

# REAL MEDIA REAL PEOPLE

Privacy and Informed Consent in Broadcasting

NEW ZEALAND  
BROADCASTING STANDARDS AUTHORITY

*Real Media, Real People*

*Real Media, Real People*  
*Privacy and Informed Consent in*  
*Broadcasting in New Zealand*

*Broadcasting Standards Authority*

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**Broadcasting Standards Authority publications:**

- *Privacy – Interpreting the Broadcasting Standards Authority’s Decisions January 1990 to June 1998* (Michael Stace) 1998
- *Monitoring Community Attitudes in Changing Mediascapes* (Gary Dickenson, Michael Hill & Wiebe Zwaga) 2000
- *The Younger Audience – Children and Broadcasting in New Zealand* (Reece Walters & Wiebe Zwaga) 2001

For more information on the Authority’s decisions and publications please view its website:  
[www.bsa.govt.nz](http://www.bsa.govt.nz).

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# Foreword

In late 2001 the Broadcasting Standards Authority decided to conduct research into privacy and informed consent issues in broadcasting. There were three main reasons for this decision. First, the Broadcasting Amendment Act 2000 included a provision that would enable broadcasters and/or the Authority to develop a privacy code of broadcasting practice. Second, there had been a steady increase in the number of privacy complaints made to the Authority since its inception in 1989. Third, developments in programming, such as the rise of ‘fly on the wall’ documentary formats, competitive-based reality television and evolving entertainment formats, were continuing to challenge attitudes about not only privacy, but also methods of gaining consent.

The objectives of this research on privacy and informed consent in broadcasting were threefold:

- To inform the Authority’s decision-making when it considered complaints involving matters of privacy and informed consent in the context of the public interest and the freedom of expression.
- To test the efficacy of the Authority’s privacy principles as set out in its Advisory Opinion, with the option of developing a privacy code in the future in consultation with interested stakeholders.
- To assess whether the Authority should lead the development of ethical guidelines outlining the procedures for obtaining informed consent.

Chapter one of this monograph provides an overview of decisions the Authority has issued involving privacy and consent since our previous publication *Privacy: Interpreting the Broadcasting Standards Authority’s Decisions January 1990 to June 1998*. This chapter covers decisions issued between July 1998 and December 2003.

Chapters two and three detail the findings of the Authority’s consultation with specific stakeholder experts on privacy and informed consent issues. Seventy-five broadcasters, programme producers and directors, academics, lawyers, Māori, and community advocacy organisations were interviewed extensively. These interviews also helped us refine the questionnaire for a national public opinion survey.

Chapter four outlines the findings of the national survey, during which 1,195 New Zealanders were interviewed face-to-face to measure public attitudes to issues of privacy and consent.

As one would expect, the range of opinion varied greatly. This is also reflected in the tensions inherent in the topics: New Zealanders respect the right to privacy but also demand truthful news and the unmasking of improper behaviour by those in positions of responsibility.

It is not the Authority's task to resolve the broad debates. Nevertheless, we need information to assist us in navigating the decision-making path, so that our work is founded on good reasoning and an understanding of a broad range of societal views.

There are several striking findings in this research. The first is that there is a gulf between the general public's understanding of the rights of individuals when featuring in the media, and the actual legal position of those individuals. This suggests that better, more accessible information might be useful so that the public clearly understands both its rights and obligations *and* the rights and obligations of the media to go about their professional tasks.

The second is the degree of unanimity between various stakeholder groups and members of the public on some key issues. Almost all respect the principle that protection of children and the vulnerable is highly important. Many agree that public figures have less right to privacy on important issues than ordinary members of the public.

What does this mean in practice? Should individuals have complete control over the use of recordings/images in which they feature? – in law and in practice no, but many individuals disagree. Should a consent form always be used? – it is impractical for some areas of media, e.g. news gathering and most radio interviews, but may be sensible for longer-form programmes, and competitive formats where participation is sought by the individual.

If the method of gaining information is intrusive (e.g. hidden cameras), but there is a justified suspicion of wrongdoing, are privacy principles less important? – no, but the public interest is a valid defence. Are there special issues in recording Māori people? – yes.

Stakeholders made a number of suggestions for ways the Authority could amend its current privacy principles. There seems to be little desire to introduce a separate privacy code of broadcasting practice, but the suggestions for considering aspects of the principles afresh will provide us with food for thought over the coming months.

We thank all who participated in this large exercise. We hope that this publication is helpful to all who take an interest in this important field.

*Joanne Morris*  
*Chair*  
*Broadcasting Standards Authority*  
*July 2004*

# Introduction

by Wiebe Zwaga

In 1998 the Authority published *Privacy: Interpreting the Broadcasting Standards Authority's Decisions January 1990 to June 1998*.<sup>1</sup> In the foreword of that publication, Sam Maling, then chairperson of the Authority, observed the following about the Authority's role in determining complaints about alleged breaches of privacy of the individual in broadcast programmes:<sup>2</sup>

[This role] has involved the Authority, from the beginning, in weighing up 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 monograph addresses the legal challenge sketched by Sam Maling and examines how the balance between freedom of expression and the right of the individual to privacy can be achieved when the Authority determines complaints about alleged breaches of privacy. It explores stakeholders' perceptions of how these competing values should be balanced. It asks what the wider New Zealand public think of the right to privacy of their fellow citizens in relation to the freedom to impart, and *receive*, information about them.

Section 4(1)(c) of the Broadcasting Act 1989 requires broadcasters to maintain standards which are consistent with the privacy of the individual. Complaints alleging breaches of privacy may be made directly to the Authority, in contrast to complaints alleging breaches of other broadcasting standards, which must be made to the broadcaster first. A further difference is that if the Authority upholds a privacy complaint, it may award compensation of up to \$5,000 directly to the person whose privacy has been breached.

The Broadcasting Amendment Act 2000 provides for broadcasters and/or the Authority to develop a code of broadcasting practice relating to privacy. The research reported in this monograph is, among other things, a response to this Act.

## UK research

The United Kingdom's Broadcasting Standards Commission (BSC), now integrated into the Office of Communications (Ofcom), has taken the lead internationally in researching privacy and consent issues in broadcasting. The Authority has used the BSC's research programme as a model. It has attempted to follow up relevant aspects of the BSC's research and apply them to the New Zealand broadcasting environment.

A 1997 BSC publication<sup>3</sup> found that attitudes to how much privacy individuals should be accorded depended on their perceived social and moral position:

... respondents suggested that criminals had no effective rights, whereas ordinary members of the public were awarded full rights to prevent coverage. Those with public position fell in between and were awarded limited rights – not the power to prevent but some rights to consultation prior to publication.<sup>4</sup>

Furthermore, survey respondents demanded 'informed and considered participation'. Children, in particular, should not be interviewed by programme makers without parental consent. Finally, programme makers were perceived:

... to be willing to flaunt accepted rules of conduct in relation to privacy in order to make programmes.<sup>5</sup>

A second research project commissioned by the BSC in 2000 studied consent issues in broadcasting.<sup>6</sup> A survey found that just over 70 per cent of respondents thought that programme makers should inform participants about what was involved in the making of a programme. They also thought that programme makers should tell participants about the possible consequences of taking part in a programme.

This research found that the people surveyed questioned the motives of participants appearing in programmes:

... the audience characterisation of participants' motives included being labelled as 'show-offs' or 'exhibitionists'.<sup>7</sup>

Even so, on the issue of consent, a clear majority of respondents felt that consent should be sought from individuals who were not directly involved in the programme but appeared on camera footage. Two-thirds believed that consent needed to be sought from individuals being filmed by surveillance cameras before such footage was used in reality-type entertainment programmes. On this matter the study concluded:

However, members of the public were careful to differentiate between entertainment and investigative programmes. Only 45% said consent should be sought if [surveillance camera] footage was to be used in an investigative programme, implying support for the public interest in uncovering potential wrongdoing.<sup>8</sup>

The relationship between privacy, consent and the public interest was dealt with in detail by a third research project commissioned by several organisations, including: the British Broadcasting Corporation, the Broadcasting Standards Commission, the Independent Television Commission and the Radio Authority.<sup>9</sup> This study covered topics including public interest definitions, rights to privacy, aspects of media intrusion, rights to privacy and good taste and decency, consent, and motives of the media to obtain private information.

*The Public Interest, the Media and Privacy* found that once consent to the publication of private information had been given, respondents considered that this absolved the media from the charge of intrusion of privacy. However, respondents expressed concern about the vulnerability of the person giving consent, for example in cases where somebody was suffering from trauma after an accident.

There was no consensus on a firm definition of 'public interest'. Public interest issues were seen to be matters affecting crime, health and national security. Respondents felt that the media often mobilised the concept of public interest as a defence after a breach of privacy. A large majority of survey respondents saw public interest as pertaining to issues which affected them. Accordingly, the report concluded that:

... for something to be in the public interest it has to be in the interests of the collective and not a single individual, such as the promoting of some benefit, or the avoidance of some harm.<sup>10</sup>

Respondents' expectations of privacy depended on whether they were in public or private space. Whether the space was 'closed space' (the home), 'restricted public space' (the office or a secluded beach), or 'open space' (town centres, shopping malls, and open public beaches), guided respondents' opinions on privacy. In addition, respondents considered that depending on the type of space, individuals had '... a duty of care not to behave in a manner that one would not wish to become public.'<sup>11</sup>

The home, or closed space, was considered sacrosanct. A majority of respondents also believed that individuals should not be focused on in open public space even though they considered that individuals had a higher duty of care not to 'stand out' from the crowd. While respondents considered it acceptable to be filmed as part of a crowd, they did not consider it acceptable to be singled out for special attention. There was an expectation that while cultural notions of privacy would be subject to change over time, the concept of public interest would remain constant.

Privacy and public interest are related where the degree and method of media intrusion is concerned: 'The higher the degree of public interest, the greater the degree of intrusion permitted.'<sup>12</sup> For example, respondents believed that hidden cameras/microphones should only be used where there was a high public interest rationale, and other means of obtaining the information were not available. However, respondents placed an important caveat on the use of hidden cameras/microphones:

... surreptitious recording has to be restricted to the gathering of information that is strictly germane to the story; it should not gather 'collateral information' of a private nature. Hence listening into phone calls that might collect information about a person's family, when the family is not part of the story, is not considered permissible.<sup>13</sup>

Respondents considered that children had 'virtually inviolable rights to privacy'.<sup>14</sup> To compromise children's rights to privacy, the public interest needed to be extremely high, such as collecting information about impending terrorist acts.

Specifically citing the tabloid press in the United Kingdom, a large majority of respondents expressed considerable scepticism about the motives of the media when they intrude on privacy. The media were perceived *not* to be acting in the public interest but in their own interest to get a higher audience share.

### **New Zealand research**

The sentiments expressed in the United Kingdom survey findings resonate with the findings of earlier New Zealand research commissioned by the Authority. In a survey published in 2000,<sup>15</sup> New Zealanders cited invasions of privacy as the most unacceptable of all the issues surveyed i.e. bad language, the portrayal of sex and nudity, violence, discrimination, and fairness. However, a cluster analysis by socio-demographic background found that a significant number (18% of respondents) fitted the label of 'Nosy Parkers'. *Monitoring Community Attitudes in Changing Mediascapes* reported on this cluster in the context of television programming trends such as reality television, as follows:

... Nosy Parkers did not seem to be too concerned about privacy issues arising from broadcasting .... The so-called 'tabloidisation' of broadcast media has been blamed for the increasing trend to pry into the private lives of citizens, be they prominent members of society or reluctant debutantes. The fact that such programmes rated well could be explained by the fact that there proportionately was – in audience terms – a sizeable constituency of Nosy Parkers who did not take much exception to privacy and fairness issues.<sup>16</sup>

'Nosy Parkers' in New Zealand constitute a viable audience share. One might hypothesise that the proliferation and popularity of new reality television formats may result in privacy being less valued.

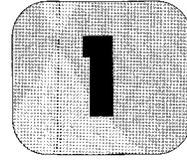
The Broadcasting Standards Authority has received complaints about alleged breaches of the privacy standard when the good taste and decency standard might have been more appropriate. The UK report, *The Public Interest, the Media and Privacy*, also found that people had difficulty making a distinction between privacy and good taste and decency.

It was in the context of the developments sketched above – both programme developments and shifts in audience preferences – that the Broadcasting Standards Authority embarked on its research of New Zealanders' views of privacy and consent in broadcasting reported in this monograph.

All Broadcasting Standards Authority decisions cited, as well as further information on the broadcasting standards regime, are available through its website [www.bsa.govt.nz](http://www.bsa.govt.nz)

## Notes

- <sup>1</sup> Michael Stace, *Privacy: Interpreting the Broadcasting Standards Authority's Decisions January 1990 to June 1998*, Palmerston North: Dunmore Press, 1998.
- <sup>2</sup> *Ibid.*, p. 9.
- <sup>3</sup> Matthew Kieran, David Morrison and Michael Svennevig, *Regulating for Changing Values*, London: Broadcasting Standards Commission, 1997; and also Matthew Kieran, David E. Morrison and Michael Svennevig, 'Privacy, the public and journalism: Towards an analytic framework', *Journalism*, 1(2): 145–169, 2000.
- <sup>4</sup> Matthew Kieran *et al.*, 1997, p. 6.
- <sup>5</sup> *Ibid.*
- <sup>6</sup> Stirling Media Research Institute, *Consenting Adults?*, London: Broadcasting Standards Commission, 2000.
- <sup>7</sup> Stirling Media Research Institute, *op. cit.*, p. 8.
- <sup>8</sup> *Ibid.*
- <sup>9</sup> David E. Morrison and Michael Svennevig, *The Public Interest, the Media and Privacy*, British Broadcasting Corporation, Broadcasting Standards Commission, Independent Committee for the Supervision of Standards of Telephone Information Services, Independent Television Commission, Institute for Public Policy Research and Radio Authority, London: Broadcasting Standards Commission, 2002.
- <sup>10</sup> *Ibid.*, p.1.
- <sup>11</sup> *Ibid.*, p. 2.
- <sup>12</sup> *Ibid.*
- <sup>13</sup> *Ibid.*
- <sup>14</sup> *Ibid.*
- <sup>15</sup> Garry Dickinson, Michael Hill and Wiebe Zwaga, *Monitoring Community Attitudes in Changing Mediascapes*, Palmerston North: Dunmore Press and Broadcasting Standards Authority, 2000.
- <sup>16</sup> *Ibid.*, p. 99–100.



# The BSA's regulatory framework: recent decisions on privacy and consent

*by Michael Stace*

## **Introduction**

“Privacy is the right to be let alone.” So stated United States Supreme Court justices Warren and Brandeis in their famous legal axiom in 1890.<sup>1</sup> More than a century later, community attention to the concept of privacy has not declined, and no more authoritative legal exposition of what the right to privacy means has been advanced.

One of the requirements of section 4(1)(c) of the Broadcasting Act 1989 is that broadcasters maintain standards consistent with the ‘privacy of the individual’.<sup>2</sup> The Act does not define what is meant by the privacy of the individual. It is not the role of the Authority, nor does it have the mandate, to resolve broader community and juristic perceptions of the place of privacy in the general law. The Authority, nonetheless, is required to adjudicate on complaints alleging breaches of privacy in broadcasting.

Accordingly, the Authority has developed a set of privacy principles which it applies when it investigates privacy complaints. As well as providing guidance to broadcasters and to the Authority, the principles attempt to balance the competing values society places on individual privacy and freedom of expression.

In a monograph published at the end of 1998,<sup>3</sup> the Authority outlined its efforts to interpret and apply section 4(1)(c) of the Act. The monograph recorded chronologically every decision released between January 1990 and June 1998 which involved the Authority in investigating a complaint alleging a breach of privacy.

This chapter takes up where the previous monograph left off and discusses how the Authority has applied the privacy principles in decisions issued between July 1998 and December 2003. During this period, 132 privacy complaints were determined of which 48 were upheld. In 1999 the Authority also amended privacy principle (vii) to increase the protection of children.

## The privacy principles

One of the Authority's functions under Section 21(d) of the Act is to issue advisory opinions relating to broadcasting standards and ethical conduct in broadcasting. On 25 June 1992 the Authority issued its first advisory opinion, setting out the privacy principles it had developed since its inception in 1989, and which it intended to apply when investigating complaints alleging a breach of privacy.

The Authority's first advisory opinion contained five privacy principles. Noting that its decisions could be appealed to the High Court, the Authority stated in that opinion that it was necessary for it to follow appropriate legal precedents. The Authority noted that there was a paucity of reported cases and a lack of a clear legal definition in New Zealand. Therefore, the Authority relied upon precedents from the United States in developing the first five privacy principles.

As the Authority gained more experience determining privacy complaints, it developed and expanded the privacy principles. In another advisory opinion, released on 6 May 1996, it added two further principles to the original five. A third advisory opinion, released on 20 September 1999, focused on the issue of consent given by children, and amended the original principle which dealt with consent.

In the introduction to each of the advisory opinions, the Authority has stressed the following:

- 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.

That is, the Authority looks at the specific facts of every complaint alleging a breach of privacy, and may elaborate, refine or add to the principles as it sees fit.

There are seven privacy principles which the Authority applies to privacy complaints against radio and television broadcasters:

- i) The protection of privacy includes 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 a reasonable person.
- iii) There is 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

*cont'd ...*

individual's interest in solitude or seclusion does not provide the basis for a privacy action for an individual to complain about being observed, followed or photographed in a public place.

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

Three particular aspects of the Authority's privacy principles have evolved since 1998; identification, the definition of 'individual' as applied by the Authority, and consent by children.

### Identification

Real people are sometimes shown on television taking part in exciting, unusual, harmful or even illegal activities. This applies particularly to documentary, reality and entertainment formats, for example those involving the police or emergency services. These services often deal with people who may well prefer not to feature on television, or who are not in a position to consent, or decline to consent, to be featured. It is not unusual for their faces to be pixelated or otherwise electronically masked.

If a person who appears on radio or television is not identifiable, there cannot be a breach of that person's privacy. The Authority has also ruled on a number of occasions that a person is not identified if the individual is identifiable only to family and close friends who would reasonably be expected to know about the matter dealt with in the broadcast. While the degree to which an individual is identifiable beyond such a close group is a question of fact which must be determined with each complaint, the Authority's starting position, and its application to the particular facts, was recorded in decision number 2000-179. The complainant, R, said

that his son was shown stealing from his employer – although his son was not convicted. The programme “Stealing on the Job” was broadcast by TV3 as an *Inside New Zealand* documentary. The Authority wrote:

Before determining whether there has been a breach of privacy, the Authority must be satisfied that the broadcast identified R’s son. Only then can it apply its privacy principles to determine whether a breach occurred. In this case, the Authority is not satisfied that the identification threshold has been reached. In previous decisions, the Authority has held that for there to be identification it is insufficient that the individual be identifiable to a close circle of family and acquaintances. Here, the identity of R’s son was protected in many ways. The surveillance footage, which members of the Authority found difficult to decipher, showed R’s son’s legs and lower body, and in the brief time his face was shown it was pixelated. The Authority does not accept R’s argument that by identifying the owner of the tyre business – one of more than 40 of that company’s agencies in the Auckland region – his son was identified. Nor does it accept the contention that the owner’s reference to a “young fella” identified R’s son. Although it accepts that a small number of people within the industry may have linked the programme with his son, the Authority is unable to find that such identification, if any, crosses the identification threshold.

Decision number 2002-128/143 is another occasion when the Authority decided that the broadcast had not crossed the identification threshold. The complainant, R K Watkins, had made a large number of complaints about the radio station The Rock, a number of which the Authority upheld. Her complaints were the subject of comment from the presenters of The Rock’s *Morning Rumble*. The Authority did not uphold her subsequent complaints that the comments about her on the *Morning Rumble* breached her privacy. It stated:

When the Authority deals with a complaint that an individual’s privacy has been violated, it must first consider whether the individual was identified by that broadcast. In previous decisions, the Authority has required that a person is able to be identified by the broadcast by more than a limited number of people such as family and close friends. The Authority considers that identification requires the broadcast positively to identify an individual whose privacy is said to have been breached. On this occasion the complainant was not identified by name in any of the broadcasts and no personal descriptive factors were broadcast. The information revealed about her in the broadcasts was limited to the fact of her existence as a complainant, but her specific identity was not revealed.

### **The ‘individual’**

Section 4(1)(c) of the Broadcasting Act requires broadcasters to maintain standards consistent with the ‘privacy of the individual’. The Act did not originally define the word individual. The Authority therefore interpreted it to be consistent with the definition of individual in the Privacy Act 1993; that is, ‘a natural person, other than a deceased natural person’.

Although a company is a ‘legal person’, it is not an ‘individual’ and does not have a right to privacy under the Broadcasting Act 1989 (2000-006). Similarly, a trust is not an individual under the Act (1999-242).

The individual must also be alive. The Authority declined to uphold a complaint that an item which showed the body of a child who had suffered a violent death breached the child's or the whānau's privacy (2000-165).

The Authority's definition of individual was confirmed by the Broadcasting Amendment Act 2000, which amended the principal Act to state that 'individual has the same meaning as in section 2(1) of the Privacy Act 1993'.

### **Privacy Principle (vii) – Consent – Children**

An item broadcast on TVNZ's *Holmes* on 4 March 1999 examined the situation of a woman and her eight-year-old son who was described as suffering from Attention Deficit Disorder. Footage of the child was shown in which he exhibited behaviour which was said to be a result of the disorder. In decision number 1999-087/089, the Authority made the following observation about consent:

The issue of filming young children is one which broadcasters will appreciate is fraught with difficulty. In the Authority's decision [1998-005/006], which TVNZ has referred to, the Authority found that a young child had been identified in a television broadcast in a way which *infringed her rights to privacy, and which would ordinarily require consent before broadcast*. Consent had been sought, and given, by the child's grandparents who had the day to day care of her. Despite that, the Authority in its decision said:

... 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.

In the instance now under consideration, the Authority appreciates that TVNZ obtained the consent of the child's mother to the filming.

The Authority takes the view that, in the circumstances of this case, the mother's consent on its own was not sufficient. Here, clearly, the interests of the child needed to be considered as well.

Taking into account the fact that the child was young, was filmed in circumstances of great vulnerability, and clearly did not wish to be filmed, along with the point that the mother's motive included applying pressure on the responsible welfare agency, the Authority ruled that the situation was one in which the child's interests were paramount and the mother's consent did not justify the broadcaster's intrusion into the child's privacy. It concluded:

... in the case of children, filming and subsequent broadcast of footage of a child can only be justified first, by obtaining the consent of parents or legal guardians, and secondly, in circumstances where the child's interests are properly considered and furthered. It considers that both elements must apply. Further, the Authority reminds broadcasters that the interests of parents or legal guardians may not be identical to those of the child.

A child's privacy was the focus of another decision issued on the same day (1999-093/101). There were nine complaints about the broadcast of an item on TVNZ's *You be the Judge* after a child's paternity was revealed to him in the studio following a DNA analysis. The Authority did not accept that the parents' consent to the child's appearance was in the best interests of the child, even if the parents genuinely believed so. It added:

In the Authority's view, the responsibility lies with the broadcaster to ensure that where there are competing rights, both parties are independently advised. In this case, it is apparent that minimal thought had been given to the possible repercussions the disclosure would have on the child such as, for example, when he returned to school. The Authority believes that TVNZ failed to recognise the possibility that the boy's self identity and self-worth could be seriously compromised by publicly disclosing personal facts about him. As for TVNZ's argument that reports from the boy's mother indicated that her son was happier in the knowledge that he now knew who his father was, the Authority understands that this knowledge could well be of comfort to him. However, what it cannot reconcile is the means by which he learned a private fact about his parentage, with the result that it was now public information.

Until September 1999, privacy principle (vii) on consent stated:

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

The two decisions discussed above provided the Authority with the impetus to revise privacy principle (vii) in an Advisory Opinion issued on 20 September 1999:

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

Consent on behalf of a child was again a central matter in decision number 1999-170. An item on *One News* included an interview with the father and ten-year-old son of a convicted murderer who had been recaptured after six years 'on the run'. The child's mother complained, stating she had not consented and that she would not have agreed to the interview had her consent been sought. The broadcaster contended that the child and his grandfather, with whom he spent considerable time, had consented fully. The Authority did not accept that informed consent had been given and upheld the privacy complaint.

In another decision (2003-107) the Authority ruled on a complaint from the Department of Child, Youth and Family Services that a current affairs item breached the privacy of two children who were in the Department's care. The Authority considered whether the broadcaster had adequately assured itself that the broadcast was in the best interests of each of the children. After noting the involvement of each child and the approach taken by the broadcaster, the

Authority decided that the broadcaster had acted in the children's best interests. In regard to one of the children, the Authority wrote:

On balance, the Authority accepts the footage of the child was justifiable as being in the best interests of Child B. Nothing more clearly illustrated the plight of the child than being shown being taken away from her mother. The Authority accepts TV3's contention that Child B's interests were served by exposing her case to public scrutiny. TV3 wrote:

There was no way to adequately convey the extent of the pain [Child B] was experiencing without showing it.

In the Authority's view Child B was not exposed to any harm or potentially humiliating footage as a result of the broadcast. In the Authority's view, the broadcaster did not on the occasion of this broadcast infringe Child B's privacy. Accordingly, it declines to uphold this aspect of the complaint.

### **Privacy Principle (vii) – Consent – General**

From the outset the Authority has regarded the complainant's consent to the broadcast as a bar to a successful privacy complaint. Consent is not an issue when people agree to be interviewed for news and current affairs programmes. In addition, release forms are used for many documentary and reality programmes. There are also occasions when consent may be implied.

The Authority has found that a complainant consented implicitly to the broadcast of identifying particulars by taking the following actions:

- participating in a competition which was being organised and broadcast by a radio station (1998-132/133, 2002-039, 2003-007/008), and
- operating a business where potential customers might phone for straightforward information (1999-058).

The Authority will also consider the reason consent was given, and whether it related to limited circumstances only. For example:

- while participating in a competition being run and organised by a radio station amounts to consent to the publication of your name, it does not necessarily amount to consent for the publication of your work place (2002-144/145).

The Authority has also accepted that a consent form which allows material to be screened on more than one occasion means, in fact, just that, even though the circumstances of the second broadcast might be different. For example:

- consenting to participate in *Weddings* amounted to consent to a report that the marriage had failed (1999-123) or that circumstances had changed (2002-020)

- consenting to participate in a current affairs item amounted to consent to include a summary of the first programme in a later programme on the same matter (2002-073).

### **Identity and consent issues resolved**

As will now be apparent, the Authority will only determine a privacy complaint if it is clear that the complainant:

- is identifiable in the broadcast beyond family and close friends who would reasonably be expected to know about the matter dealt with in the broadcast, and
- has not consented to the broadcast.

However, being seen in a broadcast or being heard on the radio in a situation where consent is neither explicit nor implicit, does not of itself give rise to a breach of privacy. For example, it is not unusual for people to see themselves on television as members of a crowd at a gathering in a public place, for example watching a sporting event.

Privacy only becomes relevant when the broadcast discloses private facts, or when the broadcast involves intentional intrusion into an individual's privacy.

### **Privacy Principle (i) – Disclosure of Private Facts**

Privacy principle (i) requires public disclosure of private facts, where the facts disclosed are highly offensive and objectionable to a reasonable person of ordinary sensibilities.

The following are some examples where the Authority found that the disclosure of facts in the broadcast about an identifiable person was highly offensive when assessed by community standards of offensiveness. Some of the complaints were ultimately not upheld because the disclosure, while involving a breach of privacy, was deemed justified in the public interest:

- the person was a rape victim (1998-094)
- the person was tricked into disclosing personal details (1999-024)
- the man's wife, who was named, had left him after 13 years and had taken up with a 19-year-old (1999-062)
- a senior religious figure was seen to be drinking at a private party and making outrageous personal statements (1999-128)
- filming the squalid conditions of cats inside a person's home (1999-188)

- the condition of a person in police cells following her apprehension for excess breath alcohol (1999-202)
- filming a teenager being interviewed in a police station (1999-229)
- filming children of a gang member sought by police (2000-043)
- filming a professional in consulting rooms by use of a hidden camera (2000-109)
- filming a person being visited by a civil debt collector (2000-132)
- reporting the death of a young man by suicide (2001-028)
- showing recent photographs of a child placed for adoption some 30 years ago (2001-121)
- disclosing that a child was a prostitute (2002-031)
- disclosing women who had been victims of sexual offending (2002-067/070)
- disclosing the name of a man who was a debtor (2002-077)
- referring to neighbours who had removed survey pegs as 'generally abusive' (2002-205)
- showing a couple behind in hire purchase payments (2003-017), and
- interviewing a woman who was described as the mother of a schizophrenic (2003-075).

While the Authority determined that the above broadcasts breached privacy principle (i), there are a number of other decisions where it has ruled that privacy principle (i) was not breached:

- showing people apprehended for criminal behaviour (1998-119 and 1998-120)
- reporting a traffic accident in a public place (1999-055)
- reporting bad driving behaviour (1999-031)
- showing police responding to a threat of suicide in a public place (1999-076)
- showing a person being arrested and processed in a police station (1999-085)
- screening a person worshipping in church (1999-132)
- showing pictures of a child being rescued from a house fire (1999-159)
- screening a tape of a police interview of a man charged with murder (1999-237)

- showing a person at a veterinary surgery arranging for a cat to be put down (1999-238)
- showing pictures of a teacher dismissed for a sexual liaison with a student (2000-072)
- unauthorised filming of private premises when no offensive private facts were disclosed (2000-148)
- showing a naked child in a documentary where neither child nor nudity were exploited (2000-064)
- showing an offender apprehended who was subsequently put through a diversionary scheme rather than charged in court (2000-178)
- disclosure of the address of a house where newsworthy crimes had occurred in the past did not breach the privacy of the present owners (2002-095)
- showing offending driving and the offender's attempt, in a public place, to ask the police to change the facts of the incident for insurance purposes (2002-118)
- expressing an opinion that the producer of a show had been acting unfairly (2002-176)
- disclosing a person's occupation as a prison officer (2003-050)
- disclosing a person's occupation as a social worker (2003-107)
- footage of an employee explaining why he was late for work and being censured by his employer (2003-113), and
- reporting a message left on a telephone answer phone (2003-122/123).

### **Privacy Principle (ii) – Effect of passage of time**

Privacy principle (ii) acknowledges that some facts which might have been public at one time may become private again over time.

On one occasion the Authority ruled that the fact that a woman had been convicted of a minor assault some six years previously did not now justify screening the incident which gave rise to that offence (1999-103).

### **Privacy Principle (iii) – Prying**

Privacy principle (iii) provides for a breach of privacy which involves intentional interference "in the nature of prying". It also states that an individual cannot make a privacy complaint about being observed or followed or photographed in a public place.

The Authority has ruled on a number of occasions that the intrusion which occurred contravened the principle. Some examples are:

- secretly filming an inebriated person at a private party (1999-128), and
- a patient who secretly filmed a consultation with her medical doctor (2000-109).

Despite the broad public place exemption, the Authority has ruled that intrusion can occur in a public place when a person would have clearly expected that the actions disclosed would be private. For example:

- reporting a private conversation which was overheard walking next to a person in the street (1999-003), and
- filming an injured person climbing out of a car after an accident (2003-043).

