The tapu of privacy: privacy through a tikanga lens.

Mihi

[1] Ko te whakāro tuatahi māku ki a Tā Bruce Slane, he tipua o te ture, he kuru pounamu, ka tino nui te mana, nā reira, nau mai, haere e te rangatira, haere, haere atu rā.

[2] Ki a tātou te hunga ora, ngā mihi ki a koutou.

[3] Ā, me mihi ki te whanau o Tā Bruce Slane. Ka tino nui te whakahirahira o te kaupapa nei, ko te whakanui tō pāpā.

[4] Ka mihi hoki ki ngā kaiwhakahaere o te wananga nei. Ngā mihi nui ki a koutou i o koutou manaakitanga mai.

[5] Ka mutu, ki koutou katoa kui huihui mai nei, ka nui te whakawhetai i o koutou tautoko mai.

Acknowledgment

[6] I commence by acknowledging Sir Bruce Slane, a taonga of the law, and his family. I also want to thank the Office of the Privacy Commissioner for giving me this opportunity to speak on two topics of considerable interest to me, tikanga and privacy, and in particular to speak to what I have called the tapu of privacy. This speech forms one of a number in which I hope to share my knowledge of tikanga as a framework and to provide insight into tikanga as law. The **object here is not to advocate a particular direction of travel,** but to help lay the foundations for what we call maramatanga or genuine understanding in te Ao Māori.

Thesis

[7] My central thesis is this:[1] **[slide]**

(a) First, tapu and privacy share a very similar starting point, that is a **common concern** for the inherent worth of a person, what is referred to as "mauri" in te Ao Māori.[2]

(b) Second, tapu, like privacy, is the manifestation of the **duty** to protect and sustain that worth.

(c) Third, where relevant, tapu and privacy may provide a **mutually reinforcing basis** for the further incremental development of the privacy torts.[3]

(d) Fourth, I offer some views, **theoretical** only, on what that might mean at the end of this speech.

[8] But in brief I am **not** here suggesting that tapu automatically creates free standing rights enforceable in the law (though I do not discount that possibility). Rather, my primary claim is that a tikanga based tapu analytical framework may usefully **inform** what Professor Moreham has called privacy's **normative** inquiry into *what* **should** be protected and *from what*.

---

1 I want to acknowledge the assistance I have received in preparing this paper from Justice Layne Harvey, Justice Rebecca Edwards, Associate Professor Khylee Quince, Jayden Houghton and Aoife Hyland in preparing this paper.

2 See on inherent worth and dignity: *Hyndman v Walker* [2021] NZCA 25 at [31] and [70]; *Peters v Attorney-General* [2021] NZCA 355 at [88]; and *C v Holland* [2012] NZHC 2155 at [19]–[20].

3 As Quince and Houghton explain, the concept of privacy is analogous to the tikanga concept of tapu. See Khylee Quince and Jayden Houghton "Privacy and Māori Concepts" in Nikki Chamberlain and Stephen Penk (eds) Privacy Law in New Zealand (3rd ed, Thomson Reuters, Wellington, 2023) 38 at [2.1]–[2.2].

[9] **[Slide]** Importantly, the tapu analytical framework identifies **protected domains** with corresponding obligations to protect and expectations of protection. Concepts of **reasonableness** and **offensiveness have no or limited role to play** in this framework, and the **public / private** spatial divide may not be significant.

[10] These domains may, by way of potential example only, include **vulnerable** states, **intimate** spaces and information that carries **whakapapa**, including information of biometric significance. It also recognises **processes and purposes that may enable or justify intrusion** and thereby provide methods for achieving balance between competing values.

Background

[11] I start with some basics. There are two linked forms of privacy tort in New Zealand:

(a) the tort of publication of private facts, commonly known as the *Hosking* or publication tort;[4] and

(b) the tort of intrusion into seclusion.[5]

[12] The *Hosking* or publication tort has two fundamental requirements:[6]

(a) The existence of facts in respect of which there is **a reasonable expectation of privacy**.

---

4 *Hosking v Runting* [2005] 1 NZLR 1 (CA).
5 *C v Holland* [2012] NZHC 2155, [2012] 3 NZLR 672.
6 *Hosking v Runting*, above n 4, at [117].

(b) Publicity given to those private facts that would be considered **highly offensive** to an **objective reasonable person**.

[13] The intrusion tort largely follows the Hosking tort. It requires:[7]

(a) an intentional and unauthorised intrusion;

(b) into seclusion (namely intimate personal activity, space or affairs);

(c) involving infringement of a **reasonable expectation** of privacy;

(d) that is **highly offensive** to a reasonable person.

