

B113 BABER, C.H. Efficacy of the Broadcasting Standards Authority...

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EFFICACY OF THE BROADCASTING
STANDARDS AUTHORITY IN DETERMINING
PRIVACY COMPLAINTS

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I. INTRODUCTION

Freedom of expression is a fundamental human right in a democratic society, thus broadcasters have a fundamental role in informing, educating and entertaining the public. However in a society that craves out for information the intrusion of privacy

ABSTRACT

The Broadcasting Standards Authority, charged with the maintenance of standards consistent with the privacy of the individual, began with no guidance from the legislature as to what privacy should encompass. Now it has developed a workable definition and accumulated a wealth of knowledge in the area of privacy.

In New Zealand the privacy of the individual is currently protected principally by the

This paper examines how effective the Authority is in determining privacy complaints and concludes that although the Authority is highly accessible to complainants, the accessibility of broadcasters is hampered by a lack of guidance as to the meaning of privacy.

The Authority has developed seven privacy principles which form a good basis for determining complaints, however they are quite vague and introduce terms without definition. The Authority has also, to a degree, confused the concept of privacy with fairness and defamation, which complicates the issue. Further the Authority's decisions do not always clearly spell out the reasoning behind the decision, which lowers their value as precedent.

To further promote the maintenance of 'standards consistent with the privacy of the individual' this paper advocates that the Broadcasting Standards Authority should work towards a code of broadcasting practice for privacy, giving greater guidance and responsibility to the broadcasters.

Part III considers the efficacy of the Broadcasting Standards Authority from the

The text of this paper (excluding contents page, footnotes and annexures) comprises approximately 13,826 words.

¹ G. Dickson, M. Hill & W. Zenge *Membership Committee of the Broadcasting Standards Authority* (The Dunedin Printing Company Limited, Dunedin, New Zealand) (Christchurch, Wellington)
² Broadcasting Act 1989, Long 1989.

I. INTRODUCTION

Freedom of expression is a fundamental human right in a democratic society, thus broadcasters have a fundamental role to play in informing, educating and entertaining the public. However in a society that cries out for information the intrusion of privacy is rated the most unacceptable breach of broadcasting standards.¹ Thus not only are broadcasters responsible for ensuring freedom of expression but they are responsible for the maintenance of standards that are consistent with the privacy of the individual.

In New Zealand the privacy of the individual is currently protected principally by the Privacy Act 1993, the developing tort of invasion of privacy and, in the particular case of the broadcast media, by the privacy principles developed by the Broadcasting Standards Authority. This paper examines the efficacy of the Broadcasting Standards Authority's approach to the issue of privacy.

The Broadcasting Act 1989 established the Broadcasting Standards Authority to provide for the maintenance of programme standards in broadcasting in New Zealand.² This paper addresses in particular the standards in relation to the privacy of the individual. Part II introduces the structures and functions of the Authority. The Broadcasting Act did not define privacy so the Broadcasting Standards Authority was left to develop its own concept of privacy. Part II also looks at this development and introduces the Authority's privacy principles.

To be an efficient standards regime a body must be accessible to all parties concerned. In the case of broadcasting standards the Authority needs to be accessible to complainants, so that they can uphold the standards by initiating complaints, and accessible to the broadcasters so that they can uphold the standards through their conduct and by preventative measures such as training.

Part III considers the efficacy of the Broadcasting Standards Authority from the perspective of a complainant's access to the Authority. In this regard the public's

¹ G Dickinson, M Hill & W Zwaga *Monitoring Community Attitudes in Changing Mediascapes* (The Dunmore Printing Company Limited, Palmerston North, 2000) [*Changing Mediascapes*].

² Broadcasting Act 1989, Long Title.

awareness of the Broadcasting Standards Authority, the adequacy of remedies for complainants, the structure and formalities of the complaints procedure, fairness of the procedure for complainants and the ability to appeal are considered. This part considers the role of compensation in a standards regime and concludes that it is necessary only to the extent that it recognises the personal harm involved. Privacy is to a large extent irremediable; therefore regulation is necessary as a preventative measure. The goal of statutory regulation is to promote high standards, not to provide personal remedies to complainants. The tort of invasion of privacy is now reasonably well established and is a more appropriate forum to deal with civil actions. It is also submitted that the courts are a better forum for dealing with the issuance of injunctions. The power of prior restraint can almost be equated with censorship. Given the serious nature of this remedy it is contended that the courts are better equipped with a well-established body of law to deal with injunctions.

The effect on broadcasters of the high level of accessibility for complainants is also considered. Here the issues of unaffected complainants, vexatious complaints and double jeopardy arise. It is proposed that complaints of invasion of privacy from unaffected complainants are entirely consistent with the nature of a standards regime. Vexatious complaints are uncommon in the area of privacy however it is contended that as the issue could arise in the future an efficient method of dealing with such complaints should be developed. With regard to the threat of double punishment in the courts under the tort of privacy this paper suggests that complainants should not be required to waive the right to receive damages in the courts. Although there is a danger to broadcasters in some respects of the court proceedings being jeopardised by a prior Broadcasting Standards Authority decision, a complainant should not be forced to give up their right to damages if they choose to also maintain the standards for the benefit of all society.

The foundation of a strong regulatory system is guidance. Clear and concise, easy-to-follow guidelines enable broadcasters to be proactive and to a large extent avoid invading the privacy of individuals. It is difficult to comply with standards if their scope and meaning is unclear, especially in the time-constrained environment of the broadcasting industry.

As well as having to comply with the legislative requirements of the Broadcasting Act, broadcasters also have to fulfil their shareholders' need for a return on their investment, the audience's expectation about programming content and their employees' requirement for a safe and stimulating work environment ... All of these challenges occur within a context in which commercial imperatives may or may not dovetail with quality imperatives and where deadlines, cost control and other operating constraints are a minute by minute reality.³

Part IV examines the Broadcasting Standards Authority's approach to privacy and its jurisprudence. Privacy is a difficult concept to define. Ruth Gavison believes privacy has three components: secrecy, or the limitation of information known about an individual; anonymity, or the limitation of attention paid to an individual; and solitude, or the limitation of physical access to an individual.⁴ These overlapping concepts are recognised in the Broadcasting Standards Authority's privacy principles by way of a protection against the disclosure of private, and some public, facts and a protection against intentional interference with an individual's interest in solitude and seclusion.⁵

This paper considers the privacy principles that the Broadcasting Standards Authority has developed to deal with complaints alleging invasion of privacy and concludes that the principles are not as effective as they could be in providing guidance for broadcasters. The Broadcasting Standards Authority has endeavoured to establish sound principles and to consistently and articulately apply them,⁶ however the privacy principles are based on the American tort of invasion of privacy and have not been adapted to any large extent for New Zealand purposes. The effect of this is that the wording of the principles is not as clear and easily applicable as it could be, nor are they specifically directed at the broadcasting industry. Also the Broadcasting Standards Authority puts a high emphasis on the facts in each case and does not

³ Joan Withers "Broadcasters Know Their Responsibilities" (Broadcasting Standards Authority Quarterly Jan 2000) 1.

⁴ Ruth Gavison "Privacy and the Limits of the Law" (1980) 89 Yale LJ 421, 428.

⁵ *Broadcasting Standards Authority Advisory Opinion* (BSA, Wellington, 25 June 1992) see privacy principles (i), (ii) and (iii). For a full list of the principles see Appendix I.

⁶ Sam Maling "Some Reflections on Vacating the Chair" (Broadcasting Standards Authority Quarterly July 2000) 1.

always clearly explain how it has reached its conclusions. This lowers the precedent value of the decisions and can limit the decisions to very particular factual situations.

The role of the defences of public interest and consent are considered as well as the issue of the invasion of privacy of public figures. The defence of public interest is essential in the process of balancing the right to privacy and the right to publicity whilst the defence of consent, although a bit of a misnomer, is a practical necessity. It is argued that public figures should not be denied a right to privacy solely on the ground of their high public profile. The public's right to know should only prevail where the information is connected to their public role.

Part V considers the borders of privacy and looks at the extent to which privacy has been confused with fairness and reputation. It appears that the concept of privacy has been confused to some degree with fairness particularly in the fourth and fifth principles. The Authority also seems to have extended its jurisdiction to defamation by considering the disclosure of facts to be an invasion of privacy regardless of the veracity of the facts. This is a concerning development.

This paper concludes that the Broadcasting Standards Authority's privacy principles can only be fully understood in the context of the Authority's decisions. This is not particularly helpful for broadcasters who have to make split second decisions regarding the content of their broadcasts. It is proposed that the Broadcasting Standards Authority ought to take advantage of their new ability to create a code of broadcasting practice for privacy in the light of their jurisprudence over the past decade.⁷ Such a code should be sufficiently detailed so that a broadcaster can gain a full understanding of the Broadcasting Standards Authority's concept of privacy without reading a single decision of the Authority.

⁷The Broadcasting Amendment Act 2000 enables the Broadcasting Standards Authority to make codes of broadcasting practice relating to the privacy of the individual, previously the Broadcasting Standards Authority was restricted to Advisory Opinions in this area.

II. THE BROADCASTING STANDARDS AUTHORITY

A. The Broadcasting Act 1989

The Broadcasting Standards Authority is an independent statutory body established by the Broadcasting Act 1989 primarily to receive and determine complaints made about broadcasts.⁸ The Broadcasting Standards Authority has the jurisdiction to determine complaints that, amongst other matters, a broadcaster has not maintained in its programmes and their presentation, standards which are consistent with the privacy of the individual.⁹

The four members of the Broadcasting Standards Authority are appointed by the Governor-General, on the recommendation of the Minister of Broadcasting.¹⁰ Thus although the Authority is an independent body there is clearly a potential for political influence. Former chairperson of the Authority, Sam Maling, has suggested that this political influence is wrong when much of the Authority's work involves sensitive political issues and not infrequently complaints by politicians.¹¹

The true extent of such an influence is difficult to quantify. It is likely to manifest in the Authority's general approach rather than in specific decisions or standards. Although there is potential for abuse, a degree of political influence may in fact be desirable. As the democratically elected representatives of the people it is appropriate that the government should exert some influence in terms of representing society's current attitudes towards broadcasting and standards in general.

The Broadcasting Act also contains safeguards regarding membership. The chairperson must be a barrister or solicitor of not less than seven years practice.¹² One of the members is appointed after consultation with representatives of the broadcasting industry¹³ and another is appointed after consultation with

⁸ Broadcasting Act 1989, s 10.

⁹ Broadcasting Act 1989, s 4(1)(c).

¹⁰ Broadcasting Act 1989, s 26.

¹¹ Maling, above n 6, 4.

¹² Broadcasting Act 1989, s 26(2).

¹³ Broadcasting Act 1989, s 26(1A).

representatives of public interest groups in relation to broadcasting.¹⁴ This ensures that the Authority has legal experience and aims to ensure that both the interests of the broadcasting industry and the public are represented. At present two members have experience in journalism and one has extensive experience in radio broadcasting. Some television broadcasters have questioned whether the Broadcasting Standards Authority has sufficient knowledge of the television industry especially in the current deregulated environment.¹⁵ This criticism fails to acknowledge the broadcasters' ability to express their point of view in their submissions on complaints, and their ability to consult with the Authority. Broadcasters need to be prepared to work with the Authority rather than viewing them as "just policemen."¹⁶

The Broadcasting Standards Authority is funded partly by money appropriated by Parliament to the Authority¹⁷ and partly by an annual levy on broadcasters, which consists of .00051% of their operating revenue over \$500,000.¹⁸ In effect the broadcasters are paying to be complained about, however this is probably in their best interests as the Broadcasting Standards Authority is a far cheaper forum for dispute resolution than the court system.

The Broadcasting Standards Authority only considers a matter if a member of the public complains about it. Thus their role does not encompass any degree of censorship or proactive monitoring of the media. Where the Minister of Broadcasting considers it is desirable in the public interest he or she can request the Authority to consider whether it is appropriate to issue an Advisory Opinion on the matter.¹⁹ This course of action has, to date, not been undertaken. In a recent survey the Authority found that 24% of New Zealanders believed that the Authority did serve this function. This suggests that the public need more education about the role of the Authority.²⁰

¹⁴ Broadcasting Act 1989 s 26(1B).

¹⁵ Steve Braunias "See Evil, Hear Evil – inside the Broadcasting Standards Authority's Culture of Complaint" (New Zealand Listener May 6-12, 2000) 28, per Mark Jennings, director of news and current affairs at TV3.

¹⁶ Braunias, above n 15, 27, per Derek Lowe, chairman of Radioworks (Radio Pacific and The Rock).

¹⁷ Broadcasting Act 1989, s 31.

