

# **Photography in Public Places and the Privacy of the Individual**

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## INTRODUCTION

Privacy receives recognition as a right in a number of international instruments.<sup>1</sup> It is not, however, included in the New Zealand Bill of Rights Act 1990. Despite this, there is still protection for personal privacy in New Zealand law through the Privacy Act 1993, the Broadcasting Act 1989, criminal law, and common law. Commentators link the value of privacy to a number of other values including autonomy, self-realisation and self-development.<sup>2</sup> Protecting privacy provides opportunities for personality development by allowing people to act or think in ways that they would be too embarrassed to act or think in if they were under constant observation. Consequences of lack of privacy can include lack of individuality and independent thought, and no opportunity for emotional release.<sup>3</sup>

This dissertation is concerned with one area in relation to invasion of privacy: that of invasion of privacy in public places through photographing or filming without the subject's consent. This covers surreptitious filming and photography, and accosting people to film or photograph without their consent, as practised by a number of television shows. Examples include *Cow TV's* "walk of shame" segment, or *Fair Go* seeking comment from someone who has refused to grant an interview. In these situations individuals are either unaware of or surprised by the camera, so they have no real control over the captured images, which may be embarrassing or offensive.

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<sup>1</sup> Some examples include The Universal Declaration of Human Rights 1948; The European Convention on Human Rights 1950; The International Covenant on Civil and Political Rights 1976; and The United Nations Convention on the Rights of the Child 1989.

<sup>2</sup> See for example Ruth Gavison "Privacy and the Limits of Law," (1980) 89(3) *The Yale Law Journal*, 421; Alan Westin, *Privacy and Freedom* (London: The Bodley Head, 1970).

<sup>3</sup> See Westin, 34-35.

In public places, there can be some reasonable expectation of privacy, albeit to a more limited extent than in private places. The expression "public place" includes places that are accessible or visible to the public, although privately owned. Examples include shopping malls, swimming pools, and even people's backyards that are visible from a public place. An exploration of common law and statute shows that only in very limited circumstances will there be any legal protection against photography in public, or publication of photographs, even where they are offensive or otherwise harmful. Greater protection is desirable against harm caused by photography, and subsequent publication.

Chapter 1 explores the concept of privacy in public places, and the particular ways in which photographs can intensify invasions of privacy. People do expect and usually enjoy a certain measure of privacy in public through being essentially anonymous, and generally ignored by others. Photography can destroy this kind of privacy to a greater extent than one merely being the focus of someone else's attention, through the permanence of the image and its dissemination.

Chapter 2 deals with the Privacy Act 1993 and what protection, if any, it might afford against either the taking of photographs in public places, or their subsequent publication. Photography does not really amount to a "collection" of personal information in terms of the Privacy Act, precluding the application of several of the Information Privacy Principles. The principles governing use and disclosure of personal information may apply, but often will not be breached, especially as news media are exempt from their application.

Chapter 3 deals with the tort of invasion of privacy in New Zealand. The tort is very limited. It is capable of covering some photographs taken in public places, but only

in exceptional circumstances. Prior restraint may be available here, unlike under the Privacy Act or Broadcasting Act. However, there is a high threshold for prior restraint, which is unlikely to be met in most circumstances. Damages will be the primary remedy.

Chapter 4 deals with the Broadcasting Standards Authority's jurisdiction under the Broadcasting Act 1989 to determine complaints against broadcasters. Privacy complaints are determined under Privacy Principles issued by Advisory Opinion. Footage captured in public will only rarely breach the Principles, as they contain a public place exemption. Other broadcasting standards may apply in relation to photographs and filming in public places as well. Privacy complaints, however, are the only complaints in respect of which the Authority can grant monetary awards.

Chapter 5 covers the criminal law. The taking of "up-skirt" type photographs in public can be an offence, as can publication of those photographs. Occasionally photography in public may constitute offensive behaviour. However, this is unlikely, except in very limited scenarios.

Chapters 2-5 demonstrate that legal protection for individuals photographed or filmed in public is fairly narrow and specific. Chapter 6 suggests some possibilities for expanding legal protection. All possibilities carry with them some problems. The best way in which to expand protection is to identify specific scenarios or groups where photography in public causes problems, and to legislate to grant greater protection to those affected. This provides a smaller limit on free expression than many of the other possibilities, and is also less likely to prohibit harmless behaviour.

## CHAPTER 1: PUBLIC PLACES AND PRIVACY EXPECTATIONS

Usually people venturing out in public do not have any legally enforceable right to prevent their photograph being taken, or subsequently published. However, people whose photographs are taken in public places, and published without their consent, may well feel their privacy has been invaded. There are situations where a photograph taken in public could lead to significant humiliation;<sup>4</sup> or possibly violence;<sup>5</sup> or some other kind of harm.<sup>6</sup> Where harm is caused by the photograph being taken or published, it is at least arguable that a remedy should be available.

This proposition does require some qualification. Where someone is not focussed upon in a photograph, there is less justification for a remedy. The photographer has not brought them deliberately to anybody else's attention, or invaded their personal space by shoving a camera in front of them. The person is somewhat incidental to the image. It is more truly in the nature of making a record of a scene, which was the justification Prosser cited for the unavailability of a remedy for invasion of privacy in public in the United States.<sup>7</sup> A person should be the focus of a photograph for a remedy to be available.

### 1.1 PRIVACY AS A LEGAL CONCEPT

Many consider "privacy" to be an important value, or right. However, "privacy," as a legal concept, is not well defined. Courts and legislatures tend not to have given

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<sup>4</sup>For example a candid moment, such as when someone's dress flies up in the wind, could lead to significant humiliation if a photograph was taken and/or published.

<sup>5</sup>See *Case Note 89271* [2007] NZ PrivCmr 12, where a girl whose photograph was published and her mother feared the possibility of renewed harassment by the mother's former partner if he discovered their whereabouts.

<sup>6</sup>Take for example an employee who pretends to be sick, and is then photographed out doing something in public, and as a consequence is disciplined by his or her employer.

<sup>7</sup>William Prosser, "Privacy" (1960) *California Law Review*, 383, at 391-392.

much thought to a definition. Complaints about invasion of privacy often seek to protect other interests as well. Some American examples include prohibitions of abortion, or the use of contraceptives; and insulting, harassing, or persecuting behaviour.<sup>8</sup> Prosser considers the interest protected by the appropriation of image tort in the United States is not so much emotional as proprietary.<sup>9</sup> It is focussed towards the commercial use of image rather than protecting people's wishes not to be photographed. The protection of different interests under the aegis of "privacy" only adds to the confusion.

It is often considered that what occurs in public is not "private." Prosser stated that:<sup>10</sup>

On the public street, or in any public place, the plaintiff has no right to be alone, and it is no invasion of his privacy to do no more than follow him about.

The idea that what takes place in public is not "private" is firmly entrenched in America. A number of commentators, however, consider "anonymity" as one important aspect of the concept of privacy.<sup>11</sup> Westin describes anonymity as that which occurs when an individual is in public, "but still seeks and finds freedom from identification and surveillance."<sup>12</sup> Even though people are aware that they are open to observation in public, they do not generally expect to become the focus of attention, or to have a permanent record made of their actions. In public places, there is an etiquette protecting privacy to some extent. People in crowded situations, such as using public transport, ignore others and are ignored in turn.<sup>13</sup> Also, people venturing into public choose how much or how

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<sup>8</sup> These examples are listed along with others by Gavison, at 436-437.

<sup>9</sup> Prosser, 406.

<sup>10</sup> Prosser, at 391 – 392.

<sup>11</sup> Gavison, 428; see also Westin, at 31.

<sup>12</sup> Westin, 31.

<sup>13</sup> Ibid, 39.

little of themselves to reveal to others, through the type of clothing they wear, where they discuss personal matters, and where they choose to have intimate experiences.<sup>14</sup> Privacy can therefore be invaded in public. This may be through using technology to record others, or possibly even through focussing attention on them.

The value of privacy can be demonstrated through an examination of its functions.<sup>15</sup> The functions identified and discussed by Gavison include: “a healthy, liberal, democratic, and pluralistic society; individual autonomy; mental health; creativity; and the capacity to form and maintain meaningful relations with others.”<sup>16</sup> A lack of privacy can result in a lack of individuality. Without privacy, there is no opportunity for independent thought, diversity of views, and non-conformity.<sup>17</sup> Also, there is no opportunity for emotional release through being alone, among intimate acquaintances, or in the anonymity of a public place.<sup>18</sup>

## **1.2 THE PARTICULAR PROBLEM OF PHOTOGRAPHS:**

Where people are stared at in public, or followed, they may feel their privacy is invaded. However, a person can confront the person staring, or walk away. Any invasion caused by being the focus of someone’s attention is transitory. It continues only as long as that person focuses on an individual. Distress, or annoyance caused by someone staring or following us about will not last a great deal longer than that behaviour. If it does, it may be that the person focused upon is unduly sensitive, or because the behaviour is reprehensible. In the case of bad behaviour, such as stalking, some penalty may apply.

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<sup>14</sup> See N. Moreham, “Privacy in Public Places” (2006) 65(3) *Cambridge Law Journal*, 606, 617-618.

<sup>15</sup> See discussion by Gavison, 440-456.

<sup>16</sup> *Ibid*, 442.

<sup>17</sup> Westin, 34.

<sup>18</sup> *Ibid*, 35.

It may amount to harassment under the Harassment Act 1997, in which case there may be the possibility of criminal sanction,<sup>19</sup> or the person harassed could apply for a restraining order to prevent recurrence.<sup>20</sup> Some behaviour may also constitute disorderly behaviour or offensive behaviour.<sup>21</sup>

McClurg argues that photographs or video-recordings intensify invasion of privacy in three ways.<sup>22</sup> The first is that the temporal limitation inherent in other types of invasion is gone. The camera makes a permanent record, allowing scrutiny to be extended indefinitely.<sup>23</sup> Secondly, the making of a permanent record allows the possibility of additional information being revealed that is not noticeable through transitory observation. Subtleties and nuances that would be unobserved by passers-by can be discovered through examination of a photograph.<sup>24</sup>

Thirdly, there is potential to multiply the impact of the original invasion through wide dissemination. In *Gill v Hearst Publishing Co.*,<sup>25</sup> two people were photographed embracing at their stall at the local farmers' market. The Supreme Court of California held that taking the couple's photograph was not an actionable invasion of privacy. McClurg considers the reasoning that publication of the photograph did not disclose

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<sup>19</sup> Section 8(2) of the Harassment Act 1997, provides a penalty of up to 2 years in prison for the offence criminal harassment, which is described in s8(1).

<sup>20</sup> Section 9 of the Harassment Act 1997 allows a person harassed to apply for a restraining order to prevent recurrence of the harassment. An example of what might amount to harassment is waiting outside someone's home or business in order to follow them about. To amount to harassment some "specified act" in section 4, must be done twice or more within 12 months (section 3).

<sup>21</sup> Sections 3 and 4 of the Summary Offences Act 1981 respectively. In *Garnham v Police* [1997] 3 NZLR 228, a 50 year-old man who followed a 17 year-old girl in public in his car was convicted of disorderly behaviour.

<sup>22</sup> Andrew Jay McClurg, "Bringing Privacy Law out of the Closet: A Tort Theory of Liability for Intrusions in Public Places," (1995) 73 *North Carolina Law Review*, 989; 1041-1043.

<sup>23</sup> *Ibid*, 1041-1042.

<sup>24</sup> *Ibid*, 1042.

<sup>25</sup> 253 P.2d 441, 445 (Cal. 1953).

anything private, but merely extended knowledge of the incident to a somewhat larger public, to be a drastic understatement:

In the absence of the photograph, few persons would have taken notice of the couple ... with the photograph, the "somewhat larger public" to which they were displayed as an object of attention was the nationwide audience of a popular magazine.<sup>26</sup>

Invasion of privacy is intensified by publication of a photograph beyond what is foreseeable by most people who venture out in public. Dissemination is not only to a larger audience than the subject foresees, but to a different audience. For example, someone who may be willing to show flesh at the beach, would consider it embarrassing to do so in other contexts.<sup>27</sup>

Another problem associated with photography in public as opposed to physical observation, is that it is easier to take a photograph without detection than it is to stare at someone for any length of time. Cell-phones with built-in cameras make it difficult to tell whether a person is sending a text message or taking a photograph. They are only one example of technology that makes photography of people in public hard to detect.

People photographed covertly may also feel their privacy is invaded because the shot is candid rather than posed. Lord Phillips M.R. in *Douglas v Hello!* stated, "A personal photograph can portray, not necessarily accurately, the personality and the mood of the subject of the photograph."<sup>28</sup> Unposed photographs seem to look behind normal social masks. However, a person's expression may not accurately portray their mood. Someone may simply let their face go slack when unobserved, rather than being actually

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<sup>26</sup> McClurg, 1042-1043.

<sup>27</sup> Ibid, 1043.

<sup>28</sup> *Douglas v Hello! (No 3)* [2005] EWCA Civ 595; [2005] 3 WLR 881, at [106].

unhappy. Because it is natural for people to smile for photographs, a candid shot seems invasive. People cannot conduct themselves in public as if every moment is under observation. It is, therefore, natural for individuals to feel that photographs taken without their consent amount to an invasion of privacy.

## **CHAPTER 2: THE PRIVACY ACT 1993**

Photographs taken in public will not receive much protection through the Privacy Act 1993. The preliminary provisions relating to “agency” and “collection” of personal information will halt many complaints. For complaints that pass the preliminaries, a breach of an Information Privacy Principle (IPP) is necessary, along with some harm in terms of s66(1)(b), before any relief is available. Additionally, the Privacy Commissioner cannot in most instances make binding orders.<sup>29</sup> Complaints must come before the Human Rights Review Tribunal before a binding order is made. Even then, publication of the photograph cannot be prevented.

### **2.1 PRELIMINARY PROVISIONS**

#### **2.1.1 “AGENCY”**

The IPPs in section 6 of the Act only apply to “agencies”. If an organisation or individual is not an “agency”, compliance with the IPPs is not necessary. Section 2(1)(a) gives a broad definition of “agency” as “any person or body of persons, whether corporate or unincorporate, and whether in the public sector or the private sector; and, for the avoidance of doubt includes a department”. Section 2(1)(b) lists a number of entities that are excluded from the definition of agency. The exception most relevant in relation to photographs taken in public places is s2(1)(b)(xiii): “in relation to its news activities, any news medium.”

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<sup>29</sup> The exception to this rule is that under section 78 of the Privacy Act 1993 the Commissioner may make final and binding determinations as to whether a charge fixed in respect of an information privacy request is reasonable.

