PRIVACY

Interpreting the Broadcasting Standards Authority's Decisions

January 1990 to June 1998

Michael Stace

PRIVACY

INTERPRETING THE BROADCASTING STANDARDS AUTHORITY'S DECISIONS

January 1990 – June 1998

PRIVACY

INTERPRETING THE BROADCASTING STANDARDS AUTHORITY'S DECISIONS

January 1990 – June 1998

Michael Stace

dP

The Dunmore Press Ltd

First Published in 1998
by
The Dunmore Press Ltd
P.O. Box 5115
Palmerston North
New Zealand

Australian Supplier:
Federation Press
P.O. Box 45
Annandale 2038 NSW
Australia
Ph: (02) 552-2200
Fax: (02) 552-1681

ISBN 0 86469 333 8

Text:	Times New Roman 10/12
Printer:	The Dunmore Printing Company Ltd, Palmerston North

Contents

Acknowledgements

This review encapsulates the hours and hours of discussion and debate that the Members of the Broadcasting Standards Authority have devoted over the years to the interpretation and application of the injunction contained in section 4(1)(c) of the Broadcasting Act 1989. This provision requires broadcasters to maintain in all their programmes standards which are consistent with "the privacy of the individual".

The initial members of the Authority on its establishment in 1989 were Iain Gallaway (Chairperson), Joycelyn Fish, Jan Hardie and Joanne Morris.

These Members, and in particular Joanne Morris, were responsible for drafting decision Nos: 5/90 and 6/90. These determinations laid down a solid and, with hindsight, an enduring foundation for the development of the Authority's Privacy Principles.

The following chairpersons, Judith (now Justice) Potter and Sam Maling, have led the Authority in the application and refinement of the Principles. Members Lindsey Dawson, Rosemary Barraclough, Lyndsay Loates, Bill Fraser, Rosemary McLeod, Allan Martin and Joan Withers have all contributed thoughtfully to the development of the Principles.

I am also indebted to a number of the Authority's staff who have worked with complaints over the years or have helped in putting this review together. Thank you Phillipa Ballard, Felicity Steel, Di Berry, Wiebe Zwaga, Deborah Houston and Madeline Palmer. I hope that you, the reader, will find this review contains a little of the challenges and excitement experienced by the Authority as it has examined and determined privacy complaints since 1990.

The review records some 80 decisions by the Authority on privacy complaints. Decisions since January 1996 are available on the Authority's web site, which can be found at http://www.bsa.govt.nz

Michael Stace

Foreword

Privacy is a concept which has increasingly become a focus of attention in the 1990s, both in New Zealand and throughout much of the world. And that seems set to continue as technology moves us with seemingly whirlwind pace into the 21st century.

So perhaps the legislators of 1989 acted with remarkable prescience when they enacted in the Broadcasting Act of that year, a requirement for broadcasters to maintain in programmes and their presentation, standards which are consistent with the privacy of the individual.

For the Broadcasting Standards Authority this has meant developing precedents and guidelines to assist broadcasters in applying the concept in a practical way. And it has involved the Authority, from the beginning, in weighing competing concepts: on the one hand, freedom of expression and the public's right to know and, on the other, the right of the individual to privacy.

The debate continues and is often referred to by complainants and broadcasters in complaints submitted to the Authority. The principles which the Authority has adopted in dealing with these issues continue to require review and refinement through decisions. As many broadcasters will appreciate, the issues are not always easily resolved and not infrequently arise out of complex factual situations.

This review records the Authority's rulings on complaints alleging breach of privacy by broadcasters.

Privacy complaints are challenging for the Authority. The following pages explain the Authority's response to this challenge.

Sam Maling
Chairperson
Broadcasting Standards Authority

Introduction

The Broadcasting Act 1989

The Broadcasting Standards Authority was established as an independent body by the Broadcasting Act 1989. The Governor-General, on the recommendation of the Minister of Communications, appoints the four Members of the Authority. Its chairperson is required to be a barrister or solicitor, one member is appointed after consultation with the broadcasters, and another after consultation with appropriate public interest groups. The Authority now has seven functions. They are:

i) To receive and determine formal complaints;
ii) To approve codes of broadcasting practice developed by broadcasters;
iii) To develop and issue codes if broadcasters' codes are inadequate;
iv) To issue advisory opinions on broadcasting standards and ethical conduct;
v) To publicise the complaints procedures and decisions;
vi) To encourage broadcasters to consult with interested parties on codes; and
vii) To conduct research on broadcasting standards matters.

As its title makes clear, the Authority focuses on broadcasting standards. Programme standards are addressed in section 4 of the Act. It sets out four standards which *all* broadcasters in New Zealand must ensure that *all* programmes comply with.

Section 4(1) requires broadcasters to maintain standards which are consistent with:

(a) The observance of good taste and decency; and
(b) The maintenance of law and order; and
(c) The privacy of the individual; and
(d) The principle that when controversial issues of public importance are discussed, reasonable efforts are made, or reasonable opportunities are given, to present significant points of view either in the same programme or in other programmes within the period of current interest.

Section 4(1)(e) permits the Authority to approve codes of broadcasting practice.

The Authority has a limited role in regard to complaints about advertisements. It deals with complaints about promotions for forthcoming programmes and, in the lead-up to an election, with complaints about party political and parliamentary candidate advertising on radio and television.

Most of the Authority's work is concerned with complaints. The complaints procedure is set out in the Act. It details the process whereby formal complaints must initially be made first to broadcasters within 20 working days of the programme going to air. Where there is dissatisfaction with the decision of the broadcaster on the complaint or the action taken, the complainant can refer the complaint to the Authority, which will then determine the complaint. Complainants must be told of this right of referral when the broadcaster responds to the formal complaint. When the Authority upholds a complaint, it can apply sanctions which range from ordering an on-air statement of correction or apology to removing all broadcasting or advertising from the air for up to 24 hours. It can also award costs to the Crown of up to $5,000. The Authority's decisions can be appealed to the High Court.

The complaints referred to the Authority are classified in the following categories: good taste and decency; balance, fairness and accuracy; privacy; alcohol promotion; violence; sexism; and racism.

This review discusses the requirement for privacy, and the first point to note is that although all broadcasters must at all times comply with s.4(1)(c), the Act does not provide a definition of the phrase "the privacy of the individual".

The Act acknowledges that the privacy standard differs from the other standards in the Act or in the approved codes by providing three distinct processes which apply only to complaints which allege a breach of s.4(1)(c). The three differences are:

i) Privacy complaints may be made directly to the Authority. All other complaints must be made to the broadcaster and may be referred to the Authority only after the broadcaster has ruled on the complaint and when the complainant is dissatisfied with the broadcaster's decision.

ii) When a privacy complaint is upheld, the Authority may award compensation to the complainant up to a maximum of $5,000. There is no other type of complaint on which the Authority can impose an order for compensation.

iii) The legislation does not allow the Authority to develop a Code of Broadcasting Practice relating to privacy. Privacy is not referred to in s.21 of the Act which lists the issues about which codes of practice may be developed. Consequently, the Privacy Principles which have been developed by the Authority, and which are used as guidelines when it determines privacy complaints, are issued by way of an Advisory Opinion.

While this paper explores the Authority's interpretation of s.4(1)(c), a standard dealing with privacy is also contained in the Radio Code of Broadcasting Practice. However, this provision does not assist the Authority with interpretation as it states simply that radio broadcasters, in the words of what is now standard R11, are required:

R11 To respect the privacy of the individual.

Format of this Review

This review is divided chronologically. The first chapter, "In the Beginning", records the Authority's approach to privacy complaints in 1990. The second chapter looks at the period beginning 1991 and concludes with the release of the Authority's Advisory Opinion (dated 25 June 1992) which promulgated the Privacy Principles which had been developed by the Authority at that time. The Advisory Opinion advised that the Authority intended to apply these principles to complaints which alleged a breach of privacy. The Advisory Opinion was sent to all broadcasters. The period June 1992–December 1993 is covered in the third chapter and reports the application of the Privacy Principles to specific complaints.

The Authority's decision No 1/94 was appealed to the High Court (*TV3 v BSA* [1995] 2 NZLR 720). The decision and the High Court's judgment are the focus of the fourth chapter. The period January 1994 – July 1994 is examined in the fifth chapter, which concludes with the release of two Advisory Opinions which addressed an anomaly identified with privacy complaints. It advised broadcasters of a procedural change which the Authority intended to implement.

The sixth chapter covers the period September 1994 – March 1996. It includes a discussion of some decisions released in early 1996. The concern expressed in these complaints resulted in the revision of the Privacy Principles, and this was formalised in an Advisory Opinion dated 6 May 1996. This Opinion remedied specific shortcomings of the Privacy Principles in dealing with some kinds of complaints which involved an allegation of a breach of an individual's privacy,

Chapter seven looks at privacy decisions issued between March and December 1996, and the interpretation of the expanded Privacy Principles, while the eighth chapter deals with decisions on privacy complaints in 1997. Over the past year or so, there has been a substantial increase in both the number and proportion of complaints referring in some way to privacy and the ninth chapter reviews the decisions released between January 1998 – June 1998. This is the final period covered in this review.

The final chapter draws some conclusions about the Authority's approach to privacy complaints since 1990, and raises matters which may well need to be addressed when it is decided that the Privacy Principles need further revision.

Chapter 1

In the Beginning: Developing an Approach to Privacy Complaints – 1990

(i) An allegation that a broadcast breached the privacy of an individual and thus contravened the standard set out in s.4(1)(c) of the Broadcasting Act 1989 was the issue addressed by the Authority in the fifth decision that it issued (5/90, 3.5.90). The approach developed and explained in some detail in that decision continues to provide the basis for the Authority's subsequent approach to privacy complaints.

The complaint arose from a television news item which showed the funeral of a young man who had committed suicide immediately after shooting dead a worker with the local council. The murder evoked considerable public interest as it involved the apparently motiveless killing of the son of a well-known former cricketer by one of a group of skinheads. The complainant was the mother of the young man who had been charged with the murder and had subsequently committed suicide. Filming for the item occurred, she complained, despite a request that it not take place, and as a result, she said, the television crew's presence had denied family members the opportunity to mourn in private.

The broadcaster, Television New Zealand Ltd (TVNZ), advised that when it had arrived to televise the funeral, it had been asked to leave the cemetery. It had done so and the film crew moved to a public road adjacent to the cemetery, and filmed from that position. After the service, TVNZ added, the deceased's brother had spoken to the TVNZ reporter and had invited the crew to the grave to examine the Nazi paraphernalia which were on display.

The privacy complaint considered by the Authority focused on the footage of the funeral contained in the item. The Authority began by outlining the legislative history of s.4(1)(c), and pointed to a similar provision in the Broadcasting Act 1976 (ss.24(1)(g) and 95(1)(g)). It also looked at the issue of privacy as used in everyday

language, but because Authority decisions are appealable as of right to the High Court, it believed that it was necessary to explore how privacy had been approached as a legal concept. It concluded on this point:

> Unfortunately, a precise legal view of the matter is not readily ascertained: the development of a clear legal concept of privacy is in its early stages in New Zealand, as it is in many other countries.

Nevertheless, as the issue of privacy had been dealt with in a range of forums, the Authority reported that it had undertaken what it described as a "detailed approach" to the concept of privacy.

In the decision, the Authority began by highlighting the conflict between the individual's right to privacy and the public's right to know, observing:

> The clearest principle to emerge from the sources, as well as from common sense, is that an individual's privacy cannot be protected by law to such an extent as to override the legitimate interests of other members of society. In the context of the present complain – against a broadcaster – the complainant's interest in privacy is in competition with the public's "right to know" about events of interest to it. If both interests are to coexist, neither can be given its fullest meaning: 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.

This issue – the competing interests in the individual's right to privacy versus the public's right to know – remains at the core of the Authority's subsequent determination of complaints which allege a breach of s.4(1)(c).

In its examination as to how this conflict has been addressed legally, the Authority looked to the relevant New Zealand case law, principally *Tucker* v *News Media Ownership* [1986] 2 NZLR 716, and to the American notions of privacy which Justice McGechan had invoked in that case.

In its review of the *Tucker* decision, the Authority reported that McGechan J had expressed his support for the introduction into the New Zealand common law of a tort covering, at least, invasion of personal privacy by the public disclosure of private facts. In *Tucker* the facts disclosed were of the plaintiff's previous criminal convictions – facts which were a matter of public record. The occasion which prompted the media to disclose those facts were the plaintiff's public appeal for money to fund heart surgery which he was advised he needed, and for which he had to travel to Australia. Despite the "public concern" about the plaintiff's criminal record in the circumstances, McGechan J clearly was not convinced that the plaintiff would be debarred from relief in any privacy action that might be recognised in New Zealand. The judge stated (at 735):

> It may well be that a person looses a right to privacy by presenting himself to the public eye for evaluation. This concept is well recognised in American privacy law and is not unknown to our own law in the somewhat cognate field of breach of confidence. ... In this case Mr Tucker undoubtedly did put himself and his character forward to the public when appealing for funds through the media. By doing that he invited some degree of examination of his personal background and "worth" in the eyes of persons considering requests for assistance. However, on the facts of this case I do not place undue weight on this qualification to privacy. Mr Tucker was a reluctant debutante as far public exposure was concerned. It gave him no pleasure, and was forced upon him by a desperate need for funds for what then was perceived to be a lifesaving operation. There is some element of unfairness in holding that inevitable situation against him.

In developing a process to deal with complaints which alleged a breach of s.4(1)(c), the Authority relied on the text *Prosser and Keeton on Torts* (fifth edn) which outlined the approach to privacy in the United States. The text reported that, in the United States, the invasion of privacy was said to comprise a number of distinct torts. Two were noted:

> The first tort is described as protecting against the public disclosure of *private* facts but it is generally agreed that it will also protect against the public disclosure of *public* facts provided, in both cases, that the facts disclosed would be "highly offensive and objectionable to a reasonable person of ordinary sensibilities".

The second tort was described in the following way:

> This is said to consist of intentional interference with another's interest in solitude or seclusion, either as to his person or to his private affairs or concerns.

Contending that the American jurisprudence was appropriate to use given the nascent state of a New Zealand legal approach to the concept of privacy, the Authority began its decision on the specific complaint in the following way:

> In the Authority's view, the protection afforded to an individual's privacy by s.4(1)(c) of the Broadcasting Act 1989 includes protection against disclosure of private or public facts where, to adopt the phraseology of the American tort, the matter disclosed would be highly offensive and objectionable to the reasonable person of ordinary sensibilities.

It continued:

> Whether a disclosure meets that criterion of offensiveness, etc. will depend on the circumstances of each case: the protection of privacy cannot be absolute. Therefore, in an inquiry into a complaint that s.4(1)(c) has been infringed, any competing claim of "public interest" in the facts disclosed, as well as any other

> relevant matter of defence (e.g. consent of the individual whose privacy is alleged to have been infringed) will need to be examined.

The Authority decided that the funeral service was a public fact and was conducted in a public place: a cemetery. Furthermore, it was conducted in the view of another public place: a street. Moreover, even if the family's privacy had been infringed, the Authority wrote:

> While it is unfortunate for those members of the deceased's family who did not want publicity given to the funeral, the Authority is of the view that the public interest in the matters which surrounded [the deceased's] death makes it impossible to describe the 6 October 1989 Network News item as highly offensive and objectionable to a reasonable person of ordinary sensibilities.

Nevertheless, the Authority recognised that the New Zealand law could well take a stricter view than that in the United States of the circumstances when public facts could justifiably be disclosed. This view emanated from McGechan J's opinion in *Tucker* that the privacy of a "reluctant debutante" is entitled to more protection than someone who seeks media attention.

The Authority also pointed out that the American tort of "unreasonable intrusion" required some activity "in the nature of prying". It cited *Prosser and Keeton*:

> ..."on the public street or in any other public place, the plaintiff has no legal right to be let alone". Thus, it is not an unreasonable intrusion to photograph a person in a public place "since this amounts to nothing more than making a record, not differing essentially from a full written description, of a public sight which anyone would be free to see."

The Authority concluded:

> The Authority has already expressed its view that the funeral service in the cemetery and the behaviour of skinheads afterwards, were public facts. On that basis, if the American tort is taken as indicative of the protection conferred by s.4(1)(c) against the broadcaster's conduct in obtaining material for broadcast, the complainant's privacy complaint would fail. Even if the facts were private, however, it is the Authority's view that, again, the conduct of the film crew was not such as would be offensive and objectionable to the reasonable person of ordinary sensibilities. This is because the filming of the actual funeral service took place from a street some considerable distance from the cemetery and the filming of the skinheads' behaviour afterwards was done at the invitation of the deceased's brother. Therefore, by applying notions of privacy consistent with those prevailing in the United States, the complaint about the film crew's obtaining of material must also fail.

This decision has been canvassed in some detail. The Authority was required to explore the protection given by s.4(1)(c) of the Act, and it acknowledged from the outset that there was a conflict between this section and the freedom broadly described as the freedom of expression. The principles developed in this decision remain the

principles the Authority continues to apply in complaints which allege a breach of privacy.

(ii) The Authority's next decision (6/90, 6.6.90) also dealt with a complaint that a broadcast had breached an individual's privacy. The complainant, a well-known commentator on racial issues, had been reported as observing that theft was a form of income redistribution. In response, two breakfast show hosts on a radio station had given the commentator's name, address and telephone number, and had invited listeners to telephone him and/or go around to his house and, in the name of redistribution, help themselves to his property. The commentator advised the Authority that he had not heard the remarks, but they had been reported to him. On receipt of the complaint, the Authority noted in its decision, the executive chair of the radio station had visited the commentator to apologise.

In its decision, the Authority said that there were three relevant facts to take into account:

> (a) the fact that [the complainant's] home address and telephone number are published in the telephone directory;
> (b) the fact that comments encouraging listeners to use that information were broadcast in conjunction with it;
> (c) the fact that [the complainant] is a prominent spokesperson on issues affecting Maori.

With regard to point (a), the Authority ruled that the address and telephone number were public facts. Nevertheless, citing No: 5/90, the Authority wrote:

> The Authority is of the view that the broadcast of public facts can infringe an individual's privacy – where the facts broadcast would be highly offensive and objectionable to a reasonable person of ordinary sensibilities (see Decision No: 5/90). It does not believe, however, that the mere broadcast of the information about an individual which can be found in a telephone directory meets the criterion of being "highly offensive", etc.

Moving on to point (b), the Authority accepted that the hosts, at least implicitly, had encouraged listeners to call at the commentator's home and steal his property. While it was acknowledged that the hosts' intentions were meant to be flippant, the Authority considered the issue to be too serious to be dismissed as being merely "tongue in cheek".

Then, on point (c), the Authority noted that the commentator was a public figure and "a prominent spokesperson on issues affecting Maori" who, the Authority accepted, had received numerous obscene and abusive calls in the weeks following the breakfast show hosts' comments.

The Authority drew the following conclusions. First, it considered that the conduct encouraged by the announcers would, if unlawful taking of property occurred, invade the commentator's privacy. Moreover, persistent and unwanted phone calls would, in

non-legal terms, be seen as an invasion of privacy. However, whether it amounted to invasion of privacy in legal terms could be a separate matter, especially as it was accepted that public figures may command less privacy than is afforded other people. After discussing this matter, the Authority decided that the hosts could have reasonably foreseen that their remarks could produce a campaign of calls – in other words, it accepted a causal relationship.

The Authority then asked:

> The second question to be determined is whether it is in itself an infringement of an individual's privacy to broadcast statements encouraging listeners to act in a manner that would infringe the individual's privacy.

It provided the following answer:

> The Authority is in no doubt that [the hosts'] conduct in their programme of 26 September 1989 was unethical – it was an abuse of power of the media. Moreover, in light of the above discussion, it is the Authority's view that the broadcast of the [hosts'] statements did infringe the complainant's privacy. Thus, in the Authority's view, [the broadcaster] infringed [the complainant's] privacy by broadcasting the [hosts'] statements encouraging listeners to telephone [the complainant] because that encouragement could be reasonably foreseen to cause a campaign of calls to his home and in fact that result ensued.

