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ARTICLE

Caught in the Web: Do New Zealand's Privacy Laws Adequately Protect Children from the Modern Phenomenon of "Sharenting"?

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With the prevalence of smartphones and social media platforms in our modern world, parents are increasingly ditching the family photo album in favour of posting their children's memories online. In the United States, 92 per cent of children have a digital footprint by the age of two. This 21st century phenomenon, known as sharenting, brings several advantages. It allows increased connection with family and friends, the maintenance of a sense of self, identity and belonging, and the documentation of key milestones in a child's life. However, sharenting also has its dark side. In particular, it poses a significant risk to children's privacy, especially when children are not given any control over the information shared. Unfortunately, New Zealand laws currently do not adequately protect children's interests in this area. To better provide for children's privacy interests online, New Zealand lawmakers need to look to overseas jurisdictions and adopt a statutory right to erasure and the common law tort of misappropriation of likeness. The Government should also initiate a public health communications campaign to educate parents on the harms of sharenting. These legal and educational reforms will better protect children from their parents' posting, while also respecting parental authority and freedom of expression.

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I Introduction

In September 2016, reports surfaced claiming that a teenager in Austria was suing her parents for refusing to remove 500 childhood photos of her, which they had posted on social media.[1] Although the story was later proven false,[2] it highlights the reality of a common practice among parents in our modern age. With smartphones and social media platforms making it all too easy to share photos, stories or other forms of information with the world, parents are increasingly ditching family photo albums in favour of posting their children's memories online.[3] As well as assisting with documenting key milestones, sharing a child's life online helps parents stay connected with friends and family, and maintain a sense of self, identity and belonging.[4] The practice has become such a cultural norm that 92 per cent of children in the United States have a digital footprint by age two, while 23 per cent have an online presence before birth.[5]

However, despite the advantages of documenting a child's life online, the practice also poses several risks for children. Even the most well-intentioned of parents may subject their children to embarrassment or online abuse and bullying.[6] More nefariously, sharing a child's information online may lead to "digital kidnapping", whereby a child's image is exploited for pornographic or sex trafficking purposes.[7] Furthermore, as children grow up, the practice makes it difficult for them to craft their own self-identity separate from the online identity crafted by their parents' posts.[8] These unfortunate realities create privacy concerns when a parent posts about their child online, especially when children are not given any control over the information shared.

This article will focus on the privacy concerns associated with "sharenting", which American legal professor Stacey Steinberg defines as "the ways many parents share details about their children's lives online".[9] In particular, it will assess whether New Zealand law provides adequate protection for children's privacy interests in the context of sharenting. This article defines a child as an individual under the age of 18, in line with the United Nations Convention on the Rights of the Child (UNCRC).[10] It only discusses non-commercial forms of sharenting. The practice of commercial sharenting, whereby parents make an income from posting their children online, warrants a separate article.

Part II will set out some preliminary considerations by defining the concept of privacy and outlining competing interests. Part III will canvass the statutory and common law in

1 Julian Robinson "Daughter, 18, sues her parents for posting embarrassing photographs of her as a child on Facebook" *Daily Mail Australia* (online ed, Australia, 14 September 2016).
2 Francisco Perez "Austrian trial over embarrassing Facebook pictures debunked" *DW* (online ed, Germany, 19 September 2016).
3 Sarah Sorensen "Protecting Children's Right to Privacy in the Digital Age: Parents as Trustees of Children's Rights" (2016) 36 Child Legal Rts J 156 at 156.
4 Nikki Chamberlain "Privacy and Children" in Nikki Chamberlain and Stephen Penk (eds) *Privacy Law in New Zealand* (3rd ed, Thomson Reuters, Wellington, 2023) 387 at 414–415.
5 "How Many 2-Yr-Olds Have Online ID? 92 Percent" *ABC News* (online ed, New York, 9 October 2010).
6 Chamberlain, above n 4, at 415.
7 At 416.
8 Gaëlle Ouvrein and Karen Verswijvel "Sharenting: Parent adoration or public humiliation? A focus group study on adolescents' experiences with sharenting against the background of their own impression management" (2019) 99 Child Youth Serv Rev 319 at 320.
9 Stacey B Steinberg "Sharenting: Children's Privacy in the Age of Social Media" (2017) 66 Emory LJ 839 at 842.
10 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 1.

New Zealand to assess the adequacy of New Zealand's law in recognising a child's privacy interests in the context of sharenting. Part IV will explore legal protections available in overseas jurisdictions. Part V will make legal and non-legal recommendations for reform. Ultimately, I will conclude that the law in New Zealand does not adequately protect a child's privacy interests from sharenting. To better provide for these privacy interests, New Zealand should adopt a statutory right to erasure and the common law tort of misappropriation of likeness. The Government should also initiate a public health communications campaign to educate parents on the harms of sharenting and attempt to minimise incidents of sharenting in the first place.

II Some Preliminary Remarks

A few preliminary issues must be explored before assessing the current state of the law and proposing legal reform. The first is defining privacy as a concept and the specific privacy interests that need to be protected in the sharenting context. The second is to outline other interests that compete with a child's privacy interests. Any proposed law reform must strike a reasonable balance between a child's privacy and these competing interests.

A *Privacy as a concept*

Academics generally accept that privacy is an elusive concept, with no one particular definition able to capture its entire form.[11] The concept has been described as multi-faceted and "plastic", contingent upon cultural, historical and societal influences.[12] Furthermore, privacy protects a range of interests, including territorial, bodily, informational, spatial, associational and decisional privacy.[13]

Despite its elusiveness, multiple definitions have been proposed over the last few centuries. In their seminal 1890 article "The Right to Privacy", Samuel Warren and Louis Brandeis defined privacy as "the right to be let alone".[14] Referring to a situation in which a man records in his diary that he did not dine with his wife on a certain day, Warren and Brandeis go on to suggest that this right to privacy exists independent of any property rights; that is, privacy encompasses an individual's ability to prevent publication of mere *facts* related to the individual regardless of any monetary value attached to them.[15] It is a right to an "inviolate personality", contingent upon the ability of individuals to withdraw and not associate with others.[16]

