PRIVATE MATTERS:
A REVIEW OF THE PRIVACY DECISIONS OF THE BROADCASTING STANDARDS AUTHORITY

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Foreword

Privacy is an area of law that is evolving. Its scope has been challenged in recent years by changes in both the means of conveying information to the public and the nature of the information being conveyed. In the broadcasting context, programmes involving 'real-life' events are far more common now than twenty years ago and some are pushing at the boundaries of individuals' rights to privacy.

There is a Privacy standard in each of the Broadcasting Codes of Practice for free-to-air television, pay television, and radio. The Broadcasting Standards Authority (BSA) has developed a set of Privacy Principles to assist us in dealing with alleged breaches of the privacy standard.

As a public organisation, we are concerned to ensure that our decision making is robust and relevant. To this end, we have regularly commissioned critiques of our decisions by media academics and practitioners. In recent years we have had the general quality of our decision making examined by a legal expert and by a journalist. This year, because of an increasing focus on the matter of privacy, we chose it as the specific subject for assessment of our decisions. We wanted to obtain an outside perspective on the key issues that have emerged in our recent decisions and, in particular, on whether we are striking an effective balance between the interests of broadcasters and their audiences, on the one hand, and individuals' rights to privacy, on the other.

We commissioned Dr Nicole Moreham of Victoria University, Wellington to conduct this review. Dr Moreham is a Senior Lecturer in the Faculty of Law and we chose her because of her knowledge of and passion for privacy law. On behalf of the members of the BSA I thank Dr Moreham for her work on this project, which has given us a good deal of food for thought and debate.

This report does not represent the opinions of the BSA. Our opinions are contained in our decisions. We hope, however, that the questions raised in the report will prompt renewed consideration by broadcasters and the public about the broadcasting standards' protection of individual privacy. The BSA looks forward to being part of that on-going discussion.

Joanne Morris
Chair, Broadcasting Standards Authority
December 2009

Introduction

This review examines the key issues to emerge from the decisions of the Broadcasting Standards Authority (the 'Authority') over the last four years, with particular focus on 20 decisions the Authority indicated it would like included (see Appendix for a list of these decisions). The review's principal conclusion is that the Authority is striking an appropriate balance between the interests of broadcasters and aggrieved individuals. The Privacy Principles that form part of the Privacy Standard from the Codes of Broadcasting Practice are well-formulated and applied in a fair and balanced way. Clear rules are established and judgments are easy to understand, making the Authority's decisions an excellent source of guidance for broadcasters and privacy lawyers alike.

Clarity and simplicity are very important, particularly where an authority is charged with providing quick and cost-effective redress for breaches of broadcasting standards. The focus of this review will, however, be on areas where the Authority's decision-making would benefit from closer examination of underlying complexities. Areas where the operation of bright line rules might exclude meritorious claims will be identified, as will ways in which more nuanced approaches could be developed. The review will also examine the impact of the High Court judgments in this area and suggest possible responses to them. These matters will be discussed under ten headings, initially approximating to one for each of the eight Privacy Principles which, for the sake of completeness, are set out here in full. The Principles form part of the Free-to-Air Television, Pay Television and Radio Codes. There are two additional headings covering the relationship between privacy and another related standard, fairness, along with a look at how the Authority reports its decisions.

Advisory Opinion: Privacy Principles

1. It is inconsistent with an individual's privacy to allow the public disclosure of private facts, where the disclosure is highly offensive to an objective reasonable person.

2. It is inconsistent with an individual's privacy to allow the public disclosure of some kinds of public facts. The 'public' facts contemplated concern events (such as criminal behaviour) which have, in effect, become private again, for example through the passage of time. Nevertheless, the public disclosure of public facts will have to be highly offensive to an objective reasonable person.

3. (a) It is inconsistent with an individual's privacy to allow the public disclosure of material obtained by intentionally interfering, in the nature of prying, with that individual's interest in solitude or seclusion. The intrusion must be highly offensive to an objective reasonable person
(b) In general, an individual's interest in solitude or seclusion does not prohibit recording, filming, or photographing that individual in a public place ('the public place exemption')
(c) The public place exemption does not apply when the individual whose privacy has allegedly been infringed was particularly vulnerable, and where the disclosure is highly offensive to an objective reasonable person.

4. The protection of privacy includes the protection against the disclosure by the broadcaster, without consent, of the name and/or address and/or telephone number of an identifiable

individual, in circumstances where the disclosure is highly offensive to an objective reasonable person.

5. It is a defence to a privacy complaint that the individual whose privacy is allegedly infringed by the disclosure complained about gave his or her informed consent to the disclosure. A guardian of a child can consent on behalf of that child.

6. Children's vulnerability must be a prime concern to broadcasters, even when informed consent has been obtained. Where a broadcast breaches a child's privacy, broadcasters shall satisfy themselves that the broadcast is in the child's best interests, regardless of whether consent has been obtained.

7. For the purpose of these Principles only, a 'child' is defined as someone under the age of 16 years. An individual aged 16 years or over can consent to broadcasts that would otherwise breach their privacy.

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

Note:

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

1. Principle 1 – the public disclosure of private facts

It is inconsistent with an individual's privacy to allow the public disclosure of private facts, where the disclosure is highly offensive to an objective reasonable person.

Protection against the disclosure of private material is provided throughout the common law world, including New Zealand.[1] Its inclusion in Principle 1 is therefore uncontroversial. However, the Authority's decisions on Principle 1 raise two main questions: firstly, how should a principle protecting private information be formulated and secondly, should protection always be excluded if the claimant is not identifiable?

a. Limitations of the 'private facts' concept

There are a number of different views about how rules protecting private information should be formulated. Principle 1 protects informational privacy by relying on the 'private facts' concept. Private facts are protected; non-private facts are not. This is usually effective but,

[1] The New Zealand tort of breach of privacy will be made out if an individual can establish firstly, the existence of facts in respect of which there is a reasonable expectation of privacy and secondly, that publicity was given to those facts that would be considered highly offensive to an objective reasonable person (*Hosking v Runting* [2005] 1 NZLR 1, para [118]).

