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Moving from Self-Justification to Demonstrable Justification — the Bill of Rights and the Broadcasting Standards Authority

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Introduction

In 2006, at the behest of the Broadcasting Standards Authority (the BSA), Professor John Burrows conducted a review of one year of BSA decision making (2005), evaluating it from the perspective of legal robustness, and the quality and consistency of the BSA's legal reasoning.¹ In the course of this review, he examined the BSA's treatment of the New Zealand Bill of Rights Act 1990 ("the Bill of Rights").² He began

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¹ J F Burrows, "Assessment of Broadcasting Standards Authority Decisions", paper commissioned by Broadcasting Standards Authority, April 2006 <http://www.bsa.govt.nz/publications-booksandreports.php> (accessed 9 May 2008).

² Burrows, "Assessment of Broadcasting Standards Authority Decisions", pp 16-19.

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by setting out the two principal ways in which the Bill of Rights is relevant to the BSA's complaints function: first, to the interpretation of the broadcasting standards that the BSA enforces; and secondly, to the application of those standards in individual cases.³ He then turned to the approach taken by the BSA to the Bill of Rights in its 2005 decisions.

Professor Burrows noted with some unease that in the vast majority of cases the BSA had mentioned the Bill of Rights only by way of a standard clause in which it recorded that, having given "full weight" to the Bill of Rights, the BSA considered the proposed exercise of its powers to be consistent with it.⁴ "The use of this kind of boilerplate," he warned, "does not carry much conviction, but it is certainly better than nothing in that it indicates that the Bill of Rights has not been forgotten."⁵

While warning that this approach was likely to attract criticism from some quarters, he could not bring himself to conclude that in the ordinary run of cases, it was insufficient.⁶ Underlying Professor Burrows' reasons for this was a particular concern with the value of simplicity in administrative decision making. His starting point was the importance of the BSA's decisions being accessible and understandable, including to people who are not legally trained. In comparison, he pointed out, Bill of Rights reasoning can be "quite sophisticated, not to say complex".⁷ He also questioned how informative many "proportionality" analyses conducted under s 5 of the Bill of Rights (to determine whether limits on rights are reasonable) really are.⁸ Perusal of a number of such analyses including those contained in reports issued by the Attorney-General under s 7 of the Bill of Rights had, he said, left him "none the wiser as to why the decision was made as it was".⁹ His ultimate conclusion was that although the BSA ought to consider engaging in a

³ Burrows, "Assessment of Broadcasting Standards Authority Decisions", p 17. The Bill of Rights is also relevant to the BSA's standard-setting function but that was not the focus of Professor Burrows' evaluation, nor is it the focus of this essay.

⁴ Burrows, "Assessment of Broadcasting Standards Authority Decisions", p 18.

⁵ Burrows, "Assessment of Broadcasting Standards Authority Decisions", p 18.

⁶ Burrows, "Assessment of Broadcasting Standards Authority Decisions", pp 18-19.

⁷ Burrows, "Assessment of Broadcasting Standards Authority Decisions", p 18.

⁸ Section 5 says that subject to s 4 (which preserves legislative enactments), the rights and freedoms contained in the Bill of Rights "may be subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society". The concept of "proportionality" which underlies it is discussed below.

⁹ J F Burrows, "Assessment of Broadcasting Standards Authority Decisions", paper commissioned by Broadcasting Standards Authority, April 2006 <http://www.bsa.govt.nz/publications-booksandreports.php> (accessed 9 May 2008), p 18. Section 7 requires the Attorney-General to report to Parliament whenever a new Bill appears to be inconsistent with the Bill of Rights.

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more explicit Bill of Rights analysis in the occasional particularly difficult case, in the vast majority of cases its existing boilerplate was sufficient.¹⁰

In this evaluation, with the insight and wisdom that we have come to expect of him, Professor Burrows put his finger on what we would suggest is a significant roadblock to the application of the Bill of Rights in the administrative law context — an obstacle that has not been fully confronted by the courts or indeed by academic commentators. It is that much of the complex and technical jurisprudence in which the Bill of Rights has been swathed is not readily accessible, intelligible or even obviously applicable to tribunals (and other persons or bodies) charged with first instance administrative decision making.

In this paper, we explore that problem of accessibility, concentrating on two issues that are deftly highlighted in Professor Burrows' evaluation: the complexity and unhelpfulness of Bill of Rights jurisprudence on the one hand and the lay nature of many administrative tribunals on the other. In light of these issues, it is understandable that the BSA has been somewhat reluctant to adopt a Bill of Rights methodology and that, when forced to do so, it has struggled to bring it coherence. Professor Burrows' conclusion that it would not be fair to expect a first instance administrative tribunal to engage in a technical and largely meaningless "proportionality" analysis is also understandable — particularly in light of his overall conclusion that the BSA's general reasoning was of a high quality.¹¹

Our concern, however, is that the BSA's "boilerplate" approach does not provide sufficient assurance that the BSA is meeting its legal obligation to comply with the Bill of Rights in every case. The boilerplate does not spell out a Bill of Rights-inspired line of investigation or analysis. Instead, it contains a retrospective assertion of consistency with the Bill of Rights based on reasons already given — a case more of self-justification than (adopting the language of s 5 of the Bill of Rights) demonstrable justification.

What first instance decision makers such as the BSA need is straightforward, practical and context-specific guidance as to how to translate the notion of proportionality that lies at the heart of the s 5 inquiry into a methodology that assists rather than hampers its decision-making processes. We believe that this can be done and in the latter half of this paper, we attempt to do so. We translate the concept of proportionality into a detailed but relatively simple framework in which the BSA can systematically identify, evaluate and weigh the two sets of competing values at stake: those underlying freedom of expression and those underlying the competing social objectives of broadcasting

¹⁰ Burrows, "Assessment of Broadcasting Standards Authority Decisions", p 19. Understandably given the broad focus of his evaluation, he did not expand on what the more explicit analysis to be conducted in difficult cases ought to look like.

¹¹ Burrows, "Assessment of Broadcasting Standards Authority Decisions", pp 1 and 20.

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regulation. Although we concentrate on the BSA, the approach we develop may be of assistance to other administrative decision makers, particularly those who, like the BSA, are integrally concerned with the regulation of speech.

In developing this approach, we deliberately steer clear of a related set of issues concerning the circumstances in which the Bill of Rights might require the Courts to interfere in the BSA's decision-making processes on appeal or review. Although closely connected, these issues ought to be thought of as distinct because they are complicated by institutional concerns surrounding the proper role of the courts vis-à-vis first instance decision makers. For want of space, we do not take up those issues in this paper.¹² They are both important and difficult (one might even say intractable) but they should not be allowed to contaminate the key underlying question as to how the BSA and other administrative decision makers ought best to discharge their own responsibilities under the Bill of Rights.

The regulation of broadcasting standards in New Zealand

The statutory regime for the regulation of broadcasting standards is found in the Broadcasting Act 1989 ("the Act"). The Act establishes the BSA, a Crown entity whose main functions are approving codes of broadcasting practice and determining complaints that those codes have been breached.¹³ The BSA consists of four members, one of whom (the chair) must be an experienced lawyer, one of whom is appointed after consultation with representatives of the broadcasting industry, and one of whom is appointed after consultation with "representatives of public interest groups in relation to broadcasting".¹⁴

The Act contemplates two tiers of broadcasting standards: those imposed directly on broadcasters by the Act and those considered more appropriate for development by broadcasters themselves, in conjunction with the BSA. The first tier is found in s 4(1) of the Act. It imposes on broadcasters the responsibility for maintaining in their programmes and their presentation, standards which are consistent with five stated heads:

- the observance of good taste and decency;
- the maintenance of law and order;
- the privacy of the individual;

¹² See, though, the helpful recent analysis in J McLean, "The Impact of the Bill of Rights on Administrative Law Revisited: Rights, Utility, and Administration" [2008] NZ Law Rev (forthcoming).