[14] While much has been said about privacy, Justice Keith's metaphor of the law of privacy as that "ridiculous mouse" continues to fairly describe the relative insignificance of privacy as an actionable tort in the **common law**.[8] *Hosking* remains the high point of common law recognition and as far as I can tell, there have been only two successful privacy tort claims in the Senior Courts since, in *Holland* in 2012 and *Henderson v Walker* in 2019.[9]

[15] But, as Justice Winkelmann foreshadowed in the inaugural Sir Bruce Slane Memorial Lecture, privacy is an area in which further

---

7 *C v Holland*, above n 5, at [94].

8 *Hosking v Runting*, above n 4, at [216] per Keith J.

9 *Henderson v Walker* [2019] NZHC 2184. See *Hyndman v Walker*, above n 2, at [39]–[47] referring to *Television New Zealand Ltd v Rogers* [2007] NZSC 91; *Andrews v Television New Zealand Ltd* [2009] 1 NZLR 220; *Grant v Everett* [2022] NZHC 3109; *Dew v Discovery NZ Ltd* [2023] NZCA 589; *A v Hunt* (Contempt) [2006] NZAR 577 (compare *Brown v Attorney-General* [2006] NZAR 552 (DC)); and *Peters v Attorney-General*, above n 2.

development is inevitable,[10] and it can be said that the influence of privacy as a common law value has found growing indirect expression in recent years, exemplified most recently in *Tamiefuna v R* — a decision I will return to shortly.[11]

[16] Running alongside this slow yet inevitable evolution, tikanga has emerged from a **long sleep** so that, where relevant, tikanga values may inform the development of the common law and tikanga is now recognised a potential source of common law rights.[12] The potential for tikanga to provide a further analytical framework for privacy was also foreshadowed by Justice Winkelmann in the same speech,[13] and by Associate Professor Quince and Jayden Houghton in their account of privacy and tapu in the Privacy Law text.[14]

[17] I propose to explore that potential in this lecture. To this end I will:

(a) provide a brief account of privacy as a **common law** value in New Zealand;

(b) examine privacy through **a tikanga lens** — that is from within the wharenui; and

(c) offer a view on how tikanga **might safely interact with** the common law of privacy.

---

10 Helen Winkelmann, Judge of the Court of Appeal of New Zealand (Sir Bruce Slane Memorial Lecture, Victoria University of Wellington, 30 October 2018) at 23.
11 *Tamiefuna v R* [2025] NZSC 40, [2025] 1 NZLR 216.
12 *Ellis v R* [2022] NZSC 114, [2022] 1 NZLR 239.
13 Winkelmann, above n 10, at 3.
14 Quince and Houghton, above n 3.

Privacy as a common law value [slide]

> It is not the breaking of his doors, and the rummaging of his drawers, that constitutes the essence of the offense; but it is the *invasion of his indefeasible right of personal security, personal liberty and private property,* where that right has never been forfeited by his conviction of some public offence, — it is the invasion of this sacred right which underlies and constitutes the essence of Lord Camden's judgment [in *Entick v Carrington*].
>
> *Boyd v United States* (SC)[15]

[18] As Justice Winkelmann noted in her lecture, **two analytical frameworks** underpin the privacy norm: the liberty framework and the human dignity framework. The former emphasises the importance of freedom from interference from others,[16] while the latter lionises the ability to keep private our bodies by maintaining control over them, and the basic idea that to keep private information about ourselves is essential to dignity.[17]

[19] Since then there have been a trio of privacy cases that reached the Court of Appeal in which the privacy norm, and its underpinning frameworks have been explained. The Court of Appeal in *Hyndman v Walker* observed that:[18]

> [31] The tort is aimed at publicity given to private facts. It is generally accepted that the tort is founded on a person's *inherent dignity*, and often times *personal autonomy,* and is a constraint on others' right to freedom of expression.

---

15 *Boyd v United States* 116 US 616 (1886) at 630.
16 Winkelmann, above n 10, at 5–6.
17 At 3.
18 *Hyndman v Walker*, above n 2, at [31] (footnotes omitted, emphasis added).

[20] The Court of Appeal in *Peters v Attorney-General* linked the privacy norm to liberty in these terms:[19] **[Slide]**

> [88] Privacy is essential to human dignity and autonomy. Privacy is also important to liberty: to freedom of thought, freedom of religion, and freedom from unreasonable search and seizure. Hence the importance of legal protection of privacy, as recognised in international human rights instruments and in domestic law.

[21] Both Courts were invited to examine whether the **highly offensive** threshold requirement remained good law, and both refused to do so. They emphasised the conflicting demands of privacy and freedom of speech and the corresponding the need for caution in formulating the privacy tort.[20] The "highly offensive" test thus remains the default threshold in privacy claims.

[22] An evident feature of both cases is the adoption of what **Professor Moreham** calls a **"normative inquiry"** into a reasonable expectation of privacy protection.[21] The *Peters* Court identified the following elements of this inquiry:[22] **[slide]**

(a) What a person is entitled to expect in the circumstances in question?

(b) Protection of what, and from what?

(c) It is necessarily contextual — how would reasonable people respond to the disclosure?

