PRINCIPLES AND PRAGMATISM:
AN ASSESSMENT OF BROADCASTING STANDARDS AUTHORITY DECISIONS FROM A JOURNALIST'S PERSPECTIVE

NGĀ MĀTĀPONO ME TE MAHI WHAI KIKO:
HE AROTAKENGA I NGĀ WHAKATAU A TE MANA WHANONGA KAIPĀHO, KI TĀ TE KAIKAWE KŌRERO TITIRO

by Colin Peacock

BSA
Broadcasting Standards Authority
Te Mana Whanonga Kaipāho

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FOREWORD

The role of the Broadcasting Standards Authority (BSA) is to determine the areas where, and the extent to which, broadcasters' right to free expression should give way to other interests that are highly valued in our society. We do this by applying the Codes of Broadcasting Practice. The standards specified in the Codes relate to such matters as treating people fairly, providing a range of views on controversial issues, ensuring accuracy in the news and current affairs, protecting the interests of children, protecting individual privacy, restricting certain portrayals of violence, and upholding norms of good taste and decency.

Each time the BSA receives a complaint and assesses whether broadcasting standards have been breached, we stand in judgment on a broadcaster. But we are also subject to the judgment of others. At a formal level, our decisions are appealable to the High Court. Typically, this results in a small number of judgments on our decision making each year; although every one contains lessons.

Less formally, it is our policy to invite stakeholders to take part each year in reviews of aspects of our processes and decision making. The insights we have gained from the various surveys conducted and meetings held to date have led to a number of changes, including in the wording of standards and in the adoption of more user-friendly elements of the complaints process.

As part of our ongoing openness to review, four years ago we commissioned media law expert Professor John Burrows to undertake an analysis of the legal quality of our decisions. His critique, while overwhelmingly positive, has been of greatest value to us for posing challenges to some of our assumptions and for alerting us to difficult issues that may yet arise for our consideration. By subjecting our work to such rigorous scrutiny, and learning from the responses received, we believe we are exercising our public function responsibly.

The BSA commissioned the present report as an important step in exploring journalists' views of our decisions. There is, as the report notes, "an inherent conflict between the day-to-day reality that broadcast journalists work with and the requirement to adhere to a set of prescribed principles such as those that make up the codes of broadcasting practice". We want to know about any areas of tension between the Authority's decisions and journalism practice so that we can either better explain our position in future or adjust it if that is consistent with our statutory responsibility. We also wanted a journalist to review the readability of BSA decisions and assess the extent to which the decisions provide useful guidance to journalists and other programme makers. Just as communication is the essence of broadcasters' business, so it is of ours.

We commissioned Colin Peacock, the host of Radio NZ's Mediawatch programme, to do this review. We chose Colin not only because of his experience in journalism but also because he is accustomed to analysing media issues from a critical, objective position. On behalf of the current members of the BSA - Tapu Misa, Diane Musgrave and Paul France - I thank Colin for his hard work on this project and for providing us with considerable food for thought.

This report and its conclusions do not represent the opinions of the BSA. Our opinions are contained in our decisions. We trust, however, that Colin Peacock's measured assessment of BSA decisions will inspire many other journalists to engage with the vitally important questions that surround the application of broadcasting standards in New Zealand. The BSA looks forward to being part of the continuing debate and utilising its lessons to the advantage of all New Zealanders who rely on the broadcasting standards system.

JOANNE MORRIS, OBE
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April 2009

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INTRODUCTORY REMARKS

The Broadcasting Standards Authority ('BSA' or 'the Authority') asked me to provide an assessment of their decisions from a journalist's perspective. This report addresses the following questions:

- Where is the tension between the 'bottom-line standards' for the Authority and the 'bottom-line standards' for journalists?
- What is the Authority getting right from journalists' perspective - and what is it getting wrong?

Part 1 is an executive summary, while the main report (Part 2) examines how the Authority interprets the standards in the television and radio codes with reference to selected decisions published since 2004 (listed in Part 3).

In these sections, I've looked at how the Authority's determinations may clash with the perspectives of journalists and other programme-makers. I have also considered the extent to which the Authority's decisions provide useful guidance for journalists, and the extent to which the decisions recognise the practical realities of broadcast journalism.

Part 4 has individual commentaries on 15 of the decisions I have consulted. These include some of the more significant, interesting and controversial decisions in which complaints were upheld ,with one exception, for breaches of various standards in the codes. Other less significant decisions are also included to ensure a range of the standards is covered.

Quotations from the decision documents are in italics and quotation marks, followed by the number of the relevant paragraph from which they were extracted, for example:

"… the absence of any challenge to the interviewee's story in the broadcast contributed to the breach of Principle 5." [149]

Some older decisions do not use paragraph numbers so no paragraph reference can be given in these cases. Some shorter quotes are run on in the text with quotation marks. Note that prior to July 2008 the Standards in the Radio Code were known as 'Principles'. These should not be confused with the Privacy Principles that are applied when determining complaints under the Privacy Standard.

COLIN PEACOCK
Presenter and producer of Radio New Zealand's *Mediawatch*
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PART 1 EXECUTIVE SUMMARY

There is an inherent conflict between the day-to-day reality that broadcast journalists work with and the requirement to adhere to a set of prescribed principles such as those that make up the codes of broadcasting practice. Broadcast journalists operate in a competitive and largely commercial environment. Often, they are encouraged to produce journalism that has 'impact,' and to be 'first with the news'. This can compromise commitments to fairness, balance and accuracy. It can also encourage breaches of privacy that are not justified by legitimate public interest.

The Authority's decisions should be robust and consistent to maintain and preserve broadcasting standards.

In the writing of this report I consulted more than 40 decisions of the Broadcasting Standards Authority and on the whole they are consistent with the principles set out in the standards and their attached guidelines. These in turn are mostly consistent with principles in the editorial policy guidelines of major broadcasters, all of whom were consulted in the drafting of the standards in the codes.

So, effectively, the Authority and broadcasters share many of the same 'bottom line standards', and the majority of upheld complaints do offer journalists and programme-makers a benchmark for good practice in their work. But tensions inevitably arise when the Authority applies the principles and guidelines in its consideration of complaints.

Journalists may concede that it's fair to uphold complaints in many cases, but in a few they will feel that the Authority has:

- 'set the bar too high'.
- taken a narrow view of what is in the public interest.
- been persuaded by the arguments of well-resourced and/or highly motivated complainants.
- failed to take into account fully the realities of broadcast journalism today.
- restricted their freedom of expression.

Some journalists will also believe some of the Authority's decisions could discourage risk-taking or courageous journalism that could prove to be in the public interest.

Turning to the individual standards:

PRIVACY

In many cases where privacy complaints are upheld, the breach is clear – but some of the Authority's upheld decisions reflect a higher expectation of privacy than some journalists and programme-makers would consider healthy for serving the public interest.

They may disagree with some of the Authority's judgments concerning:

- ***what is an "offensive intrusion in the nature of prying"?***
- ***what counts as a disclosure of private facts?***
- ***when is a breach of privacy justified by public interest?***

The way the "public interest" is explained varies in the decisions in which it is discussed, and journalists may find some inconsistencies in the way it is applied by the Authority and feel it does not always give the 'benefit of the doubt' to the broadcaster.

BALANCE / CONTROVERSIAL ISSUES - VIEWPOINTS

Tensions between the Authority's view and that of journalists and programme-makers are inevitable. Some journalists simply do not respect the balance standard – nor believe the obligations it brings are fair. Some senior journalists have argued it should be removed, or replaced with a principle enshrining 'impartiality'. But in the decisions I consulted, weak claims were not upheld and the balance complaints which were upheld did identify deficient journalism which may have prevented the audience from forming an informed opinion.

But tensions arise in these areas:

- ***What is a "controversial issue of public importance" to which the balance standard applies? What are the aspects of the story that require balance?***
- ***Whose views are considered to be significant?***
- ***What constitutes reasonable efforts made, or reasonable opportunities given, to provide significant points of view?***
- ***What constitutes the "period of current interest", within which broadcasters should present significant other points of view?***

The Authority says it assesses balance from the point of view of listeners and viewers. In my view, by and large, it correctly identifies controversial issues of public importance, and makes the right call on whether they are the focus of the item or not. In the decisions I examined, it would not have complicated the broadcast to include the viewpoints identified as absent, even though journalists may feel that the Authority is interfering in their editorial freedom, and passing judgment on their decision-making and newsgathering methods.

Determining the period of current interest within which balance should be supplied is trickier, and some decisions will strike journalists as too arbitrary, and based on contestable assumptions about people's viewing and listening habits. For some issues,

it is unclear whether balancing material in other broadcasts – or even other media – can be considered. This makes it difficult for journalists to determine in advance whether broadcasts will be considered 'unbalanced' if there's a subsequent complaint.

With 'rolling news' and new platforms making stories available round the clock these days, broadcasters may begin to argue that stories which could balance allegedly unbalanced ones are available elsewhere at any time. The Authority may have to begin assessing whether broadcasters properly reported the available facts of the matter at the time of broadcasting the story in question.

ACCURACY

The accuracy standard is consistently applied in the decisions I consulted – but quite strictly applied. The following points of tension arise for journalists:

- ***whether some inaccuracies are really significant "errors of fact".***
- ***whether some inaccuracies make an entire item inaccurate, and possibly also unfair.***
- ***the distinction between assertions of fact and expressions of opinion.***
- ***the standard of proof a broadcaster must meet for facts and assertions presented in reports.***
- ***the extent to which the Authority will go to establish the truth about disputed facts – and whether it strays beyond its expertise in doing so.***
- ***whether the BSA challenges complainants' assertions as rigorously as those of the broadcasters.***
- ***what constitutes "correction at the earliest opportunity"?***

The Authority consistently distinguishes assertions presented as fact – to which the accuracy standard applies – from opinion, analysis and comment – to which it does not.

In cases where a complaint has been upheld for misleading or unnecessarily alarming viewers (Guideline 5b of the Free to Air Television Code), the conclusions are convincing and help to 'set the record straight' for journalists – and the public. But in some cases journalists will feel the inaccuracies identified are not significant and do not make the whole item fundamentally inaccurate. There are other instances where the inaccuracy could not have been easily detected prior to broadcast, and where it was even difficult for the broadcaster to establish the facts after a complaint was received, especially when deadlines are a factor.

It seems harsh to uphold complaints about inaccuracies contained in reports supplied by a reputable international news agency[1], when employing such an agency could qualify as "a reasonable step" to ensure reliability of the source. However, this does remind all broadcasters they are responsible for the standards of everything they choose to broadcast.

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1 e.g. ***Decision No: 2006-063 (CanWest TVWorks and Dewar); Decision No: 2008-024 (TVWorks and Treadgold).***

In some cases, well-resourced complainants including state agencies[2] submitted detailed complaints and responses. Sometimes, these were very technical.

Broadcasters will feel that they are at a disadvantage here. The Authority sometimes conducts research of its own into disputed facts, but I am not clear about how far the Authority is prepared to go to establish the accuracy of such facts. Where the arguments are highly technical or the facts are the subject of intense debate, journalists may believe the Authority can stray beyond the limits of its expertise.

FAIRNESS

Most judgments made about fairness seemed reasonable, but areas of tension include:

- ***the interpretation of a "reasonable opportunity to respond".***
- ***the fairness of singling people out.***
- ***the granting of anonymity, and whether it's inherently unfair.***
- ***use of hidden cameras and covert filming.***
- ***what constitutes a "distressing situation" requiring extra sensitivity on the part of journalists and programme-makers?***
- ***what constitutes "denigration"?***

Where the Authority concluded that individual inaccuracies or instances of unfairness made an entire item unfair, the case was convincing. But journalists may feel the Authority sometimes puts too much responsibility for fairness on broadcasters, possibly encouraging uncooperative interviewees or sources to obstruct their broadcasts.

Journalists may also feel in some cases that the Authority is too sensitive to the feelings of people featured in the broadcasts in question. In one decision a broadcast was upheld as unfair because of the way a woman was 'named and shamed' - even though the information revealed was not private, and the filming was done in a public place and in the context of a broadcast about the ethics of 'naming and shaming'.

OTHER STANDARDS

The standards governing good taste and decency, liquor, children's interests, violence, discrimination, law and order and social responsibility do not routinely cut across the work of broadcast journalists in the same way as those covering balance, fairness, accuracy and privacy. And because the context is so critical in each case, it's not simple for journalists and programme-makers to work out which ones can be treated as yardsticks.

However, the decisions I consulted make it clear complaints are far more likely to be upheld if the viewers / listeners would have felt "ambushed" by the offending content of the broadcast. Broadcasters and programme-makers will get the message that complaints can be upheld if they are cavalier about consumption of alcohol or drugs, obscenity, public safety and the possible adverse effect on children.

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2 e.g. ***Decision No: 2006-127 (CanWest TVWorks and Pharmac); Decision No 2006-058 (TVNZ and Department of Child, Youth and Family Services).***

But the Authority is not a censor. The good taste and decency standards effectively say they are not intended to prevent broadcasts with a strong satirical element, or productions with a 'higher purpose'. My reading of decisions is that complaints about such programmes are unlikely to be upheld. That gives broadcasters a lot of leeway, even for programmes that cause a great deal of offence, such as *South Park*.

However, broadcasters may not be happy about the complaints upheld against some 'reality-style' programmes aimed at the younger audience – and 'edgy' and 'outrageous' commercial radio broadcasting targeting young listeners. Broadcasters may feel the Authority has not recognised that public taste may have changed in this area.

THE AUTHORITY'S METHODS AND APPROACH

When considering "what the Broadcasting Standards Authority is getting right – and what it is getting wrong" from the point of view of journalists and programme-makers, it's also worth looking at the methods the Authority uses, and the way it presents its decisions.

Naturally and instinctively, broadcasters will not enjoy having their work scrutinised in response to public complaints. Dealing with complaints takes up time they'd prefer to devote to journalism, and where complaints are upheld and costs awarded, broadcasters complain it feels like getting 'fined'. But I couldn't find any evidence that the Authority is partial to complainants or predisposed to uphold certain kinds of complaints. Nor was it unnecessarily judgemental in its comments or overzealous with penalties.

EXERCISE OF POWERS

Under section 12 of the Broadcasting Act, the Authority can compel news organisations to hand over "raw material" in order to determine complaints. The Authority uses this power sparingly, even when strongly urged to do so by complainants. In each case, it was employed only to try to resolve critical contradictions between the accounts of the complainant and the broadcaster. In each case, precise reasons were given, and care was taken to explain why the step was necessary.

FLEXIBILITY

At times the Authority showed flexibility when dealing with broadcasters. Some decisions were re-written to clarify things for the broadcasters, and sometimes the Authority accepted the broadcasters' word on disputed matters even when there was no direct evidence at hand. Also, it appears the BSA can be fairly forgiving when inconsistencies emerge in the broadcasters' submissions and responses - eg*: Decision No: 2005-129 (TVNZ and Balfour).*

On some occasions, the BSA responded to submissions from broadcasters after they had received the decision-in-part prior to publication, even though the Authority could have dismissed them as matters for a possible appeal. These include *Decision No: 2006-127 (CanWest TVWorks and Pharmac*) and *Decision No: 2006-014 (CanWest TVWorks and XY)*

STYLE AND TONE

Journalists will appreciate the way complaints about their style and tone are rarely grounds for upholding a complaint and are considered editorial matters, best determined by the broadcaster alone.

ANONYMITY

Journalists and programme-makers will also appreciate that they are not named in the decision documents, and nor are the officials responding on behalf of the broadcasters. Some may feel journalists and programme-makers should be personally accountable for their work, especially when complaints are upheld. But as the Authority's main objective is to maintain broadcasting standards, and not to mete out punishment or blame, that would not be appropriate or fair.

PENALTIES

The Authority can only award costs and compensation when complaints have been upheld, in accordance with powers set out in the Broadcasting Act 1989. Costs are almost always modest sums, and awards to the Crown are usually well under the NZ $5,000 upper limit, even for what the Authority describes as "serious departures" from the standards.

However, for a broadcaster, it still feels like getting fined by a court, particularly when it comes on top of the cost and time it can take to defend a complaint. Sometimes broadcasters resent the fact that complaints can be made by individuals, companies or government organisations with substantial resources which can include their own legal teams.

However, some broadcasters will also acknowledge that if the Authority didn't exist they might be fighting more legal battles in which the costs and financial penalties could be much greater.

Journalists and broadcasters will appreciate that when a complaint is upheld, the only penalty may be the publication of the decision itself.

Many complainants request an apology in their submissions on orders, but these are rarely ordered by the Authority. None was granted in any of the decisions I consulted for this report. Journalists will welcome this because issuing public apologies would imply that the entire broadcast was deficient – or that the individual 'apologee' had been unfairly targeted by the broadcaster. Arranging justice for aggrieved parties is not the Authority's main job – that's a matter for the courts.

HOW THE AUTHORITY'S DECISIONS ARE PRESENTED

To compare any given decision with others, the presentation needs to be consistent, and almost invariably it is. BSA decisions compare very favourably with those of the New Zealand Press Council which can be frustratingly variable, and (albeit on a limited viewing) those of the body which considers broadcasting complaints in Australia, the Australian Communications and Media Authority (ACMA).

The language in the BSA's decisions is precise and unambiguous. The Authority takes care not to stray into commentary or emotions or pass judgment. Occasionally, the

Authority "expresses concern" about things and in one case it described a broadcaster's argument as "not credible", but generally speaking, that's as far as it goes. This is consistent with its mission to maintain and preserve standards, and not punish or condemn broadcasters which may fall short of the standards from time to time.

The Authority's decisions sometimes refer to previous ones concerning similar complaints which may be a relevant precedent.

Professor JF Burrows, in assessing the legal robustness and quality of legal reasoning in BSA decisions, noted that to do this too often could give the impression of "legalism", which can be off-putting,[3] and it could also undermine the impression that the Authority considers complaints on a case-by-case basis, giving full consideration to the unique context of each one. But if the Authority refers to these precedents in its own discussions of the complaint, that seems appropriate and can help journalists spot the patterns.

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3 **JF Burrows, *Assessment of BSA Decisions*; April 2006, p.10.**

PART 2: INTERPRETATION OF THE STANDARDS

In this section I have examined how the Authority interprets the standards with reference to 40 selected decisions (listed in Part 3).

These include some significant, interesting and controversial decisions published since 2004 in which complaints were upheld (with one exception) for breaches of various standards in the Free to Air Television Code or the Radio Code. Other less significant ones are also included to ensure a range of standards is covered.

15 of these significant decisions are examined individually in greater detail in Part 4.

STANDARD 3: PRIVACY

Few journalists or programme-makers would quibble with the basic principles of 'accuracy' or 'fairness', but with 'privacy' it's different.

Journalists aren't necessarily unsympathetic about "maintaining standards consistent with the privacy of the individual" as the standard says, but their instinct is obviously to reveal as much as possible about any given story. There is also a gulf between the media's attitudes to privacy and those of the public - something identified in the Authority's own research.

A survey in 2005[4] found that many people think broadcasters should always explain to people participating in broadcasts precisely how their contribution will be used on air, and when. More than half those surveyed said people should be given an advance screening of the part in which they feature. These expectations are clearly unrealistic—even unfeasible – as far as the media are concerned. The survey also revealed that while many people have 'concerns' about violations of privacy by broadcasters, only 15% could actually cite an example.

At the time, media commentator Steven Price noted that this is a problem because the Authority has to work out what a reasonable person would find objectionable in a breach of privacy. So it's inevitable journalists and programme-makers will be irritated by some of the Authority's decisions on alleged breaches of privacy.[5]

However, complaints that are weak and would be considered vexatious by journalists and programme-makers are rarely upheld.

For instance, in *Decision No: 2007-049 (TVNZ and Brereton);* the complainant alleges aerial footage of his rural property was a breach of privacy. But the Authority states plainly:

"Irrespective of whether the programme disclosed the location, this was not a private fact – and…the complainant's address is available in the phone directory and any member of the public could easily find his property if they wanted to." [83]

In many cases where privacy complaints are upheld, the case is strong and the breach is clear, and the decisions offer good guidance to journalists and programme-makers.

For instance, *Decision No: 2006-014 (Canwest TVWorks and XY) concerned a* programme which included hidden camera footage of a men's magazine editor because, according to the programme-maker, "word around the modelling industry" was that the editor was "luring young girls into his bedroom for trial photo shoots with the promise of getting work in his magazine".

While the complainant's conduct may strike many people as morally questionable, the complaint was upheld – quite correctly – because there was no compelling reason to justify covert filming in the complainant's house and broadcasting the footage.

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4 ***Real Media Real People – Privacy and informed consent in broadcasting,*** **Broadcasting Standards Authority; 2004**

5 **Radio New Zealand, *Mediawatch,* 12 May 2005**

In such cases, the Authority often takes care to point out that the privacy standard and attendant guidelines are not a prohibition on either pursuing or broadcasting stories which disclose things the subjects would not want widely known. Similarly, the standards and guidelines don't necessarily prohibit newsgathering methods like covert filming, which might compromise privacy.

This is important because the decisions should not seek to restrict or condemn the newsgathering methods employed by journalists and programme-makers.

However, some journalists and programme-makers will conclude some of the Authority's upheld decisions involve a higher expectation of privacy than they would consider healthy for the efforts to serve the public interest.

In some decisions, they will not accept there has been "interference in the nature of prying" or "disclosure of private facts" that is "offensive to the reasonable and objective person". In some cases, journalists will also disagree when the Authority finds there is no "public interest defence" for breaches of privacy.

In some of the decisions I have examined, journalists and programme-makers will also feel the Authority has not adequately recognised the realities of broadcast journalism. They might also feel that a few of the decisions consulted here could dissuade journalists and programme-makers from embarking on risky or courageous journalism that is likely to be in the public interest –something which could interfere with the media's role in a democratic society.

Where privacy complaints are upheld, the following points of tension arise for journalists and programme-makers:

- ***What is an "offensive intrusion in the nature of prying"?***
- ***When is a breach of privacy justified by public interest?***
- ***What counts as disclosure of private facts?***

POINT OF TENSION: WHAT IS AN "OFFENSIVE INTRUSION IN THE NATURE OF PRYING" (PRIVACY PRINCIPLE 3)?

Decision No: 2007-016 (TVNZ and Russek) concerned news coverage of the hunt for a six-year-old believed to have been 'kidnapped' by relatives.

In the item, a *Close Up* reporter went to a property identified in an anonymous letter. The owner of the property was shown on TV saying that the boy had not been there. He was filmed from a camera inside a car nearby, which the broadcaster insisted was not deliberately concealed.

The Authority concluded the filming of Mr Russek was a breach of his privacy, as it was done without informing him of the fact and while he was on his farm far from his house.

This seems reasonable on the grounds set out in Privacy Principle 3, and it gives journalists the message they should be 'upfront' when filming people, especially on their private property. But journalists may feel it was harsh to sanction TVNZ for this because there was no evidence Mr Russek suffered significant hurt and humiliation as a result

(although Russek claimed he had been treated unfairly because he had been branded "as a person who is investigated by the police and who is therefore associated with criminal behaviour".)

The Authority also found an "offensive intrusion in the nature of prying" in another case involving filming without permission on a rural property, an instance which journalists will find harder to accept.

In *Decision No: 2005-129 (TVNZ and Balfour)* the filming was done by a television crew which "pried without permission" on the rural property of a dog breeder when he was absent. Their programme had previously been investigating complaints about the dog breeder's alleged mistreatment of animals.

They entered onto private land, discovered a pit in which there were dead dogs, and footage of this was later broadcast on *20/20*.

Here, the Authority extended protection of privacy principle (iii) to a situation where:

"… a broadcaster has entered onto a person's land, and pried into matters that the occupier was entitled to keep private from the world, irrespective of whether the occupier was present or shown in the broadcast." [31][6]

Journalists will appreciate that the Authority declined to make an order in this case, citing "novel issues in respect of the privacy standard", but they will feel it's harsh to find that a breach of privacy took place when the person was not shown, and where the footage in question was taken some distance from the complainant's home.

In its decision, the Authority said the "specific head of privacy relating to solitude and seclusion remains unexplored" and it had to consult United States jurisprudence for a steer on the matter.

In his assessment of BSA decisions JF Burrows says that the New Zealand courts also consult US jurisprudence for guidance where necessary,[7] so it would be odd if the BSA did not do likewise. However journalists would surely feel the broadcaster should have enjoyed the benefit of the doubt in this case.

The Authority said the decision in *TVNZ and Balfour* has "clarified its expectation in this area" (the offensive intrusion onto private property) but broadcasters will note the even split between the Authority's members on the question of whether this intrusion was "offensive to the ordinary person". Two Authority members accepted *20/20* had gone to the property with the intention not of "snooping", but getting further comment in an 'upfront' manner. Accordingly, journalists may not be dissuaded from such 'fishing expeditions' in the future when visiting a property without the owner's consent.

In *Decision No: 2006-087 (TVNZ and KW)* the Authority said a breach of privacy occurred because some filming took place in KW's home, where he had "an interest in solitude and seclusion" as set out in Privacy Principle 3, and:

"…the ordinary person would find offensive the broadcast of hidden camera footage of the inside of their property in these circumstances." [59]

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6 **Note that the film crew had interfered with the burial pit and this formed a part of the Authority's reasoning here.**

7 **Burrows, *Assessment of BSA Decisions, p.13*.**

However, the broadcaster pointed out that *Close Up* did not give out details of the address, or seek to "unmask" the individuals living and working there. The broadcast footage only showed the parts of the house used as business premises, with one exception. It's probable that only a handful of viewers could have recognised the property from the programme item or the preceding promotional trailer.

The breach was not a clear-cut one – as it was in *Decision No: 2006-014* (*TVNZ and XY)* for example – *and* the "ordinary person" would not find this offensive in the same way they would in the circumstances set out in either *Decision No: 2007-023* (the '*Last Laugh*' prank, where a young woman's bedroom was "invaded" by a TV crew without her knowledge or consent) or *Decision No: 2006-112* (*CanWest RadioWorks and EF*) in which a radio station revealed a person's private visit to a medical clinic.

The broadcaster said it was trying to show that with the law as it stands now, apparently ordinary suburban houses may be operating as brothels unknown to all but their operators and clients. This was part of a wider investigation into what the broadcaster called "serious crimes" associated with the brothel trade – such as money-laundering and tax evasion.

Close Up thought it had evidence that a particular property was being used for prostitution, and would be suitable for illustrating the story. A reporter (or person acting on behalf of one) recorded hidden camera footage inside.

The conclusion that anyone working in a business which is also a private residence has "a reasonable expectation of privacy" is unduly restrictive for journalists and programme-makers, especially when the business receives public clients on those premises. Viewers of programmes like *Fair Go* are familiar with doorstep-style confrontations at small business premises, some of which are attached to homes.