¹³ Broadcasting Act 1989, Part 3.

¹⁴ Broadcasting Act 1989, s 26.

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- the need for balance;¹⁵ and
- any applicable “approved code of broadcasting practice”.

The second tier of broadcasting standards is found in s 21(1)(e), which lists the subject heads in respect of which “approved codes of broadcasting practice” can be made. These are:

- the protection of children;
- the portrayal of violence;
- fairness and accuracy;
- safeguards against the encouragement of denigration or discrimination of certain groups;
- restrictions on the promotion of liquor;
- the presentation of appropriate warnings; and
- the privacy of the individual.¹⁶

The BSA’s functions include encouraging the development and observance by broadcasters of codes of broadcasting practice, approving these codes and, in any case where it considers it appropriate, itself developing and issuing codes.¹⁷ In practice the BSA has not drawn up any codes of its own but has approved four codes drawn up by representatives of the country’s broadcasters and relating to free-to-air television, radio, pay TV and election programmes respectively.¹⁸ The first two of these are of widest application. Both range freely over all of the subject heads listed in s 21(1)(e), as well as the additional heads listed in s 4(1).¹⁹

The content of the two codes is substantially similar, though not identical. Both are divided into “standards” or “principles” (which purport to lay down binding rules) and more detailed “guidelines” (which purport to assist in the interpretation of the

¹⁵ Specifically, “the principle that when controversial issues of public importance are discussed, reasonable efforts are made, or reasonable opportunities are given, to present significant points of view either in the same programme or in other programmes within the period of current interest”: s 4(1)(d).

¹⁶ For reasons that are unclear, this last subject head replicates a head stated in s 4(1).

¹⁷ Broadcasting Act 1989, s 21(1).

¹⁸ We understand that the “approval” process has been a hands-on one in which the BSA has considered itself free to withhold approval if not satisfied with content: see, for example, BSA *Annual Report for the year ended 30 June 2001*, p 8.

¹⁹ Incidentally, we think this latter practice is ultra vires. We also think that Principle 7 of the Radio Code (to the extent that it purports to prescribe a broad standard of “social responsibility” that goes beyond the specific situations contemplated in the attached “guidelines”) and Principle 9 of the Radio Code (requiring broadcasters to retain tapes and transcripts for a period of 35 days) are ultra vires. See, in this latter respect, the separate rule-making power in the Broadcasting Act 1989, s 30.

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standards/principles).²⁰ In addition to the codes, the BSA has sought to give additional guidance by issuing “advisory opinions”²¹ and, more recently, by issuing practice notes on particular issues.²²

Turning to the complaints jurisdiction that is the focus of this paper, the Act enables members of the public to complain about breaches of the broadcasting standards found in s 4 of the Act and in the approved codes.²³ With the exception of privacy, such complaints must be made at first instance to the broadcaster whose actions are being complained of.²⁴ If the complainant is dissatisfied with the result of that process (or if a privacy issue is raised) the complainant can complain to the BSA.²⁵ The BSA is required to deal with complaints with “as little formality and technicality as is permitted” by “the requirements of [the] Act,” by “a proper consideration of the complaint” and by “the principles of natural justice”.²⁶

The BSA receives about 200 complaints a year. It upholds, on average, between 20 and 25 per cent. In about half the complaints it upholds, it issues no further penalty. When it does, it usually orders the broadcaster to broadcast a statement and, if the breach is serious, to pay a fine in the form of costs to the Crown.²⁷ It can award damages only in privacy cases, and even then, only up to \$5000.²⁸ Such awards are relatively rare. In extreme cases, the BSA has powers to order a broadcaster not to broadcast advertisements — or to go off-air altogether — for up to 24 hours.²⁹ It has only used those powers a handful of times.³⁰

Broadcasters and complainants can appeal the BSA’s decisions to the High Court, which must hear and determine the appeal “as if the decision or order appealed against had been made in the exercise of a discretion”.³¹ The decision of the High Court on such an appeal is final.³²

²⁰ Often, the former go little further than the statutory criteria, with much of the real assistance being given in the so-called “guidelines”. Note that since this paper was written a revised Radio Code has been issued that adopts the Free-to-Air Television Code’s nomenclature of “standards” instead of “principles”. The revised code is not considered here.

²¹ See Broadcasting Act 1989, s 21(1)(d). The most significant of these is the “Privacy Principles” which can now be taken to have been incorporated by reference (and by being appended) into the codes themselves.

²² <http://www.bsa.govt.nz/codesstandards-practicenotes.php> (accessed 9 May 2008). This move may well have been prompted by one of the recommendations made in Professor Burrows’ evaluation.

²³ Broadcasting Act 1989, Part 2.

²⁴ Broadcasting Act 1989, s 6.

²⁵ Broadcasting Act 1989, s 8.

²⁶ Broadcasting Act 1989, s 10(2).

²⁷ See Broadcasting Act 1989, ss 13 and 16.

²⁸ Broadcasting Act 1989, s 13(1)(d).

²⁹ Broadcasting Act 1989, s 13(1)(b).

³⁰ *Re NZ Business Roundtable* [1991] NZAR 63; *Diocese of Dunedin v TV3* 1999-125; *Barnes v Alt TV* 2007-029.

³¹ Broadcasting Act 1989, s 18.

³² Broadcasting Act 1989, s 19.

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The Bill of Rights and administrative action: getting the basics right

Section 14 of the Bill of Rights protects the right “to freedom of expression, including the freedom to seek, receive, and impart information and opinions of any kind in any form”. The broadcasting standards regime limits that right.³³ This point is so obvious that we would not feel the need to articulate it if there were not at least one contrary High Court authority.³⁴ The very *raison d’être* of the broadcasting standards regime is to define and enforce a set of circumstances in which limits can be imposed on the freedom of broadcasters to say what they like, how they like and when they like. It imposes those limits first, by setting out broadcasters’ own statutory responsibilities to maintain certain broadcasting standards and secondly, by empowering an independent authority to impose binding sanctions for default.

As in Canada, the New Zealand approach to freedom of expression is to define what counts as expression widely and to balance any conflicting interests separately as part of the reasonableness assessment mandated by s 5 of the Bill of Rights.³⁵ Issues such as the quasi-consensual nature of the standard-setting process, the absence of a power of prior restraint and the relatively minor nature of the sanctions available under the Act (if indeed they are to be regarded as such)³⁶ are thus relevant to the latter assessment rather than to whether there has been a breach of the *prima facie* right.

This being so, the issue at the heart of this paper is what role the Bill of Rights ought to play in influencing or constraining the BSA’s power (and duty) to determine complaints of breaches of broadcasting standards. A convenient starting point is Professor Burrows’ own: that the Bill of Rights impacts on the BSA’s adjudicative function in two ways. First, it assists in the interpretation of the statutory standards; and secondly, it constrains the BSA from upholding complaints against broadcasters unless satisfied that the limits it would thus be imposing on

³³ See, for example, *A Bill of Rights for New Zealand: A White Paper* (1985) I AJHR A6, para 10.57, detailing the range of ways in which freedom of expression can be limited.