Commentators have since pulled various concepts related to privacy out of Warren and Brandeis' articulations. Many accounts focus on Warren and Brandeis' idea of an "inviolate personality" to suggest that invasions of privacy are those that are "demeaning of personality and an affront to human dignity".[17] In *Hosking v Runting*, Tipping J noted how the Privacy Act 1993 requires "significant humiliation, significant loss of dignity, or

11 Stephen Penk "Thinking About Privacy" in Nikki Chamberlain and Stephen Penk (eds) *Privacy Law in New Zealand* (3rd ed, Thomson Reuters, Wellington, 2023) 3 at 3–4.
12 At 4.
13 At 22–23.
14 Samuel D Warren and Louis D Brandeis "The Right to Privacy" (1890) 4 Harvard L Rev 193 at 193.
15 At 201–205.
16 At 205.
17 Penk, above n 11, at 7.

significant injury to the feelings of th[e] individual" for interference with privacy to be found.[18] Others emphasise the concepts of autonomy and control. Richard Parker sees privacy as "control over when and by whom the various parts of us can be sensed by others".[19] Alan Westin describes privacy as "the claim of individuals, groups, or institutions to determine for themselves when, how, and to what extent information about them is communicated to others".[20]

Without limiting the concept of privacy to one simple definition, this article will see privacy as an individual's ability to protect their dignity and have autonomy over the presentation of their image to others by controlling what information about themselves is available online. The specific interest at stake is, therefore, the informational privacy of an individual. When this articulation of privacy is adopted, parents sharing their children's photos or stories online is likely to invade children's privacy. Unfortunately, parents often share such information online without their child's consent. Additionally, even if the child approves of the post, it will usually be the case that the child lacks the requisite judgement and decision-making skills to make an informed choice.[21]

B *Competing interests*

(1) Freedom of expression

Freedom of expression is the primary interest that competes with any claim to privacy. In New Zealand, freedom of expression is a right under the New Zealand Bill of Rights Act 1990 (NZBORA) and includes "the freedom to seek, receive, and impart information and opinions of any kind in any form".[22] Indeed, in developing common law privacy torts, the courts have been greatly attuned to ensuring they do not authorise any unjustified restriction on freedom of expression. For example, in *Hosking*, Keith J's dissenting opinion against developing a tort of public disclosure of private facts rested partially on "the central role in our society of the right to freedom of expression".[23]

However, it is essential to note that rights imparted by NZBORA are not absolute. Under s 5, these rights are subject to "such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society".[24] A child's privacy interests should act as a limit on their parents' freedom of expression. It will be up to the legislature and courts to decide how this limit operates. Currently, however, children's privacy rights in the context of sharenting are not afforded enough weight under New Zealand law.

(2) Parental authority

A child's online privacy interests may also conflict with a parent's interest in rearing their child as they see fit.

While New Zealand law has evolved to better prioritise children's rights and interests, the legislature and the courts continue emphasising the parent's interest in exercising

18 *Hosking v Runting* [2005] 1 NZLR 1 (CA) at [98] per Tipping J.
19 Richard Parker "A Definition of Privacy" (1974) 27 Rutgers L Rev 275 at 281.
20 Alan F Westin *Privacy and Freedom* (Atheneum, New York, 1967) at 7.
21 Sorensen, above n 3, at 170–171.
22 New Zealand Bill of Rights Act 1990, s 14.
23 *Hosking*, above n 18, at [177].
24 New Zealand Bill of Rights Act, s 5.

control over their minor child. Steinberg notes that this reality is coloured by the societal presumption that parents will always strive to do what is best for their children.[25]

For example, New Zealand is a signatory to UNCRC. Article 16 of UNCRC expressly recognises a child's right to privacy. Article 3 further states that the best interests of the child shall be the primary consideration in all actions concerning children. Despite these provisions, however, UNCRC also requires that respect is given to "the responsibilities, rights and duties of parents … to provide … appropriate direction and guidance in the exercise by the child of the rights recognized in the present Convention".[26] Meanwhile, art 18 recognises that parents and legal guardians have the primary responsibility for the upbringing and development of their child.

Our domestic family law also reflects this principle of giving effect to parents' interests in raising their children. Section 4 of the Care of Children Act 2004 establishes that a child's welfare and best interests are to be paramount when making decisions on behalf of the child. However, under s 5(b), one of the principles to take into account when considering the best interests of the child is that "a child's care, development, and upbringing should be primarily the responsibility of his or her parents and guardians".

Accordingly, any legal reforms that aim to better protect a child's interest in controlling the information posted about them online will need to consider the competing interests of freedom of expression and maintaining a degree of parental autonomy in their child's care, development and upbringing.

III New Zealand Law

New Zealand law does not adequately protect children's privacy interests in a sharenting context. This section will first outline the various statutory provisions and common law causes of action available in New Zealand that might provide children with some protection from sharenting. It will then argue that these protections are inadequate to protect a child's interest in controlling the information posted about themselves online.

A *New Zealand's legislative scheme*

(1) Privacy Act 2020

The Privacy Act 2020 purports to protect an individual's data privacy through 12 information privacy principles (IPPs), developed as "a framework for limiting the use and disclosure of personal information".[27] Agencies, including individuals and social media networks such as Facebook, Instagram and YouTube, are expected to abide by these principles when collecting, handling and using information.[28] However, the Privacy Act and its IPPs do not adequately protect against sharenting.

For one, the IPPs do not cover individuals collecting or holding personal information solely for the purposes of, or in connection with, the individual's personal or domestic affairs unless the collection, use or disclosure of the personal information would be highly

25 Steinberg, above n 9, at 862.
26 United Nations Convention on the Rights of the Child, art 5.
27 Law Commission *Privacy: Concepts and Issues – Review of the Law of Privacy Stage 1* (NZLC SP19, 2008) at [4.42].
28 Privacy Act 2020, s 8.

offensive to a reasonable person.[29] Parents who post to social media solely to document and share their children's memories are unlikely to be covered by the IPPs.

