

# **Children's Interests**

## **A Review of Broadcasting Standards Authority Child Complaints Decisions 1999-2009**

Dr Sue Jackson  
School of Psychology  
Victoria University of Wellington  
P.O.Box 600  
Wellington

## **Foreword by the Broadcasting Standards Authority**

The Broadcasting Standards Authority has a history of pursuing research into the relationships between children and broadcasting standards. Among other things, the Broadcasting Act 1989 prescribes that we must take account of the interests of children. The Codes of Broadcasting Practice contain many specific provisions relating to the protection of children.

As a public organisation, we are concerned to ensure that our decision making is robust and relevant. To this end, we have regularly commissioned critiques of our decisions by media academics and practitioners. In recent years we have had the general quality of our decision making examined by a legal expert and by a journalist and have looked at our privacy related decisions.

This time we have chosen to review our decisions with relation to children. Primarily children as subjects, but also children as viewers.

We commissioned Dr Sue Jackson of Victoria University, Wellington to conduct this review. Dr Jackson is a Senior Lecturer in the School of Psychology and has a special research interest in issues pertaining to young people. She had previously undertaken research for us relating to children as part of the team that authored *Children's Media Use and Responses: A Review of the Literature* (published by us in 2007). The BSA would like to thank Dr Jackson for her work on this project.

This report does not represent the opinions of the BSA. Our opinions are contained in our decisions. We hope, however, that the questions raised in the report will prompt renewed consideration by broadcasters and the public about how we can best protect children in relation to broadcasting standards matters. The BSA looks forward to being part of that on-going discussion.

**Broadcasting Standards Authority  
May 2010**

## Overview

This review has been commissioned to examine BSA decisions on complaints lodged regarding children as viewers of, and participants in, television broadcasts.

In reviewing the decisions the following BSA materials have been accessed:

- A DVD containing items about which complaints were lodged
- A list of decisions to be reviewed
- Decisions downloaded from the BSA website

The approach taken to the review comprised the following:

- Repeated readings of each decision
- Viewing the associated film footage to which each decision related
- Database literature searches for relevant literature
- Reviews of relevant literature
- Application of professional knowledge from 13 years practice as child and family Clinical Psychologist (with child abuse and Family Court specialties) and seven years practice as lecturer in child clinical psychology

The review is organised broadly around four key themes in the content of complaints made to the Authority:

- The matter of children's emotional state (frequently termed "distress") in relation to the interests of children as viewers
- The matter of child participants' emotional state in relation to the *children's interest* and *fairness* provisions of the Broadcasting Act 1989
- The matter of children's emotional state in relation to *privacy* provisions of the Broadcasting Act 1989
- The matter of consent regarding children's privacy

The following key theoretical and research literatures have informed this review:

- Social constructionism, in particular in relation to the constructions of childhood and the effects that are produced by such constructions on the treatment of children
- Developmental Psychology, focusing on children's cognitive abilities (understandings) and emotional development in the journey through childhood and adolescence
- Child Abuse, especially dynamics, effects and ethics
- Child Mental Health, primarily the trauma literature
- Social Science research methodologies with children, in particular pertaining to ethics (privacy, competencies, consent, assent)
- Children and media, which has historically emphasised children as audience over children as active subjects

## Introduction

This review focuses exclusively on broadcasts on free-to-air television as the bulk of complaints referred to the Authority concern such broadcasts. Currently, the protection of children's rights both as audience and as participants in the media are managed within the provisions of the Free-to-Air Television Code of Broadcasting Practice. Standard 9 in the Code is entitled Children's Interests and is aimed at protecting children as viewers. There is no specific standard or Code that protects children as participants in broadcasters, issues such as fairness to children and practice in relation to children's privacy are contained in Standards relating to those issues. The absence of a code specifically pertaining to children will be returned to in the concluding section of this report.

Within the child-related provisions of the Code, tensions between the competing constructions of children play out. On the one hand, the construction of children as vulnerable and powerless demands the provision of adult protection. Examples of this construction in the Code can be seen in allowing parental consent as a defence against an alleged breach of privacy and in Standards that protect the exploitation and best interests of children. On the other hand, the construction of children as empowered conforms to the notion of children having participatory rights.

Within the Code, however, the emphasis is directed more toward a right to protection than a right to active voice (as in, for example, their consent being obtained as well as parental consent). Many of the children's interests and fairness provisions specific to children in the Code refer to them as ('passive') audience and their participatory rights feature rather less.

Such a balance in the Code perhaps reflects the state of the media itself where, as Joseph (2007) notes, children's experiences and opinions are rarely incorporated in news items even when of direct relevance to them (e.g. education). Media research more broadly reveals a bias toward viewing children as a somewhat vulnerable audience in need of protection from violent and sexual content.

In recent years, however, an emerging body of literature on children and media has underlined children's competencies and criticality as media consumers and producers (e.g., Buckingham & Bragg, 2004; Gauntlett & Hill, 2001; Livingstone, 2002). Problematically, children in news media and current affairs programmes tend to be represented around some highly stereotypical depictions, for example as victims or survivors of crime, sexual abuse, disasters and violence (Joseph, 2007; Ridley, 2000). In the complaints made in the decisions reviewed, these depictions are disturbingly familiar.

Notably, the majority of complaints to the BSA reviewed here raised concerns about children in relation to news and current affairs programmes and not general entertainment programmes. These complaints less frequently dealt with concerns

about the impact of items on child viewers, but primarily referred to concerns about child subjects or participants featured in the news or current affairs programme.

In reviewing the Decisions (and complaints they addressed) two broad themes emerged in considerations of issues around children's interests, fairness and privacy: the salience of the child's emotional state and the role of consent in terms of both privacy and children's interests. The review is organised around these broad themes, firstly in relation to children as viewers and then to children as participants or subjects.