Journalists may also conclude this is not consistent with *Decision No: 2006-089 (TVNZ and An Ying),* which concerned complaints about another *Close Up* broadcast which was part of the same investigation.

In this case, a privacy complaint about a teller being identifiable in hidden camera footage was not upheld because the Authority said the teller did not have an interest in "solitude and seclusion" because she was "working in a business premises where any member of the public could see her".

Journalists may feel the undercover recording at KW's premises was not a significantly greater interference with someone's expectation of privacy.

POINT OF TENSION: WHEN IS A BREACH OF PRIVACY JUSTIFIED BY PUBLIC INTEREST (PRIVACY PRINCIPLE 8)?

Privacy principle 8 says:

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

In the decisions I have consulted, the Authority takes different approaches to explaining what it considers of legitimate public interest. For example, in *Decision No: 2006-014 (CanWest TVWorks and XY)* the Authority merely cites another of its own decisions in

order to state that the matter at hand was not one that "would have to be of concern to, or have the potential to affect, a significant section of the New Zealand population".

But in *Decision No: 2005-129 (TVNZ and Balfour)* the explanation is more comprehensive. It refers to two legal precedents[8] and summarises the principles overseas regulators employ. In this case, the Authority spelled out that it was not in the public interest to interfere with the dog carcasses, or to broadcast the results on *20/20*, because the complainant was:

"…entitled to expect that the way in which he managed this unpleasant aspect of his business would remain private." [40]

and:

"While the Authority accepts that the programme's wider story about Mr Balfour's treatment of the animals was a matter of public interest, the footage taken while intruding on Mr Balfour's property made no contribution to this story." [62]

and:

"…the only effect of the footage, in the view of the Authority, was to sensationalise a distasteful but unremarkable discovery, and to create the impression that Mr Balfour's actions were somehow sinister and improper." [63]

In essence here the Authority said that the footage itself must be in the public interest.

But as there had been earlier reports about disturbed dogs belonging to the complainant, many journalists may feel there was a wider public interest here: public safety concerns arising from news stories about serious dog attacks in recent times, as well as general concerns about animal welfare.

Journalists may feel these factors could justify both the filming of the *20/20* footage and the broadcast. (However, it should be said that if *20/20* was observing best practice, they would have tried to get Mr Balfour to go 'on the record' for an explanation of what they found – and filmed – in the burial pit before broadcasting the footage.)

Returning to *Decision No: 2006-087 (TVNZ and KW),* the Authority decided there was no public interest in broadcasting the hidden camera footage of KW's home, because it didn't show anyone being "a prostitute or running a brothel" or disclose "anything of legitimate concern to the public".

The wider issue raised by *Close Up* involved crimes thought to be associated with the brothel trade. *Close Up's* editors probably felt confident there would be sufficient public interest in broadcasting the footage as part of their intended series on prostitution and what the programme called "the serious crimes" associated with it. The editor in charge of the day's broadcast of *Close Up* may not have felt there was any compelling reason not to run the undercover footage, without which the item would have had less impact.

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8 ***TV3 Network Services Ltd v BSA [1995] 2 NZLR 720*** **and** ***Hosking v Runting*** **Court of Appeal,** **CA 101/03, 25 March 2004, per Gault J**

In a separate complaint about another part of *Close Up's* investigation of this same issue, (*Decision No: 2006-089 TVNZ and An Ying* – published six months later), the Authority said:

"TVNZ was investigating an issue of public interest - whether companies in New Zealand were allowing customers to perform illegal financial transactions which could be hidden from the Inland Revenue Department." [32]

and concluded that the use of hidden camera footage in this other instance did not breach Guideline 6c, which states:

> *Programme-makers should not obtain information or gather pictures through misrepresentation or deception, except as required in the public interest when the material cannot be obtained by other means.*

The "need for pictures" is, of course, not a justification for broadcasting material that breaches privacy. Other BSA decisions make this clear. But journalists and programme-makers would be disappointed the Authority didn't appear to attach the same weight to the wider issue in *TVNZ and KW*[9].

In some cases, journalists and programme-makers will believe it is in the public interest to use what they have at hand when a significant story is either unresolved or 'open-ended'. For example, the disappearance of Jayden Headley was of intense public interest, as was the ongoing police investigation into it. Following up the tip-off described in *Decision No: 2007-016 (TVNZ and Russek)* was legitimate newsgathering, and although it's true that the broadcast of footage of Mr Russek "did not disclose anything of legitimate concern to the public which might justify the breach of his privacy", arguably the footage did help TVNZ serve the public interest. The public got to see journalists actively trying to locate Jayden Headley – and they gained an insight into the difficulties facing the police looking for him.

Strictly speaking, the story could have been told without the offending footage, but given that the Authority stated that it had portrayed Mr Russek as "a good-natured and helpful citizen", journalists would feel no harm was done, and some good may have been achieved.

Similarly, in *Decision No: 2005-129 (TVNZ and Balfour)* the Authority said *20/20* had broadcast footage "of an unpleasant aspect of his business which the complainant would expect to remain private" (the dog carcasses in the pit on his property), but in doing so *20/20* may have "winkled out" more information about his professional conduct and the welfare of animals in his care.

Some journalists will believe the item could have led to the exposure of unethical or illegal behaviour – and that would have been "in the public interest".

As discussed earlier, the way the public interest test is explained varies in the decisions in which it crops up. In *Decision No: 2005-129 (TVNZ and Balfour)*, the Authority includes this handy summary:

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9 **On appeal, *TVNZ* and *KW* was set aside by the High Court.**

"Examining the principles of similar broadcasting tribunals – the Australian Communications and Media Authority, and the United Kingdom's Ofcom – reveals that matters considered to be in the public interest include:

- *criminal matters, including exposing or detecting crime*
- *issues of public health or safety*
- *matters of politics, government, or public administration*
- *matters relating to the conduct of organisations which impact on the public*
- *exposing misleading claims made by individuals or organisations*
- *exposing seriously anti-social and harmful conduct."* [59]

It's not an exhaustive list but it gives readers the right idea – and shows the sort of criteria which apply in countries with comparable broadcasting systems. Assuming the Authority is confident that this summary is sound enough, it could be used more often.

POINT OF TENSION: WHAT COUNTS AS DISCLOSURE OF PRIVATE FACTS?

Decision No: 2007-017 (CanWest TVWorks and Du Fresne) was a very unusual case, but the Authority's determination will annoy journalists. It decided there had been an offensive disclosure of private facts in spite of the fact that the subject had not only consented to the disclosure, but actually initiated it.

3 News interviewed a woman (JS) who had been committed under the Mental Health Act and was receiving electro convulsive therapy. She told *3 News* she wanted the treatment to stop.

3 News stated the psychiatric hospital's view that the woman "was not well enough at the time of the interview to have given informed consent to it", and the Authority said it had "no doubt" the facts of a woman's mental health and treatment were private facts – the disclosure of which were "highly offensive to an objective reasonable person". The Authority said there was no legitimate public interest in the disclosure because "the proper processes had been followed" in her treatment.

Complicating already unusual circumstances, the complainant (Dr Stephanie du Fresne) was JS's supervising clinician at the time of the interview in question. The Authority accepted Dr du Fresne's view that:

- JS was not capable of giving informed consent to the disclosure of private facts about her
- that JS may not have understood the implications of the broadcast
- and that *3 News* should not have disregarded advice from Dr du Fresne prior to the broadcast because Dr du Fresne was "the person best qualified to assess JS's capacity for giving consent to the interview and the broadcast".

Some journalists will believe the Authority got it wrong.

The decision cuts across an individual's right to 'go public' with their story and a broadcaster's right to tell it, which would be an unacceptable limitation on freedom of

expression. In its response to the Authority, CanWest pointed out that though a mental health patient, JS has not given up her right to freedom of expression – indeed, her rights to communicate are specifically preserved within the mental health legislation and codes.

The item shows JS discussing her concerns in a lucid and controlled manner, having taken legal advice and getting the support of a lawyer before consenting. Journalists would agree with CanWest that the decision was "a breach of natural justice" [40].

Journalists may even feel the Authority's decision is actually unfair to JS, given that Guideline 6d of the Fairness standard says:

> *Broadcasters should acknowledge the right of individuals to express their own opinions.*

Secondly, JS was complaining about treatment overseen by the complainant (Dr du Fresne). Journalists may resent the conclusion that the 'judgment call' on whether JS could consent to a breach of her privacy should be made by a clinician in charge of her care. This may mean mentally ill people could never protest publicly about their treatment if those administering it object to the disclosure by advising that he or she is unable to give informed consent.

Under what circumstances could a mentally ill person air grievances about their treatment if the clinician in charge can effectively prevent the broadcaster doing so?

Significantly, this decision was later overturned in the courts in August 2008. In his judgment, Justice France of the High Court said he did not endorse the broadcaster's conduct, but on the matter of whether JS was "capable of appreciating the ramifications of what she was doing", he said:

In my view, "informed consent" in a Broadcasting Code…relates to an awareness of being interviewed, of knowing the true context of the interview, and of being aware of the purposes to which the interview is to be put. In other words, what use is planned for it. Thus Ms X would need to have known that she was being interviewed, that it was going to involve disclosing her name, medical status and history, and that it was going to be shown on national television as part of the news.[10]

And he also noted the editorial guidelines of the BBC concerning informed consent:

Our commitment to fairness is normally achieved by ensuring contributors know:

- *why they are being asked to contribute to BBC output*
- *the context of the programme or website*
- *the nature of their involvement.*[11]

In JS's case, all three boxes could be ticked by TV3.

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10 ***TVWorks Ltd v Stephanie Du Fresne*** **- BC200860519, High Court of New Zealand — Wellington Registry, Simon France J, CIV-2007-485-2060, [17]**

11 ***TVWorks Ltd v Stephanie Du Fresne,*** **[20]**

In the light of this, many journalists will believe the well-being of mental health patients is a subject that can legitimately be tackled by a responsible broadcaster – but it should not be the business of the Authority.

One other unusual privacy case which will annoy journalists also had mental health as a backdrop. *Decision No: 2004-070* (*TVNZ and BA*) concerned the filming of a woman who had given evidence before the Medical Practitioners Disciplinary Tribunal in a controversial and newsworthy case, but whose name was suppressed because:

"It became apparent to the Tribunal that most witnesses employed in the Southland MHS were very distressed by this case and that their ability to function as effective members of the Southland MHS was at risk unless they received the "protection" of name suppression." [16]

TVNZ, acknowledging and respecting the name suppression order made by the Tribunal, did not name her in the item. In covering part of the evidence she gave, the item noted BA's occupation, showed her hands and the midsection of her torso, and included an audio of her voice. In her subsequent complaint BA said she was identifiable to people not previously aware that she had given evidence because her job title was given in the item and she was at the time only one of two people employed by the SMHS in that position.

The Authority agreed, saying she would have been distinguishable from the other employee in the same position, given her voice, jewelry and her general body shape.

But is her appearance before a medical tribunal really a "private fact" whose disclosure is offensive to a reasonable person? It may be regrettable if a wider circle of people subsequently found out about her appearance before the Tribunal if this is something BA didn't want to be more widely known, but journalists will feel the broadcaster should not be held responsible for consequences of the disclosure that it could not have foreseen.

STANDARD 4: BALANCE / CONTROVERSIAL ISSUES -VIEWPOINTS

It seems everyone thinks the concept of balance is important in journalism, but there's little consensus among journalists about how it should be achieved, let alone enforced. Some journalists have expressed dissatisfaction with the obligations the balance standard brings, with some senior journalists arguing for it to be rewritten, junked altogether or replaced with an obligation to ensure 'due impartiality', which applies in some other countries.

Some senior broadcasters now argue that the Authority should take a longer view of "the period of current interest" and allow potentially 'unbalanced' perspectives to compete in a 'contest of ideas'; a bit like the way they do in some publications and in the online arena.

Senior broadcasters often say complaints about balance arise from people miffed that their own point of view was not represented, and not necessarily because deficiencies in the journalism prevented the audience from forming an informed opinion.

Sometimes they are aggravated by what appears to be overlaps between the standard for balance – and the standards for fairness and accuracy.

For instance, *Decision No: 2004-135 (TVNZ and Ngaei and ASMS and NZMA*) and *Decision No: 2006-116* (*TVNZ and Mason*) both concern doctors not given a reasonable opportunity to respond to allegations about their conduct. In the former case, the Authority said the balance standard applied because controversial issues of importance were involved (patients' safety and the accountability of doctors). But in the latter case, the issue was deemed to be one of fairness, because the broadcast raised the general issue of "the power doctors have over people" – but it focused only on Dr Mason. As far as journalists are concerned the distinction is purely academic because the same newsgathering and editorial decisions are being questioned.

These issues have been discussed at a Broadcasting Standards Authority symposium[12] and in some of the research it has commissioned.[13] The debate will certainly go on.

But for now, where an important issue is raised in a news or current affairs broadcast and insufficient effort is made to represent a significant side of the story, it's right that the public can complain to an independent body which can then declare for the record that the story was 'not balanced' – and explain why.

When significant and specific claims are made in factual programmes which are disputed, and where there's debate about significant issues under discussion, the context should also be represented in the reports to give the audience a balanced picture. The decisions I have consulted make it clear that the balance standard does not oblige the broadcasters to accommodate "every madcap group" or fringe belief, as is sometimes argued.[14]

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12 ***Significant Viewpoints: Broadcasters Discuss Balance, BSA 2006***

13 ***Balancing Act: A review of the balance provision in the New Zealand broadcasting standards, Martin Hirst;*** **October 2007**

14 ***Significant Viewpoints: Broadcasters discuss balance p. 43.***

Today, issues are routinely covered as 'human interest' stories, where the focus is on the people concerned rather than the context, and the Authority's decisions do help clarify for journalists that they run the risk of being found in breach of the balance standard if they discuss major issues but do not make a decent effort to explore and explain them.

Cases like Pharmac's complaint about TV3's *60 Minutes* programme on breast cancer treatment *(Decision No: 2006-127),* for instance, send a message to broadcasters that they shouldn't simply rely on viewers getting balance from other reports about the same issue – or even from other media outlets.

The upheld complaints I examined all identified deficient journalism, but journalists and programme-makers will disagree with the way in which the Authority interprets the balance standard and its attendant guidelines in some cases.

Tensions arise in these areas in particular:

- ***What is a "controversial issue of public importance" to which the balance standard applies? What are the aspects of the story that require balance?***
- ***Whose views are considered to be significant?***
- ***What constitutes reasonable efforts made, or reasonable opportunities given, to provide significant points of view?***
- ***What constitutes the period of current interest, within which broadcasters should present significant other points of view?***

POINT OF TENSION: WHAT IS A "CONTROVERSIAL ISSUE OF PUBLIC IMPORTANCE" TO WHICH THE BALANCE STANDARD APPLIES? WHAT ARE THE ASPECTS OF THE STORY THAT REQUIRE BALANCE?

Where complaints about balance are made, it is necessary to establish whether controversial issues of public importance are involved. This seems strange to some journalists, who feel that if balance is so important in journalism, it should apply to all stories. But in effect, this is to their benefit because it means journalists are not obliged to provide balance for every single claim made in their reports and it allows for the effective disposal of vexatious or trivial complaints – or complaints about aspects of the report that are not material to the main focus.

The explanations as to whether controversial issues of public importance are involved vary in the decisions I consulted, though the reasons for the Authority's determination were well explained in all cases. Generally, I think the Authority has correctly identified "controversial issues of public importance" raised in broadcasts.

In some cases, the complaint concerns an issue that is significant and controversial, but the broadcaster may not be required to supply balance because the topic has been the subject of sustained debate in the past. Significant viewpoints on issues such as abortion or the Treaty of Waitangi, for instance, need not always be included because the issues are well understood by most people. I think the Authority makes sensible calls on this in the decisions I consulted – and broadcasters should welcome this because it means their journalists and programme-makers don't have to waste production time and airtime reiterating well-known issues. As Steven Price puts it, they are "adding perspectives to an existing debate".[15]

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15 ***Media Minefield: A Journalists' Guide to Media Regulation in New Zealand,*** **NZJTO, Wellington, 2007, p38.**

For the balance standard to apply to issues raised, they must also be the ones actually focused on in the broadcasts in question – and the Authority also correctly determines this in the decisions I have consulted. In some instances, these decisions highlight how the broadcaster has referred to an important controversial issue but failed to focus on it.

For instance, *Decision No: 2006-116 (TVNZ and Mason)* concerned a *Close Up* item introduced like this:

"The waiting list is a fundamental and controversial part of the health system. You're on the list for your operation and you wait. But how much power do doctors and specialists have to remove you from the waiting list for reasons other than medical ones, and would you actually know?" [1]

The Authority decided the issue of "the power doctors have over people" is an issue of public importance, but the focus of the broadcast was actually the individual grievance of a parent about one surgeon's care of her son, so the balance standard did not apply.

Similarly, in *Decision No: 2005-081 (TVNZ and Continental Car Services)* the Authority said that while the difficulty of registering some second-hand cars as roadworthy may be important, the balance standard did not apply here either because:

"…the focus of the item [was] Mr Clayton's personal story about getting his Ferrari registered, and the part CCS had played." [36]

Things are less clear-cut when complaints concern stories about people with individual grievances about state agencies. Arguably, the conduct of public outfits is always of public interest, but where the circumstances are special or there's a unique individual grievance, the Authority doesn't always agree issues of public importance are involved. In *Decision No: 2006-035 (TVNZ and Nottingham)* for instance, the Authority correctly said the balance standard didn't apply to what was in essence a contract dispute with the Accident Compensation Corporation.

However, in other cases the Authority decided issues of public importance were involved, and convincingly and clearly explained why. For instance, *Decision No: 2006-058 (TVNZ and CYFS)* passed the "controversial issue test" because:

"Although this item discussed an individual case, as opposed to the wider issue of CYFS procedures, the Authority observes that CYFS is the government department that is charged with the care of vulnerable children. Therefore, the reasonableness of its actions in each individual case is of significance and concern to New Zealand society." [111]

The Authority also said the balance standard applied in David Benson-Pope's complaint against RNZ because he was an associate education minister in government at the time and the allegations concerned his conduct when he was a teacher. Also, similar allegations had been raised in Parliament and in the media and they were also the subject of a police investigation.

In the case of the *60 Minutes* programme about breast cancer (*Decision No: 2006-127: CanWest TVWorks and Pharmac*), the broadcaster claimed it didn't address an issue of public importance when it clearly did.

POINT OF TENSION: WHOSE VIEWS ARE CONSIDERED TO BE SIGNIFICANT? HOW MUCH PROMINENCE SHOULD THEY HAVE IN A BROADCAST?

Guideline 4b of the Free to Air Television Code says:

> *No set formula can be advanced for the allocation of time to interested parties on controversial public issues. Broadcasters should aim to present all significant sides in as fair a way as possible, it being acknowledged that this can be done only by judging each case on its merits.*

This is a difficult area, requiring the Authority to pass judgment on the editorial decision making of journalists and programme-makers.

Instinctively, journalists will resent the idea of being obliged to accommodate certain individuals or viewpoints in their broadcasts. It may make more work for them, or diminish the impact of an item they had planned. ("On one hand…on the other hand… etc).

Any perceived inconsistency between the Authority's decisions may be seen as evidence that the process is arbitrary and unfair to them.

But journalists also know that significant perspectives on important issues should be adequately represented in news and factual programmes – and if the guidelines are interpreted with care when considering complaints, these will only be upheld in cases where this has clearly not been done.

If serious allegations are made about an individual or organisation, they should always be put to them for a response. And if claims are made about a significant and important general issue, significant viewpoints should be represented by referring to those affected by the issue at hand, those with expertise in it, or relevant officials or spokespeople.

None of this is incompatible with the editorial principles most media outlets set down in writing for their journalists and programme-makers, and in each case I examined, where the Authority found significant viewpoints had not been represented, I thought it was right.

In Pharmac's complaint about TV3's *60 Minutes* programme about breast cancer care (*Decision No: 2006-127)* the Authority said the broadcaster presented "a series of highly controversial statements" about the standard and effectiveness of care for breast cancer patients in New Zealand. These were "left unchallenged" and the programme had not given reasonable opportunities, or made reasonable efforts, to present other significant points of view.

Pharmac's decision not to fund the drug Herceptin was criticised in the programme and the Authority said Pharmac's was a significant point of view which was unreasonably excluded because:

"It was the body responsible for that decision. The Authority disagrees with CanWest that the item was simply a "human interest" story; it also presented the views of a highly regarded Australian specialist and a "breast cancer survivor and activist", who both strongly criticised the decision not to fund Herceptin in New Zealand. Accordingly, the Authority considers that CanWest had a responsibility to present PHARMAC's viewpoint within the programme complained about, or during programmes within the period of current interest." [55]

The broadcaster argued that quoting from a letter written by the Minister of Health represented a significant viewpoint, but that was not sufficient to meet the requirement for balance [57].

However, some journalists will have sympathy for the broadcaster's argument that:

"…the programme did not set out to be a detailed examination of the position of the funding agencies and those who challenge their funding decisions – it was clearly presented as a human interest story – allowing the two women upon whom the story was focused to tell their story." [36]

Accordingly, they may feel that sanctioning the broadcaster amounts to an unreasonable limitation on its freedom to tell the story in the way it considers to be appropriate for its own audience. But the broadcaster could still have made the programme in such a way as to be covered by Guideline 4c which states:

> *Factual programmes, and programmes shown which approach a topic from a particular or personal perspective (for example, authorial documentaries and those shown on access television), may not be required to observe to the letter the requirements of standard 4.*

Interestingly, when TV3 did broadcast such a programme in 2006 (an award-winning documentary about a former police officer who was lobbying Pharmac for funding of the costly chemotherapy drug Temadol), Pharmac's point of view was represented in some detail. Also, *60 Minutes* has previously accommodated Pharmac in other items about expensive medicines which are restricted due to the way Pharmac apportions its budget. In October 2004, Pharmac's boss was put on the spot in a programme about the availability of publicly funded growth hormone treatment for children. [16]

Journalists may feel aggrieved that well-resourced agencies like Pharmac can use the Authority to challenge journalism that is unfavourable to them or which neglects to include their particular viewpoint. To programme-makers, it will appear that the broadcaster is being 'told what to do' by a regulator, but in this case the Authority said clearly:

"This does not amount to a finding that CanWest was required to interview a representative from PHARMAC. The Authority observes that alternative perspectives could adequately have been presented by the reporter or by an interviewee from another appropriate organisation with sufficient knowledge of the issue." [64]

Indeed, to have sought comment from District Health Boards which supply cancer treatment, or a prominent oncologist, would not have unduly complicated the programme, in which one viewpoint was clearly allowed to dominate.

Some of the Authority's other decisions on balance also clearly demonstrate to journalists that they are obliged to include an organisation's viewpoint only where it is critical to the item. In *Decision No: 2004-223* the New Zealand Big Game Fishing Council said it should have been included in a *60 Minutes* programme about whether fish feel pain, and fishing methods are cruel.

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16 ***'Growing Concern'*** **TV3*, 60 Minutes ,* 25 October 2004, 7:30pm**

But the Authority said:

"While bodies such as the NZBGFC might properly be regarded as the authority on policy directions for its members, broadcasters are not obliged to seek their views or their approval of interview subjects unless this is critical to the item. It notes that while the NZBGFC complained that the two fishers interviewed for the programme were not "official spokespersons" for the Council, or authorised to comment on the Council's official position, the two men were not identified as representing anyone other than themselves." [48]

In other words, the Authority recognises that one viewpoint has not been allowed to dominate.

If the focus of the programme had been on whether members of the NZBGFC were using cruel methods – or the Council's new policy on this was being questioned – then the outcome may have been different.

However, I found one case of an upheld balance complaint where the organisation in question was represented in the item – and the outcome is confusing for journalists.

In *Decision No: 2006-058 (TVNZ and CYFS)* the Authority found that the broadcast was dominated by the aggrieved former foster-parents and their supporters – and it failed to present significant perspectives relating to the reasonableness of CYFS' actions in removing the children from the couple's care. A senior CYFS official was included in the broadcast and the reasonableness of CYFS' action was also raised with a third party with knowledge of the events.

The Authority said the main problem with the item was that *TVNZ failed to present a key piece of information that was critical to viewers' understanding of CYFS' perspective* (evidential interviews of the children involved in which they reported abuse). This is arguably an issue of accuracy (ie. omitting a fact that caused the item to be misleading[17]), not one of balance.

It's also not always entirely clear whose views are held to be significant.

In *Decision No: 2005-083* the Authority said Radio New Zealand had a responsibility to achieve balance even though David Benson-Pope had refused to be interviewed on *Nine to Noon* – in response to serious allegations made about his conduct as a teacher in the 1980s, which were made by an anonymous interviewee.

Radio New Zealand reported Benson-Pope's denials of earlier allegations of bullying, but the Authority said that wasn't sufficient as they preceded the allegations RNZ broadcast from its anonymous interviewee. RNZ also argued that the emails read out by the *Nine to Noon* host provided "significant points of view", because some were supportive of Mr Benson-Pope and sceptical about the interviewee's credibility.

Journalists and programme-makers reading this decision will get the message that balance cannot be provided merely by broadcasting the opinions of those who had sent in responses to a broadcast.

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17 **See Free to Air Broadcasting Code – Standard 5 – Guideline 5b.**

The Authority agreed with the complainant that "significant points of view" need to be given by people with direct knowledge of the alleged events, and this will confuse journalists, who will feel it was impossible to properly determine who these might be without Benson-Pope's co-operation.

In this case, people with direct knowledge of the alleged events – such as a witness to the events described by the interviewee – are unlikely to be available for interview, which may mean that "balance by other means" amounts to interviewing a character witness to provide a kind of testimonial for Mr Benson-Pope.

But as RNZ said in its response to the Authority, "good things" said about Mr Benson-Pope:

"…w*ould not preclude the possibility that Mr Benson-Pope behaved in the manner described by the interview."* [46]

"…and this would not benefit the listeners in any meaningful way.

POINT OF TENSION: WHAT CONSTITUTES REASONABLE EFFORTS MADE, OR REASONABLE OPPORTUNITIES GIVEN, TO PROVIDE SIGNIFICANT POINTS OF VIEW?

Many journalists will welcome the fact that the Authority found that the interview offers to David Benson-Pope were reasonable and therefore, there was no breach of the balance standard. It said Mr Benson-Pope was made aware of allegations made against him, and he could have made a response.

But in the light of his unwillingness to 'front up', journalists may not agree that the other efforts to "provide other significant viewpoints" were insufficient – especially given that it was reported in the introduction that "he categorically said any of the allegations, all of the allegations, were not true" – and "he has denied any allegation that he mistreated or bullied pupils".

Having said earlier that the allegations of the anonymous interviewee on *Nine to Noon* were tied up with the previous allegations (described as "the wider Benson-Pope controversy") it would appear that here the focus of the item had been switched back to the 'small picture' of the new anonymous allegations. And when the accuracy of these was challenged by David Benson-Pope, the Authority found that in effect it was impossible to determine their accuracy.

