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Dear Sir Geoffrey and Dr Butler

Constitution Aotearoa: Submission on the Right to Privacy

I am pleased to contribute to discussion about the right to privacy in the Constitution Aotearoa Project.

Privacy is important for a person to be themselves, to think freely, to nurture intimacy, relationships and social interaction, and thereby flourish. In this sense, privacy contributes to the development of personality and citizenship. Privacy helps to preserve the necessary space for individuals to participate in a functioning and healthy democracy. The right to privacy protects aspects of freedom of speech and association that are essential to the functioning of a democratic society and creates the necessary conditions for a healthy public sphere.

This submission outlines the importance of the right to privacy in New Zealand, considers recent challenges to privacy, explains why a constitutional provision is needed and why this would strengthen existing rights.

I welcome the opportunity to contribute to this project and would be happy to discuss with you.

Yours sincerely

John Edwards
Privacy Commissioner

P/1347/A536945

Introduction

This submission makes the case for the right to privacy to be included in a written constitution. A general right to privacy was not included in the New Zealand Bill of Rights Act 1990 because it was considered *"inappropriate … to attempt to entrench a right that is not by any means fully recognised now, which is the course of development, and whose boundaries would be uncertain and contentious*."

Today, the idea there is no general right to privacy can be confidently refuted. Privacy is recognised as a fundamental human right that the law should protect.[1] Technological transformations have contributed to the blossoming of privacy rights. In 1990, the first New Zealand website had not been created and the Internet as we know it today did not exist. Today there is growing awareness of how privacy supports freedom of expression, freedom of thought, freedom of movement and freedom from discrimination.

Privacy is an aspect of "human autonomy and dignity".[2] Dignity has been described as central to all human rights, having a uniting role on human rights:[3]

> *Probably [no human right] is more basic to human dignity than privacy. It is within a person's sphere of privacy that the person nurtures his or her autonomy and shapes his or her individual identity. The nexus between human dignity and privacy is particularly close.*

This submission sets out why the Privacy Commissioner supports the inclusion of a right to privacy in a written constitution for New Zealand. The first section describes New Zealanders' support for the right to privacy. The second considers the importance of the right to privacy in a modern digital age, examining recent challenges to the right to privacy and how these have been considered overseas. The third section describes existing protection of the right to privacy in New Zealand. The fourth outlines how constitutional protection would improve visibility, scrutiny and accountability for the right to privacy and how constitutional protection can strengthen public trust. Finally, the submission highlights the need for a modern Privacy Act, and specific areas of law reform that are needed to improve the privacy rights of New Zealanders.

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[1] Law Commission *Privacy Concepts and Issues* (2008, SP 19) [21]; ch 4

[2] *Brooker v Police* [2007] NZSC 30 at [123], Mc Grath J, citing Lord Hoffmann in *Campbell v MGN Ltd* [2004] 2 AC 457.

[3] Ibid at [177], Thomas J, citing Aharon Barak *The Judge in a Democracy* (2006) 85.

1 New Zealanders Support the Right to Privacy

1.1 New Zealanders value their right to privacy in daily life including their right to be let alone, to be free from unwanted intrusion by others, to control their personal information and to protect their bodily integrity, individuality and human dignity. In 2016, we commissioned the seventh independent survey on New Zealanders' views on individual privacy and the handling of personal information. Privacy concerns change over time and the surveys attempt to identify the issues of the time.

1.2 Results show New Zealanders concerns about the right to privacy have consistently remained high with nearly two-thirds (65 percent) expressing concern.[4] Individual privacy concerns have been increasing: in 2016, nearly half (46 percent) of New Zealanders were more concerned about individual privacy issues over the last few years. Young people aged 18-29 years (55 percent more concerned) and those with university education (55 percent) were particularly concerned.

1.3 Nearly all respondents (87 percent) were concerned about the personal information children upload to the Internet. A large majority (75-81 percent) were concerned about issues related to identity theft, credit card and banking details, businesses sharing personal information and security of information. There was less concern (but still significant) about the way government (59 percent concerned) and health organisations (47 percent concerned) are sharing information. This represents a decrease of 8 percent and 6 percent from 2014 respectively.

1.4 These results tell us that, contrary to popular belief, young people take their privacy seriously. While caution remains, the public do have some trust and confidence in how government agencies share information. The results also reinforce that privacy is one of the cornerstones on which citizen and consumers build their trust in government and other agencies with which they interact.

