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Comparing statutory and consent-based rights limitation mechanisms:

A case study of the NZ Covid-19 Tracer App

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Abstract

The Covid-19 pandemic has brought unprecedented change to New Zealand's social, economic and legal landscape. The pandemic has seen us sheltering in our homes, distancing ourselves from those around us, and tracking our every movement through the use of smartphone apps. Such a situation calls for renewed scrutiny on the legislative and consent-based mechanisms that are charged with protecting us as individuals from undue privacy intrusions and human rights violations. This essay uses the case study of the Covid-19 Tracer app, to compare and contrast the approach to privacy rights limitations under a consent-based model and under a statutory rights-limitation model, like that in section 5 of the Bill of Rights Act. I argue that both have their respective advantages and disadvantages, but that there is a need to reconsider the total reliance on user-consent to rights limitations in the privacy context. As contact tracing technology become a normal part of life in Aotearoa, this question looks to be increasingly critical.

Key words: Covid-19, contact-tracing, consent, human rights, privacy

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I Introduction

The response to the Covid-19 pandemic in the first half of 2020 has involved wide-reaching encroachment on the personal freedoms and rights of people living in Aotearoa. Whilst New Zealand has now moved out of ‘lockdown’ stage, some restrictions are likely to continue into the near future as the pandemic continues to impact countries around the world. In this unique legal and social environment, thorough analysis is needed of the legal frameworks that are being used to support or justify the limitations imposed on individuals rights in New Zealand.

In New Zealand, like many other democracies around the world, human rights and civil rights are espoused as foundational and essential values. Some of these rights represent jus cogens norms, they are fundamental international law principles which it would be illegal for a state to limit.¹ Jus cogens norms such as the prohibitions against torture or genocide will be illegal under international law.² Of course, the fact of their illegality in some cases will not prevent states from breaching these rights.

Yet beyond this exclusive set of jus cogens norms, many of the rights contained in New Zealand’s BORA, in fulfillment of New Zealand’s obligations under the ICCPR, and UN Declaration of Human Rights can be limited.³ There are two main ways within New Zealand’s legal context that human rights may be limited, firstly, via statute, and secondly, through an individual’s consensual waiver of their rights.

This essay will closely examine the consent-based rights limitations being permitted by New Zealanders through the Covid-19 Tracer app. In the first part of my essay, I will explain the context of Covid-19, both overseas and in New Zealand, and the importance of contact tracing and technological contact tracing solutions. In the second part I will introduce New Zealand’s respective legal frameworks on privacy and human and civil

¹ Alberto Costi *Public International Law: A New Zealand Perspective* (LexisNexis, Wellington, 2020) at 168.

² Costi, above n 1 at 168.

³ Bill of Rights Act 1990, s 5.

rights, pointing to some significant differences between the two frameworks and their respective origins in Western legal theory.

In the fourth part I will undertake a substantive comparative analysis between the approach taken to rights limitation under the consent model, and an approach based on statutory rights limitations, that seeks to limit interference with rights through the use of a statutory test like that of section 5 of the Bill of Rights Act.

The Covid-19 context, and the need for technological contact tracing, I argue, mandates closer scrutiny of New Zealand's differing treatment privacy rights compared to other rights under the Bill of Rights Act. My analysis will seek to identify some of the differences between consent-based and statute-based approaches and their respective advantages and disadvantages for rights protection in the context of data privacy and a Covid-19 tracer app. I will also highlight some key public law issues relevant to this case study, such as individual autonomy, rights protection, collective interests such as the protection of public health and the need for government accountability.

II The Covid-19 context

The Covid-19 pandemic has caused substantial loss of life globally as well as severe economic and social consequences. The virus was first reported to the World Health Organisation in December 2019 after being first identified in Wuhan, China.⁴ It has since spread around the world, with more than 29 million cases as of September 2020 and 937,000 deaths.⁵ Patients with the virus, caused by SARS-Cov-2, may experience no symptoms, or mild symptoms such as fever, cough, fatigue and shortness of breath.⁶ In more serious cases, patients may suffer from acute respiratory distress or pneumonia.⁷

⁴ Susan Strongman 'Covid-19 Pandemic Timeline' (last updated 12 July 2020) Radio New Zealand <<https://shorthand.radionz.co.nz/coronavirus-timeline/>>.

⁵ WHO Coronavirus Disease (Covid-19) Dashboard (accessed 12 October 2020, dashboard last updated 11 October 2020 2.45pm CEST) World Health Organisation <<https://covid19.who.int/>>.

⁶ 'Questions and Answers Hub': What are the symptoms of Covid-19?' (17 April 2020) World Health Organisation <www.who.int>.

⁷ 'Questions and Answers Hub', above n 6.

Older people, as well as those with underlying health conditions such as cardiac disease, diabetes or chronic respiratory conditions are most at risk of becoming severely ill or dying from the virus.⁸

Covid-19 is transmitted through close contact with other people, coughing and spreading of droplets from one person to another.⁹ This has led to widespread ‘lockdowns’ around the world, with people confined to their homes - apart from accessing essential services - to stop the spread of the virus.¹⁰ International borders have also closed in many parts of the world with travel between countries prohibited except for citizens or residents returning home.¹¹ The transmission rate from Covid-19 globally is 2.5, meaning that most cases will infect one or no other people, with some infecting two or three others.¹² However, Covid-19 has also been characterised by ‘clusters,’ described by Dr Ayesha Verrall as ‘rare but important super-spreading events that may infect 10 or 20 contacts’ or, in some cases, even more.¹³

A New Zealand’s Covid-19 Response

New Zealand diagnosed its’ first case of Covid-19 on 28 February 2020.¹⁴ Since then New Zealand has had a total of 1,802 cases of Covid-19 with twenty-five deaths from the virus.¹⁵ This included two distinct outbreaks, one in March-April and another in Auckland in August. During the first outbreak 16 significant clusters, were recorded, with

⁸ ‘Questions and Answers Hub’ above n 6.

⁹ ‘Questions and Answers Hub’: How is Covid-19 transmitted?’ (9 July 2020) World Health Organisation <www.who.int>.

¹⁰ ‘Coronavirus: the world in lockdown in maps and charts’ (7 April 2020) BBC News <www.bbc.com>.

¹¹ Philip Connor ‘More than nine in ten people world-wide live in countries with travel restrictions amid Covid-19’ (1 April 2020) Pew Research Center <<https://www.pewresearch.org>>.

¹² Dr Ayesha Verrall, speaking in addition to Dr Susan Jack, Dr Andrew Chen “Rapid case contact management: what is it and why is it important, how does it work in practice and what is the role of technology to enhance it” (Covid-19 Masterclass Series, Otago Global Health Institute, 30 June 2020).

¹³ Verrall, above n 13. For example, in New Zealand, clusters at a wedding in Bluff, and at Marist College in Auckland each caused more than 90 cases of Covid-19; ‘Covid-19 Significant Clusters’ (6 July 2020) Ministry of Health <www.health.govt.nz>.

¹⁴ Susan Strongman ‘Covid-19 Pandemic Timeline’ (last updated 12 July 2020) Radio New Zealand <<https://shorthand.radionz.co.nz>>.

¹⁵ ‘Covid-19 Current Cases’ (last updated 9am 15 July 2020) Ministry of Health <<https://www.health.govt.nz>>.

the largest cluster being a wedding in Bluff that infected 98 people.¹⁶ During the second outbreak, a large cluster of cases in Auckland causing around 150 cases. However, New Zealand has thus far been able to prevent widespread community transmission of Covid-19, thanks to geographical advantages, and the governments' prompt response.¹⁷ New Zealand's international borders were closed to all non-residents on 19th March, and since the 10th of April all incoming New Zealand citizens and residents must undertake 'managed isolation' or quarantine in hotel facilities for two weeks upon arrival.¹⁸

In response to rising case numbers in late March 2020, New Zealand spent a month weeks in alert level 4 'lockdown' beginning on 25th March, followed by three weeks at level 3 (lockdown with takeaways) and two weeks at alert level two, which allowed gatherings of up to ten people, and for the reopening of some businesses.¹⁹ On the 8th of June, New Zealand moved to alert level 1, with no restrictions on freedom of movement or association.²⁰ New Zealand has since enjoyed some of the least restrictions in the world, and the government's health response has garnered international praise.²¹

After 102 days with no community transmission in New Zealand, four confirmed and four probable cases of Covid-19 in Auckland were announced by the Prime Minister at 9.15pm on Thursday 11th August.²² Auckland was moved to alert level 3 lockdown at 12pm the following day which was then extended to last for 18 days until 11.59pm on Sunday 30 August.²³ The alert level status for the rest of the country was raised to level

¹⁶ 'Covid-19 Significant Clusters' (6 July 2020) Ministry of Health <<https://www.health.govt.nz>>.

¹⁷ Siouxsie Wiles, 'Why I'm confident there is no community transmission in NZ' (25 June 2020) The Spinoff <<https://thespinoff.co.nz>>.

¹⁸ Strongman, above n 14.

¹⁹ Strongman, above n 14.

²⁰ Strongman, above n 14.

²¹ 'Coronavirus: World Health organisation praises NZ's Covid-19 response' (8 July 2020) Stuff <<https://www.stuff.co.nz>>; 'In awe of NZ: How world media reacted to New Zealand eliminating Covid-19' (9 June 2020) NZ Herald <<https://www.nzherald.co.nz>>.

²² Prime Minister Jacinda Ardern "PM comments on Auckland Covid-cases" (The Beehive, Wellington 11 August 2020).

²³ Ardern, above n 22; Jason Walls "Covid 19 coronavirus Prime Minister Jacinda Ardern extends Auckland's level 3 lockdown a further 12 days" (15 August 2020) NZ Herald <<https://www.nzherald.co.nz>>.

2, requiring physical distancing, rigorous contact tracing and mask use in some spaces.²⁴ As of the 6th of October, the whole country has now returned to alert level 1.²⁵ As is evidenced by this latest outbreak, significant challenges still remain for managing the ongoing health response to the pandemic, as the global situation continues to change and develop.

B Contact tracing

Contact tracing has been a core element of New Zealand's Covid-19 health response, and the response of other countries around the world. Contact tracing is an established disease control practice that has been used to control communicable diseases in the past, such as measles outbreaks, influenza and tuberculosis.²⁶ The methods of contact tracing will range from one disease to the next.²⁷ In the Covid-19 context, contact tracing includes 'the identification and isolation of people who have been exposed to an infectious case, to prevent onwards transmission from the contact to others.'²⁸ On the whole, most countries have relied mostly on manual contact tracing. This involves in person interviews between health interviews and Covid-19 patients, relying on patients' memory of where they have been, and when, during the infection period, as well as who they have been in contact with.²⁹

However, Ferretti et al, argue that manual contact tracing is too slow, and that in order to achieve sufficiently rapid contact tracing, there is a need for a digital app to monitor

²⁴ 'All of New Zealand is now at Alert Level 2' Unite Against Covid-19 (30 August 2020) <<https://covid19.govt.nz/>>.

²⁵ 'New Zealand will move to Alert Level 1, Auckland will move to Level 2 with no extra restrictions' Unite Against Covid-19 (21 September 2020) <<https://covid19.govt.nz/>>; 'PM says Auckland will move to level 1 this week' (5 October 2020) Radio New Zealand <<https://www.rnz.co.nz/news/political>>.

²⁶ Dr Ayesha Verrall, speaking in addition to Dr Susan Jack, Dr Andrew Chen "Rapid case contact management: what is it and why is it important, how does it work in practice and what is the role of technology to enhance it" (Covid-19 Masterclass Series, Otago Global Health Institute, 30 June 2020).