## **1. Will it upset or distress them?: Protecting the interests of child viewers**

As noted above, the research literature is dominated by studies about the effects on children of viewing particular kinds of media content, in particular violence and sexual behaviour (see for example Buckingham & Bragg, 2004; Hargrave, 2003). A small proportion of the research has examined children's responses to 'frightening' content as well (e.g., Walters & Zwaga, 2001), generally establishing children's competency as viewers of frightening material. Of relevance here, the greater the perceived reality of the programme, the greater the probability of children reports of feeling frightened (Hargrave, 2003). Hargrave found the news and soap operas most cited by children as containing content that frightened them. Only two complaints in this review drew attention to concerns about the emotional impact on child viewers as a cause for concern, one referring to a news item and the other to an entertainment programme. The Authority's decisions did not uphold either complaint regarding the concerns about the programmes being contrary to children's interests (Standard 9). Each complaint is discussed below.

### ***Kiro and TVNZ (Decision 2007-111): Autopsy Photographs***

The complaint in Decision 2007-111 referenced a news item that had shown autopsy photographs of a child's beaten body. The Authority supported its decision not to uphold the complaint, in part, with the argument that the broadcaster had provided a warning about the content, enabling parents to turn off the television and so prevent their children from seeing the images. However, as noted by two of the Authority members, the warning had not specified the images were of a child.

The child developmental literature supports the view that children may identify more closely with content featuring children as subjects, particularly given that their self-other boundaries are not well defined in comparison with older children and adults. More specifically to media, Knoblock-Westerwick (2006) found children were more likely to respond fearfully to a news story if it described a victim of similar age and gender to themselves. Such self-other identification suggests that providing an indication that the images are of a child may have been a more judicious approach for the broadcaster to take.

On the other hand, I note from my own viewing of the item that the images are disembodied and do not obviously identify a child per se; rather it is the context or story surrounding the images that does so. A young child may not therefore understand the images as being specifically related to a child like them. However, older children, who understand the context of the story, would have the capacity to identify with the child and have empathy for him as a child abuse victim (Cantor, 1998; Hargrave, 2003) and so may potentially benefit from being warned about content.

The Authority also supported its decision to dismiss the child audience effects aspect of the complaint by referencing the facts that the item was a news broadcast for an adult target audience and that the news is exempt from classification. As pointed out

earlier in comments about the research, however, the news has been specifically identified by children as containing the most frightening content which seems to relate, in part, to its realism. Although children don't necessarily choose to watch the news, they may nonetheless be present in the room with their parents during the broadcast. In a survey of New Zealand children, for example, 21% of 10-11 year olds reported watching the news 'all the time' and a further 65% indicated they watched it 'sometimes' (Lealand & Zanker, 2008). In a different survey undertaken by the Authority 67% of parents/caregivers reported that their children (6-13 year-olds) watched the early evening news 'regularly' (BSA, 2008). Thus, although the exemption of the news from audience classification is understandable it is perhaps not sufficiently mindful of child viewers, particularly in relation to sensitive issues such as maltreatment (Standard 9d).

***Thomas and TVWorks (Decision 2009-081): Music Video "Distressed" Toddler***

In contrast to the potential child audience for the autopsy photographs, the possibility of young children viewing the "distressed" toddler in the music video in complaint 2009-081 was remote due to its late night timing, well outside of the watershed for child viewing. The Authority's decision not to uphold the complaint regarding effects on children appropriately took the viewing time into account. If a child had viewed the video, would there be grounds for concern? The fantasy of the film was readily apparent and research cited earlier points to the ability of children to recognise fantasy for what it is and being able to process it as such without undue fear.

The definition of "distress" is important here also. The toddler is shown in happy moments and moments of being readily consoled by his mother; his moments of crying are no different to those that would be seen for a child of his age experiencing everyday events, for example being growled at, having a toy taken by another child and so on. Distress constitutes, at least psychologically, more than tears; fearfulness, behavioural disturbances, prolonged and inconsolable tears, for example, differentiate being momentarily 'upset' from distress. In a number of the complaints reviewed, the term "distress" seems to be applied by both the Authority and the complainant when what is being referenced would more accurately be described as a child being 'upset' or 'tearful'.

## 2. Filming emotionally upset children: How fair is that?

The remainder of the decisions reviewed addressed children who participated in broadcasts, sometimes as the focus of a story (including a focus on children generally) and at other times caught up in film coverage as unwitting participants. For a number of these cases, the emotional states of children were a key consideration. Most of the complaints raised concerns about a breach of privacy in relation to the filming of children in situations of grief or high anxiety. One case, however, centred on the argument that filming the child's "distress" was unfair and exploitative. Many of the issues raised in the decision related to this case are similar to those reporting privacy concerns.

### ***Agnew and TVNZ (Decision 2007-010): Child Interview About Mother's Deportation***

The complaint in this decision referred to a *Close-Up* item about a Chinese immigrant family in which the mother faced deportation. All three of the children and the mother featured in the item but the 7 year old girl, Candy, featured most prominently. The reporter both interviewed Candy and had her ask and interpret questions put to her mother. The complaint documented the girl's tearfulness in talking about her mother's deportation and the unfairness of placing the child in such a distressing situation. The Authority upheld that the broadcast treated the child unfairly, exploiting her for the emotional impact of its story. There are two key issues here: whether the broadcaster exploited the child's emotional state and the reporter's use of the child to put questions to her mother.

In my own viewing of the broadcast, the item as a whole appeared to be grounded in concerns for the family, in particular the plight of the children should their mother be deported. The reporter spent a little time developing rapport with Candy, appropriately talking with her about her special school award. In this regard, the reporter did show due sensitivity and some understanding in terms of interviewing children. The situation for the children is undoubtedly a sensitive and potentially traumatising one and one that might readily produce tears for any family member. Was it necessary for the programme to include the children at all?