---

19 *Peters v Attorney-General*, above n 2, at [88].
20 *Hyndman v Walker*, above n 2, at [3]; and Peters v Attorney-General, above n 2, at [115].
21 N A Moreham "Unpacking the Reasonable Expectation of Privacy Test" (2018) 134 LQR 651 at 655.
22 *Peters v Attorney-General*, above n 2 at [107]–[108].

(d) What is the particular disclosure in issue?

[23] The **purpose** of the disclosure was also identified as another key metric, the Court in *Peter*s noting that:[23]

> [119] … Just as there may be good reason for excluding liability in respect of disclosure to the public, where the public has **a legitimate interest in receiving the information,** so too liability in respect of a more confined disclosure should be excluded where the recipient(s) have a legitimate interest in receiving the information.

[24] Similarly, the Court of Appeal in *Dew v Discovery NZ Limited,* rejected a claim that a television programme's reference to an ongoing police investigation amounted to an interference with a reasonable expectation of privacy. Rather the Court said the rights of the parties fall to be considered on the basis of the right to freedom of speech and protections afforded by the law of defamation.[24]

[25] It is perhaps not surprising then that the privacy claims in all three Court of Appeal cases failed. And, with that, the imagery of the **"ridiculous mouse"** comes to mind given the **apparent ineffectiveness** of the privacy norm in the face of legitimate interest in publishing and receiving information. Part of the reason for that may be that the threshold for claim has been set too high. Indeed, it might fairly be queried whether there really is an indefeasible and sacred right to be let alone at all if another person's "legitimate" interest in your private self is enough to defeat it?

---

23 *Peters v Attorney-General*, above n 2, at [119].
24 *Dew v Discovery NZ* [2023] NZCA 589

[26] However, against this reflection on the privacy norm in tort law, there is another field of law, **search and surveillance**, where the privacy mouse has undergone what some might describe as a **gorilla-like** incarnation. I am referring here in particular to the recent Supreme Court decision in *Tamiefuna*.

Tamiefuna

[27] In *Tamiefuna* a majority found that photos taken on a public footpath at a traffic stop and subsequently used as evidence in relation to later alleged offending constituted an unreasonable search and that the photos were not admissible.

[28] The majority, in finding that there was an unreasonable search in breach of s 21 of the NZBORA and that the photos were inadmissible, relied heavily on the concept of privacy as well as the primary rule of recognition, namely whether there was "a reasonable expectation of privacy that was intruded upon".[25] The majority affirmed that the reasonable expectation of privacy is directed at protecting:[26] **[slide]**

> [20] … "a biological core of personal information which individuals in a free and democratic society would wish to maintain and control from dissemination [to] the state".

[29] The majority focused their analysis on the place where the information was obtained, the manner in which the information was obtained, the nature of the information and the use to which the information was to be put. For my purposes today, I want to highlight that the majority took a **strongly normative approach** to the issues of place and use. In other words they focused on the **why** of it all — why is privacy

---

25 *Tamiefuna v R*, above n 11, at [16].
26 *R v Alsford* [2017] NZSC 42 as cited in *Tamiefuna v* R, above n 11, at [20].

important and why is the intrusion happening. The Court found that the taking of photos was "state action confronting Mr Tamiefuna unexpectedly and preventing him from continuing on his way."[27]

[30] The Court also reasoned that: [28]

(a) firstly, even though he was on a public road, it remained important to preserve a **sufficient zone** of privacy as part of preserving the **fundamentals** of a liberal democracy; and

(b) Secondly, **the use** to which the information was to be put is relevant to the intrusiveness of the search given the sensitivity of the information and its status as a repository of biometric information.

[31] The Court also concluded that the nature of the information, which is both personal and biometric, supported a **reasonable expectation of privacy** for the purposes of s 21.[29] These same reasons were also said to support a finding that the search was unreasonable.[30]

[32] In contrast, the minority judgment of Justice Glazebrook is notable for not linking expectations of privacy to state intrusion, and finding that there could be no expectation of privacy on a public footpath.[31] Justice Kós also found that it was not a search by reference to the *Hosking* principles, but he also observed that the reasonable expectations could nevertheless **"trench on use",** if not the capture of the information.[32]

---

27 *Tamiefuna v R*, above n 11, at [29].
28 *Tamiefuna v R*, above n 11, at [31]-[40].
29 At [52]–[55].
30 At [56]–[57].
31 See at [229] and [233] per Glazebrook J.
32 At [317]–[319] and [320] per Kós J.

[33] While none of the judgments refer in their reasons to the intrusion principles stated in *Holland*, Justice Kós refers to them in a footnote, observing that the principle established there was that intrusion into personal space would only be an actionable breach of privacy if it involved "intimate personal activity".[33]

[34] In any event, the reasoning of the majority and Justice Kós marks an important application of privacy values in the common law. Or perhaps it might be better explained as an example of the law returning to its roots, a **reinvigoration** of the principle laid out in *Entick v Carrington* and what has come to be known as the right to be let alone, at least, by the State.

