

## **Privacy: Right, Value or Fundamental Interest?**

Abstract: As time goes by legal recognition of privacy in New Zealand continues to develop, but terminology remains uncertain, and this provides restrictions on privacy being protected to its fullest extent. Part of this uncertainty stems from difficulties in defining what privacy is and what it means to people, but this difficulty should not deter New Zealand from attempting to clarify a matter of such importance.

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The way in which privacy is defined and conceptualised in New Zealand will in turn impact upon how it is applied in relation to NZBORA and, in particular, the way in which s 5 balances competing rights or interests. In the Supreme Court case of *Brooker*, Thomas J made it clear in a detailed dissent that he saw privacy as an existing right in New Zealand.<sup>1</sup>

### **Definition of privacy**

The difficulties in defining privacy are well documented. The winning response to Rt Hon Sir Geoffrey Palmer's recent request to define privacy, written by Steven Price, was "what people believe they have lost when they complain about their privacy being infringed."<sup>2</sup>

Countless taxonomies of the various conceptions of privacy exist.<sup>3</sup> None of them is however considered as definitive, and various cases and commentators cite different definitions. In its recent report, the Law Commission divided its discussions into

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<sup>1</sup> *Brooker v Police* [2007] NZSC 30 at [11] per Elias CJ [Brooker SC].

<sup>2</sup> Law Commission, "Definition of 'Privacy' Competition", Law Commission, 2011.

<sup>3</sup> See, for example, Stephen Penk, "Thinking about Privacy" in Stephen Penk and Rosemary Tobin, *Privacy Law in New Zealand*, (Brookers, Wellington, 2010) 1 ["Thinking about Privacy"].

“informational privacy” and “local privacy”.<sup>4</sup> The former category deals with privacy relating to the disclosure of personal information. It is implicit that this category includes the tort discussed in *Hosking v Runting*.<sup>5</sup> The latter category is about personal space of individuals. It is strongly linked to William Prosser’s strand of privacy that relates to solitude and seclusion.<sup>6</sup>

### **Status of rights under NZBORA**

What is a right under our legislation? The Act itself, the New Zealand Bill of Rights Act 1990 [NZBORA], does not provide any guidance, other than in s 2 where it says that the rights and freedoms it contains are to be affirmed. Even the leading text on NZBORA does not set out to define what a ‘right’ is.<sup>7</sup> For the purposes of this paper, I will use the definition of a right as follows:

- Rights are what all people (and in some cases legal entities such as companies) are entitled to have provided or facilitated by the Government (and in some cases bodies exercising governmental functions, as per s 3(b)).
- NZBORA contains within it a list of rights that are defined in their scope, and a framework for applying them.
- Section 5 refers to any matter that restricts a right as being a “limit” upon that right.

Who bears the burden and receives the benefit of NZBORA rights is a much more detailed subject than the scope of this paper permits, as both burden and benefit can vary substantially depending on their context, as a result of the statutory scheme.

So rights and limits can be weighed against each other to achieve an appropriate balance, but rights maintain that higher status under the framework of NZBORA.

Often, other matters which are not defined rights in NZBORA are referred to by other names, such as rights or values, seemingly with little distinction in meaning (this is

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<sup>4</sup> Law Commission, “Privacy: Concepts and Issues”, Law Commission, 2008, at [8.3-8.4].

<sup>5</sup> *Hosking v Runting* [2005] 1 NZLR 1 (CA) [*Hosking*].

<sup>6</sup> William L Prosser (1971) *Handbook of the Law of Torts* St Paul: West Publishing Co; codified in American Law Institute Restatement of the Law of Torts (2nd ed, 1977) § 652B.

<sup>7</sup> Andrew Butler and Petra Butler (2005) *The New Zealand Bill of Rights Act: A Commentary* Wellington: LexisNexis.

discussed later in this paper). Privacy in the case law has been variously referred to as a right, a value, an interest and a limit.

