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JUST LEAVE IT TO THE COURTS?
New Zealand's Privacy Rights Regime as a Case Study in the Relationship between Common Law Development and Legislative Reform

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I Introduction

The common law tradition's defining characteristic is its duality: that is, it draws from two distinct sources of legal authority. Judge-made law is law 'from below', emanating retroactively from specific disputes and, over time, crystallizing into general legal principles. Legislation, conversely, descends 'from above', originating as abstract rules and principles which then take effect in specific cases. The difference is not merely structural – the two sources represent different forms of reasoning and necessarily result in different kinds of law. As such, in attempting legal reform in the common law tradition it is important not only to arrive at the best substantive legal rules, but to ensure that the rules are arrived at by, and developed within, the right strand of authority. The question – is this an issue for Parliament or for the courts? – is always a salient one.

Since the 1980s a body of law has emerged in New Zealand, both through the courts and through statute, concerning the rights of individuals to privacy. The demands of technological and social developments have forced law-making institutions to move reasonably quickly both to provide an effective regulatory regime and to offer redress when breaches of rights occur. The question of what (if anything) should be left to the courts has frequently been raised in relation to privacy rights, but the answers given have often been uncertain and contradictory. At common law, judges have consistently expressed reservations about going too far in offering rights in tort, yet the regime relies heavily on the two torts that have emerged. Meanwhile, the legislature have arguably hindered common law developments through some reforms while supporting the Law Commission's recommendation that the common law in this area should be left to develop without direct statutory intervention. The resulting regime is piecemeal and overlapping, and while it is not without merit, one might rightly be concerned about its ability to develop so as to continue to provide effective regulation and redress.

With new privacy issues emerging at a rapid rate and further legislative reforms expected to be announced this year,[1] now is an appropriate time to consider afresh where responsibility for ongoing development should lie. This paper investigates the reform and development of private law privacy rights with a view to contributing towards answering two questions. Firstly, what ought the respective roles of the courts and Parliament be in the ongoing development of this fast moving area of law? Secondly, what can this case study show about the relationship

[1] Amy Adams, Minister of Justice "Opening address to the Wellington Privacy Forum" (Speech to the Wellington Privacy Forum, Wellington, 11 May 2016).

between judicial development of the law and legislative reform in New Zealand more generally?

To this end, the paper proceeds in three parts. In part one, the development of the components of New Zealand's private law privacy rights regime will be described, with a particular focus on the balance of labour between judicial development and statutory reform. Finding that there has been no coherent and principled basis to the respective roles that the courts and Parliament have in fact taken on, part two presents a theoretical framework from first principles for choosing between the two institutions, and analyses the privacy rights regime against that framework. It is found that while this exercise offers some helpful insights into the regime, a neat binary of the courts' and the legislature's respective prerogatives along the lines suggested is neither possible nor helpful. In light of these findings, in part three the Law Commission's recommendation that the privacy torts should be left entirely to the courts is revisited. It is argued that legislative consolidation of the rights regime is desirable, and that what is needed is a closer and more dynamic relationship between Parliament and the courts in future development. Such a model, it is suggested, could be useful in private law development more generally.

First, however, something must be said to make sense of the "large, unwieldly, and elusive concept"[2] of legal rights to privacy.

A The Right to Privacy

On one level, privacy can be seen as a value that underlies many areas of the law. It is a latent idea in protections of the person and property in both private and criminal law, and in the legal regulation of the relationship between the state and the citizen.[3] However, in recent decades, express rights to privacy have been recognised by the law, and it is these rights that are the subject of this paper. As with all rights, the right to privacy only arises out of relationships; between individuals and between individuals and institutions. Different kinds of relationships

[2] Stephen Penk "Thinking About Privacy" in Stephen Penk and Rosemary Tobin (eds) *Privacy Law in New Zealand* (Brookers, Wellington, 2010) 1 at 1.
[3] Law Commission *Privacy Concepts and Issues: Review of the Law of Privacy Stage 1* (NZLC SP19 2008) at 71.

raise different issues. This paper will take a private law focus; as such, the rights of individuals to privacy arising out of the relationship between state and citizen will not be addressed.

What does it mean to say one has a right to privacy? It is made up of two parts. A 'right' in this context is to be understood under traditional Hohfeldian analysis as a 'claim' which corresponds to a duty.[4] My right to privacy imposes on you a duty not to interfere with it.

As to what a claim or duty relating specifically to *privacy* entails, theorists and lawmakers have proposed a great number of answers. The first and perhaps most influential enunciation of a legal privacy right came from Warren and Brandeis in 1890, who conceptualised it as the "right to be let alone".[5] Others have conceptualised it as a right to be able to control access to the self; to be able to determine which aspects of the self are perceivable to others.[6] Gavison provides a sophisticated version of this as the individual's ability to limit access to his self in order to preserve a level of secrecy, anonymity, and solitude.[7] Still others conceptualise privacy as connected to human intimacy, and a right to it as the ability to keep secret those facts and situations that can be seen as expressions of intimacy.[8] Many eschew the project of definition entirely, arguing that there is no single idea of privacy but rather a loosely connected net of claims, rights, and interests which are variously described under that name.[9]

The various definitions have in common the idea that any right to privacy is an expression of fundamental human values including dignity, autonomy, and the sanctity of the individual self. Also common ground is that there can be no such thing as an absolute general right to privacy – privacy is always balanced by other rights and interests, most notably those relating to freedom of expression.

The problem of definition will be discussed some more below, but as this paper focuses on the approach New Zealand law makers have in fact taken towards privacy it is not necessary to engage in the definitional debate. The Law Commission, in its issues paper on privacy reform, does a good job of describing what the New Zealand approach to defining privacy rights has been. The first thing to note is that it has been piecemeal – no right of general application has been recognised, and as such no attempt at defining such a right has been made. Importantly,

[4] Wesley Hohfeld *Fundamental Legal Conceptions as Applied in Judicial Reasoning* (Yale University Press, New Haven, 1966).
[5] Samuel Warren and Louis Brandeis "The Right to Privacy" (1890) 4 Harvard L R 193 at 195.
[6] Law Commission, above n 3, at 34.
[7] Ruth Gavison "Privacy and the Limits of the Law" (1980) 89 Yale LJ 421.
[8] Law Commission, above n 3, at 38.
[9] Penk, above n 2, at 12.

the Commission delineates two distinct types of privacy rights which have been recognised at New Zealand law: informational privacy and local privacy. Informational privacy refers to a right in respect of information of an intimate or personal nature[10] and local privacy to a right in respect of one's personal sphere or seclusion.[11] Both draw on the idea of privacy as limited access – the former to information about oneself, the latter to one's intimate physical sphere.

II Part One: The Development and Reform of Private Law Privacy Rights in New Zealand

It is first necessary to describe New Zealand's privacy rights regime and to explain the process of reform and development that has given rise to it. The purpose is twofold: firstly, to see how the courts, Parliament, and reformers have answered the question of where law-making responsibility should lie, and, secondly, to enable a comparison of the kinds of rights that the two institutions have developed.

Although the narrative of reform starts in the 1980s, the most important moment in the development of New Zealand's regime for present purposes came in 2010 when the Law Commission published their findings on stage three of a four stage review of the law of privacy.[12] In it they considered whether the common law tort that had been developed concerning informational privacy should be codified into statute, or left to develop in the ordinary course of the common law. They concluded:[13]

> A statute would render the law more accessible than the common law (an advantage in itself), fill some of the gaps in the current law, and render some of the criteria more certain than they currently are. The common law is dependent on the accidents of litigation and develops slowly. Statute law can present a complete and coherent whole straight away.
>
> However, after careful deliberation we have decided that the tort should be left to develop at common law. The common law has the great advantage that in a fast-moving area judges can make informed decisions on actual cases as they arise. Privacy is particularly fact-specific. As has been said in the United Kingdom, each case requires an intense focus on the individual circumstances. The common law is well-suited to that task. The common

[10] Law Commission, above n 3, at 57.
[11] Law Commission, above n 3, at 59.
[12] Law Commission *Invasion of Privacy: Penalties and Remedies: Review of the Law of Privacy: Stage 3* (NZLC R113 2010).
[13] At 90.

> law is also flexible, and can thus develop with the times. Statute creates a risk that what is enacted today may be out of date tomorrow. To avoid this dilemma, any privacy statute would have to be drafted in open-ended terms, and might end up being little advance on the common law.

The significance of this finding was that it preserved the status quo in terms of the balance of labour between statute and common law. As will be seen, that meant separate regimes developing in parallel – a developing tortious body of law at common law, and a piecemeal assortment of rights developing through ongoing legislative action. This decision will be returned to, and critiqued, as the focus of the final part of this paper.