1.5 Fast moving changes in technology, increased data storage and the increased usage, across both public and private sectors, of analysis of large data sets have raised new questions and challenges regarding privacy. While we support innovations, there is also a need to ensure these do not compromise privacy and will bring tangible benefits to New Zealanders. Privacy should not be seen as a barrier to change and needs appropriate frameworks to ensure efficient introduction of new innovations.

1.6 Changes in technology are just one context in which to consider the right to privacy today. The fundamental rights of access to personal information remain of enduring importance to many members of the public. Each year we receive more than 7,000 enquiries and investigate between 700 and 800 complaints about rights to personal information. Conversely, many agencies still struggle to fulfil their obligations to collect, store, use, not disclose and to delete the personal information they hold.

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[4] Survey results available: https://privacy.org.nz/news-and-publications/surveys/

1.7 Constitutional protection is one way to strengthen existing frameworks as innovation continues and new challenges arise. Current and possible future risks to privacy and public concern about these demonstrate the right to privacy is an enduring one, is important to New Zealanders and would remain relevant and enduring in a constitutional setting.

2 The Enduring Importance of the Right to Privacy

2.1 The response of the international legal community to debate about the right to privacy in a digital age has some useful lessons for those considering constitutional protection of the right to privacy in New Zealand. In 2013, revelations about the use of technology by governments in national security contexts resulted in debate about the relevance of the right to privacy in the digital age. The result was an elegantly simple and powerful reaffirmation of the enduring nature of the right to privacy when the United Nations Human Rights Council reaffirmed:[5]

> … the right to privacy, according to which no one shall be subjected to arbitrary or unlawful interference with his or her privacy, family, home or correspondence, and the right to the protection of the law against such interference, as set out in article 12 of the Universal Declaration of Human Rights and article 17 of the International Covenant on Civil and Political Rights;
>
> and:
>
> that the same rights that people have offline must also be protected online, including the right to privacy.

2.2 This powerful affirmation that the right to privacy endures through technological change was important because the right to privacy proposed in the *Constitution Aotearoa* largely reflects the wording of existing international standards. A constitutional protection in New Zealand would be a similarly powerful affirmation of the enduring right to privacy, regardless of technological developments.

Privacy is a well established fundamental human right

2.3 In the modern human rights era, which dates from the 1940s, the constitutional nature of the right to privacy has been reflected in the fundamental universal human rights of all people. The Charter of the United Nations (the Charter) 1945, for example, reaffirms "faith in fundamental human rights, in the dignity and worth of the human person, in the equal rights of men and women and of nations large and small."[6] In 1948, United Nations Members adopted the Universal Declaration of Human Rights (UDHR), setting out the fundamental human rights which they agreed must be universally protected, including the right to privacy, in article 12:[7]

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[5] A/HRC/28//L.27
[6] *Charter of the United Nations,* Preamble.
[7] http://www.un.org/en/universal-declaration-human-rights/

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

2.4 Subsequent agreements on more specific rights also protect the right to privacy, including Article 17 of the International Covenant on Civil and Political Rights 1966 (ICCPR), the International Covenant on Economic, Social and Cultural Rights (ICESCR) and Article 22 of the Convention on the Rights of Personal with Disabilities 2006 (CRPD) (which also requires protection of the privacy of personal, health and rehabilitation information of persons with disabilities on an equal basis with others).

2.5 Despite these international standards, the 2013 events surrounding revelations by Edward Snowden and others of alleged mass surveillance by national security agencies of the United States of America brought the right to privacy at national and international levels sharply into question. There was doubt surrounding whether, and if so, how existing privacy rights might apply, with some arguing these simply did not apply in a digital age and others arguing a need for more express protections for the right to privacy in the modern digital era.

2.6 As noted above, the United Nations took the opportunity to look afresh at the right to privacy in a digital age. The risks associated with changing technologies and the vulnerabilities of those technologies to electronic surveillance and interception were reflected in a reaffirmation of the right to privacy and the introduction of new protection mechanisms.[8] In July 2015 the United Nations Human Rights Council (the Council) established a Special Rapporteur on the right to privacy. A Special Rapporteur is an independent expert appointed by the Council to examine and report on a specific human rights theme.[9]

2.7 For privacy authorities and all those working to ensure the security and integrity of personal information, the creation of a Rapporteur role devoted to privacy was a singular universal elevation of privacy rights. It was more than symbolism; it was a reflection of the growing international convention that privacy is a value that needs special attention in changing world.

