

Inside story: The journalist who quit TVNZ after his 'off the record' interview was used to undermine a victim of sexual offending

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A journalist who quit TVNZ and his role on its flagship current affairs show *Sunday* has spoken of resigning on a point of principle after "off the record" material was provided to defendants in a sexual offending case who then used it in an attempt to undermine the victim in court.

Former TVNZ producer Chris Cooke told the *Herald* he quit the state broadcaster after 26 years of journalism because he believed his employer had breached his pledge to Erin Leighton that he would protect details she shared about falling victim to adult predators as a teenager.

He said he had promised he would keep confidential interview footage with Leighton, who alleged she was drugged and subject to an indecency as a teenager by notorious serial fraudster Paul Bennett and a woman who can't be named for legal reasons.

That footage was played in the Auckland District Court as part of their defence on charges relating to the allegations. It is believed to be the first time the Criminal Disclosure Act has been used to take confidential information from a journalist, according to one media law expert, and has sparked calls for greater legal protection for information gathered by journalists.

TVNZ has denied it failed to protect the information, saying it went to court to fight to withhold it and was complying with a court order to produce it.

Bennett was found guilty of three charges of committing an indecent act on a young person and three charges of supplying a Class B controlled drug. The female defendant was convicted of two indecent act charges and one charge for supplying a Class B drug, and was found not guilty on two other charges. Bennett has now been sentenced to 21 months in prison and the woman to 16 months.

Leighton has waived her automatic suppression as the victim of a sex crime to seek justice for events when she was 15 and was tricked into taking the drug ecstasy then subjected to inappropriate contact.

That was 2008 and led to Leighton complaining to police and carrying out a formal video interview to be used as evidence should the allegations ever result in a later trial.

Seven years later, then an adult, Leighton spoke to TVNZ's *Sunday* about her frustration that police knew Bennett and the woman were in Australia but had not acted to have them extradited and charged.

Leighton waived the automatic suppression afforded victims of sexual violence to highlight the perceived police inaction.

As TVNZ later told the Auckland District Court, Leighton "agreed to participate only on receiving a commitment from TVNZ that, if any details of the offending were mentioned during the interview, they would not be televised and would remain confidential".

In the wake of the *Sunday* show broadcast, Bennett and the woman were arrested on multiple counts of committing an indecent act on a young person and providing an illegal drug.

The two defendants sought a copy of the hour-long raw interview footage from the *Sunday* show to defend the charges.

It took two years and eight months for the footage to go from "off the record" to evidence for the defence at the Auckland District Court.

In cross-examination, lawyers for both defendants highlighted discrepancies between comments the victim made during a 2008 police evidence video and the 2015 raw footage from the TVNZ interview.

The woman's lawyer, Jo Scott, said the victim's interview with TVNZ did not make reference to an alleged massage or shower on the first of two nights during which she alleged the indecent acts took place.

She said that was a change from her police interview where she had alleged indecent acts occurred on two nights.

Her lawyer, Simon Shamy, also highlighted discrepancies, including the complainant's police video statement that a pill had been taken by a chemist known to the accused man while she told TVNZ he had called it pain relief left over from a leg injury.

Crown lawyer Claire Paterson described the differences between the interviews to the jury as the "tiniest" details.

The pathway to the raw interview footage making its way into the recent criminal trial began in October 2020 when the female defendant asked that the District Court order TVNZ to surrender it.

Court documents show the entire interview was about an hour, of which six minutes was used in the 20-minute *Sunday* story.

In February 2021, Judge Ema Aitken of the Auckland District Court described the case as "a head-on collision between the defendant's fair trial rights and the expectation of the complainant that TVNZ will honour its undertaking to keep the interview with her confidential".

Judge Aitken ordered two sections of the interview, making up 118 seconds, to be disclosed by TVNZ as they appeared to differ from the victim's statements to police in 2008.

She said "the right of the defendant to a fair trial trumps the public interest in maintaining the confidences of TVNZ" in places where the interview "strayed into eliciting information ... as to the detail of what she says happened to her".

Cooke said he urged TVNZ to appeal the decision and it did not - and then Bennett and the female defendant did, winning access to even more of the video interview.

The Court of Appeal ruled almost 25 minutes of the interview be provided, saying Leighton could be compelled at trial to answer questions on what she had told TVNZ and the situation was no different than if she was required to produce a private diary.

The judgment showed TVNZ opposed the release of further footage, unsuccessfully arguing disclosure should be limited to the 118 seconds ordered released by the District Court. It said going further would create a "chilling effect" and it would "be seen to be unable to honour undertakings of confidentiality made to encourage disclosure in the public interest".

But the Court of Appeal said the interview about a perceived lack of police action went into aspects of the alleged offending. "If the interview had been confined to [police delays], and had not extended beyond that into discussion of the alleged offending itself, the question of disclosure would not arise."

Cooke said he had expected TVNZ to appeal the District Court and Court of Appeal decisions - and that it should have simply deleted the raw footage to uphold its agreement with Leighton.

After Bennett and the woman who cannot be named were arrested, TVNZ received a request for a copy of the story. At that point - before the raw footage was sought - Cooke said he tried to have the footage deleted.

