

# Broadcasting Standards Authority: Review of the Broadcasting Standards Codebook

## 2022 Public Consultation Report

### Part 1: Introduction

#### *Code review: background*

Te Mana Whanonga Kaipāho | The Broadcasting Standards Authority (BSA) is an independent body that oversees the broadcasting standards regime in New Zealand. One of our core functions under the Broadcasting Act 1989 (BA) is to work with broadcasters to develop codes of broadcasting practice that apply to all broadcasters in New Zealand.

The Broadcasting Standards Codebook (the Codebook) sets out standards that broadcasters must adhere to, as well as commentary and guidelines which help explain how the standards work. The Codebook is regularly reviewed, in consultation with broadcasters and the public, to ensure the standards remain relevant to the media environment to which they apply.

#### *Consultation process*

The 2022 review of the Codebook was the first full review since 2016. Proposed updates to the Codebook were developed in consultation with broadcasters and other industry and government stakeholders. The key objectives of the review were to:

- Ensure the standards and guidelines reflect today's diverse society and contemporary broadcasting environment – in terms of industry and community expectations, attitudes, values and audience behaviour.
- Ensure the Codebook is consistent with legal principles which may have evolved since it was published in 2016.
- Simplify, streamline and clarify Codebook content so it's clearer, practical and more user-friendly for broadcasters and audiences.
- Align, where appropriate, with frameworks overseen by other content standards entities, with a view to a more joined-up regulatory system.
- Future-proof the Codebook to the extent possible within the current regulatory environment.

The public were invited to give their views on the proposed changes to the Codebook, as well as revised policies on third-party privacy/fairness complaints and complainant name suppression. The consultation period ran from 25 January 2022 to 8 March 2022.

Feedback was invited by way of a 'Code Review Consultation Document' which set out questions for response on key changes to the Codebook and policies. Proposed changes included:

- Updating the introduction to reflect the current environment.
- Combining the three existing codes for pay TV, free-to-air TV and radio into one simplified code.
- Streamlining and combining some standards which cover related issues.

- Updating the discrimination and denigration standard guidelines to clarify its application to content which reinforces negative stereotypes.
- Incorporating an obligation to correct material errors of fact within the accuracy standard.
- Updating the guidelines/commentary on how the standards apply, shaped by past BSA decisions and, in the case of privacy standard guidelines, legal developments.
- Refreshing the language to make the Codebook easier to understand.
- Updating guidance on the complaints process to clarify the requirements for a formal complaint (and consequently the types of complaints broadcasters may treat as feedback only).

## Part 2: Submissions

The BSA received 29 submissions in total from a range of broadcasters, members of the public, former complainants, academics and other stakeholders. We greatly valued the feedback and appreciated the time and effort taken by submitters to participate in our code review.

Key submissions received in relation to each of the questions in the consultation document are summarised below:

<b>General</b>
<b>1. Is it clearly written? If not, how would you improve it?</b>
<ul style="list-style-type: none"> <li>• Submitters were broadly of the view that the draft Codebook was clearly written.</li> <li>• Feedback on how it could be improved included: <ul style="list-style-type: none"> <li>○ Clarify guidelines are just that – guidelines and not firm rules – and are not exhaustive.</li> <li>○ The ‘Introduction’ section should specify that there were previously separate codes and there remain important differences between broadcaster types.</li> <li>○ Throughout the draft Codebook, the term ‘on-screen’ is used for television content. This should be changed to ‘television’ to clearly identify it as applicable to TV rather than radio, or online content.</li> <li>○ References to ‘content’ should be changed to ‘programmes,’ given this is what the BA regulates</li> <li>○ The importance of freedom of expression and the public interest in broadcasts should be more to the fore. The ‘Introduction’ section should expressly refer to section 4 and section 6 of the Bill of Rights Act 1990 (<b>BORA</b>).</li> <li>○ The word ‘grievance’ should be used in the code over ‘harm’ (which is more subjective).</li> </ul> </li> </ul>
<b>2. Is there anything else we could do to ensure it reflects the interests of Aotearoa/New Zealand’s diverse community? If so, what?</b>
<ul style="list-style-type: none"> <li>• Give more prominence to the principles of Te Tiriti o Waitangi and the rights of tangata whenua. Te reo Māori and Māori culture don’t just have a ‘special significance’ as noted in the draft – they have constitutional centring.</li> <li>• Incorporate protection of te Reo Māori into the code given Te Ture mō Te Reo Māori 2016 (Māori Language Act) recognises it is a taonga of both iwi and Māori, and it is protected by Te Tiriti.</li> <li>• Make the Codebook available in te Reo Māori, NZ sign language, and languages of Cook Islands, Niue and Tokelau.</li> <li>• Communities who experience harm from a broadcast should be able to feed back as to whether the penalties and remedies are culturally appropriate.</li> </ul>