“News medium” is defined as “any agency whose business, or part of whose business, consists of a news activity”.<sup>30</sup> “News activity” means:<sup>31</sup>

- (a) The gathering of news, or the preparation or compiling of articles or programmes of or concerning news, observations on news, or current affairs, for the purposes of dissemination to the public or any section of the public:
- (b) The dissemination, to the public or any section of the public, of any article or programme of or concerning –
  - (i) news:
  - (ii) observation on news:
  - (iii) current affairs

The issue of what constitutes “news activity” arose in *Talley Family v National Business Review*.<sup>32</sup> The Privacy Commissioner and defendant newspaper submitted that compiling a publication was “news activity” if it was part of an undertaking broadly described as news activity. The plaintiff submitted that “news activity” must be something containing an element of legitimate public concern. The Tribunal did not choose between these two approaches as either would have yielded the same result in that case.

Most commentators favour the broader approach advanced in *Talley*.<sup>33</sup> Whether a news medium is engaged in news activities is treated as a question of the capacity it was acting in. Paton-Simpson states, “so long as the organisation was acting in its capacity as a mass communicator, the exemption applies.”<sup>34</sup> Paton-Simpson, however, argues for an approach relating to the genre of the publication, namely “whether the article or programme fits within the broad genre of news and current affairs, including political

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<sup>30</sup> Section 2 Privacy Act 1993.

<sup>31</sup> *Ibid.*

<sup>32</sup> (1997) 4 HRNZ 72 (Decision No 23/97)

<sup>33</sup> Elizabeth Paton-Simpson, “The News Activity Exemption in the Privacy Act 1993” (2000) 6(3) *New Zealand Business Law Quarterly*, 269.

<sup>34</sup> *Ibid.*, 274.

news, sports news, entertainment news, and business news.”<sup>35</sup> One example that falls under the Privacy Act on this approach is prank calling by radio announcers. Although a radio station is a “news medium” a prank call would not be a programme “of or concerning news, observations on news, or current affairs”.<sup>36</sup>

In *Lehmann v Canwest Radioworks Ltd*<sup>37</sup> the Tribunal found that a broadcast seeking information on the whereabouts of a debtor breached IPP 4. In general, however, the Privacy Commissioner has applied the exemption to relate to the capacity in which the organisation is acting. Photos could fall within the exemption even under Paton-Simpson’s genre approach, as long as the article or programme concerns “news, observations on news, or current affairs.” Complaints about many images captured in public places will be precluded by the news media exemption.

Whether a photographer is a news medium is also considered a matter of the capacity in which they are acting when they take the photograph. Bruce Slane, while Privacy Commissioner, considered: "Ultimately it is a question of the purpose for taking the photographs and how they are used”.<sup>38</sup> If a photograph is taken to be published by a “news medium” as part of its “news activity”, the photographer will come within the exemption. If the photograph is taken without that purpose, then published by a news medium, the exemption will not cover the photographer.

### **2.1.2 SECTION 56 EXEMPTION**

Section 56 also qualifies the application of the Privacy Act. The IPPs do not apply to the collection of or holding by an individual of personal information “solely or

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<sup>35</sup> Ibid, 275.

<sup>36</sup> Ibid.

<sup>37</sup> [2006] NZHRRT 35.

<sup>38</sup> “Photographer May Change Hats,” (1998) No 21 *Private Word*, 4 January 1998.

principally for the purposes of, or in connection with, that individual's personal, family, or household affairs". This could apply to family holiday photographs. The exemption applies to collection or holding of personal information. Arguably use and disclosure would not be protected. In *S v P*,<sup>39</sup> however, a father complained because details about his supervised access to his children were disclosed to their school by his ex-wife's lawyer. The lawyer was treated as the mother's agent so s56 could apply. The Tribunal held that s56 also implicitly covers disclosure of information.

It seems somewhat unfair to extend the exception to disclosures. The language of the section covers only collection and holding. Disclosure takes the information out of the domestic sphere, and so should not really be covered by the domestic affairs exemption. However, the Tribunal has held that disclosure is covered by the s56 exemption. Therefore, not only would taking holiday photographs be exempt from the IPPs, but also posting them on a website freely accessible to anyone.

### 2.1.3 "PERSONAL INFORMATION"

"Personal information" is "information about an identifiable individual."<sup>40</sup>

"Information" is not defined. The leading case dealing with the concept is *Commissioner of Police v Ombudsman*.<sup>41</sup> The Court of Appeal considered that information is "that which informs, instructs, tells or makes aware."<sup>42</sup> The Privacy Commissioner has considered photographs to constitute personal information.<sup>43</sup>

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<sup>39</sup> [1998] 5 HRNZ 610.

<sup>40</sup> Section 2 Privacy Act 1993.

<sup>41</sup> [1988] 1 NZLR 385.

<sup>42</sup> *Ibid*, 482. Cited in Katrine Evans, "Personal Information in New Zealand: Between a Rock and a Hard Place?" May 2006, 1.

<<http://www.privacy.org.nz/library/personal-information-in-new-zealand-between-a-rock-and-a-hard-place-katrine-evans>> (May 2006).

<sup>43</sup> See *Case Note 60017* [2006] NZ PrivCmr 1 for example. The complainant had been photographed in a shopping mall and the photograph used for advertising purposes. The Privacy Commissioner considered

## INFORMATION “ABOUT” AN INDIVIDUAL

The definition of personal information in the Canadian Privacy Act 1985 specifically includes the name of a person when it appears with other personal information, or where the disclosure of the name itself would reveal information about the individual.<sup>44</sup> Names by themselves are really identifiers rather than information about individuals. This is arguably true of photographs. They may be identifiers rather than information “about” individuals. Photographs, however, are capable of showing a great deal of information about a person, such as gender, ethnicity, and eye colour. Therefore, they can be considered to contain information “about” an individual.

## IDENTIFIABILITY

The individual must be “identifiable.” In *Case Note 64131*,<sup>45</sup> part of a man’s hair and arms were visible in a photograph used in an advertising booklet for a tertiary institution. The Privacy Commissioner considered that, to a casual observer, the man was not identifiable and so the photograph did not contain personal information.

An individual does not necessarily have to be identifiable to the world at large in order for the information to be considered “personal information”. The man in the above Case Note recognised himself, and his acquaintances may have too. Perhaps he was in fact identifiable for the purposes of the Act. In *Proceedings Commissioner v Commissioner of Police*<sup>46</sup> the Tribunal considered that an individual did not have to be identifiable to the general public: “It is enough that [someone is] able to be identified by anyone who can make an identification as the result of the receipt of personal information

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there had been a collection of personal information in breach of Information Privacy Principle 3, but the requirement of harm under s66 of the Act had not been met.

<sup>44</sup> Section 3(i) Privacy Act R.S.C. 1985

<sup>45</sup> [2006] NZ PrivCmr 7.

<sup>46</sup> [2000] NZAR 277.

not previously known.”<sup>47</sup> “Identifiable” does not mean identifiable to the world at large. It may be enough to be identifiable only to a few, or maybe even one person, for a photograph to be considered personal information under the Privacy Act.

#### 2.1.4 “COLLECTION”

A third preliminary provision to consider is the definition of “collect” in section 2. Collection “does not include the receipt of unsolicited information.”<sup>48</sup> IPPs 1-4 are concerned with collection of personal information, and will not apply if there is no “collection.”

It has generally been assumed that photography constitutes “collection”. In *Case Note 60017*,<sup>49</sup> a shopper complained about his photograph being taken without his knowledge or consent and used for publicity purposes for a shopping mall. The Privacy Commissioner considered IPP 3 to have been breached, through collecting information without informing the individual of the matters in IPP3(1). This assumption that photography amounts to a collection is flawed. A photograph is simply a record of what can be observed with the naked eye. Information obtained through casual observation could not be considered to be “collected” in terms of the Privacy Act. Watching someone could not amount to a solicitation of information from them, and the Court of Appeal in *Harder v Proceedings Commissioner*<sup>50</sup> held that merely recording information which is otherwise unsolicited cannot amount to a collection.

In *Harder*, it was held that merely making an audio recording of an unsolicited phone call did not constitute collection of personal information. A woman telephoned her

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<sup>47</sup>*Proceedings Commissioner v Commissioner of Police* [2000] NZAR 277 at p285.

<sup>48</sup>Section 2(1) Privacy Act 1993.

<sup>49</sup>[2006] NZ PrivCmr 1.

<sup>50</sup>[2000] 3 NZLR 80.

ex-partner's lawyer with a settlement proposal. He recorded that conversation, and arranged for the woman to call back. He also recorded the second conversation, during which he asked her a number of questions. The Court of Appeal considered the first conversation contained entirely unsolicited information, and that recording it could not amount to a collection in terms of the Privacy Act. Tipping J said:<sup>51</sup>

“The tribunal's acceptance of the submission that when he switched on the tape recorder Mr Harder changed from being a passive recipient of unsolicited information to an active recorder "and therefore collector" of the information cannot stand scrutiny. The unsolicited nature of the information was not affected by the fact it was recorded or the way it was recorded. It was therefore not relevantly collected.”

The second conversation, however, was a collection. Harder, by asking questions, “solicited the information provided in the replies.”<sup>52</sup>

Photographs taken surreptitiously, or otherwise without consent of the subject, are a receipt of unsolicited information, rather than a “collection” in terms of the Privacy Act. It is no collection to merely look at a person, or even to focus your attention on them, although a great deal of information may be obtained. To “solicit” implies directly asking for information. The Concise Oxford Dictionary defines “solicit” as “ask repeatedly or earnestly for or seek or invite (business etc.)”; or, “make a request or petition to (a person).”<sup>53</sup> If a person is not asked to pose, or appear in a certain place, there is no solicitation. Although “taking” a photograph seems intuitively to denote an act of collection, it is difficult to see how recording can render unsolicited information “collected”.

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<sup>51</sup> Ibid, at [25]

<sup>52</sup> Ibid, at [26].

<sup>53</sup> The Concise Oxford Dictionary 8<sup>th</sup> ed (Oxford: Clarendon Press, 1991)

Roth considers that information obtained through video surveillance does not fit within the Privacy Act.<sup>54</sup> Information obtained through a surveillance camera is not solicited from the individual. The surveillance camera is trained on an area and captures what takes place in that area. This is unsolicited information and therefore not “collected”.<sup>55</sup> An employer who installs a camera in a toilet cubicle, for example, would not breach IPP 4(b)(ii) which prohibits collection “by means that... intrude to an unreasonable extent upon the personal affairs of the individual”. There is no collection, and so no breach. Roth considers, “The information is not actively sought or solicited from the individual but passively received from the camera.”<sup>56</sup> The argument that surveillance does not constitute “collection” has also received some recognition by the Law Commission.<sup>57</sup>

Photographers taking photos in public places have not solicited information from an individual. While a photographer might train their camera on a particular individual, or even follow them about in public, it would be artificial to consider information obtained in this manner as “solicited”.

## **2.2 INFORMATION PRIVACY PRINCIPLES**

The twelve IPPs are listed in section 6 of the Privacy Act. IPPs 1-4 deal with collection of personal information; 5 deals with storage and security; 6 and 7 deal with access and correction; 8 provides for checking accuracy before use; 9 relates to retention

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<sup>54</sup>Paul Roth “Surveillance Cameras in the Workplace” (2002) *Employment Law Bulletin*, 54.

<sup>55</sup>*Ibid*, 55.

<sup>56</sup>*Ibid*.

<sup>57</sup>New Zealand Law Commission, *Report 97: Search and Surveillance Powers* (Wellington, New Zealand, June 2007), at paragraph 11.21 the Law Commission considered the argument that surveillance does not engage the IPPs to be a strong one.

of information; 10 and 11 deal with use and disclosure; and 12 deals with unique identifiers. The IPPs most likely to arise in connection with complaints about photographs taken in public places are IPPs 1 – 4, 6, 10, and 11.<sup>58</sup>

### **2.2.1 IPPs 1-4**

If taking a photograph is not a “collection” of personal information, IPPs 1-4 will not apply. The only mechanism for fixing the purpose of use or disclosure of personal information is contained in IPP3. If that principle does not apply this potentially affects the operation of IPPs 10 and 11. If however, photography does amount to “collection” in terms of the Privacy Act, then photographs surreptitiously taken in public may breach one or more of the first four IPPs.

IPP 1 provides that information shall not be collected by an agency unless collection is necessary for a lawful purpose connected with a function or activity of the agency. An unlawful purpose might be to use the information for blackmail, or to enable the commission of an offence. Whether collection is “necessary” for a purpose is likely to be the chief issue in relation to IPP 1. In *Lehmann*<sup>59</sup> the Tribunal considered the test was “reasonable necessity” for the purpose, rather than absolute necessity.<sup>60</sup>

IPP 2 provides that “the agency shall collect the information directly from the individual concerned.” There are exceptions to this requirement.<sup>61</sup> A reason to consider the exceptions is Roth’s conclusion that information obtained surreptitiously through means of an intermediary device, is not collected “directly from the individual

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<sup>58</sup> The full test of the Information Privacy Principles can be found in Appendix A.

<sup>59</sup> *Lehmann v Canwest Radioworks* [2006] NZHRRT 35 (21 September 2006).

<sup>60</sup> *Ibid*, paragraph [50].

<sup>61</sup> IPP 2(2).

concerned.”<sup>62</sup> Roth identifies two possible interpretations of “directly”. The first is with the subject’s awareness of the collection (“directly” meaning “straightforwardly”, “by a direct, open, manifest process”); the second is directly in a purely physical sense (“with no intermediary”, or “by a physically direct process”).<sup>63</sup> The Privacy Commissioner has interpreted “directly” in the second sense.<sup>64</sup> Roth argues the first interpretation would be more in line with paragraph 7 of the OECD Guidelines,<sup>65</sup> which provides “data should be obtained ... where appropriate, with the knowledge or consent of the data subject.”<sup>66</sup> The Guidelines are reflected in the Long Title to the Privacy Act, lending support for the interpretation of “directly” as “openly”. This interpretation would also be consistent with the counterpart to IPP 3 in the Australian Privacy Act 1988, principle 2, dealing with “solicitation of information from the individual concerned”.<sup>67</sup>

Surveillance only collects information “directly from” the subject in an artificial sense.<sup>68</sup> People have no control over video surveillance. As Roth states, “[t]he information is really being collected about the individual. Indeed the very point of such techniques is to avoid collecting the information directly (i.e. openly) from the individual.”<sup>69</sup> An individual surreptitiously photographed likewise has no control over the photography. Photography that is not surreptitious will be collection “directly from” the

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<sup>62</sup> Paul Roth, “The Privacy Act 1993 – Workplace Testing, Monitoring and Surveillance,” (1997) 3(2) *Human Rights Law and Practice*, 113.

<sup>63</sup> *Ibid*, 118.

<sup>64</sup> *Ibid*, 118-119.

<sup>65</sup> The Organisation for Economic Co-operation and Development Guidelines Governing the Protection of Privacy and Transborder Flows of Personal Data (1980).

