

"GET THAT CAMERA OUT OF MY FACE!"

A LOOK AT CHILDREN, PRIVACY AND THE BROADCASTING STANDARDS

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This article looks at the current national and international law surrounding children's rights to privacy in broadcasting. It examines issues of consent, both of the parent and the child, as well as public interest defences where consent is absent. The article concludes that the Broadcasting Standards Authority should develop a new and separate broadcasting code for children's privacy rights based partly on overseas precedents.

I INTRODUCTION

With the drive for ratings and the advertising dollar heating up some television programmers are compromising their standards. In March last year a *Holmes*¹ broadcast contained an item involving a boy with Attention Deficit Disorder (ADD) and the problems his mother faced trying to look after him. At points throughout, the boy made it blatantly clear that he did not want to be filmed yet the piece was still broadcast. *You Be the Judge*,² on Television New Zealand's (TVNZ) Channel Two, showed a six year old boy finding out who his father was after a paternity test. The former Commissioner for Children, Dr Ian Hassall, said of the show "It's absurd, it's cruel and it's inhumane. I'm astonished that anybody could be so crass and unfeeling to do such a thing. I don't believe

* This paper was submitted in fulfilment of the LLB (Hons) requirements at Victoria University in 1999.

1 "Holmes" TVNZ (TV1), 4 March 1999, 7.00pm [Holmes].

2 "You Be the Judge" TVNZ (TV2), 30 March 1999, 7.30pm.

it. Not in this country, it's too civilised."³ Programmers and producers have used children to boost ratings. They have broadcast very private matters whether or not the child wanted it.

There has been an increase of similar programmes and broadcasts and an increase in the number of complaints alleging breaches of children's privacy to the Broadcasting Standards Authority (BSA). While in most instances the BSA can deal with the complaints adequately it has nevertheless raised some concerns. In dealing with a complaint against TVNZ the Authority "...felt concern that TVNZ appeared not to have specific procedures to be followed when interviewing young children for a television broadcast" and that "more specific requirements should be in place."⁴ The Authority also noted that the mechanisms it uses to deal with privacy complaints might not be sufficient. "The Authority is... mindful of the fact that it has yet to develop a principle which deals specifically with the privacy interests of children."⁵

Broadcasters must know what they can and cannot do. It is obvious from the mounting number of complaints that the guidelines are not clear enough. The Broadcasting Standards Authority needs to amend its codes and standards to curb the rising tide of privacy breaches concerning children. In so doing, it must have regard to the rights set out in the United Nations Convention on the Rights of the Child and then develop these rights so it can incorporate them into its standards. In the context of broadcasting and the media a principle would also address issues such as consent and relevant defences. These will be discussed below. First, it is necessary to explain some background law including the Broadcasting Act and the BSA's functions and powers.

II BACKGROUND LAW AND THE BROADCASTING STANDARDS AUTHORITY

A *The Privacy Act 1993*

The Privacy Act 1993 would seem to be the most appropriate legislation to look to for a problem concerning privacy, but it does not apply. This is because "news media",⁶ in relation to their "news activities",⁷ are excepted from the definition of agencies⁸ that the

3 "TV Show is Inhumane, Hassall says" *The Evening Post*, Wellington, New Zealand, 29 March 1999, 1.

4 *Hetherington v TVNZ* (31 May 1995) unreported, Broadcasting Standards Authority, Decision No 44/95.

5 *Smits v TVNZ* (12 February 1998) unreported, Broadcasting Standards Authority, Decision No 1998-005/006, 3.

6 Privacy Act 1993, s 2- Interpretation, "News medium".

7 Privacy Act 1993, s 2- Interpretation, "News activity".

Act applies to under section 2 of the Act. Most privacy complaints arise from news or current affairs activities so complaints cannot be made to the Privacy Commissioner. Complainants, therefore, may only lay privacy complaints with the particular broadcaster or the BSA. The Privacy Act would apply to broadcasters in capacities not associated with news activities such as employment, but it is arguable that the Act would apply to a broadcast that was not a news or current affairs item. According to *Talley Family v National Business Review*,⁹ heard in the Complaints Review Tribunal, situations such as this may still be out of the jurisdiction of the Privacy Commissioner. The Privacy Act may be helpful for its general principles but its use is limited to that. In any event, the BSA is the best body to hear matters concerning broadcasting as it was created specifically for that purpose.

B The Broadcasting Act 1989 and the Broadcasting Standards Authority

The Broadcasting Act 1989 replaced the 1976 Act of the same name¹⁰ to regulate the broadcasting industry in New Zealand. It established the Broadcasting Standards Authority¹¹ and it defines the Authority's roles and functions. It is from this Act that the BSA gets its powers and guidance to determine complaints and to amend its principles and codes of broadcasting practice. In relation to privacy, section 4 provides the standards that all broadcasters and programmes must adhere to:

4. Responsibility of broadcasters for programme standards-(1) Every broadcaster is responsible for maintaining in its programmes and their presentation, standards which are consistent with-

...

(c) The privacy of the individual;

...

