

BEFORE THE BROADCASTING STANDARDS AUTHORITY

Decision No: 29/90

Dated the 19th day of December 1990

IN THE MATTER of the Broadcasting Act 1989

AND

IN THE MATTER of a complaint by

JOHN O'NEILL

of Dunedin

Broadcaster

TELEVISION NEW ZEALAND
LIMITED

I.W. Gallaway Chairperson
J.B. Fish
J.L. Hardie
J.R. Morris

DECISION

Introduction

At 8.35 pm on 30 September 1989, TV2 broadcast a programme entitled "Safer Sex". The programme had an 'AO' certificate and was broadcast with an appropriate warning. The production had been co-financed by TVNZ Ltd and the Health Department and the Authority was advised by TVNZ that it was an informational special which had set out to alert young adults to the dangers of unprotected sex in an entertaining and informative manner. The programme's target audience was in the 16 to 25 years of age range and it averaged a rating of 20%.

Mr O'Neill's Complaint to TVNZ Ltd

(i) **Grounds for the Complaint**

On 5 October 1989, Mr O'Neill made a formal complaint to TVNZ alleging that in broadcasting the programme " ... the broadcaster failed to comply with Section 4 of the [Broadcasting] Act, and in particular, in regard to the observance of good taste and decency and the maintenance of law and order".



Mr O'Neill added that he did

not know what code applies at the present time to programmes, but I also allege that the programme failed in a crucial matter in that it made light of consequences of venereal disease and, in particular, it failed to adequately explain the threat of the H.I.V. to the nation and to the individual. This threat is of such enormity that the incitement of sexual activity and the utter disregard of the place of marriage, which were both features of the programme, amounted to crass irresponsibility on the part of the producer.

(ii) Letters to the Police

By way of explanation of his complaint, Mr O'Neill attached copies of letters he had written to the Commissioner of Police on 22 September (which was also copied to TVNZ), 29 September and 5 October 1989.

In the two letters which preceded the broadcast of "Safer Sex", Mr O'Neill drew the Commissioner's attention to his concern that the broadcast would constitute an offence against the provisions of section 3(2) and (3) of the Contraception, Sterilisation and Abortion Act 1977. He therefore asked that TVNZ be warned that the company was not one of the persons who, pursuant to subsection (2), may lawfully persuade any child under the age of 16 years to use any contraceptive; nor was it one of the persons who, pursuant to subsection (3), may lawfully supply information in the case of any contraceptive to any child under the age of 16 years. In reply, the Commissioner advised Mr O'Neill that TVNZ had been approached about "Safer Sex" and informed that any complaints received after its broadcast would have to be investigated.

Mr O'Neill's letter to the Commissioner of 5 October 1989 was written after he had viewed "Safer Sex". As this letter was appended, by way of explanation, to Mr O'Neill's letter of the same date in which he made his formal complaint to TVNZ, it is appropriate to summarise his specific allegations. These were:

1. The presenter's opening question to the studio audience ("who is never going to have sex?", to which no-one answered in the affirmative) set the programme off with a clear bias since no distinction was made between sexual indulgence while single and sexual union in the married state.

2. The programme went along entirely on the assumption that young people should indulge freely in sexual intercourse, sodomy and other sexual aberrations. There was a doctor there who "in a subtle but clear manner, promoted homosexual behaviour". Young girls were encouraged to carry condoms in their handbags and to let them be seen; there were demonstrations on fitting condoms and a performance by "Professor Condom"; and there was no mention at all of the age of consent. There was persuasion to use contraceptives and instruction in their use which was not authorised under the Contraception, Sterilisation and Abortion Act, 1977.

3. The "Hine" skit, in which the panel recommended that Hine date the bi-



sexual Kevin because he was the most "caring", and always used condoms, was a "disgusting spectacle". According to Mr O'Neill's notes, the "doctor" also recommended Kevin and "gave the message that male-to-male sex is fine".

4. Condoms are not 100% effective and in advocating their use, and consequently the activity that goes with their use, the programme was promoting the spread of venereal disease.

5. "Safer Sex" promoted licentious behaviour and not Aids prevention. There was only slight mention of abstinence.

TVNZ's Response

TVNZ wrote to Mr O'Neill on 21 December 1989 informing him that its Complaints Committee had considered his complaint at its November meeting "in the context of section 4(1)(a) and (b) of the Act which you cited" and had decided that it not be upheld.

(i) Section 4(1)(a) - Good Taste and Decency

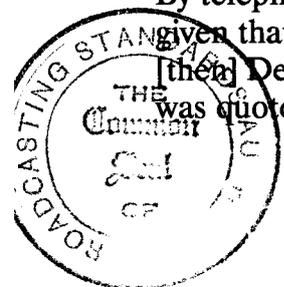
TVNZ's Complaints Committee first examined the fundamental question of whether or not "Safer Sex", as a programme in itself, was capable of being held to have been broadcast in contravention of the requirement in Section 4(1)(a) of the Broadcasting Act that broadcasters, in the preparation and presentation of programmes, maintain standards consistent with the observance of good taste and decency.

