

Proud and Prejudiced: Hate Speech and Freedom of Expression in New Zealand *continued*

provocation. Participants in the Authority's research have referred to talkback radio as "democracy in action". They say that they know they are allowed to express their opinions, and are not shy of doing so. As a result, talkback radio is often punctuated by highly provocative comment and opinion, from both the host and listeners. Every section of the community gets it – gays, Māori, immigrants, religious minorities, and politicians. Hosts will sometimes bait listeners who have called in, provoking them to an even stronger expression of their views.

Decision after decision of the Authority notes that the denigration standard has a high threshold, and a breach of the standard will not lightly be found in light of the right to freedom of expression. But there is no doubt that there is a limit on this right. No-one has unfettered freedom to say in public, or on the airwaves, what they want, when they want, how they want.

The vexed question for judicial or regulatory bodies is to draw the right balance between protecting free expression on the one hand, and protecting the rights of those targeted by this "free expression" on the other.

What is denigration?

The first issue the Authority considers is whether a broadcast is, on the face of it, denigratory. Many broadcasts, especially on talk radio, are critical of people or organisations. But of itself, criticism is not denigration. Accordingly, the test the Authority applies is whether a broadcast has "blackened the reputation of an identifiable class of people."

This takes the meaning beyond simple criticism into the realm of something that is likely to be hateful, vitriolic or injurious.

Applying the Test

Some United States academic writing distinguishes between speech that makes a rational – and thus important – contribution to a debate, and is thus worthy of a high degree of protection, and speech of such little value (because of its essentially hateful or incendiary nature) that any harm in its restriction is outweighed by the public interest in protecting those whom it denigrates.

The Codes of Broadcasting Practice in New Zealand adopt a similar approach; the Codes state that the prohibition against denigration does not extend to prevent the broadcast of material which is a genuine expression of serious comment, analysis or opinion and makes a rational contribution to a debate.

A higher degree of protection attaches not only to serious comment or opinion, but also to humour. The Codes specifically provide for this, stating that the standard is not meant to prevent the broadcast of material which is offered "in the legitimate context of a dramatic, humorous or satirical work".

Why does humour or satire attract such a degree of protection? For satire, maybe it is because it is a highly effective vehicle for social comment. Something that on its face might appear to be critical or even denigratory of certain groups, on a deeper level may well be offering intelligent and insightful comment.

Does this equally apply to humour? In many cases, probably not. But humour is intended to make people laugh. Its prime intent is not to communicate hateful or violent ideas. While it may poke fun or reinforce negative and outdated stereotypes, ultimately it is intended to be funny. Sometimes, as we all know, it falls woefully short of the mark but the intent behind humour, regardless of the quality of the material, is seldom malicious or hateful.

Essentially it is this that differentiates humour from hate speech. At its core, hate speech has malicious intent. It is not said to make us laugh. It is not light-hearted. It has no social message. It has no aim or purpose other than to offer up for public scorn and contempt a class of people.

Conclusion

It is probably accurate to say that the threshold for sanctioning denigratory speech in New Zealand is lower than in the United States. The threshold

in New Zealand is lower than hate speech per se, and the test used by the Authority focuses instead on the concept of the blackening of a class of people's reputation. In many cases, this will also amount to hate speech, but in others, not necessarily so.

Why is our threshold lower? There are two primary reasons, in my view. First, while New Zealand has its Bill of Rights Act, it does not have an entrenched constitution, the equivalent of the American First Amendment protections. While the New Zealand Bill of Rights was undoubtedly one of the landmark constitutional developments in our recent history, it nevertheless falls short of being a constitution. The rights contained in it, including the right to freedom of expression, are important, but they are not all-important. The Bill of Rights itself makes it clear that it can be overridden by inconsistent legislation, and among the judiciary there is not the same degree of reluctance to allow such overriding as there is in United States jurisprudence.

Secondly, New Zealand's jurisprudence – especially at tribunal level (such as the Broadcasting Standards Authority) – is very much a reflection of our society. New Zealanders as a whole, I think, value the freedom inherent in our democratic society, and value our right to speak our mind on political and social matters openly and honestly. But we also value fair play, and have an instinctive distrust and dislike of those who don't play fair. We feel an instinctive discomfort when we hear someone openly expressing hateful views; our immediate response is that in our free and democratic society, we do not value such unfairness. And ultimately, I think our sense of unfairness is stronger than our attachment to academically pure democratic ideals.

For this reason, and maybe it does come at the expense of a legally and democratically pure idea of freedom of expression, there are some things you just can't say in New Zealand. But despite this, I leave you with the proposition that in the broadcasting environment, and in the world of the Broadcasting Standards Authority, freedom of expression is alive and well in New Zealand.



