a surveillance device warrant ... (c) observation of private activity in private premises, and any recording of that observation, by means of a visual surveillance device.

61 *Hosking v Runting*, above n 19.

plaintiffs was a well-known New Zealand television host who attracted significant media attention. The couple objected to photographs of their children (that had been taken in public) being published in a magazine owned by Pacific Magazines NZ Ltd, the second defendant. The couple advised Pacific Magazines that they did not consent to the taking or publication of the photos, but Pacific Magazines refused to cancel publication. They applied for an injunction restraining publication on the basis of a tort of invasion of privacy which, they submitted, did not require proof of damage.⁶²

In confirming the existence of the tort and determining its elements, the majority of the Court of Appeal identified the two fundamental requirements which must be met for the tort to be successfully made out.⁶³ First, there must be facts in existence in respect of which there is a reasonable expectation of privacy. Secondly, the publicity given to those private facts must be considered highly offensive to an objective reasonable person.⁶⁴ Rather than formulating all the boundaries to this cause of action in a single decision, Gault P and Blanchard J considered it was more appropriate for the tort of privacy to develop incrementally as the courts applied the law to particular circumstances.⁶⁵

The Court in *Hosking* did, however, recognise a defence to an invasion of privacy where disclosure of the relevant private facts was "justified by a legitimate public concern in the information."⁶⁶ Further, on the facts of *Hosking*, the Court held that the plaintiffs failed to make out their claim since the photos were not taken in circumstances in which there was a reasonable expectation of privacy.⁶⁷

Hosking was applied in *Brown v Attorney-General*⁶⁸ and *Andrews v Television New Zealand Ltd*.⁶⁹ The incremental approach continued in 2012 when the High Court had to decide in *C v Holland* whether a tort of intrusion upon seclusion should form part of the law of New Zealand.⁷⁰ The Court found that privacy concerns were undoubtedly increasing with technological advances,

62 The plaintiffs also brought a claim based on intentional infliction of emotional distress. However, that tort did not neatly fit the facts of the claim. A particular difficulty was that the plaintiffs needed to show that harm was intended by Pacific Magazines (or that it was reckless as to harm occurring). The publication of the photos would not necessarily result in harm or distress.

63 *Hosking v Runting*, above n 19, at [117] per Gault P and Blanchard J, and [249]–[256] per Tipping J.

64 At [117].

65 At [118].

66 *Hosking v Runting*, above n 19, at [129].

67 At [164].

68 *Brown v Attorney General* [2006] DCR 630.

69 *Andrews v Television New Zealand Ltd*, above n 57.

70 *C v Holland*, above n 39.

including prying technology through, for example, the home computer. Therefore, the Court held that the affirmation of a tort of intrusion upon seclusion was commensurate with the value already placed on privacy and, in particular, the protection of personal autonomy. Since the similarity to the *Hosking* tort was sufficiently proximate, the tort of intrusion upon seclusion could be seen as a logical extension of, or adjunct to, it.⁷¹

2 *Privacy as a fundamental value that limits other rights*

(a) The courts

Privacy has been conceptualised by the New Zealand courts as a fundamental value. But rather than treating privacy as a "trump card", the courts consider it a value to be balanced against other important values. Judicial treatment of privacy as a fundamental value can be found in case law, particularly in relation to unreasonable search and seizure (prohibited by s 21 of the Bill of Rights Act).⁷² This demonstrates that positive gains could be made from confirmation of its place among other fundamental rights and freedoms in the Bill of Rights Act.⁷³

Entick v Carrington establishes a common law rule that there must be some lawful basis for police entry onto property for the purpose of preventing or detecting crime.⁷⁴ There is no general right of entry onto private property; there must be implied (or express) licence to enter, which also applies to the general public.⁷⁵ An implied licence "is an invention of the common law to reflect the balance between respect for an individual's right to privacy and the public interest in enforcement of the criminal law."⁷⁶ In the already cited Supreme Court decision of *Hamed v R* Elias CJ unequivocally affirmed that s 21 protects "personal freedom and dignity from unreasonable and

71 At [86].

72 Though the Bill of Rights Act is not entrenched or supreme law, it is accepted as one of New Zealand's constitutional documents: see for instance Anna Adams "Competing Conceptions of the Constitution: The New Zealand Bill of Rights Act 1990 and the Cooke Court of Appeal" [1996] NZ L Rev 368; and Paul Rishworth "Affirming the Fundamental Values of the Nation: How the Bill of Rights and the Human Rights Act Affect New Zealand Law" in Grant Huscroft and Paul Rishworth (eds) *Rights and Freedoms: The New Zealand Bill of Rights Act 1990 and the Human Rights Act 1993* (Brookers, Wellington, 1995) at 71.

73 Compare Elias CJ in *Hamed v R*, above n 31, at [37] where her Honour states the courts' duty:

Indeed, the New Zealand courts would fail in their obligations under ss 3 and 6 of the Bill of Rights Act if they do not ensure that the common law is consistent with the Act.

This obligation stated so clearly by Elias CJ authorises (if not instructs) the courts to develop (at least) the common law in light of privacy.

74 *Entick v Carrington*, above n 10.

75 See *Robson v Hallett* [1967] 2 QB 939; and *Howden v Ministry of Transport* [1987] 2 NZLR 747 (CA) at 751. On the scope of implied licence, see also *Tararo v R* [2010] NZSC 157, [2012] 1 NZLR 145.

76 *Police v McDonald* [2010] NZAR 59 (HC) at [35].

arbitrary state intrusion."⁷⁷ For Elias CJ and Tipping J that meant that private conversations and conduct are protected from state interference even in public places.⁷⁸ The Court of Appeal had observed in an earlier case that the "main aim of s 21 of the Bill of Rights is to protect privacy interests",⁷⁹ and had deemed evidence seized as a result of an unreasonable search to be inadmissible.⁸⁰ Privacy interests were also considered in the 2006 decision *Avowal Administrative Attorneys Ltd v District Court at North Shore*, where Avowal was investigated for tax avoidance.⁸¹ Avowal claimed a right to privacy in respect of the Commissioner of Taxation's statutory powers of entry onto premises and obtaining of information pursuant to s 16 of the Tax Administration Act 1994. Avowal argued that the Commissioner's powers had to be read in accordance with s 21 of the Bill of Rights Act and the common law right to privacy. Baragwanath J observed that two competing interests had to be balanced: privacy and the collection of revenue for the public good. The incursion into privacy was held to be justified because it was reasonable for the Commissioner to inquire into Avowal's conduct because it was in the business of tax mitigation.⁸²

Privacy concerns have to be weighed when search warrants are issued. General warrants have been held invalid for a long time to safeguard privacy and property.⁸³ In *Dotcom v Attorney-General* the High Court had to decide whether a warrant issued under the Mutual Assistance in Criminal Matters regime had to meet the requirements that are demanded by New Zealand law in the light of s 21 Bill of Rights Act.⁸⁴ The Court found that the warrant in the particular case did not adequately state the alleged offence and was, therefore, too general.⁸⁵

The right to privacy in the home has also been upheld in cases such as *Choudry v Attorney-General*, where the Court of Appeal refused to imply into legislation that conferred powers on the Security Intelligence Service an incidental power of entry onto private property.⁸⁶ Furthermore, several of the judges in *Brooker v Police* considered that the common law recognised that people

77 *Hamed v R*, above n 31, at [10].

78 *Hamed v R*, above n 31, at [12] per Elias CJ and [222] per Tipping J.

79 *R v Williams* [2007] 3 NZLR 207 (CA) at [236] per William Young P and Glazebrook J.

80 *R v Shaheed* [2002] 2 NZLR 377 (CA).

81 *Avowal Administrative Attorneys Ltd v District Court at North Shore* [2010] 2 NZLR 794 (HC).

82 At [105].

83 *Leach v Money* (1765) 19 State Tr 1002; *Chic Fashions (West Wales) Ltd v Jones* [1968] 2 QB 299; *Auckland Medical Aid Trust v Taylor* [1975] 1 NZLR 728 (CA) at 733 per McCarthy P; and *Dotcom v Attorney-General* [2012] NZHC 1494, [2012] 3 NZLR 115 at [28] per Winkelmann CJ.

84 *Dotcom v Attorney-General*, above n 83, at [31] and following.

85 At [50]–[51].

86 *Choudry v Attorney-General* [1999] 2 NZLR 582 (CA).

were entitled to feel secure and enjoy tranquillity in their homes, identifying this right to residential tranquillity as an element of the right to privacy.⁸⁷

Additionally, the courts have taken privacy matters into account in respect of judicial discretion to allow the media access to court records of criminal proceedings under the search rules,⁸⁸ and recognised the right to privacy as an important discretionary factor when deciding whether or not to grant permanent name suppression where a case does not reach the stage of public prosecution.⁸⁹

As well as the examples outlined above, there are a myriad of other legislative provisions and cases which take privacy into account.⁹⁰ While there are certainly many privacy protections in New Zealand law, the current approach is not the only (or best) means by which to fully protect privacy rights.

(b) The Law Commission

The Law Commission when conceptualising privacy found that the right to privacy embodied two values: "The first of these core values is the autonomy of humans to live a life of their choosing. The second is the equal entitlement of people to respect."⁹¹ The Commission elaborated that privacy can be seen as informational, as well as local (or spatial). Informational privacy is concerned with control over access to private information or facts about oneself. The Commission considered that not all personal information could be regarded as private but conceded that opinions might differ as to exactly which facts count as private. On the other hand, the Law Commission defined local or spatial privacy as that which is concerned with control over access to one's person and to private spaces, typically the home, but in other places as well.⁹²

IV PRIVACY PROTECTIONS ACROSS JURISDICTIONS

Several different approaches have been taken to the protection of privacy throughout the world. The strongest recognition of privacy has been given in the European Union and, in particular, Germany, where a general right to privacy is enshrined in constitutional law. Jurisdictions also recognising a strong right to privacy are those where privacy protections are held to exist by

87 *Brooker v Police*, above n 41, at [11] per Elias CJ, [60] per Blanchard J, [129] per McGrath J and [218] per Thomas J.