Section 4(1)(c) clearly states that programme standards must be consistent with the privacy of the individual and it is this section that the BSA regards as the most important. Section 4(1)(e) maintains that broadcasters must also adhere to codes that the BSA has developed under the powers conferred on it by section 21. That section allows the BSA to develop codes in relation to the protection of children,¹² but it does not mention privacy.¹³

8 Privacy Act 1993, s 2- Interpretation, "Agency" (b)(xiii).

9 *Talley Family v National Business Review* (1997) 4 HRNZ 72.

10 Broadcasting Act 1976.

11 Broadcasting Act 1989, s 20.

12 Broadcasting Act 1989, s 21(1)(e)(i).

To overcome this obstacle the BSA has developed privacy principles by way of an Advisory Opinion¹⁴ to give guidance to broadcasters as to how it interprets section 4(1)(c). However, neither the codes relating to children nor the Advisory Opinion mention children's privacy in particular. The BSA should either develop a comprehensive code or should amend the Advisory Opinion to show to broadcasters that section 4(1)(c) is a valid and important consideration for all, including children.

C Why the BSA's Advisory Opinion on Privacy is not Sufficient

Although the privacy principles would still apply to a child, as they stand they do not suffice. There are two important areas where the present principles are lacking. They are consent and the public interest defence.

The principles are based mainly on United States case law since there was a lack of New Zealand precedent concerning privacy at the material time. The American cases did not address children either so it is understandable therefore, why the New Zealand principles do not cater specifically for children and why there are problems surrounding consent and public interest.

The fact that the Authority is receiving more and more complaints involving children and privacy shows that the current privacy principles do not act as a clear enough guide to broadcasters. The Authority, in the Advisory Opinion, states nonetheless that:¹⁵

[The] 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.

With the authority from both case and statute law the BSA can amend its present principles or may develop a specific code. Any change must take account of the issues involving consent and public interest. Presently, principle (vii) of the Advisory Opinion states that, "an individual who consents to the invasion of his or her privacy cannot later succeed in a claim for a breach of privacy." The problem then, is that if a parent or guardian gives consent on behalf of the child that is the end of the matter. The child may not later complain nor may anyone else. As to public interest, any matter which is in the

13 The Broadcasting Amendment Bill (No 2) is currently before Parliament. Clause 3 of that Bill would amend section 21 to include privacy of the individual amongst those matters for which the BSA may develop codes of broadcasting practice. However the amendment would only clear up an inconsistency rather than change any substantial part of the law.

14 Broadcasting Act 1989, s 21(1)(d) allows the BSA to formulate Advisory Opinions.

15 See appendix A

public interest is a defence to an individual's claim for privacy. However, this standard should perhaps be more strict for broadcasts involving children due to their vulnerability. These matters will be discussed below.

Adults often pressure children to do what the adult thinks is right leaving children with little say in matters that directly affect them. For example, in the *Holmes*¹⁶ show that featured the boy with ADD, the boy explicitly stated that he did not want to be filmed yet TVNZ went ahead anyway on the basis that his mother had given consent. A broadcaster would most likely have respected an adult's right not to be filmed, yet because the boy is younger he seemingly has no rights or his mother has usurped them. Children need protection from influences that may harm them. Unwanted attention, if it has stemmed from private or embarrassing circumstances, will harm a child, especially so in New Zealand where anonymity is harder to achieve in its small population.

D The Holmes and You Be the Judge Decisions

Recently, two BSA decisions upheld complaints alleging breaches of children's privacy. They were a complaint involving the *Holmes* show¹⁷ and a complaint involving the *You Be the Judge* show.¹⁸ The Authority stated that:¹⁹

The present Privacy Principles and Codes of Practice have not been an impediment to the Authority's decision-making, notwithstanding that they do not have specific provisions relating to children. However, the Authority acknowledges the desirability of developing a Code of Practice that relates specifically to children....

Despite having no problem in upholding the complaints, most likely due to the obvious and gross breaches of privacy in each case, the Authority still noted that "[t]he issue of filming young children is one which broadcasters will appreciate is fraught with difficulty."²⁰ This only goes to show that broadcasters need a clear and coherent guideline to overcome the difficulty. Furthermore, the Authority found in both cases that the validity of consent from parents was problematic notwithstanding that it "appreciate[d] that TVNZ obtained the consent of the child's mother to the filming." The BSA is aware of the problems that broadcasters face so it should therefore aid them by amending its present

16 *Holmes*, above n 1.

17 *Burnell v TVNZ* (15 July 1999) unreported, Broadcasting Standards Authority, Decision No 1999, 87-89.

18 *Commissioner for Children v TVNZ* (15 July 1999) unreported, Broadcasting Standards Authority, Decision No 1999, 93-101.

19 *Commissioner for Children v TVNZ* above n 18, 16.

20 *Burnell v TVNZ* above n 17, 14.

privacy guidelines. It would be easier for the BSA to apply settled principles to cases involving children rather than go about such cases in an indirect and sideways fashion. Furthermore, it would benefit both the BSA and broadcasters in practice, if not in theory, to have a coherent and separate guide.