importantly in the broadcasting context, reliance on the concept of 'private facts' can cause problems when discussing images and recordings. Something more than a 'fact' is communicated when someone sees or hears an image or recording of another. For example, members of the public who saw CCTV footage of Y suffering a sexual assault would gain significantly more knowledge of that attack even if they already knew that Y had been assaulted and exactly how the attack had been carried out. Yet even though broadcast of that footage would be a serious breach of Y's privacy, this situation does not clearly satisfy the 'private facts' requirement. It is difficult to argue that any private 'facts' were communicated in the footage because, since everyone already knew about the attack and how it was carried out, no new 'facts' were obtained.[2]

Many judges have therefore eschewed the concept of 'private facts' in favour of more flexible concepts such as 'reasonable expectations of privacy'. One of the best formulations is to be found in Tipping J's judgment in the leading New Zealand case of *Hosking v Runting*. Tipping J says that in order to establish an actionable breach of privacy, the claimant needs to show 'a reasonable expectation of privacy in respect of the information or material which the defendant has published or wishes to publish'.[3] This test captures the breach of privacy which occurs in the Y example above much more effectively than a test which requires disclosure of 'private facts'. Whilst it is difficult to say what 'private facts' have been disclosed in the broadcast, it is clear that the broadcaster has disseminated *material* which Y could reasonably expect to remain private.[4]

Suggested response

There is a risk that meritorious claims will be excluded from Principle 1 because of its focus on 'private facts'. It would therefore be desirable to amend Principle 1 to ask whether the claimant had a reasonable expectation of privacy in respect of the information or material which the defendant has broadcast. If an amendment is not practicable, the Authority should

[2] One would of course hope that such a flagrant breach of privacy would not occur in New Zealand but similar breaches have occurred in other jurisdictions.

[3] *Hosking* (note 1 above), para [249].

[4] The case of *TVNZ and Lewis* 2007-109 (in which Mr Lewis was filmed as Fisheries Officers gave him an infringement notice and a fine for being in possession of undersized paua) also highlights the limitations of the 'private facts' requirement. Lewis complained that 'he had been publicly displayed [in the television programme] for no reason and without his consent' (para [3]). Yet when disposing of his case, the Authority focused on the 'facts' which had been communicated in the broadcast (*ie* the fact that he had been fined for possession of undersized paua) and said that they were not private because 'the events occurred in a public place' (para [21]). The current formulation of Principle 1 encouraged the Authority to ask this question, yet it does not address the claimant's real objection which, as mentioned, was that he was 'displayed without his consent'. An inquiry into whether the claimant had a reasonable expectation of privacy in respect of the *material* broadcast would have required a more detailed examination of the footage itself, including the manner and circumstances in which it was obtained and how the claimant was presented in it. Such an inquiry would have better addressed the complainant's objections to the broadcast.

make it clear that the concept of 'private facts' will be read sufficiently widely to include the kind of sensory knowledge that a broadcast provides.

b. Identifiability

The Authority states in a number of decisions that the claimant must be identifiable in the broadcast if Principle 1 is to be satisfied.[5] In the majority of cases, this requirement is appropriate because the claimant's objection to the broadcast is that it tells the public something private about him or her. For example, a picture of an identifiable person leaving a brothel or a Narcotics Anonymous meeting is objectionable because it demonstrates that that person uses prostitutes or has a drug addiction. If the person leaving the clinic or the brothel is not identifiable then nothing has been revealed except a partial impression of what the subject looked like walking down the street. Insistence on identifiability is appropriate in these cases. [6]

However, there is a limited class of situations where a claimant will suffer a breach of privacy even though he or she was not identifiable in the broadcast. This is particularly likely to be the case where the broadcast shows an intimate part of the claimant's body or shows him or her engaging in an intimate activity. For example, footage which showed someone's naked body, someone using a toilet, engaging in sexual activity, or receiving emergency medical treatment could breach his or her privacy even though his or her face was not shown.[7] This is because in all of these situations, the claimant has lost control over who can see his or her body and/or his or her intimate moments. No doubt the humiliation and loss of dignity would be worse if the claimant was identifiable but this does not make identifiability an appropriate requirement in all cases. Being forced to sit naked on Lambton Quay is still humiliating even if one has a paper bag over one's head; intimate broadcasts can be much the same.

Suggested response

Decency standards should mean that the broadcast of intimate images of the type just described would be rare. However, in order to ensure that meritorious claims are not excluded, the Authority should recognise that the rule that a claimant must be identifiable is not absolute.

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[5] See for example, *CanWest TV Works Ltd and du Fresne* 2007-017 (BSA), para [24] and *TVNZ and Davies* 2005-017, para [19].

[6] The broadcast of footage of unidentifiable individuals might, however, still be a breach of Principle 3 which protects against intrusion.

[7] See in this regard *L v G* [2002] DCR 234 in which Abbott DCJ awarded damages to a prostitute, L, after G sent photographs of her genitalia to an 'adult lifestyles' magazine without her consent. (The magazine was not a party to the proceedings.) Abbott DCJ said 'the [privacy] rights which are protected by the tort of breach of privacy relate not to issues of perception and identification by those members of the public to whom the information is disclosed but to the loss of the personal shield of privacy of the person to whom the information relates' (at 246).

2. Principle 2 – the public disclosure of 'public' facts

It is inconsistent with an individual's privacy to allow the public disclosure of some kinds of public facts. The 'public' facts contemplated concern events (such as criminal behaviour) which have, in effect, become private again, for example through the passage of time. Nevertheless, the public disclosure of public facts will have to be highly offensive to an objective reasonable person.

a. Time limits for public facts becoming private again

The recognition that facts or material which have been 'public' can become private again is welcome. However, the Authority was right to conclude that the exception did not apply in either *TVNZ and Walden* (in which the broadcast showed the drunken claimant being expelled from a rugby match 13 months earlier)[8] or *TVNZ and Arthur* (concerning the conviction a school teacher had received for supplying methamphetamine to young people three years earlier).[9] Both were a long way removed from the facts of *TV3 v BSA* where the story concerned the failings of officials some 20 years earlier.[10] The Criminal Records (Clean Slate) Act 2004 could also provide guidance in future cases. That legislation requires a lapse of seven years before the offences covered by the Act are removed (for some purposes) from an individual's criminal record.

b. Events which occur in public

As well as acknowledging that 'public' facts can become private again, the Authority should recognise that a fact can be 'private' even though it relates to something which occurred in a publicly accessible place. It is therefore too simplistic to say, as the Authority did in *TVNZ and Lewis*, that the events surrounding the issue of an infringement notice for catching undersized paua were not 'private' simply because 'the event occurred in a public place'.[11] The fact that Y was the victim of a rape in a public alleyway, tried to commit suicide from a public bridge,[12] or walked off the street into an abortion clinic will be private even though the events in question took place in public. The claimant's potential exposure to passers-by at the time that the events occurred is not enough to make them public for all purposes. More detailed reasons should therefore have been given for the decision in *Lewis*.