²⁷ Verrall, above n 26.

²⁸ Verrall, above n 26; Siouxie Wiles and Toby Morris, 'Why contact tracing is so crucial to moving out of lockdown' (18 April 2020) The Spinoff <https://thespinoff.co.nz>.

²⁹ Teresa Scantamburlo, Pierre Dewitte, Valentina Billa, Atia Cortes, Daphne Van Der Eycken, Pieter Duysburgh, Willemien Laenens 'Covid-19 and Contact Tracing Apps: a review under the European legal

people's movements.³⁰ Ferretti et al devised a mathematical model that reflects the rate of transmission of Covid-19. According to their work, R_0 is the 'basic reproductive number.'³¹ This is the average number of people that each person with the virus will infect.³² If R_0 is two, each active case will infect two other cases. If R_0 is less than one, then each infected person will infect less than one person. When R_0 is less than one the outbreak will gradually slow.³³ In the early stages of the epidemic in China, $R_0 = 2.0$.³⁴ Ferretti et al argued that the control of this original outbreak in Wuhan demonstrated that through two interventions – the isolation of infected people, and the tracing and quarantining of their contacts, R_0 could be brought below one and the pandemic could be slowed.³⁵ The speed and completeness with which these contact tracing methods are conducted will affect whether this is achieved.³⁶

New Zealand's contact tracing system has significantly improved since the beginning of the pandemic. At the beginning of the pandemic, the Ministry of Health had the capacity to contact trace, using manual methods, about 10 people per day.³⁷ By the time the country entered alert level 4 lockdown this had increased to 50 per day, still short of the case numbers that were being seen around that time (ranging from 60-80 cases per day).³⁸ Dr Verrall raised some significant issues with the system, arguing that in addition to increasing speed and improving the completeness of contact tracing, there was a need to address underlying capacity and efficiency issues.³⁹ Dr Verrall argued that in order for NZ to achieve $R_0 < 1$ health officials would need to be able to trace 80% of the close

framework' (preprint, working paper, 19 May 2020, via arXiv.org hosted by Cornell University) <<https://arxiv.org/abs/2004.14665>> at 2.

³⁰ Luca Ferretti, Chris Wymant, Michelle Kendall, Lele Zhao, Anel Nurtay, Lucie Aberler-Dorner, Michael Parker, David Bonsall, Christophe Fraser, 'Quantifying SARS-Cov-2 transmission suggests epidemic control with digital contact tracing' *Science* 368, 619 (May 2020).

³¹ Ferretti et al, above n 30 at 1.

³² At 2.

³³ At 1.

³⁴ At 1.

³⁵ At 4.

³⁶ At 5-6.

³⁷ Verrall, above n 26

³⁸ Verrall, above n 26

³⁹ Dr Ayesha Verrall 'Rapid Audit of Contact Tracing for Covid-19 in New Zealand' (10 April 2020) Ministry of Health <<https://www.health.govt.nz>> at 7.

contacts of an infected person within two days of a positive test.⁴⁰ She made a series of recommendations in her audit which were used to help increase contact tracing capacity and speed across multiple parts of the system. One of these recommendations was for the Ministry to continue development work on a contact tracing app.⁴¹

C The NZ Covid-19 Tracer app

The NZ Covid-19 Tracer app was released by the Ministry of Health on 20 May 2020.⁴² Prime Minister Jacinda Ardern described the NZ Covid Tracer App as a ‘digital diary,’ designed to allow users to record the locations they had been for the purposes of supporting contact tracing by the Ministry of Health.⁴³ The app is voluntary to download.⁴⁴ As was emphasised by the Director General of Health, Dr Ashley Bloomfield, the app is intended to supplement existing manual contact tracing process described earlier.⁴⁵

Users download the app to their smartphone on Android or iOS operating systems.⁴⁶ They must then enter an email address and password.⁴⁷ Other personal information including name, phone number, address, date of birth, gender identity and ethnicity is optional to provide.⁴⁸ These details are stored centrally by the Ministry of Health, using an Amazon Web Services server in Sydney.⁴⁹ To use the app, users then keep track of

⁴⁰ Verrall ‘Rapid Audit’, above n 39 at 11.

⁴¹ At 7-8.

⁴² Ministry of Health ‘NZ COVID Tracer app released to support contact tracing’ (press release, 20 May 2020).

⁴³ ‘Covid-19: Government to release contact tracing ‘digital diary app’ on Wednesday’ (18 May 2020) Radio New Zealand <<https://www.rnz.co.nz>>.

⁴⁴ Alex Braae, ‘What you need to know about the government’s new contact tracing app’ (20 May 2020) The Spinoff <<https://thespinoff.co.nz>>.

⁴⁵ ‘More than 92,000 people already registered on NZ tracing app – Bloomfield’ (20 May 2020) Radio New Zealand <<https://www.rnz.co.nz/news>>.

⁴⁶ ‘How NZ COVID Tracer works’ (accessed 16 July 2020) Ministry of Health <<https://www.health.govt.nz>>.

⁴⁷ ‘How NZ Covid Tracer works’, above n 46.

⁴⁸ Braae, above n 44.

⁴⁹ Braae, above n 44.

where they have visited by scanning QR codes that are displayed in public places such as shops, restaurants, public transport and universities.⁵⁰ Users' scan history is stored locally on their own device, rather than centrally on the Amazon servers.⁵¹ If a user tests positive for Covid-19, they can use the app to make their scan history available to the Ministry of Health for contact tracing.⁵² As of the June update, users can also opt-in to receive notifications from the app if they have checked in to any location at the same time as someone who has tested positive.⁵³ QR scan information stored on a users device is only stored for 31 days, and after this it is automatically deleted.⁵⁴

The NZ Covid Tracer app was introduced a week after New Zealand entered alert level 2.⁵⁵ At alert level 2 all hospitality businesses such as cafes and restaurants were required to maintain contact tracing registers of all clients, and workplaces were also required to maintain records of staff presence on site.⁵⁶ When the app was introduced, several other privately developed apps were already in the market.⁵⁷ These included Rippl, which was piloted among Wellington hospitality businesses, and Team Safe, used to track workers by companies such as Fletcher Building.⁵⁸ The Tracer app did not replace these apps or the manual registers that businesses were legally required to keep during alert level 2.⁵⁹ Rather, businesses were expected to keep their own records of customers (through an app such as Rippl, a Google Form, or a pen and paper) in addition to customers using the Covid Tracer app to keep their own records if they chose.⁶⁰ Following the shift to alert

⁵⁰ 'How NZ Covid Tracer works', above n 46.

⁵¹ Dr Andrew Chen, Research Fellow "Digital Technologies for Contact Tracing" (webinar, Koi Tū: Centre for Informed Futures, University of Auckland, 3 July 2020).

⁵² 'Privacy and Security for Covid Tracer' (accessed 16 July) Ministry of Health <<https://www.health.govt.nz/our-work>>.

⁵³ 'NZ Covid Tracer app and daily numbers update' (media release, 10 June 2020, Ministry of Health) <<https://www.health.govt.nz/news-media>>.

⁵⁴ 'Privacy and Security for Covid Tracer', above n 52.

⁵⁵ Ministry of Health press release, above n 42.

⁵⁶ 'Doing business at alert level 2' (accessed 6 October) Unite Against Covid-19 <<https://covid19.govt.nz/business>>.

⁵⁷ Alex Braae 'Wellington picks contact tracing app – so what about the rest of the country?' (12 May 2020) The Spinoff <<https://thespinoff.co.nz>>.

⁵⁸ Braae, above n 57.

⁵⁹ 'Doing business at alert level 2', above n 56.

⁶⁰ 'Doing business at alert level 2', above n 56.

level 1 businesses are no longer required to contact trace, but individuals are still encouraged to use the Tracer app for their own records.⁶¹

D Other technological contact tracing solutions

Since the release of the Tracer app, the government has expressed that they are continuing to consider other technology-based contact tracing options, and that there is the option for these to be added on top of the Tracer app.⁶² The two most likely options include a Bluetooth functionality to be added to the Tracer app, and a Covid Card which could be provided to all New Zealanders.

A Bluetooth functionality added to the Tracer app is likely to function in a similar way to the TraceTogether and CovidTrace apps, implemented in Singapore and Australia respectively.⁶³ Rather than tracking a person's location, these apps utilise Bluetooth on a user's smartphone to exchange 'tokens' with surrounding devices that have the app.⁶⁴ These tokens are 'time varying,' meaning they are refreshed regularly to protect the anonymity of the device.⁶⁵ The tokens received by each device are recorded along with a timestamp of the interaction.⁶⁶ If an individual tests positive, they can share the list of tokens that their device has been in contact with, with the Ministry of Health able to decrypt this list into mobile numbers of the potentially exposed device-owners.⁶⁷ The solution continues to face some technical difficulties in Singapore and Australia, and also

⁶¹ Doing business at alert level 1' (accessed 6 October) Unite Against Covid-19 <<https://covid19.govt.nz/business>>; Collette Devlin 'Coronavirus: PM clears up contact tracing confusion for businesses in level 1' (8 June 2020) Stuff <<https://www.stuff.co.nz/national/health/coronavirus>>.

⁶² Rebecca McBeth 'Bluetooth functionality to be added to contact tracing app' (19 May 2020) Health Informatics New Zealand <<https://www.hinz.org.nz/news>>.

⁶³ Hyunghoon Cho, Daphne Ippolito, Yun William Yu 'Contact Tracing Mobile Apps for COVID-19: Privacy Considerations and Related Trade-offs' (preprint, submitted 30 March 2020, accessible via arXiv.org hosted by Cornell University) <<https://arxiv.org/abs/2003.11511>> at 2.

⁶⁴ Cho et al, above n 63 at 2.

⁶⁵ At 2.

⁶⁶ At 2.

⁶⁷ At 2.

is reliant on a large-scale voluntary uptake of the app, something which has also been an issue in both countries.⁶⁸

Another potential option the government has mentioned is a CovidCard. This would be a hardware solution requiring a physical card to be issued to all New Zealanders.⁶⁹ The card would also operate using Bluetooth, logging the IDs of the other cards it came in contact with.⁷⁰ Similar to under a Bluetooth app, if a person tested positive for Covid, the Ministry of Health would be able to contact by phone the list of contacts that had been logged by that person's CovidCard.⁷¹ The approach appears to have advantages from the point of digital inclusion and uptake, however there are also likely to be some practical issues with this solution.⁷²

III Rights limitation mechanisms in NZ law

As mentioned, there are two main ways that human, civil and other rights may be limited in New Zealand – either through statute, or through an individual's consent. This section will introduce both frameworks, including their theoretical underpinnings with a view to applying them to the case study of the NZ Covid-19 Tracer app in section IV.

A Statutory rights limitation mechanisms

New Zealand's statutory framework for human rights sets out a range of human rights, the protective mechanisms available for those rights and how the rights may be legally limited. The core statutes determining the scope of human rights in New Zealand are the New Zealand Bill of Rights Act and the Human Rights Act.⁷³ However these statutes do not represent the full scope of human rights in New Zealand.⁷⁴ Existing rights or

⁶⁸ At 8; Chen, above n 51; Scantamburlo et al above n 61 at 7-8.

⁶⁹ Laura Wiltshire 'Government considering Covid Card for contact tracing' (17 April 2020) Stuff <<https://www.stuff.co.nz/national>>.

⁷⁰ Wiltshire, above n 69.

⁷¹ Wiltshire, above n 69.