2.8 The resolution appointing the Special Rapporteur, directed that, among other responsibilities, the Rapporteur was to report to the Council "on alleged violations of the right to privacy including in connection with the challenges arising from new technologies."[10] In 2016, the Rapporteur's first country visit was to New Zealand.[11]

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[8] For an overview see: United Nations Office of the High Commissioner for Human Rights "The Right To Privacy in a Digital Age", http://www.ohchr.org/EN/Issues/DigitalAge/Pages/DigitalAgeIndex.aspx
[9] http://www.ohchr.org/EN/Issues/Privacy/SR/Pages/SRPrivacyIndex.aspx
[10] http://www.ohchr.org/EN/Issues/DigitalAge/Pages/DigitalAgeIndex.aspx
[11] See also Canataci, J, Report of the Special Rapporteur on the right to privacy, HRC/34/60 (2017).

Privacy rights develop continuously

2.9 The challenges faced at international level of how to deal with new developments within existing human rights have, to varying degrees, been reflected at regional and national levels. For example, the European Convention on Human Rights (ECHR) gives effect to the UDHR[12] and established the European Court of Human Rights, giving citizens the right to bring court action against their governments for human rights violations. Article 8 of the ECHR protects the "right to respect for private and family life" and has been interpreted as constituting a right to privacy.[13]

2.10 Decisions on Article 8 emphasise measures encroaching on this right must provide legal protection against arbitrariness, including in the modern context protection from arbitrary information sharing. A recent decision of the Supreme Court of the United Kingdom explained, in the context of information sharing about children and young people, that there must be safeguards to ensure the proportionality of the privacy interference can be examined and that doing so is an issue of the rule of law.[14]

2.11 An examination of international instruments and the legal frameworks of other jurisdictions makes its clear that the right to privacy is an important one that needs continued recognition, even where constitutional protection exists. For example, on 24 August 2017 the Supreme Court of India ruled unanimously that the right to privacy is "protected as an intrinsic part of the right to life and personal liberty under Article 21 [of the Constitution] and as part of the freedoms guaranteed by Part III of the Constitution"[15]. The Court commented that, as a constitutional right, no legislation passed by the Government could violate the right to privacy.

2.12 Other 'modern' opportunities to re-examine fundamental human rights have highlighted the importance of the right to privacy in response to specific national contexts. For example, in 1949, following the atrocities of World War Two, Germany established the "Basic Law for the Federal Republic of Germany" as a tool to guarantee its citizens' fundamental human rights, including the right to privacy.[16] The South African Constitution, created under Nelson Mandela's government, includes the right to privacy as one of the fundamental rights protected by the Constitution.[17]

Privacy is fundamental to rights protection in response to technology

2.13 Privacy rights and data protection have been very important in modern Europe where citizens have challenged the use of technology. In the Population Census case[18] (1980) for

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[12] http://www.echr.coe.int/pages/home.aspx?p=basictexts
[13] Hao Wang *The Legal Protection of Privacy in International Practices: Potential as Models for a Chinese Privacy Protection Regime* (Springer, 2011) at 79.
[14] *R (T) v Chief Constable of Greater Manchester Police* [2015] AC 49.
[15] *Justice KS Puttaswamy v Union of India* [2017] The Supreme Court of India Civil Original Jurisdiction at 546.
[16] Basic Law for the Federal Republic of Germany 1949, Article 10.
[17] Constitution of The Republic of South Africa 1996, Article 14.
[18] See Volkszählungsurteil, 1983, German Federal Constitutional Court

example, the German constitutional court determined that in the new age of data processing, the right to informational self-determination requires protection against the unlimited collection, storage, use and disclosure of personal information. The court considered the unconstitutionality of one level of government passing data to another dictated a requirement for organisational and procedural safeguards.

2.14 The court set out requirements for legal purpose-specific collection, as well as the need to check accuracy of information, the ability to access and revise it, timeliness, limits on retention of personal data, minimising the amount of data collected and the need for independence of data protection officers. These principles remain central to data protection laws, including New Zealand's Privacy Act.