Privacy is not a defined right in NZBORA, therefore the crucial section at issue here is s 28, which states as follows:<sup>8</sup>

An existing right or freedom shall not be held to be abrogated or restricted by reason only that the right or freedom is not included in this Bill of Rights or is included only in part.

Thus, if privacy is held to be a right by dint of s 28 it has important implications for the rest of the NZBORA framework. Most importantly, it should be applied as a right of *equal standard* when compared against freedom of expression (which is set out in s 14 of NZBORA), when considering a s 5 analysis about whether limitations upon the latter right are justified. If it is not of equal value, then that inequality would have to be reflected in the comparison between the two, by treating privacy on a limit. The inclusion of freedom of expression within NZBORA shows that there has been legislative affirmation of that right,<sup>9</sup> yet privacy was left out of the proposed Bill when it was introduced in Parliament.<sup>10</sup> This is a definitional challenge that the New Zealand have shied away from, while other jurisdictions have dealt with the issue and ended up with workable definitions. A right to privacy, either local or informational but with a focus on the former, exists in both German Basic Law,<sup>11</sup> and under the South African Constitution.<sup>12</sup> In the United Kingdom, the Human Rights Act 1998 recognises the right to respect for private and family life,<sup>13</sup> which mirrors the art 8 protection of privacy under the European Convention on Human Rights (the Convention),<sup>14</sup> to which there are 47 member states.<sup>15</sup> A right to privacy is also contained in legislation of two Australian states.<sup>16</sup>

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<sup>8</sup> New Zealand Bill of Rights Act 1990, section 28.

<sup>9</sup> *Ibid*, section 2.

<sup>10</sup> Geoffrey Palmer, "A Bill of Rights for New Zealand: A White Paper" [1984-1985] 1 AJHR A6 at [10.18].

<sup>11</sup> German Basic Law 1949, article 2.

<sup>12</sup> Constitution of the Republic of South Africa Act 1996, section 14.

<sup>13</sup> Human Rights Act 1998 (UK), article 8.

<sup>14</sup> The Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights), (opened for signature 4 November 1950, entered into force 3 September 1953), article 8.

Finally, and most importantly, privacy is protected under art 17 of the International Covenant on Civil and Political Rights [ICCPR].<sup>17</sup> Article 17 protects an individual from “arbitrary or unlawful interference” with “privacy, family, home or correspondence... [and] unlawful attacks on his honour and reputation”.<sup>18</sup> Given the NZBORA was designed to affirm New Zealand’s commitment to the ICCPR,<sup>19</sup> this makes the absence of an express privacy protection within it more obvious. In order to evaluate the importance of privacy in spite of that absence, and determine where the current privacy tort should fit in NZBORA, a s 28 analysis is necessary.

Section 28 is only briefly discussed by Paul Rishworth in his text on NZBORA, mainly to note the comparison between s 28 and the Ninth Amendment to the United States Constitution,<sup>20</sup> which states that the “enumeration... of certain rights, shall not be construed to deny or disparage others retained by the people.”<sup>21</sup> It has been applied in the United States in cases discussing the scope of a potential privacy interest.<sup>22</sup> Like the NZBORA, privacy is not expressly protected under the Constitution, but it is commonly mentioned, including in cases like *Roe v Wade* as a relevant interest that the Ninth Amendment can protect.<sup>23</sup>

The NZBORA commentary by Andrew and Petra Butler does not address the s 28 issue in great detail; however, they do provide a useful list of interests or rights that the common law has traditionally protected in some fashion, despite their exclusion from NZBORA. The list comprises:<sup>24</sup>

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<sup>15</sup> Council of Europe Treaty Office (2011) “Simplified Chart of Signatures and Ratifications” <conventions.coe.int>.

<sup>16</sup> Charter of Human Rights and Responsibilities Act 2006 (Vic); Human Rights Act 2004 (ACT).

<sup>17</sup> International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976), art 17 [ICCPR].

<sup>18</sup> *Ibid*, article 17(1).

<sup>19</sup> New Zealand Bill of Rights Act, long title.