There have also been a number of situations where the Authority considered that the broadcast of the event was not sufficient to amount to intrusion. For example:

- filming a person who shared the house of a prison officer charged with having sexual intercourse with an inmate (1998-170)
- filming a corrections department employee in a public place who was accused of having a relationship with an inmate (1999-069)
- responding to a threatened suicide in a public place (1999-076)
- secretly filming people leaving a neighbour's home very late when hours of visiting had become a neighbourhood dispute (1999-105)
- filming a fire officer rescuing an 18-month-old child (1999-159)
- filming an innocent visitor to a house where the owners were involved in a questionable activity (2000-133)
- using a hidden microphone, and filming from a distance, a dissatisfied customer visiting a repairman (2001-060)
- filming police in action dealing with a traffic incident on a highway (2002-118)
- openly filming a property auction (2002-193), and
- broadcasting a message intended for all callers left on a telephone answer phone (2003-122/123).

**Privacy Principle (iv) – Denigration and ridicule**

Privacy principle (iv) protects against the disclosure of private facts to denigrate or ridicule an identifiable person. While the principle partly arose from a situation in which a broadcaster referred to a named person with whom there had been a prior relationship, the existence of a prior relationship is not an essential criterion.

The following are some of the decisions where the principle has been considered:

- a complaint was upheld where the announcer, without identifying himself or the station or that the telephone call was being broadcast, asked the woman, who was identifiable, some personal questions (1999-024)
- a complaint was upheld where the broadcast of a video taken at a party exposed one of the people at the party to public opprobrium (1999-128)
- a complaint was upheld about a broadcast which disclosed demeaning behaviour in police cells (1999-202)
- a complaint which revealed some private facts, but the facts were not used to abuse or ridicule, was not upheld (2000-048), and
- the Authority held that showing an employee admitting that he was late to work and being censured by his employer did not amount to denigration or ridicule (2003-113).

**Privacy Principle (v) – Disclosure of name, address, or telephone number**

Privacy principle (v) provides that disclosing, without consent, the name, address or telephone number of an identifiable person may amount to a breach of privacy. However, the principle also states explicitly that a defence is available when the disclosure is in the public interest.

The principle is rarely invoked by complainants. The Authority has ruled on the following:

- The complaint which was upheld because the announcer, without advising the person who had been telephoned that the call was being broadcast, humiliated her, was also upheld on the basis that the caller had been identified and there was no public interest defence (1999-024).
- An announcer suggested to listeners that if they disagreed with a proposal advanced by a local councillor, they should gather outside his address with their car stereos turned up loud. The councillor's address was provided. While the broadcast encouraged protest action, the Authority decided that the principle was not breached when the announcer changed his mind and called off the action promptly (1999-235).
- A complainant whose work as a builder was criticised by a customer on a consumer programme was unsuccessful in arguing that the item breached his privacy (2001-040).

- A broadcaster gave the name of a man on air and asked a person who knew his whereabouts to contact the station. The man was sought because of a dispute about a debt but this was not revealed. The Authority decided that the broadcast was an improper use of a missing person report and upheld the complaint (2002-077).
- The Authority also found that the principle was contravened when the broadcaster disclosed, without reason, the workplace of the complainant who had entered a competition run by a radio station (2002-144).

### **The public interest: A defence**

Broadcasters frequently counter privacy claims by arguing that the public interest warrants the disclosure of the facts, or the intrusive method used to gather the information. The Authority accepts that the broadcast of material sufficiently in the public interest overrides a claim of breach of privacy.

The following are some situations where the Authority has accepted that although the broadcast might have breached a privacy principle, it was nevertheless justified in the public interest:

- the apprehension of a drug smuggler identified through inadequate pixelation (1998-120)
- naming the victim of a plane crash before the family were advised (1998-169)
- disclosing the identity of members of the armed forces involved in the cover-up of the death of a New Zealand soldier killed by friendly fire (1999-060)
- naming an employee of the prison service who was involved in a relationship with a former inmate (1999-069)
- inadequately protecting the identity of a man charged with driving with excess blood alcohol (1999-085)
- using pictures of an unconscious and partly naked hepatitis patient (2000-081)
- showing footage taken using a hidden camera in a doctor's surgery where the doctor had repeatedly sexually abused his patients (2000-109)
- filming of a car accident scene (2000-141), and
- disclosure of the identity of some children who were involved with CYFS was acceptable in the interest of requiring the service to account for its actions (2003-107).

The privacy standard did not apply to showing footage of a child's body, as the child was dead and therefore not an 'individual' under the Broadcasting Act. In addition, the Authority considered that the footage was justified in the public interest (2000-165).

Examples where the public interest defence has not been accepted by the Authority include:

- identifying the wife of a man who won a ‘deserving holiday’ competition when he advised that his wife of 13 years left him and their two sons for a 19-year-old (1999-062)
- filming of a humiliating sequence for a person in police cells (1999-202)
- identifying a young woman being interviewed by the police for a minor offence (1999-229)
- identifying a person sought by debt collectors because of an unpaid debt (2000-132)
- reporting that a 20-year-old man from a well-known family had committed suicide (2001-028), and
- disclosing the identity of child prostitutes in Fiji (2002-031).

### **Findings of a breach when the privacy principles do not apply**

The Authority stated explicitly in the Advisory Opinion which contains the principles on privacy that they are not necessarily the only privacy principles the Authority will apply. Each privacy case will be considered according to its specific facts.

There has been one decision since 1999 where the Authority upheld a privacy complaint although none of the specific principles applied. The broadcast involved coverage of a high-profile murder trial which had caused considerable anger in the community. The complainant was seen in the item standing near the murder accused, and the Authority accepted his assertion that his proximity to the accused suggested that he was in fact a supporter of the accused. The complainant advised that he had been in court because he had been summoned for jury service.

The Authority ruled that disclosing the complainant’s identity breached s.4(1)(c) of the Act, which requires broadcasters to maintain standards consistent with the privacy of the individual (2001-214/215).

In another case, the Authority did not uphold a complaint from the family of a man who was shown in some archival footage used by the broadcaster to illustrate a documentary about child abuse. There was no suggestion that the archival footage was related in any way to present or past incidents of child abuse. The Authority did not uphold the complaint as the man shown had since died and other members of his family were not identifiable. Nevertheless, the Authority urged broadcasters to take care when using archival footage in such situations (2001-018).

### **Orders**

In addition to the orders which the Authority may impose when it upholds any complaint, the Act provides that it may order compensation of up to \$5,000 when it upholds a privacy complaint.

Between July 1998 and December 2003, the Authority upheld 48 of the 132 privacy complaints determined. No orders were imposed for eight of the upheld complaints.

Of the remaining 40, orders were made as follows:

Compensation to complainant	11
Compensation to complainant and costs to Crown	8
Broadcast of summary, costs to complainant, costs to Crown	4
Broadcast of summary	3
Broadcast of summary, costs to Crown	13
Broadcast of summary, costs to complainant	1

On two occasions the Authority ordered payment of the maximum compensation of \$5,000. A number of other orders were imposed in each instance. A brief summary of these two decisions is presented below, focusing on the privacy aspects, to indicate the type of complaints in which the maximum amount of compensation has been considered appropriate.

Thirteen complaints, including five privacy complaints, were referred to the Authority about "Sex, Lies and Videotape", an item broadcast on TV3's *20/20* on 28 June 1998 (1999-125/137). The item concerned matters surrounding the dismissal of the Director of Music at St Paul's Cathedral Dunedin, and the subsequent walkout by all but one of the members of the all-male cathedral choir. The reason for the dismissal was said to be the inappropriate behaviour of the Director of Music in relation to the young men in the choir. However, the item claimed that compromising behaviour of a similar nature could equally have been attributed to other members of the cathedral hierarchy.

Two of the five privacy complaints were upheld. One complaint involved footage screened of the complainant, a member of the cathedral hierarchy, who was shown inebriated at a private party where he believed he was among friends. This was the 'videotape' referred to in the title of the item. The Authority concluded that there was no justification or public interest in screening the tape and imposed an order for compensation of \$5,000.

The other upheld privacy complainant was from the choir member who did not walk out. The Authority concluded that the broadcast disclosed private facts about his sexual behaviour in which there was no public interest. Again, an order for compensation of \$5,000 was imposed.

An item on *Holmes* broadcast on TV One on 21 May 2001 (2002-067/070) reported on sensitive information about two women which had been found on a second-hand computer hard drive. Excerpts from subsequent interviews with the two women were included in the broadcast. The broadcaster accepted that the identities of the two women had been inadequately concealed and that the broadcast had breached their privacy. Its offer to pay each of the

women compensation of \$2,500 was unacceptable to the four complainants (including one of the women) who had referred their complaints to the Authority. The Authority expressed the opinion that the breaches were 'extremely serious'. Stating that TVNZ's proposed action was 'manifestly insufficient', the Authority ordered the broadcast of an approved statement and the payment of \$5,000 to each of the women whose privacy had been breached.

### Conclusion

The conclusion of the Authority's 1998 publication on privacy raised a number of issues which it suggested might be clarified in later decisions. Two of these matters have since been addressed; the consent required from children and the extent to which an individual must be identified in order to justify a privacy complaint.

The procedure the Authority now applies *before* assessing a privacy complaint is to determine whether the person whose privacy is alleged to have been breached is in fact an identifiable individual. Once the Authority has determined that there has been an apparent breach of privacy, it then assesses, if raised, the broadcaster's contention that the complainant consented to the broadcast.

In the case of children, the Authority requires assurance from the broadcaster, regardless of parental consent, that it has taken the best interests of the child into account. With adults, the Authority looks closely at the circumstances in which an all-encompassing release form has been signed. It also accepts that consent may be implied by the complainant's actions.

Broadcasters often argue that the disclosure of the information contained in the broadcast is justified in the public interest. Indeed, the circumstances in which this matter is raised frequently involve what would otherwise be a clear breach of an individual's privacy. While the Authority insists that the information disclosed must be *in* the public interest, and not merely *of* public interest, it accepts that disclosure in the public interest overrides an individual's right to privacy.

Because of the importance of the factual situation of each complaint and the range of situations with which the Authority is required to deal, it is difficult to generalise about what factual situations amount to a breach of privacy. It can be noted, however, that a person shown participating in criminal behaviour is unlikely to have a privacy complaint upheld.

In the period between July 1998 and December 2003 there has been one appeal to the High Court of an Authority decision involving an alleged breach of privacy. The Authority upheld a complaint from ECPAT (End Child Prostitution, Pornography and Trafficking) New Zealand Inc. that the broadcast of a 20/20 item entitled "Paradise Lost" about child prostitution in Fiji, which included interviews with some alleged child prostitutes, breached the children's privacy (2002-031/032). TV3 appealed.

Justice Chambers dismissed the appeal ([2003] NZAR 501). He drew the following conclusions:

- He accepted the Authority's argument that, in considering a breach of privacy of a foreign national, it had applied its jurisdiction extra-territorially, but that it was entitled to do so in order to maintain programme standards in New Zealand.

- ECPAT, as a third party, was entitled to bring a privacy complaint.
- He expressed the view that the children shown were victims requiring protection, and that reasonable people would object to their identity being revealed, and
- He said that the public interest was not available as a defence because of the interests of the child being paramount.

## Notes

<sup>1</sup> Warren and Brandeis *The Right to Privacy* (1890) 4 Harv L Rev 193.

<sup>2</sup> The Authority notes that privacy complaints under the Broadcasting Act are a separate matter from privacy complaints under the Privacy Act 1993. The Privacy Act is primarily concerned with the collection and disclosure of personal information. In relation to their news activities, media agencies are exempted from the operation of the Privacy Act. 'News activity' is broadly defined in section 2 of the Privacy Act as:

- (a) The gathering of news, or the preparation or compiling of articles or programmes of or concerning news, observations on news, or current affairs, for the purposes of dissemination to the public or any section of the public.
- (b) The dissemination, to the public or any section of the public, of any article or programme of or concerning –
  - i. News
  - ii. Observations on news
  - iii. Current affairs.

The Authority further notes that privacy complaints under the Broadcasting Act are a separate matter from the developing general tort of giving unreasonable publicity to private facts, articulated in the recent Court of Appeal decision in *Hosking v Runting & Ors* (CA101/03, 25/3/2004, Gault P, Keith J, Blanchard J, Tipping J, Anderson J).

<sup>3</sup> Michael Stace, 1998, op. cit.



# Stakeholders discuss privacy in broadcasting

*by Wiebe Zwaga*

## **Introduction**

A stakeholder consultation was conducted by Authority staff among five groups identified as having an interest in privacy and informed consent issues in New Zealand broadcasting. The five groups were: (1) radio and television broadcasters (2) independent programme makers (3) academics and legal professionals (4) Māori broadcasters, producers and community leaders, and (5) community advocacy organisations.

The radio and television broadcasters were from the larger networks in New Zealand. The names of independent programme makers were obtained from the Screen Production and Development Association (SPADA). Academics and legal professionals were spoken to because they could provide expert opinion on the topic of privacy. Māori broadcasters, producers and community leaders were interviewed for their views on cultural definitions of privacy and informed consent as they pertain to Māori.<sup>1</sup> Community advocacy groups had a special interest in the media and/or children. In total, 75 stakeholders were interviewed between May and August 2002.

The interviews followed a semi-structured format. A checklist was used to ensure they were consistent across the different stakeholder groups. Depending on the background of the interviewee, the weight on either privacy or informed consent varied. For example, the interviews with broadcasters and independent producers focused in-depth on both privacy and informed consent, whereas the interviews with legal academics and legal professionals concentrated predominantly on privacy. Interviews with Māori broadcasters, producers and community leaders, as well as community advocacy organisations, were an amalgamation of privacy and consent issues. On the whole, interviews lasted 45 minutes to an hour.

## Broadcasters on privacy

### *Privacy and the public interest*

Balancing the privacy of the individual with public interest was a crucial issue for broadcasters.

[It] has to be balanced between the public interest and privacy, and our view is that the public interest has to prevail. If it's a fifty-fifty decision, the public interest will carry the day.

Another said that the conflict between the privacy of the individual and the public interest was hard to define.

Well, it's very difficult. There is a constant tension and I don't think there's any answer to that ... It's an understanding that the tension does exist and a realisation that there are occasions when the balance is going to swing one way or another. You've got to get down to pragmatic examples of how it operates.

The Bill of Rights Act 1990 was seen as a fundamental protection of freedom of expression.

Another important theme was that only people directly affected should be able to complain about privacy.

I definitely think we should follow the British rule. I don't think you should be allowed to complain unless you or your immediate family is affected.

This observation was extended to fairness. Broadcasters saw only a very narrow distinction between fairness and privacy. Speaking of the fairness standard, one broadcaster said that privacy should be subsumed under fairness. There should not be a separate privacy provision, because of broadcasting's exemption under the Privacy Act. This broadcaster said that when it came to the Authority's privacy principles, internal standards were higher than those the principles sought to achieve.

Broadcasters believed that the case for privacy had become compelling in the public mind because broadcasters were dealing with real life. The public interest argument, which was related to wider freedoms within a democratic society, did not have the same appeal to the public as privacy advocacy. The public interest argument was therefore receiving less attention, even though it was important in uncovering stories – an important role of the fourth estate.

Some perceived that a separate jurisprudence was being developed by the Broadcasting Standards Authority and the Office of the Privacy Commissioner because despite the news media exemption in the Privacy Act, the Privacy Commissioner had, on at least one occasion, defined media as 'data collection agencies' – these agencies are not exempt. Broadcasters believed that in effect this amounted to double jeopardy.

Some broadcasters considered that privacy issues were taking on a greater 'legal' complexion, and the trend was an impediment to the complaints determination process:

It's becoming more and more legalistic. The complaints system we want to create is so we can deal with it and be user-friendly for people – the viewers who want to complain. If you're coming up with a very legalistic document you are going to deter viewers from using it and make it difficult on broadcasters who don't have a legal training and who have to deal with formal complaints on a regular basis.

Uniquely, one broadcaster believed that in the future privacy would not be an issue at all. He called for the removal of all restrictions protecting privacy as society prepared itself for a new age:

I think that the so-called right to privacy will become non-existent, because we will need to be less and less private in order for us to exist as a society ... . Our right to live and to exist as a community of world entities says that we cannot be private. Ultimately, philosophically, I am personally against preserving a [privacy] right that gets in the way of a society thing.

#### *Authority's decisions on privacy complaints*

Generally speaking, broadcasters felt that investigative journalism had come off second best in the Authority's determination of privacy complaints. An Authority decision involving *Fair Go* had especially disappointed broadcasters:

It's in the area of investigative journalism [where we will have a] clash ... we are surprised that in the final analysis a chap cannot doorstep a dodgy character in a car park. In my view, [the decisions] hadn't quite settled down on the principles themselves.

In another case involving 'doorstepping', a broadcaster said it had been gratifying that public figures had been accorded a different kind of test:

In fairness to the BSA, it was nice to see the Michael Laws' one where he appeared in his negligee or whatever (it was at the doorway) and being kicked into touch so firmly [with the BSA] saying, 'No, he was a politician, a public figure' – that was good, that was positive.

It was argued that the Authority's decisions could impact on broadcasters to a point that infringed on their ability to go about their daily work. Alternatively, the Authority's decisions were about what was permissible or not in terms of invading the privacy of individuals:

I suppose it's about how far we go and what we need to be aware of as far as where the line is for privacy ... in terms of what is allowable just being very, very clear.

#### *The privacy principles*

The seven privacy principles<sup>2</sup> followed by the Authority received general support from most broadcasters: 'I'm reasonably happy with them at the moment, and I think I interpret them broadly', said one broadcaster. Another saw them as like a separate standard in the code of broadcasting practice:

The [privacy] standard in the codes is really only a reflection of the BSA's own principles which have been developed over time, and at the end of the day [the Authority] put a lot of work into those. I'm not mounting any major argument that those principles are unreasonable at all.

### *Principle (i)*<sup>3</sup>

With respect to principle (i), broadcasters suggested that the manner of disclosure of facts should be contained in the test as well as the actual facts themselves.

My argument is about the fact that is disclosed. [It] may be a brief glimpse of it ... but the fact that it was only momentarily [disclosed] is not taken into account [by principle (i)]. One needs to add 'where the facts disclosed, *and the manner of their disclosure*, are offensive and objectionable to a reasonable person of ordinary sensibilities'.

There was a perceived tension between the ethical and the legal status of privacy. It was noted that the Press Council dealt with privacy as a predominantly ethical issue. Broadcasters had strong sympathies with that point of view:

I'd rather see it in the area of ethical than legal as much as we could. I don't think the law helps us much in this area at all. I think the law is a very blunt instrument and I think it is an area of legal debate when it comes to the sorts of issues that we come across relating to privacy. I mean the key legal issue that comes along in privacy is whether the camera person is operating on public property or not ... . So one needs to accept that there is a legal framework within which you work, but once you get past that it is large theatre for debate. The reason that it's ethical is it's actually about relationships. I mean it is about developing relationships with people who appear in the programme which stand you in good stead over a long period of time. So it's the ethics of the relationship, not the legal one.

There was concern about what a 'reasonable person of ordinary sensibilities' meant in respect of privacy. One broadcaster said the definition of good taste and decency raised *similar* difficulties. This broadcaster found it difficult to ascertain what this reasonable person would find acceptable or not acceptable, just as it was difficult to state unequivocally 'this is good taste and this isn't' in respect of good taste and decency.

### *Principle (ii)*<sup>4</sup>

Principle (ii) contemplates a passage of time after which public facts become private again. A perceived difficulty with principle (ii) was that time limits could depend on the nature of the story. For example, it was in the nature of crime stories for there to be an interest in previous convictions of people before the courts. Broadcasters wanted some indication from the Authority about what the passage of time meant:

One of the difficulties we've had is what is the passage of time and you try to get out of the [Authority's staff], what time period it is. Is it two years, five years, ten years? I never

really got it out of [the Authority's staff] and I think [the Authority's staff] might have said five years or something. That is problematic, because there is no time set. There's also the more fundamental problem of criminal acts staying on the public record forever. When does that become private?

*Principle (vii)<sup>5</sup>*

It was suggested that principle (vii) be divided, the part referring to children becoming a new principle and starting with the phrase 'Children's vulnerability must be of prime concern'. But broadcasters also thought that the wording of the principle placed too high a duty on them:

The notion that broadcasters shall satisfy themselves that the broadcast is in the best interests of the child almost seems to suggest that the broadcast has to be a positive thing for the child, instead of a neutral thing ... that the child's interest must be positively advanced. What I think it is getting at is that it's not going to disadvantage the child or harm the child. In other words, it's putting it around the other way.

The suggestion was made for the principle to be rephrased concentrating on a 'harm' principle not a 'best interests' principle.

For another, the principle was challenging because it expected broadcasters to override parental consent: 'If the parents are reasonably intelligent human beings then that must carry huge weight'. To place the responsibility on the broadcaster was a significant 'ask':

It has to be the parent who takes responsibility for the child. Parents make mistakes. Whether they are giving us the right to film that child or whether they are sending them out on the street when they shouldn't be, parents sometimes make mistakes. It doesn't mean that we should be forced to correct those mistakes or someone else should.

Another said:

I think it is difficult to make a judgment about what's in the best interest of the child, but it's incredibly difficult for the broadcaster to make the call if the child or the parent has agreed in full knowledge ... that they've given consent. Having given consent to appear in a programme and what does the broadcaster then need to do to satisfy that it's in the best interest of the child. I mean what further test does the BSA expect the broadcaster to apply ... I don't know.

The children's consent requirement in principle (vii) was added by the Authority in 1999 as a result of two programmes, *You be the Judge* and a *Holmes* item dealing with a child with ADDS. There was some criticism about how the addition had been arrived at:

... I think you've got to raise a real question mark over creating principles based on one example. Principles should not be based on one example. They should be based on a number of examples and I think that's a real danger in what we're talking about that one creates a general rule based on one situation.

It was thought that for a multi-cultural society it was more difficult to determine what ‘children’s best interests’ were. ‘Different segments of society have different views on what is best for the child.’

#### *A privacy code of broadcasting practice*

There was reluctance among broadcasters to develop the current privacy principles into a code of broadcasting practice. They did not see a need as the principles were already in the codes of broadcasting practice. ‘In terms of the way they’re applied, the principles have every bit as much strength as the code’, said one broadcaster. They feared that a, presumably larger, document would become unworkable:

The more you add to it, the more you start adding bits on, the more difficult it is to interpret because inevitably you will get conflict between one division and another.

Another reason why broadcasters queried the need for a privacy code of broadcasting practice was that it would create a major point of difference between broadcasting and other media.

### **Independent programme makers discuss privacy<sup>6</sup>**

#### *Privacy and the public interest*

The privacy issue was of major concern to the independent programme makers interviewed who tended to specialise more in factual programmes, entertainment and documentary rather than news and current affairs production. While a medium like television was often intrusive, it was also the case that ‘very rarely are people forced to go in front of cameras’. According to another programme maker, working with people to make programmes such as documentaries involved a necessary invasion of privacy.

Independent producers had difficulty drawing a balance between the individual’s right to privacy and the public’s right to know. This was a major tension, although the right to privacy was defined straightforwardly:

An individual under a Western democratic system has a right to a certain privacy which we have defined as being within the confines of one’s property and also information about oneself when acting in a private capacity.

An independent producer said that audiences wanted intimacy, ‘the audience wants to see and experience life as the subjects of the documentary experience life’. This raised the question of finding a balance between the public’s right to know and the privacy of the individual:

When you’re into the kind of intimacy which the audience increasingly expects, it leaves a whole pile of questions that aren’t so clear-cut anymore when I’m filming somebody with their consent and when I’m invading their privacy. Questions about the boundaries we try and set ourselves [are] not easy to discern.

Being invited into people's lives gave independent producers a certain degree of responsibility which needed to be used wisely:

From a production perspective, I think if you are working with a member of the public in their own domain then they give you what they want to give you. Sometimes they give you more than you've asked for and I think you have to use your discretion about whether or not that was a deliberate intention to divulge something ... we have to respect the boundaries of people's privacy and use our discretion quite a lot in what we do. They do invite you in, they do allow you to be there and therefore that's got to be considered as well. But they are also innocent parties and we manipulate them and we have to be careful about that.

Complying with the privacy of the individual was an important consideration:

Any contentious filming that might involve breaching somebody's privacy, we are always aware of what our requirements are under the Privacy Act and the BSA guidelines ... and certainly over the years it has become clearer what we can and can't do.

There was a perception that the protection of someone's privacy was subjected to a much higher threshold in New Zealand compared to the United Kingdom or Australia. One producer said that the media in New Zealand were constantly fighting suppression orders and other restraints to the point that one could wonder whether New Zealand had a free press. Privacy was used by organisations to ward off the media which, as a collective, probably did not have a good reputation among corporate organisations and institutions:

[Organisations you need to work with] already have an interface with broadcasters and they perceive 'Oh no, not the *Holmes* programme again'. It's not a privacy thing, it's a convenience issue in some ways because we're all branded with what their perception of the media is, so that's the difficulty that we have.

For others, the public interest was the key benchmark against which the individual's right to privacy needed to be measured:

The key issues to deal with are the rights of the press and the media to go out and do their job. The public interest is the key issue and that has to be balanced against the right to privacy ... privacy has become an issue now that is starting to get in the way of us doing our job and making a living. People are getting too sensitive about it – I'm running up against it all the time.

The 'public interest' concept was relatively straightforward for traditional documentary making, but entertainment or reality-style programmes created different issues:

In a documentary format approach it is absolutely crucial that the independence and the editorial influence of the programme maker to portray exactly what happens, how it happens and to give a wider perspective of that [is protected]. In the public interest [means] to give an understanding, to investigate. When you move into entertainment structures then there are different rules and different approaches that we take as producers. Issues of privacy

and the public good in the context of voyeuristic entertainment [are different]. Therefore, it's absolutely fundamental that the context in which the programme is made is considered – there's no blanket line about the privacy issue.

In making programmes involving participants, a distinction was made between 'ordinary people' and public figures or those who act in a particular professional capacity:

When you're dealing with people within their professional arena and performing their professional jobs then they have their own responsibility to adhere to their professional conduct .... We have responsibility in terms of the invasion of privacy in terms of what permission we've been given from the ordinary person.

Third-party complaints, from people not involved in the programme, were common:

You get people, third parties, who feel that all sorts of things have been done to people on television.

But:

There are public perceptions about privacy and about the invasion of privacy that not until people are actually in that situation [of the programme] that they can really appreciate one way or another whether it is [an invasion of privacy].

It was standard practice for most independent producers to require people appearing in their programmes to sign a release form. It was acknowledged that such release forms were quite broad in scope:

We always get release forms from participants in documentaries. The release forms are very blanket, they're relating to all rights in perpetuity. We do ask them to give up an enormous amount.

It was pointed out that the consent form was a relatively recent phenomenon:

Five years ago, we would not have had signed consents. It was a kind of honour agreement or the shake of the hand. You were there, therefore you consented.

#### *The Authority's decisions on privacy complaints*

One independent producer did not have any difficulty with the way privacy had been applied by the BSA: 'It seems to me that in fact the Authority has been a little more liberal than public opinion'. Another believed that the Authority did 'a fine job'.

Independent producers felt they were in an invidious position where the complaints process was concerned. Being absent from the complaints process was a bone of contention. They said it was crucial that the opportunity for comment be extended to include them. Even so:

I think in a couple of cases what the producer said in his or her defence has not been included [in the broadcaster's submission]. So there's a potential conflict there. I can see why the [broadcaster] would do that if the producer said 'well, I didn't want to put [the footage complained about] in, the Commissioner made me'. They're not going to make that part of the submission. It would be nice if there was some mechanism for the rare case where the producer would like to put their point of view direct to the BSA.

Another programme maker was more passionate:

The biggest concern I as a producer have is that we've had a situation where a complaint has come in about one of our programmes and it has been purely dealt with by the Authority and the broadcaster, and we haven't even known about it until afterwards. I was absolutely ropeable because the broadcaster just decided that it was easier just to pay out and let them go away, whereas we should've had an input in terms of that process ... an independent voice.

I don't think that's particularly fair to people like us because we're exempt. We're exempt, yet we can be fined [by the broadcaster] when the BSA has found fault with us. How can you exempt somebody and then still fine them? We end up being fined by the broadcaster because that's part of our agreement with them.

Another concern was the perception of 'double jeopardy' for programme makers who, except for news and current affairs production, were subject to both the Broadcasting Standards Authority and the Privacy Commissioner's regimes.

Our biggest problem is that there is a different set of rules for us which makes life extremely difficult for us. We can be dealt with by the Broadcasting Standards Authority; we can be dealt with by the courts and also the Privacy Commissioner. To me, it's like living in Pakistan – if they don't get you on the military law, they'll get you on the civil, and if they don't get you on that they'll get you on the religious law. Well, I know which one I would rather be caught by.

Another commented:

Until recently it's felt like, OK, there are some privacy principles from the BSA and we work to those. Somebody complains then we apply those, that's quite straightforward. The big area of vagueness for me is the Privacy Act and its reference to exempting the news media. When we're making a documentary series about rescues are we the news media? I don't know.

### *The privacy principles*

Principle (i) and its phrase, 'highly offensive and objectionable to a reasonable person of ordinary sensibilities' provided some interpretive difficulties. The question was whether this included the broadcast of 'revolting' activities: 'There are occasions where revolting activity is news'.

Principle (iii) drew comment because the public do not fully understand their rights in respect to privacy in public places:

You have people thinking that they've got a right to privacy when they're in the street, which they haven't. And there is no reason why they should have a right to privacy in the street, so I think there's a lot of misinformation about privacy amongst the public.

If I've got permission from the supermarket owner, why can't I film people in there doing public things? So how we interpret the public place is an area of concern.

The old touchstone is that if you're doing something in public, you've got to expect to be filmed.

Principle (vii), referring to children's vulnerability, could also get programme makers into trouble. However:

I would have thought that most broadcasters were ultra cautious when it came to children and I haven't seen a lot of gratuitous stuff. Obviously, we had the case with the DNA on *You be the Judge*.

Principle (vii) also raised the question of the age at which a child can give consent. This question was further complicated by having to ask whether the broadcast was in the best interest of the child:

I find that hard. How can I judge that? A 15-year-old might think that he's able to give informed consent. Well, five years later he might decide that it wasn't a very good idea to do that after all. But at what point am I able to make that judgment call. I've kind of liked the way we've treated kids by actually giving them the right to make a decision for themselves. It can be a problem, but I also would not like to give them power either.

Another producer felt that principle (vii) was not very practical:

You can see that it's a good 'motherhood and apple pie' principle, but I'm not sure that it's practical. What do you do if the parent has said it's perfectly fine – and perhaps it is and perhaps it isn't – you can't act in a *loco parentis* role.

She continued:

How do you demonstrate that it's in the best interest of the child? We can't have every responsibility for the child. We can get consent from parents. We can think carefully about the ramifications for the child, but we can't demonstrate that we know it's in their best interests. We don't know what's going to happen when the child is at school. Maybe they get teased about the fact that they're on television and we talked about them having nits in their hair.

### *A privacy code of broadcasting practice*

The need for a privacy code of broadcasting practice depended on whether the current privacy principles were deemed inadequate. If they were, then broadcaster and programme maker input would be crucial for a privacy code to work:

It has to be a practical document at the end of the day. There's no good in putting out a fancy piece of paper that no one will pick up.

### **Academics and lawyers discuss privacy**

On the whole, the legal experts believed the existing principles were satisfactory. There was often disagreement on various interpretive matters. The main concern was ensuring that people who did not have a lot of power were not exploited. All believed the young, the infirm and the elderly needed privacy safeguards. The power of the press was a concern: 'At the end of the day the media do have enormous power, and in the heat of getting a story they can misuse that power'.