88 *Mafart v Television New Zealand Ltd* [2006] NZSC 33, [2006] 3 NZLR 18 at [7]; and *R v Mahanga* [2001] 1 NZLR 641 (CA) at [32].

89 *Forrest v A and B* [2009] NZAR 697 (HC).

90 For example Accident Compensation Act 2001, ss 159, 160 and 246; Arbitration Act 1996, s 14H; Armed Forces Discipline Amendment Act (No 2) 2007, s 68; Births, Deaths, Marriages, and Relationships Registration Act 1995, s 75 G; and Evidence Act 2006, s 69.

91 Law Commission *Privacy Concepts and Issues*, above n 16, at [4].

92 Law Commission *Privacy Concepts and Issues*, above n 16, at [3.21].

implication from a constitutional document, such as the United States and Canada. Further down the scale is the United Kingdom which, like New Zealand, recognises privacy in piecemeal form, allowing for incremental development through the common law. Each of these jurisdictions will be examined with reference to their effectiveness at protecting the breadth of privacy rights.

A Europe

In 27 European countries privacy is protected under two different regional legal systems with traditionally different mandates: the European Union and the Council of Europe. The focus of the legislative competence of the former lies in the regulation of commerce between its member states. The latter safeguards the citizens' human rights in its 47 member states through the Convention for the Protection of Human Rights and Fundamental Freedoms 1950 (the European Convention).⁹³ The Convention is adjudicated by the European Court of Human Rights (the ECtHR). Both systems have at their core the principle that for Europeans privacy, protects dignity and/or their public image.

1 European right to privacy

The impetus for the European Convention was to protect member states against fascism.⁹⁴ Article 8 of the European Convention sets out the right to privacy, providing that: "Everyone has the right to respect for his private and family life, his home and his correspondence." This right is, however, subject to limitation where interference with the right to privacy is "in accordance with the law" and "necessary in a democratic society ... for the prevention of disorder or crime, the protection of health or morals, or for the protection of the rights and freedoms of others."⁹⁵ The interests safeguarded by art 8 can be summarised as concerning the "unjustified exposure to public view of matters properly confined to the knowledge of an individual or family group."⁹⁶

The language of art 8 purposefully departed from the *Universal Declaration*. While the *Universal Declaration* formulation was first proposed in the draft of the European Convention, art 8 was amended to change the touchstone of the provision from "unlawful interference" to "respect for privacy".⁹⁷ The change in language has arguably resulted in a shift in jurisprudence towards increased recognition of the right to non-interference with one's private life. The focus on "respect

93 European Convention on Human Rights 213 UNTS 221 (opened for signature 4 November 1950, entered into force 3 September 1953).

94 Clayton and Tomlinson, above n 5, at [IN.15]. In fascist regimes, racially restrictive marriage laws and policies alienating children from their parents were able to take root: see Mark W Janis, Richard S Kay and Anthony W Bradley *European Human Rights Law: Text and Materials* (3rd ed, Oxford University Press, Oxford, 2008) at 373.

95 Article 8(2).

96 Janis, Kay and Bradley, above n 94, at 374.

97 Janis, Kay and Bradley, above n 94, at 374.

for privacy" and limiting the right for the protection of morals⁹⁸ provide scope for member states to regulate family relations.⁹⁹

The ECtHR has so far not offered a clear and precise definition of what is meant by private life: in its view it is a broad concept, incapable of exhaustive definition.¹⁰⁰ In line with this approach, the ECtHR has held that the ambit of "private life" is not limited to an "inner circle" in which an individual excludes the outside world. It also includes the right to develop relationships with other human beings, which can include an individual's professional activities.¹⁰¹ The right to privacy also includes a person's ability to choose his or her name,¹⁰² as well as control over their image¹⁰³ and sexual life.¹⁰⁴ Article 8 has proved itself able to cover a growing number of issues and to extend its protection to a range of interests that would not fall under the scope of any other articles. This is partly due to the fact that the Court has not provided any comprehensive definition of art 8 interests, thus making them fully adaptable to changing times.¹⁰⁵

The right to privacy is not, however, unfettered; it may be subject to justified limitations, such as where interference is necessary in a democratic society. A limitation will be deemed necessary where it is proportionate to a legitimate aim.¹⁰⁶ In this way, rights are subject to similar limitations as provided in the (New Zealand) Bill of Rights Act. One distinction, however, is that the ECtHR

98 Note however that limitations on the basis of morality have rarely been upheld by the European Court of Human Rights: *Janis, Kay and Bradley*, above n 94, at 428–429.

99 *Janis, Kay and Bradley*, above n 94, at 374.

100 *Costello-Roberts v United Kingdom* (1993) 19 EHRR 112 (ECHR) at [36]; and Ivana Roagna *Protecting the right to respect for private and family life under the European Convention on Human Rights – Council of Europe Handbook* (Council of Europe, Strasbourg, 2012) at 12.

101 *Niemietz v Germany* (1992) 16 EHRR 97 (ECHR) at [29].

102 *Burghartz v Switzerland* (1994) 18 EHRR 101 (ECHR); and *Stjerna v Finland* (1994) 4 EHRR 195 (ECHR).

103 *Schüssel v Austria* (42409/98) Section III, ECHR 21 February 2002; *Von Hannover v Germany* (2005) 40 EHRR 1 (Section VI, ECHR); *Sciacca v Italy* (50774/99) Section IV, ECHR 11 January 2005; and *Reklos and Davourlis v Greece* (1234/05) Section I, ECHR 15 January 2009.

104 See *X and Y v The Netherlands* (1985) 8 EHRR 235 (ECHR) at [22] where art 8 was held to be violated when the criminal law failed to protect the claimant who had been subject to sexual assault; and *Dudgeon v United Kingdom* (1981) 4 EHRR 149 (ECHR) where Northern Ireland's prohibition of homosexuality was held to be an unjustified limitation on the right to respect for the private life of consenting adults.

105 Roagna, above n 100, at 9.

106 *Norris v Ireland* (1988) 13 EHRR 186 (ECHR) at [41].

also applies a margin of appreciation as to the necessity of a limitation to allow for cultural differences among member states.¹⁰⁷

The ECtHR's jurisprudence in respect of unwanted publicity is of particular interest, having struck a balance between freedom of expression and the right to privacy which is different to that of New Zealand. In *Von Hannover v Germany*, Princess Caroline of Monaco brought a claim against Germany.¹⁰⁸ The princess was constantly photographed by the paparazzi, and a German magazine published several photos of the princess engaging in everyday activities in public. German courts upheld the media's freedom of expression based on the public interest in her as a figure of contemporary society "par excellence". The ECtHR held that the German courts had failed to adequately protect Princess Caroline's privacy rights. Even though she was a public figure, she did not perform functions on behalf of the state. Since the information did not impact upon public or political debate, it was not deemed to be in the public interest.¹⁰⁹

In another widely-cited case, *Peck v United Kingdom*, the applicant was being filmed by local authority CCTV surveillance with a knife in his hand.¹¹⁰ The CCTV operator notified police, who attended the scene and prevented the applicant from committing suicide. Without the applicant's consent, the local authority released the footage (in which he was identifiable) to the media to advertise the effectiveness of CCTV in preventing and detecting crime. The ECtHR held that, while the incident took place in public, the subsequent publication caused it to be viewed to a degree beyond which the applicant could possibly have foreseen, thus constituting a serious interference with the applicant's right to privacy. Although the state has a strong interest in detecting and preventing crime, this objective could have been achieved while ensuring the applicant's anonymity or by obtaining his consent to release the footage. *Peck* is an example of a case in which the right to privacy prevailed where it might not have if it had been before a court in New Zealand.¹¹¹ This difference is discussed in more detail below.

107 The margin of appreciation doctrine was introduced in *Handyside v United Kingdom* (5493/72) ECHR 7 December 1976.

108 *Von Hannover v Germany*, above n 103.

109 At [63].

110 *Peck v United Kingdom* (2003) 13 BHRC 669 (Section IV, ECHR).

111 However, note Keith J (as he then was) in *Hosking v Runting*, above n 19, who indicates that Peck's privacy interest might be protected in New Zealand not because of his right to privacy but because the local authority or government body acted outside its powers. His Honour approached the issue by emphasising the justification for the "encroachment on freedom of expression in those [ie *Peck*] and like cases." Keith J stated (at [201]) that any justified encroachment:

In regard to information privacy, the Council of Europe adopted the Convention for the Protection of Individuals with Regard to the Automatic Processing of Personal Data in 1980.¹¹² The Convention sets out basic privacy principles similar to the Principles developed in accordance with the New Zealand Privacy Act and provides a template for countries without data protection legislation.¹¹³ The principles of the Convention have formed the foundation of subsequent privacy regulation in Europe, and regulation between the European Union and other jurisdictions, beginning with guidelines adopted by the Organisation of Economic Cooperation and Development in 1981.¹¹⁴

2 *Data protection in the European Union*

The main focus of the European Union, in line with its mandate, has also been data protection. The Directive "on the protection of individuals with regard to the processing of personal data and on the free movement of such data",¹¹⁵ which became effective in October 1998, requires that personal data can only be gathered (legally) under strict conditions, for a legitimate purpose in the 27 member states of the European Union. Persons or organisations which collect and manage personal information must protect it from misuse and must respect certain rights of the data owners which are guaranteed by European Union law.¹¹⁶ Unlike the United States¹¹⁷ the European Union imposes

... should be capable of definition in rather precise terms and demonstrated justification (to anticipate the last part of this judgment) by reference to such relatively concrete matters as rights specifically affirmed in the Bill of Rights or legally enforceable limits on the powers of governmental bodies.

It should also be noted that Keith J (and Anderson J) in separate dissenting judgments strongly denounce the emergence of an "invasion of privacy" tort (at [216] per Keith J and [264]–[268] per Anderson J).

