

ON WHAT AUTHORITY? IN SEARCH OF A LEGAL AUTHORITY FOR GOVERNMENT FACILITATION OF "MEDIA RIDE-ALONG" PROGRAMMES AND THE PRIVACY HARM THEY CAUSE

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Whether it be through the tort of privacy or the Broadcasting Standards Authority, involuntary subjects of reality journalism have suffered sufficient harm at their inclusion to take legal action against the media. Utilising the TV series Border Patrol as a case study, this article looks at the role that government agencies play in facilitating this harm, rather than the media which produce and broadcast these programmes. The tort of privacy is adopted in this article as a framework to examine and establish the significant risk of privacy-related harm in this area. Following the proposition that the state must act under legal authority, it is argued that government agencies must have a clear legal basis for permitting production companies to enter and film passengers in the controlled border space, particularly given the high risk of privacy breaches. There does not appear to be any legal justification or authority for facilitating access to this space. Given these agencies' public assurances regarding transparency and privacy, they should identify and publicise this legal basis, alongside documentation of their interaction and co-operation with the media production company.

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I INTRODUCTION

"Observational documentaries" or "media ride-alongs", such as *Border Patrol* and *Police Ten 7*, are very popular in New Zealand.¹ Greenstone TV, the production company behind *Border Patrol* and *Dog Squad*, produces at least six different series in this genre alone.² *Border Patrol* published its 11th season in 2019 and has been the recipient of a New Zealand Screen Award for Best Reality Series.³ Though these shows are often promoted as providing education or insight into the work of frontline government officials, the reality is that they need to succeed as entertainment. This has significant ramifications for the ordinary people who may be featured in them.

There is increasing evidence that media ride-along programmes can cause harm and distress to the individuals who happen to be captured by the film crew. Much of the harm experienced in this genre is associated with intrusion and dissemination of personal information, as was the case in *Andrews v Television New Zealand Ltd*. Privacy complaints regarding media ride-alongs are often made against the media production company or the television network involved.⁴ However, this author would argue that responsibility can also be assigned to the government agencies who permit and facilitate this harm.

This article's key enquiry is whether public agencies can justify facilitating potential breaches of privacy by the media. *Border Patrol* will be used as a case study. Part II of this article examines the media ride-along genre and the harm it can cause for its subjects. Part III will use the tort of privacy as a framework for examining the harm caused by *Border Patrol*, including whether a defence of legitimate public concern could provide justification. Finally, Part IV will investigate the legal authority empowering public agencies (or lack thereof) to facilitate programmes that cause privacy-related harm.

II THE "MEDIA RIDE-ALONG" GENRE

"Observational documentaries", a form of reality journalism or television often referred to as "media ride-alongs", involve film crews following and filming the duties and activities of public officials and agents such as Police or Customs officers. Greenstone TV's description of *Border Patrol* provides an overview of the process involved:⁵

We follow dedicated border staff working on the frontlines of Border Security around the clock, checking for drugs and illegal goods, and intercepting packages carrying potentially harmful pests and diseases,

1 Greenstone TV "Border Patrol" <www.greenstonetv.com/our-programmes/border-patrol/>.

2 Greenstone TV "Highlights: recent and current top rating shows" <www.greenstonetv.com/programmes/>.

3 Greenstone TV "Border Patrol", above n 1.

4 *Andrews v Television New Zealand Ltd* [2009] 1 NZLR 220 (HC).

5 Greenstone TV "Border Patrol", above n 1.

that if introduced into New Zealand could cripple our economy overnight. We are with officers as they constantly monitor, identify and screen incoming passengers who may be undesirable arrivals into our country.

Greenstone TV's own words demonstrate that though media ride-along programmes are often promoted as following frontline agents, *Border Patrol's* episodes and plotlines appear to revolve primarily around incoming passengers' behaviour. These passengers are not paid actors, merely individuals unlucky to arrive during scheduled filming. As Natalya King notes, "the involuntary reality television participant is the (un)lucky citizen who interacts with that organisation when the camera crew is present".⁶

It is unsurprising, given the nature of frontline worker's roles, that members of the public come into the picture. However, the very aspect which makes the media ride-along genre so popular, can also cause significant discomfort and harm for those "(un)lucky" involuntary subjects.⁷ *Border Patrol* provides numerous examples which give rise to significant privacy concerns and associated harm. For example, an extensive bag search could uncover anything from prescription medication to the type of underwear one wears. Likewise, a thorough interview with an immigration officer regarding a passenger's travel intentions, relationships, occupation and general history can also cause harm. In one particular interview, a Singaporean man's history of liver problems stemming from him being a "major alcoholic" was exposed. This potentially humiliating admission was further compounded by being made to count out the little cash he had on him, as well as detail the amount of money in his bank account.⁸ Indeed, as the Broadcasting Standards Authority (BSA) noted in their report *The Real Deal: Experiences of and Attitudes towards Reality TV*, though many people enjoy and take an interest in the media ride-along genre, they would not like to be in the position of the individuals filmed.⁹

The extent of discomfort and harm these "(un)lucky" individuals can experience is shown through the legal action some have taken after appearing in these programmes. *Andrews v Television New Zealand Ltd* provides an excellent example.¹⁰ The claimants, Gary and Penny Andrews, became involuntary participants on the reality television programme *Fire Fighters* after they were involved in a car accident resulting from their intoxication. The accident was attended to by police officers,

6 Natalya King "Privacy and Reality Television: Issues for Producers and Involuntary Participants" in Stephen Penk and Rosemary Tobin (eds) *Privacy Law in New Zealand* (2nd ed, Thomson Reuters, Wellington, 2016) at 358.

7 At 358.

8 Greenstone TV "Border Patrol – Season 11, Episode 5" (14 October 2019) TVNZ OnDemand <www.tvnz.co.nz/shows/border-patrol/episodes/s11-e5>.

9 Broadcasting Standards Authority *The Real Deal: Experiences of and Attitudes towards Reality TV / Te Mahi Tūuru: Nga Pūkekotanga Me Nga Waiaro Ki Nga Whakaata Motuhenga* (September 2011) at 8, 37.

10 *Andrews v Television New Zealand Ltd*, above n 4.

ambulance officers and a firefighting team.¹¹ The firefighters were "accompanied by a camera operator who filmed the subsequent rescue operation in its entirety", including when the plaintiffs were still trapped in their vehicle.¹² The programme's screening was incredibly distressing for the claimants, particularly due to the accident's impact on their familial relationships and the "emotional health" of their children.¹³ The claimants were "forced to re-live the trauma of the accident, as they saw the scene from an entirely different viewpoint".¹⁴ The claimants were found to have a reasonable expectation of privacy regarding the intimate exchanges captured, even though the footage screened failed to meet the "highly offensive" test.¹⁵ However, the evident discomfort and harm that the claimants suffered is significant in considering the media ride-along genre.

