

PRINCIPLES
AND PRAGMATISM:
AN ASSESSMENT OF
BROADCASTING STANDARDS AUTHORITY
DECISIONS FROM
A JOURNALIST'S PERSPECTIVE

NGĀ MĀTĀPONO
ME TE MAHI WHAI KIKO:
HE AROTAKENGA I NGĀ
WHAKATAU A TE MANA
WHANONGA KAIPĀHO,
KI TĀ TE KAIKAWA KŌRERO TITIRO

by Colin Peacock



FOREWORD

The role of the Broadcasting Standards Authority (BSA) is to determine the areas where, and the extent to which, broadcasters' right to free expression should give way to other interests that are highly valued in our society. We do this by applying the Codes of Broadcasting Practice. The standards specified in the Codes relate to such matters as treating people fairly, providing a range of views on controversial issues, ensuring accuracy in the news and current affairs, protecting the interests of children, protecting individual privacy, restricting certain portrayals of violence, and upholding norms of good taste and decency.

Each time the BSA receives a complaint and assesses whether broadcasting standards have been breached, we stand in judgment on a broadcaster. But we are also subject to the judgment of others. At a formal level, our decisions are appealable to the High Court. Typically, this results in a small number of judgments on our decision making each year; although every one contains lessons.

Less formally, it is our policy to invite stakeholders to take part each year in reviews of aspects of our processes and decision making. The insights we have gained from the various surveys conducted and meetings held to date have led to a number of changes, including in the wording of standards and in the adoption of more user-friendly elements of the complaints process.

As part of our ongoing openness to review, four years ago we commissioned media law expert Professor John Burrows to undertake an analysis of the legal quality of our decisions. His critique, while overwhelmingly positive, has been of greatest value to us for posing challenges to some of our assumptions and for alerting us to difficult issues that may yet arise for our consideration. By subjecting our work to such rigorous scrutiny, and learning from the responses received, we believe we are exercising our public function responsibly.

The BSA commissioned the present report as an important step in exploring journalists' views of our decisions. There is, as the report notes, "an inherent conflict between the day-to-day reality that broadcast journalists work with and the requirement to adhere to a set of prescribed principles such as those that make up the codes of broadcasting practice". We want to know about any areas of tension between the Authority's decisions and journalism practice so that we can either better explain our position in future or adjust it if that is consistent with our statutory responsibility. We also wanted a journalist to review the readability of BSA decisions and assess the extent to which the decisions provide useful guidance to journalists and other programme makers. Just as communication is the essence of broadcasters' business, so it is of ours.

We commissioned Colin Peacock, the host of Radio NZ's Mediawatch programme, to do this review. We chose Colin not only because of his experience in journalism but also because he is accustomed to analysing media issues from a critical, objective position. On behalf of the current members of the BSA - Tapu Misa, Diane Musgrave and Paul France - I thank Colin for his hard work on this project and for providing us with considerable food for thought.

This report and its conclusions do not represent the opinions of the BSA. Our opinions are contained in our decisions. We trust, however, that Colin Peacock's measured assessment of BSA decisions will inspire many other journalists to engage with the vitally important questions that surround the application of broadcasting standards in New Zealand. The BSA looks forward to being part of the continuing debate and utilising its lessons to the advantage of all New Zealanders who rely on the broadcasting standards system.

A handwritten signature in black ink, appearing to read 'JRMorris'.

JOANNE MORRIS, OBE
Chair, Broadcasting Standards Authority
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INTRODUCTORY REMARKS

The Broadcasting Standards Authority ('BSA' or 'the Authority') asked me to provide an assessment of their decisions from a journalist's perspective. This report addresses the following questions:

- Where is the tension between the 'bottom-line standards' for the Authority and the 'bottom-line standards' for journalists?
- What is the Authority getting right from journalists' perspective - and what is it getting wrong?

Part 1 is an executive summary, while the main report (Part 2) examines how the Authority interprets the standards in the television and radio codes with reference to selected decisions published since 2004 (listed in Part 3).

In these sections, I've looked at how the Authority's determinations may clash with the perspectives of journalists and other programme-makers. I have also considered the extent to which the Authority's decisions provide useful guidance for journalists, and the extent to which the decisions recognise the practical realities of broadcast journalism.

Part 4 has individual commentaries on 15 of the decisions I have consulted. These include some of the more significant, interesting and controversial decisions in which complaints were upheld, with one exception, for breaches of various standards in the codes. Other less significant decisions are also included to ensure a range of the standards is covered.