112 Convention for the Protection of Individuals with Regard to the Automatic Processing of Personal Data CETS 108 (opened for signature 28 January 1981, entered into force 1 October 1985).

113 These principles are: obtained and processed fairly and lawfully; stored for specific and legitimate purposes; not used in a way that is incompatible with those purposes; adequate, relevant and not excessive in relation to the purpose for which they are stored; accurate, and where necessary, kept up to date; preserved in a form which permits identification of data subjects for no longer than is required for the purpose for which the data are stored; protected by appropriate security measures; and accessible to individuals to enable checking the veracity of the information and enabling correction if necessary.

114 OECD Guidelines on the Protection of Privacy and Transborder Flows of Personal Data (adopted on 23 September 1980).

115 *Directive 95/46 on Data Protection* [1995] OJ L281/31.

116 For example, sensitive personal information such as racial or ethnic origin, political opinions, religious or philosophical beliefs, trade union membership and data concerning health and sex life cannot be collected. Note that the European Union is currently revising its data protection rules: see European Commission "Commission proposes a comprehensive reform of data protection rules to increase users' control of their data and to cut costs for businesses" (press release, 25 January 2012).

117 In regard to the problems that have ensued due to the different level of data protection in the European Union and the United States, see Avner Levin and Mary Jo Nicholson "Privacy Law in the United States, the European Union and Canada: The Allure of the Middle Ground" [2005] UOLTJ 357 at 377–378.

controls over business processing and use of personal data, both before and after the data is collected. Citizens whose data is collected have to be informed of the purpose of the processing and the recipients of the data.¹¹⁸ The data can be processed and used only for the purposes specified.

B Individual Countries

The following gives a brief overview of the protection of the individual's privacy in Germany, the United Kingdom, Canada, the United States and the Australian state of Victoria. The paper thereby allows a comparison between New Zealand and other common law jurisdictions. These approaches are contrasted with the protection of privacy in Germany which has very comprehensive privacy protection. In regard to the United Kingdom and Germany, both Council of Europe member states, the jurisprudence of the ECtHR has influenced the protection of their citizens' privacy. The protection of privacy in both countries is very different due to the different historical and cultural conditions. Since those different conditions are taken into account by the margin of appreciation doctrine of the ECtHR, its jurisprudence has had a different influence on the protection of privacy in both countries.

1 Germany

The *Grundgesetz*, or Basic Law, which entered into force in 1949, enshrines a general right to privacy in Germany's constitutional law. Central to the Basic Law is the constitutional value of respect and protection for human dignity.¹¹⁹ The right to privacy is contained in three sections of the Basic Law. The first source is the right to personality in art 2, which provides that "[e]veryone shall have the right to the free development of his or her personality" subject only to the rights of others, the constitutional order and moral code. Article 2 also provides for inviolable liberty and "the right to life and inviolability of his or her person", which can only be limited by law (which is narrower than the permissible limitations to the first limb of the article). The courts have interpreted art 2 as guaranteeing "an inviolable sphere of privacy beyond the reach of the public authority."¹²⁰ It is a guarantee that the individual can fully realise his or her potential.

The second and third sources of the right to privacy can be found in art 10 (the right to privacy of posts and telecommunications) and art 13 (the right to inviolability of the home).

The German approach to privacy begins with the presumption that the state should interfere with private life as minimally as possible. The right to privacy is a right to one's image, name and reputation (or what the Germans call the right to informational self-determination). Although this fundamental guarantee originated from a desire to be protected from totalitarian oppression, the

¹¹⁸ *Directive 95/46*, above n 115, art 10.

¹¹⁹ Basic Law of the Federal Republic of Germany, art 1(1).

¹²⁰ *Microcensus Case* (1969) 27 BVerfGE 1 (German Constitutional Court).

right has continued to have relevance.¹²¹ The Constitutional Court developed its *Drittwirkungstheorie* (theory of horizontal effect of rights) on the right to privacy.¹²² The protection of the citizen's privacy interests against the interests of other citizens, including the public represented by the media, is predominantly determined by the level of privacy the individual demanded for him or herself. To this day, Germany is considered to have one of the strongest statements of privacy protection in domestic law.¹²³

It comes, therefore, as no surprise that, as Lord Walker observed, Germany, as the bastion of privacy against media intrusion, felt hard done by the decision of the ECtHR in *Von Hannover v Germany*.¹²⁴ In a landmark judgment, the German Constitutional Court had granted Princess Caroline's injunction regarding the photographs in which she appeared with her children on the ground that the children's need for protection of their intimacy was greater than that of adults.¹²⁵ However, the Constitutional Court considered that the applicant, who was undeniably a contemporary "public figure", had to tolerate the publication of photographs of herself in a public place, even if they showed her in scenes from her daily life rather than engaged in her official duties. The Constitutional Court referred in that connection to the freedom of the press and to the public's legitimate interest in knowing how such a person generally behaved in public.

The ECtHR agreed that:¹²⁶

... the decisive factor in balancing the protection of private life against freedom of expression should lie in the contribution that the published photos and articles make to a debate of general interest.

However, the ECtHR then in assessing the case came to the opposite view from the German Constitutional Court. For the ECtHR it was clear, as already stated above, that the photos made no

121 See for example Statement of former President of the Constitutional Court, Ernst Benda in "Fundamental Rights: A Comparative Analysis" (paper presented at the Center for Contemporary German Studies, John Hopkins University, Washington DC, 23 September 1987) at 6, where it states that the right to privacy continues to have relevance in respect of the "complexities of modern life, by the potential invasion of an ever-present welfare state into almost all aspects of private life".

122 See (1958) 7 BVerfGE 198 (German Constitutional Court) at [205]; and Ingo von Münch and Philip Kunig (eds) *Grundgesetz-Kommentar* (Translation: Basic Law Commentary) (5th ed, Beck, Munich, 2000) vol 1, vorb art 1–19 at [28]–[36].

123 The strong constitutional privacy protection does permeate into civil law protections like protection for defamation and civil law protection of privacy (that is, a tort of privacy).

124 Robert Walker (Lecture given for the New Zealand Centre for Public Law, Wellington, 13 August 2009).

125 *Caroline von Monaco II* (1999) 101 BVerfGE 361 (German Constitutional Court).

126 *Von Hannover v Germany*, above n 103, at [76].

contribution to a debate of public interest, "since the applicant exercised no official function and the photographs and articles related exclusively to details of her private life."¹²⁷

2 *The United Kingdom*

The United Kingdom ratified the European Convention, thereby accepting the compulsory jurisdiction of the ECtHR, in 1966. The Human Rights Act 1998 (UK) made European Convention rights justiciable in domestic courts¹²⁸ and specifically provided for a right to privacy in the same terms as the European Convention. Furthermore, there is a "strong rule of construction" requiring legislation to be interpreted consistently with the European Convention.¹²⁹

In Lord Walker's view,¹³⁰ the European Convention and the ECtHR jurisprudence on art 8 have had an impact on four main areas of United Kingdom law: personal autonomy; personal privacy; the importance of the home; and the importance of the family.

Personal autonomy encompasses the right to take decisions about one's own body and one's own sexuality. Strasbourg jurisprudence directed United Kingdom law in the areas of abortion, homosexuality,¹³¹ trans-sexuality and assisted suicide.¹³²

Article 8 of the European Convention influenced the law in regard to personal privacy, especially in the areas of search,¹³³ surveillance, crowd control, the interception of communications, the retention by the police of DNA samples and other personal materials,¹³⁴ and the media intrusion into private life. In regard to the latter it can be acknowledged that with the enactment of the Human Rights Act, the balance between the freedom of expression of the media and the right of personal privacy of the individual has markedly improved. However, the United Kingdom jurisprudence still tips the balance in favour of the media's freedom of expression, as is evidenced by the fact that the media could persuade the government to pass s 12 of the Human Rights Act which provides a strict

127 At [63].

128 Human Rights Act 1998 (UK), s (1).

129 Human Rights Act 1998 (UK), s 3. See Clayton and Tomlinson, above n 5, at [IN.13].

130 Robert Walker "The Indefinite Article 8" (paper presented at the Thomas More Lecture, Lincoln's Inn, London, 9 November 2011).

131 *Dudgeon v United Kingdom* (1981) 4 EHRR 149 (ECHR); *Smith & Grady v United Kingdom* (1999) 29 EHRR 493 (Section III, ECHR); and *Lustig-Prean & Beckett v United Kingdom* (2000) 29 EHRR 548 (Section III, ECHR).

132 *R (Pretty) v DPP* [2001] UKHL 61, [2002] 1 AC 800 at [56]; *Pretty v United Kingdom* (2002) 35 EHRR 1 (Section IV, ECHR); and *R (Purdy) v DPP* [2009] UKHL 45, [2010] 1 AC 345 at [35]–[39], [61], [71] and [95].

133 *Gillian and Quinton v United Kingdom* (2010) 50 EHRR 45 (Section IV, ECHR).

134 See *S and Marper v United Kingdom* (2009) 48 EHRR 50 (Grand Chamber, ECHR).

test for the granting of interlocutory injunctions to restrain interference with privacy. Even the *News of the World* scandal has not brought an outwardly major shift, since the Leveson inquiry into the culture, practices and ethics of the press found that:¹³⁵

... not a single witness has proposed that the Government or that Parliament should be able to step in to prevent the publication of anything whatsoever. Not a single witness has proposed that the Government or Parliament should themselves be involved in the regulation of the press. I have not contemplated and do not make any such proposal.

The United Kingdom common law does not recognise a general right to privacy.¹³⁶ Instead, recovery for intrusion into privacy has been melded to the existing equitable doctrine of breach of confidence, which traditionally rested on a pre-existing relationship of trust and confidence.¹³⁷ The courts have, however, expanded the action to include claims where "the party subject to the duty is in a situation where he either knows or ought to know that the other person can reasonably expect his privacy to be protected."¹³⁸ The tort was rechristened as the tort of "misuse of private information."¹³⁹ In this way, the doctrine, overlaid by the application of art 8 of the European Convention, includes claims that might be more naturally conceptualised as breaches of privacy. The Leveson inquiry did not find it necessary to review the civil law protection of privacy.¹⁴⁰ It observed in its report that the way in which the common law had addressed the privacy protection in civil law had allowed flexibility and a sensible enunciation of the relevant factors to be taken into account "when balancing the competing issues in fact sensitive cases."