However, this decision also reminds broadcasters that they must provide balance by playing 'devil's advocate' – challenging allegations made by anonymous sources during the interview –or in their treatment of balance in the broadcast. Effectively, the hosts can provide "significant points of view" themselves and achieve balance.

On this occasion, this was not done – indeed, the Authority found that the field tape revealed editing which actually removed such expressions of scepticism, and quite rightly concluded this aggravated the lack of balance.

However, this too will annoy journalists. They might agree that it's essential for an interviewer to play 'devil's advocate' when the protection of anonymity has been granted, but when interviewees are not 'wise in the ways in the media' or are nervous,

the interviewer has to tease the story out of them, which may give a false impression of soft-pedaling. When an interview is recorded in advance the interviewer doesn't always know how it will be presented when it is broadcast.

Other cases of failure to present a significant range of views are more straightforward.

In *Decision No: 2004-135 (TVNZ and Ngaei and Association of Salaried Medical Specialists and New Zealand Medical Association*) the Authority decided the *Holmes* show did not make reasonable efforts to provide other viewpoints in an item about an alleged assault involving two doctors, even though *Holmes* cited numerous calls made to Southland Hospital and said the hospital did not advise it that Mr Ngaei was out of the country.

This was disputed by Mr Ngaei and the doctors' union, the ASMS, which complained that it was not approached for comment either. But the Authority said even if it accepted the broadcaster's version of events about attempts made to contact Mr Ngaei, this would still not be adequate.

In this case, it's hard to argue otherwise as the allegations were damaging and "significant viewpoints on the controversial issues" were clearly absent in the broadcast, which was also upheld as inaccurate and unfair for other reasons.

Here, the broadcaster should have delayed the broadcast until it had some response from Mr Ngaei – and the same is true of other cases where there's no input from the person who is the subject of the allegations.

By and large, journalists can be confident that if they've identified appropriate people who could supply balance and tried conscientiously to contact them, the Authority is unlikely to uphold a balance complaint. But the Authority's decisions do not give clear guidance about how long broadcasters should wait for a response.

POINT OF TENSION: WHAT CONSTITUTES THE PERIOD OF CURRENT INTEREST, WITHIN WHICH BROADCASTERS SHOULD PRESENT SIGNIFICANT OTHER POINTS OF VIEW?

The balance standard says significant points of view should be provided either in the same programme or in other programmes within the period of current interest. Steven Price[18] summarises this as meaning simply "while it's a live issue", which sounds simple but is often hard to determine.

When specific topical controversies flare up and vanish from the news quickly, the period of current interest is fairly obvious. But some stories or issues may have relevance over an indefinite period, and some stories develop slowly and are the subject of much coverage over a long period of time. Where this is the case, broadcasters can sometimes successfully cite other broadcasts outside of the one complained about as providing balance.

In the RNZ and Benson-Pope decision (*Decision No: 2005-083*), the Authority said:

"…balance is assessed from the point of view of the listener, not the person affected." [182]

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18 ***Media Minefield,*** **p.34.**

But the way the Authority interprets this will frustrate journalists in some cases. Broadcasters have complained it can be arbitrary, and makes contestable assumptions about people's viewing and listening habits.[19]

As discussed earlier, the Authority found that balance was not adequately supplied within the (also misleading and inaccurate) *60 Minutes* programme about breast cancer treatment. The broadcaster argued that debate about the rights and wrongs of funding the acclaimed drug Herceptin had developed over a long time, and the period of current interest should be long.

Accordingly, the broadcaster felt coverage of the issue in other programmes meant it had "made reasonable efforts or (given) reasonable opportunities to present significant points of view within the period of current interest". However, CanWest did not put up a good case for a longer period of interest in this case because it failed to point to any broadcasts which presented viewers with any other perspective on whether Herceptin should be funded in New Zealand.

Conversely, the Authority said the "period of current interest" was limited to "a period within close proximity to the broadcast", and accordingly, balance needed to be presented within the programme. It gave two reasons:

First, in the Authority's view, the 60 Minutes item…purported to be a self-contained discussion about whether Herceptin should be publicly funded in New Zealand. [60]

Having viewed the item, I believe that is true.

Secondly, the Authority said Herceptin is not a subject, such as euthanasia or abortion, about which competing arguments have been advanced over a lengthy period of time to enable viewers to arrive at an informed and reasoned opinion.

The Authority said:

"…a significant proportion of the media coverage about Herceptin has focused solely on the plight of breast cancer patients who feel that they should be given access to the drug, and who criticise PHARMAC's decision not to fund it." [62]

"…and as it happens, that's true too. A lot of the coverage at the time was strikingly one-sided, dominated by the views of sufferers and their advocates, and that lends weight to the Authority's assertion that the general public had no comprehensive understanding of the issue at hand at that time.

But on what grounds does the Authority make that judgment? Would it make similar assessments of overall media coverage for other controversial topical issues? Some journalists will feel that the Authority is in danger of straying beyond its area of expertise in making such assertions.

Since that programme was made, other news stories have been produced on this issue when Pharmac's policy on Herceptin has returned to the news. This could give ammunition to those who feel the case of a longer "period of current interest" should have applied on this issue.

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[19] ***Significant Viewpoints,*** **pp.44-49.**

In a 2006 BSA seminar discussing balance, TVNZ's former Head of Current Affairs, Bill Ralston voiced frustration about the Authority's interpretation of the period of current interest.[20]

He cited *Decision No: 2005-081 (TVNZ and Continental Car Services Ltd and Pitt)* – discussed earlier in Part 2 - Fairness*),* and complained that the balance decision did not take account of two other TVNZ news stories on the same matter – one broadcast three months earlier, one a month or two later. Where he felt that these provided essential balance, the Authority said "few viewers would have recalled the background information in the earlier story". [35]

The Authority also said clearly that news items will usually be considered "on their own merits", even if facts about the same story have been broadcast previously, and on the face of it that seems fair – and in line with good journalistic practice. Oddly, Bill Ralston himself appeared to back that up when he said at that same seminar that the *One News* audience "churns over" by as much as two-thirds each night.

But Bill Ralston did make a good point when he said this may be too rigid a policy for the modern 'rolling news' environment which is now upon us; one in which, he said, editors must make decisions in just a few minutes:

You may run a completely unbalanced story at midday, but by three o'clock you've got the other point of view in, so during the course of the afternoon the whole story balances itself out. [22]

The same has been true in radio, of course, for some time, and in the same seminar, Radio New Zealand news chief Don Rood said:

The whole of a breaking story won't be told in the first newsflash, or the next news bulletin. It may take hours, days or weeks for the entire story to be revealed, or unravelled. It is not fair to call broadcasters to account midstream by arbitrarily deciding when the period of current interest has ended, or narrowly defining what that period is. [23]

In addition, as more and more people get more and more of their 'broadcast news' online, broadcasters may begin to argue that stories which could balance allegedly unbalanced ones are available online at any time.

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20 **ibid, p.44.**

21 **ibid p.45.**

22 **ibid p.50**

STANDARD 5: ACCURACY

The accuracy standard was consistently applied in the decisions I consulted, reinforcing the message that journalists and programme-makers must not make statements they do not know to be true, or allow contributors in their stories and programmes to do so. Similarly, they must not leave their audience with misleading impressions by omitting relevant information, or presenting opinion or conjecture as fact.

Where claims are disputed, it is important that journalists note and explain this, especially in stories based on the grievances of one party – which are quite common in current affairs programmes these days.

Decision No: 2006-058 (TVNZ and CYFS) is a good example. It involved former foster-parents who pleaded guilty to smacking a foster-child on the hand with a wooden spoon and had two children removed from their care. On the face of it, this seemed an unjustified overreaction by CYFS, but the former foster-parents had originally faced a number of other abuse charges which were detailed in a police statement of facts which CYFS insisted was "knowingly" withheld from viewers by TVNZ. TVNZ argued that the statement of facts was never presented in court so it would be improper to include it in a report. The report also said the charges against the couple were dropped because:

"CYFS… accepted the plea bargain, because they wanted to spare the children having to testify in court." [140]

But CYFS said it did not arrange or approve any plea bargain.

In this case, the Authority correctly concluded that the item was inaccurate, especially as the information in the police statement of facts was omitted, even though it was clearly significant in CYFS' decision to remove the children from the couple's care. This gives journalists the clear message that just because they don't know how to best handle information at their disposal, they should not pretend it does not exist.

Some complaints require the Authority to distinguish assertions presented as fact – to which the accuracy standard applies – from opinion, analysis and comment. By and large, this is also done consistently.

In cases where a complaint has been upheld for misleading or unnecessarily alarming viewers (Guideline 5b of the Free to Air Television Code), the Authority's decisions can help to 'set the record straight' for the public. This is not the main function of the BSA (which is upholding standards in broadcasting) but I believe it is an important function nonetheless, especially now that such decisions are often reported in the media and are also readily available on the internet.

Examples include *Decision No: 2007-114 (TVWorks and Gough)*, concerning a consumer TV show's inaccurate claims about dangerous levels of formaldehyde in clothes; and *Decision No: 2006-127 (CanWest TVWorks and Pharmac)* involving a current affairs show on breast cancer treatment which contained inaccuracies that misled viewers.

Where accuracy complaints are upheld, the following points of tension arise for journalists and programme-makers:

- ***whether some inaccuracies are really "significant errors of fact".***
- ***whether some inaccuracies make an entire item inaccurate (and possibly also unfair).***
- ***the distinction between assertions of fact (to which the standard applies) and legitimate expressions of opinion.***
- ***the standard of proof a broadcaster must meet for facts and assertions presented in reports.***
- ***the extent to which the Authority will go to establish the truth about disputed facts, and whether it strays beyond its expertise in doing so.***
- ***whether the BSA challenges complainants' assertions as rigorously as those of the broadcasters.***
- ***what constitutes "correction at the earliest opportunity".***

POINT OF TENSION: WHETHER SOME INACCURACIES ARE REALLY SIGNIFICANT ERRORS OF FACT.

During an episode of *Campbell Live*, host John Campbell told viewers he had interviewed one of the "medal thieves" who had stolen precious war medals from the Waiouru Army Museum. The man was referred to as 'Robert', and appeared as a hooded figure with his face hidden in shadow. After the interview, Mr Campbell told viewers they "used an actor's voice", and a caption appeared which read: 'actor's voice'.

But later it emerged that the man appearing as 'Robert' was also an actor – and not a "medal thief" at all. In *Decision No 2008-034 (TVWorks and Cheer)* the complainant said the suggestion of an actual interview taking place with the alleged thief was misleading, and in breach of Guideline 5b, which states:

> *Broadcasters should refrain from broadcasting material which is misleading or unnecessarily alarms viewer".*

The broadcaster said that although the failure to display a "reconstruction graphic" was "a mistake…"

"This was not a material breach and was not one that was active for long…because the position regarding the re-enactment was made clear before the next Campbell Live programme." [38]

But the Authority said failing to explicitly inform viewers that the interview was a re-enactment was in breach of Standard 5[23].

"Although the correct position was publicised on the internet and in print news articles mentioned by the parties, the broadcaster itself never corrected the misleading impression created by the broadcast within the same forum as the original broadcast; that is, on Campbell Live or even on TV3." [51]

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[23] **Although it did not find that the failure compromised "the editorial independence and integrity of news and current affairs", as set out in Guideline 5c of The Free to Air Code.**

Many journalists will agree with the broadcaster that upholding the complaint would be an "overreaction to what was a simple…mistake". They will observe that print journalists routinely use unnamed sources – and in this case the interview was, as TVWorks argued, "acted…for proper journalistic reasons". They will feel the error of judgment (not acknowledging the reconstruction) was the result of the haste with which the item went to air, and that in the end the error was not really a significant one for the majority of viewers.

The Radio Code, revised to take effect from 1 July 2008, now says in its accuracy standard:

> *Broadcasters should make reasonable efforts to ensure that news, current affairs and factual programming:*
>
> - *is accurate in relation to all material points of fact and / or*
> - *does not mislead.*

The determination as to what qualifies as "material" may be far from clear in many cases, but the distinction is an important one that journalists would like to see applied more widely.

POINT OF TENSION: WHETHER SOME INACCURACIES MAKE AN ENTIRE ITEM INACCURATE – AND POSSIBLY UNFAIR.

Where there are several significant inaccuracies, the Authority sometimes determines that the entire item is unfair. In 2005, JF Burrows noted:

…the Authority seems likely to find unfairness in cases where inaccurate statements have been made about the complainant, and where the inaccuracy reflects adversely on his or her reputation, or renders him or her likely to be the subject of criticism. In such a situation, the damage to reputation and standing is the additional element which takes the case out of the Accuracy standard and places it within the Fairness one.[24]

It may seem unfair to some journalists that complaints citing one standard can also be upheld under another, but I found no cases where I thought this was inappropriate or unfair.

Decision No: 2005-081 (TVNZ and Continental Car Services / Richard Pitt) is a good example.

Here, the Authority said individual inaccuracies in a *One News* report made the entire item a breach of Standard 6 (fairness) because it "unfairly damaged Mr Pitt's credibility". The complainant's side of the story was not explored with anything like the vigour applied to that of the aggrieved car-owner. The broadcaster was cavalier in its claim of "restrictive trade practices", and the implication that Mr Pitt had lied didn't bear scrutiny either.

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24 Burrows, ***Assessment of BSA Decisions p7***

TVNZ had upheld two inaccuracies itself, but five further aspects of the report were upheld by the Authority as breaches of Standard 5. The Authority's conclusion that:

"…the action taken by TVNZ in respect of this complaint was manifestly inadequate in all the circumstances." [59]

…is a clear message that the broadcaster itself should have upheld the complaint, rather than try to 'defend the indefensible'.

Similarly in *Decision No: 2005-052 (Prime Television and Dr X)* the Authority found that inaccuracy stemmed from the broadcaster omitting relevant facts because it did not mention that "expert evidence" on the matter had been disregarded in a court case by a judge.

For this – and other inaccuracies – a majority correctly found the item was also unfair to Dr X.

POINT OF TENSION: THE EXTENT TO WHICH THE BSA ENDEAVOURS TO ESTABLISH THE FACTS, AND WHETHER IT STRAYS BEYOND ITS EXPERTISE IN DOING SO – AND WHETHER IT CHALLENGES COMPLAINANTS' ASSERTIONS AS ROBUSTLY AS THOSE OF THE BROADCASTER BEING CHALLENGED.

In *Decision No: 2006-127: (CanWest TVWorks and Pharmac*) the Authority upheld complaints about a *60 Minutes* report on differences in breast cancer treatment in Australia and New Zealand, and the availability of the so-called "wonder drug Herceptin". In doing so, the Authority had to consider some complex technical arguments advanced by the complainant, Pharmac.

The Authority declined to uphold Pharmac's challenge to a statement that *"sophisticated treatment" available in Australia means "Australian women are 28% more likely to survive breast cancer than women (in New Zealand)".* In doing so, it placed the burden of proof on the *complainant:*

"PHARMAC has provided no evidence to suggest that the survival rates in Australia are similar to those in New Zealand, [so] the Authority has no basis upon which to conclude that the statement was inaccurate or misleading." [75]

But the Authority was convinced by Pharmac's analysis of two other claims it alleged were inaccurate, including the following one:

"Trials show women with HER2-positive early breast cancer are up to 50% less likely to have a recurrence of the cancer with Herceptin and 33% less likely to die." [11]

This is consistent with other accuracy complaints, such as *Decision No: 2006-087 (TVNZ and KW)*, where the Authority says:

"Once the accuracy of the broadcast has reasonably been thrown into question, the broadcaster must satisfy the Authority, on the balance of probabilities, that the disputed facts are true." [41]

But given that the Authority accepted Pharmac's analysis of the inaccurate claims, journalists and programme-makers will be wondering whether the playing field is even. Pharmac is an agency of state with considerable resources to build a case to challenge

unfavourable assertions. Journalists will also question whether the Authority's members have sufficient expertise to judge these matters – and if not, they will feel it would be fairer to decline to determine such complaints.[25]

POINT OF TENSION: THE STANDARD OF PROOF A BROADCASTER MUST MEET TO BACK UP FACTS AND ASSERTIONS PRESENTED IN REPORTS.

Guideline 5e of the Free to Air code says:

Broadcasters must take all reasonable steps to ensure at all times that the information sources for news, current affairs and documentaries are reliable.

However, it isn't always clear to journalists what's "reasonable".

In *Decision No: 2006-116 (TVNZ and Mason)* allegations were made about the conduct of a senior medical professional (Dr Mason), with respect to the treatment of a child whose mother was dissatisfied with his care. The source in question was described as "a family friend, an orthopaedic specialist based in Taiwan" who had said in a letter the boy's tumour should be removed without delay. The complainant challenged both this opinion – and the Taiwanese specialist's credentials[26].

The Authority said *Close Up* gave no indication to viewers that this second opinion should be given any less weight than Dr Mason's, and "there was nothing to indicate the qualifications or expertise of the Taiwanese man". The Authority said the Taiwanese man's "opinion was introduced and presented by the reporter, thereby lending it credibility", and in the end TVNZ was ordered to broadcast a statement which said it "failed to ensure that one of its sources was reliable".

The Authority was not persuaded by the broadcaster's argument that the specialist's letter had been "presented as part of the mother's honest opinion" that her son's care had been inadequate – and it did not accept TVNZ's contention there is "a limit to how far TVNZ can go" to establish the credentials of a source such as this.

Journalists should know that if their story casts doubt on the conduct of a professional person, the onus is on them to substantiate the accuracy of any such statements. But does this mean it's up to journalists to assess the credentials of qualified professionals against each other? And given that the broadcaster could not independently determine the facts of the boy's condition, why should the broadcaster ignore the opinion of the Taiwanese specialist, which partly explained the mother's motivation for speaking out – and was therefore itself a significant part of the story?

The Authority does not specify the "reasonable steps" which would have satisfied it in this instance – and journalists will feel that when deadlines are pressing, this is not feasible or fair.

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25 **Burrows, *Assesment of BSA Decisions* (refer page 14 especially) discusses the inappropriateness of the BSA declining to determine matters before it.**

26 **The complainant said that specialist was not on the Taiwanese register of Orthopaedic Surgeons, nor any other medical register in Taiwan, that the opinion was not printed on official letterhead and had neither an address nor anything to indicate his qualifications.**

The reliability of sources was also questioned in *Decision No: 2006-063 (CanWest TVWorks and Dewar)* about a TV3 news report – supplied by the UK-based TV news service ITN – stating that the Chernobyl nuclear disaster in 1986 was "the killer of at least 16,000, possibly double, even treble that".

A similar complaint from the same complainant about a TVNZ news report was upheld in *Decision No: 2005-085 (TVNZ and Dewar).* The complainant said the actual number of deaths was far smaller and both news items had not reported that the death toll was disputed.

The Authority consulted some literature on the matter and concluded:

"…from the available papers, total deaths appear to be below 100." [25]

…and the complaint was upheld.

But in *Decision No: 2006-063 (Canwest TVWorks and Dewar),* TV3 could justifiably be disappointed that the complainant was not satisfied with its response: an undertaking that doubt and confusion about the number of deaths would be accurately explained in its reports on the issue in future. This response was also in line with the outcome of Mr Dewar's earlier complaint against TVNZ (*Decision No: 2005-85*), where the Authority stated:

The Chernobyl disaster is an on-going story and the Authority expects TVNZ to use more credible sources of information when it next reports on the consequences of the accident in the Chernobyl reactor. [19]

The Authority told TV3 it should have upheld the complaint on the basis that the reporter's statement was "inaccurate and a significant exaggeration of the death toll", not because the position was merely "uncertain".

The accuracy standard – quite rightly – makes no exception for news reports of international origin, but Guideline 5e does state:

> *Broadcasters must take all reasonable steps to ensure at all times that the information sources for news, current affairs and documentaries are reliable.*

So might not the fact TV3 has engaged a reputable provider for its international news constitute "a reasonable step" in itself? After all, this was not a case where the inaccuracy would alarm viewers, as envisaged in Guideline 5b; and in concluding that the reporter got it wrong after some limited research, the broadcaster will note that the Authority considers its own interpretation of the facts to be more 'sound'; than that of a professional journalist working for a highly regarded international news organisation.

In *Decision No: 2007-007 (TVNZ and Broatch)*, a complaint against a broadcaster's estimate of casualties during the current war in Iraq was not upheld because there was "no reliable estimate" available. Journalists will feel the same criterion could have been applied here.

This will cause journalists to question how deeply the Authority is prepared to investigate disputed facts and how much research it is prepared to conduct to determine their accuracy.

POINT OF TENSION: THE DISTINCTION BETWEEN FACTS (TO WHICH THE STANDARD APPLIES) AND LEGITIMATE EXPRESSIONS OF OPINION.

In *CanWest TVWorks and Pharmac* the Authority also upheld as inaccurate a statement from a breast cancer physician – also a campaigner – who said:

"…we calculate that actually 66 additional lives could be saved every year if we use Herceptin on 400 women in New Zealand." [13]

The Authority said the latter was presented as "a statement of fact" to which the accuracy standard applies, and that the statement was also inaccurate and misleading for viewers. However, journalists will feel that it was clear to viewers this was a statement that was likely to be contestable, as it was made by someone advocating the wider availability of the drug.

David Benson-Pope's complaint against Radio New Zealand *(Decision No: 2005-083)* alleged that assertions made by an anonymous interviewee were presented to listeners as facts, but were untrue and inaccurate. The then-Cabinet minister said the anonymous interviewee accused him of serious – and possibly criminal – misconduct. He argued that without knowing the identity of the interviewee, his assertions could be no more than "an accurate recall of inaccurate facts" which would fall foul of the then-Principle 6 of the Radio Code, which said:

In the preparation and presentation of news and current affairs programmes, broadcasters are required to be truthful and accurate on points of fact.

Benson-Pope argued that the disclosure of the source's identity was required to determine the accuracy of the interviewee's assertions, but the Authority declined to determine whether the allegations were accurate.

Its consideration of this latter issue led to upholding his complaint of unfairness, but it was a good outcome for journalists who will feel that the need to protect sources was understood and safeguarded – and that anecdotal evidence was not assessed against the accuracy standard.

POINT OF TENSION: WHAT CONSTITUTES CORRECTION AT THE EARLIEST OPPORTUNITY?

Once a significant inaccuracy has been identified, Guideline 5a of The Free to Air Television Code says:

> *Significant errors of fact should be corrected at the earliest opportunity.*

This issue arose in only one decision I consulted.

In *Decision No: 2008-034 (TVWorks and Cheer)* the Authority said such a correction had not been made because:

"Neither John Campbell nor TVWorks' Director of News mentioned the mistake in interviews given the day after the broadcast, and John Campbell's acknowledgement was not made until three days after the broadcast, in a Sunday newspaper." [52]

The Authority said that upholding this part of the complaint would "clearly promote the objective of Standard 5, which is to protect audiences from receiving misinformation and thereby being misled".

But journalists will have sympathy with the broadcaster here as the broadcaster had effectively upheld the essence of the complaint when it initially determined it, and there had already been widespread acceptance in other media of the error that was made. They will feel there was – in John Campbell's words – "no ongoing attempt to deceive".

In some cases when they're defending accuracy complaints, broadcasters warn that sanctions may have a "chilling effect", dissuading broadcasters from serving the public interest in the future.

Many journalists will agree with the broadcaster that in this case the "inaccurate" interview did make "a significant contribution to discussion about an important issue to New Zealanders" and the mistakes made should not undermine this. Viewers were interested in hearing what the "medal thief" had to say on the matter, and reporters should be encouraged to seek out similar news-makers, and inform the public about their views.

In *Decision No: 2007-114 (TV Works and Gough)* the Authority found that consumer programme *Target* misled and unnecessarily alarmed viewers in its presentation of test results which suggested toxic levels of formaldehyde in children's clothing – a faulty conclusion based on faulty testing. But the broadcaster said the programme was a "success story" overall because it was instrumental in the implementation of a safety standard for formaldehyde in clothing, and it said the Authority should "be careful to avoid being captured by the benefit of hindsight".

The broadcaster added:

"If programmes like Target were to be discouraged from researching and bringing results to the public, TVWorks wrote, it would be inconsistent with the proper operation of the media in a free and democratic society." [56]

The Authority responded in its decision:

"Consumer information programming is an important form of speech, but when that information is grossly inaccurate and in breach of broadcasting standards…upholding the complaint and imposing an order are reasonable limitations upon the broadcaster's freedom of expression." [60]

Most journalists and programme-makers would accept this as fair. Some will even reflect that any 'chilling effect' would be much greater if the complainant or another party had gone to the courts to resolve the matter.

STANDARD 6: FAIRNESS

In his assessment of Broadcasting Standards Authority decisions, JF Burrows says:

"fairness is so open-ended as to be almost indefinable, and the decisions on it are bound to involve a degree of subjective judgment."[27]

Unless carefully monitored, decisions falling outside the guidelines are in danger of being criticised by broadcasters as being subjective and unpredictable.

However, most judgments made about fairness in the decisions I have consulted seem reasonable, and are also consistent with the wording of the standard and the guidelines.

Decision No: 2005-081 (TVNZ and Continental Car Services Ltd and Pitt) for instance, is a good 'how not to' case study for journalists and broadcasters. The complainant was clearly not dealt with fairly. The item focused almost entirely on the grievances of one party, whose allegations were damaging to the reputation of the company and on its boss.

But in other cases, journalists and programme makers will not agree with the reasons for upholding complaints, and some decisions may leave journalists and programme-makers unclear about the expectations they must meet in order to be 'fair'. In some cases they will feel the Authority does not adequately recognise the realities of broadcast journalism.

Areas of tension include:

- ***the interpretation of a "reasonable opportunity to respond".***
- ***the fairness of singling out people.***
- ***the granting of anonymity, and whether it's inherently 'unfair'.***
- ***use of hidden cameras and covert filming.***
- ***what constitutes exploitation and humiliation.***
- ***what constitutes "denigration".***

POINT OF TENSION: THE INTERPRETATION OF A "REASONABLE OPPORTUNITY TO RESPOND".

Many decisions on fairness will remind journalists and programme-makers that the need to get the 'other side of the story' is paramount, especially when reporting the grievances of one individual or one party in a dispute. Journalists will also be reminded that they need to make it clear precisely what they are asking people to do and be specific about the deadlines that apply.

No honourable journalist would argue against giving people a reasonable opportunity to respond to allegations made against them, but in some cases where the Authority has decided this was not done, journalists may feel sufficient effort was made - and the subject of the story bears some responsibility for any consequent unfairness.

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27 **Burrows,** ***Assessment of BSA Decisions, p.7.***

In *Decision No: 2006-116 (TVNZ and Mason)* a mother who believed her child wasn't getting adequate medical care made allegations about the conduct of the surgeon in charge of the child's treatment. The surgeon said the programme's claim that he did not provide a statement before the programme's deadline was unfair to him and showed him "in the worst light possible".