A Common Law

1 Informational privacy tort

Prior to the Law Commission's report, the development of a tortious right to privacy had been characterised by reluctance and caution on the part of the courts, and its continued existence had been a matter of uncertainty. Its genesis came in the 1989 case of *Tucker v News Media Ownership*[14] where judges in both the High Court and Court of Appeal intimated for the first time that a tort of informational privacy might be recognised. Prior to this, privacy was only protected indirectly at common law, through actions such as breach of confidence and trespass. In the case, the plaintiff pleaded on the basis of the then well-established American tort in seeking an injunction. Jeffries J in the interim injunction application remarked that development of such a tort would be "in accordance with the renowned ability of the common law to provide a remedy for a wrong",[15] and on the full hearing McGeehan J said that the tort "will need much working out on a case by case basis so as to suit the conditions of this country".[16] Regarding future development, however, the judge made it clear where he thought responsibility should lie, saying that "legislative action" giving a "comprehensive basis determining the extent of the right to privacy"[17] was a matter of urgency and reflecting that:[18]

[14] *Tucker v News Media Ownership Ltd* HC Wellington CP 477/86, 22 October 1986; *Tucker v News Media Ownership Ltd* [1986] 2 NZLR 716 (HC); *Tucker v News Media Ownership Ltd* CA172/86, 23 October 1986.
[15] *Tucker v News Media Ownership Ltd* HC Wellington CP 477/86, 22 October 1986 at 6.
[16] *Tucker v News Media Ownership Ltd* [1986] 2 NZLR 716 (HC) at 733.
[17] At 737.
[18] At 737.

> …the Courts are being forced into a position where they must soon create new law as they see appropriate. This process which will be painful and expensive to the litigants involved, might not be thought the ideal approach. It will however be necessary if nothing is done.

Nevertheless, Parliament did not immediately take any steps to intervening and a tortious right to privacy continued to be used by litigants in applications for injunctions, and the courts tentatively encouraged such a development. The pattern in the cases that followed *Tucker* early on was that the tort was affirmed, and aspects of its ambit tentatively outlined in obiter dicta statements.[19] However, a lack of arguable cases meant that for several years the courts only heard arguments in relation to interlocutory injunction hearings, and were never able to undergo a full analysis of what the tort might entail.

It was not until the turn of the new century that the information privacy tort was successfully argued in a full trial. In P v D[20] an injunction was successfully attained, and in L v G[21] damages were for the first time awarded.

The question of the appropriate scope for the courts' development of privacy rights came to a head in the 2002 case of *Hosking v Runting*.[22] Although both at trial and on appeal the case was found to fall outside the boundaries of the informational privacy tort, the judges involved were divided over whether a tort should exist at all. Randerson J in the High Court, and Keith J and Anderson P dissenting in the Court of Appeal thought that the earlier recognition of a privacy tort was wrong and that any gaps that were not able to be filled by existing privacy related common law and equitable doctrines should be filled by Parliament.[23]

The disagreement was not about what the law ought to protect. Randerson J and the Court of Appeal minority agreed that the common law was capable of offering a remedy in cases which fell within the majority's formulation of the privacy tort. However, they thought that it could do so on the existing doctrine of breach of confidence, and not a new tort based on privacy.[24] Rather, the disagreement was around the appropriate forum for the future development of the law. It was clear that fitting these cases into the constraints of breach of confidence would allow much less room for development at common law than would be the case in a new tort based on a general idea of privacy. For example, breach of confidence would not, without absurd

[19] See for example *T v Attorney General* (1988) 5 NZFLR 357; *Bradley v Wingnut Films* [1993] 1 NZLR 415.
[20] *P v D* [2000] 2 NZLR 591.
[21] *L v G* [2002] NZAR 495.
[22] *Hosking v Runting* [2003] 3 NZLR 385 (HC); *Hosking v Runting* [2005] 1 NZLR 1 (CA).
[23] *Hosking v Runting* [2003] 3 NZLR 385 (HC) at [184].
[24] *Hosking*, above n 23, at [158].

conceptual strain, be able to offer protection in intrusion into seclusion cases, whereas this could be seen as (and soon was) the natural evolution of a remedy based on the protection of personal privacy.

At the heart of this disagreement were contradictory interpretations of how the parallel statutory regime of privacy rights (see below) affected the role of the courts.[25] Tipping J argued that "Parliament can hardly have meant to stifle the ordinary function of the common law"[26] and that legislative action had been merely "setting the scene" for a more fulsome regime of privacy rights.[27] Keith J for the Court of Appeal minority, meanwhile, argued that Parliament's actions amounted to a denial of any general protection of privacy and that Parliament had intended to constrain the development of privacy rights to those that they had specifically enacted.[28]

The tort was therefore established on the unsure footing of a narrow majority and two strong dissents. The following years brought a handful of cases that were successfully argued on the tort,[29] but *Hosking* remains the leading case. The elements of the tort as outlined in that case are:[30] (1) Existence of facts in respect of which there is a reasonable expectation of privacy; (2) Publicity given to those facts which would be considered highly offensive to an objective reasonable person. There is a public interest defence available, and harm of some sort (including emotional distress) has to have resulted.

Despite it being over 25 years since the tort first emerged, the relatively small number of cases which have been decided on it means that it still suffers from a high degree of uncertainty as to its scope.

2 Local privacy tort

In the report mentioned above, the Law Commission also recommended against creating a statutory cause of action for invasions of local privacy, or 'intrusions into seclusion', arguing that that too should be left up to the courts.[31] Although it considered that the fact that the courts had not recognised such a tort hitherto meant that "there [was] more of a case to resort to

[25] John Burrows "Common Law among the Statutes: The Lord Cook Lecture 2007" (2008) 39 VUWLR 401 at 407.
[26] *Hosking v Runting* [2005] 1 NZLR 1 (CA) at [227].
[27] Burrows, above n 25, at 407.
[28] *Hosking*, above n 26, at [205].
[29] See for example *Brown v Attorney-General* [2006] NZAR 552.
[30] Hosking, above n 26, at [117].
[31] Law Commission, above n 12, at 92.

statutory enactment,"[32] it considered that there would likely be much overlap between the two torts and that having one in statute and one in the common law could lead to difficulties in terms of future development.[33]

Such a tort soon came into existence in the 2012 case of *C v Holland*.[34] The case involved the covert filming of a woman in her shower by a flatmate. In affirming that a tort of intrusion into local privacy did exist and awarding damages for breach, the court discussed at length the Law Commission's opinion that the common law was the appropriate forum for the development of such a tort.[35] In response to the argument that development in the area was the purview of Parliament, the judge concluded:[36]

> The reticence of Parliament to wade into the realm of civil claims in the years since *Hosking* is a matter of conjecture, though the Law Commission report provides several reasons why that might be so including the potential breadth of such a statutory tort. But it is the function of the Courts to hear and determine claims by litigants seeking to vindicate alleged rights or correct alleged wrongs. As Sharpe JA said in Tsige, this is a case crying out for an answer, and given the value attached to privacy, providing an answer is in my view concordant with the historic function of this Court.

Clearly the Court relied heavily on the Law Commission's report and the subsequent inaction of Parliament as a mandate for further developing the common law in this area.

There is therefore now a second privacy tort at common law. The Judge formulated its elements as:[37] (a) an intentional and unauthorised intrusion; (b) into seclusion (namely intimate personal activity, space or affairs); (c) involving infringement of a reasonable expectation of privacy; and, (d) that is highly offensive to a reasonable person.

No detailed judicial discussion of the new tort since its creation has yet occurred, and thus it, too, remains uncertain in scope.

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[32] At 92.
[33] At 93.
[34] *C v Holland* [2012] 3 NZLR 672 (HC).
[35] At [83].
[36] At [88].
[37] At [94].

B Statute

Prior to the late 1980s, there was also very little statutory protection of privacy.[38] Despite a right to privacy being contained in both the Universal Declaration of Human Rights[39] and the United Nations Covenant on Civil and Political Rights[40] (which New Zealand ratified in 1978), Parliament opted not to include a right to privacy in either the New Zealand Bill of Rights Act 1990 (NZBORA) or the Human Rights Act 1993. On its omission from his original 1985 draft of NZBORA Geoffrey Palmer wrote:[41]

> There is not in New Zealand any general right to privacy, although specific rules of law and legislation protect some aspects of privacy. It would be inappropriate therefore to attempt to entrench a right that is not by any means fully recognised now, which is in the course of development, and whose boundaries would be uncertain and contentious.

Its omission, therefore, was not because of the undesirability of such a right, but rather necessitated by a recognition that the right or rights would need to develop in an appropriate way. The following years saw the development of a statutory regime of privacy rights running parallel with that being developed at common law.

1 Broadcasting Act 1989

Although Parliament did not act to directly intervene with the developing tort, two Acts were passed while the common law tort was in its infancy that created individual privacy rights, covering some of the same ground as the action at common law. In 1989 Parliament passed a new Broadcasting Act which created the Broadcasting Standards Authority (BSA) – a quasi-judicial body which was to hear complaints against broadcasters. One of the standards contained in the Act was the "privacy of the individual",[42] a breach of which the BSA could award up to $5000 damages.[43] Decisions of the BSA are appealable to the High Court, which decides appeals as though the BSA were exercising a discretion.[44]

[38] The Wanganui Computer Centre Act 1976 offered some limited protections of individual privacy against the government.
[39] *Universal Declaration of Human Rights* GA Res 217 A III (1948), art 12.
[40] The United Nations Covenant on Civil and Political Rights 999 UNTS 171 (opened for signature 16 December 1966, entered into force 23 March 1976), art 17.
[41] Geoffrey Palmer "A Bill of Rights for New Zealand: A White Paper" [1984-1985] I AJHR A6 at 104.
[42] Broadcasting Act 1989, s 3(1)(c).
[43] Section 13(1)(d).
[44] Section 18.

