

Review of Election Programmes/ Advertisements Code

The Authority is currently reviewing the Election Programmes/Advertisements Broadcasting Code, prior to the 2005 general election. The code was last reviewed in 1996.

In July 2004, we wrote to the NZ Television Broadcasters' Council, the Radio Broadcasters Association, and Radio New Zealand, asking if there were any issues relating to the code that they wished to see considered.

They raised the following matters:

- whether party opening and closing addresses should be subject to broadcasting standards, specifically the accuracy standard, given that broadcasters cannot easily exercise editorial control
- whether complaints should be made directly to the BSA
- alignment with advocacy provisions in the Advertising Standards Authority Code of Ethics to ensure consistency across media
- making any revised Code easier to follow and in plainer English.

The first two matters would need legislative change. The Authority believes a select committee inquiry is currently being mooted to examine the regulation of elections. In advance of such an inquiry, the Authority has decided that a substantive review of the standards governing broadcast election programmes should not be undertaken.

However, the current Election Programmes/Advertisements Code is outdated in its form and layout, and improvements can be made to address the second two matters listed above.

In December 2004 we wrote to broadcasters and political parties enclosing a discussion paper suggesting revisions to the Code. Responses were considered by the Authority at its February 2005 meeting, and the Code review will be completed shortly. A revised Code is likely to take effect from 1 April 2005. Further details will be placed on our website soon.



2005 Research programme

Research is an important function of the BSA. Research serves to inform members, broadcasters and the public of the issues surrounding the broadcasting environment.

Our research involves discussion and debate about various broadcasting freedoms and constraints, and gaining a thorough understanding of societal attitudes and shifts.

This year, we have commissioned ACNielsen to undertake a major public attitude survey on the good taste and decency, balance, and fairness standards. The research will update *Monitoring Community Attitudes in Changing Mediascapes* published by the BSA in 2000.

Six focus groups and a face to face survey of 500 people (forming a representative sample of the New Zealand adult population) will be conducted. The findings of the research will be publicly available by early 2006.

New staff member

We are pleased to welcome Genevieve O'Halloran who has been appointed Complaints Executive, commencing 31 January. Genevieve is a full time replacement for Karen Scott-Howman who left in December to pursue an interest in television production.

0800 Number

The Broadcasting Standards Authority's 0800 number is

0800 366 996

It has a recorded message which explains the complaints process.



Quarterly

Number 25, February 2005

This edition of the *Quarterly* begins with an article on the application of the Bill of Rights Act 1990 to Authority decision making. We update you on the Authority's review of the election programmes/advertisements code. The review commenced last July and will be concluded shortly. We also summarise the Authority's decisions issued between October and December last year, and tell you about the research we have planned for 2005.

Bill of Rights

The right to freedom of expression is enshrined in section 14 of the New Zealand Bill of Rights Act 1990, and provides:

Everyone has the right to freedom of expression, including the freedom to seek, receive and impart information and opinions in any form.

This article briefly explains the Authority's approach to the application of the New Zealand Bill of Rights Act 1990 as a result of a recent development of the jurisprudence in this area.

A High Court decision last year served to clarify the relationship between the decision-making process of the BSA, and this protection of freedom of expression enshrined in the Bill of Rights Act.

In *Television New Zealand Ltd v Viewers for Television Excellence (VOTE)*, Justice Wild concluded that the broadcasting codes of practice were not "enactments" for the purposes of the Bill of Rights Act. In practical terms, this means that the Bill of Rights Act applies to the Authority in a slightly more limited way.

As a result of the *VOTE* case, the key focus of the Authority in complying with the Bill of Rights Act is section 5. This provides that the rights and freedoms contained in the Act may be subject only to "such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society".

If the Authority intends upholding a complaint, it must ensure that its decision:

- is prescribed by law, ie comes within one of the established broadcasting standards
- is a reasonable interpretation of the relevant broadcasting standard, and thus also a reasonable limitation on the right to freedom of expression
- imposes a limitation on the right to free expression that is justified in a free and democratic society.