New Zealand courts have commented that the United Kingdom breach of confidence approach is undesirable because intrusions into privacy do not neatly fit within the bounds of breach of confidence.¹⁴¹

The importance of family life, which is part of the privacy protection under art 8 of the European Convention, has influenced jurisprudence in regard to a widow's entitlement to social

135 Lord Justice Leveson, above n 9, at ch 3, [12].

136 *Douglas v Hello! Ltd* [2001] QB 967 at [71] per Brooke LJ and [110] per Sedley LJ. See also *Wainwright v Home Office* [2003] UKHL 53, [2004] 2 AC 406 at [28]–[35] per Hoffmann LJ. See the excellent discussion in Gavin Phillipson "Transforming Breach of Confidence? Towards a Common Law Right of Privacy under the Human Rights Act" (2003) 66 MLR 726.

137 *Coco v Clark* [1969] RPC 41 (Ch D).

138 *A v B (a company)* [2002] EWCA Civ 337, [2003] QB 195 at [11] per Lord Woolf CJ.

139 *Campbell v MGN* [2004] UKHL 22, [2004] 2 AC 457 at [14] per Lord Nicholls. See also *Ash v McKennitt* [2006] EWCA Civ 1714, [2008] QB 73.

140 Lord Justice Leveson, above n 9, at ch 3, [4.2].

141 See for instance the observations in *Hosking v Runting*, above n 19, at [48] per Gault and Blanchard JJ and [245] per Tipping J.

security pension,¹⁴² the application of the Hague Convention on Civil Aspects of International Child Abduction,¹⁴³ and jurisprudence in deportation and extradition cases.¹⁴⁴

Like the New Zealand Privacy Act, the Data Protection Act 1998 (UK) protects personal information held by organisations, businesses or the government. It also controls how personal information is used.¹⁴⁵ Like the Privacy Act, the Data Protection Act regulates a very distinct part of privacy protection: data or information privacy.

The protection of privacy interests in the United Kingdom and the value placed on privacy has shifted over the years due to the influence of the ECtHR jurisprudence.

3 Canada

In Canada, privacy protection is focused on individual autonomy through personal control of information.¹⁴⁶ Canada has not included a right to privacy in its key constitutional document, the Canadian Charter. However, the Supreme Court has observed:¹⁴⁷

Society has come to realize that privacy is at the heart of liberty in a modern State ... Grounded in a man's physical and moral autonomy, privacy is essential for the well-being of the individual ... The restraints imposed on government to pry into the lives of the citizen go to the essence of a democratic state.

The courts have interpreted s 7 (right to life, liberty and security of the person) and s 8 (freedom from unreasonable search or seizure) as guarding against unreasonable invasions of privacy. The Supreme Court of Canada stated that s 8 is broader than physical search: "what is protected ... is people, not places or things. The principal right ... is individual privacy, and the provision must be purposively applied to that end."¹⁴⁸ In *Godbout v City of Longueuil* the Supreme Court held that s 8

142 *R (Hooper) v Secretary of State for Work and Pensions* [2005] UKHL 29, [2005] 1 WLR 1681 at [9].

143 *Re E (Children)* [2011] UKSC 27, [2012] 1 AC 144 at [19]–[26]. See also *Neulinger v Switzerland* (41615/07) Grand Chamber, ECHR 6 July 2010, which marks the approach of the European Court of Human Rights to the Hague Convention on the Civil Aspects of International Child Abduction 1343 UNTS 89 (opened for signature 25 October 1980, entered into force 1 December 1983).

144 *Huang v Secretary of State for the Home Department* [2007] UKHL 11, [2007] 2 AC 167; *EB (Kosovo) v Secretary of State for the Home Department* [2008] UKHL 41, [2009] 2 AC 1159; *Norris v Government of United States* [2010] UKSC 9, [2010] 2 AC 287; and *ZH (Tanzania) v Secretary of State for the Home Department* [2011] UKSC 45, [2011] 2 AC 166.

145 See generally Information Commissioner's Office *A Guide to Data Protection* (London, 2009).

146 Levin and Nicholson, above n 117, at 360.

147 *R v Dymnt* [1988] 2 SCR 417 at [28].

148 *R v Colarusso* [1994] 1 SCR 20 at 60 per La Forest J.

guarantees a zone of autonomy for "choices that are of a fundamentally private or inherently personal nature."¹⁴⁹

Personal information, on the other hand, is protected by ordinary federal legislation. The Privacy Act RSC 1985 P-21 is similar to New Zealand's Privacy Act, limiting the collection, use and disclosure of personal information by government entities and establishing rules relating to the fair use of information. Furthermore, the Personal Information Protection and Electronic Documents Act SC 2000 c 5 sets out principles relating to the fair use of information by private organisations. Both Acts enable individuals to access and request correction of personal information and both are subject to oversight by a Privacy Commissioner.

Certain aspects of privacy have long been protected by causes of action such as defamation, breach of copyright, nuisance and breach of confidence. On the other hand until recently it was uncertain in Canada as to whether there is a cause of action for breach of privacy. In *Jones v Tsige* the Ontario Court of Appeal established a new tort for invasion of personal privacy which it called the tort of "Intrusion upon Seclusion".¹⁵⁰

Despite these protection mechanisms, it seems the courts are most comfortable applying privacy considerations in relation to criminal law, and for this reason "calls continue to be made for the entrenchment of an explicit and broad right to privacy in the Canadian Constitution."¹⁵¹

4 *United States*

Traditionally, Americans have preferred that their government leaves them alone. "[L]ife, liberty and the pursuit of happiness," are their predominant values.¹⁵² Nations such as Canada with its belief in "peace, order and good government" are suspect.¹⁵³ Privacy is ensured only when government leaves one alone.¹⁵⁴ Privacy is protected in the United States by means of a patchwork quilt made up of common law, federal legislation, the United States Constitution, state law and state constitutions.

149 *Godbout v City of Longueuil* [1997] 3 SCR 844 at 913.

150 *Jones v Tsige* 2012 ONCA 32.

151 Nancy Holmes *The Right to Privacy and Parliament* (Parliamentary Information and Research Service, Law and Government Division, 22 February 2006).

152 *Declaration of Independence* (1776).

153 British North America Act 1867 (UK), s 91.

154 The United States, unlike New Zealand, Canada or most European Union states, does not have an official privacy watch dog: see Levin and Nicholson, above n 117, at 359.

Privacy in the American value system plays its strongest role in a value protecting citizens against the state's intrusion.¹⁵⁵ Unsurprisingly, therefore, the privacy of physical space or things generally receives strong protection. The right to freedom from unreasonable search and seizure in the Fourth Amendment has been interpreted to include several aspects of the right to privacy.¹⁵⁶ The Supreme Court has held that a search occurs when a person expects privacy in the thing searched and that expectation is reasonable.¹⁵⁷ The Supreme Court has also recognised a right to privacy in the home where no trespass has been committed, because protecting the privacy of the home was considered "of the highest order in a free and civilized society."¹⁵⁸ In another case, *Frisby v Schultz*, concerning a law banning picketing outside residential homes, the Supreme Court stated: "a special benefit of the privacy all citizens enjoy within their own walls, which the state may legislate to protect, is an ability to avoid intrusions."¹⁵⁹

However, privacy protection in the United States is wider than just the liberty to be free from intrusion of one's home. In *Griswold v Connecticut* the Supreme Court, when striking down a state law prohibiting the distribution of contraceptives to married couples, held that the guarantees in the Bill of Rights created "zones of privacy".¹⁶⁰ More recently in *Lawrence v Texas*, the Supreme Court referred to the right to privacy when it held that Texas violated the right to liberty when it enforced against two gay men a state law prohibiting homosexual sodomy.¹⁶¹ The Court reaffirmed the implicit privacy protections contained in the Constitution, citing *Planned Parenthood of Southeastern Pa v Casey*.¹⁶²

These matters, involving the most intimate and personal choices a person may make in a lifetime, choices central to personal dignity and autonomy, are central to the liberty protected by the Fourteenth

155 See Philip Kurland "The Private I" (1976) 7 University of Chicago Magazine 8 as cited in *Whalen v Roe* 429 US 589 (1977) at n 24.

156 United States Constitution, amend IV provides:

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

157 *Katz v United States* 389 US 347 (1967).

158 *Carey v Brown* 447 US 455 (1980) at 471.

159 *Frisby v Schultz* 487 US 474 (1988) at 484–485.

160 *Griswold v Connecticut* 381 US 479 (1965) at 484.

161 *Lawrence v Texas* 539 US 558 (2003). The right to liberty is found in the United States Constitution, amends V and XIV.

162 *Planned Parenthood of Southeastern Pa v Casey* 505 US 833 (1992) at 851.

Amendment. ... "It is a promise of the Constitution that there is a realm of personal liberty which the government may not enter."

The United States constitutional tradition champions freedom of expression, protected by the First Amendment of the Constitution, over and above privacy.