Finally, the Authority referred to the wording of s.4(1)(c) and, emphasising the requirement to maintain standards *consistent with* the privacy of an individual, concluded:

> From the emphasised words in s.4(1)(c), the Authority infers that the provision may be breached by the broadcast of material which does not itself infringe an individual's privacy. Therefore, even if the Authority were of the view that the broadcast of [the hosts'] statements did not infringe [the complainant's] privacy, still it would be satisfied that s.4(1)(c) of the Broadcasting Act had been breached by that broadcast. This is because the broadcast statements encouraged listeners to act in a manner which would infringe [the complainant's] privacy and, in the Authority's view, a broadcaster's encouragement of that conduct cannot be "consistent with" the privacy of [the complainant].

The Authority upheld the privacy complaint and awarded compensation of $500 to the complainant to be paid by the broadcaster.

(iii) The third complaint in 1990 which dealt with privacy (30/90, 14.12.90) involved an aid organisation which declined to participate in a television documentary examining the organisation. The organisation's co-ordinator, who was away while the programme was being made, advised the broadcaster that the group had made a decision not to be represented on the programme. Nonetheless, in a visit which it described as a final attempt to gain comment, the broadcaster called at the co-ordinator's home and spoke to the co-ordinator's flatmate. The item included a brief shot of the house and a glimpse of the reporter knocking at the front door.

The Authority decided in determining the balance aspect of the complaint that the broadcaster's efforts to elicit a response from the agency were reasonable, and that the footage of the house did not amount to a breach of privacy.

Summary

From the outset, complaints which allege a breach of an individual's privacy have involved the Authority reconciling the competing interests of the individual's right to privacy and the right to a freedom of expression. Determination of the early and many subsequent complaints has required the resolution of this conflict in specific factual situations.

In this process, the Authority has adopted the reasonable person approach, for example, when the Authority adopted the position that s.4(1)(c) included protection against the disclosure of private or public facts only when the matter disclosed was "highly offensive and objectionable" to the reasonable person of ordinary sensibilities. The crucial importance of the facts in each specific case has also been highlighted in the early decisions.

Moreover, from its earliest decisions the Authority has intimated that it will take a different approach to privacy when dealing with a person who courts publicity in some way, than when dealing with the "reluctant debutante".

The Authority has also accepted that a person's privacy can be infringed if the broadcast involves unreasonable intrusion in the nature of prying. A person in a public place – including a cemetery – however, cannot complain that being photographed there amounts to unreasonable intrusion.

The type of information and the range of places which are "public" are issues which recur regularly in later cases. At this stage, the decisions have recorded that it is the circumstances under which the public information is disclosed which will be relevant when deciding whether s.4(1)(c) has been transgressed.

It has been intimated as well that conduct which is journalistically unethical may be relevant to the decision as to whether an individual's privacy is infringed in the particular instance. In one complaint dealt with – the reference to the commentator – the Authority accepted that while the broadcast in itself might not involve a breach of privacy, a breach occurred if the broadcast encouraged others to commit acts which could be interpreted as contravening an individual's privacy. The Authority reached that conclusion by referring to s.4(1)(c) which requires broadcasters to maintain standards "consistent with...the privacy of the individual".

Chapter 2

Towards the Authority's Advisory Opinion on Privacy: Dealing with the Concept of Privacy in 1991 and Early 1992

(i) *Fair Go*, a television programme which examines consumer concerns, investigated a building company which went into liquidation leaving a new house uncompleted. Meanwhile, the owner of the building company had established a new company. *Fair Go* showed the home of the owner of the liquidated building company, together with an expensive car parked in the driveway, as a contrast to the plight of the buyers of the new but only partly completed home. The company owner complained (1/91, 27.2.91) that the item had breached his privacy by disclosing personal information. The Authority wrote:

> The information disclosed about [the owner] falls clearly and unambiguously into the category of "public facts", in as much as the make, model and year of his vehicle, and the price, street number and location of his house are all matters of public record. In addition, the shots of his house and its number were filmed from a public place.

Referring to No: 5/90, the Authority stated that public disclosure of public facts amounted to a breach only when such disclosure was highly offensive. That was not the current situation and the complaint was not upheld.

(ii) "For the Public Good", a *Frontline* current affairs investigation broadcast by TVNZ, is known within the annals of the Authority as the only occasion when, after a complaint has been upheld, a severe penalty has been imposed. In this instance, the broadcaster was ordered not to broadcast advertising for a period of six hours. The decision which produced the ruling (27/90, 14.12.90) arose from complaints from The Treasury and the Business Roundtable. There were, in addition, a number of complaints about the broadcast from politicians. The decisions on aspects of these complaints – from three former Cabinet ministers are contained in Nos: 16, 17 and 18/91, dated 29. 4.91.

One of the political complainants alleged, among other matters, that the filming from an office block across the road of people arriving at, and inside, the Prime Ministerial residence during the evening, amounted to a breach of their privacy. The breach was compounded, it was claimed, by the fact that in order to gain access, the broadcaster had lied to the occupants of the office block about the reasons why filming was necessary (allegedly traffic flows). In response, TVNZ argued that privacy was not an issue, as the home (Vogel House) was used only for public or semi-public events. The political nature of the dinner party filmed, it added, meant that it was a matter of public interest.

The Authority referred back to its first decision dealing with privacy (5/90) which, it said, gave rise to the following principles:

> – an individual's privacy cannot be protected by law to such an extent as to override the legitimate interests of other members of society;
>
> – in striking a balance between the interests of individual privacy and the public's right to know, s.4(1)(c) protects against the public disclosure of private facts (and perhaps public facts) provided that the facts disclosed would be highly offensive or objectionable to a person of ordinary sensibilities; and
>
> – in striking a balance between individual privacy and the public's right to know, s.4(1)(c) protects an individual against unreasonable intrusion, i.e. the intentional interference with another's interest in solitude or seclusion. This could include intrusion into a person's home either physically or by the use of microphones or other listening devices. The intrusion would have to be of a prying nature, be offensive and occur in a private place.

Having regard to the specific facts – first, that the guests were not identified on arrival although some were identifiable through the window; secondly, that filming took place from a site where the broadcaster had permission to be; and thirdly, that no sound was recorded, the complaint from the former Cabinet minister which raised this issue was not upheld.

(iii) A *Fair Go* programme was complained about in No: 33/91 (23.7.91) when, among other matters, a property developer's home was shown. It was said to have a valuation of half a million dollars but, it was added, it was not in the developer's name. In balancing the individual's privacy with the public's right to know, the Authority noted that the valuation information was publicly available, and that it was neither offensive nor objectionable. The privacy aspect was not upheld.

(iv) Being named and described on a television documentary as a "spiteful little girl", when she was at school 35 years previously, evoked a complaint from a woman who, although now married and using her married name, still lived in the same district. She complained that the broadcast was an invasion of her privacy, and unfair to her (52/91, 18.11.91).

In view of the difficulty of ascertaining the correct facts of the events which gave rise to the comment, the Authority declined to determine the privacy complaint. Nevertheless, a majority of the Authority decided that although the matter was not a major one, it had been unfair to refer to the complainant by her name when she was a child, and upheld that aspect of the complaint.

(v) The variety of factual situations which can give rise to a privacy complaint was apparent in No: 7/92 (2.3.92). Because of the alleged unruly activities of some local college students when visiting a nearby university, which was reported in the print media, a local radio station sought comment from the principal and a senior teacher at the college. While both teachers knew they were talking to a reporter, neither was told that the conversations were being taped for possible broadcast.

Lengthy extracts from the ruling in decision No: 5/90, discussing the concept of privacy, were included in this decision and, in addition, the Australian Law Reform Commission Report No: 22 on Privacy (1983) was cited to the effect that genuine public interest, not prurient morbid curiosity, was necessary to justify the publication of sensitive private facts (ALRC 11, Volume 1, p.126). The Authority commented:

> From the foregoing discussion, the Authority accepts that an individual does not have the inalienable right to be left alone – but neither does the media have the right to intrude unreasonably. In any particular situation, the question of whether a broadcaster's alleged intrusion is inconsistent with the privacy of an individual will involve an assessment of the specific facts.

In its decision, the Authority noted:

> 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 s.4(1)(c).

Accordingly, it accepted that the radio station's calls to the teachers were legitimate. Turning to the specific facts, the Authority expressed the opinion that broadcasting the senior teacher's call without permission, while unethical, was not highly offensive or objectionable. It considered that the questions posed in the call to the principal were also unethical, but because he responded professionally, and in a non-committal way with regard to the behaviour of a particular pupil, it was neither offensive nor objectionable.

(vi) The complexity of the facts in No: 19/92 (14.3.92) provided the impetus to the Authority to issue an Advisory Opinion to outline the Privacy Principles which it had developed and which it intended to apply when determining complaints which alleged a breach of s.4(1)(c). The factual summary for that decision recorded:

> In September 1991, while driving home from work, [the complainant] had a disagreement with another driver about driving behaviour. The other motorist pursued him for some 30 minutes. It involved him driving through a red light

> and stopping in his neighbour's driveway. [The complainant] described it as a harrowing experience after which he was worried for his family's and own safety for some weeks.
>
> On Monday 18 November, [the complainant] received a phone call from a woman claiming to be the wife of the other driver who said her "husband" was on the way to visit [the complainant] to take revenge. The woman revealed certain information about [the complainant] during the call but she concluded by describing the phone call as a "candid call". A recording of the telephone call was broadcast in Auckland on 89FM at about 7.00 am on 19 and 21 November.
>
> Because of the information about him disclosed during the broadcast, [the complainant] complained directly to the Authority under s.8(1)(c) of the Broadcasting Act 1989 that the broadcaster had failed to meet standards consistent with the privacy of the individual. He also complained to the broadcaster, alleging several breaches of the Radio Code of Broadcasting Practice.

In its decision the Authority listed the five Privacy Principles it had developed from legal precedents in the United States, which it now applied when determining privacy complaints under the Broadcasting Act. It then listed some of the facts disclosed by the broadcast, which included the complainant's name, the type of car he drove and its registration number, the complainant's employer, and the complainant's neighbour's address.

While not arguing that the public interest defence was applicable, the broadcaster said that the complainant, as a listener to the station, could be assumed to have consented. The Authority did not agree. The Authority next considered whether the matters disclosed were public facts and decided that they all were, except the complainant's name. He had been driving a company car (and thus was not the registered owner) and, on the morning after the incident some two months previously, he had asked the receptionist specifically not to disclose his name to any caller. The Authority continued:

> Having established that the broadcast disclosed the complainant's name, a fact which was not otherwise in the public arena, the Authority then considered whether its disclosure was both highly offensive and objectionable to a reasonable person of ordinary sensibilities.
>
> The answer to this question is always largely dependent on the facts of each complaint. In this case, taking into account the events which were broadcast and the shock and fear evident in [the complainant's] voice when he answered the candid call, the Authority concluded that the "practical joke" on this occasion involved more than having fun at someone's unwitting expense. Having disclosed otherwise private information, i.e. the scenario, and having referred, to use [the complainant's] word, to "unfinished business" which, because of his concerns, he had sought strenuously to keep private, the Authority decided that the facts disclosed were both highly offensive and objectionable.

The Authority upheld the complaint and, in view of the broadcaster's irresponsible action, ordered the broadcaster to pay compensation of $1,000 to the complainant.

(vii) The principles enumerated in this decision were reiterated in an Advisory Opinion (dated 25.6.92) distributed to all broadcasters. It provided the following background:

> Under s.4(1)(c) of the Broadcasting Act 1989, each broadcaster is responsible for maintaining in its programmes and their presentation, standards which are consistent with the privacy of the individual. In a number of decisions the Authority has developed its approach to the question of privacy as a broadcasting standard. The Authority, under s.21(1)(d) of the Act, may issue to broadcasters "advisory opinions relating to broadcasting standards and ethical conduct in broadcasting".
>
> By way of introduction to this Advisory Opinion, the Authority wants to stress that although it records five relevant Privacy Principles:
>
> – These principles are not necessarily the only privacy principles that the Authority will apply;
>
> – The principles may well require elaboration and refinement when applied to a complaint;
>
> – The specific facts of each complaint are especially important when privacy is an issue.

It then introduced and recorded the Privacy Principles the Authority intended to apply in future complaints:

> Although the right to be left alone is a common-sense definition of privacy, as the Authority's decisions may be appealed to the High Court it is necessary for the Authority to follow what it considers to be appropriate legal precedents. Because of the paucity of reported cases and the lack of a clear legal definition of privacy in New Zealand, the Authority has relied upon precedents from the United States in developing the following five principles which have been applied to privacy complaints so far by the Authority when determining them under the Broadcasting Act 1989.
>
> i) 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.
>
> ii) 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.

iii) There is a separate ground for a complaint, in addition to a 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.

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

v) An individual who consents to the invasion of his or her privacy, cannot later succeed in a claim for breach of privacy.

Summary

There are aspects of the decision about the privacy complaint regarding *Frontline's* "For the Public Good" to which the Authority may well now give greater emphasis having examined the concept of privacy in considerable detail over the years. In particular, this observation refers to the tone of the item. During the broadcast, well-dressed but anonymous people were seen to arrive at night at the Prime Minister's official residence, and were then principally seen as shapes, without sound, through curtained windows. These matters, on reflection, it could be said, contributed to a sinister atmosphere sustained by a combination of unusual sound and visual effects present throughout the programme.

While tone is a matter which is often of great importance in a broadcast, the Authority is not suggesting that tone, in itself, would amount to a breach of privacy. Indeed, it is usually the case, as in the broadcast of "For the Public Good", that tone is a matter to be evaluated when considering the fairness or balance aspects of the complaint. Nevertheless, it may be an ingredient for the Authority, as are possibly questions of ethics, when determining a privacy complaint.

One decision (7/92) recorded that a broadcaster's efforts to contravene the privacy standard by asking for personal information were frustrated by the interviewee, who declined to give the information sought. The broadcaster – in a relatively small town – apparently intended to broadcast the personal information sought because of the perceived public curiosity in the incident. The public interest aspect had been met by the coverage elsewhere. The complainant confined the complaint to one of privacy. Consequently, the Authority did not have before it either the issue of standards, or the issue which arises when a radio broadcaster does not advise an interviewee that the conversation is being taped for broadcast. Whereas the latter aspect would probably have been upheld on the facts, the former matter involves the overlap between ethics and broadcasting standards. This is an issue which continues to challenge the Authority.

Despite the narrow focus of this decision, the Authority accepted in this complaint that an approach by telephone to a newsmaker, or someone in authority, did not in itself amount to an invasion of privacy.

The range of facts which are already apparent in privacy complaints gave rise to the Authority's strong emphasis on the importance of the facts in each case. The variety of facts also illustrates the difficulties for the Authority in applying the Privacy Principles.

Nevertheless, despite the complexity of the complaints which alleged a breach of s.4(1)(c), and despite the lack of legal precedent in New Zealand when the concept of privacy had been explored, by mid-1992 the Authority considered that it had acquired sufficient experience to justify formulating, and publishing, its American-based guidelines as the Principles on which it relied when determining privacy complaints.

Chapter 3

Applying the Privacy Principles: Privacy Complaints from Mid 1992 until the End of 1993

This period can be regarded as a time of consolidation. The Privacy Principles were clearly in the public arena, and broadcasters had been advised of the approach that the Authority would take when it dealt with a complaint that a broadcast allegedly breached s.4(1)(c) of the Broadcasting Act 1989. In this and the following chapters, the Authority's decisions will be summarised briefly unless they deal with, or expand on, a point not previously assessed.

(i) A radio station's announcer's comments were the focus in No: 69/92 (28.9.92). In referring to a dedication request for the song "Lets Talk about Sex" made by two girls with the same unusual name, the announcer said, "I hope that all you girls do is talk about it, but we know that your mothers don't just talk about it".

In response to the complaint from one of the mothers, the station suspended the staff member from announcing duties for four weeks.

In view of the unusual names of the daughters which were broadcast, the Authority considered that sufficient information was disclosed to enable listeners in the locality who knew the family circumstances to identify the mothers. Referring to principle (i), the Authority concluded:

> Applying the principle outlined above to the complaint, 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 public disclosure of the private fact and the Authority accepted that disclosure of the relationship was highly offensive to an ordinary person.

Having upheld the complaint, and while acknowledging the broadcaster's action in suspending the announcer and apologising to the complainant, the Authority nevertheless ordered the broadcaster to pay compensation of $750.

(ii) An investigation into alleged computer piracy by TVNZ's *Holmes* show gave rise to two privacy complaints. It was also the first time the Authority assessed a complaint about a programme which had involved the use of a hidden camera. The summary states that the item (94/92, 7.12.92):

> ... recorded with the use of a hidden camera and microphone, portrayed the purchase by a reporter of a software programme from [a named person] who was described as a computer pirate. The item also showed that later in the day the reporter and a cameraman visited [this person]. They were accompanied by a Mr R[...], a representative from a computer company which imported the programme purchased earlier. [The pirate] invited the reporter inside and the broadcast then showed that a scuffle took place between [the pirate] and Mr R[...] in the doorway.

It was also recorded that the alleged pirate complained as well to the police about the behaviour of his visitors, and that the reporter, the cameraman, and Mr R were charged with trespass. Mr R took the diversion path (an implicit guilty plea), and after a defended hearing, the two TVNZ staff members were convicted of trespass and each given a suspended sentence. Trespass had occurred, the Court ruled, when the three men returned to the alleged pirate's home and, after being warned, refused to leave.

The complaint raised a number of broadcasting standards, and it was also claimed that the alleged pirate's privacy was contravened when the trio visited him with the intention of confronting him. As the programme did not disclose offensive private facts, principle (i) was not deemed relevant. Turning to principle (iii), the Authority noted that the address visited was both the home and business address of the alleged pirate, and thus could not be considered an intrusion into his solitude. It concluded that there was no breach of the pirate's privacy.

The Authority then dealt with the standards issues raised. It was not required by the complaint to address the use of the hidden camera but, under the balance complaint, dealt with door-stepping. It wrote:

> The item complained about made use of the "walk-in" technique with a camera rolling. While potentially most effective in confronting an alleged wrongdoer, the process makes use of the television broadcaster's implicit potential to dominate and, perhaps, intimidate. It was a technique which, for reasons not totally in TVNZ's control, proved to be ineffective on this occasion in providing a satisfactory opportunity for [the alleged pirate] to respond to the item's allegations. Despite its failure as a means of obtaining [his] unguarded response other than to portray his participation in a struggle for which he might or might not have been responsible, TVNZ decided to show part of the confrontation which, in the Authority's opinion, emphasised the visual

> entertainment aspects although it did provide some information on the attitudes of those involved. While acknowledging that the walk-in technique is an acceptable technique for the appropriate occasion, the Authority believes that its use when serious allegations are made carries with it a special responsibility to ensure the accused person is given a reasonable opportunity to present his or her point of view.

Because the alleged pirate was not given an adequate opportunity to respond to the allegations of piracy, the standards complaint was upheld because the item was considered unbalanced. In view of the request from complainant's counsel, on this occasion TVNZ was ordered to contribute about one quarter ($1,250) of the alleged pirate's legal expenses.

(iii) The other complaint about the same item (95/92, 7.12.92) came from an apparently disinterested viewer. Again a number of standards were raised and it was alleged the man's privacy was breached when confronted with the unannounced visit to his home by three men, one with a camera rolling. Because no offensive private facts were disclosed, and because the visit to the man's business could not be regarded as interference in the nature of prying, the privacy complaint was not upheld.

(iv) The first decision dealing with privacy issued in 1993 (27–28/93, 18.3.93) was upheld and the broadcaster was ordered to pay compensation of $2,500.

The news item reported that a woman, after being certified dead, was found alive in the hospital morgue. However, 17 hours later, she had died. The item included visuals of the funeral service, and of the coffin being loaded on to the hearse. These visuals carried the graphic "amateur video".

In response to a complaint from the deceased's son, the broadcaster, TVNZ, accepted that the broadcast, by showing the funeral service and broadcasting the deceased's name, amounted to an unwarranted invasion of the family's privacy.

The Authority agreed that the portrayal of the funeral service was intrusive and breached principle (iii), and that it was also offensive and insensitive. The Authority did not contest TVNZ's ruling that disclosure of the name amounted to a breach of privacy, although it noted it had been included in a newspaper's death column. In deciding whether to impose an order, the Authority wrote:

> Taking into account that the circumstances in this complaint were the most insensitive that it has encountered in about four years, the Authority believed that a significant amount of compensation was appropriate. The circumstances are, first, the blatant intrusion of privacy involved in filming the funeral service; secondly, the unnecessary broadcast, both verbally and visually, of the deceased's name and the unfair intrusion thus occasioned for both the family and the deceased; and thirdly, that the broadcast of a statement of correction could only, on this occasion, exacerbate the family's grief.