³⁴ *CanWest TVWorks Ltd v XY* (High Court, Auckland, CIV 2006-485-002633, 22 August 2007, Harrison J) at para [66].

³⁵ See *Moonen v Film and Literature Board of Review* [2000] 2 NZLR 9 (CA) at para [15] per Tipping J. Compare the apparently contrary approach taken by the Chief Justice in two recent cases, though without the support of her colleagues: *Brooker v Police* [2007] 3 NZLR 91 (NZSC); and *Rogers v Television New Zealand* [2007] NZSC 91.

³⁶ We note in this respect that the BSA’s power to take a broadcaster off-air, a power with significant economic consequences, has now been exercised on one occasion: *Barnes v Alt TV Ltd* 2007-029.

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freedom of expression are reasonable and justified in terms of s 5 of the Bill of Rights.³⁷

Whereas the first limb of this proposition is uncontroversial, the second has been doubted by some High Court Judges. So in *Television New Zealand Ltd v Ministry of Agriculture and Fisheries* McGechan J accepted that where there “genuinely is room for interpretation” of the broadcasting standards, freedom of expression is to be protected, but rejected the proposition that the BSA should only find against a broadcaster where the finding is demonstrably justified in a free and democratic society.³⁸ Similarly in *TV3 Network Services Ltd v Holt* Rodney Hansen J held that the BSA had gone too far in purporting to test its individual decisions against s 5 and that the impact of the Bill of Rights was only on the standards rather than on individual complaints.³⁹

With respect, that approach is based on an impoverished notion of what the interpretive obligation in s 6 of the Bill of Rights requires.⁴⁰ Certainly, s 6 has an important ambiguity-resolving function: it requires an interpreter faced with two contrasting articulations of what statutory language might mean to choose an articulation that promotes consistency with the Bill of Rights.⁴¹ Section 6 is, however, by no means limited to cases of textual ambiguity. It also requires statutory language that confers a power, function or discretion to be read subject to an implicit proviso: that it cannot lawfully be exercised in a manner that would be inconsistent with the Bill of Rights. This is a proposition that has been clearly accepted in a number of cases at appellate level.⁴² It is only if the terms in which the power, function or discretion is expressed (read in context) clearly require it to be exercised in a manner that is

³⁷ J F Burrows, “Assessment of Broadcasting Standards Authority Decisions”, paper commissioned by Broadcasting Standards Authority, April 2006 <http://www.bsa.govt.nz/publications-booksandreports.php> (accessed 9 May 2008), p 17.

³⁸ *Television New Zealand Ltd v Ministry of Agriculture and Fisheries* (High Court, Wellington, AP 89/95, 13 February 1997) at 34-35.

³⁹ *TV3 Network Services Ltd v Holt* [2002] NZAR 1013 at paras [37]-[41]. For the contrary (we think correct) view see the decisions of Wild J in *Television New Zealand Ltd v Viewers for Television Excellence Inc* [2005] NZAR 1 (HC) at para [48]; and *Browne v CanWest TV Works Ltd* [2008] 1 NZLR 654 (HC) at paras [33]-[40]. See also *TV3 Network Services Ltd v ECPAT New Zealand Inc* [2003] NZAR 501 (HC) at para [42].

⁴⁰ Section 6 says that wherever an enactment can be given a meaning that is consistent with the rights and freedoms contained in the Bill of Rights, that meaning is to be preferred.

⁴¹ See *R v Hansen* [2007] 3 NZLR 1 (NZSC).

⁴² For example, *Drew v Attorney-General* [2002] 1 NZLR 58 (CA) at para [68]; *Zaoui v Attorney-General (No 2)* [2006] 1 NZLR 289 (NZSC) at para [91]. This is really no more than an application of the common law “principle of legality” that, in the absence of express language or necessary intent, the courts will presume that general words in a statute are subject to the basic rights of the individual: see, for example, *R v Secretary of State for the Home Department, ex parte Simms* [2000] 2 AC 115 (HL) at 131 per Lord Hoffmann.

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inconsistent with the Bill of Rights that s 4 (preserving contrary legislative enactments) becomes relevant.⁴³

It is important to be clear about what (in)consistency with the Bill of Rights means in this context. For that, one need look no further than the recent decision of the Supreme Court in *R v Hansen*.⁴⁴ In it a majority of Supreme Court justices held that the s 6 requirement that enactments be interpreted consistently with the Bill of Rights does not mandate consistency with rights and freedoms in their undiluted form but rather, consistency with the proposition that the only limits that should be placed on rights are ones that are demonstrably justifiable in terms of s 5 of the Bill of Rights.⁴⁵ In short, “consistency” in s 6 means consistency with s 5. For now at least, that is the law in New Zealand.⁴⁶ It places s 5 at the centre of the correct methodology. We refrain from endorsing it unreservedly as a principle of general application but we do agree that at its heart, Bill of Rights methodology is there to promote reasonable accommodations between competing rights and interests — a goal that is surely shared by administrative law.

To repeat, in addition to its ambiguity-resolving function, s 6 of the Bill of Rights also places a gloss on the exercise of statutory powers, functions or discretions. In administrative law cases, it is this latter application of s 6 that is likely to be most significant. Doubtless, administrative decision makers ought constantly to be alert to the possibility that one or more aspects of the language in which their power is conferred might be capable of generating competing meanings. Too exclusive a focus on words and their meaning, however, may distract from the real impact of s 6 on administrative action. That is because the boundary between a reasonable and unreasonable exercise of a statutory power, function or discretion is not always capable of articulation by way of contrasting “meanings”. Rather, it may simply be a question of degree.

For example, a complaint is made that a sex scene offends the notion of “decency” found in the Act and approved codes. The Bill of Rights requires the BSA only to uphold the complaint if to do is a justifiable limit on freedom of expression. It is unhelpful, however, for the BSA to attempt to articulate by way of competing meanings where the line is to be drawn. (One nipple versus two?) Rather, it needs to undertake an overall evaluation of the degree of interference with the values underlying broadcasting standards and the degree of interference with

⁴³ Section 4 says that no Court shall hold any provision of an enactment to be impliedly repealed or revoked, or to be in any way invalid or ineffective, or decline to apply any provision of an enactment by reason only of its inconsistency with the Bill of Rights.

⁴⁴ *R v Hansen* [2007] 3 NZLR 1 (NZSC).

⁴⁵ *R v Hansen* [2007] 3 NZLR 1 at paras [57]-[59] per Blanchard J, paras [89]-[91] per Tipping J and paras [186]-[189] per McGrath J.

⁴⁶ The Chief Justice dissented (*R v Hansen* at paras [6] and [15]-[24]) and has continued to assert her alternative view in subsequent cases.

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the values underlying freedom of expression.⁴⁷ Professor Burrows captured this notion in his BSA evaluation by describing the proportionality assessment mandated by s 5 as often being a matter of “impression”.⁴⁸

It should be clear from this analysis that the error fallen into by McGechan and Rodney Hansen JJ in the cases discussed above was in drawing a rigid distinction between the role of the Bill of Rights in the “interpretation” of broadcasting standards on the one hand and their “application” on the other. These are two sides of the same coin. It is the interpretive power of s 6 of the Bill of Rights that requires statutory powers, functions or discretions to be read (unless the statute clearly directs otherwise) subject to an implicit rider that it cannot be exercised inconsistently with the Bill of Rights. This in turn places an obligation on decision makers, in each case, to act within the constraints of reasonableness and justifiability established by s 5. If they did not, they would be acting in excess of their statutory authority as properly defined.