¹⁸ Broadcasting Act 1989, s 30A, B and C. According to the Broadcasting Standards Authority Annual Report for the year ended 30 June 1999 the Authority received \$488,889 from Parliament and \$366,329 from Broadcaster levies.

¹⁹ Broadcasting Act 1989, s 23.

²⁰ *Changing Mediascapes*, above n 1.

Concern was also raised in Parliament when the Broadcasting Bill was introduced that the Authority did not have the power to initiate complaints when it believed standards were not being met.²¹ It would be inconsistent with the Authority's principle of maintaining standards, for the Authority to have such an ability. The better view is that where a body is adjudicating complaints it is inappropriate for that same body to initiate complaints as this would destroy the impartiality of the decision-makers. A degree of separation of powers is necessary.

B. The Broadcasting Standards Authority's Approach to Privacy

The Broadcasting Act 1989 does not define privacy. The Broadcasting Standards Authority has therefore developed its own jurisprudence largely adopting the approach of the United States as the High Court did in *Tucker v News Media Ownership Ltd*²². The first complaint received by the Broadcasting Standards Authority in 1990, *Fay McAllister v Television New Zealand Limited*,²³ was not upheld, however it provided an opportunity for the Authority to define privacy. The case involved a Television New Zealand broadcast of the funeral of a skinhead who had committed suicide after murdering a City Council worker.

The Broadcasting Standards Authority believed that because its decisions can be appealed to the High Court,²⁴ it was unable to rely solely upon everyday notions of privacy to determine complaints made under s4(1)(c) of the Broadcasting Act. Thus the Broadcasting Standards Authority endeavoured to take an approach based on legal principles.²⁵

Due to the lack of a clear legal concept of privacy in New Zealand the Broadcasting Standards Authority began with the idea that "an individual's privacy cannot be protected by law to such an extent as to override the legitimate interests of other

²¹ (13 December 1988) 495 NZPD 8826-8839.

²² *Tucker v News Media Ownership Ltd* [1986] 2 NZLR 716, [*Tucker*].

²³ *Fay McAllister v Television New Zealand Limited* (1990-005), [*McAllister*].

²⁴ Broadcasting Act 1989, s 18(1).

²⁵ *McAllister*, above n 23, 7.

members of society.”²⁶ In order for both the individual’s right to privacy and the public’s ‘right to know’ to coexist neither could be given its fullest meaning:²⁷

if individual privacy is given its largest interpretation, the valued freedom of the media would be severely constrained; if the ‘public interest’ in events is given its widest interpretation – to cover the public’s curiosity about all matters reported to it – there would be no room left for individual privacy to be respected.

The Broadcasting Standards Authority referred to *Tucker v News Media Ownership Ltd*²⁸ where McGechan J invoked American notions of privacy in support of the High Court’s earlier decision. The Broadcasting Standards Authority considered the four American torts of privacy as discussed in Prosser and Keeton²⁹ and adopted the formulation of two of the torts: that the public disclosure of private facts or public facts would invade the privacy of the individual where the facts disclosed were highly offensive and objectionable to the reasonable person of ordinary sensibilities and that the intentional interference with another’s interest in solitude or seclusion was an invasion of privacy. Further given McGechan J’s comments in *Tucker* regarding public facts, the Broadcasting Standards Authority felt that s4(1)(c) may provide greater protection against the disclosure of public facts than is provided in the United States.³⁰

Despite being assisted in its comprehension of privacy by such materials as official reports on privacy, legal text books, and by commentaries on the International Covenant on Civil and Political Rights, the Authority opted for a wholesale importation of the unusual American phraseology. This appears to have been merely for convenience as the most developed ideas came from the United States. Also the adoption of the American concept of privacy was not without legal precedent, as McGechan J had invoked American notions of privacy in *Tucker*.

²⁶ *McAllister*, above n 23, 8.

²⁷ *McAllister*, above n 23, 8.

²⁸ *Tucker*, above n 22.

²⁹ P Keeton & W L Prosser *Prosser and Keeton on Torts* (5 ed, West Publishing Co, Minnesota, 1984) 856-859.

³⁰ *McAllister*, above n 23, 8.

Further the Broadcasting Standards Authority recognised that the New Zealand concept of privacy might differ from the American tort, specifically referring to the concept of the 'reluctant debutante' in *Tucker*.³¹ McGechan J considered that public figures may have a lesser right to privacy, however reluctant debutantes, those who do not voluntarily enter the public arena but are thrust into the public limelight by their circumstances, may retain their right to privacy. However there was no attempt on the part of the Broadcasting Standards Authority to elaborate or elucidate the principles, or any discussion as to relevant local considerations in the New Zealand broadcast industry. The consequences of this will be discussed later.

The Authority also considered an Australian Law Reform Commission Report³² in regard to three proposed defences: public interest, consent and that the information complained of is a matter of public record. The Authority concluded that the defences of public interest and consent would also have to be examined in relation to any complaint. The Authority acknowledged that the New Zealand courts may not endorse the American notions of privacy and therefore stated that they would have come to the same conclusion had the Australian Law Reform Commission's views been applied.

In declining to uphold Fay McAllister's complaint the Authority held that as the cemetery was a public place and the footage had been filmed from a public street the case involved the public disclosure of public facts.³³ However the disclosure was not sufficiently offensive or objectionable to breach the test, and there was sufficient public interest in the original attack and the 'Nazi' behaviour at the funeral to justify the broadcast. The consent received for the filming from other members of the family further justified the broadcast.³⁴

Over the next two years the Broadcasting Standards Authority considered nine privacy complaints during which it developed its approach to privacy. In 1992 a particularly complicated factual scenario arose providing the impetus to the Broadcasting Standards Authority to issue an Advisory Opinion outlining the privacy

³¹ *Tucker*, above n 22, 735.

³² Australian Law Reform Commission *Privacy – No. 22* (Australian Government Publishing Service, Canberra, 1983).

³³ *McAllister*, above n 23, 12.

³⁴ *McAllister*, above n 23, 12.

principles it had developed. The Broadcasting Standards Authority has used advisory opinions³⁵ in the area of privacy, as section 21(1)(e) did not apply to privacy. This was amended in July 2000 and now allows for the development of a code of broadcasting practice for privacy.³⁶

C. *The Privacy Principles*

The Advisory Opinion highlighted five relevant privacy principles, which the Authority intended to apply when considering complaints alleging a breach of privacy. The first two established protection against the disclosure of highly offensive and objectionable private facts and highly offensive and objectionable public facts which have become private through the passage of time. The third principle provided protection against offensive interference with an individual's interest in solitude and seclusion. And the last two principles established the defences of public interest and consent. In 1995 TV3 challenged these principles in the High Court.³⁷ The High Court approved the approach taken by the Broadcasting Standards Authority, Chief Justice Eichelbaum stated:³⁸

I see no error of principle in the authority's decision to regard prying as one potential form of breach of privacy, nor in its adoption of the approach gleaned from USA case law as a foundation for its own guidelines on the topic.

Since then a further two principles (principles (iv) and (v)) were added in 1996 to deal with factual situations the Broadcasting Standards Authority believed were not covered by the earlier principles. Principle (iv) protects against the disclosure of private facts to abuse, denigrate or ridicule a person and principle (v) protects against the disclosure of a person's name, address or telephone number without consent. In 1999 it became apparent that the responsibility of broadcasters in regard to the privacy of children needed to be clarified. This was done by altering the defence of consent so that it only justifies broadcasts that are in the best interests of the child.

³⁵ Broadcasting Act 1989, s21(1)(d).

³⁶ Broadcasting Amendment Act 2000, s 4.

³⁷ *TV3 Network Services Limited v Broadcasting Standards Authority* [1995] 2 NZLR 720, [TV3 v BSA].

³⁸ *TV3 v BSA*, above n 37, 729.

Thus the Broadcasting Standards Authority has now developed seven privacy principles³⁹ which it applies when determining a complaint that a broadcaster may have contravened section 4(1)(c) of the Broadcasting Act. The Authority states that “[t]hese principles are not necessarily the only privacy principles that the Authority will apply; [t]he principles may well require elaboration and refinement when applied to a complaint; [and t]he specific facts of each complaint are especially important when privacy is an issue.”⁴⁰

The Authority does refer to its previous decisions where they are considered relevant, but preserves for itself considerable flexibility in dealing with complaints.⁴¹ Defining privacy is no easy task so the Authority’s desire to maintain flexibility is understandable however from a broadcaster’s perspective this flexibility can be equated with uncertainty. This uncertainty undermines the benefit of the regulatory system, as it is difficult to maintain standards consistent with the privacy of individuals if broadcasters do not know what privacy is until the Authority determines a complaint.

D. Privacy Complaints

The number of privacy complaints received by the Broadcasting Standards Authority has steadily increased over the past eleven years, and although the total number of complaints has also been rising the proportion of privacy complaints as a percentage of the total has increased from about 2% to 18%.⁴² This does not appear to be indicative of less stringent standards on the part of broadcasters as the trends regarding the number of decisions upheld have remained relatively constant.⁴³ Therefore the increase could be the result of greater awareness of the Broadcasting

³⁹ See Appendix I for a full list of the Privacy Principles.

⁴⁰ *Broadcasting Standards Authority Advisory Opinion* (Broadcasting Standards Authority, Wellington, 25 June 1992).

⁴¹ John Burrows & Ursula Cheer *Media Law in New Zealand* (4ed, Oxford University Press, Auckland, 1999) 186, [*Media Law*].

⁴² This statistic ignores the first year of complaints in which 16% were privacy complaints as this was skewed by the fact that only 12 complaints were received in that year.

⁴³ The Authority upholds about a third of privacy complaints with the exception of the year ended 30 June 2000 in which the Authority upheld half of the privacy complaints received.

Standards Authority or of privacy issues in general. The Hon Maurice Williamson, former Minister of Broadcasting, believes that it is "an indication that the system is working. Members of the public are increasingly exercising their right to complain, and by doing so they hold broadcasters accountable in standards matters."⁴⁴

A privacy complaint may be made directly to the Broadcasting Standards Authority, unlike other complaints which must go first to the broadcaster concerned. The reasoning behind this is unclear. Originally the lack of a clear definition of privacy and of what is in the public interest, the emotive aspect of privacy and the desire to resolve disputes speedily may have been the reasons that privacy complaints were fast tracked to the Authority. However the Broadcasting Tribunal, the predecessor to the Broadcasting Standards Authority, considered that allowing a direct reference to the Authority for breaches of privacy was not necessary or desirable.⁴⁵ There seems to be no reason why broadcasters should not be the first port of call, especially now that the Broadcasting Standards Authority has developed an approach to the definition of privacy.⁴⁶

If a complaint is made directly to the Broadcasting Standards Authority the Authority can only assess the privacy aspect of the complaint, as all other complaints must go to the broadcaster first. The Broadcasting Standards Authority advises complainants to refer their complaint to the broadcaster concerned if it involves standards other than privacy.⁴⁷ However many complainants fail to do this as they feel they have already laid their complaint. Thus fast-tracking complaints can prejudice complainants. The Broadcasting Standards Authority does not have the jurisdiction to consider standards complaints directly⁴⁸ and extending its jurisdiction to allow it to consider them where a complaint alleges a breach of privacy could lead to complainants alleging a breach

⁴⁴ Hon. Maurice Williamson "Speech to the Broadcasting Summit Conference" (New Zealand Executive Government Speech Archive, 23 April 1996) <http://www.executive.govt.nz/93-96/minister/williamson/mws230496.htm> .

⁴⁵ Broadcasting Tribunal "Submission to the Select Committee on Planning and Development on the Broadcasting Bill 1988."

⁴⁶ In the year ended June 30 1999 of the 22 complaints received by the Authority seven were referrals from broadcasters' decisions. Of those seven five were not upheld, one was upheld with no penalty and one was upheld with compensation and costs awarded. This indicates that broadcasters are capable of assessing privacy complaints in the first place and their decisions are generally upheld.

⁴⁷ Broadcasting Standards Authority Advisory Opinion 26 July 1994.

