

COMPLAINTS PROCESS AND OTHER GUIDANCE

COMPLAINTS PROCESS STEP BY STEP

DO YOU WANT TO MAKE A FORMAL COMPLAINT?



GUIDE TO THE BSA COMPLAINTS PROCESS FOR TELEVISION AND RADIO PROGRAMMES

What type of programme can I complain about?

You can complain about any programme broadcast in New Zealand on television or radio.

When can I complain?

You need to make your complaint within **20 working days of the broadcast**. You cannot complain about a show before it has aired.

What will the BSA accept complaints about?

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| ✓ Free-to-air TV programmes | ✗ Advertising (contact the Advertising Standards Authority) |
| ✓ Pay TV programmes | ✗ Programme scheduling (contact the broadcaster) |
| ✓ Radio programmes | ✗ Broadcaster websites (contact the broadcaster) |
| ✓ Programmes viewed or listened to on demand (ONLY if you can supply details of original TV or radio broadcast and lodge your complaint within 20 working days of that broadcast) | ✗ Programmes viewed or listened to on demand – if you cannot supply details of original TV or radio broadcast (contact the broadcaster) |
| ✓ Election advertisements on television or radio (during election periods) | ✗ News and current affairs on broadcasters' websites, which has not been on TV or radio (contact the Online Media Standards Authority) |
| | ✗ Other internet content (contact provider) |
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What issues can I complain about?

You can complain about the following issues:

- | | |
|----------------------------------|------------|
| • good taste and decency | • alcohol |
| • programme information | • balance |
| • children's interests | • accuracy |
| • violence | • privacy |
| • law and order | • fairness |
| • discrimination and denigration | |

These issues are explained in detail in the Codes of Broadcasting Practice within this Codebook and on our website. The standards and guidelines contained in each code are slightly different according to where the programme was broadcast (radio, free-to-air television, pay television). There is a separate code for election programmes.

How do I complain?

To be able to go through the BSA process, complaints have to be 'formal complaints'.

If you just want to let the broadcaster know your concerns, or it is not an issue that can come to the BSA, it will be considered an 'informal complaint'.

Formal complaints have to go to the broadcaster first (unless they are privacy complaints or election programme complaints which can be sent straight to the BSA). Contact details for major broadcasters can be found on the BSA's website, www.bsa.govt.nz.

The simplest way to make a complaint is to complete an online form. Most of the major broadcasters have them. They can be accessed via our website (see, *If you are ready to make a complaint to the broadcaster now*). The BSA also has an online form that you can use if the broadcaster you are complaining about doesn't have one (see, *If you cannot find the broadcaster you're looking for*).

Please note that the formal complaint process can take some time. It is unlikely you will get an instant answer or resolution. If you complain to the broadcaster and then you go on to refer your complaint to the BSA, it could be a number of months after the original date of the broadcast that you get a final decision.

What is needed for my complaint to be a 'formal complaint'?

To make a formal complaint certain requirements must be met. A formal complaint must:

- be in writing
 - specify it is a 'formal complaint'
 - be received by the broadcaster within 20 working days of the broadcast
 - include the following details:
 - o date of the broadcast
 - o time of the broadcast
 - o title of the programme
 - o channel or station which broadcast the programme
 - o the standards you think have been breached
 - o an explanation of why you think the standards have been breached.
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What happens to formal complaints to broadcasters?

A broadcaster has **20 working days** to send you a written decision telling you whether or not your complaint has been upheld (ie, whether the programme did breach standards), and advising you of your right to refer your complaint to the BSA if you are not satisfied with its decision. (The broadcaster is allowed to extend the timeframe to **40 working days**, if it lets you know within the initial 20 working days.)

When can I refer my complaint to the BSA?

You can refer your complaint to the BSA in any of the following situations within the following timeframes:

When can I refer?

If you are unhappy with the broadcaster's decision

If the broadcaster has upheld part or all of your complaint and you are unhappy with the action they have taken to address the breach

If you have not heard from the broadcaster within 20 working days of your complaint (or within 40 working days if the broadcaster wrote to you requesting an extension)

How long do I have to refer?