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[8] *TVNZ and Walden* 2006-061.
[9] *TVNZ and Arthur* 2006-115.
[10] *TV3 v BSA* [1995] 2 NZLR 720.
[11] *TVNZ and Lewis* 2007-109, para [23].
[12] The European Court of Human Rights held that the United Kingdom breached the claimant's right to private life by failing to provide redress after a city council allowed the broadcast of CCTV footage of him holding a knife just before trying to commit suicide. See *Peck v United Kingdom* [2003] ECHR 44647/98.

Suggested response

Again, it is desirable that the Authority recognise that there can be no absolute rule that disclosures about things which occur in a public place will not be a breach of privacy. Instead, decisions about 'privateness' need to be assessed on the basis of a range of considerations. These include the place in which the event occurred, the nature of the event in question,[13] the profile of the person concerned, and perhaps also, the way in which the footage was obtained. (See further the discussion under Principle 3.) Recognition of an exception for situations in which the claimant is 'particularly vulnerable', as in Principle 3(c), might also be desirable.

3. Principle 3 – intrusion into solitude and seclusion

(a) It is inconsistent with an individual's privacy to allow the public disclosure of material obtained by intentionally interfering, in the nature of prying, with that individual's interest in solitude or seclusion. The intrusion must be highly offensive to an objective reasonable person

(b) In general, an individual's interest in solitude or seclusion does not prohibit recording, filming, or photographing that individual in a public place ('the public place exemption')

(c) The public place exemption does not apply when the individual whose privacy has allegedly been infringed was particularly vulnerable, and where the disclosure is highly offensive to an objective reasonable person.

The recognition in Principle 3 that privacy is not simply about protecting private information but also about bodily integrity and the sanctity of personal space is very welcome. It is also appropriate that the Privacy Principles protect against intrusion, since the collection of material is a necessary corollary of its broadcast. This section analyses the Authority's application of Principle 3.

a. The test for satisfying principle 3

Decisions of the Authority and High Court make it clear that a claimant seeking to establish a breach of principle 3 needs, firstly, to establish that he or she had an interest in 'solitude or seclusion'. 'Solitude' has been defined as 'the state of being alone'[14] and has not been satisfied in any of the cases considered.[15] 'Seclusion' is broader. *CanWest TVWorks Ltd v XY* establishes that a claimant will have an interest in 'seclusion' if he or she is in a 'state of screening or

[13] Thus, in a case like *Lewis*, the fact that the broadcast showed the claimant receiving a fine for committing an offence (albeit a very minor one) should weigh against the material being 'private'.

[14] See *CanWest TV Works Ltd v XY* [2008] NZAR 1, para [40] and *TVNZ v KW* (CIV-2007-485-001609), para [56].

[15] For example, there was no interest in solitude when caring for an elderly woman inside her home (*TV Works Ltd and O'Connell* 2007-067), when photographing models in one's own home and an apartment (*XY*), or when greeting clients in a waiting room in one's own home (*KW*).

shutting off from outside access or public view'.[16] This is because by 'screening or shutting off' the claimant has created 'a zone of sensory or physical privacy'.[17] A claimant can do this even if he or she is not completely alone: '[seclusion] extends to a situation where the complainant is accompanied'.[18] Once an interest in solitude or seclusion is established, the claimant must show that there has been an 'interference' with it. It is almost always an interference with solitude or seclusion to broadcast footage obtained with a hidden camera[19] or, it seems, filmed openly.

Once an interest in solitude or seclusion has been established, a complainant will have little difficulty showing that it has been interfered with. In none of the cases considered did the Court or Authority hold that the claimant had an interest in solitude or seclusion without also holding that there had been an interference with it.

These rules create a sound starting point for consideration of an intrusion claim yet, unfortunately, they are not always clearly applied. In some cases, the Authority simply holds that there has been no intrusion without referring to the 'screening or shutting off' or 'a zone of sensory or physical privacy' tests.[20] In other cases, the Court or Authority have equated the *XY* tests with a 'reasonable expectation of privacy'. For example, in *TVNZ v KW*, Courtney J begins her discussion of Principle 3 by setting out the *XY* definition of 'seclusion' but she never applies it. Instead she asks whether 'there was an expectation of privacy at the front door',[21] 'what expectation of privacy existed in relation to the entry and waiting areas'[22] and frames her conclusion in the same language.[23] With respect, this is confusing. Although it can inform the application of the *XY* test,[24] the question of whether a claimant has 'reasonable expectation of privacy' is not the same as the question of whether he or she is 'screened or shut off from outside access or public view'.

[16] *XY* (HC), para [42].
[17] *XY* (HC), para [42].
[18] *XY* (HC), para [42].
[19] See for example, *XY* (HC), para [57] and *KW* (HC), para [58].
[20] See for example, *Davies*, para [20] and Y*oung*, para [22].
[21] *KW* (HC), para [62].
[22] *KW* (HC), para [61].
[23] She concludes that 'there was a reasonable expectation of privacy… in relation to the waiting areas and the house' but 'it was not an expectation at the level one might have in relation to premises used solely for private living' (*KW* (HC), para [64]).
[24] Indeed in *XY* (HC) itself, the fact that the hidden cameras were used to film 'inside XY's home, and inside an apartment where he had a reasonable expectation of privacy' was held to mean that the filming was an intrusion which the ordinary person would find offensive (*XY (HC)*, para [58]; see also para [42]). See also *O'Connell*, in which the Authority held that because the caregivers had an interest in seclusion they 'had a reasonable expectation of privacy when working inside the *Target* home' (*O'Connell*, para [46]) and *TVNZ and Hood* 2007-028, in which the Authority held that the claimant had a reasonable expectation of privacy inside his home and car which amounted an interest in solitude and seclusion (*Hood*, para [29]).