⁷² Marc Daalder 'NZ considering \$100m contact tracing 'Covid-Card' (17 April 2020) Newsroom <<https://www.newsroom.co.nz>>.

⁷³ Bill of Rights Act 1991; Human Rights Act 1993.

⁷⁴ Paul Rishworth "Human Rights" (2018) NZLR 543 at 565.

freedoms predating NZBORA are not ‘abrogated’ merely because they are not included in that statute.⁷⁵ This means that rights that are broadly recognised in society generally or are established by common law can continue to exist separately to rights contained in BORA.

1 Theoretical underpinnings

Though the concept of human rights is present in many legal cultures, New Zealand’s human rights framework is based heavily on English common law legal principles.⁷⁶ These include principles such ‘liberty, security and dignity of the person’ as well as ‘autonomy’ and private property rights.⁷⁷ New Zealand’s framework is also heavily influenced by international law, especially documents such as the United Nations Charter, the UN Declaration on Human Rights and the ICCPR and ICESCR treaties.⁷⁸ The ICCPR establishes inalienable human, civil and political rights that should be available to all people.⁷⁹ The ICESCR establishes a variety of economic, social and cultural rights, most of which governments should strive to meet, though they are under no obligation to guarantee them.⁸⁰

It is a well known principle of human rights law that *most* human rights are not absolute.⁸¹ The existence of multiple human rights means it is inevitable that rights will need to be balanced against each other and be subject to a degree of limitation.⁸² The right to freedom of expression does not include the right to spread hate speech, for example, or to subject individuals to discrimination on the grounds of protected

⁷⁵ Bill of Rights Act, s 28.

⁷⁶ Paul Rishworth ‘Writing things unwritten: Common law in New Zealand’s constitution’ (2016) 14 ICON 137 at 143.

⁷⁷ At 143.

⁷⁸ Andrew Butler and Petra Butler ‘The Judicial Use of International Human Rights Law in New Zealand’ (1999) 15 VUWLR 173 at 173.

⁷⁹ International Covenant on Civil and Political Rights, 1966, article 2(1).

⁸⁰ International Covenant on Economic, Social and Cultural Rights, 1966, article 2(1).

⁸¹ Costi above n 1 at 628.

⁸² Rishworth, above n 74 at 544.

characteristics such as race, sexuality or religious beliefs.⁸³ Rights such as the right to freedom of association, freedom of assembly and freedom of movement, can all also be limited where the broader public interest requires it.⁸⁴ In New Zealand, the Bill of Rights Act establishes the test for when rights may be justifiably limited.⁸⁵

2 NZ's human rights regime

New Zealand's Bill of Rights Act 1991 and the Human Rights Act 1993 are the primary instruments in New Zealand's human rights regime.⁸⁶ The Bill of Rights Act applies to all acts done by the Government or any 'person or body' in performance of any 'function power or duty' prescribed by law.⁸⁷ It sets out a range of civil and political rights which are to be protected and outlines in the operational provisions how these rights are to be recognised and upheld in parliamentary decision making and statute.⁸⁸ The Human Rights Act establishes the Human Rights Commission, outlines the prohibited grounds of discrimination, and clarifies some exceptions to the rule prohibiting discrimination.⁸⁹

New Zealand's Bill of Rights Act is not supreme law.⁹⁰ Under s 4, courts are prohibited from striking down legislation on the grounds that it is inconsistent with the rights set out in the BORA.⁹¹ The operational powers in s 5, 6 and 7 nonetheless create some powers for courts, public authorities and the general public to hold the government accountable for human rights breaches. Under s 6, courts, when interpreting statutes, should prefer

⁸³ Andrew Butler "Limiting Rights" (2002) 33 VUWLR 537 at 539 at 548; *Living Wood Distributors v Human Rights Action Group* [2000] 3 NZLR 570 (CA).

⁸⁴ As has been seen in the Covid-19 context where widespread lockdowns restricting peoples freedom of movement, assembly and association have been implemented in the interests of public health and safety. See *Borrowdale v Attorney General* [2020] NZHC 2090 for the Court's obiter statement that, if prescribed by law, the limitations placed on freedom of movement, association and assembly during the first nine days of alert level 4 were demonstrably justified in the circumstances.

⁸⁵ Bill of Rights Act 1991, s 5.

⁸⁶ Human Rights Commission 'What legislation protects and promotes human rights?' (accessed 8 October 2020) <www.hrc.co.nz>.

⁸⁷ Bill of Rights Act, s 3.

⁸⁸ Bill of Rights Act, explanatory note.

⁸⁹ Human Rights Act 1993, s 4, s 21, ss 24-34.

⁹⁰ Bill of Rights Act, s 4.

⁹¹ Bill of Rights Act, s 4.

interpretations that are consistent with BORA.⁹² Rights under BORA should only be limited, according to s 5, where it can be ‘demonstrably justified in a free and democratic society.’⁹³ Courts may investigate whether a legislative limitation is ‘demonstrably justified’ in compliance with s 5 and, according to Geiringer, issue an ‘implied’ declaration of their conclusion.⁹⁴ The Attorney-General is also empowered under s 7 to bring any ‘provision’ that might be in breach of BORA to the attention of Parliament when a Bill is introduced.⁹⁵

3 Section 5 ‘justified’ limitations

Section 5 of BORA establishes that;

“Subject to section 4 the rights and freedoms contained in this Bill of Rights may be subject only to such *reasonable* limits prescribed by law as can be *demonstrably* justified in a *free and democratic society*.*⁹⁶”

Section 5 is a ‘stand-alone,’ ‘general’ provision that applies to all of the rights in BORA.⁹⁷ This approach differs to other jurisdictions where specific limitations are directly incorporated into specific rights with no umbrella limitation clause, or courts are simply left to determine the scope of justifiable limitations with no statutory guidance.⁹⁸ This means that most of the rights contained in BORA could be justifiably limited by section 5.⁹⁹ There may be an exception for some rights that BORA may have intended to

⁹² Bill of Rights Act s 6.

⁹³ Bill of Rights Act s 5. * Emphasis added.

⁹⁴ Claudia Geiringer ‘On a Road to Nowhere: Implied Declarations of Inconsistency and the New Zealand Bill of Rights Act’ (2009) 40 VUWLR 613 at 618-619; *Moonen v Film and Literature Board of Review* [2000] 2 NZLR 9 (CA).

⁹⁵ Bill of Rights Act 1991 s 7.

⁹⁶ Bill of Rights Act 1991, s 5.

⁹⁷ Andrew Butler, above n 83 at 539.

⁹⁸ At 539-540.

⁹⁹ Paul Rishworth “Human Rights” (2018) NZLR 543 at 559. Note that Butler disputes this, arguing that these rights should also be considered to be subject to section 5. See: Andrew Butler, Petra Butler “The New Zealand Bill of Rights Act: A Commentary” (second ed, Lexis NZ, Wellington, 2015) at 162-163.

absolutely protect – such as the right not to be tortured or the right not to be tried unfairly.¹⁰⁰

Looking to the literal meaning of s 5, Butler has argued there is a need for rigorous literal interpretation.¹⁰¹ ‘Reasonable’ he argues, implies a more flexible standard than had ‘necessary’ been used.¹⁰² ‘Free and democratic society’ also raises issues for Butler. He argues that the use of ‘society’ supports that rights only derive meaning *within* a ‘society’ in which we are forced to interact with others.¹⁰³ Butler also questions whether ‘democratic’ qualifies ‘free,’ meaning the ‘free’ society is one that is governed democratically.¹⁰⁴

Butler argues that s 5 creates two possible avenues through which rights might be limited; the ‘definitional balancing approach’ and the ‘ad hoc balancing approach.’¹⁰⁵ Under the ‘definitional balancing approach’ justifiable limitations on rights are incorporated into the definition of the right itself – downsizing the scope of the right to fit justifiable limitations.¹⁰⁶ Whereas, under the ‘ad hoc balancing’ approach – the scope of rights are defined broadly and then have constraints imposed on them by courts or legislation.¹⁰⁷ Butler argues that the correct interpretation of s 5 mandates use of the ‘ad hoc balancing approach.’¹⁰⁸ This is consistent with one of the purposes of the provision which, he argues, was to create a two stage process: defining the right, then establishing whether the encroachment on the right was justified.¹⁰⁹ Further purposes of the section, according to Butler, include establishing a standard for justificatory breaches of rights, allocating the

¹⁰⁰ *R v Hansen* [2007] NZSC 7 at [65].

¹⁰¹ Andrew Butler, above n 83 at 564.

¹⁰² At 564-565.

¹⁰³ At 566.

¹⁰⁴ At 566.

¹⁰⁵ At 541.

¹⁰⁶ At 541.

¹⁰⁷ At 541.

¹⁰⁸ At 542.

¹⁰⁹ At 542-543.

burden of proof, requiring the rights-violator to prove that the limitation was justified and affirming that rights are not absolute.¹¹⁰

I argue that this ‘ad hoc balancing’ interpretation of s 5 is reflected in the *Hansen* test for establishing whether rights limitations are justified. *Hansen* drew on the approach of the Supreme Court of Canada in *Oakes* to outline a test for when limitations on human rights might be ‘demonstrably justified.’¹¹¹ The Court first established that the right had been limited.¹¹² Following this they tested whether that limit was justified by asking whether the limiting measure served a sufficiently important purpose to justify curtailing a BORA right.¹¹³ They found the limiting measure also needed to be rationally connected with the legislative purpose, and impair the right ‘no more than reasonably necessary to achieve the purpose.’¹¹⁴ Finally they said the limitation should be in due proportion to the importance of the objective.¹¹⁵

Hansen concerned s 6(6) of the Crimes Act, which created a presumption of possessing controlled drugs for the purpose of supply where a person possessed a certain quantity of drugs.¹¹⁶ The Supreme Court found that the reverse onus this placed on the defendant to prove there was no intent to supply was a limitation on the presumption of innocence.¹¹⁷ The Court then found that this limitation was unjustified and disproportionate, in breach of section 5.¹¹⁸ Through using the *Hansen* test, courts have gone on to identify an

¹¹⁰ At 543.

¹¹¹ *R v Hansen*, above n 100 at [64].

¹¹² At [66].

¹¹³ At [64].

¹¹⁴ At [42].

¹¹⁵ At [70].

¹¹⁶ At [1].

¹¹⁷ At [2]-[4], [132].

¹¹⁸ At [136].

unjustified limitation on prisoners right to vote through the Electoral (Disqualification of Sentenced Prisoners) Amendment Act in *Taylor v Attorney General* in 2015.¹¹⁹

In the context of the Covid-19 response, section 5 and the *Hansen* test can be used to assess the legality and justifiability of rights-limiting legislation.¹²⁰ During the response, legislation has been used to authorise severe constraints on people's civil liberties, including the rights to freedom of movement, association and assembly.¹²¹ Following the issuance of an epidemic notice by the Prime Minister Jacinda Ardern on 24 March, and declaration of a state of emergency by Civil Defence Minister Peeni Henare, special powers under the Health Act were unlocked to enable the Director General of Health Ashley Bloomfield to impose quarantine conditions on the entire population, ordering everyone, apart from essential workers, to stay at home.¹²² Since the state of emergency was lifted in mid-May, additional legislation has also been introduced to empower 'enforcement officers' to enforce rights limitations on people in New Zealand at alert levels 1 and 2.¹²³ These legislative measures, may all be subject to judicial review to assess whether the limitations they imposed on human rights were prescribed by law and justifiable under s 5. Indeed some legislation used to support the Covid-19 response has already been judicially reviewed.¹²⁴

In contrast, a right to privacy is not included in the Bill of Rights Act. This means that the BORA review mechanisms such as s 5 are not available where New Zealanders' right to

¹¹⁹ *Taylor v Attorney General* [2015] NZHC 1706 at [28], [33], [79].