This analysis also renders irrelevant another question that has preoccupied High Court Judges in the BSA context: the question of whether the codes are “enactments” for the purposes of s 6.⁴⁹ Clearly they are not and accordingly, s 6 does not apply directly to them.⁵⁰ But that is beside the point. The codes must where possible be interpreted and applied consistently with the Bill of Rights because their authorising statute is directly subject to s 6. The only alternative is to hold that the codes are ultra vires their authorising statute. Thus the constraints on the authorising statute flow down directly to the interpretation and application of the subsidiary legislation.⁵¹

Even if s 6 did not mandate this result, it would be compelled by the combined effect of ss 3 and 5 of the Bill of Rights. When determining complaints, the BSA is doing an act “in the performance of ... a ... public function, power or duty conferred or imposed on the BSA by or pursuant to law” in accordance with s 3(b) of the Bill of Rights. Accordingly, the Bill of Rights (including s 5) applies to that act and the BSA is constrained by it.

In short, therefore, the BSA is constrained in its adjudicative activities not to impose limits on broadcasters that are “unreasonable” in terms of

⁴⁷ We discuss below how that might be done.

⁴⁸ J F Burrows, “Assessment of Broadcasting Standards Authority Decisions”, paper commissioned by Broadcasting Standards Authority, April 2006 <http://www.bsa.govt.nz/publications-booksandreports.php> (accessed 9 May 2008), p 18.

⁴⁹ See, for example, *Television New Zealand Ltd v Viewers for Television Excellence Inc* [2005] NZAR 1 (HC) at paras [31]-[34]; *CanWest TVWorks Ltd v XY* (High Court, Auckland CIV 2006-485-002633, 22 August 2007, Harrison J) at para [64].

⁵⁰ See the definitions of “enactment” and “regulation” in the Interpretation Act 1999, s 29.

⁵¹ *Drew v Attorney-General* [2002] 1 NZLR 58 (CA) at para [68].

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s 5 of the Bill of Rights. That is so first, because the authorising statute is itself constrained by s 6 and secondly because the BSA is directly constrained by ss 3 and 5.⁵² The only exception is that to the extent (but only to the extent) that the authorising statute itself compels limits on freedom of expression that fail to meet the s 5 standard, the BSA is mandated by s 4 of the Bill of Rights to do likewise.

All of this follows inescapably from a proper understanding of the Bill of Rights' operative provisions, but this is (or ought to be) only the starting point. The real difficulty is in translating s 5 of the Bill of Rights into a meaningful methodology that is intelligible and accessible to administrative decision makers. Before we confront that difficulty, however, we turn to summarise the BSA's own approach to the Bill of Rights.

The BSA's approach to the Bill of Rights

The BSA's approach to the Bill of Rights has varied over time.⁵³ For example, for the first decade of its life, the BSA barely mentioned the Bill of Rights at all. Since 2001, however, it has inserted a standard paragraph on the Bill of Rights into many of its decisions. The precise wording of this "boilerplate" and the exact circumstances in which it is invoked have changed over time. In general, the standard paragraph records that the BSA has considered the Bill of Rights and has concluded that any restrictions on speech resulting from the decision the BSA has reached in the particular case are consistent with the Bill of Rights.⁵⁴ The BSA does not generally explain how it goes about

⁵² This is something more than an obligation to treat the Bill of Rights as a "mandatory relevant consideration" and the invocation of that language, with its connotation of ultimate administrative discretion, is unhelpful. For examples of this defect see *Television New Zealand Ltd v Viewers for Television Excellence Inc* [2005] NZAR 1 (HC) at para [52]; *CanWest TVWorks Ltd v XY* (High Court, Auckland, CIV 2006-485-002633, 22 August 2007, Harrison J) at para [64].

⁵³ This survey reflects the evolution of BSA jurisprudence up to 2 February 2008 when the conference paper on which this essay is based was presented. There are recent indications of further changes to the BSA's Bill of Rights approach, in part as a result of circulation of our conference paper. They are not canvassed in this discussion but the most significant are adverted to in nn 56, 59 and 62 below.

⁵⁴ For different versions see, for example, *Robertson v TVNZ* 2001-087; *Anderson v Channel Z* 2001-131; *Mann v TVNZ* 2001-137; *Lehmann v Radioworks* 2002-077; *Anderson v TVNZ* 2003-103; and, when not upholding a complaint, *Boyce v Radio NZ* 2001-122 and *Boyce v TVNZ* 2002-207. See also nn 55-59 below. Some of these changes may have been in response to High Court decisions, which have not always given consistent guidance.

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considering the Bill of Rights or why it has concluded that particular decisions are consistent with it.⁵⁵

The BSA's current boilerplate reads as follows:⁵⁶

For the avoidance of doubt, the Authority records that it has given full weight to the provisions in the New Zealand Bill of Rights Act 1990 and taken into account all the circumstances of the complaint in reaching this determination. For the reasons given above, the Authority considers that its exercise of powers on this occasion is consistent with the New Zealand Bill of Rights Act.

Under its current approach, the BSA does not consider it necessary to refer to the Bill of Rights at all when rejecting complaints.⁵⁷

Very occasionally, the BSA varies the boilerplate so as to spell out that it has also given "full weight" to the Bill of Rights when deciding whether to impose an order.⁵⁸ In most cases, however, the BSA makes no reference to the penalty in its Bill of Rights boilerplate, and makes no reference to the Bill of Rights in the sections of its decisions dealing with penalty, even where penalty is a very significant issue.⁵⁹

⁵⁵ In 2001 the BSA would occasionally emphasise particular aspects of its reasoning in its Bill of Rights paragraph: see for example, *Watson v TV3 Network Services* 2001-210; *Blackburn v TV3 Network Services* 2001-211; *Holt v TV3 Network Services* 2001-212. In addition, a handful of cases contain a much more detailed discussion of the BSA's approach to the Bill of Rights although even these cases provide little information about how the Bill of Rights is being applied to the case at hand: see *R K Watkins v RadioWorks* 2001-071; *Macdonald v TVNZ* 2002-071 at paras [100]-[109]; *Prime Minister v TV3* 2003-055 at paras [249]-[260].

⁵⁶ This is the same "boilerplate" that was critiqued by Professor Burrows. It was initially adopted by the BSA in April 2004 (*Northern Inshore Fisheries Company v TVNZ* 2004-038 at para [44]). Since 2005, it has been deployed fairly routinely: see, for example, *Continental Car Services v TVNZ* 2005-081; *Benson-Pope v Radio NZ* 2005-083; *KW v TVNZ* 2006-087; *Russek v TVNZ* 2007-016; *Hood v TVNZ* 2007-028. For occasional exceptions see *Harris v CanWest TVWorks* 2005-049; *Tumbangai v TVNZ* 2005-101; *NZ Council of Licensed Firearms Owners v TVNZ* 2006-083; *Brereton v TVNZ* 2007-049. For further changes to the boilerplate since the conference paper on which this essay is based was circulated see, for example, *Marsh v TVWorks* 2007-026 at para [45] and *Livesy v TVNZ* 2007-092 at para [19].