<sup>20</sup> Paul Rishworth, (2003) “Interpreting and Applying the Bill of Rights” in Paul Rishworth and others (eds) *The New Zealand Bill of Rights*, Melbourne: Oxford University Press, at 67.

<sup>21</sup> United States Constitution 1787, amendment 9.

<sup>22</sup> *Griswold v Connecticut* 381 US 479 (1965).

<sup>23</sup> *Roe v Wade* 410 US 113 (1973) at 177.

<sup>24</sup> Andrew Butler and Petra Butler, (2005) *NZBORA: A Commentary*, Wellington: LexisNexis, at [3.3.28].

- property rights (including Māori customary rights);
- principle against retrospective law;
- right to a livelihood or trade;
- right to subsistence;
- right of access to Court and legal advice;
- family rights; and
- right to personal reputation.

The last of these is a reference to defamation. Privacy has been held to have a reputational element to it in some cases; however, it is principally tied up with the concept of dignity rather than reputational interests, and the two torts are linked, but fundamentally distinct.<sup>25</sup> However, the harm from the privacy breach can be reputational under the current tort when private facts are disclosed about the person. The European Court of Human Rights in a recent case noted that art 8 of the Convention can include harm to reputation,<sup>26</sup> but has somewhat retreated from this statement by adding qualifiers, such as a threshold for reputational harm discussed in *Axel Springer AG v Germany*.<sup>27</sup> In that case the Grand Chamber of the European Court of Human Rights held that art 8 cannot be engaged unless the reputational attack reaches a threshold of seriousness, and the attack is carried out in such a manner as to cause prejudice “to personal enjoyment of the right to respect for private life.”<sup>28</sup>

So how is it assessed whether s 28 is met in any particular circumstance? The section itself provides no indication of the way in which rights or freedoms should be evaluated, or if they must cross a certain threshold of acceptance or community recognition in order to fall within the meaning of the section.

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<sup>25</sup> NA Moreham (2008) “Why is Privacy Important? Privacy, Dignity and Development of the New Zealand Breach of Privacy Tort” in Jeremy Finn and Stephen Todd (eds) *Law, Liberty, Legislation*, Wellington: LexisNexis, at 232.

<sup>26</sup> *Pfeifer v Austria* (2007) 48 EHRR 175 at [33-35] (Section I).

<sup>27</sup> *Axel Springer AG v Germany* (39954/08) Grand Chamber, ECHR 7 February 2012 at [83].

<sup>28</sup> *Ibid.*

Some guidance may be provided by the words of s 5. When carrying out analyses under that section, such analyses are to be performed with respect to “the rights and freedoms contained in this Bill of Rights”.<sup>29</sup> What is the implication of this statement? According to the Law Commission, it means that the rights and freedoms contained in NZBORA must still entertain a higher status than those excluded, even in spite of s 28.<sup>30</sup> Paul Rishworth notes that s 2 only affirms those rights which are contained in NZBORA.<sup>31</sup> Elias CJ takes a similar approach in *Brooker v Police*. Her Honour said she had:<sup>32</sup>

...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.

However, such a discussion was based in the context of an enactment, the Summary Offences Act, and thus does not mention how s 5 should be utilised when applying the common law. By her Honour’s reasoning, the Courts could expressly recognise a value as being important, even if it is not contained within NZBORA, and that is exactly what the *Hosking* majority purported to do.

Such an interpretation of the provisions however, seems to deny the clear and express words contained within s 28. The purpose within those words is that the NZBORA is not to be considered a code or an exhaustive list of rights, and that other rights should not be hampered in any way because of their exclusion from the Act. The mention of establishing justified limitations with respect to rights contained in the Act, could be interpreted to refer to limitations on both NZBORA rights, and include those rights brought in under s 28. Andrew Butler suggests that the wording of s 5 means that it suggests that only rights contained in Part II of the Act may be

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<sup>29</sup> New Zealand Bill of Rights Act, section 5 (emphasis added).