By contrast, public figures were accorded different expectations:

If you make your bed you've got to be prepared to lie in it. So if you're somebody in the entertainment or sporting arenas where you seek publicity – and that publicity is to do with your private life as well as your public life – then I think you've got to expect, if you like, a lower level of privacy protection than might be the norm for people who do not seek this kind of attention.

Privacy meant different things to different people. The definition of privacy had to be as precise as possible:

I think it's a question of really finding out what are the sort of threats to privacy that people see as being important and making sure of being clear what privacy means otherwise privacy starts to overlap with things such as questions of ethics and morality.

A definition of privacy in broadcasting would encompass two separate elements: what would be considered intimate personal details, and the methods used to obtain them, such as hidden cameras.

It was pointed out that people generally had a higher consciousness of their rights where privacy was concerned. In a broader sense, the protection of the right of privacy was seen as the protection of a person's human dignity. It was highlighted that there were differing cultural perceptions about what privacy meant. The point was made that more could be done to inform people about their right to complain.

### *The Authority's decisions on privacy complaints*

The Authority's decisions on privacy complaints were perceived to be consistent.

I have never felt that any decision was outrageously wrong. There's quite a few on the borderline where you could argue either way perhaps, but I think there's a reasonable

balance between the freedom of speech and privacy and now, of course, you get the Bill of Rights coming in as well.

I think generally the Authority has been good in dealing with complaints. There have been some areas where one could question its decision, but the reasoning was easy to follow.

There are some areas where I believe that the public interest and the needs of professional journalism outweigh those of complainants.

It was observed that the Authority had taken a legalistic approach to privacy from the period when it released its privacy principles. This contrasted with the Press Council which considered privacy more of an ethical issue. While the Authority's legal approach was seen in the context of its decisions being subject to appeal, there was still a tension between ethical and legal considerations:

You can view privacy in a legal or ethical way. In New Zealand, we have the right to film or photograph from a public place. For example, it might be legally OK to film Paul Holmes sunbathing naked in his back garden if you happen to take it from a public place, but there's an ethical issue whether or not you should publish or broadcast that ... the Press Council, which doesn't have the complication of appeals to the High Court when it's considering a privacy complaint, tends to see privacy purely as an ethical consideration – was this appropriate? – was this justified as an intrusion of someone's privacy and so forth? Whereas I think the Authority is always mindful of that legal element.

On the matter of compensation, one legal expert thought that the jurisdiction limit of \$5,000 was a 'piddling amount of damages' and it would not be worth a complainant's while to engage lawyers on a fully professional basis for that amount of damages. On the awarding of compensation by the Authority to complainants, another had the following to say:

I wonder at times how the money is awarded. I think they should have given them a little more in some of the cases and a little less in others, but I don't have a major problem with that.

It was suggested that it was more difficult to have a privacy complaint upheld compared to, for example, a fairness complaint. One legal expert wondered whether there was a procedural disadvantage against privacy complaints because the complainant lodged the privacy complaint directly with the Authority.

It seems more difficult to have a complaint upheld in terms of privacy than in terms of fairness. I've noted in one or two decisions that the Authority has been keen to look at the issue in terms of fairness, but it has only been argued or complained about in terms of privacy. That may well be because the person wants to go direct to the Authority and not through the broadcaster, and yet they have been unsuccessful in that the BSA has said that in terms of fairness probably you would have been successful. That's unfortunate, I think, when that happens.

### *The privacy principles*

Some respondents believed that the privacy principles could be expressed more clearly. It was thought that international conventions and overseas jurisdictions had tackled the privacy issue better:

In some ways clarity would be important. For example, in the Bill of Rights there is no specific privacy right as such. You have to derive that by rather complex legal exegesis, and it's to the document's detriment that there is no right to privacy expressly stated. Of course, you can find it because the Bill of Rights is to affirm those principles contained in the ICCPR [International Covenant on Civil and Political Rights] and by that also the European Convention which does have a privacy right. It would be quite good to bring this into broadcasting in a direct sense with some clarity. The problem with the privacy principles, as I see it, is that some of them are rather broad and then some of the qualifications, for example the tests, perhaps in some ways render privacy as such as a very low threshold protection indeed, and that causes me some concern.

The legal experts believed that the Authority had followed the proper course by developing privacy principles. Because the Authority's decisions were subject to appeal on points of law, it had been necessary to develop jurisprudence in the form of legal principles.

It is important that there is some form of code by which complaints about privacy can be assessed. I don't think it's an area that can simply be left to the discretion of broadcasters. So some form of regulation is necessary and I think the Authority did some very good work in being proactive and devising these privacy principles early on, observing correctly that there was no privacy law in this country. So using overseas principles, largely American, the Authority came to its formulation of its privacy principles which I think have stood up well to the process of examining complaints. It's worth noting that they were the subject of an appeal in the High Court where the Chief Justice himself effectively endorsed the principles that the Authority was working to. They have been modified and amended in the last 10 years or so and that's also a help that there's been some evolution of these principles in the light of discussions that have gone on. So, I think that they are a good working framework for assessing privacy complaints.

The principles were perceived as having stood the test of time. It was suggested that they would be able to deal with any future technological developments in broadcasting such as electronic surveillance:

It seems to me that one of the virtues of these privacy principles is just that they are principles. We're talking about the revelation of private facts. That sort of principle applies regardless of the technology that's being used to acquire private facts or that might be used to broadcast private facts ... . Technology aiding and abetting broadcasters, the use of surveillance camera footage and that sort of thing comes under the Authority's privacy principles.

It was suggested that the principles did not provide for an adequate distinction between a public figure and an ordinary citizen who might get caught up in a news story. It was proposed

that the Authority look at the BBC producer guidelines which, it was thought, contained a useful discussion on this matter.

While so much depended on the context of the specific broadcast, this was very clearly expressed in the principles. This posed a danger that the principles could be treated as ‘absolutes’.

The Bill of Rights was also mentioned in the context of the privacy of the individual. For one respondent, it was a relatively straightforward relationship:

I don't think the freedom of expression we have enshrined in the Bill of Rights is an absolute freedom and we know there are various limitations on it. Defamation would be one of them. And so the rights to privacy are simply another legitimate or reasonable restraint on the freedom of expression .... It's never intended to be an absolute freedom and so we come back to this balance of is this person entitled to their privacy or is the broadcaster entitled to claim freedom of expression on a matter of public interest.

In general, respondents did not see any gaps within the current principles:

I'm not aware of a great gaping hole here. The Authority has filled in some of the holes. It has filled in principles, whatever they are, to do with people not abusing the airwaves because of a couple of rogue characters on Auckland radio who were doing exactly that, and the Authority felt the need for a principle to cover that. They're pretty robust and there are no obvious gaps there.

#### *Principle (i)*

With respect to principle (i), an additional phrase was suggested which would specifically refer to the publication of facts:

Well, I have always thought that facts are not offensive, but that it's the publication that's offensive. So, I would prefer to see the third line read 'where the publication of the facts is seen as offensive'. Because most publication is not offensive at all ....

Another informant said principle (i) was unclear about what it wanted to convey:

What we have here is the test of being both offensive and objectionable to a reasonable person of ordinary sensibilities. Now, the question I ask is what does this mean? Does it mean that it's highly offensive to a reasonable person of ordinary sensibilities who has had their privacy violated by the public disclosure of private facts, or does it mean that the facts disclosed are highly offensive and objectionable? In this sense, this doesn't help. Perhaps the focus should be the fact of disclosure itself is such that it is highly offensive and objectionable ... so I look at this and there are potentially three ways of interpreting it. It needs more clarity in terms of where the weight is going to be. Where is the fulcrum of the test? It's the act of disclosure itself which is offensive, but the way in which the principle is written does not make that clear.

The language of principle (i) was seen as unnecessarily legal; terminology like ‘highly offensive and objectionable’ and ‘reasonable person of ordinary sensibilities’ were a barrier to members of the public wanting to lodge a complaint. More accessible language would be a remedy, as well as providing some relevant example of what the principle wanted to convey:

When it comes down to it, people watching television or listening to radio have an immediate gut reaction as to whether or not that was right – was that appropriate, did that seem to be a gratuitous lingering on that person’s grief? And by and large I think most people respond to it immediately and have a sense of whether they think that was appropriate or not appropriate. That tends to be the level of their reaction; they’re not interested in the legal niceties ...

The matter of identification was the necessary first step in respect to principle (i). Whether or not a person was identified was perceived to be crucially linked as to whether or not there was a case to answer.

#### *Principle (ii)*

Principle (ii) with its reference to ‘passage of time’ raised the question whether this was a relevant privacy matter. Criminal convictions, for example, were a matter of public record, so the passage of time issue could be more a fairness issue than a privacy one. One informant believed that this was a difficult judgement call:

This is a difficult area where criminal acts have in effect become private through the passage of time. That would simply depend on context. I can visualise some situations where in the passage of time criminal behaviour may have become private again. Let us say a priest convicted of paedophilia and after 15 years was convicted again, now I would regard that as something that ought to be included in the story, but others might argue that the passage of time means you can’t mention the earlier offence.

Another observed:

I accept that criminal convictions become private. There is also legislation at the moment and if the Clean Slate Bill does go ahead then the period of time cited in that bill may be appropriate time if you’re going to say convictions become private.

On the other hand, it was thought that the passage of time was an important notion, but that the reference to ‘highly offensive to a reasonable person’ was too low a test:

With the [passing] of time, obviously I think it’s right and proper that we don’t continually revisit [previous convictions] – it undercuts the notion of rehabilitation. And so it’s quite right these things recede into the realm of private information given the passage of time. But then we have at the end of paragraph: ‘nevertheless the public disclosure of public facts would have to be highly offensive to a reasonable person’ – and the worry with that term ‘highly offensive to a reasonable person’ is that it is perhaps too low a test. So you have, in a sense, public information becoming private with the passage of time – people

live a blameless life for years and yet there's this peccadillo in the past which has been glossed over and forgotten in the public mind and then we can bring it back. In a way you can do that by justifying the fact that it's not highly offensive to a reasonable person. This is too low a test and it becomes easy to violate a person's sanctity in terms of their privacy.

*Principle (iii)*

It was thought that principle (iii) could be expressed more simply. Some respondents felt that filming without permission was problematic in any event:

As an ex-journalist, it's something I have never been in favour of anyway. Although I can see why journalists would be keen to do that because it might add 'reality', or it might be the only way that you get the story but at the end of the day it's potentially libellous.

Surely there must be a cut-off point or a way of balancing whereby the ability to move in public must mean that people shouldn't be hassled or stalked. No matter how important you are or how much of a public profile you have, you have to move in public and have the ability to do so unimpeded, not hindered by being photographed and observed all the time.

But others believed that privacy could not be claimed for behaviour filmed in public places:

If it's in the open street or if it's a public event, on a sports ground or something like that, then that is a public view and maybe the privacy provisions should not occur there.

Another mentioned:

We shouldn't identify people when they've got nothing to do with the programme or a particular issue, and by implication say that they were ... . The broadcasters should be wary of that, I think. They may have to resort to computer graphics or something else.

*Principle (iv)*

Principle (iv) was superfluous to one respondent, as it simply represented an example of a very serious breach of principle (i). The suggestion was that breaches involving abuse and ridicule should be reflected in the level of compensation or costs awarded rather than by having a separate principle. However, another thought that the principle was appropriate, as the airwaves should never be used to deal with a private dispute. For another respondent, it was a question of power:

People who are involved in broadcasting, particularly in public radio and television, or even the press, have a very high and privileged position in the sense that they have a degree of power that other people haven't got. They can convey their opinion to a wide audience and by repeating what they say it gives the mantra of truth to it. They are in quite a more powerful position than the ordinary person and so you have to be able to restrain their ability to denigrate or ridicule a person.

*Principle (v)*

Some saw principle (v) as difficult because the principle did not seem to apply to details which constituted public information.

You can't call certain facts [which are public information] private information. You can't call facts private facts when in other circumstances they are public facts.

However, if principle (v) contemplated gratuitous or annoying naming or the identification of a person's name 'where the name is not necessary to convey the information', it would probably work. But then again, as was the case with principle (iv), it would probably constitute a serious breach of principle (i), which should be reflected in the order.

*Principle (vi)*

Principle (vi) was deemed an absolute requirement for the privacy principles to work. The public interest, which like privacy was difficult to define, should be more than merely that which was interesting to the public:

Not those things that relate to curiosity, (nosiness and voyeurism, that's all out), but genuine public interest that relates to community issues. [For example] a celebrity is a publicly interesting person, but that doesn't mean there is public interest in knowing what they do.

Another respondent put it this way:

It comes down to the old argument: what is of interest to the public and what is the public interest. I think any journalist who sets out to do a story ought to be able to establish clearly that it was in the public interest. If they can't do that, they shouldn't go down that track. Too often in the media the trivial is made to seem important trivia. This is a good check for the journalist that what they're actually writing about and broadcasting is in the public interest and should always be.

However, the public interest defence lacked adequate definition:

One of the things you find with a lot of codes and so forth is that they might specifically invoke the public interest as a justification for not doing something or for doing something, but very seldom do you see any significant discussion as to what that might be. I think when you are going to apply a public interest test, it's pretty important to have some criteria as to what might constitute the public interest – at least give a sense of the sort of things that would be criteria rather than just leaving it as some undefined justification that you can invoke.

In other words, broadcasters would have to come up with an adequate definition of the public interest for it not to become a catchall phrase:

I think it's very easy for the broadcaster just to say: 'Oh, the public interest justifies whatever we do here', but that's too facile, it's too broad and it's too general. You really

have to then start examining, well, why is this story in the public interest justified. Is it because there's alleged wrongdoing here? Is it an issue of broad social, political concern? Is it something trivial? ... I think the public interest could be defined in a helpful way for all concerned – for members of the public who might be interested in pursuing a privacy complaint and the broadcasters who might be interested in mounting a public interest defence.

[The public interest] is a very large cloak that covers a lot of things, you know, anything which excites what the public wants to know is deemed to be in the public interest. In a sense that's offensive to me; it doesn't really help good journalism discussing big issues. It can undercut what good journalism is aiming at which, you know, is the disclosure of useful information that's important and useful to the public, as opposed to just idle curiosity and gossip.

It was suggested that the meaning of public interest was a topic that the Authority could usefully explore in future research or in a discussion paper.

A specific question was asked about principle (vi) about why news and current affairs, or anything that passed itself off as being in the public interest, could be exempted from some of the principles. It was a significant exemption because public interest claims could be quite self-serving, particularly in the coverage of court cases:

I don't think the public interest is served when potential court cases are prejudiced as a result of privacy invasions.

For one respondent, the public interest defence was crucial in cases of intentional prying through the use of hidden cameras:

Hidden cameras would always fall foul of the privacy principles if there were not a public interest defence. Some cases involving hidden cameras have not been found to be in breach of the privacy principles, but others have and they usually turn on whether it is a genuine public interest defence that the broadcaster is able to mount .... Where the broadcaster can demonstrate that there is a clear public interest in the revelation that is associated with this prying then the public interest prevails, and I think that's a judgement that will have to be made in every case and the Authority has done that effectively.

Another preferred the way European media dealt with the public interest compared with, for example, American media:

I quite like the European way, particularly the French where, for example, Mitterrand had a mistress for a number of years and yet they would never publish this in the press or the news media because people realise over there that this was his private sphere which shouldn't interact on his ability to hold office or transact his duties. However, then you have the Bill Clinton saga and it's a completely different cultural mindset. I prefer the European approach because do you have to appeal to the lowest common denominator and the public's desire for gossip and tittle-tattle?

*Principle (vii)*

The response to principle (vii) was mixed. The reference to children's best interests was applauded by some: 'I quite like "in the best interests of children". It's a phrase that's used in the Family Court system as well'. However, it was thought that children needed a privacy principle of their own. The way it was phrased as part of principle (vii) gave the impression that it was an afterthought.

Another believed that the use of children in broadcasting was of concern and that broadcasters had not come to grips with understanding the vulnerability of children:

Broadcasters must always be aware of the vulnerability of children, because even when a child does consent, children are often not capable of thinking through the ramifications of what it is they have done. While they may have been happy to go on the programme, they are not capable of thinking ahead to what the reaction of their school friends might be. What may be seen by parents and children to be a perfectly legitimate appearance can become the butt of some very cruel jokes the next day.

Among supporters of the principle, there was little sympathy for some broadcasters' position on the principle:

Broadcasters are objecting because they don't want any duty at all. They'd prefer it not to be there, obviously. As with the Family Court, it gives you an objective view of what's in the best interest of the child and that will be something that broadcasters definitely have to judge ... they can't just interpret it in a way that suits their own purposes. It ought to be based on a view that objective observers would be able to say: 'What you did was not in the best interests of the child'.

But the principle also had its detractors. Apart from the parents' or caregivers' right to provide consent on behalf of their children, the actual age of consent for children was a contentious matter:

It says that somehow, even though you have the consent of the guardian or parent, you must then turn around and play the lawyer and somehow represent the child over and beyond [parents and guardians] and decide what is in the child's best interests. I would say that if the nature of the consent is from someone with direct responsibility over the child then the matter should end there, absolutely. You're putting a standard of care over and above what the law requires parents themselves to do. In other words, you're making the broadcasting journalist a specific species who carries a higher duty or requirement than the parents of the child itself. It's quite a remarkable thing to do.

The principle in its current form poses certain difficulties for broadcasters because they need to come to some sort of assessment about what the best interests of the child are. There's even reference in one of those decisions to perhaps the broadcaster needing to take independent advice about that. Now, I think we're getting into quite difficult territory here really if the Authority is going to require the broadcaster to conduct an exhaustive analysis of what the best interests of the child are. I think there are other issues in connection with

this particular area because the Authority effectively said that the parent giving consent for a child to appear, such as the eight-year-old on the *Holmes* programme, was not sufficient and that the child really had to give, or had the right to consent or not to consent appearing in the programme. Now nothing has been established as to what point does parental consent, (it would be clearly appropriate in the case of let's say a four or six-year-old requiring parental consent), but at what point is a child judged sufficiently mature, knowledgeable and in a position to give informed consent on their own. I don't think we've done any work on that, or I haven't seen any discussion of that particular point, but it's obviously a point that would exercise broadcasters.

Others appreciated that it was not always an easy call when thinking of children's interests *vis-à-vis* parental consent:

It becomes more difficult if it's a news programme where a parent or guardian has been involved in something that's illegal or dodgy, but has nothing to do with the family or with their children themselves. It could be argued that their privacy then isn't important because the issue is not related to them. But I think it's a fine line because others may argue that simply exposing children in a situation like that wouldn't be right. It may serve the interest of the parent, but it may not suit the child's interest. It's a difficult situation, I think, from a broadcaster's point of view, but principle (vii) is still an important one.

... an absolutely crucial issue for me is, what do you do about self-serving parents or guardians who want to waive the privacy of their child? And the wording ... 'broadcasters shall satisfy themselves that the broadcast is in the best interest of the child', sounds OK, but I would imagine it's very difficult to assess .... If the parent/guardian has the authority to make the consent then you've got the ethical issue of the broadcasters taking a higher moral ground position and in the competitive environment of television where having faces, emotions et cetera on screen, it would be very hard to imagine a broadcaster not wanting to get that kid on there.

*In loco parentis* ... standing in the position of a parent or caregiver who may have an agenda different to the child .... I think that's always going to be very hard. Perhaps there should be a degree of sympathy with the people in the media, because it's going to be very hard to get behind the subjective views.

However, the fact that this could mean that broadcasters would have to go beyond parental consent was not the main issue:

I think when both parents agree, they [broadcasters] do have to check that. I don't see any problem with that at all. Schools do it, everybody else does it. There's no doubt that it is a form of patronisation. We are saying that in some circumstances they can't rely on parents .... This is the State saying you have a duty to go that one step further than the parents. I mean in other areas the law intervenes over the parents and children, for example, with blood transfusions.

The argument that the principle's focus should be changed to a broadcast not harming a child was not considered a better alternative:

If you say the broadcaster will not harm the interests of the child, then the broadcaster will be arguing on the lines of we've only harmed [this much].

Principle (vii) would be assisted, according to one respondent, by spelling out more fully what children's best interests might be:

I know a lot of thought and soul-searching no doubt went into principle (vii) and I don't think, given the legal complication, you can ever come up with adequate wording unless you are more fulsome in the way you describe the best interests of the child. I mean, it could be expanded to give some greater sense of what that might be. I think there's scope there in a more expansive way. It would be more helpful to the broadcaster, too.

#### *A privacy code of broadcasting practice*

A separate privacy code of broadcasting practice was not considered necessary. It was felt that the privacy principles could be brought into the codes of broadcasting practice as they currently were. One respondent was quite adamant that there was no need for a separate privacy code of broadcasting practice, as it would have no practical purpose:

Well, I can't see the need for this. I mean your current codes refer to requirements of the Act and the fact that's interpreted through these privacy principles. That seems to me quite enough. These principles have been acknowledged to have the full force of the code and you've got the power to award compensation to the complainant which you can't do with any other sort of complaint. So privacy principles are already distinguished in a number of ways and I just do not see any necessity to import these principles into standards or a code. They seem to have quite a powerful enough existence in their current form. However, I've really got nothing against it either – it seems to me to be a moot point – neither here nor there.

Another felt that no code should be developed, mainly out of concern that broadcasters should not be treated differently to the print media. Self-regulation was considered a better option:

I know that broadcasters themselves have their in-house codes which touch on privacy. I would have thought that the whole issue was best left with those internal codes rather than having an outside one imposed on them ... . The principles ought to be translated into a code by the two major television networks themselves and then submitted to the Authority for recording ... the networks should look in terms of their own experience as to how they see and define those principles.

One lawyer thought it was important to consider what a privacy code sought to achieve. There was some reluctance to have a comprehensive and prescriptive code as it raised questions whether a code could cover every possible situation. However, broadcasters could be assisted with a set of questions that they should ask themselves like 'how do you determine whether something may or not be in the best interests of a child?'

If a privacy code of broadcasting practice would entail more prescription, enthusiasm for such a code was minimal – 'I've become increasingly less happy with codes that are prescriptive

dos and don'ts'. To be of assistance a code would illustrate the principles more fully with actual examples or guidelines for broadcasters' decision-making:

The wording of the code should not so much be about prescribing what you should and shouldn't do, but point to the important elements of your decision – the things you should be thinking about. It would be really helpful to state, for example, when we're talking about public facts which are past events but which might have become private to cite a case or illustrate this with decisions ... you'd have to qualify that by indicating that they are indicative of the sort of thinking the Authority has had, because each case is going to be different.

### **Māori on privacy**

Perhaps more so than with other stakeholders, Māori believed privacy and informed consent were intimately related but, in terms of wider broadcasting issues, took something of a back seat. The representation or portrayal of Māori and the treatment of issues relating to Māori society by the mainstream media caused the greatest concern. The mispronunciation of the Māori language also rated as a concern.

The marae was the first benchmark for what might be considered private or public information. A tikanga expert explained:

The standard of what is private and what isn't has to do with what might be discussed on a marae and what might not be, and I would use that as the benchmark for what is a reasonable thing. So if it's discussed on the marae it is at that level that really depends on the judgement of the people who are there. Also, I think there must be a very different level of understanding about what constitutes a whānau or a hapū or community's business and when it is public business.

As to a distinct Māori dimension of privacy, Māori stakeholders were divided. One programme maker said he operated from the current privacy provisions:

The concern [with privacy] is about the individual [and] in the legal context in which we live, a whānau could not make a decision for an individual anyway.

Beyond the legal definition of privacy, there were cultural aspects which needed to be carefully negotiated. Dealing at an iwi level, it was sometimes difficult to identify where the source of authority rested. But there were also broader issues:

If you bring an individual into disrepute within the context of tikanga Māori, you could bring an iwi into disrepute or a whānau and there is a sense of a broader family group – an extended family, if you like. More people are likely to feel the impact of something than within a Pākehā situation.

And:

Of course you see yourself as part of just a small thing in a bigger scheme of things. You are always conscious of the fact that you've got your tūpuna and you're always conscious

of the way that you stand and represent your tūpuna. You could be putting yourself in a situation where unknowingly you're being offensive to your own iwi if you didn't act appropriately.

Or in the words of a government official:

The impact upon a breach of privacy for a Māori isn't only ever about that individual, it is always about their familial ties and their community connection or their local geography. Now others may argue well that's the same for every person who is a member of a family, except that in a positive and negative sense the reputations that are at stake are more obvious to Māori. So it's never just the individual who is implicated positively or negatively from an exposure of privacy matters. There is always a genealogical impact. There is always a family impact because the *modus operandi* of those communities culturally refers by tribe, by descent, by genealogy, by Māoriness.

And, again, as the issue was seen by a community leader:

For Māori the individual always takes a whānau with it. It's a collection of people that goes for Māori and that's not, you know, having separate rules for Māori and separate rules for Pākehā – it's a fact of life. We can never be individuals as such and if we were to make a complaint or something we would take our whānau and our extended whānau.

Furthermore, for Māori, the invasion of privacy did not confine itself to 'living individuals'. Unlike the present legal position, a deceased person's place in Māori genealogy meant their privacy might be breached and, by extension, the privacy of his or her whānau, hapū and iwi:

Privacy issues that are to do with Māori continue from when you are born to when you die to when you return to what is considered your homeland. Now whether people subscribe to that is irrelevant, but that is the Māori world. We refer to our genealogy and to those who have recently gone on because in a sense we are part of that connection to the past and the future and the present. Therefore, we treat a deceased person differently, and so in our eyes that deceased person still retains some dignity and the need for privacy and ritual.

Māori broadcasters pointed out that as far as they were concerned, the journalistic practices covering things Māori were subject to the same legal parameters as the mainstream. There were, however, different approaches:

There are no differences as far as I see it. The law is the law is the law. There are, however, certain approaches that are different. There are the ways that you negotiate your way into getting the history of a canoe or a meeting house or an iwi which is different too.

In newsgathering practices there existed a strong sense of the boundaries marking public and private spheres. Māori journalists, it was suggested, were acutely aware of the public-private distinction which was shown by their respect for whānau, hapū and iwi traditions.

The public/private distinction was particularly relevant to what occurred on the marae where Māori spoke ‘publicly’, but this was different from ‘going public’ through the media. In a similar vein, the very question as to whether the marae was a public space needed to be addressed. According to a tikanga expert:

The benchmark that I’d use is: Is the marae a public place? The argument that has been used is that it’s a public place, it’s a public meeting room. Our public have the right to know what’s going on. My view is *why* is it a public place – in fact, I’d say it isn’t a public place. But there is this question of what is a public place and what isn’t a public place. To what extent is a marae and all the things that go on there part of the public domain? I see it as not belonging to the public domain. [For instance] the tangi, I would have thought, was a fairly private matter. Although many [tangi] aren’t – I mean Hepi Te Heuheu’s tangi was filmed. And there might be many people who are quite fine about that who’d want their tangi to be front-page news, but [there is] this assumption there is a right to do that and that it is a public place.

Similarly, there were strong reservations as to what could be shown on television – the tangi being a case in point which needed to be treated with discretion and understanding of tapu.

As a Māori lawyer said:

Part of the tangi process is the public grieving. This is actually a very public affair and to have it represented in public through television, Māori have become more accommodating of that now than we would have been previously .... The other part of that though is that television crews have become far more sensitive towards ensuring the way in which they capture those images. However, I still find it difficult even now to allow cameras in cemeteries. To me, the last part of the ritual is so private. It’s the last opportunity to say the final farewell. It should remain as a private part of the ritual.

The public interest played an important role for Māori broadcasters, and it was defined as follows:

I guess there are expectations about people who are in authority over a great mass of people’s well-being. And if they take a point of view, and I suspect any inconsistencies, I would say it is our job to highlight those inconsistencies because they impact on your well-being. The John Davy case is a case in point.

However, there were strong reservations about the public interest. Privacy was of paramount concern, as this producer stated:

I’m probably more on the side of the individual’s right to privacy rather than the public’s right to see it or to view it – whatever. With the public interest, you get to a point where you realise you can’t push people any further past [their comfort levels], and that is probably a rule I apply myself. As soon as you start pushing them further and further, where they are feeling offended, then you will lose whatever it is you’re [trying] to get from them anyway.

A Māori journalist was also less supportive about the public interest argument:

I think that television reporting has trouble distinguishing when or where does the public interest come in and where does it stop? It still has the idea of the public execution a lot of the time. It's sort of like, what the best I can do as a broadcaster is to expose everything because that's what I'm supposed to do, put all the facts on the table. But they tend to do that also, in my view, from a knee-jerk reaction rather than looking at the facts and analysing them.

Programme makers saw the protection of the privacy of individuals and families as an ethical requirement rather than a question of satisfying legal guidelines:

As a programme maker I wouldn't want to do anything that screwed up anybody's life. I wouldn't even consider it; it would never be an issue.

Concealing a person's identity could be an important safeguard to the invasion of privacy. Pixilation was a technique regularly used to prevent the disclosure of a participant's identity. However, as one programme maker said:

I'd rather not blur as a stylistic thing. I would rather find another way of telling the story. I mean if you had to tell the story about child prostitution and you were not allowed to interview or talk to any of the child prostitutes then you wouldn't do it. You'd just find another way. You might think the story wasn't quite as strong, but you'd talk to more social workers, you'd talk to the police and you'd talk to others.

Programme makers said that the use of archival footage had a difficult history where the use of Māori images was concerned. However, there had been changes in policy which had addressed the problem:

The Film Archive changed its policy with Māori images, as well as where they won't release anything for use in documentaries or news and current affairs unless the family are consulted first. I know that because our family has been consulted regularly. But of course there are a lot of archival images that are sitting there in the television archives where they don't have any such policy and so the media people have access to them.

The use of children in programmes could also be difficult, mainly for reasons relating to the legal status of consent forms and the internal procedures employed by broadcasters. One programme maker believed:

Now just in terms of the legal side of things, it seems to me that the areas of privacy are not clear, particularly in terms of the ages of individuals and when consents are required. In general, I don't think a consent form means anything. Does it matter if somebody, a child for example, has signed a consent form if one of the television censors says no? The consent form means nothing because of the guidelines set out. There's no point really.

Referring to the notion of children's best interests as enunciated in privacy principle (vii), another programme maker said that 'nobody knows what the best interests of children are'. He continued by saying that broadcasters were not really interested in addressing what children's best interests were:

Broadcasters don't care about children; they only care about being sued. I mean, they don't care whether everyone has given their consent. They are simply worried about being sued and they don't care what the impact of the programme will be on individuals. This is only about money – it's not about children.

Another programme maker said that looking after children's best interests was a moral obligation and, in the final analysis, an obligation that was not hard to fulfil:

Children in our programmes might burst into tears which shows their vulnerability. We would certainly not use it, because we cut it out .... It might cost you a few dollars extra to do it, but in the end if something has gone wrong we don't use it. I mean children – they're our future, and if you start totally mucking them over on television now, what are you doing? There is, as a producer, a major responsibility to ensure that everything that goes to air on a children's programme is in the best interests of children, and it's very easy to do that.

