

External review of decisions of the Broadcasting Standards Authority

May 2017

Prepared by Kensington Swan
for the Broadcasting Standards Authority

Introduction

- 1 The Broadcasting Standards Authority (**BSA**) has commissioned an external review of its decisions. In particular, the review is to assess whether the way the BSA interprets the Programme Information Standard (Standard 2) and the Children's Interests Standard (Standard 3) in five of its decisions is reasonable and proportionate, having regard to:
 - a the legal robustness of the decisions;
 - b the quality of the legal reasoning;
 - c readability and clarity;
 - d the degree to which the decisions provide guidance and useful clarity on the BSA's approach; and
 - e consistency of approach (where possible given the small sample size).
- 2 The BSA provided the following decisions for review:
 - a *Office of Film and Literature Classification and Television New Zealand Ltd* – Decision No. 2016-029
 - b *McCaw and SKY Network Television Ltd* – Decision No. 2015-011
 - c *Henderson and MediaWorks TV Ltd* – Decision No. 2014-156
 - d *Johns and Television New Zealand Ltd* – Decision No. 2016-049
 - e *Edwards and Television New Zealand Ltd* – Decision No. 2014-109.
- 3 The BSA also provided two decisions from other jurisdictions. These were:
 - a *Investigation report BI-174* (Australian Communications and Media Authority)
 - b *Game TV re Eastern Promises* (Canadian Broadcasting Standards Council).
- 4 The BSA has previously commissioned external reviews of its decisions, including in 2006 and 2013.

Summary

- 5 The reviewers acknowledge at the outset that the BSA has a challenging task. As a complaint appeals body the BSA is contacted by complainants only after a programme has been broadcast and (usually) after a direct complaint to the broadcaster has been rejected. The majority of complainants are viewers and listeners with no particular expertise in broadcasting or the law. Quite naturally, many complainants offended or upset by a programme approach the BSA confident that their offence is justified and that 'something should be done about it'.
- 6 What is perhaps less well understood is that the BSA's powers to punish broadcasters are limited. In a liberal democratic society, such as New Zealand, the right to freedom of expression is highly prized and protected. The BSA's role is to strike the right balance between freedom of expression and protecting society from harm.

- 7 While individuals' views will differ about where that balance should be struck, particularly when it concerns sensitive subjects such as what television programmes are suitable for young children, the BSA's decisions are the means by which the BSA communicates what it has determined and why it has come to that determination.
- 8 This review concludes that the BSA's decisions are generally legally robust, well-reasoned, readable and clear. The BSA is to be commended for its skilful management of a substantial workload that requires navigating the evolving social expectations and values that broadcasting standards are designed to reflect.
- 9 Nevertheless, the review contains a number of suggestions which the reviewers consider would further enable BSA decisions to fulfil their primary function, namely informing and educating broadcasters and the public as to the boundaries of freedom of expression in a liberal, democratic society. In particular, the reviewers recommend that the BSA:
- a provide, at the outset of each decision, a clearer articulation of the nature of freedom of expression and the high threshold required to limit the freedom;
 - b fully explain the rationale underlying its decisions, including its conclusions as to whether a proposed decision would place a demonstrably justified limit on freedom of expression;
 - c make better use of earlier BSA decisions where possible and practicable to help educate and explain decisions;
 - d adopt a slightly modified structure which better complies with the New Zealand Bill of Rights Act 1990 (**NZBORA**) and clearly delineates between the facts underlying a complaint and the BSA's analysis of the complaint;
 - e comprehensively outline the relevant factual elements of the broadcast at issue;
 - f directly cite, rather than paraphrase, relevant broadcasting standards; and
 - g where necessary, differentiate between the role of broadcasting standards and the guidelines contained within the standards.

The role and function of a BSA decision

- 10 To assist the review in assessing the 'appropriateness and reasonableness' of the BSA decisions, it is relevant to first consider the role and function of a decision issued by the BSA.

The statutory authority

- 11 The BSA derives its authority from the Broadcasting Act 1989 (**the Act**). The Act establishes a two tier complaints system by which standards imposed on broadcasters by sections 4(1) and 21(1)(e) of the Act and the broadcasting codes developed by the broadcasters themselves (in collaboration with the BSA) in accordance with the Act, are developed, encouraged and enforced.
- 12 The functions of the BSA are set out in section 21(1). They are to:
- a receive and determine complaints;¹

¹ Broadcasting Act 1989, section 21(1)(a)-(ba)

- b publicise its procedures;²
 - c issue advisory opinions to broadcasters;³
 - d encourage the development and observance by broadcasters of codes of broadcasting practice;⁴
 - e develop and issue codes of broadcasting practice;⁵ and
 - f conduct research and publish findings on matters of broadcasting standards.⁶
- 13 Under section 13(2) of the Act, the BSA must give notice of its decisions in writing to both the complainant and the broadcaster about who the complaint is made. Under section 15, the BSA must also give public notice of its decisions.
- 14 The purpose of the BSA's decision-making process is not articulated in the Act. However, having regard to the BSA's functions and statutory obligations, we consider that the decisions of the BSA have multiple purposes, each as important as the next. They are:
- a *determinative* – the decision is the notification of the determination (either to uphold or not to uphold a complaint);
 - b *informative* – the decision informs the complainant and relevant broadcaster of the determination and the reasoning for that determination; and
 - c *educative* – the decision provides explanation to a wider audience about the application of the standards to the circumstances of the complaint. This wider audience includes future broadcasters, viewers and listeners.
- 15 In addition, there are two other relevant considerations:
- a accessibility; and
 - b the requirements of natural justice.
- 16 The Act permits the BSA to manage complaints with greater formality than the broadcasters (who are required to be a complainant's first port of call),⁷ but also to provide for as little formality and technicality as is permitted by the requirements of the Act, a proper consideration of the complaint and the principles of natural justice.⁸ This emphasis on limited formality (or 'just enough' formality) underpins Parliament's intention that the complaints process be accessible – anyone can complain.
- 17 To be an accessible decision-maker, the BSA's process for complaints must be relatively uncomplicated, and the published decisions must be comprehensible and easy to follow.
- 18 However, the principles of natural justice demand that a body exercising decision-making powers, such as the BSA, should fully and transparently explain the reasons for any decision and that obligation may mean that, in certain cases, more formality is required.

² Broadcasting Act 1989, section 21(1)(c)

³ Broadcasting Act 1989, section 21(1)(d)

⁴ Broadcasting Act 1989, section 21(1)(e)

⁵ Broadcasting Act 1989, section 21(1)(f)

⁶ Broadcasting Act 1989, section 21(1)(h)

⁷ Broadcasting Act 1989, section 5(i)

⁸ Broadcasting Act 1989, section 10(2)

Working in practice

- 19 In 2016, the BSA considered 124 formal complaints and issued 101 decisions.⁹ For a small quasi-judicial authority that is a substantial workload. In determining each case the BSA has limited guidance from the Act as to the relevant standards to apply. The Act provides broad categories of responsibility under section 4, but it does not set out clear definitions of what is or is not responsible broadcasting. Instead, section 21(1)(e)-(f) provides that the broadcasting standards are to be developed by broadcasters and the BSA.
- 20 These standards are outlined, in generally-worded terms, in the *Broadcasting Standards in New Zealand Codebook*. The BSA must interpret and apply these standards. This requires a fluidity that recognises that broadcasting standards must reflect contemporary social attitudes and conditions. These attitudes change over time and with the context and circumstances of each case. Managing that fluidity is challenging, as is managing the expectations of complainants and broadcasters.
- 21 The Chairman of the BSA refers to this in the 2016 Annual Report:¹⁰
- ...to some we are seen to be too light-handed but nevertheless to others we remain too interventionist.
- 22 However, the BSA is not only juggling the expectations of different constituencies with different societal expectations, it is also juggling important and competing objectives – the protection of freedom of expression and an understanding that untrammelled expression can cause harm and that therefore limitations may be justified, through the imposition and enforcement of standards in a free and democratic society.