2.15 In today's dynamic digital environment, new privacy issues are emerging. For example, the human body is now the source of sensitive identifying personal information through the increasing use of biometric technologies and wearables. The sanctity of the cell-phone is now rivalling the sanctity of the home[19] as a repository of significant personal information and intimate details about a person's life and connections.

2.16 A modern constitution for New Zealand must take into account these new issues and consider the right to privacy in a digital age so that the scope of the constitutional right is broad. We suggest that a new written constitution include a right to privacy that spans the full range of areas where the right to privacy can arise, including:

- **bodily privacy** – protecting the integrity of a person's body;
- **physical privacy** – protecting places, such as person's home;
- **informational privacy** – protecting information about an individual; and
- **communications privacy** – protecting the method of communication where privacy would be normally expected.

2.17 Finally, the *absence* of a right to privacy in a written constitution risks elevating freedom of expression to constitutional significance without adequate consideration of the right to privacy. There is already inadequate protection in New Zealand for testing the rationality of limits on rights and freedoms and the proportionality of those limits in relation to privacy.[20] While the common law rights enunciated by Warren and Brandeis in 1890 are well known,[21] it is less well known that the right to privacy is not expressly set out in the US Bill of Rights. The Supreme Court has found sources for the right to privacy in the first, third, fourth, fifth and ninth amendments.[22] A written constitutional protection would enable New Zealand to chart its own course more clearly.

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[19] See Lord Coke's *Laws of England* (1628): "The poorest man may in his cottage bid defiance to all the forces of the Crown. It may be frail – its roof may shake – the wind may blow through it – the storm may enter – the rain may enter – but the King of England cannot enter."
[20] This is discussed further in paras 4.10 - 4.11 below.
[21] Brandeis and Warren "The right to privacy" 4/5 Harvard Law Review (1890) 193-200.
[22] Stewart, Blair "Should the right to privacy be expressly recognised in the New Zealand Bill of Rights Act?", *Privacy Forum*, April 1994.

3. Privacy Protection in New Zealand Today

3.1 The judicially enforceable rights of access to personal information in the Privacy Act have been recognised as having constitutional status in New Zealand's existing unwritten constitutional arrangements.[23] Some Latin American jurisdictions recognise this in [24]a constitutional writ known as "habeas data" - "bring up the data". The phrase recalls that most fundamental human rights writ and instrument of the rule of law: habeas corpus or "bring up the body".

3.2 This section briefly describes ways in which the wider right to privacy is currently protected across many laws in New Zealand.[25] The diversity of these current protections reflects the very broad themes, concepts and values[26] that the right to privacy embodies. Examples of current privacy protections include:

- The Fencing Act 1978.
- Freedom from unreasonable search and seizure.[27]
- Criminal Investigations (Blood Samples) Act 1995
- Criminal Investigations (Blood Samples) Act 1995.
- Criminal Records (Clean Slate) Act 2004.Criminal offences against the use of interception devices.[28]
- Authorising provisions in the Intelligence and Security Act 2017, which limit when and how personal information can be used by intelligence agencies.
- Protection from harassment.[29]
- Privacy principles in the broadcasting standards.[30]
- Communication Principles in the Harmful Digital Communications Act 2015.
- The Code of Health and Disability Consumers Rights
- Privacy standards in codes issued by the Press Council.
- Broadcasting Standards Act and the Broadcasting Standards Code;
- The Official Information Act 1982.[31]
- Common law rights, for example, torts protecting informational privacy[32] including public disclosure of private facts and from intrusion into solitude.[33]

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[23] *Commissioner of Police v The Ombudsman* [1988] 1 NZLR per Cooke P.
[24] Brazil, Paraguay, Argentina. For early commentary see Guadamuz, A. *Habeus Data: Latin American response to data protection,* Journal of Information Law and Technology, 2000 (2). Available at: https://warwick.ac.uk/fac/soc/law/elj/jilt/2000_2/guadamuz
[25] *Hosking v Runting* [2005] 1 NZLR 1 Gault P, Blanchard J at [91]-[116]; Keith J at [185]-[207].
[26] For example, *R v Jeffries* [1994] 1 NZLR 290, Thomas J at 319.
[27] *R v Fraser* [1997] 2 NZLR 442; *Hamed v R* [2011] NZSC 101: includes any unjustified state intrusion on an individual's privacy.
[28] Part 9A of the Crimes Act 1961.
[29] The Harassment Act 1997
[30] Broadcasting Standards Act 1989
[31] The Act protects official information in the public interest and to the extent necessary to preserve personal privacy.