While not conferring on individuals a legal right to privacy against broadcasters, the right of appeal and the awarding of damages means the effect is similar.

The Act does not define privacy nor give any detailed guidance as to how the BSA is to adjudicate complaints. As such the BSA has had to build up a jurisprudence of its own. The first privacy case it heard was in 1989,[45] and in this case the tone was set for the way in which the BSA would develop its privacy jurisprudence. It noted:[46]

> Since legal notions can be expected to dominate the High Court's approach on appeal, the authority is of the view that it must endeavour to take a similar approach when determining the extent of the protection afforded against broadcasters' actions by s4(l)(c). Unfortunately, a precise legal view of the matter is not readily ascertained: the development of a clear legal concept of privacy is in its early stages in New Zealand, as it is in many other countries

The BSA took notice of what the High Court had decided in *Tucker*, but went beyond this, drawing heavily from American jurisprudence and stating that aspects of local as well as informational privacy would be protected by the Act.[47] The principles enunciated in this case and those following it were issued in various advisory opinions, and were endorsed by the High Court when their validity was challenged on an appeal of a BSA decision in 1995.[48] In that case, Eichelbaum CJ made it clear that he considered the BSA was free to develop its own understanding of what the right to privacy entailed, and that it did not err in drawing on American jurisprudence.[49] In his judgment he noted that the BSA jurisprudence would be likely to diverge from the common law for the reason that other remedies available at common law that might fill some of the gaps left by the tort would be unavailable to BSA complainants.[50]

The five principles that made up the advisory opinion had expanded to eight by 2006.[51] The Authority has developed its privacy jurisprudence in much the same way as the courts would – by referring to previous decisions but adapting case by case as required. The Authority routinely refers to previous cases and to the principles which developed from them. In fact, the result has been that the right to privacy under the Broadcasting Act has come to be very

[45] *McAllister v Television New Zealand Ltd* BSA 1990-005, 3 May 1990.
[46] At 7.
[47] At 10.
[48] *TV3 vs BSA* [1995] NZLR 720.
[49] At 13.
[50] At 10.
[51] The principles were most recently updated in 2010: Broadcasting Standards Authority "Privacy as a Broadcasting Standard" (practice note, 2010).

analogous to that which has been created through the common law courts, although the list of principles arguably offer a higher degree of certainty as to scope.

2 Privacy Act 1993

The other statutory innovation in this period, the Privacy Act 1993, is the most comprehensive statutory component of New Zealand's regime of privacy rights. The Act was the result of a long process of consultation and discussion about how best to reform the law so as to protect personal information. In 1987, Tim McBride released an options for reform paper which had been commissioned by the then Minister of Justice, Geoffrey Palmer.[52] The paper put forward 14 possible options for reform, with varying degrees of reliance on the courts. Although the tort mooted in *Tucker* is mentioned in the report,[53] it does not seem to have been thought that a tort of personal informational privacy could provide sufficiently comprehensive data protections.

The Act concerns the acquirement, storage, use, and access of personal information of individuals held by public and private sector "agencies" – broadly defined as "any person or body of persons, whether corporate or unincorporate".[54] "Personal information" is likewise defined broadly as any "information about an identifiable individual".[55]

The Act sets out a list of information privacy principles which agencies are required to abide by with regards to private information.[56] The principles are drafted as a series of restrictive statements followed by exceptions. For example, principle one restricts the collection of any personal information whatever and then provides a broad exception for information that is necessary for a lawful purpose connected with the function or activity of the agency.[57]

Like with the BSA, the legislature opted to grant the jurisdiction not to the courts, but to an administrative body. The Act gave the Privacy Commissioner responsibility for investigating complaints about breaches of the privacy principles. The Commissioner investigates the dispute, and acts as a conciliator to try and get a settlement between the parties.[58] If no

[52] Tim McBride *Data Privacy: An Options Paper* (Report to the Minister of Justice, December 1987).
[53] At 145.
[54] Privacy Act 1993, s 2.
[55] Section 2.
[56] Section 6.
[57] Section 6(a), 6(b).
[58] Section 69.

settlement is reached, then the dispute can be escalated by the Commissioner or the complainant to the Human Rights Review Tribunal, which considers the matter afresh and can award various remedies including up to $200000 damages, restraining orders, and a variety of specific orders.[59]

The Privacy Commissioner has a wide range of functions with a strong educational emphasis, and also issues privacy codes which adapt the principles to particular industries or sectors (e.g. health code).

While the Act is comprehensive, it does not offer complete protection of informational privacy rights. As mentioned, the news media are exempt, and some important remedies, such as injunctions, are not available.

In the Law Commission's report mentioned above, it was recommended that the Privacy Act be repealed and re-enacted with some 136 changes.[60] The majority of these are minor tweaks and modernisations, and importantly the Commission recommended to retain the principles-based approach rather than moving to a more rules-focused regime.[61] More important recommendations included substantive changes to some of the privacy principles and their exceptions, and increased powers to the Privacy Commissioner, such as the ability to issue compliance notices, breach of which would constitute a criminal offence. The government has intimated that it plans to proceed with the recommendation in 2017.[62]

3 Harmful Digital Communications Act 2015

In 2012, the Law Commission were tasked with another project with a strong privacy element. They were asked by the government to investigate possible changes to the regulatory regime for the media in light of the social media age, where every individual with an internet connection is in a position to cause the kind of harms through publication that used to be the prerogative of only the professional media. One of the terms of reference was "whether the existing criminal and civil remedies for wrongs such as defamation, breach of confidence and privacy are effective in the new media environment and, if not, whether alternative remedies

[59] Sections 82-89.
[60] Law Commission *Review of the Privacy Act 1993: Review of the Law of Privacy Stage 4* (NZLC R123 2011).
[61] Law Commission, above n 60, at 43.
[62] Adams, above n 1.

may be available?".[63] This element of the broader report was fast tracked and the Commission's findings were released in a ministerial briefing paper in late 2012.[64] It formed the basis for what became the Harmful Digital Communications Act 2015.

The Act creates civil and criminal liability for people who use electronic communications to cause harm to another. The drafters took a similar approach to the Privacy Act in that the heart of the Act is a list of principles. Principle one provides: "A digital communication should not disclose sensitive personal facts about an individual."[65] Principle Seven also provides that a communication should not be in breach of confidence.[66] A civil claim under the Act can be made when there is repeated breach of one or more of the principles, or an attempted or actual serious breach of one of the principles.[67] Serious breach is not defined.

Unlike previous legislative changes, the Act gives final jurisdiction to the courts, after a process of complaint and conciliation to an approved agency (currently Netsafe) akin to the process in the Privacy Act. However, the remedies available to the courts through the statute are different from those available in other regimes. The court can order that online content is taken down or that the defendant refrains from the harmful conduct or issues an apology,[68] but no damages are available. If damages for harm are sought, an action would need to be brought under the common law tort.

4 Local privacy

There currently exists no express right to local privacy at statute. Although one of the principles developed by the BSA involves local privacy,[69] for it to apply there has to have been a broadcast, so an element of publication of private facts is inevitably present in breaches of this principle.

The Law Commission, in its review of privacy, recommended the implementation of a Surveillance Devices Act to protect people against breaches of local privacy involving digital

[63] Law Commission *The News Media Meets 'New Media': Rights, Responsibilities and Regulation in the Digital Age* (NZLC R128 2013) at 24.
[64] Law Commission *Harmful Digital Communications: The Adequacy of the current sanctions and remedies* (NZLC MB3 2012).
[65] Harmful Digital Communications Act 2015, s 6(1).
[66] Section 6(1).
[67] Section 12(2).
[68] Section 19(1)
[69] Broadcasting Standards Authority, above n 51, principle 3.

technology.[70] The proposed Act would create criminal offences and concurrent civil causes of action for use of technology to commit the most serious of intrusions. It has not thus far been adopted, and there are no signs from the Government that there are any plans for doing so. As the Law Commission recommended such an Act alongside a recommendation that a local privacy tort be developed in the courts, it is unlikely that the emergence of such a tort in *C v Holland* would have any effect on their recommendation.

C Discussion

From the above narrative it is clear that there has not been any overall consistent answer to the question of what the respective roles of the courts and Parliament ought to be in this developing area of law. This is not surprising given the ad-hoc nature of how the law has developed in response to issues as they arise, but it may pose problems for future development.