**3. Is the guidance under ‘What is needed for my complaint to be a ‘formal complaint?’ helpful? If not, how would you improve it?**

- It should note that the burden is on the broadcaster to clarify whether correspondence is just feedback or a formal complaint.
- Complainants should be required to estimate the time of the broadcast within a window of one hour.
- It should include provision for people with cognitive disabilities – a process with multiple submissions is not helpful.
- The time frame to complain to the BSA should be extended to 60 days.

**4. The review seeks to ‘future proof’ broadcasting standards in the face of an evolving media and regulatory environment. However, there are limits to what can be done within current law. Do you have any suggestions for ‘future proofing’ the Codebook?**

- Review it as to whether it is accessible for disabled people in accordance with the New Zealand Public Health and Disability Act 2000.
- Remove reference to age of the BA and technological change/discussion about new approaches to content regulation, which is not relevant to the BA.

**Simplification / Streamlining**

**5. The radio, free-to-air TV and pay TV codes have been combined (but with a view to preserving key differences between these codes):**

- a. Do you support this?**
- b. Do you have any suggestions to improve the Codebook on this topic?**

- There was broad support for combining the codes.
- Suggestions for improving the Codebook on this subject included:
  - Specific guidelines for radio from the current Codebook should be retained, for talkback especially. References to radio are very brief, and radio broadcasters may find it difficult to understand how they fit in.
  - Key guidelines for pay TV should be retained including with respect to foreign pass-through channels where there is little or no ability to control programming, and time bands not being applicable.

**6. The ‘good taste and decency’ and ‘programme information’ standards and aspects of the ‘violence’ standard have been combined into one ‘offensive and disturbing content’ standard:**

- a. Do you support this?**
- b. Do you have any suggestions to improve the Codebook on this topic?**

- There was general support for this change.
- Some more targeted feedback included:
  - The standard is skewed towards television (at the expense of radio), particularly around the classification systems.
  - The name change is leading and invites people to be offended.
  - Where the standard states broadcast content should not ‘unduly offend or disturb,’ ‘disproportionately’ is a better word to use as it’s more objective.
  - Guideline 2f of previous pay TV code should be retained - audience advisories do not need to be displayed for foreign pass-through channels. This reflects that pay TV broadcasters take pass-through channels ‘as is’ and can’t add advisories.

**7. The ‘alcohol’ and ‘law and order’ standards and aspects of the ‘violence’ standard have been combined into one ‘promotion of illegal, dangerous or antisocial behaviour’ standard:**

- a. Do you support this?**
- b. Do you have any suggestions to improve the Codebook on this topic?**

- There were a range of differing views on this matter.
- Two submitters considered the distinction between the law and order and alcohol standards should be maintained.
- One submitter considered the law and order standard should not change, bar that guidelines on alcohol promotion could be contained within the standard. The violence standard could be adequately addressed under the new offensive and disturbing content standard.
- Suggestions for improving the Codebook on this topic included:
  - The standard should not prohibit active promotion of **dangerous** behaviour, which is common on TV (motor racing, alpine sports, action films) and not specified in the BA.
  - The criteria that the broadcast must 'actively promote' the behaviour sets the bar too high - should just be 'encourage or condone', or 'be likely to result in'.
  - Guideline 3.4, where it states that alcohol promotion must not combine alcohol and another activity in a way that endangers health and safety, should be removed. This would be untenable for fictional material, including many movies.
  - The nature of the programme, ie fact or fiction, should be a contextual factor to consider.
  - The context should focus on the effect of a programme rather than what it depicts.
  - In the commentary for 'Illegal Activity', the threshold should be promotion of 'contempt' for the law rather than 'disrespect' which is too low.
  - Guideline 4a of the previous pay TV code (concerning editorial control and foreign pass-through channels) should be retained.