The UK case *Ali and another v Channel 5 Broadcast Ltd* also sheds light on the media ride-along genre and its potential for harm. The claimants were featured on the reality programme *Can't Pay? We'll Take It Away* being evicted from their tenanted property by High Court Enforcement Agents.¹⁶ The claimants found their inclusion in the programme extremely distressing and undignifying. They contended that it "showed them at their lowest ebb, being evicted without prior notice, in a state of shock and very distressed, and being repeatedly taunted by Omar Ahmed [landlord]".¹⁷ Their inclusion also had a significant impact on their children. Given that "no attempt was made" to conceal the claimants' identities, their daughter had become the victim of ridicule and bullying in school.¹⁸ The English High Court of Justice held that the claimants had a reasonable expectation of privacy¹⁹ and awarded £10,000 in damages for each claimant.²⁰

Though *Andrews v Television New Zealand Ltd* is the "only reality journalism case considered by the New Zealand courts" thus far, this should not be mistaken for an absence of discomfort or complaint regarding the genre.²¹ In New Zealand, privacy or content complaints regarding media ride-along programmes are also decided by the BSA. The BSA's database provides a number of decisions

11 At [4]–[9].

12 At [8].

13 At [15]–[16].

14 At [15].

15 At [100].

16 *Ali and another v Channel 5 Broadcast Ltd* [2018] EWHC 298 (Ch) at [1].

17 At [148].

18 At [153].

19 At [210].

20 At [220].

21 King, above n 6, at 358.

in this area, such as the decision of *MA v Television New Zealand Ltd*, which involved an episode of the series *Police Ten 7*.²² The episode featured the execution of a search warrant on MA's property and his subsequent arrest for possession of cannabis.²³ As a result, the family had received "unwanted attention" and were approached and questioned about their involvement in the programme.²⁴

It is important to note that these "(un)lucky" individuals do not need to be captured in dramatic or traumatic incidents such as a car accident or eviction to suffer harm and distress. The BSA's, aforementioned report, *The Real Deal*, noted numerous complaints of involuntary exposure which could be considered more ordinary or mundane, such as a long voyeuristic shot of a woman sunbathing in a bikini.²⁵ It would appear that an individual need not be portrayed in extraordinary circumstances or with anything to hide in order to suffer privacy-related harm. Privacy harm is, by its nature, both contextual and subjective.

III PRIVACY IMPLICATIONS FOR BORDER PATROL

Much of the harm experienced as a result of the media ride-along genre is associated with feelings of intrusion and the dissemination of personal information. If the correct legal requirements are met, such harm can be labelled as a breach of privacy. Such breaches can be grounded in the Privacy Act 2020, the Broadcasting Standards, or the tort of invasion of privacy.²⁶ This article will focus on the tort of invasion of privacy, which has been employed in New Zealand and abroad concerning media ride-alongs.²⁷ However, the purpose of this article is not to investigate whether this tort has been committed. Rather, the tort of privacy will be used to create a framework for examining the harm created by *Border Patrol* and facilitated through the public agencies which allow them filming access.

A A Reasonable Expectation of Privacy? Border Patrol and the Tort of Invasion of Privacy

The express recognition of privacy protections through tort is a relatively recent occurrence in New Zealand. In 2003 the foundational case *Hosking v Runting*, while not finding an actionable claim in the particular case, recognised the existence of the tort of invasion of privacy in New Zealand and

22 *MA v Television New Zealand Ltd* BSA 2010-084, 22 February 2011.

23 At [1].

24 At [8].

25 Broadcasting Standards Authority *The Real Deal*, above n 9, at 32.

26 Privacy Act 2020; Broadcasting Standards Authority *The FreetoAir Television Code* (May 2020) at 43; and *Hosking v Runting* [2005] 1 NZLR 1 (CA) at [244]–[247].

27 *Andrews v Television New Zealand Ltd*, above n 4; and *Ali and another v Channel 5 Broadcast Ltd*, above n 16.

established the requirements of the tort.²⁸ At present, there are two fundamental requirements for a successful claim:²⁹

1. The existence of facts in respect of which there is a reasonable expectation of privacy; and
2. Publicity given to those private facts that would be considered highly offensive to an objective reasonable person.

Since the publicity requirement will be satisfied through the broadcast of *Border Patrol*, the focus of this article is on whether a claimant is entitled to a reasonable expectation of privacy.³⁰ This discussion will operate on the assumption that if a reasonable expectation of privacy exists, it will be considered highly offensive to the objective reasonable person. This assumption takes into account significant criticism of the "highly offensive" test. In *Hosking v Runting*, Tipping J noted his preference to use a reasonable expectation of privacy standard alone:³¹

... I would myself prefer that the question of offensiveness be controlled within the need for there to be a reasonable expectation of privacy. In most cases that expectation is unlikely to arise unless publication would cause a high degree of offence and thus of harm to a reasonable person.

Indeed, requiring an additional threshold may be redundant given the claimant has proven a reasonable expectation of privacy. Moreover, it is unlikely that an individual would bring a claim if they were not sufficiently offended by the publication. The "highly offensive" threshold may also be unduly restrictive and prevent claimants who have established a reasonable expectation of privacy, such as those in *Andrews*, from making a successful claim.³²

Given its importance to this discussion, it is necessary to set out how the reasonable expectation of privacy test is to be understood and applied, particularly as it has been subject of some confusion.³³ It is not a factual question about what "potential privacy-infringers can or usually do in the situation in question" or how widespread the intrusive practice is.³⁴ *Border Patrol's* long TV run and notoriety

28 *Hosking v Runting*, above n 26, at [244]–[247].

29 At [117]; and King, above n 6, at 366.

30 The "existence of facts" element will not be treated as distinct from a reasonable expectation of privacy. The reasonable expectation assessment already involves consideration of the private nature of the facts or circumstances.

31 *Hosking v Runting*, above n 26, at [256].

32 See *Andrews v Television New Zealand Ltd*, above n 4, at [100]; and N A Moreham "Abandoning the 'High Offensiveness' Privacy Test" (2018) 4 CJCL 1 at 9.