Social media sites such as Facebook and Instagram are covered by the IPPs.[30] However, the IPPs are unlikely to provide any protections against sharenting. Under IPP 2, if an agency collects personal information, it must be collected from the individual concerned.[31] Personal information is "information about an identifiable individual", which has been broadly interpreted such that it is not limited to sensitive or private information.[32] According to the Privacy Policy of Meta—the company that owns Facebook and Instagram—the information collected by Meta includes "content you create, like posts, comments, or audio".[33] In collecting information from these posts, it follows that information is likely to be collected about individuals other than the person who created the post; in the sharenting context, this may include information about children. Social media networks may, therefore, be in breach of IPP 2 if they collect information about identifiable children in their parent's posts. However, the Privacy Act provides several exceptions to IPP 2, including where the agency believes, on reasonable grounds, that compliance is not reasonably practicable in the circumstances.[34] In a society where posting memories involving third parties is becoming a norm, it is unlikely to be feasible to expect social media sites to only collect personal information from the individual concerned. Therefore, social media sites where parents engage in sharenting are unlikely to breach IPP 2.

IPP 3 requires an agency collecting personal information to ensure the individual is aware of the fact that the information is being collected, the purpose for its collection, who will hold the information and the individual's right to review and correct it.[35] However, IPP 3 only applies to personal information collected "from the individual concerned"; there is no requirement for an agency to inform individuals if the agency acquired the information through indirect means.[36]

Interestingly, the Government has acknowledged the "current gap that arises because there is no requirement for an agency … to notify an individual when it collects personal information about the individual indirectly".[37] In September 2023, a new IPP 3A, which aims to rectify this gap, was introduced to Parliament in a Privacy Amendment Bill.[38] IPP 3A would require an agency collecting personal information from a source other than the individual to whom the information relates to take reasonable steps to inform the individual about the collection. This includes ensuring that the individual concerned is aware of the fact that the information is being collected, the purpose for its collection, who will hold the information and the individual's right to review and correct the information.[39] Under this new principle, social media sites collecting children's information from their parents might be expected to inform the child of the collection and make them aware of

29 Section 27.
30 Section 4.
31 Section 22.
32 Section 7; and Stephen Penk "The Privacy Act 1993 and 2020" in Nikki Chamberlain and Stephen Penk (eds) *Privacy Law in New Zealand* (3rd ed, Thomson Reuters, Wellington, 2023) 139 at 153.
33 Facebook "Your activity and information that you provide" (26 June 2024) <www.facebook.com>.
34 Privacy Act, s 22.
35 Section 22.
36 Section 22.
37 Privacy Amendment Bill 2023 (292-1) (explanatory note) at 1.
38 Richard Massey "Privacy Amendment Bill: New requirements for 'indirect' data collection" (11 September 2023) Bell Gully <www.bellgully.com>.
39 Privacy Amendment Bill 2023 (292-1), cl 4.

their right to review and correction. However, IPP 3A includes an exception where compliance is not reasonably practicable in the circumstances of the particular case. In cases where a child without social media features in their parent's posts, it may not be reasonably practicable to track down and notify the child.[40]

At first glance, IPP 4 perhaps has the most promising potential to protect children from sharenting. IPP 4 requires personal information to be collected by a lawful means and by a means that, in the circumstances, is fair and does not intrude to an unreasonable extent upon the personal affairs of the individual concerned.[41] Notably, IPP 4 specifically mentions the need for fair and non-intrusive collection "particularly in circumstances where personal information is being collected from children or young persons".[42] Read broadly, therefore, IPP 4 may be of assistance to a child who can prove their parent's post unreasonably intruded upon their personal affairs. Again, however, a clear obstacle exists in that the child will not have been the one who provided the information. In *Harder v Proceedings Commissioner*, the Court of Appeal noted that the primary purpose of IPP 4 is to prevent people from being induced by unfair means into supplying personal information that they would not otherwise have provided.[43] In discussing IPP 4, the Court said that "the harm aimed at is to the person supplying the information".[44]

IPP 6 and 7 provide a child or their representative with the right to access and correct information held about them, giving a child some control over such information.[45] However, it is essential to note that these principles simply allow the correction of incorrect information, not the deletion of unwanted information (also known in some jurisdictions as the right to erasure). As discussed later in this article, the right to erasure does not generally exist in New Zealand.

Finally, even if a child were able to establish that an act of sharenting breached one of the IPPs, the child is unlikely to access any remedy under the Privacy Act. This is because under the Privacy Act's complaints mechanism, a complainant must establish that any breach of the IPPs caused harm of a type set out in s 69(2)(b). Establishing this type of harm requires some kind of loss, adverse effect, or significant humiliation, significant loss of dignity or significant injury to feelings.[46] Many forms of sharenting will not cause such loss or adverse effect, or meet the high threshold of "significant" humiliation, loss of dignity or injury to feelings.

(2) Harmful Digital Communications Act 2015

The Harmful Digital Communications Act 2015 may protect children from certain harms of sharenting. However, it does not fully protect a child's privacy interest in controlling the information posted about themselves online.

The Harmful Digital Communications Act aims to deter, prevent and mitigate harm caused by digital communications.[47] A digital communication is defined as any form of electronic communication, including any text message, writing, photograph, picture,

40 Clause 4.
41 Privacy Act, s 22.
42 Section 22.
43 *Harder v Proceedings Commissioner* [2000] 3 NZLR 80 (CA) at [32].
44 At [32].
45 Privacy Act, s 22.
46 Section 69(2)(b).
47 Harmful Digital Communications Act 2015, s 3.

recording or other matter that is communicated electronically.[48] The Act provides a set of 10 "communication principles", several of which could be breached in the realm of sharenting.[49] These include:

- Principle 1: A digital communication should not disclose sensitive personal facts about an individual.
- Principle 3: A digital communication should not be grossly offensive to a reasonable person in the position of the affected individual.
- Principle 4: A digital communication should not be indecent or obscene.
- Principle 5: A digital communication should not be used to harass an individual.

An individual who feels a digital communication has harmed them may complain to Netsafe, who can then investigate and seek to resolve the complaint.[50] After making a complaint and giving Netsafe a reasonable opportunity to decide what action to take, the individual may apply for an order in the District Court that the defendant remove or correct the digital communication, cease or refrain from particular conduct, issue an apology, or give the affected individual a right of reply.[51] The Court may also order an online content host to take down posted material, identify the author of an anonymous communication, correct any published material or give the affected individual a right of reply.[52]

Notably, however, the Court must not grant an order unless it is satisfied that there has been a serious or repeated breach of a communication principle and that breach has caused or is likely to cause harm to an individual.[53] The Act defines harm as serious emotional distress.[54] The Act's communication principles, therefore, do not generally protect against all unwanted forms of sharenting; children still need to prove that their parent's post caused them serious emotional distress.