Compensation from the broadcaster to the woman's family of $2,500 was ordered.

(v) Having been divorced for ten years from a woman who later developed an addiction to drugs, and having established a totally independent lifestyle, the former husband complained when a news item, which referred to some unusual circumstances of the woman's death, included their wedding photograph.

As the marriage was a public fact and although the public disclosure was now embarrassing, the Authority did not accept that the visual of the wedding photograph would have been offensive to an ordinary member of the public in contravention of principles (i) or (ii).

Moreover, it considered, under principle (iii), the intrusion was not offensive and, in addition, the story revealed facts of legitimate public interest, which, the Authority considered, affirmed its ruling on principle (iii) (44/93, 19.4.93).

(vi) The issue of privacy did not come before the Authority for some months, during which time some 60 complaints referring to other standards were released.

It arose again (108-109-110/93, 2.9.93) when the Society for the Protection of the Unborn Child (SPUC) and some of its members complained about a comment from a gynaecologist and obstetrician during a current affairs item, when he remarked that he had terminated the pregnancies of the children of presidents of SPUC.

The broadcaster, in response to the privacy aspect, maintained that it was not possible to talk about the privacy of an individual because there were a number of past and present national and regional presidents of SPUC.

As s.4(1)(c) speaks about the privacy of the individual, the Authority accepted that as the comment referred to one of a reasonably large number of people who had not been sufficiently identified, a breach had not occurred.

(vii) Two weeks later, the Authority issued its decision (121/93, 16.9.93) on a complaint from some listeners that the manager of a radio station in a small town had breached the privacy of a named announcer when on air he had said that the announcer's actions had caused the station to falter and that his future with the station was "shaky".

With hindsight, the manager regretted the comment. It had been made, he said, to deal with some staff conflict which, with the rumours being spread, was damaging the station's goodwill.

The Authority applied principle (i) and decided that the matters disclosed were private facts. However, while their public disclosure could be regarded as somewhat offensive, the Authority did not accept that they were "highly" offensive, and thus it did not uphold the complaint.

(viii) Privacy was at the core of a decision issued soon afterwards (123/93, 29.9.93). Television coverage of a Police Armed Offenders Squad action (in which the person holding hostages was shot and killed) was the subject of the complaint. A viewer with

no apparent connection to the Squad complained that some of the Squad members were readily identifiable in the item.

The broadcaster, TVNZ, pointed out that there was no complaint from the police, and the Authority noted that the complainant's efforts to seek police support were unsuccessful. Moreover, members of the Squad had been readily identifiable in a subsequent documentary about the Squad. In these circumstances, the Authority ruled that the Squad members had consented to their identification in terms of principle (v).

(ix) One of the complaints the Authority received in its early days (March 1990) argued that the use of a hidden microphone breached the privacy of the individual whose comments were secretly recorded. The complaint was not determined for nearly three years, until the trials dealing with the activities disclosed were concluded (138/93, 29.10.93). The individual was acquitted on all charges.

The broadcaster had deliberately used a "plant" to speak to the complainant about his business activities. Although the activities disclosed were the subject of criminal action, the complainant was subsequently acquitted. Consequently, the Authority began from the principle that a person is innocent until proven guilty.

The decision reviewed the approach adopted by the Authority to complaints which allege a breach of privacy and recorded in full the principles which it applied. It then applied the principles to the current facts, which were:

> ... that the item broadcast a conversation which one person, unaware that the other had arranged for the recording, believed was a private discussion about a business matter.

Without hesitation, the Authority ruled that the electronic eavesdropping on a private business conversation amounted to an offensive intrusion as under principle (iii). It was required to consider whether the public interest defence in principle (iv) applied in this case.

The Authority accepted that the matter discussed was of important public interest given the proposed changes to the laws governing the type of business the man was involved with. The item also included an interview in which he denied using questionable practices. The Authority acknowledged that the method used – a hidden microphone – was indispensable in this instance in disclosing his involvement in such practices.

The broadcaster had argued that disclosing anti-social behaviour was sufficient justification for the method used, and on this point the Authority commented:

> The Authority then focused on the other aspect of TVNZ's argument that the use of technique was in the public interest because it disclosed an activity, event or behaviour which was criminal or widely recognised as being anti-social. As noted above, in view of the District Court decisions, the Authority

> accepted that the behaviour disclosed by the surreptitious recording was not criminal. Nevertheless, in view of the continuing widespread interest in immigration, the Authority readily accepted that the behaviour disclosed would definitely be widely regarded as anti-social.

The Authority continued:

> Consequently, the Authority concluded, the defence encapsulated in privacy principle (iv) justified the broadcast of an item which breached privacy principle (iii).

(x) The final two decisions issued in 1993 both raised matters of privacy. The Authority did not release the complainants' names in either decision, describing them respectively as "R" and "H".

The Police complained on behalf of R. She was one of two rape victims who gave evidence at a trial after which nine gang members were found guilty of sexual offences. The complaint alleged that the news item which reported the sentencing included a shot of R entering the Court in which she was clearly identifiable.

There was no dispute about the facts other than whether R's identity was revealed. On this point, the Authority remarked:

> Because of the camera angle of the shot, the Authority accepted, for the most part, TVNZ's submission that viewers generally would not have been able to identify her. At no time was Complainant R's entire face portrayed but her profile was clear during the broadcast and her walk, hairstyle and general deportment would have made her identifiable to acquaintances.
>
> TVNZ acknowledged that Complainant R would have been recognised, "perhaps", by her "closest acquaintances". On the basis of viewing the nine second sequence of the event at normal speed during which both women were seen, the Authority concluded that this summary was unduly restrictive. It considered that Complainant R would have been recognised by people – close to her or not – who had had a considerable amount of interaction with her. That would apply not only to family and close friends, but acquaintances at work or in the community or participants in the same leisure interests.

In view of this conclusion, the Authority accepted that the disclosure was highly offensive and ordered compensation of $2,500 (176/93, 21.12.93).

(xi) The final decision issued in 1993 (177/93, 21.12.93) contained the following summary about a documentary to which the complaint related:

> It followed the fortunes of a woman who invested her late husband's insurance policy in an all-male strip revue. The programme included extracts from some of the troupe's performances, which included its interactions with members of the audience.

> Ms H complained to Television New Zealand Ltd that, as a member of an audience, she was shown on stage at a nightclub during part of a performance screened during the item. She had been embarrassed and humiliated by the portrayal and, as she had not been aware of the filming, she had not been treated fairly and her privacy had been invaded.

Acknowledging the overlap between privacy and the requirement to deal with people fairly, the Authority first dealt with the privacy issue. The filming, it said, had occurred in a nightclub which was open to the public on payment of an admission fee and was, on that basis, a public place.

The Authority did not accept that principles (i) or (ii) had been infringed as H's attendance at the nightclub did not amount to an offensive point of fact. As for principle (iii), the Authority accepted that H and her friends, while realising that some filming took place, were not aware that a documentary was being filmed that evening.

It continued:

> These conclusions do not allow a straightforward answer as to whether or not principle (iii) was breached. The principle is aimed to deal with the situation where filming is undertaken surreptitiously with the intention to deceive the person being filmed. Filming did not take place in that manner on this occasion and there is no evidence that the film makers intended to deceive the people who were filmed. Nevertheless, the Authority acknowledges that the use of video cameras for private purposes (e.g. weddings and funerals) is increasing steadily. The appearance of cameras at many occasions is assumed to be for private purposes. However, although the use of filming equipment by a television company might be accompanied by a number of people and the use of logos for advertising purposes, the presence of a film crew or the display of logos is not necessary and, indeed, might not be acceptable or practical in some locations.

Privacy principle (iii) is breached when the broadcast involves the disclosure of public or private facts by the intentional interference (in the nature of prying) with a person's interest in seclusion. Ms H undoubtedly, did not wish to be shown in the documentary screened by TVNZ. However, taking into account the factual conclusions it had reached about the circumstances relating to the filming, the Authority was hesitant to conclude that the interference had been in the nature of prying. That hesitancy was confirmed when the Authority considered the next part of the principle. It begins:

> The intrusion must be offensive to the ordinary person ... .
>
> Although the intrusion which occurred at the [...] nightclub might well have been unwelcome and, because the fact and purpose of the filming was not plain, the absence of identification of the camera person allowed incorrect assumptions to be drawn by those who were aware of the filming, the Authority was not prepared to conclude that filming a person's attendance at a nightclub

> without an explicit announcement of the purpose for which filming was taking place, amounted to intentional interference with a person's privacy.

In regard to the fairness standard, the Authority stated succinctly:

> The Authority agreed with TVNZ that, on this occasion, the concerns raised by the complainant were encompassed by its conclusions about the privacy aspect of the complaint.

Summary

The first step for the Authority in a privacy complaint is to decide whether the identity of a specific individual has been revealed. A group of people cannot allege that their identity is revealed unless the facts are sufficient to focus on one person.

At the other end of the spectrum, the identity does not need to be revealed in such a way that the person is recognisable by all and sundry. Even if the facts do not include the name, particulars given by the broadcaster (combined with visuals in the case of television), will be considered sufficient for the purposes of identification if they enable the person to be recognised by more than immediate family.

Further, it has been emphasised repeatedly that disclosure of facts by themselves does not amount to an invasion of privacy. The facts disclosed must, in addition, always be offensive to the ordinary person. That standard applies even when the disclosure comes as a result of intrusion in the nature of prying.

Having established that the broadcast disclosed facts which are offensive to the ordinary person, the defences of consent and public interest remain.

The public interest defence has not been explored in any depth in the decisions to date. At a general level, it is accepted that it is applicable if the facts disclosed amount to criminal behaviour, and could well apply when the facts amount to anti-social behaviour.

The overlap between an invasion of privacy and dealing fairly has been acknowledged. While door-stepping is considered to raise a matter of fairness rather than privacy, the interaction between the concepts of privacy and fairness has been left open.

The Authority has not been required to define what is a "public place" for the purposes of principle (iii). Nevertheless, it has to date adopted a fairly wide definition to include places which are open to the public. Without dealing with the issue directly, it could be argued that the decisions have accepted that the filming of a private place from a public place complies with the exemption contained in principle (iii).

The complaint determined in No: 19/92, the decision in which the Authority fully formulated its Privacy Principles, focused on the comments made by announcers on a radio station. In the Authority's experience, radio broadcasters, seemingly because of the extent of their interactivity with listeners, broadcast material to which objection is taken on the grounds of privacy more often than their television counterparts.

Chapter 4

The Privacy Principles in the High Court: S – TV3 (1/94, 19.1.94)

The Authority's determination (1/94, 19.1.94) of a complaint arising from a *20/20* programme broadcast on 11 July 1993 was appealed to the High Court by TV3 – the broadcaster. The Chief Justice's decision (*TV3 v BSA* [1995] 2 NZLR 720) clarified the Authority's approach to the interpretation of s.4(1)(c). In view of the pivotal nature of the High Court's decision, the Authority's decision and the court judgment are covered in some detail below. Until this decision, the Authority had not received any authoritative legal guidance on the applicability of an approach sourced from the United States.

(i) The Authority's Decision

The summary of the decision recorded:

> "Hear No Evil – Speak No Evil" was the title of an item on incest broadcast by TV3's *20/20* programme between 7.30 and 8.30pm on Sunday 11 July 1993. The programme interviewed three daughters (whose identity was partly-disguised) of a man sentenced to prison for incest with his five daughters. The item also included an interview with the offender's partly-disguised former wife, the mother of the victims, in which she denied she had been aware of her former husband's actions.
>
> Mrs S, the mother, complained directly to the Broadcasting Standards Authority under s.8(1)(c) of the Broadcasting Act 1989 that the broadcast contravened the privacy standard as she had been unaware that her conversation with TV3's reporter was being either taped or filmed.
>
> In response, TV3 Network Services Ltd stated that Mrs S had been filmed from an adjoining landfill which it described as public property. Maintaining that the mother's name had been changed, that a photograph of her house had

> been altered, and that during the interview her face was obscured, TV3 declined to uphold the complaint.

The Authority upheld the complaint and awarded $750 compensation to Mrs S. It reached its decision on the following facts:

> Mrs S spoke to a TV3 reporter while standing by her back door. She knew the person was a reporter but did not know that the conversation was being recorded and filmed. Her own experience as an incest victim was raised by the reporter but Mrs S strongly denied that she knew of her former husband's actions towards their daughters. She brusquely terminated the conversation with the reporter, who left the property when ordered to do so.
>
> On the basis that Mrs S knew that she was speaking to a reporter, the Authority did not accept that the report of the conversation itself invaded her privacy. The Authority accepted that any discussion with a reporter, other than one which is "off the record", can be reproduced or summarised by the reporter.

In addition:

> There is one other factual matter which the Authority believed to be relevant to its decision on this specific complaint. That matter is the reports in the newspapers of the father's trial in February last year and an interview with the eldest daughter reported in a New Zealand weekly magazine in April. Those reports gave the father's correct name when reporting that he had been sentenced to 12 years imprisonment for offences first reported to the police by the eldest daughter in 1969. The magazine article also gave the eldest daughter's married name and recorded the first names of some of her sisters. It included an undated photograph of Mrs S with her husband as well as reporting that Mrs S had been an incest victim and the daughter's belief that her mother had protected her husband during some police inquiries in the 1970s. The *20/20* item covered much of the same ground that the magazine had already traversed.

The Authority considered the disclosure of Mrs S's experience as an incest victim was a highly offensive fact in terms of the Privacy Principles. With regard to principles (i) and (ii), it decided that although Mrs S's face was pixilated, she would have been recognised by friends and acquaintances, given her deportment and distinctive voice. The Authority did not accept that the magazine article had made the information public.

As for principle (iii), the Authority believed that the surreptitious filming amounted to intrusion in the nature of prying, and had disclosed a highly sensitive matter. The Authority added:

> Moreover, as Mrs S was in her own back yard while the surreptitious filming was occurring, the exceptions in the standard about being observed, followed or photographed in a public place did not apply. TV3 argued that the landfill, from which the filming took place, was a public place. However, the exceptions

> to principle (iii) arise when the person being observed, followed or photographed is in a public place not merely, as TV3's argument assumed, when the observer, follower or photographer is in a public place.

Although TV3 did not raise the public interest defence, the Authority assessed the surreptitious filming on this basis, but declined to accept it as a justification for it. The Authority decided on this point:

> Because of the very sad and shocking story the item related, the Authority could understand why TV3 wanted to interview Mrs S. However, the Authority did not believe that the item moved beyond the "human interest" level to become a "legitimate concern to the public" as required for the principle (iv) defence to apply. Accordingly, it concluded, as the broadcast involved the intentional intrusion in the nature of prying into an individual's interest in seclusion, it breached the s.4(1)(c) requirement that broadcasters respect the privacy of an individual.

(ii) The High Court Decision

The judgment from Chief Justice Eichelbaum notes that TV3, during the appeal, challenged not only the Authority's decision, but also the Privacy Principles which were applied. It is recorded:

> Essentially the first branch of the appellant's argument was an attack on the Authority's adoption of USA caselaw. As noted the Authority went to this source because of the perceived paucity of reported cases and absence of a clear definition of privacy in New Zealand. At the time of issue of the Advisory Opinion, so far as I am aware the only New Zealand reported cases on the topic were the judgments of McGechan J in *Tucker* v *News Media Ownership Ltd* [1986] 2 NZLR 716 and Neazor J in *Bradley* v *Wingnut Films Ltd* (1992) 24 IPR 205. I am sure the Authority's reference to the absence of clear definition was not intended as criticism of the terms of those judgments, the point being rather that by contrast with North America, in New Zealand this field of law was still in its infancy and the scope of any tort of privacy and the principles applicable had not yet been fully developed.

TV3's argument that "privacy" in s.4(1)(c) should be read as a reference to the principles of the New Zealand law of privacy was rejected for three reasons. The judgment on this point included the observation:

> The protection afforded to the individual under s.4(1)(c) is an important one. It would downgrade the role of the Authority in establishing and maintaining that protection if the meaning of "privacy" were to be interpreted in the way the appellant argues.

TV3 accepted that privacy principle (i) had been recognised in New Zealand courts. It disputed the basis for principle (ii). However, the judgment recorded that principle (ii) was implicitly accepted on the *Tucker* case. The judge added:

> I do not need to emphasise that what is presently under consideration is not whether publication of such facts can constitute a tort, but whether it is one fit basis for the imposition of a standard by the Authority, charged as it is with maintaining standards consistent with the privacy of the individual. 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. True that precise definition might be difficult if not impossible but the introductory remarks made by the Authority in its Advisory Opinion recognised that the principles were not set in stone and would require consideration in the light of particular sets of facts. Reflecting the arguments advanced, I have spent a little time on considerations arising out of *Tucker's* case but they do not go to the heart of the issues in this appeal.

In regard to principle (iii), TV3 argued that prying was a matter of trespass rather than privacy. Eichelbaum CJ responded:

> I do not see this as a reason for excluding such situations from those where complaints regarding breach of privacy may be brought under s.4(1)(c). Complainants may have a choice of remedies. Again, 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 caselaw as a foundation for its own guidelines on the topic.

Having accepted that the Privacy Principles which the Authority had adopted were acceptable guidelines for the purposes of s.4(1)(c), the judgment then dealt with the specific findings which TV3 challenged.

The finding that Mrs S could be recognised by acquaintances and friends by her voice and deportment was challenged by TV3. Having viewed the tape, Eichelbaum CJ ruled that it was an issue of fact for the Authority, and he did not accept the submission that there was no evidence on which the Authority could reach that conclusion.

He then considered the point that the information disclosed was, in fact, already in the public domain. The judgment canvassed the legal requirement regarding the suppression of details about victims of incest contained in s.139 of the Criminal Justice Act 1985. It was suggested that the Authority might not have correctly interpreted that provision, however:

> So although the passage in the Authority's reasoning may be a little cryptic, subject to consideration of two further factors I agree with the majority conclusion on the first of the two alternatives bases advanced: effectively, that by reason of the s.139 prohibition Mrs S should not have been identified, and therefore the information that she had been an incest victim would not have become known.

TV3 had also argued that, as Mrs S had given evidence that she had been an incest victim in open Court, the information was public property. Noting that the print

media, when covering the trial, had reported that Mrs S had been a victim of incest, the judgment said that the effect of s.139 was to prohibit the publication of Mrs S's name. Accordingly:

> ... although her statement regarding the abuse she had suffered was made public, her identity remained protected from media publication. In other words, although her identity and history became known to any persons in Court, the information retained a significant degree of privacy. The *20/20* programme did not merely report the evidence previously given - a "highly offensive disclosure, objectionable to a reasonable person of ordinary sensibilities" - but linked it with pictures and sound in a form, as the Authority found, rendering Mrs S identifiable, albeit in a limited way.

Agreeing with the Authority's decision on principle (i), he continued:

> It will be apparent that in my view, for purposes of this legislation "privacy" is not an absolute concept. The term should receive a fair, large and liberal interpretation; and although in the first instance this is a matter for the Authority, it would certainly not be wrong to adopt a similar approach to its definition of private facts. On any sensible construction the meaning of that expression 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. In determining whether information has lost its "private" character, it would be appropriate to look realistically at the nature, scale and timing of previous publications.

Turning to the issue of surreptitious filming, the judgment recorded that it was not a tort to photograph another person's private property without consent. TV3 had argued that a reporter was entitled to enter the complainant's property to seek an interview. Referring to the implied licence for a member of the general public to enter a property and to knock at the door of a house, the judge said it did not apply when it was known that the occupier would not consent. He wrote:

> Here no doubt the purpose of the visit was to obtain an interview if that could be achieved; but if it could not, TV3 was ready to film whatever encounter ensued and record such statements as the occupier might make without her being aware of it. The occupier would not have agreed to the reporter coming on the premises for that purpose, and the inference is open that TV3 was aware of that. In the circumstances the reporter's entry did not fall within the terms of the normal implied licence, and for purposes of action in tort was a trespass from the outset.
>
> In summary, for the reasons stated I consider that while the conduct of the camera crew was not unlawful, the reporter was a trespasser. However, even had my finding regarding the reporter's actions been otherwise, consonant with views expressed elsewhere in this judgment I would not regard such a conclusion as immunising TV3 against a finding of breach of broadcasting standards.