<sup>66</sup> Roth, “The Privacy Act 1993 – Workplace Testing, Monitoring and Surveillance”, 119.

<sup>67</sup> *Ibid*. Section 6(1) of the Australian Act defines ‘solicit’ as to “request a person to provide ... [personal] information.” Roth points out that this implicitly provides for the subject’s “knowledge and consent” in accordance with the Guidelines.

<sup>68</sup> *Ibid*.

<sup>69</sup> *Ibid*.

subject in that the subject will be aware of the collection.<sup>70</sup> Surreptitious photography, however, will be an indirect collection if it is a collection at all, and therefore it will need to fit within one of the exceptions to IPP 2.

The exceptions most likely to apply to photography in public are IPP 2(2)(c) “that non-compliance would not prejudice the interests of the individual concerned;” (e) “that compliance would prejudice the purposes of collection;” or (f) “that compliance is not reasonably practicable in the circumstances of the case.” The Privacy Commissioner is not likely to be easily satisfied as to lack of prejudice. Addressing the similar exception under IPP3(4)(b), the Commissioner considered that what amounted to prejudice would depend on the individual concerned.<sup>71</sup>

The exceptions in (e) and (f), might apply more easily. If the purpose of collection is to photograph someone in a natural pose, or catch them doing something they should not be, then collecting the information directly from them could prejudice the purpose of collection.<sup>72</sup> Likewise, if someone cannot be reached to be made aware of the collection, then compliance with IPP2 is not “reasonably practicable”.

If photography constitutes “collection directly from the individual concerned”, the individual must be informed of the matters in IPP 3(1). These include the fact that the information is being collected; the purpose for which it is being collected; the name and address of the agency collecting, and so on. Assuming that IPP 3 applies to photographs taken in public, the most likely breach is that often people will not be informed of the matters in IPP3(1). The complainant in *Eastweek Publisher Ltd v Privacy Commissioner*

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<sup>70</sup> This could include door-stepping type photography or film footage (where someone is accosted unexpectedly by a reporter and camera crew), although the agency there will usually come within the news media exemption.

<sup>71</sup> *Case Note 60017* [2006] NZ Priv Cmr 1.

<sup>72</sup> Covert surveillance to catch employee misconduct might come under this exception.

*for Personal Data*,<sup>73</sup> for example, did not know her photo had been taken until it was published. In New Zealand, a man did not know his photograph was taken until it appeared in an advertisement for a shopping mall.<sup>74</sup>

IPP 3(2) provides that the steps in 3(1) “shall be taken before the information is collected or, if that is not practicable, as soon as practicable after the information is collected.” The word “practicable” presents some difficulty. It may well be practicable, as in “feasible” or “possible” to tell someone of an intention to photograph them, but not desirable.<sup>75</sup> A photographer wishing to catch a natural pose may not wish to inform the subject of the intended photography, although it is “practicable” to do so.

IPP 3(4) provides total exceptions to 3(1). The main exceptions potentially available for photos taken in public are IPP 3(4)(b), (d), and (e). Paragraph (b) applies where the agency believes on reasonable grounds “that non-compliance would not prejudice the interests of the individual concerned.” The Privacy Commissioner has not been particularly liberal in applying this exception to photographs taken in public.<sup>76</sup> What amounts to prejudice varies depending on the individual.<sup>77</sup> An example could be of a person who is in hiding.<sup>78</sup>

IPP 3(4)(d) allows non-compliance if “compliance would prejudice the purposes of collection.” If the purpose is to catch someone in a candid pose, it would prejudice the purpose of collection to tell them before taking the photograph. However, the Privacy

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<sup>73</sup> [2000] 1 HKC 692.

<sup>74</sup> *Case Note 60017* [2006] NZ PrivCmr 1

<sup>75</sup> Roth discusses this in the context of workplace surveillance. Compliance with IPP 3(1) is “practicable” there, but will prejudice the purpose of collection if it is to detect employee theft. See Roth, “The Privacy Act 1993: Workplace Testing, Monitoring and Surveillance”, at 120.

<sup>76</sup> *Case Note 60017*.

<sup>77</sup> *Ibid*.

<sup>78</sup> See for example *Case Note 89271* [2007] NZ PrivCmr 12. A girl whose photograph was published and her mother feared the possibility of renewed harassment by the mother's former partner if he discovered their whereabouts.

Commissioner has considered that using signage to inform people that they may be photographed would not prejudice the purposes of collection, where one purpose was to obtain natural poses.<sup>79</sup> If the complainant is pictured in an open public space, signage may not be feasible. However, where the photography is pre-arranged in a specific area, signage could be used and the exception not apply.

The IPP 3(4)(e) exception covers situations where it is “not reasonably practicable in all the circumstances of the particular case” to comply with IPP3(1). This might apply when someone is photographed from a distance in a crowd. However, where the photography takes place in a defined area, such as in a shopping mall, appropriate signage at the entrance to the mall would be practicable, and so the exception will not apply.<sup>80</sup>

IPP 4 provides that personal information must not be collected by means that are unlawful, or unfair, or intrude unreasonably into the affairs of the subject. Taking a photograph in a public place can be unlawful if, for example, a private investigator takes a photograph without the written consent of the subject.<sup>81</sup> A photograph may also amount to an intimate visual recording in terms of Part 9A of the Crimes Act 1961. In public places means that are unfair or unreasonably intrusive might include hidden cameras, or long-range lenses, or perhaps following someone about persistently. IPPs 1-4 can each be breached by photography in public places, if photography amounts to a “collection” of personal information.

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<sup>79</sup> See *Case Note 60017*.

<sup>80</sup> See *Case note 60017*. The mall management argued that seeking authorisation from every individual concerned would not have been practicable. The Privacy Commissioner took the view that signage alerting shoppers to the possibility of photography would have been practicable and would have adequately discharged the mall’s obligations.

<sup>81</sup> Section 52 Private Investigators and Security Guards Act 1974.

### **2.2.2 IPP 6**

IPP6 provides that individuals who make a request are to be granted access to information held about them.<sup>82</sup> Access does not necessarily mean retaining the information, however, or even seeing the original copy. If IPP3 does not apply however, the individual may have no idea that information about them is held, and will have difficulty knowing they can exercise this right.

There are exceptions to IPP6 in Part 4 of the Act. Section 29(1)(a), that “disclosure of the information would involve the unwarranted disclosure of the affairs of another individual” is the exception most likely to apply to photographs taken in public.

### **2.2.4 IPPs 10 AND 11**

IPPS 10 and 11 deal with use and disclosure of personal information respectively. Their provisions are similar. IPP11 is likely to attract complaints in relation to photographs taken in public, as disclosure is generally what concerns people. There may be some other uses that attract complaint. One example might be photographs of shoplifters published on a website to increase likelihood of apprehension and to prevent losses to business owners. If that information were used for another purpose, like refusing a person employment or membership of a discount scheme, that might breach IPP10, which provides that information obtained in connection with one purpose shall not be used for another purpose.<sup>83</sup> Purpose, however, could easily be framed very widely. For example, it might be generally to

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<sup>82</sup> Radio New Zealand and TVNZ are excluded from the news medium exemption in relation to IPPs 6 and 7. Access to personal information held by those agencies is therefore enforceable under the Privacy Act, although it is not from other news media.

<sup>83</sup> The website [www.sharedfaces.co.nz](http://www.sharedfaces.co.nz) is an example of a website that publishes images of shoplifters. They publish images of those who are not apprehended as well as those who are.

make shoplifters' lives difficult. Whether IPP 10 is breached depends on how the purpose is framed. IPP3 provides the only mechanism within the Act for determining purpose. Without "collection", there may be difficulty proving for what purpose the information was obtained. However, an agency might simply assert any purpose, as it would be hard to disprove.

Use or disclosure for the purpose the information was obtained is permissible, or for a directly related purpose (IPP10(e) and IPP11(a)). Counter-intuitive as it may seem, photographs taken in order to appear on voyeuristic websites would come under this exception. They are taken for the purpose of disclosing them in this manner, and so there would not be a breach of IPP11. Another exception that could apply is maintenance of the law, or the conduct of legal proceedings.<sup>84</sup> This could cover uses of photographs that capture the commission of a crime, or "wanted" photos. There is also an exception to prevent or lessen a "serious and imminent threat to" public health or safety, or the life or health of an individual.

Although news media are exempt, photographers are not always. In *Proceedings Commissioner v Commissioner of Police*,<sup>85</sup> a police officer was liable for the consequences of a disclosure of personal information to the media. A photographer who does not come within the news media exemption, such as a bystander who photographs an accident, could be liable, for disclosing to the media, and possibly for media disclosure. In *Proceedings Commissioner*, the officer was the media's original source of information. He created the media attention. A car accident on the other hand is something the media are likely to find out about anyway. Perhaps a photographer

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<sup>84</sup> IPP 10(c) and IPP 11(d).

<sup>85</sup> [2000] NZAR 277.

would only be liable for the media disclosure if they created the media interest. The actions of the photographer would be relevant when assessing the measure of damages.<sup>86</sup>

### 2.3 SECTION 66: HARM

In order for remedies to be available, the section 66 requirements must be met. There must be a breach of an IPP or code of practice,<sup>87</sup> and the breach must have: (i) “caused or may cause loss, detriment, damage, or injury” to the complainant; or (ii) “adversely affected, or may adversely affect, the rights, benefits, privileges, obligations, or interests” of the complainant; (iii) “resulted in, or may result in, significant humiliation, significant loss of dignity, or significant injury to the feelings” of the complainant.<sup>88</sup>

In the context of public photographs, the most likely “harm” is probably that in s66(1)(b)(iii) significant humiliation, loss of dignity, or injury to feelings, although (i) and (ii) might also apply depending on the circumstances. The test in s66(1)(b)(iii) may not easily be satisfied however, as the humiliation must be “significant”. The Human Rights Review Tribunal has noted that the test is subjective, but the plaintiff must demonstrate that the harm is greater than ordinary emotional harm.<sup>89</sup> This high threshold was not met in *Case Note 60017*. The Privacy Commissioner did not accept the plaintiff’s contention that he suffered detriment as a consequence of the

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<sup>86</sup> Section 85 deals with damages.

<sup>87</sup> Section 66(1)(a)(i) and (ii). For IPPs 6 and 7, a breach of the IPPs or a code of practice is all that is necessary for a remedy to be available (section 66(2)).

<sup>88</sup> Section 66(1)(b)(i)-(iii).

<sup>89</sup> *K v Police Commissioner* (unreported, Decision No 33/99, CRT 17/99, 26 November 1999), 7. Discussed in Roth, *Privacy Law and Practice*, (looseleaf ed, Wellington: Butterworths, 1994 – 2007), PVA66.7.

distribution of pamphlets containing his photograph to every household in the area. Conversely, in *Case No 3734*, a woman was followed and photographed by a private investigator. She claimed to have suffered considerable distress as a result. The Privacy Commissioner accepted her statements as evidence of an adverse effect.

The language of section 66(1)(b) seems to suggest that anticipated actions could be prevented. Each of the s66(1)(b) grounds refers to something that “may” happen. However, s66(1)(a) indicates that prior breach of an IPP is necessary. There is therefore no jurisdiction for prior restraint. The Tribunal can only prevent the breach from continuing or being repeated.

## **2.4 REMEDIES**

The Privacy Commissioner’s approach is conciliatory. Upon receipt of a complaint under s67, she either investigates, or chooses to take no action in accordance with s71.<sup>90</sup> The Commissioner’s function is to investigate complaints and attempt to reach a settlement between the parties. If the Commissioner considers the complaint to have substance and is unable to effect a settlement, she may refer the matter to the Director of Human Rights Proceedings, to determine whether to institute proceedings under section 82.<sup>91</sup> Despite the Privacy Commissioner’s inability to award specific remedies, most complaints are resolved through the Commissioner’s fairly informal processes.<sup>92</sup>

Section 85 lists the powers of the Tribunal where an interference with privacy is found. These include remedies such as a declaration of breach, and orders

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<sup>90</sup> Section 70(1) provides this.

<sup>91</sup> Section 77 Privacy Act 1993.

<sup>92</sup> Katrine Evans, “Show me the money: remedies under the Privacy Act” (2005) 36 VUWLR 475.

restraining the defendant from repeating or continuing the breaching conduct.

Damages can be awarded in accordance with section 88.<sup>93</sup> Evans comments that the focus of parties is often on money. But this overlooks that sometimes alternative remedies under s85 are more appropriate.<sup>94</sup>

Section 85(1)(a) gives the Tribunal the power to make a declaration that the defendant's action constituted an interference with the individual's privacy. This provides a public, formal statement that the defendant was wrong, and can be useful to educate that agency and others.<sup>95</sup> It may be the appropriate remedy in access cases if the plaintiff has received the material by the time of the decision.<sup>96</sup>

Section 85(1)(b) provides for an order to discontinue or not repeat the action. This ensures that the plaintiff and others are safe from the same intrusion in future. Section 85(1)(d) provides the Tribunal can order the defendant to take specified steps to remedy the interference, or redress loss or damage. For photographs of an individual, a possible remedy might be their destruction. This would probably depend on the seriousness of the breach, and the nature of the photographs. In the context of up-skirt photography, s216L of the Crimes Act 1961 already provides for destruction. Where the photograph does not constitute an "intimate visual recording", but is still offensive or embarrassing, the Tribunal might order it destroyed through s85(1)(d).

Section 85(1)(e) allows for "such other relief as the Tribunal thinks fit". This section gives the Tribunal significant latitude. This could allow destruction of a photograph as well as paragraph (d). Evans states that "realistically, the Tribunal is

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<sup>93</sup> Section 85(1)(c) Privacy Act 1993.

<sup>94</sup> Evans, "Show me the money", at 475 – 476.

<sup>95</sup> Ibid, 482.

<sup>96</sup> Ibid, 482 -483.

unlikely to stray too far from standard judicial solutions to the dispute before it.”<sup>97</sup> The provision is not likely to be used in particularly novel ways.

#### 2.4.1 DAMAGES

Section 85(1)(c) provides the Tribunal may award damages in accordance with section 88. That section provides damages may be awarded for interference with privacy in respect of:

- (a) Pecuniary loss ...
- (b) Loss of any benefit, whether or not of a monetary kind...
- (c) Humiliation, loss of dignity, and injury to the feelings of the aggrieved individual.

In general, damages awarded in relation to a photograph taken in a public place would most likely be under (c). There may be some instances, such as where an employer disciplines an employee as the result of them being photographed in public while they were supposed to be home sick, when (a) or (b) might apply.

The highest award given by the Tribunal for interference with privacy is \$40,000 in *Hamilton v The Deanery 2000 Ltd.*<sup>98</sup> That case concerned a serious and harmful disclosure of personal health information. The Tribunal listed factors contributing to the seriousness of the breach. Evans categorises them as:<sup>99</sup>

1. The nature of the agency which disclosed the information.
2. Whether there were internal standards prescribing an appropriate information handling practice.
3. The number of disclosures and the width of disclosure.
4. Whether the disclosure was deliberate.
5. The nature of the information.
6. Motivations of the discloser.
7. Knowledge of consequences of disclosure.