¹²⁰ *Borrowdale v Attorney General* [2020] NZHC 2090.

¹²¹ See for example, epidemic notices issued under the Health Act 1956, the Covid-19 Response Act 2020.

¹²² Rt Hon Jacinda Ardern Prime Minister, Epidemic Preparedness (Covid-19) Notice 2020, issued under s 5 Epidemic Preparedness Act 2006, 24 March 2020; Minister of Civil Defence Peeni Eratara Gladwyn Henare Declaration of State of National Emergency, issued under s 66 of the Civil Defence Emergency Management Act 2002, 25 March 2020; Health Act 1956 s 70.

¹²³ Covid-19 Public Health Response Act 2020 ss 18-25.

¹²⁴ See for example, *Borrowdale*, above n 120 and *A v Ardern* [2020] NZHC 796 at [40]. In *A v Ardern* Justice Peters found that the applicants claim that the imposed lockdown constituted 'detention' under the Habeas Corpus Act 2001 failed and that the proper route for challenging the merits of the lockdown was an application for judicial review. A different judicial review claim was then filed by Andrew Borrowdale challenging the legality of Dr Bloomfield's exercise of power. See, *Statement of Claim: Andrew Borrowdale v Director General of Health*, High Court Wellington Registry and Andrew Geddis and

privacy might be at issue, such as in the case of the Covid-19 tracer app or other similar technological contact tracing measures. As will be explored, different measures are available under the Privacy Act to protect New Zealanders' right to privacy, including the use of individual consent to justify incursions into privacy. The following section will provide a brief introduction to the context of privacy and consent theory in New Zealand, prior to a more thorough analysis of the relative advantages and disadvantages of the two different approaches in the context of the case study.

B Consent-based rights limitation mechanisms in the privacy context

Legislative limits imposed on established BORA rights are not the only way that individuals' rights can be limited. Individuals can also consent to limitations upon their rights. As will be seen, across both private and public actors, consent is typically the basis used to justify rights intrusions in the context of personal privacy.

1 Consent in English legal theory

Prior to introducing how consent is incorporated in New Zealand privacy law, it is necessary to consider the jurisprudential origins of consent as a concept in English legal theory. Simmons argues that consent theory 'affirms the moral importance of individual autonomy... insisting that our most important relationships are those that we *choose*, not those that we are forced or born into.'¹²⁵ Consent influences and characterises many of our formal and informal interactions, transforming the 'normative expectations' between ourselves and others, and permitting us to engage in conduct that would not be legal, absent the consent.¹²⁶ For example, individuals can consent to sex or medical procedures.¹²⁷ These are both acts that, absent the consent, would constitute a criminal

Claudia Geiringer 'The legal basis for the lockdown may not be as solid as we've been led to believe' *The Spinoff* (28 April 2020) <<https://thespinoff.co.nz/covid-19/>>.

¹²⁵ John Simmons 'Political Obligation and Consent' in Frankin Miller and Alan Wertheimer *The Ethics of Consent: Theory and Practice* (Oxford, Oxford University Press, 2010) at 307.

¹²⁶ John Kleinig 'The Nature of Consent' Frankin Miller and Alan Wertheimer *The Ethics of Consent: Theory and Practice* (Oxford, Oxford University Press, 2010) at 4.

¹²⁷ Kleinig, above n 126 at 4, 6.

violation of a person's bodily autonomy.¹²⁸ Consent may also operate to alter the nature of the relationship between individuals and the state.¹²⁹ For example, in the United States, arrested persons may waive their Miranda rights to answer questions that police ask of them.¹³⁰ Miranda rights include the right to remain silent when asked questions by police, the right to speak to a lawyer prior to an interview and to have them present during the interview.¹³¹ By waiving these rights, a capable adult, operating without coercion, can voluntarily alter the nature of their relationship with the state, making unacceptable conduct (such as depriving someone of a lawyer), acceptable.¹³²

In both of these situations consent can be described as a 'communicative' act that 'alters the moral relations' between two parties.¹³³ Consent includes both a 'subjective' component, the willingness to offer consent, and a 'performative' component (such as an oral expression of consent or a signature).¹³⁴ The subjective component means that consent must be voluntary.¹³⁵ Coerced consent, such as consent obtained through physical threats, will not be a valid form of consent.¹³⁶ Social and moral pressure or financial or other incentives offered to individuals to encourage them to consent might also be coercive, depending on the circumstances.¹³⁷ For subjective consent, individuals

¹²⁸ Kleinig, above n 126 at 4.

¹²⁹ Thomas W. Merrill 'Dolan v City of Tigard: Constitutional Rights as Public Goods' *Denver University Law Review* 72(4) 1995 at 860.

¹³⁰ William T. Pizzi, 'Waiver of Rights in the Interrogation Room: The Court's Dilemma,' 23 *Conn. L. Rev.* 229 (1991) at 230-231.

¹³¹ *Miranda v Arizona* [1966] 384 US 436.

¹³² Although some theorists have questioned whether this approach gives sufficient regard to the inherent power imbalance that exists between individual and state, particularly in the context of interrogation room or 'stationhouse' confessions. Other theorists have also raised issues around the application of this approach to children who are arrested. See, William T. Pizzi, *Waiver of Rights in the Interrogation Room: The Court's Dilemma*, 23 *Conn. L. Rev.* 229 (1991); Kenneth J. King 'Waiving Childhood Goodbye: How Juvenile Courts Fail to Protect Children from Unknowing, Unintelligent and Involuntary Waivers of Miranda Rights' *Wis. L. Rev.* (2006) 431.

¹³³ Kleinig, above n 126 at 4.

¹³⁴ At 9-10.

¹³⁵ At 14-15.

¹³⁶ At 13.

¹³⁷ At 15.

must also be informed, understanding what they are agreeing to, or at least provided with the opportunity to inform themselves.¹³⁸

The performative element might be expressed as a one-off offer of consent, and be unable to be revoked (for example when a person votes in an election) or the consent might be a continuous processes, whereby consent can be withdrawn at any time, such as in case of ongoing medical procedures, or sexual activity.¹³⁹ Finally, there are boundaries around what one can consent to, what rights one can waive, and in what circumstances one's consent is valid. Parties generally cannot consent to significant harm or death caused to themselves by another, and parties must usually have the competence to give consent, by being of sufficient age and mental capacity.¹⁴⁰

2 Privacy

Consent is often drawn upon in a privacy context.¹⁴¹ The collection of personal information, where otherwise illegal or an invasion of privacy, becomes legal through the individuals' consent to the data collection.¹⁴² It is necessary now, therefore, to examine NZ privacy law more closely to identify how it protects privacy, and how consent is incorporated.

The concept of privacy is recognised as critical to maintaining the balance of power in the citizen-state relationship, protecting citizens from undue intrusion by the state or community at large.¹⁴³ Privacy can be defined as the 'right to be let alone,' free from surveillance or interference in our personal affairs.¹⁴⁴ Privacy protects citizens anonymity

¹³⁸ At 16.

¹³⁹ At 9-10.

¹⁴⁰ At 13; Vera Bergelson 'Consent to Harm' Franklin Miller and Alan Wertheimer *The Ethics of Consent: Theory and Practice* (Oxford, Oxford University Press, 2010); *R v Brown* [1993] UKHL 19.

¹⁴¹ For example, user consent is typically the basis upon which personal information is collected about individuals by social media platforms and other websites.

¹⁴² Kleinig, above n 126 at 4; Marianne Elliott, *Digital Threats to Democracy* (The Workshop, May 2019) at 135-136. Disclaimer that the author of this paper worked on the *Digital Threats to Democracy* report as a research assistant.

¹⁴³ *Entick v Carrington* [1765] 95 ER 807.

¹⁴⁴ Samuel D. Warren and Louis D. Brandeis 'The Right to Privacy' (1890) 4 Harv. L. Rev. 193 at 193.

and security, providing us with the freedom to live our lives (largely) free from the judgement, humiliation and ridicule of others.¹⁴⁵ Though the right is bestowed on individuals, the whole community has an interest in protecting rights to privacy.¹⁴⁶ As Petra Butler has pointed out, different societies have different conceptions about what is expected to be treated as private.¹⁴⁷ Rights to privacy are also often inequitable.¹⁴⁸ People who are the recipients of state financial assistance, for example, are expected to put up with increased incursion by the state into their private lives.¹⁴⁹

The right to privacy has been affirmed at international law under art 12 of the UNDHR and art 17 of the ICCPR.¹⁵⁰ However, as mentioned, the right to privacy is not included under the New Zealand Bill of Rights Act.¹⁵¹ Academics such as Petra Butler have argued that a right to privacy should be included under the Bill of Rights Act.¹⁵² She argues that this would have symbolic importance, demonstrating the significance of privacy and would increase legislative attention on privacy rights (via the Attorney General's section 7 reports).¹⁵³ She also argues it would give greater clarity to courts about how rights to privacy should be treated in law, as historically they have been

¹⁴⁵ Petra Butler, 'The Case for a Right to Privacy in the New Zealand Bill of Rights Act' 11 NZPJIL 213 (2013) at 214.

¹⁴⁶ *R v Jefferies* [1994] 1 NZLR 290 (CA) at 319 per Thomas J, cited in Petra Butler above n 145 at 214.

¹⁴⁷ Petra Butler, above n 145 at 214.

¹⁴⁸ Ella Brownlie, LAWS 438, '(Un)reasonable expectations of privacy for recipients of social welfare', supervised by Māmari Stephens.

¹⁴⁹ Ella Brownlie, above n 148. For example, in one instance it was uncovered that the Ministry of Social Development had acquired a welfare recipients personal photographs and text messages direct from the cell phone provider without her consent for the purposes of establishing that she was in an intimate relationship that affected her benefit entitlements. See, Sarah Robson 'MSD told it must do more for beneficiaries after privacy breaches' (16 May 2019) Radio New Zealand <<https://www.rnz.co.nz/news/national>>.

¹⁵⁰ Universal Declaration on Human Rights, 1948, art 12; International Covenant on Civil and Political Rights, 1966, art 17.

¹⁵¹ Bill of Rights Act, 1991.

¹⁵² Petra Butler, above 145 .

¹⁵³ At 244-245.

unclear about whether it should be treated as equivalent to those rights contained in BORA or as a lesser, mere ‘value’.¹⁵⁴

It is important to note that the lack of a formal right to privacy under the Bill of Rights Act does not mean that no privacy rights are available in New Zealand law.¹⁵⁵ As mentioned, the Bill of Rights Act does not extinguish any pre-existing rights established in the common law.¹⁵⁶ Indeed, some form of a right to privacy was likely established as far back as *Entick*, where it was established that citizens had the right to be protected from unreasonable search and seizure by the state.¹⁵⁷ However, it is certainly the case that privacy in New Zealand law is largely covered ‘piecemeal’.¹⁵⁸ This ‘piecemeal coverage’ includes the Privacy Act, other regulations pertaining to treatment of personal information in areas such as health or provision of credit, and a ‘(limited) tort of invasion of privacy.’¹⁵⁹ This tort enables plaintiffs to recover damages or an injunction where ‘facts’ (or possibly ‘information’ or ‘material’, per Tipping J) in which the plaintiff has a reasonable expectation of privacy, are published in a manner that would be ‘highly offensive’ to the objective reasonable person.¹⁶⁰

The Privacy Act sets out information privacy principles, that define the way in which public agencies, businesses and individuals should collect and use personal information about people.¹⁶¹ Personal information shall not be collected by an ‘agency’ (individual, business or public agency) unless it is for a lawful purpose, connected with an activity of that agency, and the collection is ‘necessary for that purpose.’¹⁶² The information should generally be collected directly from the individual concerned, demonstrating the

¹⁵⁴ At 246. Petra Butler uses the judgement of Thomas J from *Brooker v Police* [2007] NZSC 30 at [164] in support of this point.

