COMPLAINTS AGAINST THE MEDIA: A COMPARATIVE STUDY

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A NOTE ON CITATION

So far as is known, there is no established system for the citation of decisions of the Press Council, the Broadcasting Tribunal, the Broadcasting Corporation or the Committee of Private Broadcasters. Although these bodies do not use adversarial procedures in the determination of complaints, for standardisation and ease of reference decisions will always be cited in the form *Complainant* v *Newspaper or Warrantholder*. Decisions of the Press Council are summarised in annual reports, which for convenience, will be cited in the unofficial form (1980) 8 NZPC Rep. 18. Decisions of the Tribunal will be referred to by number and date, but they may be located in the *Gazette* by reference to the heading "Broadcasting Act: Notices" in the index for the appropriate year. Some of the decisions of the Tribunal may also be found in the New Zealand Administrative Reports, Decisions of the Corporation and the Committee are not publicly available.

INTRODUCTION

It is inherent in the proper functioning of newspapers, radio and television that they will generate complaints by the public about aspects of their news, entertainment and advertising content. This paper examines the subject matter of these complaints and the rules and procedures by which they are determined. In New Zealand, there are important differences in substance and procedure between the electronic and the printed media in the matter of complaints; comparisons between the different media will be drawn where appropriate, and possible improvements to rules and procedures will be suggested.

Part I is a descriptive section, setting out the procedures used for determining complaints and the essential sources of the rules by which the validity of each complaint is assessed. Part II is analytical, comparing and contrasting the substance of various decisions made by the four principal complaint-hearing bodies.

The dominant theme, which runs through both Part I and Part II, is the elucidation of the readily observed fact that the electronic media are regulated more closely through the complaints procedure than the printed

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media. The paper seeks primarily to document the extent of this phenomenon, but it also seeks to explain it and to assess whether any modifications to either complaints system are justified in terms of the wider public interest.

PART I RULES AND PROCEDURES FOR COMPLAINTS

A. *Complaints Procedures*

1. *Definition*

For the purposes of this paper, a "complaint" is a formal complaint lodged by a member of the public with the appropriate authority stating his or her reasons for objecting to one or more specified items broadcast or printed by a particular station or newspaper. Informal complaints (telephone calls, abusive letters, etc.) are not considered.

The different procedures by which complaints are disposed of are depicted in diagramatic form in Fig. 1.

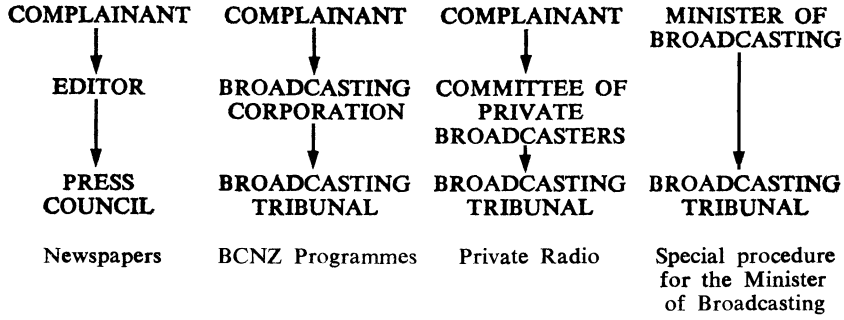

Fig. 1: Complaints Structures

The most important difference between newspaper procedures and broadcasting procedures is that the latter are principally statutory in origin whereas the Press relies exclusively on a system of self-regulation. The other important differences become clear when the procedures are examined in detail.

2. *Newspapers*

A complaint concerning an item published by a member of the Newspapers Publishers Association of New Zealand (N.P.A.) must first be referred to the Editor of the publication involved. If the Editor does not respond or if the response is not satisfactory to the complainant the matter may be referred to the Secretary of the Press Council. If the matter is clearly covered by a previous Council decision, or if the Council does not have jurisdiction to hear the case, the Secretary will reply to that effect. In all other situations the complaint will be examined by the Council, and further submissions may be invited from the parties in oral or written form. The Council then notifies the parties of its decision, and a Press Statement detailing the complaint and the reasons for the decision will normally be issued. There is no established procedure for the consideration of formal

complaints against newspapers and magazines where the publisher is not a member of the N.P.A., and such complaints are not dealt with in this paper.

The initiative for the establishment of a New Zealand Press Council came from the New Zealand Journalists' Association (N.Z.J.A.) in 1968, prompted in part by reports that the Labour Party intended to establish a statutory Press Council if it became the Government. The President of the N.Z.J.A., Mr Ian Templeton, was quoted as saying that a statutory Press Council would "make life exceedingly difficult for newspapers and probably also for journalists."[1] This is a revealing insight into a danger which the voluntary Press Council seeks to avoid by its existence and through its practice.

The Council was finally formed in 1972 as a joint venture between the N.Z.J.A. and the N.P.A., funded principally by the latter body. The Council's constitution is modelled on that of the British Press Council, with certain modifications based on the experience of that body. The New Zealand Council is very small, having only four members entitled to vote at each meeting, and its membership includes an independent chairman and a representative of the public. It is frequently noted that with the casting vote of the chairman, the independent representatives are able to outvote the industry representatives; this is quite the reverse of the position in the United Kingdom.[2]

3. *Broadcasting Corporation Programmes*

By virtue of the Broadcasting Act 1976, the Broadcasting Corporation of New Zealand is the only organisation currently allowed to operate a television station in New Zealand. The Corporation also operates the majority of New Zealand medium wave radio stations. All formal complaints concerning programmes broadcast by the Corporation must be addressed in writing to the Secretary of the Corporation, and they must set out the grounds for complaint.[3] The complaint is referred by the Secretary to the Corporation's Head of Programme Standards, who will invite comment from whichever staff members he considers appropriate. They may include the producer of the relevant programme, the divisional head responsible for the programme (the Controller of News and Current Affairs, for example), the Director-General of the particular service (e.g. Radio New Zealand), the Office Solicitor, and the reporter, writer and cameraman. In exceptional circumstances, further written information may be solicited from the complainant or other parties involved. The various reports collected are then

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[1] *Evening Post*, 22 September 1968. Journalists feared that a statutory Press Council would have compulsory jurisdiction and significant disciplinary powers. The voluntary Press Council has consensual jurisdiction and no penal power other than the right to castigate the blameworthy newspaper, editor or journalist. Each nwespaper is morally obliged to publish decisions against it, and this obligation has been faithfully discharged by the New Zealand Press. Nevertheless, the Council is sometimes criticised for a lack of power and for the absence of compulsory jurisdiction and these criticisms are considered in the conclusion of this paper.

[2] The Royal Commission on the Press (U.K.) reported in 1977 that the British Press Council suffered from the preponderance of press representatives over public representatives.

[3] *Broadcasting Act* 1976, s. 25.

forwarded with the recommendation of the Head of Programme Standards to either the Corporation's Television Complaints Committee or its Radio New Zealand Complaints Committee. Each Committee comprises a chairman (the Chairman of the Corporation chairs the Television Complaints Committee and the Deputy-Chairman chairs the RNZ Complaints Committee), two or three other members of the Board, and a representative of the Corporation's staff. The recommendation of the committee is forwarded to the full Board of the Corporation for final decision. The complainant is, of course, advised of the decision, but the Corporation does not make its decision public unless the complainant himself has publicised the complaint, or the issue has in some other way aroused public interest.

If the complainant is dissatisfied with the decision of the Corporation or with the action taken by the Corporation, or if the Corporation has not within 14 days after receiving the complaint notified the complainant of the date on which the complaint will be considered (the date being within a reasonable time after the lodging of the complaint), the complainant may refer the matter to the Broadcasting Tribunal.[4] The Tribunal is completely independent of the Corporation, being separately constituted under the Broadcasting Act. The Tribunal deals with complaints concerning all warranted radio and television stations, and it reports annually to Parliament on this and other aspects of its work. When a complaint is received against a programme broadcast by the Corporation, the Tribunal initiates such enquiries as it considers necessary to determine the complaint. The view of the Corporation is always sought, and the Tribunal will on occasion conduct an oral hearing to obtain further information. The Tribunal is deemed to be a Commission of Inquiry, and as such has power to take evidence on oath. Each adjudication made by the Tribunal is notified to the parties concerned as well as being published in the *Gazette*.

Questions of law disputed in the Tribunal may be referred to the Administrative Division of the High Court, and it is assumed that there is also a power of judicial review in that Court in accordance with general principles of Administrative law.[5]

Ministers of the Crown are expected to follow the complaints procedure in the same way as private citizens, with the one exception that the Minister of Broadcasting may refer directly to the Tribunal any programme broadcast or intended to be broadcast by the Corporation where the Minister is of the opinion that the programme infringes or is likely to infringe the programme rules or certain provisions in the Broadcasting Act.[6] This power may be exercised only where the Minister considers its exercise to be in the public interest in the special circumstances of the case. The Minister has not yet found occasion to invoke this power.

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[4] Ibid., s. 25(5). The Tribunal comprises a Chairman and two members, each appointed by the Governor General on the recommendation of the Minister. In addition, the Tribunal is obliged when dealing with complaints to co-opt two persons whose qualifications or experience are likely, in the opinion of the Tribunal, to be of assistance to the Tribunal in dealing with that complaint. These persons participate in hearings and discussions but do not vote.