However, s 22A makes it a specific offence to post intimate visual recordings of an individual without their consent, regardless of whether harm has been caused. An intimate visual recording includes photos or videos of individuals in a place which, in the circumstances, would reasonably be expected to provide privacy and where the individual is naked or engaged in showering, toileting, or other personal bodily activity that involves dressing or undressing.[55] Crucially, the Act states that an individual under the age of 16 cannot consent to the posting of an intimate visual recording of which they are the subject.[56]

Section 22A was only introduced on 9 March 2022, and courts have yet to consider it in any detail. At least ostensibly, however, parents who post nude pictures of their children could be liable under this section, provided it is established that the photo was taken in a place where there is a reasonable expectation of privacy. Consequently, s 22A may protect a child's interest in controlling intimate visual recordings about themselves in certain situations. An individual who commits an offence against s 22A is liable to up to two years'

48 Section 4.
49 Section 6.
50 Section 8(1).
51 Section 22(1).
52 Section 22(2).
53 Section 12(2).
54 Section 4.
55 Section 4.
56 Section 22A(2).

imprisonment or a maximum fine of $50,000.[57] The Court also has the power to make an order to take down the material.[58]

B *New Zealand common law*

To date, no child has brought proceedings against their parents for an act of sharenting. This is perhaps unsurprising for two reasons. First, for such a case to exist, a child would have to choose to sue their parents, which is an unlikely scenario given the power dynamics at play. In New Zealand, the child would also need to be represented by a litigation guardian.[59]

Secondly, even if a child wished to bring a case against their parents, they would be unlikely to succeed under either of the two privacy torts recognised in New Zealand or any other available cause of action.

(1) Public disclosure of private facts

In 2005, the Court of Appeal in New Zealand first recognised the tort of public disclosure of private facts in *Hosking*.[60] To successfully claim this tort, an individual must establish the following two elements:[61]

- the existence of facts in respect of which there is a reasonable expectation of privacy; and
- publicity given to those private facts that would be considered highly offensive to an objective reasonable person.

Some parallels may be drawn between the facts of *Hosking* and a hypothetical situation in which a parent posts images of their child online. *Hosking* concerned the privacy of two 18-month-old twins, photographed in a stroller on the street in Newmarket for a magazine.[62] The children's parents, a well-known celebrity couple, the Hoskings, had previously declined to give interviews about the twins or allow their children's photographs to be taken.[63] They strongly opposed the proposed publication of the photo and brought proceedings claiming that the photographing of the children and proposed publication without the parents' consent amounted to a breach of the children's privacy.[64] The Hoskings sought a permanent injunction restraining the respondents from taking and publishing photographs of their children until they turned 18.[65]

To be sure, in *Hosking,* it was the children's parents who opposed the taking and publishing of the children's photo. Additionally, in coming to its decision, the Court emphasised the fact that the twins' parents were public figures.[66] Nevertheless, the case concerned the unwanted publication of children's information by a third party. Therefore, the Court's comments are helpful in anticipating how New Zealand courts would react to an invasion of privacy claim based on a parent posting photos of their children online.

57 Section 22A(3).
58 Section 22B(3)(a).
59 District Court Rules 2014, r 4.31.
60 *Hosking*, above n 18.
61 At [117].
62 At [10].
63 At [9].
64 At [11].
65 At [11].
66 At [164].

While the majority in the Court of Appeal accepted that the public disclosure of private facts tort is available in New Zealand, the Court held that the elements of this tort had not been made out on the facts.[67] Regarding the first element, the Court found that the photographs did not publicise any private facts in respect of which there could be a reasonable expectation of privacy.[68] Gault and Blanchard JJ noted that the photos did not disclose anything more than could have been observed by any members of the public in Newmarket on that particular day; specifically, they did not show where the children lived or disclose any information that might be useful to someone with ill intent.[69] The Court also emphasised that the twins' parents were public figures who had placed the fact of their children's pending birth in the public light, holding that this reduced any reasonable expectations of privacy.[70]

It remains to be seen whether the publication of a child's photo in a more private setting, such as their home by a non-celebrity parent would be afforded the title of private facts for which there is a reasonable expectation of privacy. However, the Court did cite in obiter the comments of Gleeson CJ in *Australian Broadcasting Corp v Lenah Game Meats Pty Ltd*:[71]

> An activity is not private simply because it is not done in public. It does not suffice to make an act private that, because it occurs on private property, it has such measures of protection from the public gaze as the characteristics of the property, the nature of the activity, the locality, and the disposition of the property owner combine to afford.

The appellants were also unsuccessful in arguing that the publication of the photos would be highly offensive and objectionable. The Court held that this was the case even though young children were involved.[72] Gault and Blanchard JJ stated that the right of action should only be available in respect of publicity determined objectively, by reference to its extent and nature, to be offensive by causing real hurt or harm.[73] Although one of the photographs depicted a relatively detailed image of the twins' faces, the Court held that the innocuous nature of the photographs did not meet this test.[74]

The Court did consider the position of children in relation to the tort, partly due to pressure from the Commissioner for Children, who intervened in the case. The Commissioner sought protection against publicity (seemingly whether or not involving private facts) unless the disclosure of the child's identity was shown to be in the best interests of the child or demonstrably in the public interest.[75] The Court, however, rejected such an approach, stating that the normal two-step criteria for protection provided adequate flexibility to accommodate the special vulnerability of children.[76]

It seems to follow that in the majority of sharenting cases, a court would not find that the child's image is a private fact capable of protection. Therefore, it remains to be seen how the courts would deal with a claim brought by a child against their parent for the public disclosure of private facts. What is clear, however, is that the child would need to

67 At [163].
68 At [164].
69 At [164].
70 At [123].
71 *Australian Broadcasting Corp v Lenah Game Meats Pty Ltd* [2001] HCA 63, (2001) 208 CLR 199 at [42] as cited in *Hosking*, above n 18, at [119].
72 *Hosking*, above n 18, at [19] and [165].
73 At [126].
74 At [165].
75 At [140].
76 At [145].

establish the two elements set out in *Hosking*. It would appear that in the majority of sharenting cases—which often involve photos depicting children going about their daily activities—a court would not hold the child's image to be a private fact or the publication of the image to be highly offensive to an objective, reasonable person.