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<sup>97</sup> Ibid.

<sup>98</sup>[2003] NZHRRT 28

<sup>99</sup> Evans, “Show me the money,” 487-488.

8. Whether there was admission of wrongdoing or attempt to mitigate injury.

9. Knowledge of the legislation.

These may provide useful guidance for calculation of damages under IPPs 1-5, 8, 10 and 12 as well as IPP11.<sup>100</sup> In *Feather v ACC*,<sup>101</sup> the Tribunal added the consideration, “the extent to which the plaintiff was the author of his own misfortune.”<sup>102</sup> This might apply to photos taken in public, as the subject might to some extent be the author of their own misfortune by choosing to venture out in public. Whether or not this is so, photographs taken in public places are unlikely to attract an award of damages as high as in *Hamilton*. In most instances of public photography, the harm caused is unlikely to be huge, so the award will not be high.

Formal remedial orders, including awards of damages, are really a last resort under the Privacy Act. It is worth remembering therefore, that while damages could be available in relation to photographs taken in public, settlement through the efforts of the Privacy Commissioner will usually occur.

## 2.5 SUMMARY

The Privacy Act will not cover many photographs taken in public places. News media will usually be exempt, which prevents the possibility of a remedy for publication of photographs in newspapers, magazines, and on television in most circumstances. The taking of a photograph arguably does not amount to a “collection”. Therefore, IPPs 1-4 do not apply to photographs taken in public places, as they deal with collection of personal information.

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<sup>100</sup> IPPs 6 and 7 do not require harm, and will be different.

<sup>101</sup> [2003] NZHRRT 29.

<sup>102</sup> Evans, “Show me the money”, 489.

IPP11 is the most likely to be engaged, although disclosure may well be one of the purposes for which the photograph was obtained. It will be very hard to find any breach in relation to the majority of photographs taken in public places. There is also the obstacle of harm in s66. Most cases are settled by the Privacy Commissioner rather than reaching the Tribunal.

### CHAPTER 3: TORT

A tortious action for invasion of privacy was recognised in New Zealand in a series of decisions in the High Court from the mid-1980s on.<sup>103</sup> The tort was confirmed by the Court of Appeal in *Hosking v Runting*.<sup>104</sup> It can apply to news media, unlike the Privacy Act. Prior restraint, unavailable under the Privacy Act 1993 or the Broadcasting Act 1989 can be available in some closely defined circumstances.

*Hosking* concerned the attempt of celebrity parents to prevent publication of photographs of their twin daughters taken in public. The parents brought actions for breach of confidence and invasion of the twins' privacy. The facts did not fall within the traditional breach of confidence action, and the Court of Appeal declined to follow English law and widen the action. The Court instead recognised a limited tort of invasion of privacy where private facts about a plaintiff were published.<sup>105</sup> Gault J set out the elements of the tort:<sup>106</sup>

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

There was also a possible defence of legitimate public concern.<sup>107</sup>

The New Zealand tort is narrower than the United States tort. Invasion of privacy in America comprises four distinct causes of action:<sup>108</sup>

1. Intrusion upon the plaintiff's seclusion or solitude, or into his private affairs.

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<sup>103</sup>The main High Court decisions were *Tucker v News Media Ownership Ltd* [1986] 2 NZLR 716; *Bradley v Wingnut Films Ltd* [1993] 1 NZLR 415; and *P v D* [2000] 2 NZLR 591.

<sup>104</sup>[2005] 1 NZLR 1

<sup>105</sup>The Hoskings, however, failed to meet the elements of the tort.

<sup>106</sup>*Ibid*, at [117]. Gault J delivered the leading judgment on behalf of himself and Blanchard J.

<sup>107</sup>*Hosking* at [129] per Gault and Blanchard JJ.

<sup>108</sup>Prosser, at 389.

2. Public disclosure of embarrassing private facts about the plaintiff.
3. Publicity which places the plaintiff in a false light in the public eye.
4. Appropriation, for the defendant's advantage, of the plaintiff's name or likeness.

The New Zealand tort comprises only the second of these, although the fourth is somewhat similar to the tort of passing off. In relation to photographs taken in public, the New Zealand privacy tort may have broader coverage than the tort in the United States. In discussing intrusion into seclusion Prosser stated:<sup>109</sup>

On the public street, or in any other public place, the plaintiff has no right to be alone, and it is no invasion of his privacy to do no more than follow him about. Neither is it such an invasion to take his photograph in such a place...

Paton-Simpson has written on the strictness of United States courts in applying this public place exemption.<sup>110</sup> Someone who ventures out in public is considered as having waived their privacy rights, or consented to invasion. An example is *Gill v Hearst Publishing Co.*<sup>111</sup> The plaintiffs were photographed in an affectionate pose at their ice-cream stand. The Court held that the plaintiffs voluntarily exposed themselves to the public gaze, waiving their privacy rights.<sup>112</sup>

In *Hosking*, Gault J considered that United States authority was qualified somewhat by cases like *Peck v United Kingdom*,<sup>113</sup> so that “in exceptional circumstances a person might be entitled to restrain additional publicity being given to the fact that they

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<sup>109</sup>Ibid, 391-392.

<sup>110</sup>Elizabeth Paton-Simpson, “Privacy and the Reasonable Paranoid: The Protection of Privacy in Public Places,” (2000) 50 *University of Toronto Law Journal*, 305.

<sup>111</sup> 253 P.2d 441 (Cal. 1953); discussed by Paton-Simpson at 311-312.

<sup>112</sup> *Gill v Hearst Publishing Co.*, at 444 – 445.

<sup>113</sup> [2003] ECHR 44647/98; [2003] EMLR 287

were present on the street in particular circumstances.”<sup>114</sup> New Zealand’s tort therefore has the potential to cover some things that take place in public.

### 3.1 “REASONABLE EXPECTATION OF PRIVACY”

“Facts in respect of which there is a reasonable expectation of privacy” are facts which are not known to the world at large, although they may be known to some people.<sup>115</sup> The observations of Gleeson CJ in *Australian Broadcasting Corporation v Lenah Game Meats*,<sup>116</sup> at paragraph [42] were considered in *Hosking*:

There is no bright line which can be drawn between what is private and what is not. Use of the term ‘public’ is often a convenient method of contrast, but there is a large area in between what is necessarily public and what is necessarily private... Certain kinds of information about a person, such as information relating to health, personal relationships, or finances, may be easy to identify as private; as may certain kinds of activity, which a reasonable person, applying contemporary standards of morals and behaviour, would understand to be meant to be unobserved.

“Facts” to which the tort applies will be more sensitive than the broad coverage of the Privacy Act. In *P v D*,<sup>117</sup> the fact that the plaintiff had received treatment relating to their mental health was seen as private. Burrows argues that the formulation of “reasonable expectation of privacy” could easily go further than “private” facts.<sup>118</sup> “Private” facts, to Burrows includes things like health, intimate bodily appearance, sexual activity, and family relations.<sup>119</sup> “Facts in respect of which there is a reasonable expectation of privacy” could extend to anything that one has a reasonable expectation

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<sup>114</sup> *Hosking* at [164].

<sup>115</sup> *Hosking* at [119].

<sup>116</sup> [2001] 208 CLR 199

<sup>117</sup> [2000] 2 NZLR 591.

<sup>118</sup> John Burrows, “Invasion of Privacy – *Hosking* and Beyond” [2006] *New Zealand Law Review*, 389.

<sup>119</sup> *Ibid*, 392.

will not be published.<sup>120</sup> This has included a confession that was ruled inadmissible at trial,<sup>121</sup> and the photo and general location of a convicted paedophile on parole.<sup>122</sup>

Gault J in *Hosking* considered that, except in exceptional cases, things that take place in public would not be covered by the new tort as there would be no reasonable expectation of privacy.<sup>123</sup> Examples given were situations like *Peck*<sup>124</sup> and *Campbell v MGN Ltd.*<sup>125</sup> In *Peck*, the plaintiff attempted suicide. His image was captured by CCTV, and the police were contacted and came to his assistance. The local authority that installed the cameras then disclosed the footage to the media. Peck's identity was apparent from items published by local and national media. The European Court of Human Rights found that disclosure was far beyond what the applicant could possibly have foreseen, and so constituted a serious invasion of his privacy.<sup>126</sup>

In *Campbell*, the majority of the House of Lords allowed an action for breach of confidence for the publication of a photograph of supermodel Naomi Campbell leaving a narcotics anonymous meeting, along with the details of her treatment. The majority held that this information was analogous to the private and confidential information contained in medical records, and so could be reasonably expected to be confidential.

While the examples cited in *Hosking* are United Kingdom cases, UK case law should be treated cautiously in this area, as the UK is party to the European Convention on Human Rights 1950, which is incorporated into domestic law by the Human Rights Act 1998. The convention contains a right to respect for private and family life in Article

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<sup>120</sup> Ibid, 392.

<sup>121</sup> *Rogers v Television New Zealand* [2007] 1 NZLR 156

<sup>122</sup> *Brown v Attorney-General* (DC Wellington, CIV-2003-085-236, 20 March 2006, Judge Spear)

<sup>123</sup> *Hosking v Runtig*, at [164]

<sup>124</sup> *Peck v The United Kingdom* [2003] ECHR 44647/98; [2003] EMLR 287.

<sup>125</sup> [2004] 2 AC 457

<sup>126</sup> *Peck v The United Kingdom*, at paragraph 62 - 63.

8, as well as a freedom of expression right in Article 10. The New Zealand Bill of Rights Act 1990 contains only a right to freedom of expression.<sup>127</sup> The United Kingdom may have stronger privacy rights in public places than New Zealand though incorporation of the Convention and through being subject to the jurisdiction of the European Court of Human Rights (ECHR).

The ECHR in *Von Hannover v Germany*<sup>128</sup> held that photographs taken by paparazzi of Princess Caroline of Monaco going about her normal business in public infringed her Article 8 right. This infringement was not outweighed by the publishing magazine's Article 10 right to free expression. The exact scope of this decision is unclear.<sup>129</sup> It could be so far-reaching as to grant a general right to privacy to anyone photographed in public.<sup>130</sup> This would be as wide as the privacy right in Quebec, which allowed recovery for embarrassment when a photograph of a girl, taken in public, appeared in a magazine.<sup>131</sup> Alternatively hounding by the paparazzi may have been a necessary element, as this type of attention could restrict the "development of the personality".<sup>132</sup> This suggests limits to the extent of privacy rights. An isolated photograph of an ordinary person would not in most circumstances significantly affect

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<sup>127</sup> Section 14 New Zealand Bill of Rights Act 1990. The preamble to the New Zealand Act affirms New Zealand's commitment to the International Covenant on Civil and Political Rights, Article 17 of which provides that "No one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence, nor to unlawful attacks on his honour and reputation." However, the Bill of Rights Act itself does not incorporate any right to privacy, except indirectly as the right to be free from unreasonable search and seizure in section 21.

<sup>128</sup> [2004] EMLR 379

<sup>129</sup> The potential scope of privacy rights in the United Kingdom following *Von Hannover* is discussed in Alistair Wilson and Victoria Jones, "Photographs, Privacy and Public Places" (2007) 29(9) EIPR 357.

<sup>130</sup> *Ibid*, 359.

<sup>131</sup> *Aubry v Editions Vice Versa Inc* [1998] 1 SCR 591

<sup>132</sup> Wilson and Jones, 358.

their personality rights.<sup>133</sup> Another possible limit is a requirement that the person be photographed going about their private life.<sup>134</sup>

Whatever the scope of the *Von Hannover* case, it was considered by the English Court of Appeal in *McKennitt v Ash*,<sup>135</sup> in adopting a balancing approach between Articles 8 and 10. United Kingdom authorities should therefore be treated with caution as the privacy right in the UK is potentially wider than in New Zealand.

In New Zealand, a reasonable expectation of privacy in a public place arose in *Andrews v Television New Zealand Ltd*.<sup>136</sup> The plaintiffs, a married couple, were involved in a car accident. Footage of them was captured by a camera operator who arrived with the emergency services. This footage was broadcast in a reality television show called *Firefighters*. Allan J concluded that there was a reasonable expectation of privacy despite the fact the accident occurred in public.<sup>137</sup> The expectation was created by the recording of conversations, in combination with the prolonged nature of filming. At paragraph [65], the judge said:

The length of the screened footage combined with the accumulation of depicted intimate communications, serves to distinguish the privacy expectations in this case from those in which the images portrayed and the information conveyed can be characterised as part and parcel of general news footage.

The impression is that photographs, or limited footage, would not attract a reasonable expectation of privacy. The case is important as it provides some guidance as to what might attract a reasonable expectation of privacy in public places.

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<sup>133</sup> Ibid.

<sup>134</sup> Ibid, 359.

<sup>135</sup> [2006] EWCA Civ 1714.

<sup>136</sup> HC Auckland, CIV-2004-404-3536, 15 December 2006, Allan J

<sup>137</sup> *Andrews v Television New Zealand Ltd*, at [61] to [66].

“Reasonable expectations” may change with time. In *Rogers v TVNZ*,<sup>138</sup> the plaintiff attempted to prevent TVNZ airing a videotaped confession to murder. When the video was made, expectations of privacy were fairly limited. It was however, excluded from evidence at trial. The Court of Appeal made it clear that “reasonable expectations of privacy” were to be assessed at the time of publication, rather than when the videotape was made.<sup>139</sup> The Court considered *Tucker v News Media Ownership Limited*<sup>140</sup> provided support for the conclusion that public facts may, through passage of time, become private.<sup>141</sup> Tucker obtained an interim injunction in relation to the proposed publication of convictions entered more than ten years earlier.<sup>142</sup>

Reasonable expectations of privacy may also be influenced by celebrity. People who are constantly in the public eye have lower expectations of privacy, especially when in public places. Gault J in *Hosking* discussed the reasonable expectations of privacy of celebrities and their families.<sup>143</sup> Reasonable expectations of privacy in many areas of life will be reduced with the increase of public status. Involuntary public figures also have lower expectations of privacy, but not to the same extent as those who willingly seek publicity.<sup>144</sup> McGechan J in *Tucker* implied that there was a difference between seeking the limelight and being a “reluctant debutante.”<sup>145</sup> Gault J also concluded that families of celebrities lose some reasonable expectation of privacy. He stated, “[i]t is a matter of

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<sup>138</sup> [2007] 1 NZLR 156

<sup>139</sup> *Rogers v Television New Zealand* [2007] 1 NZLR 156, at [52].