¹⁵⁵ At 217.

¹⁵⁶ Bill of Rights Act 1991, s 28.

¹⁵⁷ At 216; *Entick v Carrington*, above n 143.

¹⁵⁸ At 215.

¹⁵⁹ At 215; see for example; Credit Reporting Privacy Code 2004; Health Information Privacy Code 1994.

¹⁶⁰ At 223-224; *Hosking v Runting* [2005] 1 NZLR 1 (CA).

¹⁶¹ Privacy Act 1993, s 2(1) meaning of ‘agency.’

¹⁶² Privacy Act 1993, s 6, information privacy principle 1.

importance placed on consensual participation.¹⁶³ Individuals should also be able to access and correct their information.¹⁶⁴ The principles are not enforceable in court.¹⁶⁵ However, individuals can make a complaint to the Privacy Commissioner if they believe there has been an ‘interference’ with their privacy.¹⁶⁶ This ‘interference’ must involve a breach of one or more of the IPPs, that causes ‘loss’, ‘detriment’, ‘adverse affects upon rights’, or ‘humiliation’ to the individual concerned.¹⁶⁷

The Covid-19 context has brought new and unexpected challenges to peoples’ right to privacy in New Zealand. The unusual context, in particular the introduction of the NZ Covid-19 Tracer app, provides a good opportunity to scrutinise the rights limitation mechanisms available in New Zealand law. The next section will use the Tracer app case study to assess the relative advantages and disadvantages of both consent and statute-based rights limitation mechanisms when it comes to protecting privacy.

IV A comparative analysis

This section will use the case study of the Covid-19 tracer app to compare and contrast the current consent-based approach to limiting privacy rights, with a statutory-based rights limitation approach. The purpose of this is to identify the strengths and weaknesses of the two approaches when it comes to protecting privacy rights. I will pay close attention to how the two respective approaches seek to balance individual autonomy, government accountability and effectiveness.

A Consent-based rights limitations

1 Introduction to the consent-based approach

As discussed, the Tracer app is currently heavily based on user consent to limitations on privacy rights. There is no underpinning legislation to the current Tracer App. Instead,

¹⁶³ Privacy Act 1993, s 6, information privacy principle 2(1).

¹⁶⁴ Privacy Act 1993, s 6, information privacy principles 6, 7.

¹⁶⁵ Privacy Act 1993, s 11.

¹⁶⁶ Privacy Act 1993, s 67.

¹⁶⁷ Privacy Act 1993, s 66(1).

the users consent is engaged throughout the whole process of installing and using the app. Firstly, the user consents to installing the device and providing the mandatory information such as name and contact details.¹⁶⁸ The users' consent is then engaged again each time they scan a QR code for their 'digital diary'.¹⁶⁹ The user is free to choose not to scan a particular QR code, though depending on the alert level, some venues may require people to use alternative contact tracing methods.¹⁷⁰ User consent is engaged for the final time when, if they have tested positive, the user can choose to share the information from their Tracer app with the Ministry of Health.¹⁷¹

However, the fact that the app is designed around user consent to data collection does not mean that there were no legal principles guiding the app's development. As has been explained, privacy is a respected legal value that exists outside of the BORA, in legislation and in the common law.¹⁷² This is demonstrated in the case of the Covid-19 tracer app, where it is clear from the Privacy Commissioner's Privacy Impact Assessment that sources such as the Privacy Act information privacy principles and the Health Information Privacy Code all informed the development of the app.¹⁷³

It is also important to note that the current voluntary app exists alongside other contact tracing requirements that *are* mandatory. Whilst users are not required to share the information they have stored on the app with the Ministry of Health, they are required to comply with the obligations regarding contact tracing set out in s 92ZZC of the Health Act.¹⁷⁴ These obligations include providing information about 'the people with whom they have been in contact and the circumstances in which they believe they contracted or transmitted the disease.'¹⁷⁵ So, if someone does not provide information direct from the

¹⁶⁸ NZ Covid-19 Tracer app, privacy statement, Ministry of Health, accessed 17 September 2020 via author's own device.

¹⁶⁹ NZ Covid-19 Tracer app, privacy statement, above n 168.

¹⁷⁰ NZ Covid-19 Tracer app privacy statement, above n 168; Covid-19 Public Health Response Act 2020.

¹⁷¹ NZ Covid-19 Tracer app, privacy statement, above n 168.

¹⁷² Petra Butler above n 145 at 214.

¹⁷³ Privacy Commissioner, 'Covid-19 Contact Tracing Application: Privacy Impact Assessment' (9 September 2020).

¹⁷⁴ NZ Covid-19 Tracer app privacy statement, above n 168; Health Act 1956 s 92ZZC.

¹⁷⁵ Health Act 1956, s 92ZZC.

app about the locations they have visited they are likely to be expected to still make information about their whereabouts and contacts known to the Ministry through a different means such as in-person interviews.¹⁷⁶ Section 11 of the Covid-19 Public Health Response Act also provides the Minister or Director General of Health with the power to require persons to provide ‘in specified circumstances or in any specified way any information necessary for contact tracing.’¹⁷⁷

2 *Advantages of the consent-based approach*

The current approach with the use of privacy guidelines and engagement with the Office of the Privacy Commissioner appears to have delivered some substantively good outcomes in terms of user privacy for people using the app. Strong government engagement with the Privacy Commissioner has meant that the app reflects ‘privacy by design’ principles.¹⁷⁸ The voluntariness of the app may have also had benefits in terms of developing public trust in the app.

We can see ‘privacy by design’ reflected in the current app in multiple places. Firstly, the reliance on user consent to provide information reflects the information privacy principle that information should be obtained directly from individuals wherever possible.¹⁷⁹ Data minimisation, where the least possible data is collected and stored to achieve the apps purpose is also incorporated in the app.¹⁸⁰ For example, no location data is stored, only the name assigned to the QR code of the business or location that someone scans into.¹⁸¹ Records of the QR codes an individual has scanned are also automatically deleted after 31 days.¹⁸² We can also see the principle of data sovereignty being incorporated.¹⁸³ All

¹⁷⁶ Health Act, s 92ZZC.

¹⁷⁷ Covid-19 Public Health Response Act, s 11.

¹⁷⁸ John Edwards, Privacy Commissioner, “Privacy Commissioner backs NZ Covid Tracer App” (press release, 20 May 2020).

¹⁷⁹ Privacy Act, information privacy principle 2.

¹⁸⁰ Covid-19 App: Privacy Impact Assessment, above n 173 at 4; Scantamburlo et al, above n 29 at 6.

¹⁸¹ NZ Covid-19 Tracer app privacy statement, above n 168.

¹⁸² NZ Covid-19 Tracer app privacy statement, above n 168.

¹⁸³ Bernard Hickey ‘Sovereignty in a digital world – part 2’ (8 September 2020) Newshub <<https://www.newsroom.co.nz/sovereignty-in-a-digital-world>>.

QR code data is stored locally on the individuals' own phone, and is able to be deleted by the user.¹⁸⁴ The user can also choose whether this information is shared with the Ministry of Health or not.¹⁸⁵ However, on the other hand, the individuals personal information and login details is stored offshore in Sydney, Australia, minimising data sovereignty because the information is kept outside of New Zealand's jurisdiction.¹⁸⁶

The high degree of user autonomy and consent that is included in the current Tracer app may also have the advantage of increasing public trust and comfort in using the app. It is relatively straightforward to acknowledge that if people do not trust a technological contact tracing solution they will not use it.¹⁸⁷ As the Commissioner commented in the Privacy Impact Assessment 'consumer trust is essential if use of the [app] is to become widespread.'¹⁸⁸ Vaithianathan et al have also argued that community engagement and trust is essential if a digital contact tracing solution is to attain the 'social license' needed to be effective and successful.¹⁸⁹ A voluntary app likely assures people that they can continue to exercise some control over their own privacy because they can choose to opt out of scanning certain QR codes, or sharing their data with the Ministry of Health.¹⁹⁰ Reassuring people that they are in control of their own information likely increases individual buy in and comfort with using the app.¹⁹¹ This is likely to be particularly important with the current Tracer app, as it relies on a process of continuous engagement

¹⁸⁴ NZ Covid-19 Tracer app privacy statement, above n 168.

¹⁸⁵ NZ Covid-19 Tracer app privacy statement, above n 168.

¹⁸⁶ Hickey, above n 183; Karaitiana Taiuru 'Govt tracing app data could be accessed by AUS/USA' (25 May 2020) Te Ao Māori News < <https://www.teaomaori.news/govt-tracing-app-data>>.

¹⁸⁷ Luciano Floridi, Jessica Morley, Josh Cowls and Mariarosaria Taddeo *Ethical Guidelines for SARS-CoV-2 Digital Tracking and Tracing Systems* (Oxford Internet Institute, 2020) at 4.

¹⁸⁸ Covid-19 App: Privacy Impact Assessment, above n 173 at 4.

¹⁸⁹ Rhema Vaithianathan, Matthew Ryan, Nina Anchugina, Linda Selvey, Tim Dare and Anna Brown *Digital Contact Tracing for COVID-19: A Primer for Policymakers* (The Centre for Social Data Analytics (AUT) and the Institute for Social Science Research (University of Queensland), May 2020) at 11.

¹⁹⁰ NZ Covid-19 Tracer app privacy statement, above n 168.

¹⁹¹ Covid-19 App: Privacy Impact Assessment, above n 173 at 23.

between the individual and the app, with the user scanning codes wherever they go, not just having the app running in the background.¹⁹²

To some extent, we can also argue that the current approach, relying on individual consent has worked to build public support and use of the app. Vaithianathan et al noted the importance of ‘robust and interactive public engagement’ regarding technological contact tracing solutions on both an ‘initial and ongoing basis’.¹⁹³ This issue appears to have been central to the government’s approach to the Tracer app as is demonstrated through the numerous publicity campaigns that have been used to encourage people to use the app.¹⁹⁴ The high rates of app downloads, particularly seen since the August Auckland lockdown have demonstrated that some of these efforts have paid off, with two million downloads achieved by the beginning of September 2020, approximately 40% of the total NZ population.¹⁹⁵ Whilst, for example, a text prompt or mandatory automatic download of the app to every phone may have increased the number of downloads of the app – this approach would not necessarily have achieved the ongoing public buy in needed for people to engage in using the app on a daily basis.¹⁹⁶ Given that people are quite easily able to find a way to avoid using particular technological solutions, such as leaving a device or card at home or engaging in other contact tracing methods when they

¹⁹² NZ Covid-19 Tracer app, privacy statement, above n 168.

¹⁹³ Vaithianathan et al, above n 189 at 11.

¹⁹⁴ Lana Andelane ‘Dr Bloomfield’s two-minute guide to the Covid Tracer app’ (6 August 2020) Newshub <<https://www.newshub.co.nz>>; Unite Against Covid-19 (accessed 8 October 2020) <www.uniteagainstcovid19.co.nz>; see also Ministry of Health media briefings, public signage, billboards and use of motorway information boards to promote the Covid-19 Tracer app.