Justice Wild accepted in the *VOTE* case that most of the Authority's decisions would pass the justified limitations threshold, given the content of the Codes and the "relatively tame" sanctions available to the Authority. However, he found that this did not eliminate the need for the Authority to consider the impact of its decision in respect of each complaint, by subjecting it to a section 5 "reasonableness" assessment.

The broadcasting codes, by their very nature, constrain broadcasters' freedom of expression. In practice, all the Authority's decision-making is driven by considerations of reasonableness. Before finding a breach of a standard, members of the Authority satisfy themselves that such a finding is justified in light of the broadcaster's freedom of expression. In this manner Bill of Rights-related considerations are built into the Authority's decision-making processes. The

Authority ensures that all decisions clearly articulate that it has balanced the broadcaster's freedom of expression with the principles and guidelines of the particular Code of Broadcasting Practice.

It has always been the practice of the Authority to make decisions that take into account considerations of reasonableness, and which attempt to balance society's expectations. For this reason, while the *VOTE* decision has subtly altered the conceptual legal framework within which the Authority operates, the decision-making process has not changed.



Directory

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Decisions

The Authority released 61 decisions between October and December 2004

Balance Fairness Accuracy

TVNZ broadcast a 90-minute documentary, *Murder on the Blade?* in which the programme maker mounted a detailed challenge to the validity of Scott Watson's convictions for the murders of Olivia Hope and Ben Smart.

The complainant, who was a prosecution witness at the trial, thought that the programme breached standards of good taste and decency, balance, accuracy and fairness.

A three-member Authority (Diane Musgrave declared a conflict) declined to uphold the alleged breaches of good taste and decency, fairness and accuracy. However, it was divided over whether the programme was balanced.

A majority concluded that it was sufficiently balanced for four reasons:

- the authorial perspective was clear
- while it focussed on challenging the convictions, the programme briefly discussed key elements of the prosecution case thereby acknowledging other perspectives
- Scott Watson's arrest, trial and conviction had been major news stories, so the public already knew a lot about it
- freedom of expression was a significant consideration.

On the other hand, the minority (Joanne Morris), did not consider that adequate attempts had been made to present views other than those of the programme maker.

Decision Ref: 2004-127A

Ronald van der Plaat complained through his lawyer about a TVNZ *Sunday* programme. It investigated Mr van der Plaat's legal pursuit of his daughter over ownership of a painting. Mr van der Plaat is serving a 14 year jail term for the sexual abuse of this daughter.

Much of Mr van der Plaat's complaint was an attempt to relitigate issues that had arisen during his trial for sexual abuse. He complained that the *Sunday* programme made him out to be a "monster" when there was material that portrayed him in a much more favourable light. He said that no evidence was presented to contradict his daughter's side of the story in relation to the sexual abuse.

The Authority declined to determine four of his eight grounds as attempts to relitigate issues that had arisen during his trial. Of the complaints about the programme, none was upheld.

Decision Ref: 2004-150

A *Holmes* item discussed an alleged doctor-on-doctor assault. The presenter interviewed an 'expert' (a health economist, not a doctor). They spoke about whether the medical profession's reaction to the incident had been appropriate, and generally about the accountability of the profession.

The Authority received three complaints: one from the doctor involved, one from the New Zealand Medical Association, and one from the Association of Salaried Medical Specialists. The complainants alleged that the programme was unbalanced as the doctor's viewpoint had not been advanced and

reasonable efforts had not been made to obtain his comments. They alleged that the item was also inaccurate, unfair and encouraged discrimination against doctors.

The Authority noted that the programme constituted an attack on the doctor's reputation, and did nothing to offer competing viewpoints. In this, it was unfair to the doctor concerned, and unbalanced. The Authority also identified three inaccuracies constituting a breach of the accuracy standard.

The doctor involved was awarded legal costs of \$1700, and TVNZ was ordered to pay costs to the Crown of \$2500.