In conclusion, it appeared that there existed a certain degree of conflict between Māori definitions of privacy and the way in which privacy was defined by current legislation. However, this was not something that could not be overcome:

I think statute always provides us with a baseline about what can be termed legal or illegal, but it shouldn't constrain the Authority in developing guidelines for good practice. If we're concerned about standards in an industry and standards in a profession then we ought to be going for lifting beyond the benchmark of just the absolute statute. I think that's a positive step because Māori will always have a complementary set of views that widen the narrowness of a statute. My observation is that among many communities there is not only a greater awareness, there's a greater adoption of some of the practices that might be Māori as being normalised community things. The New Zealand people are becoming well used to those kinds of elements in their everyday lives.

### **Community advocacy organisations discuss privacy**

The representatives of community advocacy organisations interviewed were predominantly advocates for children. Hence, the interviews tended to focus on the rights of children as vulnerable citizens, where privacy and consent issues are especially intertwined.

Privacy issues in broadcasting were perceived by community advocacy organisations in terms of human dignity, and of the rights of the individual:

Human dignity is extremely important when talking about privacy issues.

The test is always the right of the individual. Broadcasters have to determine how they can best represent the issue, but without transgressing the right of the individual .... I think the individual has a right first and then others like the family, community and society – they come after the individual in my view.

It was clear that community advocacy organisations had a much lower threshold for privacy breaches than broadcasters. Community advocates gave the following examples:

I find even when looking at a prisoner being taken from the dock and they've been forced to cover their face, I actually feel that it is an invasion of that person's privacy.

When it comes to *Treasure Island* and *Big Brother*, those programmes offend a viewer's sense of privacy. This influx of reality-style TV which gives us all that stuff that we can watch and say, 'Oh that's interesting, what other ways are we going to invade somebody else's privacy?'

As another community advocate said:

I guess for me it would be that intrusion [is] very high. You see a lot of the interviewing that I've heard of late seems to be very in the face of people, even though those people have clearly expressed an interest not to be involved, and that's then what I consider to be the intrusion.

Children's right to privacy should be a major concern to broadcasters and society as a whole: 'Adults are given dignity and privacy, so why wouldn't children be?' In this light, children's permission to participate in programmes needed to be actively sought, with understanding that children might not always be able to judge whether their participation would be in their best interests. As one children's advocate put it:

With respect to children, it is important that decisions are made that are in the best interests of the child. Article 3 of the UN Convention on the Rights of the Child talks about our nation promising to do everything in the best interests of the child. Sometimes that might mean that they would not be shown on television or that their identity would not be disclosed, because it could cause problems down the track for them in later life or at school the next morning – when the exposure of their privacy is going to be detrimental to them and the outcome is going to be negative in terms of them being victimised down the track by somebody, or by not being able to leave behind the mistake they made, for example.

Another suggested that broadcasters or programme makers who were involved in filming children during an important news item should avail themselves of the services of a child advocate in order to safeguard children's best interests.

At the same time, it was mentioned that privacy concerns needed to be balanced with giving children a voice, a matter also addressed in the UN Convention on the Rights of the Child. In giving children a voice, it was important that children were made aware of their rights:

The other aspect with children is to seek their opinion. They have an entitlement to express their view about things – Article 12 of the UN Convention. Even quite young children can be asked their view about things and it can be done very well.

Giving children a voice was important, particularly when the media, as one child advocate observed, tended to treat children in a negative light as a social problem that needed to be addressed:

I would put it to you that children are mainly viewed as a nuisance, in trouble and as a problem in society. You'll have people saying to children: 'I'm watching you, don't put a foot wrong'. You wouldn't say it to a group of adults. There's a general attitude that children are going to be trouble. I don't think it's a deliberate move, but it's just when the child is in trouble it's a little bit more newsworthy than when someone does a good job.

The identification of children was not considered acceptable, even when the media revealed their names and images, as in the case of convicted child criminals.

We basically use the UN Convention on the Rights of the Child as our mandate and it says that State parties have to take all steps to ensure children that are going through the process of law – that their identity is protected. So we would still say that if it was in the public interest to reveal some kind of identity, it needs to be done without stigmatisation. The media can still report a case without children having to be prizes or stigmas.

Issues surrounding privacy and the freedom of expression needed careful reflection where the privacy of children was concerned. As one child advocate explained:

Just as New Zealanders believe in the freedom of speech, we need to make this proportional to the interests of children and young people who can't speak for themselves. Some children are quite mature, but generally we'd want to say that the rights of children and young people have to override the freedom of speech rights of adults.

Child advocates often complained as third parties on behalf of children in general. Broadcasters argued, following the broadcasting standards regime in the United Kingdom, that only people personally affected by a broadcast should be able to complain. Child advocates felt that the broadcasting standards jurisdiction in New Zealand should retain the opportunity for third-party complaints to be heard. In the words of this child advocate:

Some people have a statutory obligation to speak on behalf of different groups in society. There are professional advocates – trade unionists. You try and tell a trade union official whose job it is to advocate for workers in an industry that they can't complain about something that was broadcast concerning one of their members, or the spokesperson for doctors in New Zealand, or the Commissioner for Children.

One child advocate said that the broadcasting industry had made significant improvements where the protection of the privacy rights of children was concerned. Broadcasters and producers were now seeking advice from children's advocates about programmes featuring children. Two 'landmark' decisions of the Authority were also cited in this regard:

In recent years, there has been a big move by, not only the Authority, but also by television producers and broadcasters in general that children are not to be dealt with in a non-human way. I think people are now talking about children's television and children on television. I think it has been a jump in attitudes and that's why people ring me up. They ring up and say 'Well, what do you think of this as an interview with a child? Would it be OK if we did a programme about this little girl who is disabled?' Because of a couple of landmark

decisions made by the Authority, the boy on television with ADDS and the very short-lived *You be the Judge* programme – well, we were the judge and we don't have the programme anymore.

There existed some scepticism about how broadcasting showed intimate private details in the name of the public interest. Furthermore, broadcasters were reminded not to think only about the public interest:

I look at things that have been broadcast that are newsworthy and supposedly in the public interest and I think I don't need to know that. It doesn't mean that the crime or the incident is not as important or whatever, but I don't need to know these intimate, graphic, gruesome private details. [For example] I think there are ways to say a child has been abused by telling how it came about that this child has been abused. I can't think of any reasons why knowing the details of the abuse would be sustainable.

And:

What's important is that broadcasters don't only think of the public interest and that they have some understanding of what individuals who are affected by a tragedy might actually be thinking at a particular moment. [Broadcasters] need to have something of an understanding not to confront people with a television camera asking 'How do you feel?' at moments of great extremity and grief.

Or as another community advocate said:

There is a major confusion in the minds of journalists [regarding the public interest]. The public's right to know does not equate with the media's right to know. They are two different things and there is a sense of real confusion in the minds of the media. They think they are the public, well, they're not – they are purveyors of news for profit.

However, one advocate felt that the public interest defence was important when broadcasters scrutinised the behaviour of public figures:

I think [public figures] have to accept the public attention that they get is by virtue of the position they hold. They have to accept a certain *quid pro quo*.

Another disagreed:

Media interviews will often start trying to rake up people's individual lives and try to make that into public happenings. The media are trying to do a big hype on some of those things. When it comes to a business or public matter, things within a person's private life are highly irrelevant. Also with parliamentarians, [the media] try and rake up what's going on in their private lives.

The representatives of the community advocacy groups interviewed did not necessarily agree that privacy protection should be extended to public places. One community advocate said:

You can see a crowd shot outside Parliament and the people who are there know there's TV. They can't say 'Hey, I don't want to be shown in the crowd', when they know there're cameras panning. They know what it's about, so you can't hide behind privacy if you want to be public in your demonstration. You and I walking down the street – I don't think we have a right to say the cameras can't show us.

## Conclusion

On the whole, broadcasters expressed satisfaction with the Authority's privacy principles. They were an ingrained part of the broadcasting standards regime in New Zealand. However, the Authority's interpretation of the principles and their application to complaints drew a mixed response. Furthermore, the possibility of lodging third-party complaints (complaints made by people about alleged breaches of privacy who themselves were not personally affected by the broadcast), was judged in need of revision. Broadcasters thought that a separate code of broadcasting practice regarding privacy was unnecessary, as they considered the privacy principles were part of the existing codes of broadcasting practice.

Independent producers saw the privacy principles as embedded in the overall broadcasting standards regime in which they operated. In other words, they were a 'given' of the broader environment in which independent production companies functioned. Like broadcasters, independent producers had difficulty with the way in which the Office of the Privacy Commissioner can have privacy jurisdiction in the case of television programmes which are not news and current affairs. For independent producers, filming in a public place, in particular, should not generally be restricted by any privacy concerns, as that would significantly affect the normal execution of their professional tasks.

Legal and academic experts felt that the Authority had developed a credible jurisprudence on privacy in broadcasting. This was in spite of the fact that privacy issues in broadcasting had been difficult to define because of the varied contextual matters. The Authority was perceived as having done the sensible thing by developing a set of principles and using a common-sense approach in applying them. While the academics and legal experts made some suggestions for rewording the current privacy principles there was also a tension between a desire for more prescription and leaving the principles as they were as broad interpretive tools. The need to 'translate' the privacy principles into a separate code of broadcasting was not considered necessary as the principles were in effect part of the codes of broadcasting practice.

For Māori, privacy issues in broadcasting were problematic mainly because little account was given by mainstream media to Māori tikanga such as marae protocol. While the notion of the privacy of the individual extended to the whānau, hapū and iwi, deceased persons and their whānau had a right to privacy too, and whānau needed to be asked for consent accordingly. The privacy of deceased persons was not provided for by privacy legislation or the broadcasting codes of practice.

Community advocates tended to place a much lower threshold on what they perceived to be invasions of privacy than currently provided for by the Authority's privacy principles. They fully endorsed the notion that a broadcast featuring a child should be in the child's best interest.

## Notes

- <sup>1</sup> Tainui Stephens conducted the interviews with Māori stakeholders on the Authority's behalf.
- <sup>2</sup> See Chapter one, pp. 18–19.
- <sup>3</sup> The protection of privacy includes protection against the public disclosure of private facts where the facts disclosed are highly offensive and objectionable to a reasonable person of ordinary sensibilities.
- <sup>4</sup> 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 a reasonable person.
- <sup>5</sup> An individual who consents to the invasion of his or her privacy, cannot later succeed in a claim for a breach of privacy. Children's vulnerability must be a prime concern to broadcasters. When consent is given by the child, or by a parent or someone *in loco parentis*, broadcasters shall satisfy themselves that the broadcast is in the best interest of the child.
- <sup>6</sup> Throughout this chapter independent programme makers are also referred to as producers or directors.

# 3

## Stakeholders discuss consent in broadcasting

by Wiebe Zwaga

### Introduction

This chapter discusses the views of various stakeholders on informed consent issues in broadcast production. It follows the same format as the previous chapter, presenting the findings by stakeholder group starting with broadcasters, followed by independent programme makers, academic and legal experts, Māori, and community advocacy organisations.

The discussion commences with what respondents' considered might be the rights of people participating in programmes. It then outlines how broadcasters and independent programme makers go about obtaining informed consent. It discusses responses to the definition of informed consent put to the people interviewed. This definition of informed consent, taken from the 2000 UK report *Consenting Adults?*<sup>1</sup> commissioned by the Broadcasting Standards Commission in the United Kingdom, reads:

Permission based on a participant's knowledge and understanding of (a) a programme's format, aims and objectives, (b) how their contribution will be used and (c) the potential consequences for them or for third parties of their taking part.

The question of whether or not programme participants should be able to exercise editorial control in post-production on how they appear in the programme was discussed. This section concludes with a discussion on the desirability of developing a set of industry guidelines for obtaining informed consent.

### Broadcasters on informed consent

#### *Consent and broadcasting standards*

Television broadcasters thought Standard 6 (Fairness)<sup>2</sup> of the *Free-to-Air Television Code of Broadcasting Practice*, and the relevant guidelines,<sup>3</sup> covered the rights of participants in terms of achieving informed consent. As a couple of broadcasters said:

Well, I just go to the code and quote you back the words. They're as helpful as anything. I think their rights are to be dealt with fairly and that they should be informed of what they're about to do – what they're being asked to do – and that really is all you need to say.

Participants in programmes should be dealt with fairly, and as required in the public interest, be informed of their contribution and the role that's expected of them. That's the basic principle, I think. And we shouldn't get pictures through misrepresentation or deception is the other one, and I think that applies to all programmes, news and current affairs, documentaries, anything. Reality programmes, the whole lot.

News and current affairs programmes were, in terms of informed consent, different from other programmes. In news and current affairs consent was predicated on the fact that somebody had agreed to be interviewed:

Every person has the ability to judge situations, and some decide that they don't want to be interviewed any more and they leave. Nobody ties anyone to the chair. You always have the opportunity to get up and walk out.

But in reality formats, for example, participants needed to be given 'a few moments of sober thought, rather than just leaping in'.

One radio broadcaster saw the rights of participants in programmes related to them being treated fairly. In talkback radio, another broadcaster believed that respect, rather than fairness, was the key concept:

Well, I don't know if they need to be treated fairly. I mean, is that part of the deal? We don't ring up the radio station to be treated fairly. I mean this a commercial operation and we make the rules. It's more of a respect issue probably. But at the end of the day it's our radio station and we run it as we like as far as callers go. We don't guarantee to give anybody three minutes on air, you know. They can open their mouth and we might judge that they are saying something [we don't want to hear] and we reserve the right to cut them out there and then.

With respect to talkback radio, it was thought that the 'rules of engagement' were clear to audiences as well as to participants. In fact, callers to a particular programme often broadly represented the audience for that programme:

When people ring particular shows, they are probably aware that they will be challenged and could be ridiculed if they are not sound in their logic and their argument, [even though] that's sometimes hard for people to understand.

In terms of talkback, people know that this is an arena where various things can happen: (a) they can get into a dogfight with the host; (b) their call could be terminated.

However, one radio broadcaster questioned whether people were aware of the rules, as his organisation received correspondence from people complaining that they had been cut off.

It was generally agreed that freedom of expression was an important right for participants in talkback radio, but that this right was not limitless.

#### *Actual practices for obtaining informed consent*

One television broadcaster said that there were no comprehensive rules about obtaining informed consent:

I don't think we want to lay down a rule that should apply willy-nilly over the whole spectrum of getting consent as such. [People have] got to be treated fairly, as the codes point out, and if you're going to interview someone we don't want to say that they should sign a form first.

Another said that consent was often implied: 'The fact that they sit there while you're taking a picture of them suggests that they are consenting'.

The process followed to obtain consent depended on the type of programme:

Each case is different. In the normal circumstance the person is approached by telephone, saying 'Hey we're making a documentary about this, this and this, and you're relevant because of this factor, we'd like to talk to you'. The fact that he or she agrees at that point, that's a consent. I certainly would be very wary about looking for written consent in every case. It would be ridiculous – a paper war.

Asking participants to sign a release form appeared to be standard practice, as it provided protection for both broadcasters and participants. Once consent was obtained, it was binding. Participants who had signed a form and then wanted to renegotiate placed broadcasters in a difficult position. One broadcaster responded to participants who were having second thoughts as follows:

We'd be saying 'We have invested a lot of money in this programme already, and you signed a consent form. We can't take a loss just because you decide to change your mind.'

The relationship that broadcasters developed with contributors was crucial to the success of a programme. One broadcaster said that New Zealand television producers were ethical:

The reality is that it's the relationship between the participant and the television person. That's the key to it. If you're going into that on the basis of an exploitative position, I don't think you're actually going to have a very good relationship. I mean that is not what successful television programmes are about .... I believe that producers who work in the New Zealand environment are ethical people. I don't think they're out to sign up five people in five minutes. I mean the quality of the performance is going to be improved if people [know] about the format and about what that might mean.

Release forms were less common in radio broadcasting, partly because they were often impractical in a medium focused on immediacy. Radio broadcasters did inform potential

participants of the broad expectations of their contribution during pre-interview contact. In news and current affairs programmes, radio broadcasters operated from the principle that no prior agreements with people were entered into. Contributors were told what the programme was interested in, but a list of specific questions was not handed over.

### *Informed consent: a definition*

It was generally accepted that the need to inform participants about the programme's format, aims and objectives, as well as about how their contribution was going to be used, was implied in the current code of broadcasting practice. As one television respondent put it: 'You inform [participants] of the reason for the proposed contribution and of the role that's expected of them'. However, talking with participants about the anticipated outcome of the programme was difficult as this might change during post-production:

... We don't always know – particularly if it's a complex mosaic style documentary with lots of small pieces you're building up to a total picture. Even if it has been quite a long interview, you may be using a very small part of that and you won't necessarily know. You certainly won't know at the time of concluding the interview exactly which bits you are going to use as it might be that your particular theme is developing. The programme focus may shift and you end up using that piece rather than that piece of the interview.

People had a good understanding of television genres and styles so that when reporters explained which programme they were working for, they had a fair idea what to expect. However, a member of the public participating in a documentary was different from somebody taking part in a game show. That person was a contestant and therefore, not a 'member of the public' as such.

However, in the case of programmes other than news and current affairs, more elaborate procedures to obtain informed consent, including comprehensive release forms with guidelines, were sought by one respondent:

I don't see anything wrong with a fairly lengthy form that tells you types of things that could happen, you know, 'by participating in this programme you may find that more people recognise you in the street.' I don't see anything wrong with explaining that to a person.

The way in which people were briefed depended on their contribution:

It's the principle of fairness in terms of your dealings with people. Inevitably, people may be surprised at the focus which you end up with. I think that for long-term programmes, the preparation time it takes spans quite some weeks which means that you develop a relationship between yourself and the [contributor] and you actually feel more obligated than if you spend just five minutes with someone.

A further distinction was made between public figures and 'ordinary people'. Particularly in news and current affairs programmes, public figures were considered 'fair game'.

Broadcasters thought that it was very difficult to inform participants about the potential consequences of their contribution:

It's just impossible because something happens in an interview and everybody just goes ballistic and suddenly – what started out to be a reasonably straightforward thing – people become grotesque. And things are suddenly revealed in an interview which you didn't know about when you set out on it. So the consequences can be altogether different. Something is revealed and it turns the whole enquiry down a different track.

Another broadcaster, tongue-in-cheek, emphasised the difficulty of explaining what might be said about 'consequences' to a prospective contributor:

You realise the consequences of appearing on this programme, they may be adverse. Who knows, you might be looked on as an idiot for evermore.

At another level, contributors were often warned about danger areas. Defamation as a case in point was carefully monitored for the protection of both the contributor and the broadcaster.

The motivations of people appearing on television were diverse. For most, it was their moment of fame. For others, their motivations could only be guessed at:

One friend of mine was on *Location, Location, Location* and I couldn't believe that he went on, he and his wife. They have a beach property and a house and they had to get rid of one or the other, because they were asset rich and cash poor, and poured out to the nation the fact that they were hard up .... Now, why he went on and why he did it, God only knows. He was obviously persuaded somehow to do it.

The vulnerability of participants was an important qualification:

To take an extreme example, if somebody was intellectually handicapped it would not be fair to subject him or her to a gruelling interview.

Similarly, someone for whom English was a second language would also need consideration. However, broadcasters thought both examples would be covered by Guideline 6f of the *Free-to-Air Television Code of Broadcasting Practice*.

#### *Editorial control in post-production for participants*

Broadcasters felt strongly that participants should not be accorded editorial control in post-production. Television was for informing and entertaining audiences and not, as one put it, for 'enhancing' participants. Broadcasters were professionals and programme making should be left to them:

If contributors want to have veto power, they can go and make a programme, become a producer, which is what a lot of film stars do.

However, broadcasters sometimes did take account of the views of contributors who might have had second thoughts about appearing in programmes. The outcome of such negotiations were very case specific, depending on, among other things, the level of financial investment the broadcaster had in the programme, and the seriousness of the contributor's reasons for wanting to withdraw.

Radio broadcasters mentioned that in formats like talkback radio, they had 'absolute editorial control' in setting the agenda of topics for discussion, which were often dictated by the issues of the day.

#### *Desirability of (industry) guidelines on informed consent*

Mainly for the reason that the current code of broadcasting practice covered issues of informed consent, a set of guidelines on informed consent was not considered necessary: 'I think the guidelines are in the current code already'.

There was a reluctance to create another document which would have to co-exist with the code of broadcasting practice. It was felt that this would greatly add to the complexity of maintaining broadcasting standards and determining complaints.

#### **Independent producers on informed consent**

The views of independent programme makers varied depending on the television genre they were working in. Producers and directors involved in traditional-style documentary, which involved close liaison with participants, often developed close relationships with their 'talent'. Consent in these cases was invariably informed, given the type of relationship the production staff had with the participants. For producers of other types of programmes, the relationship with participants was often more fleeting.

According to one producer, the rights of participants could only be stated in very general terms, and they did not include 'editorial rights' and 'legal rights' after they had agreed to take part in a programme:

They have to be very broad-brush. They have the right to know what the programme is. They have the right to know the style and the kind of stories that are covered in the programme. They have the right to know what their position is when they sign their agreement to participate. They don't have the right, editorially, to intervention after the fact, unless that's negotiated for specific reasons.

Another programme maker believed that participants' rights lay predominantly in the area of being fairly dealt with and being fairly represented:

I think to be accurately portrayed and to be kept in context, that's basically it. But if somebody says something then you don't editorialise or try and change their view. If they are making a monkey of themselves or if they're condemning some particular thing then it would be wrong to try and water that down for the sake of offence. ... As long as you don't

put words into people's mouths or take them out of context or misrepresent them, that's about their rights I think.

For others, the rights of participants were relatively clear-cut. First, participants had to be informed that they were going to be recorded. As one producer put it:

Well, a person has the right, has to have the right, that they know what's happening. They have to know whether it's recorded and they have to understand what the footage will be used for.

A distinction was made between participants appearing in their own private environment compared to people walking down the street in a crowd scene or engaged in some sort of group activity in a public place.

It was observed that the producer's concern for the wellbeing of participants ought to be paramount – wider than their concern for the programme or the broadcaster:

I'm always conscious of the fact that I'm also a member of the community and [contributors] are members of the community, and we have to be able to carry on living with one another and living with ourselves as well.

The relationship programme makers developed with their participants was crucial to the success of many programmes.

The programmes we make are about communicating usually quite sensitive areas of people's lives. To allow people to sit in front of a camera and to reveal things in their lives is quite scary for people. ... So therefore the relationship that you capture on camera depends on the relationship you have between the interviewer and the person. And if that relationship has animosity in it, your interview will have animosity in it.

On the subject of relationships between programme makers and participants, it was also noted that programme makers in general did not want to deal with unwilling subjects. Instead, as one producer said:

[We] want to deal with subjects who have something to say, and who have a need or a desire to say it.

#### *Actual practices for obtaining informed consent*

The first step in obtaining consent occurred while researching the programme. This involved advertising for people, seeking them out, selecting talent, and auditioning them on camera.

We record interviews with these people in which often the interview is about what is going to happen in the documentary and what their own attitude towards that might be. Then we select these people and we let them know and we get them to sign the release form. So from that point on they become kind of ours, really.

And:

Well, you do your initial research and from that you identify what people you would like to take part and at that point you ask them to take part in the documentary. You explain to them what the documentary is. If they agree then at the point when we film we give them a consent form which has been generated by ourselves. [The consent form] is as clearly laid out as we can – about what the requirements and obligations are and how the material is going to be used in the context of the programme and the people sign at that point where we start filming. In some situations we will film people and then obtain the consent afterwards.

One producer said: 'People are very aware of how the media can manipulate them'. Potential participants who did not display this awareness needed to be carefully coached when consent issues arose.

Another producer of predominantly reality television shows explained how participants were informed so that they understood what was involved:

I think, by and large, we go to every effort to make sure that people understand the process and that they are doing something that involves a television company which is filming and therefore they may well end up on camera. I think the way we operate, the way the production managers and the location managers deal with our talent, there's every opportunity for them to say: 'Look I'd rather not.' If they don't want to, then that's fine.

Another explained obtaining verbal consent in reality television programmes like this:

A lot of the programmes we make are so-called reality programmes where you are in the street and you don't have the opportunity or the personnel there to sign off [consent forms] which, in our case, our protocol is that we ask the cameraman to talk to people and get verbal consent from on camera and to tell them that they're going to be part of television. Often, the fact that those people are talking to the camera shows that they've complied. Because not all the time you'd be able to say: 'Sorry, what's your name, do you mind if I just...' Because it's click, click – you use the moment. We don't really have problems in this area.

A documentary producer felt it was necessary that consent forms be quite specific: 'I demand that our consent forms explain the programme, and explain the ramifications of all factors'.

We usually attach a fact sheet to the release form or to the information that any particular participant receives which is an explanation or summary of what the programme is going to be about.

A producer of current affairs documentaries said that the matter was relatively straightforward:

You've got to be totally up front, you've got to be totally explicit about why you want them to appear in your programme. People who are interviewed, people who let you into

their private property and allow you to film them doing something privately obviously have given you consent .... You can't get an interview unless someone agrees to give an interview.

Producers involved in making programmes featuring children as participants would get children up to 16 years of age to sign a release form in the presence of their parents or caregivers, who also signed the form.

The legalistic format of some release forms was found to be off-putting by participants.

We started off with release forms which were full legal documents, you know, to cover every available situation. We found that was putting off people even doing interviews. It was like the American system. To do an interview you've got to sign a whole contract that's got all the legal ins and outs and stuff. Basically, it is about trust between the producer and the director team and the person involved in it.

Behind ethical considerations loomed financial implications, which might be considerable for programme makers if participants withdrew consent after shooting. However, as one informant said:

I think the ethical will always be slightly ahead of the financial, as you'd expect because programme makers are not monsters, you know.

When participants wanted to withdraw, the request was considered seriously in spite of financial implications:

We've had occasions where this has happened. It's a frustration and I don't think there are any instances where we have gone ahead with somebody if they have not wished to be in the programme.

Another programme maker saw the consent process in terms of both ethical and legal concerns:

I think you square off by explaining to the people who you deal with or work with, or the people that you use in your programme, ultimately what you're going to do with the material. So ethically you balance that out by either getting them to sign a consent form to say this is what we're going to do with it, this is how we're going to use it ... sign it off. Then if you're in breach of that, then you come into a legal thing.

#### *Informed consent: towards a definition*

Hypothetically, obtaining informed consent from participants could be a written or verbal agreement covering information about the programme's format, how the contribution would be used, and the potential consequences of being involved.

Without knowing about the format of a programme, it was unlikely that a participant would sign a release form:

I can't envisage a scenario where someone who didn't know what was going to happen signed their consent form.

One producer thought that participants only needed to know what the programme was about, and that further details such as format did not have to be discussed:

We don't have to talk to [participants] about the format of the programme or details like that. So the amount of information we give is: it's a television programme about diabetics and it's going to be television, it's a documentary. For us that's enough information for the public. If they want to know more, they'll ask us. We don't go into details of what the format is and what the treatment is going to be like. We don't hide anything. If it's a controversial programme about controversial issues, obviously people will want to know what the angle is. They may ask, 'what's your angle?' Well, our angle is this: we're trying to tell both sides, or we're trying to do this. So we explain things like this.

It was almost impossible to inform participants how their contribution would be used, he said: 'We don't even know at the stage of filming whether it will be used. That's the reality.'

Another believed that it was necessary for a release form to make it unequivocal that 'anyone is able to be edited'. Another was even firmer:

The question as to how the contribution is used sounds to me like editing. [When seeking consent] we do not get involved in discussions with participants how we may or may not edit the programme.

It was also thought that informing participants about how their contribution would be used was implied in the explanation about the programme's format, aims and objectives:

Programmes change and evolve as you make them so you can only give as much information as you are aware of at the time. How you're eventually going to use the product is inherent in what the programme is about and what the parameters of the programme are.

Depending on the programme and the type of contribution, it was thought prudent to inform participants in advance that their portrayal might not always be complimentary to them.

Informing participants about all the possible consequences of taking part in programmes was virtually impossible:

You may get rung up by the women's magazines. You may become a media star, you know. You may get weird people contacting you. The trouble is you can't predict none of this, obviously.

And:

How do you judge what the public thinks about people who appear on television and what they say? ... I mean there's a whole variety – it's good for your business or it could be bad for your business, depending on the outcome of the way you conduct yourself and it's very hard. What are the consequences?

For another, the need to inform participants of what the consequences might be was part of the relationship a producer built up with participants. This was a relationship characterised by trust and respect:

I think it's part of the issues of trust and having respect for what you do. There's no point in transgressing that trust ... because you will find later on that it will be difficult for you to deal with people in a similar situation and New Zealand is a very small community. It's a village really and so there are certain things New Zealanders don't do to other New Zealanders and this would be one of the areas. We've actually talked about it, you know. If somebody doesn't want to go into something, you don't go there. It's not worth your while.

As part of the consent process, producers said that they had to prepare participants so that they understood that their contribution would be broadcast:

They have to understand that it's on national television, and it's important they know the kind of time slot it may go on. I give that info, absolutely, and it's really important that they understand ... there's a big difference in going out on Channel 7 in Wellington and going out on TV2. I mean on the first a small number of people watch it, on the other 500,000 might watch you.

Another producer relied on the participants themselves to work out the consequences of their taking part in programmes:

I would say that we're not specific about that at all. We're relying on the other person's own understanding or perceptions of these things when they agree to participate. Except in the case of two programmes which we have done where we were asked to get informed consent by the parties. That did involve speaking to the wider family groups in those cases and letting them know. Otherwise, there is a kind of natural process where people do this themselves and they don't have to be led by the nose, they can suss it out and make decisions.

#### *Editorial control in post-production for participants*

Almost all independent producers did not want participants to exercise any editorial control:

We wouldn't be an independent organisation if a participant, be they Mr Smith from Mangere or Nick Smith, the MP from Nelson, had an input. I don't think that it's right that people, once they've consented, should have any control how that is used.

For most, editorial control belonged to the province of their professional judgment: 'At the end of the day, we have the editorial control and with that all of the responsibilities'. It was also a responsibility that came with the job producers were paid to do:

We do not give editorial control to anybody else other than the production company. The only other people that can influence editorial control are our publishers, the broadcasters.

Some believed that rendering editorial control to participants was simply impractical – no documentary would ever be finished if participants were involved in the editorial process.

Others felt that they did not want to be captured by political pressures:

... some people are very skilled political manipulators, and if you are going to work at the end of the spectrum where people are political activists where they hold strong views and where they see the media as a way of presenting their case then you are going to face continual pressure.

Most producers indicated that editorial control could not be handed over to participants because of contractual obligations to broadcasters:

Our contract is with the network. They have editorial control, if you like, we can't hand it to somebody else legally for a start. What we do is we say we want you to view, you've been part of this process, you've contributed to it, and tell us any of your concerns. We'll look at them seriously and if we can address them without affecting the story or the programme, we'll address them and we do that. We can't give them editorial control, but we can be sympathetic and alter something.

But there were independent producers who had worked closely with organisations, such as police and hospitals, some of which had been given editorial power. For example:

We did one where we inadvertently exposed an undercover person that would have put him at extreme risk. None of us realised. No one knew he was undercover but, thank God, the authorities did.

#### *Desirability of industry guidelines on informed consent*

Some independent producers were open to broad guidelines being developed to assist producers in the field. General education for people working in the industry could accompany such guidelines:

I think there is some need for general education in the industry, particularly for cameramen. I mean a simple cameraman's guide to privacy would be intensely useful because I find they've all got a different version of what it is.