There have been other programmes that have dealt with sensitive issues involving children but in a far better way than either *You Be the Judge* or *Holmes*. TV3 ran a documentary about a woman dying of cancer and her son.²¹ The programme was filmed over a period of time and counsellors were involved in the production and post production work. The boy had time to discuss the implications and had the right to voice his concerns. He was however, never informed of his rights nor were his views actively procured.²² A new code would make broadcasters' and producers' obligations all the more certain. As will be seen below children are entitled to the protection of the law against interferences with their privacy. A new code would give this protection for broadcasting matters at least.

E The United Nations Convention on the Rights of the Child

There is no doubt that children have a right to privacy. Article 16 of the United Nations Convention on the Rights of the Child clearly provides that:

- (1) No child shall be subjected to arbitrary or unlawful interference with his or her privacy, family, home or correspondence, nor to unlawful attacks on his or her honour and reputation.
- (2) The child has the right to the protection of the law against such interference or attacks.

New Zealand ratified this core international Convention in 1993 and therefore has obligations to protect and promote the rights set out in the agreement. Arguably, the BSA, being a Government agency, must move towards implementing the rights of the Convention or at least it must conform by providing children with an explicit right to privacy. The Authority has stated that it takes "the same approach as the courts in interpreting the Convention's relevance, by giving due regard to the principles in reaching its decision[s]."²³ If the Authority is aware that it must have regard to the Convention in its decisions, then it should also incorporate the Convention's principles into its own privacy standards.

Article 43 provides for the establishment of a committee to review and examine the ways State parties are achieving the realisation of the obligations undertaken in the

21 "Inside New Zealand: My name is Jane" TV3, 21 March 1999, 8.30pm.

22 Pamela Stirling "Mother Love" *The Listener*, Auckland, New Zealand, 17 April 1999, 20.

23 *Commissioner for Children v TVNZ* above n 18, 15.

Convention. This committee receives reports from each signatory country and replies with observations and recommendations to the specific country. The recommendations are not binding but the signatory country should give them careful consideration. In its report to New Zealand in 1997, the committee, while generally pleased with New Zealand's progress so far, raised some matters of concern. A principal worry was that:²⁴

[New Zealand's] approach to the rights of the child appears to be somewhat fragmented, as there is no global policy or plan of action which incorporates the principles and provisions of the Convention, encompassing all the areas covered by the Convention.

Were there a global policy, government agencies would have a much easier task. The BSA, when making a ruling on a privacy breach or some other right affecting a child, would be able to do so with greater ease. There would also be an accepted standard from which to develop a new code. The UN committee did recommend:²⁵

that [New Zealand] prepare and adopt a comprehensive policy statement with respect to the rights of the child, incorporating the principles and provisions of the Convention, that could provide guidance to all those involved in support services delivered or funded by the Government. [Also] the Government [should] pursue the process of bringing existing legislation into line with the principles and provisions of the Convention....

On the basis of that report, it is clear that the Government has not completely fulfilled its international obligations. Moving to incorporate the provisions of the Convention into law would give guidance to government departments and agencies. Nonetheless, the BSA need not wait for that to happen. It should conform to the UN Convention as soon as practicably possible. The UN Convention makes it clear that children's privacy is a legitimate concern. If the BSA is a little unsure of how best to form a new code it should look to other countries for direction.

III OVERSEAS CODES AND STANDARDS

It is useful to look at overseas broadcasting codes and standards as a starting point to help formulate a new principle in New Zealand. However, the BSA should look at them only as a guide and then tailor them to suit New Zealand's conditions.

On the whole there are very few countries whose codes specifically address the issue of children's privacy. Many consider both children and privacy in their broadcasting standards but treat them as separate issues. The codes and standards that do mention

24 Ministry of Foreign Affairs and Trade *Convention on the Rights of the Child: Presentation of the Initial Report of the Government of New Zealand* (Wellington, 1998) 29 [UN Committee Report].

25 UN Committee Report, above n 24, 30.

children have an emphasis on the actual programmes that children might watch and the content of such programmes, such as excess violence, sexual content or negative stereotyping. The Australian Commercial Television Industry Code of Practice is representative of many codes of practice world wide in dealing with children and privacy, and is also similar to New Zealand's present codes. Section 4: News and Current Affairs Programmes follows:

4.1 This Section is intended to ensure that:

...

4.1.2 news and current affairs programmes are presented with care, having regard to the likely composition of the viewing audience and, in particular, the presence of children;

4.1.3 news and current affairs take account of personal privacy and of cultural differences in the community;

....

Privacy of children is not guaranteed and more weight is placed on what a child may see rather than who may see a child. Privacy and children are treated as distinct issues. The United States has a specific Children's Television statute²⁶ and other federal regulations but they do not address privacy specifically. They are more concerned with the education content of programmes, the effects of advertising on children and allowing children to participate in the media.