It could be argued that the programme sought to prevent the mother's deportation through its broadcast, to influence the immigration authority, and that the effects on the children, depicted in the item through interviewing them, had a crucial part to play in that goal. In other words, the children's inclusion can be interpreted as in their interests since the programme sought to prevent the disintegration of their family. From another perspective, it could also be argued that it was Candy's right to express her views about what was happening to her family. In the absence of any clear consent process for children, there is no way of knowing whether Candy's participation in an interview was in fact something that she wanted to take place.

Nonetheless, there is the matter of emotional impact, as emphasised in the complaint and the Authority's decision. Candy did shed tears in the item but the camera did not intrusively zoom in and hold the focus on her as sometimes happens in expressions of grief on programmes of this nature. As a point of comparison, in

Decision 2003-070 (discussed later in this section), Taylor Bourne expresses his grief at his father's funeral, without tears. It is qualitatively difficult to differentiate the two situations: each child is in a grief-laden situation, one experiencing actual loss, the other potential loss; in each case, parental consent for the child to appear is implicit. The decisions, however, are quite different; the former is not considered exploitative, the latter is.

In Agnew and TVNZ, however, the fairness (indeed ethics) of the second issue, using the child as interpreter, is less equivocal; requiring Candy to verbalise a question which articulated her anxieties and then interpret her mother's response clearly denoted insensitivity and arguably induced Candy's tears as she verbalised her fears of losing her mother. Interviewing children in stressful, anxiety provoking situations requires a good deal of skill and sensitivity (see Gollop, 2000; UNICEF, 2007); problematically, in a media context, reporters simply may not have the degree of sensitivity and skill required to interview children experiencing traumatic or highly anxiety provoking situations (Davies & Westcott, 1999; Poole & Lamb, 1998). The Authority's decision, in this regard, highlighted an important issue that needs underlining in practice guidelines for reporters and broadcasters.

### **3. Filming emotionally upset children: Does it intrude on a child's privacy?**

Where breach of privacy presided as the primary issue in decisions, notions of "objectionable" and "highly offensive" were central, most often in relation to "public interest" and provisions relating to the child's best interest within the privacy principles. For the filming of upset children, the question of privacy violation through intrusiveness is also particularly relevant. Moreover, when the filming relates to a traumatic event for the child, the possibility of breaches of fairness and privacy are heightened. It is important to clarify that trauma is clinically defined as an "overwhelming" event or series of events that render a sense of helplessness in a person; there is individual variability as to whether an event is experienced as traumatic or not (see Attwool, 2001 regarding children and trauma).

#### ***Le Comte and TVNZ (Decision 1999-159-160): Child Rescued from a Fire***

The emotional "distress" in the complaint addressed in this decision refers to the filming of a crying toddler receiving medical attention in an item about a fire officer rescuing her from a fire. Under the terms of the Code's Privacy Principles, the Authority deemed that the brief depiction of the toddler did not constitute the public disclosure of highly offensive and objectionable facts (Privacy Principle 1). In considering this decision, clearly the context was an important factor to the Authority members; here, in contrast to Agnew and TVNZ, the child's crying is treated as a naturally occurring response in a highly traumatic event for a young child. In Agnew and TVNZ, the child's tears, in the Authority's opinion, were evoked by the reporter's questions and accordingly not merely expressive of the potential grief of losing a mother. The differentiation is perhaps open to argument but both the unclear identification of the toddler and the fleeting capture of her in the camera lens do support the Authority's decision in this instance.

#### ***Boyce and TV3 Network Services (Decision 2003-106): CYFS Removal of a Child from her Mother***

In this decision, the complainant addresses the identification of a baby (Child A) and the intrusive filming of a child being uplifted from her mother by a CYFS Social Worker (Child B, the focus here). While acknowledging both the intrusiveness of filming the upset toddler and the traumatic, emotional nature of the footage, the Authority nonetheless considered it to be in the child's interests and as necessary to the story (i.e. not exploitative). As with the 'natural distress' in the fire rescue item, it can be argued of this filming that a child's separation from her mother, at this age in particular, is likely to be a highly anxiety provoking if not traumatising event. The Authority takes such a view: it deems the child's tears and expressions of not wanting to leave her mother to be representative of the trauma of the situation. It would be hard to argue otherwise but there are issues that need to be addressed in this kind of filming.

One question is whether the justification that the child is unlikely to be humiliated or harmed by broadcasting the footage is sufficient protection of children's interests. Child B appeared to be very aware of the cameras "in her face" (see des Tombe,

1999) and the possibility that the presence of strangers in a film crew and cameras in a child's face, so to speak, exacerbates the trauma of a child's situation is one that remains unanswered. Another thorny question is how to delineate between when a child stands to gain from the filming of her emotional state and when that filming is being exploited for audience impact. Perhaps, rather than asking what the footage probably *does not* do (e.g., humiliate, ridicule) it would be better to reframe the question to ask in what specific ways the filming *does* serve the child's interests.

The Authority found that showing the upsetting separation of the child was necessary to the story and not an emotional exploitation on the part of the broadcaster for story effect. It is a somewhat contestable decision, justified within "public interest" and provisions relating to the child's best interest within the privacy principles. Once again, similarities can be drawn with filming Candy's tears and upset response (Decision 2007-010) in an interview addressing pending separation from her mother (setting aside the important interviewing issues). The emotional situation for the children in each respective situation was qualitatively the same. Although a reporter's questions were not part of the scenario for Child B the presence of cameras and film crew ostensibly may have escalated her distraught feelings and tearfulness.