- Personal information rights in the Privacy Act 1993.

3.3 Despite its name, the Privacy Act is mainly concerned with protection and promotion of the privacy of personal information, regulating the collection, use, disclosure and deletion of personal information about individuals. The definition of personal information is very broad. The Privacy Commissioner has a wide range of statutory functions under the Act including educative, advisory, inquiry, consultative and reporting functions. The Commissioner also takes into account wider considerations including other human rights and social interests, such as the free flow of information, New Zealand's international obligations, and efficient means of achieving government and business objectives. The Commissioner can investigate and seek to resolve of disputes about personal information.

3.4 Government agencies accessing and sharing personal information has implications for an individual's control of the use of their personal information, with broader implications for their dignity and selfhood. In Europe, this is described as the right of "informational self-determination".[34] To develop one's personality, in the European tradition, a person needs to be able to participate in society by only disclosing such information as they wish. If a person does not know what information about them is being recorded, used or disclosed to others, to keep control of their information they may withdraw from the public actions and debates central to a democratic society.

3.5 The Privacy Act provides a range of mechanisms so that personal information can be shared where there is a justifiable need to do so. The Act has a purpose based approach: information sharing must be connected to the purpose for which it has been collected. The range of information sharing tools is intentionally diverse so as to allow the most appropriate approach to be used in the circumstances. Where purposed-based information sharing is not possible or appropriate, other tools such as sharing anonymised information, sharing in accordance with an exception to the disclosure principle, information matches, or approved information agreements are options. As these mechanisms allow for personal information to be shared without the individual's authorisation, the Act includes the necessary process safeguards including transparency and oversight.

3.6 In addition to the Privacy Act, many other laws require consultation with the Privacy Commissioner.[35] Consultation is also required in Cabinet decision-making process when new laws or policies may affect the privacy of individuals.[36] These requirements reflect the

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[32] *Hosking v Runting* [2005] 1 NZLR 1 (CA). See also *Brown v Attorney-General* [2006] DCR 630; *Andrews v Television New Zealand* [2009] 1 NZLR 220 (HC)); *Rogers v Television New Zealand [*2007] NZSC 91.

[33] *C v Holland* [2012] NZHC 2155.

[34] See Cannatacci, J *Report of the Special Rapporteur for Privacy* (2016) United Nations A/HRC/31/64, para 26.

[35] For example, s 146 Anti-Money Laundering and Countering Financing of Terrorism Act; s 182D Corrections Act 2004; ss 274A, 280J, 281, 282H and 286A Customs and Excise Act 1996; s 25 Financial Transactions Reporting Act 1996 and ss 32 and 305 Immigration Act 2009.

[36] Cabinet Office Cab Guide, *Guide to Cabinet and Cabinet Committee Processes* Departmental consultation http://www.cabguide.cabinetoffice.govt.nz/.

fundamental importance of constitutional safeguards for the right to privacy in government decision-making

3.7 The Courts have also been prepared to take notice of the Privacy Act in assessing the actions of parties to disputes, for example in the employment context or in discovery, as well as aspects of tort law and human rights cases. Finally, the importance of the right to privacy in the Privacy Act can be noted by its inclusion in the Legislative Advisory Committee guidelines.[37]

3.8 In summary, the right to privacy is protected across a wide range of laws and processes, many of which focus on privacy of personal information. With recognition of its place in New Zealand's unwritten constitution, it might be considered there is no need to include the right to privacy in a new, written constitution. The next section sets out why we consider the right to privacy is needed if a new, written constitution were to be developed.

4. We Need a Constitutional Right to Privacy

4.1 Constitutional protection enables three things: visibility, scrutiny and accountability through the different roles of the Courts, Parliament and the Executive.

Visibility

4.2 The absence of a constitutional protection does not mean there is no protection for the right to privacy. In the United States of America, for example, the right to privacy is not specifically included in the first ten amendments (which are known as the Bill of Rights). However, as noted recently by the Supreme Court of India: [38]

> *"The development of the jurisprudence on the right to privacy in the United States of America shows that even though there is no explicit mention of the word 'privacy' in the Constitution, the courts of the country have not only recognised the right to privacy under various Amendments of the Constitution but also progressively extended the ambit of protection under the right to privacy."*

4.3 Similarly, the Canadian Charter of Rights and Freedoms of 1982 does not explicitly create a "right to privacy", however the Supreme Court of Canada has pointed to certain sections of the Charter in order to recognise a right to privacy.[39]

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[37] Legislative Advisory Committee Guidelines (2014).