The Committee considered that broadcasters were bound to rely on common sense evaluations and interpret, as best they could, the public perception of such things in the climate of contemporary attitudes. In a context of public health or survival versus feelings of offence, it was assumed that the overwhelming tide of public opinion would favour the education-to-help-survive concept.

It was also felt that facts about sexually transmitted diseases were presented by the programme in a structured manner. Advice of an increasing rate of such diseases among young people was highlighted as were disease prevention methods, mostly by way of humour to retain the attention of the target audience. It ranged from "saying no" to using prophylactics.

It was accepted by the Committee that the presentation of the programme was all-important in measuring the other elements of the taste and decency equation. Its assessment was that the approach adopted was direct, frank and matter-of-fact yet permeated with good-natured banter and humour.

By telephone calls alone, the public response to "Safer Sex" was overwhelmingly positive, given that most people usually phone to complain. Press reaction was also positive. The [then] Deputy Leader of the Opposition and Spokesman on Health, Mr Don McKinnon, was quoted as supporting the programme. These reactions were interpreted as strongly



suggesting that the public at large was not upset by taste and decency factors. That the Minister of Health, in puppet image, was prepared to give an opening warning about the programme's content, added evidence which suggested that both sides of the main political spectrum supported this type of educational programme.

Because of the nature of the programme, TVNZ had sought legal advice with regard to section 4(1)(a) of the Act. Both the script and the final edited version were studied and no serious problem areas were identified. In addition, a number of health professionals, who were consulted, found the script to be factual and accurate.

The Committee was therefore unable to conclude that the good taste and decency provisions of the Act had been breached. Accordingly, this part of Mr O'Neill's complaint was not upheld.

(ii) Section 4(1)(b) - The maintenance of law and order

The second main question before the Committee related to elements of the law and whether there had been any breach of section 4(1)(b) of the Act, which requires broadcasters to maintain standards consistent with the maintenance of law and order. For the purposes of examining this part of the complaint, the Committee had proceeded on the basis that Mr O'Neill was alleging that the broadcast of the programme had breached section 3 of the Contraception, Sterilisation and Abortion Act 1977.

TVNZ reiterated that this issue was raised before the programme went to air and a legal opinion was obtained. The crux of the matter is that the Act provides exemptions (to the offence created by section 3) in cases where a registered medical practitioner or authorised representative of the family planning clinic is involved. This applied to contraceptive advice which may be intercepted by those under 16 years of age. The broadcast of "Safer Sex" was accordingly made, as the Act would require, under the supervision of, and with the authority of, a registered medical practitioner or a family planning clinic or agency authorised by the Minister.

The Committee was therefore unable to conclude that there had been a breach of section 4(1)(b) of the Act. Accordingly, this part of Mr O'Neill's complaint was also not upheld.

(iii) The Letters to the Police

Although the complaint had not been upheld, TVNZ nonetheless felt that some comment was called for in reply to the specific allegations made in Mr O'Neill's letter of 5 October 1989 addressed to the Commissioner of Police. These can be summarised as follows:

1. The subject of morality and behaviour was not the purpose of the programme. The distinction between pre-marital and extra-marital sex, on the one hand, and sexual relations within marriage on the other hand, was irrelevant.



The suggestion that the presenter's opening question ("who is never going to have sex?") evidenced a biased point of view amounted to a misunderstanding of the point of the question, which was to illustrate the fact that sex is an aspect of everyone's life.

2. "Safer Sex" acknowledged that many members of the targeted audience are sexually active outside marriage. In doing so, it was neither condemning nor condoning the situation.

3. The point of the "Hine" sketch was that it is safer to have protected sex with a bisexual person than unprotected sex with a heterosexual.

4. The contention that advocating the use of condoms among those likely to engage in sexual relations amounted to advocating sexual activity itself, did not seem to the Committee to be a self-evident truth; nor did the claim that by advocating the use of condoms the programme was promoting the spread of venereal disease. At no time did "Safer Sex" suggest that the use of condoms offered 100% protection.

5. "Safer Sex" did not advocate sexual activity generally, nor any particular form of sexual activity. Had it stressed abstinence to the extent Mr O'Neill appeared to advocate, it would have run the risk of losing credibility with its target audience.

Referral of Mr O'Neill's Complaint to the Authority

Mr O'Neill was dissatisfied with TVNZ's decision and referred the matter to the Authority for an investigation and review on 29 January 1990.

In subsequent correspondence Mr O'Neill forwarded copies of his completed Broadcasting Complaint Referral Form, assorted correspondence with TVNZ, press clippings, and copies of correspondence held at the National Headquarters of the New Zealand Police on the file relating to the complaint he had made to the Police Commissioner (this material having been obtained by Mr O'Neill under the Official Information Act 1982).