[35] Overall then, the leading authorities affirm that privacy is a value of the common law directed at its core to the protection of inherent dignity and personal autonomy corresponding to the **indefeasible** right to be protected from **unauthorised state intrusion**. Whether a plaintiff has a reasonable expectation of privacy is a **normative enquiry** into what privacy protection a person can expect the law to provide.

The tikanga lens

[36] I turn then to the tikanga lens and the potential for a tikanga analytical framework within the common law of privacy.

[37] Before I go further I also want to acknowledge again the work of Quince and Houghton in their discussion about tapu and privacy.[34] I draw liberally on their work in forming my own views.

---

33 At [317] n 396.
34 Quince and Houghton, above n 3.

Mauri, Mana, Tapu and Noa

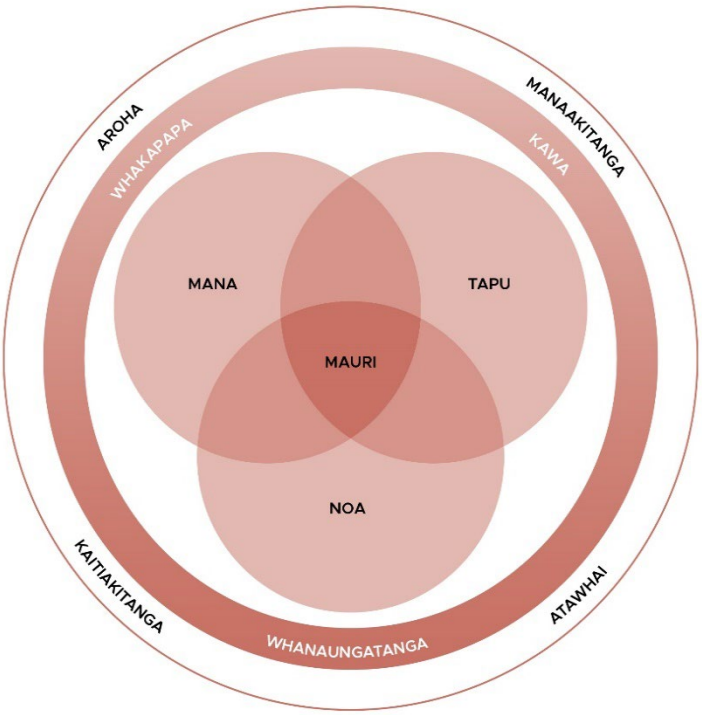
> Mauri is like a purposefulness, a design, a will to fulfil. Our mauri emerges from the many facets of our being: from our spiritual reality and philosophical underpinnings; from our intelligence; from our emotions; and from our physical desires. It is a driving force that generates wilfulness and zeal, and at times, obsession.[35]
>
> Tamati Kruger

[38] I commence with a very brief account of some fundamental values, assuming they will be familiar to you. First, the idea of **protecting the inherent worth** of a person is one of the most fundamental values within te Ao Māori. This inherent worth is encapsulated by the concept of **mauri**. Mauri commonly refers to the spark of life, but also refers to the essence of a thing, animate or inanimate, sourced in the atua, that both defines its special character and at the same time links it through wairua (spirit) to all other things. It is thus existential in character and makes the demand for its protection. For those of you who have grown up with Star Wars, in a way, mauri is like The Force.

[39] How that demand is met involves the polycentric interaction of an amalgam of values and norms, each reinforcing the others, and vindicated by clear rules or proscriptions for engagement. I have reproduced here a diagram illustrating this amalgam: **[slide]**

---

[35] Waitangi Tribunal *The Report on the Management of the Petroleum Resource* (2011, Legislation Direct, Wellington) at 28.



[40] Located at the centre is mauri, enveloped by three equally fundamental norms: mana, tapu and noa. For my purposes, these concepts are descriptive of a condition or state of being and denote a corresponding jural status. In the present context: **[slide]**

(a) **Mana** here refers to power and authority (both inherited and acquired) in respect of people, place, objects, and processes and corresponding responsibilities. Mana is key to identity, self-worth and thus to sustaining mauri.

(b) **Tapu** speaks to the inherent worth, alongside mana and mauri, of all aspects of creation, with corresponding restrictions to protect that worth. In my view they manifest themselves in the form of a right to protection and correlated

duty to protect. The protective function of tapu was described by Mead as a personal force field.[36]

(c) **Noa** denotes freedom from restriction and the power to remove restriction, including tapu. Following proper processes, the restriction can be moderated so that a state of noa is reached and engagement is safe and appropriate.

[41] Framing these core values are whakapapa and whanaungatanga. Most relevantly, it is whakapapa that lays the foundation for and thus defines and links a person's mana, tapu and noa aspects, and what we might call their rights, powers, duties, liabilities and freedoms that attach to those aspects.