The United States courts have nevertheless developed a common law cause of action for invasion of privacy, which applies as between private citizens as well as against the state.¹⁶³ That cause of action provides that "[o]ne who invades the right of privacy of another is subject to liability for the resulting harm to the interests of the other", defining four circumstances in which that right will be invaded.¹⁶⁴ This includes an action akin to the New Zealand and Canadian tort of intrusion upon seclusion and an action akin to tort as set out by the New Zealand Court of Appeal in *Hosking v Runting*.¹⁶⁵

A claim for unreasonable publicity of another's private life will succeed if the publicity would be highly offensive to a reasonable person and is not of legitimate public concern.¹⁶⁶ United States courts have distinguished public information such as public registers and information visible in a public place, from private information that would not have been obtained but for covert surveillance, theft or breach of trust.¹⁶⁷ Moreover, "publicity" refers to widespread dissemination rather than the wider meaning of "publication" in New Zealand defamation law.¹⁶⁸

The effectiveness of the tort has been challenged. A comprehensive academic review in the 1980s identified fewer than 18 cases in which a plaintiff had been successful,¹⁶⁹ concluding that the tort was not an effective means of redress and was very costly for plaintiffs to pursue.¹⁷⁰ In addition, the requirement for widespread publication is problematic when one considers the significant damage that may result from unauthorised disclosure to only one other individual, such as identity

163 American Law Institute *Restatement of the Law of Torts* (2nd ed, 1977) at § 383–394. See also William L Prosser "Privacy" (1960) 48 CLR 383.

164 American Law Institute, above n 163, at § 652A.

165 See American Law Institute, above n 163, at §§ 652B–652E.

166 See for example *Melvin v Reid* 297 P 91 (Cal 1931).

167 Prosser, above n 163, at 394–395. See for example *Cox Broadcasting Corporation v Cohn* 420 US 469 (1975); *Humiston v Universal Film Mfg Co* 189 App Div 467, 178 NYS 752 (1919); *Berg v Minneapolis Star & Tribune Co* 79 F Supp 957 (D Minn 1948); and *Barber v Time Inc* 348 Mo 1199, 159 SW 2d 291 (1942).

168 In New Zealand, publication is an essential element of the tort of defamation, but is satisfied by dissemination of the statement to another person: *Pullman v Hill & Co* [1891] 1 QB 524.

169 Diane L Zimmerman "Requiem for a heavyweight: a farewell to Warren and Brandeis's privacy tort" (1983) 68 Cornell L Rev 291 at 293.

170 At 362–363.

theft as a result of disclosing an individual's personal information. This has led to calls for the establishment of a privacy law which focuses on:¹⁷¹

... identifying (preferably by statute) those exchanges of information that warrant protection at their point of origin, rather than continuing its current, capricious course of imposing liability only if the material is ultimately disseminated to the public at large.

Like New Zealand, Europe and Canada, the United States also has a Privacy Act. The 1974 Act is the only federal omnibus Act that protects informational privacy.¹⁷² It applies only to data processing by the federal government and not to state governments or the private sector. The Act obliges federal agencies to collect information to the greatest extent possible directly from the concerned individual, to retain only relevant and necessary information, to maintain adequate and complete records, to provide individuals with rights of access to review and have their records corrected and to establish safeguards to ensure the security of the information. Other legislative regulatory measures to protect citizens from government invading their privacy include: the Electronic Communications Privacy Act 18 USC § 2510 of 1986,¹⁷³ the Privacy Protection Act 15 USC § 6501 of 1980,¹⁷⁴ the Family Educational Rights and Privacy Act 20 USC § 1232g of 1974,¹⁷⁵ the Driver's Privacy Protection Act 18 USC § 2721 of 1994¹⁷⁶ and the Right to Financial Privacy Act 12 USC § 3401 of 1978.¹⁷⁷ Furthermore, there are numerous Acts that protect citizens from each other in regard to the invasion of privacy.¹⁷⁸

171 Zimmerman, above n 169, at 362–363.

172 Privacy Act 5 USC § 552a.

173 The Act requires government officials who wish to intercept or obtain electronic communications to seek and receive permission, known as a Title III order, from a federal judge. The Act has been amended by the USA PATRIOT Act.

174 Prohibition of searching or seizing without court authorisation of any work or materials intended for dissemination to the public.

175 Protection of the privacy of student records.

176 Prohibition of the public disclosure of personal information contained in state department of motor vehicle records for marketing purposes, unless drivers expressly consent.

177 The Act is designed to protect the confidentiality of personal financial records from government.

178 For example Telephone Consumer Protection Act 47 USC § 227 of 1991; Health Insurance Portability and Accountability Act 42 USC § 1320d of 1996; Videotape Privacy Protection Act 18 USC § 2710 of 1988; and for further examples, see Levin and Nicholson, above n 117, at 364–369.

In summary, the United States is much more orientated toward values of liberty. At its core the right to privacy in the United States still takes much the form that it took in the 18th century: the right to freedom from intrusion by the state, especially in one's own home.¹⁷⁹

5 *Australia: Victoria*

The Australian Constitution does not explicitly protect privacy. In the state of Victoria, however, s 13 of the Charter of Human Rights and Responsibilities Act 2006 (Vic) (the Victorian Charter) provides for the right of an individual not to have (a) his or her privacy, family, home or correspondence unlawfully or arbitrarily interfered with; and (b) his/her reputation unlawfully attacked.¹⁸⁰

The courts, including the High Court of Australia, have already explored the meaning of s 13 of the Victorian Charter.¹⁸¹ Thus far, however, the jurisprudence has focused on the meaning of "arbitrary"¹⁸² and "unlawful", and particular aspects of the right to privacy, but has not attempted to extract the values behind the right.

Historically, the development of privacy was halted by the High Court decision in *Victoria Park Racing and Recreation Grounds Co Ltd v Taylor*, where Latham CJ stated that "no authority was cited which shows that any general right of privacy exists."¹⁸³ However, 60 years later, in *Australian Broadcasting Corporation v Lenah Game Meats Pty Ltd*, the High Court indicated that its earlier jurisprudence did not preclude the recognition of a cause of action for invasion of privacy.¹⁸⁴ Specifically, Callinan J stated:¹⁸⁵

... it seems to me that ... the time is ripe for consideration whether a tort of invasion of privacy should be recognised in this country, or whether the legislatures should be left to determine whether provisions for a remedy for it should be made.

179 Jeffrey Rosen *The Unwanted Gaze: The Destruction of Privacy in America* (Knopf Doubleday, New York, 2011) at 5.

180 This section is based on art 17 of the ICCPR.

181 See *Hogan v Hinch* [2011] HCA 4, (2011) 243 CLR 506 at [13], where the High Court noted the considerable restriction on privacy by supervision orders.

182 *WBM v Chief Commissioner of Police* [2010] VSC 219, (2010) 27 VR 469.

183 *Victoria Park Racing and Recreation Grounds Co Ltd v Taylor* (1937) 58 CLR 479 at 496.

184 *Australian Broadcasting Corporation v Lenah Game Meats Pty Ltd* (2001) 208 CLR 199. It should be noted, however, that the Court was not required to make a firm pronouncement on the existence of a tort.

185 At 335.

Gleeson CJ hinted at the value that the right to privacy seeks to protect, stating that a tort of privacy might not apply to corporations, given that privacy protects human dignity.¹⁸⁶ Similarly, Gummow and Hayne JJ (with whom Gaudron J agreed) adopted the view that privacy is based on the fundamental value of personal autonomy, which can only be invoked by natural persons, not corporations, thereby rejecting the idea that corporations have a right to privacy.¹⁸⁷ The Court's approach in *Lenah Game Meats* is more aligned with the United Kingdom approach, protecting private information based on breach of confidence.

In contrast, the Australian Law Reform Commission in its *Unfair Publications: Defamation and Privacy* had considered the matter of privacy more comprehensively in light of intrusion on solitude or seclusion, appropriation of identity, public disclosure of private facts and display in a false light.¹⁸⁸

Since 2001, the lower courts have used *Australian Broadcasting Corporation* to develop a tort of invasion of privacy,¹⁸⁹ though recent decisions to the contrary suggest that Australian law is not yet settled in this area.¹⁹⁰

Like the other countries Australia protects data collection. The Privacy Act 1988 (Cth) regulates the handling of personal information about individuals. This includes the collection, use, storage and disclosure of personal information. The Privacy Act includes 11 Information Privacy Principles that apply to the handling of personal information by most Australian, ACT and Norfolk Island public sector agencies and 10 National Privacy Principles that apply to the handling of personal information by large businesses, all health service providers and some small businesses and non-government organisations. There is isolated protection of privacy by special subject matter legislation like the Human Rights (Sexual Conduct) Act 1994 (Cth).

C Summary

The preceding analysis has shown that privacy rights are drawn from more than one provision or source, with some jurisdictions reading privacy protections into narrower constitutional provisions (such as Canada and the United States), and others developing rights to privacy through the

¹⁸⁶ At 41 and 43.

¹⁸⁷ At 132.

¹⁸⁸ Australian Law Reform Commission *Unfair Publications: Defamation and Privacy* (ALRC Report 11, 1979) at 130–131.

¹⁸⁹ See for example *Jane Doe v Australian Broadcasting Corporation* [2007] VCC 281.

¹⁹⁰ *Kalaba v Commonwealth of Australia* [2004] FCAFC 326; and *Giller v Procopets* [2008] VSCA 236 at [129] per Asher J (rejecting a tort of privacy). Contrast *Grosse v Purvis* [2003] QDC 151 at [81]–[706]; and *Jane Doe v Australian Broadcasting Corporation*, above n 189. For discussion, see Des Butler "A Tort of Invasion of Privacy in Australia" (2005) 29 MULR 339 at 340.

common law (such as in the United Kingdom). While the Victorian Charter, the European Convention, and Germany's Basic Law contain the most comprehensive statements of the right to privacy, common to all of the jurisdictions is the need for judicial interpretation to define the parameters of the right. Experience has demonstrated that recognising a general right to privacy does not automatically subordinate other rights and values, but simply adds another ingredient to the evaluation. The outcome of that evaluation, however, generally depends on the interests that the right seeks to protect. The philosophical bases underlying the protection of privacy interests also differ between jurisdictions, thus resulting in varying degrees of protection. Compare, for example, the United States where privacy protection stems from the inviolability of the home – a principle fundamental to individual liberty¹⁹¹ – and Germany and the European Union where the root of privacy protection is grounded in the dignity of the individual – an essential concept of the Basic Law.¹⁹² However, one privacy value is common in all the surveyed jurisdictions: the protection of one's data. The new technologies have probably forced the acceptance of a common privacy value based on data protection.