0800 Number
The Broadcasting Standards Authority's 0800 number is **0800 366 996**
It has a recorded message which explains the complaints process.



Quarterly

Number 27, August 2005

Amendments to the Classification Standard in the Free To Air TV Code

Earlier in the year, the BSA considered submissions about programme promos and programme classification. As a result, Standard 7 (guidelines 7b 7c and 7d) and Appendix 1 of the Free To Air TV Code were

amended to take effect from 1 July. The revised standard and appendix are in the new edition of the Free to Air TV Code available from the BSA or our website www.bsa.govt.nz.

Proud and Prejudiced: Hate Speech and Freedom of Expression in New Zealand

This article is adapted from a presentation by the BSA's Complaints Manager, John Sneyd, to a conference of the Broadcasting Complaints Commission of South Africa

"The right to freedom of expression is as wide as human thought and imagination"
– New Zealand Court of Appeal

In the broadcasting world, there is nothing that piques the interest and raises the ire of listeners or viewers more than a loud and proud expression of views on sensitive religious, racial, political or sexual issues.

The issue for regulatory bodies is how to decide when such a broadcast has gone beyond what is acceptable in the interests of free debate into the realm of the denigratory, discriminatory, or even hate speech.

In practice it is difficult to identify, on the one hand, speech that is opinionated, critical and even vitriolic, but which is a legitimate form of expression, and on the other, speech which is so extreme that it goes beyond the reasonable scope of the legal protection.

Inevitably hosts and presenters will say things that are downright rude, that widely

offend, that criticise and demean. But the fact that many people would consider those comments to be offensive, or ill-judged, does not mean that the words should automatically attract sanction under the broadcasting codes.

In a free and democratic society it is the right of every person to hold whatever views they choose. As Voltaire put it:

I disapprove of what you say, but I defend to the death your right to say it.

The approach of the Broadcasting Standards Authority

The Authority has repeatedly stated that it must apply a high threshold before it will categorise speech as being discriminatory or denigratory in terms of broadcasting standards. It is implicit that any lower threshold could not be demonstrably justified in a free and democratic society – the standard to which we must adhere under the Bill of Rights Act.

There is limited opportunity for the regular broadcast of extreme views on mainstream television stations. But radio, and especially talkback radio, thrives – and indeed survives – on controversy, free expression, argument and

Invitation for submissions: proposed amendments to the Privacy Principles

The BSA is proposing changes to four of the Privacy Principles, appended to the Free-to-Air Television, Pay Television and Radio Codes of Broadcasting Practice:

- Principle (i) – amend
- Principle (iii) – amend
- Principle (iv) – delete
- Principle (v) – delete
- Principle (vii) – amend

The Privacy Principles are contained in an Advisory Opinion, issued under section 21 of the Broadcasting Act. Advisory Opinions are intended to provide guidance on the BSA's interpretation and application of the broadcasting standards. As such, the BSA can – and should – amend Advisory Opinions to ensure that they reflect the development of policy in the particular area.

In June 2004, some broadcasters were invited to meet with the BSA to discuss the Privacy Principles. As a result of the discussion, it was agreed that the BSA would draft amendments for further discussion. In particular, Principle (i) was giving rise to a degree of interpretative confusion and thus an uncertainty of result.

A discussion paper has now been issued to invite public feedback on the proposals. The full paper is available from our website: www.bsa.govt.nz

The deadline for submissions is 9am, Monday 12 September, 2005.

Directory

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Decisions

The Authority released 46 decisions between April and June 2005.

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BSA Decisions Released Each Quarter

	First Quarter	Second Quarter	Third Quarter	Fourth Quarter	TOTAL
2004/05	57	62	49	46	214
2003/04	57	76	20	50	203
2002/03	67	60	25	30	182

Decisions of particular interest issued in the last quarter include the following:

Fair Go

Fairness and Accuracy

A *Fair Go* item examined criticisms from the Bodies Corporate of four residential complexes, all of which were dissatisfied with their secretary, Strata Title Administration Limited, and its director Michael Chapman-Smith. Strata complained that the item was unbalanced, inaccurate and unfair.

In the Authority's view, the overall message of the *Fair Go* programme was that while Strata and Mr Chapman-Smith had acted legally, the apartment owners were frustrated and unable to terminate Strata's services due to the Body Corporate rules and Mr Chapman-Smith's refusal to negotiate. The Authority found nothing unfair in that message.

Strata also identified a number of excerpts from the *Fair Go* programme which it alleged were inaccurate or misleading. Of the extensive complaint, the Authority upheld only one statement as being inaccurate. The Authority held that it was inaccurate to state that Mr Chapman-Smith had agreed to an interview with *Fair Go* and then changed his mind.