### **Specific Standards**

#### ***Discrimination and denigration***

**8. *Recognising the importance of freedom of expression, a 'high level of condemnation, often with an element of malice or nastiness' is generally required to breach this standard. Proposed amendments (guideline 4.2) recognise that 'reinforcing or embedding negative stereotypes' can be enough in some cases. Do you support this and, if not, why?***

- There were mixed views on this amendment, with general support from complainants and stakeholders.
- Some broadcasters were opposed on the basis that it significantly lowers the threshold for a breach of the standard and could unjustifiably limit the right to freedom of expression in some cases.
- Some broadcasters were not opposed, but made the following key suggestions:
  - The standard should retain reference to recognised sections of the community / the Human Rights Act rather than list the groups it applies to as these may change over time.
  - At guideline 4.2 where it states 'a high level of condemnation (eg attack, criticism or disapproval) will usually be necessary to find a breach', the standard should not refer to 'disapproval', which is too low a threshold.

#### **Balance**

**9. *Amendments to the balance standard and commentary recognise that, given the current proliferation of media/information sources, balancing viewpoints will normally be available across time, different programmes or different media (such that complaints under this standard will rarely be upheld). Do you support this and, if not, why?***

- Several complainants did not support this change, largely on the basis that the standard should not rely on the audience having to find opposing views elsewhere.
- Other suggestions for the standard included:
  - Issues of public importance discussed in a broadcast should have to be **legitimately** controversial for the balance standard to apply. This is tied to the principle that extreme/misinformed views should only be represented with caveats about their minority status.

- Guideline 8c of the previous pay TV code should be retained - 'news, current affairs and factual programmes broadcast on foreign pass-through channels, over which the broadcaster retains no (or little) editorial control, are not required to be balanced by the broadcaster.'

### **Accuracy**

#### **10. The obligation to correct material errors of fact has been elevated from a 'guideline' to form part of the standard itself. Do you support this and, if not, why?**

- There was broad support for this from complainants and stakeholders, with some wanting to see it strengthened further to require the correction to occur during the same programme, and at the same time/day.
- Several broadcasters did not support this change, noting a requirement for flexibility in how corrections are addressed.
- One broadcaster considered the requirement that the correction occur 'at the earliest possible opportunity' was problematic, and should be 'a reasonable period after the broadcaster has been put on notice'.

#### **11. Amendments to the guidelines (guideline 6.1) clarify this standard's potential application with respect to analysis, comment or opinion (ie where facts referred to, or on which such content is based, are misleading). Do you support this and, if not, why?**

- There was broad support for this from complainants and stakeholders.
- Key feedback included:
  - Guideline 9d of the previous Radio Code should be retained – 'Talkback programmes will not usually be subject to the accuracy standard.'
  - Guideline 9a of the previous Pay TV Code should be retained - 'the standard does not apply to news, current affairs and factual programmes broadcast on foreign pass-through channels, over which the broadcaster retains little or no editorial control.'

### **Privacy**

#### **12. Recognising privacy law developments, guidelines to the privacy standard have been amended to remove the requirement that private information be disclosed in a way that is 'highly offensive to an objective reasonable person'. Factors that might previously have been considered in assessing offensiveness, are considered when assessing the 'reasonable expectation of privacy'. Do you support this and, if not, why?**

- Several submitters did not support this, on the basis that currently the common law of New Zealand retains the 'highly offensive' criterion.
- One submitter was comfortable with the proposal, so long as the offensiveness element was adequately covered in the discussion of reasonable expectation of privacy.
- Other feedback received included:
  - The guidelines should address more fully the collection of information as well as use and disclosure. The standard should protect individuals from unethical collection practices, eg cyber-attack or breach of confidence.
  - Guideline 7.7 states that an individual may have a reasonable expectation of privacy in a public place if they are particularly vulnerable. This may be problematic for broadcasters if it is not apparent at the time of filming.
  - The standard should refer to 'identifiable individuals' rather than 'identifiable living individuals', as in tikanga the mana of a person survives their death.
  - Factors to consider when assessing whether there is a reasonable expectation of privacy are stated to include 'whether the content is particularly embarrassing or has the potential to impact negatively on reputation' and whether it was 'exploitative'. These should not be factors to consider under reasonable expectation of privacy – they go to fairness.
  - Examples of factors relating to an individual's vulnerability were too definitive.