⁵⁷ For a different approach in earlier cases see *Reserve Bank of NZ v RadioWorks* 2001-103; *Hooker v TV4* 2001-217; *Anderson v TVNZ* 2003-028. The only current exception is cases involving denigration and discrimination: see n 63 below.

⁵⁸ For example, *Dujmovic v CanWest TVWorks* 2004-216; *Daly v TVNZ* 2005-130; *Hegarty v CanWest TVWorks* 2006-009.

⁵⁹ See, for example, *Barnes v Alt TV Ltd* 2007-029, the only case in which the BSA has exercised its power to take a broadcaster off-air. See, though, *Shieffellbien v RadioWorks* 2007-102 at para [27]; *Wellington City Council v Radio NZ* 2007-056 at [45]; *Spring v TRN* 2007-108 at para [45] — cases issued since the conference paper on which this essay is based was circulated. It appears from these cases that the BSA has changed its boilerplate to indicate that it has also considered the Bill of Rights in deciding to impose a penalty.

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The boilerplate is almost invariably asserted towards the end of the decision and the reference in it to “the reasons given above” is a reference to the BSA’s general reasoning about why the standards have been breached. That general reasoning is often of high quality. Professor Burrows, in his evaluation, was impressed overall with the level of rigour and analysis shown in the BSA’s decisions, and we agree with that general assessment.⁶⁰ The Bill of Rights is not, however, usually mentioned in this general reasoning process. The boilerplate thus contains a retrospective assertion of consistency with the Bill of Rights based on general reasons already given, rather than an attempt to spell out a Bill of Rights-inspired line of investigation or analysis.

What is clear from the boilerplate is that the BSA does appreciate that in order to comply with the Bill of Rights, the BSA must ensure that its decisions on individual complaints are “consistent” with the Bill of Rights. Further, in two recent decisions, the BSA has made it clear that in its view, “consistency” means consistency with the standards of reasonableness and justifiability found in s 5.⁶¹ In a newsletter in 2005 the BSA explained that s 5 considerations were “built into the Authority’s decision making process” which was “driven by considerations of reasonableness”.⁶² It explained that:

If the Authority intends upholding a complaint, it must ensure that its decision:

- is prescribed by law, ie comes within one of the established broadcasting standards
- is a reasonable interpretation of the relevant broadcasting standard, and thus also a reasonable limitation on the right to freedom of expression
- imposes a limitation on the right to freedom of expression that is justified in a free and democratic society

However, it did not (nor has it anywhere else) explained what the s 5 concepts of “reasonableness” and “justification” might require — an exercise that, in any event, needs to be conducted by reference to the circumstances of the individual case.

⁶⁰ J F Burrows, “Assessment of Broadcasting Standards Authority Decisions”, paper commissioned by Broadcasting Standards Authority, April 2006 <http://www.bsa.govt.nz/publications-booksandreports.php> (accessed 9 May 2008), pp 1 and 20.

⁶¹ *NZ Catholic Bishops Conference v CanWest TVWorks* 2005-112 at paras [88]-[98]; *Simmons v CanWest TVWorks* 2006-022 at paras [63]-[74]. In other words, the BSA has preferred Wild J’s dicta to that of McGechan and Rodney Hansen JJ: see n 39 above and associated text.

⁶² *BSA Quarterly* No 25, February 2005, 1. This understanding is further reflected in changes to the boilerplate made since the conference paper on which this essay is based was circulated: see, for example, *Marsh v TVWorks* 2007-026 at para [45]; *Livesey v TVNZ* 2007-092 at [19].

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It must be acknowledged that this “boilerplate” approach is not quite the whole story. There have been a handful of occasions over the years on which the BSA has been more explicit as to how the Bill of Rights has played into specific decisions. The most systematic example is that the BSA now consistently invokes the Bill of Rights in order to justify a high threshold for denigration and discrimination complaints.⁶³ Less consistently, the BSA has on the odd occasion invoked the Bill of Rights to:

- require extra sensitivity when considering political speech;⁶⁴
- find in favour of the broadcaster when the broadcast is ambiguous;⁶⁵
- adopt a narrow construction of a standard;⁶⁶
- provide latitude to humour and satire;⁶⁷
- provide leeway to a discussion of sexual matters;⁶⁸
- find the breach too minor to warrant punishment;⁶⁹
- set a high threshold in a taste and decency complaint;⁷⁰
- tip the balance in a close case;⁷¹ and
- reason that it is not demonstrably justifiable to restrict matters of legitimate public concern.⁷²

These are, however, rather ad hoc uses of the Bill of Rights. The BSA does not routinely apply these approaches (explicitly, anyway) even in cases that are apparently similar.⁷³ In the vast majority of cases, it relies

⁶³ See, for example, *Berney v CanWest TVWorks* 2005-128 at para [39]; *McGeechan v CanWest RadioWorks* 2006-048 at para [11]; *Chapman v The Radio Network* 2007-076 at para [14].

⁶⁴ *Maori Party v Ruakawa FM* 2005-103 at para [38]. But see also the earlier cases of *Prime Minister v TV3* 2003-055 at para [428]; *Prime Minister v TV3* 2003-077 at para [60] in which the BSA noted that with the increased importance of political speech comes “increased responsibility”.

⁶⁵ *Davidson v RadioWorks* 2001-116; *Reardon v TV3* 2001-120.

⁶⁶ *Dowler v CanWest TVWorks* 2006-074 at para [21].

⁶⁷ *NZ Catholic Bishops’ Conference v TV3* 2005-112 at para [134]. See also *Craig v The Radio Network* 2003-132 at para [22].

⁶⁸ *Faithfull v CanWest RadioWorks* 2005-015 at para [24].

⁶⁹ *Zarifeh v TVNZ* 2002-009 at para [78] (by majority).

⁷⁰ *Morrish v TVNZ* 2005-137 at para [30]. See also *Slocombe v CanWest RadioWorks* 2004-102 at para [12].

⁷¹ *Jaspers v CanWest TVWorks* 2007-060 at para [32]. Arguably, the BSA also used the Bill of Rights as a tie-breaker in the earlier case of *Davidson v RadioWorks* 2001-116.

⁷² *Benson-Pope v Radio NZ* 2005-083 at para [146].

⁷³ So, for example, the Bill of Rights received no special treatment in other politically sensitive cases such as *Robinson v The Radio Network* 2006-023; *Morgan v TVNZ* 2006-072; *Dodd v TVNZ* 2006-096; *Lubbock v TVNZ* 2007-019; nor in other cases involving elements of satire, such as *Wolf v TVNZ* 2007-043; *Palmer v The Radio Network* 2007-054; nor in almost all taste and decency cases,

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solely on its boilerplate. Even when it does invoke the Bill of Rights in the ways described above, there is little explanation of why it is doing so and little evidence of a coherent underlying vision of what the Bill of Rights means for the BSA's decision-making processes.

The failure of Bill of Rights jurisprudence to effectively constrain administrative action

It is clear from the BSA's current approach that the BSA does understand that the Bill of Rights (in particular s 5 of the Bill of Rights) constrains its decision-making authority. It is not, however, clear that the BSA understands what sort of methodology this requires of them, nor that it engages routinely in that methodology in order to resolve particular cases. Instead, the boilerplate approach asks us to accept the BSA's assurances that the Bill of Rights has been understood and applied — an example, as we suggested above, of self-justification rather than “demonstrable justification”.