33 NA Moreham "Unpacking the reasonable expectation of privacy test" (2018) 134 LQR 651 at 654.

34 At 654.

does not make privacy-related harm acceptable.³⁵ Rather, it is a normative enquiry into what privacy protection a claimant should be afforded by the law in the situation in question.³⁶

This is a very specific enquiry, which focuses on the particular disclosure or exposure of information or activities.³⁷ It involves consideration of the "subtle differences" of a claimant's circumstance, including the location, activity, breadth of publication and even the type of media involved.³⁸ The existing framework of case law also indicates predictable categories of "probably-private" information or activities. For example, matters relating to "health, bodily functions or nakedness", sexual activity, "intimate personal relationships", and the "experience of trauma, grief or strong emotion".³⁹ These categories provide "readily-understandable guidance" as to how contemporary societal attitudes perceive what qualifies as a "reasonable" expectation of privacy, but they are not exhaustive.⁴⁰

So, would there be a reasonable expectation of privacy in respect of the information and activities broadcast by *Border Patrol*? From both informational and personal perspectives, much of what goes on in the border space is inherently private. When clearing Customs, Immigration and Biosecurity, passengers must produce identity documentation, answer all questions asked of them by a customs officer, "make any item in your possession or under your control available for examination", and may be subject to a personal search.⁴¹ Although this high level of exposure is warranted and legally mandated for border security purposes, this does not mean that passengers are not entitled to protection from the dissemination of this material to a much broader TV and online audience. This is a much higher level of exposure than they would typically experience. Moreover, many of these facts and activities fall into the aforementioned "probably-private" categories, for example, the disclosure of a person's medical issues and medication, details of someone's profession, or the intimate personal details of whom a passenger is visiting and why.⁴²

Though much of the circumstance surrounding the border area and *Border Patrol* points towards a reasonable expectation of privacy, there is a potential hurdle. The fact that *Border Patrol* is filmed in a public space could undermine a privacy claim, as there is generally no expectation of privacy in

35 Moreham "Unpacking the reasonable expectation of privacy test", above n 33, at 654.

36 At 653.

37 At 656–657.

38 At 656.

39 At 659.

40 At 659.

41 New Zealand Customs Service "On your arrival" (19 March 2020) <www.customs.govt.nz/personal/travel-to-and-from-nz/travelling-to-nz/on-your-arrival/>.

42 Moreham "Unpacking the reasonable expectation of privacy test", above n 33, at 659.

public spaces.⁴³ This aspect will be examined as part of this privacy framework for exploring harm, alongside the merits of a "legitimate public concern" defence.

1 No general expectation of privacy in public places: Why Customs and Immigration may form an exception

Greenstone TV claims that "Generally, events taking place in public (e.g., on the motorway) don't have an expectation of privacy."⁴⁴ *Andrews v Television New Zealand Ltd* has acknowledged that this is generally the case but has noted that there are "exceptions to the general rule".⁴⁵ Allan J noted that:⁴⁶

It will not always be a complete answer to a claim to a reasonable expectation of privacy to show that the relevant facts or information arose from something occurring in public.

In notable cases such as *Peck v United Kingdom* and *Campbell v MGN Ltd*, courts have found a reasonable expectation of privacy despite the claimant being in a public place. They provide exceptions to this "general rule".⁴⁷ Both cases involved facts or events that many would consider intimate or embarrassing, disseminated on a wide scale. In *Peck*, the claimant was suffering from depression and was captured on CCTV late at night "with a kitchen knife in his hand and he attempted suicide by cutting his wrists".⁴⁸ The Court emphasised his relative seclusion at the time, comparative to the much larger ultimate audience.

In *Campbell*, the claimant was the subject of a tabloid article, including photographs and details of the claimant's attendance at Narcotics Anonymous meetings.⁴⁹ The majority emphasised the intimate and private nature of these facts, treating the details of Campbell's therapy as the Court would

43 Rosemary Tobin "The Common Law Tort of Invasion of Privacy in New Zealand" in Stephen Penk and Rosemary Tobin (eds) *Privacy Law in New Zealand* (2nd ed, Thomson Reuters, Wellington, 2016) at 98–99.

44 Greenstone TV "Will I be on TV?" <www.greenstonetv.com/will-i-be-on-tv/>.

45 *Andrews v Television New Zealand Ltd*, above n 4, at [31].

46 At [31].

47 *Peck v United Kingdom* [2003] 36 EHRR 41 at [10]; and *Campbell v MGN Ltd* [2004] UKHL 22 at [159].

48 *Peck v United Kingdom*, above n 47, at [10].

49 N A Moreham "Privacy in public places" (2006) 65(3) CLJ 606 at 610; and *Campbell v MGN Ltd*, above n 47, at [2].

a medical condition and its treatment.⁵⁰ The anonymised nature of the meetings and the privacy this sought to provide was also noted.⁵¹ The New Zealand case of *Hosking v Runting* accepted that:⁵²

... *Peck* and perhaps *Campbell* qualify [the general rule against privacy in public spaces] to some extent, so that in exceptional cases a person might be entitled to restrain additional publicity being given to the fact that they were present on the street in particular circumstances.

As *Campbell* and *Peck* exemplify, discerning the existence of a right to privacy is a contextual exercise. A public location does not automatically defeat a claim to a reasonable expectation of privacy.⁵³ On the other hand, one cannot expect to have a reasonable expectation of privacy in public at all times.⁵⁴ Rather, as Professor Nicole Moreham has argued, it depends on a number of factors: the nature of the location, the nature of the claimant's activity, and the way in which the image was obtained.⁵⁵ These will be applied with reference to *Border Patrol's* filming locations.

(a) Nature of location

The nature of the location in which the claimant's image or information was captured is important in determining whether a reasonable expectation of privacy exists. Though "as a general rule something which occurs in a public place is unlikely to give rise to a reasonable expectation of privacy", it is important to remember that not all public locations are created equal.⁵⁶ Their nature may vary dramatically. For example, a busy street in the Auckland CBD at noon is very different from a secluded, yet publicly accessible beach in the late evening.

Border Patrol is filmed primarily in passenger arrival and departure halls. These areas are designated Customs, Immigration and Biosecurity "control" or "controlled areas".⁵⁷ Immigration and Biosecurity control areas are designated by the relevant Chief Executive or Director-General, and the

50 *Campbell v MGN Ltd*, above n 47, at [91].

51 At [53].

52 *Hosking v Runting*, above n 26, at [164].

53 *Andrews v Television New Zealand Ltd*, above n 4, at [31]; *Peck v United Kingdom*, above n 47, at [10]; and *Campbell v MGN Ltd*, above n 47, at [111].

54 King, above n 6, at 369.

55 Moreham "Privacy in public places", above n 49, at 620.

56 *Andrews v Television New Zealand Ltd*, above n 4, at [31].

57 New Zealand Customs Service "Customs-controlled Areas" (17 February 2021) <www.customs.govt.nz/business/customs-controlled-areas/>; Immigration New Zealand "Immigration Control Areas at New Zealand's airports" <www.immigration.govt.nz/assist-migrants-and-students/other-industry-partners/airlines-cruise-shipping/immigration-control-area>; and Ministry for Primary Industries "Operating at a place of first arrival" (16 November 2020) <www.mpi.govt.nz/import/border-clearance/places-of-first-arrival-in-new-zealand/operating-a-place-of-first-arrival/>.