Parliament have certainly taken the more active role, something which in the early stages clearly made the courts hesitant in their own development. The courts seem to have seen their function as at most one of filling the gaps left by Parliament, and offering redress in cases where justice particularly demanded it. Yet the vote of confidence offered by the Law Commission in their recommendation that the torts be left to the ordinary course of the common law has arguably placed the common law in a more central position in the overall regime. This and Parliament's assent by inaction operated as a mandate in the development of the second tort and has arguably ensured the survival of the first from a rather precarious position after *Hosking*. Yet Parliament's more recent action in the Harmful Digital Communications Act is somewhat inconsistent with this approach, as it will divert cases away from the common law tort in favour of statutory remedies. It is possible that this will make the courts again more cautious in developing the common law, particularly where digital technology is involved.

Although the courts have been very self-conscious about the appropriate division between the two institutions, and the Law Commission too gave it considerable thought, such questions have evidently been of less concern to the legislature itself. It has legislated to meet felt needs, and has not necessarily been so interested in the overall picture of privacy protections.

The lack of any clear separation of roles between the two institutions and the ad-hoc approach of the legislature has meant that the regime suffers from a distinct lack of coherence. Coherence

[70] Law Commission, above n 12, at 22.

is increasingly becoming recognised as an important principle in the law, and is especially relevant in considering the relationship between common law and statute.[71] Although writing in the American context, Strahilevitz's comments on the desirability of coherence in privacy law are relevant to the New Zealand regime. He argues that incoherence "limits the gains available in common law adjudication."[72] That is, the opportunity for the common law to develop is hindered when cases are siloed off into different regimes and potential precedents in one regime are excluded from the others.

The lack of coherence here described appears to be having exactly that effect. There is significant overlap between the two regimes in that the Privacy Act and the Broadcasting Act both offer remedies to victims in cases which would also fall under the ambit of the informational privacy tort. The relative accessibility of the statutory remedies in comparison to those at common law means that for practical purposes, the common law is reserved for very serious breaches where high damages are sought, breaches involving the media and local privacy, for which any statutory protection is absent, and instances where the desired remedy is an injunction. Given that the common law requires cases to come before it in order to develop, one might be concerned whether the courts can develop a coherent general doctrine of privacy with only this assortment of leftover cases from the gaps in the statutory regime.

The Harmful Digital Communications Act adds further complexity, and overlaps both with the common law that has developed and the privacy principles in the Privacy Act. One commentator has noted the danger that these overlaps means the Act has the potential to "completely displace existing legal principles".[73] For example the Act offers protections similar to those that already exist but does not specify any of the defences that are available in its cousin regimes, meaning there is a danger that the Act could be used to undercut the already extant law and that the law will arbitrarily protect privacy much more robustly in the digital communications context that other contexts.

In short, the result of an ad-hoc process of development running parallel in the two institutions has been a complex regime which lacks overall coherence and leaves future development somewhat uncertain.

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[71] See Elise Bant "Statute and Common Law: Interaction and Influence in Light of the Principle of Coherence" (2015) 38 University of New South Wales Law Journal 367.
[72] Lior Strahilevitz "Reunifying Privacy Law" (2010) 98 California Law Review 2007 at 2037.
[73] Stephanie Panzic "Legislating for e-manners: Deficiencies and unintended consequences of the Harmful Digital Communications Act" (2015) 21 Auckland U L Rev 225 at 239.

III Part Two: Deciding Between Institutions: A Principled Approach?

Given this lack of coherence and uncertainty as to which institution is going to be responsible for developing the privacy rights regime going forward, one might well ask whether a more principled approach is possible. Is it possible to say that one or the other institution ought to take on the whole burden, or that each should have a distinct role within the development of the regime? This question is the topic for exploration in this second part.

Although the adage 'form follows function' may be a controversial one in the field of architecture, it has strong intuitive strength when it comes to the law. The decision of what form (statutory or common law) the law should take will depend on the function it is to carry out. In search of a principled basis for deciding between institutions, then, two things must be ascertained. Firstly, what function or functions is a privacy rights regime trying to fulfil? Secondly, which of the two forms of law are most appropriate for this function or for each of these functions?

First, however, the source of difference between the law created by the two institutions – their opposite processes of legal reasoning – must be outlined.

A Common Law and Legislative Reasoning

The reasoning that gives rise to common law is adjudicative in nature; that is to say, the common law emerges out of the process of the adjudication of legal disputes. This adjudicative reasoning is often referred to as being 'artificial'.[74] It is 'artificial' in the sense that it is "not something laid down either by will or nature… [nor] a structured set of authoritatively posited, explicit norms, but… rules and ways implicit in a body of practices and patterns of practical thinking".[75] Gerald Postema identifies five distinct features of this artificial reason. They are that it is: pragmatic, contextual, non-systematic, discoursive, and common.[76] It is pragmatic and contextual in that the legal rules which emerge from it do so in relation to specific disputes between parties, for the purpose of settling those specific disputes. Common law rules never originate in the abstract, but in response to the specific facts of a specific case, and by analogy to facts in cases past. Through the doctrine of *stare decisis* there is a level of consistency

[74] Gerald Postema "Philosophy of the Common Law" in Jules Coleman and Scott Shapiro (eds) *The Oxford Handbook of Jurisprudence and Legal Philosophy* (Oxford University Press, Oxford, 2002) at 593.
[75] Postema, above n 74, at 590.
[76] Postema, above n 74, at 593.

between decisions, and so the law develops slowly in response to variations in the situations the courts are faced with. It is non-systematic in that it does not see the rules it creates as part of a theoretical ideal or unified vision, and discoursive in that its results come about by a process of "deliberative… argument between interlocutors".[77]

Most importantly, the artificial reasoning of the common law is a "common, or shared," reason;[78] that is, it "seeks to identify, or approximate by construction… the community's shared reason on social problems."[79] In contrast to rules set down by a sovereign individual, or those that might be suggested by a philosopher or theologian looking at an overarching coherent picture of right conduct, the process of common law reasoning works from the bottom, from the common understanding of custom and values that arise from the community as perceived, argued, and acted on by members of the legal profession.[80] It is this that explains why until recently the prevailing view has been that judges merely 'discover' the law and not create it. Although not necessarily self-consciously, the common law is engaged in a process of 'discovering' what the values and customs of the community are.

Legislation has long since taken over from the common law as our primary source of law. Statutory change is far more accessible to reformers, and is not subject to the restraints which cause common law development to be slow. Whereas common law is reactive and specific, legislation is proactive and general – it is not implemented in order to reach a particular result in a case, but to guide a class or classes of conduct more generally. The common law exists as a form of regulation of last resort – it only comes into play when ordinary mechanisms of settling disputes in the community have broken down and an authoritative ruling is needed. Legislation, conversely, does not arise out of adjudication at all – but from a process of formulating and implementing a particular policy. The direction of legislative reasoning is thus exactly the opposite of the common law – it starts in the abstract and political realm and moves downward to regulate conduct in particular cases.

There are some similarities between the common law's artificial reasoning and the process of legislative reform. Pojanowski even goes so far as to say that modern legislation in common law democracies is the fulfilment and natural successor of such reason.[81] For example there is

[77] Postema, above n 74, at 594.
[78] Postema, above n 74 at 595.
[79] Jeffrey Pojanowski "Reading Statutes in the Common Law Tradition" (2015) 101 Va L Rev 1357 at 1388.
[80] AWB Simpson "The Common Law and Legal Theory" in AWB Simpson *Legal Theory and Legal History: Essays on the Common Law* (The Hambledon Press, London, 1987) 359 at 362.
[81] See generally Pojanowski, above n 79.

obvious commonality in the idea of identifying and embodying community values which is fundamental to the traditional understanding of the common law; in democracies, the direct accountability to the electorate in theory ensures that the needs and values of the community are reflected in the laws their representatives create. In New Zealand's MMP electoral system this may be especially true, as compromise and the input of minority perspectives is more likely that a simple majoritarian system. Furthermore, the legislative approach in common law countries has tended to be piecemeal rather than systematic in the way that the civil codes are.

Nevertheless, the opposite direction of legislative reasoning means that the laws it produces are fundamentally different from those that develop at common law. They are principled and proactive, whereas the common law is context-driven and reactive.

For present purposes, there are two key differences between common law and legislation that result from the different methods of reasoning which it is useful to highlight going forward. The first is that that statute law tends to be flexible in design, but rigid in application, whereas the common law is rigid in design, and flexible in application. In creating law, judges are bound by precedent, by the facts in the case before them, by their constitutional deference to Parliament, and by the tradition of incrementalism which characterises development of the common law. The legislature, conversely, armed with parliamentary sovereignty, are able to pass laws containing any content whatsoever so long as it can pass by a majority through the House of Representatives. The only other constraints are time, democratic accountability, and the cost of implementation. As such legislation can take on many forms, and can canvass any content, whereas the common law is restricted in form and has a comparatively closed list of areas of competence.

When it comes to application, however, the common law has greater flexibility. Judges are not bound by any particular linguistic formulation of common law rules,[82] and can constantly recast them as each individual case demands. Conversely, the written text of legislation is authoritative and final, and judges only have a limited amount of latitude in creatively interpreting them when applying them in cases.