(i) Grounds for the Complaint

In completing Question 3 (grounds for complaint) of his Complaint Referral Form dated 13 February, Mr O'Neill listed a number of "grounds" upon which he based his complaint.

From the Authority's viewpoint, the more relevant of the grounds relied upon were that the programme:

(a) was inconsistent with the broadcaster's responsibilities under section 4(1)(a), (b), (d) and (e) of the Broadcasting Act 1989;



(b) offended against section 3 of the Contraception, Sterilisation and Abortion Act 1977;

(c) failed to inform on the consequences of Aids personally and socially and failed to deal with the threat that loose sexual habits have brought upon the world; and

(d) was misleading, biased and amoral.

Mr O'Neill stated that he relied also on the points made in his letter to the Commissioner of Police dated 5 October 1989.

(ii) Reasons for Dissatisfaction with TVNZ's Decision

As to the reasons why he was dissatisfied with TVNZ's decision (Question 4 on his Complaints Referral Form), Mr O'Neill made numerous points. For the purposes of its Decision, however, the Authority will list only the following:

(a) The decision dealt with only section 4(1)(a) and (b) of the Broadcasting Act 1989 whereas Mr O'Neill considered that his complaint was not so limited. He was also dissatisfied with the actual decision based on section 4(1)(a) and (b).

(b) The decision introduced "feelings of offence". Mr O'Neill had not mentioned any such feelings. The programme and the complaint should have been considered objectively.

(c) If the broadcaster set out to inform and alert the public, a very different programme is required.

(d) Section 3 of the Contraception, Sterilisation and Abortion Act does not permit the broadcaster to comply with the section merely by the "involvement" of a medical practitioner or other authorised persons.

(e) The decision did not address the question of the programme's promoting the spread of sexually transmitted diseases.

(f) The comments made by a member of the Family Planning Association were beyond the bounds of decency and good taste.

Mr O'Neill also expressed a preference for his complaint to be heard at a formal hearing

On 16 February, all material associated with the referral of the complaint to the Authority was passed to TVNZ for a response.

As it appeared that some of the correspondence that should have accompanied Mr O'Neill's Complaints Referral Form was missing, Mr O'Neill was at the same time asked to supply copies of all relevant correspondence.



TVNZ's Response to the Authority

On 16 July, TVNZ responded to the complaint, having delayed doing so pending the receipt of whatever further correspondence may have been forthcoming from Mr O'Neill in reply to the Authority's request. As none seemed to be in prospect, TVNZ made its substantive response on the basis of the material then before it.

(i) Grounds for the Complaint

TVNZ first addressed the grounds upon which Mr O'Neill's complaint was based. Although each of Mr O'Neill's "grounds" were addressed, only those comments relating to the "grounds" considered relevant by the Authority will be noted. They were:

- (a) In his letter of 5 October to TVNZ, Mr O'Neill clearly cited the substance of section 4(1)(a) and (b) of the Broadcasting Act 1989 and as to the Codes of Broadcasting Practice for Television he was unpecific.

The company did not write back to the complainant for clarification for two reasons. First, given his profession [as a solicitor], it could reasonably be assumed that he would know what was required. Secondly, the complainant is not unfamiliar with complaints procedures and requirements, having taken a matter to the Broadcasting Tribunal in 1977 which is the subject of Tribunal Decision 5/77. (It was also noted that these matters were in train prior to the Authority's Decision 3/90 which set forth specific guidelines for broadcasters on the matter of clarifying a complainant's grounds for complaint.)

TVNZ therefore submitted that the specific references by Mr O'Neill to section 4(1)(d) and (e) of the Act introduced new grounds which should not be taken into account in the Authority's review of the company's decision as the Complaints Committee was not invited to consider them and did not assess them.

It was also noted that his three letters to the Commissioner of Police, which Mr O'Neill used as the method "of explanation of his complaint" when he made his initial complaint to TVNZ, did not shed any light as to the other grounds under section 4 which he now sought to invoke. He had stated in his letter of 5 October to TVNZ that he did not know "what code applies at the present time to programmes", but on the basis of what he said in the rest of that paragraph, TVNZ considered that it was something of a lottery trying to determine what code [included in the Codes of Broadcasting Practice for Television] might be covered which embraced his subjective judgement of "crass irresponsibility". In the circumstances the company submitted that its selection of the grounds for consideration was not unreasonable.

- (b) As already noted, the broadcast did not breach section 3 of the Contraception, Sterilisation and Abortion Act 1977; there was therefore no breach of section 4(1)(b) of the Broadcasting Act.

As to the alleged failure to inform concerning the consequences of Aids



and the threat associated with "loose sexual habits", the company drew the Authority's attention to a decision of the Broadcasting Tribunal 10/90, dealing with a programme similar to "Safer Sex". The programme was called "First Aids" and it, too, did not go into every detail relating to Aids. The Tribunal said at page 13:

It was not a documentary setting out to examine all issues about Aids. It is legitimate to limit the information in a programme in accordance with the purpose of the programme. Programme makers are entitled to take aspects of a topic and confine themselves to that.