<sup>140</sup> [1986] 2 NZLR 716

<sup>141</sup> *Rogers* at [53]. Some support for public facts becoming private through passage of time can also be found in U.S. case law. In *Melvin v Reid* 112 Cal. App. 285, 297 Pac. 91 (1931), a former prostitute had been a suspect in a high profile murder trial. She later married and began leading a respectable life. A movie about the murder which exposed her past to the world was held to be an actionable invasion of her privacy.

<sup>142</sup> The injunction was later discharged because the convictions reached the public domain through publication by other media.

<sup>143</sup> *Hosking v Runtig*, at [120] to [124].

<sup>144</sup> *Hosking v Runtig*, at [121].

<sup>145</sup> *Tucker*, at 735.

human nature that interest in the lives of public figures also extends to interest in the lives of their families.”<sup>146</sup>

It will fall for determination on a case by case basis whether a photograph taken in public attracts a reasonable expectation of privacy. The facts must be sufficiently private or sensitive. In *Andrews* it was the recorded conversations in conjunction with the duration of visual footage that carried a reasonable expectation. If a photograph were to show a lot of detail of an accident victim’s injuries, it might be regarded as sensitive because of its medical nature. Another scenario might be where a woman’s skirt is blown up by a gust of wind and the moment is captured by a photograph.<sup>147</sup> The information is not medical, but does relate to the appearance of a part of the body normally considered intimate. In general, photographs taken in public will not attract reasonable expectations of privacy, as they do not often deal with sensitive, or even particularly embarrassing, material.

### **3.2 PUBLICITY THAT IS “HIGHLY OFFENSIVE”**

The second element of the tort, relates to the nature of the publication. There must be publicity that is “highly offensive to an objective reasonable person.”<sup>148</sup> This test is found in American formulations, and in the privacy principles of the Broadcasting Standards Authority. It is not such a common requirement in English breach of confidence law, however, where the focus tends to be on the reasonable expectation of

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<sup>146</sup> *Hosking*, at [124].

<sup>147</sup> In the United States case of *Daily Times Democrat v Graham*, 162 So.2d 474 (Ala. 1964), it was held that a woman whose skirt was blown up by carnival fun house air jets so that her underpants were visible did not waive right to personal privacy simply by appearing in public.

<sup>148</sup> Tipping J in *Hosking* at [256] preferred a formulation of a “substantial” degree of offense (and harm), rather than the “highly offensive” formulation adopted by Gault and Blanchard JJ.

privacy.<sup>149</sup> Arguably this element could be part of the test for reasonable expectations of privacy. Tipping J in *Hosking* would have preferred to approach offensive publication as part of the need for a reasonable expectation of privacy.<sup>150</sup> He considered that in most cases there is unlikely to be a reasonable expectation of privacy unless publication would cause a high degree of offence and therefore harm.<sup>151</sup>

The test puts an “objective reasonable person” into the shoes of the plaintiff. The question is “what would I, a reasonable person, think if this were published about me?”<sup>152</sup> This test raised particular difficulty in *Brown v Attorney-General*.<sup>153</sup> The photograph of a convicted paedophile on parole was published by police in a flier along with other information including his name and general whereabouts. This breached police guidelines. The objective reasonable person is not a paedophile. However, the test is of a reasonable person in the plaintiff’s shoes. Judge Spear considered the difficulty and concluded at [81]:

I am just able to find that an objective reasonable person standing in the shoes of the plaintiff should be highly offended by the publication of the information about the plaintiff.

Brown received \$25,000 damages for breach of his privacy. *Brown’s* case demonstrates that the test is difficult to apply when the plaintiff is not an “ordinary” person.

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<sup>149</sup> Burrows, 394.

<sup>150</sup> *Hosking* at [256].

<sup>151</sup> Ibid.

<sup>152</sup> *P v D* [2000] 2 NZLR 591, at [39] per Nicholson J; cited in *Burrows*, at 396.

<sup>153</sup> DC Wellington, CIV-2003-08-236, 20 March 2006

### 3.3 DEFENCE

A defence of legitimate public concern is available to justify interference with privacy. The word “concern” was used deliberately to distinguish from matters that are merely of interest to the public.<sup>154</sup> The degree of public “concern” necessary to establish a defence will depend on the facts of the case. Gault J considered “[t]he level of legitimate public concern would have to be such as outweighs the level of harm likely to be caused”.<sup>155</sup> Tipping J also considered that “the greater the invasion of privacy the greater must be the level of public concern to amount to a defence”.<sup>156</sup>

In *Rogers*, the Court of Appeal considered the defence of legitimate public concern would probably be available. The weighing between the legitimate public concern and the privacy right was treated as a matter of proportionality.<sup>157</sup> Because Mr. Rogers’ privacy rights were at the low end of the scale, the concern needed for a defence was also at the lower end of the scale.

### 3.4 IDENTIFIABILITY

Identifiability was not directly addressed in *Hosking*. It is difficult to see how harm could occur without identification, so common sense would lead to identifiability being necessary for the tort to apply. An award of damages has been given for invasion of privacy, however, where the plaintiff was not identifiable. In *L v G*<sup>158</sup> a prostitute’s client sent an intimate photograph of her to an adult magazine for publication without her knowledge. She was unable to identify herself until she was informed that the photograph

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<sup>154</sup> *Hosking*, at [133].

<sup>155</sup> *Ibid*, at [134].

<sup>156</sup> *Ibid*, at [257].

<sup>157</sup> *Rogers*, at [86].

<sup>158</sup> [2002] DCR 234

was of her. Judge Abbott awarded \$2,500 for breach of her privacy. Evans believes however, that *L*'s claim should have been in breach of confidence.<sup>159</sup> Evans explores identification in comparable areas of law including the Privacy Act, Broadcasting Standards Authority decisions, and United States law, and concludes that the full weight of precedent seems to be against the decision reached by Judge Abbott with regard to identifiability.<sup>160</sup>

Considering the issue of identifiability in *Andrews*, Allan J stated at [52]:<sup>161</sup>

At least in most circumstances, in order to make out a claim, a plaintiff will need to establish that he or she has been identified in the publication, either directly or by implication.

It is likely that identification of a plaintiff from the facts published will be necessary to attract liability. A photograph incapable of identifying an individual could still amount to “facts in respect of which there is a reasonable expectation of privacy”. However, it would be less likely to be covered by the tort of invasion of privacy, as generally there is no harm without identification.

### 3.5 REMEDIES

In *Hosking* the Court of Appeal considered damages to be the primary remedy.<sup>162</sup> Prior restraint may be available, but the threshold that must be met is “compelling evidence of most highly offensive intended publicising of private information and there is little legitimate public concern in the information.”<sup>163</sup> Prior restraint of publication is an inhibition of freedom of expression, and will be granted only in the clearest of cases. In

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<sup>159</sup> Katrine Evans, “Of Privacy and Prostitutes” (2002) 20(1) NZULR, 71, at 72.

<sup>160</sup> *Ibid*, 90.

<sup>161</sup> *Andrews*, at [52].

<sup>162</sup> *Hosking v Runting* at [149] per Gault and Blanchard JJ.

<sup>163</sup> *Hosking* at [158].

*Rogers*, the High Court granted an injunction, but it was discharged in the Court of Appeal, because the high threshold was not met.

### **3.6 SUMMARY**

The tort of invasion of privacy is very limited. There will be very few photographs taken in public places where the tort will apply. Examples of photographs where there may be a reasonable expectation of privacy in public include up-skirt photography, or an involuntary embarrassing pose such as when a skirt flies up in a gust of wind. Situations like *Peck*, where the plaintiff was especially vulnerable, are also likely to be covered as hinted by the Court of Appeal in *Hosking*.

The advantages of the tort over the Privacy Act and Broadcasting Act include the availability of prior restraint, although usually the high threshold will not be met. Damages are not limited to \$5,000, which is the maximum award the Broadcasting Standards Authority can give. Also, the media are open to liability, unlike under the Privacy Act.

## CHAPTER 4: BROADCASTING STANDARDS AUTHORITY

The Broadcasting Standards Authority can give relief to individuals whose privacy is invaded by broadcasters. The Authority was established under section 20 of the Broadcasting Act 1989. Its functions include: s21(1)(a) “to receive and determine complaints from persons who are dissatisfied with the outcome of complaints made to broadcasters under section 6(1)(a);” and s21(1)(b) “to receive and determine complaints from persons where the complaint constitutes an allegation that a broadcaster has failed to comply with section 4(1)(c)”. Section 4(1)(c) provides that broadcasters are responsible for maintaining standards “consistent with the privacy of the individual”. Only privacy complaints can be referred directly to the Authority.<sup>164</sup> All others must first go to the broadcaster. Privacy complaints are also the only complaints in respect of which the Authority can make monetary awards, albeit to a \$5,000 maximum.<sup>165</sup>

### 4.1 PRIVACY PRINCIPLES

The Authority’s fifth decision<sup>166</sup> determined a privacy complaint.<sup>167</sup> TVNZ screened an item about the funeral of a skinhead who committed suicide after killing the son of a well-known former cricketer.<sup>168</sup> The Authority considered the funeral to a public fact, conducted in a public place (the cemetery), in view of a public street, from which filming occurred. The complaint was not upheld. The Authority considered it necessary to explore privacy as a legal concept, as its decisions are appealable to the High Court.<sup>169</sup>

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<sup>164</sup> Section 8(1)(c) Broadcasting Act 1989.

<sup>165</sup> Section 13(1)(d) Broadcasting Act 1989.

<sup>166</sup> Decision Number 5/90, 3.5.90

<sup>167</sup> Michael Stace, *Privacy: Interpreting the Broadcasting Standards Authority’s Decisions January 1990-June 1998* (Palmerston North: The Dunmore Press Ltd, 1998), 15.

<sup>168</sup> *Ibid*, 15.

<sup>169</sup> Stace, 16.

American legal consideration of privacy was used to augment New Zealand law.<sup>170</sup> Not only publication of private facts is covered but the Authority's privacy jurisdiction, but also intrusion into a person's solitude or seclusion.

The principles developed by the Authority in that case were eventually published, on 25 June 1992, in an advisory opinion, pursuant to section 21(1)(d).<sup>171</sup> In *TV3 Network Services Ltd v Broadcasting Standards Authority*,<sup>172</sup> the High Court held the Authority had been entitled to adopt those principles. "Privacy" in the Broadcasting Act did not refer only to New Zealand common law principles.<sup>173</sup>

Paton-Simpson considers the privacy principles amount to fairly rigid rules, and that there is inadequate distinction by the Authority as to which principle is applied.<sup>174</sup>

She states:<sup>175</sup>

The distinction between intrusion and publication could be important where, for example, a broadcaster captures an embarrassing public moment on film unintentionally but then chooses to televise it, or where a disclosure is gratuitous or misleading.

The principles do amount to fairly rigid rules. However, they have undergone development to address particular problems. Things that have been added include the current principle 4, dealing with malicious disclosure of a person's name, address, and/or telephone number, and principle 6, giving higher protection to children.<sup>176</sup>

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<sup>170</sup> Stace, 16 – 17.

<sup>171</sup> *Ibid.*, 27.

<sup>172</sup> [1995] 2 NZLR 720.

<sup>173</sup> Eichelbaum CJ's findings in this respect are outlined by Stace, at 41-42.

<sup>174</sup> Paton-Simpson, "Privacy and the reasonable paranoid", 320. Paton-Simpson notes that confusion regarding the relationship between the two torts is apparent in *TV3 v. B.S.A.* Discussing principle (iii) (at p729), Eichelbaum C.J. incorrectly lists the criteria for the private facts tort as limitations on the intrusion tort (see Paton-Simpson footnote 104).

<sup>175</sup> *Ibid.*

<sup>176</sup> The current form of the privacy principles is reproduced in Appendix B.

Principles 1 and 2 deal with publicity given to private facts. Principle 2 expressly provides that public facts may become private through passage of time. Principle 3 deals with intrusion into an individual's interest in solitude or seclusion. Principle 3(b) provides an exemption that "in general, an individual's interest in solitude or seclusion does not prohibit recording, filming, or photographing that individual in a public place." Principle 3(c) clarifies that this public place exemption will not apply where the individual was particularly vulnerable, and the disclosure is highly offensive to an objective reasonable person. Children's vulnerability is recognised by principle 6. Broadcasters must satisfy themselves that a broadcast is in the child's best interests regardless of whether consent has been obtained. This covers broadcast of images of children captured in public places as well as in private.

#### **4.1.1 INTRUSION AND THE PUBLIC PLACE EXEMPTION**

The validity of the intrusion principle was explored in *Canwest TVWorks Ltd v XY*.<sup>177</sup> That case related to hidden camera footage of two photo-shoots, conducted by the complainant for a men's magazine, that appeared in a show called *Inside New Zealand-Stakeout: Models Exposed*. The broadcaster contended that because principle 3 related to how the footage was obtained rather than the broadcast, the principle was ultra vires. The Authority's job is to monitor broadcasting standards, and there is no nexus between the principle and broadcasting unless there is a requirement of public disclosure of offensive facts. Harrison J, however, rejected this argument at paragraph [71] quoting Eichelbaum CJ in *TV3 Network Services*<sup>178</sup>:

I would hold that where filmed or taped material has been televised, in adjudicating upon a complaint the authority is entitled to take into account not

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<sup>177</sup> unreported, HC Auckland, CIV 2006-485-002633, 22 August 2007, Harrison J.

<sup>178</sup> *TV3 Network Services*, at 733.

only the broadcast material itself but also how it was obtained. To restrict complaints to the content alone would significantly limit the authority's jurisdiction.

Harrison J considered that the Authority's function of monitoring and preserving proper broadcasting standards extends to the manner in which material is acquired. It would be artificial to separate standards for acquiring information for broadcast from the broadcast itself.<sup>179</sup>

The public place exemption in principle 3 disqualifies most complaints about images captured in public places from succeeding. However, the Authority does occasionally recognise a breach of s4(1)(c) in relation to filming in a public place. In *TV3 Network Services*, the complainant S was filmed from a neighbouring landfill speaking to a reporter at her back door. The surreptitious filming was considered to amount to intrusion in the nature of prying, even though the complainant was visible from a public place. The complainant was awarded \$750 compensation. Eichelbaum CJ, upholding the Authority's decision in the High Court, considered that the implied licence to enter a person's property did not extend to the reporter in this case. This was because it was known or understood that S would not give consent to her encounter with the reporter being filmed.<sup>180</sup> The reporter was therefore a trespasser. The result of the case indicates that surreptitiously filming something that is visible from a public place will not necessarily attract the public place exemption in the privacy principles, and may still amount to an intrusion.

The reasoning of that case, however, is odd. S did not consent to the interview being filmed. She did however answer questions until questioning offended her and she

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<sup>179</sup> Ibid, [74].