The effect of a BSA decision

- 23 The effect of any decision by the BSA is to either uphold or limit freedom of expression. This is not how the BSA frames its decisions. However, the decision to uphold a complaint (or not), or to find a broadcasting standard has been breached (or not) is a determination about section 14 of NZBORA.
- 24 The High Court in *Television New Zealand v West* stated that:¹¹
- There is no doubt that a finding of breach of the standards involves an imposition on the right to freedom of expression, even if no direct restraint is involved. The mere upholding of a complaint without penalty can dampen future expression.
- 25 Conversely, a decision to decline to uphold a complaint ‘allows the line of acceptability to be marked’.¹² In other words, it assists in defining the justified boundaries of freedom of expression.
- 26 The BSA itself recognises the central role of section 14:
- a the Chairman refers to freedom of expression being ‘at the forefront of all of our considerations’;¹³

⁹ BSA Annual Report 2016, p 10

¹⁰ *Ibid*, p 5

¹¹ HC Auckland CIV-2010-485-00, 21 April 2011 at [90]

¹² See n 9, p 5

¹³ *Ibid*

- b the *Broadcasting Standards in New Zealand Codebook* states that ‘freedom of expression, including the broadcaster’s right to impart ideas and information and the public’s right to receive that information, is the starting point in our consideration of complaints’;¹⁴
 - c BSA decisions refer to freedom of expression in a range of ways (we will return to this later in the review).
- 27 In addition, previous reviews or reports commissioned by the BSA have given particular consideration to freedom of expression:
- a In 2006, Professor John Burrows stated, ‘it is obvious that the BSA is concerned with freedom of expression and limitations imposed upon it’;¹⁵
 - b In 2008, Claudia Geiringer and Steven Price stated, ‘the very raison d’être of the broadcasting standards regime is to define and enforce a set of circumstances in which limits can be imposed on the freedom of broadcasters to say what they like, how they like and when they like’;¹⁶
 - c In 2012, Steven Price stated, ‘when the BSA upholds a complaint and thereby restricts freedom of expression (by punishing that expression and by effectively creating constraints on broadcasters’ future speech), it must first satisfy itself that its actions, including the penalty it imposes, are demonstrably justified, that is, proportionate’;¹⁷ and
 - d In 2013, a panel of three reviewers stated that ‘any relevant test [that applies to a broadcasting standard] should be defined in a way that limits expression only to the extent justified in terms of section 5’ of NZBORA.¹⁸
- 28 As a number of these previous reviews have noted, the interpretation and understanding of human rights under NZBORA has evolved slowly in New Zealand. Likewise, the BSA’s interpretation of how (and where) to apply section 14 has also been the subject of evolving consideration:
- a In 2006, the BSA tended to mention the Bill of Rights only by way of a ‘standard clause’, a kind of ‘boilerplate’.¹⁹
 - b In 2008, Claudia Geiringer and Steven Price recommended the BSA adopt a more ‘structured framework’ to weigh up the value of the speech on one hand versus the harm done by limiting the speech on the other.²⁰

The BSA must not uphold a complaint unless positively satisfied that to do so is a reasonable way of achieving a balance between the competing interests.
 - c In 2011, the High Court said a ‘boilerplate’ consideration which records, without reasons, that the BSA has given weight to freedom of expression is inadequate.²¹

¹⁴ *Broadcasting Standards in New Zealand Codebook*, 2016, p 6

¹⁵ J F Burrows, *Assessment of Broadcasting Standards Authority Decisions*, April 2006, p 17

¹⁶ Claudia Geiringer and Steven Price, *Moving from Self-Justification to Demonstrable Justification – The Bill of Rights and the Broadcasting Standards Authority* in Jeremy Finn and Stephen Todd, *Law, Liberty, Legislation* (2008), p 301

¹⁷ Steven Price, *The BSA and the Bill of Rights: A Practical Guide*, May 2012, p 6

¹⁸ Simon Mount, Jim Mora and Raymond Miller, *Review of Broadcasting Standards Authority Decisions*, June 2013, p 7

¹⁹ See n 15, p 18

²⁰ See n 16, p 337

²¹ See n 11, at [104]

- d By 2013, the BSA had 'moved to a new approach that affords freedom of expression a prominent place at the start of its analysis and which weaves the Bill of Rights analysis throughout the decision'.²²
- e The 2013 review recommended the BSA modify its approach further to only consider NZBORA if it had reached a preliminary view to uphold a complaint. This is in keeping with the earlier High Court finding that NZBORA must be taken into account 'if the BSA is considering upholding a complaint'.²³

29 For reasons provided later in this review, we consider that further refinement of how the BSA interprets freedom of expression and how it incorporates that interpretation into its decisions could enhance the work of the BSA as it exercises its informative and educative functions, as well as enhancing the robustness of its decisions in the event of challenge.

Review of BSA decisions

30 The reviewers found the five BSA decisions overall to be well-founded, accessible and thorough. The issues the BSA members need to consider are diverse and application of the standards is, ultimately, more subjective than objective. For example, in relation to Standard 3 (Children's Interests), it is both possible and conceivable for two individuals to hold quite opposite views on what is acceptable content for children's viewing. The *Broadcasting Standards in New Zealand Codebook* provides guidance via the guidelines but, beyond that, the BSA navigates a minefield of social expectations and values.

31 Before we provide our views on the nature and structure of the five decisions given to the review team, we provide a review of the application of the broadcasting standards in each of the decisions.

Application of Standard 2 – Programme Information

32 We note that the applicable standard for the majority of decisions we were asked to review was Standard 8 – Responsible Programming. From April 2016 this has been replaced by Standard 2. The objective of each standard is the same:

- a Broadcasters should ensure programmes are appropriately classified;
- b Information about the classification should be clearly displayed;
- c Warnings should be given if the programme contains content which may not be suitable for likely viewers, or may offend.

33 The standard is, on the face of it, more definitive than other standards. It requires broadcasters to classify, label, warn and then abide by the classifications. However, like all decisions about what is or is not acceptable to wider societal norms, defining what material falls within which classification will always be a matter of debate and subjectivism.