It was noted that the submissions had examined whether the Authority's jurisdiction extended to conduct as distinct from broadcasting and, the judge, accepted that complaints must focus on a programme which is broadcast, but:

> ... I do not see why the references to "programmes" should be construed narrowly; and I would hope that where filmed or taped material has been televised, in adjudicating upon a complaint the Authority is entitled to take into account not only the broadcast material itself but also how it was obtained. To restrict complaints to the content alone would significantly limit the Authority's jurisdiction.

He concluded on principle (iii):

> The Authority was of the view that the surreptitious filming of a discussion in what the complainant thought was the privacy of her own property amounted to prying which the ordinary person would regard as offensive. I think this should be read as relating to the showing of a programme obtained in the manner stated. Being satisfied that in reaching that conclusion the Authority did not commit any error reviewable on this appeal and that the finding was open, I uphold the Authority's finding of a breach of principle (iii).

As for TV3's challenge to the decision on the basis that the exposure of misconduct justified the tactics used, and thus the public interest defence applied, the judgment noted that attitudes towards sexual offending had changed substantially in recent years and, it was recorded:

> 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. I find no error of principle in the Authority's conclusion that the defence under (iv) did not apply.

The judgment also accepted the Authority's decision that the covert activities employed by the TV3 could not be justified on the grounds of balance, and by way of obiter, remarked as to the standard of proof:

> The appellant did not pursue a submission that the Act required a higher standard than the balance of probabilities. It may be helpful if I express the view, obiter, that the proceedings before the Authority should in this respect be regarded as analogous to professional disciplinary proceedings. In those the standard of proof is the civil standard but it is applied with regard to the gravity of the particular allegation.

The appeal was dismissed on all the grounds advanced.

Summary

In view of the right for parties to appeal its decisions to the High Court, the Authority has always taken great care to develop principles which rely on legal precedents – although it

was required to adopt Privacy Principles from the law in the United States given the state of law in New Zealand.

Thus, it was gratifying for the Authority when the High Court in the above decision accepted that the Privacy Principles were appropriate and, moreover, had been applied carefully.

The judgment also clarified the issue that although filming may take place from a public place, if it involves the filming of a private place in an intrusive manner, then it is not excusable under the public place exemption in principle (iii).

Chapter 5

Two Advisory Opinions on Procedure: Decisions on Privacy Complaints January – July 1994

The decision on the complaint from Mrs S (1/94) was released in January, and appealed in February. The matter was heard by the High Court in December 1994, with the judgment released on 15 May 1995. During that time the Authority received and determined a number of other complaints which alleged that other programmes had breached s.4(1)(c). In view of the personal nature of the facts disclosed in four different complaints, two Advisory Opinions were released in July 1994.

(i) The coverage of a trial of a person on charges of child molestation included footage from the courtroom and of counsels' tables. A complaint alleged that privacy was breached as the item disclosed the names of two of the children complainants as their names were visible on the files gathered on the desks. When advised of the complaint, the broadcaster expressed distress and, to avoid any repetition, advised that it had removed and destroyed the offending shots. The Authority upheld the complaint as a breach of principle (i) (19/94, 25.4.94).

(ii) One of Mrs S's daughters also complained about the broadcast of "Hear No Evil-Speak No Evil". Mrs S's husband had been convicted of incest against each of their five daughters. The complainant, Ms P, was one of the two daughters who declined to participate in the item.

The broadcast included a number of family photographs which had appeared in the magazine which had examined the case, and the Authority considered the complaint evoked the following issue. It wrote:

> Ms P did not appear on the item. The central question, the Authority believed, was whether sufficient information had been revealed for a person who knew her or the family's circumstances – but not necessarily the intimate matters disclosed in the item – to identify the family and, specifically, Ms P. Amongst

> the matters disclosed were three undisguised photographs of Ms P and her two brothers and sisters as children, a house in which the family lived some years ago, two different neighbours from the family's past, the mother's present backyard and garden, the official buildings in the town in which the family lived for some years and the voice and deportment of three of the daughters and the mother.

Again ruling that the previous disclosure by the magazine was inapplicable when deciding whether Ms P's identity was revealed, the Authority commented (21/94, 28.4.94):

> In dealing with the question, a majority of the Authority was of the opinion, first, that disclosure of the private facts to one person would be sufficient to contravene the privacy principles. It then concluded that although Ms P was not seen on the item except, possibly, in a photograph as a child, sufficient background information about the family had been revealed to enable a person who had known Ms P as a child to realise who was being referred to.
>
> In addition, the majority considered that a person who knew Ms P as an adult and who was aware of some details of her family background – but not the fact that she was a victim of incest – could, from the information presented in the item, identify Ms P as one of the five sisters referred to.

A majority of the Authority upheld the privacy complaint. The Authority unanimously upheld the balance complaint. As Ms P, unlike her mother, had not been filmed surreptitiously, the Authority did not impose an order for compensation.

(iii) Complaints about broadcasts on Wellington's Pirate FM have involved the Authority in an examination of the Privacy Principles on a number of occasions. In No: 25/94 (9.5.94), it involved a complaint from a listener who had telephoned the station to object to a sexist remark made by the announcer. The telephoned complaint was answered by the announcer. When registering his objection, the caller gave his name and address and, on air, the announcer described him as a wimp. Another abusive off-air phone call followed, and the complainant was later visited by the police who said that they had received a complaint from the announcer as he claimed that his life had been threatened by the caller.

The issue for the Authority which arose from this exchange was whether the broadcast of the complainant's first name, his address and description of him as a wimp amounted to a breach of his privacy. Arguing that the remark about a wimp was only opinion, the Authority did not accept that the name and address involved the disclosure of highly offensive private facts. It declined to uphold the complaint.

(iv) The next privacy decision (29–30/94, 9.5.94) dealt fully with the issue of door-stepping.

The director of a medical centre which was in a dispute with the ACC over charging was approached by a television reporter and crew early in the morning when, while

still in his dressing gown, he collected the paper from his letter box. Among other aspects of his complaint, the complainant alleged that their filming breached his privacy and was unfair to him.

The Authority explained that the essence of the Privacy Principles referred to the public disclosure of private facts, or the intentional intrusion into an individual's interest in solitude.

Accepting that the complaint involved unwelcome intrusion:

> The Authority then proceeded to determine whether or not the intrusion was in the nature of "prying". It does not necessarily accept the argument advanced by TVNZ on this occasion that prying cannot occur if the camera is located in a public place. The surreptitious filming from a camera hidden in a public place but directed towards a private place or the use of a telephoto lens while sited in a public place could be considered to amount to prying in some circumstances.
>
> Although [the complainant] in his complaint stated that he was televised "from an initially concealed position", his letter suggested that he became aware speedily that the intruder was a reporter who wanted to ask him questions about the alleged double-billing at the clinic he controlled. There was no suggestion of either a hidden camera or microphone.
>
> Accordingly, the Authority concluded, as the programme involved neither the disclosure of certain kinds of private facts nor the use of a surreptitious method to film the incident, it did not breach any of the Privacy Principles and was not in contravention of s.4(1)(c) of the Broadcasting Act 1989.

It upheld the complaint that the broadcast was unfair in its use of the door-stepping technique. Because door-stepping puts the interviewee at a disadvantage, the Authority does not accept that it should be used until all alternative methods have been considered by the broadcaster. Those other methods had not been exhausted on this occasion.

(v) The facts were unusually complicated in two distinct complaints which arose from a documentary which examined rumours that an early Boeing plane was hidden under Auckland's North Head.

The first complaint (34–35/94, 2.6.94), from a participant in the item, alleged that his participation in the documentary had been gained by deceit. On the privacy matters raised by this complaint, the Authority declined to uphold them, writing:

> The facts disclosed about Mr [...] were his name and face. Other than in exceptional circumstances which did not apply on this occasion, these matters are very public facts. Thus, the Authority concluded, the broadcast did not disclose any highly offensive private facts – contrary to principle (i). Furthermore, as Mr [...] consented to being filmed, the broadcast did not involve the intentional interference (in the nature of prying) with his interest in solitude or seclusion – contrary to principle (iii).

(vi) The name of the other complainant (a film-maker) was not released in the Authority's decision (36–37/94, 2.6.94). As a rival film-maker, he was shown briefly, attending a meeting at which it was agreed that footage of any discovery in the tunnels would be distributed to the media. He requested anonymity because he was at the time making a documentary about some potentially violent people and, for that purpose, had been using a false identity. Now, he complained, the broadcast had breached his privacy by revealing his identity, despite his requests before its broadcast to edit out his appearance.

After reviewing the circumstances of the filming, the Authority did not accept that surreptitious filming had occurred. It found that the item had revealed the complainant's true identity, which was a public fact.

Both this complaint and the former one, the Authority felt, involved a dispute between competing companies which made television programmes, and did not give rise to broadcasting standards concerns.

(vii) As some 37 dangerous psychiatric patients had been recently released from various hospitals and could not now be recalled to hospital, one radio station read a list of the serious crimes committed by psychiatric patients who were still receiving treatment in hospital.

The mother of one of the people whose crimes were listed complained that his privacy was transgressed, as sufficient details were given to enable him to be identified. She also complained that the item was inaccurate (43–44/94, 23.6.95).

On the privacy point, the Authority accepted that sufficient details were released to enable the patient to be identified, but, it added, this information was already in the public domain. It did not accept that the additional fact disclosed – the name of the clinic in which the man was detained – was highly offensive or objectionable to the ordinary person.

(viii) An item which showed a man coming ashore after fishing without the required permit evoked a complaint from the fisherman on several grounds – including a breach of privacy. First, he complained that he was filmed by people who did not identify themselves, and secondly, the extracts were broadcast without his knowledge or consent.

On the privacy matter, the Authority decided that the item did not disclose any private facts, and it did not accept that the filming amounted to prying, as it had occurred in a public place.

The defences of public interest, and consent, which were raised by the broadcaster, were not addressed in view of the Authority's conclusions on principles (i) and (iii) (45–46/94, 23.6.94).

The second half of 1994 was a busy time for the determination of complaints. However, privacy was an issue in relatively few.

(ix) In one, the station manager and announcer on Pirate FM referred to his former wife by name and called her a "silly bitch" (56/94, 26.7.94). She complained to the Authority. Explaining in the decision the purpose of s.4(1)(c) as "[t]he essence of the principle is its protection of sensitive factual material, the disclosure of which is highly offensive", the Authority decided:

> As the complaint was made on the basis that the material broadcast was untrue, the Authority concluded that s.4(1)(c) had not been contravened.

The Authority nevertheless included a lengthy footnote to the decision. It recorded:

> Although the broadcast did not breach the privacy standard, the Authority was appalled that a broadcaster should abuse the airwaves to make personal comments in this manner. It has prepared an Advisory Opinion for Pirate FM expressing its displeasure and has sent a copy to the Ministry of Commerce, the government department which is responsible for the administration of the Broadcasting Act. In addition, the Authority intends to distribute the Advisory Opinion to those who receive its decisions.
>
> This decision has raised another matter which has occurred in a number of other complaints received by the Authority which allege a breach of privacy. In its preparation and subsequent application of the Privacy Principles (mentioned in the decision above), the Authority has taken great care in balancing the conflict between the public's right to know and the individual's right to keep some matters private. Sometimes, when an individual would prefer that a matter remains undisclosed, a breach of privacy is alleged. The broadcaster responds by stating that disclosure was in the public interest or, in fact, the disclosure dealt with matters which were already in the public arena.
>
> There are other occasions, as occurred in this instance, when the matters disclosed by the broadcast were untruths. To the complainant, such broadcasts involve a breach of privacy.
>
> Whereas public interest might be sufficient to counter the alleged breach of privacy when a fact is disclosed, it does not deal with the possible complaint that the broadcaster has, in addition to allegedly breaching a person's privacy, dealt with the complainant unfairly and unjustly in contravention of the broadcasting standards. This concern is of particular relevance with the disclosure of untruths – as occurred in this instance.
>
> In an attempt to confront this source of dissatisfaction felt by complainants, the Authority is preparing another Advisory Opinion for all broadcasters outlining how it intends to deal with this situation. The Opinion encourages broadcasters to adopt a similar approach.
>
> In view of the very unpleasant content of the broadcast which Mrs A complained about, the Authority also notes in this instance that a complaint under standard R2 – alleging a breach of currently accepted norms of language and behaviour – would probably have been upheld.

The following is the Advisory Opinion sent to the broadcaster, Pirate FM, and released to the media and other subscribers, dated 26.7.94.

TO: The Licence Holder and Chief Executive of Pirate FM, Wellington

Under s.21(1)(d) of the Broadcasting Act 1989, the Authority may issue to broadcasters "advisory opinions relating to broadcasting standards and ethical conduct in broadcasting". This opinion is issued pursuant to that provision.

The Authority received a complaint that the broadcast by your station between 5.00–6.00pm on 17 February 1994 referred to and breached the privacy of Mrs S[...] A[...]. The comments were made by the announcer, Mr D[...] A[...], who is the complainant's husband from whom she said she is legally separated.

In its decision on the complaint (No: 56/94), the Authority declined to uphold the privacy complaint under s.4(1)(c) of the Act on the basis that the material disclosed was untrue.

The Authority recorded in the decision that it was outraged at your announcer's misuse of the airwaves to make personal comments. It suggested that had it received a complaint under standard R5 of the Radio Code of Broadcasting Practice, its decision would probably have been different. That standard required broadcasters:

> R5 To deal justly and fairly with any person taking part or referred to in any programme.

Should Mrs A[...] have complained under that standard, the complaint would probably have been upheld as a blatant breach and you would have been censured strongly.

In addition, the Authority might well have upheld a complaint under standard R2 of the Code which requires broadcasters:

> R2 To take into consideration currently accepted norms of decency and good taste in language and behaviour, bearing in mind the context in which any language or behaviour occurs.

The Authority also records that this complaint has highlighted difficulties for complainants, who might be unsure about whether or not to complain under the privacy provision or standard R5, the "dealing unfairly" standard. This has also been apparent in other complaints it has received. The Authority will address this matter in an Advisory Opinion to be sent to all broadcasters.

The Authority intends to send a copy of this Advisory Opinion to the complainant, to the Ministry of Commerce as the Government department responsible for the administration of the Broadcasting Act, and to all subscribers who receive copies of the Authority's decision.

The Advisory Opinion sent to all broadcasters stated: (also dated 26.7.94)

TO: The Chief Executive of all television and radio broadcasters and subscribers

Under s.21(1)(d) of the Broadcasting Act 1989, the Authority may issue to broadcasters "advisory opinions relating to broadcasting standards". This opinion is issued pursuant to that provision.

In an Advisory Opinion dated 25 June 1992, the Authority advised all broadcasters of the five relevant Privacy Principles which it intended to apply to complaints which alleged a breach of privacy under s.4(1)(c) of the Act. The Authority stated in that Opinion that the specific facts of each complaint were especially important when privacy was an issue. It also said that the principles listed on that occasion were not necessarily the only ones which would be applied.

By way of introduction, the Authority also notes that complaints which allege a breach of privacy, unlike complaints which allege a breach of any of the other standards, may bypass the broadcasters and be made directly to the Authority under s.8(1)(c) of the Act.

The Issue

In developing the Privacy Principles it intended to apply when complainants alleged the unwarranted disclosure of private facts, the Authority was very conscious of the "public's right to know", and acknowledged the existence of a "public interest" defence. It also acknowledged that recording action in a public place was a defence to a complaint which alleged the intentional interference (in the nature of prying) with an individual's interest in solitude or seclusion.

As a consequence of its efforts to achieve a balance between the individual and the public, the Authority has settled on a reasonably narrow definition of privacy. In contrast, the concept of privacy advanced by some complainants is much wider than the Authority would accept. Moreover, some complainants argue that the disclosure of "untruths" is a breach of privacy whereas the principles apply only when "facts" were revealed.

The Solution

Taking into account, first, the fact that privacy complaints may be made directly to the Authority based on the complainant's version of that concept (which may not correspond with the Authority's) and secondly, that the statutory time limits during which a broadcaster must accept complaints may elapse before the Authority's decision is issued, the Authority intends to take the following action.

Upon receipt of all complaints made directly under s.8(1)(c) alleging a breach of the privacy standard in s.4(1)(c) of the Broadcasting Act 1989, the Authority, when acknowledging the complaint, will advise the complainant that it may be appropriate to lodge, in addition, a complaint with the broadcaster alleging a

breach, as appropriate, of standard G4 of the Television Code of standard R5 of the Radio Code. It shall also follow this procedure on the rare occasions when the complainant sends to the Authority for its information a copy of a complaint to a broadcaster alleging a breach of privacy.

The Reason

The Authority is established under the Broadcasting Act and its functions and powers are set out there. While it is necessary to comply conscientiously with those requirements, the Authority is of the view that its decisions on complaints should not be determined by technicalities at the expense of a complainant's central concern.

For this reason, the Authority intends to adopt the above procedure. The Authority would also encourage all broadcasters, when they receive a privacy complaint, to consider assessing the complaint under standard G4 or R5 as appropriate.

Summary

The disclosure of a listener's name, in itself, came before the Authority early in 1994 as an alleged transgression of s.4(1)(c). In the first complaint, the person's first name was accompanied by the address – which ensured identification – and some abuse. However, on this occasion, given that the release of a person's name and address could not as a rule be regarded as highly objectionable facts, the Authority was not prepared to rule that disclosure of these particulars amounted to a breach of privacy.

Subsequent complaints in 1996, as this report reveals in the next chapter, led the Authority to review, and revise, the Privacy Principles to deal with occasions when the disclosure is intended to be abusive in some way.

The possibility that door-stepping involved a breach of privacy was considered, and dismissed, by the Authority when prying was not in issue. Door-stepping, the Authority ruled on that occasion, was an issue of fairness.

The broadcasting standards distinction between the concepts of privacy and fairness, the Authority appreciated, might not necessarily correspond with the distinction held by listeners/ viewers. This was particularly likely, the Authority believed, when the broadcast involved some kind of abuse. Abuse, however, is usually a matter of opinion – not facts. At this stage of the development of the Privacy Principles, it was considered that privacy was concerned with the disclosure of facts. Accordingly, the Authority ruled, abuse (which may occur in a broadcast in which facts are disclosed) raised solely the issue of fairness.

To ensure that complainants were not disadvantaged should they complain only on the basis of privacy when fairness might also be in issue and, later, found themselves time barred from lodging a complaint which alleged unfairness, the Authority issued an Advisory Opinion. It

explained to broadcasters that it would, on receipt of a privacy complaint, advise the complainant that it might be appropriate, in addition to making a complaint to the Authority alleging a breach of privacy, to complain to the broadcaster on the grounds of fairness. The Opinion also encouraged broadcasters to assess privacy complaints they received both on the grounds of privacy and fairness.

Chapter 6

The Ongoing Application of the Privacy Principles: Decisions from September 1994–March 1996

During this 19-month period, the Authority determined 14 complaints which alleged a breach of privacy. (In the following 22 months, the number increased to more than 30.) One of the issues which arose during the period ending in March 1996 gave rise to a further Advisory Opinion, which was released on 6 May 1996.

(i) Without seeking permission of the person referred to in the station promotion, Wellington's ZMFM ran a competition to guess the location of a diamond ring worth $3,000. A new clue was given each morning and the first three callers each day were given a chance to guess the precise location. The imaginary hiding place for the ring was in a boot under poet Sam Hunt's bed. The clues had included a reference to a boathouse in Paremata – Mr Hunt's home.

In considering the privacy aspect of Mr Hunt's complaint, the Authority did not accept that any reference to the address was a highly offensive fact as required by principle (i). Moreover, as the promotion did not involve prying, principle (iii) was not transgressed and the privacy complaint was not upheld (79/94, 8.7.94).

(ii) The consumer programme *Fair Go* was the subject of lengthy complaint (91/94, 29.9.94), of which one relatively minor aspect involved an allegation that the reporter's entry into the manager's office of the business under investigation amounted to a breach of privacy. As the reporter left when asked to do so, the privacy aspect was not upheld. The decision focuses on the other standards, and some aspects of the complaint were upheld.

(iii) A news item about the court appearance of a young man charged with driving under the influence of alcohol, and causing an accident in which four people were killed, included the name and a picture of the young man. His mother alleged that the item breached her son's privacy, and pointed out that the item had caused trauma to him.