Upholding the fairness complaint, the Authority said the broadcaster should have tried harder to get the rebuttal required, and should not have 'switched' from telephoning their requests to sending text messages.

Maybe so, but the surgeon was aware for some time that the allegations were to be the subject of a broadcast, and he did not dispute that he was asked for a statement in response. And if the complainant had agreed to be interviewed in the first place, as the broadcaster initially requested, fairness could easily have been achieved.

This decision doesn't adequately clarify what constitutes "a reasonable offer" to be interviewed in circumstances where a deadline is approaching. Having failed to get a response in time, it may have been 'fairer' to delay the broadcast, but journalists may feel that this could encourage reluctant sources to stall a broadcast by making themselves "hard to get hold of" – effectively vetoing the broadcast, in the short term at least.

In this case the broadcaster also showed a measure of good faith by broadcasting a portion of a subsequent statement from Mr Mason in a later programme.

Decision No: 2005-052 (Prime TV and Dr X) is another case where a medical professional complained he was not able to make comment in the item that was broadcast, but in this case, the oral surgeon who was the subject of allegations about his conduct was not named because his name had been suppressed when the matter went to court.

Standard 6 of the Free to Air Television Code of Broadcasting Practice states that, in the preparation and presentation of programmes, broadcasters are required to deal justly and fairly with any person taking part or "referred to" – and a majority of the Authority found that Dr X was "referred to" in the *Holmes* item for the purposes of the fairness standard. In the Authority's view, the name suppression order did not preclude Prime from seeking Dr X's comments, as it could have broadcast Dr X's views while still protecting his identity.

However, Prime did offer Dr X the opportunity to participate in an interview, and to broadcast a statement prepared by him. Later it also offered to incorporate reasonable comments from him in the form of a statement it proposed to broadcast. Journalists will welcome the fact that the Authority said this was "a genuine and fair way of dealing with the complaint" and declined to uphold this part of Dr X's complaint.

It's clear from these decisions that special care should be taken with allegations of unprofessional behaviour by a qualified medical professional. These could have serious consequences for doctors' careers, and if the allegations cannot be supported, they could even be defamatory.

Some journalists may well feel that this decision could have a chilling effect, discouraging investigation of senior doctors. But past BSA decisions have demonstrated that where there is credible evidence of serious wrongdoing, the public interest will be a defence

to methods that may be inherently unfair. Most notably, this can be seen in the TV3 / Dr Morgan Fahey case *(Decision Nos: 2000-108 to 113)* which said clearly:

"…the public interest on this occasion was both legitimate and strong."

Journalists and programme-makers can also be reassured by *Decision No: 2006-116 (TVNZ and Mason)* that it was legitimate to question the surgeon's conduct in the case, as the Authority declined to uphold his complaint that it was inaccurate to describe his letter to the mother as "threats about (AB's) place on the waiting list".

The Authority also said this decision is not a prohibition of – or warning against – broadcasting interviews in which people air grievances about medical professionals:

"MB was entitled to recount her interpretation of events, and viewers would have assessed the likely precision of her recollection while taking into account that she had received the information as an anxious mother who was concerned about the seriousness of her son's condition." [114]

POINT OF TENSION: THE GRANTING OF ANONYMITY.

Journalists should always try to get comments 'on the record', but in some circumstances this could compromise the safety, reputation or security of sources. Granting them anonymity may be the only way to get important information into the public arena – but there's a good chance this could be unfair to the subject.

In *Decision No: 2005-083 (Radio New Zealand and the Hon David Benson-Pope)* the complainant alleged that an anonymous interviewee falsely accused him of serious – and possibly criminal – misconduct, including "beatings" during his former career as a teacher. The interviewee also used damaging terms including "liar" and "nasty bastard", which the Authority said went "beyond merely expressing opinion".

The Authority stated that Radio New Zealand did not demonstrate that they had adequately established the credibility of the anonymous source, and said:

"…the Authority can discern no reasonable basis for the former student being granted anonymity." [157]

With reference to Decision No: 2004-115 (the Ellis case), the Authority said:

"…any programme in which unidentified accusers allege that an identified person has committed serious but unspecified criminal offences is likely to be inherently unfair to the accused. Regardless of what "opportunities" such a person might be offered to present his or her point of view, allegations of this nature are generally impossible to defend." [23]

Accordingly, the Authority decided the broadcast was unfair to Benson-Pope, even though he was given opportunities to respond. The Authority accepted Benson-Pope's claim he would have been "ambushed" if he had agreed to take part in the broadcast, and it effectively accepted the argument of Benson-Pope's solicitor, who said:

"It was…unreasonable to expect him to respond without being told the identity of his accuser. In this respect, RNZ had not given him a reasonable opportunity to present his point of view." [23]

Some journalists will feel the Authority should not have rejected Radio New Zealand's argument that Benson-Pope could have predicted the likely nature of the allegations without knowing the identity of the accuser, given all the preceding news coverage of allegations made by other former pupils about his conduct in the 1980s.

When considering Benson-Pope's complaints about balance, the Authority said:

"…a controversial issue of public importance was discussed in the broadcast." [162]

…because David Benson-Pope was then the associate Minister of Education, and:

"It would be artificial to separate out the anonymous interviewee's allegations as an independent controversial issue…the anonymous interviewee's allegations were inextricably linked to the wider "Benson-Pope controversy". The nature of the particular allegations made fell squarely into the category of concerns surrounding Mr Benson-Pope's conduct as a teacher." [166]

Many journalists will feel that this bolsters the case for airing the anonymous allegations in public, and the legitimate public interest in them is not diminished by the fact that the broadcaster could not demonstrate to the Authority that they'd done enough to satisfy themselves of the interviewee's credibility.

The Authority was at pains to point out this was not a prohibition on interviewees being granted anonymity – but this decision will leave journalists believing the Authority will always say it is unfair to broadcast anonymous allegations, and this could encourage public figures to refuse to be interviewed about their conduct in future unless they are forewarned about the nature and the provenance of allegations an interviewee may make.

The Authority said other things also contributed to the lack of fairness in this case. It said the anonymous interviewee's story was not sufficiently challenged in the interview which was broadcast and that elements of the interview in which the host appeared to express doubts about what the interviewee was saying were edited out for the version that was broadcast.

Senior journalists have in the past expressed frustration with the Authority's criticism of interview technique, and journalists may resent the way the Authority criticised the interviewer's conduct in this case, when the Authority said:

"In the Ellis decision, the Authority agreed that the choice of interviewing style is a matter of editorial judgment, but it did not accept that editorial style is never a matter of broadcasting standards." [149] [28]

The Authority does not ignore these sensitivities – and other practicalities of broadcast journalism – which are acknowledged in their final statement:

"The Authority acknowledges that – unlike in Ellis – RNZ had limited time in which to investigate the interviewee's story." [201]

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28 ***Decision No: 2004-115 (Radio NZ and Ellis)***

They concluded by saying:

"The Authority recognises that broadcasters are faced with difficult situations in the newsroom, and that they must often make important decisions within a short timeframe. The Authority does not wish to dissuade broadcasters from taking calculated risks with respect to stories of major public interest." [202]

But given that the decision doesn't offer much guidance on what would constitute a satisfactory effort to establish the credibility of the anonymous interviewee, many will agree with former TVNZ Head of News and Current Affairs, Bill Ralston, when he said in 2004:

I don't mind an ambush interview, if an ambush interview is what it takes to get the truth…because there are some people out there…who, given warning, or given the opportunity to speak, will not. Sometimes, it is in the public interest to take them on in the only way you can, by whatever method to bring out the truth. Because that's what we're there to do. [29]

POINT OF TENSION: WHAT CONSTITUTES A "DISTRESSING SITUATION" REQUIRING EXTRA SENSITIVITY ON THE PART OF JOURNALISTS AND PROGRAMME-MAKERS?

Journalists frequently have to report on situations that are plainly distressing for those involved. Indeed, sometimes they need to communicate that distress to the audience because it's part of the story. Even when this is done responsibly and professionally, some people will regard it as intrusive, gratuitous and insensitive and that any report in such a context is worthy of a complaint.

Guideline 6e in the Free to Air Television Code says:

> *Broadcasters should take particular care when dealing with distressing situations, and with grief and bereavement. Discretion and sensitivity are expected.*

But it's important that the Authority's decisions do not cut across the media's freedom – indeed its duty – to report on "distressing situations".

In *Decision No: 2007-010 (TVNZ and Agnew),* the Authority upheld a fairness complaint against TV One's *Close Up* show about a report on a Chinese family whose father had been deported the previous year. The mother was fighting a deportation order issued by the Immigration Service, and the seven-year-old daughter was obviously upset in the item that was broadcast.

The Authority said:

"…the possibility of the girl's mother being returned to China was a "distressing situation" as contemplated by the guideline." [17]

Obviously, the fact that the children were aged nine, seven and six means care should have been taken (see my later discussion of this). But that aside, many journalists will not

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[29] **From the transcript of, *Back to the Future; A one-day conference looking at the future of the New Zealand Broadcasting School,* 27th March.**

agree the situation itself was especially "sensitive". *Close Up* had the family's consent and the family's predicament was a long-running one, not a sudden trauma. The family had co-operated with the same broadcaster previously, and also with TV3, so they were not unaware of the media's demands or objectives.

Immigration law is a legitimate topic for broadcasters, as are the human consequences of its enforcement. Broadcasters should not shy away from covering a story like this just because it may be sensitive for some of the subjects.

POINT OF TENSION: WHAT CONSTITUTES EXPLOITATION AND HUMILIATION?

The main reason for the unfairness in *Decision No: 2007-010 (TVNZ and Agnew)* was that the Authority said the broadcaster "failed to use discretion and sensitivity when interviewing a child" in the "distressing situation". The presenter interviewed the couple's three children, and the seven-year-old girl was shown to be upset and crying when the possibility of her mother returning to China was discussed. The girl was also used to interpret the reporter's questions for her mother.

Guideline 6e of the Free to Air Television Code states:

> *Broadcasters should recognise the rights of individuals, and particularly children and young people, not to be exploited, humiliated or unnecessarily identified.*

The Authority made it crystal clear what was wrong with the story:

"The presenter's line of questioning upset the seven-year-old girl and deepened her distress at a very difficult time in her life. It appears to the Authority that the interview was used specifically to provoke an emotional response from the child. For example, the presenter asked the children "Do you worry that she's going to go again? Do you worry that she might have to go to China?" In the Authority's view, the interview was conducted to heighten the emotional impact of the story, at the expense of the child's wellbeing." [22]

The Authority also extracted this from the reporter's script:

"See how freely those tears flowed when we turned up to talk about this again, especially with [the seven-year-old girl]." [18]

…to illustrate how it believed the child had been "exploited".

Some journalists may agree that the broadcaster in this case did not pay enough attention to the vulnerable child's welfare, but will feel that the Authority has strayed here from its normal practice of not criticising the style and tone of broadcasts. Also, they may feel the Authority is not in a position to know if the child's distress really was deepened in any significant way by the interview or the subsequent broadcast.

Journalists may wonder if it would have been okay if the child had not shown her distress. In this circumstance, the interview may have been just as damaging, but no one would know. They may also resent the fact that a print journalist could have carried out an equally distressing interview and probably escaped censure.

The Authority did make it clear that:

"…this ruling should not be taken as an injunction against interviewing children." [24]

But journalists and programme-makers alike will be left wondering under what circumstances journalists really can interview children for news and current affairs shows without prompting complaints alleging "exploitation" which are likely to be upheld. Journalists may also be irked by the fact that the complainant is a 'third party' distressed about the presence of young children in the story.

Some journalists will conclude the Authority has not taken account of the 'headline and deadline' pressures of daily TV current affairs journalism. They would argue that it's not true that the broadcaster:

"…could easily have told the mother's story without interviewing the girl or having her present when her mother was interviewed." [22]

Arranging an adult Chinese interpreter would have involved expense and delay. The presence of a stranger in the role may even have made things more uncomfortable for the family.

Decision No: 2007-068 (TVNZ and Green) concerns another complaint from a 'third party' – this one about the naming and shaming on television of a woman convicted of drink driving for the second time. The woman declined to be interviewed when approached by the TV crew, and she was shown running down the street to get away from the reporter. Her age, marital status and salary were reported. Her face was initially pixellated, but later she was 'unmasked' and named in the item.

The Authority said it was unfair to single her out when there was nothing particular about her conviction that made this necessary – and nothing about the woman's case justified the "humiliation". The Authority said the unfairness arose from the way in which the woman was identified, pointing out that that the public record and print media exposure of convictions don't usually include the person's image – and therefore:

"…there is a fundamental difference between a conviction being on the public record, and identifying a person on national television as having been convicted of an offence." [19]

The Authority added:

"There are occasions when the public humiliation of an individual is a regrettable but necessary consequence of the pursuit of a story in the public interest." [23]

But this was not such a case in the Authority's view.

Journalists may concede that the woman's conviction was not a matter of public importance, but the issue of penalising drink-drivers is – and revealing the identities of only those who are happy to be identified outside the court (as one man in the item was) would rob such an item of its impact.

Drink-driving is a criminal offence which many people consider highly antisocial, and about which it is often said 'the message is not getting through'. Accordingly, many journalists will feel that while the unmasking was harsh, it was not unfair or gratuitous.

The filming took place in public (outside the court), the conviction in question was a matter of public record, and the unmasking was done in the context of an informative item all about the pros and cons of naming and shaming convicted drink-drivers.

The fact the woman and her conviction were unexceptional was – in a way – the very point of picking her out. And revealing the woman's identity in a humiliating way was not in itself the aim of the broadcast. It was done in the context of a thoughtful item about the efficacy and ethics of naming and shaming drunk drivers, which was followed by a discussion involving a lawyer and a newspaper editor.

Journalists may very well be bothered by the lack of consistency here – and the fact that the Authority did not give much weight to the intellectual context of the item in which the woman was 'named and shamed'.

When TVNZ pursued this in the High Court, Justice Mallon concluded the woman's interest in avoiding embarrassment was not heavy. She also pointed out that in some cases the singling out of individuals to illustrate bigger problems was not upheld as "unfair" by the Authority. One instance is *Decision No: 2006-084 (CanWest TVWorks and Young)*, in which consumer affairs show *Target* picked out an airport worker with hidden camera footage.

POINT OF TENSION: WHAT CONSTITUTES "DENIGRATION"?

Guideline 6g of The Free to Air Television Code says:

> *Broadcasters should avoid portraying persons in programmes in a manner that encourages denigration of, or discrimination against, sections of the community on account of sex, sexual orientation, race, age, disability, or occupational status, or as a consequence of legitimate expression of religious, cultural or political beliefs.*

Unless this guideline is carefully applied, broadcasters could fear that they could be sanctioned for airing the strong but sincerely held opinions of people that might be newsworthy, or worthy of further debate. They may also be concerned that 'edgy humour' about race or other sensitive social or political issues might get them in trouble.

Broadcasters or programme-makers dealing in what might be described as 'cutting edge' programming can take heart from these qualifications in the guidelines:

> *This requirement is not intended to prevent the broadcast of material which is:*
>
> *i) factual, or*
>
> *ii) the expression of genuinely held opinion in news, current affairs or other factual programmes, or*
>
> *iii) in the legitimate context of a dramatic, humorous or satirical work.*

However, broadcasters may be concerned that they could still fall foul of subjective or unpredictable judgments – or be sanctioned for denigratory views expressed in a live setting which they might otherwise not have broadcast.

In *Decision No: 2007-029 (Alt TV and Barnes)* the broadcaster received one of the highest penalties ever handed down by the Authority. The decision concerned a G-rated programme broadcast live on Waitangi Day, during which text messages of a racist and sexual nature, including explicit language, were run across the screen.

The Authority said:

"In light of the requirements of the Bill of Rights Act, a high level of invective is necessary for the Authority to conclude that a broadcast encourages denigration or discrimination in contravention of the standards." [22]

Broadcasters will feel that the messages may have caused some offence – but would not have caused any actual harm. And the target audience of this 'alternative' station would have largely shrugged off the messages as a 'bad taste joke'.

But the Authority went on to make a good case for the broadcast 'crossing the line'. It said:

"The statements supporting death of and violence towards people of particular races can, in the Authority's view, aptly be described as hate speech. It concludes that the broadcast encouraged denigration of, and discrimination against, sections of the New Zealand community on the basis of race." [22]

The broadcaster complained it was a small independent outfit and the penalty could be crippling, but the Authority quite rightly said it must maintain broadcasting standards and this case serves as a reminder to all broadcasters that they are responsible for the standard of everything they broadcast. Noting that Alt TV had claimed a financial penalty could cripple the channel, the Authority stated clearly:

"Access to the public airwaves carries with it a responsibility to adhere to broadcasting standards, and this responsibility is equal for all broadcasters." [29]

Some who saw the now-notorious *South Park* 'Bloody Mary' episode would have been deeply offended by its portrayal of the Catholic religion and some of its principal icons – and some of the complainants in *Decision No: 2006-022* (Canwest TVWorks and 35 Complainants) cited Guideline 6g (denigration).

But the Authority clearly stated that it believed the programme qualified as satire and said:

"A programme's humorous or satirical intent is a highly relevant factor in assessing an allegation of denigration. Showing disrespect, in the view of the Authority, does not amount to the sort of vicious or vitriolic attack that the standard envisages." [122]

and:

"Guideline 6(g)(iii) simply reflects the fact that democratic societies place a high value on these forms of artistic expression, and limitations should be imposed only in extreme circumstances which take a broadcast outside of a "legitimate context." [122]

It is this context which sets it apart from the Alt TV example, where there was clearly no satirical or humorous context. The Authority went on to say that penalising broadcasters for causing "religious offence" would constitute an "unreasonable limitation on their right to free expression".

Journalists and programme-makers can be reasonably confident that they will not be sanctioned for denigration if they're faithfully broadcasting sincerely held opinions of others that are expressed reasonably – or if there's a legitimate satirical or humorous context.

POINT OF TENSION: USE OF HIDDEN CAMERAS AND COVERT FILMING.

Guideline 6c recognises that the use of hidden cameras is inherently unfair; however, the Authority notes that there will not be a breach of the guideline if the information gathered is in the public interest, and the material cannot be obtained by other means.

However, the use of covert filming as merely a dramatic device seems to be increasing.

This may be inspired by the successful and legitimate use of the technique in well-known cases such the Dr Fahey expose´, where the broadcast of hidden camera footage was deemed to be in the public interest.[30] It may be due to the success of overseas programmes like those of star journalist Donal McIntyre, who has built an entire career out of investigations with hidden cameras. Similarly domestic programmes like *Target* and *Fair Go* use covert filming a lot, and the BSA's research suggests much of the TV audience is not greatly alarmed by the use of the technique any more.[31]

There were four instances among the decisions I consulted in which broadcasters used footage gathered this way and the Authority decided there was no public interest in doing so – and fairness complaints were upheld. I suspect that once broadcasters have gone to the trouble of getting the footage they simply feel compelled to use it, even if it does not reveal anything in the public interest.

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30 ***Decision Nos: 2000-108-113***

31 ***Real Media, Real People – Privacy and Informed Consent in Broadcasting in New Zealand,*** **2004, published by Dunmore Press for the Broadcasting Standards Authority, Wellington**

OTHER STANDARDS

The standards governing taste and decency, liquor, children's interests, violence, discrimination, law and order and social responsibility do not routinely cut across the work of broadcast journalists in the same way as those covering balance, fairness, accuracy and privacy.

But occasionally they will find such matters impinging on their work and in some respects, new styles of journalism make this even more likely. For example, almost every episode of TV2's current affairs show *20/20* now features material that would have been considered extreme, tasteless or sensational just a few years ago.

Similarly, programme-makers are finding that broadcasters are prepared to screen 'edgy' and risqué programmes to audiences which are no longer as alarmed by bad language, bad behaviour, obscenity or sexual themes as they may have been in the past. The TV2 comedy *Eating Media Lunch* for example, has been the subject of many complaints about good taste and decency, and in one complaint TVNZ even argued the show presents "satirical matter in such an outrageous fashion that it makes fun of the very concept of 'taste'".

In earlier years the Authority used to state:

The social objective of regulating broadcasting standards is to guard against broadcasters behaving unfairly, offensively, or otherwise excessively.

But the Authority is not a censor – and is at pains to point out in its decisions that it's usually the context of the broadcasts that determine whether the complaint is upheld, rather than the nature of the broadcast itself. Relevant factors here include:

- What time was it screened? What was the programme's classification?
- What was the intended audience?
- Was any warning given?
- Was there a satirical or humorous intent?

That gives quite a lot of leeway for broadcasters to put out stuff that would be considered inappropriate or offensive by many people – and it allows programme-makers to push boundaries and express themselves without fear of unreasonable limitations on their freedom.

However, it's also clear that gratuitous or needlessly sustained obscenity can be in breach, as it was in *Decision No: 2006-122 (The Radio Network and Taylor)* when Radio Sport played a recording which simulated the sound of a woman having sex with a bull.

It is also clear from some of these decisions that if children and young people might be exposed to such a broadcast, that is also taken very seriously. And where harm or injury may plausibly result from a broadcast – or are actually portrayed in it – this too can be grounds for upholding a law and order complaint (*Decision No: 2007-066, TVNZ and Atkins*) or a liquor complaint (*Decision No: 2007-063 CanWest TVWorks and Harrop*).

Because the context is so critical in each case, it's not simple for journalists and programme makers to work out the common factors for upholding complaints, or which of the Authority's decisions can be treated as yardsticks. But having consulted some of

them, it's clear that as a rule of thumb, complaints are far more likely to be upheld if it the viewers / listeners would have felt "ambushed" by the offending content of the broadcast.

STANDARD 1: GOOD TASTE AND DECENCY

As mentioned earlier, the small and amateurish channel Alt TV received one of the harshest penalties the Authority has ever handed down in *Decision No: 2007-029 (Alt TV and Barnes).* This followed its on-screen display of text obscenities during a live music broadcast on Waitangi Day, some of which the Authority likened to "hate speech".

Alt TV insisted it had not intentionally scandalised the audience. The mistake was inadvertent, it said, and the consequence of a hired hand falling down on the job. But the Authority decided "the use of expletives in graphic sentences was contrary to the observance of good taste and decency" and upheld the Standard 1 complaint.

However, the channel styles itself as 'alternative' and it's likely many among the audience would not have been greatly offended. Arguably, most would have simply shrugged off the offensive messages as merely a 'bad joke'. Accordingly, some broadcasters will feel the Authority overreacted to what could have been a simple mistake which Alt TV was powerless to prevent, and which did little harm in the end.

However, finding the language offensive was not simply a subjective decision. The Authority cited its own research to show that the words used included the two most unacceptable words in a long list presented to those people surveyed.[32] The Authority went on to say the impact of the words would have been exacerbated by their use in graphic sentences. It also said references to "niggers" would have been extremely distasteful to the majority of viewers.

Add to that the fact that the programme was rated 'G' and screened in the daytime, then it's also possible those outside the station's 'alternative' target audience were exposed to the broadcast. In the end this decision was consistent with the promotion and preservation of broadcasting standards.

Several of the complaints about the *South Park* show objected to sustained and gratuitous obscenity which complainants firmly believed was calculated to offend Catholics. But in its decisions, the Authority has consistently stated that the programme qualifies as satire, as referred to in Standard 1. While that doesn't exempt the broadcasters from "observing good taste and decency", the Authority pointed out in *Decision No: 2006-022 (CanWest and 35 complainants):*

"It would be an unreasonable limitation on the right to free speech to interpret the requirement of good taste and decency so as to prevent the satirical or humorous treatment of religion in this manner." [107]

The Authority said the same applied to a "strikingly similar" case (*Decision No: 2004-152*), where the Authority said it considered the Catholic church an institution "robust enough to withstand lampooning of its practices and beliefs".

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32 ***Freedoms and Fetters: Broadcasting Standards in New Zealand,*** **Dunmore Publishing, 2006, pp. 96-98.**

Journalists and programme-makers will welcome the Authority's observation that it would be:

"…a dangerous precedent to provide to any single identifiable group a greater degree of protection than others against legitimate humour or satire." [107]

"…a statement which later served as the basis for not upholding part of a subsequent complaint against a different episode of *South Park* (*Decision 2007-069).*

The Authority described another animated show offensive to Catholics (*Popetown*) as "fanciful" (rather than realistic) and declined to uphold a good taste and decency complaint[33]. However, it's not always clear that the Authority will decide that humorous or satirical intent – or other contextual factors for that matter - will outweigh the offensiveness of a broadcast.

In *Decision No: 2007-066 (TVNZ and Atkins)* a Standard 1 complaint was upheld against the programme *Balls of Steel* in which 'the Pain Men' inflicted pain on each other. One of the men applied an electric belt sander twice to the other man's bare buttocks. The injured man then had a nail hammered through the skin between his thumb and forefinger and into a block of wood.

The Authority took the view that the pain and injury were inflicted purely for entertainment, and it overstepped the limits of good taste and decency. This seems reasonable, and is consistent with some other decisions, such as Decision Nos: *2006-037 (Teenage Caveman*) and *2005-137* (*Eating Media Lunch* 'Naked News' – in which an extended and "gratuitously explicit" sequence was "clearly designed to shock").

However, the *Balls of Steel* programme was appropriately classified, screened late at night, and visual and verbal warnings were given. This type of broadcast is now not uncommon in adult viewing post-watershed, even on mainstream channels. Extreme game shows and programmes such as *Jackass* and *Distraction* are popular with young people. Indeed, on the pay TV channel MTV, the 'Pain Men' have their own show called *Dirty Sanchez* in which they hurt themselves and each other for fun in weekly half-hour episodes. It's promoted like this:

They make Jackass look like the Royal Shakespeare Company…in their tireless pursuit to destroy the bounds of taste and decency. [34]

And to my knowledge, it's never been the subject of a standards complaint. This, of course, may simply highlight the different tolerances that audiences have for material on pay television versus the free-to-air channels.

STANDARD 2: LAW AND ORDER

The *Balls of Steel* Pain Men segment is also a rare example of an upheld Standard 2 complaint. The Authority also found that the programme glamorised and condoned assault, in breach of the law and order standard.

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33 ***Decision No 2005-112 (CanWest TVWorks and the New Zealand Catholic Bishops' Conference)***

34 **http://www.mtv.co.nz/shows/VDS/**

But is this really "*the realistic portrayal of anti-social behaviour, including violent and serious crime*", as described in Guideline 2e?