Suggested response

The Authority should apply the 'screening or shutting off from outside access or public view' and 'zone of sensory or physical privacy' tests[25] in all cases, including those where no intrusion is found. It should also recognise that the approach in *KW* is not entirely consistent with *XY* and that the approach in *XY* is to be preferred.

b. Intrusions in public places

One of the most difficult questions when applying Principle 3 is whether and when a broadcaster can intrude on a person who is in a publicly accessible place. In *XY*, Harrison J acknowledged that one of the factors which 'informs' a claimant's 'reasonable expectations of seclusion' are his or her 'rights of ownership or possession' in the place in question.[26] Indeed, this seems to be the principal consideration when applying Principle 3. In all of the cases where Principle 3 was breached, the footage was obtained either by filming a person on private property or by filming the property itself. So, a claimant will be in a state of 'seclusion' when opening his or her front door[27]and attending to clients in a waiting room in a commercial premises which is also his or her home,[28] when taking photographs of models in his or her own home and an apartment to which the claimant and the models had exclusive access,[29] when inside his or her own house or car,[30] when working inside a house to which access was restricted (even though it belonged to someone else),[31] and on his or her own farm two kilometres from the farmhouse.[32] It is also an intrusion to broadcast footage of a person's land[33] or bedroom[34] obtained while he or she was not present.

In contrast, the intrusion claims of those in publicly accessible places have been disposed of by the Authority in short order. For example, in *TVNZ and Davies*, the Authority concluded that the broadcaster did not breach Principle 3 by showing footage of a man who had been filmed whilst gathering scallops in a public waterway. This was simply because he 'was filmed on a public waterway' and:

> The Authority has generally accepted that filming people in a public place without their consent does not amount to a breach of privacy. No circumstances exist on this occasion which would cause the Authority to depart from this position.[35]

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[25] *XY*, para [42].
[26] *XY*, para [42].
[27] At least if he or she is filmed with a hidden camera (*KW*).
[28] *TVNZ and KW* 2006-087 (BSA).
[29] *XY*.
[30] *Hood*.
[31] *O'Connell*.
[32] *TVNZ and Russek* 2007-016.
[33] *TVNZ and Balfour* 2005-129.
[34] *TVNZ and NM* 2007-023.
[35] *TVNZ and Davies* 2005-017, para [20]. The Authority implies that there might be exceptions to this rule but does not say what they are.

The claim in *CanWest TV Works Ltd and Young* that surreptitiously-obtained footage of an exchange between an actor and a QANTAS employee at an airport check-in counter was a breach of Principle 3 is dealt with similarly briefly. The Authority simply say that:

> because Mr Young was conducting his work in a public place with unrestricted access, the Authority finds that he had no interest in solitude or seclusion has required for a breach of privacy principle 3.[36]

Although the location of the claimant at the time of the alleged intrusion is important, the issues raised in *Davies* and *Young* are more complex than that reasoning suggests. First, the suggestion that there is no intrusion simply because the claimants were in public does not adequately recognise that it is possible to have an interest in seclusion – *ie* to 'screen or shut off from outside access or public view' – in a public place. For example, if A and B pitch a tent in the remotest reaches of the Ureweras it is strongly arguable that they have an interest in seclusion even though they are technically still in a publicly accessible place. Broadcast of surreptitiously obtained footage of them making breakfast and washing in a mountain stream could well interfere with their 'solitude and seclusion' but on the Authority's current approach to public places, it is not clear that it would be a breach of Principle 3.[37]

Secondly, too strong a focus on public accessibility fails to recognise that even in non-remote public places, seclusion and accessibility are a matter of degree. It is too simplistic to say that once a person goes into a public place then his or her activities are 'public' for all purposes. To return to *Davies*, the activities of a person who goes to a waterway to dive for scallops are only 'public' in the sense that they can be seen by a handful of people who happen also to be in the vicinity. Filming those activities and broadcasting them on television leads to a whole different order of 'publicness'. Similarly, even though Young was dealing with members of the public in a busy airport, it is unlikely that more than a handful of people would have been able to observe the exchange which took place between him and the actor. Disposing of these cases solely on the basis that the claimants were in public at the time of filming therefore fails to capture the complexity of these situations. Other reasons also need to be considered.

Finally, it is important to note that unless there is some protection against intrusion in public places then, with the exception of the protections in Principle 3(c), the Principles provide almost no protection to those without access to private property. For example, the Principles would fail to protect C and D, two homeless men living under a bridge in central Auckland, even against broadcast of footage obtained by continual unwanted surveillance by an overzealous reporter. Exclusions for public places also mean that workers who spend the bulk of their working lives in public enjoy significantly less protection than those with offices to retreat to. The decision in *Young* means that receptionists, street cleaners, shop assistants, parking attendants, and check out operators must carry out their work under the continual threat of

[36] *CanWest TV Works Ltd and Young* 2006-084, para [22].
[37] If A and B were up to no good, the reporter could rely on the public interest defence to justify the intrusion.

'reality TV' surveillance. Whilst this might be defensible on other grounds, it is important to acknowledge that the burden of the 'public places' rule therefore falls more heavily on certain segments of society.

c. Suggested response: four factors to consider when applying principle 3

There are some attractions to the bright line rule that there is no intrusion in a public place (unless Principle 3(c) applies) but they are outweighed by the fact that such a rule would obfuscate other important considerations. Although the Authority has suggested that it will depart from the 'public places' rule in appropriate circumstances, it has not said when it will be prepared to do so.[38] Indeed, it would be preferable for the Authority to recognise that there are in fact four factors which bear on the application of Principle 3. They are the nature of the claimant's activity, the nature of his or her location, any indications from the claimant that filming was unwanted, and the way the recording was obtained.

i. The nature of the claimant's activity

The first factor which should be considered when assessing whether there has been an interference with an individual's solitude or seclusion is the nature of the activity the claimant was engaged in at the time of the alleged intrusion. As recognised in Principle 3(c), the most important consideration is whether the claimant was 'particularly vulnerable' at the time of the filming. A claimant should obviously fall within this exception if he or she was experiencing something traumatic at the time of the filming such as the aftermath of an accident,[39] an assault, collapse, or emergency medical treatment, witnessing the suffering of a loved one, attending a funeral, or identifying a body. The vulnerability exception should also apply if the claimant's intimate body parts are involuntarily exposed because, for example, a skirt is blown up or clothes are removed so that medical treatment can be administered. 'Going to the toilet' in a discreet but publicly accessible place should also be covered by the vulnerability exception.

