

Will you take an election programme off the air while the complaint is being determined? No, we do not have the power to do that. The BSA will endeavour to process complaints about election programmes that are still playing (ie. advertisements) as quickly as possible.

Where do I make an election programmes complaint? Complaints about election programmes must be made directly to the BSA. We have a specific online complaints form for making election programme complaints.

What if it is an advertisement but not about elections? All complaints about ads that are not covered by the Election Programmes Code need to go to the

Advertising Standards Authority (ASA). **What if it is an advertisement but not on television or radio?** All complaints about ads that are not television or radio (eg. on the internet, at the movies, in print, billboards etc) need to go to the Advertising Standards Authority.

An advertisement didn't name the person who authorised it – do I complain to you about that? This is not part of the broadcasting standards regime. Complainants who wish to take issue with this need to contact the Electoral Commission.

Disclaimer: Nothing in these FAQs binds the BSA in determining the outcome of any future complaint. Each complaint is determined on the particular facts surrounding a broadcast.

BSA Decisions to Include Expanded Bill of Rights Explanation

The broadcaster's right to freedom of expression is guaranteed by section 14 of the Bill of Rights Act. When the Authority upholds a complaint, it places a limit on that right. As part of the complaints determination process the Authority considers whether upholding the complaint would place a limit on this right that is reasonable, prescribed by law, and demonstrably justifiable in a free and democratic society (section 5 of the Bill of Rights Act).

Traditionally the Authority has been reluctant to include a full explanation of this balancing exercise in its written decisions. This was due to a number of factors, including the desire to keep its written decisions concise and in plain language so that they remained accessible to journalists and the public, and a lack of judicial direction as to the way in which the balancing exercise should be explained.

The Authority instead preferred to include a standard statement at the conclusion of each upheld decision.

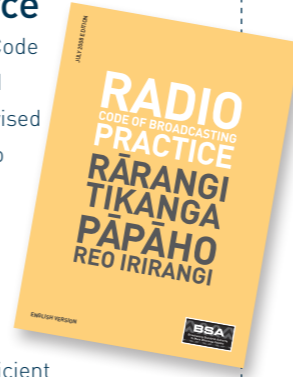
The Authority's inclusion of that statement has recently been questioned by members of the judiciary, and has attracted criticism from academics. There have also been several recent court judgments which have given good guidance on how best to describe a Bill of Rights analysis.

In light of this, the members of the Authority believe that it is time to expand the way they explain how the Bill of Rights Act provisions have been considered. Accordingly, the Authority will now be including a fuller explanation of this process in its decisions. Including this explanation does not mean that its processes have changed in any way; the Bill of Rights will continue to be applied as it has been applied previously.

Revised Radio Programmes Code Now In Force

The revised Radio Code took effect on July 1 2008. Codes are revised from time to time to reflect community expectations, to keep them relevant to broadcasting practice, and to support fair and efficient decision making by the BSA.

The revised code was prepared by the Radio Broadcasters Association (on behalf of commercial broadcasters) and Radio New Zealand and approved by the BSA. An electronic version of the Code is available on the BSA website and hard copies can be sent out on request. The BSA would like to thank all those involved in the code review process and in particular David Innes of the Radio Broadcasters Association, George Bignell of Radio NZ and Clare Bradley of MediaWorks.



Statement of Intent

The 2008-2011 Broadcasting Standards Authority SOI is now available both online and in hard copy.



New Communications Advisor

We are pleased to welcome Kate Baker to the BSA as Communications Advisor. Kate joined the BSA in June, coming from the Ministry of Research, Science and Technology.

0800 Number

The Broadcasting Standards Authority's free phone number is

0800 366 996

A recorded message explains the complaints process, and a connection through to the office is provided.

Directory

The current members of the Broadcasting Standards Authority are: Joanne Morris (Chair), Tapu Misa, Diane Musgrave and Paul France.

Contact us at:

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QUARTERLY

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The Election Programmes Code

As mentioned in the previous BSA Quarterly, the revised BSA Election Programmes Code came into effect on June 1.

The major change within the revised Code is that complaints about 'election programmes', typically election advertising and opening and closing addresses broadcast on radio or television, must now be referred directly to the BSA. Election programmes are subject to all the standards across the broadcasting Codes except an election programme need not present a range of significant viewpoints on a controversial issue of public importance. This is because the Broadcasting Act specifies that the 'balance' standard does not apply to election programmes.