He said it was discussed that if the material was handed over at any stage, even to a judge hearing the case, then the chance "to go to jail to protect it" was gone.

Cooke said he had worked as a producer on *Sunday* for 20 years and before that was on the *Holmes* show for six years and had previously seen footage at risk of disclosure destroyed.

He said it was a reflection of TVNZ's "strong internal rules" about protecting confidential material "and you would fight until the absolute end to not give up this sort of material".

When interviewing Leighton, Cooke said she was "cautious" and needed an assurance of confidentiality should details specific to the allegation arise during the interview.

"She said she didn't want to do anything that would get in the way of the case further on. I made the assurance of confidentiality, that we won't go into the details and if we do, it will be off the record."

Cooke said everyone involved in the broadcast, including bosses at the *Sunday* show, were aware of the assurance of confidentiality.

He said there were promises by TVNZ to the complainant to appeal at every possible step which he believed were not kept.

"She insisted TVNZ keep its promise that it not be handed over. She was very angry and just couldn't understand the breach of trust."

Cooke said he attended the Court of Appeal hearing and "it was clear there were grounds to appeal the District Court decision". "I was disgusted. After I sat through that hearing I resigned."

He said he believed TVNZ would argue it had done all it could and he intended to disagree publicly. "The only way I could do that was to resign to speak out."

In doing so, he hoped it would prompt lawmakers to introduce a broader, stronger "shield law" to protect journalists' confidential agreements.

Veteran TVNZ journalist Ian Sinclair, who presented the story, said he was "deeply disappointed" when he learned "judges decided to take a private discussion between myself and my source and release the details to the court and the defendants".

"The ruling sends a dangerous signal to the public that New Zealand journalists can no longer guarantee protection for their news sources and off-the-record information."

Sinclair said it could "dry up" leaks from places that had "something to hide". "Fear is the worst enemy of democracy and this court has put democracy itself under threat."

Leighton said the broadcaster made promises to her which it did not keep. "It was difficult because that footage should have never made it in the courtroom in the first place. That was a major letdown by TVNZ."

Throughout the process with TVNZ, there was one saving grace - producer Chris Cooke.

"I actually felt terrible because he felt like he'd been part of letting me down and he didn't want to stand for that, so he actually quit his job over that footage being out."

A TVNZ spokeswoman said the broadcaster had opposed the release of the footage through "hundreds of legal hours internally" and external lawyers hired at "substantial cost".

"We take these matters seriously and fight them robustly. We take our ethical responsibilities and duty of care to our interviewees seriously. Where we have given certain undertakings to interviewees, we seek to honour those commitments.

"We comply with the law and take our legal obligations to the court seriously also. TVNZ in this instance has been compelled by the courts to provide specific material for the purposes of a fair trial."

Questioned over TVNZ's decision to not appeal the court decisions, the spokeswoman said: "This was a challenging matter. You'll see from the court decisions that it's a complex area of law. Given the verdicts received at District Court and Court of Appeal we did not appeal further."

The *Herald* asked if a review had been carried out into its handling of the situation and it did not respond. The spokeswoman said the issue had been elevated to its board as was any litigation involving the broadcaster.

Massey University journalism associate professor Dr James Hollings said there was not enough protection in law for journalist's sources.

"Journalists do not have the same protection that legal advisers or medical professionals or indeed ministers of religion have."

In this instance, though, Hollings said the Court of Appeal decision was a "reasonable" finding because the *Sunday* team questions had strayed into the actual allegations of offending. He believed an appeal to the Supreme Court would have been "pointless".

"If they had stuck to the non-trial issues ... it would not have been discoverable. They promised her confidentiality they knew, or should have known, they couldn't give."

Hollings said it highlighted how the only way for a journalist to be confident that a source's identity or confidential information would not be shared was to keep it to themselves.

"If they tell their employer, or provide any documentary evidence to the employer, that employer is going to follow the law."

AUT University senior journalism lecturer Dr Greg Treadwell said a journalist had to "do everything within your power" to keep a promise of confidentiality.

"Survivors of sexual assault who talk to journalists should get cast-iron protection and real support from both the journalist and their news organisation in return as they share their difficult stories."

Treadwell said it appeared unnecessary for the TVNZ team to pose questions that elicited details of the offending but once asked there was an opportunity to understand the "potential impact of what they had recorded".

"That was the moment they should have known that the only way to be sure her answers would never be used against her would be to destroy them."

Treadwell said once the material was on a "hard drive at TVNZ" it was on the broadcaster to "do everything it could in legal terms to keep as much as possible confidential".

University of Canterbury professor Ursula Cheer said she believed it was the first time the Criminal Disclosure Act had been used to obtain "off the record" information and expected media would feel "discomfort" over it.

She said the law governing discovery - and exchange of evidence before trial - did not have the starting presumption of supporting a journalist's relationship with a source as other legislation such as the Evidence Act.

Cheer said the law governing the protection of journalists' sources was inconsistent across different legislation. She said judges were generally aware of and concerned about freedom of expression issues and the rights of journalists.