Quotations from the decision documents are in italics and quotation marks, followed by the number of the relevant paragraph from which they were extracted, for example:

"... the absence of any challenge to the interviewee's story in the broadcast contributed to the breach of Principle 5." [149]

Some older decisions do not use paragraph numbers so no paragraph reference can be given in these cases. Some shorter quotes are run on in the text with quotation marks. Note that prior to July 2008 the Standards in the Radio Code were known as 'Principles'. These should not be confused with the Privacy Principles that are applied when determining complaints under the Privacy Standard.

COLIN PEACOCK

**Presenter and producer of Radio New Zealand's *Mediawatch*
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PART 1 EXECUTIVE SUMMARY

There is an inherent conflict between the day-to-day reality that broadcast journalists work with and the requirement to adhere to a set of prescribed principles such as those that make up the codes of broadcasting practice. Broadcast journalists operate in a competitive and largely commercial environment. Often, they are encouraged to produce journalism that has 'impact,' and to be 'first with the news'. This can compromise commitments to fairness, balance and accuracy. It can also encourage breaches of privacy that are not justified by legitimate public interest.

The Authority's decisions should be robust and consistent to maintain and preserve broadcasting standards.

In the writing of this report I consulted more than 40 decisions of the Broadcasting Standards Authority and on the whole they are consistent with the principles set out in the standards and their attached guidelines. These in turn are mostly consistent with principles in the editorial policy guidelines of major broadcasters, all of whom were consulted in the drafting of the standards in the codes.

So, effectively, the Authority and broadcasters share many of the same 'bottom line standards', and the majority of upheld complaints do offer journalists and programme-makers a benchmark for good practice in their work. But tensions inevitably arise when the Authority applies the principles and guidelines in its consideration of complaints.

Journalists may concede that it's fair to uphold complaints in many cases, but in a few they will feel that the Authority has:

- 'set the bar too high'.
- taken a narrow view of what is in the public interest.
- been persuaded by the arguments of well-resourced and/or highly motivated complainants.
- failed to take into account fully the realities of broadcast journalism today.
- restricted their freedom of expression.

Some journalists will also believe some of the Authority's decisions could discourage risk-taking or courageous journalism that could prove to be in the public interest.

Turning to the individual standards:

PRIVACY

In many cases where privacy complaints are upheld, the breach is clear – but some of the Authority's upheld decisions reflect a higher expectation of privacy than some journalists and programme-makers would consider healthy for serving the public interest.

They may disagree with some of the Authority's judgments concerning:

- ***what is an "offensive intrusion in the nature of prying"?***
- ***what counts as a disclosure of private facts?***
- ***when is a breach of privacy justified by public interest?***

The way the "public interest" is explained varies in the decisions in which it is discussed, and journalists may find some inconsistencies in the way it is applied by the Authority and feel it does not always give the 'benefit of the doubt' to the broadcaster.

BALANCE / CONTROVERSIAL ISSUES - VIEWPOINTS

Tensions between the Authority's view and that of journalists and programme-makers are inevitable. Some journalists simply do not respect the balance standard – nor believe the obligations it brings are fair. Some senior journalists have argued it should be removed, or replaced with a principle enshrining 'impartiality'. But in the decisions I consulted, weak claims were not upheld and the balance complaints which were upheld did identify deficient journalism which may have prevented the audience from forming an informed opinion.

But tensions arise in these areas:

- ***What is a "controversial issue of public importance" to which the balance standard applies? What are the aspects of the story that require balance?***
- ***Whose views are considered to be significant?***
- ***What constitutes reasonable efforts made, or reasonable opportunities given, to provide significant points of view?***
- ***What constitutes the "period of current interest", within which broadcasters should present significant other points of view?***

The Authority says it assesses balance from the point of view of listeners and viewers. In my view, by and large, it correctly identifies controversial issues of public importance, and makes the right call on whether they are the focus of the item or not. In the decisions I examined, it would not have complicated the broadcast to include the viewpoints identified as absent, even though journalists may feel that the Authority is interfering in their editorial freedom, and passing judgment on their decision-making and newsgathering methods.

Determining the period of current interest within which balance should be supplied is trickier, and some decisions will strike journalists as too arbitrary, and based on contestable assumptions about people's viewing and listening habits. For some issues,

it is unclear whether balancing material in other broadcasts – or even other media – can be considered. This makes it difficult for journalists to determine in advance whether broadcasts will be considered ‘unbalanced’ if there’s a subsequent complaint.

With ‘rolling news’ and new platforms making stories available round the clock these days, broadcasters may begin to argue that stories which could balance allegedly unbalanced ones are available elsewhere at any time. The Authority may have to begin assessing whether broadcasters properly reported the available facts of the matter at the time of broadcasting the story in question.