⁴⁸ *McAllister*, above n 23.

of privacy simply to fast-track their complaints. This could all be overcome by the Authority adopting a procedure of submitting the standards issues to the broadcaster on behalf of the complainant or by requiring all complaints to go to the broadcaster first.⁴⁹

III. EFFICACY OF THE BROADCASTING STANDARDS AUTHORITY - COMPLAINANTS' ACCESSIBILITY

A. Accessibility

To be effective in the maintenance of standards the Broadcasting Standards Authority needs to be accessible. Knowledge is an important factor in the accessibility of a statutory body. The public needs to be aware of the Authority's function and how to complain. Since 1996 broadcasters have been required to screen or air daily a notice publicising the procedure for complaints.⁵⁰ The Broadcasting Standards Authority has also established an 0800 free-telephone number explaining the complaints procedure and have created a school education kit for secondary and tertiary institutions.⁵¹

A survey in 1998 found 81% of New Zealanders were aware of the Broadcasting Standards Authority's existence however only 51% identified the Broadcasting Standards Authority as an agency that receives complaints.⁵² Nearly a quarter of those surveyed believed the Authority was a censoring body and 7% confused the Broadcasting Standards Authority with 'NZ On Air.'⁵³ This suggests that although a clear majority is aware of the Authority more education about the role of the Authority is required.

The survey also identified that women, young people and those on low incomes were most likely to be unaware of their ability to complain and often believed that nothing

⁴⁹ In the year ended 30 June 1999 the Authority received 22 complaints of which 7 were referrals from broadcasters decisions. Of those 7: 5 were not upheld, 1 was upheld without penalty and 1 was upheld with compensation and costs awarded. This is indicative that broadcasters get it right most of the time.

⁵⁰ Broadcasting Act 1989, s6(ba) inserted by Broadcasting Amendment Act 1996.

⁵¹ Broadcasting Standards Authority Annual Report for the year ended 30 June 1999.

⁵² *Changing Mediascapes*, above n 1.

⁵³ NZ On Air collects the public broadcasting fee and disburses its proceeds in grants designed to achieve social objectives in broadcasting.

would be done about their complaints. Beyond further publicity it is difficult to see how this perceived ineffectiveness can be addressed. More publicity regarding decisions the Authority has upheld could assist yet these are often reported in the news already. Perhaps a level of perceived ineffectiveness is inherent in the provision of a public service and is only corrected with society's general acceptance of that body.

The cost of proceedings can also be a significant hindrance to an individual's ability to complain. Complainants do not contribute to the cost of proceedings and legal representation is not required. Thus in comparison to the court system the barriers to justice are much lower. The time involved and delays in the proceedings can be costly to complainants, especially in the area of privacy where delays can increase or aggravate the harm. A formal complaint to the Broadcasting Standards Authority must be made within twenty working days⁵⁴ of the broadcast.⁵⁵ This time limit may appear to disadvantage complainants, however from a practical, evidential point of view a limit is required so that broadcasters do not have to retain recordings indefinitely.⁵⁶

If the complaint is made directly to the broadcaster it must be investigated and within twenty working days the broadcaster must advise the complainant of its decision and any action taken in relation to the complaint.⁵⁷ The Authority expects broadcasters to have systems in place to ensure that formal complaints are dealt with appropriately.⁵⁸ If the complainant is not satisfied with the broadcaster's decision, the action taken by the broadcaster or the broadcaster has failed to consider the complaint, the complaint may be referred to the Authority, but must be done so within twenty working days. Broadcasters can use their discretion to accept late complaints, however this is probably not advisable for a broadcaster, except to maintain goodwill, as in at least

⁵⁴ Broadcasting Act 1989, s 9. Section 2: "working day" excludes weekends, statutory holidays and the Christmas - New Year period: 25 December- 15 January.

⁵⁵ *Broadcasting Standards Authority Advisory Opinion* (BSA, Wellington, 1994): If the Authority believes a privacy complaint referred directly to them also involves standards issues they will advise the complainant to consider complaining to the broadcaster on these matters.

⁵⁶ Broadcasters must retain recordings for 35 days after a broadcast although in some situations a script will be suffice.

⁵⁷ Broadcasting Act 1989, s 8(1)(b).

⁵⁸ *DD v The Radio Network* (1999-062/063). Also see Broadcasting Act 1989, s 5(a).

two cases this action has resulted in the imposition of orders of compensation against the broadcaster concerned.⁵⁹

The Broadcasting Standards Authority endeavours to consider all complaints within forty days of receipt and have achieved this in between 80–90% of cases in the past few years.⁶⁰ In comparison with the court system the cost of a complaint is much lower and complaints are considered far more expeditiously.⁶¹

However there may be a potential indirect cost to complainants of not going to court. Although complainants do not waive their legal rights to subsequent legal action the existence of the Broadcasting Standards Authority's complaints procedure and the lack of independent legal advice may preclude a complainant realising their ability to proceed under the tort of privacy.

Pursuing a tort action can be costly and uncertain, given the embryonic state of the civil action at present, but may result in significant damages. Where [a complaint to the BSA succeeds] the compensation is likely to be in hundreds of dollars rather than thousands.⁶²

B. Adequacy of Remedies

If the Authority upholds any complaint, in whole or in part, the Authority may order the broadcaster to publish an approved statement, to refrain from broadcasting or from broadcasting advertising for a specified period, or to pay compensation, not exceeding \$5,000, to an individual whose privacy was breached.⁶³ The Authority also has the power to order any party to pay any other party such costs and expenses as are reasonable.⁶⁴

⁵⁹ *Complainant S v Radio Pacific* (1996-003) \$2,500 compensation was awarded; *J & J McDonagh v Television New Zealand Limited* (1997-007) \$500 compensation was awarded.

⁶⁰ Broadcasting Standards Authority Annual Report for the year ended 30 June 1999.

⁶¹ Department of Courts Annual Report 1998: Two-thirds of defended civil proceedings and criminal trials were disposed of in the target period of 52 weeks.

⁶² *Media Law*, above n 41, 186.

⁶³ Broadcasting Act 1989, s 13. In comparison the British Broadcasting Standards Commission only has the power to direct the broadcaster to publish a summary of the complaint and the Commission's findings. It has no power to make any financial awards or even to order an apology or correction.

⁶⁴ Broadcasting Act 1989, s 16(1).

The Authority will often refrain from imposing any order. This is often a reflection on the adequacy of the action taken by the broadcaster, for example where a broadcaster displayed a genuine concern and made sufficient and appropriate efforts to remedy the situation, no order was imposed.⁶⁵ Action to prevent further breaches, such as destroying footage,⁶⁶ and prompt action in dealing with a breach⁶⁷ have also resulted in orders not being imposed. Other reasons given by the Authority for not imposing orders include that the breach was minor,⁶⁸ that the decision was not unanimous,⁶⁹ and that the relevant code was ambiguous.⁷⁰

Monetary orders are usually small and are often paid as costs to the Crown. However the maximum of \$5,000 has been awarded.⁷¹ Where the Authority imposes costs or advertising bans the amounts payable by the broadcaster can be much higher⁷² and the public humiliation resulting from being removed from the air should not be underestimated. In the parliamentary debate on the matter Mr Gerald stated:⁷³

... to be taken off air for up to 24 hours if a complaint is justified .. the penalties are much too severe and Draconian. They are unreal. No other commercial business would have to close its doors if it committed an offence.

The Broadcasting Act does not create a right to privacy it establishes a standards regime whereby broadcasters must uphold standards consistent with the privacy of the individual. In a strict standards regime compensation for breaches of the rights of individuals is inappropriate because the goal is the maintenance of standards for the benefit of society. However privacy blurs the borders of a strict standards regime because it is inherently personal. This is especially so where, as is the case at hand,

⁶⁵ *BB v Radio Bay of Plenty* (1999-107/108).

⁶⁶ *Janice Dunphy v Television New Zealand Limited* (1994-019).

⁶⁷ *Ross Warren v The Radio Network of New Zealand Limited* (1999-235).

⁶⁸ *Murray Arnesen v Television New Zealand Limited* (1997-100/101).

⁶⁹ *Maternity Services Consumer Council v Television New Zealand Limited* (1998-041/042).

⁷⁰ *Holding v TV3 Network Services Limited* (1996-181).

⁷¹ *Mrs S v TV3 Network Services Limited* (1994-001).

⁷² In *The Diocese of Dunedin & Others v TV3 Network Services Limited* (1999-125-137), the "Sex, Lies and Videotape" case, the broadcaster was ordered to refrain from advertising for 2½ hours and pay costs and expenses of \$75,000 to the complainants and \$15,000 to the Crown on top of the privacy compensation.

⁷³ (4 May 1989) 497 NZPD 10407 per Mr Gerald (Rangiora). However it should be noted that the power to remove a broadcaster from the air has never actually been used.

the enabling legislation singles privacy out with different procedures and compensation.

Compensation is necessary only in so far as it recognises the personal harm involved. Criticisms of the low amounts of compensation are put into perspective when considered in the light of the purpose of the legislation. Complainants also now have the ability to take a civil action against broadcasters in the tort of privacy to recover damages. Thus the current level of compensation seems appropriate.

The Broadcasting Standards Authority is unable to act on material that has not been broadcast, thus it is unable to prevent the broadcast of potentially privacy invading material. The Broadcasting Standards Authority's justification for this is:⁷⁴

Although s 6(1) is not explicitly confined to complaints about programmes which have been broadcast, in view of the explanation of the Act's intention contained in its long title and in view of s 6(3) (and other references to time limits), the Authority has considered its jurisdiction is limited to complaints about programmes which have been broadcast. In taking this approach, the Authority does not want to suggest that there are no controls on broadcasters on the manner in which material is gathered for a broadcast. Rather it is of the view that such matters, like all others within the Authority's jurisdiction, cannot raise broadcasting standards issues until the item is broadcast.

It is contended that as the harm caused by an invasion of privacy is immediate and irreversible it is to a large extent irremediable except by punishing and thereby deterring the conduct.⁷⁵ This underestimates the value of regulation but does raise the issue of prior restraint. Damages are a poor remedy for an invasion of privacy because compensation can never undo the harm caused by the broadcast.

In England the Broadcasting Standards Commission guidelines state:⁷⁶

⁷⁴ *Judith MacKenzie v Television New Zealand Limited* (ID1995-001).

⁷⁵ Elizabeth Paton-Simpson "Human Interests: Privacy and Free Speech in the Balance" (1995) 16 NZULR 225, 230.

⁷⁶ British Broadcasting Standards Commission *Codes of Guidance – Code on Fairness and Privacy* (<http://www.bsc.org.uk>) 11.

Privacy can be infringed during the obtaining of material, even if none of it is broadcast, as well as in the way in which the material is used within the programme.

However prior restraint is viewed as censorship and as such it is a significant threat to freedom of speech. This has resulted in a higher threshold for the granting of injunctions in defamation cases.

With the emergence of the tort of privacy it is unnecessary to provide the Broadcasting Standards Authority with the power of prior restraint. Free speech should not be fettered lightly, thus injunctions should be left in the domain of the courts. Although the courts are not as accessible, they have a well-established body of law in this area which should not be disturbed.

C. Formalities

The nature of the Broadcasting Standards Authority's proceedings is adversarial, parties make arguments and are able to respond to the other parties' arguments. The Broadcasting Standards Authority generally decides complaints without formal hearings as the Broadcasting Act provides that the Authority shall provide for as little formality and technicality as is permitted by the Act, the proper consideration of the complaint and the principles of natural justice.⁷⁷ Thus there is rarely any face to face contact and no direct cross-examination. The complainant is denied their "day in court" however this significantly reduces the costs, as there is no need for lawyers and travel costs. Thus the overall procedure is much more flexible than the court structure and more user friendly.

There are however rules as to procedure, such as time limits and inability to introduce new issues, and rules as to evidence such as the requirements for broadcasters to maintain copies of their broadcasts for certain time periods.

⁷⁷ Broadcasting Act 1989, s 10(2).

The proceedings are less public than court proceedings as the Authority rarely uses formal hearings. This is beneficial in privacy proceedings as further publicity generally exacerbates an invasion of privacy and the Authority also has the power to suppress complainants' names.⁷⁸ It is the Authority's usual practice not to publish the name of a complainant when upholding a complaint which alleges a breach of privacy unless in the circumstances it is impractical to do so.⁷⁹

The format of the decisions is designed to be useful to the specific parties involved in a complaint. However it appears that this focus makes the decisions less beneficial in the sense of creating precedent for broadcasters to follow, especially given the Broadcasting Standards Authority's strong emphasis on the facts in each case. Often the plain language does not clearly address the legal questions and the Authority does not clearly state the reason for the decision in a specific case, for example whether a complaint was declined because the broadcast did disclose a private fact or because the fact was not highly offensive.

D. Ability to Appeal to the High Court

A dissatisfied complainant or broadcaster may appeal against a decision of the Authority to the High Court,⁸⁰ but must give notice of appeal within one month after the date on which the appellant was notified of the decision.⁸¹ The determination of the High Court on any appeal is final.⁸² Approximately two to three appeals are filed each year.⁸³

The operation of the decision or order appealed against is suspended until the final determination of the appeal.⁸⁴ In 1997 TV3 appealed against a decision⁸⁵ upheld against them but failed to prosecute the appeal. After two years the Broadcasting Standards Authority applied to have the appeal dismissed. Goddard J accepted that

⁷⁸ *C v TV3 Network Services Limited* (1998-039/040).