Another was supportive of the notion but added a caveat, also mentioned by others:

I think that, in general, the more information is out there the better. The trouble is that these things are very hard to devise – that's not a reason not to try – but they have to take an awful lot into account. What I worry about is when such guidelines are promulgated as to how literally they are interpreted. Does that then become [the Authority's] stick to whack people with?

Another producer was adamant about the need for industry guidelines on informed consent:

I have to say yes. I might be old-fashioned in my production ethics, but believe it's right. I believe that television can be too dismissive of individuals, and I don't think that should be the case ... I think we are too harsh on our public and I think perhaps there is too much arrogance expressed on occasions and we don't need that. I approve. I've got better stories, more and more detailed stories than anyone else can get and I've done it by total honesty and openness. Why can't everyone do that?

The development of detailed guidelines was questioned, if not rejected by another:

Personally, I think it's dangerous for the BSA to be producing guidelines on these issues because [the issues] are all different. I think it's really hard to produce a guideline for the variety of programmes, whether it's commercial or moral or taste, all those kinds of things, because they are so subjective.

Specific guidelines were regarded as prescriptive and, therefore, difficult to sustain in a 'world of the changing media landscape'. Broader principles about informed consent were preferred because of their interpretive nature:

What I'd prefer – and I think it's harder and more difficult for us ... where applications are changing daily – almost daily – it would be far better to have principles which you can test things by and they are contestable. ... Guidelines are always hard to change. Once they're there they take ages to move – whereas principles can be interpreted and the interpretation can be subtly modified, or argued case by case.

### **Māori on informed consent**

One very important aspect of informed consent was its quality. One interviewee, who was not a broadcaster or producer, said:

I think it's a question of what do you inform. What is informed consent, and I'm making a guess that many Māori are not aware that informed consent is not just 'I agree' or 'no I don't agree', but knowing what will happen and the potential for distortion.

On a practical level, for broadcasters and independent producers, issues about obtaining informed consent were specifically related to marae protocol, particularly in the case of the filming of marae events:

I always say to the crew I go out with, if you're going to put your camera up on the marae in an area it's noticed or in an area behind the tangata whenua or behind the manuhiri or whatever and it's part of the marae process like a tangi, then you stand right next to your cameraman so that people can identify who you are. So that if there are any questions they know who to contact. Very rarely they will say what's the story for? If it's a tangi there are more reasons for the producer or the director to stand next to the cameraman – especially if the cameraperson is not Māori and the sound recorder is not Māori. I mean that's one of the things that I absolutely insist on is that we identify ourselves for the group.

Or, as a producer said:

Going into Māori communities and in Māori locations there are always processes that we need to go through. There are certain processes. Our own protocol that we have to keep in mind the whole time because there are very many ceremonial aspects that have to be constantly kept in mind when you're out there with a film crew. As long as we are sure that we're allowed to go into a particular environment to shoot on the total understanding that the images we are shooting could very well end up on a public broadcaster or on our Māori broadcaster.

Māori leaders were the first port of call for media contact according to a Māori lawyer:

I think there is identifiable leadership within those collectives that have the mana and those who belong to that collective recognise and acknowledge that mana and those leaders are supported in decisions that they take on behalf of the collective. In terms of the informed consent issues, they would be able to make decisions about their particular issues and understand the implications of it.

The rights of people appearing formed an important part of the definition of informed consent. For one Māori programme maker, it was a relatively straightforward issue:

If they have any worries about appearing they should not appear. But it seems to me that once they have agreed to appear they should, in most cases, appear and finish the film. Well, I mean once they understand what's happening and they're treated in exactly the way they said they were going to be treated then they should appear and in most cases I would make sure they appear. However, the bottom line is that if something happens then they should be allowed to opt out.

For another programme maker, the rights of participants were equal to the rights of a producer to make programmes:

Participants have every right. They're participating in our programme because they've agreed to. It is usually well explained to them what their involvement will be, what is required of them as far as whatever the programme is we might be shooting and it has to be done totally with their agreement otherwise then you start to overstep the line.

A Māori journalist believed that informed consent was to do with broadcasters laying all the cards on the table before an interview was conducted:

I think all the cards need to be put on the table in the first instance. It's like 'Look, we're talking to x who has an opposed position to what you have.' If they've done their research they should also be able to inform of where they are likely to go in terms of how they might portray it. I think informing people about what the likelihood is, or how they're going to use comments – and they need to stick to that. If I'm going to agree to give you information, my opinion, or just a general conversation given in a particular area, in the end I have to trust you and in that trust I believe that you're going to do the best for the both of us.

The practice of obtaining informed consent from Māori involved a process of extensive consultation, as this programme maker explained:

Go to as many people as you can. If you can and if there's a big chief, get the big chief. It still doesn't probably matter but you have to try and satisfy as many people as possible. I mean the consent process is not a form often – it's a group meeting, it's hui and stuff.

The emphasis was on consultation:

I think Māori people would be more than happy as long as they were consulted about these things. But more often than not, we suddenly have images being screened back on our news and from television overseas and we are seeing our own images.

Once extensive consultations were made, however, filming was productive. A Māori producer provided the following example:

We had to go to the marae for people in one particular area to gain their consent and in the end we got a whole day's shooting out of them. Once they realised what it was all about they were happy to have to go through that process. You sometimes might lose half a day in the process, but it's so important. Because on the hapū or iwi side you will have several people there, not just one person. You will have several of the hapū who are extremely interested and wanting to make sure that all the protocols are kept to and that nobody is going to be offended by anything that may result from that particular day's shooting.

As was the case with 'mainstream' programme makers, the release form stood at the centre of obtaining formal consent. Programme makers filming in public spaces, however, referred to increasingly fraught aspects of obtaining consent:

The truth is that everyone is to have a consent form really and that almost even applies to public places. It applies to a wide shot of Queen Street. The most pixilated films on TV are current shows like *Busted* and it's not the criminals that are the issue, it's the wide shot of the motorway when the commentary says that Auckland has many speeding motorists. Every car that appears in that shot is liable to sue because the occupant says: 'You showed my number, I'm not a speeding motorist'. So I mean those are the real problems. It used to be that anything in a public place was open, but the truth is, it's not.

Safeguards for the use of children in broadcasts and the related consent issues were governed by internal procedures. As one broadcaster explained:

We normally have to go through some hoops for children even if we want to go out and get a couple of kids on what they think about whatever the issues might be. It's quite difficult. I would make sure that I had a lot of protection in terms of support from the family, support within the organisation itself in terms of its lawyers in terms of lots of things. I certainly wouldn't just go ahead and barge into a story.

Of the ways in which people were used by the media, the following comment was typical:

Informed consent is a very difficult thing because ultimately they want to get the line in the news, they want to make something that's going to have a ra-ra factor, it's going to be shocking or it's going to be sensational and it's either you making a fool of yourself or you making a fool of someone else.

One programme maker saw informing participants about the potential consequences as not an issue of informed consent. Rather, it was part of the general preparation one engaged in before filming:

It's an issue of why are you doing it anyway and to me those things should be dealt with beforehand, you know. If I want to talk to somebody in jail, the only reason that I'm actually going to get as far as actually filming them is because they already accept and understand all of that. I would never turn up and film somebody and have the discussion then.

There was a realisation that members of the public, as potential participants in programmes, were getting increasingly media literate:

The whole film and television world has changed completely where everyone is totally aware. Reality television made people aware, you know. Suddenly we're following people around in their daily lives, or film crews are. So there's a whole change of perspective about the television world, everyone is much more aware. After an initial approach, I get the feeling that people are still keen to participate. They're happy to provide whatever it is they contribute to the programme – they like being on television.

While Māori had become more 'media savvy' over the last 15 years or so, according to a Māori journalist there was still a lot to learn:

Māori are more aware now, I think, of the media and its power. However, I hesitate to say it, we haven't come far enough I think as people all over we will still fly off the handle and punch someone on the marae while the cameras are rolling. Dumb move, dumb move! By all accounts the Māori reporter will use it because that's where the meat of the story is in terms of news is conflict and conflict is news.

Māori programme makers saw editorial control resting with the producer: 'I think editorial control remains with us and there should be no issue.' Another producer was resolute:

If you allow others to participate in that part of it, you could end up with a programme that doesn't look anything like what the original concept was and so it is important that the producer has the final say as far as editorial control is concerned.

However, the editorial process should allow for input from participants who were not content with aspects of their contribution:

There would be consultation. I certainly would not want to antagonise people, but try to point out to them that what we have filmed was fine, you know. During the editing process,

you can do all sorts of things. It can be edited in such a way that a person is not going to be aggrieved because we've included it. ... I will often allow participants to have a look at what was happening and they could make suggestions or whatever. Sometimes they might be extremely helpful suggestions.

Informed consent, then, had wide ramifications for Māori – both for broadcasting professionals and community leaders. As one informant summarised:

. I think a high level of informed consent is really important as it impacts on the whānau. It needs to address how the whānau are going to be involved, how they are going to be treated. The other thing is maybe the commitment to once it has been broadcast, once the material is out there, is to go back and check on how they felt about it.

### **Community advocacy organisations on informed consent**

With respect to informed consent, one community advocate referred to the fact that other professional groups had guidelines in place which were predominantly about risk management:

If you take the notion of informed consent in other professional spheres then the definition of it is that the risks have been explained and that's basically in outlining consequences and intended use. The perspective of where the programme maker is coming from also needs to be explained to the participant and the risk of that perspective to the participant, if there is one.

A link was made to academic researchers who had procedures for obtaining informed consent:

I would see it working very similarly to research. I could see that it could work very well that in fact programmes needed to get ethical approval. It would be before the programme was begun so that some of the issues could be taken care of right at the beginning.

Concerning the right of participants, it was argued that contributors should be informed about the programme's objective. Participants should also be extended the right to say 'no comment':

I think participants have the right to know what the programme is going to entail, what questions are going to be asked so that they can actually think about them. When it becomes an *ad hoc* thing, I actually feel that the person has the right to say 'no comment' when the interview digresses from what was the original contract.

Another important matter was that participants were often unsuspecting of potential outcomes, and probably somewhat taken in by the glamour of the media and its personnel:

People need to know ... I think people are entitled to understand fully what they're getting into. I think New Zealanders are often guileless and, as a people, we want to please and come across as nice persons. Most of these television presenters are very attractive and very personable individuals. They are so persuasive and people will oblige them. I think there needs to be some sort of caution.

Or, as another community advocate said:

Quite often the people signing the document don't understand what it is they're signing. I think that they need to know clearly in advance what the programme is truly about and what its promotion will be, what its audience will be and how often and how widely it will be shown.

When considering consent by and for children, the central issue was whether parental consent alone was enough or whether broadcasters also had to be satisfied that a child's best interest was being served. Broadcasters, and some producers, believed that it was difficult to override parental consent. They said it was impossible for broadcasters, as opposed to parents, to determine what was in a child's best interest. Child advocates, by contrast, believed that broadcasters should be obliged to have a child's best interest at heart. They pointed out that parents, or those *in loco parentis*, did not always make the right decisions for their children:

You have to realise that not all adults make decisions in the best interests of the individual child. Some adults push their children into prostitution. Now, it's not their right to do that. Some adults choose not to follow a course of medical advice and their children die. They don't have the right to decide whether children live or die. Parents don't have that right. The decision that the child would make for itself, if they were old and mature enough, is the one that's right. So it's very hard to judge, but if it's a four-year-old boy with ADDS, what decision would he make if he was 14 or 18 or 20? Is it the same as what his mother is saying? It may be, but it may not.

It was suggested that as well as parental consent, a neutral person, a child advocate or social worker, should oversee interviews with children:

You've got to have parents' permission. You also need people that the kids are comfortable with when they're interviewed and they need to have people there that are aware of the 'Hey, this child can't take any more' sort of thing. So you're probably involving more than just the parents. There needs to be a neutral person around to be able to say 'Cut it out, stop, this is as far as we go.'

According to one children's advocate, there were television programmes involving children where excellent examples of informed consent had been achieved. One example concerned a programme where the quality of a child's consent stood at the centre of the success of the documentary:

There was an excellent example of what can be achieved by informed consent. This young boy – all the way through the process of his mother dying and filming taking place and at the funeral – it was explained that this is what's going to happen. If you're not happy, tell us and we'll stop – if you don't like what's being filmed then we won't show it. That was a very good example of total informed consent.

Informing contributors about the potential consequences of their participation in programmes was important. Children (and their parents) needed special coaching about the possible consequences of appearing in a broadcast. As one child advocate said:

I think if it's children, they and their parents or decision-makers need to be clear about the effect [of appearing in a programme]. For a grown-up adult, I'm not so sure, but I can't imagine broadcasters are always going to want to. Why would they want to explain to Helen Clark the ramifications of an interview and what might happen politically and the polls will change. With children, you've got to take account of their maturity, or lack of it, and it's a developmental thing. I mean, a six-year-old and 12-year-old are different, an 18-year-old is different again. Broadcasters and publishers have got an obligation to bear in mind the level of maturity of the person and whether they have truly given informed consent.

Or, as another community advocate emphasised:

Children may consent because they're excited about the idea of appearing on television and something like it being a novelty thing. They're not thinking about anything other than 'I'm going to be on TV' kind of thing.

While broadcasters could not foresee everything that might result from media exposure, they needed to adequately prepare programme participants:

You wouldn't expect a broadcaster to [predict] everything that could happen as a result of someone appearing on a programme, but they must have some generic ideas of what happens. Some people might not be aware of the full range of responses to being on a programme and I think the broadcaster should be informing.

As to the desirability of having a set of guidelines regarding informed consent, community advocates were in agreement that both the general public and the broadcasting industry would be well served by such guidelines. As one informant explained:

People don't have any rights if they don't know about them. If you don't know about a right, you might as well not have it. The issues are about rights and, therefore, there is some responsibility, because where there's rights somebody usually has a responsibility, and I can't see that it would hurt for there to be some kind of guidance code that tells broadcasters and people like me.

Finally, a community advocate mentioned the fact that the guidelines would have to be monitored or policed:

It's no good having guidelines that are not monitored or policed in any way. You would have to develop compliance rules and then broadcasters would have to report on their compliance.

## Conclusion

Television broadcasters thought that informed consent was currently encapsulated in the fairness standard of the current free-to-air code of broadcasting practice. Radio broadcasters believed that informed consent was less of an issue in radio. Broadcasters, as a whole, did not see the need for a set of guidelines on informed consent.

Independent programme makers stressed the importance of creating good relationships with participants. Apart from news and current affairs programmes, obtaining (informed) consent appeared to be centred on the release form and discussions held about the programme's purpose. On the whole, independent producers thought that participants were quite 'media savvy' because, as audiences, they had become familiar with programme genres in which they might participate.

Independent programme makers believed that editorial control should remain with the producer, although there were differing opinions about the extent to which participants could be shown the programme before broadcast. It largely depended on the genre. Procedures for obtaining informed consent for a long-form documentary were different to a fast-turnaround series or a news programme. There were also different views about whether a set of industry guidelines should be developed on informed consent, which seemed to depend on whether such guidelines would be intended to assist or to judge.

Māori concerns about consent in broadcasting were to do with the need for broadcasters and programme makers to consult with Māori communities. This applied to individual privacy and informed consent, with the understanding that the consultation needed to go beyond the individual concerned to include whānau, hapū and iwi.

Community stakeholders believed broadcasters should maintain the highest standards taking into account the vulnerability and gullibility of children, and some adults, who might not understand the short and long-term consequences of participating in a broadcast.

The next chapter reports on the findings of a national opinion survey on privacy and informed consent. It will become apparent that the representative sample of New Zealanders interviewed placed a high value on privacy protection. This was also reflected by the findings of this chapter. There exists a considerable gap between the practice of broadcasters and independent producers on the one hand, and the expectations of Māori and community advocates on the other.

## Notes

<sup>1</sup> Stirling Media Research Institute, *Consenting Adults?*, London: BSC, 2000, p. 71.

<sup>2</sup> In the presentation of programmes, broadcasters are required to deal justly and fairly with any person or organisation taking part or referred to.

<sup>3</sup> Guidelines 6b, 6c and 6f provide:

6b Contributors and participants in any programme should be dealt with fairly and should, except as required in the public interest, be informed of the reason for their proposed contribution and participation and the role that is expected of them.

6c Programme makers should not obtain information or gather pictures through

misrepresentation or deception, except as required in the public interest when the material cannot be obtained by other means.

- 6f Broadcasters should recognise the rights of individuals, and particularly children and young people, not to be exploited, humiliated or unnecessarily identified.



# Attitudes to privacy and consent in broadcasting: findings of a national survey of New Zealanders *by Colmar Brunton*

## **Introduction**

The findings of the stakeholder opinion research reported in the previous chapter influenced the design of the quantitative phase of the national survey. The interviews with stakeholders revealed that there were gaps in knowledge about privacy and informed consent among respondents who were not involved with the subject in a professional capacity. It was clear that a full understanding of matters of privacy and informed consent in broadcasting required familiarity with the legal issues and a knowledge of current practices in programme production and broadcasting.

For these reasons, it was considered prudent to have focus groups precede the quantitative measurements of the national survey. Focus groups were used to test understanding of concepts and scenarios relating to privacy and informed consent. In particular, focus groups provided an opportunity to evaluate the questionnaire for the national survey. Where relevant, the findings of the focus group research are reported in this chapter to illustrate the survey's findings qualitatively.

## **Methodology**

Colmar Brunton conducted a national survey of 1,195 people aged 15 years and over from randomly selected households. The survey was conducted on a face-to-face basis between 22 February and 23 March 2003.

The following sampling approach was used:

- a representative sample of the general public aged 15 and over. This first stage consisted of 995 interviews and was designed to achieve a sample that was representative of the

population as a whole, with all sub-groups occurring in approximately the correct proportions, and

- a booster sample of Māori only. This second stage consisted of 200 interviews and was designed to ensure that sufficient numbers of Māori were interviewed to enable statistically robust analysis of this group.

At the analysis stage, the raw data was weighted using 2001 census data to ensure:

- each ethnic group was represented in its correct proportion to the total population, and
- the sample was representative in terms of age, gender and household size.

The maximum margin of error, at the 95% confidence level, on the total sample size of 1,195 was +/- 3.0%.<sup>1</sup>

The subgroup sample consisted of 297 Māori respondents. The maximum margin of error, at the 95% confidence level, was +/- 5.7%.

The following tables describe the demographic characteristics of the weighted sample. Table 1 shows the age and gender breakdown of the sample.

**Table 1: Age and gender breakdown**

Age group	Male %	Female %	Total %
15–24	15.8	13.5	14.5
25–34	14.7	16.5	15.7
35–44	23.5	20.2	21.7
45–54	15.5	16.0	15.8
55–64	11.6	13.2	12.5
65+	18.8	20.4	19.7
Refused	*	*	*
Total	100	100	100

\* Percentage is between 0.0% and 0.5%  
Base: All respondents (Males n=520, Females n=675)

Table 2 details other demographic characteristics of the weighted sample, namely: household composition, ethnicity, socio-economic group, whether or not the respondent was responsible for any children aged under 14, and combined income (covering both the respondent and their partner's income).

**Table 2: Other demographic information**

<b>Household composition</b>	<b>%</b>
Living alone	15.5
A group flatting together	5.6
Young couple with no children	4.6
Sole parent	7.2
Family with mainly school-aged children	29.2
Family with mainly adult children at home	12.4
Older couple/single with no children	22.8
Other	2.7
<b>Ethnic group</b>	<b>%</b>
New Zealand European	69.0
Māori	14.0
Pacific Island	5.5
Asian	6.0
European	3.3
Other	2.3
<b>Socio-economic Group</b>	<b>%</b>
I = Top professional	8.9
II = Managerial/executive	12.0
III = Clerical	16.2
IV = Skilled/technical	30.8
V = Semi-skilled	10.6
VI = Unskilled workers	21.5
<b>Personally responsible for children under 14</b>	<b>%</b>
Yes	37.0
No	63.0
<b>Combined income</b>	<b>%</b>
\$20,000 and under	19.2
\$20,001 – \$40,000	22.4
\$40,001 – \$60,000	13.4
\$60,001 – \$80,000	9.3
Over \$80,000	9.7
Don't know	13.0
Refused	13.0

Base: All respondents (n=1195)

Source: Questions 15a &amp; b, 16, 17, 19a, 20b.

### Questionnaire development

Prior to conducting the national survey a qualitative research stage was undertaken to:

- evaluate the draft survey questionnaire in respect of the general public's ability to answer, understand, and interpret the questions as intended, and
- provide qualitative insights into the findings of the national survey.

The qualitative research consisted of six focus groups conducted in Auckland, Dunedin and Christchurch. Two of the six focus groups were conducted solely with Māori research participants.

The qualitative research findings indicated that the quantitative questionnaire effectively measured immediate reaction toward specific scenarios exploring privacy and consent issues. This stage also highlighted the importance of contextual factors in the process people used to decide whether a scenario was acceptable or unacceptable. The reader should bear this in mind when interpreting the research findings.

### Media behaviours and preferences

To provide a contextual understanding of the research findings on privacy and informed consent this chapter describes the characteristics of the sample in terms of various media behaviours and preferences.

#### *Television viewing*

Respondents were asked on average how many hours of television they had watched *per day* over the last seven days. Results are summarised in Table 3.

**Table 3: Television viewing (for an average day)**

	%
Light (less than 2 hours)	<b>30.7</b>
Medium (2–3 hours)	<b>38.9</b>
Heavy (more than 3 hours)	<b>30.4</b>

Base: All respondents (n=1195)

Source: Question 1

Just under one-third (31%) of the respondents were classified as light viewers of television having watched less than two hours per day, over one-third (39%) were classified as medium viewers having watched between two and three hours per day, and the remainder (30%) were regarded as heavy viewers of television having watched more than three hours per day.

Sub-group analysis indicated that:

- Māori respondents watched more television than New Zealand European respondents (48% and 28% respectively were heavy viewers)
- there was a positive correlation between number of hours of television viewed and age; 41% of those aged 60 years and over were heavy viewers compared to 27% of those aged under 60 years
- socio-economic status was a defining variable. Lower socio-economic groups watch more television (20% of respondents in socio-economic groups 1 and 2 were classified as heavy viewers compared to 37% in groups 5 and 6), and
- viewers of reality programmes, real-life documentaries and comedies were especially likely to be heavy viewers (43%, 46% and 43% respectively were heavy viewers compared to 30% among the total sample).

#### *Favourite programme genres*

Respondents were asked what types of programmes they particularly enjoyed watching. This question was included in the survey to provide a contextual understanding of people's views on issues of privacy and informed consent. The reader should apply caution in interpreting the results on favourite programme genres in isolation (detailed below in Table 4). This is because the use of examples in the programme genres, while necessary to adequately describe the genres, may have resulted in fewer people choosing these genres if they did not like some of the specific examples.

**Table 4: Favourite programme genres**

	%
News and current affairs programmes	73.7
Movies	45.9
Sport	44.7
Investigative or researched documentaries about New Zealand and New Zealanders	43.9
Consumer affairs programmes such as Fair Go or Target	38.2
Soap operas such as Shortland Street or Coronation Street	35.6
British dramas	35.5
Real-life documentaries such as Motorway Patrol or Busted	28.6
American comedies such as Spin City or Friends	20.5
Real-life comedies such as Candid Camera or Funniest Home Videos	12.4
Reality programmes such as Treasure Island or Popstars	9.7
None	1.0

Base: All respondents (n=1195)

Source: Question 2

Respondents most commonly cited news and current affairs programmes as favourites (74%), well ahead of movies (46%), and sports (45%).

There were few significant differences by ethnicity. Most notably, Māori respondents showed greater preference for real-life documentaries than New Zealand Europeans (43% compared to 26%), and to a lesser extent movies (53% compared to 44%).

A number of patterns by age and gender were evident. Both men and women showed similar levels of interest in news and current affairs, real-life documentaries, American comedies, real-life comedies and reality programmes. However, women were notably keener than men on consumer affairs programmes, soap operas, British dramas, and investigated or researched documentaries about New Zealand.

The younger age groups found movies, American comedies, and reality programmes more enjoyable than did the older age groups. In contrast, older respondents indicated greater interest in news and current affairs programmes, investigative or researched documentaries about New Zealand, consumer affairs programmes, and British dramas.

### *Reasons for television viewing*

Respondents were asked about the reasons for their enjoyment of watching television. They were presented with a list of possible reasons and asked to indicate the extent to which the reason applied to them personally using a scale. The reasons, scale and results are illustrated in Table 5.

**Table 5: Reasons for watching television**

	<b>Applies a lot %</b>	<b>Applies quite a lot %</b>	<b>Applies a little %</b>	<b>Does not apply at all %</b>	<b>Don't know %</b>
Keeps you in touch with what's going on in NZ and the rest of the world	49.9	33.8	13.1	2.9	*
Lets you follow important events	42.9	35.0	17.5	4.0	0.6
Entertains you	28.4	37.4	29.3	4.8	*
Lets you follow important sporting events and issues	34.5	28.4	20.8	16.0	*
Tells you about famous people who you are interested in or admire	14.4	23.8	41.3	20.2	*
Shows what people in authority are really like	13.8	20.8	42.8	21.5	1.1
Shows you how ordinary people live	9.9	19.6	40.4	29.8	*
Keeps you company	14.4	18.0	34.8	32.7	*
Plays the music you like	8.4	13.6	31.5	45.9	*

\* Percentage is between 0.0% and 0.5%  
Base: All respondents (n=1195)

Respondents indicated that they were most likely to enjoy watching television because it kept them in touch with happenings in New Zealand and the rest of the world (84% agreed that this reason applied 'a lot' or 'quite a lot'), and because it allowed them to follow important events (75% agreed that this reason applied 'a lot' or 'quite a lot'). Television's entertainment value was also a key driver of viewing enjoyment (66% agreed this applied 'a lot' or 'quite a lot').

### *Radio listening*

Respondents were asked on average how many hours of radio they listened to *per day* over the last seven days. Results are summarised in Table 6.

**Table 6: Radio listening (on an average day)**

	%
Light (less than 1 hour)	<b>29.4</b>
Medium (1-2.5 hours)	<b>32.2</b>
Heavy (more than 2.5 hours)	<b>38.4</b>

Base: All respondents (n=1195)

Source: Question 4

Just under one-third (29%) of respondents listened to the radio for less than an hour per day; these were classified as light radio listeners. One-third (32%) were classified as medium radio listeners as they listened to between one and two and a half hours, with the remainder classified as heavy radio listeners (these people listened to more than two and a half hours per day). Younger respondents were somewhat heavier listeners than older respondents (47% of those aged 15 to 29 years were classified as heavy compared to 37% of those aged 50 and over). Māori were also more likely to be heavy radio listeners than New Zealand Europeans (46% compared to 37%).

### *Favourite radio formats*

Respondents were asked which radio stations they most enjoyed listening to. The stations are grouped into radio formats and presented in Table 7 below.

Respondents indicated they most enjoyed listening to 'Talk' stations (29%), public radio (18%), mainstream stations (16%) and current hit stations (16%).

### *Reasons for radio listening*

Respondents were asked about the reasons for their enjoyment of listening to the radio. They were presented with a list of possible reasons and asked to indicate the extent to which the reason applied to them personally using a scale. Results are presented in Table 8 below.

**Table 7: Radio stations most enjoyed**

Category	Stations included (not all listed)	%
Talk	Newstalk ZB, Radio Pacific, Radio Sport	28.7
Public	Concert FM / National Radio	18.2
Mainstream	Classic Hits, 89FM, Big River FM	16.0
Current Hit	ZM, The Edge, Life FM	15.8
Rock	The Rock, Radio Hauraki, Beach FM	12.5
Niche	Iwi Stations, Access, Mai FM, Rhema	11.5
Contemporary	More FM, The Fish, KCC FM, 92.2 XSBM	11.5
Soft	Lite FM, The Breeze, Easy FM, Radio Dunedin	8.5
Gold	Solid Gold FM, Gisborne City 96FM	6.0
New Rock	Channel Z	2.9
Alternative	UFM, Active 89FM, BFM	2.1
Other	Radio Kidnappers, Up FM, Cool Blue, Mulcha FM, Pear FM	19.7
None/Don't know		8.1

Base: All respondents (n=1195)

Source: Question 5a

**Table 8: Reasons for listening to the radio**

	Applies a lot %	Applies quite a lot %	Applies a little %	Does not apply at all %	Don't know %
Entertains you	33.1	35.3	18.9	12.2	0.5
Keeps you in touch with what's going on in NZ and rest of the world	35.2	28.6	21.3	14.3	0.6
Plays the music you like	38.9	27.2	17.0	16.1	0.8
Lets you follow important events	31.5	26.9	24.5	16.6	0.5
Keeps you company	27.1	26.8	25.1	20.4	0.5
Lets you follow important sporting events and issues	20.6	22.1	26.5	30.0	0.7
Tells you about famous people who you are interested in or admire	10.9	17.1	36.1	35.1	0.8
Shows what people in authority are really like	11.0	16.2	32.7	38.8	1.4
Shows you how ordinary people live	10.5	15.1	31.7	41.7	0.9

Base: All respondents (n=1195)

Source: Question 5b

As was the case with television viewing, key drivers of radio listening were the medium's entertainment value, and ability to keep people in touch with happenings in New Zealand and the rest of the world (68% and 64% respectively agreed with these reasons 'a lot' or 'quite a lot'). Music was a stronger driver of radio enjoyment than television enjoyment (68% agreed with this in respect to their radio listening).

### General attitudes to privacy

The research examined the community's views and perceptions on a range of privacy-related issues in broadcasting. First, for contextual understanding, respondents were asked to indicate their level of agreement with two broad statements about celebrity status and personal privacy. The results are detailed in Table 9.

**Table 9: Importance of celebrity status and personal privacy**

	Agree strongly %	Agree slightly %	Disagree slightly %	Disagree strongly %	Don't know %	Total agree %	Total disagree %
New Zealand celebrities cannot complain when their personal life is shown on TV as it is part of being a celebrity	27.5	30.9	20.2	19.4	2.0	58.4	39.6
You would always want your own personal life to remain totally private	74.9	16.5	5.5	2.5	0.6	91.4	8.0

Base: All respondents (n=1195)

Source: Q6

Opinion was divided over whether celebrities should accept that their personal lives would be shown on television due to their celebrity status (58% agreed with this and 40% disagreed). As focus group participants noted:

They make their living from the community, from the public.

When they're out in the public, then they are public property.

I don't care what Helen Clark does over the weekends. They've got to have some free time along the way.

As one might expect, there was greater consensus over the desire for respondents to keep their own personal life totally private (91% agreed with this notion and 8% disagreed).

A number of demographic variations were evident:

- older respondents were more likely to strongly agree that celebrities could not complain when their personal life was shown on TV (38% of those aged 60+ strongly agreed compared to 27% of those aged 30 to 59 years and 18% of those aged 15 to 29 years)

- younger respondents (15-29 years) were less likely than average to strongly agree that they would want their own personal life kept totally private (67% compared to 75%), and
- light television viewers were less likely than heavier television viewers to agree that New Zealand celebrities could not complain when their personal life was shown on TV.

*Perceptions of current balance between privacy and the public interest*

Respondents were asked to consider the current balance between the right of television and radio to broadcast information about individuals or pictures of people, and people's right to privacy. Table 10 provides a summary of the results.

**Table 10: Perceptions of current balance between privacy and the public interest**

<b>The balance is:</b>	<b>%</b>
Too strongly in favour of broadcaster	<b>36.6</b>
About right	<b>30.4</b>
Too strongly in favour of the right to privacy	<b>8.1</b>
Don't know enough to say	<b>24.8</b>

Base: All respondents (n=1195)

Source: Question 7

A small majority of respondents either felt the balance was 'about right' (30%) or they had insufficient knowledge to offer an opinion on this issue (25%).