¹⁹⁵ Nikita Blake-Persen ‘2.1 million download Covid Tracer app but who is signing in?’ (2 September 2020) NZ Herald <www.nzherald.co.nz>.

¹⁹⁶ See, Johannes Abeler, Sam Altmann, Luke Milsom, Severine Toussaert, Hannah Zillessen *Support in the UK for app-based contact tracing of Covid-19* (University of Oxford, Department of Economics, April 2020) at 2-3. The survey suggested that one option to increase uptake of contact tracing apps would be for phone companies to automatically install the app on all phones. This suggestion was supported by a majority of participants in the survey.

are out and about, a consent-based approach is really the only way to guarantee individual buy-in to the continuous use of a technological solution.¹⁹⁷

3 *Disadvantages of the consent-based approach*

Clearly, a pro-privacy approach has been taken by this government when developing the Covid-19 Tracer app.¹⁹⁸ However, this attitude is by no means a given in any Government. It is therefore necessary to examine the disadvantages of the consent-based model with a view to understanding whether it adequately protects individuals' privacy rights and whether improvements could be made upon the current model.

(a) The problems with consent and privacy 'self-management'

The consent-based framework that supports the Covid-19 Tracer app can be described as a form of 'privacy self-management'.¹⁹⁹ Daniel Solove coined this term to describe the way in which individuals in modern digital environments are expected to self-manage their own privacy across different platforms, and on an ongoing basis in accordance with their own privacy values.²⁰⁰

Solove identifies three main issues with privacy self-management.²⁰¹ Firstly, he argues, there are cognitive problems.²⁰² Privacy self-management 'envisions an informed and rational person who makes appropriate decisions about whether to consent to various forms of collection and use of personal data.'²⁰³ In reality, individuals typically do not even *approach* this vision.²⁰⁴ Most people do not read or engage in privacy notices, and if they do, these notices are rarely clear or comprehensive enough to fully inform

¹⁹⁷ Chen, above n 51.

¹⁹⁸ John Edwards, Privacy Commissioner, "Privacy Commissioner backs NZ Covid Tracer App" (press release, 20 May 2020).

¹⁹⁹ Daniel J. Solove 'Introduction: Privacy Self-Management and the Consent Dilemma' 126 Harv. L. Rev. (2013) 1880 at 1880.

²⁰⁰ Solove, above n 199, at 1881.

²⁰¹ At 1881.

²⁰² At 1883.

²⁰³ At 1883.

²⁰⁴ At 1883.

someone about their options.²⁰⁵ This was made apparent in one study where academics from York University found that participants spent an average of 51 seconds reading the privacy notices for a fake social media site.²⁰⁶ 98% of those involved agreed to the terms and conditions, missing ‘gotcha’ clauses including one that required participants to provide their first-born child in return for access to the platform!²⁰⁷

Secondly, Solove argues, people also typically ‘lack the expertise to adequately assess the consequences of agreeing to certain present uses or disclosures of their data.’²⁰⁸ This can result in people giving away substantial amounts of information with limited protections for little or no gain.²⁰⁹ Finally, Solove points out that ‘people are also more willing to share personal data when they feel in control, regardless of whether that control is real or illusory.’²¹⁰ Given that technological environments are designed around psychological and sociological understandings of human behaviour, the desire to be in control can be manipulated to encourage users to give up more information.²¹¹

In the context of the Covid-19 tracer app, we can see that some of these same cognitive issues may affect people’s ability to make informed choices about using the app. Firstly, however, we must acknowledge that this app is not accessible to everyone. People without smart phones are automatically excluded from this method of contact tracing.²¹² For those with smart phones, some of the cognitive issues that Solove discusses may arise. The privacy statement is 1542 words long, which is relatively short for most

²⁰⁵ Jonathan A. Obar and Anne Oeldorf-Hirsch ‘The Biggest Lie on the Internet: Ignoring the Privacy Policies and Terms of Service Policies of Social Networking Services’ (2016) *Information, Communication & Society* 1 at 2.

²⁰⁶ Obar et al above n 205, at 2.

²⁰⁷ At 2.

²⁰⁸ Solove, above n 199, at 1886.

²⁰⁹ At 1886.

²¹⁰ At 1887.

²¹¹ At 1887; Elliott, above n 142 at 131-132.

²¹² Alex Hern ‘Millions risk being locked out of Covid-19 contact tracing app’ (15 May 2020) *The Guardian* <www.theguardian.com/technology>; Kelly and Anna Pendergast ‘‘Download the app then use it’ leaves too many of us out of contact tracing efforts’ (20 August 2020) *The Spinoff* <<https://thespinoff.co.nz/tech/>>.

privacy statements.²¹³ Facebook's privacy statement, for example is 4272 words.²¹⁴ The Covid App statement is categorised around questions such as 'will my information be secure' and 'what happens to your information.'²¹⁵ This makes it reasonably easy to navigate and understand the information. The writing is quite clear, however the statement is dense with a lot of specific information contained in it. However it could certainly have been improved. A 'clickwrap' privacy notice upon first entry to the app could have helped improve user engagement with the privacy statement since most are unlikely to seek it out in the specific tab on the app.²¹⁶

Individuals' decisions about privacy risks are seldom based on a 'rational' assessment of the facts at hand, and are likely to be heavily influenced by their environment, including the personal habits and attitudes of people around them.²¹⁷ In the Covid app context, people's attitude towards and trust in government is likely to be a significant contributing factor to whether they are willing to download the Covid Tracer.²¹⁸ Attitudes towards government vary across the population and tend to be informed by a range of factors including ones' own experiences engaging with government, community attitudes and the government itself, including whether it is seen to accurately represent and advocate for a wide range of people and interests with integrity.²¹⁹

At one end of the spectrum, a profound distrust in government or engagement with misinformation might cause some people to overvalue their privacy, ignoring the enormous communal benefits that effective and reasonable contact tracing in a public health crisis can provide, particularly where privacy protection has been designed-in.²²⁰ As Laura O'Connell Rapira has explored, distrust in government and media should be viewed not as a problem specific to some individuals, but rather as a problem that is

²¹³ NZ Covid-19 Tracer app, privacy statement, above n 168.

²¹⁴ 'Data Policy' Facebook privacy statement (accessed 9 October 2020) <<https://www.facebook.com/policy>>.

²¹⁵ NZ Covid-19 Tracer app, privacy statement, above n 168.

²¹⁶ Obar et al above n 205 at 7-8.

²¹⁷ Solove, above n 199 at 1886.

²¹⁸ Covid-19 App: Privacy Impact Assessment, above n 173 at 4.

²¹⁹ Elliott, above n 142 at 58.

²²⁰ Kelly and Anna Pendergast, above n 212.

symptomatic of sustained inter-generational inequities.²²¹ Solove's point about the inability of people to weigh the consequences and benefits of giving up their privacy may also be relevant to the Tracer app.²²² Not looking closely at the terms and conditions might cause people to overlook that QR code information is only stored locally on the individuals device, and only for a short period of time.²²³ Lay people are also not likely to be well informed about how beneficial the use of the app is in the broader public health context of contact tracing. This makes it difficult for individuals to make an accurate, informed cost-benefit analysis of engaging in the app.

On the other end of the spectrum, the fear associated with crisis situations can increase some peoples' trust in government, making it easier for more rights-intrusive policies to be implemented and accepted by the general public without question.²²⁴ This was seen in the first part of the Covid-19 response, where polls conducted by the Spinoff and by Colmar Brunton demonstrated astounding levels of trust in the government to manage the Covid response.²²⁵ In early April 2020, 88% of Colmar-Brunton respondents said that they 'trust the government to make the right decisions on Covid-19,' with 84% approving of the governments response so far.²²⁶ Research by Sibly et al backs this up, they used data from the longitudinal study, New Zealand Attitudes and Values Survey (NZAVS) to compare trust and attitudes towards government pre- and post-lockdown and found that there was a statistically significant increase in trust in government post-lockdown.²²⁷ These attitudinal shifts may mean New Zealanders are more willing to make privacy sacrifices, even when they are not fully informed about the implications or scope of such

²²¹ Laura O'Connell Rapira 'How to talk to whānau about conspiracies' (13 August 2020) The Spinoff <<https://thespinoff.co.nz>>.

²²² Solove above n 199 at 1886.

²²³ NZ Covid-19 Tracer app, privacy statement, above n 168.

²²⁴ Chris Sibly, Lara Greaves, Nicole Satherley, Nickola Overall, Carol Lee, Petar Milojev, Joseph Bulbulia, Danny Osborne, Carla Houkamau, Marc Wilson, Taciano Milfont, Isabelle Duck, Raine Vickers-Jones and Fiona Kate Barlow 'Effects of the COVID-19 Pandemic and Nationwide Lockdown on Trust, Attitudes Toward Government and Well-being' (2020) 75 *American Psychologist* 618 at 619-620.

²²⁵ Toby Manhire 'Almost 90% of New Zealanders back Ardern government on Covid-19 – poll' (8 April 2020) The Spinoff <<https://thespinoff.co.nz/politics>>.

²²⁶ Manhire, above n 225.

²²⁷ Sibley et al above n 224 at 623-624.

sacrifices. A discussion of the current legal basis for the Covid-19 Tracer app, therefore needs to be informed by a more complex and complete, understanding of how consent actually operates within digital spaces.

(a) The intersection between consent and effectiveness

In addition to the cognitive difficulties associated with relying on individuals to self-manage their own privacy, the use of consensual tools to aid contact tracing may also reflect a form of technological solutionism that is harmful rather than helpful. Over-emphasising the role that an app such as the Covid-19 Tracer can play in assisting contact tracing may obfuscate the actual effectiveness of such technology.

Evgeny Morozov coined the term ‘technological solutionism’ to describe the ‘belief that every problem has a solution based in technology.’²²⁸ Morozov argues that believing that technology can solve social ills often places the burden of change on the individual and fails to address the system the individual operates within. A self tracking health app, for example, benefits those with the means and time to access healthy food and to exercise – but at the same time operates to blame other portions of the population for their lack of access to ‘health’ which, often, is completely out of reach due to systemic social and economic inequities and discrimination.²²⁹ The presence of such technology, Morozov argues, can obfuscate the real social problems that need to be solved to improve health outcomes, such as poverty alleviation, because the focus instead is on things like people just increasing their step count.²³⁰

Floridi et al have made similar points regarding the development of technology-based contact tracing apps.²³¹ They challenge the idea that this is a ‘win-win situation where if a system works it is to be lauded, and if it does not then no harm is considered to have

²²⁸ Ian Tucker, ‘Interview: Evgeny Morozov: ‘We are abandoning all checks and balances’’ (9 March 2013) *The Guardian* <<https://www.theguardian.com/technology>>.

²²⁹ Morozov, above n 228.

²³⁰ Morozov, above n 228.