<sup>30</sup> Law Commission, “Privacy: Concepts and Issues”, Law Commission, 2008, at [4.89].

<sup>31</sup> Paul Rishworth, (2003) “Interpreting and Applying the Bill of Rights” in Paul Rishworth and others (eds) *The New Zealand Bill of Rights*, Melbourne: Oxford University Press, at 67.

<sup>32</sup> *Brooker v Police* [2007] NZSC 30 at [40] per Elias CJ.

considered as valid limits upon other rights, but also notes that this would be subject to s 28.<sup>33</sup>

Alternatively, it could be argued that privacy interests underlie other rights which are recognised in NZBORA, and that privacy is implicitly recognised without the need for s 28. Stephen Penk notes that privacy underpins several sections of NZBORA, including s 10 (medical and scientific experimentation), s 11 (refusals to undergo medical treatment), s 21 (unreasonable search and seizure), s 13 (freedom of thought, conscience and religion), and s 17 (freedom of association).<sup>34</sup> In *Hosking*, Gault P and Blanchard J made it clear that there was no “legislative rejection of privacy as an internationally recognised fundamental value”.<sup>35</sup> However, such an interpretation would be inconsistent with the deliberate omission of a separate right to privacy from the Act.

### **Consideration of privacy in case law**

Do the cases implicitly consider privacy to be a right? In *Brooker*, Elias CJ stated that “[p]rivacy in the home is an important value, recognised by art 17 of the International Covenant [on Civil and Political Rights]. It may properly lead to restrictions on freedom of expression.”<sup>36</sup> It is further noted that privacy in the home is protected, inter alia, by s 21(1)(d) of the Summary Offences Act.<sup>37</sup> That offence covers watching or loitering near someone’s home, but the intention of the offender must be to intimidate or frighten, or know that such conduct is likely to have that consequence. This enactment focuses on local privacy, to use the terminology employed by the Law Commission.<sup>38</sup> Such conduct would not be actionable under the *Hosking* tort of privacy unless it led to the collection of private facts, and these facts were then published in a highly offensive manner. Therefore it is important to note when considering the *Brooker* discussions about privacy, these discussions

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<sup>33</sup> Andrew Butler “Limiting Rights” [2002] *Victoria University of Wellington Law Review* 22.

<sup>34</sup> Stephen Penk, (2010) “Thinking about Privacy” in Stephen Penk and Rosemary Tobin (eds) *Privacy Law in New Zealand* Wellington: Brookers, at 18.

<sup>35</sup> *Hosking v Runtig* [2005] 1 NZLR 1 (Court of Appeal), at [92].

<sup>36</sup> *Brooker v Police* [2007] NZSC 30, at [11] per Elias CJ

<sup>37</sup> Summary Offences Act 1981, section 21(1)(d); *Brooker v Police* [2007] NZSC 30 at [37] per Elias CJ.9-002118, 24 August 2012.

<sup>38</sup> Law Commission, “Privacy: Concepts and Issues”, Law Commission, 2008, at [8.2-8.3].

relate to a different facet of privacy than the one traditionally covered by our tort. Privacy, as correctly noted by the Law Commission, is multifaceted and can appear in different contexts.<sup>39</sup> However, recent developments in the case of *C v Holland* may provide further opportunities for a remedy.<sup>40</sup>

McGrath and Thomas JJ, each delivering separate minority judgments in *Brooker*, cite Nicole Moreham's definition of privacy as being about "desired inaccess".<sup>41</sup> McGrath J even stated in his judgment that New Zealanders have an interest in being free from intrusions in their home environment, and that it is "a value that, in the abstract, is close to being as compelling as freedom of speech".<sup>42</sup> While this is using the language of privacy as a value, it seems to be considering that value's importance as on par with freedom of expression as contained within NZBORA. McGrath J calls privacy "an aspect of human autonomy and dignity".<sup>43</sup> Such language sounds remarkably similar to that which describes rights expressly contained within NZBORA.