²² See n 18, p 8

²³ *Television New Zealand Limited v Viewers for Television Excellence Inc* [2005] NZAR 1 (HC), cited in *Television New Zealand Limited v West*, above n 11

- 34 This complaint was about the screening of an episode of *Criminal Minds* at 8.30pm.²⁴ The programme showed, in the first two and a half minutes, a beaten man, gagged, dragged and tied, another man beaten and gagged and a woman similarly gagged, tied up and injured. It also showed the two men apparently dead on the ground. It showed images of the victims' bodies, slumped or lying face down while the building burnt around them and it showed photos of the victims' dead bodies, bloody and burnt. Approximately eight minutes into the broadcast, the programme showed black and white photos of the burnt bodies and details of the victims' injuries were discussed.
- 35 The issue was whether the programme was suitable for 8.30pm viewing (with a written and verbal warning pre-broadcast and an 'AO' classification) or whether it should have been broadcast at 9.30pm with an 'AO – 9.30pm' classification.
- 36 BSA ruled that the programme was correctly classified at 'AO'. It based this decision on:
- a The absence of visual portrayal of acts of violence;
 - b The clear pre-broadcast warning; and
 - c The fact *Criminal Minds* was a long running programme (11 seasons) so the audience would have a high level of expectation and awareness about the likely content.
- 37 The BSA had previously considered other complaints about *Criminal Minds*, some of which had been upheld. But it distinguished this complaint from those earlier episodes.
- 38 Given that in this case the programme was clearly classified and a verbal and visual warning was given on air about the content (both requirements of Standard 8 – Responsible Programming), the key determination for the BSA was whether the nature of the content was suitable for the classification.
- 39 The reviewers note that, having watched the episode, our initial response was that the programme should have been broadcast at 9.30pm, rather than 8.30pm. The images were graphic and confronting. However, a review of the BSA's previous decisions provided the additional information necessary to understand how it concluded that an 8.30pm viewing time was appropriate. This additional information was not set out in the decision in much detail.
- 40 The BSA ruled that the violence in this episode of *Criminal Minds* was not 'strong adult content'. There was no reference to a threshold of 'strong adult content' in the applicable standard, (Standard 8 (now Standard 2)), or the guidelines to this standard.²⁵ The threshold is expressed as being 'content likely to offend or disturb a significant number of the intended audience'.²⁶
- 41 The BSA followed this guideline in its deliberation. It referred expressly to the long-running nature of the programme to conclude that the audience would have known what kind of (violent) content to expect. The intended audience was watchers of fictional crime shows; depictions of violence were a 'necessary component of the episode's storyline'.

²⁴ Decision No. 2016-049

²⁵ This complaint was determined under the previous *Free-to-Air Television Code of Broadcasting Practice*, which applied until 31 March 2016. We note that the *Broadcasting Standards in New Zealand Codebook* (applying from 1 April 2016) does include a definition of 'strong adult content'.

²⁶ This is the wording of the pre-April 2016 guideline 8a.

- 42 The BSA also referred to the type of violence depicted, emphasising that the violence was 'largely described' and 'occurred off-screen'. Neither Standard 8 (now Standard 2) nor the guidelines require 'actual violence' as a threshold for a breach. The BSA, however, appears to have drawn this distinction. For example, in reference to previous complaints about episodes of *Criminal Minds*:
- a in *Milich and Television New Zealand Limited*,²⁷ a man being dragged, hung up in chains, splashed with petrol and set alight was deemed to be unsuitable for viewing at 8.30pm;
 - b in *King and Television New Zealand Limited*,²⁸ a woman being kidnapped, strapped to a table and stabbed was deemed to be 'realistic and disturbing' and unsuitable for viewing at 8.30pm; but
 - c in *Archibald and Television New Zealand*,²⁹ psychological torture and kidnapping were described as 'very little actual violence'. In that case the complaint was not upheld.
- 43 The BSA provides no evidence to support its decision that 'actual violence' is limited to physical, rather than psychological acts. Nor does it provide evidence to support its finding that seeing the moments immediately prior to and immediately after an actual act of violence is any less disturbing or realistic.
- 44 However, the application of Standard 8 (now Standard 2) is consistent with the BSA's previous decisions and, taken together, the decisions do provide guidance on where the boundary lies in relation to acceptable programme information.
- 45 On balance, we consider that the BSA's application of the Programme Information Standard in this decision was appropriate, although on the information provided solely in the decision we would hesitate to come to the same conclusion. The content of this episode of *Criminal Minds* was not as graphic or as disturbing as the content in the *Milich* and *King* complaints.

Henderson and MediaWorks TV Ltd

- 46 This complaint was about the screening of a promo for *The Night Shift* being broadcast during *Shrek Forever After*. *The Night Shift* was an 'AO' programme and the promo showed two adults kissing passionately.
- 47 The issue was whether a promo for an 'AO' classified programme should have been broadcast during a 'G' classified programme.
- 48 The BSA correctly followed the guidelines to conclude that in principle a promo for an 'AO' programme could run outside of 'AO' viewing times when the content shown in the promo is consistent with the host programme (in this case 'G'). It followed then that the BSA needed to turn its mind to whether the kiss, which the broadcaster accepted depicted 'heightened adult passion', was consistent with a 'G' classification.
- 49 The BSA judged the kiss to be at the 'relatively low end of the scale', but still found the broadcast to be a breach of Standard 8 (now Standard 2) because the promo's content should have been classified as 'PGR', rather than 'G'.

²⁷ Decision No. 2011-053

²⁸ Decision No. 2011-030

²⁹ Decision No. 2008-019

- 50 It expressly stated that not all kissing shown in 'G' viewing times would breach broadcasting standards. In support of this statement it cited *Hindson and Television New Zealand*.³⁰ The 'kiss' in *Hindson*, between two men, was brief, 'not overtly sexual' and 'innocuous'. We note this was not a complaint determined under the Programme Information Standard.
- 51 Another case cited by the BSA, *Ibousi and TV Works Ltd*,³¹ in which a complaint about kissing shown in 'G' viewing times was not upheld, is, in our view, distinguishable since the kissing occurred in the host programme and not a promo, and the programme was aimed at young viewers, with the kissing forming a key part of the storyline about a teenager's anxious first kiss.
- 52 Taking those previous decisions into account, we read the BSA's decision as being more accurately expressed as, kissing depicting adult passion broadcast in 'G' viewing times will usually breach Standard 2 (previously Standard 8).
- 53 On balance, we consider this application of the Programme Information Standard is correct. Any content aired during 'G' viewing times should be acceptable for viewers of all ages, including young children. Adults engaged in 'heightened adult passion' does not meet this criteria.

McCaw and SKY Network Television Ltd

- 54 This complaint concerned the screening of Nicki Minaj's music video 'Only' which was broadcast on MTV at 6.50pm on a Saturday. The video contained numerous expletives and references to sexual acts, including repeated use of the words 'fuck', 'nigger' and 'bitches' and suggestions of sexual violence and torture. The video was classified under the Pay Television Code as 'MC', informing viewers that it was 'suitable for mature audiences 16 years and older' and that 'content may offend'.
- 55 This complaint was not directly considered under Standard 2 (the previous Standard P1 – Content classification, warning and filtering). However, the BSA considered whether the video was appropriately classified in accordance with Standard P1's guidelines in determining whether it breached the P2 – Good Taste and Decency and P3 – Children's Interests Standards.
- 56 It concluded – and the broadcaster agreed – that the video should have attracted a '16LC' classification, informing viewers that 'people under 16 years should not view', 'language may offend', and 'content may offend'. The 'MC' classification did not sufficiently prepare viewers for the 'high level of adult content'.
- 57 The BSA's particularisation of aspects of the video provide a useful future guide as to what constitutes 'adult content'.
- 58 In its decision, the BSA also considered whether the video warranted the higher rating of '18', which directs that 'people under 18 years should not view'. The BSA concluded that the video did not warrant an '18' rating, because such a rating is 'usually reserved for graphic sexual content, violence and excessive coarse language, and in particular a combination of these'. In support of this proposition, the BSA cited *McElroy and SKY Network Television Ltd*.³²

³⁰ Decision No. 2013-049

³¹ Decision No. 2010-091

³² Decision No. 2012-132

59 *McElroy* concerned a comedy-drama episode of *Shameless* which aired on UKTV, and which contained two interspersed sex scenes featuring some nudity (male buttocks), violence, and 'excessive swearing', including use of the word 'c...'. The BSA found that the combination of these factors warranted the higher classification of '18'.