You have **20 working days** from when you receive the broadcaster's decision

You have **20 working days** from when you receive the broadcaster's decision

You have **60 working days** from the date of the original broadcast

How do I refer my complaint to the BSA?

You need to write to the BSA asking for a review (by post, or email us at info@bsa.govt.nz).

Or you can complete the Refer a Complaint form on the BSA's website, www.bsa.govt.nz.

If you:

- are unhappy with the broadcaster's decision, you should outline the reasons why
- have not received a decision, you should include the date you lodged your complaint with the broadcaster so that the timeframe can be checked.

What happens when I have referred my complaint to the BSA?

When you refer a complaint, the BSA will:

- write to you and outline the process
- send a copy of your complaint to the broadcaster for comment, and ask for a recording of the broadcast and for copies of all correspondence relating to your complaint
- make sure that you have an opportunity to comment on any information provided by the broadcaster
- notify you when your complaint is going to be determined (once all the information is received) and when you might expect to receive the BSA's decision.

The Authority's board meets to consider complaints approximately every five weeks. In most cases it will only take one meeting to decide the complaint, and you will receive a decision within 20 working days of the meeting.

Some complaints are more complex. Additional time may be needed to collect more information, consider orders and/or finalise the decision. If that is the case, the BSA team will keep you informed.

Please note that the complaints process – from the referral to the BSA up until the Authority's decision being issued – can take some time, usually several months, or sometimes longer if the case is complex or further information is required.

Can I get name suppression?

The BSA's written decision will include your name and the decision will be published on the BSA website.

The board only considers requests for name suppression when dealing with privacy complaints, or in other exceptional circumstances. Name suppression is rare.

If you believe there are special reasons why you should receive name suppression, please advise the BSA in writing – you can do this at any time before the decision is released.

If name suppression isn't granted, we will let you know and you may be given an opportunity to withdraw your complaint.

What orders can the BSA make?

If the BSA upholds a complaint, it may make orders.

If the BSA is considering making an order it will write to you and to the broadcaster asking for your views on whether/what orders are appropriate. It then decides whether to make, or not make, any order, before releasing the final decision. The Authority considers both parties' submissions and takes into account a number of factors including, but not limited to:

- the seriousness of the breach, and the number of upheld aspects of the complaint
- the degree of harm caused to any individual, or to the audience generally
- the objectives of the upheld standard(s)
- the attitude and actions of the broadcaster in relation to the complaint (eg, whether the broadcaster upheld the complaint and/or took mitigating steps; or whether the broadcaster disputed the standards breach and/or aggravated any harm caused)
- whether the decision will sufficiently remedy the breach and give guidance to broadcasters, or whether something more is needed to achieve a meaningful remedy or to send a signal to broadcasters
- past decisions and/or orders in similar cases.

The most common orders are:

- a broadcast statement, eg, a correction, a summary of the decision or an apology
- costs to the Crown (a fine, essentially) of up to \$5,000
- compensation for a breach of privacy, of up to \$5,000
- compensation for a portion of any legal costs reasonably incurred.

What happens when the BSA releases a decision?

The written decision will be sent to you and to the broadcaster. You will be asked to keep the decision confidential for a few days until it is publicly released.

The decision is published on the BSA website, and in the monthly BSA newsletter. Sometimes the BSA issues a media statement about a decision of interest. The BSA never releases the contact details of complainants to the media.

Can a BSA decision be appealed?

Yes. BSA decisions can be appealed to the High Court, by either party (the broadcaster or the complainant), within one month of the decision.

If a broadcaster appeals a decision to the High Court, the complainant is named as the other party but can choose not to participate in the proceedings.

FOR MORE INFORMATION YOU CAN GO TO THE BSA'S WEBSITE, WWW.BSA.GOV.TZ

GUIDANCE: PRIVACY

This guidance is intended to elaborate on the guidelines set out in the privacy standard. It is not exhaustive and may require elaboration or refinement when applied to a complaint. The specific facts of each complaint are especially important when considering whether an individual's privacy has been breached. The BSA will also have regard to developments relating to privacy law in New Zealand and in other jurisdictions.

This guidance has been numbered for ease of reference.