ACCURACY

The accuracy standard is consistently applied in the decisions I consulted – but quite strictly applied. The following points of tension arise for journalists:

- ***whether some inaccuracies are really significant “errors of fact”.***
- ***whether some inaccuracies make an entire item inaccurate, and possibly also unfair.***
- ***the distinction between assertions of fact and expressions of opinion.***
- ***the standard of proof a broadcaster must meet for facts and assertions presented in reports.***
- ***the extent to which the Authority will go to establish the truth about disputed facts – and whether it strays beyond its expertise in doing so.***
- ***whether the BSA challenges complainants’ assertions as rigorously as those of the broadcasters.***
- ***what constitutes “correction at the earliest opportunity”?***

The Authority consistently distinguishes assertions presented as fact – to which the accuracy standard applies – from opinion, analysis and comment – to which it does not.

In cases where a complaint has been upheld for misleading or unnecessarily alarming viewers (Guideline 5b of the Free to Air Television Code), the conclusions are convincing and help to ‘set the record straight’ for journalists – and the public. But in some cases journalists will feel the inaccuracies identified are not significant and do not make the whole item fundamentally inaccurate. There are other instances where the inaccuracy could not have been easily detected prior to broadcast, and where it was even difficult for the broadcaster to establish the facts after a complaint was received, especially when deadlines are a factor.

It seems harsh to uphold complaints about inaccuracies contained in reports supplied by a reputable international news agency¹, when employing such an agency could qualify as “a reasonable step” to ensure reliability of the source. However, this does remind all broadcasters they are responsible for the standards of everything they choose to broadcast.

¹ e.g. *Decision No: 2006-063 (CanWest TVWorks and Dewar); Decision No: 2008-024 (TVWorks and Treadgold)*.

In some cases, well-resourced complainants including state agencies² submitted detailed complaints and responses. Sometimes, these were very technical.

Broadcasters will feel that they are at a disadvantage here. The Authority sometimes conducts research of its own into disputed facts, but I am not clear about how far the Authority is prepared to go to establish the accuracy of such facts. Where the arguments are highly technical or the facts are the subject of intense debate, journalists may believe the Authority can stray beyond the limits of its expertise.

FAIRNESS

Most judgments made about fairness seemed reasonable, but areas of tension include:

- *the interpretation of a "reasonable opportunity to respond".*
- *the fairness of singling people out.*
- *the granting of anonymity, and whether it's inherently unfair.*
- *use of hidden cameras and covert filming.*
- *what constitutes a "distressing situation" requiring extra sensitivity on the part of journalists and programme-makers?*
- *what constitutes "denigration"?*

Where the Authority concluded that individual inaccuracies or instances of unfairness made an entire item unfair, the case was convincing. But journalists may feel the Authority sometimes puts too much responsibility for fairness on broadcasters, possibly encouraging uncooperative interviewees or sources to obstruct their broadcasts.

Journalists may also feel in some cases that the Authority is too sensitive to the feelings of people featured in the broadcasts in question. In one decision a broadcast was upheld as unfair because of the way a woman was 'named and shamed' - even though the information revealed was not private, and the filming was done in a public place and in the context of a broadcast about the ethics of 'naming and shaming'.

OTHER STANDARDS

The standards governing good taste and decency, liquor, children's interests, violence, discrimination, law and order and social responsibility do not routinely cut across the work of broadcast journalists in the same way as those covering balance, fairness, accuracy and privacy. And because the context is so critical in each case, it's not simple for journalists and programme-makers to work out which ones can be treated as yardsticks.

However, the decisions I consulted make it clear complaints are far more likely to be upheld if the viewers / listeners would have felt "ambushed" by the offending content of the broadcast. Broadcasters and programme-makers will get the message that complaints can be upheld if they are cavalier about consumption of alcohol or drugs, obscenity, public safety and the possible adverse effect on children.

² e.g. *Decision No: 2006-127 (CanWest TVWorks and Pharmac); Decision No 2006-058 (TVNZ and Department of Child, Youth and Family Services).*

But the Authority is not a censor. The good taste and decency standards effectively say they are not intended to prevent broadcasts with a strong satirical element, or productions with a 'higher purpose'. My reading of decisions is that complaints about such programmes are unlikely to be upheld. That gives broadcasters a lot of leeway, even for programmes that cause a great deal of offence, such as *South Park*.

However, broadcasters may not be happy about the complaints upheld against some 'reality-style' programmes aimed at the younger audience – and 'edgy' and 'outrageous' commercial radio broadcasting targeting young listeners. Broadcasters may feel the Authority has not recognised that public taste may have changed in this area.

THE AUTHORITY'S METHODS AND APPROACH

When considering "what the Broadcasting Standards Authority is getting right – and what it is getting wrong" from the point of view of journalists and programme-makers, it's also worth looking at the methods the Authority uses, and the way it presents its decisions.