The second difference arising out of the opposite directions of reasoning regards constitutional legitimacy. Because legislative reasoning starts in the political realm, it has far greater

[82] Whether it makes sense to call judicial declarations of the law 'rules' at all is a contested question. The word is used here for simplicity's sake, but it may be more correct to say that judges are not bound by any particular linguistic formulation of a point of law.

legitimacy when addressing politically charged issues. As Justice Thomas noted extra-judicially: "Parliament will be favoured if the particular law is deeply entrenched, or controversial, or generates policy considerations for which the legislature should be held accountable."[83] The legislature can draw on a host of resources in formulating policy, and can consult widely with stakeholders and with the public, to whom it is ultimately accountable. Judges have much more limited resources, and in their law-making function are constitutionally subordinate to the legislature. As has already been shown in the privacy context, this leads to deference on the part of the courts when it comes to areas of the law where policy and political considerations are particularly at issue. On the other hand, judges get closest to actual disputes between parties, and have the best possible working knowledge of the law, and as such are more adept at working out how the law applies in real circumstances.

With these differences in mind, the two functions of a privacy rights regime – rights vindication and regulation – will now be explored.

B The Two Functions of Privacy Rights

1 Rights vindication

One of the chief functions of legal privacy rights is to redress the wrong suffered by the person whose privacy has been infringed by way of compensation or some other remedy. To put it another way, it is to give a forum for the rights of individuals to be vindicated when they are violated. To achieve this end it is important that legal privacy rights are formulated so as to be able to apply to breaches of privacy that have in fact occurred, and to offer an appropriate remedy.

As has already been noted, privacy is a notoriously difficult concept to define. Individually, we all know what it feels like to have our privacy violated, but it is difficult, if not impossible, to formulate in words what each violation has in common. Stephen Price's tongue-in-cheek definition captures this well: "Privacy is what people believe they have lost when they complain about their privacy being infringed."[84] There is certainly truth to this – privacy is felt most keenly by its absence, after the fact of infringement.

[83] Edward Thomas "Centennial Lecture – The Relationship of Parliament and the Courts: A Tentative Thought or Two for the New Millennium" (2000) 31 VUWLR 5 at 22.
[84] Stephen Price "Price Wins Chocolate Fish" (May 18 2010) Media Law Journal <www.medialawjournal.co.nz>

Compounding this definitional indeterminacy is the fact that the concept of privacy is always on shifting ground. Much of this is due to technological changes which throw up new issues and change the ways in which we view individual privacy. For example, few would have been able to predict the contemporary issues in informational privacy arising from social media prior to internet 2.0, nor the increased pressures on local privacy that arise out of long range lens cameras, webcams, or drone technology. The Law Commission, in the first in its series of papers of privacy, mentioned facial recognition technology which can be used to gauge people's thoughts by tracking facial expressions as an example of next-stage technology which could pose entirely new privacy questions.[85]

Lyria Moses identifies three key ways that technological changes can pose problems for existing law. Firstly, by exposing latent ambiguity in the law by throwing up a new problem that does not clearly fit existing categories.[86] Secondly, by undermining the justifications for rules.[87] Thirdly, by exposing rules as either under or over exclusive.[88] All three of these are potentially at issue in a privacy rights regime.

Furthermore what society perceives as an invasion of privacy is constantly evolving along with social expectations and values.[89] Evolving social conditions have made certain things which previously did not feel like an invasion of privacy an invasion. It is well documented that privacy entails is different from culture to culture and changes within cultures from generation to generation and place to place.[90]

Combined, these make flexibility in the application of the law of privacy paramount for the function of vindicating rights in the case of breach. It is important that conduct designed to fall outside of the rules, or consisting of conduct not previously contemplated are still caught within the field of applicability.

It is flexibility of the kind associated with the common law, then, that is needed for this function. As discussed above it manages to avoid the problems of definition in that it is not bound to any one particular linguistic formulation of a legal rule: it can adapt the concept as each new cases demands. Similarly, it is able to withstand the problems of shifting technology

[85] Law Commission, above n 3, at 141.
[86] Lyria Moses "Adapting the Law to Technological Change: A Comparison of Common Law and Legislation" (2003) 26 UNSWLJ 394 at 396.
[87] At 398.
[88] At 400.
[89] See Law Commission, above n 3, at 98.
[90] For example see Philippe Aries and Georges Duby (eds) *A History of Private Life* (Harvard University Press, Cambridge, Mass, 1987-1991).

and social expectations – the three potential problems posed by Moses above are not of particular concern in the common law context because the scope, definition, and justification for rules remain malleable.

It could be argued that the common law is inadequate to deal with constantly shifting subject matter due to its slow, incremental process, and the necessity of a suitable case to come before the courts to engender a change in the law. Indeed, criticisms of the common law's inability to 'keep up' with technological change have often been made.[91] However, these are not issues related to the function of rights vindication. When a breach has occurred a 'suitable case' already exists, and all that is needed is an accessible and flexible enough legal framework for the new breach to fit into. Certainty of a kind is needed, but it is certainty of process rather than certainty of the content of the law.

The common law is also particularly suited because of its goal of identifying the community's shared customs and values. Breaches of privacy are first and foremost breaches of social norms, and can only be identified within a social context. The retroactive approach of adjudicative reasoning is particularly suited to dealing with conduct such as privacy which as has been noted is easier to identify after the fact of breach.

The opposite direction of legislative reasoning is in theory more problematic when it comes to this function. The written formulation of the legal rule is authoritative, and in the application of statutory rights and rules only so much latitude can be taken so as to expand its field of application. The formulation of the rule also happens at a specific time in a specific context, and in a fast moving area such as privacy it would clearly not be possible to conceive of and cater for every type of possible breach prospectively.

2 Regulation

Although flexibility in application is undoubtedly a key concern, in some circumstances flexibility is not as important as certainty. A great deal of anxiety around privacy arises from the activities of businesses and institutions which handle large amounts of personal data or use indiscriminate surveillance techniques. It is important that these institutions and businesses know ahead of time what they are and are not permitted to do, and what precautions they need

[91] Micahel Shapiro "Is Bioethics Broke? On the Idea of Ethics and Law 'Catching Up' with Technology" (1999) 63 Indiana Law Review 17.

to take in order to avoid breach. For example internet service providers need to know what kind of data about their clients they are allowed to obtain and retain, and what they are allowed to do with it once they have it.

Certainty is also more important in the international context, especially when it comes to informational privacy. Privacy issues are increasingly becoming globalised, and many of the largest users of New Zealanders' personal data are multi-national corporations. As has been noted New Zealand is a signatory to multiple international conventions on privacy, and increasingly there is a need for a consistent approach to certain privacy issues across the globe.

These considerations reveal another chief function of a privacy rights regime: regulation. That is, to provide certainty and confidence to individuals, institutions, and businesses with regards to how to interact with the private realms and information of individuals. Here the focus is not on the person whose privacy is protected, but on those who have the potential to breach privacy rights on a systematic scale. For an effective regulatory regime, flexibility will only ever be a second order concern, particularly if it is running parallel to a flexible regime for the vindication of rights that can catch those who breach privacy norms not contemplated at the time of creating the regulatory regime.

Prima facie, it is statutory rules which have the greater propensity for regulation. They are proactive, formulated before any breach occurs, and are easily accessible and identifiable. The political context in which they are made is also more appropriate where international issues and broader economic issues are at stake, and where those effected by the regulatory rules can feed into the process of their creation. The common law, conversely, works reactively, is difficult to pin down, and can only take into account a limited number of perspectives.

That is not to say that the common law does not regulate behaviour. If the conception of the common law discovering the values and customs of the community is correct, then it operates in parallel to a system of widely known values and customs already extant in the community. It can be seen as a background threat, regulating behaviour by letting people know that if they grossly breach entrenched community norms there are likely to be legal, and not just social, consequences.

In the privacy context, the emergence of the *C v Holland* tort is a good example of this. Prior to that case, it could not have been said for certain that to covertly film a flatmate naked in the shower was a tort and would result in an award of damages. Yet it is such an obvious breach of civil norms, and so evidently the kind of behaviour that constitutes a tortious wrong in

analogous situations that the award of a private law remedy was overwhelmingly likely. If Mr Holland had sought legal advice before engaging in the conduct, the advice would surely have been that such behaviour was tortious. Although there was no tort that 'existed' prior to 2012, in terms of there being a precedent or common law doctrine, the first time that an appropriate case came before the courts, it was adjudicated into existence. Although we could not see it happening, it makes sense to say that prior to *C v Holland* the common law was already operating as a regulatory force against such behaviour.

This type of regulation is not, however, capable of bearing the heavy load required by a privacy regulatory regime. The common law can only regulate against conduct which is an obvious breach of entrenched social norms. While some forms of conduct, such as that in *C v Holland*, fits into this category, a lot of privacy breaching conduct does not, and thus the necessary certainty cannot be achieved merely by a background threat of liability. This is particularly clear in the case of online informational privacy, where practices and methods of collection and storage of data are changing at a rapid rate. Ordinary people do not tend to know exactly how and why data is being collected, let alone know enough for there to be a shared sense among the community about what norm-breaching behaviour might entail.

The courts are also ill-equipped to provide the kind of cross-border regulation that is increasingly necessary. Although the courts have in recent times shown themselves more and more willing to take international law into account in common law development,[92] this cannot be done in the direct and efficient way possible through statute.