TVNZ considered this finding to be equally applicable to the argument made by the complainant.

(d) The question whether or not "Safer Sex" was misleading and biased was not addressed in detail by the Committee as it did not fall within the complainant's specified grounds. As for aspects of morality, "Safer Sex" deliberately set out not to advocate a particular moral stance.

By way of a final comment on the grounds set forth by Mr O'Neill for the complaint in Question 3 of the Complaints Referral Form, TVNZ observed that asking it (the Authority) to rely on a case made out to the Commissioner of Police presents a totally unsatisfactory platform or basis for the company to mount a proper and detailed investigation. This is particularly so when it is recognised that two of the three letters to the Commissioner of Police, which the complainant relied on for an explanation of his complaint, were written prior to the programme being broadcast.

TVNZ urged that the Authority consider setting aside all copies of correspondence between the complainant and the Police as not having relevance as evidence in support of his complaint, and that the Authority limit any reviews to the other matters contained in Mr O'Neill's letter to TVNZ of 5 October 1989.

(ii) Reasons for Dissatisfaction with TVNZ's Decision

With regard to the reasons why Mr O'Neill was dissatisfied with TVNZ's decision on his complaint, TVNZ responded to the particular points extracted by the Authority and listed earlier, as follows:

(a) The Committee made its decision on the basis of section 4(1)(a) and (b) of the Broadcasting Act for the reasons set forth in sub-paragraph (a) immediately above.

(b) The reference to "feelings of offence" in TVNZ's letter of 21 December was not intended to attribute such feelings to Mr O'Neill but to put into perspective the seriousness of the topic and its significance with regard to public sensitivities, insofar as they impinged on matters of good taste and decency.

(c) It was not believed that "a different programme is required" to inform and



alert the public. This view was supported by the Broadcasting Tribunal in Decision 10/90 at page 11 where a similar situation was being traversed and it said:

... the programme complained of can be seen as directed to a particular audience rather than having of necessity to deal with every aspect of Aids, or at least address a wider audience, in one programme. Nor did there have to be other television programmes in the period of current interest specifically targeting other specific points of view on moral issues.

(d) In using the words "is involved", TVNZ was not purporting to quote from the Contraception, Sterilisation and Abortion Act but to refer to the medical people who were involved in the programme as being people authorised to give the sort of informed guidance which came through in the programme.

(e) If TVNZ's earlier reply missed the complainant's point about the programme promoting the spread of sexually transmitted diseases, it was because his point was so unbelievable that a fuller reply did not appear to be called for.

(f) The comments made by a member of the Family Planning Association, when taken in the context of the programme and in the circumstances surrounding the thrust of the particular passage, did not go beyond the taste and decency bounds. As the Broadcasting Tribunal said in its Decision 10/90, "the seriousness of the topic justified an explicit, arresting, educational approach."

By way of a final comment, TVNZ addressed Mr O'Neill's preference for a formal hearing suggesting that it was not warranted on the basis that a similar complaint had been traversed recently before the Broadcasting Tribunal (see Decision 10/90) and any new hearing would be of a repetitious nature. In addition, it was submitted that, given the limitations of the grounds specified by Mr O'Neill in his letter of 5 October to TVNZ, there was sufficient information before the Authority for it to reach a proper determination based on those grounds alone and that on the basis of those grounds, TVNZ did not have a case to answer.

Mr O'Neill's Final Comments to the Authority

Mr O'Neill wrote to the Authority on 12 September making a final comment on most of the matters raised in earlier correspondence. The more salient of his comments were:

(a) He had not added new grounds to his complaint. He relied on section 4 of the Act and need not have particularised, but did so for special emphasis.

(b) He had also believed from the outset that provisions of the Codes of Broadcasting Practice for Television had been breached. He now had a copy of the Codes and believed that standards 1, 2, 5, 6 and 7 were applicable to his complaint.



(c) The doctor who gave the message that "male-to-male sex is fine" was making a clear recommendation concerning sodomy between males. As condoms are unreliable, the programme was promoting the spread of Aids.

(d) The correspondence between Mr O'Neill and the Police (forwarded to the Authority in August and passed also to TVNZ) should be received as evidence in support of his complaint.

Decision

Before setting out its Decision on Mr O'Neill's complaint, the Authority points out that this complaint traverses many aspects of a similar complaint made by Miss Bartlett for the Society for Promotion of Community Standards. The Decision on that complaint (28/90) is also being issued today.

Many of the Authority's comments made in that Decision apply in equal measure to Mr O'Neill's complaint. However, as the two Decisions will each stand alone, the Authority will - where necessary - quote passages from the Bartlett Decision that are applicable to its determination of the present complaint.