Chief Executive must grant Customs-controlled areas a licence.⁵⁸ Indeed, under the Customs and Excise Act 2018, an area may not be used for certain purposes, such as "the disembarkation, embarkation, or processing of persons arriving in, or departing from, New Zealand" or "the processing of craft arriving in, or departing from, New Zealand" unless licensed as a Customs-controlled area.⁵⁹

Controlled border areas differ significantly from the conception of a public space seen and imagined in *Hosking v Runtig* and *Campbell v MGN*.⁶⁰ As the name would suggest, these spaces are secure, restricted and intensely monitored.⁶¹ They are identified and designated for a particular purpose, and all individuals in these spaces are there in relation to this purpose. For the most part, this is as passengers or officers associated with Immigration, Biosecurity or Customs services. Members of the public are not free to access these controlled areas as they could a bank or library. Indeed, any unauthorised person who fails to comply with a customs officer's direction to leave commits an offence.⁶² Customs officers also have the power to detain and remove individuals.⁶³

As a result of this very limited access, *Border Patrol's* filming locations involve a much smaller subset of people than one would encounter in most public places. As Moreham noted, the presence of fewer people who can see or hear an individual may point to a greater expectation of privacy.⁶⁴ People adapt their image and behaviour based on their perception of their surroundings and observers and will "usually have fewer inhibitions and make fewer self-presentation efforts when fewer people are around."⁶⁵ Even though the number of people moving through Customs and Immigration at any one time may be numerically large, that group is much more restricted and controlled.

The nature of Customs and Immigration does not sit well with the dissemination of a passenger's information on a larger scale. Though individuals accept that they must expose their physical person and information to a certain degree to move through this controlled space, this does not mean that they suffer a lower expectation of privacy. Indeed, information known by a group or subclass of

58 Customs and Excise Act 2018, s 56; Immigration Act 2009, s 382; and Biosecurity Act 1993, s 2.

59 Customs and Excise Act, s 56.

60 *Hosking v Runtig*, above n 26 at [260]; and *Campbell v MGN Ltd*, above n 47, at [122].

61 New Zealand Customs Service "Customs-controlled Areas", above n 57.

62 Customs and Excise Act, s 382(3).

63 Section 215.

64 Moreham "Privacy in public places", above n 49, at 622.

65 At 622.

people can still be private to the world at large.⁶⁶ This also extends to first-hand observers of a scene. As noted in *Peck*:⁶⁷

... the relevant moment was viewed to an extent which far exceeded any exposure to a passer-by or to security observation ... and to a degree surpassing that which the applicant could possibly have foreseen when he walked in Brentwood on 20 August 1995.

It is important to note that the claimant in *Peck* was suicidal, "deeply perturbed and in a state of some distress".⁶⁸ He may not have been aware or particularly concerned about his surroundings at that point in time. However, even if that were the case, from an objective ethical standpoint, harm does emerge from the disconnect between the number of people immediately witnessing this intimate moment and those who ultimately saw it. Returning to a subjective view, passengers travelling through Customs and Immigration, while accepting the observers initially around them, would not expect to be broadcast to a much larger audience. Many of the scenes shot in *Border Patrol* involve one-on-one interviews between a passenger and an immigration officer. The "(un)lucky" individual would not expect other passengers to hear their private information, let alone millions of viewers. Of course, in such a confined space, one would most certainly notice the film crew and camera. However, this awareness and supposedly tacit consent count for little, given the power dynamic at play.

(b) Nature of the claimant's activity

Moreham has also identified the nature of the claimant's activity as a relevant factor pertaining to whether an individual has a reasonable expectation of privacy in a public place. She focuses in particular on "intimate, traumatic or humiliating" facts and depictions of claimants.⁶⁹ As noted above, the nature of any claimant's activity in the Customs and Immigration space is particular, purpose-driven and requires a certain level of exposure, such as allowing access to one's baggage and person. However, as discussed in the case of the Singaporean alcoholic, *Border Patrol* frequently touches on "probably-private" categories of information such as medical history.⁷⁰ One episode of *Border Patrol* broadcast an examination of a passenger's undeclared Class C medication and subsequent queries about the individual's medical issues and treatment.⁷¹ The passenger revealed that he would die without this medication. Privacy is subjective, and some individuals may feel more comfortable with

66 King, above n 6, at 366.

67 *Peck v United Kingdom*, above n 47, at [62].

68 At [62].

69 Moreham "Privacy in public places", above n 49, at 623.

70 Greenstone TV "Border Patrol – Season 11, Episode 5", above n 8.

71 Greenstone TV "Border Patrol – Season 9, Episode 5" (18 July 2017) TVNZ OnDemand <www.tvnz.co.nz>.

this level of exposure than others. However, these are facts that are undoubtedly intimate and are often treated as private by the courts in both New Zealand and other jurisdictions.⁷²

(c) The way in which the image was obtained

Though one would assume that in most cases, individuals captured on *Border Patrol* would be aware that they are being filmed, this should not discount their reasonable expectation of privacy in a public space. This is because many of the considerations behind the common law's disapproval of surreptitious filming also apply to the *Border Patrol* scenario. As Moreham has noted, Lord Woolf CJ said that surreptitious filming could "add an additional ingredient to a claim" as it "prevents those who are being filmed from taking any action to prevent what they are doing being filmed".⁷³

Due to the power dynamic between Customs, Immigration and Biosecurity officers and passengers, many may not feel that they are in a position to avoid or question being filmed. They cannot seek physical privacy and move out of the camera's view in the same way an individual could on an ordinary street. Passing Customs and Immigration is a security requirement, and individuals cannot leave or avoid going through necessary screening. They cannot adopt their "usual self-presentation methods", particularly due to the intimate facts and access individuals must provide.⁷⁴

This power dynamic and the enclosed nature of border areas also makes it difficult to obtain meaningful, valid consent from passengers. Individuals may find it difficult to expressly revoke consent by asking not to be filmed. As noted above, these agencies and their officers possess extremely coercive powers, such as the powers to search and detain persons.⁷⁵ Given these extensive powers, it would be unwise to irritate border officials. Their presence and involvement during filming could even serve to intimidate some individuals moving through the border space. Moreover, while some individuals may not wish to be filmed, they may accept the film crew's presence due to their association with officials. As was noted in *MA v Television New Zealand*, the fact that the camera crew accompanies public officials can give it "the appearance of having legitimate authority to be there, and may have influenced the complainant's apparent acquiescence to its presence".⁷⁶ This perception, along with the Customs power dynamic and the general anxiety that often accompanies security screening, may negate the possibility of implied or tacit consent. This is especially the case for particular ethnic and religious groups. For example, there is evidence to suggest that the Muslim

72 *Campbell v MGN Ltd*, above n 47, at [165]; and Moreham "Unpacking the reasonable expectation of privacy test", above n 33, at 659.

73 *R v Broadcasting Standards Commission, ex parte British Broadcasting Corporation* [2000] 3 WLR 1327 (CA) at [37], as cited in Moreham "Privacy in public places", above n 49, at 628–629.