In contrast, the New Zealand Law Commission in its study paper appears to found privacy protection on *both* pillars: the autonomy of humans to live a life of their choosing, and the equal entitlement of people to respect.¹⁹³ This is in spite of Baragwanath J's comment suggesting that privacy is more closely linked with human dignity.¹⁹⁴ By avoiding phrases like "dignity" or "liberty", core human rights principles, the Commission avoids favouring one philosophical basis over the other, an approach which does not strengthen privacy protection in New Zealand by any means. Determining the philosophical basis for the protection of privacy interests is important, as it helps to explain the emphasis to be placed on *how* those interests are to be protected, and to what extent. The Law Commission's failure to emphasise which of the two bases should prevail may be an oversight, but it might equally be reflective of the lack of importance that New Zealand society places on the right to privacy.

V BENEFITS OF INCLUDING A RIGHT TO PRIVACY IN THE BILL OF RIGHTS ACT

The survey of privacy protection in New Zealand and the different countries in the previous parts revealed a different level of privacy protection but also a different underlying value that privacy regulation protects in each of the foreign jurisdictions. The common value identified

191 Levin and Nicholson, above n 117, at 384.

192 The current version of the European Constitution states that the European Union is founded on the value of human dignity, that the European Union's *Charter of Rights* is founded on the value of human dignity, and devotes an entire Title within that Charter to dignity.

193 Law Commission *Privacy Concepts and Issues*, above n 16, at [4].

194 *Avowal Administrative Attorneys*, above n 81, at [79].

between the different jurisdictions, including New Zealand, is the protection from misuse of personal data. In the following part, this article examines what difference the inclusion of a right to privacy in the Bill of Rights Act would make.

A Symbolic Recognition of the Importance of Privacy

The Bill of Rights Act is a powerful symbol of the values which New Zealanders consider worthy of protection. As Thomas J considered in *Brooker*:¹⁹⁵

Bills of rights reflect the fundamental and enduring values of society as a whole. They comprise the basic principles by which the community wish to interact and live in a representative democracy.

If, as McGrath J considered, privacy is "an aspect of human autonomy and dignity",¹⁹⁶ this would justify including a right to privacy on the basis that it is a value of fundamental importance. Furthermore, the reasoning of Thomas J that the courts should recognise the right to privacy because it would "simply ... bring legal discourse into harmony with an established and fundamental community value"¹⁹⁷ could also be applied as justification for introducing a right to privacy into the Bill of Rights Act. In *Brooker*, both Thomas J and McGrath J (the two dissenting judges) afford privacy such an importance within the New Zealand legal framework that an incorporation of a right to privacy seems to be only stating the status quo.

While the parameters of the right to privacy may be undefined, all of the rights in the Bill of Rights Act are expressed generally and are subject to legislative restriction and judicial interpretation. Just as the tort of privacy has developed incrementally, the boundaries of the right would also be defined by reference to particular cases. Since the courts already undertake evaluations of the right to privacy in relation to the exercise of state powers such as search and seizure, the practical effects of incorporating a right to privacy would not launch the courts into the "great unknown". Nevertheless, the symbolic value of including the right to privacy is significant.

B Increased Legislative Scrutiny of the Impact of Legislation on Privacy Interests

After a Bill has been introduced to Parliament, the Attorney-General must bring to the attention of the House any apparent inconsistencies with the rights and freedoms contained in the Bill of Rights Act. In one such case the Attorney-General submitted a report to Parliament in respect of a Bill that would allow police to take DNA samples from people charged with any imprisonable

¹⁹⁵ *Brooker v Police*, above n 41, at [170].

¹⁹⁶ *Brooker v Police*, above n 41, at [123].

¹⁹⁷ At [225].

offence, even if they were later acquitted.¹⁹⁸ The Attorney-General noted that the taking of DNA constituted a search and seizure under s 21 of the Bill of Rights Act, thus raising an issue of privacy.¹⁹⁹ The Attorney-General further observed that the "requirements [stipulated in s 21] are also found in the protection of personal privacy under Article 17 of the [ICCPR] and in the broader constitutional principle of the rule of law."²⁰⁰ If a right to privacy were enacted in the Bill of Rights Act, the Attorney-General would be required to consider aspects of privacy in cases beyond those concerning issues of search and seizure. Proposed legislation would be examined with respect to broader issues of privacy before being enacted into law, which could draw the legislature's attention to potential limitations on other elements of the right to privacy.

C Greater Judicial Certainty Regarding the Status of Privacy Interests

The absence of a right to privacy in the Bill of Rights Act has led to uncertainty surrounding privacy concerns and how those concerns are to be addressed by the courts. While the courts have not had difficulty in recognising privacy as an important value in the abstract, there has been difficulty in identifying *when* privacy interests matter, and *how* they are to be balanced against other rights and interests.

On the one hand, there have been several positive affirmations of the importance of privacy rights. For instance, in *Avowal*, Baragwanath J observed that privacy matters are "a face of human dignity that is recognised by both common law and statute."²⁰¹ Similarly, Thomas J in *Brooker* considered the right to privacy to be the most basic protection of human dignity, stating:²⁰²

The nexus between human dignity and privacy is particularly close, including the link between a person's dignity and the sanctity of his or her home where their privacy is nurtured.

In the same case, Elias CJ observed the importance of privacy in the home as a value which "may properly lead to restrictions on freedom of expression, even if public order is not at risk."²⁰³ The Chief Justice also noted that the rights in the Bill of Rights Act were not the only ones to be

198 Christopher Finlayson *Report of the Attorney-General under the New Zealand Bill of Rights Act 1990 on the Criminal Investigations (Bodily Samples) Amendment Bill* (10 February 2009).

199 At [6].

200 At [8].

201 *Avowal Administrative Attorneys*, above n 81, at [79].

202 *Brooker v Police*, above n 41, at [196] citing Aharon Barak *The Judge in a Democracy* (Princeton University Press, Princeton, 2006) at 132–133; and EW Thomas *The Judicial Process: Realism, Pragmatism, Practical Reasoning and Principles* (Cambridge University Press, Cambridge, 2005) at 332–333.

203 At [11].

safeguarded, nor did they always trump other values: the right to privacy and the "associated right to feel secure in one's home" also deserved legal protection.²⁰⁴

On the other hand, the decision of the Supreme Court in *Brooker* also reflects the difficulties the courts have faced in determining how privacy interests should be balanced against other competing interests, specifically freedom of expression. In that case, Mr Brooker was charged with disorderly behaviour under s 4(1)(a) of the Summary Offences Act for singing protest songs outside the home of a police constable knowing that she had finished a night shift. A majority of the Court held that Mr Brooker's conduct was not "disorderly" and quashed his conviction.²⁰⁵

As part of the inquiry, interpreting s 4(1)(a) consistently with the Bill of Rights Act required the Court to identify any relevant competing rights and interests.²⁰⁶ While some of the judges considered that Mr Brooker's right to freedom of expression was to be balanced against the interest in maintaining public order,²⁰⁷ other judges considered that the appropriate counterweight was the constable's right to privacy.²⁰⁸ The question is: why could it not be balanced against both? If, as in the case of Mr Brooker, behaviour in a public space disrupts public order *because* it encroaches upon private interests, those interests should be relevant to the inquiry. While the Summary Offences Act is aimed at maintaining public order, the interest in public order lies in enabling a public space to be enjoyed by the individuals inhabiting it. Privacy interests are inherent in the interest in public order. The absence of a right to privacy in the Bill of Rights Act may have discouraged some members of the Bench from considering privacy as relevant to the offence of disorderly behaviour.

Confusion surrounding the status of the interest in privacy can also be demonstrated in the judgment of Thomas J, who attempts to deconstruct the difference between "rights", "values" and "limitations on rights". Adopting the view that "privacy has not yet been judicially accorded the status of a right", Thomas J instead balanced the "fundamental value underlying the right to freedom of expression against the fundamental value of privacy."²⁰⁹ His Honour also noted that privacy was excluded from the Bill of Rights Act in its initial formulation as supreme law, but the substantive

204 At [8].

205 Per Elias CJ, Tipping and Blanchard JJ. McGrath and Thomas JJ dissented.

206 Section 6 of the Bill of Rights Act provides that an interpretation consistent with the Bill of Rights Act is to be preferred.

207 Elias CJ was of the view that the aim of the Summary Offences Act was not to protect privacy interests, but public order. Therefore, privacy considerations should not influence the interpretation of "disorderly". That conclusion was reached by referring to the text of the statute and the fact that other legal provisions protected privacy: at [11]. Tipping J's judgment did not refer to privacy interests.

208 Per Blanchard, McGrath and Thomas JJ.

209 At [164].

rights and freedoms were not significantly amended when it was enacted as an ordinary statute.²¹⁰ In the light of this, Thomas J stated:²¹¹

... it seems incongruous to suggest that when interpreting a statute the Courts should not prefer a meaning that is consistent with the citizens' "right" to privacy in terms of s 6. ... in a document designed to protect and promote fundamental rights by ensuring that legislation is interpreted in harmony with those rights, the express omission of a right of privacy should not inhibit the Court from giving privacy the status of a right.

In contrast, Elias CJ was of the view that the absence of a right to privacy in the Bill of Rights Act indicates that the courts should place a lesser emphasis on privacy than on the freedoms in the Bill of Rights Act, stating:²¹²

I have misgivings about whether it is open to the Courts ... to adjust the rights enacted by Parliament by balancing them against values not contained in the New Zealand Bill of Rights Act, such as privacy, unless the particular enactment being applied unmistakably identifies the value as relevant.

This reluctance was shared by Allan J in *Andrews v Television New Zealand Ltd*, a case concerning the tort of privacy.²¹³ The judge in that case looked to European case law to assess reasonable expectations of privacy, but cautioned that care is needed when doing so because:²¹⁴

Privacy is expressly protected by the European Convention on Human Rights, and ranks equally alongside the right to freedom of expression. The latter freedom is enshrined in the New Zealand Bill of Rights Act 1990, but privacy is not.