In view of the public nature of the man's conviction, principle (i) was not considered applicable. The Authority did not believe that filming involved intrusion but added that, if it had, the public interest defence would probably have applied (43/94, 6.10.94).

(iv) An article about a man's bravery in capturing an armed robber in a chemist stop was printed in the local newspaper. The article reported:

> [Mr B] said the excitement of the chase was his biggest buzz since he survived a night-time fall from an oil rig into the shark-infested China Sea four years ago.
>
> Among other things, he has also survived a stabbing, being electrocuted in Spain and a plane crash in Australia's Simpson Desert.
>
> "I think I must be an adrenalin junkie. Nothing really fazes me. I don't ever seem to look at the other aspect. They call me Bungy and the rope's never broken – yet."

A local radio station based a promo for its breakfast programme on the story and the item included the following comments:

> This man leaps buildings in a single bound.
> He has wrestled a 100kg tiger in Russia
> He has x-ray vision.
> He towed a car from Hawera to New Plymouth with his teeth after the car broke down.
> He is hung like a horse.

While these comments were being made, another announcer stated on at least three occasions that they were exaggerations. Notably, the final comment was so described.

Mr B complained that the item had exposed him to ridicule and abuse (98/94, 20.10.94). Although the complainant alleged a breach of his privacy, the Authority did not accept that any of the Privacy Principles had been contravened. It concluded nevertheless that the broadcast breached the requirement in the standards for good taste and decency, and considered that the broadcast's offer for an on-air apology was appropriate and sufficient.

(v) A not dissimilar set of facts arose in the next decision on a privacy complaint (104/94, 3.11.94). On this occasion, a press item reported that a man had been awarded accident compensation of $10,000 following injuries suffered when running into a fence post while crossing a paddock at night, and being startled by a bull. A talkback host referred to the incident in a manner which the complainant – the man who received accident compensation – thought offensive and sarcastic.

Refusing to accept a standards complaint which did not arrive within the time limits laid out in the Act, the broadcaster dealt solely with the privacy complaint. It said the

broadcast did not disclose private facts nor involve privacy. The Authority agreed on these points. The complaint was not upheld and, in contrast with decision No: 98/94, the complainant was named in the decision.

(vi) The small number of privacy complaints in 1995 began with one which involved a complaint that the broadcaster's use of door-stepping involved a breach of privacy (3/95, 24.1.95). The complainant, the supervisor of a person convicted of criminal offences, had declined to be interviewed. One morning as she walked down the road on the way to work, she was met by a reporter accompanied by a television crew, asking questions. Because the footage showed the complainant carrying out an everyday activity and because the television crew was not hidden in any way, the Authority did not accept that there had been a breach of the complainant's privacy. The Authority was not required to address a fairness complaint on this occasion.

(vii) When members of a youth gang were interviewed on a *Holmes* programme, the parents of an eleven-year-old member complained about a breach of his privacy, on the grounds that not only had their son been interviewed without permission, but also he had been named and portrayed as a thug.

Because the interview with the gang had been carried out for another broadcast some three weeks earlier and because a neighbour, who said she had responsibility for the boy, had given permission at the time, the Authority did not uphold the complaint (44/95, 31.5.95).

The Authority nevertheless made the following observation:

> The Authority also felt concern that TVNZ appeared not to have specific procedures to be followed when interviewing young children for a television broadcast. While TVNZ recognised the need for great care in these circumstances, the Authority considered that more specific requirements should be in place. Such requirements, it thought, possibly after consultation with the Commissioner for Children, should be contained in a Code of Ethics for television journalists and be supplemented by directions in the manuals for journalists produced by each television broadcaster.

(viii) The name and address of a man seen kicking a dog on the street were given on two occasions by a caller to a radio talkback session.

The broadcaster maintained that the (incorrect) full name and address of the person which were given were not highly offensive private facts.

Looking at the situation overall, the Authority concluded:

> On *Newstalk ZB* on 10 February, the information given about a specific event was linked to an address and, as a result, identified the occupant at a named address as an animal abuser. Whereas each piece of information in itself would not have contravened the requirement for privacy, i.e. either a description

> of the event, or giving the address in such a way as not to relate it to "highly offensive" facts, the Authority concluded that the combination of these two items amounted to a breach of s.4(1)(c). It did not accept that the information disclosed could be excused on public interest grounds under principle (iv).

The decision did not name the complainant – identified as the spouse of the man identified as the animal abuser (100/95, 21.9.95).

(ix) A *Fair Go* item questioned the safeguards used by a computerised telemarketing company to ensure that householders were not pestered by unwanted calls. The company's manager complained that the programme was unfair, inaccurate and breached his privacy.

The privacy aspect was not upheld on the basis that no highly offensive facts were disclosed, and there was no evidence of intentional interference in the nature of prying (146/95, 14.12.95).

(x) The final determination of a privacy complaint in 1995 returned to the issue of candid telephone calls. On this occasion, the recipient was phoned and, as a joke, was told that a forthcoming overseas trip she had arranged had to be postponed owing to problems with ticketing. The recipient of the call was named.

The recipient alleged her privacy was breached as the telephone conversation had been broadcast without her permission, and her absence, now widely known, made her home a target for burglars.

The Authority assessed the complaint under principle (i), and wrote:

> First the Authority examined the facts which had been broadcast. In addition to Ms K[...]'s name, the facts about her which were disclosed were: the day of the broadcast was her birthday, she was going on an overseas trip which included Europe and Disneyland, she had been planning the trip for six months, and her husband's name was John. In the Authority's view, some of those facts, including Ms K's name, were private facts. It then had to decide whether the disclosure of her name and other private facts was both highly offensive and objectionable to a reasonable person. In this case, it concluded that it was not offensive or objectionable to reveal her name, that she was planning an overseas trip or that it was her birthday, and therefore the broadcast had not breached Privacy Principle (i). Having decided that, it did not have to consider the applicability of Privacy Principles (ii) to (v).

However, it considered that disclosure of Ms K's name was unfair to her, and it upheld that aspect of the complaint (152–2/95, 19.12.95).

(xi) The name of a New Zealand woman raped in South Africa was given on a radio station in New Zealand during a interview with a South African journalist in South Africa.

The rape victim on her return to New Zealand complained that her privacy was breached and the broadcaster upheld the complaint. The victim was not satisfied with the action taken by the broadcaster and, on that basis, referred the complaint to the Authority. In assessing the complaint under principle (i), the Authority stated:

> In an ideal world, it could be argued that the fact that a person has been a rape victim is not something which involves any elements of shame or denigration. In reality it does and, as a result, a victim can justifiably expect that the information shall be treated as private. That is the basis of the law in New Zealand concerning victims of sexual violation.
>
> Because of the situation, the Authority was in no doubt that the broadcaster was correct in upholding the privacy complaint and that the letter of apology was, at least, an aspect of the appropriate action which should follow the decision.

The principal issue was the appropriate action on the broadcaster's behalf, and the Authority believed that, in addition to the apology, an order for compensation of $2,500 was appropriate.

(xii) A midnight to dawn talkback host had apparently once been a friend of a woman who, using false names, telephoned him on occasions and taunted him on air. The host's on- air response, about which she complained, on this occasion included the following:

> **Host**: You're the bitch and the slut that ah, that ah stalks me too. Now, I think the Police better get hold of you, because you are a danger to yourself – Maria. Your name is **** and your address is **** Street and your phone number's ****. You're not from Wellington. You're not from anywhere.
>
> Well I'll take Barbara after the news. Alright? 379 3300. Yeah I deserve everything I get because I wouldn't make love to you, you bloody stupid old bag. You're a tart. That's what you are. And ah, Wellington. She thought she'd get on straight away. What a joke.

In its determination, the Authority referred to the Privacy Principles in its Advisory Opinion of June 1992, which had been approved by the High Court in 1995, and it observed that the principles did not cover the present situation. It continued:

> The Authority was required by this complaint to decide whether the factual situation disclosed amounted to a breach of s.4(1)(c). It noted that the host had used his position as a broadcaster to abuse a caller. The Authority was of the view that any existing relationship between the host and the caller was irrelevant. The host should not have used his role as a broadcaster to deal with a personal dispute.
>
> The host, not only without the caller's permission, gave her name, address and phone number but made other comments which, the Authority decided, were personalised, reprehensible and totally unacceptable. Ms L had been abused,

> denigrated and ridiculed and a public medium was used to deal with a private disagreement.
>
> Under the Broadcasting Act, the Authority deals with a broadcaster which, in this instance, is Radio Liberty. Under the Act, it is the broadcaster – not an individual host or commentator – who is responsible for the material which is broadcast.

It upheld the complaint and ordered compensation of $750 (1996-004/005/006, 18.1.96).

It will be noted that the Authority's method of citing its decisions changed in January 1996, as decisions from this time are available on the Authority's website.

(xiii) The abuse of a named person by a broadcaster was addressed again in the next decision on a privacy complaint (1996-025/026, 7.3.96). Pirate FM's Derek Archer referred to his family and some of his on-air comments included:

> The person who is associated with my ex-wife and her sister just beat the shit out of my son. Guess what, I'm neither impressed nor amused. So unless you can come up with a bloody good explanation right about now, she better start running for frigging cover because we're about to send down people – down to *** Avenue and believe you me – grandpa and the kids ....
>
> It was all part of the plan he said, then he looked at the title deeds of the property and went, oh shit not only do we lose our houses and our cars and businesses but if you get to sit down to pee – I'm talking about females here – if you sit down to pee, you get to claim everything. That really pisses me off. ...,
>
> N...'s on the way down there to pick up *** [his son] because I'm getting really annoyed with the ex-slug and I use the term lightly – it's called the ex-wife now she's the ex-slug – she made the course, now I will finish it .....

Later, after announcing that his son was with him in the studio, the announcer stated:

> And now Mathew's giving him [his son] a drink. Don't give him bourbon mate, he goes bleeding crazy. Mummy will be here shortly. You know, Mummy, wearing about $9,000 worth of clothing and about $8,000 worth of jewellery on each hand and she's saying – give me $10 extra a week. Yes, ***, why are you laughing. You know it is so true don't you... .

The Authority recalled the Advisory Opinions issued in 1994, one of which was addressed to Pirate FM and named Mr Archer. It referred to the decision above (1996-004/005/006), and the two new privacy principles which had been advanced therein, and wrote:

> In the broadcast complained about on this occasion, Pirate FM used the airwaves to abuse and denigrate identifiable people – the named nephew and

> the announcer's former wife. Without consent, the broadcast disclosed the street address where the announcer's family members were living and where his children were playing with the named nephew. The complainant, the former wife, acknowledges in the complaint that the address disclosed was hers. As the public interest defence is not relevant, the Authority without hesitation concludes that the broadcast by Pirate FM on the afternoon of 28 August 1995 breaches standard R11 of the Radio Code of Broadcasting Practice.

Having upheld the complaint, compensation of $1,500 was ordered.

(xiv) The next decision dealing with privacy raised a similar point. A radio commentator used his regular commentary slot to speak about his recent appearance in court when both he and another person were charged with offences which arose from an incident which would now be called "road rage". The commentator was acquitted and he criticised the competence of the newspaper reporters. They had, he said, focused on him rather than the ex gang-member who, he insisted, had attacked him.

The ex gang-member complained that his privacy was breached as sufficient details had been included in the broadcast to enable him to be identified.

Referring to the recent decisions in which broadcasters talked about personal experiences on air, the Authority (1996-037, 28.3.96) wrote:

> The Authority acknowledges that some of the most compelling radio commentaries arise from the personal experience of the commentator. Nevertheless, these experiences can be used in a number of ways. Because of the inappropriate way in which broadcasters occasionally use these experiences, the Authority has developed the principle that it is a breach of privacy under the broadcasting standards for a broadcaster to use the public airwaves to abuse and denigrate an identifiable person. A broadcast which does so and, in addition, is based on a personal dispute between the broadcaster and the identifiable person, exacerbates the breach should it be found to occur.
>
> On this occasion, as decided above, the broadcast referred to an identifiable person. The comments about that person were denigratory. Accordingly, the Authority concludes the Privacy Principles were breached. Further, as the broadcast dealt with a personal matter between the broadcaster and the complainant, it is the type of breach which the Authority regards as being of the more serious type.

Nevertheless, on this occasion, because the broadcast was only one aspect of the dispute between the parties, no order was imposed.

(xv) The Advisory Opinion signalled in the above three decisions was issued on 6 May 1996. The introduction repeated the following parts from the Advisory Opinion issued four years earlier:

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

Principles (i) – (iii) remained the same. Principles (iv) and (v) were renumbered (vi) and (vii) and the new principles, (iv) and (v) provided:

(iv) 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.

(v) 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).

Summary

Some of the privacy complaints during this period involved the disclosure of private facts. Accordingly, the Authority was required to decide whether the facts were offensive to the ordinary person. Furthermore, the Authority was confronted increasingly with complaints where a person was referred to in a broadcast, and then abused. The abuse in some of these instances arose from some earlier, and possibly ongoing, dispute between the broadcaster and the person who was abused. As this had occurred infrequently in the past, the Authority's approach had been to treat the matter as an issue of fairness.

On the occasions when a broadcaster abuses or denigrates an identifiable individual, it is debatable whether the issue is primarily one of fairness or privacy but, without doubt, it usually involves a situation where the broadcaster abuses its power.

Whatever the primary issue, it is obvious that this is not necessarily only an issue of fairness. While a person's name, address, and phone number may well be known to friends, and may be readily ascertainable through the telephone directory, or some form of public register, people do not expect their name to be broadcast without justification, or without reason. If a person is involved in some way with a newsworthy event, it is a reasonable expectation that their name, and possibly address, will be published in the print or by the electronic media. However, if they are not a news maker, or are only peripherally involved in an event which is considered to be newsworthy, then, in the Authority's opinion, it is reasonable to expect that

their name will not be so broadcast. A person's name may be reasonably easy to discover, but it is out there for specific purposes – not for a broadcaster to use and abuse at its whim.

When an identifiable person is abused, the broadcaster is not acting in a way which complies with the provision in s.4(1) of the Act relating to the maintenance of standards "consistent with" the privacy of the named individual.

Fairness is the issue, the Authority has decided, if a person's name, which is otherwise legitimately in the media, becomes an object of fun, criticism or irony to the broadcaster. However, privacy is the issue when a person's name is used in one of these ways, when it is not legitimately in the media.

Chapter 7

Decisions from March to December 1996: The Expanded Principles in Action

The line of demarcation between names and other details legitimately in the public arena, and those which were not, was a distinction developed in the following decisions. Indeed, it is an issue which continues to arise in complaints before the Authority.

The flurry of complaints in early 1996 involving the abuse of a named listener by a broadcaster generated the concern about the adequacy of the then existing Privacy Principles. The matter was addressed in the Advisory Opinion released in May. Meanwhile, the Authority dealt with other complaints alleging a breach of privacy. Furthermore, the issue of privacy was arising in complaints with increasing frequency.

(i) Callers to a radio station were asked to vote for their favourite television advertisement. The announcer named one caller and, in view of his choice of a promo for *Baywatch,* called him a "squinge" and a "bit of a dork". The broadcaster upheld the complaint, apologised to the complainant, and offered to broadcast an apology.

Dissatisfied with the action taken, the complainant referred his complaint to the Authority (1996-061, 20.9.96). The Authority felt the action was appropriate given that it considered this to be a gratuitously offensive remark, but declined to make any further orders.

(ii) A viewer who was offended by a television announcer's use of the work "fuck" in a joke twice, telephoned the broadcaster to register his complaint. On the same show two weeks later, the announcer referred to a complaint "from a little man Mr W[...]" (1996-067, 27.6.96).

Applying the newly released principle (v) about identifying a person without consent, and pointing out that the release of the name was not in the public interest, the

Authority upheld the complaint and imposed an order requiring the broadcaster to pay Mr W $500. The decision referred to the complainant as "CW".

(iii) A magician complained about a television show which disclosed how magicians performed some illusions. One aspect of the complaint alleged a breach of privacy (1996-069/070, 27.6.96).

The Authority decided that the disclosure of how illusions were performed was both a commercial issue and one involving magicians' ethics. The complaint, it concluded, did not involve the standards contained in s.4(1)(c) of the Broadcasting Act.

(iv) WIFT (Women in Film and Television) complained about a news item which showed the house in which the occupant had been raped. The location of the house was apparent from the street signs on the corner.

The broadcaster upheld the complaint and reported that the producer had been advised of the need for greater care. WIFT was not satisfied with the extent of the action and referred the complaint to the Authority on this basis. However, as the broadcaster had carried out the actions sought by WIFT in the original complaint, the Authority declined to uphold it on the basis that the action was sufficient given the initial letter of complaint (1996-077, 18.7.96).

(v) The newly promulgated principle (v) – the legitimate public interest defence when a person is named – came before the Authority in decision No: 1996-087 (15.8.96). The complaint referred to a television news item which reported that a former rugby league international had been sentenced to imprisonment for supplying drugs. The coverage included a shot of his partner and their child outside the courthouse. His partner was named, and it was noted that she intended to stay in Auckland where she had her business, while the prisoner, it was said, would serve the sentence in Christchurch.

The player's mother complained that the item breached the family's privacy. The Authority sought more details about the footage of the partner, and it was noted in the decision:

> TVNZ reported that the filming, of which the woman was aware, had occurred in a public place – on the pavement as the pair emerged from the courthouse – and that the encounter was amicable and was relevant because of the unusual situation involving the separation of the player from his partner.

The named partner advised the Authority that she was filmed against her explicit wishes.

The Authority began:

> By way of introduction to its decision on the complaint, the Authority notes that there is one over-riding consideration when Privacy Principles are discussed and applied. That matter is currently recorded as principle (vi) and reads:

> 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.

Naming of the player, the Authority said, was a legitimate matter of public interest.

Turning to the coverage of the player's partner and child, the Authority first considered whether it amounted to prying in breach of principle (iii). It said:

> Principle (iii) does not apply where the person who objects is filmed in a public place. As that was the situation in the matter complained about, the Authority does not accept that the filming of the player's partner and child as they came out of the courtroom amounted to a breach of their privacy.

It continued:

> The item not only explained that the woman and the child were the player's partner and their child, but also identified her by name. As the identification occurred without consent, the Authority considers that there is a breach of the requirements of principle (v). It is now required to consider whether the principle was or was not applicable in view of the exceptions it contains.
>
> While the Authority has no hesitation in deciding that the public interest defence applies to the identification of the player, it is also firmly of the view that it does not apply to the identification of his partner. There was not the slightest suggestion that she was in any way involved in the criminal activity, and she was not identifiable merely as part of a family group. Rather, she was on her own with her child and the item referred to her as a businesswoman. Thus, as she was not a protagonist in any way in the item, the Authority considers that there is no public interest in identifying her. The fact that she intended to stay in Auckland while the player was seeking to serve his sentence in a prison in Christchurch was incidental, and did not justify the publication of her name. Accordingly, the Authority concludes that although TVNZ did not breach the standards in filming her while she left the courthouse, it did so when it identified her by name.

Because of the brevity of the shot, the Authority did not impose an order.

(vi) A couple who ran a furniture shop complained that their privacy was breached, and that they were embarrassed, when a local radio station reported that their business was closing down and that they were selling their home, but were making every effort to pay their liabilities (1996-113/114, 12.9.96).

In regard to the privacy aspect of the complaint, the Authority applied principle (i) and, on the basis that the fact that the home was being sold was unlikely to be highly offensive to the reasonable person, declined to uphold the matter.

(vii) The next decision involved complaints both about privacy and intrusion into grief. A motorcyclist was killed in an accident shortly after noon and a television camera crew

which was at the site, apparently coincidentally, took pictures. The death was reported in the 6.00 pm news that day. The dead man was not named, and the item included a brief shot of two women apparently consoling each other, both of whom were obviously dressed for travelling on motorbikes (1996-115/116, 12.9.96).

The complaint, from a family member, said that one of the women was the dead man's wife, and the other was a friend who was the partner of another motorcyclist with whom they had been travelling at the time. The complainant was the family member responsible for informing others in the family of the death, and he advised that the police did not release the man's name until that notification had been completed – at 9.25 pm that evening. As one aspect of the complaint, he argued that the broadcast had breached the family's privacy.