Even in cases where the 'vulnerability' exception does not obviously apply, the nature of the claimant's activity can still weigh in favour of a breach of Principle 3. For example, the fact that the claimant's body was exposed in footage of her playing with her children on a beach in her togs[40] or engaging in sexual activity in a remote but publicly accessible place should make a breach of Principle 3 more likely. [41]

[38] See *Davies*, para [20].
[39] As in *TV3 and CD* 2000-141,142,143.
[40] The fact that she is on a family outing might also be relevant.
[41] The inherently intimate nature of sexual activity is also an important consideration.

ii. The nature of the claimant's location

The nature of the claimant's location at the time of the filming is also an important factor when applying Principle 3. Was the claimant somewhere where he or she would expect to be seen by a large number of people or was the location sufficiently remote that he or she could be said to be 'screened or shut off' or otherwise to have created 'a zone of sensory or physical privacy'?[42] There is obviously a difference in this regard between a busy street, airport or shopping centre and a quiet beach, bush walk or suburban street.

iii. Indications that filming was not welcome

Any express or implied indications that filming was unwelcome should also be taken into account when considering whether there has been an interference with an individual's solitude or seclusion. An individual who responds to the sudden appearance of a reporter by asking for filming to cease is, to the extent that it is possible in a public place, attempting to 'screen or shut him or herself off' or to create 'a zone of sensory or physical privacy'.[43] This factor should not be determinative but it should be given more weight than it received in *Davies*. Subsequent attempts to locate the broadcaster to request that the footage not be shown should also have some bearing.[44]

iv. The way the recording was obtained

The way in which the recording was obtained should also have a bearing on whether its broadcast interfered with the solitude or seclusion of a person. As the Authority has recognised, the use of hidden cameras is particularly intrusive.[45] Because the claimant is unaware that filming is taking place, he or she is unable to tailor his or her behaviour to take account of the filming. The claimant does not know to put on his or her 'public face'. Surreptitious recording also prevents the claimant from removing him or herself from view and/or from asking for the filming to stop. Misleading an individual as to the purpose of the footage can have a similar effect. The Authority should therefore be more willing to find a breach of Principle 3 if the claimant has been filmed surreptitiously or other forms of deception were employed.

d. The formulation of Principle 3

It should be noted briefly, that although Principle 3 is based on the US intrusion tort, it is differently formulated in one important respect. According to the Second Restatement, the US

[42] *XY*, para [42].
[43] Note that such indications were taken in to account in *TV3 and CD*.
[44] Again, more weight should have been given to this factor in *Davies*.
[45] See the discussion of the 'interference' requirement above.

tort protects not only against intrusion into 'solitude or seclusion' but also into 'private affairs or concerns'. Section 652B of the Second Restatement provides:

> One who intentionally intrudes, physically or otherwise, upon the solitude or seclusion of another *or his private affairs or concerns*, is subject to liability to the other for invasion of his privacy, if the intrusion would be highly offensive to a reasonable person (emphasis added).[46]

Although the 'private affairs or concerns' part of the test is often overlooked in US case law, it means that intrusions which take place in public places are not automatically excluded. Indeed, the Restatement itself says that '[t]he defendant is subject to liability… only when he has intruded into a private place, *or has otherwise invaded a private seclusion that the plaintiff has thrown about his person or affairs*' (emphasis added). [47] It would be desirable to include this interest in Principle 3 if practicable in the future.

e. The relationship with the fairness standard

It is clear from the Authority's decisions that conduct which breaches the Privacy Principles will often result in a broadcast which is unfair.[48] The fairness standard therefore offers valuable supplementary protection to a claimant who has been treated unfairly but it is important that it is not also used to ameliorate too rigid an approach to intrusions in public places. (For further discussion of the relationship between the fairness and privacy standards, see section 9 below.)

4. The desirability of the 'highly offensive' requirement in Principles 1 and 3

The requirement in Principles 1 and 3 that the disclosure or intrusion be 'highly offensive to an objective reasonable person' is consistent with both US law on which the Principles are based and the New Zealand privacy tort which has developed subsequently.[49] However, questions are increasingly being asked about the desirability of the highly offensive publicity requirement in the context of the New Zealand tort. In the recent Supreme Court decision of *Rogers v Television New Zealand*, Elias CJ said that the Court should 'reserve its position on the view… that the tort of privacy requires not only a reasonable expectation of privacy but also that publicity would be "highly offensive"'.[50] Similar reservations can be found in other cases.[51]

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[46] Restatement of the Law Second, Torts 2d (Volume 3), section 652B. The purpose of the Restatements is to articulate and clarify the basic principles of American law.

[47] Restatement, section 652B.

[48] See for example, *Young*, *O'Connell*, and *Davies*, although compare *Russek.*

[49] See the discussion on Principle 1 above.

[50] *Rogers v Television New Zealand* (SC) [2008] 2 NZLR 277, para [25].

[51] See *Television New Zealand v Rogers* (CA) [2007] 1 NZLR 156, para [122] (per Young P) and *Hosking* (above), para [256] where Tipping J said that he would 'prefer that the question of offensiveness be controlled within the need for there to be a reasonable expectation of privacy. In most cases that expectation is unlikely to arise unless publication would cause a high degree of offence and thus of harm to a reasonable person. But I can envisage circumstances where it may be unduly restrictive to require offence and harm at that high level…'. I have also

Many of the arguments against applying the highly offensive test in the tort context, also apply in the broadcasting standards context. The first argument against its inclusion is the fact that the requirement does little analytical work. In most cases, a decision that the broadcast was highly offensive follows automatically from the fact that there was an actionable intrusion or disclosure of private facts. Thus, in cases like *KW* and *TVNZ and Hood*, the Authority's reasons for concluding that the broadcast was highly offensive, are the same as its reasons for concluding that there was an intrusion.[52] In cases such as *XY*, no reasons are given at all.[53] However, the requirement still adds uncertainty to the application of the Principles because the decisions provide little by way of guidance for those seeking to ascertain how the highly offensive requirement will be applied in future cases.[54] This is not a criticism of the Authority. The question of whether a disclosure or intrusion is 'highly offensive' is a value judgment for which it is difficult to provide clear reasons. There is a danger, however, that the resulting uncertainty will deter meritorious claimants or have an undesirable chilling effect on broadcasters.