[5] This point has not yet been tested in the High Court.

[6] *Broadcasting Act*, s.25(6), (7), (8).

4. *Private Radio Programmes*

No medium wave radio station may be operated except with a licence issued by the Post Office and a warrant (or short-term authorisation) issued by the Broadcasting Tribunal.[7] Apart from Station 4XD, every permanent private commercial station has membership in the Independent Broadcasters Association (I.B.A.). This Association represents all private broadcasters, including non-members, in matters relating to programme rules and complaints.

Formal complaints against programmes broadcast by private stations are addressed in the first instance to the Committee of Private Broadcasters. This is a statutory body[8] serviced by the Justice Department. Its independent chairman is appointed by the Minister of Broadcasting, and its two members and their deputies are appointed by the Minister on the nomination of the Association. The role of the Committee parallels that of the Corporation with regard to complaints, but the workload of the Committee is generally much lighter. The Committee notifies its decisions only to the parties and to the Tribunal; there is no provision for the general circulation or publication of its adjudications, although steps are being taken to circulate decisions to the management of private stations and to the Corporation. The Committee's only disciplinary power is to refer serious breaches of warrant to the Tribunal.

The complainant's right of recourse to the Tribunal exists in the same circumstances as those appertaining to a complaint made to the Corporation. The position of the Committee is different from that of the Corporation, however, because the Committee is not itself a warrant-holder. The Tribunal has a broad power to issue general directions to the Committee on any matter relating to the Committee's powers, functions and duties,[9] but in practice the Tribunal has not sought to influence the Committee by the use of this power. The Tribunal has preferred instead to rely upon its general power to issue binding directions to warrant-holders; this power is exercisable over Corporation and private stations without distinction.

The Minister has the same power to direct referral to the Tribunal in the case of private radio programmes as he has in connection with the Corporation.

5. *Conclusion*

It is clear that the complaints procedure applying to radio and television is more rigorous than that applying to the press. This is but one aspect of an oft-observed phenomenon, namely that the public accountability of the New Zealand electronic media is much greater than that of the printed media. It appears that there are at least five reasons for this. First, the freedom of the press has always been a cornerstone of the British parliamentary constitutional model, and is therefore enshrined by the long tradition of the common law, whereas the electronic media have their origins in the twentieth century. Second, the Government until recently

[7] *Post Office Act* 1959, s. 164; *Broadcasting Act*, s. 70.

[8] Established by s. 85 of the *Broadcasting Act*.

[9] *Broadcasting Act*, s. 67(8). The Committee is obliged under s. 90(b) to adhere to any such directions.

followed the Commonwealth practice of monopolising the electronic media through para-statal public corporations, and hence public accountability has been perceived as essential to the preservation of the independent and non-partisan nature of this important information source. The growth of private radio has shifted the balance slightly, but major incursions into the Corporation's monopoly have not yet been made. Third, the Broadcasting Corporation is not and can not be financed on a direct "user pays" system, and hence it is not susceptible to that pressure of market forces which plays at least a limited role in the regulation of the press. Fourth, radio frequencies are a scarce public resource which must be allocated and utilised in the public interest. Finally, the increasing importance of the television medium combined with its exceptionally pervasive nature has lead to demands that it be made accountable to each member of its audience and not merely to the "general average audience" or ratings system.[10] These demands by the public have been carried over to Radio New Zealand, although not to the same extent.[11]

Further evidence of the greater accountability of the electronic media may be gleaned from a comparison between the standards and rules governing radio and television programmes and those applying to the press. It is to these standards and rules that discussion now turns.

B. *Standards and Rules*

At the heart of the complaints system are the standards and rules which are used to determine the rectitude of each complaint. It is an unwavering rule that a formal complaint against a newspaper or broadcasting station must expressly or impliedly allege a failure to observe the appropriate standards and rules. The absence of such an allegation will generally render a complaint ineffectual.

1. *Press Standards and Rules*

The Press is not legally obliged to adhere to any standards or rules other than those applying to every citizen under the general law of the land.[12] Journalists are bound in honour (and sometimes in contract) to the profession's code of ethics, a copy of which is set out below. However, this code is seldom referred to expressly by the Press Council. The Council prefers to rely on the norms of journalistic practice as its measuring stick. The dictates of good journalistic practice are very pragmatic, and they are not easily discerned by those outside the profession. They find their most concrete expression in the recorded decisions of the Press Councils in New Zealand, the United Kingdom and Australia; some of the more important New Zealand adjudications are examined in part II of this paper. Nevertheless, it is fair to say that very few Press Council decisions can not be reconciled with the code of ethics.

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[10] Audience interest in television is shown by the fact that the television stations throughout the country receive more than 4000 informal complaints each year.

[11] Of the 20 complaints determined by the Tribunal between its inception in 1977 and May 1981, 15 related to television, four to Radio New Zealand and one to private radio.

[12] *The Newspapers and Printers Act* 1955 requires that newspapers be registered, but makes no further demands on journalists.

The rules of the New Zealand (Except Northern) Journalists Union (N.Z.J.U.) provide as follows:

7. CODE OF ETHICS: All members shall recognise the following code of ethics in the course of their employment:
   (a) To report and interpret the news honestly.
   (b) To promote, through their conduct, full public confidence in the integrity and dignity of their calling.
   (c) To observe professional secrecy in matters revealed in confidence to the furthest limits of law or conscience.
   (d) To use only honest methods to obtain news, pictures or documents.
   (e) Never to accept any form of bribe, either to publish or suppress.
   (f) To reveal their identity as members of the Press when not to do so would be contrary to ethical standards.
   (g) Not to suppress essential fact and not to distort the truth by omission or wrongful emphasis.
   (h) To observe at all times the fraternity of their profession and never take unfair advantage of a fellow member of the Union or any other member of a journalists union or other organisation of journalists in New Zealand.
   (i) To accept no compulsion to intrude on private grief.

The Northern Journalists Union also subscribes to this code. Together, the N.Z.J.U. and the N.J.U. cover all working journalists in newspapers and private radio stations; some senior staff are also members. Broadcasting Corporation journalists have their own voluntary association, the Association of Broadcasting Journalists. The A.B.J. has no written code of ethics, but a combination of an unwritten code and house rules yields a result similar in terms to the N.Z.J.U. code.

Broadcasters and newspaper journalists are of course obliged to act within the limits of the general law, but the professional allegiance to this code of ethics is so strong that journalists may in some cases see it as prevailing over the law. For instance, the National Council of the N.Z.J.U. has resolved that in the event of censorship such as that imposed in 1951 under the Public Safety Conservation Act 1932 "the Union will still expect all its members to honour the Code of Ethics and will give unlimited support to any member who is prosecuted for ethical journalism."[13]

2. *Broadcasting Standards and Rules*

At least 30 different statutes, regulations and rules of the general law have particular relevance to the media, including such little-known laws as the Optometrists and Dispensing Opticians Regulations 1977, the Designs Act 1953 and the Commercial Use of Royal Photographs Rules 1962.[14]

In addition to the general law, broadcasters are required by statute to adhere to certain standards and rules which derive from four principal sources. These sources must now be examined.

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[13] National Council Minutes, 26 May 1976.

[14] Neither the Press Council nor the broadcasting complaints procedure is intended to act in substitution for the Courts of Law, and they therefore do not seek to enforce the general law. The relationship between the general law and the complaints procedure is discussed in Part II below.

(i) Section 24(1) of the Broadcasting Act provides that:

1. The Corporation shall be responsible for maintaining, in its programmes and their presentation, standards which will be generally acceptable to the community, and in particular it shall have regard to—
   (a) The provision of a range of programmes which will cater in a balanced way for the varied interests of different sections of the community:
   (b) The need to ensure that a New Zealand identity is developed and maintained in programmes:
   (c) The observance of standards of good taste and decency:
   (d) The accurate and impartial gathering and presentation of news, according to recognised standards of objective journalism:
   (e) The principle that when controversial issues of public importance are discussed, reasonable efforts are made to present significant points of view either in the same programme or in other programmes within the period of current interest:
   (f) The maintenance of law and order:
   (g) The privacy of the individual.

Under section 95 of the Act private broadcasters bear identical responsibilities except that they are not expressly required to have regard to "The provision of a range of programmes which will cater in a balanced way for the varied interests of different sections of the community." However, private broadcasters face a more onerous liability than the Corporation in that they may be subject to a complaint that they have failed to have regard to "The need to ensure that a New Zealand identity is developed and maintained in programmes", whereas there is no provision for complaints against the Corporation under this head.[15] This disparity is surprising in view of the superior ability of the Corporation to ensure the development of a New Zealand identity in programmes, and the reasons for the distinction are not clear.

(ii) The Corporation is required under section 26 of the Act to maintain a standing committee, the Broadcasting Rules Committee, which formulates detailed standards and rules applying to radio and television programmes.[16] The Committee has prepared booklets setting out these standards and rules, and from time to time it issues circulars interpreting or amending sections in these booklets. Representatives of the I.B.A. must be included whenever the Committee considers the radio rules, and ratification by the Corporation (and the I.B.A. in the case of radio rules) is required before rule changes come into effect. The rules are enforced through the complaints procedure and through the power of the Tribunal to direct and discipline warrant holders.