As a result of TVNZ's submissions in this complaint, the Authority decided to elaborate on its reasoning in certain parts of the decision to make it clear to broadcasters and to programme appraisers which aspects of the broadcast breached the law and order standard. The Authority noted:

"It is a criminal offence to assault another person, even with their consent. Although the common law recognises a defence of consent in sporting activities, the Authority considers that there is a material difference between technical assaults committed by players in legitimate sports games and the acts committed on the programme." [16]

The reasoning is convincing in this case, yet most of the content in *Balls of Steel* involves stunts where contestants must simply hold their nerve. Should the broadcasters refuse to screen parts of overseas shows that may 'overstep the limits', like the 'Pain Men' bit? Or withhold entire episodes which may do so?

In *Decision No: 2007-004* (*CanWest RadioWorks and Vandenberg*) a radio stunt in which announcers on *The Rock* tested "Jimmy's ability to dodge fireworks" was deemed socially irresponsible under Principle 7 of the previous Radio Code.

Some broadcasters will consider that in the context of modern commercial music radio, which is getting 'edgier,' this was actually fairly harmless. Indeed, *The Rock* station argued that having urged listeners not to copy them, the target audience of younger males:

"…would have sufficient life experience to know that shooting fireworks at a person is a dangerous thing to do." [9]

But the Authority said the stunt involved the "willful misuse" of fireworks close to Guy Fawkes night, when the risk of injury and damage to property is heightened. It also noted children without that "life experience" could be listening at the pre-9am time of the broadcast.

The logic is clear, and it is consistent with other decisions about other commercial radio stunts, such as *Decision No: 2007-102* (*CanWest RadioWorks and Shieffelbien*) concerning prank calls to the National Poisons Centre.

But this ruling must also have left music radio broadcasters wondering how they should cater for their target audience of males in a highly competitive market. Would it still have been "socially irresponsible" after 9am when fewer kids might be listening?

Competition between stations like *The Rock* and *The Edge* has led to the hosts doing extreme things more often, and some make uncomfortable stunts the centrepiece of their act. And as *The Rock* pointed out in its response to the Authority, many among its target audience:

"…enjoy watching and listening to silly and dangerous stunts of this kind (e.g. Jackass and programmes of that genre)." [9]

Granted, *Jackass* is a show that screens only on pay TV, which has a different code and different obligations, and programmes of that genre are not normally on in the morning. However, broadcasters may feel the Authority has not recognised that public taste may have changed in this area. Other such programmes – both local and foreign – have screened here without attracting broadcasting standards complaints.

STANDARD 11: LIQUOR / STANDARD 9: LIQUOR

There are comprehensive rules governing the advertising of liquor, and broadcasters also have to take care when they portray liquor and its consumption in programmes. Standard 11g of the Free to Air Television Code and 9g of the Radio Code say:

> *In the preparation and presentation of programmes, broadcasters must avoid advocacy of excessive liquor consumption.*

In *Decision No: 2007-030 (The Radio Network and Hutt Valley District Health Board)* the Authority said a ZM Breakfast presenter drinking a yard glass on his 21st birthday was a socially irresponsible promotion of liquor, in part because children may have been listening at the time.

This decision said the drinking was "treated as humorous and desirable" and the hosts "presented it in a positive light" and the tone of the item accepted the excessive consumption "as normal" – all of which amounted to "advocacy".

The Authority said:

"The consumption of two litres of beer at one time by a 21 year old male is exactly the sort of behaviour in respect of which broadcasters are expected to exercise extreme caution…There is wide concern in New Zealand about a perceived culture of binge drinking among young people." [15]

Yet almost by definition, the '21st yard glass' is a 'one-off', a special occasion. While the broadcast wasn't classy, many broadcasters will agree with ZM's claim it was "a bit of fun acceptable to the target audience".

Broadcasters may also be annoyed that radio hosts have been sanctioned as a result of a complaint from a public health official, but the fact that the 'on-air drinker' was an employee of the broadcaster means they do bear greater responsibility in this case.

Still, broadcasters targeting the younger audience may feel this is too restrictive. Taken in tandem with *Decision No: 2007-063 (CanWest TV Works and Harrop)* they may conclude it will never be possible to broadcast any event in which young people are consuming alcohol without being at risk of a breaching Standards 9 or 11.

In *Decision No: 2007-063* the Authority found an episode of *Studentville* failed to "avoid advocacy of excessive liquor consumption". *Studentville* showed footage of students drinking and at various stages of intoxication during the 'Uni Games'. CanWest didn't deny "the portrayal of consumption of excessive amounts of liquor", but it argued the behaviour that occurred was typical of such events and was not outside what the target audience would expect to see in this type of programme.

The Authority said the drinking was "the focus of the programme" but evidently, excessive liquor consumption is a big part of the Uni Games, if not the actual focus of the event. So how could you make a programme about it without reflecting this?

The Authority said the programme did not properly portray the negative effects of the excessive drinking portrayed, which was:

"…particularly inappropriate given that C4 targets an audience between 15 and 29 years of age, many of whom fall within the demographic seen to be at risk from binge drinking." [17]

In both these cases, broadcasters will feel they are unduly constrained by social circumstances for which they themselves are not responsible.

OTHER MATTERS

When considering *'what the Broadcasting Standards Authority is getting right – and what it is getting wrong'* from the point of view of journalists and programme-makers, it's also worth looking at the methods the Authority uses, and the way it presents its decisions.

1. EXERCISE OF POWERS

The Authority can use powers under section 12 of the Broadcasting Act to compel news organisations to hand over "raw material" in order to determine complaints. It can also require journalists to supply affidavits, as it did for instance in *Decision No: 2006-087* and *Decision No: 2006-116*.

For journalists and broadcasters this is an unwelcome intrusion. Who would want their newsgathering methods scrutinised by outsiders? Or to surrender confidential details about how they work, at the behest of complainants with an axe to grind?

However, it doesn't happen often, and in each case it was done only to try to establish the truth where the accounts of the broadcaster and the complainant were contradictory.

In his complaint against Radio New Zealand *(Decision No: 2005-083)* David Benson-Pope urged the Authority to acquire pre-broadcast material and ascertain the name of the anonymous interviewee. Radio New Zealand did surrender the field tape of the recorded interview, but broadcasters will be reassured by the fact that Benson-Pope failed to persuade the Authority to compel Radio New Zealand to disclose the name of the interviewee.

In its interlocutory decision on the matter, the Authority said:

"the name of the interviewee and the other material requested by Mr Benson-Pope were not required in order for the Authority to determine the complaint". [32] [35]

In each decision I consulted, precise reasons were given for requesting information or material from the broadcaster, and care was taken to explain why it was required.

2. GRAVITY OF BREACHES

As stated earlier, the Authority's published decisions offer good guidance to journalists on good and bad practice. But it will not always be entirely obvious to them whether the breaches detailed in the decision are regarded as significant or serious.

It is fairly clear when the Authority finds breaches of balance and accuracy in reports, and then subsequently finds that the reports were also unfair. Likewise, where a broadcast is misleading and alarming, or extreme or gratuitously offensive, the Authority will explicitly state that it is a "serious departure" from the standards.

But otherwise, it is relatively rare for the Authority to comment explicitly. An exception is *Decision No: 2005-081 (TVNZ and Continental Car Services Ltd and Pitt)* in which an item about a car firm accused of unprofessional practices was deemed "fundamentally flawed" and the broadcaster's initial response was condemned as "manifestly inadequate".

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35 **Detailed in *Interlocutory Decision No: 2005-083.***

In cases where costs are awarded, this is in itself a sign the Authority thinks the breach is serious – and sometimes the Authority states that the sum of costs reflects the gravity of the breach. But in others, the Authority makes no order, saying it believes its decision has "clarified its expectation in this area".

3. STYLE AND TONE

Complainants often object to the script of a broadcast, seeing it as evidence of bias or malice or prejudice or exaggeration. But journalists will note that complaints about their style and tone are rarely upheld. For instance, when Pharmac claimed that describing Herceptin as a "wonder drug" was inaccurate, the Authority said it was merely:

"…a colloquial and hyperbolic way to reflect the current hype surrounding the drug's effectiveness." [77]

Similarly, the Authority did not uphold CYFS's complaint about allegedly sensationalised reconstructions of the acts of vandalism attributed to a foster-child portrayed by TV One's *Sunday* show. These included punk rock music and scenes of vandalism.

The Authority said it found:

"…nothing unfair in the way in which the programme reconstructed and presented the events." [152]

This is consistent with its usual approach whereby style and tone are considered editorial matters, to be determined by the broadcaster.

4. ANONYMITY

Where privacy is an issue, the Authority does not use the name of the person in question, which makes sense as it avoids any unnecessary additional exposure of the aggrieved person or people. Similarly, journalists and programme-makers will appreciate that they are not named in the documents either, and nor are the officials responding on behalf of the broadcasters.

Some may feel journalists and programme-makers should be personally accountable for their work, especially when complaints are upheld, but as the Authority's objective is to maintain broadcasting standards, and not to mete out punishment or blame, that would not be appropriate or fair.

5. APOLOGIES

Many complainants request an apology in their submissions on orders, but these are rarely granted. None were granted in any of the decisions I consulted for this report.

On the face of it, Richard Pitt may have had a case for one in *Decision No: 2005-081 (TVNZ and Continental Car Services Ltd and Pitt)*. The "fundamentally flawed" item gave the false impression he had lied and had potentially damaged his reputation and that of his company. Also, he had received a "manifestly inadequate" initial response from the broadcaster when he first complained.

Yet the Authority said simply:

"It does not consider that an order of an apology is required in this case." [73]

Journalists will welcome this because issuing public apologies would imply that the entire broadcast was deficient – not just the specific deficiency in the journalism identified by the Authority's decision. The audience may also perceive the broadcaster would be to blame for the consequences of a controversial broadcast, even if that is not so.

Arranging justice for aggrieved parties is not the Authority's job – that's a matter for the courts.

6. GENERAL REMARKS ON HOW THE AUTHORITY'S DECISIONS ARE PRESENTED

As the Authority's decisions are designed to fully lay out the reasoning behind a ruling it's important that the decisions are easy for journalists to follow when they consult them.

The decisions need enough detail extracted from the complaint and the responses so that journalists understand what the complaint is all about, how the decision was reached, and whether or not they agree with it. Where a complaint relates to several standards, each one is dealt with separately, with separate conclusions, which is very helpful. When more than one complaint is made under the same standard, they are generally dealt with individually too. For instance, in *Decision No: 2005-081 (TVNZ and Continental Car Services)* five separate inaccuracies are all considered individually.

The way the text is broken up into short numbered paragraphs is particularly useful. It makes the unavoidably lengthy decision documents (such as the 38 pages-worth of *Decision No: 2005-083: RNZ and Benson-Pope*) much easier to follow. Readers can easily refer back to reconfirm details without wasting time or getting confused. It is doubly helpful where complaints are made under several standards.

The headnotes are extremely useful and, in all cases, they were an accurate concise reflection of the following decision. The 'guts' of the decisions are also well set out. Each has a clear and accurate description of the broadcast and the nature of the complaint; followed by a tightly-written and unambiguous chronological summary of the complaint and responses.

It wasn't always this way, as JF Burrows noted in his earlier assessment.[36] 'Pleadings' used to be attached as an appendix at the end of the BSA decision, which allowed readers to get to the Authority's decision more quickly, but I agree with JF Burrows that presenting summaries of the arguments before the determination allows readers to:

follow the progressive refinement of the issues involved, and the reader is enabled to grasp very clearly the issues with which the BSA is left to deal".[37]

In order to compare any given decision with others, the presentation needs to be consistent - and almost invariably it is.

In these respects, BSA decisions compare very favourably with those of the New Zealand Press Council which can be frustratingly variable; and (albeit on a limited viewing) those of the body which considers broadcasting complaints in Australia, the Australian Communications and Media Authority (ACMA).

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36 **Burrows*, Assessment of BSA Decisions*, p.7.**

37 **ibid, p.3.**

Also useful here are the occasional references to other decisions concerning previous complaints which are similar. I found several instances where the Authority drew the readers' attention to these in order to explain the ways in which a previous complaint might be a relevant precedent.

Burrows notes that to do this too often could give the impression of 'legalism', and overdoing it would also undermine the impression that the Authority considers complaints on a case-by-case basis and takes into account the unique context of each one. I suspect that where the Authority refers to these precedents, it's because they've figured heavily in its own discussions. If so, that seems appropriate.

The language in the decisions is precise and mostly relatively plain. I couldn't find any examples of significant ambiguity. It's also clear from the decisions I examined that the Authority takes care not to stray into commentary or emotions. Occasionally, the Authority "expresses concern" about things and in one case it described a broadcaster's argument as "not credible", but generally speaking, that's as far as it goes.

This may be disappointing for people who would like strong verdicts on broadcasts which breach the standards, and a clear indication of just how 'bad' the breach is considered to be. But, as mentioned above, the Authority's focus must be maintaining broadcasting standards – not condemning the broadcasters when they fall short.

7. STATEMENTS FOR WEBSITES

In *Decision No: 2007-010 (TVNZ and Agnew)*, the complainant submitted that the Authority should order TVNZ to publish the statement summarising the Authority's decision on its website. The Authority duly ordered that the statement must accompany the version available for viewing on the broadcaster's website.

Many journalists will feel the BSA shouldn't be able to interfere with the internet. However, many other items in the decisions I reviewed are also online, and no such order has been made. They remain available for viewing with no indication that complaints about them have been upheld. Among them is the item covered in *Decision No: 2007-068 (TVNZ and Green)* in which a convicted drink-driver was unfairly identified and "humiliated".

In this case I suppose it could be argued that an attached statement would increase the focus on the 'unmasked' individual, but as maintaining broadcasting standards is the Authority's goal, shouldn't general viewers be able to know that this was upheld as 'unfair' when they see it?

I note that in many cases where TVNZ reads out the on-air statement to fulfill the Authority's order, the video of the statement is made available on the broadcaster's website as a separate video item. Does that count as "accompanying" the item? Now that many news and current affairs items are made available for viewing very soon after they've been broadcast, shouldn't the same apply to every upheld complaint?

8. OVERLAPPING STANDARDS AND PRINCIPLES

In his assessment of BSA decisions published in 2005, JF Burrows noted that the guidelines attached to the standards cannot cover the circumstances of every complaint the BSA has to consider, and it makes decisions "outside the guidelines" from time to time.

In doing so, he believes the Authority has over time effectively established three further 'principles' of its own with regard to fairness, which he believes have been consistently applied by the Authority:[38]

Firstly, the Authority seems likely to find unfairness in cases where inaccurate statements have been made about the complainant, and where the inaccuracy reflects adversely on his or her reputation, or renders him or her likely to be the subject of criticism. In such a situation, the damage to reputation and standing is the additional element which takes the case out of the Accuracy standard and places it within the Fairness one.

Secondly, the Authority is likely to find unfairness if a complainant has not been given an opportunity to respond to allegations made in the programme against him or her.

Thirdly, there seems to be a principle developing that hidden cameras and covert filming are unfair unless such activity can be justified in the public interest."

Burrows suggests the Authority should consider publishing these 'principles' – in part because he didn't think many journalists actually pore over BSA decisions looking for patterns.

Although I think he's probably right about that latter point, I prefer the idea that complaints are considered case by case under the standards. Publishing – or publicising – such 'principles' may make them de facto rules. For all we know, subsequent members of the Authority may interpret things differently, and broadcasting practice may change accordingly over time. Public taste may change in terms of attitudes to privacy and other matters.

However, on hidden cameras and covert filming, JF Burrows might be right.

As mentioned earlier (in STANDARD 6 - FAIRNESS) there were four instances among the cases I looked at where broadcasters used footage gathered this way and the Authority decided there was no public interest in doing so.

I suspect that once broadcasters have gone to the trouble of getting the footage they simply feel compelled to use it, even if it does not reveal anything in the public interest – in which case publicising the fact that this will likely be in breach of the fairness standard, as Burrows suggested, may do no harm.

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38 **Burrows, *Assessment of BSA Decisions,* p.7.**

PART 3: LIST OF DECISIONS CONSULTED

TVNZ and Mason	2006-116
TVNZ and Russek	2007-016
TVNZ and Agnew	2007-010
TVNZ and Green	2007-068
TVNZ and Brereton	2007-049
TVNZ and JB	2006-090
TVNZ and CYFS	2006-058
TVNZ and Balfour	2005-129
TRN and Taylor	2006-122
Alt TV and Barnes	2007-029
TVNZ and Atkins	2007-066
CanWest TVWorks and XY	2006-014
CanWest TVWorks and Pharmac	2006-127
CanWest TVWorks and Du Fresne	2007-017
TVNZ and KW	2006-087
CanWest TVWorks and 35 Complainants	2006-022
Radio NZ and Benson-Pope	2005-083
CanWest TVWorks and Harrop	2007-063
TVNZ and Continental Car Services and Pitt	2005-081
Canwest TVWorks and Dewar	2006-063
TVNZ and Dewar	2005-085
TRN and Regional Public Health, Hutt Valley District Health Board	2007-030
CanWest RadioWorks and Vandenberg	2007-004
TVNZ and Nottingham	2006-035
TVNZ and Broatch	2007-007
RadioWorks and Shieffelbien	2007-102

CanWest TVWorks and McArthur	2007-069
TVNZ and NM	2007-023
TVNZ and An Ying	2006-089
TVNZ and Morrish/Valenta	2005-137
TVNZ and Robinson	2005 082
TVNZ and Wishart	2005-059
TVWorks and Cheer	2008-034
Prime and Dr X	2005-052
TVNZ and BA	2004-070
TVWorks and Gough	2007-114
CanWest RadioWorks and EF	2006-112
TVNZ and Lilley	2006-037
TVNZ and Ngaei and ASMS and NZMA	2004-135
CanWest TVWorks and NZ Big Game Fishing Council	2004-223

PART 4: COMMENTARIES ON INDIVIDUAL DECISIONS

Individual commentaries on selected Broadcasting Standards Authority decisions published between 2004 and 2007, in terms of:

- the tension between the 'bottom-line standards' for the Authority and the 'bottom-line standards' for journalists.
- the extent to which the decisions provide useful guidance to journalists and other programme-makers.
- the extent to which the Authority's decisions adequately recognise the practical realities of broadcast journalism.

Quotations from the decision documents are in italics and quotation marks, followed by the reference number of the relevant paragraph from which they were extracted – for instance:

"…the absence of any challenge to the interviewee's story in the broadcast contributed to the breach of Principle 5." [149]

Dated: 30 May 2007
Decision No: 2007-010

Complainant
SHELAH AGNEW
of Masterton

Broadcaster
TELEVISION NEW ZEALAND LTD
broadcasting as TV One

Complaint under section 8(1)(a) of the Broadcasting Act 1989
Close Up - update on a 2005 story about a Chinese family - father had been deported and mother was fighting a deportation order - interviewed the couple's three children - daughter was shown distressed and in tears - allegedly unfair

Findings
Standard 6 (fairness) - broadcaster failed to use discretion and sensitivity when interviewing child about a distressing situation - child was exploited - unfair - upheld

Order
Section 13(1)(a) - broadcast of a statement
Section 16(4) - payment of costs to the Crown $1,500

ISSUES FOR JOURNALISTS AND PROGRAMME-MAKERS

- *How should a broadcaster approach stories involving distressing family situations?*
- *Is it okay to interview young children – or use a young child as an interpreter when interviewing parents?*
- *Was the public interest in the surrounding issue of immigration a defence for this type of coverage?*

OBSERVATIONS

The Authority made it clear what it thought was wrong with the story here:

"The presenter's line of questioning upset the seven-year-old girl and deepened her distress at a very difficult time in her life. It appears to the Authority that the interview was used specifically to provoke an emotional response from the child. For example, the presenter asked the children "Do you worry that she's going to go again? Do you worry that she might have to go to China?" In the Authority's view, the interview was conducted to heighten the emotional impact of the story, at the expense of the child's wellbeing." [22]

The Authority went on to say the broadcaster had "exploited" the child and extracted this quote from the reporter's script:

"See how freely those tears flowed when we turned up to talk about this again, especially with [the seven-year-old girl]." [18]

The Authority added that:

"While it understands the need to give a human face to the story, the Authority considers that this could have been achieved without interviewing the children." [19]

Compounding this, the Authority said it was also inappropriate to use a child as an interpreter for her mother, because:

"…the broadcaster could easily have told the mother's story without interviewing the girl or having her present when her mother was interviewed [22].

For journalists and producers, alarm bells should have been ringing because the story involved young children. Any hint of children being deliberately upset by the actions of the media is highly likely to draw complaints; and journalists and producers know that in general, regulators take the interests of children very seriously.

However, the broadcaster may still feel harshly treated by this outcome.

It could consider that it was acting in the family's interest – even 'doing them a favour' by further publicising their difficult situation. *Close Up* was found to have been 'unfair' even though the family had co-operated with this same broadcaster previously – and others too.

The Authority concluded:

The possibility of the girl's mother being returned to China was a "distressing situation" as contemplated by the guideline.[39] Accordingly, TVNZ was expected to exercise discretion and display a degree of sensitivity when dealing with the young girl. [17]

But the broadcaster may have felt the child's distress was a result of the situation the family found itself in, rather than the manner in which its interview was conducted, or the fact that the child took on the role of interpreter. Journalists may feel the Authority is not in a position to know if the child's distress was really deepened in any significant way by the interview.

Journalists reading this decision will conclude the Authority did not take account of the 'headline and deadline' pressures of daily TV current affairs journalism. They would argue that it's not true that the broadcaster:

"could easily have told the mother's story without interviewing the girl or having her present when her mother was interviewed." [22]

Arranging an adult Chinese interpreter would involve expense and delay. Furthermore, the presence of a stranger may indeed have been even more uncomfortable for the family. And what is a journalist to do if a family suggests this option?

The Authority did state that it:

"…wishes to make it clear that this ruling should not be taken as an injunction against interviewing children. It considers that the broadcaster should have been guided on this occasion by the ages of the children, the clear distress displayed by the young girl, and the vulnerability of children who are involved in traumatic situations." [24]

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39 **Guideline 6e, which requires that discretion and sensitivity be shown in distressing situations.**

Taken in tandem with the earlier highlighting of the way the reporter emphasised the child's distress, that is an effective clarification of the Authority's expectations for journalists and programme-makers. The message is clear that gratuitous use of such material should be avoided.

But journalists and programme-makers alike may still be left wondering under what circumstances journalists really can 'safely' interview children for news and current affairs shows where the story involves sensitive family issues. Journalists will wonder if it would have been okay if the child had not shown her distress. In this circumstance, the interview may have been just as damaging, but no one would know. Journalists may also resent the fact that a print journalist could have carried out an equally distressing interview and probably escaped censure.

Having said the broadcaster "should have been guided by the child's age", perhaps the Authority should have been explicit about what it considers a reasonable limit in such a case.

Dated: 4 December 2007
Decision No: 2007-068

Complainant
DAVID AND HEATHER GREEN
of Auckland

Broadcaster
TELEVISION NEW ZEALAND LTD
broadcasting as TV1

Complaint under section 8(1)(a) of the Broadcasting Act 1989

The Complaint
During a Close Up item about the "naming and shaming" of drunk drivers by a Wellington newspaper, a woman was approached outside court after being convicted of her second drink driving offence. Although the woman declined to be interviewed for fear of losing her job, she was shown running down the street to get away from the reporter, and her age, marital status and salary were reported. Her face was initially pixelated but she was "unmasked" and named later in the item. David and Heather Green objected to the woman's treatment. They said the item had imposed an extra penalty over and above that imposed in the courtroom, and was unfair.

Standard 6 (fairness) - upheld

No order

ISSUES FOR JOURNALISTS AND PROGRAMME-MAKERS

- *How far should they go when giving out details about people without their consent?*
- *Precisely why was it considered unfair in this case to reveal details that are a matter of public record?*
- *Whether a defence of public interest holds water, as drink-driving is a problem of great public concern about which it is often said that 'the message is not getting through'.*
- *Whether the Authority considers that aggressive "doorstepping" of people outside a Court has any bearing on their decision to uphold the complaint.*

OBSERVATIONS

At issue here is the fairness of "naming and shaming" on television of people convicted of a criminal offence which many people consider highly anti-social. Here the broadcaster's argument was persuasive - filming took place in public and the conviction in question was a matter of public record, and the unmasking was done in the context of an informative item all about the pros and cons of 'naming and shaming' convicted drink-drivers.

The Authority believed the treatment of the woman was unfair – and that the unfairness arose from the way in which the woman was identified. The Authority pointed out that the public record and print media exposure of convictions don't usually include the person's image and therefore:

There is a fundamental difference between a conviction being on the public record, and identifying a person on national television as having been convicted of an offence. [19]

The Authority went on to say it was unfair to single her out when there was nothing particular about her conviction that made this necessary and nothing exceptional about the woman's case to justify the "humiliation".

From this, journalists will understand that television broadcasters need a very good reason for "unmasking" an unremarkable individual convicted of an otherwise unremarkable offence.

The Authority said:

The item could have been presented effectively without singling out one woman and showing her face simply because she was in the wrong place at the wrong time. [22]

And it went on to add:

There are occasions when the public humiliation of an individual is a regrettable but necessary consequence of the pursuit of a story in the public interest. [23]

But here, many journalists and programme-makers will reckon this case is such an occasion.

They will not think the unmasking was "sensational and gratuitous", as the Authority insists, because revealing the woman's identity in a humiliating way was not in itself the aim of the broadcast. The fact the woman and her conviction were unexceptional was – in a way – the very point of picking her out.

"It was done in the context of a thoughtful item about the efficacy and ethics of naming and shaming drunk drivers, which was followed by a discussion about the pros and cons between a lawyer and a newspaper editor. Also, there was no legal impediment to prevent the programme revealing her identity, as TVNZ noted in paragraph." [11]

Journalists may concede that the woman's conviction was not matter of public importance, but arguably the issue of penalising drink-drivers is – and revealing the identities of only those who are happy to be identified outside the court (as one man in the item was) would rob such an item of its impact, an important consideration in terms of the realities of current affairs television today.

Having condemned the unmasking of the woman as not only unfair but also "sensational and gratuitous", readers might expect a significant sanction for the broadcaster. However, in setting out its orders, the Authority said it:

"…agrees with TVNZ that no order should be made on this occasion. The Authority considers that the publication of its decision will serve to clarify its expectations for broadcasters in respect of the fair treatment of individuals." [29]

Journalists and programme-makers will interpret this statement as a sign the Authority does not consider this a particularly serious breach.

There are two other aspects of this decision which may puzzle readers.

Towards the end, the Authority said:

"As a result of TVNZ's submissions, the Authority decided to elaborate on and clarify its reasoning in certain parts of the decision to make it clear to the broadcaster, and to journalists, which aspects of the broadcast infringed the fairness standard." [28]

It is unclear whether this means that the preceding parts of the document were rewritten, or whether this clarification took place in the form of some sort of response to TVNZ itself. And seeing that TVNZ's submissions were persuasive enough for the Authority not to make an order, it would be appropriate to summarise them in the decision itself – or to attach them for the benefit of journalists and programme-makers consulting this document later.