⁷⁹ *Suzi Archer v Pirate FM* (1996-026/027).

⁸⁰ Broadcasting Act 1989, s 18(1).

⁸¹ Broadcasting Act 1989, s 18(3).

⁸² Broadcasting Act 1989, s 19.

⁸³ Broadcasting Standards Authority Annual Report for the year ended 30 June 1999.

⁸⁴ Broadcasting Act 1989, s 18(6).

⁸⁵ *Criminal Bar Association v TV3 Network Services Limited* (1997-128).

failure to prosecute an appeal under the Act was contrary to the very public interest which the Act seeks to protect.⁸⁶ As the delay was inordinate and inexcusable on the facts the appeal was dismissed. Thus broadcasters must not use their right of appeal to diminish the effectiveness of the Authority's orders.

In the case of privacy complaints the Broadcasting Standards Authority is generally the first port of call rather than the broadcaster. Thus the only way to review a privacy complaint is by appeal to the High Court. To date there has only been one appeal on the grounds of privacy⁸⁷ and it is difficult to know whether this reflects the quality of the Broadcasting Standards Authority's decisions or an insufficient ability to appeal. The cost of appealing to the High Court may be a significant barrier to both complainants and broadcasters. However there may be a benefit in the appeal process being less accessible, because if it were too accessible all complaints would be appealed as a matter of course leaving the Broadcasting Standards Authority virtually redundant, although the success rate of appeals would also be a factor. The important point is that an appeal process is available, so that there is a check on the Authority, and where a case demands it it can be utilised.

E. Effect of the Complainants' Accessibility on Broadcasters

1. Double Jeopardy

The tort of privacy was judicially confirmed in the recent High Court case of *P v D*.⁸⁸ Thus a complainant could both pursue a complaint to the Broadcasting Standards Authority and seek damages for breach of the tort of privacy. The danger of having two avenues of action available to a complainant is that the Authority may be used as a test run for court cases and broadcasters may be subject to a second punishment in the courts.

New Zealand does not have a double jeopardy rule nor are complainants required to waive their legal rights when complaining to the Broadcasting Standards Authority,⁸⁹

⁸⁶ *TV3 Network Services Limited v Criminal Bar Association of NZ Inc* [2000] 1 NZLR 634, 639.

⁸⁷ *TV3 v BSA*, above n 37.

⁸⁸ *P v D* [2000] 2 NZLR 591.

⁸⁹ The Advertising Standards Authority and the Press Council do require such waivers.

therefore the complainant can get a Broadcasting Standards Authority ruling in their favour and then take the broadcaster to court as well. Any evidence given in a Broadcasting Standards Authority decision is inadmissible in any other court,⁹⁰ however it is questionable how effective this is as the decisions of the Broadcasting Standards Authority are published. Also delinquent broadcasters often have to broadcast summaries of the decisions against them which can have the effect of infecting or prejudicing the potential jury pool.

In the case of *TV3 Network Services Limited v Broadcasting Standards Authority*⁹¹ Eveready and Home & Safety issued court proceedings against TV3 based on allegations of injurious falsehood or disparagement of goods and defamation. Soon after, Eveready laid a complaint with the Broadcasting Standards Authority alleging breaches of broadcasting standards. McGechan J stayed the broadcasting complaint until the proceedings in the High Court had been determined, settled, or permanently discontinued.⁹² Thus if court proceedings are initiated at the same time as the complaint they will take priority so the problem lies in court proceedings being initiated after a successful complaint to the Authority.

In *St Bede's College v The Radio Network of New Zealand Limited*⁹³ the Radio Network delayed responding to a complaint because the complainant had threatened defamation proceedings. The Authority acknowledged that their cautious approach was because of the decision in *Eveready* however they held that the broadcaster should have advised the complainant as to the reason for the delay.

In Britain the Broadcasting Standards Commission shall not entertain or proceed with the consideration of a complaint if it appears to them that the matter complained of is the subject of proceedings in a court of law or if the person affected has a remedy in a court of law.⁹⁴ This clarifies the issue to a certain degree however the second factor would bar all privacy complaints in New Zealand now that the tort of invasion of

⁹⁰ Broadcasting Act 1989, s19A.

⁹¹ *TV3 Network Services Limited v Broadcasting Standards Authority* [1992] 2 NZLR 724 [*Eveready*].

⁹² *Eveready*, above n 91, 738.

⁹³ *St Bede's College v The Radio Network of New Zealand Limited* (1997-110/111).

⁹⁴ Broadcasting Act (UK) 1996 s 114(2)(a) & (b).

privacy has been recognised.

Although it is possible that the broadcasters may be penalised a second time for the same act it is submitted that complainants should not be barred from seeking damages through the courts. The Broadcasting Standards Authority provides only minimal compensation so a complainant who complains to the Authority for the societal good of the maintenance of standards should not be prevented from seeking personal redress for the breach of their right to privacy.

2. *Unaffected Complainants*

The Broadcasting Standards Authority is entitled to accept complaints from unaffected complainants, individuals other than the person whose privacy has been breached.⁹⁵ In a complaint in 1997 Television New Zealand urged the Broadcasting Standards Authority not to accept two complaints from an unaffected couple claiming that the complaints interfered with the individuals concerned right to choose for themselves whether to complain.⁹⁶ In their view, Television New Zealand considered that a complainant should not be able to make a breach of privacy complaint on behalf of someone from whom they had received no mandate to do so and referred to the British legislation as a model.

In Britain a fairness complaint, which includes a breach of privacy, shall not be entertained unless it is made by the person affected or by a person authorised to make the complaint on his or her behalf.⁹⁷ If the person affected is unable to make the complaint for any reason then a family member or some other person or body closely connected to the individual, such as an employer or a body of which the individual is a member, may complain on their behalf.⁹⁸

By accepting and ruling on privacy claims from unaffected complainants the Broadcasting Standards Authority is in danger of breaching the privacy of the

⁹⁵ *George Gray v Television New Zealand Limited* (1996-172); *NE & MH Archer (2) v Television New Zealand Limited* (1997-043/044).

⁹⁶ *NE & MH Archer (2) v TVNZ*, above n 95. In fact TVNZ also made submissions on this point to the Select Committee on Planning and Development on the Broadcasting Bill.

⁹⁷ Broadcasting Act (UK) 1996, s 111(1).

⁹⁸ Broadcasting Act (UK) 1996, s 111(3).

individual concerned. As privacy, once breached, cannot be restored by more speech. Even if the individual's name is suppressed the private facts will still be published in the Broadcasting Standards Authority's reports. Sam Maling, former chairperson of the Broadcasting Standards Authority, has questioned why the Broadcasting Standards Authority must accept and rule on complaints about privacy matters from people other than those directly affected.⁹⁹

Adopting the British model would be more consistent with the privacy of the individual, further it would reduce the number of 'busy-body' complaints and prevent politicians from using the Broadcasting Standards Authority as part of their bandwagon to a certain extent. However the purpose of the Broadcasting Standards Authority is to maintain standards and in particular to maintain standards consistent with the privacy of the individual. The fact that the Authority has upheld complaints from unaffected complainants illustrates that there are instances where a broadcaster has not maintained the required standards even though the individual concerned did not complain. Thus in order to maintain standards it is appropriate that complaints be received from both affected and unaffected complainants in relation to a broadcast.

3. *Unethical Journalism*

The Broadcasting Standards Authority noted in their first privacy case that unlike the 1976 Broadcasting Act the 1989 legislation did not state "infringement of privacy in, or in connection with the obtaining of material included in, programmes broadcast ..." (emphasis added) and that this may be a restriction on the grounds of privacy.¹⁰⁰ The Authority still considered this aspect of the complaint and subsequently interpreted "consistent with ... the privacy of the individual" to allow the consideration of journalistically unethical conduct.¹⁰¹

Privacy principle (iii) has been used to examine some of the techniques used, particularly by television, to obtain material such as the secret recording of a business

⁹⁹ Broadcasting Standards Authority Quarterly Report July 2000.

¹⁰⁰ *McAllister*, above n 23.

¹⁰¹ *Dr Ranganui Walker v Television New Zealand Limited* (1990-006).

interview,¹⁰² filming of an interview at an individual's front door by a camera out of view on public property,¹⁰³ and door-stepping complaints.¹⁰⁴

Gathering material for broadcast is an integral part of broadcasting, thus the inclusion of unethical conduct in the scope of the principle of invasion of privacy is justifiable. However this is an area not specifically covered by the privacy principles. A clear statement of the Broadcasting Standards Authority's position on the matter would be useful to assist broadcasters in regulating their own conduct.

4. *Frivolous, Vexatious and Trivial Complainants*

The Authority has the power to decline to determine a complaint if it considers that the complaint is frivolous, vexatious or trivial.¹⁰⁵ However a broadcaster does not have this power and must therefore give due consideration to every complaint they receive. Sam Maling has suggested that there needs to be found a way to sieve out some especially trivial complaints before the broadcasters or the Broadcasting Standards Authority commit their time and resources to enquiry.¹⁰⁶

If complainants had to pay to complain, even a token fee, this may prevent some of the more trivial complaints. However this may also have the effect of turning away genuine complaints. The Authority does have the power to award costs against the complainant. This power has not yet been utilised in any privacy complaints, however it could be an effective disincentive to trivial, vexatious or frivolous complaints.

This is unlikely to be an issue in the case of a privacy complaint as these generally involve the serious principle of privacy. However it could become a problem in the future if the number of complaints continues to rise.

¹⁰² *Gene Leckey v Television New Zealand Limited* (1993-138).

¹⁰³ *Mrs S v TV3*, above n 71; *TV3 v BSA*, above n 37.

¹⁰⁴ *Dr Paul Smedley v Television New Zealand Limited* (1994-029); *Michael Laws v TV3 Network Services Limited* (1997-024).

¹⁰⁵ Broadcasting Act 1989, s 11.

¹⁰⁶ Maling, above n 6, 4.

IV. EFFICACY OF THE BSA'S APPROACH TO PRIVACY

- THE BSA'S JURISPRUDENCE

A broadcaster's understanding of 'standards consistent with the privacy of an individual' arises primarily from the Broadcasting Standards Authority's privacy principles. However an understanding of the principles can only be gained through a thorough reading of the Broadcasting Standards Authority's jurisprudence. This is an acute limitation on a broadcaster's access to the standards and is thus a serious limitation on a broadcaster's ability to implement the standards. This section analyses the decisions of the Broadcasting Standards Authority and attempts to identify what 'standards consistent with the privacy of the individual' has been interpreted to mean.

A. Public Disclosure

Public disclosure is the first requirement as the Authority's jurisdiction is limited to complaints about material which has been broadcast. The manner in which material has been gathered cannot raise broadcasting issues until it is broadcast.¹⁰⁷ Disclosure of private facts to one person is sufficient to contravene the Broadcasting Standards Authority's privacy principles,¹⁰⁸ although in the context of broadcasting establishing disclosure is not usually difficult, especially where the item complained of has been broadcast on nation-wide television. The degree of publication may be relevant to the quantum of damages or compensation. To date this has not been stated as a factor in any of the Broadcasting Standards Authority's decisions, however the Authority takes into account all the circumstances when making an order.

Once it is established that the relevant facts were publicly disclosed it is necessary to establish that the disclosure identified an individual.

B. Identification

The Broadcasting Act provides that broadcasters are responsible for maintaining standards which are consistent with the privacy of the individual. Therefore before the

¹⁰⁷ *MacKenzie v TVNZ*, above n 74.

¹⁰⁸ *Ms P v TV3 Network Services Limited* (1994-021).

privacy principles can be applied to a broadcast it is essential that the broadcast discloses the identity of an individual. The individual must be living, as privacy rights do not attach to the deceased.¹⁰⁹ The individual does not need to be identified to everyone, "identity is revealed if the person would be recognised by friends, neighbours and acquaintances."¹¹⁰

The Broadcasting Standards Authority considers that in most cases identification to only a limited number of individuals, closely connected to the person, is unlikely to offend the principles. But if a wider group than this, such as friends and acquaintances can identify the individual, then this will raise a potential privacy issue.¹¹¹ It is not necessary that the individual's name be disclosed if the individual's clothing, voice or deportment can establish identity,¹¹² or if details given by the broadcaster identify the individual.