As occurred in that case, the Authority noted the preference expressed by the complainant for an appearance before the Authority to give evidence or make further submissions in the event of the Authority deciding to hold a formal hearing. The Authority's comments made concerning Miss Bartlett's request are equally applicable to Mr O'Neill's and hence are quoted:

Pursuant to the provisions of s.10 of the Broadcasting Act 1989 which permit the Authority, if it thinks fit, to determine a complaint without a formal hearing, the Authority's usual practice is to determine complaints on the papers without a formal hearing or receiving oral submissions. It saw no compelling reason to vary this practice in this instance.

A prolonged and prolific correspondence has been entered into between the complainant and the broadcaster, TVNZ, a correspondence which, in the Authority's view, has allowed each party to put its case adequately and it must be stated, increasingly repetitiously, in regard to content. Consequently the Authority considered that there was ample material available for it to arrive at a proper determination based on the papers. Indeed a formal hearing, in the Authority's view, could merely tend to repeat the existing arguments of the parties and hence do little but further delay a decision.

Further, TVNZ had drawn to the Authority's attention that a complaint made by Miss Bartlett in 1987 on similar grounds was heard by the then Broadcasting Tribunal at a formal hearing at which witnesses from both the Society and the BCNZ were heard. A detailed decision on this complaint (Decision 10/90), dated 31 January 1990 and running into 17 pages, became available during the time covered by the correspondence in the present case, and has been studied by the



Authority. Consequently, the Authority holds a view similar to that of TVNZ that a formal hearing would be unwarranted and would be repetitious.

The Authority, then, considered Miss Bartlett's present complaint on the papers.

Similarly, the Authority considered Mr O'Neill's complaint on the papers, for identical reasons.

The Authority notes that, on the Complaint Referral Form, Mr O'Neill alleges breaches of section 4(1)(a), (b), (d) and (e) of the Broadcasting Act. This section provides as follows:

4(1) Every broadcaster is responsible for maintaining in its programmes and their presentation, standards which are consistent with -

- (a) The observance of good taste and decency; and
- (b) The maintenance of law and order; and
- ...
- (d) The principle that when controversial issues of public importance are discussed, reasonable efforts are made, or reasonable opportunities are given, to present significant points of view either in the same programme or in other programmes within the period of current interest; and
- (e) Any approved code of broadcasting practice applying to the programmes.

The Authority will deal with the specific complaints in the order in which they appear in this section of the Act.

Section 4(1)(a) of the Act - Good Taste and Decency

Mr O'Neill's first allegation is that in presenting the programme "Safer Sex", TVNZ failed to maintain standards which are consistent with the observance of good taste and decency. On the Complaint Form, Mr O'Neill did not give any specific examples to indicate clearly what part or parts of the programme allegedly breached this requirement although he did say that "It was immoral". His other paragraphs referred mainly to omissions and failures to deal with certain matters. He did make reference to his letter to the Commissioner of Police dated 5 October 1989, as part of his complaint, but this letter is also less than clear about specific instances which offend standards of good taste and decency. The only example actually given comes up later: that Barbara Lusk's explanation was "in particular beyond the bounds of good taste and decency".

The Authority can infer, therefore, that it was the broadcast of the programme on the topics of sex, sexually transmitted diseases and their prevention which provided the grounds for Mr O'Neill's complaint. Certainly TVNZ (in its letter of 21 December 1989)



seemed to take this to be the case, and it replied accordingly.

In Decision No: 28/90 similar allegations of a breach of s.4(1)(a) were made by Miss Bartlett. Therefore the Authority considers it appropriate to restate those conclusions as being applicable in this case:

In regard to the maintenance of standards consistent with the observance of good taste and decency, the Authority refers to its own definition of this concept as set out in Decision No: 2/90 (19 January 1990) which also relates to a complaint made by Miss Bartlett on behalf of the Society for Promotion of Community Standards. This Decision stated that in the Authority's view "the concept of good taste and decency in a given situation pertains to conformity with such standards of propriety as the Authority considers to be in accordance with generally accepted attitudes, values and expectations of New Zealand society".

In order to decide then whether or not the programme "Safer Sex" breached the requirements for the observance of standards of good taste and decency, the Authority believed that it must first establish the purpose of the programme and hence the expectations it engendered as well as its overall impression. Then it must indicate what it believes to be the generally accepted attitudes of society with regard to the topic or topics traversed by the programme.

The Authority notes TVNZ's statement that the programme "set out to alert young adults to the dangers of unprotected sex in an entertaining and informative way. Its target audience was in the 16 to 25 years range". The programme was designed to be educational and specifically it was directed towards young adults whose attention is unlikely to be either attracted or sustained by any programme they may consider to be even remotely "preachy", "moralistic", or even worse, "boring". The opinion of the Authority is that notice of such a programme would create the expectation in the minds of the viewers of an accurate presentation with an informal format, the educational intent of which would be honestly achieved without a hint of pomposity. The Authority believes that "Safer Sex" successfully fulfilled such reasonable expectations by way of its clearly stated medical opinions, simple diagrams and skits which while humorous nevertheless left the viewer in no doubt as to the seriousness of the situation with regard to the dangers of unprotected sex.