[42] **Whanaungatanga** then speaks to the universal obligation to maintain connection in all we do. This obligation to maintain connection is fundamental to the tikanga jural scheme. Indeed, it can be said that there is **no inherent worth without this connection**.[37]

[43] Absent from this picture, but critical to understanding how tikanga works, are the duties or demands that sit alongside mauri, namely **utu and ea** — that is the obligation to reciprocate and to strive for balance. Mauri is closely connected to these ideas, because to adversely affect the mauri is to greatly unsettle the balance between all things.

---

36 Hirini Moko Mead *Tikanga Māori*: *Living by Māori Values* (rev ed, Huia Publishers, Wellington, 2016) at 51.

37 Wiremu Doherty, Hirini Moko Mead and Pou Temara "Tikanga" in Law Commission He Poutama (NZLC SP24, 2023) Appendix 1.

[44] As explained by Quince and Houghton:[38] **[slide]**

> The overall normative ideal in tikanga is for people to coexist in a state of balance and harmony with all of the other elements in the universe.

[45] And further:[39]

> The system works together: when tapu is breached, it is mana that is affected, and this calls for utu to restore balance.

[46] They also described tapu as the principle means by which to protect an object. They say:[40]

> For people then, the operation of tapu serves to guard a person's mauri by controlling their activity.

[47] Here Quince and Houghton refer to tapu both as a descriptor of a state of being, normatively linked to the protection of mauri, and as a category of law, the breach of which demands an expected response to restore balance. I agree with this.

Privacy and tapu

[48] What then would privacy look like within this tikanga framework? Protection from intrusion into seclusion for the purpose of sustaining the inherent dignity of a person is **analogous to tikanga's duty** to sustain the mauri, mana and tapu of a person. The literal effect of the privacy norm is to provide **a zone free from intrusion** that mirrors tapu's proscription — tapu's personal force field to use Mead's descriptor.

---

38 Quince and Houghton, above n 32, at [2.2.2(2)].
39 At [2.2.2(6)].
40 At [2.2.3].

[49] As Quince and Houghton also succinctly put it:[41] **[slide]**

> Personal privacy – or tapu – is underpinned by the recognition of the value of each human life in te ao Māori, and an individual's sanctity derives from that sense of worth. This provides for a normative inviolability of the person that should not be breached by harmful action or words.

[50] However, while the tikanga of tapu logically applies to secure privacy in the sense of an inviolable personal domain, **the application of tapu of this kind has vastly greater reach**, while at the same time with more definite, almost **strict liability** rules for its application for some types of tapu. This is because all aspects of creation have mauri, mana and tapu, as descriptors of a state of being, giving rise to a strict form of restriction, and corresponding specific obligations to protect.

[51] For example tapu attached to **the inherent worth and sacrality** or mauri can be found in multiple contexts, including in addition to the protection from intrusion into intimate space and of personal information: engagement between peoples (in public or private spaces); engagement between the physical and spiritual realms; in the performance of tasks (for example construction of wharenui, cultivation and food production); in dealing with deceased and the deceased's family; in the protection of the environment, and in the protection of whakapapa (of all things). In some contexts, in a literal sense, the very books that contain whakapapa records are tapu and cannot be handled around kai — food being noa.

[52] Attached to each of these applications of tapu will be a deep, rich whakapapa or layers of information clearly defining the characteristics of the object of the tapu that mandate its imposition. Ordinarily, **the rules**

---

41 At [2.2.5].

for that application will be clear and well known. Application of tapu proscription will rarely if ever be a simple matter of subjective evaluation or an assessment of whether an individual subjective reasonably believes that tapu is operative. It will invariably be a matter of the **application of clear rules to specific contexts**. I accept that there may be cases where the boundaries of the tapu are difficult to define in strict real terms — the MACA case law is filled with debates about this. But at the scale we are discussing, dealing with issue of personal privacy, the nature and extent of the tapu are capable of workable application in the law.

[53] In any event, the values underpinning **privacy and personal tapu are sufficiently similar** that privacy is amenable to recognition within a tikanga framework and to safe cohabitation with tikanga norms. Significantly, privacy protection is not dependant on property rights (though property is one manifestation of it).[42] This is important. **Privacy's focus on inherent worth** is readily amenable to a **cohesive** application within or alongside tikanga.

[54] However, as foreshadowed, there is an important potential point of divergence: **the overarching duty of whanaungatanga**. This has multiple aspects. It may bear on **what is in fact personal or private** because of inherent significance of an individual's mana and mauri to the mana and mauri of their whānau.[43] It may bear on the significance of the breach of personal tapu given the corresponding effect that will have on the whānau. It may also have countervailing significance in terms of bringing directly into frame the importance of the collective good. All of this inevitably bears on how tapu functions and the corresponding rules

---

42 Afterall, *Entick v Carrington* was essentially a trespass case.
43 At [2.2.5].

governing relationships between all things, and this will affect any conception of reasonable expectation of protection from intrusion within Māori communities.