Naturally and instinctively, broadcasters will not enjoy having their work scrutinised in response to public complaints. Dealing with complaints takes up time they'd prefer to devote to journalism, and where complaints are upheld and costs awarded, broadcasters complain it feels like getting 'fined'. But I couldn't find any evidence that the Authority is partial to complainants or predisposed to uphold certain kinds of complaints. Nor was it unnecessarily judgemental in its comments or overzealous with penalties.

EXERCISE OF POWERS

Under section 12 of the Broadcasting Act, the Authority can compel news organisations to hand over "raw material" in order to determine complaints. The Authority uses this power sparingly, even when strongly urged to do so by complainants. In each case, it was employed only to try to resolve critical contradictions between the accounts of the complainant and the broadcaster. In each case, precise reasons were given, and care was taken to explain why the step was necessary.

FLEXIBILITY

At times the Authority showed flexibility when dealing with broadcasters. Some decisions were re-written to clarify things for the broadcasters, and sometimes the Authority accepted the broadcasters' word on disputed matters even when there was no direct evidence at hand. Also, it appears the BSA can be fairly forgiving when inconsistencies emerge in the broadcasters' submissions and responses – eg: *Decision No: 2005-129 (TVNZ and Balfour)*.

On some occasions, the BSA responded to submissions from broadcasters after they had received the decision-in-part prior to publication, even though the Authority could have dismissed them as matters for a possible appeal. These include *Decision No: 2006-127 (CanWest TVWorks and Pharmac)* and *Decision No: 2006-014 (CanWest TVWorks and XY)*

STYLE AND TONE

Journalists will appreciate the way complaints about their style and tone are rarely grounds for upholding a complaint and are considered editorial matters, best determined by the broadcaster alone.

ANONYMITY

Journalists and programme-makers will also appreciate that they are not named in the decision documents, and nor are the officials responding on behalf of the broadcasters. Some may feel journalists and programme-makers should be personally accountable for their work, especially when complaints are upheld. But as the Authority's main objective is to maintain broadcasting standards, and not to mete out punishment or blame, that would not be appropriate or fair.

PENALTIES

The Authority can only award costs and compensation when complaints have been upheld, in accordance with powers set out in the Broadcasting Act 1989. Costs are almost always modest sums, and awards to the Crown are usually well under the NZ \$5,000 upper limit, even for what the Authority describes as "serious departures" from the standards.

However, for a broadcaster, it still feels like getting fined by a court, particularly when it comes on top of the cost and time it can take to defend a complaint. Sometimes broadcasters resent the fact that complaints can be made by individuals, companies or government organisations with substantial resources which can include their own legal teams.

However, some broadcasters will also acknowledge that if the Authority didn't exist they might be fighting more legal battles in which the costs and financial penalties could be much greater.

Journalists and broadcasters will appreciate that when a complaint is upheld, the only penalty may be the publication of the decision itself.

Many complainants request an apology in their submissions on orders, but these are rarely ordered by the Authority. None was granted in any of the decisions I consulted for this report. Journalists will welcome this because issuing public apologies would imply that the entire broadcast was deficient – or that the individual 'apologee' had been unfairly targeted by the broadcaster. Arranging justice for aggrieved parties is not the Authority's main job – that's a matter for the courts.

HOW THE AUTHORITY'S DECISIONS ARE PRESENTED

To compare any given decision with others, the presentation needs to be consistent, and almost invariably it is. BSA decisions compare very favourably with those of the New Zealand Press Council which can be frustratingly variable, and (albeit on a limited viewing) those of the body which considers broadcasting complaints in Australia, the Australian Communications and Media Authority (ACMA).

The language in the BSA's decisions is precise and unambiguous. The Authority takes care not to stray into commentary or emotions or pass judgment. Occasionally, the

Authority “expresses concern” about things and in one case it described a broadcaster’s argument as “not credible”, but generally speaking, that’s as far as it goes. This is consistent with its mission to maintain and preserve standards, and not punish or condemn broadcasters which may fall short of the standards from time to time.

The Authority’s decisions sometimes refer to previous ones concerning similar complaints which may be a relevant precedent.

Professor JF Burrows, in assessing the legal robustness and quality of legal reasoning in BSA decisions, noted that to do this too often could give the impression of “legalism”, which can be off-putting,³ and it could also undermine the impression that the Authority considers complaints on a case-by-case basis, giving full consideration to the unique context of each one. But if the Authority refers to these precedents in its own discussions of the complaint, that seems appropriate and can help journalists spot the patterns.

³ JF Burrows, *Assessment of BSA Decisions*; April 2006, p.10.