Suggested response

Abandoning the highly offensive requirement is unlikely to be practicable. However, the Authority could establish a rule that if a broadcast discloses a private fact and/or intrudes into a person's solitude or seclusion then the highly offensive test will almost always be satisfied. Such a rule would recognise that in almost all cases, an intrusion or disclosure of private facts will cause great 'offence' to the person affected. Use of the highly offensive test should then be reserved for the very rare situations where a disclosure or intrusion is a breach but for some reason finding a breach is undesirable.

5. Principle 4 – addresses and phone numbers

> *The protection of privacy includes the protection against the disclosure by the broadcaster, without consent, of the name and/or address and/or telephone number of an identifiable individual, in circumstances where the disclosure is highly offensive to an objective reasonable person.*

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argued elsewhere that the 'highly offensive' test should no longer form part of the intrusion tort. See N. Moreham 'Why is Privacy Important? Privacy, Dignity and the Development of the New Zealand Breach of Privacy Tort' *Law Liberty, Legislation* J Finn and S Todd (eds) (LexisNexis, Wellington, 2008), 231.

[52] See *KW* (BSA), paras [55] to [61]; *TVNZ and Hood* 2007-028, para [31]; *Spring*, para [25]; *Russek*, para [30]; *TVNZ and LM* 2007-138, para [70]; and *NM*, para [16].

[53] *CanWest TV Works Ltd and XY* 2006-014 (BSA), para [58]. See also *TVNZ and JB* 2006-090, para [31].

[54] For example, in *Balfour* the majority said that the intrusion was highly offensive because the crew 'walked some distance across Mr Balfour's property… in circumstances where they knew, or should reasonably have known that they were not welcome' (para [43]) and they went beyond their original purpose of looking for the complainant (para [44]). The minority said that it was not offensive because the intrusion was not sufficiently connected to his personal life (paras [49]-[50]). With respect, there are no clear general principles in these statements which could be relied on by a journalist seeking to know whether a proposed broadcast was offensive in the future.

As *The Radio Network Ltd and Spring* highlights, Principle 4 ensures that redress can be obtained if broadcasters disclose an individual's address in a way that is likely to make him or her the subject of harassment or other unwanted attention.[55] Since it is not clear that disclosure of telephone numbers or addresses in these circumstances would satisfy Principle 1, the specific protection in Principle 4 is valuable. The Authority was also right to recognise in *TV Works Ltd and Kirk*, that the disclosure of an e-mail address does not create the type of mischief that Principle 4 is designed to address, namely 'potential harassment or physical threats at their place of residence'.[56] Unwanted e-mails can be easily deleted and e-mail addresses can easily be changed. However, the possibility that disclosure of an e-mail address could be a breach of Principle 1 should be kept open. For example, it might breach Principle 1 to broadcast the personal e-mail address of the victim of a crime.

6. Principle 5 – informed consent

> *It is a defence to a privacy complaint that the individual whose privacy is allegedly infringed by the disclosure complained about gave his or her informed consent to the disclosure. A guardian of a child can consent on behalf of that child.*

a. The scope of informed consent

TV Works v du Fresne establishes that in the usual case a broadcaster seeking to rely on the defence of 'informed consent' in Principle 5 will have to show that the claimant had:

> an awareness of being interviewed, or knowing the true context of the interview, and [an awareness]… of the purposes to which the interview is to be put. In other words, what use is planned for it.'[57]

An 'appreciation of the consequences of giving an interview' is therefore not usually a requirement of the informed consent defence.[58] This definition of informed consent seems workable and appropriate. Also desirable is Simon France J's further observation that a broadcaster who is seeking to rely on the informed consent of a mentally ill interviewee might be required to show that the interviewee's understanding was 'real and sufficiently complete'[59] and that he or she had the capacity to appreciate the ramifications of what he or she was doing.[60]

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[55] See *The Radio Network Ltd and Spring* 2007-108.
[56] *TV Works Ltd and Kirk* 2007-088, para [16].
[57] *TV Works Ltd v du Fresne* [2008] NZAR 382 (HC), para [18].
[58] See *du Fresne* (HC), paras [17]-[18].
[59] *du Fresne* (HC), para [22].
[60] *du Fresne* (HC), para [22].

b. Implied consent

The Authority is right to say that the broadcaster has the burden of establishing that full and informed consent has been obtained from the subject of the broadcast. As it has recognised, a broadcaster cannot infer consent from the fact that it told the subject's employer about the broadcast and then received no objection from the subject.[61] It is also clearly unacceptable to infer consent from the fact that the claimant declined to preview the footage when pre-approval of the footage was an express condition of her participation in the broadcast.[62]

c. Complaints on behalf of those without capacity

Also important is Simon France J's ruling in *du Fresne* that the Authority should not consider an alleged breach of a third party's privacy interests if investigation of that complaint would necessitate an inquiry into the mental health of that third party. *Du Fresne* concerned Ms X, a committed mental health patient, and du Fresne, her physician. Du Fresne complained that broadcast of an interview during which Ms X discussed her mental health history and objections to particular types of treatment, breached Ms X's privacy because she was not competent to consent to it. However, Ms X was not a party to the complaint and confidentiality requirements prevented du Fresne from substantiating her claims about Ms X's health. Simon France J concluded that this meant that the Authority should not have considered the complaint at all. He said:

> [T]he complaint cannot be made in this form. It is not correct for a third party to allege a breach of Ms X's privacy where such complaint necessitates this sort of enquiry into Ms X's mental health status.[63]

However, he also said that it was 'important to note that this is not a situation of a person, in the sense of a guardian, applying on behalf of an incapable person.'[64] This clearly implies that Ms X's legal guardian could have brought a claim on her behalf.