If a broadcast refers to a group of people no breach will exist unless the comments can be attributed to an individual in that group.¹¹³ For example in a documentary about abortion a reference was made to the aborting of fetuses of the daughters of the presidents of the Society for the Protection of the Unborn Child. The Broadcasting Standards Authority held that the privacy principles did not apply because the statement did not refer to an identifiable individual.

Electronic masking or pixellation does not entirely protect a person's identity. The Broadcasting Standards Authority has warned broadcasters on several occasions of the limitations of these techniques, as individuals are often still identifiable by their physique and voice.¹¹⁴ "[T]he blurring of the person's face in itself is usually an insufficient claim that a person's identity has not been revealed."¹¹⁵ Further if the surrounding context can identify the individual then pixellation is ineffective. A girl was held to be identifiable as although she was pixellated she was filmed with her

¹⁰⁹ *The Hope Family v Television New Zealand Limited* (1999-237).

¹¹⁰ *R R v TV3 Network Services Limited* (1999-076/077).

¹¹¹ *J D v TV3 Network Services Limited* (1999-085/086).

¹¹² *R R v TV3*, above n 110.

¹¹³ *Society for the Protection of the Unborn Child & Others v 60 Minutes* (1993-108/109/110).

¹¹⁴ *R R v TV3*, above n 110 and *J D v TV3*, above n 111.

¹¹⁵ *R R v TV3*, above n 110.

father who was not.¹¹⁶ Broadcasters must also be careful when filming courtrooms as a child was identified in Peter Ellis' appeal case, as the name was visible on a file in the courtroom.¹¹⁷

A distinctive car is insufficient to identify its owner if the owner may not have been the driver on the occasion referred to.¹¹⁸ However the distinctive first names of two girls in a radio broadcast was sufficient to identify their mothers.¹¹⁹

Thus the broadcast must disclose the identity of an individual. It need not be a direct identification so long as the person is recognisable by their friends and acquaintances.

C. *Definition of Privacy*

The Broadcasting Standards Authority has primarily defined the standard of privacy as protection against the public disclosure of private facts,¹²⁰ and some kinds of public facts¹²¹ where the facts disclosed are highly offensive and objectionable to a reasonable person of ordinary sensibilities.¹²² The 'public' facts contemplated concern events (such as criminal behaviour) which have, in effect, become private again, for example through the passage of time.

The standard of privacy also includes protection against the intentional interference (in the nature of prying) with an individual's interest in solitude or seclusion.¹²³ The intrusion must be offensive to the ordinary person but an individual's interest in solitude or seclusion does not provide the basis for a privacy action for an individual to complain about being observed or followed or photographed in a public place.¹²⁴ This principle has generally been used for intrusive filming or recording and any other sort of prying, such as hidden cameras. Eavesdropping on a private conversation in a

¹¹⁶ *G v Television New Zealand Limited* (1999-229/230).

¹¹⁷ *Dunphy v TVNZ*, above n 66.

¹¹⁸ *R v The Radio Network* (1999-031).

¹¹⁹ *Presland v Northland Radio Company Ltd* (1992-069).

¹²⁰ Privacy Principle (i) see Appendix I.

¹²¹ Privacy Principle (ii) see Appendix I.

¹²² Privacy Principles (i) and (ii) see Appendix I.

¹²³ Privacy Principle (iii) see Appendix I.

¹²⁴ Privacy Principle (iii) see Appendix I.

public place is an intentional interference with an individual's privacy.¹²⁵ Electronic eavesdropping on a private business conversation amounted to an offensive intrusion,¹²⁶ and an obscene telephone call broadcast on a radio programme was also held to be an intrusive or objectionable interference with a person's right to privacy.¹²⁷

Another interesting point is that a person does not need to be present in order for their interest in solitude or seclusion to be interfered with. Footage of a woman's home, which had formerly been the home of a senior gang associate with whom the Children and Young Persons Service had placed two juvenile offenders, was an invasion of privacy even though the woman was not present.¹²⁸

In 1996 the Broadcasting Standards Authority extended privacy to include the protection against the disclosure by a broadcaster, without consent, of the name and/or address and/or telephone number of an identifiable person.¹²⁹ This principle does not apply to details which are public information, or to news and current affairs reporting, and is subject to the 'public interest' defence in principle (vi).¹³⁰

These principles are the basis of the Authority's definition of privacy, however they contain many uncertainties. Many terms are introduced but the scope of the meanings are not defined such as private and public facts and highly offensive and objectionable. These concepts are discussed below.

D. Private Facts and Public Facts

1. Public or Private?

Categorising factual information as either public or private facts is not an entirely clear cut procedure. The concept of 'private facts' evades a simple definition. In their first privacy complaint¹³¹ the Broadcasting Standards Authority quoted the Australian

¹²⁵ *Geoff Black v The Radio Network Limited* (1999-003).

¹²⁶ *Leckey v TVNZ*, above n 102.

¹²⁷ *J v 92.2XS (now Radioworks)* (1998-023/024).

¹²⁸ *J & J McDonagh v TVNZ*, above n 59.

¹²⁹ Privacy Principle (v) see Appendix I.

¹³⁰ Privacy Principle (v) see Appendix I.

¹³¹ *McAllister*, above n 23.

Law Reform Commission's report of 1979 which stated that private facts were: "matters relating to the health, private behaviour, home life or personal or family relationships of the individual."¹³² On the other hand public facts are, by exclusive definition, facts that are already in the public arena, as these cannot be private facts.¹³³ Between these clear examples lies a spectrum of shades of privacy and publicity. This is illustrated by Chief Justice Eichelbaum's comment in the High Court:¹³⁴

On any sensible construction the meaning of [private facts] cannot be restricted to facts known to the individual alone. Although information has been made known to others, a degree of privacy, entitled to protection, may remain.

Therefore whether a fact is public or private in nature generally depends on how available that information is in the public arena. In general, information on public record such as criminal convictions¹³⁵ and births, deaths and marriages¹³⁶ are public facts. A person's name, address and telephone number are generally public facts if they are listed in a public directory.¹³⁷

However the Broadcasting Standards Authority has held that in some circumstances disclosure of a person's name, address and telephone number may invade their privacy. In some instances it is because they constitute private facts or because they are protected by law¹³⁸ and in some cases because they are protected by principle (v).

Principle (v) attributes a quality of privacy to an individual's name, address and telephone number. Arguably these details, where they are listed in public telephone directories, are public facts which should not be protected. In fact the Broadcasting Standards Authority has held that a person's name, address and telephone number are

¹³² Australian Law Reform Commission *Unfair Publication: Defamation and Privacy* (Australian Government Publishing Service, Canberra, 1979).

¹³³ *NE & MH Archer (2) v TVNZ*, above n 95; *S v The Radio Network* (1998-020).

¹³⁴ *TV3 v BSA*, above n 37, per Eichelbaum CJ.

¹³⁵ *Monica O'Neill v TV3 Network Services Limited* (1994-093).

¹³⁶ *Dame Thea Muldoon v TV3 Network Services Limited* (1994-112).

¹³⁷ *Dr Ranganui Walker v TVNZ*, above n 101.

¹³⁸ The names of rape victims are suppressed by the Criminal Justice Act 1985, section 139. The provision only applies to reports or accounts 'relating to any proceeding commenced' in respect of the specified offences.

not highly offensive or objectionable facts.¹³⁹ In which case this principle seems to require something more, perhaps that the facts are disclosed in circumstances that would be objectionable to the reasonable person. This was the case when this principle was applied in *Ross Warren v The Radio Network of New Zealand Limited*,¹⁴⁰ the details were disclosed for the express purpose of encouraging a public protest, so the circumstances raised the issue of privacy.¹⁴¹

The factual situation that principle (v) was introduced to address had in fact already arisen in 1990. The second privacy case the Authority ever had to consider was a broadcast by a radio station host of the name, address and telephone number of a prominent spokesperson on issues affecting Maori. Dr Ranganui Walker had commented that theft was a form of income redistribution. The host encouraged listeners to telephone Dr Walker and/or help themselves to his property in the name of redistribution. In that case the Authority held that the broadcaster had infringed the individual's privacy by encouraging others to engage in activities which could, and in fact did, result in an invasion of his privacy. The basis for this argument was that section 4 requires broadcasters to maintain standards which are *consistent with* the privacy of the individual.

It is difficult to see the necessity of this principle as it only serves to ascribe a quality of fairness to the disclosure of the facts which is already addressed or should be addressed under the highly offensive and objectionable limb. Also principle (v) explicitly states that it does not apply to details which are public information. This seems to be a contradiction in terms given that the majority of this information is listed in the telephone directories and is therefore public information.

2. *The Public Arena*

The bounds of the public arena are not clearly defined. If a person has already been named, or information about an individual is publicly available, then that information

¹³⁹ *Paul Carabatakis v Pirate FM* (1994-025).

¹⁴⁰ *Ross Warren v RNZ*, above n 67.

¹⁴¹ *Ross Warren v RNZ*, above n 67.

can be regarded as in the public arena and has therefore lost its quality of privacy.¹⁴² As indicated by Chief Justice Eichelbaum, information that has come into the public arena may not have lost its private character, this is determined by the "nature, scale and timing of previous publications."¹⁴³ In other words if by some misfortune private information has come into the hands of the media this does not automatically transform it into public information which can be broadcast nation-wide. The principle is similar to that already established in the field of breach of confidence where information ceases to be confidential only when it is known to a substantial number of people.¹⁴⁴ Also the media can only publish that which has become public knowledge. If a subsequent publication adds further factual information it will be a breach of confidence.¹⁴⁵

Common-sense is a reasonable guide to the bounds of the public arena, for example any discussion with a reporter, other than one which is 'off the record', can be reproduced or summarised by the reporter, as once it is disclosed to the reporter the facts are no longer private.¹⁴⁶ Also the location of the incident can provide some guidance. Being observed, followed or photographed in a public place is not an intrusion into an individual's privacy, so if the individual is in a public place principle (iii) does not apply,¹⁴⁷ and generally if the filming occurs from a public place the privacy principles will not apply.¹⁴⁸ However if the individual is on private property and is filmed surreptitiously from public property this will be an intrusion in the nature of prying.¹⁴⁹ In one case the Authority stated:¹⁵⁰

Surreptitious filming from a camera hidden in a public place or the use of a telephoto lens while sited in a public place could be considered to amount to prying in some circumstances.

¹⁴² *Maternity Services Consumer Council v TVNZ*, above n 69, *NE & MH Archer (2) v TVNZ*, above n 95; (1997-043/044), *Murray Arnesen v TVNZ*, above n 68; *Steve Alloway v 95BFM* (1997-144/145).

¹⁴³ *TV3 v BSA*, above n 37, per Eichelbaum CJ.

¹⁴⁴ See *Attorney-General v Guardian Newspapers Ltd (No. 2)* [1988] 3 All ER 545, 643. Also see *Media Law*, above n 41 for a general discussion on the doctrine of breach of confidence.

¹⁴⁵ *Attorney-General of the United Kingdom v Wellington Newspapers Ltd* [1988] 1 NZLR 129, 175 per Cooke P.

¹⁴⁶ *Mrs S v TV3*, above n 71.

¹⁴⁷ *Jim Wallace v TV3 Network Services Limited* (1999-068/069/070/071/072/073).

¹⁴⁸ *Graeme Cook v Television New Zealand Limited* (1991-001); *Dr Paul Smedley v TVNZ*, above n 104.

¹⁴⁹ *Mrs S v TV3*, above n 71; *TV3 v BSA*, above n 37.

¹⁵⁰ *Dr Paul Smedley v TVNZ*, above n 104.

The justification for not allowing privacy actions for conduct that occurs in public is that anybody who was there could have seen the conduct and could subsequently describe it. However where such methods as telephoto lenses are utilised it is arguable that what is filmed is not capable of being viewed in public. Filming with a hidden camera is sometimes more akin to fair dealing thus it is appropriate that the additional element of surreptitious filming be required.

3. Public Places

Principles (ii) and (iii) raise the issue of the distinction between private and public places. The Broadcasting Standards Authority has not defined what a 'public place' is, instead it has dealt with the concept on a case by case basis. Overall the Authority has attributed 'public place' a wide meaning including places open to the public.¹⁵¹ The roof of a car-parking building¹⁵² and a night-club with an admission fee¹⁵³ have both been held to be public places. If the filming is of a business address rather than a residential address there is less likelihood that the Authority will find that there has been an intrusion into the person's solitude.¹⁵⁴ Nonetheless a psychologists office¹⁵⁵ and a doctors office¹⁵⁶ have both been held to be private places.

An interview room in a police station is a private place insofar as it is generally not accessible to the public, except with the permission of the police or in the exercise of some other legitimate authority.¹⁵⁷ It is to be distinguished from a public place as contemplated by privacy principle (iii). The process of a police interview is essentially a private matter at the time, notwithstanding that those matters may become matters of public record later.