(iii) Statutory regulations which specifically affect programme rules include the Radio Regulations 1970 (especially Regs. 49-52) and the Broadcasting Regulations 1977. Under section 98(h) of the Broadcasting Act the Governor-General may, by Order-in-Council, make regulations prescribing conditions relating to warrants. This power may be used to

[15] Nor may complaints be brought against the Corporation under s. 24(1)(a).

[16] The Broadcasting Regulations 1977 set down the procedure for the operation of this Committee.

thwart decisions of the Broadcasting Rules Committee, although this has been done only once.[17]

(iv) As has been noted, each broadcasting station must hold a warrant or authorisation issued by the Broadcasting Tribunal. Where it appears to the Tribunal that a station has failed to adhere to the programme rules made under section 26, it may make such direction to the station as it thinks fit.[18] Any subsequent failure to comply with the direction is a breach of the conditions of the station's warrant, and the Tribunal may impose a fine of up to $500 on the warrant-holder. The Tribunal may also revoke or suspend the warrant, but this power may not be exercised in respect of warrants held by the Corporation except at the request of the Corporation or with the consent of the Minister.

The disciplinary powers of the Tribunal also apply where there has been a breach of the express or implied conditions of a station's warrant. The Tribunal must hold a public hearing before exercising its disciplinary powers,[19] and there is a right of appeal to the Administrative Division of the High Court.[20]

The Tribunal has not had occasion to exercise its power to revoke or suspend warrants. It has, however, had recourse to a more subtle sanction, namely the power to renew warrants for less than the maximum period of five years. The power was first used in the case of two Auckland stations to reduce the renewal period to three years; the implied threat to the stations' continued existence had a marked effect on the managers and directors of the stations concerned.

Despite its lack of use, the power to revoke or suspend warrants is potentially a very potent weapon, and it is noteworthy that this power is exercisable more readily against private radio stations than against the Corporation. The probable reason for this difference in treatment is that the assets of the Corporation are publicly owned, and the Corporation is accountable to Parliament through the Public Expenditure Committee, the annual estimates debates, the Corporation's annual report to Parliament, and members' questions to the Minister. Furthermore, the Corporation holds statutory powers with which it is expected to perform certain statutory duties. Private radio stations, on the other hand, are said to be accountable only to the shareholders, and they owe no duty to anyone outside the terms of the warrant. Hence, it is argued, they do not require the Minister to intercede between them and the Tribunal. It is submitted, however, that this is insufficient reason for the difference in treatment. If the Tribunal is to be entrusted with the power to revoke or suspend warrants, the public interest requires that this power be exercisable equally in respect of Corporation and private stations. The role of the independent Tribunal should not be undermined by the interposition of the Minister as a protector of the Corporation. If, alternatively, the intention

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[17] A statutory regulation in 1977 to prohibit advertising promoting the consumption of alcohol—see Part II below.

[18] *Broadcasting Act*, s. 83.

[19] Ibid., s. 76(4).

[20] Ibid., s. 84(1).

is to reserve to the Tribunal a discrete power to silence private radio stations, then it is reasonable to ask just why this power is necessary. The evidence presented in part II of this article shows that the Tribunal must have teeth if it is to work effectively, and it is therefore submitted that the power of the Tribunal to revoke or suspend Corporation warrants should be exactly the same as that presently applying to privately-held warrants.

3. *Conclusion*

There is a substantial element of self-regulation in both the printed and the electronic media. The Press Council is an entirely voluntary body; both its jurisdiction and its authority rest upon the consent of the constituents. The standards enforced by the Council emanate almost exclusively from the newspaper industry. The broadcasting complaints procedures are statutory, but the primary responsibility for prescribing and enforcing programme standards is entrusted to the broadcasters themselves. The Broadcasting Rules Committee is composed solely of representatives of the broadcasting industry; this body is responsible for most of the specific rules on programme standards. The Corporation complaints committees and the Committee of Private Broadcasters are structured to represent the interests of broadcasters. As it is put in the preamble to the *Standards and Rules*:

> The quality of broadcasting in New Zealand is very much in the hands of broadcasters themselves: the standards they aim at, and the degree of self-discipline they impose on themselves, will more than anything else dictate the nature of the end product.

The importance of self-regulation in broadcasting must not be understated. Nevertheless, it remains true that the power of broadcasters to set their own standards is exercised only on the suffrance of the Government, and that the final arbiter of compliance with the standards is the independent Tribunal. To this extent, the press enjoys much more freedom to prescribe and police its own standards.

It is readily apparent that the standards and rules applying to broadcasting are more precise, more detailed and more comprehensive than those applying to the press. Broadcasting standards are codified in written form, whereas press standards must be gleaned from Council decisions, the Code of Ethics, and press practice. This conclusion is unsurprising, for it accords with the pattern of greater and closer regulation of the broadcasting media. It now becomes necessary to focus on some specific standards and rules to ascertain whether the differences in rules and procedures are reflected in the decisions made on complaints in each branch of the media.

PART II DECISIONS ON COMPLAINTS

For the purposes of this comparative analysis, it is useful to divide the decisions made by the various adjudicating bodies into two broad categories. Section A deals with the substantive aspects of these decisions in five of the most important areas, and Section B reviews the procedural aspects of the substantive decisions.

The overall intention is to discern the major differences between decisions made on complaints against the electronic media and decisions made on complaints concerning the printed media. Arguments will be advanced as to the reasons for these differences, and specific proposals for improvement will be made where appropriate.

A. *Substantive Aspects*

1. *Accuracy and Balance*

A fundamental tenet of news and current affairs reportage in all media is that it must be accurate, objective, and impartial, and free from bias and unfairness. The Press Council has adjudicated on more than 40 complaints relating to alleged breaches of this principle, and the Broadcasting Corporation and the Broadcasting Tribunal have both devoted many hours to consideration of complaints made under this head.[21] All three bodies have been unhesitating in upholding legitimate complaints on this subject, particularly where the complaint relates only to one or two articles or programmes. The full protection of the complaints procedure is accorded regardless of whether the injustice has been done to a private individual, a public figure,[22] a group, organisation or movement,[23] or an ethos.[24]

An interesting comparison may be drawn between a Press Council adjudication[25] and a decision of the Broadcasting Tribunal[26] on what was essentially the same matter, namely an inaccurate news report on the Contraception, Sterilisation and Abortion Bill as reported back to the House from the Committee of the Whole. The reports stated that the mental or physical state of the mother would not be considered when deciding whether an abortion should be granted. The Press Council took the view that, while the statements may well have been inaccurate, it was much too late to ask for a correction six months after the event, and the complaint was therefore dismissed. The Tribunal reached the opposite conclusion, holding that news had been inaccurately presented and that Television One should have publicly acknowledged its error. Considering the matter after 11 months had elapsed, the Tribunal conceded that a correction of the inaccurate report was no longer practical, but stated that it was possible ". . . even now for Television One to broadcast a programme which might help to explain the criteria laid down in the Act."[27]

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[21] The Committee of Private Broadcasters has received very few complaints on this subject; the reasons for this are not clear.

[22] For example, *Stevenson* v *Gore Ensign* (1979) 6 NZPC Rep. 13; *Young* v *BCNZ*, BCNX Board decision of 12/9/80; *Gill* v *BCNZ*, Tribunal decision 10/78, 23 November 1978.

[23] For example, *Philip* v *N.Z. Truth* (1974) 2 NZPC Rep. 4, *NZ Truth* 9/4/74 p.20, (South African Consulate); *Everett* v *BCNZ*, BCNZ Board decision of 12/9/80 (Worldwide Church of God); *Astons Ltd* v *BCNZ*, Tribunal decision 16/78, 4 December 1978 (Astons Ltd).

[24] *Philips* v *Auckland Star and New Zealand Herald* (1979) 7 NZPC Rep. 23 *S.P.U.C.* v *BCNZ*, Tribunal decision 9/78, 23 November 1978.

[25] *Pryor v Evening Post* (1978) 6 NZPC Rep. 9.

[26] *S.P.U.C.* v *BCNZ*, Tribunal decision 9/78, 23 November 1978.

[27] Ibid., p.5.

Three significant points may be noted from this comparison. First, the Tribunal generally upholds a complaint whenever the appropriate standards have been breached, whereas the Press Council is reluctant to uphold a complaint merely because there has been a technical breach of the relevant standard. One of the reasons for this difference is that the Tribunal is under a statutory duty to act judicially,[28] whereas the Press Council is not. The Tribunal has indeed chided the Corporation for failing to uphold a complaint after it found itself to have been in breach of the *Standards and Rules*.[29]

The second point is that the Tribunal was here prepared to go much further than the Council in strongly suggesting that a new programme be produced to rectify the previous inaccuracy, despite the fact that it is much easier for a newspaper to print a story than for television to produce a programme.

The third point is that the complainant undoubtedly would have felt better served by the Tribunal than by the Press Council on this occasion.

These three differences arise in part from the difference between a statutory body with compulsory jurisdiction and subject to judicial review, and a voluntary body whose jurisdiction rests upon the consent of its constituents. The comparison also provides evidence of the greater demands made of the electronic media by the complaints procedure, and it may indicate that higher standards are demanded from television than from newspapers with regard to accuracy and balance in news and current affairs.