There was no attempt to deal with aspects of sex other than this stated need for prophylactic measures from the health standpoint, in order to combat sexually transmitted diseases (Stds). For instance, no mention was made of human sexuality, of sex as communication, of sex among older couples nor of moral stances. These and any other additional topics were, in the Authority's view, rightly precluded by the over-riding purpose of the programme, the success of which depended on retaining the attention of the young viewers for whom the programme's educational message could be, in fact, a matter of life or death.

Given that this was the purpose of the programme, and that this purpose was, the Authority believes, achieved, the Authority then sought to establish current



indicators of "generally accepted attitudes values and expectations in New Zealand society" with regard to the need to educate young adults on how they may best avoid the risk of Stds. The Authority notes the report by TVNZ of reactions to the programme - 20% rating, 250 callers supporting the programme with some 175 against it ("overwhelmingly positive given that most people usually phone to complain"), and press reaction which was "positive without exception". Spokespersons from both major political parties were quoted as being supportive.

The Authority is of the view that the advent of the Aids epidemic and the increasing awareness of the serious consequences of Stds have over recent years modified generally held attitudes on the necessity for education about sex and about the use of condoms and other protections vis a vis previously widely supported moral stances on such matters ... The Authority notes that the programme - which significantly was called "Safer Sex" and not "Safe Sex" - points out that 40% of persons in the relevant age group are sexually active. It appears to be the view that most people, even while they may question the morality of the so-called "sexual revolution" of recent years, would agree with the statement of TVNZ that "the tide of concern now evident relating to sexually transmitted diseases, which are capable of decimating populations if not controlled, seemed to override considerations of upset feelings for some. In a context of public health or survival versus feelings of offence, it was assumed that the overwhelming tide of public opinion would favour the education-to-help-survive concept."

With regard to the specific example of the interview with Barbara Lusk of the Family Planning Association instanced by Mr O'Neill, the Authority again quotes its own comments from Decision No: 28/90:

While aware that some people may well disagree with and/or be offended by the suggestions in the programme that e.g. touching may be a pleasurable alternative to intercourse, the Authority is of the view that these sections of the programme were consistent with the perceived expectations of a frank and matter-of-fact presentation and hence were not inconsistent with maintaining standards of good taste and decency.

The Authority therefore believes the programme to be consistent with the observance of standards of good taste and decency.

For this reason the Authority declines to uphold the complaint that in the broadcast of "Safer Sex", TVNZ breached s.4(1)(a) of the Broadcasting Act 1989.

Section 4(1)(b) of the Act - The Maintenance of Law and Order

The Authority next considered Mr O'Neill's allegation that s.4(1)(b) had been breached in that the programme offended against s.3 of the Contraception, Sterilisation and Abortion Act 1977.

The Authority notes that it has disregarded Mr O'Neill's letters to the Commissioner of



Police dated 22 and 29 September 1989 as it believes that it is only empowered to consider matters referred to it about programmes which have been broadcast, in accordance with ss.6(1)(a) and 8 of the Broadcasting Act, and these letters preceded the broadcast of "Safer Sex". It is aware, however, that no criminal prosecutions for breaches of the Contraception, Sterilisation and Abortion Act followed the broadcast of the programme.

The Authority accepts the view proffered by TVNZ that

A properly qualified medical person supervised the content of the programme and certified its legitimacy for broadcast. There was also present on the programme a family planning representative as well as other medical experts. In essence the broadcast was made, as the Act would require, "under the supervision of, and with the authority of a registered medical practitioner or a family planning clinic or agency authorised by the Minister.

For this reason, the Authority declines to uphold the complaint that in the broadcast of "Safer Sex", TVNZ breached s.4(1)(b) of the Broadcasting Act 1989.

**Section 4(1)(d) of the Act - Lack of Balance and
Section 4(1)(e) - Codes of Broadcasting Practice**

Before making a decision on alleged breaches of these provisions of s.4(1) of the Act, the Authority gave consideration to TVNZ's claim that in citing these provisions as well as s.4(1)(a) and (b), on the Complaints Referral Form, Mr O'Neill was introducing new grounds not in his original complaint to TVNZ.

The Authority notes that initially Mr O'Neill mentioned breaches of s.4(1)(a) - good taste and decency and s.4(1)(b) - law and order; but that he then went on to say "I do not know what code applies at the present time to programmes ... ". Before he returned his completed Complaint Referral Form, Mr O'Neill had obtained a copy of the Codes of Broadcasting Practice and subsequently he specified breaches of s.4(1)(d) and (e). The Authority is aware that TVNZ claims that the grounds for complaint were broadened by this later inclusion but it accepts Mr O'Neill's view that he was not adding new grounds but was simply particularising previous grounds. For this reason, the Authority then proceeded to examine the complaint in regard to these two provisions.