¹⁵¹ Michael Stace *Privacy - Interpreting the Broadcasting Standards Authority's Decisions* (The Dunmore Press, Palmerston North, 1998) 38.

¹⁵² *RR v TV3*, above n 110.

¹⁵³ *H v Television New Zealand Limited* (1993-177).

¹⁵⁴ *Frank Lane v Television New Zealand Limited* (1992-094).

¹⁵⁵ *Drury & Daisley v TV3 Network Services Limited* (1996-130/131/132).

¹⁵⁶ *Burnell & Others v Television New Zealand Limited* (1999-087/088/089). Also in *William de Hart & Others v TV3 Network Services Limited* (2000-108 - 113) the broadcast of hidden camera footage filmed in Dr Fahey's surgery was an intentional interference with his interest in solitude and seclusion. However the broadcast was held to be in the public interest.

¹⁵⁷ *Aihana Johns v Television New Zealand Limited* (1999-201/202).

4. *Passage of Time*

The Broadcasting Standards Authority has further clouded the issue of distinguishing between public and private facts by extending the definition of privacy to include the disclosure of highly offensive and objectionable public facts that have become private through the passage of time. Exactly when a public fact will have the necessary quality of privacy due to the lapse to time is unclear. An incident which resulted in a conviction for assault was held to have become a private fact as the offence and conviction related to relatively minor matters and had occurred more than six years previously.¹⁵⁸ An allegation of sexual harassment was a private matter after twelve years as it was supposed to have been expunged from the individual's employment file after two years.¹⁵⁹ However the privacy of a complainant who was still serving a two-year suspended sentence was not protected by the passage of time¹⁶⁰ and an eight year old murder conviction was not private.¹⁶¹

This principle does not define at what point in time a person's public past becomes a matter of that person's private life. It appears there are several factors involved: the nature of the public fact or the offence; the length of time that has elapsed; an individual's right to put their past behind them; the public's right to know and the circumstances of the particular case. Public conduct, particularly conduct for which the person is not responsible, does seem to be an area that should be protected. In an American case the filming of a road accident victim, who was disfigured and distressed, was held to be a breach of privacy.¹⁶²

This principle seems to be usurping the role of Parliament. The determination of when a criminal conviction is spent is a matter for Parliament and until such time as Parliament passes legislation such as the United Kingdom's Rehabilitation of Offenders Act 1974, all convictions in New Zealand stand. Thus it is difficult to say how criminal convictions on public record can ever become private again. The case of

¹⁵⁸ *MM v TV3 Network Services Limited* (1999-103/104).

¹⁵⁹ *Drury & Daisley v TV3*, above n 155.

¹⁶⁰ *JD v TV3*, above n 111.

¹⁶¹ *Earlly v Radio Pacific Ltd* (1994-043).

¹⁶² *Leverton v Curtis Pub Co* 97 F Supp 181 (1951). In *Bathurst City Council v Saban* (1985) 2 NSWLR 704 Young J, citing *Leverton*, thought it might be open for an Australian court to give relief where a person was photographed surreptitiously in an embarrassing pose.

Tucker v News Media Ownership Limited gives this principle some weight. In that case, by acknowledging a right to privacy, McGechan J implied that in some circumstances criminal convictions might be private facts. However that case can be distinguished on the ground that the right to freedom of speech was in competition with the right to life, rather than just the right to privacy and although McGechan J reminded himself of the danger of hard cases making bad law perhaps he did not heed his own warning.

In *TV3 v Broadcasting Standards Authority*¹⁶³ a woman was interviewed at her back door regarding her husband's conviction for the incest of their five daughters. Unbeknownst to the woman the interview was filmed from an adjoining landfill and broadcast, insufficiently obscured, together with allegations that she had been aware of the her husband's actions when they occurred twenty years ago. In upholding the complaint Chief Justice Eichelbaum stated:¹⁶⁴

The authority can properly take the view that privacy in this setting should include relief from individuals being harassed with disclosure of past events having no sufficient connection with anything of present public interest.

Principle (ii) purports to allow the protection of public facts in some cases, when in actual fact it is defining when public facts can become private facts, since after a lapse of time information is no longer regarded as being in the public arena. Lapse of time is also an important consideration in the defence of public interest, once a fact is no longer current it is less likely to be in the public interest.

The lack of certainty regarding the extent of the contents of the public arena creates difficulties. The purpose of regulation is to prevent invasions of privacy by providing sufficient guidance to broadcasters. Thus the case by case clarification of the bounds of the public arena does not promote effective maintenance of the standards of broadcasting.

¹⁶³ *TV3 v BSA*, above n 37.

¹⁶⁴ *TV3 v BSA*, above n 37, 724.

E. *Highly Offensive and Objectionable to the Reasonable Person of Ordinary Sensibilities*

1. *Highly Offensive Facts or Disclosure of Facts?*

Privacy is, by nature, subjective. An individual's conception of privacy is inherently personal. It arises from their belief system and from their cultural upbringing. It is influenced by economic, locational, temporal and personal factors.¹⁶⁵ To allow for the variance in people's tolerances to invasions of privacy, the private facts that are disclosed must be highly offensive and objectionable to the reasonable person of ordinary sensibilities. The Broadcasting Standards Authority's ostensible focus is that the facts themselves must be highly offensive and objectionable, the manner of disclosure does not infer this. This reasoning is difficult, as it is generally the fact that the facts have been disclosed that is highly offensive rather than the facts themselves or the method of disclosure. For example a person's name and address can not be described as highly offensive and objectionable facts but the disclosure of these facts could be highly offensive and objectionable. The unwanted and unwarranted disclosure of private information or the circumstances in which a fact is disclosed can easily be described as offensive whilst in general the facts are innocuous and the description of offensiveness is forced.

This paper agrees with Alfred Hill's suggestion that the single principle of the shocking character of the disclosure should be the decisive factor.¹⁶⁶ Under this approach the nature and extent of the publication would be factors in the determination. In the end it may just be a question of semantics, as the Broadcasting Standards Authority, in applying this standard of offensiveness to the reasonable person, has generally taken a holistic approach regarding not only the facts but the disclosure and the circumstances of the disclosure. This can be seen in *Burnell & Others v Television New Zealand Limited* where the Authority stated: "the issue is whether it was highly offensive or objectionable to film this child in these

¹⁶⁵ Katrine Evans *Privacy and Publicity: Restraining Abuses of Power in New Zealand* (Victoria University of Wellington, Wellington, 1999) 17.

¹⁶⁶ P Keeton & W L Prosser, above n 29.

circumstances.”¹⁶⁷ Also to be noted is that the courts in privacy cases have also adopted the phraseology used by the Broadcasting Standards Authority.¹⁶⁸

In *DD v The Radio Network*¹⁶⁹ a man who entered and won a competition, stated that the reason he deserved a holiday was because his wife had left him and their two sons for a nineteen year old who had subsequently ‘dumped’ her. The Authority held that that the details disclosed were highly offensive and objectionable because of their personal nature. However a better analysis would be that the facts were private because of their personal nature and the disclosure was highly offensive and objectionable because it was unbalanced and portrayed her in a negative light. In an earlier case, *Presland v Northland Radio Co Ltd*,¹⁷⁰ a radio announcer, dedicating a song entitled “Let’s Talk about Sex” to two girls with the same unusual name, said “I hope that all you girls do is talk about it, but we know that your mothers don’t just talk about it.” This case demonstrates the difficulty in describing the facts as highly offensive and indeed the Authority’s own words indicated that they felt the disclosure was offensive rather than the fact of the woman’s sexual relationship:¹⁷¹

.. the Authority decided that the broadcast disclosed private facts of no public interest and exposed [the complainant’s] personal life to the public in a way which most people would find objectionable. [The complainant] acknowledged to the Authority that she was a separated woman, who at the time, had been involved in a relationship with a person also known to the announcer who made the comment. In her comments to the Authority [the complainant] has expressed considerable anguish about the disclosure of the private fact and the Authority accepted that disclosure of the relationship was highly offensive to an ordinary person.

The Authority also placed a strong emphasis on the considerable anguish the complainant expressed she had suffered. This appears to be less objective than the reasonable person standard required. Often the standard of the reasonable person is

¹⁶⁷ *Burnell & Others v TVNZ*, above n 156.

¹⁶⁸ See: *Bradley v Wingnut Films Ltd* [1993] 1 NZLR 415; *TV3 v BSA*, above n 37; *P v D*, above n 88.

¹⁶⁹ *DD v The Radio Network*, above n 58.

¹⁷⁰ *Presland v Northland Radio*, above n 119.

¹⁷¹ *Presland v Northland Radio*, above n 119.

glossed over in the Authority's decisions. This raises the concern that it is simply being used to disguise pure judgement calls.

Footage of a child receiving medical treatment after being rescued from a burning building was not highly offensive or objectionable because it was fleeting and served to illustrate an essential point of the news story; also the manner of the reporting was not highly offensive or objectionable.¹⁷² The manner of disclosure was the relevant issue here not the fact that the child was receiving medical treatment or had been the victim of a house fire.

Footage of a child in the throes of a severe behavioural episode was held to be highly offensive and objectionable.¹⁷³ Again the fact of the child's behavioural disorder could not be said to be offensive but in the words of the Authority the "publication of which was capable of being highly offensive or objectionable to the reasonable person."¹⁷⁴

2. *Public Figures*

A possible gloss on the reasonable person standard, that is not clearly elucidated in the privacy principles, is that public figures are expected to be more robust,¹⁷⁵ as they command less privacy than is afforded to other people.¹⁷⁶ It has been stated that:¹⁷⁷

People in public life must accept a higher level of media intrusion because of the power, influence, privilege and financial rewards they seek, exercise and enjoy.

As the Broadcasting Standards Authority often uses public interest to find that a fact is not highly offensive and objectionable it is unclear whether there is a higher standard than that of the reasonable person for public figures or whether the public interest in public figures justifies a higher level of interference. For example in the

¹⁷² *Paul Le Comte v Television New Zealand Limited* (1999-159/160).

¹⁷³ *Burnell & Others v TVNZ*, above n 156.

¹⁷⁴ *Burnell & Others v TVNZ*, above n 156.

¹⁷⁵ *Michael Laws v TV3*, above n 104.

¹⁷⁶ *Dr Ranganui Walker v TVNZ*, above n 101.

¹⁷⁷ Jim Tully "The Public Face of Privacy" in P Ballard (ed) *Power and Responsibility: Broadcasters Striking a Balance* (Broadcasting Standards Authority, Wellington, 1994) 130.

case of *McAllister v Television New Zealand Limited*¹⁷⁸ the Authority held that the public interest in Glen McAllister's death made it impossible to describe the news item as highly offensive or objectionable to the reasonable person.¹⁷⁹

In either case it is difficult to justify why public figures should command less privacy than anybody else. Certainly the public needs to know when a person's private conduct bears upon their ability or suitability to perform their duties. The Broadcasting Standards Authority has held that surreptitious filming of guests arriving at Vogel House, from a site where the broadcaster had permission to be, did not breach the privacy of the individuals filmed due to the political nature of the function.¹⁸⁰ The Authority has also held that seeking a telephone comment from a public person is a legitimate practice.¹⁸¹

The Authority accepts that a single telephone call to most people, but especially to people who hold positions of authority and whose opinion on relevant matters can be expected to be sought, will rarely amount to an invasion of privacy within the terms of s4(1)(c).

However public figures ought to be able to retain a degree of privacy regarding their personal life. Just because one puts one's self in the public arena it cannot be said that a public interest is created in knowing the whole of the person, not just that which the person concerned decides to release to the public.¹⁸² The public interest should only justify the broadcast of important or relevant information not the broadcast of information solely because it is interesting.

By entering the public arena public figures do invite a degree of examination of their personal background and some personal information will as a result become general knowledge. Where this is the case that information will lose any quality of privacy.

¹⁷⁸ *McAllister*, above n 23.

¹⁷⁹ This is illustrative of the Broadcasting Standards Authority's tendency not to strictly apply their principles. A matter should be able to be described as highly offensive before the defence of public interest is considered.

¹⁸⁰ *Sir Roger Douglas, Richard Prebble, David Lange v Television New Zealand* (1991-016/017/018).

¹⁸¹ *Gisborne Boys' High School Board of Trustees v Radio 89FM* (1992-007).

¹⁸² John Burrows "Privacy from a Legal Perspective" in P Ballard (ed) *Power and Responsibility: Broadcasters Striking a Balance* (Broadcasting Standards Authority, Wellington, 1994) 85.

