

11 March 2022

Glen Scanlon
Chief Executive Officer
Broadcast Standards Authority
PO Box 9213
Wellington 6141
By email: [REDACTED]

Dear Glen,

Please find the MediaWorks submission to the Broadcast Standards Authority on the 2022 Draft Code outlined below. Thank you very much for additional few days to make our consideration.

General Points

The publication of Commentary alongside the Code.

On balance, we do not support the publication of the Commentary alongside the Code, as it gives the impression that the Commentary forms part of, and has the same weight as the Code, and it does not. We believe there is merit to the publication of the Commentary, but as a separate document, similar to how Practice Notes have been published in the past.

The single code for both Radio and Television

Yes we support this in principle, however we believe that the Draft Code as it stands, is skewed towards television.

We therefore request that where the consideration of context is mentioned in the Code and Guidelines, that 'platform' is included as part of the contextual consideration. This is to provide clarity that radio formal complaints may have their own unique considerations compared to television, and that consideration against this Code needs to be consistent with previous radio decisions.

Also we note that some guidelines specific to radio have been excluded from the Draft Code, and we have requested their reinstatement in our comments about specific standards below.

If the above two issues cannot be addressed in the new Code, then we support maintaining the status quo of two separate codes for radio and television, which has the added benefit of simplicity for users, and is in line with the BSA-commissioned expert advice of John Burrows.

The use of the term 'on-screen' in the Code and the Commentary

Throughout the Draft Code, notes and Commentary, the use of the term 'on-screen' is used for television content. Given the proposal of one code for both television and radio, it would provide more clarity for users and be more accurate to use the term 'television' instead of 'on-screen'. These sections would then be easily identifiable as applicable to television only, and would ensure it is clear that the guidelines do not apply to online content of radio stations, for example.

Seeking external cultural advice

We support this approach in principle, however, we are of the view that seeking external advice has the potential to be problematic in some circumstances and believe that the Authority needs to consider the following points when deciding to seek that advice.

The first is that by consulting an external advisor, it is highly possible that the advisor will be providing an opinion or advice without an equal understanding of broadcasting landscape that Authority members have. The context of the broadcasting landscape at the time of the decision is very relevant to making a decision that is fair and well-informed.

While the Authority can receive the expert's advice and go on to consider it in the context of the media landscape before making a final decision, we are of the view that the mere act of consulting an expert elevates the expert's view in a way that may make it difficult for the Authority to disagree with their input, even if the Authority's experience or judgment so justifies. Therefore we are of the view that when consulting externally, the Authority should ensure:

1. Where possible, to consult an expert with significant exposure to, and understanding of, the media landscape.
2. It does not specifically ask the cultural advisor for their opinion on whether to uphold the complaint or not uphold the complaint, so that the Authority is not concerned with the possibility of directly contradicting the advice.
3. It does not ask the cultural advisor to consider any material in the broadcast that is not subject to complaint, as this falls outside of the scope of the Authority's consideration. This has occurred in the past.
4. To record why they feel they need to consult externally, so that if it finds its members persistently lacking specific knowledge, it can be taken into consideration when appointing Authority members in the future, so that external consultation is undertaken less often.

Feedback on Specific Standards:

Standard 1 – Offensive and Disturbing Content

- a. The change from the current heading of Standard 1 (Good Taste and Decency) is an improvement. In practice, the headings of the standards are the first and in many cases, the only, part of the code that complainants read, and therefore the more accurately that they reflect the scope of the actual standard and guidelines, the more efficient the complaint process.
- b. The term 'unduly' implies a subjective standard against which to measure offense, and we suggest 'disproportionately' is more appropriate.

- c. Audience advisories – the inclusion of helpline information as a Code requirement is impractical and unnecessary, especially in a radio environment. Although the guideline allows a measure of discretion as to when an audience advisory will be appropriate, the explicit mention of helpline in relation to specific issues such as ‘rape, sexual violence or suicide’ places the broadcaster in danger of breaching the code when it is not practical or advisable to include helpline information in a broadcast. Therefore, it should not be included in the code at all.

As a broadcast standards manager that has worked across both radio and television, I have received feedback from the charity organisations in the past that, while on the surface it appears like a good thing to do, it can cause problems for the non-profit organisations. For example, they may not have the resources to deal with a sudden influx of calls. To my knowledge, helplines are still included in broadcasts even though it is not a requirement of the code, and therefore there is no need to formalise it as a requirement. The current approach is a more fluid and favourable practice for the parties affected and it does not disadvantage the viewer/listener.