<ul style="list-style-type: none"> <li>○ Guideline 7.1, stating the standard will only apply when private information is disclosed, could be interpreted as excluding the other type of privacy infringement - intrusion into solitude or seclusion.</li> </ul>
<b>Other</b>
<b>13. The BSA is reviewing its policy on third-party and fairness complaints. A draft is set out, below, in Appendix A. Do you have any issues with or suggestions for this policy?</b>
<ul style="list-style-type: none"> <li>• Limited feedback was received on this draft policy.</li> <li>• One suggestion was for the policy to be brought in as a guideline to the privacy standard to state that only the individuals affected or connected to them can complain.</li> </ul>
<b>14. The BSA is reviewing its policy on complainant name suppression (as set out, below, in Appendix B). Do you have any issues with or suggestions for this policy?</b>
<ul style="list-style-type: none"> <li>• Limited feedback was received on this draft policy.</li> <li>• One suggestion was that further factors to consider when determining whether name suppression ought to be granted include whether there is a realistic prospect of significant harassment to the complainant, and the age and vulnerability of the complainant (particularly if under 16).</li> </ul>
<b>15. Do you have any other feedback on the Draft Codebook?</b>
<ul style="list-style-type: none"> <li>• More emphasis should be given to the protection of children as part of the fairness standard.</li> <li>• The fairness standard should include current radio guideline '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.'</li> <li>• Pass-through channels of dubious reputation should have to have a viewer warning/fact check suggestion.</li> </ul>

### Part 3: Response to submissions

We carefully considered all submissions. In general terms, our consideration of submissions included determining whether the issues raised: were within the scope of our code review; were already sufficiently addressed in the Codebook as drafted; and/or were consistent with our general approach to our code review. Where appropriate, we have amended the Codebook. Key changes that were made as a result of the feedback received are set out in further detail below.

#### *Relationship with Te Ao Māori*

The Introduction section was amended to acknowledge more fully the principles of Te Tiriti o Waitangi and the needs, aspirations and values of tangata whenua, and also the constitutional significance of te Reo and te Ao Māori in New Zealand society. We also acknowledge there is more work to be done to ensure the important relationship that Te Tiriti guarantees is reflected properly in the BSA's work.

We acknowledge the submission that the Codebook should incorporate protection of te Reo Māori given Te Ture mō Te Reo Māori 2016 (the Māori Language Act). The Codebook has been translated into te Reo Māori, and we have also added te Reo translations for classifications and advisories in the English version of the Codebook, to facilitate broadcasters' use of these in their programming. To require the use of te Reo by broadcasters is outside the BSA's legislative mandate. However the BSA's powers (including making decisions on complaints) are exercised taking into account the Māori Language Act and the constitutional significance of te Reo.

### *Introduction section*

Several of the suggested amendments to the Introduction section were implemented in the final version of the Codebook. These include:

- Adding reference to there being separate codes for each platform before this Codebook was introduced, and that there remain some important differences in relation to how the standards apply to each platform.
- Adding more emphasis to the importance of freedom of expression and the level of public interest in a broadcast.
- Clarifying that the guidelines and commentary are not firm rules and do not carry the same weight as the standards.
- References to 'on-screen' content changed to 'television' content, and references to 'content' changed to 'programmes' (similar changes were also made throughout the Codebook where appropriate).

### *Standard 1 - Offensive and disturbing content*

Key amendments made to this standard included:

- Changing the wording of the standard from stating broadcast content should not 'unduly' offend the audience to 'disproportionately' offend.
- Re-instatement of the guideline from the previous Radio Code to recognise talkback, as an opinionated environment, is granted some latitude to be provocative and edgy in the interests of robust debate (guideline 1.2).
- Inclusion of guidelines recognising the practical issues associated with audience advisories and scheduling in a pay TV context (guidelines 1.12 and 1.14).