This last proposition finds support in the decision of the Tribunal in *Curran* v *BCNZ*,[30] where the Tribunal recommended that the Broadcasting Corporation establish a regular procedure for ensuring objectivity, impartiality and balance in the long term coverage of controversial overseas issues such as violence in Northern Ireland.[31] Newspapers are not required to maintain such monitoring systems, and they generally do not do so except in connection with election coverage.[32] No distinction is drawn in either the Broadcasting Act or the *Standards and Rules* between the standards of accuracy and balance required of radio and those required of television. While the absence of any distinction may be desirable on policy grounds, it may be argued that the vastly greater verbal throughput of radio stations would justify their being judged according to a standard more akin to that applied to newspapers. Some support for this proposition may be found in the Tribunal decision in *Ehrhardt* v *BCNZ*,[33] but in

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[28] *Broadcasting Act*, s. 67(6).

[29] *Curran* v *BCNZ, Tribunal* decision 6/79, 2 October 1979, p.5. The Tribunal's approach appears more objective and hence is more likely to satisfy complainants.

[30] Ibid.

[31] Compare the Press Council decision in *S.P.U.C.* v *New Zealand Herald* (1978) 6 NZPC Rep. 7, especially at p.9.

[32] The Christchurch *'Star'*, for instance, does not monitor its long-term coverage of any issue except at elections where it analyses the number of column inches allowed to each party each day. See also the decisions of the Council in *Little* v *Sunday Times* (1980) NZPC Rep. 7 and *West Coast Futures Inc.* v *Christchurch Press* (1980) 8 NZPC Rep. 7.

[33] Tribunal decision 7/78, 6 September 1978.

general it seems that no distinction will be drawn between radio and television standards.

It is not intended to suggest that inaccuracy and imbalance are readily tolerated in any medium with respect to individual items, for this clearly is not so. Reference should be made to the diligence with which the Council, the Tribunal and the Corporation investigate allegations of inaccuracy, imbalance, bias and unfairness. Examples are the Council's decision in *Tirikatene-Sullivan* v *Dunedin Evening Star*,[34] where two full meetings of the Council were taken to hear the complaint; the Tribunal's decision in *O'Neill* v *BCNZ*,[35] where a special hearing was held in Dunedin; and the adjudication of the Corporation in *Fraser* v *BCNZ*,[36] where a complaint and supporting material concerning the Waipara Full Gospel Mission involved the Corporation in a detailed study which took three months to complete. However, it does seem that the Tribunal is prepared to go further than the Council in demanding rectification of mistakes, and in upholding complaints for technical breaches of the relevant standards. The Tribunal also demands long-term balance from television stations, and it is likely that, if a suitable case arose, similar demands would be made of radio stations. These high standards are apparently not matched by the standards which the Press Council requires of newspapers.

Assuming that balanced and accurate reporting is in the public interest, it may be said that in simple terms the public interest is served better by the broadcasting complaints procedure than by that of the press. However, this is not to say that the broadcasting complaints procedure should be applied to the press; that is a separate question which is discussed in the conclusion of this paper.

2. *Editorialising*"

Expression of the views of an individual reporter in the form of commentary or opinion is clearly permissible in both the electronic and printed branches of the media. This freedom runs far enough to permit patently one-sided expressions of opinion on political matters provided it is clearly the opinion of the reporter and not, for instance, that of the warrant-holder which is being expressed.[37] However, a sharp divergence appears on the question of the right of the newspaper or warrant-holder to express its own editorial opinion on controversial matters.

The Press Council is vigorous in its assertion of the right of newspaper editors to express any view on any subject, provided that the editorial view is not masquerading under the guise of objective presentation of the news. Thus the *"Christchurch Star"* is entitled to express its view of a ban on "Down Under the Plum Trees"[38] and *"N.Z. Truth"* is allowed to cam-

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[34] (1975) 3 NZPC Rep. 8.

[35] Tribunal decision 5/77, 22 December 1977.

[36] BCNZ Board decision of 12/5/81.

[37] See *33 Minginui Forest Residents* v *N.Z. Truth* (1979) 7 NZPC Rep. 20; *James Dean* v *Rutland Weekend Radio Ltd.*, Committee of Private Broadcasters decision 4/80, 5 March 1980 (names changed so as not to lead to the identification of the parties).

[38] *Rush* v *Christchurch Star* (1978) 6 NZPC Rep. 19.

paign to preserve the Whirinaki State Forest.[39] The strength of the Council's support for the right to editorialise is exemplified by the decision in *Guery* v *Better Business*, where the Council, in dismissing a complaint against a highly inflammatory editorial, said

> The language of the article is considered to be extravagant, unrestrained and lacking in dignity, but the Council must uphold the right of an editor to express opinion fiercely. This is a part of the history of European and New Zealand polemics. Hyperbole and even invective unquestionably have their traditional place in political disputation. The Council cannot accept that the forcefulness of a writer's argument should be subject to restriction because intemperance in expression might cause offence.[40]

The one qualification is that newspapers expressing editorial views on controversial matters are obliged to provide reasonable opportunity for the presentation of opposing views.[41]

Broadcasters, on the other hand, must not only distinguish comment from news,[42] but they must also adhere to the rule that "Editorials stating the opinion of the warrant holder on political and religious matters, on industrial disputes and on matters of public controversy are not permitted."[43] Thus newspapers can campaign but broadcasting stations can not. This is another illustration of the tighter rein under which broadcasting is held.

The different rights of newspapers on the one hand and broadcasting stations on the other to make statements of editorial opinion exemplifies the difference between the positions of the printed media and the electronic media in New Zealand. Reasons for the greater public accountability of the electronic media have been advanced in Part I above. The reasons for the greater restriction on editorial rights are similar, and they are essentially political in character.

First, broadcasting is relatively new technology which has still not won the unqualified trust of politicians or the public. Second, the electronic media are instantaneous, and they rely on direct person-to-person communication. They may become potent motivators of men when used by skilled operators. There is a risk that the broadcasting of editorial opinions could have adverse effects on public order, public institutions or the popularity of the Government. This risk is not so great in the case of the printed media, and it is certainly much less than the risk involved in any attempt to interfere with the established peacetime freedom of the press. A third consideration arises from the decisions of successive Governments that broadcasting (particularly television) should be retained substantially in

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[39] *33 Minginui Forest Residents* v *N.Z. Truth* (1979) 7 NZPC Rep. 20.

[40] (1980) 8 NZPC Rep. 17, 18.

[41] *Hutt* v *Thames Star* (1980) 8 NZPC Rep. 17.

[42] *Radio Standards and Rules*, Programme Rule 4.2(a); *Television Standards and Rules*, Programme Rule 5.1(a).

[43] *Radio* and *Television Standards and Rules*, Programme Rule 2.3. See *Large Co Ltd* v *Radio Intermission*, Committee of Private Broadcasters decision 3/78, 11 December 1978, upholding an allegation of a flagrant breach of this rule (names changed). A certain latitude in the interpretation of this rule is allowed to religious stations such as *Radio Rhema*.

public ownership. An accepted principle of public broadcasting, espoused by the first Chairman of the B.B.C., Lord Reith, is that broadcasting stations do not editorialise except perhaps on broadcasting matters. This principle is rigorously applied in New Zealand, the United Kingdom, Australia and Canada, for the very good reason that where the opinion of the community is divided the community will be equally unable to agree on which side the public interest lies. Furthermore, expressions of editorial opinion can scarcely be truly independent and unpressured in a Government-owned broadcasting system, and it is therefore deemed preferable to do without editorial opinions on controversial matters.

3. *Advertising*

About 10% of the complaints received by the Press Council relate to advertisements, whereas fourteen of the 28 complaints received by the Broadcasting Tribunal from its inception in 1977 until July 1981 were concerned with advertising programmes. The difference in proportions is undoubtedly attributable to the untiring efforts of one man, Mr C. R. Turner of Hamilton. He is responsible for twelve of the fourteen advertising complaints received by the Tribunal; eight of these complaints were upheld, and two others received sympathetic hearings.[44] Mr Turner has made only one reported foray into the domain of the Press Council,[45] and his complaint was rejected in no uncertain terms.

Mr Turner may well have been very prudent in directing the bulk of his energies at the electronic media. Advertisements on broadcasting stations must comply with all the rules, regulations, provisions and conditions relating to other programmes, and they are also subject to a special set of advertising rules. This extensive regulation may once again be contrasted with the situation applying in the printed media, where advertisements are subject to restrictions that are even less burdensome than those applying to news items. Furthermore, broadcast advertisements are dealt with through the usual complaints procedure whereas the Press Council has been reluctant to deal directly with complaints dealing with advertising.

The Press Council asserts jurisdiction over advertisements, holding that advertisements affect the overall tone of the paper and are therefore subject to broad editorial responsibility exercisable in accordance with the usual journalistic standards. However, this assertion was made in *Beck* v *Dunedin Evening Star*,[46] a case which deals not with simple advertisements but with a two-page advertising feature sponsored by the anti-fluoridation lobby. The normal practice of the Council is to refer complaints about advertisements to the Newspaper Publishers' Association, where they are considered

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[44] The complaints upheld were Tribunal decisions 2/77, 3/80 (four complaints, including one against *Radio Waikato*, a private radio station), 6/81, 7/81 and 13/81. The complaints viewed sympathetically were decisions 2/80 and 9/80. Mr Turner's principal concern in the past has been the advertising of alcohol, but a survey of 13 of the complaints made by him to the Corporation over the 12 months to May 1981 indicates that his range encompasses the whole gamut of advertisements and extends further to such matters as the telecast of the Leonard-Duran boxing match, which Mr Turner unsuccessfully alleged to be an infringement of the programme rules relating to the portrayal of violence.