Potentially, the filming of Candy's story may have had some influence on the immigration case; if so, it can be argued that it would substantively have served the child's best interests. Similarly, in Child B's case, potentially CYFS may review its decisions about removing the child from her mother long term and similarly be deemed to have served the child's best interests. Problematically, however, broadcasters could perhaps quite easily turn to such imagined scenarios to justify the erosion of children's rights concerning their participation, rights that are already made fragile through the absence of a process to obtain their informed consent.

***Nicol and TVNZ (Decision 2003-070): Child's Funeral Tribute to his Father***

Parental separation and its attendant grief also featured in a complaint regarding the broadcast of Taylor Bourne's tribute during the filming of his father's funeral in a *Holmes* show item. In this case, the complainant argued that Taylor's privacy had been breached through exposure of his grief on television, with the attendant possibility that he would be reminded of this in years to come. In contrast to the previous three decisions, consent issues are implicit in the complaint through reference to Taylor's "never sought" exposure.

The broadcaster responds by noting parental agreement to the filming of the funeral, which was a public event. Acknowledging the insufficiency of parental consent alone, the broadcaster also comments on the requirement for the broadcast to be in the child's best interests. How might that be determined? Would it heighten the "distress" of the child, for example? The fact that Taylor was prepared and able to deliver a tribute at a public funeral for his father suggests this most likely not to be the case. Precariously, however, the child's best interests relies somewhat on anticipation of how others might treat the child as a result of the filming; embarrassment, ridicule, humiliation being itemised as examples of adverse effects.

In this instance, the fact of Possum's death was public knowledge; Taylor's school, schoolmates and friends would all have been aware of the sad event and support for Taylor would seem to be a more likely response than adverse effects. The Authority agreed with the broadcaster that the broadcast had been in the child's best interests and did not breach privacy, but the earlier discussed point of arguing around absence of the negative rather than establishing the positive also applies here. The broadcaster does, however, suggest Taylor may feel proud if he viewed the footage in the future which shows a consideration of what may be positively in the child's interest.

As an aside, the Authority makes a point in its decision about the child's ability to consent to the filming. However, this commentary seems somewhat at odds with its acceptance of implicit parental consent. Taylor's consent is unknown; his mother may or may not have explained the cameras would be present and that Taylor may therefore appear on television giving his tribute. Importantly, if there was a statutory requirement for both parental and child consent for children aged five and over, broadcasters would be clear about obtaining the child's agreement to filming.

### ***Section Summary***

The decisions reviewed in this section raise the question of when the filming of a child experiencing an emotional event contravenes not only privacy principles but also other standards set out in the Code. As is apparent from comparisons between some decisions, the answers are not altogether clear-cut: demarcating the boundaries of exploitation, children's interests and public interests is a complex and subjective decision; different contexts influence matters of appropriateness and justification.

Common across all of the decisions reviewed here, however, is an assumption on the part of broadcasters that cameras can invade the personal space of children in stressful situations without requiring, where possible, children's agreement to do so. UNICEF's (2007) guidelines on ethical reporting on children are useful to broadcasters here. Some of the question marks that hover uncomfortably around the filming of children in stressful situations may be resolved, at least in part, by ascertaining the willingness of children over age five to have cameras present and for independent advice to be taken on the appropriateness of filming younger children in stressful situations.

#### **4. Privacy Matters: When should a child's identity be protected?**

The fairness and privacy provisions of the Free-to Air-Code contain standards related to the matter of identification. Under the fairness provisions, children and young people have the right not to be “unnecessarily identified” (Standard 6f). According to the privacy provisions of the Code, identification of a person through name, address or phone number cannot be made where the disclosure is of a highly offensive or objectionable nature (Principle 4). Privacy is not considered to be breached under any circumstances where consent has been given (Principle 5). However, in the case of children any contravention of privacy must, regardless of consent, be in the child's best interests (Principle 6). Several of the decisions reviewed pertained to complaints about the identification of children as contrary to fairness and/or the best interests of the children involved and a discussion of these follows.

##### ***TVNZ and Kiro (Decision 2007-111), Turia and TVNZ (2000-165): Child Autopsy Photographs***

In terms of the Broadcasting Act 1989, violation of privacy does not extend to a dead body. Nonetheless, the viewing public, child statutory bodies and different cultural groups may consider a dead body should be accorded the same privacy out of respect for family or whanau. Additionally, the fairness provisions of the Code advise that broadcasters need to avoid causing “unwarranted distress to surviving family members”. In Decisions 2007-111 and 2000-165 the complainants objected to news items on *One News* and *Te Karere* that showed autopsy photographs depicting the extensive abuse injuries of two separate children.

In both cases the children's injured bodies are testament to the extensive maltreatment the children endured and the complainants note that the photographs may potentially highly ‘offend’ and be ‘objectionable’ to viewers through their horrific meanings. Although not upholding the complaints, the Authority's decisions in each case convey sensitivity to the cultural and public sensibility concerns. In these cases a ‘greater good’ in terms of public awareness of child abuse is arguably justification for showing the graphic evidence of abuse. However, there is substance in the complainants' arguments in both cases that the display of horrible photos may effect emotional response but do not enlighten the public about the important issues related to child abuse.

##### ***Barraclough and CanWest TVWorks (Decision 2005-024): Identification of Boys on Security Camera Footage***

Very different kinds of issues led to complaints about the use of film footage in Decision 2005-024. In this case, the complainant advised that her sons had experienced ridicule and judgemental complaints as a consequence of identifying material used in a *60 Minutes* item about a 15 year old girl who had run away from home. The elder 17 year old son had lodged a similar complaint. In response, the Authority decided that the boys were identifiable only to those who knew them and that there was nothing offensive or objectionable about the boys' portrayal in the programme (they were not suggested to be responsible or implicated in any way).