The Authority addressed this point in the decision and noted that the media were not reliant on the police for the release of information, nor obliged to comply with police directives about information which has been gathered. Nevertheless:

> By the same token, there are legal provisions (e.g. the possibility of contempt of court) and conventions (e.g. releasing the names of accident victims), when it is in the interest of both the media and the police to co-operate.

On the privacy issue, the Authority ruled:

> The item to which the complaint related disclosed the possible identity of the dead motorcyclist to people who recognised either of the women. Privacy principle (iii) is concerned with filming a person without that person's knowledge. However, it does not apply when the filming occurs in a public place as occurred on this occasion. Moreover, while members of the public may object to the filming which occurs in a public place, they do not have the power to order that it stop.
>
> Road accidents are matters of public interest, as is apparent in the item under discussion, and thus the broadcast of the material which allowed the women to be identified is not a breach of the privacy principles. While not a breach of privacy, however, the Authority questions whether the editing of the item, no doubt in an effort to provide a human face to the story, showed sufficient sensitivity to the people involved.

Because the footage showed the two women as concerned onlookers, rather than distressed onlookers, the Authority did not uphold the unnecessary intrusion complaint.

(viii) That the issues raised by the privacy complaints were becoming increasingly complex was apparent from decision No: 1996-130/131/132 (10.10.96).

A current affairs item examining the events surrounding the suicide of a 16-year-old boy included extracts from an interview with a psychologist to whom the teenager had been referred. It was reported that the interview had been obtained by using a hidden camera.

The psychologist not only complained that his privacy had been infringed by the use of the hidden camera, he also complained about the accuracy, fairness and balance of the full item. Another complainant, an apparently disinterested viewer, also complained that the use of the hidden camera had breached the psychologist's privacy. The following summation focuses on the privacy matters canvassed in the 70-page decision.

Under the heading "Hidden Camera", the Authority's observations included:

> The Authority considers the use of the hidden camera not only breached the psychologist's privacy, but was also unfair to him. It refers to the correspondence where the psychologist explained that while he was willing to provide information by telephone, he was unwilling to be interviewed on camera. His principal concern was that some of the matters raised were being dealt with in the Employment Tribunal and publication would breach the express request of the adjudicator and further, might jeopardise his chance for reinstatement.
>
> The Authority repeats the point made above that the information gleaned from the hidden camera interview provided little new information and the broadcast of extracts from it merely served to highlight an adverse impression about [the psychologist]. That impression, it concludes, was unfair.
>
> The use in the item of extracts obtained by a hidden camera highlights some ethical questions which the Authority now considers. It refers to the guiding principles in the *BBC Producers' Guidelines* concerning the gathering of information by the use of concealed recording equipment. Those guidelines highlight the individual's right to privacy, yet recognise that journalists must be allowed to investigate and establish matters which it is in the public interest to know about. The use of surreptitious recording of people not in public view – and especially in their homes – is only sanctioned, under those guidelines, where prima facie evidence exists of crime or significant anti-social behaviour by those to be recorded. Such recording would only be used when an open approach would be unlikely to succeed and the material is necessary for the programme. Based upon those guidelines, the Authority concludes that the BBC would have been unlikely to sanction the hidden camera footage which was broadcast about [the psychologist]. There was no evidence of crime or significant anti-social behaviour, an open approach had been successful insofar as [the psychologist] had responded by telephone and had merely declined an on camera interview until the Employment Tribunal issues had been resolved; and the material gleaned was arguably not vital for the programme.

In the "Conclusion", the Authority recorded:

> Returning to the matter of covert filming, the Authority considers that the broadcast of extracts created an atmosphere of intrigue that contributed overwhelmingly to a damaging impression of [the psychologist]. It notes that two distinct decisions were made in this instance: the first, to use a hidden camera, and the second, to incorporate the footage in the finished programme. Had the programme makers used the hidden camera solely as a research tool, its use would no doubt have never come to the Authority's attention. However,

> the footage which was included was so prejudicial that it is unlikely that any balancing factor could have compensated adequately.

The programme also reported a past accusation of sexual misconduct against the psychologist, and revealed that the alleged female victim had suicided some years later. The Authority wrote on this point:

> The Authority acknowledges that past instances of questionable behaviour may have a justifiable place in stories such as this, although a majority does not believe that it was appropriate in this case to include the detail of the 1984 incident. A minority accepts the relevance of recalling the past incident but does not believe the prominence accorded to it was fair to [the psychologist].

In view of these findings, the Authority concluded:

> The Authority decides that [the psychologist's] right to privacy was violated by the use of the hidden camera and upholds the complaint that privacy principle (iii) was breached, and a majority upholds the complaint that privacy principle (ii) was breached. The majority decides that the defence under principle (iv) is not applicable.

On the privacy aspect, the broadcaster was ordered to pay compensation of $1,500 to the psychologist.

(ix) The next privacy decision arose when a local radio station telephoned a person, who had earlier phoned the station, to ask if she still had tickets available for a local event. That phone call was recorded and played on air.

As the complaint alleged that the caller's privacy was breached as her phone number was broadcast, the Authority considered that consent, pursuant to principle (vii) applied. The number had been given by the caller when she called the broadcaster initially (1996-158/159, 21.11.96).

(x) The series *Epitaph* reveals the stories behind the headstones in various New Zealand cemeteries. One episode referred to a person who had been interred in 1939, but whose body had been taken by a pair of body-snatchers intent on faking the death of one of them.

The granddaughter of the dead man complained that her privacy was breached as her permission had not been obtained for the disclosure of the material contained in the broadcast (1996-170/171, 12.12.96).

The broadcaster advised that a grandson of the dead man (and adopted brother of the complainant) had been spoken to, and he had provided information for the programme. The broadcaster informed the Authority that it had been under the impression that the grandson would advise other family members about the forthcoming programme. That had not occurred, apparently because of the nature of the relationship between the complainant and her adopted brother.

The Authority considered that the complainant should have been informed. However, as the facts relating to the death of their grandfather had not become private again as required by principle (ii), the Authority did not uphold the privacy complaint.

(xi) Privacy was the focus of another decision released on the same day (1996-172, 12.12.96). The summary records:

> The death of a young New Zealand woman on her honeymoon in an air crash off Peru was reported in an item on *One Network News* between 6.00–7.00pm on 3 October 1996. The item reported that the woman was the daughter of a named former senior public servant, and showed shots of the family home where the crash victim had grown up. It also reported that the house in the Wellington suburb of Karori was empty as the family was overseas.

The complaint, received from a person with seemingly no connection to the family, argued that the item breached the family's privacy, and could attract a burglar. The summary continues:

> Explaining that the shot of the home was taken carefully to make identification almost impossible, TVNZ nevertheless acknowledged that it had erred in disclosing information which was not relevant to the item. However, as the complainant was not apparently involved with the home owner in any way, it declined to uphold the complaint.

The Authority was faced with the situation where TVNZ acknowledged an error in showing pictures of a family home, and reporting that it was empty, but declining to uphold the privacy complaint on the grounds that the complainant had no relationship with the family. Having reviewed the provisions in the legislation, the Authority had no hesitation in ruling that it was entitled to accept complaints from anyone.

The Authority drew a distinction between its role and that of the (then) Broadcasting Complaints Commission in the United Kingdom, where privacy, and fairness, complaints may be made only by a person affected. Here, it acknowledged that the status of the complainant could have some relevance in deciding whether or not to impose an order.

As TVNZ had admitted a breach of the s.4(1)(c) of the Act, the Authority upheld the privacy complaint, but no orders were made for the reason mentioned above.

(xii) The operator of a travel company complained that an investigation by *Fair Go* invaded her privacy, among other matters, when the programme reported a discussion it had held with her, which she had believed was off-the-record.

The Authority accepted that there was a difference of opinion as to the status of the conversation. The complainant thought, because of her off-the-record request, that it was confidential. The broadcaster understood her request to mean that it not be recorded, which it had complied with. As the conversation referred to the complainant's

business, the subject of the investigation, the Authority did not believe that privacy was an issue. The complaint was also dealt with under the standards complaints relating to fairness and balance (1996-175/176, 12.12.96).

Summary

The increasing concern being expressed by complainants about the use of airwaves by broadcasters to deal with personal matters gave rise to an Advisory Opinion which focused specifically on broadcasters who gratuitously insulted an identified person. The principle enunciated in that Opinion has enabled the Authority to deal with a steady flow of complaints which raise this concern. The Advisory Opinion accepted that identification in itself may amount to a breach of privacy, although the Authority accepted that there could well be news reasons why some identifying particulars were included in an item. The Authority has not tried to define precisely the line between public interest and what may amount to a breach of privacy. It has dealt with complaints on a case-by-case basis to date. It is also aware of the pressures in newsrooms to ensure that news items are informative.

In other complaints, the Authority has applied the Privacy Principles settled in its 1992 Advisory Opinion. It was stated at that time, and it continues to be central to the Authority's approach, that a complaint that a broadcast discloses a fact will only be upheld if that fact is offensive and objectionable to the ordinary person.

Nonetheless, privacy may overlap with issues broadly related to fairness. When this occurs, the Authority has applied the Privacy Principles stringently on the basis that a standards complaint claiming unfairness is the more appropriate avenue than a complaint alleging a breach of privacy. The decisions note that because a concern about privacy is in conflict with the freedom of expression and the right to know, the matters which are to be regarded as private must be kept within clearly defined boundaries.

The broadcasters, and TVNZ in particular, have strongly advanced a case that the Authority has no jurisdiction to deal with a privacy complaint if the complainant is not in some way affected by the broadcast. The Authority has declined to accept this submission. It has noted that it is an organisation which was established by the Broadcasting Act to act in the public interest. The source of the complaint, however, may be relevant to penalty should the complaint be upheld.

Chapter 8

Increasing Numbers: Privacy Complaints on the Authority's Agenda in 1997

The most notable features for complaints determined by the Authority during 1997 were, first, the endless variations in the factual situations to be dealt with, and secondly, the increasing proportion of the total complaints received which included an alleged breach of privacy.

In 1997, 22 out of the 190 complaints received by the Authority in some way alleged a breach of privacy. The Authority upheld five, declined to uphold 16, and declined to determine one. Compensation to the complainant was ordered in each of the five upheld complaints – three of $500, and two of $250. Costs to the Crown were imposed on four occasions when privacy was an issue. In two of these cases, the Authority made an order for costs in addition to the order for compensation. In the other two, the privacy aspect of the complaint was not upheld, but the fairness aspect was, and costs were ordered in relation to that matter.

(i) The placement by the Childrens and Young Persons Service of two juvenile offenders with a senior gang associate was examined in a current affairs programme. The item included pictures of the rural home where the gang associate had been living.

The current owners of the house complained that the footage of the home, clearly taken from inside the property, was an invasion of their privacy. Maintaining that it had the right to enter a property to visit a homeowner, the broadcaster acknowledged nonetheless that there was no public interest in screening footage of the empty house. It upheld the complaint under principle (iii).

The complaint was referred to the Authority because of dissatisfaction with the action taken by the broadcaster. The Authority affirmed the broadcaster's ruling that the

implied licence to enter does not equate with the right to film while on the property. While refusing to decide the dispute between the parties as to whether the gate to the property had been locked when the broadcaster visited, the Authority considered that the footage of the home contained in the broadcast was reasonably identifiable to local residents and, in the circumstances, ordered compensation of $500 (1997-007, 13.2.97).

(ii) A mother, whose baby had been breastfed by another woman against her wishes, raised the issue publicly, and it was a subject of some media discussion. The issue was later referred to in a radio discussion where one panellist considered the mother's anger to be extreme.

Acknowledging that she had been responsible for bringing the issue into the public arena, the mother complained that the cavalier way the panel had considered the issue in relation to herself had breached her privacy, and was unfair.

As the matter had been brought to the attention of the public by the complainant, the Authority did not accept that her privacy had been breached in view of the consent provisions in principle (vii). Further, although she had been aggrieved by what she thought was the superficial manner in which the issue had been addressed, the Authority accepted the broadcaster's argument that having put the issues into the public arena, she did not have control of how the information was used and conveyed (1997-022, 6.3.97).

(iii) The next decision (1997-024, 6.3.97) involved a privacy complaint from a well-known political figure. He complained that his privacy was breached when he opened his door one morning in his night attire, to face a television reporter with a camera rolling. The complainant confined his complaint to one of privacy.

The Authority reviewed the development of its principles, and the law, before deciding whether the broadcast of the door being opened amounted to a breach of principle (iii) – prying – and, if so, whether the public interest defence applied.

Stressing the relevance of the facts in any complaint, the Authority wrote:

> The facts which the Authority considers are relevant to this complaint are, first, that the complainant is an important political adviser to the New Zealand First Party. Secondly, his alleged influence was said, by the candidates involved, to be the reason for their resignation from New Zealand First as parliamentary candidates – they resigned some four weeks before the date of the general election, and their actions clearly put the complainant's alleged influence squarely in the public domain. Thirdly, the official election campaign then under way focused media attention on political activity, and furthermore was a time when politicians were exceptionally keen to have their activities reported in the media. In other words, the symbiotic relationship between the media and politicians was approaching in mid September a level of intensity which would culminate on 12 October – the day of the general election.

> It is also relevant that the complainant opened his door, shut it, then reopened it and spoke to the reporter, knowing that he was almost certainly being recorded on film.

As the complainant was a person who had a high political profile, and as he was filmed at his home at a time of intense interest in his activities, the Authority decided that he could not claim that persistent media approaches amounted to a breach of privacy. In the circumstances, the prying constraint in principle (iii) had not been transgressed.

(iv) People involved in Family Court proceedings may not be identified. The police made an application to the Family Court for a protection order on behalf of a woman without her knowledge or consent. One item which showed the woman's home, and another which included an interview with the woman's father, were the subject of a privacy complaint from a resident of a town some distance away (1997-031, 10.4.97).

The broadcaster declined to uphold the privacy complaint as the house would not have been identifiable, and the father's identity had been concealed. The privacy aspect of the complaint was not referred to the Authority, and because the broadcaster's actions respected the principles of law, the Authority did not uphold a complaint which alleged that such principles were not respected.

(v) A television news item concerned with a dispute between neighbours about the noise made by a parrot brought a complaint from the neighbour, who publicised the matter, that his privacy had been breached when the item, contrary to an agreement, included his name and shots of his home.

Because the story had been carried in the local newspaper where the information contained in the news item had been disclosed, the broadcaster argued that consent pursuant to principle (vii) had been given. The Authority agreed, noting that as the complainants (the neighbouring family) had themselves publicised the issues, they had forfeited their right to privacy (1997-032, 10.4.97).

(vi) In No: 1997-035 (17.4.97), the summary began:

> When reporting on the sentence imposed on a woman for armed robbery, footage was included of her being shot at the scene by a police officer. The item showed the police officer from a rear angle firing two shots.

A police officer in another town reported that he was able to identify the officer who fired the shots, and complained that the officer's privacy had been contravened.

The broadcaster rejected the complaint on the basis that the incident had occurred in a public place, that the police were accountable for their actions, and the New Zealand Bill of Rights Act protected freedom of speech.

In its consideration, the Authority recorded that it had developed a set of Privacy Principles, and reported:

> While none is directly relevant to the current complaint, the Authority has taken into consideration the concern contained in the principles that "private" facts which are highly offensive, or which are not legitimate matters of public interest, should not be disclosed. With this complaint, the specific issue for the Authority is whether the identity of the individual officer who fired the shot is a public or a private fact.
>
> In its response to this question, the Authority recognises that it is not police practice to identify officers who use weapons, and indeed, only rarely are officers identified who respond to specific incidents or who supervise an inquiry. The Authority takes these practices into account in reaching its decision.
>
> The Authority also takes into account that a person joining the police acquires the right to use weapons against people in clearly delineated situations and, in particular, acquires the right to use a hand gun, a weapon the public is forbidden to use in other than extremely restricted situations. The individual officer thus has the right, in very specific circumstances, to use these extraordinary powers.

As the officer was performing a police duty in a public place, the Authority did not accept that his identity should be totally concealed. Nonetheless, as the use of a weapon was at the extreme edge of a police officer's duty, the Authority reminded the broadcaster of its obligations about fairness and said that the item on this occasion involved an element of insensitivity.

(vii) The next two decisions on privacy complaints (1997-043/044, 21.4.97) arose from complaints by a couple seemingly unrelated to the news item complained about, but who felt that each item involved an invasion of an individual's privacy.

The Authority repeated its ruling as to jurisdiction, in view of the submissions from the broadcaster, stating that the Act enabled it to accept privacy complaints from unaffected complainants.

The first item displayed a picture of a man, gave his name and some personal details, and reported that the police had issued a warning to local schools about his past deviant behaviour.

The Authority accepted that the information about the man was in the public arena as it had been released by the police, and thus principle (v) had not been breached. Moreover, the Authority believed given the actions of the police in the interest of public safety, that the details were of public interest as required by principle (vi).

The other complaint focussed on an item which reported the name, age and nationality of a woman who had left her three-month-old baby unattended in her home. After unsuccessful efforts to ascertain whether these details had been released by the

police, the Authority declined to determine the privacy complaint in all the circumstances.

(viii) Questions during a current affairs item asked a school pupil about the sexual abuse he had experienced at boarding school. One complainant argued that such questions invaded the child's privacy (1997-054/055, 15.5.97).

The Authority applied principles (vi) and (vii) and considered that s.4(1)(c) had not been breached because, even though offensive facts could have been disclosed, the child had consented to the interview.

(ix) Two aspects of a lengthy complaint about a current affairs item which examined the activities of a named pastor, alleged a breach of privacy. The complaint came from the pastor, and while the Authority did not consider that the public interest defence in principle (vi) applied, it pointed out that the pastor himself had brought his activities into the public arena. Therefore, the defence of consent in principle (vii) was relevant (1997-100/101, 7.8.97).

Although the item also included footage of the pastor's home, and gave his phone number and address, the Authority considered that this information was not offensive, and declined to uphold the alleged breach of principle (i).

(x) A comment by a talkback host about the attitude of a teacher when he had administered corporal punishment at the time the host had been at school, named both the teacher and the school. The privacy of the teacher was one of the issues raised in the complaint. The broadcaster maintained that the teacher was not the object of abuse, a breach of principle (iv) had not occurred. It argued that the broadcast was the host's honest opinion of the teacher's attitude to corporal punishment.

The Authority summarised the principles when it wrote:

> The Privacy Principles deal with the disclosure of private facts, with the disclosure of public facts which have become private with the passage of time, with intrusion into a person's interest in solitude or seclusion, and with the protection against the disclosure of private facts to abuse, denigrate or ridicule an identifiable person. They include the protection against the disclosure by the broadcaster of the name and address or telephone number of an identifiable person. The defence for an individual's claim for privacy is that the matter is discussed in the public interest.

It concluded: (1997-110/111, 21.8.97)

> The Authority makes no finding as to whether the discussion of the identity of the teacher was a public or private fact. It agrees with The Radio Network that the host's comment was ill-advised and possibly imprudent, and considers that the essence of the complaint is concerned not with privacy, but with the unfairness of naming a teacher and ascribing to him an attitude about corporal punishment. That aspect has been dealt with above. The Radio Network has

acknowledged the breach and has offered an apology. The Authority repeats that it considers that both a broadcast and a written apology are appropriate remedies.

(xi) Recent pictures of a house which was central to an eight-year-old murder inquiry, as it had the been a haunt for drug dealers and prostitutes, were shown on a television news item. The current owner – who was not referred to in the item – considered that the pictures were inconsistent with her privacy (1997-116, 18.9.97).

Assessing the complaint under principle (iii), the Authority did not accept that the pictures, taken from outside the property, were in the nature of prying and involved an intentional interference in the owner's interest in solitude.

(xii) A lawyer, acting for a politician who had been investigated by the Serious Fraud Office for his activities prior to his election to Parliament, telephoned a television reporter to discuss the possibility of the politician giving, for a fee, an exclusive interview. Having gone this far in the discussion, the lawyer said he assumed that the conversation was confidential, and was assured by the reporter that it was.

The television news item included a recording of not only the conversation up to the assurance of confidentiality, but also the subsequent negotiations as to the extent of the fee.

The Criminal Bar Association complained that the broadcast was both unfair to the lawyer and a breach of privacy.

The Authority did not consider the privacy complaint to be justified on the basis, as the broadcaster put it, that "one can hardly complain about privacy if you are contacting the media to disclose information". However, in view of the explicit assurance about confidentiality, the Authority considered that the broadcast of the telephone conversation beyond that point was unfair to the lawyer. It required the broadcaster to pay costs to the Crown of $500 (1997-128/129, 25.9.97).