C The New Zealand Regime

Prima facie, then, we might prefer the common law for the purpose of rights vindication, and legislation for regulatory purposes. Has the privacy regime conformed to this, and where it has does the experience of the regime bear out the prediction of the approach in theory?

With regards to the first question, the answer is mixed. Undoubtedly the common law torts are almost completely focused on rights vindication, and any regulation that they do offer is a by-product of fulfilling this primary function. However, a great deal of the rights vindication function has been met through statutory enactments. In the Privacy Act and the Broadcasting

[92] See Michael Kirby "The Growing Impact of International Law on the Common Law" (2012) 33 Adelaide Law Review 7.

Act, the functions of rights vindication and regulation are closely interlinked, and the Harmful Digital Communications Act has a clear emphasis on rights vindication.

If the principled assignment of the two forms of law-making to the two functions of a privacy rights regime is tenable, then we might expect inadequacies in the current regime where legislation has taken on the vindicatory role or the functions have been mixed. To the parts of the regime discussion will now turn to see if this is so.

1 The statutory regime

The Privacy Act undoubtedly has a strong regulatory focus. The long title of the Act specifies that it is an Act for reaching compliance with the OECD Guidelines on the Protection of Privacy and Transborder Flows of Personal Data, something which shows the Act has as a primary purpose the facilitation of business efficiency and certainty.[93] The Act has a strong institutional focus, and the Privacy Commissioner has a number of roles that are based around the idea of educating data users and promoting compliance from data-using sectors. However, it also has a strong emphasis on the victims of privacy breaches, and implements an extensive system of redress through the Privacy Commissioner and the Human Rights Review Tribunal.

The privacy principles which are at the heart of the Act are the mechanism through which the Act tries to achieve both of these functions. This approach has often been criticised for failing to provide enough regulatory certainty. Stephen Penk writes:[94]

> The formulation of open ended principles, or guidelines, while having the merit of allowing flexibility, precludes the operation of any system of precedent. To achieve the predictability and reliance that comes from a doctrine of precedent would require the replacement of principles with rules and remove some of the Commissioner's discretion now applied on a case by case basis; that is to say it would favour rigidity over flexibility. But at the same time it would make for greater certainty and consistency – a necessary prerequisite should there be any move from the Act's current emphasis on "education" and conciliation to provision for penalties against offending agencies.

Similarly, in a recent statement, the minister of Justice Amy Adams said:[95]

[93] Stephen Penk "The Privacy Act 1993" in Stephen Penk and Rosemary Tobin (eds) *Privacy Law in New Zealand* (Brookers, Wellington, 2010) 49 at 55.
[94] Penk, above n 93, at 57.
[95] Adams, above n 1.

> [T]he current structure of our Privacy Act appears to cause difficulty for agencies in reaching a definitive or legally-robust conclusion about when information can be shared.
>
> This stems from the principles based approach of the Act, which, ironically, is flexible in nature but doesn't help a frontline operator needing to make a quick decision. This leads to a situation that stifles decision-making and creates an environment where agencies don't share information in fear of being responsible for the latest privacy breach.

The Privacy Act has been much more successful in its function of vindicating individuals' rights and offering appropriate remedies. The conciliation process of the Privacy Commissioner has an extremely high success rate: 81 per cent of cases referred reach a settlement.[96] Access to the quasi-judicial process and on limited occasions the courts in more serious or intractable cases ensures cases are dealt with appropriately. Although damages tend to be low, the forum for airing grievances and getting functional remedies provide an important avenue for those whose rights have been breached.[97]

Contrary to what might have been expected through a vindicatory regime created by statute, the privacy principles have managed to continue to have relevance despite changing privacy conditions. Although the principles have been amended several times,[98] and are set to be updated again in the upcoming reforms, changes have mostly been minor, and the principles remain largely intact since their creation in 1993. Considering the changes since then, in social attitudes and technology, this is a remarkable achievement.

The experience of the Privacy Act, then, undermines the assumption that legislative reasoning is too inflexible to fulfil the function of a vindicatory privacy rights regime. Nevertheless, while the principles are flexible and the discretionary approach in which they are applied ensures that they can be used creatively, they do have limits. Some breaches of rights do fall outside of the principles, and the regime has relied on the common law torts to deal with these when they have arisen.

The lack of regulatory certainty, however, suggests that combining the two purposes under one set of principles is a mistake. They are either going to be too flexible in order to cater for the

[96] Gehan Gunasekara and Erin Dillon "Data Protection Litigation in New Zealand: Processes and Outcomes" (2008) 39 VUWLR 457 at 462.
[97] Gehan Gunasekara and Alida Van Klink "Out of the Blue? Is Litigation Under the Privacy Act 1993 Addressed Only at Privacy Grievances?" (2011) Canterbury Law Review 229 at 250.
[98] Most notably in the Privacy Amendment Act 1996 and the Privacy Amendment Act 2013.

vindicatory purpose, as is here the case, or too certain and inflexible to provide adequate redress when breaches occur.

The Broadcasting Act also combines regulatory and vindicatory functions. The legislature avoided the problems of definition and inflexibility in this case by going a step further than in the Privacy Act and conferring a completely undefined jurisdiction on an adjudicative body – all that the Act specifies is that broadcasts must be consistent with "the privacy of the individual."[99] Atiyah describes legislative language such as this as "open textured".[100] By its ambiguity, such language delegates "responsibility for the creative development of case law" to the adjudicator, meaning that the law which ultimately emerges is "a mixed legislative and judicial creation."[101] Although the jurisdiction was conferred on an administrative authority and not the courts, as has been mentioned a similar process to that at common law has occurred through the exercise of this jurisdiction. The legislature did not contemplate the principles that the Broadcasting Standards Authority eventually developed, but through the Act started the process of their development.

As a result, the Act has been successful in launching an effective vindicatory regime. This further undermines the assertion that the legislature is ill-equipped to fulfil this function – at the very least it can start the process of an effective regime developing via adjudicative reasoning.

Interestingly, this adjudicative process has also managed to produce a functioning regulatory regime, and the Broadcasting Act has come under none of the criticisms that the Privacy Act has in terms of uncertainty. What started out as uncertainty in the text of the act has evolved into relative certainty through the process of adjudication and the development of a list of principles to guide future cases. This can be attributed to the fact that its regulatory function is limited to a narrow and homogenous industry. As argued above, adjudicative processes can provide effective regulation against conduct in respect of which there are extant and commonly understood norms. Arguably in the broadcasting world there already were best practices and commonly understood boundaries in relation to privacy, and the working out of the Act served to entrench these rather than to create new regulatory rules. This suggests that adjudicative processes of law-making can provide effective regulation in limited situations.

[99] Broadcasting Act, s 3(1)(c).
[100] Patrick Atiyah "Common Law and Statute Law" (1984) 48 MLR 1 at 3.
[101] Atiyah, above n 100, at 3.

The Harmful Digital Communications Act is similar to the Broadcasting Act in that it confers a jurisdiction on the courts for the purpose of rights vindication that it must subsequently develop through the process of adjudication. Again, privacy is not defined, and the content of the law is entirely up to the process of the courts interpreting it. The lack of litigation on the Act means that the jury is still out on whether this approach will work as it did in the broadcasting context.

2 Common law torts

In one sense, the common law torts have provided flexibility in the way predicted, in that they can conceivably adapt to changing circumstances as they arise and offer remedies in the case of breach. Evidence of this occurring is clear from the development of the second tort in *C v Holland* – a previously unacknowledged right at tort was created so as to cater for a particular serious breach. For the reasons already discussed, changes in technology or social attitudes are unlikely to cause problems for the development of the torts.

But a combination of prescriptive tests and indeterminacy as to the nature of the elements of those tests has meant that the torts have had limited effectiveness in providing a robust regime for the vindication of privacy rights. The tests that the torts follow are relatively onerous for potential litigants to meet, meaning they are reserved for the most serious of breaches, and the questions that still surround the various elements are many.[102] Arguably this has meant that the torts do not have the required level of certainty of process that it was suggested above is needed for people to feel as though they can get an effective remedy when a breach occurs. This is particularly true in the intrusion tort, where in *Holland* the bar for liability has been set extremely high.

The extensive indeterminacy is in part due to the incrementalism of the common law, where in each case judges seek to authoritatively state as little as possible about the law as is required to solve the particular problem. But it is also due to the lack of cases that have come before the courts. Separating the common law tort from its cousin rights under the Privacy Act by giving the Human Rights Review Tribunal that jurisdiction has meant that the cases have been spread

[102] For a detailed discussion of the uncertainties that remain in the tort, see Rosemary Tobin, "The Common Law Tort of Invasion of Privacy in New Zealand" in Stephen Penk and Rosemary Tobin (eds) *Privacy Law in New Zealand* (Brookers, Wellington, 2010) 99. The fact that this discussion remains relatively up to date six years on demonstrates the slow speed at which the tort is developing.

too thinly, and the courts have not been able to adequately delineate the boundaries of the tort in relation to those other rights. It is of course impossible to say how the torts would look if the rights vindication function had been left entirely to the common law. It could well be the case that privacy is an area where breaches that are serious enough to warrant litigation are too few to develop a robust and detailed tortious body of law in the ordinary process of the common law.