Having viewed the footage, the exposure of the boys is fleeting and the security camera photo includes others in the shot that gives less focus to the 15 year old girl and the boy beside her. The points made in the complaint about identifying the 17 year old's residence, however, does, from my viewing, have some support but, as with the security camera shot, only to people who live in the area and know who the occupants of the house are. The Authority's decision in this case seems to give appropriate weight and balance to the factors such as the degree of exposure (c/f Decision 1999-159-160), the age of the boys, the clear absence of culpability, and the limits to their identification.

***ECPAT and TV3 Network Services (Decision 2002-031-2): Identification of Child Abuse Victim and Child 'Prostitutes'***

The integration of privacy and fairness issues featured strongly in a complaint regarding the portrayal of the children in a TV3 20/20 documentary about child prostitution in Fiji (*Paradise Lost*). The complainant argued that the programme had breached the privacy of a young child abuse victim by identifying her mother/caregiver and filming her outside the Fijian court and, in so doing, identifying the child. Separately, the complaint also referred to the 'interview' of two young Fijian boys that both identified them and, in the views of the complainant, represented them as "prostitutes" and "liars".

Clearly, the identification of the children in this case occurs in a very different context to the boys in the security camera footage who were identified. In New Zealand, child sexual abuse victims are legally protected from such identification via suppression orders. It also seems unlikely that reporters in New Zealand would not ask children if they were prostitutes yet asking Fijian boys appeared to be ethical to the 20/20 reporter. The broadcast of these actions can accordingly be deemed "highly objectionable and offensive" to the mores and sensibilities that may influence a New Zealand viewing audience.

Notably, and surprisingly, the Authority's decision does not use the term children once in its 11 item consideration of the privacy complaint, apart from reference to "the child sex trade". Rather it uses the terms "person" "individual/s" "child abuse victim". The effect is to erase the child and youths and render them invisible. While privacy can be argued, as the Authority does, on legal points the position of children and young people as dependent on adults to afford due protection from exploitation and unfair treatment is highly salient; decisions about children's privacy warrants consideration of the issues from a child's perspective with due consideration for the United Nations Convention on the Rights of the Child. In essence the decision considers i) its jurisdiction to consider privacy concerns in this case, ii) whether "public disclosure" has been made and iii) whether the broadcast is in the "public interest".

Having ascertained its jurisdiction to rule on the complaint and the designation of public disclosure of private facts, the Authority then ruled that although child prostitution is of public interest, it does not justify the disclosure of private facts. Regarding fairness, the Authority determined that breach of privacy is inherently

unfair. While performing the task required of it, in this instance the Authority provides a decision of limited helpfulness as a reference point and broadcasting resource on the protection of children's privacy rights.

### ***Section Summary***

The four decisions discussed in this section demonstrate the wide variability of complaints that may be made within the Privacy Provisions and the extent to which these may overlap with the fairness provisions of the Code. They also demonstrate the variability in ways that the different incarnations of the Authority have approached the process of dealing with complaints; some provide a clear and well documented reference point for broadcasters as a guide to future practice and others limit the scope to breach/no breach dimensions. In order to enhance both utility and consistency, there seems to be a need for broadcasting guidelines specifically related not only to children, but also to programmes dealing with the highly sensitive area of child abuse. Such a need is further underlined in discussion of decisions in the next section where, once again, broadcasters' foray into sensitive areas exposes their inadequate attention to the rights and needs of children.

## 5. Consent Matters: Can consent protect children's interests?

Complaints referencing privacy and consent matters uniformly deemed parental consent to be contrary to children's interests. Most of the complaints clustered around disclosure of private facts related to the family: child abuse, child custody and child paternity. This section examines the Authority's responses and decisions made in these complaints cases.

### ***JB and TVNZ (Decision 2006-090): Custody Dispute, Father's Use of Child Video Film Footage***

The complaint in this decision referred to a TVNZ *Sunday* item about the frustrations of fathers with the Family Court. Specifically, a father had made available video footage of his daughter playing at home and a recorded telephone conversation with her in which her responses could clearly be heard (and sometimes sought). The key issue in the complaint, related to the child, was one of privacy; the child's mother complained that her daughter's identity was revealed when she, as custodial parent, had requested that TVNZ not reveal it and she argued that showing the video footage and playing the recorded telephone conversation were not in her daughter's best interests. The Authority upheld the breach of privacy on the grounds that the disclosure of the material in relation to the child was "highly offensive; that is, to an "objective reasonable person". It also underlined that its decision was because the private facts revealed were of an emotional and personal nature and pertained to a "vulnerable child".

Adopting a child's rights perspective, neither the father nor the broadcaster had a right to use material that was personal to the child without the consent of the child or of the custodial parent. The material is not inherently 'highly offensive'; viewed by the child's family and those invited to view it is perhaps a treasured visual memory of a particular moment in the child's life, or perhaps something they watch 'for fun'. Its 'offensiveness' is the violation it represents in being lifted out of its family context to be used to arguably emotive and persuasive purposes about the perceived injustices done to a father by the Family Court. In other words, the exploitative nature of the use of the child's material underlines the item's offensiveness.

Appropriately, the Authority deemed the use of the child's material exploitative and contrary to the child's interests in the sense that it was unnecessary identification in a domestic conflict context. Importantly, however, this is a case where lack of consent from the appropriate person (the mother as custodial parent) should have prevented the misuse, some would say abuse, of a child's personal material. If the child had been asked, she may well have given her assent to please her father (particularly if full information about purpose of using it was not explained) and this case typifies a situation where an independent advisor would have been appropriate on the child's behalf because of the significant loyalty pulls that children experience in parental separation.