²³¹ Floridi et al, above n 187 at 3.

occurred.’²³² A poorly developed or ineffective app, they argue is not neutral with all potential harms as mere externalities.²³³ Rather, a poorly deployed solution may be worse than useless, as it will cause ethical problems and potentially exacerbate health-related risks, e.g. by generating a false sense of security, or deepening the digital divide.²³⁴

These arguments are relevant to an analysis of the Covid-19 Tracer app. The mere existence of the app does not, in and of itself, make any contribution to contact tracing or disease control.²³⁵ In order for it to assist efforts, a high degree of public uptake and use of the app is needed.²³⁶ Dr Andrew Chen has discussed this in a public lecture, pointing out that there is limited international evidence of the effectiveness of tech enabled contact tracing, including bluetooth apps.²³⁷ We can see this reflected in penetration rates for the apps. In both Singapore and Australia the TraceTogether app and the Australian bluetooth app have had a take-up rate of 25% after multiple months.²³⁸ Anecdotal data also suggests that what data has been recorded has been of limited use to manual contact tracers. In Norway, after their app had been operating for three months, only 14 additional contacts had been found that were not identified by manual contact tracers.²³⁹ In Singapore this was even lower at 6 new contacts.²⁴⁰

Despite a slow start to Tracer app penetration rates, since the second wave in August, greater penetration of the NZ Tracer app with 2.1 million New Zealanders downloading the app, a rate of approximately 40%.²⁴¹ The second wave has also seen an increased uptake in regular use and scans on the app from approximately only 10,000 per day during June 2020 to an average of 1.6 million scans per day in the period between 10

²³² At 3.

²³³ At 3.

²³⁴ At 3.

²³⁵ Chen, above n 51.

²³⁶ Chen, above n 51.

²³⁷ Chen, above n 51.

²³⁸ Ripu Bhatia ‘Not nearly enough Covid-19 tracker app downloads, tech expert says’ (25 May 2020) Stuff <<https://www.stuff.co.nz>>.

²³⁹ Chen, above n 51.

²⁴⁰ Chen, above n 51.

²⁴¹ Blake-Persen, above n 195.

August and 17 September, while New Zealand has been at alert level 2 and alert level 3 in Auckland, following the reemergence of community transmission.²⁴² Clearly, knowing the disease is present has motivated people to make an effort to use the app. However even should the current level of scanning be maintained as this cluster subsides, New Zealand is still short of the penetration and regular use that would be needed to make significant benefits to manual contact tracers.²⁴³ With each app user scanning approximately once every two days, the information is unlikely to represent a comprehensive record of each users' movements.²⁴⁴ The alert function on the app has been used in 18 cases to let people know they may have been exposed to Covid-19.²⁴⁵ However the Ministry has not released any information on whether any additional contacts have been located by contact tracers through the app than those identified using manual methods.

On the other hand, Siouxsie Wiles has pointed out that there is some benefit in people simply downloading the app and inputting their contact details.²⁴⁶ 70% of people do not have a cell phone number attached to their National Health Index number and this slows down manual contact tracers when they are seeking to reach the close or casual contacts of a positive case.²⁴⁷ Large numbers of people registering on the app and adding their phone number can therefore contribute to increasing speed in this area.²⁴⁸

Ultimately, the issue of effectiveness is important for two reasons. Firstly, it may be just as Morozov and Floridi et al argue, that the app is ineffective and also works to obfuscate the need for other disease control measures such as fast manual contact tracing and hand

²⁴² Ministry of Health (press releases, June 2020-September 2020). Calculations are the authors' own based upon Ministry of Health app scan data provided in the daily briefings.

²⁴³ Chen, above n 51; Bhatia above n 238. Estimates from overseas suggest that 60% of the population need to be actively using tech-based contact tracing solutions for these to make a difference to contact tracing efforts.

²⁴⁴ Ministry of Health (press releases, 10 August-17 September), calculations authors' own.

²⁴⁵ Ministry of Health '7 new cases of Covid-19' (press release 17 September).

²⁴⁶ Siouxsie Wiles and Toby Morris 'Contact tracing apps, explained' (23 May 2020) The Spinoff <<https://thespinoff.co.nz/society>>.

²⁴⁷ Wiles and Morris above n 246.

²⁴⁸ Wiles and Morris above n 246.

washing.²⁴⁹ Secondly, the effectiveness of the app connects back to whether there is a legitimate basis for data collection in the first place.²⁵⁰ If personal privacy is being sacrificed for the communal benefit of effective contact tracing, and that effective contact tracing is not occurring – then the privacy tradeoffs are being made for little or no benefit.²⁵¹ There might be a paradox here where a tech-based system is consensual in order to protect privacy and autonomy, but as a result only attains a low uptake.²⁵² Arguably, at this point it is unjustified to continue infringing on people’s privacy for no benefit, other than merely ‘signalling’ that ‘something’ has been ‘tried and done’.²⁵³

B Statute-based rights limitations

1 Introduction to the statutory limitation approach

The flaws in the current consent-based approach to limitations on privacy become even more compelling when contextualised in New Zealand’s broader human rights framework. Very few, if any, other rights are managed by relying so heavily on individuals’ consent to rights limitations.²⁵⁴ This stark contrast between how privacy rights are managed and the statutory mechanisms used to limit almost all other human rights, warrants substantial further scrutiny. While privacy rights are framed in the language of consent and voluntariness, a clear legal tests set out the boundaries of legal rights limitations for other human rights.²⁵⁵ Section 5 of the Bill of Rights Act requires that legislative limitations on human rights be ‘demonstrably justified’ in the

²⁴⁹ Morozov, above n 228; Floridi et al, above n 187 at 3.

²⁵⁰ Floridi et al, above n 187, at 4.

²⁵¹ Floridi et al, above n 187, at 4.

²⁵² Cho et al, above n 63, at 8.

²⁵³ Luciano Floridi, ‘Mind the app – considerations on the ethical risks of COVID-19 apps’ (18 April 2020) Onlife <<https://thephilosophyofinformation.blogspot.com>>.

²⁵⁴ Bill of Rights Act.

²⁵⁵ Bill of Rights Act, s 5. Privacy rights on the other hand are often limited using

circumstances.²⁵⁶ What further protections, then, does a statutory rights limitation approach offer for privacy, and what might be the respective disadvantages?

A raft of benefits accrue to rights defined under the Bill of Rights Act.²⁵⁷ However, this essay will focus mostly on analysing the way in which section 5 of the Bill of Rights Act provides a check on legislative limitations of BORA rights and the advantages and disadvantages that a similar mechanism could offer in respect of a right to privacy in the Covid-19 Tracer app case study. In an effort to maintain consistency across the two areas of my analysis, I have assumed that under a statutory rights limitation approach the app would still be voluntary to download.²⁵⁸

Borrowdale, provides a helpful example of what the application of a statutory rights limitation mechanism might look like in a Covid-19 context.²⁵⁹ In *Borrowdale*, the High Court found that New Zealanders' rights to freedom of movement and association had been limited during the first nine days of lockdown, without being 'prescribed by law' under s 5 of BORA.²⁶⁰ The Prime Minister and Police Commissioner had indicated through their public statements that lockdown level 4 measures would be enforced by Police, even though there were no legal powers in Order 1 (23rd March) that authorised this.²⁶¹ The Court, however, indicated in obiter dicta that if such limits had been

²⁵⁶ Bill of Rights Act, s 5.

²⁵⁷ Bill of Rights Act. For example, the requirement under s 7 of the Act that the Attorney General report to Parliament on whether a proposed Bill intersects with any rights under the Act.

²⁵⁸ This is also consistent with the Prime Minister's assertion that any technological contact tracing system implemented in New Zealand would be voluntary. See, Interview with Jacinda Ardern, (Prime Minister, Morning Report, RNZ, 6 April 2020) selected quotes and audio available at <<https://www.rnz.co.nz>>.

²⁵⁹ *Borrowdale v Attorney General* [2020] NZHC 2090.

²⁶⁰ *Borrowdale v Attorney General*, above n 259 at [75].

²⁶¹ At [156]-[158].

‘prescribed by law’ then they would have constituted ‘demonstrably justified’ or ‘reasonable’ limitations on the rights under s 5.²⁶²

Through *Borrowdale*, we can see the Court applying three legal steps to establish whether there has been a justified limitation on a BORA right. These include;

- a) identifying whether a right/s have been limited;
- b) establishing whether those limits were ‘prescribed by law’; and
- c) determining whether those limits were ‘demonstrably justified in a free and democratic society, as per the *Hansen* test (though this step was not needed *Borrowdale*).²⁶³

This process allows courts to use s 5 of BORA to ‘check’ laws passed by Parliament, and to make a formal declaration if the rights limitations imposed are ‘prescribed by law’ and not ‘demonstrably justified’ in a ‘free and democratic society’.²⁶⁴ An application of this approach to the issue of rights limitations to the Covid-19 Tracer app highlights both advantages and disadvantages, and calls into question the differential treatment between human rights in New Zealand’s human rights regime.

The rights limitations imposed by the current Covid-19 Tracer app, I argue, are likely to fall within the definition of ‘demonstrably justified.’ Firstly, the purpose of contact tracing, helping to contain outbreaks of Covid-19, is a sufficiently important purpose to justify limitations on the right to privacy.²⁶⁵ The consequences of a failure to effectively contact trace during community outbreaks is severe loss of life, as has unfortunately been seen in many countries.²⁶⁶ This places elderly people and those with pre-existing medical conditions at substantial risk.²⁶⁷ In New Zealand, pre-existing, severe, and systemic

²⁶² At [177], [237].

²⁶³ At [95]-[97].

²⁶⁴ *Taylor v Attorney General* [2015] NZHC 1706 at [72]; *Attorney General v Taylor* [2017] NZCA 215 at [185]-[187].

²⁶⁵ *R v Hansen*, above n 100, at [64].

²⁶⁶ WHO Coronavirus Disease (Covid-19) Dashboard above n 5.

²⁶⁷ Farah Hancock ‘Elderly people’s double pandemic risk’ (18 March 2020) Newsroom <<https://www.newsroom.co.nz>>.

health and healthcare inequities also mean that some groups such as Māori and Pacific peoples will experience significantly worse effects compared to other ethnic groups such as Pākehā.²⁶⁸ The app, therefore likely serves a sufficiently important purpose to justify curtailing some privacy rights.

Secondly, the limiting measure must be proportionate.²⁶⁹ This means it must be rationally connected with the legislative purpose, impair the right ‘no more than reasonably necessary to achieve the purpose,’ and be in proportion to the importance of the objective.²⁷⁰ The current Covid-19 Tracer app is rationally connected with improving contact tracing. Through encouraging individuals to use the app to record their own movements, the Ministry of Health has an improved chance of ensuring that they are able to effectively contact trace in the population.²⁷¹ Certain limitations on the apps’ functions, such as information being stored locally on the individuals’ device and only shared if needed, demonstrate attempts to ensure that rights are being impaired no more than is needed.²⁷² The measure of introducing an app is likely in proportion to the importance of contact tracing as discussed, to prevent widespread community transmission of Covid-19.

2 Advantages of the statutory limitation approach

The major advantage of a statutory rights limitation approach, compared to a solely consent-based approach is the ‘bottom line’ that a statutory rights limitation approach would introduce. Tests such as the one in section 5 create a narrow band of space in which rights can be legally limited, so long as they are ‘justified’ and ‘proportionate’ in light of the legislative objective.²⁷³ In the context of a Covid-19 tracer app, this could have multiple effects, as will be outlined.

²⁶⁸ Rhys Jones ‘Why equity for Māori must be prioritised during the Covid-19 response’ (18 March 2020) The Spinoff <<https://thespinoff.co.nz>>; Dr Anna Matheson ‘Covid-19 lays inequality in NZ bare’ (28 April 2020) Newsroom <<https://www.newsroom.co.nz>>.

²⁶⁹ *R v Hansen*, above n 100, at [64].

²⁷⁰ At [64].

²⁷¹ Dr Verrall, ‘Rapid Audit’ above n 39 at 8.

²⁷² Covid-19 App: Privacy Impact Assessment, above n 173 at 6.

²⁷³ Bill of Rights, s 5; *R v Hansen*, above n 100, at [64].