Finally, in some cases where orders were made, the broadcaster was instructed to attach statements summarising the reasons for an upheld decision to their website video. That would seem to be appropriate in this case too. But as no order was made, the item in which the woman is deemed to be unfairly humiliated is still available to view on TVNZ's website, which seems contrary to the BSA's goal of promoting broadcasting standards.

Dated: 28 November 2005
Decision No: 2005-081

Complainants
CONTINENTAL CAR SERVICES LTD
of Auckland

and

RICHARD PITT
of Auckland

Broadcaster
TELEVISION NEW ZEALAND LTD

Complaint under section 8(1)(a) of the Broadcasting Act 1989
One News - update on a previous item about a used Ferrari - item reported that Continental Car Services Ltd had "refused to hand over" a statement of compliance for the vehicle - item implied that CCS was engaging in restrictive trade practices - allegedly unbalanced, inaccurate and unfair - TVNZ upheld two points as inaccurate

Findings
Standard 4 (balance) - subsumed under Standards 5 and 6
Standard 5 (accuracy) - item contained several inaccurate and misleading statements - item as a whole was also inaccurate - action taken by TVNZ insufficient - upheld
Standard 6 (fairness) - unfair to CCS and Mr Pitt - upheld

Order
Broadcast of a statement
Payment of legal costs of $5,283
Payment of costs to the Crown $2500

ISSUES FOR JOURNALISTS AND PROGRAMME-MAKERS

- *Would some inaccuracies in the story be considered enough to make the whole item inaccurate and unfair?*
- *Did the broadcaster do enough to give both sides of the story?*
- *Was the broadcaster guilty of playing 'fast and loose' with a businessman's reputation - and 'going in to bat' for a man with a grievance?*
- *Would the Authority consider facts made public in the broadcaster's previous report on this same story to be relevant to this complaint?*

OBSERVATIONS

This complaint involves allegations of professional misconduct in a TV news report which was a follow-up to an item screened three months earlier – all about one man's struggle to get a certificate of roadworthiness for an imported sports car. Two inaccuracies had already been upheld by the broadcaster before the Authority considered the complaint.

The report in question claimed that the complainant and his company (CCS) had "refused" to register a vehicle as roadworthy because of its own commercial interests, and broadcast the allegation that the complainant's firm was engaging in "restrictive trade practices". Furthermore, the reporter erroneously said the complainant had earlier claimed he "had nothing to do with the used car business", when this was not correct. The reporter also contradicted the introduction to the item on the issue of the CCS's supposed obligation to certify certain vehicles.

Having pointed out that the complaints about balance were not appropriate, and declining to uphold them, the Authority then made it clear that the item as a whole was inaccurate – and that it was also unfair to the complainant.

The Authority also dismissed the broadcaster's claim that an important issue of public interest was raised (the difficulty of registering some second-hand cars as roadworthy) by pointing out clearly that:

"…this general problem was not the focus of the item. Rather, it focused on Mr Clayton's personal story about getting his Ferrari registered, and the part CCS had played." [36]

The broadcaster also contended it was appropriate to assess the item in the context of one screened three months before, but the Authority was clear it didn't agree, stating:

"…the Authority considers that few viewers would have recalled any background it provided. The Authority accordingly considers that the item complained of must be assessed on its individual merits." [35]

Five aspects of the report alleged to be inaccurate were addressed separately in this decision, and upheld as breaches of Standard 5 (accuracy), and the Authority then stated:

"…the cumulative effect of these individual inaccuracies amounted to an item that was fundamentally flawed." [37]

The item was deemed in breach of Standard 6 (fairness) because it "unfairly damaged Mr Pitt's credibility" by implying Mr Pitt had lied, and engaged in "restrictive trade practices".

Journalists and programme-makers can reflect on how the complainant's side of the story was not explored with anything like the vigour of that of the aggrieved car-owner (Mr Clayton), and how the careless scripting of parts of the item exacerbated the inaccuracies and ambiguities in the report.

The broadcaster was cavalier in its claim of "restrictive trade practices" for which there was no clear evidence – and in the implication that Mr Pitt had lied, which didn't bear scrutiny either.

Journalists will note the Authority's clear statement that news items will usually be considered "on their own merits", even if facts about the same story have been broadcast previously. It may have been different if this report – or the introduction to it – had contained an accurate summary of the facts from the previous broadcast, but it didn't. In fact, the references to the previous item were not clear and it seems likely the introduction was written either in a hurry – or by someone not fully aware of all the background.

Broadcasters will also note from this decision that spurious claims about important public issues being raised aren't likely to be persuasive. In this case the story was clearly focused on nothing other than one man's grievance.

Finally, given that the Authority is restrained in the language employed in decision documents, the Authority's conclusion that:

"…the action taken by TVNZ in respect of this complaint was manifestly inadequate in all the circumstances." [59]

is a clear message that the broadcaster should have upheld the complaint itself, rather than try to "defend the indefensible".

Dated: 19 October 2006
Decision No: 2005-083

Complainant
THE HON DAVID BENSON-POPE
of Wellington

Broadcaster
RADIO NEW ZEALAND LTD
broadcasting as National Radio

Complaint under section 8(1)(a) of the Broadcasting Act 1989
Nine to Noon - broadcast of anonymous interviewee's allegations that the Hon David Benson-Pope was guilty of bullying students at Bayfield High School - allegedly unbalanced, inaccurate and unfair

Findings
Principle 5 (fairness) - broadcasting allegations by anonymous interviewee unfair - RNZ did not verify interviewee's credibility to a high standard before granting anonymity - did not undertake sufficient independent investigations into interviewee's story - upheld
Principle 4 (balance) - controversial issue whether Mr Benson-Pope bullied students during his time as a teacher - RNZ made reasonable efforts to present significant perspectives within period of current interest - not upheld
Principle 6 (accuracy) - one aspect subsumed under Principle 5 - decline to determine whether allegations were accurate - describing a caning as a "beating" not inaccurate - not upheld

Order
Section 13(1)(a) - broadcast of a statement
Section 16(1) - payment of costs to the complainant $5,000
Section 16(4) - payment of costs to the Crown $2,000

PREAMBLE

This decision details a fiercely contested complaint, made by – and on behalf of – a senior government figure who, as such, can expect greater scrutiny of his conduct than any ordinary person, but has more to lose in terms of his reputation and future prospects than any ordinary person if he is treated unfairly in a broadcast.

In the course of the complaint, David Benson-Pope requested that the Authority obtain "all relevant pre-broadcast records and documents" from Radio New Zealand, while for its part, the broadcaster fought its corner vigorously, even challenging the very validity of its referral to the Authority – on the grounds that the complaint was not initially referred by Benson-Pope personally. Benson-Pope also contended that some of the media coverage concerning him was politically inspired, and in the case of this broadcast, he believed Radio New Zealand was 'used' by his political rival Rodney Hide, who supplied Radio New Zealand with the anonymous interviewee's contact details, and vouched for him as a credible source.

The complaint was made against a backdrop of news coverage and questions in Parliament concerning allegations of bullying and possible criminal conduct by Mr Benson Pope during his former career as a teacher in the 1980s, and an ongoing police investigation into two other claims of misconduct alleged by his former pupils.

The Authority acknowledged these surrounding issues were part of the context of the broadcast in question, yet the Authority's focus was on whether the broadcast itself was fair, accurate and balanced – as set out in the Radio Code's standards. A transcript of the broadcast version of the interview in question was attached to this decision.

There are some similarities with another prominent decision concerning a broadcast involving an anonymous interviewee (*Decision No 2004 -11; RNZ and Ellis*) and, feeling that it strengthened his own case, Benson-Pope cited aspects of the Authority's determination in that decision in his complaint. Accordingly, the Authority points out the relevant similarities with '*Ellis*' – and the relevant differences – as it lays out its conclusions, which is very helpful for those looking for patterns, themes or precedents in the Authority's decision making.

ISSUES FOR JOURNALISTS AND PROGRAMME-MAKERS

- *Guidance on when to grant anonymity to an interviewee, and how to handle the broadcast of such material in this special circumstance.*
- *Guidance on whether the complainant was correct in asserting that the invitation to appear on the programme to respond to the allegations was "not reasonable".*
- *An assessment of the interviewer's performance, given that the interviewee had the protection of anonymity.*
- *Guidance on how to handle the involvement of a political rival in setting up the interview in question – and whether this has any bearing on breaches of balance or fairness.*

Also, news organisations are always reluctant to hand over raw material or reveal details of the way they go about their newsgathering. So they will also be interested in:

- *the circumstances whereby RNZ handed over the 'field tape' of the interview.*
- *how the Authority handled the complainant's requests to reveal the name of the interviewee, and acquire other "pre-broadcast material".*

OBSERVATIONS

In this decision, the Authority was clear about why it concluded Mr Benson-Pope wasn't treated fairly. The Authority highlighted:

"…the absence of any serious challenge by the interviewer to the anonymous interviewee's story." [130]

which is evident from the attached transcript of the item as broadcast.

Later the Authority said:

"…the absence of any challenge to the interviewee's story in the broadcast contributed to the breach of Principle 5." [149]

In addition, the Authority pointed out that elements of the interview in which the host appeared to express doubts about what the interviewee was saying were edited out for the version that was broadcast, and this contributed to the lack of fairness. The Authority noted that the interviewee used damaging terms including "liar" and "nasty bastard", which went beyond merely expressing opinion.

The Authority also said:

"…the interviewer's reference to police involvement implied that the conduct alleged by the anonymous student amounted to criminal conduct." [130]

…and

"…the interviewee was allowed to make serious and unchecked allegations that Mr Benson-Pope was guilty of criminal conduct in relation to other students." [130]

In addition, the Authority said the unfairness was compounded by the fact that Radio New Zealand's efforts to ascertain that the anonymous interviewee was 'bona fide' were not sufficient.

All of this paints a clear picture of a broadcast that was not fair to Benson-Pope.

But the allegations wouldn't be 'unchecked' if David Benson Pope had fronted up to rebut them – and the fact that he was given the opportunity to do so is not disputed by either side. So is that not 'fairness' on the part of the broadcaster?

The Authority said it was, but clearly stated that the interview was unfair in spite of that offer. With reference to *Decision No: 2004-115* (the Ellis case), the Authority said:

"…any programme in which unidentified accusers allege that an identified person has committed serious but unspecified criminal offences is likely to be inherently unfair to the accused. Regardless of what "opportunities" such a person might be offered to present his or her point of view, allegations of this nature are generally impossible to defend." [23]

And the Authority accepted the argument of Benson-Pope's solicitor, who insisted in the referral to the Authority:

"It was…unreasonable to expect him to respond without being told the identity of his accuser. In this respect, RNZ had not given him a reasonable opportunity to present his point of view." [23]

In this case, the Authority effectively accepted Benson-Pope's claim he would have been unfairly "ambushed" if he had agreed to take part in the broadcast that day. The Authority pointed out that as his career spanned 23 years in which many pupils would have been caned by him, Benson-Pope could not reasonably be expected to have identified his accuser.

To "avoid doubt", the Authority included this recap when presenting its determination:

This broadcast was unfair to Mr Benson-Pope even though RNZ offered him an opportunity, which he declined, to be interviewed in the broadcast. Because the broadcaster has not persuaded the Authority that it undertook sufficient investigations into the interviewee's credibility and his story, and because RNZ then allowed the

interviewee to remain anonymous, the Authority finds that the broadcast remained unfair despite the invitation to Mr Benson-Pope to participate. [145]

That is a pretty unambiguous reiteration for journalists of why the Authority upheld the complaint about fairness. The Authority was at pains to point out this was not a prohibition on interviewees being granted anonymity, because:

"…there may be some circumstances in which a broadcaster is justified in allowing the broadcast of allegations by an anonymous interviewee - even where the broadcast may be unfair to an individual. These will be situations in which there is a high degree of public interest - meaning legitimate public concern." [146]

And given that David Benson-Pope was the then-associate Minister of Education, and the allegations concerned his conduct as a teacher, the Authority added:

"…a controversial issue of public importance was discussed in the broadcast." [162]

However, the Authority went on to say:

"There can be no public interest in broadcasting allegations from an anonymous person whose credibility and information have not been adequately verifie." [146]

"…which is a clear message to all readers that the integrity of any such interview is undermined by a failure to comprehensively check out the credentials of anyone granted anonymity. Reinforcing that, the Authority stated twice that the anonymous interviewee should not have been put on air at all, because:

"…when a broadcaster is unable to satisfy itself to a high standard that an individual and the information he is providing is credible, it should either refuse to grant that individual anonymity, or it should refrain from broadcasting the allegations altogether." [143]

But journalists may feel the Authority was not justified in rejecting Radio New Zealand's argument that Benson-Pope could have predicted the likely nature of the allegations without knowing the identity of the accuser – given the preceding news coverage involving revelations made by other former pupils about his conduct in the classroom in the 1980s.

Journalists may feel that the Authority's decision will encourage public figures to refuse to be interviewed about their conduct [in future] unless they are forewarned about the nature and the provenance of allegations an interviewee may make. Furthermore, when considering Benson-Pope's complaints about balance, the Authority says:

"It would be artificial to separate out the anonymous interviewee's allegations as an independent controversial issue…and the anonymous interviewee's allegations were inextricably linked to the wider "Benson-Pope controversy". The nature of the particular allegations made fell squarely into the category of concerns surrounding Mr Benson-Pope's conduct as a teacher." [166]

Many journalists will feel that this bolsters the case for airing the allegations in public, because the legitimate public interest in them is not diminished just because the broadcaster could not demonstrate in that case that they'd done enough to satisfy themselves of the interviewee's credentials.

However, the decision doesn't offer much guidance on what would constitute a satisfactory effort to establish the authenticity of the anonymous interviewee's claims.

Journalists will welcome the fact that the Authority found that the interview offers to Benson-Pope were reasonable and accordingly, there was no breach of the balance standard. But in the light of his unwillingness to 'front up', journalists may not agree that the other efforts to "provide other significant viewpoints" were insufficient, especially as it was reported in the introduction that "he categorically said any of the allegations, all of the allegations, were not true" – and "he has denied any allegation that he mistreated or bullied pupils".

Journalists may feel that in order to satisfy the following:

"RNZ's responsibility to achieve balance by other means - that is, to ensure that the programme, or other programmes within the period of current interest, included other significant viewpoints." [162]

"…they might be obliged to broadcast something unsatisfactory that was not in the best interests of the audience. In this case, people with direct knowledge of the alleged events – such as a witness to the events described by the interviewee – are unlikely to be available for interview, which may mean that "balance by other means" amounts to interviewing a character witness to provide an on-air testimonial for Mr Benson-Pope, something he suggests in his response to the Authority. And as RNZ said in its response to the Authority, "good things" said about Mr Benson-Pope:

"…would not preclude the possibility that Mr Benson-Pope behaved in the manner described by the interview." [46]

Journalists might agree that it's essential for an interviewer to play 'devil's advocate' when the protection of anonymity has been granted, but they will have reservations about the conclusion that the host failed to do so here – and thus, failed to provide balance.

Senior journalists have in the past expressed frustration with BSA decisions they perceive to be critical of interviewers' technique. And journalists may resent the way the Authority criticised the interviewer's conduct of the interview in this case too, when the Authority stated:

"In the Ellis decision, the Authority agreed that the choice of interviewing style is a matter of editorial judgment, but it did not accept that editorial style is never a matter of broadcasting standards." [149]

When interviewees are not 'wise in the ways in the media' and are nervous, the interviewee has to tease the story out of them. This may give the impression of soft-pedaling, but when the interview is recorded in advance, the host doesn't always know how it will be presented when broadcast. The host may not be able to anticipate that 'challenge' to the story could be missing in other elements of coverage; nor could he or she know what other perspectives may crop up during "the period of current interest".

However, the Authority does not ignore the practicalities of broadcast journalism, which were acknowledged in this final statement:

"The Authority recognises that broadcasters are faced with difficult situations in the newsroom, and that they must often make important decisions within a short timeframe. The Authority does not wish to dissuade broadcasters from taking calculated risks with respect to stories of major public interest." [202]

And also this one:

"The Authority acknowledges that – unlike in Ellis – RNZ had limited time in which to investigate the interviewee's story." [201]

The Authority was clear that it recognises these were serious allegations which had significant implications for Mr Benson-Pope's standing as a Cabinet Minister, which made it an issue of public importance to which the balance standard applies. Bearing that in mind, journalists will appreciate the decision not to order an apology to Mr Benson-Pope, and to decline his request to publicise the decision more widely in the media (as was ordered after the *Ellis* decision).

Broadcasters will be also reassured by the fact that Benson-Pope failed to compel the broadcaster to disclose the name of the interviewee, because the Authority said in its interlocutory decision on the matter (2005-083):

"The Authority considered that the name of the interviewee and the other material requested by Mr Benson-Pope were not required in order for the Authority to determine the complaint." [32] [40]

As Radio New Zealand agreed to provide the 'field tape' of the interview in question in this case, broadcasters can't refer to this published decision for guidance on the question of whether they might in a similar case be obliged to surrender such material.

Nevertheless, this decision serves to remind journalists that their "raw material" may be scrutinised in the event of a complaint (if the complainant is successful in requesting that the Authority use its powers under section 12 of the Broadcasting Act).

In this case, scrutiny of the field tape revealed editing that contributed to the unfairness of the broadcast, that is, the removal of some questions and answers giving the impression Benson-Pope had acted illegally when caning a student. This is a good reminder of the need to be careful – and ethical – when editing sensitive material.

The decision also serves to remind journalists that when using the 'empty chair' (stating that person in question declined invitations to be interviewed) they must be specific about what the offer was and the reasons given for declining it.

Journalists and programme-makers reading this decision will get the message that balance cannot be provided by merely broadcasting the opinions of those who had sent in responses to a broadcast – and it reminds journalists they must provide balance by challenging allegations made by anonymous sources.

Journalists reading this will understand that granting interviewees the protection of anonymity must be a last resort after all efforts to get information 'on the record' have failed. They are also better advised now of the change in editorial approach that is required once anonymity has been granted.

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40 **Detailed in *Interlocutory Descision No: 2005-083.***

Dated: 21 March 2006
Decision No: 2005-129

Complainant
DAVID BALFOUR
of Waipawa

Broadcaster
TELEVISION NEW ZEALAND LTD

Complaint under section 8(1)(a) of the Broadcasting Act 1989
20/20 - item reporting on a Waipawa dog breeder - television crew entered complainant's land and pried without permission - filmed pit in which dogs were buried - alleged breach of privacy

Findings
Standard 3 (privacy) - actions of crew amounted to intentional interference with complainant's interest in solitude and seclusion - intrusion was into matter complainant was entitled to keep private - majority considers intrusion offensive to reasonable person - no public interest defence - discussion of principles of interpretation of privacy principle (iii) - discussion of principles relating to public interest - majority uphold

No order

ISSUES FOR JOURNALISTS AND PROGRAMME-MAKERS

- *Can footage shot on private property without the owner's consent be broadcast?*
- *Can the media really interfere with someone's privacy when they're not even there?*
- *If so, would it be considered a defence to claim that the story was "in the public interest"?*

OBSERVATIONS

This is an interesting case where the Authority's members had to consider "novel issues in respect of the privacy standard", because the footage in question was taken on a property some distance from the residence of the complainant – when the complainant was not actually there. The Authority was split on the issue of whether that intrusion was "offensive".

Instinctively, journalists may feel that a TV crew ought to be entitled to investigate on the property of a man who had been the subject of previous reports about the treatment of animals in his care – and who earns an income from breeding dogs. Like TVNZ, they may well consider animal welfare a matter of legitimate public interest and that having discovered a pit of dead dogs on the property, broadcasting the footage was justified.

But in this decision, the Authority decided that the footage of the pit was a breach of privacy; that most people would find this intrusion offensive – and that there was no public interest defence for broadcasting the footage.

In its submissions, TVNZ said the discovery of the burial pit was made only when its crew went on to the property having made reasonable efforts to contact Mr Balfour in advance. It was able to provide evidence of these efforts, which shows thoroughness in preparing its response.

But it did not have a strong case when it said "there was no intentional interference in the nature of prying". The Authority notes TVNZ "provided contradictory information" about how its crew came to be walking across the property when challenged by the complainant, prompting the Authority to "express concern" about this "inconsistency". Broadcasters will reflect on the need to get their story straight, because the inconsistencies in TVNZ's initial response to the complaint and then its first response to the Authority may have undermined its subsequent arguments.

The decision explains clearly that TVNZ's crew had no business traipsing across the complainants property to where the pit was found, and no right to broadcast footage of themselves interfering with the carcasses – because:

"…an occupier is entitled to the quiet enjoyment and exclusive possession of his or her private property, and that this right continues even when the owner is not on the property…and the complainant was also "entitled to expect that the way in which he managed this unpleasant aspect of his business would remain private." [38]

By walking onto the complainant's property and interfering with the burial pit, the camera crew in this case "did intrude on Mr Balfour's interest in solitude and seclusion". But when considering whether this intrusion was offensive to the ordinary person, two of the four Authority members said it was –in part because the crew had clearly gone beyond the original stated purpose of finding Mr Balfour for comment. A minority (the other two members) contended offensiveness could not be established, citing observations from the Court of Appeal indicating that the expectation of privacy is higher at home than on land and – explicitly – farmland.

Having acquired the disturbing footage of the burial pit, some journalists may feel that there was a wider public interest in this issue – given the earlier reports about disturbed dogs belonging to the complainant, coupled with public safety concerns arising from reports of serious dog attacks in recent times (e.g. the highly publicised mauling of Auckland toddler Carolina Anderson and others).

However, in paragraphs [56]-[60] the Authority provides useful and concise guidelines for assessing issues of public interest, and goes on to decide:

"…the material being broadcast must be of importance and concern to the New Zealand public generally." [61]

…and in this case, it did not shed light on the public safety issue of animal welfare. The Authority spelled out that it was not in the public interest to interfere with the carcasses – or broadcast the results on 20/20, and:

"…the only effect of the footage, in the view of the Authority, was to sensationalise a distasteful but unremarkable discovery, and to create the impression that Mr Balfour's actions were somehow sinister and improper." [62]

The footage itself is arresting and even though little was revealed by it, it seems the broadcaster could not resist using it, having gone to the trouble of acquiring it.

In paragraph [68], the Authority said it believed this decision has "clarified its expectation in this area" (meaning the offensive intrusion onto private property) but broadcasters will note the even split in opinion between the Authority's members on the question of whether this intrusion was "offensive to the ordinary person".

Two board members accepted *20/20* had gone to the property with the intention not of snooping, but of getting further comment in an upfront manner – so this may in fact mean journalists may not be dissuaded from such "fishing expeditions" in the future when visiting a property without the owner's consent.

Dated: 28 June 2006
Decision No: 2006-022

35 COMPLAINANTS

Broadcaster
CANWEST TVWORKS LTD
broadcasting as C4

Complaint under section 8(1)(a) of the Broadcasting Act 1989
South Park – "Bloody Mary" episode – portrayed statue of Virgin Mary menstruating – menstrual blood sprayed on faces of characters including cardinal and Pope – allegedly in breach of good taste and decency, law and order, privacy, balance, accuracy, fairness (humiliation and denigration), programme classification, children's interests, violence

Findings
Standard 2 (law and order), Standard 3 (privacy), Standard 4 (balance), Standard 5 (accuracy), Guideline 6(f) (humiliation), Standard 8 (programme information), Standard 9 (children's interests), Standard 10 (violence) – no application to broadcast – not upheld

Standard 1 (good taste and decency) – content of programme did not breach standard in light of contextual factors – no breach of standard simply because programme offensive to Catholic religious values – not upheld

Standard 6 (fairness) and Guideline 6(g) (denigration) – programme was legitimate satire within meaning of standard – threshold aligned to vitriol or hate speech – lacked respect for Catholic icons and practices but did not amount to attack on Catholic Church or Catholics – not upheld

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PREAMBLE

These complaints concern a broadcast which was the subject of major publicity in advance, and the programme was certain to offend a significant number of people when it was aired. This decision is a challenging one to summarise in a single document, because no fewer than 35 complainants cited a wide range of standards – in fact almost all of them except Standard 11 (liquor) – though many of these were not applicable.

It is also an unusual case in that the Bill of Rights Act is cited (paragraphs [64] - [74]). One complainant even argues the BSA could, under s21 of the Broadcasting Act, create new guidelines to cover this type of broadcast. However, the broadcaster's prior promise not to repeat the programme did effectively forestall any request for the BSA to use its power to prevent the broadcast of a programme "likely to be injurious to the public good".

This decision document needed to be set out clearly, in order to 'sort the wheat from the chaff' among the various complaints. It also needed to be robust, because of the likelihood that it would be challenged by complainants. (It subsequently withstood an appeal in the High Court.)

ISSUES FOR JOURNALISTS, BROADCASTERS AND PROGRAMME-MAKERS

- Whether they're 'on thin ice' screening controversial programmes certain to offend certain sectors of the community, and programmes which employ 'gross' or 'over the top' humour. Broadcasters will be aware that complaints against broadcasts of a humorous and/or satirical nature are not often upheld, and must have been wondering if the same would apply in this case.
- What guidance can be learned on how to handle the broadcasting of programmes in the future which are likely to cause offence to adherents of certain religions or other people with other deeply held beliefs? Broadcasters don't want to be in the position of deciding not to screen episodes from 'brought-in' series on the grounds that they may offend a section of the community, but neither do they want to be regularly responding to formal complaints about the material they broadcast.

OBSERVATIONS

The decision did a good job of sifting the relevant themes from the 35 formal complaints covering almost the full range of standards. Once that was done, the reasoning is actually quite straightforward and easy to follow.

The decision opened with an economical but accurate summary of the programme in question and the most controversial aspects of it, and gave a crucial piece of context right at the start.

"South Park is an animated satirical programme which highlights social, political and other current issues in a controversial and provocative manner". [1].

Later on in its determination, the relevance of the Authority's recent decision about three episodes of *Popetown (Decision No: 2005-112)* was also clearly set out.

"While there may be situations where satire does offend good taste and decency – for example, where the programme was particularly vicious or vitriolic,…it would be an unreasonable limitation on the right to free speech to interpret the requirement of good taste and decency so as to prevent the satirical or humorous treatment of religion in this manner." [107]

Similarly, with reference to Guideline 6 (denigration) the Authority said:

"It would be an unreasonable limitation on the right to free speech to interpret the requirement of good taste and decency so as to prevent the satirical or humorous treatment of religion in this manner." [107]

The Authority made it clear that it considers the same applies to this "strikingly similar" case involving *South Park*; and the Authority states clearly it considers the Catholic Church an institution which is:

"…robust enough to withstand lampooning of its practices and beliefs." [107]

The Authority repeated its observation from *Decision No: 2004-152* that it would be "a dangerous precedent to provide to any single identifiable group a greater degree of protection than others against legitimate humour or satire" – a statement which later served as the basis for not upholding part of a subsequent complaint against a different episode of *South Park (Decision No: 2007-069).*

In clearly stating that it believed the programme qualified as satire, this decision also set out that:

"Satire is seldom respectful or reverential and – while the satire was not to the complainants' liking – the Authority cannot agree with the premise, implicit in their arguments, that broadcasters may not legitimately satirise religious belief." [130]

It went on to say that penalising broadcasters for causing "religious offence" would constitute an "unreasonable limitation on their right to free expression".