This decision is important, firstly, because it limits the class of persons who can bring a privacy complaint about a broadcaster's treatment of an incapable person. A person who is not a legal guardian cannot bring a complaint even if the incapacity of the subject was severe and obvious to all concerned. So, even if Z obviously suffered from severe dementia and was incapable of consenting to an interview, only a guardian could bring a complaint if a broadcaster relied on Z's consent to screen detailed and intimate footage of him. The Authority would have to dismiss the complaints of Z's doctor, concerned members of the public or anyone else because it would be unable to investigate it without inquiring into Z's mental health status. Z would of course be unable to complain because of his continued incapacity.

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[61] See *TVNZ and O'Connell* 2007-067, paras [55]-[56].
[62] *TVNZ and LM* 2007-138, para [75].
[63] *du Fresne* (HC), para [13].
[64] *du Fresne* (HC), para [13]. Although Ms X's husband was opposed to the broadcast, he did not bring a complaint on her behalf.

This is potentially problematic and means that the Authority should rely on Simon France J's dicta to recognise an explicit exception to the *du Fresne* rule for guardians bringing complaints on behalf of an incapable individuals. If that exception does not apply, *du Fresne* will have entirely removed the protection of the broadcasting standards from some of New Zealand's most vulnerable people – those who lack the capacity to bring a complaint. Even with the guardian exception in place, *du Fresne* creates the paradox that any third party is able to make a complaint about the treatment of a person who is quite capable of bringing a complaint him or herself but only a guardian can bring a complaint about the treatment of a person is completely unable to look after his or her own interests. Unless the matter comes before the courts again, this conclusion seems unavoidable.

It is also arguable that *du Fresne* establishes a broader principle that the Authority should only consider third party privacy complaints if it has adequate facts on which to assess the alleged interference without the input of the subject of the broadcast. Simon France J's observation that 'third party complaints about privacy may be properly resolved in *some* situations' (emphasis added) supports this interpretation.[65] However, Simon France J does not refer to *TV3 Network Services Ltd v ECPAT NZ Inc* in which the Authority's right to hear third party claims was confirmed.[66] This diminishes the force of these dicta.

Suggested response

In my view, it is appropriate that any member of the public should be able to complain to the Authority if he or she believes that broadcasting standards have been breached. However, in future cases the Authority should articulate more clearly why it believes it is in a position to resolve a third party complaint without the third party's input. In particular, is should set out exactly what features of the broadcast support the conclusion that the subject's privacy has been breached.[67] In addition, as discussed above, the Authority should recognise an express exception to the *du Fresne* rule for guardians or others acting 'on behalf of' the incapable subject.

[65] *du Fresne* (HC), para [15]. There has been some academic criticism of the approach in *ECPAT* and its treatment of New Zealand Bill of Rights Act 1990 considerations. See C. Geiringer and S. Price, 'Moving from Self-Justification to Demonstrable Justification: The Bill of Rights and the Broadcasting Standards Authority' *Law Liberty, Legislation* J Finn and S Todd (eds) (LexisNexis, Wellington, 2008), 295 at 333-334.

[66] See *TV3 Network Services Ltd v ECPAT NZ Inc* [2003] NZAR 501.

[67] The following factors might be relevant: the subjects clearly did not know they were being filmed; the subjects clearly lacked capacity to consent to the broadcast (for example, because they were children or clearly mentally impaired); the subjects were trying to avoid the camera or asking for filming to stop; the broadcast showed the claimants at an intimate or traumatic time; the broadcaster was unable to adduce evidence to show that that filming was open, consent was obtained and/or the subject was of full capacity.

7. Principles 6 and 7 – children

Children's vulnerability must be a prime concern to broadcasters, even when informed consent has been obtained. Where a broadcast breaches a child's privacy, broadcasters shall satisfy themselves that the broadcast is in the child's best interests, regardless of whether consent has been obtained.

For the purpose of these Principles only, a 'child' is defined as someone under the age of 16 years. An individual aged 16 years or over can consent to broadcasts that would otherwise breach their privacy.

As *TVNZ and JB* illustrates, the protections for children in Principles 6 and 7 are important and work well in practice.[68] It is appropriate that broadcasters be required to consider the best interests of children independent of the claims of their parents or caregivers, particularly in cases where the parent or caregiver is potentially using the child to promote his or her own interests. It is also proper that in cases of conflict the best interests of the child should prevail.

8. Principle 8 – the 'public interest' defence

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

The Authority's approach to the public interest defence is balanced and consistent with common law authority. It is almost universally accepted that, as the Authority maintains, in order to be in the 'public interest' a matter must be of 'legitimate public concern' rather than simply 'interesting to the public on a human level'.[69] Also, desirable and consistent with New Zealand common law, is the Authority's proportional approach to the public interest defence under which more serious breaches of privacy require more significant public interest to outweigh them and vice versa.[70]

The Authority's has also provided a list of matters which might be in the public interest[71] which is useful as long as two conditions which the Authority have attached to its use continue to be applied. The first condition is that the list should not be conclusive. This means that a matter that does not fall within the categories on the list can nonetheless be in the public interest and also that a matter which does fit into one of the categories is not necessarily in the public interest. This latter point is important because many of the categories on the 'public interest' list are very broad. For example, 'matters relating to the conduct of organisations which impact on the public' potentially covers any activity engaged in by a hospital, teaching institution or

[68] See *TVNZ and JB* 2006-090.
[69] See for example *XY (HC)*, para [57]. See also *Hosking* (note 1 above), para [129] and [133]-[134].
[70] *O'Connell*, para [61] and *XY (HC)*, para [57] and [58]. See also *Hosking* (note 1 above), para [134].
[71] See for example, *Balfour*, para [59].

private company regardless of whether it is harmful to the public. 'Issues of public health and safety' also cover matters ranging from CCTV to quarantine policies to the disposal of rubbish. Since not all of these matters will be in the public interest, shoehorning the footage into one of the listed categories should not necessarily be enough to establish the defence.