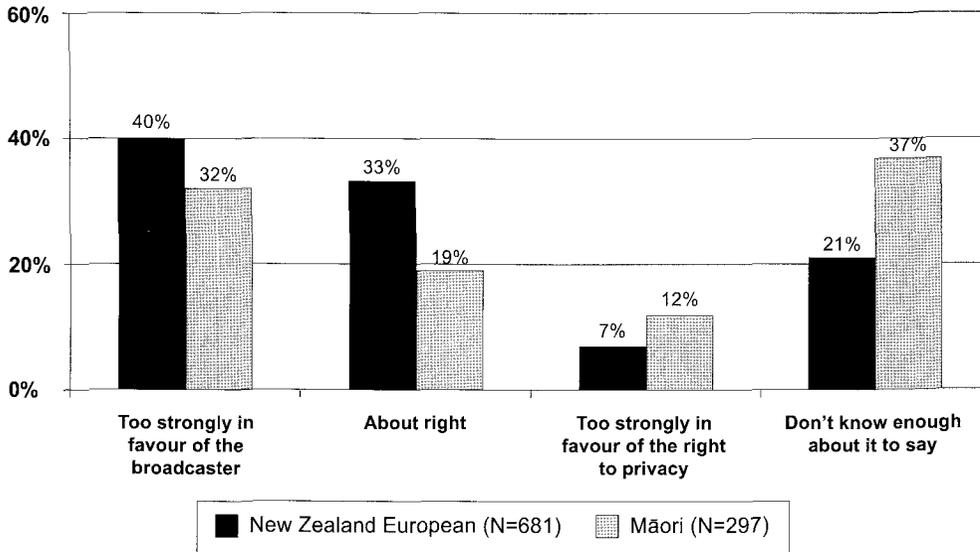
Those who felt the current balance was inappropriate were more likely to believe the current balance was too strongly in favour of broadcasters (37%) than in favour of the right to privacy (8%).

The focus group research revealed that there was a fear of 'the American situation' permeating New Zealand media and the possibility of a shift to trial by media.

You go to the media first and they blare it out and spread all the information everywhere. Well, it could prejudice a legal case so the media has a responsibility to justice to say 'yes, thanks for the information but we're not going to do anything with it'.

As Figure 1 indicates, ethnicity was a defining demographic variable. Māori respondents were less likely to approve of the status quo; only 19% of Māori respondents felt the current balance was 'about right'. However, this lower level of support was largely due to a notably higher proportion of Māori not feeling that they knew enough about the subject to form an opinion (37% compared to 21%). Māori were also somewhat more likely to say that the current balance was too strongly in favour of the right to privacy (12% compared to 7%).

**Figure 1: Perceptions of the current balance between privacy and the public interest – ethnicity**



Source: Question 7

Other demographic variations were as follows:

- older respondents (70 years and over) were more likely than average to believe the current balance was too strongly in favour of the broadcasters (46% compared to 37%)
- younger respondents (15 to 29 year olds) were more likely than average to feel they had insufficient knowledge to give an opinion (39% compared to 25%)
- higher socio-economic groups (1 to 3) were more likely to feel the balance was too strongly in favour of the broadcasters (44% compared to 37% on average) whereas lower socio-economic groups (5 to 6) were more likely to feel they had insufficient knowledge to give an opinion (34% compared to 25% on average), and
- light radio listeners were more likely to feel the current balance was too strongly in favour of the broadcasters (40% compared to 33% of heavy radio listeners).

#### *Recall of perceived privacy breaches*

Without prompting, respondents were asked to think of specific examples where a television broadcaster or radio station had breached the privacy of a New Zealander.

A substantial majority of respondents (85%) were unable to think of specific examples of breaches of privacy. Among those who did recall examples of privacy breaches, a wide range of examples were cited. The most commonly mentioned examples involved media coverage

of Donna Awatere Huata, Mike Hosking’s marriage separation and photographs of his children, the release of Constable Abbott’s name, and Paul Holmes’ private life.

*Perceived protection by New Zealand laws*

In the context of the balance between the public’s right to know information, and people’s right to privacy, respondents were asked whether they believed they were sufficiently protected by New Zealand laws from the broadcasting of personal information, or the broadcasting of actual footage, of them.

**Table 11: Perceived protection by New Zealand laws**

<b>As an individual are you sufficiently protected by New Zealand laws from the broadcasting of personal information or the broadcasting of actual footage of you?</b>	<b>%</b>
Yes – sufficiently protected	<b>39.3</b>
No – not sufficiently protected	<b>25.2</b>
Don’t know enough to say	<b>35.5</b>

Base: All respondents (n=1195)

Source: Question 9

Three sets of opinion emerged. Respondents were most likely to feel they were sufficiently protected (39%) or had insufficient knowledge to make a judgement on this matter (36%). One quarter (25%) felt the current law provided insufficient protection.

Sub-group analysis indicated that Māori respondents were significantly less likely to believe that they were sufficiently protected by the current laws than those of New Zealand European descent (31% compared to 39% respectively). Correspondingly, 36% of Māori believed that they were not sufficiently protected compared to 24% of New Zealand Europeans. This is illustrated in Figure 2.

Other analysis shows that women were more likely than men to feel they had insufficient knowledge to give an opinion (40% compared to 30%).

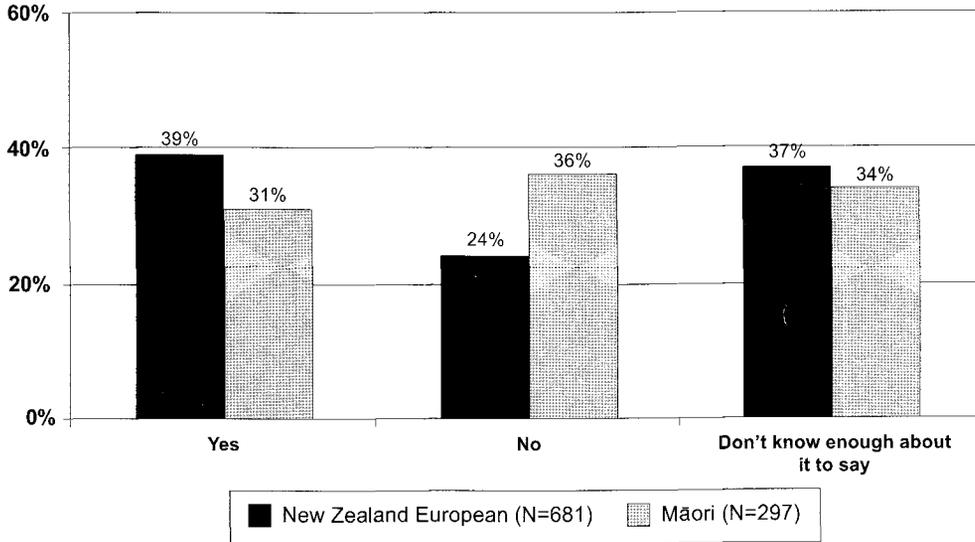
*Methods used to obtain information*

To test the public’s level of acceptability of the *process* by which material was obtained, respondents were asked to rate seven different methods of obtaining information for a given scenario. The first scenario was that of a New Zealand psychologist, suspected of sexually harassing patients, who had refused all approaches from the media.

A seven-point scale was used from 1 to 7, where 1 was completely unacceptable and 7 completely acceptable. For ease of interpretation, the rating scale was collapsed as follows: ‘acceptable’ (rating of 6 or 7), ‘middle ground’ (rating of 3, 4 or 5), and ‘not acceptable’ (rating of 1 or 2).

The results are summarised in Table 12.<sup>2</sup>

**Figure 2: Perceived protection by New Zealand laws – ethnicity**



Source: Question 9

**Table 12: Methods used by TV or radio broadcaster to obtain information**

Scenario: “A New Zealand psychologist is suspected of sexually harassing patients and has refused all approaches from the media”

Situation	Acceptable (6-7) %	Middle Ground (3-5) %	Not acceptable (1-2) %	Depends %	Don't know %	Mean Score
1. Patients describing the alleged behaviour of the psychologist in an interview with a journalist	34.9	32.4	28.7	3.0	1.0	<b>4.18</b>
2. Audio tape of psychologist seeing a patient using a hidden microphone carried by the patient	24.7	29.6	42.3	2.2	1.1	<b>3.47</b>
3. Footage of the psychologist seeing a patient using a hidden camera carried by the patient	23.7	27.2	45.9	2.0	1.2	<b>3.31</b>
4. An attempted interview with psychologist as he walks down the street, where the journalist follows the psychologist down the street after refusing to be interviewed	13.3	27.2	58.1	0.9	0.5	<b>2.73</b>
5. Attempted interviews with psychologist in their own home where the journalist puts a foot in the front door after psychologist refuses to answer questions and asks them to leave	10.3	16.0	72.0	1.1	0.7	<b>2.18</b>
6. Footage of the family of the psychologist	3.3	9.7	85.5	0.7	0.8	<b>1.53</b>

Base: All respondents (n=1195)

Source: Question 10a

Generally, those interviewed were most accepting of the broadcaster seeking information directly from those affected by the alleged behaviour. However, respondents were evenly divided on this method, with 35% indicating that this method was acceptable, 32% taking the 'middle ground' (a rating of 3 to 5 out of 7) and a slightly smaller proportion finding it unacceptable (29%).

Use of hidden recording devices was perceived to be less acceptable; 42% and 46% respectively felt use of a hidden microphone for audio-taping and use of a hidden camera were unacceptable. Small majorities of respondents, however, took the 'middle ground' or found the use of hidden recording devices acceptable. There was very little difference in levels of acceptability between audiotapes and cameras.

Attempted interviews with an alleged perpetrator who refused to consent to an interview were generally considered to be unacceptable. However, the location where these attempts took place had a significant bearing on this method's acceptability. Fifty-eight percent found this approach unacceptable in a public space (defined as 'the street' for the purpose of this scenario) compared to 72% if the attempt was made on private property (described as 'putting a foot in the front door').

Recording footage of the family of an alleged perpetrator was considered most unacceptable. A substantial majority said this was unacceptable (86%) with just 3% viewing it as acceptable. As a focus group participant said:

Children are taboo. You just don't go there under any circumstances.

Analysis by ethnicity indicated that Māori respondents were somewhat more accepting than New Zealand Europeans of each of the methods of obtaining information. Figure 3 shows the distribution of the mean scores of the six hypothetical situations.

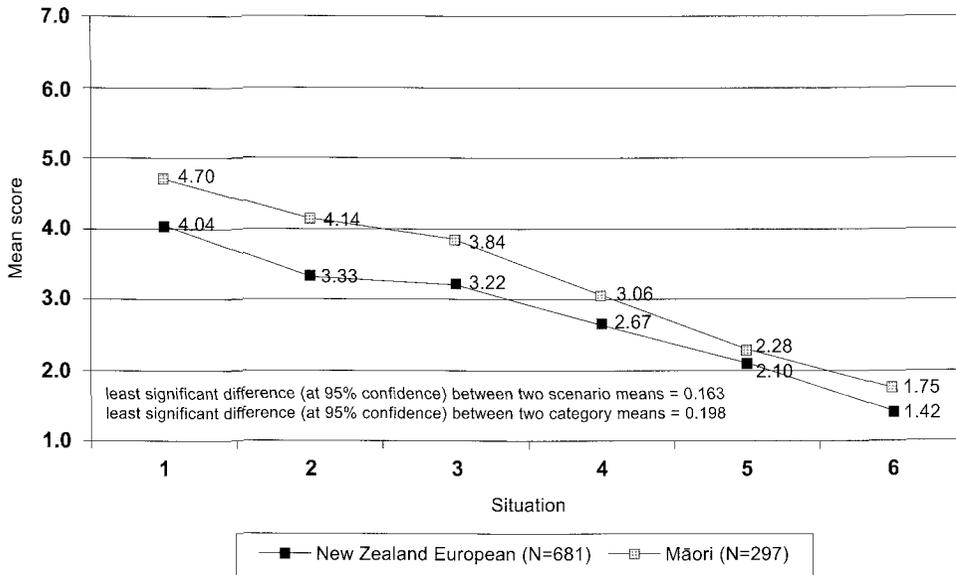
Analysis by other variables indicated that:

- younger respondents generally found the methods more acceptable than older respondents
- there were no significant differences by gender
- heavier television viewers were more accepting of three methods (methods 2, 3, and 6)
- heavier radio listeners were more accepting of three methods (methods 3, 5 and 6), and
- the lowest socio-economic group (group 6) was more accepting of methods 2 and 6.

#### *Status of the individual*

To understand the effect that the status of the individual had on the public's opinions on rights to privacy, respondents were asked to rate the level of acceptability of five situations. Each situation involved the same scenario of a bitter marriage separation, but involved different types of individuals. The seven-point acceptability scale was again used. The results are shown in Table 13 at a total sample level.

**Figure 3: Methods used by TV or radio broadcaster to obtain information – analysis by ethnicity**



Source: Question 10a

**Table 13: Status of the individual**

Scenario: The bitter separation of a married couple

Situation	Acceptable (6–7) %	Middle Ground (3–5) %	Not acceptable (1–2) %	Depends %	Don't know %	Mean Score
1. One of the people involved is a New Zealand politician	14.3	30.3	52.5	2.2	0.6	<b>2.90</b>
2. The people involved are both well-known celebrities	12.7	31.1	53.3	2.2	0.8	<b>2.82</b>
3. Both of the people involved are well-known celebrities and are fighting for custody of their children	8.0	20.9	68.7	1.8	0.6	<b>2.21</b>
4. One of the people involved is a New Zealand politician and the couple is fighting for custody of their children	7.3	20.3	70.0	1.5	0.9	<b>2.18</b>
5. Both of the people involved are ordinary New Zealanders	4.9	17.7	73.9	2.8	0.6	<b>1.95</b>

Base: All respondents (n=1195)

Source: Question 10b

Overall, few respondents found the broadcast of an item about the bitter separation of a married couple acceptable (between 5% and 14% found this acceptable depending on the status of the individual).

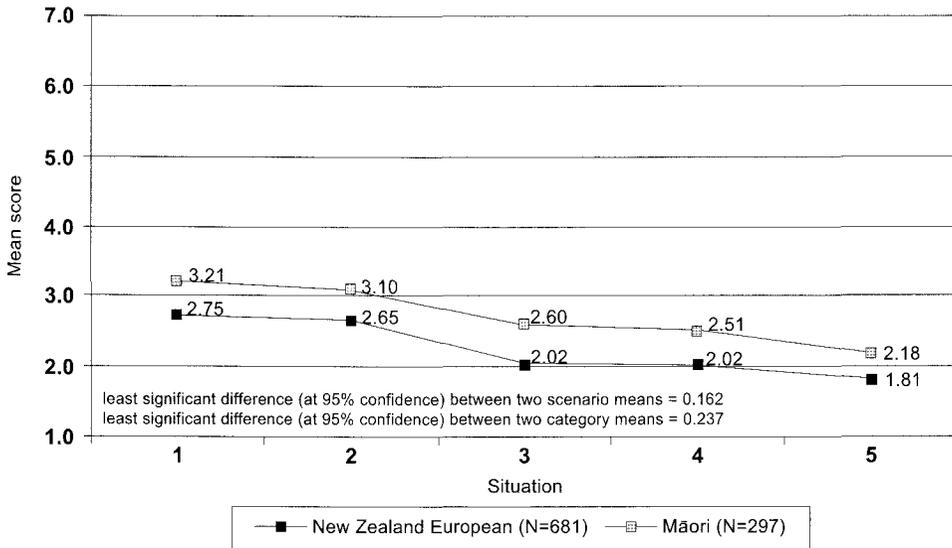
There was, however, notably more concern for the protection of private individuals than public figures. Seventy-four percent believed coverage of a bitter marriage separation would be unacceptable if both people were ordinary New Zealanders compared to just 53% if a politician was involved or if both were well-known celebrities. There was very little difference in opinion when well-known celebrities were involved versus politicians. This sentiment was also apparent in the qualitative research which preceded the survey:

When you stand for office you know you're going to come under a certain amount of scrutiny. It comes with the territory.

Likewise, the people interviewed were keener to protect people's privacy when children were involved. Sixty-nine percent viewed the broadcast of a bitter marriage separation of two well-known celebrities who were fighting for custody of their children as unacceptable, compared to 53% when the separation involved well-known celebrities but where no mention of children was made. A similar pattern was evident in regard to a separation where one of the parties was a politician; if the couple were fighting for custody of their children 70% viewed the broadcast as unacceptable, whereas 53% viewed it as unacceptable when children were not mentioned.

Analysis by ethnicity indicated that Māori respondents were significantly more accepting than New Zealand Europeans of each of the situations. Figure 4 shows the distribution of the mean scores of the five hypothetical situations.

Figure 4: Status of the individual – analysis by ethnicity



Source: Question 10b

Analysis by other variables indicated that:

- men were more accepting of each of the hypothetical situations than women
- younger respondents were more accepting of each of the hypothetical situations than older respondents
- heavier television viewers were more accepting of the broadcast than lighter television viewers if the situation involved two well-known celebrities
- heavier radio listeners were more accepting than lighter radio listeners of the two scenarios involving children, and
- the lowest socio-economic group (group 6) was more accepting of the two scenarios involving children.

*Passage of time – the point at which public facts become private again*

To understand the public's opinion on when a public fact becomes private again, respondents were asked to rate the acceptability of the broadcast of an item given various time lapses. In each case, however, the scenario consisted of a broadcast revealing the prison record of the head of a New Zealand charity. Respondents were asked to assume that the record had not previously been disclosed. The seven-point acceptability scale was used.

**Table 14: Passage of time – the point at which public facts become private again**

Scenario: A New Zealander is appointed to run a charity and the item reveals that he/she has served a three month prison term *that has not been disclosed*

The undisclosed term was...	Acceptable (6–7) %	Middle Ground (3–5) %	Not acceptable (1–2) %	Depends %	Don't know %	Mean Score
Two years ago	32.8	30.2	27.4	8.7	0.9	<b>4.18</b>
Five years ago	24.8	36.4	29.6	8.2	1.1	<b>3.85</b>
Seven years ago	20.9	34.1	36.0	8.3	0.8	<b>3.51</b>
Ten years ago	20.5	25.7	45.8	7.1	0.9	<b>3.23</b>
Thirty years ago	19.5	16.9	56.1	6.6	0.9	<b>2.83</b>

Base: All respondents (n=1195)

Source: Question 10c

Opinion on the acceptability of broadcasting the item was divided, particularly if the prison term was recent. For example, one-third (33%) believed such a broadcast would be acceptable

if the prison term was two years ago, 30% took the ‘middle ground’ and a slightly smaller proportion believed it would be unacceptable (27%).

The lapse of time between the fact in question and the broadcast clearly affected the degree to which people felt the broadcast was acceptable. However, a time period of at least 30 years was required for a majority of respondents to find the broadcast of the fact to be unacceptable. And even then, only a small majority found it to be unacceptable (56%).

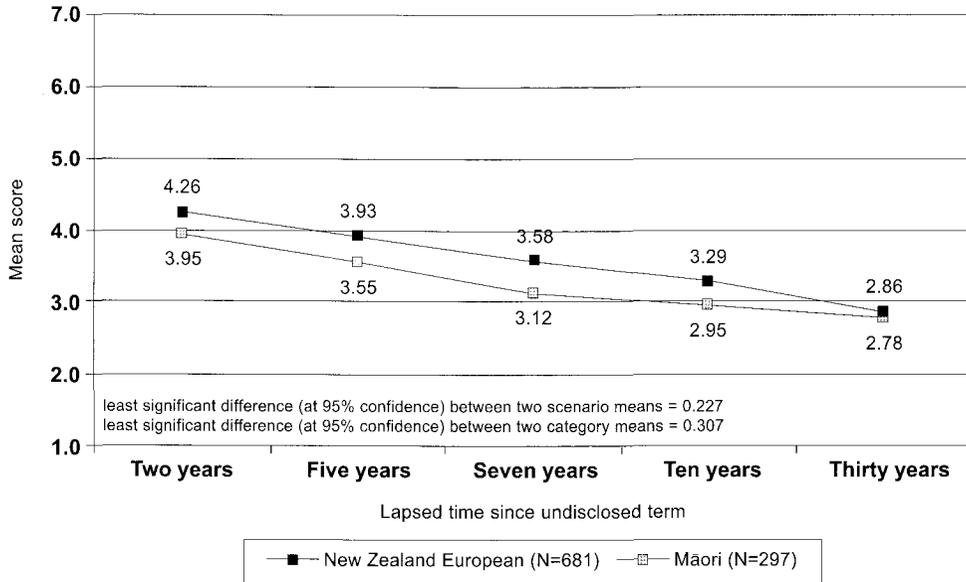
The qualitative research indicated that both the severity of the issue and the intent behind the issue appeared to impact on people’s evaluation of time-lapse appropriateness.

If the conviction was for fraud or probably gambling ... it would be more serious.

You have to make a distinction between the silly act of a youth and the intentional act of an adult.

In contrast to the previous analyses by ethnicity, Māori respondents were significantly *less* accepting of the broadcast of this type of information for each of the time categories with the exception of 30 years. The mean scores are presented in Figure 5.

**Figure 5: Passage of time – the point at which public facts become private again – analysis by ethnicity**



Source: Question 10c

Lower socio-economic groups were generally less accepting of the disclosure of this type of information across the time lapses.

Viewers of reality television programmes were also generally less accepting of the disclosure of this information across each of the time lapses.

### *Public versus private place*

To gauge the effect that the *place* in which information was obtained had on the public's acceptability of broadcasting information, respondents were asked to rate a number of situations using the seven-point acceptability scale. A common scenario was used of a New Zealander being investigated for fraud within a large corporation and having refused all other approaches from the media. The results are summarised below.

**Table 15: Public versus private place**

Scenario: A New Zealander who is being investigated for fraud within a large corporation, and has refused all other approaches from the media

Approaching the person...	Acceptable (6-7) %	Middle Ground (3-5) %	Not acceptable (1-2) %	Depends %	Don't know %	Mean Score
1. For an interview while they are in their own home/on own property	26.1	26.8	44.5	2.1	*	<b>3.48</b>
2. For an interview while they are walking down the street	20.5	31.1	46.3	1.8	*	<b>3.22</b>
3. For an interview while they are in a bar/restaurant	11.7	23.0	63.7	1.3	*	<b>2.47</b>
4. For an interview while they are in someone else's home or property	5.8	14.8	77.8	1.4	*	<b>1.87</b>
5. While they are picking their children up from school	3.7	7.8	87.6	0.5	*	<b>1.51</b>

\* Percentage is between 0.0% and 0.5%  
Base: All respondents (n=1195)

Source: Question 10d

Obtaining this type of information was deemed to be most appropriate when the person was in the privacy of his/her own home or was in the openly public space of a street.

Now, that's even worse than approaching them on their own property, I feel, because you're not encroaching on the person you're chasing, you're encroaching on someone else's privacy and private property. In my opinion, that is totally unacceptable.

However, even in these situations the people interviewed leant towards finding this unacceptable rather than acceptable; 45% and 46% respectively viewed obtaining the information while the subject is in their own home or while walking down the street as unacceptable. In both cases, small majorities (53% and 52% respectively) viewed these scenarios as either acceptable or took the middle ground.

The public appears to be most concerned with situations that have the potential to identify and/or involve others not directly related to the investigation – 78% believed approaching the subject for an interview while they were on someone else’s property was unacceptable and 88% regarded approaching the subject while they were picking their children up from school as unacceptable. The latter scenario reinforces other findings from this survey that indicated people are particularly protective of children.

Māori views were generally in line with those of the rest of the community. The only significant difference was for the situation that involved approaching a person for an interview while they were walking down the street. Māori respondents were more likely than New Zealand European respondents to find this unacceptable (55% compared to 45% respectively).

Analysis by other sub-groups indicated that:

- respondents aged 70 years or over found each of the situations to be less acceptable than their younger counterparts with the exception of the first situation; older respondents found the idea of conducting an interview in the person’s own home or on their own property to be more acceptable than did younger respondents
- men found each of the situations to be more acceptable than did women, with the exception of the fourth situation (there was no significant difference between the genders on an interview being conducted in someone else’s home or property)
- light television viewers found each of the situations to be more acceptable than heavier television viewers (with the exception of the first situation pertaining to the interview being conducted in the subject’s own home)
- heavy radio listeners found the first situation (the interview being conducted in the subject’s own home) to be more acceptable than less avid radio listeners, and
- respondents from higher socio-economic groups found the situation involving an interview while the subject was walking down the street to be more acceptable than those from lower socio-economic groups.

#### *Public disclosure of private facts*

To provide an understanding of the types of facts that the public thought were acceptable/unacceptable to disclose, respondents were asked to rate a scenario whereby information about a person who was standing for local body election was broadcast. Seven different contexts were presented to respondents, each involving the disclosure of a different type of fact. The results are summarised in Table 16.

The public disclosure of the individual’s academic qualifications was deemed most acceptable; a small majority (55%) viewed this as acceptable.

Opinion on the acceptability of the disclosure of a previous criminal conviction or history of mental illness was less clear-cut. Less than half (45%) found the disclosure of a previous

**Table 16: Public disclosure of private facts**

Scenario: Specific pieces of information which might be revealed as part of an item on a NZ news, current affairs or other factual programme about a person *who is standing for election for the city or district council*.

For public disclosure...	Acceptable (6–7) %	Middle Ground (3–5) %	Not acceptable (1–2) %	Depends %	Don't know %	Mean Score
1. Their academic qualifications	55.4	22.0	19.4	2.0	1.1	<b>5.08</b>
2. Previous criminal conviction	45.4	28.6	16.7	8.7	0.6	<b>4.92</b>
3. History of mental illness	23.3	31.0	39.8	4.7	1.1	<b>3.52</b>
4. Their sexual orientation	15.3	17.8	64.4	1.6	0.9	<b>2.53</b>
5. Their financial history	14.1	27.6	54.5	3.1	0.7	<b>2.79</b>
6. Extra-marital affair	11.2	21.4	65.1	1.3	0.9	<b>2.42</b>
7. Their medical history	9.9	19.9	66.4	3.4	*	<b>2.30</b>

\* Percentage is between 0.0% and 0.5%  
Base: All respondents (n=1195)

Source: Question 11

criminal conviction acceptable, with 29% taking the middle ground and 17% finding it unacceptable.

Again, it should be noted from the qualitative findings that both the severity of the act and the time lapse of an act played a large part in the evaluation of this issue:

Some things we don't ever lose the privacy of. One of the things that will always remain public knowledge is child molesting.

Once again, people can make mistakes in their past. If it was fifteen years down the track and someone slipped then 'hey, that's your business'. But if there is a current extra-marital affair going on, I want to know.

While disclosure of the candidate's history of mental illness was generally viewed as less acceptable, there was no majority view, with 23% finding it acceptable, 49% unacceptable and 31% taking the middle ground.

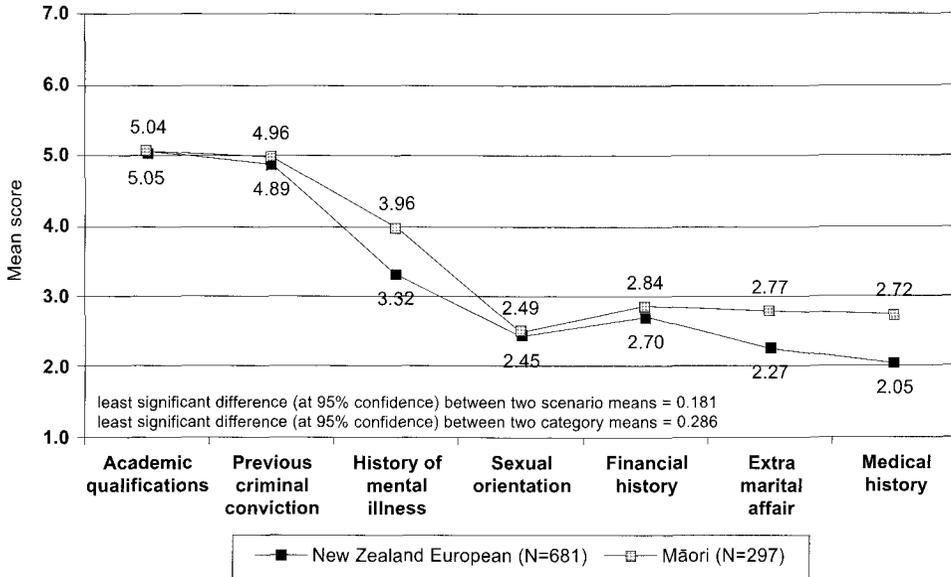
The majority of people interviewed regarded disclosure of the financial history, sexual orientation, existence of an extra-marital affair and medical history to be unacceptable (between 55% and 66% viewed the disclosure of these types of facts as unacceptable).

Although the majority of people regarded the disclosure of a candidate's sexual orientation as being unacceptable, opinion was more strongly polarised here than for other types of fact. Only 18% took the middle ground – the smallest proportion for any of the facts.

Analysis by ethnicity indicated that Māori respondents were significantly more likely to

find the disclosure of information about an individual's medical history, history of mental illness, and an extra-marital affair acceptable. This is illustrated in Figure 6 below.

**Figure 6: Public disclosure of private facts – analysis by ethnicity**



Source: Question 11

Sub-group analysis reveals a number of patterns:

- men found the disclosure of each type of fact to be more acceptable than did women
- respondents aged 70 years plus were less accepting of the disclosure of the candidate's academic qualifications, history of mental illness, financial history, and extra-marital affair than younger respondents
- young respondents (aged 15 to 29 years) were less accepting of the disclosure of the candidate's history of mental illness than their older counterparts
- respondents aged under 50 were more accepting of the disclosure of the candidate's medical history than respondents aged 50 years and over
- light television viewers were more accepting of the disclosure of the candidate's sexual orientation than heavy television viewers
- heavy radio listeners were more accepting of the disclosure of the candidate's financial history and medical history than light radio listeners, and

- lower socio-economic groups were less accepting of the disclosure of the candidate's previous criminal conviction and academic qualifications than higher socio-economic groups.

### **Informed consent**

The following section examines the general public's views on issues of informed consent.

#### *Desired levels of informed consent*

To gain an understanding of the public's desired levels of informed consent in different contexts, respondents were asked to rate six different scenarios. For each scenario, respondents were asked to indicate which of the following levels of permission they felt the television broadcaster should obtain before broadcasting:

*No permission required at all*

*Participating in an interview implies you have agreed for it to be shown on television*

*Verbal permission for it to be shown*

*Written permission for it to be shown*

Respondents were also given the option of saying that they did not know enough to give an opinion.

The desired level of informed consent required varied considerably depending on the context of the event.

A situation where a member of the public was filmed briefly in the background in a public place and subsequently shown on a real life documentary warranted the lowest level of permission. Two thirds (66%) believed this type of situation required no permission or that permission was implied. As a focus group participant commented:

I often think that if you're filming locally and you have someone on the street, and there are people coming in behind them who are not meant to be there – they can't just stop each person and say 'is it ok that you're going to be on film?'

If the individual was focused on for more than a few seconds, respondents were more likely to feel that permission was required (49% felt that verbal or written permission was required compared to 28% if the individuals were filmed briefly in the background).