As we have also said above, the BSA's general reasoning process is fairly rigorous. In fact, it often discloses hints of the sort of balancing process that s 5 of the Bill of Rights requires. For example, the language of the codes themselves often requires the BSA to evaluate the degree of “public interest” in a particular broadcast⁷⁴ — a concept which, as we discuss below, may be helpful in exploring one side of the s 5 balancing equation. The BSA occasionally does this even when not explicitly required to by the codes.⁷⁵ Its decisions also often contain evaluation of the extent to which the broadcast has done harm to a particular individual or to society — an aspect of the other side of the s 5 equation.⁷⁶

We would go further. We suspect that most of the BSA's decisions are substantively consistent with the Bill of Rights. Indeed, as we discuss below, our impression is that over the last few years in particular, without explicitly invoking a Bill of Rights methodology, the BSA has been moving towards a general orientation that often promotes Bill of Rights-consistent outcomes.

including *McNaughton v Prime TV* 2005-109; *Lilley v TVNZ* 2006-037; *Forbes-Dawson v CanWest TVWorks* 2006-109; *Deerness v CanWest TVWorks* 2007-005.

⁷⁴ For example, the Free-to-Air Television Code refers to the public interest in guidelines 2d, 6b, 6c, 6h, 7f, 9h and 10g. In addition, the Privacy Principles refer to “public interest” and the balance standard references to issues of “public importance”.

⁷⁵ See, for example, *De Hart v TV3* 2000-108; *The NZ Woman v TV3* 2002-018; *Land Transport Safety Authority v TVNZ* 2003-102; *Boyce v TVNZ* 2004-003.

⁷⁶ See, for example, *Diocese of Dunedin v TV3* 1999-125; *Macdonald v TVNZ* 2002-071; *Nicol v TVNZ* 2003-070; *Balfour v TVNZ* 2005-129; *Osmose NZ v TVNZ* 2005-140; *Watts v TVNZ* 2005-029.

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As long as the BSA fails to conduct the systematic identification and evaluation of competing values mandated by s 5 of the Bill of Rights, however, it places itself at risk of defaulting on its legal obligations in some cases — and indeed, we believe that some such defaults do occur.⁷⁷ The BSA's current approach, therefore, fails to provide sufficient assurance that the BSA is meeting its legal obligations to comply with the Bill of Rights in every case. An additional concern is that in the absence of an explicit Bill of Rights justificatory framework, the tendency in recent BSA decisions towards more Bill of Rights-consistent outcomes may not survive the current membership. A Bill of Rights orientation has not been internalised into the BSA's decision-making processes.

The failure of the BSA to grapple with an explicit Bill of Rights justificatory framework illustrates a more general malfunction in the practical operation of New Zealand's Bill of Rights. It is that the theoretical role of the Bill of Rights in constraining administrative powers, functions and discretions, as detailed above, has not translated in practice into meaningful constraints on administrative action.

The constraint of Executive and quasi-Executive action must surely be a primary concern of any bill of rights instrument — a concern that in the case of the New Zealand instrument is not (or not significantly) impeded by its inability to constrain primary legislation.⁷⁸ In the early years of the Bill of Rights, therefore, it seemed to commentators that its promise for administrative law was a fulsome one. The Bill of Rights would operate as a “valid constitutional impediment” to rights-inconsistent exercises of administrative power.⁷⁹ Administrative decision makers would thus be subject to the disciplines of a rights methodology and in particular, would need to justify their decisions in terms of the “transparent particularisation and weighing which section 5 [of the Bill of Rights] requires”.⁸⁰

In practice, this promise has not been realised and administrative decision makers have rarely engaged in transparent “proportionality” analyses of the kind that s 5 of the Bill of Rights has been thought to

⁷⁷ It may, for example, have led the BSA to undervalue political speech (*Christian Heritage Party v TVNZ* 2002-173), underutilise the balance standard (*Wicksteed v Radio NZ* 2004-008 and *Powell v TV3* 2005-125) and suppress viewpoints in the name of taste and decency (*Dickinson v The RadioWorks Ltd* 2001-047 and *Robbins v The Beach 94.6FM* 2004-108). These cases are discussed further below.

⁷⁸ See, for example, *NZ Parliamentary Debates — Hansard* vol 502, p 13039, Rt Hon Geoffrey Palmer, 10 October 1989.

⁷⁹ J McLean, P Rishworth and M Taggart, “The Impact of the New Zealand Bill of Rights on Administrative Law” in Legal Research Foundation *The New Zealand Bill of Rights Act 1990* Legal Research Foundation, Auckland, 1992, pp 68-69.

⁸⁰ J McLean, P Rishworth and M Taggart, p 96.

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mandate.⁸¹ The BSA's Bill of Rights "boilerplate" is, we think, a case in point.

In Professor Burrows' evaluation of the BSA's decisions, he hit on two key reasons for the lack of impact the Bill of Rights has had in the administrative law context. On the one hand, much Bill of Rights jurisprudence is not only complex and technical but frankly inapposite to administrative decision making. On the other hand, the lay nature of many administrative tribunals makes it difficult for them, or the audiences to which they speak, to make sense of this jurisprudence. Both these points are worthy of fuller exploration.

The complexity and unhelpfulness of Bill of Rights jurisprudence

Some degree of complexity is inherent in the application of the Bill of Rights (and in particular in the uneasy relationship that exists between its various operative provisions).⁸² It would be fair to say, however, that the Courts have not always acted with an eye for simplicity and for the downstream impact of their jurisprudence on first instance administrative decision making.

The leading Court of Appeal authority on the application of the Bill of Rights in the administrative law context, *Moonen v Film and Literature Board of Review*, is a case in point.⁸³ As is well known, *Moonen* concerned a provision in New Zealand's censorship legislation that deems as objectionable any publication that "promotes or supports, or tends to promote or support" the exploitation of children.⁸⁴ The Court of Appeal considered that the Film and Literature Board of Review had given insufficient weight to the Bill of Rights when interpreting the provision. The Court set out a five-step approach to applying the Bill of Rights when interpreting statutes, the first two steps of which require the interpreter to identify all of the meanings of the legislation that are "properly open" and then to select the one that constitutes the "least possible limitation" on the right or freedom in question.⁸⁵

Others have drawn attention to the error of this approach in requiring the adoption of "most consistent" rather than simply "consistent" meanings and in failing to give sufficient weight to s 5 of the Bill of

⁸¹ For an extremely helpful recent analysis see McLean, "The Impact of the Bill of Rights on Administrative Law Revisited: Rights, Utility, and Administration" [2008] NZ Law Rev (forthcoming).

⁸² For example, the relationship between ss 5 and 6 of the Bill of Rights has troubled Courts from its inception and continues to do so: see the competing positions in *R v Hansen* [2007] 3 NZLR 1 (NZSC), discussed above at nn 44-46 and associated text.

⁸³ *Moonen v Film and Literature Board of Review* [2000] 2 NZLR 9 (CA) per Tipping J for the Court.

⁸⁴ Films, Videos, and Publications Classification Act 1993, s 3(2).

⁸⁵ *Moonen v Film and Literature Board of Review* [2000] 2 NZLR 9 (CA) at para [17] per Tipping J for the Court.