Secondly, as the Authority and High Court have consistently recognised, it is essential that the public interest relates to the exact footage to which the complaint relates and not to the programme as a whole. This is an important qualification as without it a broadcaster would be free to use intrusive footage to liven up any broadcast as long as the programme as a whole dealt with a matter in the public interest and the relevant footage is tangentially related to it. Thus, the broadcast of detailed CCTV footage of a woman being sexually assaulted could be included in a programme about the damage caused by sexual offending[72] and footage of a patient in a hospital could be included in a programme about the inadequacy of nursing care. This is highly undesirable and highlights the importance of continuing to keep the public interest defence within sensible bounds.

9. Relationship between privacy and the fairness standard

As well as requiring broadcasters to maintain standards consistent with the privacy of the individual, the Free-to-Air Television, Pay Television and Radio Codes provide that when preparing and presenting programmes, broadcasters must 'deal justly and fairly with any person or organisation taking part or referred to'. There is considerable overlap between these standards. In particular, a broadcast which breaches the privacy standard will often also be unfair – as the Authority's decisions reflect, it is commonly unfair to disclose private facts about a person or to broadcast footage obtained intrusively or surreptitiously.[73] Thus, a programme showing secretly obtained footage of caregivers in the course of their employment was held to have breached both standards,[74] as did the broadcast of a secretly filmed interview with a man who had been acquitted of sexual offences in Thailand[75] and a radio broadcast in which the presenter encouraged listeners to look up and contact a man who had admitted to drowning neighbourhood cats.[76] Conversely, neither the fairness nor privacy standards were breached by the broadcast of programmes showing secretly obtained footage of a QANTAS check-in employee,[77] a drunken man being expelled from a rugby match 13 months earlier,[78] or a man being fined for illegally possessing undersize paua.[79]

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[72] A similar argument was expressly rejected in *Peck United Kingdom* (above).
[73] Indeed, Fairness Guideline 6c states that 'Programme makers should not obtain information or gather pictures through misrepresentation or deception, except as required and the public interest when the material cannot be obtained by other means.'
[74] *O'Connell.*
[75] *Hood*.
[76] *Spring*.
[77] *Young.*
[78] *TVNZ and Walden* 2006-061.
[79] *Lewis*. Although compare *Russek* and *Arthur* in which different conclusions were reached on the fairness and privacy questions.

This overlap between privacy and fairness raises questions about the relationship between the two standards. How should the Authority decide whether an issue should be determined under the fairness or privacy standard? What impact should the Authority's determination on privacy have on its determination of the fairness complaint and vice versa? Privacy is the narrower of the two interests and is the only standard for which damages can be awarded on breach. Assessment of the privacy complaint should therefore be the starting point in cases where both fairness and privacy are at issue.[80] Once that assessment is complete, the Authority should turn to the fairness inquiry. Further, because they concern different interests, the privacy and fairness complaints should be assessed separately; disposal of a complainant's privacy complaint should have no bearing on the Authority's disposal of the fairness complaint and vice versa.[81] However, the Authority will often be able to rely on the same or similar reasoning for the disposal of both complaints.[82] It would also be desirable to ensure that unsuccessful privacy complainants who appear to have been treated unfairly (like the complainant in *Davies*)[83] could make a further complaint for unfairness.

10. Reporting and miscellaneous

a. Reporting of decisions

The Authority's reasoning is clearly set out in its judgments. However, in my view, improvements could be made to other aspects of the Authority's reporting to make decisions easier to follow.

i. Referring to previous cases by name rather than number

Often earlier cases are referred to in the Authority's decisions by case number rather than name. For example, in *XY* the Authority refers to its comments in Decisions 'No 2000-108-113' and 'No 2005-129'. A reader would have to be very familiar with the Authority's jurisprudence to realise that these are references to the well-known cases of *Fahey* and *Balfour*. The use of case names would make references to previous decisions more meaningful.

ii. Providing more factual details

There were a number of cases where the report did not provide sufficient factual detail for the reader to understand the arguments fully. For example, in *NM* it was difficult to ascertain exactly what disclosures the complainant had consented to and in exactly what circumstances her bedroom had been filmed. Likewise, in *Kirk*, the Authority

[80] This appears to be the Authority's current practice. See for example, *O'Connell.*
[81] See further, section 3e above.
[82] See, for example, *O'Connell*, *Spring*, *Lewis*, and *Hood*.
[83] *Davies*, para [22].

referred to the complainant's status as a public figure but the decision did not set out clearly the nature of her public role.

iii. Setting out the arguments of the parties

It is helpful that the reports set out the arguments made in correspondence between the parties. However, the Authority's current practice of setting out the initial complaint, the referral to the Authority, the broadcaster's response to the Authority, complainant's final comment, the broadcaster's response to a request for further details from the Authority, and then the Authority's decision leads to repetition and makes the arguments difficult to follow. It would be much easier to understand what arguments were made by each of the parties if they were synthesised under just two headings – one for the complainant and one for the broadcaster, if practicable.

b. Need for a reality television code?

Finally, many of the most difficult problems canvassed in the decisions discussed in this review arise in the context of reality television programmes. Development of a code of conduct for those making reality television programmes might therefore be desirable. It is important that an appropriate balance is struck between the interests of those making and watching these programmes and of those who, often involuntarily, find themselves caught up in them.

APPENDIX

List of Broadcasting Standards Authority and High Court decisions that the Authority indicated must be included in this review:

2005-017 – TVNZ and Davies
2005-129 – TVNZ and Balfour
2006-014 – CanWest TVWorks and XY
CanWest TVWorks v XY – High Court appeal
2006-061 – TVNZ and Walden
2006-084 – CanWest TVWorks Ltd and Young
2006-087 – TVNZ and KW
TVNZ v KW – High Court appeal
2006-090 – TVNZ and JB
2006-115 – TVNZ and Arthur
2007-016 – TVNZ and Russek
2007-017 – CanWest TVWorks and Du Fresne
CanWest TVWorks v Du Fresne
2007-023 – TVNZ and NM
2007-028 – TVNZ and Hood
2007-067 – TVWorks and O'Connell
2007-088 – TVWorks and Kirk
2007-108 – The Radio Network and Spring
2007-109 – TVNZ and Lewis
2007-138 – TVNZ and LM