***Kiro and CanWest TVWorks (Decision 2006-105): Young Person's Interview in Child Abuse Item***

The Authority's decision in this case draws out some crucial aspects of consent and privacy issues concerning children and young people, again in the context of a sensitive domain; child abuse. The content of the complaint references a *Campbell Live* interview with a 14 year old boy whose mother had been found not guilty of assaulting her son with a riding crop under Section 59 of the Crimes Act (before repeal). The complainant raises issues of consent, exploitation, privacy, and child's interests in relation to the conditions and content of his interview.

There are two key matters in this complaint that warrant elaboration. The first is the matter of whose consent is sought, under what conditions and, related to the latter, in whose interests. The Authority points out in its decision that at the time of the broadcast, a 14 year old was not considered a 'child' under the privacy principle and so the question it had to address was whether the boy consented freely to be interviewed and also the disclosure of private facts that might identify him. However, its decision was in effect that it was unable to make a decision because it considered a decision would require interviewing the boy as to his consent.

While apparently statutorily restrained through age definition of the time, it is worth noting that the Authority's expressed reservations on the matter are well founded on the basis of the child abuse research literature, particular around the power dynamics. Children who live with violent or psychologically abusive parents are ever mindful of the punitive consequences they potentially face (e.g. alienation) if they do not please a powerful parent. At the same time, abusive parents are not always abusive and children often feel a sense of loyalty and love, however confused it may be.

In this instance, where the boy's involvement had already been accomplished through deception, the broadcaster placed him in an untenable situation where he had to try and manage what he said to avoid possible alienation, or losing the only mother he has, at some later stage. Had he been considered a "child", clearly it was not in the boy's interests to be interviewed under the programme's conditions. The Authority gave due weight to this in its decision, clearly recognising that the broadcaster had sufficient information of risks to the boy to know his involvement was inappropriate.

Notably, had the boy been deemed a "child" the broadcaster could have applied justification of parental consent for proceeding with the broadcast although according to principle 6 of the privacy principles, they would need to show that the broadcast was in the child's best interests. In that case the boy's wishes (and needs) could be ignored and the best interests of the boy over-ridden, with the same outcomes as documented in the complaints. As noted in the previous decision, however, in cases of family conflict children and young people may give assent in an effort to try and keep a parent happy. These cases in particular may require the use of a suitably qualified, experienced child advisor. In the 14 year old boy's case, the Authority's inability to rule on the consent aspect due to the boy's age was

nonetheless redressed to some extent through the fairness provisions of the principles.

***Commissioner for Children and Others and TVNZ (Decision 1999-093): Revealing Results of Child Paternity Test on Live TV Show***

In a family matter aired on TV2's *You be the Judge* involving different sensitivities, multiple complainants raised concerns about the public disclosure of a DNA paternity test pertaining to a six year old boy who, up to that point, did not know the identity of his father. Complaints addressed various facets of the disclosure including: the absence of the child's consent; the "highly offensive and objectionable" nature of the disclosure; the absence of child or public interest being served; and the exploitative nature of the programme in using the child's private information.

The Authority established that the child's identity was revealed through identification of his parents and proceeded to systematically consider the complaints. They agreed the disclosure contravened standards of good taste and decency, finding both the manner of the disclosure (paralleling it with game show genre) and the violation of the boy's private information about his father's hitherto unknown identity "highly offensive". Nor did it find any justification of public interest. In so doing, the Authority gives full recognition to children's rights to own their private information. Moreover, it upheld the child's right to privacy over the right of the parents to discuss their personal family circumstances.

Across all the decisions reviewed, this is the one instance in which the Authority so clearly underlines that parents do not necessarily make decisions in the best interests of their child nor do they necessarily protect the rights of their child. The insufficiency of parental consent is highlighted in this case and the Authority aptly points to the broadcaster's responsibility to ensure that where parental and child interests do not align there is an independent advisor for parents and child respectively. However, as des Tombe (1999) notes, it also suggests that broadcasters need clearer direction on consent and privacy issues concerning children.

Addressing the complaints that reached into areas of fairness, and in contrast with Decision 2002-031-032 discussed earlier, the Authority argued that there were matters of fairness that did not relate to privacy. Again, as with its detailing of the consent and privacy considerations, the Authority reveals well-grounded understanding of children's issues. That the child was exposed to public scrutiny in a sensitive situation which may not have been fully explained to him and to which his consent may not have been sought, are important issues that the Authority recognises and gives due weight to. In its conclusion, the Authority points to the "desirability of developing a Code of Practice which relates specifically to children" but more than 10 years have passed since the statement and such a Code is persistently absent.

***Burnell and Others and TVNZ (Decision 1999-087-89): Filming of Child Against his Wishes***

*You be the Judge* drew widespread public and media censure for what was perceived to be a gross violation of good taste and decency (see Des Tombe, 1999; Ridley, 2000). A *Holmes* episode on ADHD, in which an eight year old boy's disruptive behaviour at home and in the GP's office had been filmed against his wishes, similarly elicited strong, adverse public reaction. Three complaints to the Authority documented privacy and confidentiality concerns regarding the child's clear indication he did not want to be filmed, his identification, and the display of his medical records on camera when produced by the family's GP. One of the three complaints also mentioned the mother's negative statements about the child, expressing concern about their impact on the child's current and future emotional well-being. The issues this particular item raises are multi-layered and complex and this is reflected in the Authority's detailed, lengthy explication of its decisions.

On the matter of privacy, the Authority ruled that there had been a clear breach of the boy's privacy that could not be justified on grounds of public interest; they argued that the story did not progress public knowledge on ADHD and could have been told without the intrusive filming of the boy and showing his identity. Indeed, the Authority adopted the view that the mere presence of the film crew exacerbated the episodes at home and at the doctors, which is supported by the boy's constant references to get the camera out.