A United Kingdom Codes

It is perhaps the United Kingdom which has best dealt with the issue of children and privacy so far. Both the Broadcasting Standards Commission (BSC) Codes, which regulate State owned television channels, and the Independent Television Commission (ITC) Codes, which deal with commercial television, address children's privacy. The BSC Codes contain a comprehensive section on privacy with a separate subsection devoted to children. That section follows:

Broadcasting Standards Commission Code

Children's vulnerability must be a prime concern for broadcasters. They do not lose their rights to privacy because of the fame or notoriety of their parents or because of events in their schools. Care should be taken that a child's gullibility or trust is not abused. They should not be questioned about private family matters or asked for views on matters likely to be beyond their capacity to answer properly. Consent from parents or those in loco parentis should

²⁶ Children's Television Act 1990 (Fed).

normally be obtained before interviewing children under 16 on matters of significance. Where consent has not been obtained or actually refused, any decision to go ahead can only be justified if the item is of overriding public interest and the child's appearance is absolutely necessary.

Similarly, children under 16 involved in police enquiries or court proceedings relating to sexual offences should not be identified or identifiable in news or other programmes.

Children's vulnerability is a fundamental concern in the BSC code. Any action the broadcaster takes must have this factor in mind. This is a good code on which to model a New Zealand standard and it is perhaps the only one on which to do so. However, it would be better to take note of the important concepts and specifically tailor a code rather than copy it directly. This way, the BSA could give real thought to the issue and could take account of New Zealand's different social and cultural contexts. The BSC code does not adequately address the issue of consent however, so the BSA would need to further investigate this for a new standard.

The ITC code may also be useful for its general ideas, but it is very much lacking in any substantive rights or directives. It serves more as a quick guide on what might not be acceptable for an interviewer to do.

Independent Television Commission Programme Code

2.6 Interviewing of children- Any interviewing of children requires care. Children should not be questioned to elicit views on private family matters, nor asked for expressions of opinion on matters likely to be beyond their judgment.

Consent and respective interests are not even mentioned and it is not detailed enough to solve the problem.

B International Federation of Journalists Guidelines

Apart from the UK codes, there is another document which specifically addresses children's rights and the media. At the *Journalism 2000: Child Rights and the Media* Conference held in 1998 and arranged by the International Federation of Journalists (IFJ), the Federation proposed a set of guidelines for reporting on children. The guidelines are extremely useful. They state:

Informed, sensitive and professional journalism is a key element in any media strategy for improving the quality of reporting concerning human rights and society. The daily challenge to journalists and media organisations is particularly felt in coverage of children and their rights.... To do their job of informing the public effectively, journalists must be fully aware of the need to protect children and to enhance their rights without in any way damaging freedom of expression or interfering with the fabric of journalistic independence.... Media organisations

should regard violation of the rights of children and issues related to children's... privacy... and all forms of exploitation as important questions for investigations and public debate. *Children have an absolute right to privacy* (emphasis added), the only exceptions being those explicitly set out in these guidelines.... Journalists and media organisations shall strive to maintain the highest standards of ethical conduct in reporting children's affairs and, in particular, they shall:

...

4. consider carefully the consequences of publication of any material concerning children and shall minimise harm to children;

5. guard against visually or otherwise identifying children unless it is demonstrably in the public interest;

...

9. use fair, open and straightforward methods for obtaining pictures and, where possible, obtain them with the knowledge and consent of children or a responsible adult, guardian or carer....

The International Federation of Journalists adopted these guidelines as a draft code to debate and develop over three years. They are therefore currently not in use and may need some amending. Nevertheless, they advance children's rights enormously and posit that children have an *absolute* privacy right subject only to a public interest defence.

These last three codes show that at least some countries and institutions are serious about protecting children's rights. They have all provided separate sections specifically aimed at children with the IFJ Code being the most comprehensive. Privacy is as important for children as it is for adults and these codes observe this fact. Nonetheless, they all fail to resolve the issue of consent that plagues the BSA when it has to make decisions involving children. This issue will be discussed below.

IV CONSENT

If a reporter is to interview or film a child, consent should be obtained either from the child or from the child's caregiver if it is a matter of significance. The question is whether obtaining parental consent or consent from another adult is *enough* to discharge the obligations of the broadcaster or journalist. In most other situations of importance involving a child, such as medical treatment, consent must be obtained from the child's parent or guardian before any action is taken.²⁷ The same should apply when matters of significance involving children are broadcast or images of children are shown that have some importance. Consent from an adult would of course not be needed *every* time a child

²⁷ Guardianship Act 1968, s 25.

was shown on television, but in matters where there may be some detrimental effect on the child, a broadcaster should obtain consent. Such matters might involve medical or behavioural conditions, matters embarrassing to the child or other highly personal circumstances.

A Definition of a Child

As a preliminary matter, it is necessary to define at what age consent becomes an issue. Anyone above a certain age will have no problem granting or declining consent themselves. The broadcaster will not be held liable for any allegation that it has breached that person's privacy if it has obtained consent from that person. For those below a certain age however, consent becomes a live issue. Who has it come from? Is it valid? And does the child have a say? These issues will be furthered below. Returning to the present question, there is no clear definition of a child under New Zealand law. The age at which a person may legally do certain activities differs quite markedly from 18, when a person gains the right to buy alcohol,²⁸ to 16, the age at which there is no legal obligation to attend school²⁹ to 14, the age at which a young person can be convicted of all crimes.³⁰ The UN committee:³¹

note[d] with concern the lack of conformity of relevant domestic laws with the definition of the child under the Convention, [and] further note[d] with concern the appearance of a wide range of cutoffs- which do not appear to be necessarily consistent- under legislation administered by various government entities for eligibility for different types of government support.