1. Who can complain?

- 1.1 Privacy complaints may be brought only in relation to individuals who are identifiable in a broadcast. The Authority is able to accept privacy complaints from people other than the individual whose privacy is alleged to have been breached. However, it retains the discretion to decline to determine any complaint if this is warranted in all the circumstances.
- 1.2 Privacy complaints may only relate to living natural people (Privacy Act 1993).

2. Identification required

- 2.1 Privacy will only be breached where the individual whose privacy is at issue is identifiable in the broadcast. Individuals must be identifiable beyond family and close friends who would reasonably be expected to know about the matter dealt with in the broadcast (see BSA decision *Moore and TVWorks Ltd*, 2009-036).
- 2.2 Broadcasters that take steps to mask a person's identity to avoid a privacy breach must take care that the masking is effective. In some cases, where there is a unique combination of identifying features within the broadcast, merely masking the person's face will sometimes be inadequate (for example, see BSA decision *DS and Television New Zealand Ltd*, 2011-144).
- 2.3 In some circumstances, a combination of information inside the broadcast and other readily available material or information from outside the broadcast may enable identification.

3. Reasonable expectations of privacy

- 3.1 A person will usually not have a reasonable expectation of privacy in relation to matters of public record, such as matters that occur in open court or matters that have recently been given widespread media coverage. In some circumstances, there may be a reasonable expectation of privacy in relation to information even though it is in the public domain.
- 3.2 In general, a person will not have a reasonable expectation of privacy in a public place. Public places are places that are generally accessible to, and/or in view of, the public.
- 3.3 In exceptional circumstances a person may still have a reasonable expectation of privacy in a public place. This could include situations where it is obvious from the circumstances that the individual is particularly vulnerable, for example:
 - people who are caught up in emergencies
 - victims of accidents
 - those suffering a personal tragedy
 - those with learning difficulties
 - those with mental health issues
 - the bereaved
 - people with brain damage or forms of dementia
 - people who have been traumatised or who are sick or terminally ill.

4. Public figures

- 4.1 Public figures, particularly those exercising public power, and others who seek publicity, generally have lower reasonable expectations of privacy in relation to matters pertaining to their public roles.

5. Children's privacy

- 5.1 For the purposes of the privacy standard, a child is under the age of 16.
- 5.2 Children, including children of public figures, generally have high reasonable expectations of privacy.
- 5.3 A parent or guardian, or other person aged 18 or over in loco parentis (standing in the shoes of the parent or guardian), can consent on behalf of a child under the age of 16 years to the broadcast of private matters, but the broadcaster must be satisfied that the broadcast is not contrary to the best interests of the child.

6. Highly offensive intrusions and disclosures

- 6.1 The means by which private material is gathered affects the offensiveness of the intrusion or disclosure. For example, it may be highly offensive to broadcast private material gathered by surreptitious, deceptive or dishonest means.
- 6.2 Disclosure of private facts is likely to be highly offensive where:
- it is done for the purpose of encouraging harassment
 - the material is particularly embarrassing, sensitive or traumatic, or has the potential to impact negatively on reputation
 - the person is particularly vulnerable
 - the broadcast is exploitative or gratuitous
 - the person concerned has made efforts to protect his or her privacy, or has not consented to the broadcast.

7. Informed consent

- 7.1 Informed consent is provided where a person identifiable in a broadcast:
- is aware he or she is contributing to the broadcast
 - understands the true context and purpose of the contribution
 - understands the nature of the consent and its duration
 - freely agrees to contribute.
- 7.2 The level of consent required may vary depending on the type of programme and the particular circumstances in each case.
- 7.3 Where there is reason to doubt the person's capacity to understand the consequences of his or her contribution (for example, when the person is mentally impaired or intoxicated), the broadcaster must take particular care to ensure that the person is capable of providing informed consent and understanding the potential ramifications of participating in the broadcast.
- 7.4 Only the person whose privacy is in issue, or in the case of a child, their parent, guardian or person over 18 acting in loco parentis (standing in the shoes of the parent or guardian), can give consent.
- 7.5 In general, consent must be written, recorded, or obvious from the circumstances. What is 'obvious from the circumstances' will be a matter for interpretation and depend on the specific facts of the case.
- 7.6 The greater the invasiveness of the broadcast, the more care the broadcaster must take to ensure informed consent is obtained.