74 Moreham "Privacy in public places", above n 49, at 629–630.

75 Immigration Act, ss 282–285, 309–315; Customs and Excise Act, ss 201, 215, 218 and 219; and Biosecurity Act, ss 107–109.

76 *MA v Television New Zealand Ltd*, above n 22, at [43].

community in particular is subject to increased scrutiny by security officials.⁷⁷ If passengers feel uncomfortable voicing any objections and cannot leave the area, their continued presence and participation cannot be taken as consent.

However, one can infer that *Border Patrol* attempts to obtain express consent, or at the very least what Greenstone TV and the border agencies consider to be viable consent. The co-operation agreement between MPI and Greenstone TV (the Company) for Season 7 of *Border Patrol* notes:⁷⁸

The Company will ask consent of every person at an MPI site featured and identifiable in the Series to that person appearing in the Series. MPI will give the Company all reasonable assistance to obtain any consents required. Where there is any doubt about whether consent is given, the Parties will agree at the relevant offline view of an episode whether an individual should be pixelated.

Given that many of the people featured in *Border Patrol* are not pixelated, one could infer that both Greenstone and the agencies have obtained what they consider to be valid consent. It is not apparent, however, from the agreement what would meet this standard. As individuals are pixelated, rather than not featured, it appears that emphasis is placed on obtaining consent for identifiable footage of individuals to be included in the programme, not consent to be filmed in the first place. Regardless, even if express consent for either of these aspects were obtained, it is questionable whether this consent would be valid, given the aforementioned feelings of pressure and intimidation or even duress. Indeed, in *Ali and another v Channel 5 Broadcast Ltd*, Arnold J noted that "agreement to participate under protest" is not true consent.⁷⁹ In *Ali*, Arnold J noted that the claimant was faced with a choice. He could object to being interviewed and allow his landlord and the debt collectors to narrate events or agree and share his side of the story.⁸⁰ Similarly, in *Border Patrol*, featured individuals may feel cornered, pressured and intimidated, particularly when under investigation by officials. They may acquiesce or decide to defend their story and image on film.

Ultimately, the restricted and coercive nature of Customs and Immigration, accompanied by an inability to provide meaningful consent, erodes the individual's control of their personal image in this space. As Moreham has noted:⁸¹

77 New Zealand Law Foundation "Helping Muslim travellers deal with authorities" (September 2017) <www.lawfoundation.org.nz/?p=8338>; and Mohamed Hassan "I just felt like I was a criminal" (28 June 2016) RNZ <www.rnz.co.nz/news/national/307416/i-just-felt-like-i-was-a-criminal->.

78 Greenstone TV, Ministry for Primary Industries "Border Patrol Series 7 co-operation agreement" (2011) at [4.7].

79 *Ali and another v Channel 5 Broadcast Ltd*, above n 16, at [177].

80 At [177].

81 N A Moreham "Privacy in public places" [2006] NZLJ 265 at 265 and 267.

... although people cannot usually avoid being observed in public places, they can make that observation tolerable by choosing how much or how little of themselves they reveal to others when they go into public.

This is not an option for individuals in this controlled area. Privacy is strongly tied to autonomy, and ultimately the loss of this control is what creates a strong argument for a reasonable expectation of privacy in this space.⁸²

B Educative and Insightful, or Just Pure Entertainment? Whether the Events of Border Patrol are of Legitimate Public Concern

The second issue involved in any legal privacy analysis is whether a privacy concern is outweighed by any countervailing interest. Again, the tort of privacy will be used as a framework for this assessment. In *Hosking*, Gault and Blanchard JJ established that there "should be available in cases of interference with privacy a defence enabling publication to be justified by a legitimate public concern in the information".⁸³ The relevant inquiry was whether there was sufficient legitimate public concern to outweigh the potential harm caused by a privacy breach.⁸⁴ The defence of legitimate public concern has since become a central part of the New Zealand privacy tort. For example, in *Andrews*, Allan J noted in an obiter statement that if the claimants had successfully established that the publication of facts would be "highly offensive" to the reasonable person, he would have upheld the defence of legitimate public concern as invoked by TVNZ on the basis the TV show had a "serious underlying purpose".⁸⁵ It is important to note that Allan J's statement is hypothetical. As he did not find a privacy interest, a proportionality assessment is impossible. Any balancing of interests is artificial without anything to balance against.

Whether the defence is made out requires an assessment balancing the rights and interests of the litigants, as well as the rights of the claimant versus that of the public.⁸⁶ It must also be a matter of general concern, rather than interest:⁸⁷

A matter of general interest or curiosity would not, in our view, be enough to outweigh the substantial breach of privacy harm the tort presupposes. The level of legitimate public concern would have to be such as outweighs the level of harm likely to be caused. For example, if the publication was going to cause a

82 N A Moreham "The nature of the privacy interest" in N A Moreham and Mark Warby (eds) *The Law of Privacy and the Media* (3rd ed, Oxford University Press, Oxford, 2016) at 42.

83 *Hosking v Runting*, above n 26, at [129].

84 At [129]–[134].

85 *Andrews v Television New Zealand Ltd*, above n 4, at [91].

86 *Hosking v Runting*, above n 26, at [132].

87 At [134].

major risk of serious physical injury or death (as in the *Venables* case), a very considerable level of legitimate public concern would be necessary to establish the defence.

Though the example of harm provided is very high, this is not the threshold required for the defence to fail. It is a balancing test; the legitimate public concern must outweigh the risk of harm.⁸⁸ The potential harm suffered by passengers caught in the filming of *Border Patrol* must be justified by a more significant legitimate public concern in the show's content.

Although perhaps not as much of a major life event as a car crash or an eviction, passenger experiences in the border space can still be traumatic, intimate or humiliating. There may also be increased trauma for passengers from particular ethnic or religious backgrounds.⁸⁹ Individuals moving through Customs and Security are made to reveal what many would consider to be private facts about themselves. For example, in one episode of *Border Patrol*, a bag search revealed a man's Viagra supply, ergo his potential erectile dysfunction.⁹⁰ Though any "balancing test" will be dependent on the particular privacy breach or harm claimed, it is feasible that significant and serious invasions of privacy could occur, such as the alcoholism admission previously referred to in this article.⁹¹ For example, rather than Viagra, a bag search could uncover a passenger's transitional hormone therapy medication, Ritalin for the treatment of ADHD, or anti-depressant medication for a mental illness that is unknown to their friends, family or employer.