### *Standard 3 – Promotion of Illegal or Antisocial Behaviour*

The following key changes were made to this standard:

- The standard and guidelines were adjusted to ensure focus on the effect of a broadcast rather than what it depicts.
- References to 'dangerous' behaviour were removed.
- The threshold for finding a breach of the standard was changed from 'broadcast content should not **actively** promote' such behaviour to 'should not **be likely** to promote'.
- The guideline stating that alcohol promotion must not combine alcohol and another activity in a way that endangers health and safety was removed.
- Whether a broadcast is factual or a fictional/dramatic work was added as a contextual factor to consider when assessing a broadcast's likely practical effect.
- In the commentary for 'Illegal Activity', the statement that the standard is concerned with broadcasts that 'promote disrespect for' the law was changed to 'promote disobedience of' the law, recognising that the original threshold was too low.
- A guideline was included recognising the limited editorial control broadcasters exercise over foreign pass-through content (guideline 3.2).

### *Standard 4 - Discrimination and Denigration*

Taking into account feedback regarding the risk of inappropriately limiting freedom of expression in some cases, the standard recognises that 'a high level of condemnation, often

with an element of malice and nastiness', will usually be necessary to find a breach of the standard. However, it also makes clear that content having the effect of reinforcing or embedding negative stereotypes, **may also be considered**. This recognises the way in which the Authority has more recently been deciding discrimination and denigration complaints.

#### *Standard 5 - Balance*

Key amendments were:

- Inclusion of a guideline (guideline 5.5) recognising:
  - foreign pass-through pay TV programmes are not usually subject to the balance standard in light of the limited editorial control broadcasters have over such programmes, the value in providing access to a breadth of perspectives and the choice made by pay TV customers to pay to receive such broadcasts
  - however, the standard may be applied where there is a serious risk of material harm.
- The Commentary was amended to clarify that 'An issue will not be "controversial" for the purposes of this standard simply because some continue to hold alternative views about it (eg climate change, vaccine safety)'.

#### *Standard 6 - Accuracy*

Key amendments were:

- Acknowledging feedback that the requirement for a correction to occur 'at the earliest possible opportunity' may give rise to issues for broadcasters, we have amended the wording to require that the correction occur 'within a reasonable period after' the broadcaster has been put on notice. We also included further guidance on this requirement at guideline 6.6, to underline that a correction can be made in 'such manner as is reasonable', taking into account contextual factors.
- We have re-instated the guideline from the previous Radio Code to recognise talkback radio programmes will not usually be subject to the accuracy standard (but added clarification regarding the situations when it may apply) (guideline 6.4).
- A similar guideline to that discussed under 'balance' has been added with respect to this standard's applicability to foreign pass-through pay TV programmes (guideline 6.5).

#### *Standard 7 - Privacy*

The requirement that private information be disclosed in a way that is 'highly offensive to an objective reasonable person', has been re-instated. We acknowledge that the common law of New Zealand retains the 'highly offensive' criterion and that there are risks in anticipating law change. Accordingly, the standard has reverted to wording consistent with New Zealand's existing common law.

With regard to the submission that the standard's guidelines should address more fully the collection of information as well as use and disclosure, the BSA has concluded its jurisdiction is limited to considering complaints about programmes and their presentation, and therefore no additions have been made in this respect. Further, as to the submission that the standard

should be able to apply to deceased people, the Broadcasting Act defines individual in a manner that prevents this (consistent with the application of the Privacy Act 2020).

### *Standard 8 - Fairness*

Key amendments were:

- reinstatement of the guideline addressing the use of prank calls on radio (guideline 8.8)
- adding the 'vulnerability of the individual' as a factor to consider in assessing fairness (guideline 8.1).

### *Outside of scope*

Some submitters made suggestions that would require amendment to our governing legislation, for example that:

- The complaints process should be simplified.
- The time frame to complain to the BSA should be extended.

Until such time as our legislation is amended by Parliament, we are limited to working within the current wording and scope of our Act. However, we will bear all such feedback in mind in our contributions to the Government's current content regulatory review (which contemplates updating the Broadcasting Act).

Several submissions raised issues that are more properly addressed outside of our code review consultation process, such as reviewing the Codebook as to accessibility and reviewing the cultural appropriateness of orders by the BSA. We have noted this feedback for separate consideration.

### *Final version*

The final version of the Codebook is available [here](#). The new Code comes into effect on 1 July 2022.

Our (internal) policies on third-party and fairness complaints and complainant name suppression have also now been finalised in light of the feedback provided (as outlined above).

**Broadcasting Standards Authority**

**30 June 2022**