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Rights.⁸⁶ We suggest, however, that the most problematic aspect of the *Moonen* approach is that it assumes that the primary function of s 6 of the Bill of Rights is to assist in the generation of and selection between different “meanings”. As we suggested above, the most important work being done by s 6 in the administrative law context is not aiding in the resolution of textual ambiguities but constraining exercises of administrative authority to those that are reasonable in terms of s 5. Properly analysed, *Moonen* itself was not a case of textual ambiguity. On the Court of Appeal’s own analysis, the perceived error in the board’s approach was not that the board had failed to identify and choose between competing meanings but that it had failed to give any content at all to the statutory language: it had treated “promotes and supports” as synonymous with “depicts”.⁸⁷ It is not clear that a Bill of Rights methodology was required to correct this deficiency. In any event, had the Bill of Rights been correctly applied its primary contribution would have been to ensure that concepts such as “promoting” and “supporting” were applied with sufficiently heightened emphasis and intensity to ensure that findings of objectionability were only made in circumstances that were, in terms of s 5, reasonable and demonstrably justifiable in a free and democratic society.

By implying that the primary import of s 6 of the Bill of Rights is to compel the generation of and selection between competing meanings, the *Moonen* Court set administrative decision makers off on a blind trail that has distracted them from the real work being done by the Bill of Rights in the administrative law context. In any event, the proposed five-step approach set out in *Moonen* is so difficult to apply that, with respect, the Court of Appeal failed to do so in *Moonen* itself.⁸⁸ During the seven years of *Moonen*’s inglorious reign before it was effectively overruled by the Supreme Court in *R v Hansen*,⁸⁹ High Court Judges and administrative tribunals expended a great deal of effort trying to avoid having to apply it and, when they did apply it, rarely did so coherently.⁹⁰

⁸⁶ See, for example, P Rishworth et al *The New Zealand Bill of Rights* Auckland, Oxford University Press, 2003, pp 135-136.

⁸⁷ *Moonen v Film and Literature Board of Review* [2000] 2 NZLR 9 (CA) at paras [26] and [29] per Tipping J for the Court. It is at least questionable whether the relevant passages in the board’s reasoning (see the Court of Appeal’s decision at para [9]) really did manifest this error.

⁸⁸ See *Moonen v Film and Literature Board of Review* [2000] 2 NZLR 9 (CA) at paras [25]-[29] per Tipping J for the Court.

⁸⁹ *R v Hansen* [2007] 3 NZLR 1 (NZSC). Tipping J’s attempt in *Hansen* (at paras [93]-[94]) to avoid overruling *Moonen* by distinguishing the two cases is, with respect, less than convincing and it is most unlikely that the current Supreme Court will apply the *Moonen* approach in any future case.

⁹⁰ The jurisprudence of the Film and Literature Board of Review reflects this problem: see, for example, *Belles-Bottom Boys* Decision No 1, April 2001 at para [11]; *Closer* Decision No 1, 23 February 2005 at para [30]; *Irreversible* Decision No 8, 1 December 2004 at para [101]. The board has often repeated the words of the Full Bench of the High Court in *Moonen v Film and Literature Board of*

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It has yet to be seen whether the replacement methodology proposed by the Supreme Court in *R v Hansen* will fare better.⁹¹ *Hansen* was not, however, an administrative law case and *was* a case about purported textual ambiguity. For that reason, the steps set out in it for applying s 6 of the Bill of Rights may turn out to be of limited assistance to administrative decision makers.⁹²

Turning to the related question of how to conduct the proportionality inquiry mandated by s 5 of the Bill of Rights, the degree of assistance that administrative decision makers can derive on this point from either *Moonen* or *Hansen* is, again, limited. Tipping J for a unanimous Court of Appeal in *Moonen* and all five Supreme Court justices in *Hansen* adopted one variation or another of the Canadian *Oakes* test.⁹³ This test involves a “proportionality” inquiry in which attention is given to the sufficiency of the conflicting legislative objective, to whether there is a “rational connection” between the violating measure and that objective, to whether the restriction on the right goes further than is necessary in order to achieve the statutory objective, and to whether the salutary effects of the legislation outweigh its deleterious effects.

This methodology was designed for the evaluation of the proportionality of legislative breaches of rights rather than for assessing the reasonableness of a particular exercise of administrative power. Applied in this rather different context, it has the potential to create

Review (No 2) [2002] NZAR 358 at para [26] that “[w]e have not exactly found the approach easy of practical application”: see for example *Hostel Part II* Decision No 1, 24 August 2007 at para [101]. See also *R K Watkins v Radioworks* 2001-071, the one case where the BSA fell into the trap of trying to apply the *Moonen* approach. See also *Television New Zealand Ltd v Viewers for Television Excellence Inc* [2005] NZAR 1 (HC) at para [37], where Wild J attempted to apply the *Moonen* test but concluded: “I do not think that exercise works here”.

⁹¹ The challenge for lower courts and first instance decision makers of making sense of and applying *Hansen* is not, however, assisted by the fact that each of the five Supreme Court justices issued separate reasons even on areas of apparent agreement; nor by the fact that in the very next Bill of Rights case to come before it (*Brooker v Police* [2007] 3 NZLR 91) the Supreme Court justices did not seemingly apply the steps they had set out in *Hansen*; nor by the fact that the major fault line that appeared in *Hansen* with respect to the role of s 5 (discussed above at nn 44 and 45 and accompanying text) continues to stubbornly resurface in subsequent cases (*Brooker v Police* [2007] 3 NZLR 91 (NZSC) and *Rogers v Television New Zealand* [2007] NZSC 91).

⁹² That said, the underlying principle established in *Hansen* that “consistency” in s 6 means consistency with s 5 rather than with *prima facie* rights is doubtless relevant to administrative law cases: see above at nn 44-46 and accompanying text.

⁹³ *R v Oakes* [1986] 1 SCR 103 (SC). See *Moonen v Film and Literature Board of Review* [2000] 2 NZLR 9 (CA) at para [18] per Tipping J for the Court and *R v Hansen* [2007] 3 NZLR 1 (NZSC) at para [42] per Elias CJ, paras [64]-[81] per Blanchard J, paras [103] and [120]-[124] per Tipping J, paras [203]-[205] per McGrath J and paras [269]-[272] per Anderson J.

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more shade than light. It is not that any of the limbs of the test are entirely inapposite to administrative decision making but that some of them have little to contribute in practice to the explicit justificatory process. For example, the minimal impairment limb of the *Oakes* test embodies the important idea that even a legitimate reason for limiting a right should not be used to justify an unnecessarily broad restriction. In practice, however, it is difficult if not impossible to articulate why a conclusion that a particular broadcast offends good taste and decency, for example, impairs the right to freedom of expression no more than is reasonably necessary. Questions of degree or intensity do not lend themselves easily to this kind of justification.

A related problem is that the *Oakes* test is dauntingly legalistic and even those with specialist training do not always apply it with great aplomb. This may explain in part Professor Burrows' telling observation that the proportionality analyses undertaken as part of the s 7 vetting process are not always particularly informative.

An alternative approach to s 5 of the Bill of Rights can be found in Richardson J's concurring judgment in the seminal Bill of Rights case of *Ministry of Transport v Noort*. He suggested that a s 5 inquiry is a matter of weighing:⁹⁴

- (1) the significance in the particular case of the values underlying the Bill of Rights Act;
- (2) the importance in the public interest of the intrusion on the particular right ...;
- (3) the limits sought to be placed on the [right] in the particular case; and
- (4) the effectiveness of the intrusion in protecting the interests put forward to justify those limits.