<sup>180</sup> *TV3 Network Services*, at 732.

asked the reporter to leave. The reporter therefore had her permission to be present and left when asked to, so was not a trespasser. The footage of the interview was obtained without the woman's knowledge, but not through trespass. While it is not difficult to see how Ms S would feel there had been an invasion of her privacy, the reasoning that because the reporter was a trespasser the filming amounted to an intrusion seems flawed.

There have been some cases where broadcasts of images captured in public have been considered to breach the principle 3. In Decision Number 2003-043, filming an injured person climbing out of a car after an accident was held to be a breach.<sup>181</sup> Complaints about filming car accidents will be upheld only if there is something in the nature of a highly offensive intrusion. In *Andrews*, Allan J pointed out that most complaints relating to motor accidents are not upheld by the Authority where the footage is neither lingering nor gratuitous. The public interest element in reporting such accidents is usually a defence.<sup>182</sup> In general where something has been filmed in public the Authority has considered that the privacy principles are not breached.<sup>183</sup>

#### **4.1.2 THE PRIVACY PRINCIPLES AND TORT**

In *Andrews*, Allan J found the proposition that section 4(3) of the Broadcasting Act precluded plaintiffs from bringing a tort action where they could complain to the Authority to be unattractive. No firm conclusion was reached, but the judge said:<sup>184</sup>

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<sup>181</sup> Broadcasting Standards Authority, *Real Media, Real People: Privacy and Informed Consent in Broadcasting*, (Wellington: Dunmore Press Ltd, 200), 27.

<sup>182</sup> *Andrews v TVNZ*, at [95]. The public interest defence is set out in the current Principle 8.

<sup>183</sup> See for example Decision number 2005-017(3 June 2005), where a man's complaint of being shown in *Coastwatch* for having gathered over the legal limit of scallops was not upheld because he was in a public place; also Decision Number 1998-170 (17 December 1998), where a Corrections Department employee who had been accused of having a relationship with an inmate was filmed in public; Decision number 1999-076 (24 June 1999), responding to a threatened suicide in a public place; and Decision number 2002-118 (19 September 2002), filming of police dealing with a traffic accident on a highway.

<sup>184</sup> *Andrews v TVNZ*, at [98].

If the defendant is right, then the most meritorious claims will fail. Additionally, there is no logic in a state of affairs which would leave a plaintiff able to sue for breach of privacy occurring in print, but not by way of broadcast.

Arguments against section 4 precluding liability include that the section is silent as to the tort, the inconsistency of exposing print media to greater liability than broadcast media, and that the award before the Authority is limited to \$5,000. For some offensive disclosures of private facts, \$5,000 may not be adequate compensation. It seems likely that there will be a choice of forum for complaint.

#### **4.2 OTHER STANDARDS**

Standards other than privacy may sometimes be more suitable for complaints relating to filming in a public place. As well as section 4, standards can be found in codes of practice issued under s21(1)(g).<sup>185</sup> There are codes for free to air television, pay television, radio, and election programmes. Standards which might be breached in relation to filming in public include fairness,<sup>186</sup> balance,<sup>187</sup> or good taste and decency.<sup>188</sup> Graphic images of accident victims, for example, might violate the standard of good taste and decency. Privacy complaints may sometimes be made where another complaint would be more appropriate, as compensation can only be awarded in respect of privacy complaints.

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<sup>185</sup> Section 4(1)(e) Broadcasting Act 1989 provides broadcasters must maintain standards consistent with any approved code of broadcasting practice. These codes incorporate the standards set out in section 4(1) of the Broadcasting Act 1989, and add other standards that broadcasters must comply with such as accuracy, balance, fairness, programme classification and so on.

<sup>186</sup> Standard 6 in the *Free to Air Television Code of Broadcasting Practice*, August 2006; and Standard P7 of the *Pay Television Code of broadcasting Practice*, August 2006.

<sup>187</sup> Standard 4 of the *Free to Air Television Code*; and Standard P6 of the *Pay Television Code*.

<sup>188</sup> Section 4(1)(a) Broadcasting Act 1989 provides that broadcasters must maintain standards consistent with good taste and decency. The standard is also incorporated into the codes of practice issued by the Authority under s21(g).

### **4.3 SUMMARY**

The Broadcasting Standards Authority may at times overlap with the privacy tort, and the Privacy Act, as broadcasters will not always come within the “news media” exemption. Coverage of the Authority’s privacy principles is potentially broader than coverage by the tort, as a “reasonable expectation of privacy” is not necessary for the Authority’s intrusion principle, although to get around the public place exemption, an individual must be especially vulnerable.

## CHAPTER 5: CRIMINAL LAW

There is the potential for some protection for photographs taken in public places through the criminal law. This will only cover a limited number of situations, but the possibility of conviction and sentence may be a strong deterrent to taking and publishing photographs in those situations.

### 5.1 INTIMATE COVERT FILMING

The Crimes (Intimate Covert Filming) Amendment Act 2006 added sections 216G to 216N to Part 9A of the Crimes Act 1961. The amendment covers only “intimate visual recordings”, defined in s216G as:

... a visual recording (for example, a photograph, videotape, or digital image) that is made in any medium using any device without the knowledge or consent of the person who is the subject of the recording, and the recording is of—

...

(b) a person's naked or undergarment-clad genitals, pubic area, buttocks, or female breasts which is made—

(i) from beneath or under a person's clothing; or

(ii) through a person's outer clothing in circumstances where it is unreasonable to do so.

The Law Commission recommended inclusion of an offence covering “up-skirt” and “down-blouse” type photography and filming, in addition to covert filming in private places.<sup>189</sup> They considered:<sup>190</sup>

The importance that individuals attach to the ability to control access to viewing of their most intimate body parts extends to keeping control over

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<sup>189</sup> New Zealand Law Commission, *Study Paper 15: Intimate Covert Filming* (Wellington, 2004), paragraph 4.16.

<sup>190</sup> *Ibid.*

who sees their underwear, even when they are not in a private place. This is another form of voyeurism, and it is another instance where technology enhances the ability of the voyeur to pierce the “cloak of privacy” surreptitiously.

“Up-skirt” and “down-blouse” filming therefore attract criminal liability. Location is not an ingredient in s216G(1)(b). For an image to come within s216G(1)(a), however, the subject of the recording must be “in a place which, in the circumstances, would reasonably be expected to provide privacy.” A topless sunbather on a public beach would not be covered, nor would someone whose skirt blew up in the wind.

The only public photography which amounts to “intimate visual recording” is therefore “up-skirt” type filming and photography. There is a prohibition on making an intimate visual recording,<sup>191</sup> possessing one for the purpose of publishing, distributing, or selling it with knowledge it is an intimate visual recording,<sup>192</sup> and possession without lawful excuse when the possessor knows that it is an intimate visual recording.<sup>193</sup> The last carries a lower sentence, 1 year maximum, as opposed to 3 years. Publication, exporting, importing, and selling intimate visual recordings also carries a potential 3 year sentence.<sup>194</sup>

Section 216L(1) provides for the possibility forfeiture and disposal of any images in respect of which a person is convicted under ss216H-216J. Subsection (2) provides that equipment used can be forfeited and disposed of as well. In addition to punishment therefore, the criminal law provides for destruction of the offending images. This will often be desired by anyone who is the subject of such a photograph. The destruction of

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<sup>191</sup> Section 216H Crimes Act 1961.

<sup>192</sup> Section 216I(1) Crimes Act 1961.

<sup>193</sup> Section 216I(2) Crimes Act 1961.

<sup>194</sup> Section 216J(1) Crimes Act 1961.

the photographs is important for remedying the affront to someone's dignity caused by "up-skirt" type photography.

## 5.2 OFFENSIVE BEHAVIOUR

There has been a conviction for offensive behaviour under section 4 Summary Offences Act 1981 for photographing people in a public place.<sup>195</sup> Mr Rowe took a large number of photos of high school girls on their way to school from a concealed position in a parked van in the street outside the school. The police eventually discovered him, and he was charged with offensive behaviour.<sup>196</sup> He was convicted and discharged in the District Court. The High Court upheld the conviction, as did the Court of Appeal.

Rowe's actions did not really meet the elements of the offence. Section 4(1)(a) Summary Offences Act 1981 provides:

- (1) Every person is liable to a fine not exceeding \$1,000 who,—
  - (a) In or within view of any public place, behaves in an offensive or disorderly manner

Mr Rowe sat in a van with the curtains drawn and surreptitiously took photographs of girls on their way to school. He did not behave in a way that was offensive or disorderly. If the police had not discovered what he was doing, there would have been no offence caused by his behaviour, as no-one would have known of it. The section seems aimed at people who do things in public that cause offence to those in the vicinity at the time. Those in the vicinity at the time of the photography were not offended until they saw the photographs later.

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<sup>195</sup> *R v Rowe* [2005] 2 NZLR 833.

<sup>196</sup> Under section 4(1)(a) of the Summary Offences Act 1981.

The Court of Appeal placed emphasis on the fact that there was no evidence of a “legitimate purpose”.<sup>197</sup> The impression is that if Rowe had a legitimate purpose in covertly taking photographs, his appeal would have been allowed. Purpose is not an element of the offence. It is difficult to see how covert photography without a legitimate purpose can be considered offensive behaviour. Covert photography with a legitimate purpose would not be, as the observable behaviour is the same. The case is likely to be confined to its own specific facts, rather than creating a general rule that covert photography can constitute “offensive behaviour”.<sup>198</sup>

### 5.3 SUMMARY

Criminal law can afford protection to a limited class of photographs taken in public. That is “up-skirt” or “down-blouse” photography. There is unlikely to be any criminal liability for other photographs in public, unless the conduct of the photographer amounts to some criminal offence. *Rowe’s* case is probably confined to its particular facts. Protection is therefore likely to be broader under the Privacy Act, Broadcasting Act, and common law.

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<sup>197</sup> *R v Rowe*, at [32]-[33], and [38].

<sup>198</sup> In fact Rowe was again convicted of offensive behaviour in the District Court for sitting in the “Celebrity Squares” at the University of Otago Library and surreptitiously taking photographs of women studying. Hansen J allowed his appeal in the High Court. He considered that as the original *Rowe* case was marginal, this case was even more so, and outside the margin that would require intervention of the criminal law. See *Rowe v Police* (2005) 22 CRNZ 244 at [48].

## CHAPTER 6: POTENTIAL WAYS TO EXPAND PROTECTION

People in public places may be photographed without their consent, and those photographs may be published, with little consequence to the photographer or publisher in most instances. This can be a problem if, for example, the photograph captures an embarrassing moment, or someone is the subject of a protection order and wishes their whereabouts to remain unknown. Greater protection against photography in public is therefore desirable. Possibilities for expanding protection include recognition in the Bill of Rights Act of a privacy right; a ban on photography in public places; a proprietary right over one's image; adapting the tort of invasion of privacy to more easily include photographs taken in public; and legislation dealing with specific situations or groups.

### 6.1 NEW ZEALAND BILL OF RIGHTS ACT 1990

Recognition in the New Zealand Bill of Rights Act 1990 of a right to privacy is one possibility. Recognition in the Act, however, is unlikely. A right to privacy was excluded from the 1985 White Paper,<sup>199</sup> because the boundaries of the right would be too uncertain and contentious.<sup>200</sup> The right was also excluded from the final Act.<sup>201</sup>

It is unclear what recognition of a privacy right in the Act would achieve. It might change nothing, or it might justify expansion of the tort to include situations like *Von Hannover*, or *Aubry* by requiring privacy and free expression to be given equal weight. Because it is impossible to tell whether protection would be enhanced, inclusion of a

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<sup>199</sup> *A Bill of Rights For New Zealand: A White Paper*, Presented to the House of Representatives by leave by the Hon. Geoffrey Palmer Minister of Justice (Wellington: Government Printer, 1985)

<sup>200</sup> *Ibid*, Paragraph 10.144.

<sup>201</sup> This exclusion was one reason that Keith J in *Hosking* did not recognise the tortious action for invasion of privacy. See *Hosking*, at [181]

privacy right in the Bill of Rights Act is not a satisfactory way to expand protection against photography in public places.

## **6.2 BANNING PUBLIC PHOTOGRAPHY**

Totally banning photography in public would constitute a huge limit on freedom of expression. A ban would inhibit journalism. Newsworthy events would often not be able to have any images accompanying the stories. There may also be a negative impact on tourism if tourists are prevented from taking photographs.

A ban would be difficult to enforce. Because of the prevalence and relative cheapness of cameras, it would be difficult to detect photography. It may also be impossible to tell whether someone is taking a photograph or sending a text message with their mobile phone. Covert photography especially would be hard to catch. A total ban might discourage “legitimate” photography, while simply forcing those who intentionally exploit people to be more careful. Enforcement issues make a total ban impractical, and the limit on freedom of expression makes it undesirable.

## **6.3 PROPRIETARY RIGHTS OVER IMAGE**

A proprietary right over image may expand protection available to those photographed or filmed in public. However, proprietary rights primarily protect commercial interests, and only by extension emotional interests. Also, because property rights are alienable, they are not the best way to grant protection. Individuals would be unable to prevent rights from being transferred to a third party.<sup>202</sup> A legal method to

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<sup>202</sup> Pamela Samuelson “A new legal paradigm? Privacy as intellectual property?” (2000) 52 *Stanford Law Review*, 1125, at 1138. This article discusses the issue in relation to personal information rather than

protect images captured in public places would be more useful if the subject of the image had an inalienable right.

Another reason against recognising a proprietary right over one's image is that the subject of a photograph has not contributed any labour. Copyright, for example, recognises individual labour. Frankel considers that the subject of a photograph has not contributed any labour and is not deserving of copyright.<sup>203</sup> Even models, who make some creative contribution, do not get a copyright in the image.<sup>204</sup> It is difficult to argue that those who contribute no creative effort should have proprietary rights.

It is far from clear that recognising a proprietary right will achieve greater protection. Prins argues that property rights in personal data would not do anything to limit the use of personal data.<sup>205</sup> Personal data always will be processed; vesting a property right would not change this.<sup>206</sup> This argument is also cogent with regard to photographs. Granting a proprietary right over image is unlikely to stop photography without consent. There are many technologies making it easy to photograph people without their knowledge. Also, the perceived value of crime prevention measures such as CCTV makes it unlikely that a proprietary right over image would be recognised. Even if it were, it is unlikely that shop-owners would stop using CCTV. They might simply make a waiver of rights a necessary prerequisite for shopping on their premises. Also, proprietary rights might inhibit publication in mainstream media, but will not inhibit

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photographs specifically. The points made however, are applicable to photographs as well as other personal information.

<sup>203</sup> Susy Frankel, "The Copyright and Privacy Nexus" (2005) VUWLR 507, 520.

<sup>204</sup> Ibid.

<sup>205</sup> J.E.J. Prins, "The propertization of personal data and identities" (2004) 8(3) *Electronic Journal of Comparative Law*, <<http://www.ejcl.org/>>.