Furthermore, Anderson P in *Hosking* considered that elements of privacy did not comprise a right but "aspect[s] of a value", stating that it was erroneous to treat "that value" as a right, or treat s 14 of [the Bill of Rights Act] as a value;²¹⁵ the evaluation was "not about competing values, but whether an affirmed right is to be limited by a particular manifestation of a value."²¹⁶ The labels used by the judge to distinguish between privacy and freedom of expression reflect the judge's view that freedom of expression is more dominant in the hierarchy of rights.

210 At [227].

211 At [227].

212 At [40].

213 *Andrews v Television New Zealand Ltd*, above n 57, at [55].

214 At [40].

215 *Hosking v Runting*, above n 19, at [265].

216 At [266].

It appears to be widely accepted by the courts that some protection of expectations of privacy exists in New Zealand. The diverging opinions indicate, however, that there remains judicial uncertainty as to the appropriate weight to be given to privacy within the New Zealand legal framework and how it should be classified. Including a right to privacy in the Bill of Rights Act would enable the courts to turn their attention away from such discussions and focus instead on its application and incremental development.

D A Change in the Balancing of Interests

Having argued in the previous part that an inclusion of a right to privacy in Bill of Rights Act would shift the focus to the application of the right and its development, the following part will discuss where the right to privacy might shift the discussion within the legal framework.

1 Freedom of expression versus the right to privacy

Traditionally, in common law countries like New Zealand freedom of expression has trumped privacy concerns.²¹⁷ While there is a very strong public interest in maintaining free press and the public's right to be informed, preventing unreasonable privacy breaches is equally important. As the Bill of Rights Act applies only to state actors, introducing a right to privacy would have the effect that state entities and agencies would be restricted from disclosing private information to the media and others, whereas privately-owned media organisations would not be directly liable.

Recognising privacy as a fundamental right may also affect the meaning of a "justifiable incursion" on one's privacy in relation to other areas, such as the Privacy Principles in the Privacy Act. Similarly, increased recognition of the right to privacy could shift the courts' evaluation of the balance between freedom of expression and privacy. At present, if information is considered "public", widespread publication is permissible, even though most people would not expect that information to be made widely available. For instance, in *Andrews*, Mr and Mrs Andrews (who were not public figures) sued Television New Zealand for breaching their privacy by broadcasting footage of a car accident in which they were involved. In the accident, the Andrews, while not seriously injured, were trapped and required emergency assistance. Emergency services attended the scene, accompanied by a camera operator who filmed the rescue for Television New Zealand's upcoming series depicting the real-life work of fire-fighters. The footage was later shown in the programme without seeking the Andrews' consent. Although the programme emphasised the fire-fighters' work, the couple could be identified as their faces were insufficiently obscured and their first names were used. The Andrews brought a claim on the basis of the tort of invasion of privacy.

217 See for example the observation of Lord Nicholls in *Campbell v MGN Ltd*, above n 139, at [12]:

The importance of freedom of expression has been stressed often and eloquently, the importance of privacy less so. But it, too, lies at the heart of liberty in a modern state. A proper degree of privacy is essential for the well-being and development of an individual.

Allan J held that since the accident occurred in public, no right to privacy attached to the fact and circumstances of the accident. Accordingly, it was able to be broadcast on national television. The judge, nevertheless, distinguished the circumstances of the accident from a personal conversation between the couple while they were trapped in their car that was also filmed and broadcasted. The judge held that the conversation attracted a reasonable expectation of privacy because the couple would not have expected it to be heard beyond earshot.²¹⁸ By the same reasoning, however, the couple may also not have expected the fact of their involvement in a car accident to be known beyond those using the roadway or attending the scene.

Nevertheless, Allan J went on to hold that the second element of the tort was not made out, as a reasonable person would not consider the publication of the personal conversation to be highly offensive.²¹⁹ The facts did not meet the threshold of "truly humiliating."²²⁰ The judge observed that the plaintiffs appeared to be more concerned with the fact Television New Zealand had not sought their consent to using the footage, though noted that failing to obtain consent was not an element of the tort.²²¹

Even if both elements had been successfully made out, the defence of legitimate public concern would have been upheld. The television programme had a "serious underlying purpose" and the details of the accident provided "a necessary degree of verisimilitude".²²² The judge stated that since the invasion of privacy was minor, the degree of public interest required to successfully defend the claim would not have been high.²²³ The fact that the same public interest could have been satisfied while enabling the couple to remain anonymous was not a barrier to the defence.

Andrews provides strong evidence that the tort of privacy does not sufficiently address privacy concerns in New Zealand. While the stringent criteria undoubtedly exist in order to balance privacy considerations against competing rights (such as freedom of expression), it seems strange that subsequent publication is not analysed separately from initial breach. A comparative analysis of a right to privacy might lead the courts to accept, like Tipping J in *Hosking v Runting*, the value of

218 *Andrews*, above n 57, at [66].

219 It has to be noted that Tipping J in *Hosking v Runting*, above n 19, at [256] said that he would prefer that the second requirement, the question of offensiveness, be controlled within the need for there to be a reasonable expectation of privacy. Elias CJ in *Rogers v Television New Zealand Ltd* [2007] NZSC 91, [2008] 2 NZLR 277 [*Rogers* (NZSC)] at [25] also doubted that the element of offensiveness should be part of a tort of privacy.

220 *Andrews*, above n 57, at [126].

221 At [70].

222 At [92].

223 At [93].

dignity and personal autonomy as part of the underlying value of privacy.²²⁴ Part of personal autonomy must be that one can decide who holds information about oneself and how that information is used. Filming a rescue of a traffic accident, or taking a person's picture while in public, are minor intrusions and might be justified in certain circumstances, like in *Andrews* where the main focus was a legitimate one. It is the subsequent publication which raises new privacy concerns. The subsequent publication which made the plight of the Andrews suddenly available to an undefined number of people without their consent is where a different balance might be struck if a right to privacy is incorporated into the Bill of Rights Act.

Reconsidering *Peck* in line with the approach adopted in *Andrews*, it is highly likely that the footage depicting the applicant after his suicide attempt would have been permissible because it occurred in public, and there is a prevailing and legitimate public interest in broadcasting the footage as means of reducing crime. While the footage may well be in the public interest, identification of the applicant is not. In both *Peck* and *Andrews*, broadcasting footage which is of legitimate interest to the public could be achieved without breaching the applicant's or the couples' privacy simply by properly obscuring their identities.²²⁵

Even more so could a right to privacy, enshrined in the Bill of Rights Act, shift the balance when the court has to decide whether to grant injunctive relief of a publication in any form to halt an invasion of privacy. Traditionally, due to the principle of freedom of the media, which is reinforced by s 14 of the Bill of Rights Act, the right of freedom of expression, prior relief is exercised by the courts only for clear and compelling reasons.²²⁶ According to the courts' jurisprudence, any prior restraint of free expression requires passing a much higher threshold than the arguable case standard.²²⁷ A right to privacy in the Bill of Rights Act would be a serious counter-weight to freedom of expression in the s 5 balancing exercise. Judges would not need to balance the right to freedom of expression with a privacy *value* but with a right of privacy. *Prima facie* both rights are of equal value. The notions of dignity and personal autonomy would, it is argued, allow the courts to limit freedom of expression, especially of the media, in situations where the publication of personal data could not be foreseen and/or has a potentially lasting impact.

²²⁴ *Hosking v Runting*, above n 19, at [239]; and see for a more detailed discussion: Andrew Butler and Petra Butler *New Zealand Bill of Rights Act: a commentary* (Lexis Nexis, Wellington, 2005) at [13.16.13].

²²⁵ *Peck*, above n 110; and *Andrews*, above n 57. It has to be noted that the Court of Appeal in *Hosking v Runting* showed some sympathy with *Peck* and the lack of a domestic remedy. However, in the discussion of *Peck* the judges emphasised the possibility that the local authority acted outside its powers when collecting the photos rather than the breach of privacy of Mr *Peck*: *Hosking v Runting*, above n 19, at [115] and [201]. See also *Rogers* (NZSC), above n 219, at [38].

²²⁶ *Attorney-General for the United Kingdom v Wellington Newspapers Ltd (No 2)* [1988] 1 NZLR 1; *Television New Zealand Ltd v Solicitor-General* [1989] 1 NZLR 1; and *Hosking v Runting*, above n 19, at [151] and following per Gault J.

²²⁷ *Hosking v Runting*, above n 19, at [157].

2 *The presumption of open justice*

New Zealand criminal law contains a presumption of open justice. The outer bounds of the public interest in open justice are demonstrated in *Rogers v Television New Zealand Ltd*.²²⁸ In a rather extraordinary set of circumstances, the respondent was taken in for questioning regarding a murder, when another man had already been convicted of manslaughter in respect of the same deceased. While in custody and being recorded on video, the respondent confessed to having killed the deceased. The police supplied the tape to Television New Zealand on the condition that it would not be published until after the trial. The person found guilty of manslaughter successfully appealed conviction and the respondent stood trial for murder. With the videotape ruled inadmissible, he was found not guilty. Following his acquittal, the videotape was played on television.

The majority of the Court of Appeal held that though the respondent had surrendered his expectation of privacy during the trial, there was nevertheless a reasonable expectation of privacy in the videotape itself. In any case, the Court held that the defence of legitimate public concern prevailed due to it being a matter of public debate, as well as of low privacy value, and because prohibiting access to the evidence would "permit the courts to operate in secret."²²⁹

On further appeal, the Supreme Court held that there was no reasonable expectation of privacy in the videotape and therefore no invasion of privacy.²³⁰ The result might be justified due to the unusual circumstances of the case. It is argued that a right to privacy in the Bill of Rights Act would have, however, forced the judges to balance the rights differently. The Court seemed to have weighed Rogers' individual interest in rehabilitation and not being sentenced by public opinion²³¹ negligible in comparison to the public interest in maintaining confidence in the administration of justice through the principle of openness.²³² It is not clear why the principle of open justice requires the videotape of a police interview to be made publicly available. The principle is satisfied by the public attending the trial and the news coverage during and at the end of the trial.²³³

228 *Television New Zealand Ltd v Rogers* [2007] 1 NZLR 156 (CA); *Rogers* (NZSC), above n 219.