Moreover, the number of people who are offended enough to make official complaints against media ride-along programmes is further evidence that these privacy breaches, and the harm they cause, are not insignificant. While there do not appear to be any BSA decisions regarding *Border Patrol* specifically, there are numerous complaints regarding other programmes in the media ride-along genre.⁹² Similar sentiments may likely arise among those individuals captured in *Border Patrol*. However, the fact that many of the individuals featured are not fluent English speakers and are often deported may impact on the accessibility of this complaint process. This further highlights the significant implications of border powers for minority groups, who may face increased barriers to privacy protection.⁹³

88 *Hosking v Runting*, above n 26, at [132]–[134].

89 New Zealand Law Foundation "Helping Muslim travellers deal with authorities", above n 77; and Hassan "I just felt like I was a criminal", above n 77.

90 Greenstone TV "Border Patrol – Season 9, Episode 5", above n 71.

91 Greenstone TV "Border Patrol – Season 11, Episode 5", above n 8.

92 See Broadcasting Standards Authority "Search decisions" <www.bsa.govt.nz>. Looking to the BSA database and searching "privacy", there are numerous decisions regarding privacy complaints and media ride-along programmes such as *Police Ten 7*.

93 New Zealand Law Foundation "Helping Muslim travellers deal with authorities", above n 77; and Hassan "I just felt like I was a criminal", above n 77.

New Zealand courts have previously attached a significant level of public concern to the content of media ride-along programmes. In *Andrews*, Allan J noted that if the claimants had not failed to establish that the publication of facts would be "highly offensive" to the reasonable person, he would have upheld the defence of legitimate public concern.⁹⁴ Although obiter and operating in a theoretical context, it is useful to consider his reasoning. Allan J stated that the programme *Fire Fighters* had a "serious underlying purpose" and that:⁹⁵

... there is an undoubted public cost to road accidents and the impact of such accidents on rescue teams is something that attracts a significant level of public concern. The details of the crash scene, including conversations between participants, provided a necessary degree of verisimilitude. The fact that the defendant might have achieved its objectives without identifying the plaintiffs does not preclude the defendant from advancing the defence.

There may indeed be some general public good from understanding the cost of road accidents. However, this author finds it doubtful that the details of the claimant's private conversation and the additional verisimilitude or "colour" they contribute are necessary to achieve this "good".⁹⁶ Indeed, the "degree of verisimilitude" seems much more integral to the entertainment quality of *Fire Fighters* and the need to capture audience interest. It remains questionable whether this additional colour is enough to justify the harm the Andrews couple experienced as a result of the traumatic accident being televised.

Allan J's judgment gave relatively little weight to the entertainment value of *Fire Fighters*. He noted that:⁹⁷

... the television series, while providing a certain level of entertainment, nevertheless had a serious underlying purpose. The entertainment aspect is not to be taken as somehow cancelling out that purpose.

This argument operates on the assumption that entertainment is not central to the programme's purpose and function when, in fact, it would not be viable as a commercial venture if it were not. Indeed, as a former Chief Executive and Comptroller of the New Zealand Customs Service acknowledged, *Border Patrol* has portrayed the role of the Customs Service as much more exciting than it is in reality.⁹⁸

94 *Andrews v Television New Zealand Ltd*, above n 4, at [91].

95 At [92].

96 At [82].

97 At [91].

98 Jared Savage "Survey of 'disengaged' Customs officers reflects absence of TV show's drama" (11 July 2015) *NZ Herald* <www.nzherald.co.nz/nz/news/article.cfm?c_id=1&objectid=11479074>.

We get a lot of people apply to come and work at Customs and their view on what the job is like is based on what they see on *Border Patrol* ... *Border Patrol* makes it look like you find something [illegal] on every passenger, which of course isn't the reality.

Thus, it is questionable how accurate of a portrayal *Border Patrol* is in any event. Indeed, any educational or informational purpose could be compromised if *Border Patrol* serves as a promotional exercise. As such, informing or educating the New Zealand public could be considered incidental rather than a central purpose of the programme.

Though the entertainment aspect may not cancel out any other underlying or connected purpose or benefit, it does undermine the fundamental basis on which the legitimate public concern defence rests. This defence was heavily based in the right to freedom of expression and the potential ramifications that a privacy breach could have on this right.⁹⁹ As Natalya King noted, any propositions regarding free speech seem "a little thin in the context of reality journalism".¹⁰⁰ This is due to the reliance on the permission and generosity of the agencies to film. Thus, the media company is "obliged to adopt a positive standpoint toward the organisation it is trailing."¹⁰¹ As a result, any authenticity, accuracy or freedom in terms of the content of *Border Patrol* and similar observational documentaries is potentially compromised by Greenstone TV's dependence on New Zealand's border agencies.

Ultimately, for these border agencies, *Border Patrol* is an excellent public relations and publicity opportunity. Indeed, looking at the MPI and Greenstone TV co-operation agreement, it is noted that "MPI has the right to stop any filming it considers may ... negatively impact the reputation of MPI or the Government"¹⁰² and that "each episode of the Series must be approved by an MPI representative before it can be shown, sold or distributed by the Company".¹⁰³ Therefore, these agencies have a direct editorial role in the production of *Border Patrol* and what is ultimately published. Perhaps *Border Patrol* does provide a benefit of promoting these agencies, but can it truly be described as providing a public good when this editorial ability may undermine its accuracy?

IV THE LEGAL OR AUTHORITATIVE BASIS ON WHICH GREENSTONE TV ARE PERMITTED ACCESS TO CONTROLLED BORDER AREAS

Given the significant harm caused by *Border Patrol*, one would expect there to be clear legal authority empowering these agencies' decision to allow Greenstone TV filming access in controlled

99 *Hosking v Runting*, above n 26, at [130].

100 King, above n 6, at 374.

101 At 374.

102 Greenstone TV, Ministry for Primary Industries "Border Patrol Series 7 co-operation agreement", above n 78, at [5.1].

103 At [6.2].

border areas. Furthermore, as responsible government agencies, one would expect them to engage with and mitigate these privacy issues explicitly. However, it does not appear that these agencies or their governing legislation have contemplated the legal basis of *Border Patrol* or third-party access at all.

It is a longstanding common law proposition that the Crown is bound by the law just as its citizens.¹⁰⁴ The state must act under, and in accordance with legal authority.¹⁰⁵ It follows then, that however the New Zealand Customs Service, Immigration New Zealand, and the Ministry for Primary Industries permit and facilitate the filming of *Border Patrol*, they must do so pursuant to the law. Moreover, there should be some transparency as to what this legal authority is and how it operates. This is especially important given the risk *Border Patrol* poses to the privacy of individuals.

Unfortunately, it is decidedly uncertain whether any legal authority or mandate exists. The relationships between the agencies and their governing Acts are complicated and opaque, especially given their many overlapping responsibilities and powers. The lack of information available on the agencies' public-facing platforms and their lack of general acknowledgement of *Border Patrol* altogether serves to further obscure the picture. It is necessary to investigate the existence of this legal authority further.