60 It would have been helpful for the BSA to include in its decision why it distinguished *McCaw* from *McElroy*. On the face of it, it appears the key difference between the two programmes was the lack of simulated sex in the video. If that is, in fact, the element that marks the threshold from a '16' rating to '18' the BSA could say so expressly.

61 On balance, we consider that the BSA's reasoning on the classification of this video was correct. We note the classification of videos is difficult. Sexually explicit and 'edgy' content in music videos is common and community attitudes to this type of content vary widely.

Edwards and Television New Zealand Ltd

62 This complaint related to a news report featured on *One News* (at 6pm) which broadcast security footage of a violent attack on a shop owner, including the man being kicked in the head as he lay on the ground.

63 The issue was whether, due to the level of violence shown, the story should have only been broadcast in adults only ('AO') viewing time.

64 Appendix 1 of the Free-to-Air Television Code (in force at the time of this complaint) recognised that news and current affairs programmes are different from other programmes and are, therefore, not subject to the classification system. This recognises both the important role news and current affairs play in a democratic society but also the fact that news and current affairs invariably cover difficult and violent incidents and events.

65 The BSA, in accordance with Appendix 1, therefore had little difficulty declining the Edwards complaint, since:

- a The *One News* item was preceded by two warnings about content;
- b The item was a news story of high public interest; and
- c Broadcasting the footage had the potential to assist police in capturing the offenders.

66 We note the BSA also cited the guidelines to Standard 10 (now known as Standard 4 – Violence) in support of its determination. While the standards work together, we think this blending of guidelines from one standard to bolster a finding relating to another standard is confusing and does not assist future broadcasters, viewers and listeners.

67 On balance, we consider that the BSA's application of the Programme Information Standard in this decision was appropriate.

Johns and Television New Zealand Ltd

68 This complaint concerned an episode of a children's cartoon, *Grizzly Tales*, which was classified 'G' and broadcast on TV2 at 7.20am. The programme featured a young girl being sucked into a vacuum cleaner, her teeth being pulled from her gums, and her organs and body parts falling into the vacuum bag.

- 69 The issue was whether the broadcast was correctly classified as 'G' (programmes which 'exclude material likely to be unsuitable for children'), or whether it warranted a higher 'PGR' classification (programmes which contain material 'more suited for mature audiences' but not necessarily unsuitable for supervised children).
- 70 The BSA concluded 'with considerable hesitation' that the programme was 'not appropriate for children of all ages' and in particular 'had the potential to alarm and distress younger children', since the 'G' classification does not make a distinction between pre-school-aged children and older children.
- 71 It is apparent this case was a difficult one for the BSA to determine. Principally, it seems because the cartoon's macabre and frightening imagery could be seen as a modern day Pied Piper, or Little Red Riding Hood.
- 72 The key considerations against the broadcast were that:
- a It aired at a time of day when young children watch television unsupervised;
 - b There was no pre-broadcast warning;
 - c The cartoon is aimed at children aged 8 and older; and
 - d The 'G' rating makes no distinction between pre-school-age children and older children.
- 73 The BSA noted that programmes classified as 'G' must be suitable for *all* children under the age of 14.
- 74 We note that, while the BSA noted its 'hesitation' in finding a breach of broadcasting standards, it did not refer to any previous decisions in its reasoning. It would have been helpful to do so.
- 75 Nonetheless, the decision provides a useful list of relevant considerations for the application of a 'G' or 'PGR' classification in accordance with the guidelines.
- 76 We consider that the BSA's application of the Programme Information Standard in this decision correct.

Application of Standard 3 – Children's Interests

- 77 We note that the applicable standard for the majority of decisions we were asked to review was Standard 9 – Children's Interests. From April 2016, this has been replaced by Standard 3. The objective of each standard is the same, although the wording of the guidelines for each standard has changed. In broad terms in accordance with Standard 3 (previously Standard 9):
- a Broadcasters should consider the interests of children;
 - b There are normally accepted viewing times for children during which special consideration and care is required;
 - c Gratuitous violence and material outside the expectations of the programme's classification should be avoided; and
 - d The standard is about the protection of children.

78 This standard is difficult to interpret. Because it concerns children, it is likely there will be a wider range of firmly held views in the community about what kind of material is suitable and what might offend or potentially disturb and/or adversely affect children.

Office of Film and Literature Classification

79 In this complaint, the issue was whether the *Criminal Minds* episode showed unacceptable violence close to the 8.30pm watershed that delineates the onset of adults only viewing.

80 Because the BSA did not determine that the programme broadcast 'serious adult content' no breach was found. Its application of this standard was more clearly articulated in *King and Television New Zealand Ltd*,³³ where the BSA expressly stated 'only if strong adult material was broadcast close to the watershed' would the standard be breached.

81 Guideline 9b (in force at the time) states, 'broadcasters should ensure that strong adult material is not shown soon after the watershed'. In our view, the approach articulated in *King* sets a high threshold; it is 'only' if and when the broadcast meets the 'strong adult material' test that the watershed becomes a sensitive zone. Guideline 9a refers to children's viewing times as 'usually up to 8.30pm'. This, and the reference to the need for care around the watershed, acknowledges that it is artificial to expect all children to stop watching television at exactly 8.30pm.

82 For this reason we have some disquiet about the BSA's determination in this decision. The programme broadcast graphic images of dead, burnt and bleeding bodies within three minutes of the 8.30pm watershed. While we accept that the content was not 'strong adult material' based on the BSA's previous findings, a broadcaster who was mindful of the effect of any programme on children could reasonably conclude that this material would disturb or alarm them.

83 The BSA appears to have been satisfied by the other actions of the broadcaster, principally that the programme was preceded by a warning. It is not clear to us that a warning overcomes the watershed sensitivity.

Henderson and MediaWorks TV Ltd

84 In this complaint, the issue under Standard 9 (now Standard 3) was whether broadcasting an adult couple kissing passionately during 'G' viewing time breached children's interests. The BSA plainly states that:³⁴

It will usually follow that by failing to correctly classify a programme and appropriately schedule it in accordance with the responsible programming standard, the broadcaster has also failed to consider children's interests.

85 This is a logical conclusion and a natural consequence of the two standards working in concert.

86 However, the BSA further criticises the broadcaster for failing to carry out 'an adequate consideration of the interests of child viewers'. It is not clear to us what would constitute 'an adequate consideration'. The standards are silent on this; the guidelines (as they were written at the time of the *Henderson* complaint) only refer to being 'mindful' and 'having regard to'. In our view these terms infer a 'light' inquiry only. It would be helpful to have further clarification

³³ Decision No. 2011-030

³⁴ Decision No. 2014-156, at [12]

from the BSA as to what actions it regards are required to demonstrate 'adequate consideration'.

87 We consider the BSA correctly applied the Children's Interests Standard in this case.

McCaw and SKY Network Television Ltd

88 In *McCaw*, similarly, the issue was whether broadcasting a music video only people older than 16 should view at a general viewing time was a breach of children's interests.

89 The BSA concluded that it was. Wrongly classifying the music video as 'MC' rather than '16LC' meant that the parent lock filtering technology which would have prevented children from viewing 'unsuitable' content was not available. This 'unsuitable content' included explicit language and images of bleeding victims and shadowed figures. The BSA acknowledged that the availability of filtering technology specifically allows parents to control their children's access to programmes.