For the purposes of a broadcasting code, a child should be anyone under the age of 16. This would correspond with many other New Zealand laws and would conform to the UN Committee's concerns. It is also in conformity with the BSC Code. Those above 16 should automatically be treated as adults, there should be no requirement for parental consent and only that person's wishes should be adhered to. However, for those under 16, consent would become an issue. A broadcaster would need to obtain consent from a parent or caregiver and would have to take into account the wishes of the child as well.

28 Sale of Liquor Act 1989, s 155(2).

29 Education Act 1989, s 20.

30 Crimes Act 1961, s 22.

31 UN Committee Report, above n 24, 29.

B Only Legal Guardians Have the Authority to Give Consent

In the BSA decision of *Smits v TVNZ* the Authority accepted:³²

that permission was sought and given by persons who at that time apparently had the day to day responsibility for the child. But it [had] misgivings as to whether that was sufficient in the circumstances of [that] case.

It cannot be any adult who may give consent, it must be someone who has clear legal authority over the child. That would include those legally in loco parentis. As a code would apply only to broadcasts of significance, it is important that broadcasters protect themselves as well as children by obtaining consent from someone with the legal authority. TVNZ, as a policy, obtains permission from someone who seemingly has authority, but that may include a relative the child is staying with or a school teacher.³³ While this is better than obtaining no consent at all it may not be sufficient. To mitigate any risk to both the broadcaster and the child, only the child's legal guardians should consent for anything of an individual personal nature.

C A Child should Have a Say in the Matter

Article 12 of the UN Convention on the Rights of the Child (the Convention) states as follows:

Article 12- (1) States Parties shall assure to the child who is capable of forming his or her own views the right to express those views freely in all matters affecting the child, the views of the child being given due weight in accordance with the age and maturity of the child.

This provision is also mirrored in two New Zealand statutes. The first is in section 23(2) of the Guardianship Act 1968 which provides that for any proceedings under the Act relating to custody or guardianship of the child:

the Court shall ascertain the wishes of the child, if the child is able to express them, and shall... take account of them to such extent as the Court thinks fit, having regard to the age and maturity of the child.

The second is in section 5(d) of the Children Young Persons and Their Families Act 1989 which recognises certain principles to be applied when exercising powers conferred by the Act. Section 5(d) provides:

the principle that consideration should be given to the wishes of the child or young person so far as those wishes can reasonably be ascertained, and that those wishes should be given such

³² *Smits v TVNZ* above n 5, 3.

³³ Television New Zealand Journalist Rules.

weight as is appropriate in the circumstances having regard to the age, maturity and culture of the child or young person.

Extending this to giving consent on behalf of a child for the broadcasting of that child or that child's image then, due weight should be given to that child's view. The broadcaster should not only obtain consent from the parent or guardian but should also ascertain the views of the child and if the child is unhappy about any aspect, the broadcaster should seriously consider whether to go ahead or not.

Laurie O'Reilly, a former Commissioner for Children, made an important statement regarding adults giving consent on behalf of a child.³⁴

Adults cannot assume they always know what is in the child's best interest. If an adult has an investment in the outcome, how can he or she be truly objective? Sadly, many parents are forced to make compromises adversely affecting children to protect other relationships or to achieve other outcomes.

This seemingly occurred in *You Be the Judge* and in the item on *Holmes* involving the nine year old boy with ADD. The parents in both cases had ulterior motives. In the first programme the mother wished to find out who the real father was by way of a paternity test. As neither adult could afford the price of the test the producers of the programme paid for it. This was ulterior motive number one. But, if the outcome of the test showed that the man was actually the real father then the mother could hold him to his legal and moral obligations. This was ulterior motive number two. Unfortunately for the little boy at the centre of the dispute there was no direct benefit to him by this contention being televised. His mother consented for him to appear on television, but ultimately for her own benefit.³⁵

In the *Holmes* show the mother allowed her son to be televised against his wishes to highlight her own problems she had with raising her child and also to highlight the supposed lack of help she was receiving from governmental support agencies. As a direct result of the broadcast help became available to the mother. She had seemingly achieved what she had set out to do. Admittedly her son benefited from the help gained after the

34 Laurie O'Reilly "Children's Rights and Privacy- the Impact on Care and Protection" Paper presented at the Privacy Issues Forum, Wellington, 29 June 1995, 5.

35 It should be noted that in that case the boy's face was not actually shown nor was his name explicitly disclosed. However, the fact that his mother and the man disputed to be his father were clearly the centre of the dispute, and thus had their names disclosed, provided enough information for those that knew the boy to infer that it was him.

show but he suffered a gross breach of privacy in the process.³⁶ In the BSA's decision upholding the complaint³⁷ the Authority "appreciate[d] that the broadcaster [saw] the programme as one which would perform a social service. The question before it is whether that was achieved at the expense of the boy's interests." If the BSA were to make a requirement of broadcasters to ascertain the views of child then situations such as this would most likely decrease.