(2) Intrusion into seclusion

Although yet to be recognised by any New Zealand appellate court, the High Court in *C v Holland* adopted the tort of intrusion into seclusion in New Zealand.[77] Whata J set out the elements of the tort as follows:[78]

- an intentional and unauthorised intrusion;
- into seclusion (namely intimate personal activity, space or affairs);
- involving infringement of a reasonable expectation of privacy;
- that is highly offensive to a reasonable person.

The tort of intrusion into seclusion will not adequately protect children from sharenting, partly because it focuses on an intrusion instead of a disclosure. The intrusion must be "into seclusion", which Whata J states "acknowledges the need to establish intrusion into matters that most directly impinge on personal autonomy".[79] However, many cases of sharenting involve the taking of photos that arguably do not intrude into the child's intimate personal activity, space or affairs. Perhaps even more crucially, the intrusion must be highly offensive to a reasonable person. Whata J notes that these elements are a question of fact according to social conventions or expectations.[80] Bar any malicious intent, a plaintiff will struggle to establish that a parent taking a photo of their child is highly offensive to a reasonable person.

(3) Other common law torts

Along with the two privacy torts adopted in New Zealand, other common law causes of action could be relied upon to try to protect children's privacy in the sharenting context. These include the torts of defamation and intentional infliction of emotional distress. However, these causes of action were not specifically designed to protect privacy interests and, therefore, will only be available for sharenting claims in limited circumstances.

Defamation is concerned with ensuring a plaintiff's reputation is not unfairly harmed. To be successful, an individual must prove that another individual published a statement about them which would "tend to lower the plaintiff in the estimation of right-thinking members of society generally".[81] Crucially, it is a defence if the defamatory statement is true. Therefore, defamation would only be successful in the sharenting context if a parent posted a false statement about their child, which would likely affect the child's reputation. For the most part, parents' posts about their children are generally truthful. Defamation, therefore, is inadequate to protect children's online privacy interests in a sharenting context.

77 *C v Holland* [2012] NZHC 2155, [2012] 3 NZLR 672.
78 At [94].
79 At [95].
80 At [16].
81 *Sim v Stretch* [1936] 2 All ER 1237 (HL) at 1237.

Intentional infliction of emotional distress (IIED) is also an inadequate cause of action for sharenting. While the intentionality element of the tort relates to the act of posting the child online, IIED further requires that:[82]

- the defendant calculated to cause harm to a foreseeable plaintiff;
- the plaintiff suffered a fright or shock; and
- the natural and direct consequence of that fright or shock is loss, which must be in the form of physical manifestations such as bodily harm or a recognised psychiatric illness.

When a parent posts their child online, they do not generally calculate for this act to cause harm to their child. Furthermore, the child is unlikely to be frightened or shocked or suffer physical manifestations as a result. IIED, therefore, does not adequately protect the interest children have in controlling their own image or data.

C *Does the current New Zealand law adequately protect children's privacy interests in the context of sharenting?*

Based on the above canvassing of New Zealand law, it is clear that neither New Zealand's statutory scheme nor common law adequately protect a child's privacy interest in controlling what personal information is made available online.

The IPPs do not apply to parents who disclose their children's information for their personal benefit, and the principles concerning the collection of information by social media sites only protect the individual who provides the information.

Furthermore, an individual must generally prove some serious harm or offence to access a remedy for an invasion of privacy under New Zealand's privacy legislation or common law privacy causes of action. The Privacy Act requires significant humiliation, significant loss of dignity, or significant injury to feeling. The Harmful Digital Communications Act requires a serious or repeated breach of a communication principle that will likely cause an individual harm. Public disclosure of private facts requires the existence of facts of which there is a reasonable expectation of privacy and publication which is highly offensive to a reasonable person. Similarly, intrusion into seclusion requires a highly offensive intrusion. Most instances of sharenting will not meet these standards, so no remedy will be available. In this sense, New Zealand law aims to protect the dignitary interests of individuals but not the informational privacy interest that individuals have in maintaining control over their own information.

On a more jurisprudential level, both UNCRC and domestic family law generally view children's rights in accordance with what academics term "choice-based rights". Choice-based rights are those afforded to individuals with sufficient decision-making capabilities to exercise those rights.[83] Until children develop such capacity to make informed choices, parents are given the rights and responsibilities of decision-making on behalf of their child.[84] Sarah Sorensen suggests that this is because the law "presum[es] that parents possess what a child lacks in maturity, experience, and capacity for judgment required for making life's difficult decisions".[85] A choice-based view of children's rights is incompatible with sharenting, where even the most well-intentioned parents may not always act in the best interests of their child.

82 Nikki Chamberlain "Misappropriation of Personality: A Case for Common Law Identity Protection" (2021) 26 TLJ 195 at 210.

83 Sorensen, above n 3, at 165.

84 At 165.

85 *Parham v JR* 442 US 584 (1979) at 602 as cited in Sorensen, above n 3, at 165.

Noting these inadequacies in New Zealand law, the rest of this article will outline some protections against sharenting available in overseas jurisdictions before making recommendations for reform in New Zealand.

As well as attempting to balance the competing interests of freedom of expression and parental autonomy, these recommendations will adopt a "needs-based" approach to children's rights. Such an approach recognises that children should be afforded rights intrinsically regardless of their decision-making capacity.[86] Under this approach, children's rights may sometimes need to be protected from third parties. In the sharenting context, this may include protecting children's privacy interests from their parents' social media practices.[87]

IV Protections from Sharenting in Overseas Jurisdictions

A *United States: misappropriation of likeness*

In addition to the torts of public disclosure of private facts and intrusion into seclusion, the United States adopted a tort of misappropriation of likeness. Although the tort has never been claimed against a parent for posting pictures of their child online, it is, at least in theory, a more appropriate avenue of redress for some instances of sharenting. This is because the interest protected by the tort is squarely one of the interests violated by acts of sharenting; that is:[88]

> … the interest of the individual in the exclusive use of his own identity, in so far as it is represented by his name or likeness, and in so far as the use may be of benefit to him or to others.