90 The BSA's consideration of this complaint is relatively brief, possibly because the broadcaster agreed that the video was wrongly classified (due to staff error). But also because, the BSA's position, as in *Henderson*, is that a failure to correctly classify a programme will logically also mean that the broadcaster failed to consider children's interests.

91 However, we note one inconsistency in the application of the standard. In *McElroy*, in support of its decision that Standard 9 (now Standard 3) was not breached, the BSA said having the programme rated '16' was 'sufficient to alert parents that there would be content unsuitable for child viewers'. The BSA further noted that the UKTV channel, on which the programme aired, was not aimed at children. The Nicki Minaj video broadcast on MTV, similarly aired on a channel aimed at viewers aged 16 to 29.

92 The *McElroy* approach does not appear to have been considered in *McCaw*. We recommend that the BSA take a consistent approach to these factors so that readers can reach a clear understanding of the circumstances in which the broadcasting standards will be breached.

93 On balance, we consider this decision correctly applied the Children's Interests Standard.

Johns and Television New Zealand Ltd

94 *Johns* was another complaint about an alleged breach of children's interests due to the classification of the programme, a macabre children's cartoon.³⁵

95 Like the other decisions reviewed, in *Johns* the broadcaster was first found to have breached broadcasting standards by wrongly classifying the programme. Again, in this case, the BSA formed the logical conclusion that if the broadcaster failed to properly classify the programme, it also failed to consider children's interests. It follows that if the programme was classified as being suitable for young children when in fact it was not suitable, then young children have not been protected from a broadcast which might adversely affect them.

96 However, the BSA's analysis of Standard 9 (now Standard 3) was carried out exclusively through its analysis of Standard 1 (Good Taste and Decency). It would be more helpful if each standard was analysed separately, as this ensures that all of the programme classification aspects of the programme are fully considered.

³⁵ Decision No. 2016-049

- 97 For example, under Guideline 9e (which applied at the time of this complaint) there was an exception made for children's cartoons where the content is 'fanciful or farcical'. A girl being sucked into a vacuum cleaner bag is indeed fanciful and farcical, yet the BSA made no reference to or discussion of the '9e' exception. It is not clear to the reviewers why the fanciful, farcical nature of the cartoon was not addressed, particularly when the BSA noted its 'hesitation' in upholding the complaint. We note this exception is not included in the updated guidelines.
- 98 In this case, however, irrespective of guideline 9e, we consider the BSA correctly applied the appropriate standard.

General review

- 99 As noted above, in general, we found the BSA decisions reviewed to be well-founded, accessible and thorough.
- 100 The BSA requested we conduct the review having regard to a number of factors. These are set out below. We note that the following observations are not designed to be critical of the standard or quality of the decisions (which was high) but as signposts for further development and improvement. The potential improvements we identify are:
- a The structure of each decision could be clearer;
 - b The relevant standard or test could be better established and explained;
 - c The essential facts of the broadcast at issue are not always sufficiently described;
 - d Previous findings could be more helpfully employed to explain how and why the BSA reaches a certain decision; and
 - e The effect of the BSA's decision-making on the right of freedom of expression could be more clearly articulated and explained.

The legal robustness of the decisions

- 101 This review considered only a very small sample of decisions. Each decision in that sample appeared to be legally sound.
- 102 We note that while BSA decisions can be appealed to the High Court, there have been no appeals in recent years. The robustness of the decisions could be one reason for this. Alternatively, the cost of litigation and the unpredictability of the outcome may be more persuasive factors.
- 103 In either case, the decisions remain vulnerable to appeal where, due to practical considerations, insufficient information is included in the decision leading a reader to conclude that relevant factors have not been taken into consideration.³⁶

³⁶ See n 11, at [105]

The missing link

104 As noted earlier in this review, the BSA's decisions are required to be informative and educative. They provide what the Chairman has referred to as 'marks':³⁷

These various marks form a confluence which helps to produce a discernable boundary to give guidance to broadcasters and viewers and listeners.

105 The 'boundary' the Chairman refers to is the line (blurry or not) between what constitutes protected expression and that 'other' expression which the law allows to be limited or curtailed in order to meet the objective of limiting the harm that that expression might otherwise cause.

106 For this reason, framing the decisions from the outset (in all cases, not just in cases where the complaint is upheld) within the context of a freedom of expression right would be both informative and educative for future broadcasters, viewers and listeners. More than that, the proper framing of the decision in a NZBORA context will also comply with principles of natural justice and increase the robustness and defensibility of its decisions. We acknowledge this is a modification of the BSA's current approach to decision-making.

107 Currently, the BSA recognises that section 14 of NZBORA is at the centre of its decision-making, but it does not explain what this means or why this is until and unless it intends to uphold a complaint. In all but one of the decisions we reviewed,³⁸ the broadcasting standards are given primacy; freedom of expression, while acknowledged, is essentially set to one side pending consideration of whether or not the complaint should be upheld. At that point, it is dealt with in a small paragraph or less.

108 There are administrative efficiency reasons for conducting any analysis of the prospective limitations on freedom of expression (the section 5 analysis) only if, as the Court has held, the BSA is considering upholding a complaint. The office of the BSA is small and the number of complaints it receives is relatively large.

109 However, there are also compelling information and education rationales for amplifying the emphasis and focus on the primary effect of any BSA decision; upholding or limiting freedom of expression.

110 Freedom of expression, as the BSA understands well, is a two-way force. It protects both the broadcasters' right to tell and show and the viewers' right to receive. Many complainants and/or critics of broadcasting fail to appreciate this fact. It is perhaps natural, when offended by a broadcaster, to expect that you have the right to protection from such offence.

111 The generalised wording of the broadcasting standards does not assist the BSA here. In fact, when a standard broadly states:

Standard 3 – Broadcasters should ensure children can be protected from broadcasts which might adversely affect them

an offended parent might be excused for asserting that if his or her child was upset or otherwise affected by the broadcast, Standard 3 has been breached. End of story.

112 As the BSA knows, that is not how freedom of expression works. The BSA is uniquely placed to explain and describe the two-way nature of the right and the broad expectation that, except

³⁷ See n 9, p 5

³⁸ Freedom of expression is the 'starting point' of the BSA's decision in *Office of Film and Literature Classification and Television New Zealand Ltd*, Decision No. 2016-029

in limited circumstances, freedom of expression will win out, as the law says it should. In the absence of such an explanation, consumers of broadcasting – reflecting as they do the full spectrum of social attitudes – cannot be expected to understand the inevitable balancing of rights that is required.

113 We set out in more detail how the BSA might approach this later in this review.

Quality of legal reasoning

114 It is important that the reasoning of any quasi-judicial authority is logical and sound. Overall, the legal reasoning in the decisions under review was robust and thorough. However, while, as noted above, the reviewers agreed with the BSA's finding in each case reviewed, we found the reasoning given for the decision-making was frequently articulated in a condensed manner. There is an attractiveness to this from an administrative point of view; the BSA is, as previously noted, a small body with a relatively high workload.

115 We accept there is a balance to be struck. There is no need for a BSA decision to be as long, or as detailed as a High Court judgment. However, for the BSA to fulfil its information and education roles to broadcasters, viewers and listeners, its legal reasoning needs to be on display. That balance will also be contextual; the greater the limitation on the right to freedom of expression (such as, for instance, limiting speech with a high political content or imposing significant penalties on a broadcaster), the more detailed and carefully drawn the legal reasoning must be.