Lack of Balance

In considering the allegation that the programme breached s.4(1)(d), which states the requirement for the presentation of "significant points of view", the Authority is of the opinion that several of Mr O'Neill's complaints fall within the ambit of this requirement, including allegations that the programme:

"ignores guidelines" regarding "the most certain way to avoid AIDs (and other STD's)"



"failed to inform on the consequences of AID's"

"failed to deal with the advantages of abstaining ... "

" ... was misleading ... biased [and] amoral"

omitted "to explain the consequences for young girls of early sex and multiple partners"

"failed to demonstrate the urgent need to return to acceptance and observance of traditional sexual mores" and (as stated in his letter to the Commissioner of Police)

"set off with clear bias" and indicated "the blatant libertarian philosophy of the promoter came through".

The Authority considers that these allegations of lack of balance are similar to the complaints made by Miss Bartlett, as set out in Decision No: 28/90. It believes therefore that comments quoted in that case are equally applicable here.

First, TVNZ's comments:

... it must be emphasised that the programme did not set out to investigate questions of sexual morality. The makers were guided by the best possible advice from those who have a public responsibility for the health of the community. Had such medical and family planning authorities believed a lesson in sexual morality would have been more effective than the clinical up-front approach, then such expert opinion would no doubt have given the claims being made by the complainant full support and backing in the programme. A balance factor would not seem to be seriously at issue here.

Secondly, and even more cogent in the Authority's view is a relevant section of Decision 10/90 of the Broadcasting Tribunal, made in relation to a similar case:

The Tribunal also accepts that ... the programme complained of can be seen as directed to a particular audience rather than having of necessity to deal with every aspect of AIDs, or at least address a wider audience, in one programme. Nor did there have to be other television programmes in the period of current interest specifically targeting other specific points of view on moral issues.

This programme was not about moral issues, it was about options for the heterosexually active, most of whom would be unlikely to stay watching a programme with a moralistic purpose.

We do not believe that this programme itself was unbalanced for the purposes it was intended and we do not find there was a need to balance the programme with a significant different point of view.



The view of the Authority is that the Tribunal's wording is applicable to the present case.

For the foregoing reasons the Authority declines to uphold the complaint that in the broadcast of "Safer Sex", TVNZ breached s.4(1)(d) of the Broadcasting Act 1989.

Codes of Broadcasting Practice for Television

In his letter of 12 September, Mr O'Neill specified the Codes of Broadcasting Practice, TV Programme Standards that he considered to have been breached within the context of s.4(1)(e), namely standards 1, 2, 5, 6 and 7. The Authority examined these allegations in turn.

Standard 1 Truthful and Accurate on points of fact

The example quoted by Mr O'Neill as breaching this standard - "male-to-male sex is fine" - is considered by the Authority to be a matter of opinion as expressed by a participant in the programme, rather than a question of fact. Similarly, some of the other "facts" cited by Mr O'Neill, e.g. those referred to in his letter to the Commissioner of Police (5 October), were actually omissions from the programme. The Authority notes that TVNZ was advised by doctors, the Family Planning Association and the Health Department in the preparation of this programme and it considers that such expertise would be generally acceptable to the majority of New Zealanders.

For these reasons the Authority declines to uphold the complaint that the broadcast of "Safer Sex" breached standard 1 of the TV Programme Standards.

Standard 2 To take into consideration currently accepted norms of decency and taste in language and behaviour, bearing in mind the context in which any language or behaviour occurs

The Authority considers that in this instance the requirements of this standard are encompassed by the provisions of s.4(1)(a) and as such have been adequately dealt with above.

The Authority declined to uphold the complaint in regard to s.4(1)(a) and consequently declines to uphold the complaint that the broadcast of "Safer Sex" breached standard 2 of the TV Programme Standards.

Standard 6 To show balance, impartiality and fairness in dealing with political matters, current affairs and all questions of a controversial nature

The Authority considers that in this instance, the requirements of this standard are encompassed by the provisions of s.4(1)(d) and as such have been adequately dealt with above.



The Authority declined to uphold the complaint in regard to s.4(1)(d) and consequently declines to uphold the complaint that the broadcast of "Safer Sex" breached standard 6 of the TV Programme Standards.

Standard 7 To avoid the use of any deceptive programme practice which takes advantage of the confidence viewers have in the integrity of broadcasting

While, throughout his correspondence, Mr O'Neill listed examples of a variety of what he considered significant omissions and matters on which his opinions and values differ markedly from those portrayed in the programme, he does not give any examples in regard to this serious allegation that the makers of the programme deliberately set out to deceive. The Authority is at a loss to find any such instances of deliberate deception either in the programme or in the purpose of the programme.

The Authority's generalised view of the programme was summarised above in Decision No: 28/90, Miss Bartlett's complaint concerning the same programme. (See above in the passage dealing with s.4(1)(a).)

For these reasons, the Authority declines to uphold the complaint that the broadcast of "Safer Sex" breached standard 7 of the TV Programme Standards.

The Authority in this Decision has made reference to its parallel Decision concerning "Safer Sex" (Dec. No: 28/90). In the correspondence relevant to that Decision, the Authority received a letter from TVNZ in which reference was made to Decision 10/90 of the Broadcasting Tribunal in regard to a programme very similar to "Safer Sex". An extract of this letter was appended to Decision No: 28/90.