Children with the kinds of behavioural disturbances, associated with ADHD, typically have low thresholds for stressful situations (Carr, 2006) and the camera crew's ignorance of the boy's wishes would have created a difficult, intolerable situation for him (if he in fact had a reliable diagnosis of ADHD). The crew failed to read the boy's signals that he was distressed and one way his behaviour may be understood is, to some extent, as an expression of his powerlessness in being able to control the situation. The harsh restraint and dragging of the highly distressed boy (the term does warrant application here) by the arms by his mother and 'family friend' presented a humiliating and degrading picture that violated fairness, the child's interests (intrusive filming of his distress exploitative), good taste and decency and his privacy.

A particularly important aspect of the complaints considered by the Authority in its decision concerned the matter of consent. In ways indicative of his emotional state and resources for coping, the boy had made it clear that he did not want to be filmed but this was completely ignored. In this case, the broadcaster believed it was justified in filming because the mother's consent had been given. As with *You be the Judge*, once again the rights and interests of the child are in direct conflict with the rights of the parent. The boy's mother consented not only to filming the boy in his home but also in the doctor's surgery where she apparently had also agreed that the boy's medical records could be revealed to the viewing public. The doctor's actions, regardless of the mother's consent, defy professional ethics; the client/patient is the child, not the mother.

In proceeding to film the boy's behaviour, the camera crew not only violated the boy's wishes (consent) and created a psychologically distressing situation, but in so doing exposed his behaviour to a nation of viewers; that this was unjust and potentially humiliating is appropriately recognised in the Authority's decision. The arguments detailed both in this and the *You be the Judge* decision point to the very strong need to **prevent** these kinds of violations of children's privacy rights through a code of practice specifically related to children.

### ***Section Summary***

All of the decisions discussed in this section demonstrate effectively the limits of parental consent in protecting the interests of children. Where parents have their own agenda for participation in a broadcast, whether oriented to service provision or perceived injustice, children may be too easily drawn in to support claims and enhance the cause. The Authority's decisions in each case reflect careful attention to children's rights and interests and the detailing of decisions is such that they provide a very useful reference for broadcasters. Consent issues in cases of family dispute, abuse, or custody are laden with issues of power; children's assent, while still important, may be influenced by a desire to try and please one or both parents. In such cases, broadcasters need to involve an independent advisor who can evaluate the child's best interests.

## **6. In the interests of fairness and protection from exploitation**

In the next and final section of the review, two decisions that are not accommodated by the broad themes under which the preceding decisions could be organised are discussed. These refer to exploitation and fairness standards of the Code.

### ***Whiterod and CanWest TVWorks (Decision 2004-180): Interview with Child on Protest March***

The complainant in Whiterod and CanWest TVWorks suggests that the broadcaster, TV3, exploits a child in a news item by interviewing him about why he was on the Destiny Church's march against the Civil Union Bill. Although the matter of the child's consent, and parental consent on behalf of the child, are not raised as part of the complaint, it is nonetheless an interesting question; the reporter it seems takes the child's participation as consent to be interviewed on national television.

In viewing the footage, the child appears to have some difficulty in articulating his responses. In the context of the theme of the march, this child needed to be mindful of saying 'the right thing' and at the point at which his parents removed him (suggesting they had not given their consent) the risk of him saying 'the wrong thing' had perhaps become apparent. Reporters need to be aware that children immensely enjoy the idea of being on TV, and 'famous' for a moment (as can be seen when, given the opportunity, they place themselves in the camera lens giggling and performing); nonetheless it doesn't necessarily mean they understand the implications or are aware of what kinds of questions they may be asked. In the adult-child balance of power, many children do not think they have the right to refuse; if an adult asks them a question, politeness requires an answer.

Approaching children to give an opinion values their right to participation but needs to be tempered with an assurance that they don't have to answer questions if they don't wish or don't really know what to say. While the questioning of the child does not appear to be exploitative of the child or contrary to his best interests, as found by the Authority, the matter of interviewing children is nonetheless an area in need of some guidelines.

### ***CYFS and TVNZ (Decision 2006-058): Reconstruction of Child's Behaviour***

A small part of this complaint about a TVNZ *Sunday* item on child abuse refers to the portrayal of the children. Specifically, the item involved an interview with CYFS foster parents alleged to have physically abused children in their care. The item presents a reconstruction of the key child's acts of destruction, one reported by the school and the other by the foster parents regarding acts of vandalism at the farm. The main issue in the complaint addressed the programme's depiction of the children as untrustworthy liars in that their allegations of abuse appeared to be discounted under the weighting of the programme toward the views of the foster parents and wider family members. Additionally, the complaint attended to the failure of the broadcaster to accurately describe and account for the reliability measures within the evidential interviewing process.

In its response, the broadcaster presents the flawed view that children are unreliable witnesses, revealing its reliance on a pervasive myth about children's memory. There is a solid documented body of research that shows children are no less reliable as witnesses than adults; adults are as easily misled about their memories as children (see Bottoms, Najdowski & Goodman, 2009). This is an example of how constructions of childhood (in this case as prone to telling lies) can influence the approach taken by broadcasters with or toward child participants or viewers and, again, underlines the need for a children's broadcasting code of practice. The Authority's decision upholds the complaint regarding the portrayal of children, in the absence of the evidential interview material being discussed, but not in relation to the reconstruction.