During July and August Chief Executive Dominic Sheehan, along with Advertising Standards Authority Chief Executive Hilary Souter, ran seminars in Auckland and Wellington for political parties to clarify their obligations in the run-up to the upcoming general election. Some broadcasters also attended those discussions.

The following FAQ on the Election Programmes Code have been developed to help guide broadcasters, political parties and the general public. An expanded version of these FAQ which provides further guidance around election programmes is available on the BSA website. Any specific questions should be directed to the BSA's Legal Manager Christina Sophocleous.

What is the official definition of an 'election programme'? An 'election programme' is one that is broadcast on

television and/or radio which: encourages or persuades, or appears to encourage or persuade voters to vote, or not to vote, for a political party or the election of any person at an election; or advocates support for, or opposes, a candidate or political party; or notifies meetings held or to be held in connection with an election.

Isn't an 'election programme' effectively an advertisement? Yes, typically election programmes are paid advertisements for political parties or candidates. Opening and closing addresses are also definitely election programmes.

When can an 'election programme' be broadcast? It is an offence to broadcast a paid election programme for a party or candidate except during the election period. There are also restrictions around the times at which and the days on which an election programme can be broadcast. Broadcasters could choose to broadcast election programmes outside the election period but to do so would open them up to a possible fine of \$100,000.

When is the 'election period'? The election period begins on writ day (the day the Governor-General issues a writ requiring the Chief Electoral Officer to make all necessary arrangements to conduct a general election) and ends at the close of the day before polling day.

If an election programme screens outside the election period and a complaint is made to the BSA under the Election Programmes Code will you determine that complaint? Yes. The BSA would be required to determine that complaint.

You'll find election news and advertising guides for broadcasters from the Electoral Commission enclosed with this newsletter. The guides are also available for download from the article "How to run election broadcast advertising" within the Electoral rules topic of the Elections NZ website at www.elections.org.nz which has more extensive information and links for broadcasters, including how to make the post election return to the Electoral Commission required of all broadcasters.

What if a news or current affairs shows covers election issues – is that an election programme? Broadcasting news or comments or current affairs programmes relating to elections is not restricted under the Broadcasting Act. This means that news and current affairs shows are not 'election programmes' and not subject to the Election Programmes Code. However, news, current affairs and other programmes that cover the election or election issues will still be subject to all the standards of the relevant Code that covers the medium it was broadcast on (ie. Radio, Free-to-Air TV or Pay TV). Remember that complaints made under the other Codes will be dealt with by the broadcaster in the first instance, but election programme complaints must come directly to the BSA.

How much time do I have to make an election programme complaint? You have 60 working days from the date of the broadcast. We encourage all complainants to make complaints as soon after the broadcast as possible.

DECISIONS

The BSA issued 46 decisions between April and June 2008

Decisions of interest included the following:

Privacy, fairness

An episode of *Target*, broadcast at 7.30pm on 3 July 2007, featured hidden camera footage of four caregivers who had been hired to care for an elderly actor for a four-hour period. Each caregiver was given a score out of ten for their performance. Two of the caregivers performed well and scored seven and eight out of ten. One caregiver, who ate some food from the fridge without asking and did not wait outside while the actor used the bathroom, was rated five out of ten. The fourth caregiver was late to the job, used expired milk in the actor's cup of tea, did not return the actor's change after buying more milk, ignored the actor's coughing, gave her no privacy in the bathroom, and also read her personal diary. This caregiver was rated three out of 10 by the programme.

Aaron O'Connell complained that broadcasting the hidden camera footage was unfair and breached the privacy of the caregivers.

The Authority upheld the privacy and fairness complaints. It considered that secretly filming the caregivers inside the *Target* house where they had a reasonable expectation of privacy was an intrusion which the ordinary person would find offensive.

The Authority ruled that even though some of the caregivers had performed poorly, their behaviour was not of such a serious nature as to justify broadcasting the hidden camera footage in the public interest. For the same reason, the Authority also found that the caregivers were treated unfairly.

The Authority ordered TVWorks to broadcast a statement summarising its decision. **Decision ref. 2007-067**

Accuracy

On 21 August 2007 *Target* discussed the use of formaldehyde in the manufacture of clothing. It presented the results of laboratory tests of randomly selected clothing. *Target* said these tests had found levels of "total" formaldehyde up to 900 times above a limit of 20 parts per million, which was the level at which *Target* said formaldehyde could cause detrimental health effects as serious as cancer.