Another factor is the reluctance that the courts have shown to development stemming out of their deference to Parliament in the area. In part this may be because of the mixed messages from Parliament as to the appropriate scope for judicial development, but it may also be a recognition that privacy issues are on the periphery of what the courts see as their legitimate law-making function constitutionally speaking.

3 Conclusion

The results of this attempt at a principled approach have thus been mixed. The prediction that statute is more adept at providing regulation seems to be made out, and the analysis of the regime has shown that combining the two functions under one regime is problematic. New Zealand's regulatory regime in the informational privacy context is inadequate because the Privacy Act's preference for flexibility over certainty in order to cater for its rights vindication purpose. In the local privacy context, there is no effective regulation at private law, something which one might expect to become increasingly a problem as invasive technologies become more sophisticated and accessible. The Law Commission's suggestion of a Surveillance Devices statute might go some way to remedying this, but if it is to be adopted it must not make the same mistake of combining the two functions under a single application of rules or principles.

Regulation will probably be best achieved with prescriptive rules-based statutes that focus on penalties and sanctions for breach. The success of the regulation achieved through the BSA complicates this slightly, however, and suggests that targeted regimes which develop through adjudication can be successful too.

Nevertheless, the prediction that the common law is more adept at developing a functional rights vindication regime needs to be amended. The experience of the New Zealand regime has been that the statutory causes of action have been more successful that those at common law.

The legislature has managed to avoid the dangers of inflexibility, while a lack of cases at common law and the hesitance of the judges has meant that the torts have suffered from an inhibitive degree of indeterminacy.

While this has been just one attempt at a principled division between the two forms of legal development, it may well be concluded that approaching the decision between institutions from abstract generalisations about the nature of common law and statute is inherently flawed. In reality, the two forms of law are more complex and varied, and their effectiveness in any given situation will be the result of a combination of factors which are not easy to predict.

IV Part Three: The case for a closer relationship between judicial and legislative development

It seems, then, that a principled division of labour between the courts and the legislature based on their different competencies is not the answer to the incoherence and developmental uncertainty that characterises the privacy rights regime. Nevertheless, two modest conclusions can be drawn from the discussion so far. Firstly, a clearer separation between the two functions of the privacy rights regime is desirable, and further regulatory action from the legislature is needed. Secondly, while a flexible approach to the development of the law regarding the rights vindication function is necessary, it has been shown that Parliament can be involved in this to useful effect by 'open textured' legislative wording which leaves the development of the law to a greater or lesser extent up to the process of adjudication.

This second point, along with the clear limitations of the common law torts, suggests that the decision to leave the torts to the ordinary process of the common law courts needs to be revisited. Arguably, a general statutory cause of action for privacy could reduce both uncertainty and incoherence that characterises the current regime.

The idea of a statutory cause of action for privacy has been part of the conversation since the very beginning of the privacy reform process. In Tim McBride's initial review of the options, creating such a statute was one of the alternatives proposed,[103] and as has already been noted, the Law Commission considered it at some length in their report. It has also been the solution taken by several Canadian provinces[104] and was recommended by the Australian Law Reform

[103] McBride, above n 52, at 144.
[104] For example Privacy Act RSBC 1996 c 373.

Commission in 2014.[105] In this part, it will be argued that a general statutory cause of action for privacy is desirable in New Zealand for fulfilling the rights vindication function of the regime. Not, however, a simple codification of the tort with uncertainties ironed out, but a dynamic statute which leaves a great deal to the courts; a 'common canvas' from which both the courts and the legislature can both develop the law as per their competencies.

A Courts and Parliament Developing the Law from a Common Canvas

Going forward, there is every reason to think that both the adjudicative reasoning of the courts and the legislative reasoning of the legislature are going to be needed in the continued development of privacy rights. Development of the law in the context of actual cases is, as has already been argued, crucial in an ever changing area like privacy. Yet, as has been shown, the courts have been reluctant to develop the law without an explicit mandate, and it is not at all clear that the torts as they have developed will be capable of bearing the responsibility for making sure privacy rights are upheld going forward.

Continued legislative input, too, remains crucial. Arguably this is becoming increasingly so, as some currently emerging issues have very high political currency, and it is likely that the courts would be reluctant to offer any solutions to them. One example of this is the idea of a so called 'right to be forgotten'[106] which has been an issue of great controversy in the European Union following the decision in *Google Spain v AEPD* which upheld such a right.[107] It seems inevitable that at some point the issue will be considered in New Zealand, but it is a matter of uncertainty as to where in the regime it will fall. Although on creative readings the Privacy Act and the Harmful Digital Communications Act both have the potential to offer a forum for the exploration of such a right,[108] it is unlikely that the courts would want to engage in such a highly political issue, and the Privacy Commissioner has intimated that he thinks Parliament may be the best forum.[109]

The legislature is also likely to be called upon when high profile incidents occur that fall outside of the current protections. The 'sex romp' scandal in Christchurch last year, where a couple

[105] Australian Law Reform Commission *Serious Invasions of Privacy in the Digital Era* (ALRC Report 123).
[106] For a full treatment of this issue in the privacy law context see Meg Jones *Ctrl + Z: the right to be forgotten* (New York University Press, New York, 2016).
[107] Case C-131/12 *Google Spain v AEPD and Mario Costeja González* [2014] OJ-C R 212.
[108] John Edwards "A right to be forgotten for New Zealand?" *The National Business Review* (New Zealand, 4 July 2014) at 24.
[109] Edwards, above n 108, at 24.

were filmed having sex in an office, is an example of this – an incident which led to many calling for Parliament to intervene with more comprehensive local privacy protections.[110] At any given moment, it seems we are an incident or two away from privacy issues like these becoming hot political property.

Given the current state of incoherence and fragmentation in the privacy rights regime, it is undesirable for challenges such as these to be met by further piecemeal legislative action. This could potentially further arrest the development of the torts, and lead to further inconsistencies in how privacy breaches are dealt with in different contexts.

A general, broadly worded, statutory cause of action for privacy which confers a jurisdiction on the courts could be a way of providing a framework from which both the courts and the legislature could develop the law in unison. Such a statute could combine the common law torts and the rights vindication function of the Privacy Act, giving the law the best chance of development. In the Act, the legislature could iron out some of the uncertainties that currently exist in the common law tort, but leave residual development to the courts to conduct on a case by case basis. The law would be consolidated, the courts would have a clear mandate for development from the legislature, and the legislature itself would have a framework already in place for further intervention if and when needed.

A full reform proposal along these lines is beyond the scope of this paper, and designing legislation of this kind would obviously come with a host of difficulties. Only a few brief thoughts on its possible shape will here be noted.

The statute should bestow a general jurisdiction on the courts to enforce a right to privacy, similar to that granted to the BSA under the Broadcasting Act. However, it should be accompanied by an extensive series of principles and guidelines for how to go about carrying out that jurisdiction more akin to those under the Privacy Act, so as to provide some certainty as to what the right entails. Traditional remedies and more creative remedies such as those offered under the Harmful Digital Communications Act should be combined under the one cause of action and set of principles.

The office of the Privacy Commissioner should remain, and something akin to its conciliation process could still be a first-step to certain claims under the Act. It is important that a move to a statutory tort should not remove the more accessible remedies to complainants that exist

[110] See for example Samuel Beswick "Privacy: Rights Remedies, and Reform" (2015) 4 NZLJ 166.

under this regime. Higher level complaints, however, where substantial damages are a possible remedy, should be consolidated with the torts so as to ensure coherent development and even-handed treatment of privacy breaches of different kinds and in different contexts. From a developmental point of view, and in the interest of coherence, it is desirable that only one forum for the adjudicative resolving of complaints is used. The regular common law courts are better equipped to consider privacy issues in the holistic context of the law and so should be preferred to the Human Rights Review Tribunal.

B The Law Commission's Rejection of a Statutory tort

As mentioned above, the Law Commission considered at length the idea of codifying the common law torts into statute. If a statute along the lines suggested is to be advocated, the Commission's reasons for rejecting codification need to be addressed.

The Law Commission's concluding remarks on its decision to recommend leaving the tort to the common law have already been quoted above in Part One. The Commission cited coherence, certainty, and accessibility as reasons for a statutory tort,[111] but found that these were outweighed by the considerations in favour of the common law. It noted that "the great majority" of the submissions they received were in favour of the status quo,[112] and this was evidently given considerable weight. Interestingly, the Privacy Commissioner, arguably the most informed individual on legal privacy issues, submitted in favour of a statutory tort, although he emphasised that the arguments either way were finely balanced.[113]

The Law Commission seems to have been chiefly persuaded by arguments about the common law's flexibility and the particular need in privacy cases for a fact-specific analysis to shape the application of the law and its development. "Statute" they argued, "creates a risk that what is enacted today may be out of date tomorrow," while "the common law is… flexible, and can thus develop with the times." [114]

But as has been seen, the experience of New Zealand's privacy rights regime has been that statutory interventions have not suffered particularly from problems of inflexibility, and that

[111] Law Commission, above n 12, at 90.
[112] At 190.
[113] Privacy Commissioner "Submission by the Office of the Privacy Commissioner on the Law Commission's issues paper Invasion of Privacy: Penalties and Remedies (NZLC IP14)" at 3.
[114] Law Commission, above n 12, at 90.

the best results have often been when statute has been used to empower the adjudicative process to be flexible in applying the statute either through open textured wording or the conferring of a discretion. The common law, on the other hand, has tended to be much more tentative and reluctant when operating unaided. While a full codification of the tort could well have a negative impact on the flexibility of the law, something along the lines of what is being recommended here, which invites the courts to take on a great deal of responsibility going forward and a wide latitude to reimagine the statute itself would be more likely to encourage greater flexibility.