## 7. Concluding Comments

On the whole, the Authority's decisions about children in relation to broadcasts to and involving them can be well supported by the various research literatures referred to in the opening section of this review. Despite the lack of a coherent, readily accessible code of practice for children, the Authority shows in its decisions that it can effectively use existing provisions to ensure that children are accorded the dignity, respect and rights accorded to them under the United Nations Convention On the Rights of the Child. At the same time, however, the complaints process happens after the fact and any poor treatment of children by the media has already exacted its effect and cannot be erased from the viewing child or public's memory. Supporting des Tombe's (1999) call for a 'Code of Practice for Children', the provision of clear guidelines on procedures with child participants may both enhance media treatment of children and prevent broadcasts that are contrary to children's interests.

Ethical matters concerning children are not black and white: they are complex and difficult (Mishna, Antle & Regehr, 2004). With this caveat in mind, a key aspect of any code of practice for children would need to be consent procedures. As so clearly documented in the previous section, some of the most 'objectionable' material in broadcasts contravening children's privacy and interests has been permitted through parental consent. Clearly the assumption that parents (and broadcasters) will act in the best interests of children cannot be relied on; it is particularly flawed in cases of child abuse and parental disputes. In one case reviewed, the broadcaster ignored a custodial parent's efforts to protect her daughter's interest and in another the legal custodian, CYFS, was not approached. Clarity is also needed, then, around who can legitimately consent on a child's behalf.

If a broadcaster and a parent cannot be relied upon to safeguard the interests of children, then what can be added to practice guidelines in a recommended code of practice for children? Currently, children themselves have no rights regarding their participation, a state of affairs that is contrary to the United Nations Convention On the Rights of the Child. Not only does this absence overwrite the child's rights and wishes to decide for her/himself but it also constructs her/him as powerless; vulnerability is not a "prime concern" (Privacy Principle 6) in this context but a prime production of the principles.

Research across a range of areas (e.g. medical procedures, child testimony and research participation) suggests that provided children are informed in a developmentally appropriate way, they can indeed give meaningful consent (see Fullerton, 2004). Social science researchers generally use the term 'assent' for children and young people under 16 and also seek parental consent for children to participate in research. Some, however, argue from a child's rights perspective that consent should not be downgraded to assent (e.g., Darbyshire, 2000; Powell & Smith, 2006). Whichever term a children's code may incorporate, establishing the willingness of children and young people to be interviewed or filmed is a critical step in giving full recognition to their interests.

There are some important elaborations to make regarding children's consent. One is that it must be informed consent and this requires provision of clear, full and age-appropriate information about the use of a child or young person's material and why broadcasters want to include it (Fullerton (2004) uses an excellent case example of how this can be done). A second consideration is the contexts under which the consent is given: the power dynamics in child-adult relationships may influence children to do what they think parents want them to (Smith & Taylor, 2000).

In cases of child abuse particularly, but also where there are conflicting parent relationships, children and young people may find it especially difficult to express what they actually 'want' and act rather out of loyalty or anxiety about the consequences of giving or refusing their consent. Finally, there is the matter of age: when can a child be expected to understand what their consent involves? In social science research even older pre-school children are told, in ways they can understand, what a researcher wants them to do and are given the option of saying no if they don't want to participate and this could also be the case in a media context. However, for the very young, pre-schoolers and in cases of sensitivity, family conflict or violence and child abuse, a sensible practice would be the additional reference to an independent advisor who can represent the child's interests from a standpoint of knowledge about and experience with children.

Tightening and clarifying consent procedures pertaining to children and young people's participation in broadcasts is one step that can be taken to enhance guidelines for broadcasters and assist the Authority with its decision making consistency across complaints made to it. Although this step does impact on protection of children's interests it is insufficient in itself. Currently, this review suggests that the Authority uses the existing Code to good effect in relation to children despite the slipperiness of terms such as "public interest" and "children's interest". However, within existing provisions, broadcasters currently do not need to specify (and inform parents/children) how a media text actively is in a child's best interests; rather it is judged through absence of some possible detrimental effects. Much as social science researchers must do with child participants (Fullerton, 2004; Gollop, 2000), broadcasters should be able to explain to children and young people how they hope the programme will benefit them as part of a consensual process. If they are unable to do so, perhaps the broadcast is not in the child's interests.

Similarly to children's interests, the justification of privacy breach on the basis of "public interest" provides considerable manoeuvrability for broadcasters, although the Authority provides a good resource in some of its better detailed decisions. Des Tombe (2001) points out that the British broadcasting code prefixes the term "public interest" with the word "overwhelming" which implies there must be a highly compelling reason founded in the public's need for the information provided. Amongst the decisions reviewed, using "overwhelming public interest" may have made it difficult for the broadcasters to justify filming a highly distressed 8 year old boy in the name of showing what ADHD 'looks like', revealing a boy's previously unknown paternity in an entertainment fashion or showing the forced separation of

a toddler from her mother. None of these broadcasts were in either the public or the child's interests.

The protection of children's interests assumes even greater importance in contexts of high sensitivity, as indicated by the number of complaints of privacy breach in such circumstances. The high proportion of complaints related to these contexts suggests it is an area in need of greater guidance. Specific ethical guidelines are needed for broadcasters where they are wishing to film or interview children who are enmeshed in difficult life situations, for example physical abuse, sexual abuse, domestic violence, traumatic events, and family separation. There would need to be "overwhelming public interest" and compelling evidence of children's interests before proceeding and before any breach of the child's privacy. Where interviews are involved, reporters need very clear guidelines (assuming consents are obtained) for interviewing children in sensitive situations.

As noted earlier, this review does indicate that the Authority can work within the current Code of Broadcasting Practice effectively, in the main, to ensure the protection of children's rights and interests. However, the complaints and the responses of broadcasters to those complaints point to the undermining of children's privacy rights and interests. Giving full recognition to these in a separate code for children would seem the most effective way to bring clarity and recognition to the important issues that need to be addressed when children are to feature in broadcasts.

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