A Positive Authority

"Positive authority" is used to refer to law that "evidences the express or implicit wish of Parliament".¹⁰⁶ As the remaining prerogative powers are few in number and would not extend to this scenario, any possible positive authority would be found in legislation.¹⁰⁷ Indeed, there is a significant amount of statute governing the border space. Yet, there is no apparent positive legal authority for the decision to allow Greenstone TV filming access. Indeed, the purpose, function and drafting of the statutory scheme appears quite contrary to such an arrangement.

The relevant legislation pertaining to *Border Patrol* is the Customs and Excise Act 2018, Biosecurity Act 1993, and the Immigration Act 2009. These Acts and their agencies are concerned with the security, protection and management of New Zealand's border.¹⁰⁸ The intent behind the passage of these Acts was to modernise the law in the border space to meet changing security demands

104 Michael J Allen and Brian Thompson *Cases and Materials on Constitutional and Administrative Law* (8th ed, Oxford University Press, Oxford, 2005) at 164.

105 B V Harris "The 'third source' of authority for government action" (1992) 108 LQR 626 at 626.

106 At 628.

107 Max Planck *Encyclopedia of Comparative Constitutional Law* (2019, Oxford University Press, March 2019, online ed) Royal Prerogative at [1]–[3] and [6]–[8].

108 Customs and Excise Act, s 3; Immigration Act, s 3; and Biosecurity Act, part 2.

and technology.¹⁰⁹ As a result, some aspects of the law were drafted to be less prescriptive and more flexible.¹¹⁰ However, many provisions remain specific and purpose-built. Indeed, much of the legislation regarding controlled border spaces is still very prescriptive and restrictive in nature. One example is s 271 of the Customs and Excise Act 2018, which provides the Chief Executive with the power to authorise certain persons to carry out the functions of a Customs officer under the Act:

271 Authorised persons: individual authorisations

- (1) The chief executive may authorise a suitably qualified and trained person who is not a Customs officer to carry out any functions of a Customs officer under this Act.
- (2) An authorisation under subsection (1) must—
 - (a) be in writing; and
 - (b) specify—
 - (i) the authorised person; and
 - (ii) the functions that may be carried out by the authorised person; and
 - (iii) the term of the authorisation, which must not be for more than 3 years.
- (3) The chief executive may renew any authorisation given under subsection (1) for a period of not more than 3 years.
- (4) A person who is authorised under this section must, for the purposes of this Act, be treated as a Customs officer in relation to the carrying out by that person of any functions in accordance with that person's authorisation.
- (5) The chief executive may revoke an authorisation given under this section—
 - (a) for incapacity, neglect of duty, or misconduct; or
 - (b) on the written request of the authorised person; or
 - (c) if the chief executive considers that the authorisation is no longer necessary.
- (6) If a person ceases to be an authorised person under this section, he or she must surrender to the chief executive all articles and documents received by him or her in relation to the authorisation.

The section specifies the manner and form requirements, relevant time restrictions and revocation powers and processes. This prescriptive provision requires a level of care and consistency in allowing persons access and power in the border space.

109 Customs and Excise Bill 2016 (209-1) (Bills digest) at 1-5; Immigration Bill 2007 (132-2) (Bills digest) at 1-3; and New Zealand Parliament "Biosecurity Law Reform Bill 2010" (9 December 2010) <www.parliament.nz/en/pb/bills-and-laws/bills-digests/document/49PLLawBD18291/biosecurity-laww-reform-bill-2010-bills-digest-no-1829>.

110 Biosecurity Law Reform Bill, above n 109, at 4.

All three pieces of legislation also set out the powers of border officers and agents in significant detail. For example, the Customs and Excise Act 2018 has at least 77 different sections relating to the New Zealand Customs Service powers.¹¹¹ This detail also extends to officers' rights of access to border areas. Section 282 of the Immigration Act 2009 provides that an immigration officer can:

... without a warrant or any authority other than this section, enter any immigration control area or any building or craft in that area for the purposes of carrying out his or her functions under this Act.

This creates a clear positive legal basis and framework.

Although an immigration officer's power to enter an immigration control area is broad, it is clearly and explicitly set out. This is consistent with the rest of the Immigration Act 2019 and the other two Acts concerned here. It is notable then, given the detailed and prescriptive nature of these Acts, that there is no obvious provision covering third-party access or any of these agencies' ability to grant permission or access generally. It is difficult to discern how Greenstone TV is permitted access to film *Border Patrol* or the legal basis of this permission.

Because allowing unauthorised persons to remain in controlled border areas could pose a security risk, it is unsurprising that there is little room for discretion. It is difficult to find anything in the legislation which could serve as a positive authority to grant third-party access. Any provisions which could potentially provide a loophole would require significant inference and gloss to achieve this end. For example, s 382 of the Customs and Excise Act 2018 sets out the offence for unauthorised presence in certain Customs-controlled areas:

382 Unauthorised presence in certain Customs-controlled areas

- (1) In this section, **specified Customs-controlled area** means a Customs-controlled area that is licensed to be used for—
 - (a) the temporary holding of imported goods for the purpose of examining those goods under section 227; or
 - (b) the disembarkation, embarkation, or processing of persons arriving in, or departing from, New Zealand; or
 - (c) the processing of craft arriving in, or departing from, New Zealand; or
 - (d) the loading or unloading of goods onto or from craft arriving in, or departing from, New Zealand.
- (2) A person commits an offence if the person, without the permission of a Customs officer or a reasonable excuse, enters into a specified Customs-controlled area that is being, or is about to be, used for any of the purposes for which it is licensed as a Customs-controlled area.

¹¹¹ Customs and Excise Act, Part 4.

- (3) A person commits an offence if the person—
- (a) is directed by a Customs officer to leave a specified Customs-controlled area that is being, or is about to be, used for any of the purposes for which the area is licensed as a Customs-controlled area; and
 - (b) without reasonable excuse, fails to comply with the direction.
- (4) A person who commits an offence under this section is liable on conviction to a fine not exceeding \$1,000.

Under s 382(2), it is an offence if a "person, without the permission of a Customs officer or a reasonable excuse, enters into a specified Customs-controlled area". One could attempt to read into this section a discretionary power for Customs officers to grant border access. However, s 382(2) is ultimately an offence provision, not a positive authority to allow access. Its purpose is to set out the requirements for the offence and being in a Customs-controlled area "without the permission of a Customs officer" is an element of this. Thus, it is very difficult to read into this section an ability to grant access and filming permission to Greenstone TV. Moreover, even if Customs officers do hold some discretionary powers in granting access, it is difficult to perceive how this could be used for the purposes of *Border Patrol*.