[55] This is not to suggest that personal integrity, encapsulated in aspects of mana and tapu, must always yield to the whānau or community. That would be to miss the important point that maintaining the mana and tapu of the individual is integral to sustaining the mana and mauri of the whānau and community. That would also misinterpret the proper function of tapu, namely, to provide a force field or in jural terms an obligation to protect, and an immunity, in most contexts, from interference, including by those in authority. The mana and tapu of the child for example is a paramount consideration in tikanga too. So, **even persons of great mana and authority tread carefully when personal tapu is engaged**. Any intrusion must be justified or utu will be expected to ensure the correct balance is maintained.

[56] Finally, there is the **concept of noa** in this context. Within tikanga there is power to remove, suspend or moderate tapu, sometimes referred to as **whakanoa.** This power inheres in some, for example the inherent power of women to remove tapu. The ability to remove or abate tapu in particular contexts is vital to existence, because people cannot survive in a constant state of tapu. For this reason there are sophisticated processes or kawa for the management of tapu, including personal tapu. For example, the building of a wharenui involves the exclusion of women on site during construction. However, once the building ritually opened, it is a woman or puhi who must enter first, to remove the tapu placed over the site while the house was being built. This practice underscores the power of women to remove tapu in certain circumstances.

[57] In summary, privacy as a value attached to the protection of the integrity and autonomy of the person accords **with the duty** in tikanga to protect mauri and mana expressed through the concept of tapu. This is a matter of obligation, not discretion.

Tikanga and privacy in the common law

[58] With that brief introduction to tikanga, I will now speak about tikanga and privacy in the common law. As noted, where relevant tikanga may inform both the interpretation of the law and the development of the common law.[44]

[59] There have been few cases where tikanga has been considered in a privacy setting. Tikanga has for example been used to assist in whether a place or process is private[45] and the extent to which tikanga bears on whether a breach of privacy is appropriate.[46] In one case, ***Te Pou Matakana*****,** the broader value of whanaungatanga and the wellbeing of the affected communities was **definitively offset** against individual tapu and the mana of the iwi leaders for the purpose of determining whether personal health information could be released without their individual permission or the permission of their iwi leadership. But none of the cases use the tikanga analytical framework as a basis for identifying a tikanga based protection or remedy.

[60] So **theoretically,** what then could tikanga do for the law of privacy? I propose to briefly address this by way of engagement with the debate about the proper threshold tests of reasonable expectation and

---

44 *Ellis v R* [2022] NZSC 114, [2022] 1 NZLR 239; and *Nikora v Kruger* [2024] NZSC 130, [2024] 1 NZLR 608.

45 *R v Tame Iti* [2007] NZCA 119, [2008] 1 NZLR 587*.

46 *Te Pou Matakana Ltd v Attorney-General* [2021] NZHC 2942, [2022] 2 NZLR 148.

offensiveness for the privacy torts. For many tikanga jurists, the idea that recognition of tikanga-based rights are dependent on an assessment of what is **reasonable or offensive,** would be a cause for considerable concern, particularly if what reasonable or offensive means is determined by the man in the Clapham omnibus.[47] But my key point for present purposes is that in tikanga, it is the fact of the breach of the tapu — **the intrusion into the personal force field** — that triggers the expected societal response. The key issue is not whether the intrusion might cause offense or be offensive, but rather whether there has or will be a breach of the tapu and the obligation to protect and if so by who and why.

[61] For example, within the marae and wharenui, there are tapu domains that only the appropriate people may enter and then only following appropriate processes. One such domain is at the confluence of the physical and spiritual realm. That is a place of significant tapu, and one that only designated persons and for some iwi, only women may engage. Another is the dividing line that runs down the middle of the wharenui, sometimes called the kauhanganui, between the local people and visitors to the marae. To cross that line and to intrude into these domains would be a violation of tapu, triggering an immediate response.[48] While potentially offensive, it is the intrusion per se that is the wrongdoing and the inherent tapu nature of the space each side of the line that is the driving norm.

[62] Applying **orthodox customary law** methodology, the common law of privacy or a modified form of trespass[49] or nuisance[50] might logically

---

47 See approach taken in *Minhinnick v Watercare Services Ltd* [1998] ELHNZ 451.
48 Hirini Moko Mead – *Matauranga Māori,* Chapter 13.
49 See *McQuire v Hastings District Council* [2002] 2 NZLR 577 (PC).
50 See *Fearn v Board of Trustees of the Tate Gallery* [2023] UKSC 4, [2023] 2 WLR 339.

be developed to encompass tikanga proscriptions of this specific kind. It is also for this reason that I think applying a tapu analytical framework would likely **demand clearer boundaries for the reasonable expectation test** in some cases and do away with the highly offensive element of the test altogether. It would do so by demanding focus on the inherent tapu quality of the space or domain intruded upon and the corresponding obligation to protect from that space from intrusion. A tapu framework would also **demand a close inquiry into whether the intrusion is permissible or justified by reference, in short, to its purpose, who is doing it** and **how** — though some tapu spaces may be considered so inviolable that intrusion may occur only exceptionally. Finally, proper processes, if followed, may moderate the tapu, providing an authorised basis for the intrusion.