Noting that this inaccuracy had not resulted in overall unfairness to the complainant, the Authority considered that the breach of the Code was at the lowest end of the scale and declined to impose an order.

Decision ref. 2004-214

Balance and Accuracy

In another decision about *Fair Go*, Dermot Nottingham had complained about an item which described how a family had entered into a complicated property deal but ended up in debt. Viewers were told that in trying to finance a home, the Alexander family had become involved with a questionable financing arrangement based around a family trust.

Mr Nottingham complained that the item was unbalanced, inaccurate and unfair. He maintained that the finance arrangement had fallen through as a result of the Alexanders' dishonesty.

The Authority considered that the item provided a general warning about entering into complex finance deals without first obtaining good advice. The Authority did not agree with

Mr Nottingham that insufficient opportunity was given to him or his clients to have their point of view explained on the programme.

The Authority declined to determine Mr Nottingham's complaints about accuracy. Despite being provided with a large amount of paperwork, the Authority considered that it did not have the full story behind the complicated deal. The Authority found that it was unable to make any findings of fact in relation to the matters complained of.

Decision ref. 2004-141

Television News

Fairness

A *One News Insight* documentary looked at the sharp increase in private tertiary courses in New Zealand in four areas, including film. Students claimed that they had been "duped by courses that over-promised and under-delivered". The Film School was the only film training provider identified in the programme.

The Film School complained that the programme was unbalanced, inaccurate and unfair. It argued that the programme had implied

that it ran substandard courses. The School also complained that its Director had been misled into taking part by a misrepresentation about the nature of the programme.

The Authority agreed that The Film School was treated unfairly. It found that the item implied that The Film School offered substandard courses, when there was no evidence that this was the case.

The Authority also found that the item was unfair because the School's director was not told of the programme's focus and was not given an opportunity to reply to the criticisms made of The Film School.

Decision ref. 2004-204

Accuracy and Fairness

A *One News* item featured a woman who claimed that twice in six months she had expressed concern to her doctor about a lump in her breast and had been told not to worry. Later, she discovered that she had a tumour and the breast was removed.

The GP complained to the Authority about the story preparation and its contents.

In the item, the patient claimed that six months after the initial consultation the doctor had again examined her. The item failed to include the complainant's denial that this had occurred, and the Authority accepted the doctor's evidence that no such consultation had taken place.

The patient's claim, backed by one extract from a four page letter the doctor had written her, implied that the doctor was at fault and had not followed recommended referral processes. The Authority concluded that the extract was out of context and failed to reflect the explanations made by the doctor to her patient. Further, the doctor had followed the recommended referral process.

The Authority decided that the item was inaccurate and unfair to the doctor. It also

upheld as misleading the use of a file footage image of a breast tumour. The file footage image was not labelled as such, suggesting that the image was the patient's own x-ray.

Decision ref. 2004-203

Radio Talkback

Ahmed Zaoui

A talkback segment on Radio Pacific discussed the Algerian refugee Ahmed Zaoui. The host expressed strong views that Mr Zaoui should leave New Zealand, and said "I don't care if we shoot him and send him out in a dog food can". The host also stated that Mr Zaoui was a proven terrorist in Switzerland, and that he could go back and live in Malaysia if he wanted to.

Vivienne Parre complained that the item had breached standards of good taste and decency and accuracy. While the Authority considered that the "dog food" comment was on the fringe of acceptability, it did not find that the requirement for good taste and decency was transgressed. The Authority considered that the presenter's tone suggested that he was being deliberately outrageous and provocative, and that his comments were not intended to be taken seriously.

In determining the accuracy complaint, the Authority had regard to the decision of the Refugee Status Appeals Authority (RSAA) on Ahmed Zaoui's application to be granted refugee status in New Zealand. The Authority

upheld as inaccurate the host's statement that Mr Zaoui was a proven terrorist in Switzerland, noting that Mr Zaoui had not been charged with any criminal offences in that country.

The Authority also noted that if Mr Zaoui were to return to Malaysia he would be subject to deportation to Algeria. It therefore found the statement that Mr Zaoui could live in Malaysia to be inaccurate.

While finding that the item was inaccurate on these two points, the Authority considered that the breaches were not sufficiently serious to justify an order.

Decision ref. 2005-016

Good taste and decency

During a Radio Pacific late-night talkback show, the host, Miles Davis, stated that he did not intend to take any more calls from Christchurch residents and that they should simply go to bed and "cuddle up to their sheep". Bruce Newburgh complained that the comment was in bad taste as it implied that people from Christchurch practised bestiality.

The Authority did not uphold the complaint. It noted that the remark was clearly made with humorous intent, and that the late-night time slot would attract an adult audience. Further, the Authority noted that the language used was not explicit or obscene, and the remark was at most an oblique and indirect reference.

Decision ref. 2005-007

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