Raymond Gough complained to the Broadcasting Standards Authority that the programme had made unsubstantiated claims and used the wrong test to determine formaldehyde levels.

The Authority found that the programme was misleading, inaccurate and unnecessarily alarmed viewers because *Target* had no evidence to show that formaldehyde levels of 20 parts per million could cause detrimental effects such as cancer. The Authority said the programme used the wrong test by measuring "total" instead of "free" formaldehyde levels, which meant that the comparisons in the programme were not valid or accurate.

The Authority referred to a report by the Ministry of Consumer Affairs that was conducted as a result of *Target's* investigation, which found that there was little cause for concern about safe levels of formaldehyde in clothing. The Ministry's test results showed that 97 out of the 99 items it tested were within acceptable pre-wash limits for formaldehyde in clothing. The other two items had acceptable levels after washing.

The Authority ordered TVWorks to broadcast a statement summarising its decision, and to pay \$4000 costs to the Crown.

Decision ref. 2007-114

Fairness, Accuracy

In April 2007, *Close Up* ran a story about attempts by two East Coast MPs and a local Mayor to help Gisborne soccer player Scott Hales remain in New Zealand. His ex-wife and her father, a former policeman, claimed that Mr Hales was a wife beater and a racist. The host interviewed Mary Anne Thompson, the then Deputy Secretary of the Workforce group in the Department of Labour, who stated that Mr Hales had not declared a UK conviction for assault before entering New Zealand.

Mr Hales complained to the Authority that the item was both unfair and inaccurate. He claimed the item was a "malicious attempt" to stop him remaining in the country, and had falsely stated that he had not declared a UK conviction.

The Authority upheld Mr Hales' complaint. It said that TVNZ had treated Mr Hales unfairly because it had insufficient independent evidence to back up the serious and damning accusations by his ex-wife and her father that he was racist and a wife-beater.

The Authority also said the item was inaccurate because, contrary to what Mary Anne Thompson said, Mr Hales had

in fact declared his previous conviction. The Authority accepted that Ms Thompson was a reliable source, but said that by broadcasting her error, TVNZ had breached the accuracy standard.

The Authority ordered TVNZ to broadcast a statement summarising its decision and to pay costs to the complainant and Crown. **Decision ref. 2007-080**

High Court Appeals

The appeal over the *Green and TVNZ decision* (2007-068) was heard by Justice Mallon on 15 May in Wellington. This concerned a *Close Up* item about "naming and shaming" convicted drunk drivers. It showed a woman who had just been convicted of her second drink driving offence leaving court, attempting to avoid the reporter and camera operator waiting there and then being pursued down, and across, the street by them. TVNZ broadcast various facts about the woman concerned (including her age, marital status and salary) and, at the conclusion of the item, unmasked her previously pixelated face. The BSA had upheld the complaint on the ground of fairness, in particular for the humiliating way in which the woman was treated.

In the appeal TVNZ claimed that the decision placed an untenable restriction upon the broadcaster's ability to report upon a matter of valid public interest and unjustifiably restricted the broadcaster's right to freedom of expression. There was extensive discussion of the fairness standard during the appeal and also the application of the Bill of Rights to the BSA.

In a judgment received in July Justice Mallon set aside the BSA's decision. Among other things she said the BSA failed

to take into account material relevant considerations, including the fact that the right of the media to report on all or any part of what takes place in the courtroom can include television coverage of defendants appearing in public streets. The judge also pointed out the public interest in the case.

The appeal over the order made in the **Wellington City Council and RNZ decision** (2007-056) was heard by Justice France on 6 June in Wellington. The decision concerned a *Morning Report* item that erroneously claimed that the Wellington City Council was looking at scrapping free weekend parking. The BSA had upheld the Council's complaint on the grounds that the item was inaccurate and unfair, and ordered RNZ to broadcast a statement summarising the decision.

In the appeal RNZ said that the BSA's order of a broadcast statement was unnecessary as simply releasing the BSA's decision was sufficient to mark the breach. Justice France did not agree and the BSA's order to broadcast a statement was upheld. RNZ has subsequently broadcast the statement.