If we accept that children have rights as people, this involves recognising their competencies, allowing and encouraging participation in decision-making [and] understanding the child's capacity to be involved in and to make decisions about their lives.³⁸

Of course parents may always influence their children but with the "best interests" test, discussed below, the child should hopefully remain protected.

D A Broadcaster Must Obtain Consent From the Adult

There is of course another option and that is getting consent directly from the child, bypassing the parent or caregiver altogether. This would afford the child full rights to control his or her privacy. Although not directly concerning privacy but rather medical intervention into a child's life, the English House of Lords case of *Gillick v West Norfolk and Wisbech Area Health Authority*³⁹ discussed the issue of consent from the child. The majority decided that it would not be unlawful for health professionals to give contraceptive advice to young women under 16 without parental consent. Lord Scarman said that the right of parental control only existed when the child did not have the capacity to exercise her own judgment. A child has capacity when she has "sufficient understanding and intelligence" to make up her mind. The decision of whether a child had the capacity would be left up to the health professional in each case. Lord Fraser added that the decision to act without parental consent would have to be in the child's best interests but that it would still be up to the doctor to make the assessment.

This approach would be consistent with Article 12 of the Convention, however it would not be satisfactory in the context of broadcasting and the media. *Gillick* concerned a health matter and took a realistic approach to what happens in young people's lives. It did not set a limit on how young a child may be. Broadcasters, like health professionals, would

36 In this case the broadcast centred on the boy. His name and face were clearly revealed, therefore the breach of privacy was far greater than that of the *You Be the Judge* case. This is reflected in the penalties that the BSA imposed: \$5000 for *Holmes* and \$3500 for *You Be the Judge*.

37 *Burnell v TVNZ* above n 17, 15.

38 O'Reilly above n 34, 5.

39 *Gillick v West Norfolk and Wisbech Area Health Authority* [1986] AC 112 (HL).

have an onerous task deciding at what age a child was competent and then bypassing the parent if it felt the child fully understood the matter and consequences. In the case of health professionals though, there is perhaps more training to deal with sensitive issues involving patients, including children. During consultation the health professional can obtain enough information and can then make an informed decision. This is not so with the media who have a direct personal interest in having a child consent. In the end however, a choice involving serious consequences for future health is not on par with a decision to go on television. Broadcasters are simply not qualified to decide whether a child is actually mature enough to understand and give independent and informed consent. It would be far easier to have a set age above which the parent or guardian would not be involved and below which the parent or guardian would. Uncertainty could mean that a broadcaster may take advantage of a young child if it believed it had obtained proper consent from that child when in fact the child really did not understand or was somehow influenced.

In any event a child need not be fully autonomous to have rights. The parent may, and in most cases should, still be involved in decision making. Article 5 of the Convention does recognise that parents play a large role:

Article 5- States Parties shall respect the responsibilities, rights and duties of parents or, where applicable, the members of the extended family or community as provided for by local custom, legal guardians or other persons legally responsible for the child, to provide, in a manner consistent with the evolving capacities of the child, appropriate direction and guidance in the exercise by the child of the rights recognised in the present Convention.

A parent can teach a child what is right and wrong and can guide a child with the decisions the child makes. "To ignore parental input might be to deny the child a significant right."⁴⁰ The adult's views should not be imposed in place of the child's however, and neither should only the child's view be taken. A balance between the two would be the most desirable solution. Freeman states:⁴¹

To respect a child's autonomy is to treat that child as a person, and as a rights-holder. It is clear that we can do so to a much greater extent than we have assumed hitherto. But it is also clear that the exercise of autonomy by a child can have a deleterious impact on that child's life-chances. It is, of course, true that adults make mistakes (and also mistakes when interfering with a child's autonomy), but having rights means being allowed to take risks and make choices.... [C]hildren are different. Many of them have lesser capacities and abilities. Many of them are more vulnerable than adults. They need protection....If we are to make progress, we

40 O'Reilly, above n 34, 9.

41 M Freeman "Whither Children: Protection, Participation, Autonomy?" (1993) 22 Man LJ 323.

have to recognise the moral integrity of children. We have to treat them as persons entitled to equal concern and respect, and entitled to have both their present autonomy recognised insofar as it exists, and their capacity for future autonomy safeguarded.... [W]e must thus recognise the integrity of the child and his or her decision making capacities, but at the same time note the dangers of complete liberation.

E Best Interests

For children who are very young it is realistic to assume that the giving of consent will rest solely with the parent or caregiver, but that does not necessarily mean that the broadcaster should not at least try to ascertain that child's views. A good way of ensuring that any child is protected or is not adversely affected is to require that each broadcast be in the child's best interests or that any action taken by an adult on behalf of a child should take the child's interests into account. Article 3.1 of the Convention states that "In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration."

This requirement could mean that a parent could give consent even if the child did not want to be broadcast as long as it was in the child's best interests and that the child would ultimately benefit. A broadcaster would hold responsibility in deciding whether the giving of consent from the parent really was in the best interests of the child. In the *Holmes* case the Authority did not agree that the broadcast was in the boy's best interests.⁴²

...[T]he boy was of an age when he could express his feelings about whether or not he wanted to participate in the programme. Plainly he did not want to, and in the Authority's view the programme, involving as it did potentially humiliating footage of the child, was designed more to meet his mother's needs than his own....[I]n the case of children, filming and subsequent broadcast of footage of a child can only be justified... where the child's interests are properly considered and furthered. Further,... the interests of parents or legal guardians may not be identical to those of the child.