Firstly, when creating an app, Ministries and their contractors would be forced to consider whether the limitations that their product imposes on privacy are justified. This would provide a stronger judicial check on exercises of government power.²⁷⁴ Under the status quo, the Privacy Act establishes only non-binding guidance for agencies.²⁷⁵ The information privacy principles in the Act can only be enforced where an individual can prove loss, damage or humiliation.²⁷⁶ A statutory rights limitation mechanism, on the other hand, would introduce the possibility for judicial review of agencies actions, similar to the review undertaken in *Borrowdale*.²⁷⁷

Rather than simply trusting that the government will use the non-binding privacy guidelines at their disposal, I argue that a statutory rights limitation option would provide a harder backstop against unjustified incursions into privacy rights. As Andrew Butler argues, this would be consistent with the ‘ad hoc balancing’ interpretation of section 5 and rights limitations, where the definition of the right is defined broadly, and then the right is cut down to size through establishing what limitations are demonstrably justified.²⁷⁸ In the case of the Covid app, a user’s rights to privacy would be firstly be defined broadly, entitling them to freedom from incursion into their private life.²⁷⁹ For each particular app or contact tracing solution, the Ministry would then need to ensure that any limitations it imposed on privacy rights were purposeful, justified and proportionate to the problem of disease control.²⁸⁰ This would allow for the scope of justifiable rights limitations to be defined, and narrowed, *before* the individual offers their consent to using the app. Of course, one can also argue that given that courts are unable

²⁷⁴ Petra Butler, above n 145, at 245-246.

²⁷⁵ Privacy Act, s 11(2).

²⁷⁶ Privacy Act, s 66(1)(b).

²⁷⁷ *Borrowdale*, above n 259.

²⁷⁸ Andrew Butler, above n 83 at 541.

²⁷⁹ Warren above n 144 at 193; Petra Butler, above n 145, at 242.

²⁸⁰ Bill of Rights Act, s 5; *R v Hansen*, above n 100, at [64].

to strike down legislation on the grounds of inconsistency with BORA, the backstop is not particularly strong.²⁸¹

A statutory rights limitation approach could sit alongside, rather than substitute individual consent to rights limitations in the privacy context. If an app is voluntary, then statutory rights limitation mechanisms would simply provide an additional check on the app, not a substitute for individuals' consent. Individuals would still be able to make their own decisions about whether to opt in to the app or not, based upon a core understanding that they will only be consenting to rights limitations that are 'demonstrably justified.' This would allow some of the benefits associated with individual consent, such as individual autonomy to be retained.²⁸² At the same time, it might help to reduce the damage that ill-informed consent-based rights limitation decisions can cause, by limiting the circumstances where individuals' can offer consent to only those where the rights limitations on offer are not too severe. Given the cognitive problems that Solove points out with individual consent, this could help ensure that peoples' cognitive limitations are not being capitalised on, particularly during a public health crisis, to allow for gross privacy intrusions.²⁸³

In addition, as Petra Butler has argued, the application of a statutory rights limitation mechanism to the area of privacy would also provide an important 'symbolic' effect – demonstrating that privacy rights are as significant as the other rights contained in BORA.²⁸⁴ Even though individuals should be able to make decisions about their own privacy, it is important that these decisions are made within reasonable limits, particularly given the inherent power imbalance that exists between individuals and the state.²⁸⁵ Consistency between the way that rights are treated is also advantageous as it reinforces that for a healthy democracy all civil and political rights need to be protected, and

²⁸¹ Bill of Rights Act, s 4.

²⁸² Kleinig, above n 126 at 4.

²⁸³ Solove, above n 199, at 1881-1883.

²⁸⁴ Petra Butler, above n 145, at 244.

²⁸⁵ John Edwards, commenting in Elliott, above n 142 at 135.

balanced, in line with the constitution, not merely those deemed the most critical.²⁸⁶ As Butler points out, this would also be consistent with New Zealand's international obligations under the ICCPR and UNDHR.²⁸⁷

3 *Disadvantages of the statutory limitation approach*

However, it is also important to consider the downsides that might stem from a shift in approach to privacy rights limitations. Firstly, there may be legal issues with how a statutory limitation mechanism would apply in contexts where user consent is also required, and in addition, there might be a trade-off in flexibility, making it more difficult to roll out a solution like the Tracer app quickly.

Statutory rights limitation mechanisms, such as those in section 5, are more usually used to call out the governments' unjustified exercise of mandatory legislative power, such as the ban on prisoner voting.²⁸⁸ It would therefore be a departure for this type of rights limitation mechanism to be implemented where individuals are consenting to a rights limitation, such as in the case of the Covid-19 Tracer app.²⁸⁹ In *Borrowdale* the Court commented that there is a 'material difference' between voluntary and non-voluntary compliance with rights limitations.²⁹⁰ The implication was that had New Zealanders *voluntarily* stayed home during the first few days of lockdown, rather than doing so on the understanding that such an obligation was mandatory, then the Court would not have found that there had been a limitation on their right to freedom of movement or association, or that that limitation was prescribed by law.²⁹¹

This suggests that the use of statutory rights limitation mechanisms to limit rights (like privacy) that are *also* limited by consent might require a larger restructure in the way that

²⁸⁶ At 248. Butler points out that historically in the English common law freedom of expression has typically 'trumped' privacy interests. She is of the view that the introduction of a right to privacy would provide a 'counterweight' to the dominance of freedom of expression, forcing courts to consider privacy rights under section 5 cases pertaining to the freedom of expression.

²⁸⁷ At 218.

²⁸⁸ *Taylor v Attorney General* [2015] NZHC 1706.

²⁸⁹ *Borrowdale v Attorney General*, above n 259 at [194].

²⁹⁰ At [194].

²⁹¹ At [189].

we think about rights and justifiable limitations. If the fact that something is voluntary means that statutory rights protection mechanisms are unavailable, then these mechanisms may not offer anything more in terms of rights protection than the solely consent-based approach.²⁹² This is particularly important, where, as in this case, we can contest whether the app truly is voluntary in all circumstances. At alert levels 2 and 3 there are legal requirements on businesses to display a QR code, and to provide an alternative method of contact tracing, such as a written register.²⁹³ In some shops customers were asked to scan the app or use a written register before being served, with the implication that they otherwise will not be served.²⁹⁴ Placing the onus on businesses and organisations to require contact tracing, through app or other means, arguably serves the dual purpose of *essentially* mandating use of the app in public spaces, whilst at the same time maintaining the position that the app is voluntary. This overlooks the fact that written registers have their own privacy implications, such as exposing individuals' details to a wide class of people that the individual does not know.²⁹⁵ The Government is thus essentially able to double dip, effectively mandating the use of the app in some public spaces, whilst at the same time potentially being able to dodging a statutory limitation mechanism because the app is voluntary.

On the other hand, we can also see in other areas of human rights law that waiver or consent often does not extinguish the existence of a right. Jorgen Aall argues that; 'the mere fact that a voter remains passive (on his sofa) does not, by itself, indicate any waiver of the right to vote.'²⁹⁶ In this situation, the rights holder is free to exercise their right if they choose, or to remain passive.²⁹⁷ So long as, Aall argues, they are not coerced or threatened, not voting will not nullify their right to vote.²⁹⁸ Aall also points to privacy rights cases to argue that Courts have been reasonably consistent in finding that a public figure does not completely waive their right to privacy, and that this may still exist,

²⁹² At [189].

²⁹³ 'Doing business at alert level 2', above n 56.

²⁹⁴ This was common practice in many businesses and public spaces during the August alert level 2 period.

²⁹⁵ Donna Lee-Biddle 'Woman stalked after contact tracing details stolen at SkyCity Casino (10 June 2020) Stuff <<https://www.stuff.co.nz>>

²⁹⁶ Jorgen Aall 'Waiver of Human Rights' (2010) 28 Nordic Journal of Human Rights 300 at 324.

²⁹⁷ Aall, above n 296 at 323.

²⁹⁸ At 324.

depending on the circumstances and that person's conduct.²⁹⁹ It is therefore possible, notwithstanding the comments in *Borrowdale*, that individuals consenting to some rights limitations as a condition of using a Covid-19 Tracer app, will not entirely waive their right to claim an unjustified incursion into their rights, depending on the circumstances.³⁰⁰

Another downside is that a statutory protection mechanism would not, in itself, address the underlying issues associated with consent.³⁰¹ The application of a mechanism like s 5 would narrow the scope of rights infringements that people can consent to. However, the possibility remains that uninformed individuals will consent to these rights limitations without fully understanding their scope, or under the influence of other cognitive biases.³⁰² The issues of reduced trust (or over-trust) in government are also likely to continue to affect whether individuals offer their consent.³⁰³ Therefore, even if a statutory mechanism means that individuals are only able consent to 'reasonable' rights limitations it is still necessary to pay attention to the issues associated with consent. Without meaningful, informed consent, Kleinig would argue, the 'subjective' component of consent is lacking and there can be no alteration to the moral relationship between parties.³⁰⁴ Individuals may be placated with the belief that their consent enables them to exercise control, when in reality their autonomy is being surreptitiously undermined through environments that are designed to rely on their uninformed consent.³⁰⁵

Finally, a statutory rights limitation mechanism may result in delays in an app roll out if there is an additional need to establish whether the app has limited rights in a manner that is 'demonstrably justifiable.' During a fast-moving situation it may be particularly important that contact tracing solutions are able to be rolled out quickly.³⁰⁶ Given the pro-privacy approach that has been delivered in the current Tracer app through the use of

²⁹⁹ At 329.

³⁰⁰ *Borrowdale v Attorney General*, above n 259 at [194].

³⁰¹ Solove, above n 199, at 1881-1883.

³⁰² At 1883-1886.

³⁰³ O'Connell Rapira, above n 221; Elliott above n 142 at 121.

³⁰⁴ Kleinig, above n 126 at 4.

³⁰⁵ Elliott above n 142 at 137.

³⁰⁶ Verrall 'Rapid Audit', above n 39, at 8.

Privacy Act guidelines and engagement with the Privacy Commissioner, one could viably question whether an additional hoop to jump through will lead to a more privacy focused approach, or instead will sacrifice flexibility and speed for limited substantive benefits.³⁰⁷

V Conclusion

This essay has used the case study of the Covid-19 tracer app to examine the advantages and disadvantages of two different approach to rights limitations. My analysis demonstrates that in the privacy context, it is impossible to divorce user consent from playing a central role in rights limitation. However a fully consent-based models can be problematic in that it relies on the illusion of a fully rational actor, and thus does not accurately represent the way that most individuals behave in online spaces. Additional issues arise when we consider that in the context of contact tracing, a high level of population consent is required to make the app even moderately effective, justifying the rights incursion.

Ultimately, as is demonstrated in this case study, government willingness to engage with the available privacy guidelines and the Office of the Privacy Commissioner, can be crucial to ensuring that the final product protects people's privacy.³⁰⁸ Neither model is perfect, and each have their respective advantages and disadvantages. I argue that further discussion is needed about how individual autonomy, consent and statutory rights protection can co-exist in the context of data privacy and whether more effective accountability mechanisms need be made available to hold the government accountable for rights violations even where the individual might have offered their consent.

³⁰⁷ Covid-19 App: Privacy Impact Assessment, above n 173.

³⁰⁸ Covid-19 App: Privacy Impact Assessment, above n 173.

VI Word count

The text of this paper (excluding table of contents, footnotes, and bibliography) comprises approximately 11,742 words. Including 479 words in substantive footnotes .

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