The elements of the tort of misappropriation of likeness, as set out in the American Law Institute's *Restatement (Second) of Torts*, are as follows:[89]

> (a) a plaintiff must prove that the defendant has appropriated an aspect of the plaintiff's personality (identity, image, name, or likeness);
> (b) the defendant's appropriation must be without the consent of the plaintiff;
> (c) the defendant must have appropriated the plaintiff's personality (identity, image, name or likeness) for his or her own advantage; and
> (d) the appropriation (publication or use) must be highly offensive to the objective reasonable person.

Although some fine-tuning may be required by courts to figure out the exact boundaries of each element, the first two elements should be relatively straightforward in the context of a sharenting claim. According to Nikki Chamberlain, appropriating an individual's personality includes the "use of an image, characterisation, voice or name in the likeness of the person".[90] The simplest example occurs when "a defendant uses a photograph

86 Sorensen, above n 3, at 165–166.
87 Chamberlain, above n 4, at 419.
88 American Law Institute *Restatement of the Law of Torts* (2nd ed, St Paul, Minnesota, 1977) as cited in Chamberlain, above n 82, at 200.
89 At 212 (emphasis omitted).
90 At 217.

containing the plaintiff's actual image without their consent".[91] The posting of a child's image online fits squarely within this description. The element of consent should also be relatively simple. However, courts may have to determine whether a child will ever have the legal capacity to provide consent in a sharenting context.[92]

The third and fourth elements may prove more contentious with a sharenting claim. The third element requires the appropriation to have been done for the defendant's own advantage. While most states of the United States do not require this advantage to be pecuniary,[93] the question will be whether benefits to parents, such as an increased sense of connection and validation, or increased popularity on social media, qualify as an advantage for this element in the context of sharenting. However, there is a good argument for such non-pecuniary advantages to be accepted because the tort is aimed at allowing plaintiffs to control how they present themselves publicly regardless of whether there has been any commercial gain for the defendant.[94]

The fourth element requires the publication to be highly offensive to the reasonable person. According to Chamberlain, "the more embarrassing or offensive a person's conduct is in the image, the more likely its publication will be considered offensive".[95] This element is likely to bar many sharenting claims. While the privacy-minded academic sees the privacy implications and associated harms of sharenting, it may be difficult for a plaintiff to convince a court that the reasonable person would be offended by the publication of an innocuous image of a child. This is especially the case given that sharenting has become a widely accepted practice. Nevertheless, it is arguable that some instances of sharenting, such as a photo that shows a child naked, may meet the highly offensive test. Notably, the publication, and not the image itself, must be considered highly offensive.[96]

B *European Union: the right to erasure*

The European Union's General Data Protection Regulation 2018 (GDPR) affords children potentially the best mechanism available globally for controlling information posted about them online.

Article 17(1) of the GDPR codifies the "right to erasure", which affords individuals "the right to obtain from the controller the erasure of personal data concerning him or her without undue delay" if certain circumstances apply.[97] These circumstances include:[98]

- where the personal data is no longer necessary for the purposes for which it was collected or processed; or
- where the data subject withdraws their consent and there is no other legal ground for the processing.

91 At 217.
92 At 217.
93 Zahra Takhshid "Retrievable Images on Social Media Platforms: A Call for a New Privacy Tort" (2020) 68 Buff L Rev 139 at 156.
94 Chamberlain, above n 82, at 206.
95 At 213.
96 At 208.
97 Regulation 2016/679 on the protection of natural persons with regard to the processing of personal data [2016] OJ L119/1 [GDPR], art 17(1).
98 Article 17(1).

However, the GDPR does not apply to the processing of personal data by a natural person in the course of a purely personal or household activity".[99] It follows that in a non-commercial sharenting context, children in the European Union are unlikely to have any recourse to the right to erasure in asking their parents to remove information posted about the child online.[100]

Nonetheless, children can assert their rights against social media sites on which the information was posted.[101] These social media companies fall within the definition of a data controller under art 4(7) and, therefore, must remove personal information without undue delay should the right apply.[102] Notably, recital 65 of the GDPR, which assists in the interpretation of art 17, states that the right to erasure is:

> ... relevant in particular where the data subject has given his or her consent as a child and is not fully aware of the risks involved by the processing, and later wants to remove such personal data, especially on the internet.

To be sure, the right to erasure in the GDPR is also not an absolute right; it is qualified by the need to balance several competing rights and interests even when one of the circumstances set out in art 17(1) is satisfied. Under art 17(3)(a), the right does not apply to the extent that such data processing is necessary for exercising the right to freedom of expression and information. Meanwhile, art 24(2) of the Charter of Fundamental Rights of the European Union requires data processors or regulators to also consider the best interests of the child in deciding whether erasure is required.[103] Anna Bunn of Curtin University in Western Australia states that:[104]

> Where the personal information to which a request for erasure relates has been shared or posted by a third party, finding the right balance is likely to be much more difficult.

Finding the right balance between freedom of expression and the best interests of the child may pose some obstacles for individuals attempting to exercise the right to erasure concerning photos their parents posted of them as children. However, despite this potential obstacle, nearly 80 per cent of the requests advanced by children against search engines such as Google to remove URLs have been granted, almost double the rate of other private individuals.[105]

As such, the evidence suggests that in most circumstances, adolescents or adults who do not want information from their childhood available online can assert the right to erasure as articulated in the GDPR. This affords some protection to the privacy of these individuals by providing them with some control over any personal data posted as a result of sharenting.

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99 Article 2(2)(c).

100 Anna Bunn "Children and the 'Right to be Forgotten': what the right to erasure means for European children, and why Australian children should be afforded a similar right" (2019) 170 Media International Australia 37 at 38.