116 The following points may assist the BSA in further improving if not the quality of its reasoning, certainly the communication of that reasoning.

Explaining the effect of the decision

117 Taking into account both the function and effect of BSA decisions (as set out in paragraphs 10 to 29 above), the decisions under review would be improved if the BSA more clearly explained the nature of freedom of expression and the limitations it places on BSA decision-making before substantively analysing the complaint.

118 This means the BSA would address freedom of expression at two distinct points in any decision:

- a At the outset – setting out the overarching significance of the right of freedom of expression and the inevitable effect of the decision on that right; and
- b Later in the decision – the 'but for' point. If the BSA intends to uphold a complaint as a breach of standards, it needs to:
 - i acknowledge any finding of breach is a limitation of freedom of expression; and
 - ii explain the process by which it determines such a limit is demonstrably justified and proportionate.

119 We note this approach was adopted in *Office of Film and Literature Classification*, but not in any other decision we were given to review. We see this as a lost opportunity. While we appreciate and applaud the BSA's efforts to present its findings concisely and non-legalistically, if each decision is to be a 'mark' defining the boundary between acceptable and non-acceptable speech then both present and future broadcasters and complainants need

sufficient information to understand what each 'mark' signifies. The reasoning needs to be explained and not simply referred to.

- 120 For example, the decisions we reviewed set out the required balancing exercise with competing interests baldly and succinctly. In *Henderson*:³⁹

In considering whether to uphold this complaint we have taken account of the broadcaster's right to freedom of expression. We are satisfied that upholding the complaint would not unreasonably restrict this right, as we are only suggesting that a different classification should have been attached to the promo.

- 121 And in *Johns*:⁴⁰

We are satisfied that this finding does not unreasonably limit the broadcaster's right to freedom of expression; we are not suggesting that the programme ought not to have been broadcast at all – only that it would have more appropriately been classified PGR and scheduled during the PGR timeband.

- 122 And lastly, in *McCaw*:⁴¹

We are satisfied that upholding Mr McCaw's complaint would not unjustifiably limit the broadcaster's right to freedom of expression. We are not saying that the video should not have been broadcast – only that it should have been broadcast in a 16LC viewing environment that would have adequately informed viewers of the nature of the video and allowed them to avail themselves of filtering technology. This enables, rather than restricts, the right to freedom of expression as it encourages the free flow of information in order to assist the audience to make informed viewing choices and to exercise discretion.

- 123 We are not convinced by the reasoning of this last point. The '16LC' classification does enable viewer discretion and is, as the BSA asserts, an expression of the viewers' right to receive information. But any restriction on the reach of a programme to its potential audience (by virtue of age, through the availability of filtering technology) is a limitation on the broadcaster's freedom of expression. The right is, as we discussed above, a two-way force.

- 124 Setting that to one side, however, the BSA's treatment of the balancing exercise required to determine if any limit of freedom of expression is demonstrably justified is routinely set out in a set-piece paragraph (see paragraphs 120 to 122 above). The disadvantage of this approach is that it does not set out how the BSA concludes that the limit was justified, other than to state (as fact) that the limit is a proportionate limit. It does not, for example, explain where in the hierarchy of free speech the particular broadcast sits. Is it important expression? Or not so important? Nor does the decision provide details of any other relevant considerations taken into account.

- 125 The simple assertion that the limit is justified leaves the reader with the impression that the BSA 'simply knows' this to be true. Given the experience of the BSA members that may in fact be the case. However, the 'boilerplate' model does not demonstrate what factors the BSA took into account and how much weight it gave each factor. Without that information, the reader is none the wiser.

- 126 What is required instead is a balancing of the depth and complexity of the reasoning provided, against the reasonable limitations of what is achievable. So, we would anticipate a sliding scale of expectations about the content of the decisions depending on a range of factors, including:

- a the quality or importance of the expression;
- b the nature of the limitation eg, a time restriction or a more restrictive limitation?

³⁹ Decision No. 2014-156, at [13]

⁴⁰ See n 24, at [22]

⁴¹ Decision No. 2015-011, at [23]

- c consideration of the connection between the limit and the harm identified; and
- d review of whether any lesser limit would address the harm.

127 As Asher J stated in *Television New Zealand Limited v West*, generally a succinct summary of reasons will be sufficient.⁴² The key factors could even be listed as a series of bullet points. The style of the presentation is less important than the substance and the substance needs to demonstrate that a detailed analysis of the relevant factors was undertaken.

Show and tell

128 The BSA clearly endeavours to keep its decisions short and simple. However, at times, that comes at the cost of explaining why and how it came to certain conclusions. There is an inevitable tension between achieving admirable brevity and short-handing to such an extent that important information is excluded. Striking the right balance is tricky because the simplicity of the BSA's decision writing is a significant achievement.

129 However, it is not enough that the BSA's reasoning is logical; it must be seen to be logical.

130 For example, in *McCaw*, the BSA concludes that the previous BSA decisions cited by McCaw do not indicate a 'systemic problem' within SKY's classification systems. In support of this conclusion, the BSA provides brief descriptions of the decisions, but fails to express why they can be distinguished from *McCaw*. Without further information, it is difficult to understand how the BSA came to the conclusion that no systemic problem exists.

131 Likewise, in *Office of Film and Literature Classification*, the BSA decides that the programme did not contain 'strong adult content'.⁴³ However, without further information, it is not clear what would constitute 'strong adult content'. The reviewers infer from the decision that if the violent acts had been shown (rather than just the consequences of those acts, ie, the burnt and bloody corpses) the 'boundary' would have been crossed. (See paragraphs 37 to 40 above.)

132 The Chairman has said:⁴⁴

We do not set standards; it is our function to judge what are the proper community expectations and reflect these in our decisions.

133 Reflecting community expectations on subjects as potentially contentious as violence on television requires ensuring the community can easily follow the BSA's reasoning. Where the BSA fully articulates the rationale for its conclusions, broadcasters, complainants, and potential complainants can better anticipate how the BSA might apply broadcasting standards in the future.

134 The key consideration should be not just that the interested parties to the complaint can follow the reasoning, but that a reader with no background to the particular facts can follow the reasoning.

⁴² See n 11, at [105]

⁴³ Decision No. 2016-029, at [42]

⁴⁴ See n 9, at p 5

The usefulness of citing earlier decisions

- 135 The quality of the BSA's legal reasoning is significantly strengthened by comparisons made with previous BSA decisions, as occurs in *Edwards*, *Henderson*, *Office of Film and Literature Classification*, and *McCaw*.
- 136 The Chairman notes in the 2016 Annual Report that social attitudes change and evolve and the application of the standards evolve in parallel. We agree. For this reason, references to previous BSA decisions allow the reader to more clearly understand and anticipate where the various boundaries lie between what meets and what breaches the various standards.
- 137 For instance, in *Henderson*, the BSA cites circumstances in which kissing has been deemed acceptable in 'G' time, and contrasts these against the kissing scene involved in the *Henderson* complaint. This is helpful and educative. Without such references, a decision focused on one kiss in isolation would not provide present or future broadcasters and complainants with sufficient reasoning to anticipate where the boundaries actually lie.
- 138 We also note that in *Edwards* and *Henderson*, the discussion of comparable BSA decisions is contained in footnotes only. Given the value that this discussion adds to a decision, we would recommend this information appears in the body of the decision rather than in footnotes.
- 139 In contrast, the decision in *Office of Film and Literature Classification* that the programme did not contain 'strong adult content', cited above, would have made more sense with a small number of comparable examples provided.