Referring again to the *Popetown* case, the Authority describes that programme as "fanciful" and states:

"A programme's humorous or satirical intent is a highly relevant factor in assessing an allegation of denigration." [122]

and

"Guideline 6(g)(iii) simply reflects the fact that democratic societies place a high value on these forms of artistic expression, and limitations should be imposed only in extreme circumstances which take a broadcast outside of a "legitimate context." [122]

To reinforce this, the Authority refers to two decisions *(2004-193* and *2004-001)* where complaints about denigration of those with specific religious beliefs were upheld; explaining that this was because there was an absence of satire or humour, and the presence of what the Authority considered to be genuine vitriol – which makes all the difference.

This was especially important when addressing complaints that the treatment of individuals including the Virgin Mary and the Pope amounted to "an abusive attack". While the Authority concedes it is "a lack of respect" it firmly states that the complainants are effectively asking the Authority to "compel a broadcaster to respect a religious figure they hold dear".

The Authority has attached the document detailing CanWest's Standards Committee's thoughts on the matter – which is good, because it demonstrates the broadcaster did not take a casual approach to the broadcast or the complaints. (Interestingly, this contrasts with the same company's approach when dealing with some complaints about breaches of standards by its broadcasts aimed at the same young audience – for example, *2007-063*: *Studentville* on C4, and *2007-004* on The Rock; although those did not cause anything like the same degree of offence or prompt the same volume of complaints or publicity.)

The Authority concludes that it is not in the public interest for one group to restrict the freedom of expression of others in order that this group not suffer offence. The Authority sets out that this is not just the opinion of four board members, but one that could be justified with reference to the wording of the principles pertaining to the standards it is obliged to uphold.

Inevitably, the Authority's decision will not have satisfied those deeply offended by the lack of respect to Catholicism, or by the sheer unpleasantness of the humour in the *South Park* episode. They will see a double standard in *Decision No: 2006-122* about Radio Sport playing a soundtrack which conveyed the impression that a woman was

having sex with a bull. The complainant argued: "if that's not considered inappropriate, what is?" – and the broadcaster argued that it was merely "bar-room humour" which should not be taken seriously.

But the complaint was upheld in that case because the soundtrack was "gratuitous and prolonged" and the "theme of bestiality would have offended a significant number of listeners". Both these things could be said to apply to the humour in the *South Park* 'Bloody Mary' episode.

Alongside the decision on *Popetown (Decision No: 2005-112)* and the subsequent decision on another episode of *South Park (Decision No: 2007-069*), this one offers some clarity to journalists interested in where the lines are drawn in these matters, and to broadcasters faced with the dilemma of broadcasting material likely to upset certain religious groups.

In addition, complaints have been upheld for breaches of the good taste and decency, and law and order standards involving broadcasts depicting actual harm or injury, or the potential to encourage it (*2007-066: Pain Men; 2007-063: Studentville*), which is not the case with *South Park*.

Dated: 19 December 2006
Decision No: 2006-058

Complainant
DEPARTMENT OF CHILD, YOUTH AND FAMILY SERVICES
of Wellington

Broadcaster
TELEVISION NEW ZEALAND LTD

Complaint under section 8(1)(a) of the Broadcasting Act 1989
Sunday - item about former foster parents who had pleaded guilty to smacking a foster child on the hand with a wooden spoon - had originally faced a number of other abuse charges - CYFS removed two children from their care and said they were no longer suitable foster parents - interviews with former foster parents and CYFS representative - allegedly unbalanced, inaccurate and unfair

Findings
Standard 4 (balance) - upheld
Standard 5 (accuracy) - upheld
Standard 6 (fairness) - upheld

Orders
Section 13(1)(a) - broadcast of a statement
Section 16(4) - payment of costs to the Crown $2,000

ISSUES FOR JOURNALISTS AND PROGRAMME-MAKERS

- *How should they report stories involving disputed accounts of complicated family matters – and state agencies charged with the welfare of children?*

OBSERVATIONS

This decision involves an agency of state, CYFS, complaining about how it was portrayed in a current affairs item. It also said the broadcast presented a false perspective on fostering. The complainant detailed a large number of what it considered to be inadequacies and most of them were fairly robustly defended by the broadcaster point by point, so there's a lot of detail in the document.

The decision is long but in the summary of the CYFS complaint at the beginning of this decision, there is a concise outline of the background information to the Eathornes' (the former foster parents) case which was provided by CYFS.

The decision also clearly signposted a crucial issue early on: the handling of a police statement of facts which CYFS insisted contained information highly relevant to the story – the fact that the three children had each been evidentially interviewed and were consistent in their reporting of the serious allegations of abuse against the couple. This was "knowingly" withheld from viewers by TVNZ, according to CYFS, so viewers were not told that "well-substantiated" allegations against the couple existed.

At this point, it looks like TVNZ 'not letting facts get in the way' of the Eathornes' story, but TVNZ argued it had legal advice not to use the information as it was "not part of

the public record" and potentially defamatory. The media are often criticised when they make public unproven allegations about people, so here some journalists may feel the broadcaster was actually acting honourably – and that the broadcaster's hands were tied when covering the story.

However, in its determination the Authority stated clearly that the broadcast breached the balance standard, leaving viewers with an inadequate understanding of CYFS reasons for not returning the children to the Eathornes. Because the item questioned whether CYFS had acted reasonably in refusing to return the children, the Authority finds that the omission of this information was unfair to CYFS and contributed to a breach of the fairness standard too.

TVNZ's argument that it was not safe to reveal the information emerged as unsound, though the Authority did not accept CYFS claim that the item implied more serious charges against the couple were dropped because the evidence was not sufficient to prosecute.

The Authority explained that CYFS was not responsible for agreeing to the plea bargain that resulted in the dropping of more serious charges against the Eathornes – and that because *Sunday* implied the opposite:

"The Authority considers that viewers would have questioned why CYFS was now relying on the more serious allegations as a reason to revoke the Eathornes' caregiver status, when it had been willing to drop those charges against the Eathornes." [148]

Journalists can see that although many of CYFS' complaints were not upheld, there were serious inaccuracies and a lack of balance which made the story plainly unfair to CYFS – as well as misleading for viewers.

Given that Standard 4 says balance is required "when controversial issues of public importance" are discussed, and that many other balance complaints about stories concerning individuals or families fail that test, this decision needed to explain clearly why this case is different. This was explicitly done in the following statement:

"Although this item discussed an individual case, as opposed to the wider issue of CYFS procedures, the Authority observes that CYFS is the government department that is charged with the care of vulnerable children. Therefore, the reasonableness of its actions in each individual case is of significance and concern to New Zealand society." [111]

Many of the complaints made by CYFS about this item were not upheld – and many of those are simply an expression of frustration that the story was not told as they would wish – but journalists reading the Authority's determination will be clear that TVNZ was far too cavalier in its handling of this story.

This is especially so when it comes to the portrayal of the children concerned, where the Authority makes a strong case that TVNZ treated the children unfairly.

The Authority noted that:

"Costs to the Crown are generally imposed to mark the Authority's disapproval of a <u>serious</u> departure from broadcasting standards…and the fact that it has upheld breaches of three standards." [160]

It then awarded costs of $2,000. Given the modest limits to the sums it can award this is a significant amount.

Some journalists, however, will be concerned that TVNZ has been sanctioned here even though it claimed to have acted responsibly by not broadcasting what it considered unproven allegations about the Eathornes (the police statement of facts which was not eventually tested in court). Also, the reporter did indicate there were concerns about the couple:

"…at this point Lorraine Williams listed the serious allegations from the children against the Eathornes, allegations the Eathornes deny, allegations which were never prosecuted in court and which we cannot broadcast, but allegations CYFS still believes did happen." [52]

But the biggest lesson for journalists here is not to ignore evidence important to the story – even if you're not quite sure how it should be handled.

One small 'win' for journalists though is that the Authority did not uphold CYFS' complaint about *Sunday*'s allegedly sensationalised reconstructions of the acts of vandalism attributed to a foster-boy. These included punk rock music and scenes of vandalism, but The Authority said it found:

"…nothing unfair in the way in which the programme reconstructed and presented the events." [152]

This is consistent with its usual approach whereby style and tone are considered editorial matters, to be determined by the broadcaster.

Dated: 27 June 2007
Decision No: 2006-087

Complainant
KW
of Auckland

Broadcaster
Television New Zealand Ltd
broadcasting as TV One

Complaint under section 8(1)(a) of the Broadcasting Act 1989
Close Up - item about suburban brothels - broadcast hidden camera footage taken inside property which was alleged to be a suburban brothel - allegedly unbalanced, inaccurate, unfair and a breach of privacy

Findings
Standard 3 (privacy) - broadcast of hidden camera footage was an offensive intrusion in the nature of prying - breached KW and FW's privacy - upheld
Standard 4 (balance) - subsumed under Standards 5 and 6
Standard 5 (accuracy) - TVNZ had no reasonable basis upon which to conclude the complainant was running a brothel - broadcaster has not provided any evidence to support claims made in the item - inaccurate - upheld
Standard 6 (fairness) - unfair to KW and FW - upheld

Order
Section 13(1)(a) - broadcast of a statement
Section 13(1)(d) - payment to KW for breach of privacy $1,000, and payment to FW for breach of privacy $1,500
Section 16(1) - payment of costs to the complainant $1152.50
Section 16(4) - payment of costs to the Crown $3,000

ISSUES FOR JOURNALISTS AND PROGRAMME-MAKERS

- *Was the use of hidden camera footage and reporting undercover justified?*
- *The item raised the wider issue of links between legal prostitution and crime. Would the public interest in this serve as a defence to any breaches of privacy in this case?*
- *Would the broadcasters get the 'benefit of the doubt' when it challenged the complainants' account of events?*
- *When assessing the privacy complaint, does it make a difference if the broadcaster thought it was reporting on a place of business rather than a home?*

OBSERVATIONS

In this case, the broadcaster insisted it had good information that KW's house was being run as a brothel, and believed undercover reporting and taking footage with a hidden camera was justified. But the complainant disputed the key conclusion in the *Close Up* item – that his home was operating as a brothel. The complaint also contradicts the

broadcaster's account of how the newsgathering was done and what the "person acting in the role of reporter" on TVNZ's behalf claimed that he saw.

This put the Authority in the tricky position of determining which side's account was most accurate:

"Once the accuracy of the broadcast has reasonably been thrown into question, the broadcaster must satisfy the Authority, on the balance of probabilities, that the disputed facts are true." [41]

To resolve this, the Authority requested the undercover footage shot by *Close Up*. TVNZ was unable to supply it so the Authority requested sworn statements from the reporter involved and the complainant. Having scrutinised these, the Authority stated:

"TVNZ has not provided any evidence upon which it could reasonably conclude that KW's property was a brothel at the time of the broadcast." [41]

It added that the evidence TVNZ did supply was in fact *"broadly consistent with the more innocent explanation offered by KW"*.

TVNZ may feel aggrieved here, as they provided a further affidavit from another person (the ex-husband of a woman alleged to be working at the premises) which they felt added weight to the conclusion that the property in question was operating as a brothel. But the Authority did not recognise it as valid because it was not in the broadcaster's possession at the time.

The moral of the story for journalists and programme-makers is that TVNZ should have satisfied itself that it really had enough convincing evidence for its conclusions before deciding to intrude on KW's premises – and broadcast the hidden camera footage subsequently.

Also, journalists know that in most newsrooms undercover reporting and filming are techniques used only in extraordinary circumstances, usually requiring approval from senior editorial figures. It could be reasonably expected that before broadcasting the footage *Close Up's* management should have been satisfied the footage gathered was sufficient to prove the claims that the property was being run as a brothel.

TVNZ had "no reasonable basis upon which to conclude the complainant was running a brothel – according to the Authority – but TVNZ would have gone onto the premises assuming it was a place of business where the expectations of privacy are not the same.

The Authority acknowledged parts of the home were used as business premises, but said that it

"…was not a commercial business where anyone could walk from the street uninvited." [55]

Accordingly, the Authority states a breach of privacy occurred because some filming took place in KW's home, where he did have "an interest in solitude and seclusion" as set out in Privacy Principle (iii). The Authority concluded:

"…the ordinary person would find offensive the broadcast of hidden camera footage of the inside of their property in these circumstances." [59]

However, this is arguable. The broadcast footage only showed the parts of the house that were being used as a business premises – with one exception – and the ordinary person would not find this offensive in the same way they would in the circumstances set out in *TVNZ and NM (Decision No: 2007-023*, the *Last Laugh* prank), where a young woman's bedroom was "invaded" by a TV crew without her knowledge or consent. In addition, viewers of programmes like *Fair Go* are familiar with doorstep-style confrontations at small business places, some of which are attached to homes, and I think the Authority's conclusion here could be challenged.

The conclusion that anyone working in a business which is also a private residence has "a reasonable expectation of privacy" could be quite restrictive for the media – especially in a business which receives public clients on those premises. In another complaint (*Decision No: 2006-089*), a privacy complaint about a teller being identifiable in hidden camera footage was not upheld by the Authority, on the grounds that the teller did not have an interest in solitude and seclusion, because she was working in a business premises where any member of the public could see her.

However, the Authority believed there was no public interest in broadcasting the hidden camera footage, which it said*…did not disclose anyone being a prostitute or running a brothel"* or *"anything of legitimate concern to the public".* [64]

For the reasons outlined above, it's also clear why the item was deemed unfair and inaccurate – as well as a breach of privacy.

But what about the wider issue raised by *Close Up* – the subject of money laundering and crimes thought to be associated with the (now legal) brothel trade?

The broadcaster said it was trying to show that, with the law as it stands now, apparently ordinary suburban houses may be operating as brothels unknown to all but their operators and clients. *Close Up* thought it had evidence from its sources indicating this particular property was being used for prostitution in this manner. The reporter who visited undercover also formed that impression from his visit, according to TVNZ's submissions.

On this basis *Close Up's* editors at the time probably felt they had done enough to ensure they had 'got the right place' – and they would have been confident that there would be sufficient public interest in broadcasting the footage as part of their intended item on prostitution, and what the programme referred to as the "serious crimes" associated with it. The editor in charge of the day's broadcast may not have felt there was any compelling reason not to run the undercover footage, without which the item would have had much less impact.

The broadcaster also pointed out that although *Close Up* did show distinguishing features of KW and FW's property, they did not give out details of the address – or seek to "unmask" or name the individuals living and working there. It's possible that only a handful of viewers seeing the programme would have recognised the property from the programme item or the preceding promo.

Also, in a separate complaint about another part of *Close Up's* look at this same issue (*Decision No: 2006-089* – published six months later), the Authority accepted that the broadcaster's use of hidden camera footage in this other instance did not breach Guideline 6c, because:

TVNZ was investigating an issue of public interest - whether companies in New Zealand were allowing customers to perform illegal financial transactions which could be hidden from the Inland Revenue Department.

Finally, it is interesting that when the Authority asked TVNZ to provide a copy of the field tape of the hidden camera footage in order to resolve the conflicting accounts provided by the parties, TVNZ stated that "the tape has not been retained" or archived because:

"the tape contained no material beyond what was used which could conceivably be required for the future, and so was not sent to our video library for filing." [33]

The Authority makes no further comment about that. However, as covert filming should only ever be undertaken in extraordinary circumstances where a matter of public importance is involved, surely such footage should be retained? Even if only for the broadcaster's legal requirements, as it may even be required in a defamation case later on.

Journalists are often told to retain their notebooks and records for several years. Is a broadcaster obliged to do the same? If not, does this not undermine the 'commission of inquiry' powers of the BSA?

Dated: 19 September 2006
Decision No: 2006-063

Complainant
ALLAN DEWAR
of Wellington

Broadcaster
CANWEST TVWORKS LTD
broadcasting as TV3

Complaint under section 8(1)(a) of the Broadcasting Act 1989
3 News - item about the 20th anniversary of the Chernobyl disaster - said that it had killed "16,000, possibly double, even treble that" - complaint that figure was inaccurate - broadcaster upheld the complaint on the basis that there was dispute about the number of deaths and the item should have reported this - broadcaster discussed the issue with newsroom staff - complainant dissatisfied with reasons for upholding decision and action taken

Findings
Standard 5 (accuracy) - CanWest's reasons for upholding decision were incorrect - should have upheld the complaint on the basis that the figures in the report were inaccurate, not because the position was uncertain - upheld

No Order

ISSUES FOR JOURNALISTS AND PROGRAMME-MAKERS

- *Can a broadcaster be held responsible for the accuracy for information in 'bought-in' news reports provided by a foreign media outlet?*
- *Does the broadcaster get the benefit of the doubt if the truth is difficult to establish?*
- *How far will the Authority go to determine the facts of the matter?*

OBSERVATIONS

In this case the complainant clearly has an in-depth knowledge of the topic of the disputed broadcast. He had a similar complaint upheld against One News in the previous year (*Decision No: 2005-085*).

It is of course not possible for the Authority itself to determine the actual number of people who can be said with certainty to have died as a result of the explosion of the Chernobyl reactor twenty years ago, so the Authority instead tried to determine whether the estimate of deaths in the report was accurate – and whether it was accurately presented to viewers.

In its determination the Authority said that although "conventional public wisdom" regards the Chernobyl disaster as a major human tragedy"

"Referring to sources such as the United Nations and the World Health Organisation (WHO), the Authority concluded that, from the available papers, total deaths appeared to be below 100." [25]

For journalists and programme-makers, the lesson from this is that where there is doubt about a factual matter, the doubt should be acknowledged in reports, and disputed estimates should not be presented as facts.

However, the broadcaster may feel hard done by here.

In *Decision No: 2007-007 (TVNZ and Broatch*), a complaint against a broadcaster's estimate of casualties during the current war in Iraq was not upheld because there was there was "no reliable estimate" available – and the report had acknowledged that other reported estimates varied widely. However, the same benefit of the doubt was not applied here.

Given that thousands were at risk of death in the region around Chernobyl at that time – and thousands more may yet suffer fatal illnesses from their exposure to the accident – this challenge from an informed viewer must have struck the broadcaster as a bit pedantic. But having acknowledged he had a point, TV3 could also justifiably be disappointed that the complainant was not satisfied with its response - that it would ensure that doubt and confusion about number of deaths would be accurately explained in its reports on the issue in future.

This response was also in line with the outcome of Mr Dewar's earlier complaint (*Decision No: 2005-85*), where the Authority stated:

"…the Authority expects TVNZ to use more credible sources of information when it next reports on the consequences of the accident in the Chernobyl reactor." [19]

However, in spite of this, the Authority told the broadcaster in this subsequent decision its reasons for upholding decision were wrong – because it should have upheld the complaint on the basis that the reporter's statement was "inaccurate and a significant exaggeration of the death toll", not because the position was merely "uncertain".

In concluding that the reporter was wrong, the broadcaster will note that the Authority considers its own interpretation of the facts to be more 'sound' that that of a professional journalist working for a highly-regarded British-based international news organisation.

The accuracy standard makes no exemption for foreign-sourced reports, but Guideline 5e does state:

> *Broadcasters must take all reasonable steps to ensure at all times that the information sources for news, current affairs and documentaries are reliable.*

So might not the fact TV3 had engaged a reputable provider for its international reports constitute "a reasonable step" in itself?

Regardless, the upshot of the broadcast was that viewers were misled by the report of an exaggerated death toll, which can serve as a reminder to journalists and broadcasters that the reputation of a broadcaster providing material is not a guarantee of its accuracy.

In addition, it's worth noting that the (mostly British) correspondents who report on foreign affairs for networks like the BBC and ITN are often given leeway to include elements of commentary and interpretation in their reports, which go beyond stating facts or making simple observations (e.g. "Time has run out for Mugabe – a leader who has lost the confidence of his people") and which, strictly speaking, could also be challenged on the basis of accuracy – as opinions being stated as facts.

Having upheld the complaint, the Authority did not impose an order for this reason:

"The Chernobyl tragedy is an on-going story and the Authority expects that CanWest will accurately reflect the position surrounding this issue in future items." [33]

That seems a fair and appropriate response. When the issue arises again, the doubts about the number of deaths attributable can be reported more accurately.

Dated: 14 August 2007
Decision No: 2006-116

Complainant
RHETT MASON
of Christchurch

Broadcaster
TELEVISION NEW ZEALAND
broadcasting as TV One

Complaint under section 8(1)(a) of the Broadcasting Act 1989
Close Up – item about a ten-year-old boy who the reporter said was on the waiting list to have "tumours" removed from his body – outlined difficulties the boy's mother had experienced dealing with his surgeon – allegedly unbalanced, inaccurate and unfair

Findings
Standard 4 (balance) – programme did not discuss a controversial issue of public importance – not upheld
Standard 5 (accuracy) – inaccurate to state that the boy had more than one tumour – TVNZ failed to ensure that one of its sources was reliable – programme misled viewers by failing to inform them that surgeon had ensured the boy's ongoing care – upheld
Standard 6 (fairness) – complainant was not given a reasonable opportunity to respond to allegations in the item – upheld

Orders
Section 13(1)(a) – broadcast statement
Section 16(1) – costs to the complainant $6,750
Section 16(4) – costs to the Crown $2,500

ISSUES FOR JOURNALISTS AND PROGRAMME-MAKERS

- Guidance on what constitutes "reasonable opportunity to respond".
- *Guidance on fairness and accuracy when reporting the grievances of an individual.*
- *Precise reasons for requesting documents relating to the broadcaster's newsgathering on this story – and whether this intrusion on the broadcaster's freedom is justified.*
- Whether the Authority considered public interest in the issue of "the power doctors have over people" was a defence in this case.

OBSERVATIONS

This story involved allegations about the conduct of a senior medical professional, with respect to the treatment of one young patient whose mother was dissatisfied with his care. The broadcast in question presented the story as one which shed light on the issue of how medical professionals can exercise power over patients – and was introduced like this:

"How much power do doctors and specialists have to remove you from the waiting list for reasons other than medical ones, and would you actually know?" [3]

But in fact, the item focused on the grievances of the patient's mother. The surgeon's side of the story was largely absent because, the programme claimed, he did not provide a statement before the programme's deadline. The surgeon subsequently argued in his complaint that as a result the programme showed him "in the worst light possible".

The complaint was keenly contested by the complainant and the broadcaster, so much so that the Authority requested affidavits from both sides in order to weigh up their disputed claims about whether the surgeon was given a reasonable opportunity to rebut the serious allegations made. The Authority also asked the broadcaster for documents and details of their newsgathering – something guaranteed to alarm and irritate broadcasters, who regard such interventions as a fundamental intrusion on their right to investigate stories as they see fit, in order to best serve the public's right to know.

Having sighted the letter from the doctor, Rhett Mason to the patient's mother, which said:

"I would strongly recommend you do not continue to pursue your local MP to support [AB]'s case. The politicians in this government are responsible for the current waiting list fiasco, I therefore have an extremely negative reaction to any letters I receive from MPs and these patients are invariably returned to the bottom of the list." [4]

Close Up would be entitled to believe that there was a good story here. The patient's mother had been urged by the surgeon not to exercise her right to take her concerns to her MP – concerns about the quality of care her son was receiving from the public hospital system. Journalists would feel it was a doubly compelling tale, given that the surgeon had cited the political issue of hospital waiting lists as the context; and, in addition, responsibility for this patient's care had been transferred to another doctor as a result of this dispute.

In the light of all this, journalists may find it hard to credit that the Authority concluded "the programme did not discuss a controversial issue of public importance" when it considered whether the balance principle applied.

However, the Authority's reasoning is clearly and concisely explained:

"While the wider issue of surgeons influencing hospital waiting lists was mentioned in the introduction, the item itself focused solely on the individual case of AB. In this respect the Authority finds that the balance standard did not apply." [121]

This is true, and makes it clear to journalists that having cited a wider context relevant to the individual case which was its focus, the broadcaster failed to investigate that wider issue.

The decision also made it very clear that the item was inaccurate in several respects. For example, it wrongly stated that the boy had more than one tumour and made his condition sound worse than it appears to be. It also failed to ensure the credibility of a doctor who gave an opinion in the broadcast about the boy's condition which was at odds with that of the surgeon. And the Authority said *Close Up* misled viewers by failing to inform them that in fact the surgeon had ensured the boy's ongoing care.

"The Authority notes that AB's diagnosis and treatment plan has been supported by his current surgeon…and there is no evidence that Mr Mason was taking any risks with AB's life as suggested by the reporter's question." [89]

Journalists reading this decision get the clear message that key facts were missing in this story, and that *Close Up* had failed to properly scrutinise the information provided to them by sources concerned about the boy's treatment. They must scrutinise their sources; and that they mustn't knowingly leave out information which contradicts or casts doubt upon what their principle sources have told them.

The Authority made it clear that these inaccuracies contributed to a breach of Standard 6 (fairness). This was compounded by the fact that the complainant "was not given a reasonable opportunity to respond" to the serious allegations.

The surgeon insisted he was not informed of the deadline for giving his response to the programme's questions, though this was disputed by the broadcaster, and in paragraphs [81]-[86] the Authority detailed the efforts made to try to establish the truth.

The Authority decided that:

"…it was paramount that TVNZ include Mr. Mason's perspective on the allegations being made." [83]

…and the Authority made it very clear to readers of this decision that the efforts TVNZ made were not sufficient.

Failure to get a response of any kind doesn't mean they can 'empty chair' the party in question without breaching the fairness standard. They must leave the individual in question in no doubt as to what they require for the broadcast and clearly communicate the urgency by specifying a feasible deadline. Helpfully, the Authority highlights the lack of urgency in the text messages sent to the complainant prior to the broadcast which prompted the complaint.

Broadcasters, journalists and programme-makers will also note that special care should be taken with allegations of unprofessional behaviour by a qualified medical professional. These could have serious consequences for the doctor's career, and if the allegations cannot be supported, they could even be defamatory.

Some journalists may well feel that this decision could have a 'chilling effect', discouraging investigation of senior doctors because to do so might become a big hassle. But past BSA decisions have demonstrated that where there is credible evidence of serious wrongdoing, the public interest will be a defence to methods that are inherently unfair. Most notably, this can be seen in the *TV3 / Dr Morgan Fahey* case: (*Decision Nos: 2000-108* to *113*) which said clearly:

"…the public interest on this occasion was both legitimate and strong."

Journalists and programme-makers can also be reassured that it was legitimate to question the surgeon's conduct in *TVNZ and Mason*, as the Authority declined to uphold his complaint that it was inaccurate to describe his letter to the mother as "threats about [AB's] place on the waiting list".