101 At 38–39.

102 GDPR, art 17(1).

103 Bunn, above n 100, at 39.

104 At 40.

105 At 43.

C *France: penal code*

Historically, France has had strict laws to protect children's online privacy from parents. Between 1 January 2002 and 1 August 2020, art 226-1 of the French Penal Code made it an offence to publish intimate details about the private lives of individuals without their consent.[106] According to Eric Delcroix, a French internet law and ethics expert, this did not preclude children from taking their parents to court for publishing childhood photos.[107] Breaching art 226-1 of the French Penal Code attracted maximum penalties of a fine of €45,000 or a year's imprisonment.[108]

In August 2020, however, an amendment to art 226-1 of the French Penal Code came into force.[109] This amendment allowed parents to give consent for the posting of their children's details online, effectively removing any protection the law provided to children who were the subject of sharenting.[110] Additionally, guidelines published in June 2021 by the French Data Protection Agency (CNIL) do not appear to be especially well-attuned to the dangers of sharenting. These guidelines focus on assisting parents with regulating their children's behaviour online and ensuring online service providers provide relevant safeguards to protect the interests of minors, including obtaining parental consent in certain instances.[111] Little attention is paid to the practices of parents when posting about their children online.

V Recommendations

New Zealand law needs reform to protect children's privacy interests in the sharenting context. This section will outline two recommendations for legal reform. It will also recommend that the Government initiate a widespread public health campaign to educate parents on the potential privacy implications and harms of sharenting.

In making these recommendations, I am acutely aware of the need to balance a child's privacy interests with the competing interests of freedom of expression and parental autonomy. I am also conscious of the following reality pointed out by Emma Nottingham:[112]

> … "media accounting" is important for an individual's sense of self and identity. Furthermore, posting on social media has become a cultural norm. Thus, even in spite of the dangers outlined … entirely stopping parents from posting images and information regarding their children on social media is not a realistic demand.

These recommendations attempt to balance all competing interests to better protect a child's online privacy from their parent's social media habits.

106 Chamberlain, above n 4, at 418.

107 David Chazan "French parents 'could be jailed' for posting children's photos online" *The Telegraph* (online ed, London, 1 March 2016).

108 French Penal Code 1990, art 226-1.

109 Chamberlain, above n 4, at 418.

110 At 418.

111 Anna Oberschelp de Meneses, Nicholas Shepherd and Dan Cooper "French CNIL Publishes Recommendations for Protecting Minors Online" (10 June 2021) Covington <www.insideprivacy.com>.

112 Emma Nottingham "'Dad! Cut That Part Out!' Children's rights to privacy in the age of 'generation tagged': sharenting, digital kidnapping and the child micro-celebrity" in Jane Murray, Beth Blue Swadener and Kylie Smith (eds) *The Routledge International Handbook of Young Children's Rights* (Routledge, London, 2019) 183 at 184.

A *Introduce a right to erasure in New Zealand*

It is high time that Parliament amend the Privacy Act 2020 to include a right to erasure. This right could be formulated similarly to that in the European Union's GDPR, which gives individuals considerably greater control over the use and storage of their personal data while also recognising the importance of balancing this right with freedom of expression. The guideline within recital 65—which states that the right is particularly relevant where the personal information was provided when the data subject was a child—provides individuals whose information was shared during childhood with an increased ability to use this right. In introducing a right to erasure, New Zealand should ensure that such a guideline, which specifically recognises a child's limited capacity to consent, is included in the legislation.

In adopting a right to erasure, the legislation should also clarify that the right may be exercised by a data subject of any age such that an individual is not required to wait until they are an adult to exercise this right. As noted by Chamberlain, it is currently unclear at what age a child can exercise the right to erasure under the GDPR.[113] However, there does not appear to be any good reason to bar a child from exercising the right. If a child is mature enough to recognise the existence of the right and request erasure, the child should be afforded the right to exercise control over their own personal information.

Alternatively, I would advocate for the introduction of an absolute right to erasure for individuals whose personal data was shared by a third party when they were a child. Under such a right, a data controller would be obliged to remove personal information posted about a child regardless of whether the controller considered the information no longer necessary for its original purpose or there to be no other legal ground for processing. There are several arguments in favour of such an absolute right.

For one, an absolute right to erasure for children recognises the realities that come with having one's information shared when they are still a child. At the time of sharing, children may lack the requisite judgment and foresight to properly assess the potential consequences, seemingly approving of the sharing of information at the time but later wishing for its removal. An absolute right to erasure affords individuals the ability to remove childhood information as they grow up and become aware of how they wish to be presented online.

Furthermore, the grave power dynamics at play when an adult shares a child's information can make it difficult for the child to directly request removal. These power dynamics are especially prominent when the individual sharing the information is the child's parent. While an adult unhappy about a third party sharing their information might reasonably be expected to have a conversation with the third party about its removal, the same cannot always be said for children. An absolute right to erasure affords children a simple means to control their online identities without fracturing parent-child relationships.

An absolute right to erasure also aligns with the acceptance that we generally do not hold individuals accountable for their actions or beliefs as children. A common criticism of the right to erasure is that it obstructs a "third party's right to share and discuss information" concerning an individual.[114] Such a right is especially useful to employers, who may judge a prospective employee's suitability for a job based on information available about them on the Internet. However, while it may be reasonable to expect an

113 Chamberlain, above n 4, at 417.

114 Jarrod Bayliss-McCulloch "Does Australia Need a 'Right to be Forgotten'?" (2014) 33(1) CLB 7 at 9.

adult's actions to have long-term consequences, the law generally does not expect the same from children. For example, offenders who go through the Youth Justice System are not given a criminal record and are usually not obliged to tell anyone about their Youth Court records.[115] This policy likely recognises that individuals learn, mature and change as they reach adulthood. It follows that the world should not have the right to watch Becky's meltdown at the supermarket checkout in 2003 or read graphic details about the bad stomach problems Oliver experienced after overeating grandma's plum pudding at family Christmas. As they grow up, individuals should be allowed to control and craft their identities independently from their online presence as a child. An absolute right to erasure of childhood information would achieve this.

Finally, an absolute right to erasure of personal information shared during childhood would quell concerns some commentators have regarding how equipped private service providers such as social media sites are to determine whether data should be removed under the right to erasure.[116] Under the GDPR, the data controller is expected to determine whether the right to erasure applies by weighing up the competing rights of freedom of expression and information, on the one hand, and the privacy interests of the data subject.[117] Such an exercise is arguably better suited to some sort of third-party neutral arbitrator.[118] By introducing an absolute right to erasure of childhood personal information, data controllers will not be expected to weigh up competing interests regarding children's information.