For the other scenarios, opinion steered more strongly towards informed consent being required:

- 61% believed verbal or written permission was required if a house was clearly shown on television that was on the same street as a recent murder

**Table 17: Desired levels of informed consent**

	No permission at all %	Implied permission %	Verbal permission %	Written permission %	Don't know enough to say %
1. Members of the general public are filmed briefly in the background but not interviewed in a public place and shown on a real life documentary such as Motorway Patrol or Private Investigators	57.5	8.7	21.2	7.1	5.5
2. Members of the general public are focused on for more than a few seconds in a real life documentary such as Motorway Patrol or Private Investigators	33.0	10.9	33.7	15.2	7.2
3. A house is clearly shown on television that is on the same street as a recent murder	26.4	3.9	30.1	31.6	8.0
4. A witness to a car accident is filmed in a state of distress for less than a few seconds, but not interviewed	17.7	6.1	41.4	26.3	8.5
5. Members of the general public are interviewed in the street for a current affairs show to be screened at a later date	10.8	24.6	44.1	17.6	3.1
6. A house is clearly shown on television that has been the scene of a murder but is now owned by someone else	10.2	2.8	25.7	55.4	5.9

Base: All respondents (n=1195)

Source: Question 12a

- 68% believed verbal or written permission was required if a witness to a car accident was filmed in a state of distress for less than a few seconds, but not interviewed, and
- 62% believed verbal or written permission was required if members of the general public were interviewed in the street for a current affairs show to be screened at a later date.

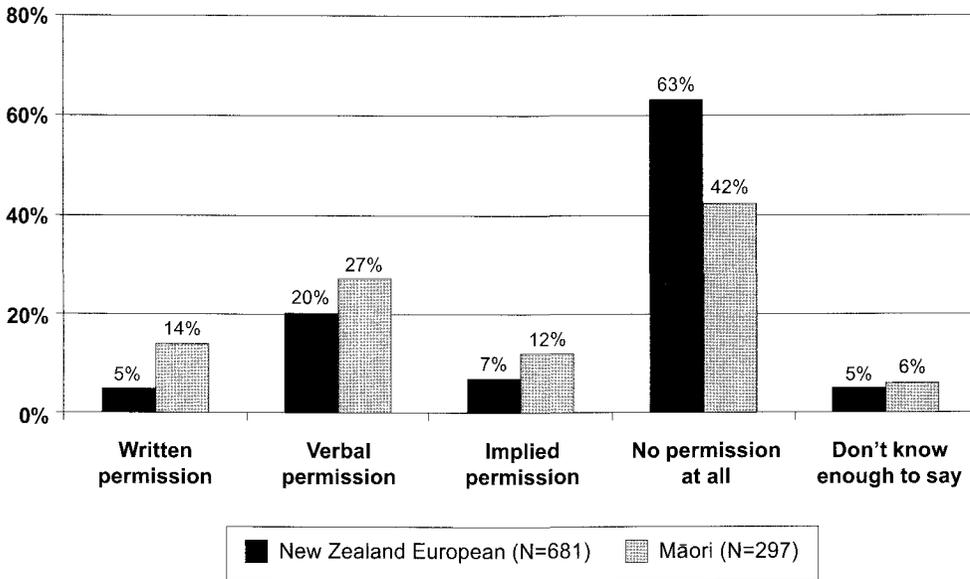
In relation to the above three scenarios, verbal permission was more commonly sought than written permission with the exception of the first scenario (where opinion was evenly divided, 30% wanted verbal permission and 32% wanted written permission).

Respondents were most cautious about the scenario involving a house that was clearly shown on television that had been the scene of a murder but was now owned by someone else. The large majority (81%) felt that this warranted either verbal or written permission, with the emphasis being on the latter (55%).

Ethnicity was a defining demographic variable for four of the six scenarios. This is illustrated in the following four charts.

### Figure 7: Scenario 1 – analysis by ethnicity

Members of the general public are filmed briefly in the background but not interviewed, in a public place and shown on a real life documentary such as *Motorway Patrol* or *Private Investigators*



Source: Question 12a

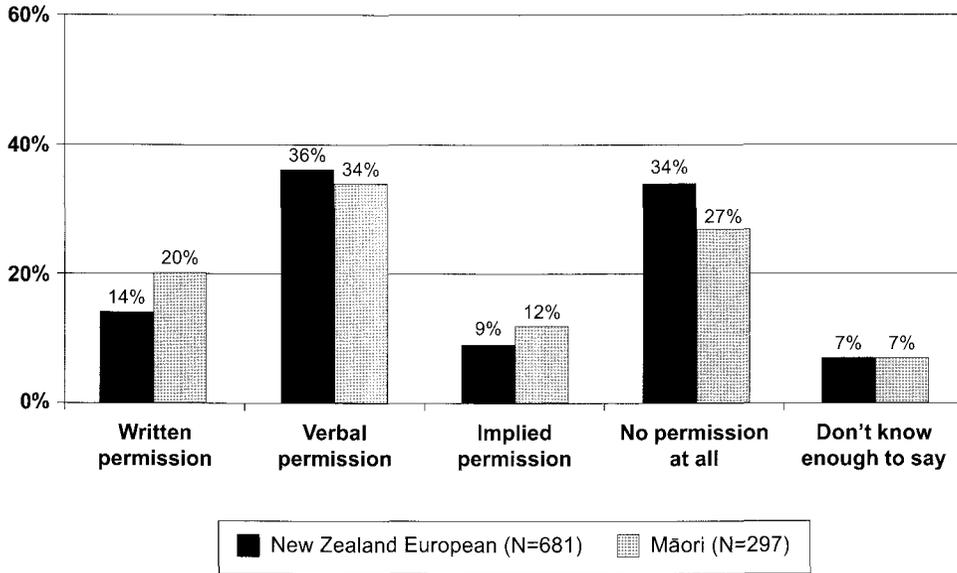
For the scenario involving filming members of the public in the background of a real-life documentary, Māori respondents were significantly more likely than New Zealand Europeans to desire written consent (14% compared to 5% respectively) and verbal consent (27% compared to 20%), and to believe that consent was already implied (12% compared to 7%). Consequently, fewer Māori respondents felt no permission was required at all (42% compared to 63% respectively).

For this scenario (Figure 8) in which members of the general public were focused on for more than a few seconds in a real-life documentary, Māori respondents were significantly more likely than New Zealand European respondents to believe written permission is required (20% compared to 14% respectively). And Māori respondents were less likely than New Zealand Europeans to believe that no permission at all was required (27% compared to 34% respectively).

Māori respondents were more likely than New Zealand European respondents to believe that written permission was required for the scenario involving members of the public being interviewed in the street for a current affairs programme (26% compared to 16% respectively).

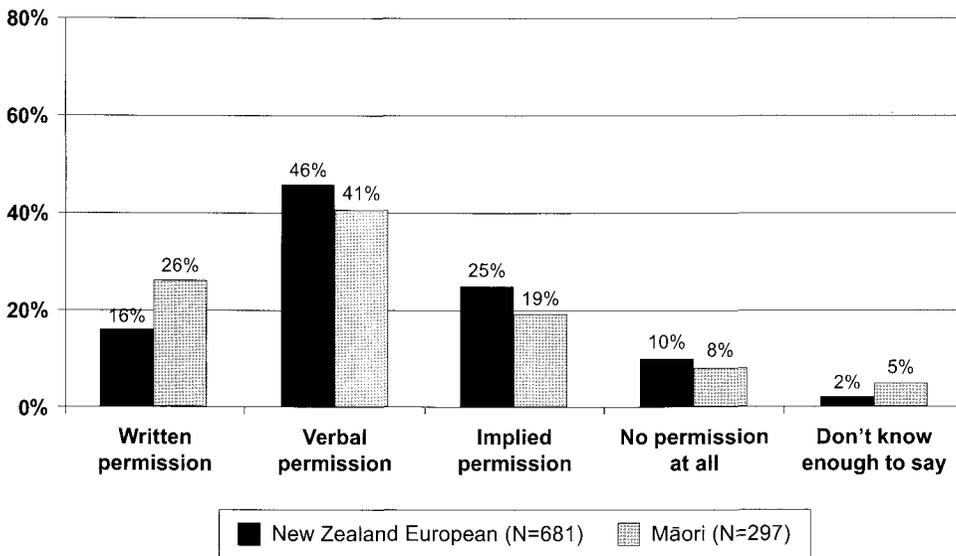
**Figure 8: Scenario 2 – analysis by ethnicity**

Members of the general public are focused on for more than a few seconds in a real-life documentary such as *Motorway Patrol* or *Private Investigators*



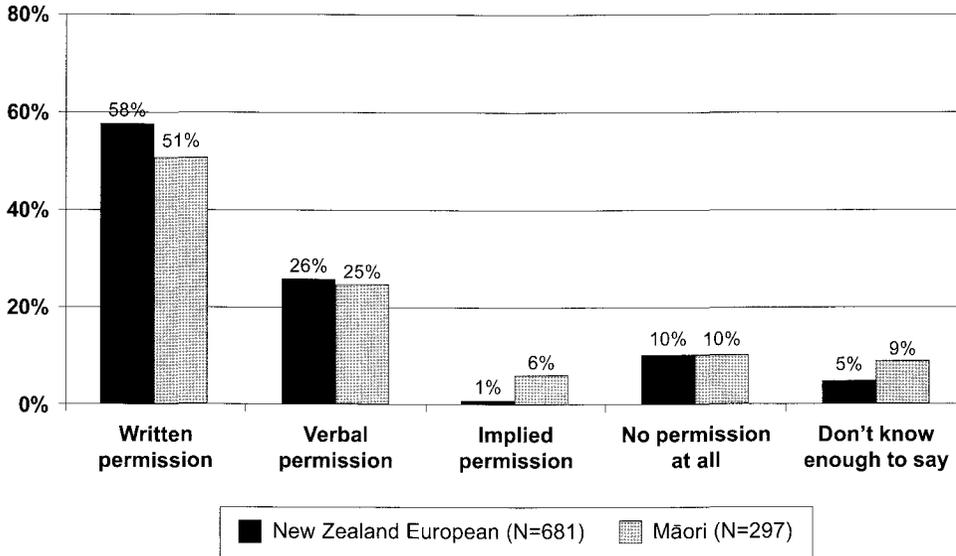
**Figure 9: Scenario 5 – analysis by ethnicity**

Members of the general public are interviewed in the street for a current affairs programme to be screened at a later date



**Figure 10: Scenario 6 – analysis by ethnicity**

A house is clearly shown on television that has been the scene of a murder but is now owned by someone else



Source: Question 12a

In contrast to the other scenarios, Māori respondents were less likely than New Zealand European respondents to believe written permission was required for the scenario involving the broadcast of a house that had been the scene of a murder (51% compared to 58% respectively).

Analysis by other demographic variables showed the following patterns:

- men were less likely than women to believe that the filming of a witness to a car accident in a state of distress warranted any type of consent (22% of men felt no permission was required at all compared to 14% of women)
- women were more likely than men to desire written permission for the filming of a house that had been the scene of a murder but was now owned by someone else (60% compared to 50% respectively)
- younger respondents (15 to 29 years) were less likely to believe that focusing on members of the general public for more than a few seconds in a real-life documentary warranted written permission (11% compared to 15% among the total sample) and more likely to feel this required verbal permission (42% compared to 34% among the total sample)
- older respondents (70 years plus) placed greater emphasis on the need for verbal permission when members of the general public were interviewed in the street for a current affairs

programme to be screened at a later date (52% compared to 44% among the total sample), and correspondingly less emphasis on written permission (13% compared to 18% among the total sample), and permission being implied (15% compared to 25% among the total sample), and

- higher socio-economic respondents generally sought higher levels of permission than lower socio-economic respondents. In particular, they were more likely to feel that verbal permission should be obtained for the second scenario (where members of the general public were focused on for more than a few seconds in a real-life documentary), whereas lower socio-economic respondents were more likely to feel that there was implied permission in that situation. Higher socio-economic respondents were more inclined to feel written permission was required in the fourth scenario (where a witness to a car accident was filmed in a state of distress). And, lower socio-economic respondents were more likely to feel that no consent was required in the fifth scenario (where individuals were interviewed in the street for an upcoming current affairs programme).

#### *Broadcaster obligations following verbal consent*

Respondents were asked to consider what conditions, if any, must be met by the broadcaster following the respondent giving permission for an interview to be shown on television. This question was asked twice – once assuming verbal permission had been given and then assuming written permission had been given. Respondents were prompted with possible conditions. The respondent could choose more than one condition. These, along with a summary of the results, are provided in the table below.

**Table 18: Verbal and written permission**

Conditions that <i>must</i> be met by the broadcaster	Verbal %	Written %
Inform the person of how it will be used and the story it is part of	75.3	71.6
Inform the person of the programme it will be shown on, including the day and time	63.9	65.0
Inform the person of possible consequences of the interview being broadcast	63.1	61.3
Show the person an advance screening of the programme	57.8	57.8
None of the above	2.4	3.8

Base: All respondents (n=1195)

Source: Question 12b and 12c

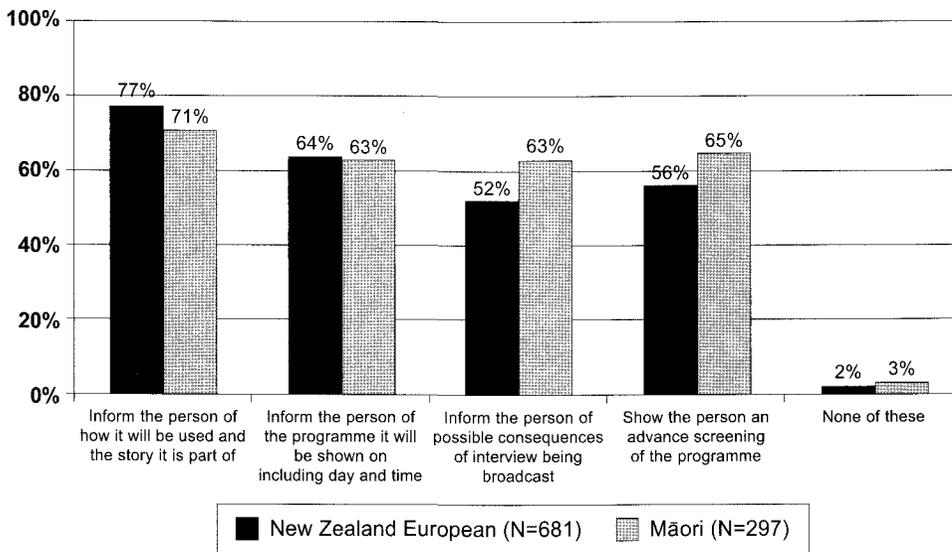
Respondents most commonly believed that the person should be informed of how the interview would be used and the story it would be part of (75% when verbal permission had been given and 72% when written permission had been given).

Small majorities also believed that the person should be informed of the programme name and timing, as well as the possible consequences of being interviewed, and be given an advance screening of the programme (between 58% and 65% believed these things should be done).

There was very little difference in perceptions of broadcasting obligations depending on whether the permission given was verbal or written.

As Figures 11 and 12 illustrate, there were a number of variations in perceptions by ethnicity. Māori respondents were significantly more likely than New Zealand Europeans to believe that the broadcaster must show the person an advance screening of the programme after *verbal* permission had already been given (65% compared to 56% respectively). Similarly, Māori respondents were more likely than New Zealand European respondents to feel this action was required after *written* permission had already been given (68% compared to 57% respectively).

**Figure 11: Verbal permission – analysis by ethnicity**

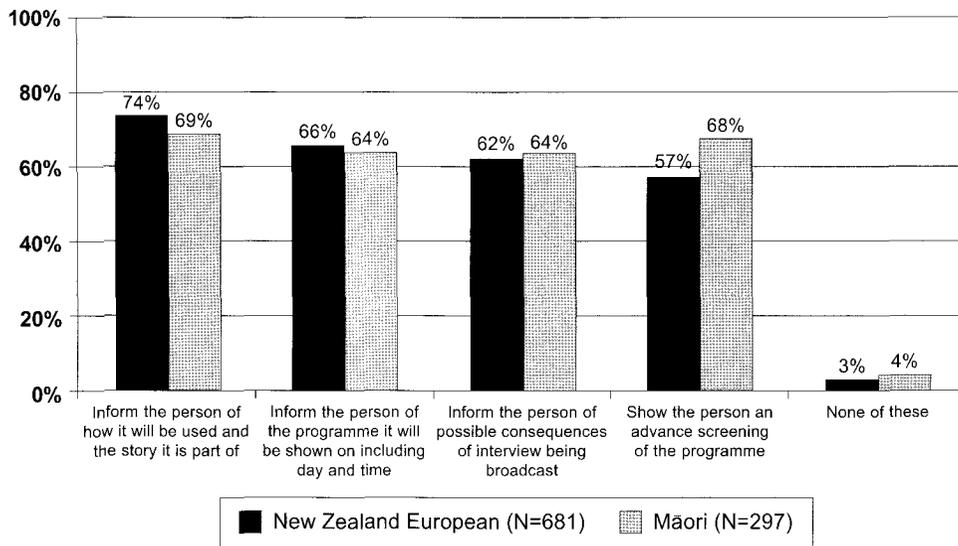


Source: Question 12b

Other demographic variations were as follows:

- women were more likely than men to believe that each of the conditions should be met
- older respondents (aged 70 years and over) were less likely than their younger counterparts to feel that the first three conditions should be met following written consent, and

**Figure 12: Written permission – analysis by ethnicity**



Sur

- higher socio-economic groups were more likely than lower socio-economic groups to feel the person should be informed of how the interview would be used following verbal consent, and that the person should be informed of the programme it would be shown on following written consent.

*Perceived right to stop first broadcast*

Respondents were asked to consider whether permission could be retracted in the context of a woman taking part in a factual programme about abortion. The results are summarised below.

**Table 19: Retracting permission once given**

Scenario: A woman has taken part in a factual programme about abortion. Should it be possible for her to stop the TV broadcaster from broadcasting their images or an interview after she has given verbal or written permission?

	%
Yes	49.1
No	17.4
Depends on the situation/footage/information	27.5
Don't know enough to say	5.9

Base: All respondents (n=1195)

Source: Question 13a

Opinion was split. One half (49%) believed that the woman had the right to stop the broadcast. The other half either felt that she did not have the right (17%) or that this depended on other factors (33%).

Māori respondents were more likely to believe that the woman had the right to stop the broadcast than New Zealand European respondents (55% compared to 47% respectively).

#### *Perceived right to stop re-broadcast*

Respondents were then asked to consider whether the broadcaster would have to regain permission from the woman if, two months later, they wished to re-broadcast the interview (or pictures of the interviews) in a different programme covering the same issue.

#### **Table 20: Regaining of permission for multiple broadcasting**

Scenario: A woman has taken part in a factual programme about abortion. Two months later the television broadcaster wants to show the same interview/pictures in a different programme covering the same issue. Should the television broadcaster have to regain permission from the person before re-broadcasting?

	%
Yes	<b>80.6</b>
No	<b>10.5</b>
Depends on the situation/footage/information	<b>7.5</b>
Don't know enough to say	<b>1.4</b>

Base: All respondents (n=1195)

Source: Question 13b

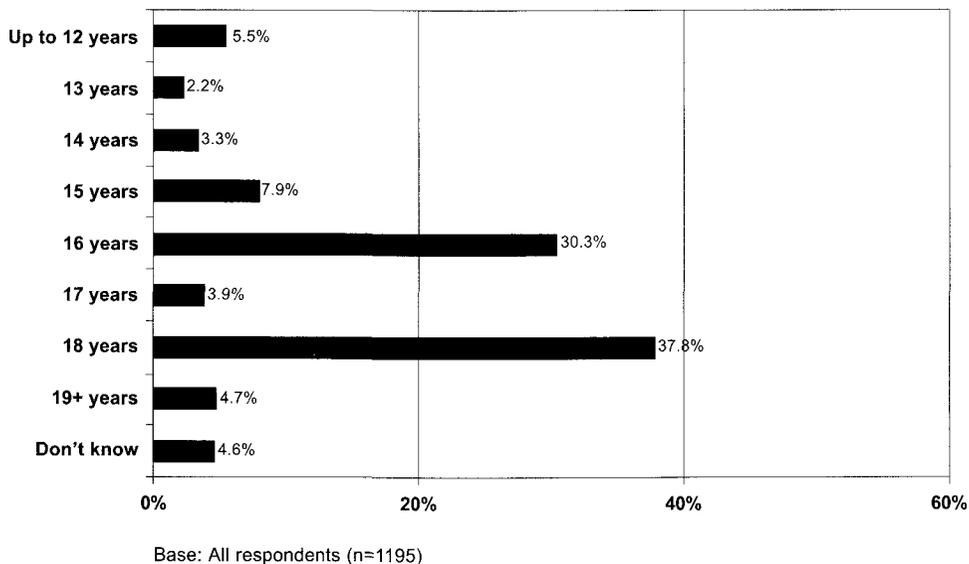
The large majority (81%) of people believed that the television broadcaster should regain the permission of the interviewee if they wished to re-broadcast pictures of the interview at a later date as part of a different programme. However, in the focus group discussion this was further qualified:

If they were simply re-showing the same programme then it's not a problem, but if there's a change of the editing of what they presented the first time ... then there's enough change going on there to get the consent again.

Māori respondents were more likely to believe that the television broadcaster should regain the permission of the interviewee than New Zealand European respondents (86% compared to 79% respectively).

#### *Age of children to give own consent*

Respondents were asked at what age they believed children should be able to give their own permission for interviews or footage of them to be broadcast, rather than broadcasters asking for parental permission. Results are presented in Figure 13.

**Figure 13: Age for children to give their own permission**

Source: Question 14a

Respondents most commonly believed that 18 years (38%) or 16 years (30%) were the ages at which children should be able to give their own consent to footage of them being broadcast.

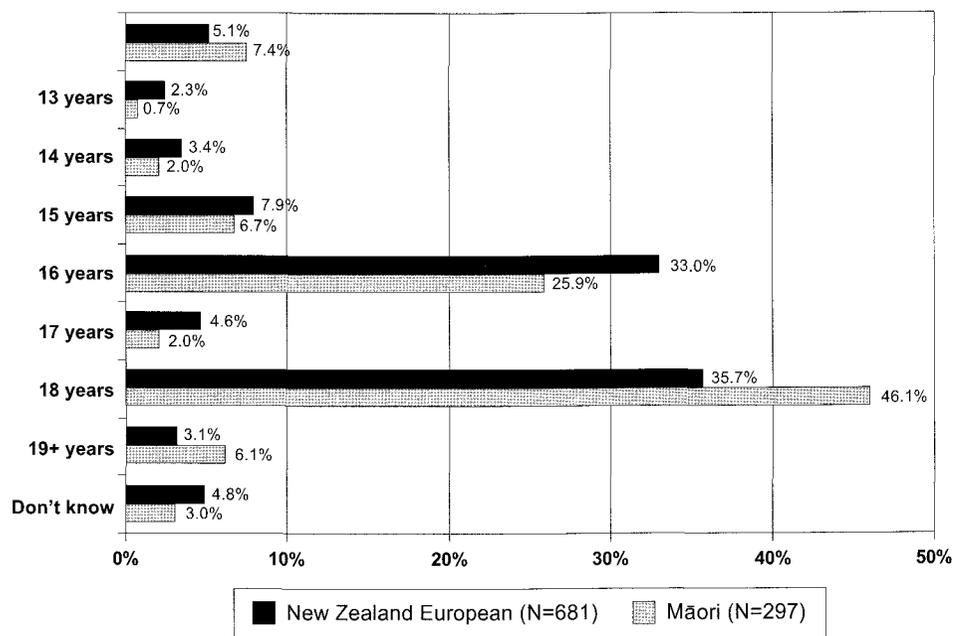
Analysis by ethnicity indicated some significant variations. Māori respondents generally felt an older age was appropriate; 52% suggested 18 years of age or older compared to 39% of New Zealand Europeans.

Parents or caregivers of children suggested an older age than those who did not have responsibility for children (45% compared to 34% respectively felt 18 years of age was appropriate).

#### *Parental permission versus broadcaster responsibility*

Respondents were asked whether parental permission was sufficient to allow broadcasters to broadcast any footage of children or whether in some instances broadcasters should decide not to show the footage regardless of parental permission. The results are presented in Table 21.

The majority of respondents (72%) felt that broadcasters should exercise their own discretion about whether to show footage to protect the welfare of the child despite parental permission already having been obtained. The qualitative research findings indicated that this was due to a fear that some parents provided consent to achieve their own goals which were not necessarily in the interests of the child, and this risk should not be taken.

**Figure 14: Age for children to give their own permission – analysis by ethnicity**

Source: Question 14a

**Table 21: Parental permission**

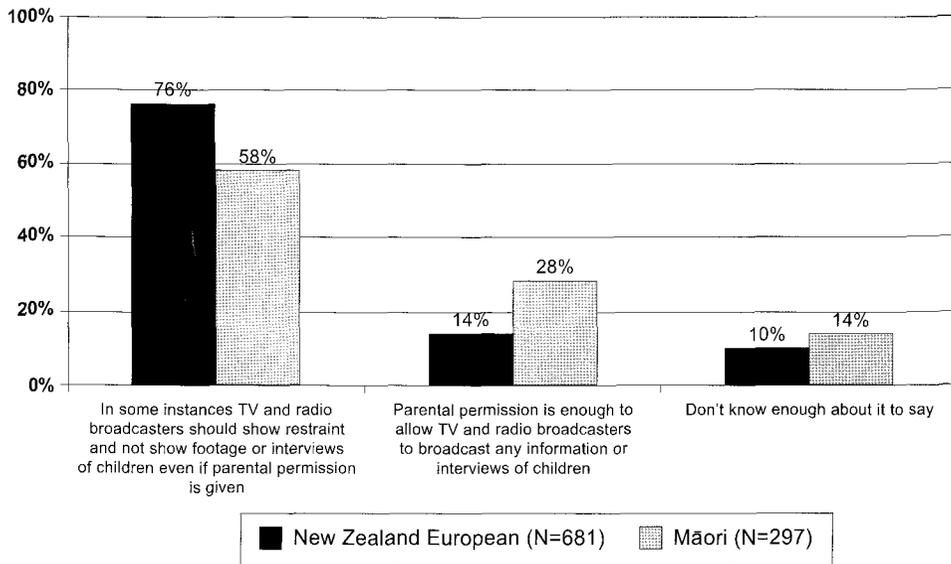
Statement most strongly agree with:	%
In some instances, television and radio broadcasters should show restraint and not show footage/interviews of children even if parental permission has been given	71.8
Parental permission is enough to allow television and radio broadcasters to broadcast any information or interviews of children	17.8
Don't know enough about it to say	10.4

Base: All respondents (n=1195)

Source: Question 14b

As Figure 15 illustrates, Māori respondents were more likely than New Zealand European respondents to feel that parental permission was sufficient (28% compared to 14% respectively).

Young respondents (15 to 29 years) were also more likely to feel that parental permission was sufficient (25% compared to 18% on average).

**Figure 15: Parental permission – analysis by ethnicity**

Source: Question 14b

## Conclusion

The final section of this chapter draws together a number of conclusions based on the quantitative research findings.

### *Privacy issues*

The research findings indicated that, with a few exceptions, there was no broad consensus in opinion on privacy related issues. Research respondents were asked high-level questions about the current balance between privacy and the public's right to know, and the adequacy of the present law to protect individuals from the broadcasting of personal information.

No dominant view was expressed. A sizeable minority expressed concern over the current balance being too strongly in favour of broadcasters and, to a lesser extent, over the adequacy of the current law in protecting them from the broadcast of personal information. However, significant numbers of people were satisfied with the status quo on these matters. Further, one should not overlook the sizeable proportion who felt ill-informed on the issues raised in these high-level questions. This was consistent with the findings of the initial exploratory qualitative research which indicated that the subject was not one the public gave much thought to in their everyday lives. This was reinforced by the overwhelming majority in the survey who were unable to think of any specific examples of perceived breaches of privacy by broadcasters. Opinion on privacy issues then appeared to be highly dependent on contextual factors.

Few felt the balance was currently too heavily in favour of the individual's right to privacy. Respondents were markedly more guarded when it came to protecting their own personal

privacy as opposed to expressing a view on the rights of other individuals. The vast majority of respondents also said they would always want their own personal life to remain totally private.

While there were diverse opinions about the specific privacy principles, the majority of respondents did draw some clear boundaries. The nature of the information being broadcast was an important determinant of levels of comfort or concern. Respondents, however, also set clear boundaries on what was acceptable according to who was affected by the broadcast of the information, be they the principal subject of the broadcast or a third party of no direct interest to the story or item. In particular, instances that involved ordinary New Zealanders or the family of the subject, especially children, invoked higher thresholds of disapproval. This applied not only to the content of the information being broadcast, but to the method being used, for example, approaching someone for an interview while they were in someone else's home or property was generally regarded as being much less acceptable than seeking an interview with the subject in their own home.

### *Informed consent*

Public opinion varied on where the line was drawn between participation (no consent required) and contribution (consent required). For example, opinion was evenly divided on whether any type of permission should be sought when members of the general public were focused on for more than a few seconds in a real-life documentary. Respondents expressed reasonably high expectations of broadcasters' obligations following verbal or written consent.

### *Defining variables*

There were some marked differences between Māori views on issues of privacy and informed consent and those of New Zealand Europeans. Generally, Māori tended to hold a more permissive attitude towards privacy issues. With the exception of the disclosure of certain types of fact, Māori were generally more accepting than New Zealand Europeans of the broadcast of information regardless of method, status of the individual, or place in which the filming has occurred. In contrast, however, Māori were less comfortable with the notion that the current New Zealand laws provided them with sufficient protection from the broadcast of personal information. And also in contrast to their attitude towards privacy issues, Māori were more guarded in protecting the individual in relation to issues of informed consent.

Men were generally more accepting than women of many of the scenarios tested and held lower expectations of informed consent. Likewise, younger respondents tended to hold more accepting views than older respondents about privacy issues and the necessary steps required for informed consent. Socio-economic status was also a defining variable, although the pattern was less clear.

Finally, levels of media consumption had a role to play in forming people's attitudes towards privacy and informed consent. On the whole, more avid television viewers and radio listeners were more accepting of the privacy scenarios tested.

**Notes**

- <sup>1</sup> The calculation of this margin of error takes into account the disproportionately higher number of Māori respondents in the sample than in the population of interest.
- <sup>2</sup> The situations are ranked from highest to lowest according to the proportion of respondents that found the method illustrated in the situation to be acceptable. This order is different to the order presented to respondents in the interview.

# Conclusion

The conclusion of this monograph draws together some of the main insights gained from the research reported in the previous chapters. Following a summary of the main findings, the two policy questions underpinning this research are addressed. These are:

- should the Authority initiate the development of a privacy code of broadcasting practice to replace its privacy principles contained in the current Advisory Opinion, and
- should the Authority instigate or encourage procedures for obtaining informed consent?

## **Privacy decisions July 1998–December 2003**

In its first privacy publication (Stace, *op. cit.*) the Authority noted that it began considering privacy complaints in 1990 with a blank slate. By June 1998, following the introduction of the privacy principles in 1992 and additions to them in 1996 and 1999, several aspects had become relatively clear. These included:

- the facts of each specific complaint are critically important
- the meaning of a ‘public place’ will be determined taking the particular facts into account
- ‘the public interest’ is a legitimate defence and a distinction will be made between information genuinely in the public interest and information which merely feeds curiosity
- privacy complainants will generally have their name suppressed where there is justification for doing so.