[45] *Turner* v *New Zealand Herald* (1979) 7 NZPC Rep. 22.

[46] (1979) 7 NZPC Rep. 11.

by that body's advertising advisory sub-committee in the light of the voluntary advertising guidelines which have been distributed to members by the N.P.A. The report of that sub-committee is notified directly to the complainant, and the Press Council then decides whether further action is necessary.

It appears that this procedure has been adopted because of the long-standing practice in the newspaper industry that the advertising department is autonomous and largely immune from editorial control. A policy motion on the books of the N.Z.J.U. states that:

> Subeditors, reporters and photographers shall not as part of their normal duties be required to handle for supplements or special features, copy written or photographs taken to suit the purposes of any individual advertiser unless the worker is engaged primarily or exclusively to handle such copy.[47]

This demarcation is strictly observed, and members of a journalistic body, such as the Press Council, may lack the experience to deal with advertising matters. It is submitted, however, that the great advantages of an independent Press Council ought not to be lost to the public merely because it is an advertisement that is the subject of complaint. From the point-of-view of the reader, an advertisement is no more or less a part of a newspaper than a news item, and the potential for harm is not dissipated by the fact that an item originates from the advertising department rather than the editorial section.

This point is well illustrated by two cases. A storm of public controversy was generated by a Wellington Capital Club display advertisement showing a girl in a bikini and captioned "Maybe She's Pretty But Would You Elect Her Prime Minister?" The Press Council did not itself adjudicate on complaints against this advertisement, but instead referred them to the N.P.A. The advisory sub-committee found that the advertisement was not in good taste and recommended that it not be published.[48] It is worthy of mention that no newspaper which had previously published the advertisement would have been obliged to publish the N.P.A. decision, whereas offending newspapers are normally expected to publish relevant Press Council decisions. Furthermore, condemnations by the N.P.A. are unlikely to be scathing, and decisions of the N.P.A. will be treated with less respect by the public than decisions of the Council.

The second case involved a Labour Party advertisement published in the Gisborne "Herald". A complaint about inaccuracies in certain economic figures used in the advertisement was referred by the Press Council to the N.P.A. The advisory sub-committee accepted that if the figures were inaccurate to the extent alleged the advertisement would be misleading and unfit for publication, but it chose not to make a final determination of their accuracy. Instead, it confined itself to advising the complainant that

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[47] N.Z.J.A. Annual Conference Minutes, 1973. The rigidity of this demarcation is illustrated by a case heard by the British Press Council (*The Press And The people*, 1977, p.101.) The advertising department of the *Hemsworth and South Elmsall Express* inserted two promotional "articles' which made numerous references to Polaroid cameras. The editor of the paper was twice overruled by the editorial director when he suggested that the phrase "Advertisers Announcement" be attached to the article.

[48] See (1975) 3 NZPC Rep. 17.

the N.P.A. intended reviewing the rules on political advertising at its next annual conference.[49]

It is submitted that this latter adjudication was wholly inadequate from the viewpoints of the complainant and the public. It leaves the complaint effectively unresolved, and it fails to demonstrate any definite prospect for future improvement. A contrast may be drawn with the recent decision of the Broadcasting Corporation on a complaint about a superlative claim made in an advertisement for a brand of anti-dandruff shampoo.[50] The advertisement claimed that the particular shampoo was "the most effective shampoo money can buy". The advertisement was stopped as soon as the complaint was received, and confirmation of the validity of the claim was sought from the New Zealand Dermatological Society. When the Society indicated that the claim was not supportable, the advertisement was disallowed and the complaint upheld.

It is submitted that the reader of a newspaper could reasonably expect that his formal complaint about an advertisement would be the subject of an adjudication by the Press Council rather than a group composed solely of newspaper interests, and it is submitted that a change in procedure to implement this proposal would constitute a significant improvement in Press Council practice.

The right of broadcasting stations to carry advertisements stems from the terms of the warrant issued by the Tribunal pursuant to the Broadcasting Act. The content of advertising, however is regulated primarily by the advertising rules promulgated by the Broadcasting Rules Committee.[51] Most disputes about the rules arise in five problem areas; Sunday advertising, cigarette advertising, alcohol advertising, sponsored programme material and "free advertising" obtained by the sponsors of televised sporting or cultural events. The most vexing and the most instructive of these matters is the advertising of alcohol, and discussion will be confined to this topic because of limitations of space.

Unlike newspapers, radio and television stations have only a limited right to publish advertisements connected with alcohol. The history of the alcohol advertising rules illustrates the way in which broadcasting rules are formulated, and it also documents a rare case of Government intervention in questions of broadcasting standards and techniques.

The position until 1978 was that advertisements designed to promote the general consumption of alcoholic beverages were prohibited, but it was permissible to broadcast advertisements on behalf of an alcohol sales outlet. In 1978 the Broadcasting Rules Committee proposed that advertisements promoting the consumption of alcohol (including advertisements for brand names and manufacturers) be permitted for a 12-month trial period. The Independent Broadcasters Association supported this proposal, but the Broadcasting Corporation refused to ratify it and thereby vetoed the rule change. This being a situation where the I.B.A. and the Corporation were not able to agree, a special committee was constituted under section

[49] See (1975) 3 NZPC Rep. 17-18.

[50] *Turner* v *BCNZ*, BCNZ Board decision of 12/9/80.

[51] As has been mentioned, broadcast advertisements are also subject to the rules, regulations, statutory provisions and warrant conditions which govern other programmes.

26 of the Broadcasting Act to resolve the impasse. The Committee comprised the Chairman of the Tribunal, Mr B. H. Slane, as Chairman, and an equal number of representatives from the Corporation and the I.B.A. The Corporation re-affirmed its inability to agree to the proposed alteration, but the proposal was carried on the casting vote of the Chairman.

The Minister of Broadcasting then intervened, seeking undertakings from the Corporation and the I.B.A. that, despite the rule change, no station would broadcast an advertisement that contravened the previous rules. This intervention was made on the ground that the broadcasting of advertisements promoting the general consumption of alcohol was contrary to Government policy. The I.B.A. refused to give the undertaking requested, and the Government responded by amending the Broadcasting Regulations 1977 to impose in every warrant a condition that advertisements promoting the consumption of alcohol could not be broadcast.[52]

The Broadcasting Rules Committee interpreted this regulation as restoring the status quo, but in a lengthy decision handed down on 16 May 1980 the Tribunal stated that the effect of the regulation was to further circumscribe the range of permissible alcohol advertisements.[53] The result of this decision was that four complaints by Mr Turner concerning very common and very lucrative forms of advertising were upheld, and the Government hurriedly repealed the relevant regulation.[54]

The Broadcasting Rules Committee then enacted new rules liberalising the pre-1978 position, but stopping short of sanctioning brand-name advertising. These rules came into effect on 10 June 1980, but in a test case decided on 29 April 1981 the Tribunal held that the new rules did not legitimate corporate image advertising such as "Lion Breweries Racing Results".[55] These were precisely the advertisements which the Committee wished to legitimate, and yet another draft of the rules has now been produced by the Committee.

The sorry saga of the alcohol advertising rules is a regrettable example of the problems arising from badly drafted rules. The Tribunal upheld eight of the ten complaints it considered on alcohol advertising up to July 1981, and the Tribunal has felt obliged to express its concern that the interpretation of the conditions, regulations and rules has become burdensome to broadcasters. (Broadcasters themselves put the matter in much stronger terms.) Although a number of the complaints have arisen from stations endeavouring to stretch the rules to their furthest limits, the Tribunal for a considerable time refrained from exercising its penal powers because of the grave difficulties of interpretation. Thus stations were effectively able to broadcast advertisements which infringed the rules, having nothing more serious than the delayed verbal criticism of the Tribunal to fear. While this is an effective sanction when applied to other matters, the confusion over the alcohol rules evoked something akin to sympathy for stations which found themselves in breach of them, and repetition of breaches became

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[52] This amendment was made by Statutory Regulations 1978/181.

[53] *Turner* v *BCNZ, Turner* v *Independent Broadcasting Ltd (Radio Waikato)*, Tribunal decision 3/80.

[54] The repeal was effected by Statutory Regulations 1990/120.

[55] *Turner* v *BCNZ*, Tribunal decision 7/81.

quite common. The principal culprit was the Broadcasting Corporation. In a strongly-worded decision handed down in June 1981 the Tribunal directed that all advertisements relating to alcohol must be approved by senior Corporation staff prior to broadcast. The Tribunal went even further in dealing with the recurring problem of Lion Breweries advertisements, requiring that no advertisement containing the names "Lion" or "Lion Breweries" be broadcast without the express prior consent of the Tribunal.[56] Responsibility for breaches of the alcohol advertising rules must rest primarily with broadcasters, particularly as it is the broadcasters themselves who draft and approve the advertising rules. It is to be hoped that the revised version of the rules will be more easily interpreted and more consistently complied with.