229 At [89] per O'Regan and Panckhurst JJ citing Cory J in *Vickery v Nova Scotia (Prothonotary of the Supreme Court)* [1991] 1 SCR 671 at 706.

230 See for example *Rogers* (NZSC), above n 219, at [74] per Tipping J.

231 In regard to the recognition of Rogers' interests, see *Rogers* (NZSC), above n 219, at [103] per McGrath J.

232 At [74] per Tipping J, [52] per Blanchard J and [105] per McGrath J.

233 Compare *Vickery v Nova Scotia Supreme Court (Prothonotary)*, above n 229, at 685 per Stevenson J. See also *R v B* [2008] NZCA 130, [2009] 1 NZLR 293 at [47]–[48] where the Crown argued that it was reasonable to rely on jurors to put aside irrelevantly prejudicial material with the assistance of an appropriate direction. This is true. But only up to a point. That point is recognised by the existence of the severance procedure, and of the restrictions on propensity evidence. Both of these procedures aid the jury and their delivery of justice by pruning irrelevant evidence from the information before them. A suppression

The principle of open justice can also be observed in the law regarding participants in the criminal process, including: accused persons, jury members and witnesses. One of the key areas in which a presumption of openness applies is in respect of name suppression in criminal trials. In *R v B* the Court of Appeal had to decide whether interim name suppression should be awarded during trial.²³⁴ The Court discussed how publishing a person's name could impact on the presumption of innocence and cause harm to the person's reputation following acquittal. While a person may be declared formally innocent, the "court of public opinion" can be less forgiving.

Baragwanath J referred to the "overlapping public interest" in human dignity and the evolving right to privacy.²³⁵ The judge accepted that there was a "real likelihood of injury to the defendant's privacy and personal dignity", but that publication of the name could not be considered a "penalty" and so was not an affront to the presumption of innocence.²³⁶ If it were a penalty, however, name suppression would need to be granted in every case, which the judge considered too extreme because of the "presumption of openness".²³⁷ The public has a right to know what happens in the courts and in this respect, the media act as the eyes and ears of the community.²³⁸ The unnecessary secrecy of name suppression in such instances would interfere with this public interest.²³⁹

Further examples of where the courts have been required to balance the interest in open justice against competing privacy considerations can be found in: *R v Chakanyuka* where the defendant requested name suppression for the purpose of protecting the privacy of his wife (the victim) and their two children;²⁴⁰ and *R v King* in relation to the privacy interests of jury members.²⁴¹

order preventing that same irrelevant information becoming available in fora other than the courtroom should be seen in the same light.

234 *R v B*, above n 233.

235 At [43].

236 At [54].

237 At [55].

238 At [55].

239 Note that William Young P and Robertson J also agreed with the result, but did not discuss privacy concerns as explicitly as Baragwanath J. The majority held at [80] per William Young P:

Not granting interim name suppression in this case thus risked undermining the fairness of the trial process. In this context, where all that is at stake is postponing publication, fair trial rights must trump open justice considerations (including those associated with the possibility that other complainants might come forward).

240 *R v Chakanyuka* HC Auckland CRI-2008-092-016723, 16 February 2010. The judge held that, on the balance, the "general community interest in, and entitlement to know an offender's identity" combined with the risk to public safety meant that name suppression was declined.

241 *R v King* [2008] NZCA 79, [2008] 2 NZLR 460. In this case the Court of Appeal held that the police could access the criminal records database to provide the prosecution with non-disqualifying criminal histories of

Introducing a right to privacy to the Bill of Rights Act would empower the courts to have much broader recognition of privacy considerations without unduly restricting the interest in open justice. A general right to privacy would inflate the status of privacy considerations from a "fundamental value" to a "fundamental right". While the interest in open justice would remain a fundamental objective of the judiciary, that interest would be subject to justifiable limitations. One such limitation would include the right to privacy of all persons affected by the proceedings, particularly in relation to the granting of name suppression. While balancing the right to privacy of the people involved in the court process and the principle of open justice the court has to assess what the public interest in the court proceedings actually is in the particular case and whether the reporting of all details is necessary to guarantee open justice.²⁴²

VI WHAT SHOULD NEW ZEALAND'S RIGHT TO PRIVACY LOOK LIKE?

While the right to privacy has been embraced to a certain extent by all of the jurisdictions previously discussed, each manifestation reflects that jurisdiction's socio-political idiosyncrasies. New Zealand has, fortunately, not experienced severe totalitarian oppression like Europe, nor was this country established in the context of revolution, like the United States. Provisions born out of such experiences may not be appropriate in the local context. New Zealand should avoid the direct transposition of a right to privacy from any of those jurisdictions, opting instead for a right which adequately reflects local socio-political culture, values and history.

If a general right to privacy were introduced in New Zealand, it would sit alongside existing privacy protections, and its application would need to be developed through the common law. A right to privacy should exist harmoniously with other provisions of the Bill of Rights Act. One option would be to amend the right to freedom of expression to provide that the right must be exercised with respect for the rights and reputation of others, as in the ICCPR. However, framing privacy as a restriction on a right is not the most desirable option. Rather, including a separate right to privacy would be far more effective for three reasons:

First, viewing privacy as a restriction has a "negative" overtone and does not recognise the full ambit of privacy as an important value in its own right. Furthermore, it would not alter the current judicial approach of treating privacy as a reasonable limitation on exercises of state power or other rights.

potential jurors to assist the Crown to decide whether to oppose a person on the jury list. Whereas, since the juror's privacy interests warranted consideration, the same disclosure should not be made to the defence unless the defendant could point to some risk that in the case at hand jurors with criminal records may be biased against the defendant.

242 See for a more detailed discussion: Butler and Butler, above n 224, at [13.12.9]–[13.12.13].

Secondly, privacy concerns transcend freedom of expression. While freedom of expression is often found at the opposite end of the balancing inquiry, it is not the only possible counterweight. Privacy is also relevant to other incursions into the personal lives of individuals by the state and having a stand-alone would allow privacy to be considered in respect of all exercises of state power.

Thirdly, the right to privacy would not be unconstrained; it would be appropriately weighed against other rights through the operation of s 5 of the Bill of Rights Act and the balancing exercise undertaken by the courts.

Fourthly, a judicial creation of a quasi right to privacy outside the paradigm of the Bill of Rights Act would be inconsistent with the scheme of the Bill of Rights Act and could lead to difficulties in reconciling it with s 5 of the Bill of Rights Act.

Accordingly, in the view of the author, a formulation of the right to privacy similar to that of the European Convention should be adopted. Due to the internal limitations on rights contained in the Bill of Rights Act, a more streamlined statement of the right could be enacted. One possible formulation is:

Right to privacy

Everyone has the right to respect for his private life, his home and his correspondence.

The suggested formulation omits reference to "family life", as included in the ICCPR and European Convention rights to privacy. Whether a right to family life should be included in the Bill of Rights Act warrants more extensive consideration than can be undertaken in this paper. The Bill of Rights Act currently excludes all references to the family, even though certain of the rights provided for derive from the language of the ICCPR. This exclusion suggests that New Zealand should consider the inclusion of the right to family life as a separate exercise, rather than piggy-backing it onto privacy. It may be that family rights veer too closely to "social" rights, which Parliament has been slow to protect by statute.²⁴³ The courts, however, may hold that the family is an important part of individual privacy and so recognise the right to family life through common law development of the right to privacy.

VII CONCLUSIONS

The notion of privacy is a familiar legal concept, yet also a concept whose parameters are hard to define. New Zealand currently affords a certain level of privacy protection through piecemeal legislation, judicial interpretation of the varying statutory provisions, as well as a significantly restricted tort of invasion of privacy. The comparative analysis undertaken in the first part of this paper demonstrates that the right to privacy is protected in a number of countries, albeit in various

²⁴³ For instance, New Zealand ratified the International Covenant on Economic, Social and Cultural Rights 993 UNTS 3 (opened for signature 19 December 1966, entered into force 23 March 1976) on 28 December 1978, but the rights and freedoms in that instrument remain largely unincorporated into domestic law.

ways and with differing levels of intensity. In conjunction with the various international instruments providing for a general right to privacy, the legal regimes discussed in this paper may provide significant guidance to the New Zealand legislature to help determine the appropriate scope of protection, and the most effective means of doing so.

In light of the Law Commission's paper *A Conceptual Approach to Privacy* the Commission argues that privacy is based on two key dimensions: "informational privacy" and "local privacy" (or "spatial privacy").²⁴⁴ It appears that the Commission considers the protection of privacy to be based on two foundational pillars: individual autonomy and equal entitlement to respect. While both are philosophically sound as a basis for protecting individuals' privacy, the Commission's failure to address the notion of privacy with respect to fundamental human rights concepts, such as dignity and liberty, may lead to further complications for the courts when determining whether to extend the protection of privacy, and in what direction. Furthermore, the failure to recognise, or even introduce the possibility of a stand-alone right to privacy could send a message to the courts as to the weight that should be accorded to the privacy interests of individuals.

Including a general right to privacy in the Bill of Rights Act would amount to a clear commitment to the value of privacy in New Zealand society – a commitment which is currently lacking, due to the unclear nature of current privacy protections. While introducing the right to privacy would not immediately ground it as a right intended to protect human dignity or personal liberty (or both), its introduction would send an undoubtedly clear indication to the courts of the emphasis that should be placed on privacy considerations. Furthermore, as a stand-alone right, it would provide the courts with an interpretative backbone to develop the law of New Zealand in light of the right to privacy. Over time, judicial application of the right would clarify the underlying basis of privacy protection in New Zealand, thereby allowing for a much more consistent approach to privacy issues than exists today.

244 Law Commission *A Conceptual Approach to Privacy*, above n 15, at [112].