Two issues were identified as needing further consideration. These were:

- the consent required for children, and
- the extent of identification disclosure.

In its decisions since 1998, the Authority has developed clear policy.

With respect to identification, the procedure currently applied by the Authority is first to determine whether the person whose privacy is alleged to have been breached is in fact an identifiable individual.

If the complainant is identifiable, and if consent is an issue, the Authority will determine whether the complainant consented to the broadcast.

Being identifiable generally means to people outside immediate family and friends who would reasonably be expected to know about the matter dealt with in the broadcast. If the person is not identifiable, a privacy complaint is unlikely to be upheld.

In the case of children, the Authority now requires confirmation that the broadcaster has taken the best interests of the child into account. This is regardless of parental consent.

In the case of adults, the Authority considers the circumstances in which a release form has been signed. Whether or not a form has been signed, it is accepted that consent can be implied by the complainant's actions.

Chapter one of this monograph also discussed the defence that the disclosure of information in a broadcast may be justified in the public interest. While the Authority continues to insist that the information disclosed must be *in* the public interest and not merely *of* public interest, it has in recent decisions reinforced that an individual's privacy right can be overridden by the public interest.

Assessing the particular facts of each complaint continues to be a critical step. It is therefore difficult to generalise about which factual situations might amount to a breach of privacy. One exception tends to be that a person shown participating in criminal behaviour is unlikely to have a privacy complaint upheld.

### **Stakeholder consultations**

Chapters two and three reported the findings of an extensive stakeholder consultation on privacy and consent involving the following communities:

- radio and television broadcasters
- independent programme makers
- academics and legal professionals
- Māori broadcasters, producers and community leaders, and
- community advocacy organisations.

Taking each stakeholder group in turn, the findings can be summarised as follows.

#### *Broadcasters*

Broadcasters mostly accepted the Authority's privacy principles and their application. The ability for privacy complaints to be made by people who themselves were not personally affected by the broadcast was questioned. Some fears for whether investigative journalism

practices were under threat were also expressed, as was the desire for clarity over whether it is the manner of disclosure of facts or the facts themselves which should be tested.

Overall, broadcasters thought that a separate code of broadcasting practice regarding privacy was not required since the privacy principles were already part of the existing codes of broadcasting practice.

Similarly, television broadcasters thought that consent issues were encapsulated in the fairness standard of the current *Free-to-Air Television Code of Broadcasting Practice*. In practical terms, radio broadcasters did not believe that informed consent was an issue in radio programmes. Both radio and television broadcasters did not see a need for the development of a set of guidelines on informed consent.

### *Independent producers*

Like television broadcasters, independent producers saw the privacy principles as part of the overall broadcasting standards regime. One important issue for these stakeholders was a strong belief that filming in a public place should generally not be subject to any privacy restrictions. They felt this would severely constrain the very nature of their profession.

With respect to consent, producers stressed the importance of creating good relationships with participants. Independent programme makers mostly believed that editorial control must remain with the producer. There were different views about whether a set of industry guidelines should be developed on informed consent, the most important question being ‘who should develop them?’

### *Legal and academic experts*

According to this stakeholder group, the Authority had developed a credible jurisprudence on privacy in broadcasting. Subsequently, in using a common-sense approach in applying the principles on a case by case basis, the Authority had demonstrated credible decision-making. There was an inherent tension between the desire for more prescription and leaving the principles as they were as broad interpretive tools. The need to ‘translate’ the privacy principles into a separate privacy code of broadcasting practice was not considered urgent as, like broadcasters, legal and academic experts believed that the principles were an effective part of the existing codes of broadcasting practice.

### *Māori*

For Māori, privacy issues in broadcasting were frustrated by mainstream media not taking account of Māori tikanga such as marae protocol. The fact that the privacy of the individual did not include their whānau, hapū and iwi, or deceased persons and their whānau, was considered a major cultural oversight.

With respect to consent issues, Māori concern focused on the need for broadcasters and programme makers to consult with Māori communities with the understanding that the consultation needed to go beyond the individual to include whānau, hapū and iwi.

### *Community advocates*

Community advocates generally placed a much lower threshold on what they perceived to be invasions of privacy than currently provided by the Authority's privacy principles. With respect to the vulnerability of children, they believed broadcasters should err on the side of caution in every instance.

### **National survey findings**

On the whole, the findings revealed no broad consensus in opinion on privacy-related issues. A sizeable minority expressed concern that the current balance was too strongly weighted in favour of broadcasters. In contrast, significant numbers of people were satisfied that the status quo afforded enough legal protection.

With respect to informed consent, public opinion varied. If the scenario under consideration was one of participation, for example in a competition for personal gain, respondents believed no formal consent was required. If a participant was making a personal contribution, for example in a documentary interview, formal consent was seen as necessary.

There were some marked differences between Māori views on issues of privacy and informed consent and those of New Zealand Europeans. This may be because individual rights are seen as less important, in reality, than the protocols surrounding the role of *iwi* and *whanau*. Māori were more protective in relation to issues of informed consent.

Other demographic breakdowns revealed that men were generally more accepting than women of many of the broadcast scenarios tested, and they held lower expectations in regard to informed consent. Likewise, younger respondents tended to hold more accepting views than older respondents both in terms of privacy issues and the necessary steps required for informed consent.

Levels of media consumption played a role in respondents' attitudes towards privacy and informed consent. Heavy broadcast media users were more accepting of the privacy scenarios tested.

### **Legal environment**

Only two privacy decisions issued by the Authority have been appealed to the High Court. Both High Court judgments dismissed the appeals and endorsed the privacy principles and their application by the Authority.<sup>1</sup>

As this monograph was being completed, a landmark Court of Appeal decision on privacy was issued concerning the print media.<sup>2</sup> The Court rejected the appeal but discussed many relevant aspects of privacy and media matters. The Court of five judges was divided on the question of whether a tort of breach of privacy exists. However, the majority recognised a right of action in tort for the unjustified publication of private information.

Dealing with freedom of expression, Gault P and Blanchard J noted that there is no express right to privacy in the Bill of Rights Act. 'Freedom of expression should not therefore be

restrained unless the exercise of that freedom threatens the very conscience of a citizen, and his or her ability to move freely within the community and be safe from harm.<sup>23</sup>

#### *A Privacy Code and the wording of the principles*

The Broadcasting Amendment Act 2000 allows the Authority, if it wishes, to encourage the development of a separate broadcasting code regulating privacy issues.

It would appear from the findings of the stakeholder consultation that a separate privacy code is currently unnecessary. Broadcasters, programme makers and legal and academic experts agreed that the current privacy principles were an effective part of the current codes.

The responses obtained from the public opinion survey – in which the privacy principles were operationalised into broadcast scenarios – highlight that members of the public appear to use reasoning similar to the Authority’s when it applies the privacy principles. What is evident from the public opinion survey, however, is the lack of information and knowledge possessed by members of the public concerning their rights and the rights of the media.

While a fully-fledged privacy code may not be necessary, the Authority may need to look at the wording of the privacy principles. In particular, principle (i) may need rephrasing to differentiate more clearly between ‘offensive facts’ and the offensiveness of the disclosure of private facts.

There may also need to be some rationalisation/harmonisation between principles, for example, whether principle (iv) is in fact a serious breach of principle (i)? Principle (vii) contains two discrete principles: adult consent, and the protection of children. Should the protection of children be enshrined in a separate principle?

#### *Informed consent guidelines*

The policy question for the Authority regarding informed consent is whether it should instigate/encourage the development of procedures for obtaining informed consent, for example, by means of an advisory opinion. Broadcasters have argued that provisions regarding consent are covered by the fairness standard of the codes of broadcasting practice.

Independent producers involved in long-form documentary showed a high level of awareness and ethical resolve in not wanting to compromise participants. Producers involved in other genres have different questions to address. For example, some need to rely on release forms being signed by participants ‘on the spot’.

There is no official guidance for the production industry on best-practice procedures for obtaining the consent of participants to appear in broadcast programmes. While a ‘one size fits all’ document would never be possible, it seems that industry guidelines would be a useful tool for emerging programme makers, and those new to factual programme making in particular.

The Authority will continue to look carefully at the principles of fairness, in particular, in considering privacy matters. The more a programme participant is briefed on, and understands,

the implications of appearing in a programme, the less likely it will be that a successful claim for breach of privacy can be mounted.

As a final observation, conducting research of this nature, while time-consuming and sometimes complex, provides useful insights into the thinking and practice of a range of stakeholders as well as an opportunity to place the decisions of the Authority into a wider context. The original research in this monograph will be used by the Authority as guidance in its policy development and we hope that it will also be useful for those interested in the practice and study of this evolving area of law and broadcasting.

### **Notes**

- <sup>1</sup> TV3 Network Services Ltd v ECPAT [2002] AP46/02 and TV3 Network Services Ltd v BSA [1995] 2 NZLR 720
- <sup>2</sup> Hosking v Runting & Ors [2004] CA 101/03
- <sup>3</sup> Ibid. [22]

# Appendices

## The 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.

- i) The protection of privacy includes 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 a reasonable person.
- iii) There is 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) 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 (iv).

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

Issued 20 September 1999

# Questionnaire

<b>INTERVIEWER'S NAME</b>	
<b>DATE</b>	<b>PHONE NUMBER</b>

<b>EMPLOYEE NO.</b>					
<b>INTERVIEW DURATION</b>					

<b>START TIME</b>	<b>FINISH TIME</b>	<b>AUDIT DETAILS</b>
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Good morning/afternoon, my name is ..... from **colmar brunton**. We are doing an important survey about New Zealanders' attitudes to the broadcasting of personal information and footage of individuals on television and radio. It has been commissioned by the Broadcasting Standards Authority.

May I please speak to the person who lives in this house who has the next birthday, and is aged 15 or more?

**REINTRODUCE IF NECESSARY.**

The interview will take approximately 20 minutes. Is now a convenient time to talk to you?

**MAKE APPOINTMENT IF NECESSARY.**

QA) Which of the following best describes your own ethnic origin? **READ OUT. CODE ONE ONLY.**

Pakeha or New Zealander of European descent	06
Maori/ New Zealander of Maori descent	07
New Zealander of Pacific Island descent	08
New Zealander of other descent	09
Chinese	10
Korean	11
Indian, Pakistani or Sri Lankan	12
Other Asian group	13
Or some other group	14

**CHECK QUOTA**

The first series of questions is about your own usage of television and radio.

- Q1) Thinking about the last seven days, about how many hours of television did you watch per day? **WRITE IN HOURS AND MINUTES.**

					P21 P22
<b>HOURS</b>			<b>MINUTES</b>		

**SHOWCARD A**

- Q2) Which of the following types of programmes do you particularly enjoy watching? **ROTATE ORDER. READ OUT. CODE ALL MENTIONED.**

Reality programmes such as Treasure Island or Popstars	06	
Sport	07	
Real life documentaries such as Motorway Patrol or Busted	08	
British dramas	09	
News and Current Affairs programmes	10	
Investigative or Researched Documentaries about New Zealand and New Zealanders	11	
Movies	12	
Real life comedies such as Candid Camera or Funniest Home Videos	13	
American comedies such as Spin City or Friends	14	
Consumer affairs programmes such as Fair Go or Target	15	
Soap Operas such as Shortland Street or Coronation Street	16	
None of these	03	P23

- Q3) Thinking now just about your viewing of television, I am going to read out a series of reasons that people have made as to why they enjoy watching TV.

**SHOWCARD B.**

Using this card, I'd like you to tell me how much each reason I read applies to you personally. **ROTATE ORDER OF REASONS.**

The first reason for watching television is..... does this apply to you a lot, quite a lot, a little, or not at all? **CODE ONE ONLY FOR EACH. READ NEXT REASON.**

P24/25

	Applies a lot	Quite a lot	A little	Does not apply at all	Don't know
Lets you follow important events	6	7	8	9	4
Keeps you in touch with what is going on in New Zealand and rest of the world	6	7	8	9	4
Shows what people in authority are really like	6	7	8	9	4
Plays the music you like	6	7	8	9	4
Keeps you company	6	7	8	9	4
Entertains you	6	7	8	9	4
Shows you how ordinary people live	6	7	8	9	4
Tells you about famous people who you are interested in or admire	6	7	8	9	4
Lets you follow important sporting events and issues	6	7	8	9	4

Q4) Thinking now about listening to the radio during the last 7 days, about how many hours did you spend listening to the radio per day?  
**WRITE IN HOURS AND MINUTES.**

--	--

**HOURS**

--	--

**MINUTES**

P26 P27

Q5a) Which two or three radio stations do you most enjoy listening to?  
**DO NOT READ. CODE TWO OR THREE.**

<b>Multi-region stations</b>	
More FM	06
Channel Z	07
The Rock	08
Radio Pacific	09
The Edge	10
Solid Gold	11
Newstalk ZB	12
Classic Hits	13
Radio Sport	14
ZMFM	15
Hauraki	16
National Radio	17
Concert Programme/FM	18
<b>Auckland only</b>	
198FM	19
George FM	20
95 BFM	21
Up FM	22
Cool Blue	23
Radio Rhema/Life FM	24
<b>Northland only</b>	
KCC FM	25
Magic FM	26
Radio Northland	27
<b>Wellington only</b>	
The Breeze	28
Waikato only	
Y99.3 FM	29
ZHFM	30
<b>BOP only</b>	
Coastline 93.4 FM	31
ZAFM	32
<b>Rotorua/Taupo only</b>	
Lakes 96FM	33
KIS FM	34

<b>Hawkes Bay only</b>	
Hot 93FM	35
<b>Taranaki only</b>	
Energy FM	36
<b>Wanganui only</b>	
Star FM	37
<b>Manawatu only</b>	
2XS	38
Magic FM	39
<b>Wairarapa only</b>	
Hitz 89FM	40
<b>Horowhenua only</b>	
95FM	41
2XX	42
<b>Christchurch only</b>	
C93	43
Lite FM	44
<b>Dunedin only</b>	
4XO	45
Radio Dunedin	46
<b>Nelson only</b>	
Fifeshire FM	47
<b>Invercargill only</b>	
Foveaux FM/AM	48
<b>Alexandra only</b>	
Radio Central	49
<b>Queenstown only</b>	
Resort Radio	50
<b>Balclutha only</b>	
Big River Radio	51
<b>Other (please specify)</b>	
None	03
Don't know	04

Q5b) Thinking now just about your listening to the radio, I am going to read out a series of reasons that people have made as to why they enjoy listening to the radio.

**SHOWCARD B.**

Using this card, I'd like you to tell me how much each reason I read applies to you personally.

**ROTATE ORDER OF REASONS.**

The first reason for listening to the radio is..... does this apply to you a lot, quite a lot, a little, or not at all? **CODE ONE ONLY FOR EACH. READ NEXT REASON.**

P29/30

	Applies a lot	Quite a lot	A little	Does not apply at all	Don't know
Lets you follow important events	6	7	8	9	4
Keeps you in touch with what is going on in New Zealand and rest of the world	6	7	8	9	4
Shows what people in authority are really like	6	7	8	9	4
Plays the music you like	6	7	8	9	4
Keeps you company	6	7	8	9	4
Entertains you	6	7	8	9	4
Shows you how ordinary people live	6	7	8	9	4
Tells you about famous people who you are interested in or admire	6	7	8	9	4
Lets you follow important sporting events and services	6	7	8	9	4

Q6) I am now going to read a series of statements that some people have made about celebrities and the general public in New Zealand. For each one I would like you to tell me whether you agree strongly, agree slightly, disagree slightly, or disagree strongly with that statement. The first statement is...

**READ OUT. ROTATE ORDER. CODE ONE ONLY FOR EACH.**

P31/32

	Disagree Strongly	Disagree Slightly	Agree Slightly	Agree Strongly	Don't know
New Zealand celebrities cannot complain when their personal life is shown on tv as it is part of being a celebrity	6	7	8	9	4
You would always want your own personal life to remain totally private	6	7	8	9	4

I'd now like to ask you some overall questions about privacy and the way the media operates in New Zealand.

**SHOWCARD C. READ QUESTION SLOWLY.**

- Q7) Thinking about the current balance between the right of television and radio to broadcast information about individuals or pictures of people, as opposed to people's right to privacy, would you say the balance is...

**CODE ONE ONLY.**

About right	6	
Too strongly in favour of the broadcaster	7	
Too strongly in favour of the right to privacy	8	
Don't know enough about it to say	9	P33

- Q8) Can you think of any **specific** examples where a television broadcaster or radio station has breached the privacy of a New Zealander?

**DO NOT READ. CODE ALL MENTIONED.**

20:20 programme called Sex, Lies and Videotape about Dunedin Anglican Cathedral.	06	
20:20 programme called Position Of Power about Morgan Fahey case where he was filmed on hidden camera to prove accusations of sexual abuse of patients.	07	
News item on both TV1 and TV3 about the death of James Whakaruru showing his beaten body.	08	
News item about a New Zealand woman who was raped 20 years ago and the offender had just been caught. The item showed her beaten face while in hospital.	09	
20:20 programme called Paradise Lost about child prostitution in Fiji which identified individual children.	10	
Holmes item about sensitive information found on a computer hard drive about two women who had been sexually abused. The women were identifiable despite being pixilated and their details were visible on the computer screen		
Other ( <b>please specify</b> )	02	
None/Don't know	04	P34

**SHOWCARD D. READ QUESTION SLOWLY.**

Q9) Thinking now about the balance between the public’s right to know information and people’s right to privacy. Overall, do you believe that you as an individual are sufficiently protected by New Zealand laws from the broadcasting of personal information or the broadcasting **of actual footage of you?**

Yes	6
No	7
Don’t know enough about it to say	8

P35

**SHOWCARD E. READ QUESTION SLOWLY.**

Q10a) Imagine an item was shown on a New Zealand news, current affairs or other factual programme based on the following theme.

“A New Zealand psychologist is suspected of sexually harassing patients and has refused all approaches from the media.”

Considering this theme and using the scale on this card, I would like you to tell me how acceptable it would be for a television or radio broadcaster to show the following parts of their investigation of this story.

**READ OUT SLOWLY. ROTATE ORDER. CODE ONE ONLY FOR EACH.**

P36/37

	Completely Unaccept.						Completely Accept.	Depends	DK
	1	2	3	4	5	6	7		
Footage of the psychologist seeing a patient using a hidden camera carried by the patient	1	2	3	4	5	6	7	8	9
Audio tape of the psychologist seeing a patient using a hidden microphone carried by the patient	1	2	3	4	5	6	7	8	9
Attempted interviews with the psychologist in their own home where the journalist puts a foot in the front door after the psychologist refuses to answer questions and asks them to leave	1	2	3	4	5	6	7	8	9
An attempted interview with the psychologist as he walks down the street, where the journalist follows the psychologist down the street after refusing to be interviewed	1	2	3	4	5	6	7	8	9
Patients describing the alleged behaviour of the psychologist in an interview with a journalist	1	2	3	4	5	6	7	8	9
Footage of the family of the psychologist	1	2	3	4	5	6	7	8	9

**SHOWCARD E. READ QUESTION SLOWLY.**

Q10b) Imagine an item was shown on a New Zealand news, current affairs or other factual programme based on the following theme.

“The bitter separation of a married couple”

Considering this theme and using the scale on this card, I would like you to tell me how acceptable it would be for a television radio broadcaster to show this item under the following circumstances.

**SLOWLY READ EACH OPTION. ROTATE ORDER.**

**READ FIRST THREE BEFORE MOVING TO LAST TWO.**

**CODE ONE ONLY FOR EACH.**

P38/39

	Completely Unaccept.	1	2	3	4	5	6	Completely Acceptable	7	Depends	DK
The people involved are both well known celebrities	1	2	3	4	5	6	7	8	9		
One of the people involved is a New Zealand politician	1	2	3	4	5	6	7	8	9		
Both of the people involved are ordinary New Zealanders	1	2	3	4	5	6	7	8	9		
Both of the people involved are well-known celebrities and they are fighting for custody of their children	1	2	3	4	5	6	7	8	9		
One of the people involved is a New Zealand politician and the couple is fighting for custody of their children	1	2	3	4	5	6	7	8	9		

**SHOWCARD E. READ QUESTION SLOWLY.**

Q10c) Imagine the an item was shown on a New Zealand news, current affairs or other factual programme that included the following as part of the story.

“A New Zealander is appointed to run a charity and the item reveals that he or she has served a three month prison term **that has not been disclosed.**”

Considering the inclusion of this in a story and using the scale on this card, I would like you to tell me how acceptable it would be for a television or radio broadcaster to include this item under the following circumstances.

**ROTATE ORDER. CODE ONE ONLY FOR EACH.**

P40/41

	Completely Unaccept.	1	2	3	4	5	6	Completely Acceptable	7	Depends	DK
The undisclosed term was two years ago	1	2	3	4	5	6	7	8	9		
The undisclosed term was five years ago	1	2	3	4	5	6	7	8	9		
The undisclosed term was seven years ago	1	2	3	4	5	6	7	8	9		
The undisclosed term was ten years ago	1	2	3	4	5	6	7	8	9		
The undisclosed term was thirty years ago	1	2	3	4	5	6	7	8	9		

**SHOWCARD E. READ QUESTION SLOWLY.**

Q10d) Imagine an item was shown on a New Zealand news, current affairs or other factual programme based on the following type of person.

“A New Zealander who is being investigated for fraud within a large corporation, and has refused all other approaches from the media.”

Considering this theme and using the scale on this card, I would like you to tell me how acceptable it would be for a television or radio broadcaster to do the following as part of their investigation of the story and to screen the outcome.

**READ OUT SLOWLY. ROTATE ORDER. CODE ONE ONLY FOR EACH.**

P42/43

	Completely Unaccept. 1	2	3	4	5	6	Completely Acceptable 7	Depends 8	DK 9
Approaching the person for an interview while they are in their own home or on their own property	1	2	3	4	5	6	7	8	9
Approaching the person for an interview while they are in someone else’s home or on someone else’s property	1	2	3	4	5	6	7	8	9
Approaching the person for an interview while they are in a bar or restaurant	1	2	3	4	5	6	7	8	9
Approaching the person for an interview while they are walking down the street	1	2	3	4	5	6	7	8	9
Approaching the person while they are picking their children from school	1	2	3	4	5	6	7	8	9

**SHOWCARD E. READ QUESTION SLOWLY.**

Q11) I’d now like you to think about some specific pieces of information which might be revealed as part of an item on a New Zealand news, current affairs or other factual programme about a person **who is standing for election for the city or district council.**

Using the same scale I would like you to tell me how acceptable you believe it would be for a television or radio broadcaster to include that piece of information.

The first piece of information is...

**READ OUT. ROTATE ORDER. CODE ONE ONLY FOR EACH.**

P44/45

	Completely Unaccept.						Completely Acceptable		
	1	2	3	4	5	6	7	Depends	DK
Their sexual orientation	1	2	3	4	5	6	7	8	9
Their financial history	1	2	3	4	5	6	7	8	9
Their medical history	1	2	3	4	5	6	7	8	9
A history of mental illness	1	2	3	4	5	6	7	8	9
Extra-marital affair	1	2	3	4	5	6	7	8	9
Previous criminal conviction	1	2	3	4	5	6	7	8	9
Their academic qualifications	1	2	3	4	5	6	7	8	9

The next series of questions is about the permission New Zealanders should have to give to television broadcasters before they can be shown on television.

### SHOWCARD F

Q12a) I am going to describe some situations and using this card I would like you to tell me which of these levels of permission you believe television broadcasters should have to obtain before broadcasting.

The first scenario is...

**ROTATE ORDER. CODE ONE ONLY FOR EACH SCENARIO.**

P46/47

	No permission at all	Implied permission	Verbal permission	Written permission	Don't know enough to say
Members of the general public are focussed on for more than a few seconds in a real life documentary such as Motorway Patrol or Private Investigators	6	7	8	9	4
Members of the general public are filmed briefly in the background but not interviewed, in a public place and shown on a real life documentary such as Motorway Patrol or Private Investigators	6	7	8	9	4
Members of the general public are interviewed in the street for a current affairs show to be screened at a later date	6	7	8	9	4
A witness to a car accident is filmed in a state of distress for less than a few seconds, but not interviewed	6	7	8	9	4
A house is clearly shown on tv that is on the same street as a recent murder	6	7	8	9	4
A house is clearly shown on tv that has been the scene of a murder but is now owned by someone else	6	7	8	9	4

### SHOWCARD G

Q12b) Imagine you had given **verbal** permission for an interview with you to be shown on television. Which of these conditions, if any, do you believe **must** then be met by the broadcaster?

**CODE ALL MENTIONED.**

None of these	6	
Inform the person of the programme it will be shown on including the day and time	7	
Inform the person of how it will be used and the story it is part of	8	
Inform the person of possible consequences of the interview being broadcast	9	
Show the person an advance screening of the programme	10	
All of these	11	P48

**SHOWCARD G**

Q12c) Imagine you had given **written** permission for an interview with you to be shown on television. Which of these conditions, if any, do you believe **must** then be met by the broadcaster?

**CODE ALL MENTIONED.**

None of these	6	
Inform the person of the programme it will be shown on including the day and time	7	
Inform the person of how it will be used and the story it is part of	8	
Inform the person of possible consequences of the interview being broadcast	9	
Show the person an advance screening of the programme	10	
All of these	11	P49

**SHOWCARD H. READ QUESTION SLOWLY.**

Q13a) Imagine a woman had taken part in a factual programme about abortion. Do you personally believe it should be possible for that person to stop the television broadcaster from broadcasting their images or an interview after they have given their verbal or written permission for it to be broadcast? **CODE ONE ONLY.**

Yes	6	
No	7	
It depends on the situation/information/footage	8	
Don't know enough about it to say	4	P50

**SHOWCARD H. READ QUESTION SLOWLY.**

Q13b) Imagine now that a woman has taken part in a factual programme about abortion, has given permission to be interviewed, and the interview has been broadcast on television.

Two months later the television broadcaster wants to show the same interview or pictures of the interview again in a different programme covering the same issue.

Do you personally believe that the television broadcaster should have to regain permission from that person before re-broadcasting this interview? **CODE ONE ONLY.**

Yes	6	P51
No	7	
It depends on the situation/information/footage	8	
Don't know enough about it to say	4	

Q14a) At what age do you believe children should be able to give their **own** permission for interviews or footage of them to be broadcast, rather than broadcasters asking for parental permission?

**WRITE IN AGE IN YEARS:** \_\_\_\_\_

Don't know	99	P52
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**SHOWCARD I**

Q14b) Which **one** of the following do you personally most strongly agree with? **CODE ONE ONLY.**

		P53
Parental permission is enough to allow television and radio broadcasters to broadcast any information or interviews of children	6	
In some instances television and radio broadcasters should show restraint and not show footage or interviews of children even if parental permission has been given.	7	
Don't know enough about it to say	8	

And finally, some questions to ensure we talk to a cross-section of all New Zealanders.

Q15a) What is your occupation?

**GET FULL DETAILS. PROBE INDUSTRY/ POSITION / JOB & WRITE IN**

\_\_\_\_\_ P54

Q15b) What is the occupation of the main income earner in this household?

**GET FULL DETAILS. PROBE INDUSTRY / POSITION / JOB & WRITE IN.**

**IF RETIRED, ASK WHAT WAS LAST JOB.**

**IF RESPONDENT IS MAIN INCOME EARNER, TICK BOX**

\_\_\_\_\_  P55 P56

Q16) Which one of the following best describes this household?

**READ OUT. CODE ONE ONLY**

Living on your own	06	
A group flatting together	07	
A young couple with no children	08	
Solo parent	09	
A family with mainly school aged or younger children at home	10	
A family with mainly adult children at home	11	
An older couple or single with no children	12	
Other	13	P57

Q17) Are you personally responsible for the care of any children aged 14 years or younger?

Yes	6	
No	7	
Don't know	4	P58

Q18) In which one of the following age groups do you belong?

**READ OUT. CODE ONE ONLY.**

15 to 19 years	06	
20 to 24 years	07	
25 to 29 years	08	
30 to 34 years	09	
35 to 39 years	10	
40 to 44 years	11	
45 to 49 years	12	
50 to 54 years	13	
55 to 59 years	14	
60 to 64 years	15	
65 to 69 years	16	
70 to 74 years	17	
75 to 79 years	18	
80 years and older	19	
Refused	05	P59

Q19a) Which one of the following best describes your own ethnic origin?

**READ OUT. CODE ONE ONLY**

New Zealander of European descent/Pakeha	06	
New Zealander of Maori descent	07	
New Zealander of Pacific Island descent	08	
New Zealander of other descent	09	
Pacific Islander	10	
European such as English, Australian or South African	11	
Korean	12	
Chinese	13	
Indian / Pakistan	14	
Other Asian	15	
Other (not specified)	02	P60

Q19b) How many people aged 15 years and over usually live in your household, including yourself?

<b>RECORD NUMBER (WRITE IN BOX)</b>		P61
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Q20a) Now a few questions about income. Firstly, in which of the groups does your own gross personal income from all sources, before tax fall into?

**READ OUT. CODE ONE ONLY IN COLUMN A** P62

Q20b) **CHECK BACK TO Q16. IF LIVING ON THEIR OWN OR FLATTING (CODE 6 OR 7) → CODE SAME AS FOR Q20a.**

And in which one of these groups does the combined gross income of you and your partner from all sources, before tax fall into?

**READ OUT. CODE ONE ONLY IN COLUMN B.** P63

		<b>COLUMN A PERSONAL</b>	<b>COLUMN B COMBINED</b>
A.	Up to and including \$10,000	06	06
B.	Over \$10,000 to \$20,000	07	07
C.	Over \$20,000 to \$30,000	08	08
D.	Over \$30,000 to \$40,000	09	09
E.	Over \$40,000 to \$50,000	10	10
F.	Over \$50,000 to \$60,000	11	11
G.	Over \$60,000 to \$70,000	12	12
H.	Over \$70,000 to \$80,000	13	13
I.	Over \$80,000	14	14
J.	Don't know	15	15
K.	Refused	16	16

That is the end of the survey. My name is \_\_\_\_\_ from **colmar brunton**. Thank you very much for your time.

# The Authors

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Michael Stace joined the Broadcasting Standards Authority in January 1991 and was its Complaints Manager from 2001 to July 2004. Now in 'semi-retirement', he continues to work for the Authority on a part-time basis. Michael is the author of the BSA monograph, *Privacy: Interpreting the Broadcasting Standards Authority's Decisions January 1990 to June 1998*.

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Since 1990, the New Zealand Broadcasting Standards Authority has spent many hours weighing up two competing concepts. Both are of vital interest to the New Zealand viewing and listening public. They are, on the one hand, freedom of expression and the public's right to know; and on the other hand, the right of the individual to privacy.

*Real Media, Real People* provides a summary of the development of New Zealand's broadcasting privacy principles and precedent-setting decisions since 1990. It updates our earlier publication, *Privacy: Interpreting the Broadcasting Standards Authority's Decisions, January 1990 to June 1998*, with a discussion of the Authority's decisions to June 2003.

Most importantly, *Real Media, Real People* reports on the views of five key stakeholder groups, and presents the findings of a major public opinion survey of 1,200 New Zealanders. It analyses and discusses the results of this comprehensive consultation for the benefit of all interested persons whether they be broadcasters, law-makers, journalists, students or past or potential complainants.



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