The reasoning behind this is again similar to that in breach of confidence cases. Primarily it is to avoid absurdity as "[t]he law would indeed be an ass if it prohibited access to information in one form even though it was freely available in another."¹⁸³ Further it is argued that publicity negates confidentiality and by analogy publicity negates privacy. As a matter of logic it cannot be said that information is private if it is publicly known. The third argument is based on harm. Once a private fact has been widely publicised further publication cannot add to the harm. This was the case in *Sam Hunt v Radio New Zealand* where it was held that Sam Hunt's address was not a highly offensive fact because it was a well-known piece of general knowledge in Wellington.¹⁸⁴

Another difficulty is the definition of public figures. Politicians and famous people are public figures but the position of those in public roles such as police and ambulance officers is less clear. Footage of a police officer shooting a woman involved in an armed robbery did not breach the officer's privacy as, although he was identifiable, the incident occurred in a public place and the police are accountable for their actions.¹⁸⁵ However the naming of two ambulance officers involved in an incident, but who were in no way responsible for the death in question, was a breach of their privacy.

The case of reluctant debutantes, which was discussed earlier, is also unclear. However instead of creating a separate category for reluctant debutantes, the surrounding circumstances should be a factor in the consideration of whether the disclosure is highly offensive and objectionable.

3. *Fine Factual Distinctions*

The Broadcasting Standards Authority's emphasis on the facts in each case leads to fine distinctions which more closely resemble judgment calls than application of the reasonable person standard. In the case of *George Gray v Television New Zealand Limited*¹⁸⁶ a shot of a senior public servant's home which was reportedly empty

¹⁸³ *Media Law*, above n 41, 163.

¹⁸⁴ *Sam Hunt v Radio New Zealand* (1994-079).

¹⁸⁵ *Stephen P Ihaka v TV3 Network Services Limited* (1997-035).

¹⁸⁶ *George Gray v TVNZ*, above n 95.

because the family was overseas was a breach of privacy. Also in the case of *J & J McDonagh v Television New Zealand Limited*¹⁸⁷ footage of an empty house which had previously been home to gang associates with whom the Childrens and Young Persons Service had placed two juvenile offenders breached the privacy of the current owners. However in *Eleanor Kietzmann v TV3 Network Services Limited*¹⁸⁸ recent pictures of a house central to an eight year old murder inquiry, as it had been a haunt for drug dealers and prostitutes were not inconsistent with the privacy of the current owner. In the first two cases the broadcaster admitted error but in the third case which went directly to the Broadcasting Standards Authority the Authority did not follow the preceding cases, distinguishing on the basis that the photos were obtained from a public place. In *Gray* the location from whence the photos were taken was not at issue, rather the fact that Television New Zealand had erred in disclosing information which was not relevant to the item was the decisive factor. *McDonagh* appears to have been upheld because the footage was obtained by trespass and thus amounted to a trespass whilst the footage of the house in *Kietzmann* was insufficient to amount to prying or intentional interference with solitude.

F. *The Defence of Public Interest*

Principle (vi) establishes public interest as a defence to invasion of privacy and defines public interest as matters of legitimate concern or interest to the public. This defence, in balancing the right to privacy with the right to publicity, underpins the whole privacy-publicity debate. To function adequately in the role of the fourth estate the media need to be assured that where they act in the public interest they will be protected. The Authority has cited an Australian Law Reform Commission Report¹⁸⁹ which stated that genuine public interest, not prurient morbid curiosity, was necessary to justify the publication of sensitive private facts.¹⁹⁰ The Broadcasting Standards Authority considers this principle involves a balancing act as “an individual does not have the inalienable right to be left alone- but neither does the media have the right to intrude unreasonably.”¹⁹¹

¹⁸⁷ *J & J McDonagh v TVNZ*, above n 59.

¹⁸⁸ *Eleanor Kietzmann v TV3 Network Services Limited* (1997-116).

¹⁸⁹ *Gisborne Boys High School Board of Trustees v Radio 89FM*, above n 181.

¹⁹⁰ Australian Law Reform Commission *Privacy – No. 22*, above n 32.

¹⁹¹ *Gisborne Boys High School Board of Trustees v Radio 89FM*, above n 181.

In an appeal of a Broadcasting Standards Authority decision to the High Court, Chief Justice Eichelbaum stated:¹⁹²

Once again it is necessary to draw attention to the distinction between matters properly within the public interest, in the sense of being of legitimate concern to the public, and those which are merely interesting to the public on a human level – between what is interesting to the public and what it is in the public interest to be made known.

Therefore just because remarks may be interesting to the public does not mean that it is in the public interest that they be reported.¹⁹³ It is difficult to exhaustively classify what information is in the public interest. Traditionally exposure of crime, impropriety, corruption or hypocrisy have been held to be in the public interest.

The Broadcasting Standards Authority has held that there is public interest in broadcasting an incident involving the cover-up of the death of a soldier by friendly fire,¹⁹⁴ in the inquiry into and reporting on a public official's execution of his duties¹⁹⁵ and in the nazi activities at the funeral of a man who had shot dead another before killing himself.¹⁹⁶ In the latter case the Authority stated:

News of (at least recent) crimes and those who commit them, of government policy, and of groups within society whose values contrast sharply with traditional norms are, in the Authority's view, matters of genuine public interest or concern. Glen McAllister's funeral and its aftermath were occasions which brought together these various matters.¹⁹⁷

Thus to be in the public interest the information must be current and of concern to the public at large. In the St Paul's Cathedral case there was held to be no public interest in showing a private video depicting Canon Somers-Edgar inebriated at a private

¹⁹² *TV3 v BSA*, above n 37, 733 per Eichelbaum CJ.

¹⁹³ *Geoff Black v The Radio Network Ltd*, above n 125.

¹⁹⁴ *Jill Banbury & J A Curley v TV3 Network Services Limited* (1999-060/061).

¹⁹⁵ *Jim Wallace v TV3*, above n 147.

¹⁹⁶ *McAllister*, above n 23.

¹⁹⁷ *McAllister*, above n 23.

party, among people he believed to be friends, because he was not a public figure, he held no public office and as an employee of the Diocese he could be expected to have a minimal public profile.¹⁹⁸ Broadcasting details of a man, including his name and picture, whom police had identified as a child molester was in the interest of public safety.¹⁹⁹

There is public interest in the work of the police and the variety of situations they confront in the course of their duties, and as a cautionary tale to would-be offenders.²⁰⁰ However the public interest did not warrant the intrusive filming of a child, as the public interest factor could and should have been addressed in other ways.²⁰¹ There is also no public interest in disclosing the paternity of a child on national television.²⁰²

Another factor in the determination of public interest is the amount of time that has lapsed since the matter occurred. Allegations that a mother had known her husband was abusing their daughters and that she had done nothing about it was held not to be a matter of public concern because the events had occurred over twenty years ago.²⁰³

The public interest defence does not extend to elements that are not necessary to the illustration of the particular story.²⁰⁴ For example footage of an intoxicated woman falling on her face when her hands were handcuffed behind her was not in the public interest because the public interest was outweighed by the offensiveness of the sequence, and the sequence was not necessary.²⁰⁵

G. *The Defence of Consent*

Principle (vii) provides that an individual who consents to the invasion of his or her privacy cannot later succeed in a claim for breach of privacy. Also children's

¹⁹⁸ *The Dunedin Diocese & Others v TV3 'Sex, Lies & Videotape'* above n 72.

¹⁹⁹ *NE & MH Archer v TVNZ*, above n 95.

²⁰⁰ *JD v TV3*, above n 111.

²⁰¹ *Burnell & Others v TVNZ*, above n 156.

²⁰² *Commissioner for Children & Others v Television New Zealand Limited* (1999-093 to 101).

²⁰³ *Mrs S v TV3*, above n 71.

²⁰⁴ *G v TVNZ*, above n 116.

²⁰⁵ *Atihana Johns v TVNZ*, above n 157.

vulnerability must be a prime concern to broadcasters. When consent is given by the child, or by a parent or someone in loco parentis, broadcasters shall satisfy themselves that the broadcast is in the best interest of the child.

This principle establishes consent as a defence to the invasion of the privacy of an individual. The consent can be express or implied by the circumstances,²⁰⁶ but must be given by the individual concerned.²⁰⁷ The Authority has implied consent where the complainants had themselves publicised the issues²⁰⁸ and where the individuals filmed did not themselves complain.²⁰⁹ In a 1999 case a couple signed an irrevocable consent to footage of their wedding preparations and ceremony appearing on the television show *Weddings*. However the groom complained when the programme aired footage later in the series announcing that the couple's marriage had failed after only 2 months. It was held that by appearing on the show a public interest in their marriage existed and therefore did not consider whether the privacy waiver extended to the subsequent programme.²¹⁰

In the case of consent to the filming and broadcasting of footage of children "[t]he Authority is of the view that such consent can only be given by the parents or legal guardians of a child, and then only in circumstances where it is in the child's interests to permit filming and subsequent broadcast."²¹¹ Further in a subsequent case the Authority emphasised that broadcasters must recognise that the best interests of a child might not be the same as the best interests of the parents or guardians.²¹² In 1999 as a result of these cases and to clarify the broadcasters responsibilities in relation to the privacy of children the Broadcasting Standards Authority extended this principle.

Thus the Broadcasting Standards Authority's approach to privacy is well established. A broadcast must identify an individual and disclose highly offensive and objectionable facts about that individual or offensively intrude on the solitude or

²⁰⁶ *J R Bowen v Television New Zealand Limited* (1993-123).

²⁰⁷ *Atihana Johns v TVNZ*, above n 157.

²⁰⁸ *J R Bowen v TVNZ*, above n 206; *Pam Sutton v The Radio Network of New Zealand Ltd* (1997-022).

²⁰⁹ *J R Bowen v TVNZ*, above n 206.

²¹⁰ *MT v Television New Zealand Limited* (1999-123).

²¹¹ *Phillip Smits v Television New Zealand Limited* (1998-005/006).

²¹² *Burnell & Others v TVNZ*, above n 156.

seclusion of the individual. However the essential distinction between public and private facts is ill defined and the application of the highly offensive and objectionable standard to the facts creates unusual and difficult reasoning in the decisions.

The defences of consent and public interest are comparatively straightforward although they are not strictly applied as defences, and public interest could benefit from further elaboration. Further complicating the Authority's approach to privacy are the closely related concepts of fairness and reputation.

V. *BORDERING ON PRIVACY: FAIRNESS AND REPUTATION*

The difficulties in applying the privacy principles highlight that privacy is a difficult concept to define. Regarding privacy, John Burrows has cautioned that:²¹³

So fluid are its boundaries that one must resist the temptation to bring within it complaints of other sorts of unfairness and other sorts of abuses of privilege which are not properly intrusions into privacy at all.

However it is submitted that the Broadcasting Standards Authority has not resisted this temptation and has allowed privacy to cross the boundaries of fairness and reputation.

A. *The Overlap Between Privacy and Fairness*

Privacy and fairness are concepts which overlap to a certain degree. This has been acknowledged by the Broadcasting Standards Authority²¹⁴ and the Authority has observed that there are occasions when complaints of privacy are more appropriately dealt with as issues of fairness.²¹⁵ Even in the High Court McGechan J described Mr Tucker as a reluctant debutante and held that "[t]here is some element of unfairness in

²¹³ John Burrows "Privacy from a Legal Perspective" in P Ballard (ed) *Power and Responsibility: Broadcasters Striking a Balance*, above n 182, 88.

²¹⁴ *H v TVNZ*, above n 153.

²¹⁵ *L v Television New Zealand Limited* (1999-238).

holding that inevitable situation against him.”²¹⁶ The potential disclosure may have been unfair, especially given the state of Tucker’s health, but it is questionable whether the publication of criminal convictions on public record was really an invasion of privacy.

Principle (iv) protects against the disclosure of private facts to abuse, denigrate or ridicule personally an identifiable person. This principle is said to be of particular relevance should a broadcaster use the airwaves to deal with a private dispute. However, the existence of a prior relationship between the broadcaster and the named individual is not an essential criterion. This is really an extension of principle (i) to include situations where the individual is dealt with unfairly.

This principle arose from the fact situation in the case of *L v Radio Liberty*²¹⁷ which involved a radio announcer using the airwaves to deal with a private disagreement. The host gave out his ex-girlfriend’s name, address and telephone number and abused, denigrated and ridiculed her. The Broadcasting Standards Authority felt that none of the privacy principles covered the particular fact situation so added principles (iv) and (v).

