INCLUDING PRIVACY IN A MODERN CONSTITUTION

Joy Liddicoat, 13 December 2017

A recent project of Sir Geoffrey Palmer and Dr Andrew Butler proposes “a modern constitution that is easy to understand, reflects New Zealand’s identity and nationhood, protects rights and liberties, and prevent governments from abusing power.”

A written constitution for New Zealand has been debated for many years. While we aren’t constitutional experts, we do think that if there is to be a written constitution, a right privacy must be included.

It might sound incredible, but a general right to privacy was not included in the New Zealand Bill of Rights Act 1990 because it was considered “inappropriate…to attempt to entrench a right that is not be any means fully recognised now, which is the course of development, and whose boundaries would be uncertain and contentious” (A Bill of Rights for New Zealand: A White Paper 1988).

Such last century thinking is hard to understand today. Our survey results show that New Zealanders value their right to privacy in daily life, including their right to be let alone to be free from unwanted intrusion by others, to control their personal information and to protect their bodily integrity, individuality and human dignity.

CURRENT PROTECTIONS

The right to privacy is currently protected across many laws in New Zealand. The diversity of these protections reflects the very broad themes, concepts and values that the right to privacy embodies.

Examples of current privacy protections range across the Fencing Act, broadcasting standards, health and disability consumer rights, criminal protections such as freedom from unreasonable search and seizure and protection of personal information in the Privacy Act.
We can see that the right to privacy is an enduring concern for New Zealanders and has been recognised as a fundamental human right that the law should protect.

The right to privacy propose in clause 92 of the draft constitution is:

\[ \text{… the right not to be subject to arbitrary or unlawful interference with that person’s privacy, family, home or correspondence.} \]

This could strengthen the right to privacy in three ways: visibility, scrutiny and accountability through the different roles of the Courts, Parliament and the Executive. The absence of a right to privacy could have the unintended consequence of suggesting a hierarchy of rights, giving privacy secondary status to other rights that are explicitly protected.

A gap in constitutional privacy protection can be seen in new laws with bespoke information sharing rules sitting outside the Privacy Act (for example, in the areas of family violence or children at risk). Assessment of these is limited because there is no explicit right to privacy in the Bill of Rights Act against which the Attorney-General must scrutinise new legislation.

Constitutional protection may also drive better policy. Our recent inquiry into the collection of individual client level data by the Ministry of Social Development is a clear example of how an agency can lose the trust and confidence of New Zealanders when data collection is disproportionate and excessive.

Changes in technology are just one context for the right to privacy today. The fundamental rights of access to personal information remain of enduring importance to many people. Each year, for example, we receive more than 7,000 enquiries and investigate between 700 and 800 complaints about rights to personal information and interferences with privacy.

The reality is that many public and private sector agencies still struggle to fulfil their obligations to collect, store, use, not disclose and to delete the personal information they hold. Getting privacy right is not an ivory tower issue for constitutional theorists.

Finally, a constitutional right to privacy would strengthen New Zealand’s privacy laws and could have benefits for New Zealand’s international standing and international trade. This would also help to answer concerns that the current arrangements are insufficient to defend the right to privacy.
and help weigh it in the balance of other rights, such as freedom of expression. The section 5 analysis that constitutional protection would bring will help ensure that remedies are contextual, depending on the specific circumstances of each case.