Reasoning as to costs

- 140 At paragraph [31] of *McCaw*, the BSA states that:
- The wording of the Act is such that any order must be related to the standards breach, rather than any perceived breakdown in the broadcaster's complaints processes.
- 141 This was in response to Mr McCaw's submission that the broadcaster should pay costs due to its delay in responding to his complaint. There is nothing in the Act that prevents consideration of the broadcaster's response to a complaint in determining costs orders. Rather, consideration of the broadcaster's conduct is consistent with general principles applying to costs orders, namely that a costs order against a party may be increased if the party has contributed unnecessarily to the time or expense of a proceeding.⁴⁵

Readability and clarity

- 142 The BSA decisions need to be easily understood, and they are. It is apparent that considerable effort has gone into streamlining and simplifying the presentation of decisions. The BSA is to be applauded for this.
- 143 The language used is simple. For the most part, the decisions are broken up into clearly signposted sections. Legal jargon and legalistic structure has been avoided. The 'quick read' summary at the beginning of every decision is an efficient and effective comprehensive device.
- 144 The way in which decisions are structured plays an important part in readability and clarity.

⁴⁵ High Court Rules 2016, rule 14.6

- 145 It is clear the BSA has progressively modified over time the structure of its decision writing. The previous reviews, in both 2006 and 2013, recommended a streamlined structure to assist clarity and comprehension.
- 146 The most recent of those reviews recommended the following structure:
- a Introduction
 - b Facts
 - c Relevant standard/test
 - d Summary of submissions
 - e Analysis/decision
 - f Orders
 - g Bill of Rights analysis.
- 147 The decisions we reviewed adhered to that recommended structure in most cases, although in *McCaw*, for instance, there was some blurring between those parts of the decision which set out the facts (ie, the description of the broadcast) and those parts which explained the analysis/decision.
- 148 Getting the structure right is important since it allows broadcasters and complainants (present and future) to better follow the BSA's reasoning and therefore understand the guidance being applied.
- 149 In light of our comments above on the importance of freedom of expression to the BSA's deliberations, we would recommend a further refinement of the structure. We believe this refinement will achieve two things. It will allow the BSA to:
- a better set out its thinking in a logical way;
 - b better comply with NZBORA; and
 - c better inform and educate broadcasters, viewers and listeners about what it decides and why it decides to uphold (or not uphold) a complaint.
- 150 The revised structure we propose could be:
- a *Introduction*: a few short sentences introducing the broadcast complained about, the parties and the date of broadcast.
 - b *Statement about the starting point of inquiry*: a short paragraph setting out that the right to freedom of expression gives broadcasters the right to broadcast what information they like and also gives viewers and listeners the right to receive what information they like, but that, in certain circumstances, freedom of expression can be limited. Any time the BSA upholds a complaint it limits freedom of expression. For this reason, the decision to uphold a complaint requires more than just a breach of the standards.
 - c *Standard test*: set out the relevant standard. Then, where possible, the BSA should publish a concise statement about what the standard means based on earlier decisions relevant to the particular complaint.

- d *Facts/circumstances*: set out in sufficient detail what the programme is, when it aired, what classification (if any) is relevant and any other facts which will be required for the consideration of the complaint. These facts should be presented without comment as to whether the programme, or any element of it, breached or may have breached broadcasting standards.
- e *Submissions from parties*: provide a brief summary of the key points from each of the parties. This section of the decision should be presented without comment or analysis.
- f *Analysis*: apply the particular facts to the relevant standard to determine if a breach has occurred. This section needs to show clearly why the standard has been (or has not been) breached and why the BSA has come to that conclusion. It should also reference its reasoning to earlier decisions for the sake of clarity and understanding. For example, a statement such as 'in previous decisions the BSA has found that 'x', 'y', 'z' constituted 'strong adult content' unsuitable for viewing at 8.30pm but that 'a', 'b', 'c' fell short of what could be regarded as 'strong adult content'.
- g *Freedom of expression analysis*: if the BSA intends to uphold a complaint, weigh up whether the limit to freedom of expression is justified under NZBORA. (If the complaint is to be dismissed this analysis is not required.)
- h *Orders*.

151 Under this slightly modified structure we would encourage the BSA to clearly delineate between those parts of the decision which are simply setting out the facts and circumstances and those latter parts of the decision that include analysis and evidence of deliberation. The two are distinct and should be kept separate as much as is practicable.

Degree to which decisions provide guidance and clarity on the BSA's approach

152 Although the BSA has authority to conduct its own research and issue advisory opinions, its principal means of encouraging and enforcing broadcasting standards is through publication of its decisions. The more clearly expressed, the more effective the BSA can be.

153 The decisions under review were generally effective in providing the reader with guidance on the BSA's approach. In particular, the determination in each decision is uniformly clearly expressed and the orders are easy to find and follow.

154 However, the following points could assist the BSA in providing further clarity.

Setting out the facts of the broadcast

155 Each BSA decision is heavily fact dependent. For this reason, it is important that readers can understand what was shown and/or said in each broadcast. The BSA members have the advantage of having watched or listened to the broadcast; future broadcasters or complainants will probably not have access to this primary resource. For them, the text of the decision needs to provide all the information required.

156 While some of the decisions under review (such as *Office of Film and Literature Classification*) provide comprehensive descriptions of the broadcast subject to complaint, other decisions (such as *Edwards*) contain only a brief description of the broadcast. We would recommend the BSA reconsider this approach.

- 157 A comprehensive description of the relevant elements of each broadcast is necessary to provide broadcasters and the public with sufficient factual context to anticipate how the BSA might apply the standards in the future. This applies equally to decisions where a complaint is dismissed, as to decisions upholding complaints.
- 158 In the interests of simplicity, the key features of the broadcast can be provided in bullet points (such as in *McCaw*, paragraph [10]). Alternately, where such a description is lengthy (eg, a transcript of part of a programme (as in *Office of Film and Literature Classification*, paragraphs [14] and [17]), the BSA could incorporate it as an appendix to avoid disrupting the flow of the decision.
- 159 In either case, the key consideration should be ensuring that readers of decisions have sufficient information about the broadcast to understand the reasoning behind the decision so that the guidance in the decision can be applied to future facts by way of comparison.

Setting out the relevant standards

- 160 At the heart of any complaint is a broadcasting standard, or multiple standards. From the complainant's perspective, the standard (or standards) is the key factor.
- 161 The BSA's style is to paraphrase the broadcasting standards under consideration rather than directly quoting them. In our view, the decisions would be clearer and more accessible if the standards were directly cited, since this avoids any confusion over their content, and means that the reader does not need to refer to the *Codebook* to ascertain their exact wording. (We note in previous decisions such as *Milich and Television New Zealand Ltd* the standards are usefully set out as a series of bullet points.⁴⁶)
- 162 Where a complaint references more than one standard, in the decisions provided, the BSA's practice was (mainly) to deal with each standard separately. This allows the facts to be applied to each standard individually and for the reasoning to be more clearly set out and understood. We regard this as good practice.