8. Legitimate public interest

- 8.1 A matter of legitimate public interest is a matter of concern to, or having the potential to affect, a significant section of the New Zealand population. It is more than something that merely interests the public.
- 8.2 Matters of legitimate public interest may include matters such as:
- criminal matters, including exposing or detecting crime
 - issues of public health or safety
 - matters of politics, government or public administration
 - matters relating to the conduct of organisations which impact on the public
 - exposing misleading claims made by individuals or organisations
 - exposing seriously antisocial and harmful conduct
- (see BSA decision *Balfour and Television New Zealand Ltd*, 2005-129).
- 8.3 The degree of public interest in the material broadcast must be proportionate to the gravity of the breach of privacy, in order for the broadcaster to rely on public interest as a defence to the breach (see BSA decision *MA and Television New Zealand Ltd*, 2010-084).
- 8.4 The public interest must relate to the disclosure of the particular information or recording that is alleged to breach privacy (see BSA decision *Russek and Television New Zealand Ltd*, 2007-016). However, the public interest in the programme or series as a whole will also always be considered.

9. Intrusion upon solitude or seclusion

- 9.1 Solitude is the state of being alone. Seclusion is a state of screening or shutting off from outside access or public view. A person does not need to be alone to have an interest in seclusion (see High Court judgment *CanWest TVWorks Ltd v XY*, HC Auckland CIV-2006-485-2633).
- 9.2 A person will usually have an interest in seclusion when at home. They may also have an interest in seclusion in their home or on their property even when they are not there.
- 9.3 Hidden cameras will usually be regarded as intrusive but each case depends on its particular circumstances. The purpose of covert filming will be relevant; a purpose which is strongly in the public interest may justify the use of a hidden camera.

GUIDANCE: ACCURACY – DISTINGUISHING FACT AND ANALYSIS, COMMENT OR OPINION

The accuracy statement (Standard 9) only applies to fact. It does not apply to analysis, comment or opinion.

A fact is verifiable: something that can be proved right or wrong. So, 'National has 60 seats in Parliament' is a statement of fact.

An opinion is someone's view. It is contestable, and others may hold a different view. So, 'This decision is disastrous' is a comment. It expresses a value judgement by the speaker. 'The Minister always declines to be interviewed on this topic. I think he must have something to hide,' is a comment, although a different sort of comment. It is a conclusion drawn by the speaker from the facts in the first sentence.

News analysis usually contains both sorts of opinion. It interprets news, offers criticism, provides possible reasons and predicts possible consequences.

However, it is not always so clear whether a statement is an assertion of fact or an opinion. If you say that certain health professionals are promoting 'bogus treatments', are you stating a fact or simply commenting or giving your opinion? It all depends on context and presentation. It is crucial how a reasonable viewer or listener would perceive it.

The following matters are relevant, although not decisive, in determining whether a statement is fact or opinion:

- The language used. 'I think' usually means it is an opinion.

- The language used in the rest of the item. If most of the statements in the item are opinions, it is likely this one is too. However, that will not always be the case – there could be a statement of fact within an opinion piece or surrounded by opinions.
- The type of programme and the role or reputation of the person speaking. For example, a statement made in a panel discussion, a film review or a programme hosted by a person of known outspoken views, is more likely to be opinion.
- The subject matter. Some subjects are notoriously controversial – climate change and alternative medicine, for instance. Statements about them could well be opinion.
- Whether evidence or proof is provided. The audience is more likely to interpret a statement as fact if supporting evidence is given.
- Whether the statement is attributed to someone. 'Mr Jones, a resident in the area, said the flooding is due to the earthquakes' is more likely to be treated as an opinion than a bare unattributed assertion to the same effect would be.

However, none of these factors is conclusive. Every case must be assessed on its merits.

GUIDANCE: BSA POWER TO DECLINE TO DETERMINE A COMPLAINT

Section 11 of the Broadcasting Act 1989 authorises the BSA to decline to determine a complaint which has been referred to it if it considers:

- that the complaint is frivolous, vexatious or trivial – section 11(a); or
- that, in all the circumstances of the complaint, it should not be determined by the Authority – section 11(b).