If the position with regard to alcohol advertising was a typical result of the application of detailed rules to advertisements, there could be little doubt that broadcasters were labouring under excessive regulation. Fortunately, the confusion which prevails over the alcohol rules is quite unique among the broadcasting rules. There is some tension over other advertising rules, particularly those applying to cigarette manufacturers,[57] sponsorship and Sunday advertising, but this is inevitable given the conflict between the desire of broadcasters to increase their advertising revenue and the desire of the Government and the Corporation to keep certain types of advertisement out of the electronic media. On balance it is submitted that the broadcasting advertising system works well and should be continued.

The press enjoys a much greater freedom to accept advertisements than the electronic media. This freedom is not easily justified by the traditional arguments advanced in support of the general freedom of the press. However the press resists suggestions that the Government regulate some of the less desirable aspects of newspaper advertising by arguing that such regulation would threaten the economic viability of the press and hence threaten its cherished freedom. This argument may well be soundly based, and perhaps all that can safely be asked is that the Press Council formulate and publish its own guidelines for press advertising, and that it then enforce these guidelines itself rather than leave the task to the N.P.A.

4. *Reporters' Methods*

The need for reporters to have unimpeded access to information must be balanced against the right of the public to be protected from unscrupulous reporters using improper methods to obtain their information. In striking this balance the self-regulated press provides more concrete protection for the public than the externally-regulated electronic media.

Newspaper journalists face great pressure from colleagues and employers to adhere to tight restrictions on the methods they may use to obtain information. The standards of behaviour expected of newspaper journal-

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[56] The directives are contained in Tribunal decision 14/81, 17 June 1981; 1981 *Gazette* 1823, 1824. The directive relating to "Lion Breweries" was subsequently withdrawn by the Tribunal, following the promulgation of new advertising rules which clearly permit certain types of "corporate image" advertising.

[57] The cigarette advertising rules have recently been redrafted to counteract the decisions of the Tribunal in *Turner* v *BCNZ*, Tribunal decision 6/81, 29 April 1981, and *Turner* v *BCNZ*, Tribunal decision 2/80, 25 March 1980.

ists are set out in the Code of Ethics, and they are firmly enforced by the Press Council.

Broadcasting journalists face similar professional pressure, but the standards they must adhere to have not been comprehensively formalised in the *Standards and Rules.* Warrant-holders are obliged by the Broadcasting Act to have regard to the accurate and impartial gathering of news according to recognised standards of objective journalism,[58] and also to have regard to the privacy of the individual.[59] These provisions are nebulous and limited in scope, and they are not adequately fleshed out in the *Standards and Rules.*

A good illustration of the difference between the printed and electronic media in this important area is the rule against subterfuge, which is expressed in the Code of Ethics as the requirement that journalists "Reveal their identity as members of the Press when not to do so would be contrary to ethical standards".[60] This rule has received the emphatic endorsement of the Press Council, which requires not only that a reporter not conceal his identity but also that he actively disclose it when present at a private meeting.[61] The one permissible exception is when a story is to be done in the public interest, and vital information can not be obtained except by an undercover reporter. The use of subterfuge in such circumstances was upheld by the Council in *Hinton* v *Sunday News*[62] where a reporter gained access to the Auckland Medical Aid Centre by adopting an assumed name and "spinning a yarn" to the effect that she was pregnant and wanted an abortion. The Council endorsed this strategy as being necessary in the public interest, and the Council observed that similar tactics may legitimately be used in the investigation of crime. The Council noted, however, that a decision to use subterfuge must be a matter for careful senior editorial examination and judgement, and that the alternatives to subterfuge—if any practical alternatives exist—must be carefully weighed. These precautionary words are heeded at least by the daily papers; at the Christchurch "Star", for instance, the personal approval of the Editor is a prerequisite to the use of subterfuge, and the very experienced Chief Reporter can remember no occasion where this approval has been given.[63] There is also great professional pressure to conform to the Code of Ethics. A persistently unethical journalist may well find that he spends years covering knitting circle meetings, and a newspaper which sought to pressurise staff into acting unethically would quickly run up against the opposition of the N.Z.J.U. and the N.J.U.

No reference to the subterfuge rule is made in the Television *Standards And Rules* or the Radio equivalent, presumably because these rules are directed more at programme content than at information-gathering techniques. The nearest broadcasting equivalents to the subterfuge rules are rules that no telephone conversation with a member of the public may be

[58] S. 24(1)(d) and s. 95(1)(c).

[59] S. 24(1)(g) and s. 95(1)(f).

[60] N.Z.J.U. Code of Ethics, rule (f).

[61] *Flint* v *New Zealand Herald* (1979) 7 NZPC Rep. 16.

[62] (1975) 3 NZPC Rep. 10; *Evening Post*, 25 March 1974.

[63] Interview with the writer, 15/6/81.

broadcast without his consent,[64] and that individuals taking part or referred to in a programme must always be dealt with justly and fairly.[65] The sweeping obligations in the Broadcasting Act may be relevant in certain circumstances, although section 24(1)(d)[66] applies only to the gathering and presentation of *news*, and section 24(1)(g)[67] is extremely vague. It is submitted that reliance on these provisions of the Broadcasting Act is generally unsatisfactory, as they do not provide any useful assistance to a broadcaster contemplating the use of unorthodox information-gathering methods. Most broadcasting rules are stated with precision and specificity, and the rules on reporters' methods are an uncharacteristic exception.

It is submitted that the programme rules are deficient for the lack of rules expressly regulating the conduct of reporters. This criticism draws particular force from the decision of the Committee of Private Broadcasters in *Large Co Ltd* v *Radio Intermission*.[68] In that case, Radio Intermission were refused admission to the Annual General Meeting of Large Co Ltd, but they used a landline connected to the public address system at the meeting venue to monitor the meeting from their studio. The Committee found that, while this was an unorthodox approach, it did not contravene any programme rule or other express broadcasting standard and therefore held that there was no basis on which to uphold this part of the complaint. It is submitted that this decision is correct in that the Committee, like the Tribunal, can only adjudicate against breaches of statute, regulations, programme rules or warrant, for these four sources together form a code.[69] It is therefore submitted that the programme rules should be extended to specifically prohibit all unethical practices by reporters. While care must be taken to ensure that the *Standards and Rules* do not degenerate into a statutory in-house manual, it is submitted that questions of reporters' methods are much too important to be left partially outside the formal complaints system.

5. *Taste, Decency and Obscenity*

Possibly the most difficult category of complaints to deal with are those alleging indecency, obscenity or bad taste.

The Press Council acknowledges that it cannot assume the role of a court of morals, and therefore it prefers to leave allegations of indecency and obscenity to the courts.[70] The Council thereby limits its jurisdiction to items which are alleged to be in poor taste. This jurisdiction is narrow for

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[64] *Television* and *Radio Standards and Rules*, Programme Rule 2.5.

[65] Ibid., Programme Rule 1.1(e).

[66] The equivalent provision for private radio is s. 95(1)(c).

[67] The equivalent provision for private radio is s. 95(1)(f).

[68] Decision 3/78, 28 November 1978. Names have been disguised at the request of the Registrar of the Tribunal to avoid identification of the parties.

[69] It is arguable that the Committee should have upheld the complaint for breach of s. 95(1)(c); the fact that it did not further reinforces the need for the "recognised standards of objective journalism" to be set out in detail in the *Standards and Rules*.

[70] *An Appraisal of Sex, Nudity And Related Topics In The New Zealand Press*, New Zealand Press Council, May 1973, p.5 (hereafter "*An Appraisal* . . . .").

two reasons. First, the Council is reluctant to consider questions of taste when they may overlap with questions of decency.[71] Second, the Council takes the view that "Good taste, in substantial degree, is a matter for editorial discretion. Inevitably the result will not satisfy everybody."[72] This means that if the publication of an item was a matter within the editor's discretion the Council will not condemn it even if the Council would itself have exercised the discretion differently. It appears that the condemnation of the Council will be reserved for items which fall "far below the general standards of accepted taste".[73]

The most useful statement by the Council on how to determine whether an item is within the "general standards of accepted taste" is that editors should ask "Where in this matter does the greater public interest lie?"[74] If the greater public interest lies in the publication of the item then the item will usually meet the "general standards of accepted taste". There are at least eight reported occasions on which the Council has found that the "general standards of accepted taste" have not been met, but these decisions go no further towards the formulation of a more precise test.

The statutory test which broadcasters must meet is "The observance of standards of good taste and decency."[75] This is no more precise than the test applied by the Press Council, and the Broadcasting Tribunal has taken a similar line when interpreting it. The Tribunal has emphasised that the motive and the purpose of the makers of the programme are important factors in deciding whether or not an item is indecent, obscene or in poor taste. Thus nudity shown as part of an informative programme on the Auckland Nudist Club was acceptable whereas the use of nudity to arouse salacious interest would not have been acceptable.[76] Similarly it has been held that the mere fact that a word is obscene in one context does not make its use obscene in other contexts.[77] The Tribunal does not allow producers the wide discretion which the Press Council confers on editors, but nevertheless the Tribunal does not presume to criticise technical decisions (the duration of camera shots, for example) which were within the reasonable discretion of the producer.[78]

It may be concluded that there is little difference between the Press Council and the Tribunal over the appropriate standards of good taste, although broadcasters have less discretion than editors. An important difference is that the Tribunal is prepared to consider allegations of indecency and obscenity in the context of broadcasting standards[79] whereas the Press Council refuses to consider such charges. Another significant distinction is that the Press Council is reluctant to curb the freedom of

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[71] See *Powles* v *Sunday Times* (1974) 2 NZPC Rep. 11.