The most clearly enunciated judgment with respect to s 28, is Thomas J's judgment. His Honour sees privacy as a right within s 28, and that if it is not, it should at least be regarded as a "fundamental value".<sup>44</sup> The section should not prevent new rights from being recognised.<sup>45</sup> It is not clear from the judgment if there is intended to be a hierarchy of values, but it is clear that values are worth less than rights.

His Honour's first key proposition is that there is broad recognition of privacy in international instruments,<sup>46</sup> such as the ICCPR, the European Convention on Human

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<sup>39</sup> Law Commission, "Privacy: Concepts and Issues", Law Commission, 2008, at [3.5]. This paper utilises the terminology of the "core values" approach to privacy, where the two key conceptions of privacy are local privacy and informational privacy, whereas there are also other interests complementary to privacy.

<sup>40</sup> *C v Holland* HC Christchurch CIV-2011-409-002118

<sup>41</sup> *Brooker v Police* [2007] NZSC 30, at [123] per McGrath J. Also see NA Moreham, (2005) "Privacy in the Common Law" 121 *Law Quarterly Review* 628 at 640.

<sup>42</sup> *Brooker v Police* [2007] NZSC 30, at [129] per McGrath J (emphasis added).

<sup>43</sup> *Brooker v Police* [2007] NZSC 30, at [123] per McGrath J; citing *Campbell v MGN Ltd* [2004] UKHL 22, at [50] per Lord Hoffman.

<sup>44</sup> *Brooker v Police* [2007] NZSC 30, at [164] per Thomas J.

<sup>45</sup> *Ibid*, at [228] per Thomas J.

<sup>46</sup> *Ibid*, at [214] per Thomas J.

Rights, and the Universal Declaration of Human Rights.<sup>47</sup> It seems logical that international experience can contribute towards establishing new rights under s 28, given that the NZBORA is based upon the ICCPR.

Secondly, case law often refers to privacy as a right. In the United Kingdom, the case of *Morris v Beardmore*<sup>48</sup> affirms that privacy is a right. Thomas J also cites his prior statements on privacy in the case of *R v Jefferies*:<sup>49</sup>

[c]are must always be taken not to confuse the difficulty in closely defining a right with the existence and importance of the basic values that inspire that right lest they be unthinkingly discounted as a result... the right to privacy is imperative. It embodies a basic respect and consideration for persons *which is the unarticulated premise in much of our law.*

The argument is that privacy interests focus on dignity, which underlies many areas of the law already, such as s 21(1)(d) of the Summary Offences Act, and its protection of local privacy. The Broadcasting Standards Authority protects privacy within its principles for broadcasters,<sup>50</sup> and the Privacy Act 1993 deals with information about individuals, and how it must be collected, stored and disclosed.<sup>51</sup> Interferences with the dignity of the individual are also seemingly consistent with the other rights in the NZBORA.<sup>52</sup>

### **How society views privacy**

The final argument is that privacy is seen by society as a right, and that the courts should utilise rights which “represent the enduring values of the community”.<sup>53</sup> John

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<sup>47</sup> Universal Declaration of Human Rights GA/Res 217A(III), UN GAOR, 3rd sess, 139th plen mtg (1948), art 12.

<sup>48</sup> *Morris v Beardmore* [1981] *Appeal Cases* 446 (House of Lords) at 461 per Lord Edmund-Davies; at 464 per Lord Scarman. Lord Scarman also cites *Entick v Carrington* (1765) 19 State Tr 1029 at 1066.

<sup>49</sup> *R v Jefferies* [1994] 1 NZLR 290 at 319 (Court of Appeal) per Thomas J (emphasis added).

<sup>50</sup> Broadcasting Standards Authority (2011) “Privacy Principles” <[www.bsa.govt.nz/free-to-air-tv-code](http://www.bsa.govt.nz/free-to-air-tv-code)>.

<sup>51</sup> Privacy Act 1993.