The purpose of this section of the Codebook is to provide guidance to complainants and broadcasters about the usual way section 11 is interpreted and applied by the BSA.

Comment

In the BSA's view, the policy behind section 11 is that the time and resources of the Authority, which are, in the end, sustained by the people of New Zealand, should not be wasted on having to deal with matters which objectively have no importance.

The complaints system under the Broadcasting Act is an open door system. Broadcasters are required to receive and consider all complaints that meet the relevant criteria for being a valid formal complaint. The BSA usually expects broadcasters to deal with complaints they receive in a considered and appropriately comprehensive way. It does not expect a comprehensive analysis of a complaint when, on its face, it is frivolous or trivial. The BSA is conscious that there is an economic cost in dealing with complaints and it does not wish to see resources wasted on complaints that have no foundation whatsoever.

All complaints which are then referred by a complainant to the BSA need to be considered by the Authority but with the qualification that if they are considered to come within section 11 they need not be determined.

BSA decisions

The following summaries and examples demonstrate the BSA's approach in decisions declining to determine a complaint (cited by decision number; all decisions are available on the BSA's website, www.bsa.govt.nz).

Section 11(a): Frivolous, vexatious or trivial

The BSA will usually apply the ordinary meanings of the words frivolous, vexatious or trivial. Obviously, there is some overlap in the meanings of these terms.

A *frivolous* complaint is one which the BSA considers to be unworthy of being treated in the same way in which it would treat a complaint which is not frivolous or which has some merit. Frivolous means not serious or sensible, or even silly.

A *trivial* complaint is one which is of little or no importance and is at such a level not to justify it being treated as a serious complaint.

Examples of complaints that the BSA has declined to determine on the basis they were frivolous or trivial include:

Trivial accuracy complaints

- a complaint that promos for upcoming programmes containing the word 'next' were inaccurate, because there were advertisements between the programmes (2007-095)
- a complaint that a reference to 'government superannuation' was inaccurate as it should have referred to 'New Zealand superannuation' (2009-164)
- a complaint that the meaning of the phrase '50 times less power' was unclear and therefore inaccurate (2009-150)
- a complaint that a reference to a '31 per cent difference' in men's and women's pay was inaccurate (2010-015)
- a complaint that a reference to 'wind chill factor' did not indicate which temperature measurement was being used (2010-033)
- a complaint that a reference to Prince William as 'the next King of England' was inaccurate because he was also the next King of New Zealand (2011-004)
- a complaint that a reference to a train 'engine' was inaccurate (2011-009)
- a complaint that a reference to a search area should have been in square nautical miles, not kilometres (2010-055)
- a complaint that the phrase Police 'force' was inaccurate because the police were not part of the Armed Forces (2011-067)
- a complaint that a reference to 'an area of around 15,000 rugby fields' was inaccurate because that was not a proper area measurement (2012-100)
- a complaint that a reference to colony cages for hens being '4cm more than conventional cages' was inaccurate (2012-100).

Complaints about low-level language

- a complaint about the word 'bugger' in a factual travel programme (2011-084)
- a complaint about the word 'damn' in an election advertisement (2011-143)
- a complaint about the use of the word 'gay' in a news item, to mean 'homosexual' (2011-118).

Other frivolous/trivial matters

- a complaint that an election advertisement which used a voiceover by a child was inappropriate because children are not allowed to vote (2011-158)
- a complaint that a news item containing footage of a reporter walking backwards was dangerous and breached standards of law and order (2012-100).

A *vexatious* complaint, on the other hand, is one which has been instituted without sufficient justifying grounds. In some cases, a person putting forward a vexatious complaint may do so with the intention of causing annoyance, but such an intention may not be necessary in order for a complaint to be considered vexatious.

The BSA is usually reluctant to label a complainant vexatious; however, examples of complaints that the BSA considered to be vexatious include:

- A complainant misheard the broadcast, received an adequate response from the broadcaster to that effect, but still proceeded with a referral to the Authority (2008-035).
- Complainants repeatedly referred complaints about the same issue, even though their earlier complaints had been dismissed and comprehensive reasons given (2012-104, 2011-087).