<sup>206</sup> Ibid, 6.

publication on the Internet. Granting a proprietary right over one's image will not grant much real protection to individuals photographed in public places without their consent.

#### **6.4 EXPANDING THE TORT**

One way proposed by McClurg to expand protection against public photography is redefinition of the tort of intrusion to allow recovery for public intrusions in appropriate circumstances.<sup>207</sup> New Zealand law currently recognises tortious invasion of privacy only in respect of publication of private facts. Adoption of McClurg's suggestion would require recognition of the tort of intrusion and expansion of it in the ways suggested, or adaption of McClurg's principles to fit current law. It may be more advisable to legislate to cover particular problems as they arise, as the New Zealand privacy tort is narrow and, given its newness, unlikely to be expanded.

McClurg's redefinition of the test for invasion of privacy is posited in reaction to the failure of American courts to allow recovery for invasions of privacy that occur in publicly accessible places. McClurg lists several examples of United States cases where plaintiffs failed because the invasions of privacy occurred in places accessible to the public.<sup>208</sup> These include: footage of a woman videotaped without her knowledge while exercising at a health club being used in a commercial;<sup>209</sup> police recording and tracing the licence plate numbers of the cars of workers at a union meeting and giving their names to

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<sup>207</sup> See A. J. McClurg, "Bringing Privacy Law out of the Closet: a Tort Theory of Liability for Intrusions in Public Places" (1995) 73 *North Carolina Law Review*, 989.

<sup>208</sup> *Ibid.*, 992-994.

<sup>209</sup> *Foster v. Living Well Midwest, Inc.*, No. 88-5340, 1988 WL 134497 (6th Cir. Dec. 16, 1988).

the employer;<sup>210</sup> a photograph of three boys talking to a policewoman in the street that appeared in *Playboy* along with a nude photograph of the policewoman.<sup>211</sup>

McClurg argues for recognition of “public privacy” by expanding the United States tort of intrusion into solitude or seclusion to include a multi-factor balancing test. This would allow for recovery if an invasion of privacy takes place in public, while still giving adequate recognition to the competing interests of free social interaction and free speech.<sup>212</sup> The test proposed by McClurg for determining whether there is an actionable invasion of privacy is:<sup>213</sup>

One who intentionally intrudes, physically or otherwise, upon the private affairs or concerns of another, whether in a private physical area or one open to public inspection, is subject to liability to the other for invasion of her privacy, if the intrusion would be highly offensive to a reasonable person.

The requirement of intentional intrusion is not ideal. Photography may intrude into someone’s affairs without the photographer intending it to. Likewise it is possible to publish private facts about someone without realising they are private. Section 85(4) of the Privacy Act recognises this by providing that it is no defence to invasion of privacy that invasion was unintentional or negligent. Reasonable foreseeability might be a better test, as this could capture unintentional invasions.

McClurg’s second step, determination of whether an intrusion is highly offensive, requires a balancing of seven different factors:<sup>214</sup>

1. The defendant’s motive;

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<sup>210</sup> *International Union v. Garner*, 601 F. Supp. 187, 189, 191-92 (M.D. Tenn. 1985) (mem.).

<sup>211</sup> *Jackson v. Playboy Enters., Inc.*, 574 F. Supp. 10, 11 & n.1, 14 (S.D. Ohio 1983).

<sup>212</sup> McClurg, 1058.

<sup>213</sup> *Ibid.*

<sup>214</sup> *Ibid.*, 1058 – 1059.

2. The magnitude of the intrusion, including the duration, extent, and the means of intrusion;
3. Whether the plaintiff could reasonably be expected to be free from such conduct under the habits and customs of the location where the intrusion occurred;
4. Whether the defendants sought the plaintiff's consent to the intrusive conduct;
5. Actions taken by the plaintiff which would manifest to a reasonable person the plaintiff's desire that the defendant not engage in the intrusive conduct;
6. Whether the defendant disseminated images of the plaintiff or information concerning the plaintiff that was acquired during the intrusive act; and
7. Whether images of or other information concerning the plaintiff acquired during the intrusive act involve a matter of public interest.

This balancing test brings in factors associated with the tort of publication of private facts because, in America, that branch of the privacy tort has almost entirely been extinguished.<sup>215</sup> McClurg's factors cannot easily work within the current form of New Zealand law. Motive (point 1) could be relevant to whether publication is highly offensive. If publication is malicious, it may be easier to find that it was offensive. However, bad motive is not necessary, and should not fall for consideration unless it is relevant to the particular case.

Point 6 of McClurg's test (publication) is an essential element of the New Zealand tort, and point 7 (public interest) is a possible defence. The points that are not already part of New Zealand law deal with the manner of acquisition, or the nature of the information, rather than with highly offensive publicity. Point 3, for example, relates to location. These factors might be used in assessing "reasonable expectations" of privacy,

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<sup>215</sup> *Florida Star v B.J.F* 491 U.S. 524 (1989); discussed by McClurg at 1076 -1078. In that case the name of a rape victim was published in a Florida newspaper contrary to a statute making it unlawful to do so. The Supreme Court however outlined a test for when true speech may be punished consistent with the Constitution that is so stringent as to be almost impossible to satisfy. The material must not concern a matter of public significance; and the plaintiff must prove that the punishment of the defendant through state sanctioned tort damages is necessary to serve a state interest of the highest order.

but there are other potential factors that could indicate whether or not a reasonable expectation of privacy exists. It may be better to leave the courts to develop their own factors as cases arise.

It is difficult to advocate the adoption of another branch of the invasion of privacy tort into New Zealand law. The Court of Appeal in *Hosking* was prepared to recognise a cause of action for publication of private facts only, although they did not rule out expansion of the tort altogether. Gault J clarified that the Court was concerned only with publicity given to private facts and added: “We need not decide at this time whether a tortious remedy should be available in New Zealand law for unreasonable intrusion into a person’s solitude or seclusion.”<sup>216</sup> Invasion of privacy in New Zealand is still new, and the Court of Appeal was careful to give the tort a fairly narrow application. Also, Gault J relied on American authority in concluding that there would seldom be a reasonable expectation of privacy in public.<sup>217</sup> This weighs against the adoption of a new tort specifically to improve protection of privacy in public places.

## **6.5 AMENDMENT TO THE PRIVACY ACT 1993**

Another potential way to expand protection would be to amend the Privacy Act 1993 to make it clear that “collection” includes a photograph. IPPs 1-4 would then apply to photographs. This could allow protection against much photography in public. If harm in terms of section 66(1)(b) of the Act is caused as a consequence of the breach of an IPP then a remedy could be available.

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<sup>216</sup> *Hosking v Runtig*, at [118].

<sup>217</sup> *Ibid.*, at [164]

There will, however, still be the exemption for the news media carrying out “news activity.” Section 56 would also exempt the collection and holding of holiday photographs from being the subject of complaint.

Also, an exception to IPP 2 or 3 could apply, allowing indirect collection, or rendering compliance with the requirements in IPP3(1) unnecessary.<sup>218</sup> IPP 3(4)(d), “that compliance would prejudice the purposes of collection”, for example, could be used to photograph people without their knowledge or consent where the purpose is to get a candid, or embarrassing shot. People could still be photographed without their consent, and not informed that the photograph had been taken, by whom, for what purpose, and so on. IPP 11 also, will not be breached by publication in connection with the purpose for which the information was obtained. Photographs could still be published on voyeuristic websites, if they were collected for that purpose. Section 85 provides no power for prior restraint, so any breaches could not be prevented, only remedies awarded later.

Although redefinition of “collection” is desirable as it would expand protection against photography without consent in public, there will still be harm which cannot be remedied under the Privacy Act. There are exemptions to coverage of the Privacy Act, and specific IPPs, which could lead to much harm still not being redressed. A better solution might be legislation for specific situations. Situations, or groups identified as deserving of coverage can then have specifically tailored remedies which will apply even where the Privacy Act cannot.

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<sup>218</sup> Exceptions that might apply include IPP 3(4)(b), (d), and (e), discussed above at 2.2.1.

## 6.6 SPECIFIC LEGISLATIVE SOLUTIONS

The best solution to problems associated with the publication of photographs taken in public places is probably to legislate to cover individual problems. Groups or situations that deserve greater protection than exists could be identified, and legislation aimed to cover photography in relation to these without unduly limiting freedom of expression.

### 6.6.1 PROBLEMS ASSOCIATED WITH THE INTERNET

Legislation dealing with the potential removal of images from the Internet may run into difficulties. Issues associated with publication of photographs on-line have received attention in Australia.<sup>219</sup> One issue is that of jurisdiction.<sup>220</sup> Removal of photographs from a website may be impossible if the website operates from another jurisdiction. If the content of a website is not illegal in the country of posting, the photographs are unlikely to be removed. Child pornography is policed through co-operation between law enforcement bodies throughout the world, as most countries have some kind of offence dealing with this issue.<sup>221</sup> There would not be similar enforcement of laws relating to images taken in public places, as other countries will not have similar offences.<sup>222</sup>

Another problem with regulating the display of photographs on the Internet is that a law can easily be too broad. Take for example a proposal to ban publication online of

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<sup>219</sup> The Standing Committee of Attorneys-General, *Discussion Paper: Unauthorised Photographs on the Internet and Ancillary Privacy Issues*. (Canberra, August 2005).  
<[http://www.ag.gov.au/agd/WWW/rwpattach.nsf/VAP/\(CFD7369FCAE9B8F32F341DBE097801FF\)~8+AugInternetPhotosFinalPaperAugust05.pdf/\\$file/8+AugInternetPhotosFinalPaperAugust05.pdf](http://www.ag.gov.au/agd/WWW/rwpattach.nsf/VAP/(CFD7369FCAE9B8F32F341DBE097801FF)~8+AugInternetPhotosFinalPaperAugust05.pdf/$file/8+AugInternetPhotosFinalPaperAugust05.pdf)>(August, 2005).

<sup>220</sup> *Ibid*, jurisdictional issues are discussed in paragraphs 138 to 141 of the paper.

<sup>221</sup> *Ibid.*, paragraph 140,

<sup>222</sup> *Ibid*, paragraph 140.

pictures of young children on the Internet “without permission”.<sup>223</sup> A law like this could catch many otherwise perfectly lawful websites. Google Street View<sup>224</sup> images, for example, might coincidentally include toddlers. The particular mischief would be better addressed narrowly to prevent the law being so easily broken. It is important to keep in mind the limits of legislating to deal with publication of photographs on the Internet when exploring the possibility of expanding protection against publication of photographs in public places.

### 6.6.2 CATEGORIES DESERVING WIDER PROTECTION

Photographing accident victims could be considered offensive. In *Bathurst City Council v Saban*<sup>225</sup> Young J considered that there should be legal protection against offensive photographs, such as of someone in a “shockingly wounded condition after a road accident”.<sup>226</sup> The taking and publication of such a photograph might be distressing to the subject. After some trauma like a car accident, an individual may well be in shock. Photographing them may increase their distress. If they do not know of the photograph when it is taken, publication may still be offensive because it exposes their vulnerable state to a wide audience. In *Kaye v Robertson*<sup>227</sup> an actor was photographed in hospital with a head injury. Although the English Court of Appeal held there was no action available in English law for invasion of privacy, they were unanimous in condemning the behaviour of the defendant.

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<sup>223</sup> Lauren Weinstein discusses this issue in his blog-post of 2 August 2007. See <<http://lauren.vortex.com/archive/000264.html>> The proposal was that of some Californian legislators in reaction to concerns raised about a paedophile with no criminal record who did not physically act upon his impulses, but posted a number of photographs of children on his website along with comments about how he liked to watch young girls and advice about the best places to watch them.

<sup>224</sup> <http://maps.google.com/help/maps/streetview/>

<sup>225</sup> (1985) 2 NSWLR 704.

<sup>226</sup> *Ibid*, 708.

<sup>227</sup> (1990) 19 IPR 147.

Publication of an accident victim's photograph could also cause distress to the subject's family and friends. Although this is not direct harm to the subject, it is still a potential reason for expanding protection against the taking and publication of photographs of accident victims.

Photographs of children arguably deserve greater protection because of the harm resulting from children's exploitation for sexual gratification. The harm is often not direct. If the photograph is taken surreptitiously for instance and never published, there is no physical or mental harm to the child pictured. However, where photographs are published in a context suggestive of their use for sexual gratification this may well lead to the child (and their parents) feeling violated by the existence of the photograph. In *Rowe's* case for example, once the existence of the photographs was discovered, the schoolgirls pictured and their parents were offended that they had been taken.

There is already some protection through the Films Videos and Publications Classification Act 1994, against photographs of naked or partially naked children. These may be part of a collection. If so, the whole collection can be classified as "objectionable," and penalties imposed for possession, publication, or distribution of the images.<sup>228</sup>

As well as the offence to children, and their parents, there is harm to society caused by the exploitation of children. This is recognised through anti-child pornography laws (although there is also specific harm to the child in that context). Accessing websites

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<sup>228</sup> Section 3 Films, Videos and Publications Classification Act 1994 relates to when images can be classified as objectionable.

with pictures of children for sexual gratification may lead to physical offending.<sup>229</sup>

Photography of children, therefore, is deserving of legal regulation.

### 6.6.3 POSSIBLE REGULATION

Who may take photographs of the groups identified above, and in what circumstances the photographs can be published, could be regulated. Accident victims perhaps should have limits placed on the type of photograph of them that can be published. Photos from which an accident victim is identifiable should perhaps not be published without consent. This would reduce the possibility of causing distress. Although the BSA already deals with the broadcast of accident victims' images through the privacy principles and the good taste and decency standard, additional legislation may be desirable to extend to print media and the general public.

Another possible restriction may be that the people who may photograph accident scenes should be only police and news media. That way the use to which photographs can be put would be more easily regulated, and the photographs would be less likely to be published on the Internet.

Children might only be photographed with their parents' consent, although this would probably be too broad a prohibition, and could limit freedom of expression too greatly, as any photograph taken in public might contain children in the background. Perhaps photographers should only be those with a "legitimate purpose" such as the Court of Appeal considered lacking in *Rowe's* case.<sup>230</sup> Legitimate purpose considerations, while not relevant to offensive behaviour, could be generally relevant in relation to taking

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<sup>229</sup> New Zealand Law Commission, *Study Paper 15: Intimate Covert Filming*, at paragraph 2.34-2.38 discusses the link between voyeurism and more serious sexual crimes, with reference to studies in the United States, Canada, and the United Kingdom.

<sup>230</sup> *R v Rowe* [2005] 2 NZLR 833.

photographs of children, and publishing them. Of course, definition of “legitimate purpose” would be required. Perhaps recording newsworthy events or photography for school yearbooks might be considered “legitimate.” The exact parameters of any law to prevent photography or publication of photographs of children will require consideration so as to afford adequate protection without unduly inhibiting free expression, or being so wide as to catch completely harmless actions.