[72] *"An Appraisal . . . . ,"* p.5.

[73] *Andrew* v *Marlborough Express* (1979) 7 NZPC Rep. 16.

[74] *"An Appraisal . . . . ,"* p.8.

[75] *Broadcasting Act*, s. 24(1)(c) and s. 95(1)(b).

[76] *S.P.C.S.* v *BCNZ*, Tribunal decision 4/79, 6 August 1979.

[77] *Dobie* v *BCNZ*, Tribunal decision 1/77, 20 June 1977.

[78] *S.P.S.C.* v *BCNZ*, supra no. 76.

[79] *S.P.S.C.* v *BCNZ*, supra no.76; *Dobie* v *BCNZ*, supra n.77.

the Press by setting moral standards at any level above the bare minimum,[80] while the Tribunal has evinced no such reluctance with regard to broadcasting. Finally, it may be argued that the lowest standard of taste and decency observed by broadcasters is higher than the "bottom line" standard observed by the yellow press, and that this difference is attributable to the tighter regulatory control of broadcasting. This conclusion appears tenable, although it is not readily susceptible of proof.

B. *Procedural Aspects*

1. *Legal Action*

No complaint may be heard by the Broadcasting Tribunal until the complainant makes a statutory declaration in the form:

> That legal action will not be taken in respect of the subject matter of my complaint (or the investigation of my complaint by the Broadcasting Corporation of New Zealand) or the investigation of my complaint by the Broadcasting Tribunal.[81]

The Press Council requires a similar undertaking in any case where a legally actionable issue may be involved. The purposes in both cases are first, to prevent the complaint being used as an economical trial run for litigation, and second, to encourage broadcasters, journalists and editors to co-operate in the complaints procedure in the knowledge that they will not subsequently be required to defend themselves in Court. The undertaking also serves to protect members of the Press Council who, unlike their counterparts in the Tribunal, have no legal protection beyond that attaching to ordinary citizens.[82]

It is submitted that the statutory declaration used by the Tribunal is poorly worded. It appears to require complainants to sign away legal rights which may enure in other persons, and it fails to stipulate what is meant by "legal action". It also leaves open the possibility that the declaration could be used in a bid to thwart an application for judicial review of the Tribunal's decision, although it is most unlikely that such an attempt to oust the jurisdiction of the High Court would succeed in these circumstances.

More importantly, the declaration assumes that the persons making the complaint will together constitute the entire group of people who may have a legal cause of action as a result of the programme. In fact, there is nothing in the Broadcasting Act which could be construed as requiring a complainant to be personally affected by the programme complained of.

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[80] In setting these standards the Council is conscious of the possibility of legislative intervention should the anger of the community be aroused by the low standards observed by elements of the press. See "*An Appraisal . . .*," p.8.

[81] See Justice Department Form BRO/5, and *Broadcasting Act*, s. 67(4).

[82] The consideration of a complaint by the Press Council does not necessarily preclude a subsequent prosecution for the publication of the material. Thus two newspapers were prosecuted in October 1973 for publishing allegedly indecent material which had earlier been the subject of complaints considered by the Press Council; compare "*An Appraisal . . .*" with *Evening Post* reports of 9/10/73, p.10, and 11/10/73, p.2.

This has placed the Tribunal in something of a dilemma, and in practice the Tribunal has been reluctant to find that a programme has been unfair or unjust to a person who has not complained or supported the complaint. The Tribunal has a discretionary power to decline to determine any complaint.[83] This power could be used to enable the Tribunal to decline to determine "busybody" complaints, although in practice it has been used primarily to avoid determining complaints where the offending programme had been withdrawn or altered and the complainant wished to pursue the matter solely to publicise a particular point of view.[84]

An argument may be put forward to support the proposition that the Tribunal itself has the power to revise the declaration. Section 67(4) of the Broadcasting Act casts some doubt on such an argument, however, and it is submitted that section 67(4) ought to be amended to take account of the criticisms levelled at the present declaration.

There is no statutory requirement that a similar declaration be made before a complaint is considered by the Committee of Private Broadcasters or by the Broadcasting Corporation. In the absence of a statutory provision, it would appear that neither the Committee nor the Corporation has the power to demand such a declaration, yet both bodies are under a statutory duty to hear and determine complaints; they have no jurisdiction to decline to determine any complaint, or to refuse to uphold justified complaints.[85] They are thereby placed in an impossible position, for it would seem that they are obliged to make determinations on complaints involving legally actionable material, and such determinations may later be used in litigation against the Corporation, a private radio station, or an individual broadcaster. It is therefore submitted that the Broadcasting Act should be amended to permit the Corporation and the Committee to require complainants to undertake not to commence civil litigation on the subject matter of the complaint or the investigation thereof. The Corporation and the Committee would have discretion to impose this requirement in appropriate cases; the present informality and flexibility of the complaints procedures would thereby be preserved in the vast majority of cases.

It has been suggested that the British Press Council has absorbed cases which would otherwise have been tried as defamation actions, but this is probably not true in New Zealand. With the possible exception of three complaints in 1975 and one in 1980,[86] the Council has not adjudicated a case where a defamation action was likely to have succeeded. Perhaps the most questionable material which has been considered was an unsupportable assertion made in "New Zealand Truth" that the recently deceased

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[83] *Broadcasting Act*, s. 67(1)(b).

[84] The power has also been used in a case where the Tribunal found that it did not have jurisdiction to deal with the complaint—see *Turner* v *BCNZ*, Tribunal decision 2/79, 1 May 1979. It is submitted that this is an undesirable use of the power as it may make judicial review of the decision on jurisdiction unnecessarily difficult to obtain.

[85] See *Astons Ltd.* v *BCNZ*. Tribunal decision 16/78, 4 December 1978, at p.9, where the Tribunal held that the Corporation could not decline jurisdiction over a complaint nor decline to determine whether it was justified. There is nothing to suggest that these comments do not apply equally to the Committee.

[86] See (1975) 3 NZPC Rep. 14, and *N.Z. Dairy Board* v *N.Z.P.A.* (1980) NZPC Rep. 12.

Toby Hill had been associated with alleged communists "who sold their souls long ago to the Soviet Union" and that he was the "commies' stooge and fellow traveller."[87] In a similar category was an unwarranted implication in the "Dominion" that HART was involved in a burglary of the nearby offices of the National Party.[88] In both cases serious legal obstacles would have arisen in any defamation action.

The Press Council appears willing to hear complaints involving possible breaches of the civil law; it has, for instance, adjudicated on one complaint where an allegation of breach of copyright was upheld.[89] However, the Council has little choice other than to decline jurisdiction in cases where a breach of the criminal law is alleged. Thus in *Gair* v *Sunday News*[90] the Council exhibited a profound reluctance to involve itself in a case where it appeared that a reporter had made a false declaration contrary to section 127 of the Social Security Act 1964. This policy is undoubtedly prudent, and it is likely that the Broadcasting Tribunal would take a similar course even though its members are protected from civil liability.[91]

Broadcasting stations are threatened with defamation proceedings fairly frequently, but the Tribunal has only considered one case where legally actionable issues were involved.[92] In that case, the "Fair Go" programme was criticised sharply by the Tribunal for procedures which allowed defamatory material to be broadcast. The case involved a small company which probably could not have afforded the cost or the risk of litigation.

In conclusion, it seems fair to say that the media complaints procedures do not reduce the workload of the Courts, but they do provide a source of redress for persons with legitimate complaints who for various reasons are unable or unwilling to litigate them.

2. *Government Policy*

The role of the Government in the regulation of the media is a matter of fundamental importance. By tradition, the Government plays no direct role in the regulation of the printed media, and any departure from this tradition would meet with stern resistance from journalists.

Government interference with the structure of broadcasting is tolerated out of necessity, but the Government is generally expected not to involve itself in questions relating to broadcasting standards or programme content. Admittedly the Government determines the content of sections 24 and 95 of the Broadcasting Act, but these standards are time-honoured and are readily accepted by broadcasters. Governmental involvement in programme standards is generally more limited in New Zealand than it is in most countries, and the resentment aroused by the Government's intervention in the alcohol advertising dispute will make the Government chary

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[87] *Family of Toby Hill* v *N.Z. Truth* (1978) 6 NZPC Rep. 15.

[88] *Richards* v *The Dominion* (1979) 7 NZPC Rep. 15.

[89] *Turner* v *The Dominion* (1977) 5 NZPC Rep. 11.

[90] (1979) 7 NZPC Rep. 14.

[91] The protection is conferred by s. 64 of the *Broadcasting Act.*

[92] *Astons Ltd* v *BCNZ*, Tribunal decision 16/78, 4 December 1978. Complaints involving alleged obscenity (*Dobie* v *BCNZ*, supra n.77) and indecency (*S.P.C.S.* v *BCNZ*, supra n.76) may have dealt with matters which could have been the subject of a prosecution.

about repeating the manoeuvre in other areas. The Government is still involved in the controversial areas of F.M. radio and Sunday advertising, but these issues are not of central significance to questions of programme standards.