To avoid the deleterious impact that children who are the subject of television broadcasts may encounter, broadcasters must take into account and further their best interests.

⁴² *Burnell v TVNZ* above n 17, 15.

V A PUBLIC INTEREST DEFENCE

Despite the seemingly strong right to privacy of a child it is not and cannot be absolute. Public interest and freedom of expression should not be disregarded. Section 14 of the New Zealand Bill of Rights Act 1990 preserves the right to freedom of expression:

14 Freedom of Expression- Everyone has the right to freedom of expression, including the freedom to seek, receive, and impart information and opinions of any kind in any form.

A Definition of Public Defence for Matters Concerning Children

Principle (vi) of the BSA's privacy principles does contain a public interest defence: "Discussing the matter in the 'public interest', defined as of legitimate public concern or interest to the public, is a defence to an individual's claim for privacy."⁴³ Other authorities define it similarly. *News Media Law in New Zealand* defines it as meaning:⁴⁴

something more than interest in the sense of curiosity or titillation for in this sense most members of the public are interested in all manner of gossip. Public concern is perhaps the nearest approximation to what the phrase appears to mean.

And Lord Denning in *London Artists Ltd v Littler* said:⁴⁵

whenever a matter is such as to affect a people at large, so that they may be legitimately interested in, or concerned about, what is going on; or what may happen to them or others; then it is a matter of public interest on which everyone is entitled to make fair comment.

Nevertheless, in the case of children these tests may not be adequate or appropriate. If a broadcaster can formulate a convincing argument that the item was of legitimate public interest then it may have a defence to breaching a child's privacy. Children are "highly susceptible to psychological damage, and embarrassing information about minors is rarely newsworthy". We want to protect them because "after all, what is [broadcast] about neighbourhood children could be [broadcast] about one's own children."⁴⁶ Thus, stories concerning children which may appear to be of legitimate public concern may need to be of overwhelming public concern before a broadcast of such is justified. The BSC Code adds "overwhelming" to its defence and the IFJ guidelines put the defence as justified if "demonstrably in the public interest". For a New Zealand code this same stricter standard should apply to children.

43 See appendix A.

44 J F Burrows *News Media Law in New Zealand* (3 ed, Oxford University Press, Auckland, 1990) 93.

45 *London Artists Ltd v Littler* [1969] 2 All ER 193, 198.

46 Julian Grant "Victims, Offenders and Other Children: a Right to Privacy?" (1992) 19 Am J Crim L 485, 496.

TVNZ tried to justify its broadcasting of the boy with ADD in *Holmes* on public interest grounds. The Authority, however, said that the "...public interest factor could and should have been addressed in other ways. In its view, that public interest did not warrant the intrusive filming of this child." With respect, this ruling does not make it clear enough to broadcasters when the BSA will allow an item of legitimate public concern despite the BSA confirming that the broadcast did contain valid material. The item was of public interest so technically it should have been allowed that defence. If however, the threshold were raised to *overwhelming* public interest then the BSA could have dealt with the claim adequately without having to justify itself in uncertain terms. The show would clearly not have been overwhelmingly in the public interest.

B Balancing Competing Interests

Inevitably, it is a matter of balancing the right to privacy with public interest and freedom of expression. In the recent case of *Newspaper Publishers Association of New Zealand v Healthcare Otago Ltd*⁴⁷ involving an order prohibiting the reporting of any news about a little boy suffering from cancer, the Publishers Association raised a public interest/freedom of expression defence. The case concerned wardship and the bulk of the argument centred around that issue. It also concerned newspaper publication rather than television broadcasting. Nonetheless, the Court made some important findings that could be applied to most cases of reporting on children.⁴⁸

...[G]reat importance should be attached to safeguarding the freedom of the press. This is because the media are effectively the eyes and ears of the general public...[H]owever, the Court observed that the freedom was not absolute. In this context it must bend to the extent necessary to ensure the protection of a child or children.

When potential damage to a child's mental well-being is at issue that would almost certainly outweigh a freedom of expression argument. The only exception to this would be where an issue was of overwhelming public interest.

C Overwhelming Public Interest is Sufficient to Justify a Broadcast

Overwhelming public interest on its own is enough to justify a broadcast. Obtaining consent in the proper fashion would be sufficient also. It is not necessary to have *both* public interest and consent to justify broadcasts of significant matters.

⁴⁷ *Newspaper Publishers Association of New Zealand v Healthcare Otago Ltd* (23 March 1999) unreported, High Court, Dunedin Registry, CP12/99 [*Healthcare Otago*].

⁴⁸ *Healthcare Otago* above n 47, 13 per Panckhurst and Chisholm JJ.