[38] *Justice KS Puttaswamy v Union of India* [2017] The Supreme Court of India Civil Original Jurisdiction at 164. See: *Kyllo v United States* 533 US 27 (2001), *Lawrence v Texas* 539 US 558 (2003), *United States v Jones* 565 US 400 (2012), *Florida v Jardines* 569 US 1 (2013), *Riley v California* 573 US (2014), and *Obergefell v Hodges* 576 US (2015).

[39] See: *Her Majesty, The Queen v Brandon Roy Dyment* [1988] 2 SCR 417, *R v Plant* [1993] 3 S.C.R. 281, *Her Majesty, The Queen v Walter Tessling* (2004) SCC 67, and *R v Spencer* (2014) SCC 43.

4.4 But a failure to include explicit protection in a new constitution could have the unintended consequence of suggesting a hierarchy of rights, giving privacy secondary status to other rights that are explicitly protected. This might create public mistrust that individual privacy rights are not adequately recognised. The absence of the protection can cause distrust whereas express protection can provide reassurance about the rule of law as a force against arbitrary use of executive and legislative power.[40] The New Zealand Chief Justice has described the rule of law this way:[41]

> *Its central plank is the principle of legality – that no one or no body is above the law and that fundamental values and rights can be trenched on only by unmistakeable legislative intent. Reasonableness and fairness in the exercise of power seem pretty well established as part of the rule of law. But the extent to which substantive values such as human rights are part of the rule of law is more contested.*

4.5 The right to privacy connects the human rights framework with the rule of law. The right to privacy, while fundamentally characterised as a human right, has long played a role in protecting the citizen against intrusions of the State. Privacy provides a fundamental connection between the human rights framework and the rule of law. This justifies the right to privacy having its own constitutional protection and one that is clearly visible to New Zealanders.

4.6 Protection of fundamental human rights under the New Zealand Bill of Rights Act since 1990 has seen new jurisprudence emerge in relation to freedom of expression, freedom from discrimination, the right to consent to medical treatment and the right to natural justice. Constitutional protection for the right to privacy could likewise ensure more consistent scrutiny. This would also avoid the current risk that development of the right to privacy is limited by the history of its omission from the New Zealand Bill of Rights Act.

Scrutiny

4.7 The right to privacy proposed in clause 92 of the draft Constitution is:

> *… the right not to be subject to arbitrary or unlawful interference with that person's privacy, family, home or correspondence.*

4.8 Constitutional protection would enhance the legal foundations of the right to privacy. Currently there is a risk that the right to privacy is inadvertently limited or unduly relegated in specific cases. Constitutional protection would give greater visibility to the right to privacy, more consistent scrutiny and would ensure robustness in each case so that the privacy right receives the necessary consideration and weighting.

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[40] The Honourable Justice Matthew Palmer "The rule of Law, Judicial Independence and Judicial Discretion (20 January 2016) https://www.courtsofnz.govt.nz/speechpapers/HJP.pdf

[41] Address At Otago University, Dunedin Wednesday 7 October 2015 "Judgery and the Rule of Law" https://www.courtsofnz.govt.nz/speechpapers/HCJ.pdf

4.9 A recent trend in New Zealand has been the creation of new laws with bespoke information sharing rules sitting outside the Privacy Act (for example, in the areas of family violence or children at risk). Scrutiny under current processes is limited because there is no explicit right to privacy in the Bill of Rights Act against which the Attorney-General must report scrutiny of new legislation.[42]

4.10 Section 5 of the Bill of Rights Act provides a strong framework to inquire whether a limitation on the right to privacy can be demonstrably justified limitation. The correct approach to a section 5 inquiry was summarised by the Supreme Court in *R v Hansen* as follows:[43]

> a) does the provision serve an objective sufficiently important to justify some limitation of the right or freedom?
> b) if so, then:
> i. is the limit rationally connected with the objective?
> ii. does the limit impair the right or freedom no more than is reasonably necessary for sufficient achievement of the objective?
> iii. is the limit in due proportion to the importance of the objective?