[63] While it is difficult to transpose the tikanga based tapu analytical framework into foreign contexts, I refer to three cases where tikanga might have usefully informed the approach: *Andrews*,[51] *Holland*, and *Tamiefun*a. I emphasise here that **I am engaged in a theoretical exercise** about what Professor Moreham's normative enquiry might look like through a tikanga lens.

[64] In brief, **Andrews** concerned the filming of exchanges between husband and wife at an accident on the motorway in which she told him she loved him and asked him to stay with her.[52] The Judge found that there was a reasonable expectation of privacy, but that the broadcast was not highly offensive. The privacy claim therefore failed. That finding has been subject to academic criticism insofar as it relied on reputational harm

---

51 *Andrews v Television New Zealand Ltd*, above n 9.
52 At [4]–[14].

for the purpose of the offensiveness assessment. That may well be correct, but I am not concerned with that for present purposes. My key point is that **both were in a vulnerable state** at the time of the accident and therefore, in my view, **in a heightened state of tapu**. It does not matter that they are in a public domain. A strong argument could be mounted that this corresponded to an obligation imposed on the world to protect them from unwanted intrusion into their personal tapu space because to do so is necessary to protect their mana and mauri. What then of freedom of speech in this context? Tapu in this context is a hard protective right.

[65] Notably, **the power of the spoken word** is significant in te Ao Māori. Indeed it is for this reason that there are strict rules to be observed when speaking on the marae atea and it is **common to prohibit persons in a vulnerable tapu state**, for example the family of a deceased, from speaking during a tangi, because they are at greater risk of saying harmful things.[53] By analogy, publication of their personal exchanges **when in a vulnerable tapu state** could be amenable to similar prohibition.

[66] Similarly in *Holland*, involving the secretive videoing of C in the shower, it is not difficult to mount an argument that the intrusion into deeply intimate personal space violated C's tapu or what Tā Hirini might call C's personal force field, and with it breached the obligation to protect her mana and mauri. That the intrusion occurred in an otherwise shared living space is unimportant. The obligation to protect her personal tapu remains engaged.[54] **The highly offensive designation also adds nothing**

---

53 More importantly, according to renowned Tūhoe and Ngāti Kahungunu expert, Professor Timoti Karetu, the role of the whānau pani, the bereaved family, is to simply mourn. They should not be involved in any other activities on the marae. They are "wahangū" – silent. Chapter 2 Timoti Karetu "Language and protocol of the marae" in Michael King *Te Ao Hurihuri – The World Moves On* (Hick Smith & Sons Limited, Wellington, 1975) at 191 – 220.

54 See discussion in Old Time Māori, Makereti Papakura at p 124.

to the calculus of the wrongdoing in tikanga terms. I note, as an aside, that the common law itself has evolved in England at least to expand the law nuisance to hold that a viewing platform that overlooked a neighbouring residential building constituted a private nuisance. I also agree with Justice Kós who expressed the view, extrajudicially, that the proper basis for claims of this kind is breach of privacy.[55]

[67] The application however of the tikanga analytical framework is **more complex** in relation to the *Tamiefuna* facts. **Mr Tamiefuna was not obviously in a vulnerable tapu** state or domain (whether public or private) when the photograph was taken. Put in tikanga terms, he was in a state of **noa**, and able to interact with others safely. Similarly others may interact with him on that basis. But, captured in that photo is Mr Tamiefuna's whakapapa — a matter, within te Ao Māori, of deep intergenerational importance, and the control of the use of his whakapapa is an aspect of both personal mana and mauri, and that of his whānau. It is that core part of him, handed down from generation to generation, **that is inherently tapu.** In this context, the tapu of his whakapapa mirrors privacy's right to retain control over that which defines us from state intrusion.[56]

[68] The **critical issue** then is whether the taking and then use of the photo amounts to an improper intrusion or perhaps more accurately is justified. This brings into frame what the majority and Justice Kós identified as an important aspect of the normative inquiry, namely the