Section 11(b): In all the circumstances, the complaint should not be determined

Additionally, in terms of section 11, there may be other good reasons for the BSA to decline to determine a complaint. Examples include:

- the complaint is based merely on the complainant's personal preferences (see section 5(c) of the Broadcasting Act 1989), or is a matter of editorial discretion, which broadcasters are entitled to exercise:
 - o complaints that programmes about the Treaty of Waitangi and New Zealand flags omitted certain facts (2010-009, 2011-055, 2011-087, 2011-170)
 - o a complaint that news programmes failed to report certain stories (2010-086)
 - o a complaint that an interview about Olympic drug cheating referred to Jamaica but did not discuss New Zealand's alleged cheating history (2012-109)
 - o a complaint that a news item reported differently on an event than a BBC item about the same topic (2012-117)
- the complaint raises matters which are incapable of being addressed as issues of broadcasting standards, the grounds of the complaint are unclear, or the complainant misheard or misunderstood the broadcast (2008-127, 2010-002, 2010-048)
- the complaint relates to material outside the Authority's jurisdiction, such as printed internet content or on demand content (2010-070)
- a recording of the broadcast is unavailable or incomplete, or cannot be located because the content of the complaint does not correspond with any broadcast at the time specified in the complaint (2007-051, 2010-068, 2010-129, 2011-102, 2012-093, 2012-117).

BSA RETAINS ULTIMATE DISCRETION

This section is intended to provide a guide only, and does not bind the BSA in determining the outcome of any future complaint. The BSA retains overall discretion and each complaint is determined on its particular facts.

GUIDANCE: COSTS AWARDS TO COMPLAINANTS

This section of the Codebook is designed to give guidance to complainants and broadcasters on the issue of costs awards.

Section 16(1) of the Broadcasting Act 1989 provides:

...the Authority may, in any proceedings, order any party to pay any other party such costs and expenses (including expenses of witnesses) as are reasonable, and may apportion any such costs between the parties in such manner as it thinks fit.

Costs awards are ordinarily to recompense in part a successful complainant for legal costs which have been incurred (but may be costs other than legal fees incurred during the complaints process).

Principles

There are some principles which we wish to apply when we consider applications for orders of costs, and these include the following:

- This is a jurisdiction which needs to be, as far as possible, accessible to participants without the need for legal advice and legal help in the preparation and presentation of submissions.
- We recognise and respect the freedom of complainants and broadcasters to involve their lawyers but they need to recognise that any recompense for costs cannot be assumed to follow.
- There will be exceptional cases where the assistance of lawyers will be desirable and appropriate and in these cases, issues of costs will properly arise.

Amount of costs

In all but the most exceptional cases, the most that is likely to be recoverable in an award of costs is a contribution to the costs actually incurred.

Different lawyers have different methods of fees assessment, different levels of relevant skills and experience, and different approaches to the work that they do. Different complainants have different approaches to the extent that their lawyers need to be involved and to the extent of their willingness to accept the impact of fees. In these circumstances, and in this jurisdiction, fees charged by lawyers to complainants vary widely and we are not able to approach the quantification of costs awards solely or substantially by judging what proportion of actual costs should be allowed.

Moreover, what costs are 'reasonable' as between the complainant and the complainant's lawyer is not something which we are ordinarily able to judge as we would usually have insufficient detail about the work requested, what was done, and what was involved in the work being done. We do, however, ask complainants to provide invoices for any legal costs incurred.

In these circumstances, our approach to the quantification of an award of costs must be broad brush and objective, and must take into account a range of factors.

The factors

The factors which we will take into account when considering any application for costs in favour of a successful complainant and in quantifying any such order will include the following:

- the complexity of the issues raised
- the number of issues raised
- the complexity of the factual background
- the number of substantive submissions that needed to be made
- whether the proceeding required resolution of any interlocutory or procedural issues
- the need for the complainant to have incurred costs to the extent that costs were incurred or at all
- the amount of costs incurred
- the nature and importance of the complaint to the complainant
- the public interest in the complaint.

BSA RETAINS ULTIMATE DISCRETION

This section is intended to provide a guide to the principles the BSA will consider in determining whether or not to award costs and, if so, the amount of any award. The BSA retains overall discretion and in any particular case may take into account such factors as it thinks should fairly and appropriately be taken into account.