The Authority stated:

"MB was entitled to recount her interpretation of events, and viewers would have assessed the likely precision of her recollection while taking into account that she had received the information as an anxious mother who was concerned about the seriousness of her son's condition." [114]

In doing so it also makes clear that this decision is not a prohibition on – or warning against – broadcasting interviews in which people express grievances about senior doctors.

But in this case it is clear from the decision that the broadcaster did not have evidence to suggest the surgeon's care of the patient was inappropriate or inadequate, as was implied by MB. Indeed, it had evidence which indicated the opposite, but did not make it known to viewers.

However, some aspects of this decision offer less clear guidance for broadcasters, journalists and programme-makers. They may conclude that this decision doesn't clarify strongly enough the Authority's expectations of what constitutes "a reasonable offer" to be interviewed in circumstances where a deadline is approaching.

The Authority said the broadcaster should have tried harder to get the rebuttal required, but broadcasters may feel that this places too high a burden on their journalists. In this case, the surgeon was aware for some time that the story was to be the subject of a broadcast, and he did not dispute he was asked for a statement in response.

Having failed to get a response in time, it would have been 'fairer' to delay the broadcast, but broadcasters may feel that this could encourage reluctant sources to stall a broadcast by making themselves 'hard to get hold of'. And if the complainant had agreed to go on camera – as the broadcaster would always prefer – fairness could easily have been achieved.

TVNZ may also feel that, having argued that the complainant's accounts of his movements on the day in question contained "discrepancies", the Authority has effectively taken the complainant's word over their own.

The broadcaster made clear its annoyance at the Authority requesting documents detailing the newsgathering efforts they'd made relating to this story. It said:

"…the Authority was impinging on "long-established press freedoms, and basic principles involving the protection of sources." [65]

Such requests are far from routine, even in hotly disputed cases, and in complying, broadcasters feel they may risk implicating themselves, while compiling the affidavits requested from people on the complainant's side may allow them the opportunity to build a more compelling case.

In addition, the broadcaster may feel aggrieved because it had shown a measure of good faith by reading a statement the next day which included information supplied by the complainant (in line with Guideline 5e) which included some relevant facts omitted in the offending broadcast the day before.

Statement summarising decision available on broadcaster's website: (http://tvnz.co.nz/view/tvone_minisite_story_skin/1380350)

The Authority upheld the complaint that Mr Mason was treated unfairly, because he was not given a reasonable opportunity to respond to the serious allegations made against him.

The Authority also found that the story misled viewers by wrongly implying that the boy had more than one tumour, and that the surgeon had failed to ensure the boy's ongoing care.

The Authority also said that TVNZ failed to ensure that the taiwanese [sic] specialist quoted in the item was a reliable source.

The Authority ordered us to broadcast this statement and pay costs to the complainant and the Crown.

Dated: 11 September 2007
Decision No: 2006-127

Complainant
PHARMAC
of Wellington

Broadcaster
CANWEST TVWORKS LTD
broadcasting as TV3

Complaint under section 8(1)(a) of the Broadcasting Act 1989
60 Minutes - examined differences in breast cancer treatment in Australia and New Zealand, and the funding of a drug called Herceptin - interviewed an Australian and a New Zealander with similar cancer and compared their prognoses - allegedly unbalanced and inaccurate

Findings
Standard 4 (balance) - broadcaster failed to present significant viewpoints on the controversial issue within the programme, and within the period of current interest - due to the presentation of the programme and the nature of the issue, the period of current interest limited to a short time after the broadcast - alternative perspectives were not presented - upheld
Standard 5 (accuracy) - two statements would have misled viewers - upheld

Order
Section 13(1)(a) - broadcast of a statement
Section 16(4) - payment of costs to the Crown $3,000

PREAMBLE

This *60 Minutes* item was one of many media reports about the care for women with breast cancer in 2006. Many of them focused on the availability (or non-availability) of the drug Herceptin. The issue also arose (though less often) in factual programmes about New Zealand's capped health budget, and the often unpopular restrictions it imposes on the public provision of expensive medicines.

The programme said care was better in Australia than it is here in New Zealand, and women with the disease here are not likely to live as long under the current treatment options available. This complaint is similar to Decision No: 2006-058 (TVNZ and CYFS) in that a TV current affairs show has decided to focus on the plight of individual sufferers, but not given due weight to the concerns of the state agency relevant to the case. Pharmac complained the programme had misinformed viewers by presenting misleading information and statistics, and not allowed them the opportunity to contribute.

ISSUES FOR JOURNALISTS AND PROGRAMME-MAKERS

- *Did the broadcaster tell 'both sides of the story' adequately? Was enough done to present other significant points of view alongside those of the cancer patients' lobby?*

- Should the broadcast have included Pharmac in order to be fair and balanced?
- Would the Authority be convinced by the broadcaster's assertion this was a human interest story for which balance was not required?
- Were key facts and claims made in the programme accurate and reliable – particularly those about the so-called "wonder drug" Herceptin?

OBSERVATIONS

The decision made it clear some of the information presented in *60 Minutes* was misleading and inaccurate. To determine this, the Authority had to analyse the competing claims of the complainant and the broadcaster, and consider some quite technical arguments advanced by the complainant. But each alleged inaccuracy in the item was separated out in the decision, with the analysis and conclusion for each clearly and concisely presented.

For example, the *60 Minutes* report said:

"Trials show women with HER2-positive early breast cancer are up to 50% less likely to have a recurrence of the cancer with Herceptin and 33% less likely to die." [11]

…and it included a breast cancer campaigner's statement that:

"…we calculate that actually 66 additional lives could be saved every year if we use Herceptin on 400 women in New Zealand." [13]

Paragraph [71] makes is clear the latter is presented as "a statement of fact" to which the accuracy standard applies – and is quite clear that both statements are wrong and misled viewers.

Pharmac was correct when it said in its submission that standing by this interpretation merely confirms that the programme was inaccurate. There are other examples of statements found to be misleading which CanWest did not accept upon receipt of the draft decision.

By contrast though, Pharmac's claim that describing Herceptin as a "wonder drug" was not upheld, as the Authority said it was:

"…a colloquial and hyperbolic way to reflect the current hype surrounding the drug's effectiveness." [77]

Here, journalists get the message that journalistic licence and 'shorthand' is not forbidden – and challenges to a report's tone and style are not often upheld. They will welcome that, and may also be comforted by the Authority's response to Pharmac's challenge to the programme's assertion about the favourable survival rate in Australia.

The Authority said:

"Because PHARMAC has provided no evidence to suggest that the survival rates in Australia are similar to those in New Zealand, the Authority has no basis upon which to conclude that the statement was inaccurate or misleading. Therefore it declines to uphold this part of the complaint." [75]

This indicates that the onus is not always on the broadcaster to prove disputed 'facts' in broadcasts are correct.

In its initial response to the Authority, CanWest said:

"The programme did not set out to be a detailed examination of the position of the funding agencies and those who challenge their funding decisions – it was clearly presented as a human interest story – allowing the two women upon whom the story was focused to tell their story." [36]

It also argued:

"By the time this programme screened the [complaints] committee considers that viewers with an interest in the subject would be well aware of the significant points of view." [18]

However, anyone reading this decision gets the message that even human interest stories need to be balanced, when the underlying issue is one of genuine importance.

The Authority said *60 Minutes* presented "a series of highly controversial statements that were left unchallenged" – and that the programme had not given reasonable opportunities or made reasonable efforts to present significant points of view within the programme. To have sought comment from DHBs or a prominent oncologist would not have unduly complicated the programme.

The Authority was also clear that Pharmac's was a significant point of view which was also unreasonably excluded:

"PHARMAC had a significant perspective on the issue of whether Herceptin should be publicly funded in this country, because it was the body responsible for that decision. The Authority disagrees with CanWest that the item was simply a "human interest" story; it also presented the views of a highly regarded Australian specialist and a "breast cancer survivor and activist", who both strongly criticised the decision not to fund Herceptin in New Zealand. Accordingly, the Authority considers that CanWest had a responsibility to present PHARMAC's viewpoint within the programme complained about, or during programmes within the period of current interest." [55]

Interestingly, *60 Minutes* has previously accommodated Pharmac in items about other expensive medicines which are restricted due to the way Pharmac apportions its budget.

In October 2005, Pharmac's boss was put on the spot in a programme about the limited availability of publicly funded growth hormone treatment for children. The following year, Pharmac featured heavily in an award-winning TV3 documentary about a former police officer who was lobbying Pharmac for funding of the costly chemotherapy drug Temadol.

The "period of current interest" is often difficult to define, and as far as broadcasters are concerned – the longer the better as it might make it easier for them to meet their obligations on balance. However, the Authority insisted that – unlike euthanasia or abortion – this one was not an issue that had been canvassed over a long period of time, and:

"CanWest was required to present other significant perspectives in a programme of similar length, impact and audience reach, within a very short period of time". [60]

The argument is logical, but will still seem harsh and restrictive to journalists, given that Herceptin and breast cancer care are topics that are in and out of the news.

The submissions on orders show that Pharmac drafted its own "corrective statement" for CanWest to broadcast, though the Authority decides the normal practice of having the broadcaster write the statement for the Authority's approval. This is proper, given that maintaining broadcasting standards is the Authority's task – rather than satisfying the aggrieved party. But having concluded that Pharmac's viewpoint was unreasonably excluded from the original broadcast, would it have been appropriate to attach Pharmac's draft to the decision, so that interested parties could see what they had to say?

Also, unlike some other decisions, no order was made to attach the statement to the version of the item that is available on TV3's website. The unbalanced and inaccurate item is still available to view on: *http://www.tv3.co.nz/60MinutesVideo/tabid/132/articleID/14421/Default.aspx .*

Dated: 30 May 2007
Decision No: 2007-004

Complainant
PAUL VANDENBERG
of Palmerston North

Broadcaster
CANWEST RADIOWORKS LTD
broadcasting as The Rock

Complaint under section 8(1)(b) of the Broadcasting Act 1989
The Rock – stunt in which announcers let off fireworks to test "Jimmy's ability to dodge fireworks" – allegedly in breach of law and order and social responsibility standards

Findings
Principle 2 (law and order) – subsumed under Principle 7
Principle 7 (social responsibility) – stunt was socially irresponsible – did not consider effects on child listeners – hosts' manner trivialised the potential danger of aiming fireworks at another person – upheld

Order
Section 13(1)(a) – broadcast of a statement

ISSUES FOR BROADCASTERS AND PROGRAMME-MAKERS

- *Is it okay for radio station hosts to do unsafe things with fireworks in the name of fun? If not, is it socially irresponsible as defined in the Radio Code standard?*
- *Would the Authority consider the target audience old and smart enough not to be influenced by it?*

OBSERVATIONS

Some broadcasters will think that in the context of modern commercial music radio – which is getting 'edgier', this was a fairly harmless prank – and having urged listeners not to copy them, it's not really a big deal. In its response to the Authority, CanWest argued that the announcer had said: "Don't try this at home", and its target audience of younger males:

"…would have sufficient life experience to know that shooting fireworks at a person is a dangerous thing to do." [9]

CanWest also said the target himself (Jimmy) was wearing protective clothing – and doing nothing a stuntman or stuntwoman wouldn't do in the course of their work.

However, the Authority said the stunt involved the "willful misuse" of fireworks quite close to Guy Fawkes night, when the risk of injury and damage to property is heightened. It also noted children without that "life experience" could be listening at the pre-9am time of the broadcast – and:

"…the hosts' amusement when Jimmy caught fire was inappropriate and thoughtless." [13]

Accordingly, it upheld the complaint under Principle 7 (social responsibility) in the Radio Code, specifically citing Guideline 7b:

> *Broadcasters shall be mindful of the effect any programme may have on children during their normally accepted listening times.*

The logic is clear, and it is consistent with other decisions about commercial radio pranks, such as *Decision No: 2007-102 (Shieffelbien and CanWest)* concerning prank calls to the National Poisons Centre. But would it still have been "socially irresponsible" after 9am when most kids were not listening?

This ruling will leave music radio broadcasters wondering whether they can cater for their target audience of males in a highly competitive market without 'breaking the rules' from time to time.

Competition between stations like The Rock and The Edge has led to the hosts doing outrageous things more often, with some making uncomfortable stunts the centrepiece of their act. And as *The Rock* points out in its response to the Authority, much of its target audience:

"…enjoy watching and listening to silly and dangerous stunts of this kind (e.g. Jackass and programmes of that genre)." [9]

However, where complaints about good taste and decency are often not upheld because the programme is satirical in nature or not meant to be taken seriously, such hosts may be left wondering if they risk being held to an unfairly high standard under the social responsibility principle.

The orders made in this case are also interesting. The Authority said the statement summarising the Authority's decision must also be attached to a video of Jimmy being assaulted with fireworks which was on The Rock's internet website at the time. The video is no longer on that site, but it is on the popular video sharing website www.youtube.com. This version does not have the statement attached.[41]

In that video 'Jimmy' doesn't look at all well protected, as stated in the broadcaster's response to the Authority:

"The person at whom the fireworks were fired was wearing "sufficient protective gear to ensure that no serious injury would result." [10]

Finally, the audio of Jimmy being bombarded is being sold as a downloadable mobile phone ring tone for $2.50 on a web-based service called 'MyMobiZone', which appears to be a tie-up between RadioWorks, TVWorks and mobile operator Vodafone.[42]

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41 ***http://www.mymobizone.co.nz/download_content.php?id=21573&device=883***

42 ***http://www.youtube.com/watch?v=OPQGnitpTVU***

Dated: 27 June 2007
Decision No: 2007-016

Complainant
NOEL RUSSEK
of Dargaville

Broadcaster
TELEVISION NEW ZEALAND LTD
broadcasting as TV One

Complaint under section 8(1)(a) of the Broadcasting Act 1989
Close Up - item about the disappearance of a six year old boy who had allegedly been kidnapped by his maternal grandfather - acting on an anonymous tip, reporter went to a remote farm and filmed an interview with the property owner - allegedly in breach of privacy and unfair

Findings
Standard 3 (privacy) - broadcasting footage of complainant filmed on private property without his knowledge amounted to a breach of privacy principle 3 - no public interest in broadcasting the footage - upheld
Standard 6 (fairness) - programme did not leave a negative impression of complainant - not unfair - not upheld

Order
Section 13(1)(d) - payment to the complainant for breach of privacy $1,000
Section 16(1) - payment of costs to the complainant $574.65
Section 16(4) - payment of costs to the Crown $1,500

ISSUES FOR JOURNALISTS AND PROGRAMME-MAKERS

- *Guidance on filming people against their will, surreptitiously and on private property - and whether it's 'safe' to broadcast the resulting footage.*
- *Guidance on whether journalists must identify themselves when seeking comment from people.*
- *Guidance on whether the Authority would consider that public interest would be a defence to any breach of privacy resulting from the broadcast of the footage.*

OBSERVATIONS

This complaint involves a man caught up in a matter that had been in the headlines for some time – a sad story about the disappearance of a six-year-old boy at the centre of a custody dispute.

Accompanied by three private investigators, a *Close Up* reporter went to the property identified in an anonymous letter. The owner of the property, Noel Russek, was shown telling the reporter and one of the private investigators that the boy had not been on his property. He was filmed from a camera located inside a car nearby, which the broadcaster insisted was not deliberately concealed.

Through his solicitor, Noel Russek said he was filmed without his knowledge, and interviewed on his own private property by journalists who did not identify themselves. He claimed this was unfair and his privacy had been breached. He believed he had been portrayed in a negative light because the broadcast of the footage connected him with the crime that TVNZ was investigating – even though the item made it clear he was not thought to be involved in Jayden Headley's disappearance.

In his referral to the Authority, Noel Russek queried:

"…why, when it did not find anything newsworthy on the property, TVNZ had then published his name and face in connection with an alleged crime of kidnapping." [22]

…and asked:

"*Is TV One now advancing the argument that it is entitled to publish any interview with any person, without that person's consent, as long as TV One is investigating a story?"* [17]

Given the public concern about Jayden Headley's whereabouts, the Authority said it "understands why the camera was rolling" when Mr Russek was filmed, but because the camera was not in plain sight, and he was not explicitly told he was being filmed, the Authority concluded the broadcaster's actions in filming Mr Russek amounted to an intentional interference in the nature of prying, and was thus a breach of his privacy.

It also concluded there was "no public interest" in showing the footage that breached his privacy.

Unlike other decision documents, this one doesn't take a few paragraphs to make the distinction between matters "in the public interest" and matters merely "of interest to the public" – instead it simply provides a reference point to the relevant part of Hosking v Runting 2005.[43]

However, the Authority did not believe that he was treated unfairly as he was in fact "portrayed as helpful, good-natured" and a private investigator was heard in the item saying he was "a nice guy" and he had no doubt that Mr Russek was not involved.

While the award of costs will seem paltry ($574.65) TVNZ may feel it was harsh to sanction the broadcaster for running the footage of Mr Russek because, although he said it evidently distressed him, there is no evidence that Mr Russek suffered significant hurt and humiliation as a result of the broadcast.

Also, while the Authority insists:

"…the footage did not disclose anything of legitimate concern to the public." [34]

…which might justify the breach of his privacy, the footage did – in a small way – help TVNZ serve the public interest, because the public got to see that journalists were actively trying to locate Jayden Headley, and they also gained an insight into the difficulties facing the Police in looking for him.

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43 ***Hosking v Runting [2005] 1 NZLR 1 (CA)***

Journalists will note that the Authority said this decision does not amount to a prohibition on confronting people on private property when investigating a matter of public importance – or approaching people with cameras rolling.

The Authority does not make any comment on what appears to be the less-than-upfront behaviour of the journalists and the accompanying investigators on Mr Russek's property that day. Neither does it make any comment about the seriousness of the breach in making orders, leaving a possible impression that it was not really considered a particularly serious breach of standards.

Dated: 14 August 2007
Decision No: 2007-030

Complainant
REGIONAL PUBLIC HEALTH, HUTT VALLEY DISTRICT HEALTH BOARD

Broadcaster
THE RADIO NETWORK LTD
broadcasting as ZM

Complaint under section 8(1)(a) of the Broadcasting Act 1989
ZM Breakfast – presenter drank a yard glass on his 21st birthday – broadcast allegedly advocated excessive alcohol consumption and broadcaster not mindful of children

Findings
Principle 8 (liquor) – tone of item accepted practice as normal – socially irresponsible promotion of liquor – upheld
Principle 7 and Guideline 7b (children) – socially irresponsible to broadcast drinking of yard glass during children's normally accepted listening times – upheld

Order
Section 13(1)(a) – broadcast statement

ISSUES FOR BROADCASTERS AND PROGRAMME-MAKERS:

- *Guidance on how radio hosts should handle alcohol in order not to be in breach of their obligation to be "socially responsible" in accordance with Principle 7 of the Radio Code.*
- *Is it unacceptable for a radio host to drink alcohol live on air? And a lot of alcohol?*
- *Guidance on how the Authority interprets "promotion of liquor" as set out in Principle 8 of the Radio Code – and what it considers "advocacy of consumption".*
- *Would the Authority consider wider social concerns about a binge drinking culture relevant to this complaint?*
- *Are radio hosts expected to be role models, or do hosts on 'edgy' stations aimed at younger listeners get a bit of leeway?*

OBSERVATIONS:

This complaint concerns the broadcast of a scene which you might expect to see at a bloke's 21st birthday party. It wasn't in great taste, but it would not have alarmed the vast bulk of the station's audience. However, it could also have been heard by children.

The decision sets out clearly what's wrong with the broadcast with reference to the principles in the Radio Code. The drinking was excessive, yet "treated as humorous and desirable" and the hosts "presented it in a positive light" – all of which amounted to "advocacy" for the purposes of the principle, according to the Authority.

Whereas the broadcaster claimed it was "a bit of fun acceptable to the target audience", the Authority states:

"There is wide concern in New Zealand about a perceived culture of binge drinking among young people." [15]

…and

"…the consumption of two litres of beer at one time by a 21 year old male is exactly the sort of behaviour in respect of which broadcasters are expected to exercise extreme caution." [15]

This is logical, but it may make broadcasters feel that they are victims of wider social circumstances for which they themselves are not responsible.

However, the fact that it was a radio host – an employee of the broadcaster – means they do bear greater responsibility in this case.

Broadcasters will also note that their argument that their target audience would not be harmed was not a persuasive one. In this case the broadcaster may have been better off upholding the listener's complaint itself. But broadcasters targeting the younger audience may feel this in unduly restrictive interpretation. Taken in tandem with *Decision No: 2007-063 (*concerning the programme *Studentville)* they may conclude it is simply never going to be possible to broadcast any event in which young people are consuming alcohol without being at risk of breaching Principle 7.

Broadcasters may be annoyed in this case by the fact radio hosts have been sanctioned as a result of a complaint from a public health official, but the decision serves to reminds broadcasters that their on-air personalities should take account of wider social concerns about important social issues, especially ones concerning young people over whom they are likely to have some degree of influence.

Dated: 10 October 2007
Decision No: 2007-029

Complainant
PIA BARNES
of Auckland

Broadcaster
ALT TV LTD

Complaint under section 8(1)(a) of the Broadcasting Act 1989
Groove in the Park – text messages ran across the bottom of screen during broadcast of live music event on Waitangi Day – contained content which the complainant found offensive – allegedly in breach of good taste and decency, contrary to children's interests, denigratory and in breach of promotion of liquor standard

Findings
Standard 1 (good taste and decency) – use of expletives in graphic sentences was contrary to the observance of good taste and decency – upheld
Standard 6 (fairness) and Guideline 6g (denigration) – text messages encouraged denigration of and discrimination against sections of the community based on race – upheld
Standard 9 (children's interests) – broadcast was G-rated and children likely to be watching on a public holiday – content highly unsuitable for children – upheld
Standard 11 (liquor) – unable to determine in the absence of a recording – decline to determine

Order
Section 13(1)(a) – broadcast of a written statement between 12pm and 5pm on Monday 22 October 2007
Section 13(1)(b)(i) – order to refrain from broadcasting between 12pm and 5pm on Monday 22 October 2007
Section 16(4) – payment of costs to the Crown $5,000

ISSUES FOR BROADCASTERS AND PROGRAMME-MAKERS

- *How serious a breach of the standards is it when a broadcaster puts such offensive language on the screen?*
- *Would the Authority take into account the 'alternative' and amateur nature of this channel, the tastes of its target audience and the fact that live broadcasts can always 'go wrong'?*
- *Should a broadcaster be held responsible when it is the victim of puerile behaviour by members of its audience?*
- *There was a racist element to some of the abusive and obscene messages. Does that make the breach of standards more serious?*
- *Did this small amateur channel really deserve such a harsh penalty?*

OBSERVATIONS

This decision illustrates two important things: that broadcasters can be held responsible for the standards of everything they broadcast; and that the Authority is prepared to apply the strongest sanctions if the breach of standards is serious enough.

Examples of the offensive text messages recorded by the complainant are set out in paragraph [3]. In its response to the Authority, Alt TV offered this explanation of how the messages were broadcast:

"It had employed the services of a moderator/censor to look at the text messages before they were broadcast. Unfortunately, it said, the person who had been employed had become intoxicated on the day and had failed to perform this role." [9]

Having noted that the messages were broadcast live on a Waitangi Day holiday between 12pm and 5pm in a programme rated 'G', the Authority stated clearly that:

"…by broadcasting these text messages, Alt TV failed to maintain standards consistent with the observance of good taste and decency." [17]

But while the messages listed in the decision are certainly abusive and unpleasant, and some are also racist in tone, many Alt TV viewers would doubtless have simply shrugged them off as a 'bad' or 'sick' joke – and not necessarily a breach of standards demanding a stern official response.

However, the Authority was able to point out in the decision that even the small selection of offending messages recorded by the complainant contained some of the words reckoned to be among the most offensive of all, according to the Authority's own survey of public opinion, and:

"…the impact of the words…would have been exacerbated by their use in graphic sentences such as those listed in paragraph [3]. It also considers that broadcasting the two other messages, with their references to "niggers" would have been extremely distasteful to the majority of viewers." [16]

The Authority went on to uphold the Standard 9 complaint too, because:

"Alt TV failed to consider the interests of child viewers on this occasion." [19]

Considering the complaint under Standard 6, Guideline 6g (denigration), the Authority said this broadcast was not of the sort that is exempted – such as news programmes, or those with a legitimate dramatic, satirical or humourous context, and:

"In light of the requirements of the Bill of Rights Act, a high level of invective is necessary for the Authority to conclude that a broadcast encourages denigration or discrimination in contravention of the standards." [22]

The Authority concluded that:

"…the threshold was clearly crossed on this occasion. The statements supporting death of and violence towards people of particular races can, in the Authority's view, aptly be described as hate speech. It concludes that the broadcast encouraged denigration of, and discrimination against, sections of the New Zealand community on the basis of race." [22]

Noting that Alt TV had claimed a financial penalty could cripple the channel, the Authority stated clearly:

Access to the public airwaves carries with it a responsibility to adhere to broadcasting standards, and this responsibility is equal for all broadcasters. [29]

In making the orders detailed above, the Authority stated that:

"…the breaches of broadcasting standards on this occasion were at the highest end of the scale." [33]

Some who may initially have felt the penalties were harsh can conclude the penalties were justified. Also, Alt TV's responses to the complainant and the Authority show it has no clear understanding of its obligations as a broadcaster. The station failed to reply to the complainant in the first instance, and in its response to the Authority it said:

"…it was very sorry and regretful about the whole situation, and added that the broadcast had "seriously damaged" its brand and its relationship with SKY Television." [10]

The first part may be sincere, but the second is irrelevant. In its submission on orders, Alt TV offered to:

"…*run an apology to anyone offended by the technical issues we experienced during the broadcast."* [28]

This is both equivocal and disingenuous. No one was offended by Alt TV's "technical issues".

The Authority also commented on Alt TV's failure to provide a recording of the broadcast, and pointed out:

"Under the Broadcasting Act 1989, broadcasters are required to establish a proper procedure for dealing with formal complaints." [29]

In the light of this, broadcasters may consider Alt TV got off lightly on the matter of the complaint under Standard 11 (liquor). The Authority declined to determine the complaint "due to the absence of a recording".

Here, it looks like the broadcaster's lack of professionalism has actually paid off by allowing it to avoid further trouble. In the absence of a recording, Alt TV had owned up to the fact that the offending text messages had been broadcast. So shouldn't they also be – at the least – obliged to confirm or deny what "promotion of liquor" may have gone on during the "Groove in the Park" broadcast? [44]

[44] Incidentally, not long after this decision was published Alt TV broadcast programmes from an event in Queenstown sponsored by a vodka company ("The Cocktail World Cup"). The company arranged travel, accommodation and entertainment for Alt TV presenters, who were seen in the programmes drinking and endorsing the sponsor's product. They may have had a case to answer if someone had made a complaint about that.