4.11 The Privacy Act is an ordinary statute, which means that other laws can override it. A new constitutional protection of the right to privacy would add a measure against which any new legislation would need to scrutinised. Scrutiny of the impact on privacy rights would be more robust and consistent if there was a more general constitutional protection. The recent decision of the Supreme Court of the United Kingdom *Christian Institute v Lord Advocate* illustrates the power of constitutional protection in relation to information sharing about children and young people.[44]

Accountability

4.12 Constitutional protection of the right to privacy would create a strong legal foundation to navigate accountability in an increasingly complex environment, as the digital transformation of people's lives, business, government and the economy continues and produces vast swathes of personal data and information. Information is increasingly being generated and collected about individuals:

- Smart phones that know our every move and the most intimate and personal aspects of our lives
- Intelligent cars that know where we go and how we drive

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[42] Section 7, Bill of Rights Act 1990, provides for the Attorney General to report to Parliament where a Bill appears inconsistent with the Bill of Rights Act.
[43] *Hansen v R* [2007] NZSC 7 at [121].
[44] *Christian Institute v Lord Advocate* [2016] UKSC 51. The Supreme Court expressed the issues raised in the following four questions: (i) what are the interests which article 8 of ECHR protects in this context, (ii) whether and in what respects the operation of the Act interferes with the article 8 rights of parents or of children and young people, (iii) whether that interference is in accordance with the law, and (iv) whether that interference is proportionate, having regard to the legitimate aim pursued.

- The internet of things where the objects we own collect information about us and our habits
- Wearable technology that collects information about our health and fitness
- Big data that collects as much information as possible from a variety of sources
- Artificial intelligence and algorithmic learning tools that can turn data into useful information and make inferences based on seemingly unconnected information

4.13 We have reached a turning point where the collection and generation of personal information is no longer consciously controlled by the choice of the individual. Valuable personal information is now also generated passively (and largely unconsciously) through new online services and devices and these are highly connected, providing insights and richer information about people's daily lives.

4.14 Decisions about what is done with personal information, how it is shared, for what purpose, and how it is protected, can be significant for individuals. While the positive uses of data are clearly beneficial to society and the economy, the risks to privacy and human rights cannot be overlooked. New devices created new methods of surveillance and intrusion. What was formerly private or obscured can now be readily revealed.

4.15 In this environment, there are increased risks: to personal control over personal information, risks of injustice such as discrimination from the misuse of personal information and risks to personal dignity from the release of personal information. Increasingly it is becoming harder for individuals to understand where their information is and who has access to it. A constitutional protection of the right to privacy in this environment would strengthen accountability for how these risks are regulated.

4.16 While warnings about the risks to privacy from technological developments have been made and repeated by Privacy Commissioners since the 1990s, these warnings remain relevant and significant with each new phase of the digital society. New Zealanders care about their privacy. This is evident from the results of the Office of the Privacy Commissioner's opinion surveys, from public reaction to privacy issues in the media, particularly high profile data breaches, and from the nature of individual privacy complaints that are raised with our Office or considered by the Human Rights Review Tribunal. Constitutional protection would be an additional, tangible form of accountability in this context.

4.17 Constitutional protection would also strengthen international accountability. New Zealand's privacy law has been formally recognised by the European Commission as providing an adequate level of data protection to meet the requirements of existing European Union (EU) law.[45] New Zealand is one of only five countries outside Europe to have received

[45] New Zealand's adequacy status is noted as a major advantage to New Zealand business in the government response to the Law Commission's review of the Privacy Act: Office of the Minister of Justice *Reforming the Privacy Act* (Cabinet Social Policy Committee, May 2014) at [38].

such formal recognition.[46] The recognition of the adequacy of New Zealand's privacy law provides a legal basis for EU businesses freely to send data to New Zealand for processing (and earning the European Commission's recognition, with its informal characterisation as 'New Zealand's first free trade agreement with the EU').

4.18 Important regional data protection has been very influential in the New Zealand Privacy Act, including the European Convention (1981), the OECD Guidelines (1980) and the APEC Privacy Framework (2004).[47] Most recently European data protection laws have been strengthened and reformed with the new General Data Protection Regulation (the GDPR) taking effect in April 2018. The adoption of the GDPR has global significance. It is widely perceived as the most stringent and the most influential privacy law in the world. It harmonises the information privacy law of member states and purports to apply not only to European businesses but also to non-resident businesses processing the information of EU residents.