The Authority believes that the substance of that TVNZ letter, quoting from the Tribunal Decision, is also relevant to this complaint. Consequently, it is added to this Decision as an appropriate Appendix.

Signed for and on behalf of the Authority


Iain Gallaway

Chairperson



19 December 1990

APPENDIX

Extract from TVNZ's Letter of 9 July 1990 to the Authority

In concluding its letter, TVNZ referred to Decision No 10/90 of the Broadcasting Tribunal and remarked as follows:

Finally it would seem appropriate to draw the Authority's attention to various segments from the Tribunal's judgement in support of this submission, and summary, as follows:

- (a) "The London Declaration which emerged from the World Summit of Ministers of Health on Programmes for Aids Prevention, held in London in January 1988, said: 'The single most important component of national Aids programmes is information and education.' "

The company would submit that in its broadcasting of the "Safer Sex" programme it fulfilled not only what might be described as a public duty, but it also met, given its context, the two provisions of the Broadcasting Act in question. In fact, as stated in my letter to the complainant: "In the context of public health or survival versus feelings of offence, it was assumed that the overwhelming tide of public opinion would favour the education-to-help-survive concept." In fact it did, if the unity of viewpoint reflected by both the main political parties (my letter at page two) is anything to go by.

- (b) Under the "Hearing" heading, the following quotation, arising from evidence of a Health Department witness, is valid in the context of this "Safer Sex" programme:

"To be effective, the programme had to be presented in a manner in which the attention of young people was captured and held for a sufficient length of time for its messages to strike home. To achieve that, appropriate language had to be used and it was acknowledged that that may have been offensive to some members of the viewing audience. Prior warning was given.

It could be expected that the segment of the programme which dealt with the use of condoms might prove controversial in the way it was presented. But the failure of condoms most frequently related to the manner in which they were used rather than because of an intrinsic defect in the condom itself. Explicit directions concerning their use needed to be given if they were to be effective, he said.

The programme was directed at sexually active young people and accepted that young people engaged in the activity. That did not mean educational programmes should ignore the value of celibacy or the limitation of sexual partners as an effective means of avoiding infection ...



... publicity about Aids has raised public awareness and made it possible to talk about subjects that were unacceptable previously. This awareness plus the promotion of safer sex had had a spin-off effect in reducing the incidence of other sexually transmitted diseases. Society was becoming more tolerant in appreciating the dangers which the gay community and intravenous drug users were exposed."

(c) In the opening comments of the Decision portion of the judgement, the Tribunal made the following observations which are equally applicable to the "Safer Sex" programme:

"It concluded that the unusual seriousness of the topic justified an explicit, arresting, educational approach. We also considered that, subject to a warning, it was appropriate to broadcast the programme at a time when the maximum viewing audience of those targeted was available. Parents would be in a position to exercise control over their children watching the programme if they were under an appropriate age. The programme was not prurient in its approach.

The major issue on which the Department of Health and the Society differed was that the Department wished to take people as they were and have them modify their behaviour in the interests of preventing the transmission of the disease, while the Society wished to highlight the dangers to the community of homosexuals and drug users, to advocate abstinence (outside marriage) on both moral and practical grounds and to emphasise the safety of sex within marriage.

Fundamentally, this issue is not a new one and has cropped up in relation to health education generally and contraceptive advice to unmarried people in particular. There appear to be strongly held views in society. One view does not accept the "lowering" of standards that has resulted in or accompanied widespread sexual activity outside marriage. It suggests that the provision of any information that enables contraception or prevention of disease to occur, runs a serious risk of promoting the activity itself. The other view is that the activity has been going on for some time and is not likely to be changed significantly by a moral campaign. Therefore, in the interests of the individual and society, education and information should be made available to those at risk.

The Tribunal is not going to resolve the diversity of society's attitudes and acknowledges both these points of view within the community.

However, the Tribunal cannot take the position that it is wrong for the television service to be used to provide this information when society itself does not by law ban that information being given ...

Likewise, it is permissible to accept the "promiscuity" of the targeted audience as a fact and give them options within their lifestyle. That is



hardly a breach of community standards which we are obliged to apply.

We do not believe it is inappropriate to use amusing, eye-catching, off-beat methods of teaching rather than using lecturing, serious or moralistic approaches ...

The Tribunal also accepts that ... the programme complained of can be seen as directed to a particular audience rather than having of necessity to deal with every aspect of Aids, or at least address a wider audience, in one programme. Nor did there have to be other television programmes in the period of current interest specifically targeting other specific points of view on moral issues.

This programme was not about moral issues, it was about options for the heterosexually active, most of whom would be unlikely to stay watching a programme with a moralistic purpose.

We do not believe that this programme itself was unbalanced for the purposes it was intended and we do not find there was a need to balance the programme with a significant different point of view."