(xiii) A current affairs item, which focused on one specific incident in which a woman died, questioned the competence of an ambulance service. The programme was the subject of a number of complaints.

The first (1997-135, 16.10.97) came from an ambulance officer who was named in the item, but who was not involved in the events surrounding the woman's death.

Assessing the complaint under principle (v), the Authority observed that the officer's name had been broadcast without his consent. The broadcaster argued that the public interest exception in principle (vi) was applicable. The Authority did not agree as the officer who complained had not been involved in the incident on which the item was centred, and could not be considered accountable for it in any way. Compensation of $500 was ordered.

(xiv) A similar factual situation occurred with regard to a complaint from another officer who was named, and who also had not been involved in the specific incident (1997-136, 16.10.97). The Authority reached the same conclusion and imposed an identical order.

(xv) The next decision arose from a request session on radio where the request was for a named person at a named school, who was described as a "friendless bitch" who was "hated by everyone".

The complaint, from the student's mother, was upheld as a breach of principle (iv) – the disclosure of private facts to abuse an identifiable person – and the standards relating to fairness and good taste. The broadcaster was ordered to pay costs of $250 and compensation of the same amount to the named student (1997-138/139, 13.11.97).

(xvi) The next complaint involving privacy occurred when a radio announcer called a real estate agent to register his displeasure at an unsolicited letter he had received when he advertised a garage sale. The call was broadcast. The agent was unaware of that fact. He was named, as was the company which employed him and its telephone number. The broadcaster apologised to the complainant, but did not accept that the standards had been breached.

The Authority was divided in its decision. It stated:

> The broadcast disclosed the name of the person called, his occupation and his employer, and did so in a way which the Authority concludes was critical of him. The disclosure of this information would not have been in question in a broadcast had the approach to [the real estate agent] been to question him openly on the business methods he used. However, [the agent] did not know that the caller was an announcer or that the interview was being broadcast, so he was not in a position to give consent.

Principle (v) was considered first by the Authority, and it recorded:

> The Authority is divided as to whether the information disclosed was public information to which the principle applies. The majority notes that the details disclosed applied only to [the real estate agent's] occupation, and not to him as a private individual. It was readily ascertainable public information about his publicly-known role. The majority also points out that [the agent], by writing to the advertisers of garage sales, provided information about himself to a range of people in the community, some of whom might object to his approach. Accordingly, the majority does not accept that the broadcast involved a breach of [his] privacy.
>
> The minority disagrees. On the basis that privacy complaints have to give particular consideration to the facts of each case, it does not consider that [the agent's] actions in seeking business deserved the public denigration to which he was subjected. The broadcast, it notes, was aggressive and invited an aggressive response from listeners towards the Agent and his employer. Taking

> into account the legitimate sales methods used by [the agent], and the animosity contained in the broadcast, the minority decides that [the agent's] privacy was breached when his name, his employer's name and his employer's telephone number were broadcast. There was, the minority concludes, no public interest involved in the broadcast.
>
> The Authority is unanimous that [the agent] was dealt with unfairly during the broadcast. He was questioned critically about his sales methods and the conversation, without [the agent's] knowledge, let alone his consent, was broadcast by 95bFM. The decision to uphold the broadcast as a breach of standard R5 is made without question.

Costs to the Crown of $250 against the broadcaster were imposed on the upheld standards matter (1997-144/145, 20.11.97).

(xvii) A person who incorrectly heard a comment about him when his request was played, complained that the alleged admonition breached his privacy. On the basis that the complainant had misunderstood the reference, the Authority declined to uphold the complaint (1997-156, 27.11.97).

(xviii) The reality programme, *Real TV,* showed a dramatic accident in a motorcycle race. One of the people injured in the accident complained that, among other things, the broadcast breached his privacy (1997-157/158, 27.11.97).

On the basis that the filming showed a public event in a public place, and that the complainant was not identified and would not be recognisable to the public at large, the Authority did not accept that the privacy principles had been breached.

(xix) An item on another reality programme, *Police Stop!,* was complained about by a woman when it showed an encounter with the police (1997-159, 27.11.97).

She was stopped in her car by a police officer because her vision was impaired by frosted over windows. Her face and the registration number of the care were pixilated but, she complained, her car would have been identifiable.

The Authority did not consider that it was necessary to decide whether she was identifiable, as it concluded that the public interest in highlighting a road safety problem was paramount. Embarrassment, it added, does not in itself amount to an invasion of privacy.

(xx) The request session broadcast by the radio station considered in (xv) above was the subject of another complaint when a song was requested for two named students at a local high school, and the announcer congratulated them on their "baby". The complainant was the father of one of the students.

Assessing the complaint under principles (i) and (iv), the Authority said: (1997-161/162, 4.12.97)

> With respect to principle (i), the Authority considers the public disclosure of private facts about the two identifiable individuals– regardless of the veracity of those facts – is offensive and objectionable to a reasonable person, and is therefore in breach of principle (i). The students themselves did not invite the unwelcome publicity, and are entitled to protection from the disclosure of a malicious lie. It is not a defence, in the Authority's opinion, for the broadcaster to claim that the announcer did not know that the facts were untrue, or to attempt to lay the blame with the students who made the request. The responsibility rests with the broadcaster, and unless it has systems in place to ensure that such breaches cannot occur, any broadcaster is vulnerable to the kind of abuse of the airwaves that occurred on this occasion.
>
> Next the Authority applies Privacy Principle (iv). That principle protects against the disclosure of private facts to abuse, denigrate or ridicule an identifiable person. In the Authority's view, this principle was also breached by the broadcast. The students were identifiable and a malicious rumour about them, which was intended to attack them personally, was broadcast.

Upholding, in addition, the complaint that the broadcast was unfair, the Authority imposed costs of $750 and compensation of $250 to the complainant's son.

(xxi) Televising the proceedings of criminal trials is taking place in New Zealand under the rules prepared by the Courts Consultative Committee. A person who gave evidence in one trial complained when his appearance during the trial to give evidence was used in a promo for a documentary about the trial (1997-164, 4.12.97).

As the promo did not contravene the Authority's Privacy Principles, the complaint was not upheld. The Authority pointed out that the question of whether brief and accurate extracts from a trial should be used in a promo was not an issue for it. Rather, it was a matter for the Courts Consultative Committee to decide.

(xxii) The final decision for the year which considered privacy (1997-172/173, 15.12.97) involved a news item about a burning house. The item reported the local people's concern at the length of time the emergency services had taken to arrive, and the odd behaviour of a man at the fire who, the item showed, was led away by the police.

The complainant expressed her concern that the item invaded the privacy of the man, as it was obvious that he had a severe mental disorder.

The broadcaster said that it was not its duty to decide on the sanity of people at newsworthy events, and said that the coverage was similar to that which would be given to a demonstration involving arrests. As the footage could not be regarded as invasive, the Authority declined to uphold the complaint.

Summary

There is no apparent pattern to date in the Authority's practice of whether to publish the name of a complainant when a privacy complaint is not upheld. Indeed, although the names

of complainants were usually not included when the complaint was upheld, this was not the inevitable case, as three complainants who received compensation did not have their names suppressed. Of the 22 decisions issued in 1997, the complainant's name was suppressed on four occasions – on two of the five occasions when the complaint was upheld, and on two of the 16 occasions when the complaint was dismissed. The Authority declined to determine one complaint.

During the year, the Authority confirmed its ruling that it had jurisdiction to deal with privacy complaints from people who had no direct relationship to the broadcast complained about. The Authority has made a similar ruling when determining complaints about fairness and balance. The Authority notes, however, that it is relatively unusual to receive fairness and privacy complaints from people who are not directly affected in some way.

None of the complaints required the Authority to canvass the issue of whether a person's name and address are always public or private information. For the Authority, the matter has been addressed satisfactorily by principle (v) – at least to date. Identifying details are not to be broadcast, principle (v) provides, unless they are public information or the release is in the public interest (which has been dealt with satisfactorily on a case-by-case basis).

The complaint from the real estate agent about the call he received from an on-air announcer, who omitted to advise him of the details, required the Authority to consider the precise meaning of "public information".

A majority of the Authority decided that as the disclosure only related to the complainant's occupation as a real estate agent, that it was information which he had given the announcer (in the announcer's private role as an occupier of a house), and thus that it amounted to public information. The minority disagreed on the basis that the degree of denigration contained in the exchange did not justify the use of the information in a way which was abusive.

The wording of s.4(1) and paragraph (c) of the Broadcasting Act – that a broadcaster is required to maintain standards "consistent with ... the privacy of the individual" – was particularly relevant to one of the privacy complaints determined in 1997. In that case, the programme makers had entered the complainant's property and, on finding no one at home, had shot film of the house and included some of this footage in the item. The broadcaster acknowledged, and the Authority agreed, that this action amounted to a breach of the homeowner's privacy.

In one complaint which alleged that the broadcast of an untrue fact about two named people breached their privacy, the Authority applied the new principle (v) which relates to the use of a broadcast to ridicule an individual. Principle (v) has allowed the Authority the possibility of dealing with complaints about untruths as fairness or privacy issues, depending, of course, on all surrounding circumstances.

Chapter 9

Privacy Complaints in the Recent Past: The Increasing Proportion of Privacy Complaints from January–June 1998

The increased number of privacy complaints continued into 1998. Overall, there appears to be a heightened awareness among viewers and listeners about privacy, while at the same time privacy is increasingly a potential concern given the growing number of "reality" based programmes made in New Zealand.

(i) A current affairs item which covered in some detail the murder by a young man of his partner, included two sequences showing footage of their child. Some shots were taken when the absence of the mother was being treated as a missing person inquiry, and some after the child's father had been sentenced to life imprisonment.

The allegation that the identification of the child was a breach of her privacy was one matter raised in the complaint about the item (1998-005/006, 12.2.98).

The Authority did not uphold either the standards complaint or the privacy complaint. However, on the latter, it wrote:

> The Authority, nevertheless, has concerns about the footage of the couple's daughter. It acknowledges that the shots showed an apparently happy child, and the people who cared for her. However, she was identified on the programme in a way which infringed her rights to privacy, and which would ordinarily require consent before broadcast. The Authority accepts that permission was sought and given by persons who at the time apparently had the day to day responsibility for the child. But it has misgivings as to whether that was sufficient in the circumstances of this case. The 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.

> It is not clear in the present case whether the grandparents were in fact the legal guardians of the child at the time the filming took place. TVNZ described their status as that of "legal custodians". But the programme itself made it clear that whole issue of custody was still before the Courts. Moreover, the Authority is not satisfied that the filming, and the subsequent broadcast, were in the interests of this child. She is young and could well face considerable stress as she grows up and learns about the events referred to in this programme. She will have to try to come to terms with all that has occurred. In the Authority's opinion, public filming of this sort will do little to assist her in this process. In addition, the Authority has the impression, rightly or wrongly, that perhaps the grandparents stood to gain more from filming than the child. The Authority also considers that there were other ways available to the broadcaster to convey the storyline in this case while still respecting the privacy of this child.
>
> Having said that, the evidence as to the grandparents' legal status is equivocal. It is not such as to enable the Authority to conclude definitely that the consent given in this case should be ignored. The Authority is also mindful of the fact that it has yet to develop a principle which deals specifically with the privacy interests of children. It now signals its intention to do so.

(ii) An examination of the issues surrounding the trial for murder of a woman who unsuccessfully advanced the battered woman's syndrome as a defence was explored in a current affairs item. One of the complaints alleged that the privacy of the victim's family was infringed.

Privacy was not a central issue and the Authority concluded that as the victim's family were not included in the item, after it focused on the murder and later developments, the family's privacy was not invaded in contravention of principles (i) and (iii) (1998-007/008/009, 12.2.98).

(iii) The Christchurch Civic Creche case, and the conviction of a staff member, has been a matter of considerable public and media interest over the years. A journalist who had written on the case participated in a talkback session on radio, and described as "unusual" the request by the mother of one of the child witnesses for the videotape of her child giving evidence.

The mother complained to the Authority as that information was contained only in an affidavit filed by her with the court which was not for public information (1998-020, 5.3.98)

The Authority considered the case under principle (i) and reached a number of conclusions. First, the information was not a private fact, but even if it was, it was not capable of identifying the mother or her child. Secondly, even if the mother had been recognisable, given the high profile of the case the Authority did not accept that the disclosure of the information reflected adversely on her. The complaint was not upheld. The mother's name was not published.

(iv) The operator of a small radio station made personal remarks about a rival broadcaster. On receipt of the complaint, the operator acknowledged the broadcast was inappropriate and said the station would broadcast an apology three times a day for seven days.

In view of the name-calling and personal ridicule contained in the broadcast, the Authority found a clear breach of principle (iv) (1998-021/022, 5.3.98). The Authority considered that the apology was excessive and exacerbated the breach.

On the basis that the broadcaster had committed a serious transgression of the Broadcasting Act, and despite the broadcaster's limited resources, the Authority upheld the privacy complaint, and the complaint that the action taken on the upheld standards complaint was inappropriate. The broadcaster was ordered to pay $250 by way of compensation, and $250 in costs. The complainant's name was suppressed.

(v) Another decision dealing with a privacy complaint was released on the same day (1998-023/024, 5.3.98) The complaint was upheld and both costs and compensation were ordered ($750 and $250), and the complainant's name was suppressed.

The facts :

> An obscene phone call, recorded the previous day, was broadcast on 92.2XS on 5 December 1997. In the call, a woman was phoned at her place of work by a man who claimed to have seen her at work. He said he was now at home, naked and thinking about her. She was identified by her first name.

The complaint claimed:

> J, the victim of the call, complained to the Broadcasting Standards Authority under s.8(1)(c) that the broadcast breached her privacy. She also complained that it was in bad taste, and was unfair to her. She expressed her outrage that the call had been broadcast without her knowledge or consent, and that the announcer had shown no regard for her feelings. J advised that her voice had been recognised by friends who heard the broadcast.

The ruling on the privacy complaint:

> With respect to the complaint that the broadcast breached her privacy, the Authority accepts J's contention that acquaintances who heard the call broadcast recognised her voice and were able to identify her. Her first name was also broadcast. The Authority concludes that to those who knew her, J's identity was revealed.
>
> Applying privacy principle (iii), the Authority then examines whether J's interest in solitude or seclusion was interfered with. The principle provides a remedy where a broadcaster has embarked on a scheme of intentional interference with a person's right to privacy where that interference is intrusive or objectionable. Prying is but one example of conduct which may offend. Here the interference was both intrusive and objectionable and, in the

> Authority's view, it cannot be excused simply because it was a stunt which went wrong. J has a right not to be publicly victimised for the amusement of breakfast show hosts and possibly listeners. The Authority finds that J's privacy was breached by the broadcast.

(vi) Resolution of the third complaint about the current affairs item broadcast some six months earlier which questioned the competence of the management of Wellington Free Ambulance was deferred as the complainant was overseas for a while.

When the complaint was determined, the decision recorded that the complainant, an ambulance officer, was shown, but not named, attending an accident which was totally unrelated to the event focused on. This footage had been collected with management consent as "wallpaper" shots for the item (1998-030, 26.3.98).

As neither identifying details were included in the item, nor did the filming involve intentional interference with the officer's privacy, the Authority did not consider that principles (iii) or (iv) had been breached.

The complainant's name was suppressed.

(vii) Allegations that an item both intruded on a person's grief, and was an invasion of privacy, were dealt with in No: 1998-032/033 (26.3.98). A news item reported the death of a toddler in a house fire and a distraught woman, possibly a relative of the child, was shown being comforted outside the house.

The broadcaster maintained that the privacy complaint should not be upheld as the brief item was not intrusive, and did not linger on the woman, who apparently was not aware of the camera. Moreover, the footage was taken from a public place, and there was public interest in the story.

Applying principle (iii), the Authority ruled that there was no intentional interference in the nature of prying which would be offensive to the ordinary person, and it pointed out that the footage had been filmed from a public place. It declined to uphold the complaint.

The complainant had no apparent connection with the incident covered and her name was not suppressed.

(viii) Following a bomb scare in downtown Wellington involving a grenade, and the subsequent arrest of a man, one radio station suggested that the incident could have been the work of the convenor of the "Buy Nothing Day". The convenor was named (1998-037/038, 23.4.98).

The convenor's complaint referred to both privacy and unfairness. In response, the broadcaster described the remarks as simply "light-hearted fun".

As the item implied that the convenor had been involved in a potentially serious event, the Authority upheld the unfairness aspect. It concluded that fairness and privacy overlapped and on this occasion, fairness subsumed the privacy aspect. The decision referred to the complainant by name, and the Authority did not consider that the breach justified an order.

(ix) The reality programme *Police Stop!* showed a woman being arrested on suspected drug offences. Her voice was audible and the house where she was arrested was shown.

The woman concerned complained that as her house was clearly identifiable, her privacy had been breached. In addition, she considered the item to be unjust and unfair, and to have distorted the context of her arrest. She requested, and was granted, name suppression and she was described throughout the item as "C".

In responding to the request for anonymity, the Authority wrote:

> The Authority notes that in previous matters in which privacy has been in issue, the name of the person making the complaint about a breach of his or her privacy has not necessarily been published in the Authority's decisions. As a matter of policy, the Authority determines that, in privacy cases, where there is justification for its so doing, then it will not generally publicise the name of a complainant. Here, it is satisfied that the complainant's request for anonymity should be respected and accordingly grants the request.

As for the aspect of the complaint which alleged that the filming of the house amounted to a breach of privacy, the Authority did not accept that the house would have been identifiable by the general public from the footage in the item. Accordingly, it did not consider that C's privacy was contravened. It added:

> In any event, it is the view of the Authority that people who engage in the activity to which the complainant pleaded guilty take the risk of attracting public attention and comment in the public domain. In the context of this programme, if it were required to do so, the Authority would hold there was a sufficient public interest to justify the filming and to attract the protection of the proviso to privacy principle (v) of the Authority's published Privacy Principles.

The Authority did not uphold any of the standards complaints, including the aspect which alleged that as Principles 10 and 11 of the Privacy Act 1993 had been breached, this amounted to a breach of standard G5 which requires respect for the principles of law. The Authority observed: (1998-039/040, 23.4.98)

> However, the Authority notes, by s.2 of the Privacy Act, it has application only to an "Agency" as defined in the Act. Any news medium, in relation to its news activities, is expressly excluded. And "news medium", for present purposed, is defined to include any agency whose business, or part of whose business, consists of a news activity. The Authority finds here that the

> broadcaster was involved in news activity within the meaning of the section. It concludes that, because of that, the privacy principles identified [in the Privacy Act] have no application to this particular broadcast and accordingly no question of a breach of standard G5 arises.

(x) Privacy was also one of the issues raised in the next decision released (1998-041/042, 30.4.98). It involved a complaint from a professional organisation about an item which investigated the dispute between medical specialists and midwives about maternity care. The item focused on the activities of one midwife, and the complaint alleged that the item invaded the midwife's privacy and portrayed her unfairly and in a biased manner.

In its ruling that principle (iii) had not been transgressed, the Authority noted that the filming of the midwife had clearly occurred in a public place. In regard to principle (v), the Authority noted that the midwife's name was in the public domain because it had been earlier released by the Health and Disability Commissioner. Moreover, the Authority recorded:

> The Authority also considers that there was a sufficient public interest in the matter to justify filming and identification of the midwife in this case. The public were entitled to know what was going on. And persons who might otherwise be mistakenly implicated were entitled to have that confusion removed. On that basis, the Authority is persuaded that there has been no breach of Privacy Principle (v).

The nub of the privacy and fairness complaints was the footage in the item of the midwife in and around her car. Concerning that footage, the Authority wrote:

> The Authority has carefully viewed the tape of the programme and notes that the particular footage was used a number of times in the item, including on one occasion when it was slowed down. In the majority's view, that use, and its repetition, gave a sinister air to the footage.

While, as noted, the privacy aspect was not upheld as the filming occurred in a public place, a majority of the Authority was of the view that it contained an element of unfairness as the midwife's case was before the Nursing Council. No other aspects of the standards complaint was upheld.

(xi) The complainant, P, in the next decision which dealt with privacy, confined her complaint to a breach of privacy (1998-049, 7.5.98). P was involved with a community standards lobby group which, at the time, featured in news reports and an announcer at a radio station broadcast himself leaving a sexually suggestive message on P's answerphone.