Standard 3 – Promotion of Illegal, Dangerous or Antisocial Behaviours

This draft standard appears to conflate the current Standard 4 (Violence) and Standard 5 (Law and Order) and we do not support this approach, and strongly object to it.

Firstly, we are of the view that it is not necessary to have a separate standard for violence as has been the case in previous versions of the code. The potential impact of violent content can be adequately addressed under Standard 1 for both radio and television. We therefore recommend it is dropped from the code. It is particularly unnecessary for radio broadcasters and in the past has been a distraction for complainants who have nominated it when it is not relevant to their concern, causing additional unnecessary work for the broadcaster.

We are of the view that draft Standard 3 therefore, should ONLY address the promotion of serious illegal, dangerous and antisocial behaviour in exactly the same way that the current Standard 5 (Law and Order) does. We do not feel that the current Standard 5 needs re-writing.

The second point is that draft Standard 3 confuses these two very separate issues, the depiction of violence and the incitement of violence. It is poorly worded in our view, and could facilitate outcomes that curtail the broadcaster’s right to freedom of expression and the listener or viewer’s right to receive information.

For example, the current application of Standard 5 (Law and Order) requires that only explicit incitement to violence (or other illegal activity listed) will breach this standard. However, with the draft Standard 3, it could be argued that a depiction of violence could implicitly incite violence, leading to a limit on the right to freedom of expression in dramatic or humorous content. In fact this possibility is alluded to in the commentary on ‘Illegal activity’:

This standard does not stop broadcasters from discussing or depicting criminal behaviour or other law-breaking, even if they do not explicitly condemn it. It also does not prevent genuine criticism of laws or their enforcement by the courts or police. The standard is concerned with broadcasts that actively undermine, or promote disrespect for, the law or legal processes.

Direct incitement to break the law is likely to breach this standard, if there is a real likelihood the audience will act on it. Broadcasts which condone criminal activity or present it as positive or humorous may have this effect.

To our knowledge, neither the current Law and Order or Violence standards have ever been applied by the Authority in such a manner, and the above inclusion is therefore a very surprising addition to the Commentary. In our view, there is no place for it in the Commentary. However, as we have already stated, we believe this draft of Standard 3 is not necessary, and we would prefer to keep the current Standard 5 (Law and Order).

However we have no objection to the inclusion of alcohol promotion guidelines under a Law and Order standard.

Standard 4 – Discrimination and Denigration

We do not agree with the inclusion of the following phrase in this standard:

However, in some cases, broadcast content which has the effect of reinforcing or embedding negative stereotypes may be enough to meet the threshold for finding a breach, without any malicious intent or a high level of condemnation.

Although we as a broadcaster have upheld a complaint referencing this aspect of a broadcast, we do not agree that this should be codified as a guideline as it significantly lowers the threshold of this standard, is very subjective in nature and potentially narrows the scope for discretion to be applied according to context. We are of the view that application of this guideline could, in some cases, unjustifiably limit the right to freedom of expression.

In addition, we are of the view that a high level of ‘disapproval’ is not relevant to this standard.

Standard 6 – Accuracy

We note that current guideline 9d has been excluded from the Code and no reference to talkback is included in the commentary. We would like guideline 9d to be included in the standard:

9d Talkback programmes will not usually be subject to the accuracy standard.

Radio, compared to television, is a predominantly live environment and this needs to be addressed in this standard further than it already does, in our view:

- a. In guideline 6.1, we would like it clarified that broadcasters should still make reasonable efforts to ensure analysis, comment or opinion is not materially misleading with respect to facts, where they have editorial control.
- b. Statements of fact about very specialist subjects, even if made by experts, cannot be fact checked in a live environment and this should be recognised as a consideration in the application of the standard.

Standard 7 – Privacy

Guideline 7.5 – we submit that the qualifiers ‘learning difficulties’ and ‘mental health issues’ are very broad descriptors open to a wide subjective interpretation, however if the application of this guideline is centred around it being obvious from the circumstances of the recording, then we have no objection.

Standard 8 – Fairness

We note that current guideline 11g of Standard 11 (Fairness) has been omitted from the code:

11g The use of prank calls as a legitimate expression of humour will usually be acceptable, but caution should be exercised to prevent undue harm to unsuspecting parties.

We believe this should be included in the current draft also stating that it is applicable to radio.

While we don’t agree with all aspects of the suggested code, clearly a lot of work has gone into devising this draft, and we thank you for the opportunity to submit our views.

Yours sincerely,

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