Reference to the guidelines

- 163 The 2006 review noted the 'degree of ambivalence' between the broadcasting standards and the guidelines to those standards.⁴⁷ As Professor Burrows observed then, many of the guidelines are framed as quite precise rules and most of them are considerably more precise than the standards they inform.
- 164 A close reading of the 2015/2016 decisions provided indicates that the BSA's reasoning closely follows the key points identified in the guidelines (see *McCaw*, at paragraphs [11] to [14], or *Johns* at paragraphs [13] and [14]).
- 165 While mostly this is a logical approach, the BSA should take care to acknowledge that the guidelines can only have a limited function. They do not constitute broadcasting standards, although the distinction between the two can be blurred.⁴⁸
- 166 We note in *Henderson*, the BSA states:⁴⁹

⁴⁶ Decision No. 2011-053

⁴⁷ See n 15, p 6

⁴⁸ *Broadcasting Standards in New Zealand Codebook*, p 8

⁴⁹ See n 39, at [8]

Guideline 8b to the responsible programming standard allows broadcasters to promote AO programmes outside of AO time, so long as the promo is classified to comply with the host programme.

- 167 This suggests that Guideline 8b sets a standard for circumstances in which promos will be deemed to breach the Responsible Programming Standard when in fact the guidelines merely provide guidance to this effect.
- 168 Keeping in mind that the decisions are the primary means by which the BSA communicates to future broadcasters, viewers and listeners, the BSA should try to always differentiate between the standards and the guidelines and the role each plays in the BSA's reasoning.

Consistency of approach

- 169 Consistency of approach is a key ingredient if the BSA is to retain the confidence of broadcasters, viewers and listeners.
- 170 Given the very small sample size of decisions reviewed, it has not been possible to come to a firm conclusion on consistency. Nevertheless, the following points arise from a limited comparison.

The BSA is not consistent on freedom of expression

- 171 As explained above, the BSA decisions are not consistent in how and where they reference freedom of expression. For example, in *Office of Film and Literature Classification* the BSA purports to use freedom of expression as the starting point and framework for its decision, but in *McCaw, Johns and Henderson* freedom of expression considerations only arise after the BSA has determined that the conduct at issue falls below the relevant standards and then based on a 'boilerplate' template. We recommend that the BSA adopt a consistent approach to the location and framing of its references to freedom of expression.

Inconsistent findings

- 172 For the most part, the small sample of decisions were consistent in logic and reasoning, but not always.
- 173 For example, the *McCaw, Johns and Henderson* decisions present different views on the effect of classification requirements on freedom of expression.
- 174 In *McCaw*, a Pay TV decision, the BSA states that its finding that the video at issue should have attracted a higher classification 'enables, rather than restricts' freedom of expression, as it informs viewers of the nature of the programme and allows them to apply filtering technology. But in *Johns and Henderson*, Free-to-Air TV decisions, the BSA accepts that reclassifying the broadcasts and requiring them to be scheduled in the appropriate timeband would limit freedom of expression, but finds that the limit is not unreasonable. While the decision in *McCaw* places less limits on freedom of expression than *Johns and Henderson*, as it does not limit the broadcaster's scheduling of the content, the decision nevertheless restricts freedom of expression. In any case, the BSA's conclusion in *McCaw* does not appear to be consistent with *Johns and Henderson*.
- 175 As noted above, the sample size was too small for any firm conclusions to be drawn. *McCaw* may be an isolated case.

Inconsistent detail

- 176 The decisions under review do not contain a consistent level of detail. For example, *Edwards* contains considerably less detail than *McCaw* and *Office of Film and Literature Classification* in its description of the broadcast and assessment of whether it breached broadcasting standards. The BSA should ensure that each decision contains a similar level of detail, as each plays a valuable role in informing broadcasters, complainants, and potential complainants of the threshold for acceptable broadcasting conduct.
- 177 In particular, the fact that a complaint is not upheld does not signify that a less detailed decision is required. As the BSA's Chair has commented:
- The fact that a complaint may not be upheld does not diminish its value as each complaint allows the line of acceptability to be marked.⁵⁰
- 178 It will be true that not all complaints are created equal; some will be more complex and the issues raised will require greater or more nuanced analysis. Some decisions will naturally be longer. However, the length of the decision should be determined by the key consideration – do future readers of decisions have sufficient information about the broadcast at issue, and enough information about the reasoning behind the decision, to be able to apply future facts by way of comparison? Is the BSA informing and educating future broadcasters, viewers and listeners about what the standards mean and how they apply?

Other jurisdictions

- 179 The BSA also requested a comparison between its application of broadcasting standards and the application of equivalent standards in Australia and Canada. To this end, we have reviewed two decisions:
- a *Investigation report BI-174* (Australian Communications and Media Authority (**ACMA**)); and
 - b *Game TV re Eastern Promises* (Canadian Broadcasting Standards Council (**CBSC**)).
- 180 Overall, there is limited value in cross-jurisdictional comparisons, since the New Zealand broadcasting standards regime is distinct from the Australian and Canadian systems. In contrast to BSA decisions, the decisions of ACMA and CBSC are not centred on freedom of expression.
- 181 In Australia there is no express statutory right to freedom of expression. *Investigation report BI-174* makes no reference to freedom of expression despite upholding the complaint.
- 182 Canada has a Canadian Charter of Rights and Freedoms (**the Charter**). The Charter confines restrictions on freedom of expression to 'demonstrably justified' limitations, as does NZBORA.⁵¹
- 183 However, CBSC is not subject to the Charter because it does not derive its authority from legislation, instead being an industry-created body which exists in addition to Canada's state

⁵⁰ See n 9, p 5

⁵¹ Constitution Act 1982 (Canada), sections 1 and 2(b)

broadcasting regulator.⁵² *Game TV* also upholds the complaint without considering freedom of expression.

- 184 Nevertheless, the following points arising from a comparison with both the Australian and Canadian cases may assist the BSA.
- 185 Both *Investigation report BI-174* and *Game TV* cite the relevant broadcasting standards in full, rather than paraphrasing them as occurs in the BSA decisions. As stated above, we consider that the better approach is to directly quote the standards.
- 186 The structure of *Investigation report BI-174* is clear and logical. The decision is delineated into a series of sections which summarise the decision, detail aspects of the broadcast subject to complaint, explain the decision-making approach to be followed, outline the relevant standards, and analyse whether the standards have been breached. These sections are logically ordered and signposted by subheadings, allowing the reader to easily digest ACMA's decision-making process. ACMA's approach is particularly clear and comprehensible. Elements of ACMA's approach have been incorporated into our suggested structure for BSA decisions at paragraph 150.
- 187 In contrast, the structure of *Game TV* does not provide a clear indication of how CBSC reached its decision. Much of the decision is devoted to a description of the facts of the complaint, and only short passages to explaining its conclusions that the broadcaster breached the relevant standards. For example, to justify its conclusion that the programme was 'intended exclusively for adults', CBSC states that:
- The Panel Adjudicators find that, in this broadcast, any one of the elements of violence, coarse language, sexuality and mature themes alone would have rendered the film "intended exclusively for adults". That is all the more so true in combination, as those elements are in *Eastern Promises*.
- 188 There is no explanation of why the particular portrayal of violence, coarse language, sexuality or mature themes in the programme renders it 'intended exclusively for adults'.
- 189 As noted above, it is important that decisions fully articulate the rationale underlying conclusions reached, as this allows broadcasters, complainants, and potential complainants to locate the 'line of acceptability' in similar cases and anticipate how the decision-maker might apply broadcasting standards in the future.

Linda Clark
Special Counsel
Kensington Swan

Assisted by Abby Ward, Solicitor

⁵² Constitution Act 1982 (Canada), section 32, Canadian Radio-television and Telecommunications Commission "ARCHIVED - Public Notice CRTC 1991-90", <http://www.crtc.gc.ca/eng/archive/1991/PB91-90.htm>