Legislation focussed on particular issues is, however, probably the best way to deal with the problems associated with photography in public places. It has the advantage of being able to directly address the harm caused without being so broad as to unduly limit competing rights such as freedom of expression. It can also have the advantage of greater clarity than common law.

## CONCLUSION

Individuals, when they venture out in public, do not expect to be under constant observation, or have their actions subject to permanent record. Consequently they tend to relax their behaviour and expressions somewhat. When people are photographed or filmed without their consent while in public, they may well feel their privacy has been invaded. Dissemination of photographs taken in public without consent exacerbates the invasion of privacy by extending the audience beyond what the person photographed would have foreseen when venturing out in public.

In New Zealand law there is currently little protection against photography in public without the subject's consent, or publication of those photographs. The Privacy Act 1993 may well not apply to the taking of photographs, and their publication or disclosure will be permissible under that Act so long as it is a purpose for which the photograph was taken, or the publisher falls under the news media exemption. If an interference with privacy does occur under the Act, there are a number of potential remedies, including compensation. Prior restraint of publication, however, is not possible.

The tort of invasion of privacy in New Zealand is too narrow to cover most photographs taken in public. For those that are covered, prevention of publication is unlikely as the Court of Appeal held that prior restraint should only be available in very limited circumstances. Damages will be the main remedy in tort.

The Broadcasting Standards Authority can award up to \$5,000 compensation for interference by a broadcaster with an individual's privacy. Most footage captured in public places will not be invasion under the Authority's privacy principles, as these contain a public place exemption. However, the exemption is not absolute, and applies

only to intrusion, so footage captured in public may occasionally be an invasion of privacy under the Authority's principles.

Criminal law covers only "up-skirt" type photography in public, although the possibility of imprisonment, and the destruction of photographs and equipment, makes the protection against this type of photography satisfactory.

There are several potential ways to expand protection against photography in public without the subject's consent. However, all these possibilities carry problems. Recognising a privacy right in the New Zealand Bill of Rights Act 1990, for example, may not achieve anything. Alternatively, a total ban on photography in public would unduly limit free expression. Amendment to the Privacy Act 1993, is one of the better possible solutions. If a photograph amounted to a "collection", many harms could be redressed that cannot be now. Some situations, however, would still have no remedy. The best way to deal with this is to identify groups or situations deserving greater protection and legislate specifically to cover these. This can enhance protection where it is desirable to do so, without creating a wide limit on freedom of expression in general, or catching behaviour that does not cause harm.

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## **Appendix A: The Privacy Act 1993 – Information Privacy Principles**

### **Section 6 Information privacy principles:**

The information privacy principles are as follows:

#### Information Privacy Principles

##### *Principle 1 Purpose of collection of personal information*

Personal information shall not be collected by any agency unless—

- (a) The information is collected for a lawful purpose connected with a function or activity of the agency; and
- (b) The collection of the information is necessary for that purpose.

##### *Principle 2 Source of personal information*

- (1) Where an agency collects personal information, the agency shall collect the information directly from the individual concerned.
- (2) It is not necessary for an agency to comply with subclause (1) of this principle if the agency believes, on reasonable grounds,—
  - (a) That the information is publicly available information; or
  - (b) That the individual concerned authorises collection of the information from someone else; or
  - (c) That non-compliance would not prejudice the interests of the individual concerned; or
  - (d) That non-compliance is necessary—
    - (i) To avoid prejudice to the maintenance of the law by any public sector agency, including the prevention, detection, investigation, prosecution, and punishment of offences; or
    - (ii) For the enforcement of a law imposing a pecuniary penalty; or
    - (iii) For the protection of the public revenue; or
    - (iv) For the conduct of proceedings before any court or [tribunal] (being proceedings that have been commenced or are reasonably in contemplation); or
  - (e) That compliance would prejudice the purposes of the collection; or

- (f) That compliance is not reasonably practicable in the circumstances of the particular case; or
- (g) That the information—
  - (i) Will not be used in a form in which the individual concerned is identified; or
  - (ii) Will be used for statistical or research purposes and will not be published in a form that could reasonably be expected to identify the individual concerned; or
- (h) That the collection of the information is in accordance with an authority granted under section 54 of this Act.

*Principle 3 Collection of information from subject*

- (1) Where an agency collects personal information directly from the individual concerned, the agency shall take such steps (if any) as are, in the circumstances, reasonable to ensure that the individual concerned is aware of—
  - (a) The fact that the information is being collected; and
  - (b) The purpose for which the information is being collected; and
  - (c) The intended recipients of the information; and
  - (d) The name and address of—
    - (i) The agency that is collecting the information; and
    - (ii) The agency that will hold the information; and
  - (e) If the collection of the information is authorised or required by or under law,—
    - (i) The particular law by or under which the collection of the information is so authorised or required; and
    - (ii) Whether or not the supply of the information by that individual is voluntary or mandatory; and
  - (f) The consequences (if any) for that individual if all or any part of the requested information is not provided; and
  - (g) The rights of access to, and correction of, personal information provided by these principles.
- (2) The steps referred to in subclause (1) of this principle shall be taken before the information is collected or, if that is not practicable, as soon as practicable after the information is collected.
- (3) An agency is not required to take the steps referred to in subclause (1) of this principle in relation to the collection of information from an individual if that agency has taken those steps in relation to the collection, from that individual, of the same information or information of the same kind, on a recent previous occasion.

- (4) It is not necessary for an agency to comply with subclause (1) of this principle if the agency believes, on reasonable grounds,—
- (a) That non-compliance is authorised by the individual concerned; or
  - (b) That non-compliance would not prejudice the interests of the individual concerned; or
  - (c) That non-compliance is necessary—
    - (i) To avoid prejudice to the maintenance of the law by any public sector agency, including the prevention, detection, investigation, prosecution, and punishment of offences; or
    - (ii) For the enforcement of a law imposing a pecuniary penalty; or
    - (iii) For the protection of the public revenue; or
    - (iv) For the conduct of proceedings before any court or [tribunal] (being proceedings that have been commenced or are reasonably in contemplation); or
  - (d) That compliance would prejudice the purposes of the collection; or
  - (e) That compliance is not reasonably practicable in the circumstances of the particular case; or
  - (f) That the information—
    - (i) Will not be used in a form in which the individual concerned is identified; or
    - (ii) Will be used for statistical or research purposes and will not be published in a form that could reasonably be expected to identify the individual concerned.

*Principle 4 Manner of collection of personal information*

Personal information shall not be collected by an agency—

- (a) By unlawful means; or
- (b) By means that, in the circumstances of the case,—
  - (i) Are unfair; or
  - (ii) Intrude to an unreasonable extent upon the personal affairs of the individual concerned.

*Principle 5 Storage and security of personal information*

An agency that holds personal information shall ensure—

- (a) That the information is protected, by such security safeguards as it is reasonable in the circumstances to take, against—
  - (i) Loss; and

- (ii) Access, use, modification, or disclosure, except with the authority of the agency that holds the information; and
  - (iii) Other misuse; and
- (b) That if it is necessary for the information to be given to a person in connection with the provision of a service to the agency, everything reasonably within the power of the agency is done to prevent unauthorised use or unauthorised disclosure of the information.

*Principle 6 Access to personal information*

- (1) Where an agency holds personal information in such a way that it can readily be retrieved, the individual concerned shall be entitled—
  - (a) To obtain from the agency confirmation of whether or not the agency holds such personal information; and
  - (b) To have access to that information.
- (2) Where, in accordance with subclause (1)(b) of this principle, an individual is given access to personal information, the individual shall be advised that, under principle 7, the individual may request the correction of that information.
- (3) The application of this principle is subject to the provisions of Parts 4 and 5 of this Act.

*Principle 7 Correction of personal information*

- (1) Where an agency holds personal information, the individual concerned shall be entitled—
  - (a) To request correction of the information; and
  - (b) To request that there be attached to the information a statement of the correction sought but not made.
- (2) An agency that holds personal information shall, if so requested by the individual concerned or on its own initiative, take such steps (if any) to correct that information as are, in the circumstances, reasonable to ensure that, having regard to the purposes for which the information may lawfully be used, the information is accurate, up to date, complete, and not misleading.
- (3) Where an agency that holds personal information is not willing to correct that information in accordance with a request by the individual concerned, the agency shall, if so requested by the individual concerned, take such steps (if any) as are reasonable in the circumstances to attach to the information, in such a manner that it will always be read with the information, any statement provided by that individual of the correction sought.
- (4) Where the agency has taken steps under subclause (2) or subclause (3) of this principle, the agency shall, if reasonably practicable, inform each person or body or agency to whom the personal information has been disclosed of those steps.

- (5) Where an agency receives a request made pursuant to subclause (1) of this principle, the agency shall inform the individual concerned of the action taken as a result of the request.

*Principle 8 Accuracy, etc, of personal information to be checked before use*

An agency that holds personal information shall not use that information without taking such steps (if any) as are, in the circumstances, reasonable to ensure that, having regard to the purpose for which the information is proposed to be used, the information is accurate, up to date, complete, relevant, and not misleading.

*Principle 9 Agency not to keep personal information for longer than necessary*

An agency that holds personal information shall not keep that information for longer than is required for the purposes for which the information may lawfully be used.

*Principle 10 Limits on use of personal information*

An agency that holds personal information that was obtained in connection with one purpose shall not use the information for any other purpose unless the agency believes, on reasonable grounds,—

- (a) That the source of the information is a publicly available publication; or
- (b) That the use of the information for that other purpose is authorised by the individual concerned; or
- (c) That non-compliance is necessary—
  - (i) To avoid prejudice to the maintenance of the law by any public sector agency, including the prevention, detection, investigation, prosecution, and punishment of offences; or
  - (ii) For the enforcement of a law imposing a pecuniary penalty; or
  - (iii) For the protection of the public revenue; or
  - (iv) For the conduct of proceedings before any court or [tribunal] (being proceedings that have been commenced or are reasonably in contemplation); or
- (d) That the use of the information for that other purpose is necessary to prevent or lessen a serious and imminent threat to—
  - (i) Public health or public safety; or
  - (ii) The life or health of the individual concerned or another individual; or

- (e) That the purpose for which the information is used is directly related to the purpose in connection with which the information was obtained; or
- (f) That the information—
  - (i) Is used in a form in which the individual concerned is not identified; or
  - (ii) Is used for statistical or research purposes and will not be published in a form that could reasonably be expected to identify the individual concerned; or
- (g) That the use of the information is in accordance with an authority granted under section 54 of this Act.

*Principle 11 Limits on disclosure of personal information*

An agency that holds personal information shall not disclose the information to a person or body or agency unless the agency believes, on reasonable grounds,—

- (a) That the disclosure of the information is one of the purposes in connection with which the information was obtained or is directly related to the purposes in connection with which the information was obtained; or
- (b) That the source of the information is a publicly available publication; or
- (c) That the disclosure is to the individual concerned; or
- (d) That the disclosure is authorised by the individual concerned; or
- (e) That non-compliance is necessary—
  - (i) To avoid prejudice to the maintenance of the law by any public sector agency, including the prevention, detection, investigation, prosecution, and punishment of offences; or
  - (ii) For the enforcement of a law imposing a pecuniary penalty; or
  - (iii) For the protection of the public revenue; or
  - (iv) For the conduct of proceedings before any court or [tribunal] (being proceedings that have been commenced or are reasonably in contemplation); or
- (f) That the disclosure of the information is necessary to prevent or lessen a serious and imminent threat to—
  - (i) Public health or public safety; or
  - (ii) The life or health of the individual concerned or another individual; or
- (g) That the disclosure of the information is necessary to facilitate the sale or other disposition of a business as a going concern; or
- (h) That the information—
  - (i) Is to be used in a form in which the individual concerned is not identified; or
  - (ii) Is to be used for statistical or research purposes and will not be published in a form that could reasonably be expected to identify the individual concerned; or

- (i) That the disclosure of the information is in accordance with an authority granted under section 54 of this Act.

*Principle 12 Unique identifiers*

- (1) An agency shall not assign a unique identifier to an individual unless the assignment of that identifier is necessary to enable the agency to carry out any one or more of its functions efficiently.
- (2) An agency shall not assign to an individual a unique identifier that, to that agency's knowledge, has been assigned to that individual by another agency, unless those 2 agencies are associated persons within the meaning of [section OD 7 of the [[Income Tax Act 2004]] ].
- (3) An agency that assigns unique identifiers to individuals shall take all reasonable steps to ensure that unique identifiers are assigned only to individuals whose identity is clearly established.
- (4) An agency shall not require an individual to disclose any unique identifier assigned to that individual unless the disclosure is for one of the purposes in connection with which that unique identifier was assigned or for a purpose that is directly related to one of those purposes.

## **Appendix B: The Broadcasting Standards Authority – Privacy Principles**

1. It is inconsistent with an individual’s privacy to allow the public disclosure of private facts, where the disclosure is highly offensive to an objective reasonable person.
2. It is inconsistent with an individual’s privacy to allow the public disclosure of some kinds of public facts. The ‘public’ facts contemplated concern events (such as criminal behaviour) which have, in effect, become private again, for example through the passage of time. Nevertheless, the public disclosure of public facts will have to be highly offensive to an objective reasonable person.
3. (a) It is inconsistent with an individual’s privacy to allow the public disclosure of material obtained by intentionally interfering, in the nature of prying, with that individual’s interest in solitude or seclusion. The intrusion must be highly offensive to an objective reasonable person  
(b) In general, an individual’s interest in solitude or seclusion does not prohibit recording, filming, or photographing that individual in a public place (‘the public place exemption’)  
(c) The public place exemption does not apply when the individual whose privacy has allegedly been infringed was particularly vulnerable, and where the disclosure is highly offensive to an objective reasonable person.
4. The protection of privacy includes the protection against the disclosure by the broadcaster, without consent, of the name and/or address and/or telephone number of an identifiable individual, in circumstances where the disclosure is highly offensive to an objective reasonable person.
5. It is a defence to a privacy complaint that the individual whose privacy is allegedly infringed by the disclosure complained about gave his or her informed consent to the disclosure. A guardian of a child can consent on behalf of that child.
6. Children’s vulnerability must be a prime concern to broadcasters, even when informed consent has been obtained. Where a broadcast breaches a child’s privacy, broadcasters shall satisfy themselves that the broadcast is in the child’s best interests, regardless of whether consent has been obtained.
7. For the purpose of these Principles only, a ‘child’ is defined as someone under the age of 16 years. An individual aged 16 years or over can consent to broadcasts that would otherwise breach their privacy.

8. Disclosing the matter in the 'public interest', defined as of legitimate concern or interest to the public, is a defence to a privacy complaint.

*Note:*

- These principles are not necessarily the only privacy principles that the Authority will apply
- The principles may well require elaboration and refinement when applied to a complaint
- The specific facts of each complaint are especially important when privacy is an issue

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