<sup>52</sup> Stephen Penk, (2010) “Thinking about Privacy” in Stephen Penk and Rosemary Tobin (eds) *Privacy Law in New Zealand* Wellington: Brookers, at 11.

<sup>53</sup> *Brooker v Police* [2007] NZSC 30, at [224].

Burrows phrases this argument as “there are a large number of activities all members of any given society would immediately recognise as infringing privacy”.<sup>54</sup> Such a definition harks back to Steven Price’s chocolate fish winning definition. While people may not be easily able to define privacy, or tell you how to define a right to it, they can certainly identify it when it has been infringed, and will often seek out a remedy for such an infringement.

Other cases have referred to privacy differently. *Tucker*, one of New Zealand’s first privacy cases, saw it as, at least, “a factor which can be taken into account” when the Courts determine the justice of the case.<sup>55</sup> In *Hosking* itself, Tipping J consistently refers to privacy as a value, but still feels that values can impose valid limits upon rights under s 5.<sup>56</sup> Anderson J concludes that privacy is “but an aspect of a value”, and should not be treated as a right.<sup>57</sup> This refers to the multifaceted nature of privacy, and that the public disclosure of private facts is merely one aspect of the overarching value. Nevertheless his Honour does not believe it reaches the threshold of a right.

In *Brooker*, the various judges refer to privacy as a right, value, interest and consideration “seemingly without any distinction in meaning”.<sup>58</sup> By treating issues of definition as less important in the framework of a case, it had led to uncertainty about the hierarchy and applicability of NZBORA to particular factors.

## Conclusion

Hesitation in recognising new rights or even discussing the issue seems inconsistent with the clear words of s 28. NZBORA’s failure to recognise privacy is unusual at international law, and there is no reason why a right could not be framed along the lines of one of the other international definitions, such as that contained within the

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<sup>54</sup> Burrows “Invasion of Privacy”, above n **Error! Bookmark not defined.**, at 846-847.

<sup>55</sup> *Tucker v News Media Ownership* [[full]].

<sup>56</sup> *Hosking v Runtig* [2005] 1 NZLR 1 (Court of Appeal) at [237]; Stephen Penk, (2010) “Thinking about Privacy” in Stephen Penk and Rosemary Tobin (eds) *Privacy Law in New Zealand* Wellington: Brookers, at 22.

<sup>57</sup> *Hosking v Runtig* [2005] 1 NZLR 1 (Court of Appeal), at [265].

<sup>58</sup> *Brooker v Police* [2007] NZSC 30; Stephen Penk, (2010) “Thinking about Privacy” in Stephen Penk and Rosemary Tobin (eds) *Privacy Law in New Zealand* Wellington: Brookers, at 21.

European Convention on Human Rights for example. Given that it also contains both a right to privacy and a right to freedom of expression, it could also provide useful guidance for New Zealand if privacy were to be considered a right, as it would then alter the s 5 analysis of limits on rights needing to be justifiable.

In the 2012 case of *C v Holland*,<sup>59</sup> Whata J held that a tort of intrusion into seclusion of solitude could exist. This represented a clear progression from the tort identified in *Hosking*. Throughout the discussion, Whata J refers to an ‘interest’ in seclusion, and describes the freedom from unwanted intrusion as an “accepted legal value”.<sup>60</sup> While it is recognised that a generalised right to privacy does not exist in NZBORA, Whata J still notes that privacy is given “form, content, and weight... as a legal value” in particular through s 21.<sup>61</sup>

As case law develops, it seems that privacy is increasingly recognised as important in New Zealand law, and worthy of protection, but the terminology is still conflicted as to whether privacy is a right, value or interest. While such uncertainty exists, there is always a risk that privacy will be seen as lesser than other rights included within NZBORA, and so if we want to increase its recognition in New Zealand, the best way is by expressly including privacy as a right here.

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<sup>59</sup> *C v Holland* HC Christchurch CIV 2011-409-0021118, 24 August 2012.

<sup>60</sup> *Ibid*, at [22].

<sup>61</sup> *Ibid*, at [25].