B The "Third Source" of Authority

In the apparent absence of a positive legal basis, border agencies could attempt to claim authority for their actions under the "third source" of government power. As BV Harris notes, the third source holds that the executive government has the freedom to act without positive legal authority provided by the first and second sources: statute and the prerogative.¹¹² For example, the Crown has the freedom to enter into contracts without additional legal authority.¹¹³ Harris has also described this ability as the executive's freedom to "like an individual, ... do that which is not legally prohibited".¹¹⁴ In this scenario, the claim would be that border agencies are free to allow Greenstone TV access to film in controlled border areas as there is no positive law preventing them from doing so.

However, the third source is constrained by existing positive law and the competing legal rights of others.¹¹⁵ Unlike the prerogative or statute, it cannot override them.¹¹⁶ Accordingly, the third source is a tenuous foundation for authority in this particular case, given the existing statute law controlling border access, and the potential for infringement of privacy rights. While border agencies

112 Harris, above n 105, at 225.

113 At 225–226.

114 At 225.

115 At 626–627.

116 At 627.

may have the freedom to contract with Greenstone TV, this does not permit the terms to conflict with positive law.¹¹⁷ As previously discussed, *Border Patrol* is filmed primarily in passenger disembarkation and processing areas at New Zealand's airports. These are all controlled Customs, Immigration or Biosecurity spaces, governed by statute.¹¹⁸ The effect of the statutory framework is that these controlled areas are secure and highly restricted. Border officers have the statutory authority to enter controlled areas, and ticketed passengers must enter in order to embark or disembark their aircraft.¹¹⁹ However, under most circumstances, ordinary members of the public are barred from entry. Indeed, they may be subject to a fine of up to \$1000 if they fail to comply with an officer's directions to leave.¹²⁰ The crew of Greenstone TV are not border officials or ticketed passengers. They are simply ordinary members of the public who, under this statutory regime, would not have access to controlled border areas. This appears to be in conflict with the statutory authority surrounding controlled border spaces, and thus, unable to be supported by the "third source" approach.

The third source of authority is also tenuous due to *Border Patrol's* potential for rights infringements. As Harris notes, "the third source does not authorise the government to override competing legal rights recognised by positive law".¹²¹ This article has already established that Greenstone TV's filming in the border space creates significant privacy risks. The right to privacy has been recognised to an extent in New Zealand through the tort of privacy and the Privacy Act 2020.¹²² This signals that Parliament and society regard actions that contravene these rights and liberties to be unacceptable.¹²³ As discussed above, a government could override these rights by identifying a "specific statutory authority" for their actions.¹²⁴ Rights can be overridden in this way because it means that Parliament has deliberately considered the matter.¹²⁵ However, as previously noted, there is no specific legislative override of these rights in this case. Thus, they remain a significant constraint on the third source of authority in the border space.

In short, the significant statutory restrictions around access to controlled border areas, and the existence of competing personal rights, makes the third source of government authority difficult to

117 At 627.

118 Customs and Excise Act, s 56; Immigration Act, s 382; and Biosecurity Act, s 2.

119 Customs and Excise Act, s 222; Immigration Act, s 282; Biosecurity Act, s 109.

120 Customs and Excise Act, s 382.

121 Harris, above n 105, at 227.

122 *Hosking v Runting*, above n 26, at [244]–[247].

123 Harris, above n 105, at 227.

124 At 632.

125 At 628.

rely upon in this case. Furthermore, the lack of any apparent authorising statute leaves the existence of any authority for Greenstone TV's filming access in question.

C Examination of Other Relevant Material

The apparent lack of legal authority for facilitating media access is all the more notable when considered with reference to the agencies' resources and public-facing information regarding privacy sharing. There is a clear inconsistency between the images these agencies portray and their facilitation of *Border Patrol*. The New Zealand Customs Service, Immigration New Zealand and the Ministry for Primary Industries all provide public-facing documents, information, and assurances regarding individuals' and non-governmental agencies' privacy. For example, MPI's "Privacy and Transparency Commitment" notes that:¹²⁶

MPI may only use and disclose information in connection with our lawful purposes and functions, and in accordance with relevant legislation, including the Search and Surveillance Act, and the Privacy Act.

The New Zealand Customs Service's *Transparency Statement* expresses a similar sentiment:¹²⁷

We're only interested in the information we need to keep our border safe and secure – no more, no less. We use the information we collect from you to carry out our lawful functions.

Both statements emphasise their lawful functions, and both agencies note the relevant empowering legislation.

Much of their information sharing, and the agreements governing this, are also published on their websites in the name of transparency. For example, New Zealand Customs has published all of its current information matching agreements, as well as information regarding the legal mandate for these and the process by which they are approved.¹²⁸ Though not publishing the information sharing agreements themselves, Immigration New Zealand notes the agencies they have agreements with, their relevant purpose and the authorising legislation.¹²⁹

In light of this, it is notable that the co-operative agreements between Greenstone TV and these agencies are not published. These agencies' official documents do not appear to contemplate *Border Patrol*'s potential for privacy-related harm. There is no mention of *Border Patrol* or the potential for

126 Ministry for Primary Industries "MPI Privacy and Transparency Commitment" (28 June 2019) <www.mpi.govt.nz> at 11.

127 New Zealand Customs Service "Transparency Statement" (10 January 2020) <www.customs.govt.nz/about-us/your-information/transparency-statement/>.

128 New Zealand Customs Service "Information matching and sharing" (21 September 2020) <www.customs.govt.nz/about-us/your-information/customs-information/information-matching-and-sharing/>.

129 Immigration New Zealand "Information matching" <www.immigration.govt.nz/about-us/policy-and-law/identity-information-management/information-matching/>.

filming in any public-facing information. Of course, if information relating to *Border Patrol* were published and acknowledged by these agencies, they would also need to reference the relevant Act, regulations or other legal sources which provide authorisation and proper mandate for this access. Commercial sensitivity of any material cannot justify an abrogation of public law duty. This is an unfortunate oversight, especially as an examination of the governing legislation does not uncover any clear legal foundation for facilitating access, nor does the third source. Regardless of whether a legal foundation exists, this opacity is inconsistent with the agencies' privacy and transparency standards.

V CONCLUSION

Border Patrol and the media ride-along genre cause privacy-related harm and distress among those "(un)lucky" individuals captured by the camera.¹³⁰ Especially in light of a lack of sufficient justification or good for this harm, save commercial entertainment and promotional material for the agencies featured, a clear legal mandate must exist to legitimise this venture. Unfortunately, after investigation of the legislative framework surrounding the New Zealand Customs Service, Immigration New Zealand, and the Ministry for Primary Industries, this source of legal authority is not evident. Given these agencies' strong public assurances regarding transparency and privacy, they should identify and publicise this legal basis, alongside documentation of their interaction and co-operation with Greenstone TV. It may be difficult to publish all documentation and information due to commercial sensitivity, however, this should not preclude the provision of information sufficient to inform individuals of the legal framework in which Border Patrol operates and their right to privacy in the border space.

¹³⁰ King, above n 6, at 358.