Expressing the opinion that the complainant's status as a member of a community group was immaterial, the Authority concluded that the broadcast of a malicious telephone call designed to intimidate the recipient was an unwarranted interference in

P's right to privacy. The Authority accepted that P's name was broadcast just before making the on-air telephone call.

The Authority then considered whether the broadcast also amounted to a breach of the privacy principles it applied. Turning to principles (i) and (iv), it stated:

> With respect to privacy principle (i), the Authority finds that the receipt of an offensive or malicious telephone call is in itself a private fact. To convey information about such a call without the recipient's consent is, it considers, a breach of privacy. It finds that such a breach is compounded when the substance and nature of the call is broadcast.
>
> Turning to privacy principle (iv), the Authority considers that the broadcast of an announcer making an obscene phone call to a named person, with the clear intention of ridiculing the recipient, is a clear breach of this principle. It was an occasion where the airwaves were used by the announcer to make a personal statement which the Authority finds offensive and intrusive.

As the factual situation in the complaint had not been previously encountered by the Authority, it explained its approach:

> The Authority emphasises that its Privacy Principles are an interpretive tool. As noted above, the Advisory Opinion makes clear that the specific facts of each complaint are especially important when privacy is an issue. On this occasion, the facts lead to the conclusion that a breach occurred.

The broadcaster was ordered to pay compensation of $250 to P, and costs of $750 to the Crown.

(xii) A news report which gave the name of the secretary of a Community Board, and hinted at her involvement in sabotage, was the subject of complaints from the named secretary and her employer, the local territorial authority (1998-054/055, 21.5.98). The secretary alleged that her privacy had been breached, while the Council regarded the item as inaccurate and unfair. The broadcaster advised the Authority that the Council's response and rebuttal to the original broadcast were broadcast over the next two days. In addition, it reported, it had broadcast a statement in which it acknowledged that the item was incorrect, and in which it apologised to the named secretary for the breach of her privacy.

As the secretary was named in regard to her public role in a legitimate news item, and despite the broadcaster's concession, the Authority did not accept that principles (v) and (vi) had been contravened.

Nevertheless, in view of the seriousness of the allegations contained in the broadcast, it considered the item had been unfair and imposed an order of costs to the Crown of $500.

(xiii) It was reported in a radio news item that a further criminal charge had been laid against a police officer, who had been granted name suppression in relation to earlier charges (1998-064, 25.6.98). The police officer complained on the basis that the reference to the further charge breached the intention of the name suppression order.

As the police officer was not named, the broadcaster declined to uphold the complaint and the Authority, after reviewing the complaint against each of the Privacy Principles, agreed. A considerable amount of the correspondence with regard to this complaint referred to a relationship between the reporter and the Crown Prosecutor which, the Authority pointed out, was not a broadcasting standards issue. The complainant was referred to in the decision as "D".

(xiv) A rugby player was charged with rape while touring South Africa with his team in 1997. The charge was later withdrawn. His decision not to travel to South Africa in 1998 with his team was announced at a press conference. That decision was the topic featured during a sports radio talkback programme. A listener with no apparent connection to the player complained that the reference to the player by name breached his privacy (1998-065, 25.6.98).

As the player had himself put his name in the public arena, and as the earlier incident was of legitimate public concern, the Authority did not uphold the complaint.

(xv) Two young people went missing in the Marlborough Sounds on New Year's Day in 1998 and the Police efforts, initially to find them, and later to locate their bodies, were matters of considerable media interest in the following months. During the investigation, the Police released photographs of four people who had been with pair shortly before they disappeared. A television news item dealing with this information included the photographs and the names of these four people.

The Police complained on the grounds that, because there was a specific request in the accompanying press release that the four not be identified, their privacy had been breached. The broadcaster argued that the four people, by consenting to have their photographs published, consented to having their privacy invaded. Moreover, the broadcaster argued that the matter was in the public interest and thus this was a defence to the privacy claim.

The Authority (1998-068/069, 25.6.98) began by emphasising the statements in the Advisory Opinion that the Privacy Principles might require amplification as different factual situations were encountered, and that the facts of each complaint were especially important when privacy was in issue. It stated:

> In the Authority's view, none of the principles enumerated were intended to deal with a situation such as this, where consent was given to the release of a visual image, but not to being named. As noted above, it is of the view that when the names were already in the public arena in the context of the inquiry, it was unrealistic for the Police to expect that anonymity could be maintained when the photographs were released.

It continued:

> Although the four young people may have been reluctant media performers, they were unwittingly bound up in the inquiry by virtue of their being at Furneaux Lodge on the night their two friends went missing. The information contained in the photographs alone was sufficient to identify them positively to those who knew them, and the Authority considers that the young people must have been well aware that there was a potential for their identities to become widely known. The Authority therefore concludes that privacy principle (vii) applies because the four had implicitly consented to an invasion of their privacy by agreeing to the use of their photographs. Furthermore, the exemptions for news and current affairs reporting under principle (v) is also applicable.
>
> The Authority concludes that there was no breach of privacy.

Summary

Fifteen of the 70 decisions issued between January and June 1998 (21%) raised the issue of privacy. For the entire year 1997 (22 of 190), the equivalent ratio was 12%. This review has already noted that the proportion of privacy complaints exploded in 1998. The issue of privacy, it will now be very apparent, has become a matter to the forefront of issues of concern to viewers and listeners. The issues raised in the complaints determined in the first half of 1998 are explored in the next chapter – the Conclusion.

Conclusion

Privacy and the Broadcasting Act 1989

The Authority was confronted with a blank slate – a *tabula rasa* if you will – when it was first required to determine a privacy complaint in 1990. Section 4(1)(c) of the Broadcasting Act enacted in 1989 simply required broadcasters to maintain standards consistent with "the privacy of the individual".

The Act imposed some limitations: the provision was restricted to individuals, not groups; and by using the word "individual" instead of "person", it excluded the broader legal definition of "person", which may include companies and societies.

From the outset in 1990, the Authority decided that it was necessary to develop principles which could be used as precedents for broadcasters. This approach also took into account that the Act provides that its decisions are appealable to the High Court as of right. Thus, when faced with the first complaint which alleged a breach of s.4(1)(c) of the Act, the Authority considered that it was appropriate to make use of the available legal discourses on the right to privacy.

The Legal Concept of Privacy Applied by the Authority

Judicial consideration of the concept of privacy was, in 1990, at its early stages in New Zealand. In contrast, there had been extensive consideration of the concept in the jurisprudence of the United States. The Authority decided to use this material.

The rules adopted from the United States in 1990, and set out by the Authority in its Advisory Opinion released in June 1992, are reasonably straightforward. Principles (i) and (ii) deal with the disclosure of facts, and principle (iii) with the process by which such factual material is obtained.

The first two principles which deal with the disclosure of facts provide that an individual's privacy is breached if the broadcaster releases private facts, or public facts which have over

time become private again, if the facts released are highly offensive and objectionable to the ordinary person. The principles impose an objective test as to whether the facts disclosed are, in fact, "offensive and objectionable".

The third principle relates to the method of obtaining these facts, and states that a breach of an individual's privacy takes place when "intentional interference" occurs with an individual's private affairs or an individual's interest in solitude. The principle elaborates to some extent on what amounts to intentional interference, which is described as "in the nature of prying". An individual's interest in solitude does not apply, it adds, when the individual is in a public place.

From the outset when determining privacy complaints, the Authority has been required to resolve the conflicting principles: on the one hand, the privacy of the individual, and on the other, the public's right to know. The disclosure of facts, in the "public interest", is a defence to an alleged breach of privacy. This defence is recorded in principle (iv) of the Advisory Opinion published in June 1992. Finally, principle (v) of that Opinion provides that an individual, who consents to the invasion of privacy, cannot later succeed in a claim for a breach of privacy.

The principles above were enunciated in the Authority's seminal decision when it first dealt with a privacy complaint (5/90, 3.5.90). They were contained in the Advisory Opinion issued two years later, and have provided a framework which has been enduring.

The applicability of these principles was reviewed by the High Court (*TV3* v *BSA* [1995] 2 NZLR 720). In that case, Chief Justice Eichelbaum ruled that it was acceptable, given the state of the approach to privacy in New Zealand law in the early 1990s, for the Authority to use them when determining privacy complaints.

While these principles have received judicial acceptance, it is important to record that the Authority has repeatedly stressed, and continues to stress, the importance of the facts which arise in each specific instance when a breach of s.4(1)(c) of the Act is alleged.

The early decisions which gave some substance to the framework espoused in 1990 were concerned with the disclosure of "facts". In contrast, by the mid and later 1990s, the Authority was also dealing with complaints where the disclosure of information involved the expression of an opinion.

The early decisions examined what was a private fact, and whether a fact which had been public at one time had become private again. The disclosure in itself of facts about a newsworthy person, such as the details about a house or car, the Authority noted on several occasions, was unlikely to amount to a breach of privacy. The facts disclosed, in addition, had to be "highly offensive" and "objectionable to a person of ordinary sensibilities".

The early decisions also examined what amounted to an intrusion into an individual's interest in solitude or seclusion. They also considered what was a public place. On this point, it could be said that some of the early decisions sometimes seemed to confuse the place in which the news agency was, especially the camera operator, with the place where the individual was. An individual cannot allege a breach of privacy if he or she is in a public

place. However, later decisions clarified the point that an individual can allege a breach of privacy if he or she is in a private place – although visible from a public place. In these circumstances, it is relevant to ascertain whether recording the activities amounts to intentional intrusion in the nature of "prying".

Furthermore, in past decisions the Authority has defined a public place in a reasonably broad manner to include, for example, a nightclub. Without imposing any specific guidelines, the Authority now records that the definition of a "public place" also involves a consideration of the specific facts of the broadcast complained about. The earlier decisions should not be regarded as imposing rigid paramaters on this point.

When applying the Privacy Principles to the specific facts disclosed in the broadcast, the Authority takes into account the "public interest". Indeed, because of the importance with which the Authority views freedom of expression, the "public interest" defence is one which it regards as being of paramount importance. This applies whether it is determining complaints based on privacy or, indeed, any other broadcasting standard.

The Unfair or Unjustified Disclosure of Information About an Identifiable Person

In early 1996 the Authority was confronted with some complaints which involved the disclosure of opinions about an identifiable person, and which did not come within the framework established by the June 1992 Advisory Opinion. The Authority then decided that it was necessary to review the adequacy of the Privacy Principles it had initially promulgated. In an increasing number of complaints received by the Authority in 1995 and 1996, the broadcast also involved some degree of unfairness to the identifiable person referred to in the broadcast.

However, the Authority felt, fairness was not the only element which was relevant because the remarks frequently involved the exposure of an identifiable individual. The type of broadcast included, but was not confined to, instances when the broadcaster used the broadcast to abuse a person who the broadcaster felt offended by. Furthermore, on some occasions, the broadcaster and the person referred to had been involved in a relationship of some sort outside of the broadcasting environment.

Following a flurry of decisions on this point in early 1996, in May that year the Authority issued an Advisory Opinion which added two further principles that it intended to apply when determining privacy complaints.

The first records that a breach of privacy occurs when a broadcast discloses private facts "to abuse, denigrate or ridicule personally an identifiable person". This principle is an expansion of the requirement in the standards for a broadcaster to deal fairly with persons referred to, and accepts that unfairness which amounts to abuse of a person who can be identified is, in addition, a breach of privacy.

The second new principle states that a breach of privacy occurs when a broadcaster discloses, without consent, the "name and/or address and/or telephone number of an identifiable person". This new principle also reinforces the public interest defence which has been applied from the start of the Authority's determination of privacy complaints, by stating

specifically that this new principle does not apply to details which are public information, to news and current affairs reporting, and is subject to the public interest defence.

The Authority has not issued a definition of the "public interest" defence. It has noted, however, that there is a distinction between information which is genuinely or legitimately in "the public interest" on the one hand, and information which merely feeds public curiosity on the other. Release of information solely to satisfy public curiosity about an identifiable person who is not otherwise a public figure, the Authority has ruled, will almost inevitably amount to a breach of that individual's privacy.

Privacy Act 1993

The Privacy Act 1993 and the Office of the Privacy Commissioner have been the subjects of sustained criticism, especially from the print media. This approach is apparent in the 1998 collection of papers published jointly by the Newspapers Publishers Association and the Commonwealth Press Union entitled *Privacy: a need for balance.*

However, the Broadcasting Standards Authority is not involved in the administration of the Privacy Act, as that Act provides explicitly that a "news medium" is not an "agency" to which the Privacy Act applies.

A "news medium" is defined as any agency whose business, or part of whose business, consists of a news activity. Complaints to the Broadcasting Standards Authority alleging a breach of privacy almost invariably concern the news activity of the broadcaster complained about.

Trespass

Privacy and trespass are different concepts. Broadcasters frequently refer to the implied licence to visit people on their private property – a licence which is shared by everyone. While the Authority does not determine complaints which allege trespass as that is not a matter of broadcasting standards, it will take into account Eichelbaum CJ's comment that the implied licence does not exist when the visitor is aware that the visit is unwelcome. This observation may be relevant when deciding, for example, whether the broadcaster's action amounted to intrusion.

The Status of the Complainant

The status of the individual who alleges a breach of privacy has also been an issue from the outset. A "reluctant debutante", to use Justice McGechan's phrase, has a vastly different investment in privacy than a high profile politician – especially at election time. This distinction has been recognised by the Authority in its decisions.

Complaints Involving the Privacy of Children

The privacy of children has been an infrequent issue for the Authority. In a recent decision, nevertheless, when dealing with a complaint about the privacy of a young girl, it expressed the view that consent on behalf of young children must be given by someone who clearly has

the authority to do so (1998-005/006). It also signalled that it intended to develop a privacy principle which deals specifically with the privacy interests of children.

Although such a principle has not yet been promulgated, the Authority intends to incorporate the sentiments contained in the standard relating to the privacy of children recently laid down by the Broadcasting Standards Commission in the United Kingdom. It provides:

> Children's vulnerability must be a prime concern for broadcasters. They do not lose their right to privacy because of the fame or notoriety of their parents or because of events in their schools. Care should be taken that a child's gullibility or trust is not abused. They should not be questioned about private family matters or asked for views on matters likely to be beyond their capacity to answer properly. Consent from parents or those in *loco parentis* should normally be obtained before interviewing children under 16 on matters of significance. Where consent has not been obtained, or actually refused, any decision to go ahead can only be justified if the item is of overriding public importance and the child's appearance is absolutely necessary.
>
> Similarly, children under 16 involved in police enquires or court proceedings relating to sexual offences should not be identified or identifiable in news or other programmes.

Name Suppression

In its early decisions, the Authority invariably named the complainant who alleged a breach of privacy. This was the practice until late in 1993 when it received a complaint on behalf of a rape victim who, it determined, was identifiable in a news item. She was referred to in the decision as "Complainant R". The Authority then dealt with other complaints from people who considered that they had been dealt with in an abusive way, and whose name and identity was of no general public interest. In such circumstances, and on occasions when a specific request for anonymity has been made, the Authority is likely to issue a decision which does not name the complainant.

For some time the Authority decided the issue of name suppression on a case-by-case basis and was increasingly declining to include the complainant's name in the decision when it is publicly released. In decision No: 1998-039/040 the Authority stated that as a matter of policy and where there was justification for its so doing, it would generally not publish the name of a complainant who alleged a breach of privacy.

Identifying Footage

The footage of "Complainant R" referred to above did not disclose her identity clearly to people who did not know her. Moreover, she was not named in the television news item. However, it disclosed her deportment sufficiently, the Authority ruled, to enable friends and acquaintances to identify her. This decision is an example of the Authority's approach to the sufficiency of details which enable a person to be identified. Part of a name and voice, as well as deportment, are also examples of information which the Authority has ruled is sufficient to enable a person to be identified beyond his or her immediate family.

The footage showing a police officer, from behind, aiming and shooting a pistol was considered sufficient for identification purposes. Nevertheless, that complaint was not upheld as it was not considered that showing a person carrying out his job was offensive.

The Methods Used in Gathering Information for Broadcast

The material contained in the broadcast is usually the main issue for the Authority when determining privacy complaints. Nevertheless, in view of the principle which refers to intrusion in privacy complaints, the Authority is also sometimes involved in examining how the material contained in the broadcast was obtained. This approach was explicitly supported by Eichelbaum CJ in *TV3* v *BSA*.

The use of hidden cameras or microphones obviously means that some consideration is given by the Authority to the way the material was gathered for the broadcast when assessing a complaint that alleges prying. The Authority has yet to determine the issue of how far it ought, or is entitled, to go in its examination of possible privacy contraventions by the broadcaster when collecting information for broadcast.

Ethical Concerns

The Advisory Opinion issued by the Authority in 1996, which added privacy principles (vi) and (v), acknowledged the overlap between privacy and fairness. The concept of fairness, as with the concept of privacy, includes ethical overtones.

Ethical issues are also highlighted in privacy complaints.

The application of ethics is illustrated here by referring again to two of the Authority's decisions. The first is dated 6 June 1990 (6/90), and the second 7 May 1998 (1998-049). Both decisions involved remarks by announcers at radio stations about named people. Both complainants could also be regarded as people to whom the legitimate public interest exception applied. Thus, the reference to the person in the first decision, and the phone call to the second, could not in themselves necessarily be regarded as an invasion of their privacy. However, the intrusion in each case did not stop with the call. The additional comments which were broadcast were found by the Authority to amount in each instance to an unjustified invasion of their privacy.

In the first decision, the Authority ruled when upholding the privacy complaint, that although the information given about the person named in the item was public, it was given in such a way as to encourage others to intrude on the complainant's privacy. It was suggested to listeners that they visit the named person and, among other things, to help themselves to his property. The broadcaster was ordered to pay compensation of $500 to the complainant.

In the second decision, the announcer broadcast his call to the complainant and, when finding no one at home and while still on air, left a message containing sexually suggestive sounds on the complainant's answerphone. Compensation of $250 was ordered, together with costs to the Crown of $750.

When dealing with complaints which allege a breach of privacy, and when applying the requirement that broadcasters maintain standards consistent with the privacy of the individual, the Authority will take a common-sense approach to the application of the Privacy Principles it has developed and published to the facts of the case.

Summary

The Chief Justice in *TV3* v *BSA* commented that the Authority's approach to the concept of privacy correctly involved a fair, large and liberal interpretation. These words reflect the required statutory approach to the interpretation of legislation. The Authority is heartened at the Chief Justice's approval of its approach in developing the Privacy Principles, and his acceptance of the way the Authority applied the principles to the specific facts in the decision which had been appealed.

Acting as the statutory watchdog on behalf of the public, the Authority believes that its approach to complaints which allege a breach of privacy has from the outset combined the requirements of the Act and reasonable public expectations.

The Authority concludes with the succinct summary of the Privacy Principles contained in decision No: 1997-110/111. It wrote on that occasion:

> The Privacy Principles deal with the disclosure of private facts, with the disclosure of public facts which have become private with the passage of time, with intrusion into a person's interest in solitude or seclusion, and with the protection against the disclosure of private facts to abuse, denigrate or ridicule an identifiable person. They include the protection against the disclosure by the broadcaster of the name and address or telephone number of an identifiable person. The defence for an individual's claim for privacy is that the matter is discussed in the public interest.

About the Author

Dr Michael Stace has been with the Broadcasting Standards Authority since January 1991, and is currently its Executive Director. His qualifications include a D.Jur, obtained in 1980 from Osgoode Hall Law School in Toronto while the recipient of a Commonwealth Scholarship.

All Broadcasters are required to maintain in all their programmes standards which are consistent with the privacy of the individual. This is a provision contained in the Broadcasting Act 1989.

Everyone has the right to freedom of expression, including the freedom to impart information and opinion of any kind in any form. This right is contained in the New Zealand Bill of Rights Act 1990.

The Broadcasting Standards Authority was also established by the Broadcasting Act and, when determining complaints which allege that a broadcast breached an individual's privacy, it acknowledges the right to freedom of expression.

This review records the Authority's decisions on privacy complaints. Frequently these decisions reflect the tension present when the Authority is required to deal with the competing concepts of the privacy of the individual, and the freedom of expression.

DUNMORE PRESS

Broadcasting Standards Authority
Te Mana Whanonga Kaipāho