Principle (v) ascribes a quality of privacy to names, addresses and telephone numbers. As discussed earlier this is also really a matter of fair dealing rather than privacy.²¹⁸

These principles are focussed on very particular fact scenarios which is good from the broadcaster’s perspective in that it provides more clarity. However there is a danger that very specific principles may be inflexible and complaints may not easily fit the mould. This is probably not a problem where, as is the case with the Broadcasting Standards Authority, there are a couple of general principles which cover most situations.

²¹⁶ *Tucker*, above n 22.

²¹⁷ *L v Radio Liberty* (1996-004/005/006).

²¹⁸ See discussion in Part IV under Private and Public Facts, 30.

B. *The Overlap Between Privacy and Reputation*

Principle (iv) has been used to cover situations where a broadcaster has not checked the veracity of the contents of its broadcast and as a result the broadcast has been incorrect²¹⁹ or contained malicious rumours.²²⁰ A broadcaster cannot claim that it did not know the facts were untrue or that a caller to the program was responsible for the statement as the broadcaster is responsible for the contents of all its programmes, even those of a talk-back nature.²²¹

The Broadcasting Standards Authority has held that the veracity of the facts is not relevant to the issue of privacy.²²² However it is strongly arguable that if a statement is false it is not a statement of fact, disclosure of which cannot, therefore, be an invasion of privacy. False statements that lower the plaintiff in the eyes of the right-thinking members of society are a matter of defamation which is outside the jurisdiction of the Broadcasting Standards Authority. Although the Authority can address false statements under the standards of accuracy and good taste.

Although privacy, fairness and reputation are closely aligned it is essential that the Broadcasting Standards Authority is not seen to be extending its jurisdiction. If it appears a complaint for defamation or fairness will be considered by the Broadcasting Standards Authority under the guise of privacy complainants may forum shop.

VI. *TOWARDS A CODE OF BROADCASTING PRACTICE FOR PRIVACY*

The Broadcasting Amendment Act 2000 has given the Authority the power to develop codes of broadcasting practice with respect to privacy. To promote high standards of broadcasting it is submitted that a code should be developed which broadcasters can refer to quickly and use in training. The development of a code would be a good chance to consolidate the Broadcasting Standards Authority's jurisprudence. It would also be an opportunity to regulate some of the more procedural matters that have been

²¹⁹ *BB v Radio Bay of Plenty*, above n 65.

²²⁰ *Mr X v HB Media Group Limited* (1997-161/162).

²²¹ *Mr X v HB Media Group*, above n 220.

²²² *Mr X v HB Media Group*, above n 220.

established to date, such as the ability to infringe privacy by conduct in gathering material.

Such a code should be sufficiently detailed that a full understanding of 'standards consistent with the privacy of the individual' can be gained without reading a single judgment of the Broadcasting Standards Authority. This would ensure new broadcasters and hobby broadcasters could easily comply with the appropriate standards. It would also give complainants a clearer concept of what privacy is, allowing them to more clearly articulate their complaints. The code need not be too legalistic, a degree of flexibility can and needs to be maintained, but within a well-defined structure.

In the second appendix I have developed a draft code of broadcasting practice for privacy. It is not comprehensive but outlines a framework within which greater guidance can be given. Ideally the code would build and expand on the Authority's privacy principles, defining key concepts and even giving illustrative examples from the Authority's decisions. The concept of privacy needs to be more closely defined so that the Broadcasting Standards Authority is not seen to be using it to extend their jurisdiction. The definition and application of the highly offensive and objectionable standard should also be clarified, as should the scope of the public interest defence. Also the privacy of public figures and of children should be clearly enunciated.

The code should also regulate the conduct of broadcasters in gathering and reporting, especially covert reporting and sensitive reporting such as the coverage of funerals. And complainants should be encouraged to complain directly to the broadcaster where it is appropriate. Therefore guidance as to appropriate remedies would be useful, especially as to when and how much compensation is appropriate.

A code would create more certainty for both the broadcasters and complainants. It would facilitate both the making of complaints and the resolving of complaints.

VII. CONCLUSION PRIVACY PRINCIPLES

The Broadcasting Standards Authority began with no guidance from the legislature as to what privacy should encompass and has now developed a workable definition and accumulated a wealth of knowledge in the area of privacy. The Broadcasting Standards Authority achieves a high level of accessibility for complainants. As was seen in Part III the Authority is more cost effective, faster and less adversarial than the court system. The procedure is less formal and does not require representation. The Authority also has a far greater ability to liaise with broadcasters. All of which encourages complaints.

However the Authority's privacy principles and their application raise some issues of clarity, definition and scope. Although privacy is a difficult concept to define it is possible to create a clear and comprehensive framework to regulate the broadcasting industry.

To further promote the maintenance of 'standards consistent with the privacy of the individual' it is submitted that the Broadcasting Standards Authority should further clarify and develop their privacy principles and ideally work together with broadcasters towards a code of broadcasting practice for privacy, giving greater guidance and responsibility to the broadcasters.

APPENDIX I - THE PRIVACY PRINCIPLES

Principle (i) - Private Facts

The protection of privacy includes legal protection against the public disclosure of private facts where the facts disclosed are highly offensive and objectionable to a reasonable person of ordinary sensibilities.

Principle (ii) - Public Facts

The protection of privacy also protects against 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 the reasonable person.

Principle (iii) - Intrusion

There is a separate ground for a complaint, in addition to the complaint for the public disclosure of private and public facts, in factual situations involving the intentional interference (in the nature of prying) with an individual's interest in solitude or seclusion. The intrusion must be offensive to the ordinary person but an individual's interest in solitude or seclusion does not provide the basis for a privacy action for an individual to complain about being observed or followed or photographed in a public place.

Principle (iv) - Abuse, Denigration and Ridicule

The protection of privacy also protects against the disclosure of private facts to abuse, denigrate or ridicule personally an identifiable person. This principle is of particular relevance should a broadcaster use the airwaves to deal with a private dispute. However, the existence of a prior relationship between the broadcaster and the named individual is not an essential criterion.

Principle (v) – Identifiable Person

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 person. This principle does not apply to details which are public information, or to news and current affairs reporting, and is subject to the 'public interest' defence in principle (vi).

Principle (vi) – Public Interest

Discussing the matter in "the public interest", defined as of legitimate concern or interest to the public, is a defence to an individual's claim for privacy.

Principle (vii) – Consent and Children

An individual who consents to the invasion of his or her privacy, cannot later succeed in a claim for breach of privacy. Children's vulnerability must be a prime concern to broadcasters. When consent is given by the child, or by a parent or someone in loco parentis, broadcasters shall satisfy themselves that the broadcast is in the best interest of the child.

APPENDIX II – DRAFT CODE

INTRODUCTION

Where a broadcast identifies an individual, broadcasters must ensure that the programme and its presentation are consistent with the privacy of that individual, unless the individual consented to the broadcast or the broadcast was in the public interest.

1 GENERAL

- 1.1 An individual's privacy cannot be protected to such an extent as to override the legitimate interests of other members of society.
- 1.2 An individual's right to privacy must be balanced with the right to freedom of expression in section 14 of the New Zealand Bill of Rights 1990.
- 1.3 An individual does not include groups, incorporated bodies or the deceased. A public figure is an individual, and is entitled to a right of privacy.
- 1.2 An individual's privacy does not extend to their conduct in public places.
- 1.3 A public place is any place that is accessible to the public irrespective of whether there is an admission charge.
- 1.4 The Broadcasting Standards Authority's jurisdiction is limited to material in or related to an actual broadcast.
- 1.5 Unaffected complainants, individuals other than the person whose privacy was breached, are entitled to complain.
- 1.6 Individuals are encouraged to complain in the first instance to the broadcaster concerned. However complainants do have the right to lay privacy complaints directly with the Broadcasting Standards Authority.
- 1.7 Complaints of fair dealing, balance, accuracy, good taste and decency are not covered by this code. Complainants should refer to the radio and television codes in regard to these standards.
- 1.8 This code is not exhaustive and it may well require elaboration and refinement over time. The specific facts of each complaint are especially important when privacy is an issue.

2 IDENTIFICATION

2.2 A broadcast identifies an individual where

- 1) The individual is named in the broadcast **and/or**
- 2) A picture or sound bite of the individual is broadcast **and**
- 3) The name, picture or sound bite is sufficient to enable friends, neighbours or acquaintances of the individual to identify the individual. The voice, clothing, characteristics, deportment or the surrounding circumstances may identify an individual. Techniques such as pixellation and electronic masking are not always sufficient to conceal an individual's identity.

3 CONSISTENT WITH THE PRIVACY OF THE INDIVIDUAL

A broadcast is not consistent with the privacy of an individual where it discloses private facts or where the broadcast intentionally interferes with an individual's interest in solitude or seclusion. The disclosure or the intrusion must be highly offensive and objectionable to the reasonable person of ordinary sensibilities.

3.1 **The broadcast discloses private facts and that disclosure is highly offensive and objectionable to the reasonable person of ordinary sensibilities.**

3.1.1 PRIVATE FACTS

- 1) Private facts include matters relating to the health, private behaviour, home life, family relationships, and personal relationships of the individual.
- 2) Private facts are facts known only to the individual or a small number of people.
- 3) Facts that are easily accessible on public records are not private facts.
- 4) Some public facts can become private over time. Broadcasters must exercise care with information that is no longer current and respect the ability of individual's to put their pasts behind them.

3.1.2 HIGHLY OFFENSIVE AND OBJECTIONABLE

Whether the disclosure is highly offensive and objectionable to the reasonable person of ordinary sensibilities will depend on:

- 1) The relevance and necessity of the disclosure.

- 2) The manner of the disclosure.
- 3) The circumstances surrounding the disclosure.

3.1.3 **REASONABLE PERSON OF ORDINARY SENSIBILITIES**

The reasonable person of ordinary sensibilities is an objective standard. Broadcasters are not required to uphold standards consistent with the most sensitive members of society.

3.2 **The broadcast intentionally interferes (in the nature of prying) with an individual's interest in solitude or seclusion. The intrusion must be highly offensive and objectionable to the reasonable person of ordinary sensibilities.**

3.2.1 **INTENTIONAL INTERFERENCE WITH AN INDIVIDUAL'S INTEREST IN SOLITUDE OR SECLUSION**

This concept encompasses conduct such as:

- 1) Surreptitious recording:
 - use of hidden or planted sound recorders or cameras,
 - cameras with telephoto lenses,
 - eavesdropping.
- 2) Sensitive reporting such as funeral coverage
- 3) Unethical conduct in obtaining material for broadcast. (Note that the Authority can only examine such conduct where it relates to a specific broadcast).

3.2.3 **HIGHLY OFFENSIVE AND OBJECTIONABLE**

Whether the intrusion is highly offensive and objectionable to the reasonable person of ordinary sensibilities will depend on:

- 1) The relevance and necessity of the intrusion.
- 2) The manner of the intrusion.
- 3) The circumstances surrounding the intrusion.

3.2.4 **REASONABLE PERSON OF ORDINARY SENSIBILITIES**

See 3.1.3 above.

4 DEFENCES TO A BREACH OF THE STANDARDS CONSISTENT WITH THE PRIVACY OF THE INDIVIDUAL

If a broadcast is consented to or the broadcast is in the public interest then it is a justified breach of the standards.

4.1 CONSENT

- 4.1.1 An individual who consents to the invasion of his or her privacy, cannot later succeed in a claim for breach of privacy.
- 4.1.2 Consent must be obtained from the individual concerned unless the individual lacks the capacity to consent for themselves.
- 4.1.3 When consent is given by a child, or consent is obtained from a parent or someone in loco parentis on behalf of a child, broadcasters shall satisfy themselves that the broadcast is in the best interest of the child.

4.2 PUBLIC INTEREST

- 4.2.1 Discussing the matter in the public interest is a defence to an individual's claim for privacy.
- 4.2.2 However the means of obtaining the information must be proportionate to the matter under investigation.
- 4.2.3 A matter is in the public interest if it is of legitimate concern or interest to the public. This includes the exposure of crime or disreputable behaviour, protecting public health or safety, exposing misleading claims made by individuals or organisations, disclosing significant incompetence in public office.

5 REMEDIES

- 5.1 Where a broadcaster has infringed the privacy of an individual the broadcaster, where appropriate, should:
 - 1) Apologise to the individual concerned in writing;
 - 2) Take appropriate steps to prevent further breaches and/or to prevent similar breaches occurring in the future;

5.2 Where the infringement of privacy has caused harm or distress to the complainant the broadcaster or the Authority may award compensation, not exceeding \$5,000, to the individual concerned. In determining the amount of compensation the following factors should be taken into account:

- 1) The extent of the infringement and any consequences of the infringement;
- 2) Other action taken by the broadcaster;
- 3) The personal harm caused by the infringement.

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