B *Adopt the tort of misappropriation of likeness*

Where an appropriate case presents itself, New Zealand courts should also adopt the tort of misappropriation of likeness. While the tort has yet to be used in the sharenting context and the "highly offensive" threshold may bar some sharenting claims, misappropriation of likeness better targets a child's interest in controlling their own image than the privacy torts currently recognised in New Zealand.

As already discussed, a key obstacle for the plaintiffs in *Hosking* was the Court's finding that an image of a child in a public street did not constitute a private fact. The misappropriation tort does not require an individual to prove that a photo is private. Similarly, unlike the tort of intrusion into seclusion, misappropriation does not require an intrusion into the intimate life of the plaintiff. Instead, the misappropriation tort focuses on a lack of consent given by the plaintiff to the highly offensive publication of their image.[119] As such, a child could theoretically bring a claim for misappropriation even where the offending photo was taken on a public street, provided the rest of the elements were met.

One objection against adopting the tort of misappropriation of likeness is that it will limit an individual's right to freedom of speech and information. While valid, there are several reasons that such a concern should not prevent the courts from adopting the tort. Chamberlain notes that "litigation is costly and most people do not bring claims unless they are particularly aggrieved or the harm to them has been great".[120] In the sharenting

115 YouthLaw Aotearoa "The Youth Justice System" <www.youthlaw.co.nz>.
116 Bunn, above n 100, at 42.
117 GDPR, art 22(3).
118 Bunn, above n 100, at 42.
119 Chamberlain, above n 82, at 206.
120 At 213.

context, where any recovery under the tort will necessarily require a child to bring a claim against their parents, litigation is likely to be extremely rare.

Furthermore, under s 5 of the NZBORA, rights and freedoms are subject to reasonable limits. The misappropriation tort includes several mechanisms to ensure that any curb on freedom of speech is reasonable given the competing privacy interest. The "highly offensive" threshold ensures that only particularly embarrassing or offensive publications are able to be met with a misappropriation claim. Additionally, a defence of legitimate public concern would further limit the scope of the tort.[121] A similar defence is available in New Zealand for public disclosure of private facts and intrusion into seclusion. In *Hosking*, the Court of Appeal stressed the difference between matters of legitimate "concern" to the public and those of mere interest; for the defence to apply, the matter must be "properly within the public interest, in the sense of being of legitimate concern to the public".[122] Of course, most sharenting claims are unlikely to be of legitimate public concern, as opposed to mere public interest. However, this defence will allow the Court to limit claims more generally such that freedom of speech is not unduly limited.

Therefore, it is desirable to introduce the tort of misappropriation of personality in New Zealand to better protect an individual's right to control their image. For the most part, the tort is unlikely to be used by children in a sharenting context, either because of the reality that children would have to bring the claim against their parents or because the facts do not meet the "highly offensive" threshold. Nevertheless, the tort would provide subjects of the most egregious sharenting conduct with the option of bringing a claim and receiving either compensatory damages or injunctive relief. Additionally, if adopted alongside a statutory right to erasure, subjects of sharenting cases that do not meet the "highly offensive" threshold will still be afforded some privacy protection in the ability to request the removal of unwanted personal information from the Internet.

C *Initiate a public health campaign*

Alongside introducing a statutory right to erasure and a common law cause of action based on misappropriation of likeness, the Government should initiate a public health campaign that educates parents on the likely privacy implications and harms of sharenting.[123]

Current sharenting guidance by Netsafe is limited to one article entitled "Sharenting" which encourages parents to think, check their privacy settings and ask for permission before posting their children's information online.[124] The article is buried on Netsafe's website, such that parents must search for the resource to access it. To properly educate parents and encourage a change in sharenting behaviour, a more comprehensive and widespread public health campaign appropriately communicating the potential harms of sharenting needs to be run. Such a campaign would encourage parents to think twice before posting, helping parents become better protectors of their children's privacy interests. It could be designed based on The Opportunity Agenda's "Communications Toolkit", which recommends seven steps to build a communications strategy capable of "moving hearts, minds, and policy over the long term".[125]

121 *Hosking*, above n 18, at [130].

122 *TV3 Network Services Ltd v Broadcasting Standards Authority* [1995] 2 NZLR 720 (HC) at 733 as cited in *Hosking*, above n 18, at [133].

123 Chamberlain, above n 4, at 420–421.

124 Netsafe "Sharenting" (9 August 2024) <www.netsafe.org.nz>.

125 The Opportunity Agenda *Vision, Values, and Voice: A Communications Toolkit* (March 2023) at 3.

Such a campaign is appealing for several reasons. As Steinberg noted, persuading parents to change their behaviour without setting strict rules or laws recognises "the importance of a parent's right to free expression but also encourages parents to consider sharing only after weighing the potential harm of the information".[126] In other words, unlike legal reforms, a public health model does not infringe on parental autonomy or an individual's right to freedom of expression and information. Furthermore, in discouraging sharenting in the first place, a successful public health campaign would minimise the need for children to resort to the limited legal protections that are available, preventing the possible negative impacts taking a parent to Court will have on family dynamics. Finally, although perhaps optimistically, in changing public attitudes, an education campaign may, over time, mould the reasonable person's perception as to what kinds of publications are highly offensive, increasing a plaintiff's chance of success in bringing a claim against sharenting based on one of the common law torts.

VI Conclusion

To conclude, in a society of smartphones and social media, where photos and information about anyone can be shared with the world at the click of a button, more must be done to protect children's privacy interests from sharenting. Current New Zealand law is wholly inadequate at ensuring that children are afforded the ability to preserve their dignity and autonomy by controlling the information about themselves that is available online. To better protect children from the privacy implications and harms of sharenting, New Zealand should adopt an absolute right to erasure and the tort of misappropriation of likeness. With these two added legal protections, children who are the subject of the most egregious forms of sharenting may be able to recover compensatory damages through the courts. Meanwhile, individuals who do not meet the requisite "highly offensive" threshold for misappropriation but are unhappy with the sharing of their personal information online will be able to request its removal, increasing the child's control over this information. Finally, the Government should also initiate a public health communications campaign that educates parents on the privacy implications and harms of sharenting in an attempt to discourage the act in the first place. Taken together, these recommended reforms afford children more control over their personal information while also attempting to recognise the competing interests of freedom of expression and parental autonomy.

126 Steinberg, above n 9, at 878.