Were both necessary it would set the threshold too high. The tests in themselves already contain stricter definitions and both serve as a way of protecting the child's interests. In the case of consent it must be from someone with authority and in the child's best interests, and in the case of public interest it must be of overwhelming public interest. To require both would hinder news and current affairs activities unjustifiably. Some programmes such as documentaries containing children, although factually interesting but not of overwhelming public interest, would suffer despite a child agreeing to take part. Either consent obtained from the proper person and in the proper way *or* the presence of an overriding public interest would suffice to protect a child's privacy right.

VI A NEW CODE OR PRINCIPLE FOR NEW ZEALAND

A *A Separate Code Devoted to Children is the Best Option*

Conceivably, a change to the public interest and consent provisions in the BSA's privacy principles is sufficient to remedy this problem. The Authority would be able to determine complaints, without the difficulty it faces now, with little change. However, the amendments would need to explicitly mention children. The standards for both provisions are set higher than for those of adults so there would need to be two separate sections within each principle. While this is the easiest option it is not the best. The strength of a child's privacy right is a powerful factor for a separate code. Broadcasters need clear guidelines to show them what they can and cannot do. A separate code would show broadcasters and the public that exploitation of children is unacceptable in clear and certain terms. It would also show New Zealand's commitment to ensuring the protection of children under the UN Convention on the Rights of the Child.

B *A Proposed Code or Principle*

Having assessed the current law, relevant overseas provisions, the BSA's privacy principles, the definition of a child and the issues of consent and public interest it is possible to form a new code tailored to New Zealand conditions. A proposal follows:

- (1) All children have a right to privacy.
- (2) Broadcasters must ascertain the views of the child, if the child is able to express them and shall give them such weight as is appropriate in the circumstances having regard to the age and maturity of the child.
- (3) Broadcasters must also obtain consent from a parent of, or from someone who is legally responsible for, a child who is under 16 if the broadcast is to contain a highly personal circumstance or a matter extremely embarrassing or detrimental to the child.

- (4) In all cases, the granting of consent by an adult must further the child's interests as must the resulting broadcast.
- (5) If consent is actually refused any decision to go ahead can only be justified if it is *demonstrably* or *overwhelmingly* in the public interest or the identity of the child and any other identifying features or persons are, and will remain, completely anonymous.

C Implications of this Code

If this code were applied to the *You Be the Judge* and *Holmes* programmes the broadcaster in both cases would have breached the child's privacy. The broadcaster would not have obtained consent in the proper way and there would have been no public interest defence either as the material in both cases would not have been of overwhelming public concern. However, had the broadcaster in both cases known beforehand what was acceptable by referring to a comprehensive and separate code, the breaches may never have occurred.

The code is not onerous or overly strict. All the broadcaster has to do is ensure that private matters remain private. It is far better for a broadcaster to take some time in gaining consent and making sure rights are preserved than it is for the broadcaster to try to defend a complaint that it has a good chance of losing. The code would not apply every time a child is shown, only for matters of significance. The proposed code does not aim to encourage complaints. Rather, it would reduce the need for a complaint in the first place as broadcasters would have unambiguous guidelines to go by. Its aim is to give a clear guide to broadcasters of how to go about "[t]he issue of filming young children... which... is fraught with difficulty."⁴⁹ And on the rarer occasion that a privacy complaint is made, the BSA will be able to deal with the issue far more easily than it does now. Inevitably, as with all other privacy complaints, the BSA will have to take the specific facts and the overall programme in to account. Every complaint will remain on a case by case basis but the BSA would have a clear set of standards to refer to and to apply.

IX CONCLUSION

The media is a vital part of daily life and a vital tool in communication. However, it can not have free reign. There must be some restrictions on its actions to protect those in society who cannot protect themselves. In this new age where broadcasters are driven by the dollar it is all the more important that standards do not slip. To ensure that children are protected, especially their privacy, the BSA must form a new and separate broadcasting code. As seen above the mechanisms in place do not suffice when it comes to

⁴⁹ *Burnell v TVNZ* above n 17, 14.

children. Broadcasters need to know what they can and cannot do. The proposed new code would hopefully correct this problem and also aid broadcasters in the future when they are contemplating significant or controversial broadcasts of children. Children have rights but adults must protect them.

ADDENDUM

In September 1999 the BSA amended its privacy principles to take account of the problems it had been having with ruling on children's privacy. It did this by adding two sentences to the end of privacy principle (vii).

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.*

While a step in the right direction, this is still not enough. The arguments presented in this essay still stand. Only when a well thought out and separate code that emphasises the importance of the issue has been produced will the BSA have fulfilled its task.

*APPENDIX**RELEVANT PRIVACY PRINCIPLES OF THE BSA*

- (1) 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.
- (2) 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.
- (3) There is a separate ground for a complaint, in addition to a complaint for the public disclosure of private and public facts, in factual situations involving the intentional interference (in the nature of prying) with an individual's interest in solitude or seclusion. The intrusion must be offensive to the ordinary person but an individual's interest in solitude or seclusion does not provide the basis for a privacy action for an individual to complain about being observed or followed or photographed in a public place.
- (4) 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.
- (5) 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 (6).
- (6) 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.
- (7) An individual who consents to the invasion of this or her privacy cannot later succeed in a claim for a breach of privacy.