Decision Ref: 2004-135

Fairness

Ibrahim Ikram complained about an episode of *Eating Media Lunch* that satirised the documentary film *Super Size Me*. The presenter purported to eat nothing but Middle-Eastern style takeaway food for an entire month while observing the effects that this had on him. As the month progressed, the effects became increasingly absurd. He began to adopt stereotypical Islamic fundamentalist traits and ended up as an Islamic terrorist.

Mr Ikram felt that the programme was deeply offensive to Muslims, as it denigrated their culture and religion. TVNZ's response was that the programme, by satirising the media's generally negative portrayal of Islam, aimed to "skewer" the very prejudices that Mr Ikram deplored.

While acknowledging the complainant's views, the Authority declined to uphold the

complaint. It said that the satirical nature of the item was apparent and thus it came within the exception noted in Guideline 6(g)(iii) of the Free-to-Air Television Code for material which is, 'in the legitimate context of a dramatic, humorous or satirical work.'

Decision Ref: 2004-152

Fairness and Balance

The Minister of Health, Hon Annette King, complained about an item on *One News* that discussed the replacement of Plunketline, a telephone advice service for caregivers, with the newly-established Healthline.

The item included a comment from the Minister; as well as from an Act MP and a Plunket nurse – both of whom were critical of the Government's actions. The item reported that Plunket had declined to comment. It gave the impression that the Minister of Health had gone back on a 1999 undertaking to support the dedicated *Plunketline* telephone advice service.

The Minister complained that the item had failed to acknowledge Plunket's support for the new telephone service. She said that during her interview she had provided a copy of a press release from Plunket outlining that support. The Minister said that she had repeatedly explained that she was making the change with Plunket's support yet this information was not included in the story.

The Minister provided the Authority with a copy of Plunket's press release. The Authority was of the opinion that its structure was the cause of the dispute. The press release was not on Plunket headed paper and the first sentence referred to a parliamentary question. On closer examination, it was apparent that

the statement had been faxed from Plunket. While not attributed by name to a Plunket staff member, it appeared to be Plunket's response to the new telephone service.

The Authority did not doubt that this was the 'press release' that was shown to the reporter; however, it accepted that there may have been some confusion about it.

Despite this misunderstanding, the Authority considered that it had sufficient information to conclude that the item was unfair to the Minister and, as a consequence, unbalanced.

The Authority ordered TVNZ to broadcast a statement explaining why the complaint was upheld.

Decision Ref: 2004-156

The Authority received six complaints from members of New Zealand's Sri Lankan community, about an item on TVNZ's *Sunday* entitled "Return to Sender".

One complaint was on behalf of 389 members of the community.

The item examined the situation of a 16-year old Sri Lankan girl being returned to Sri Lanka after falsely claiming refugee status in New Zealand.

The complainants' key allegation was that the item was unbalanced and encouraged denigration of Sri Lankans. In particular, it included a number of comments about attitudes to sexual abuse in Sri Lanka. The reporter observed that attitudes in Sri Lanka were "fundamentally different" to those in New Zealand. This was followed by an interview with an expert who claimed that some Sri Lankan men believed it was their right to rape

their daughters.

A majority of the Authority agreed that the portrayal of Sri Lankan attitudes to child abuse was unbalanced. The expert had put forward challenging views, and these were highlighted by the reporter's observations about "fundamentally different" attitudes. These negative portrayals required some degree of balance.

The majority considered that no evidence was provided in the item to justify the statement that attitudes were "fundamentally different", and that insufficient efforts had been made to present other significant views about attitudes to child abuse in Sri Lanka.

As to the allegation of denigration, the Authority was divided. The majority, taking into account the casting vote of the Chair, upheld the complaint that the item encouraged denigration of Sri Lankans. The view of the majority was that the item did create an impression that grossly dysfunctional attitudes to child sexual abuse ran right through Sri Lankan society, and it was this that constituted the fundamental attitudinal difference referred to by the reporter.

The minority did not agree that the comments amounted to encouraging denigration.

In light of the fact that the decision to uphold the complaints was not unanimous, the Authority decided not to impose an order.

Decision Ref: 2004-129



Full decisions can be found on the Authority's website www.bsa.govt.nz