A perturbing feature of the Broadcasting Act is the set of provisions designed to ensure that the Corporation and the Tribunal conform to Government broadcasting policy. Both bodies are obliged to have regard to "the general policy of the Government in relation to broadcasting" in the exercise of their functions and powers.[93] This is potentially a serious threat to the independence of the Corporation and the Tribunal; for instance, a Government policy against the broadcasting of political advertisements may be said to fit within this broad definition of Government broadcasting policy.

The Tribunal has chosen to interpret this requirement very narrowly, impliedly holding that in the absence of express direction it is not obliged to take account of Government policy on the broadcasting of alcohol-related advertisements.[94] The Minister of Broadcasting is empowered to give express binding directions to the Corporation or to the Tribunal pursuant to the Government's broadcasting policy, subject to the proviso that the direction must not be made in respect of a particular programme or a particular complaint (nor may the direction derogate from the duty of the Tribunal to act judicially). There are no conditions precedent to the use of the power; the Minister is merely obliged at the first opportunity to publish directives in the *Gazette* and to lay them before Parliament. The Minister has made only one such directive to the Tribunal,[95] but the precedent for the use of the power is now established. It is difficult to see how the existence of this power can be said to be in the public interest,[96] and it appears to constitute a serious and unnecessary incursion into the realm of programme standards.

3. *Complaints by the Media*

One of the functions of the Press Council is to consider complaints about the conduct of persons and organisations *toward* the Press. This gives members of the Press an outlet other than their columns through which to express grievances against members of the public, and it is intended that the Council will provide an independent forum for the resolution of such complaints. The Council has upheld two of the four complaints it has received under this head.[97] Both of the successful complaints concerned

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[93] See s. 20 and s. 68.

[94] *Turner* v *BCNZ, Turner* v *Independent Broadcasting Ltd*, Tribunal decision 3/80, 16 May 1980.

[95] This directive concerned F.M. Radio; see 1980 *Gazette* 293.

[96] It may be argued that it is better for the Government to formulate guidelines for broadcasting than for such matters to be left exclusively in the hands of non-elected professional bodies. This argument may have some force with regard to complex matters of public policy such as the introduction of F.M. radio, but it is submitted that decisions on programme standards ought to be made by broadcasting professionals rather than politicians.

[97] *Nelson Journalists Union* v *Mayor of Nelson* (1972-3) 1 NZPC Rep. 8; *Anderson and Bush* v *Mayor of Masterton* (1972-3) 1 NZPC Rep. 9.

minor disputes arising from criticisms of press reports made by Mayors. These two cases illustrate the powerlessness of the Council to make an effective adjudication without the consent of all parties, for in both cases the Mayors refused to co-operate with the Council. On hearing of the decision against him the Mayor of Nelson is reported to have said

> I regard it as highly presumptuous on the part of the Press Council to sit as a judicial body in a complaint made by the journalists against me and to publish the fact that it "upholds" the complaint . . . Perhaps I could close by suggesting that local government set up a tribunal of its own to adjudicate on actions of the news media.[98]

Powerless though the Press Council may be, newspaper journalists are in a much better position than their broadcasting colleagues. There is no provision for broadcasters or broadcasting stations to lodge complaints against the public. More significantly, they have no right to appeal against findings made by the Corporation, the Committee of Private Broadcasters or the Tribunal,[99] nor even a statutory right to appear before those bodies. There appears to be no recognition of the fact that an adverse decision may constitute a personal reflection on the particular broadcaster concerned.[100] It is particularly surprising that broadcasters have no right to appeal to the Tribunal from decisions of the Committee as, unlike the Corporation, the Committee takes no responsibility for the production of programmes, and it investigates complaints as an external body.

Broadcasters are free to lodge complaints in their capacities as members of the public,[101] but such complaints must allege a breach of the appropriate standards. Thus the procedure can not be used to obtain a right of appeal against a previous finding, except possibly by the tortuous device of duplicating the previous complaint.

It is submitted that this situation is unjust, and that an amendment to the Broadcasting Act is called for to permit private stations and private broadcasters to appeal decisions of the Committee to the Tribunal. Similarly, where the Corporation finds it necessary to criticise individual broadcasters in the course of a decision on a complaint, some consideration should be given to allowing the broadcasters a right of appeal to the Tribunal.

Conclusion

In part I of this paper it was concluded that the procedural mechanisms for dealing with broadcasting complaints were more formal and more complex than those used in the printed media. This greater formalisation is mirrored in the standards used to assess the validity of complaints. In the case of broadcasting these standards emanate from four formal sources

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[98] *Evening Post*, 17 November 1973.

[99] Other than the right to appeal to the High Court against any penalty imposed by the Tribunal under s. 83.

[100] For a decision which may be thought to have reflected badly on an individual broadcaster see *Astons Ltd* v *BCNZ*, Tribunal decision 16/78, 4 December 1978.

[101] Thus the Television Producers' and Directors' Association has recently made two formal complaints to the Corporation concerning sponsorship of programmes; see *NZ Listener*, June 6, 1981, p.14.

which together provide a detailed code of standards and rules, whereas the standards used by the Press Council are largely unwritten and are characterised by generality.

The fundamental differences between the two complaints systems are readily apparent when decisions of the complaint-hearing bodies are compared. With regard to substantive matters, broadcasting stations are generally required by the Tribunal to maintain adequate procedures for ensuring balance in the long term coverage of each controversial issue, whereas it appears that newspapers are not subject to such a requirement, although individual papers may impose one on themselves voluntarily. The right of broadcasting stations to "editorialise" is severely circumscribed, while the Press Council is vigilant in upholding this right for newspapers. Broadcast advertisements must comply with a plethora of rules and conditions (although broadcasters have demonstrated a penchant for getting around some of them or, in the case of alcohol advertising, for "misinterpreting" them), but the Press Council does little to control newspaper advertisements. The perplexing problem of "good taste" receives similar treatment in both systems, but the Broadcasting Tribunal goes further than the Press Council in that it will consider allegations of indecency and obscenity. An exception to the general pattern is the question of the regulation of reporters' methods; the deficiencies of the broadcasting system in this area are the result of an uncharacteristic omission from the *Standards and Rules*.

With regard to procedural matters, both complaints systems stand at a carefully calculated distance from the courts of law. The Tribunal, however, is bound more closely to the legal system than the Press Council, with the result that the Tribunal has greater investigative and disciplinary powers and broadcasting enjoys correspondingly less freedom and more accountability. A more serious threat to the independence of broadcasting stems from the role played by the Government, and in particular the requirement that regard be paid to Government broadcasting policy; this threat does not yet endanger the self-regulated press. In addition to the advantages of freedom, the press complaints procedure has the attraction that it caters in a small way for complaints by the media. There is no equivalent provision in the broadcasting complaints procedure, and broadcasters have no right to appeal against adverse decisions.

Upon close analysis it appears that there are three fundamental differences between the broadcasting and newspaper complaints systems. First, the broadcasting procedures and rules stem, albeit indirectly in most cases, from the Government, whereas the press procedures and rules are applied voluntarily. Second, the broadcasting complaints system applies to all stations while the press system does not have universal application. Third, the Broadcasting Tribunal has much more power than the Press Council; this power derives from the Broadcasting Act.

Attempts have been made at appropriate points in the paper to advance reasons to explain the differences between the two systems. The final question is whether either system requires substantial modification.

In answering this question, it is assumed that the ideal system is the one that best serves the wider public interest. If the matter were to be considered simply as a *tabula rasa*, it would be submitted that the public interest is

best served by the broadcasting complaints system, and that the application of such a system to the press would be in the public interest. When the immensely important question of the freedom and independence of the press is introduced the problem assumes a speculative nature. The speculative content arises because it is impossible to reliably predict the practical significance which the introduction of Government regulation would have for press freedom. This is a matter for personal assessment, but it is submitted that the need for a genuinely free press grows with the expansion of executive power. Once press freedom is lost it may prove irrecoverable, and it is submitted that the press complaints procedure is not so deficient as to require that press freedom be placed in jeopardy in an effort to improve it. It is therefore suggested that the voluntary press system of self-regulation be continued, perhaps with some modifications along the lines suggested in this paper. Some thought should be given to the introduction of legislation making membership of the N.P.A. (and hence the Press Council) compulsory for certain classes of newspapers, thereby allowing the N.P.A. to discipline members who do not co-operate with the Council, but beyond that the Government should not go.

It is interesting to note that the then Prime Minister, Mr N. E. Kirk, suggested in 1973 that the Press Council should extend its ambit to cover broadcasting,[102] but it is submitted that there is now little merit in this proposal. The broadcasting complaints system is working reasonably well, and it is suggested that a system of voluntary self-regulation is presently inappropriate to broadcasting. There is scope for improvement, but it is submitted that with some minor alterations the current system will continue to work effectively provided that the Government is able to restrain itself from interfering, whether by legislation, regulation or directive, in the sacrosanct sphere of programme standards. It is in the best interests of broadcasters and the public to give the Government every encouragement in this regard.

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[102] *New Zealand Parliamentary Debates*, vol. 388, p.5314 (1973).