4.19 New Zealand's formal adequacy recognition will be carried over to the new GDPR regime. However, it will be subject to ongoing review and with the more stringent EU standards applying from 2018 there will be some risk of NZ's status being questioned in the future if our law is seen as falling below prevailing EU expectations. New Zealand's participation in the Five Eyes alliance has also received scrutiny from the European Commission, following the Snowden revelations.

4.20 A constitutional right to privacy would strengthen New Zealand's privacy laws and could therefore have consequential benefits for New Zealand's international standing and international trade. Such protection would also help to answer concerns that the current arrangements are insufficient to defend the right to privacy and to weigh it in the balance of other rights, such as freedom of expression. As noted above, the section 5 analysis that constitutional protection would bring, would be help ensure that remedies were contextual, depending on the specific circumstances of each case.

Constitutional Protection Strengthens Public Trust

4.21 The collection, use and control of personal information by government agencies can raise issues of constitutional importance. The Privacy Act is an important safeguard providing an avenue for citizens to assert their rights. Constitutional protection would also add to public trust in a data rich world where public concern about behaviour of government, while showing some recent decrease, has remained high. Constitutional protection may also drive better policy. Our recent inquiry into the collection of individual client level data by the

[46] http://ec.europa.eu/justice/data-protection/international-transfers/adequacy/index_en.htm. In addition, the EU Commission has also adopted a decision recognising the adequacy of the protection provided by the EU-U.S. Privacy Shield (12 July 2016).

[47] Data protection principles have been developed in the APEC region as a means of reducing barriers to trade by removing obstacles to information flows, to encourage economic growth.

Ministry of Social Development is a clear example of how an agency can lose the trust and confidence of New Zealanders when data collection is disproportionate and excessive.[48]

4.22 Companies and government agencies have found that inadequate attention to privacy of customer and client data can erode trust and confidence, impede delivery of public services and decrease shareholder value. Building and maintaining this trust both within New Zealand and internationally is a key focus of the work that this Office carries out on a daily basis.

4.23 Our 2016 survey on attitudes to privacy introduced a new section on "Data Sharing". This was a contentious issue and we concluded that having the right safeguards in place was crucial to increasing people's willingness for their data to be shared. Constitutional protection would be one such a significant safeguard.

5 Existing Privacy Law Needs Reform

5.1 Despite Courts' acknowledgement of its important constitutional status, the Privacy Act is an ordinary statute in urgent need of reform.

5.2 Earlier this year, the Commissioner reported to Parliament that privacy law reform has been under consideration since 1998 with the release of the Privacy Commissioner's comprehensive *Necessary and Desirable* report (and four update reports between 2000-2008), followed by the thorough and wide-ranging Law Commission review (2008 - 2011) and the government's detailed response.[49] These reviews and the government response form the basis for the proposed modernisation of the Privacy Act.

5.3 These long overdue reforms have been overtaken by, among other things, new technological developments and the need for new regulatory responses, including international responses. In December 2016 I proposed additional reforms that respond to rapid changes since the 2011 review. My recommendations included new provision for:

> **A right to data portability**: introducing a right to personal information portability (also known as a right to data portability), a new consumer right that is a feature of the EU General Data Protection Regulation (that will come into force in 2018) to support and strengthen the fundamental right of access to information and to enhance consumer choice;
>
> **New enforcement powers for the Commissioner**: including for the Commissioner to be able to apply to the High Court for a civil penalty in cases of serious data breaches;
>
> **Controls on re-identification**: including protections against the risk that individuals can be unexpectedly identified from data that has been purportedly de-identified; and

[48] See: Privacy Commissioner *Inquiry into MSD Collection of Client-Level Data from NGOs,* Wellington (2017)
[49] Supplementary Government Response to Law Commission report on Review of the Privacy Act 1993 (May 2014).

A new power to require demonstrations of agency compliance: empowering the Commissioner to require agencies to demonstrate their compliance with the Act by reporting on the agency's privacy management programme or plan.

5.4 A modern constitution needs a modern Privacy Act. Constitutional protection of the right to privacy offers additional safeguards. For example, new developments may fall to be considered within the scope of a more general constitutional provision either as a source of guidance in the existing Privacy Act or influencing the interpretation of new features.