---

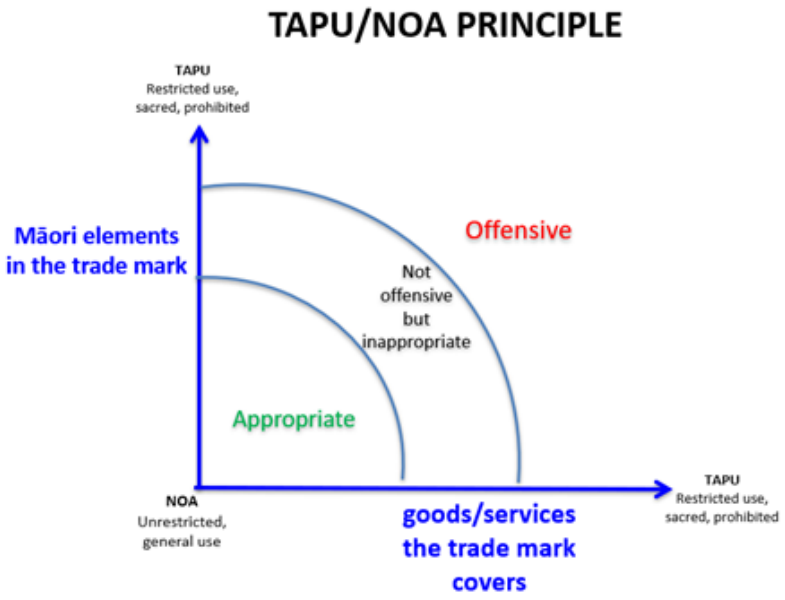
55 Stephen Kós *What a Nuisance — New Directions in Public and Private Nuisance* at [37]–[39].

56 In this context it is interesting to note that the Māori prophetic leaders Te Kooti Rikirangi from Turanga-nui-a-Kiwa (Gisborne) and Te Whiti o Rongomai from Taranaki as an assertion of visual sovereignty refused to have their photos taken for fear that it would lead to a diminishing of their mauri and mana and the commodification of their own image which they regarded as tapu. Conversely, other rangatira, including Te Hapuku of Hawkes Bay, Tamati Waka Nene of Northland and Tuhoto Ariki of Rotorua readily posed for the renowned portrait artists Goldie and Lindauer.

purpose or kaupapa to which the information is to be put. Put another way, the proposed kaupapa may **elevate or moderate** the force and application of the tapu (as occurred in the *Te Pou Matakana* case).

[69] All of this still also leaves unresolved the tension with countervailing freedom of speech imperatives, other demands in tikanga for example to maintain connection or broader community and public interest considerations. It must be remembered that **tikanga is lived**, in the real world. It is one thing to claim tapu in respect of personal information in the face of state intrusion. It is quite another thing to **make that claim** on a busy street and in a world of instantaneous communication.

[70] But, in any event, the evident effect of applying a tikanga based tapu framework would be to solidify and make clearer the domains to be protected from unauthorised intrusion. Reasonable expectations of privacy are likely to be co-extensive with the tapu based expectation of protection. Offensiveness is not relevant. That would be the starting point of the normative inquiry through a tikanga lens. **[slide]**



[71] My final comment is to acknowledge developments within the intellectual property space, brought to my attention by Jayden Houghton. The Māori Trade Marks Advisory Committee have developed what they have called a "Tapu-Noa" matrix for determining whether the use or registration of a trade mark is likely to offend Māori. Offensiveness is a statutory threshold test for preventing the registration of trade marks that might misappropriate mātauranga Māori.

[72] I reproduce here a graphic representation of this matrix. As Houghton is about to publish on this topic,[57] I only want to mention three points. First, the matrix applies to Māori elements including words and expressions whether or not they are in the public domain. Second, it identifies on the y axis degrees of noa and tapu in the Māori elements used in the trade mark, and on the X axis goods and services covered by the trade mark. This helpfully enables and envisages in graphic form the point of intersection where tapu renders the use of the Māori elements as inappropriate and then offensive. Finally, while I consider "offensiveness" is plainly the wrong criterion, it is an illustration of how our communities are trying to work out how to provide safe, clear and coherent interaction with tikanga.[58] A similar matrix in the privacy context is entirely feasible in my view, though I would reverse noa / tapu continuum, so that the baseline is tapu.

Conclusion

[73] I have offered here a brief account of the privacy value in the common law and an equally brief account of tapu and the obligation to

---

[57] See Jayden Houghton "The Tapu–Noa Matrix for Determining Whether the Use or Registration of a Trade Mark is Likely to Offend Māori" (forthcoming).

[58] Offensiveness is a criterion adopted by the law rather than tikanga to address the Māori tapu dimension (see Trade Marks Act 2002, s 17(1)(c)). The matrix, with its emphasis on the tapu-noa continuum, redirects the normative inquiry toward a tikanga lensed approach.

protect mauri as a driving norm within te Ao Māori. What is evident to me is that, as Professor Moreham aptly summarises, privacy demands a normative inquiry into what should be protected and from what. The tapu framework demands the same inquiry. While tapu has much wider application, the shared starting point — **a concern for inherent worth** — make them compatible norms and values that may provide a safe collaborative approach to the incremental evolution of privacy in the common law — one that is more focused on what is being protected, from what, who and why.