The Commission also argued that a more "open-ended" statute "might end up being little advance on the common law".[115] They also noted an argument that the infrequency of claims under the tort would mean that it would not be worth "expending the resources of Parliament, and the state, in enacting legislation".[116] This places too much emphasis on what the law is now, and not how the law might develop into the future. An Act along the lines of what is here being proposed is one which hopefully would safeguard development going forward, particularly in light of the emerging issues mentioned which will demand creative legal solutions that require the skill-sets of both Parliament and the courts. At some point, the resources of Parliament will need to be expended in this area, but setting the law up so as to be able to develop organically going forward might minimise the need to constantly revisit and restructure a complex regime.

Similarly, the Commission argued that there is no evidence that "the current state of the law is causing practical difficulties to anyone".[117] The example cited on this point was the fact that in consultation the media reassured the Commission that they were happy with the guidance offered by the state of the tort.[118] This suggests an emphasis on the part of the Commission on the regulatory function rather than the rights vindication function. Arguably, the media are happy with the state of the law because it restricts them very little – the state of uncertainty in the common law means that only the most flagrant breaches are likely to be litigated. From the perspective of potential victims, this might not be evidence in favour of the status quo. With regards to the rights vindication function, it would be difficult to expect much evidence that

[115] At 90.
[116] At 91.
[117] At 90.
[118] At 90.

the law was causing difficulties. Potential litigants who have been turned off seeking a remedy are a hard group to identify for consultation.

Another argument from a submitter cited in the Commission's report was that a statutory tort might "upset the balance already achieved by the Broadcasting Standards Authority in its complaints jurisdiction".[119] "If the statute varied from the principles the BSA has adopted", it argued, "the BSA might feel obliged to change its principles to follow suit."[120] While it is true that the balance struck by the BSA is a healthy one and there is no need to intervene in that particular regime, as an argument against a statutory cause of action this is unconvincing. As has already been noted, the BSA principles already differ from the common law and from those in the Privacy Act and the High Court has given the BSA an express mandate to diverge from the common law. There is no reason why any statutory regime cannot make an exception for this already well functioning regime; arguably the tort might look to the BSA for guidance in developing a model rather than the other way round.

Although mostly the Commission was considering whether to undergo a full codification of the tort or not, they did briefly respond to one submission which argued for a partial codification of the tort to deal with some outstanding issues while leaving the bulk of development to the courts.[121] This is more along the lines of what is being argued presently. The Commission rejected the solution, arguing that it can be "dangerous to provide answers to only some questions 'out of context'" and that there would be a risk that the common law might be hindered in its development and that if it did develop the codified areas would become a bad fit with the surrounding regime.[122] This would certainly be the case if static and inflexible rules were used to replace elements of the common law tort, but that is not what is being argued for here. As long as the statutory clarifications are written as guidelines, or as high level principles, there is little danger. There should be an explicit recognition in the Act that the courts are free to develop the law as per the usual common law method, and that they should only take into account the statutory wording insofar as it is useful for carrying out that purpose.

[119] At 91.
[120] At 91.
[121] At 91.
[122] At 91.

C Towards a more co-operative dynamic between law-making institutions?

The Law Commission appears to have thought that, although the case for a statutory tort was finely balanced, overall, the privacy rights regime in place was adequate. Although some critiques of the current regime have been discussed in this paper, and a statutory tort does overall seem desirable, it must be acknowledged that in this extremely difficult area of law, the New Zealand regime is not without merit. For the most part, it offers sufficient privacy protections at this moment in time. As a result, the reality is that it is unlikely to be a priority issue, even if consolidation in a statutory cause of action would be an improvement.

There is however another, more general, reason that we might want a privacy statute of the kind here being advocated which could make reform of more general import.

Commentators have long since remarked on the changing nature of the relationship between common law and statute. It is well recognised that areas of the law that are solely the product of the common law are becoming fewer and fewer, as the sheer quantity and reach of statute law continues to grow.[123] It is not uncommon for ours to be called 'the age of statutes'.[124] Indeed, privacy law was chosen as a case study for this relationship primarily because it is one of only a few areas where the courts have been particularly active in creating distinctly new causes of action in private law over recent decades.

The courts' reluctance to develop privacy protections here described is typical of a new dynamic between the courts and Parliament, characterised by increasing deference on the part of the courts and a felt lack of legitimacy in carrying out more traditional law-making functions. Although this shift might well be seen as a positive thing in many ways, it is important that we do not lose the distinct benefits of common law reasoning as a tool for developing the law. In order to do this, it might be necessary to think differently about the ways in which the two institutions interact. Justice Thomas called for:[125]

> a more positive jurisprudence in which the relationship of Parliament and the courts is in the nature of a fruitful partnership in the law-making business together, but with Parliament the dominant partner working within the limits of the constitution. The single most debilitating influence on that more positive jurisprudence has been the judiciary's fulsome

[123] Burrows, above n 25, at 405.
[124] For example Guido Calabresi *A Common Law for the Age of Statutes* (Harvard University Press Cambridge Mass, 1982); Mark Geistfeld "Tort Law in the Age of Statutes" (2014) 99 Iowa Law Review 991.
[125] Thomas, above n 83, at 22.

> deference to the sovereignty of Parliament. With a grip of iron the concept has strangled the coherent development of the law.

Similarly, in his book *English and American Judges as Lawmakers*, Louis Jaffe wrote:[126]

> "statutes cannot or should not try to forsee every situation and take care of every emergency. If they do so, they impair the capacity of the law to take care of the future. If statutes are taken to express general concepts and policies, they enrich the whole body of legal principles with which the judges can operate. There can and should be a continuous interplay between Parliament and courts, each making its contribution."

And further:[127]

> "There are many things [the courts] cannot do, but that has always been so; and there are many things that Parliament can do better, which may, though not necessarily, mean that the Courts should abstain. There are many things that Parliament and the judges can do together, and such co-operative action may be the most fruitful of all methods of legal lawmaking."

The case of privacy rights is one of these latter cases, where the best law is going to arise where a co-operative approach between the courts and Parliament is adopted. But the matrix of the need for flexibility in application yet a degree of certainty, and the need for political input and the need for justice to be done in the individual case is not unique to privacy and characterises many areas of private law. A statute along the lines proposed is an opportunity to test out how a more co-operative relationship between the two institutions might work in practice, something which could have enduring benefits for legal development going forward.

V Conclusion

At the outset, two questions were posed: what are the appropriate roles of the courts and Parliament in this developing area of law, and what can the example of the privacy rights regime show about the relationship between the common law and legislation more generally?

With regards to the first question, it has been argued that the current division between the common law and statute is unsatisfactory because of its incoherence and developmental uncertainty. But it has also been shown that attempting to divine a principled basis from which

[126] Louis Jaffe *English and American Judges as Lawmakers* (Clarendon Press, Oxford, 1969) at 75.
[127] At 75.

to assign roles to the two forms of legal development is fraught with difficulties. Common law and statute do not in practice conform to neat binaries that they are often associated with, and privacy is a multifaceted legal issue that requires a multifaceted legal approach. It has been argued that the parallel development through the two institutions has contributed to the problems of the regime, and that the best way forward is not parallel development, but a partnership where the two institutions work off a common body of law launched by a broadly construed statute. Exactly what such a statute should look like is something which will require further in-depth analysis and creative legislative design.

With regards to the second question, the generalisations that can be made are, in truth, limited. The case study is illustrative of the way the courts can be hesitant to develop the common law in a crowded field, where legislative action and inaction leaves mixed messages as to the proper place for further development. It also demonstrates the extent of the constitutional deference that the courts typically show Parliament in New Zealand, and the need for Parliament and law reform bodies such as the Law Commission to provide explicit mandates for judicial development when it is desired. Further, it shows the potential danger that parallel development of the law by the two institutions in an area can lead to inconsistencies and developmental uncertainties.

Finally, this investigation raises some methodological issues with regards to the study of the relationship between the two institutions. From a law reform perspective, engaging in abstract debate about the nature of idealised forms of common law and statute, while interesting, is perhaps unhelpful. Although the question of whether an issue is one for Parliament or the courts is a crucial one and should not be overlooked in favour of jumping straight to questions about substance, the question must be asked in the context of the actual legal regime and with regards to the political and institutional realities into which the development of the law will fall.

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