Some appellate authority on freedom of expression reflects a more general balancing approach of this kind.⁹⁵ In our view, this line of authority has more potential for assisting administrative decision makers to make sense of the constraint placed upon them by s 5. Ultimately, however, what first instance decision makers need is practical and context-specific guidance on applying s 5. To date, the numerous High Court decisions on appeal from the BSA have contained little or none of

⁹⁴ *Ministry of Transport v Noort* [1992] 3 NZLR 260 (CA) at 283-284 per Richardson J. Butler and Butler prefer this approach to the *Oakes* test: Andrew Butler and Petra Butler *The New Zealand Bill of Rights Act: A Commentary* Wellington, LexisNexis, 2005, para 6.12.2. See also Hanna Wilberg, "The Bill of Rights and Other Enactments" [2007] NZLJ 112 at 114-115 for helpful suggestions as to how this approach might be clarified and developed. The approach we advocate below is similar to the one she suggests.

⁹⁵ For example, *Hosking v Runting* [2005] 1 NZLR 1 (CA) at 223-259 per Tipping J and *Brooker v Police* [2007] 3 NZLR 91 (NZSC) at 130-146 per McGrath J dissenting (although he characterises the case as a clash of rights situation rather than an application of s 5). See also *R v Hansen* [2007] 3 NZLR 1 (NZSC) at para [64] per Blanchard J, listing Richardson J's approach alongside the *Oakes* test but in practice, applying the latter (at paras [65]-[81]).

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that. In general, High Court Judges have been content to infer from the BSA's general reasoning processes that it has complied with its obligations under the Bill of Rights — even when the BSA has not (as it never does) explicitly undertaken a proportionality inquiry or indeed has not mentioned the Bill of Rights at all. Because the decision of the High Court on an appeal from the BSA is final, there is little opportunity for input at a more senior appellate level.⁹⁶

The lay nature of administrative tribunals

On the other side of the equation is the fact that administrative decision makers often do not have the skills, aptitude or inclination for engaging in refined legal analysis, nor would we want them to. The BSA is, again, a case in point. Although one of its members (the chair) must be a lawyer of some considerable experience the others are lay persons appointed to ensure representation of the key stakeholders: broadcasters and complainants.⁹⁷ One might expect them to bring to the process particular knowledge of the workings of the broadcasting industry and particular intuitions about community standards. With the exception of the chair, one would not expect them to possess a high level of technical legal ability, let alone specialised Bill of Rights expertise.

Further, the BSA is expected to speak in its decisions to a non-legal audience. As the Law Commission has recently pointed out, at the heart of the tribunal system is the expectation that tribunals will improve public access to dispute settlement mechanisms by delivering “simpler, speedier, cheaper and more accessible justice”.⁹⁸ These values are explicitly protected by the Act, which requires the BSA to deal with complaints with “as little formality and technicality” as possible.⁹⁹ Unnecessary legalism is clearly to be avoided.

So what is to be done?

Against that background, it is understandable that the BSA has been resistant to the legalisation of its processes through the imposition of a Bill of Rights framework and that it has resorted to the minimalist

⁹⁶ There is, however, no reason why a judicial review of a decision of the BSA could not be appealed to the Court of Appeal and it is perhaps surprising that more cases have not been pursued by this route.

⁹⁷ Broadcasting Act 1989, s 26.

⁹⁸ NZLC IP 6 *Tribunals in New Zealand* 2008, p 41, quoting Sir William Wade and Christopher Forsyth *Administrative Law* 9th ed, Oxford, Oxford University Press, 2004, p 906. Emeritus Professor Burrows was, of course, one of the commissioners who produced this report.

⁹⁹ Broadcasting Act 1989, s 10(2). See *Television New Zealand Ltd v Viewers for Television Excellence Inc* [2005] NZAR 1 (HC) at para [11]; *Television New Zealand v BA* (High Court, Wellington, CIV 2004-485-1299, 13 December 2004, Miller J) at para [32].

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“boilerplate” approach set out earlier in this paper. We also have considerable sympathy for Professor Burrows’ conclusion that in the majority of cases, the boilerplate approach ought to be regarded as sufficient.

Ultimately, however, we take a different view. We do not think that the concept of proportionality at the heart of s 5 of the Bill of Rights needs to be a complex one, and we are reluctant to accept that it is incapable of translating into a more explicit justificatory process. We suggest below how that might be done. In essence, it involves an explicit identification of the values underlying freedom of speech, the values underlying the broadcasting standards regime, and the extent to which each is implicated in the particular case.

We accept that technical legal tests such as the *Oakes* test ought generally to be avoided. On the other hand, one of the reasons for utilising administrative tribunals such as the BSA is to enable expertise to develop around a particular area of administrative practice.¹⁰⁰ Freedom of expression and the limits that society should place on it are at the heart of the BSA’s jurisdiction, and it is reasonable to expect the members of the BSA to develop a degree of specialised knowledge on those topics. That may well involve developing appropriate training manuals and/or holding training sessions for new members.¹⁰¹

Quite apart from providing assurance to the BSA that it is complying with its legal obligations, engaging in the kind of explicit justificatory process that the Bill of Rights requires may have additional benefits for the BSA itself. First, the absence of an explicit Bill of Rights justificatory process makes it difficult for the High Court to exercise its supervisory responsibilities on appeal or review. Given the highly deferential approach taken by the current High Court Bench, this has not yet created problems (other than lack of guidance) for the BSA. In the absence of an explicit justificatory process, however, a less deferential Court might be tempted to revisit the BSA’s ultimate conclusion in a particular case by conducting the balancing exercise itself. Secondly, a better understanding of the values at stake on either side of the balancing equation will not necessarily inhibit the BSA’s ability to uphold complaints. It may in fact give the BSA greater confidence to restrict speech in appropriate cases.¹⁰²

¹⁰⁰ NZLC IP 6 *Tribunals in New Zealand* NZLC 2008, paras 2.30 and 2.44.

¹⁰¹ NZLC IP 6, paras 4.6-4.10.

¹⁰² For example, we think there are cases where the BSA has undervalued the balance standard because of a failure to appreciate its significance in fostering the very values that underlie the free speech guarantee. See the discussion under the heading “Balance” below.

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Proportionality in action — how the BSA ought to approach its task

What, then, does s 5 of the Bill of Rights require and how might it be operationalised in the context of BSA decision making? It may be helpful to begin by setting out s 5 in full. It provides:

Subject to section 4 of this Bill of Rights, the rights and freedoms contained in this Bill of Rights may be subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.

In short, in order to conform to s 5, limits on rights must be able to jump through two hoops. First, they must be “prescribed by law”. Secondly, they must comply with the mutually reinforcing concepts of “reasonableness” and “demonstrable justification”. These two aspects of the s 5 requirement are discussed in turn below. We begin, however, with some preliminary observations as to the centrality of s 5 to the BSA’s adjudicative function.

As we have said above, the very *raison d’être* of the broadcasting standards regime is to define and police limits on broadcasters’ freedom of expression. By virtue of s 6 of the Bill of Rights we are required to assume, unless the empowering statute clearly directs otherwise, that this regime is capable of being applied to each case in a manner that is consistent with s 5. The standards of reasonableness and justifiability that s 5 entails thus lie at the very heart of the BSA’s adjudicative processes. They are implicated in every single exercise by the BSA of its adjudicative function.

The BSA has sometimes acknowledged the centrality of s 5 to its adjudicative process,¹⁰³ but this has not been made explicit in the structure of its decisions. The Bill of Rights boilerplate appears late in the BSA’s decisions and is used to retrospectively confirm rather than infuse and invigorate the BSA’s reasoning process.

In our view, s 5 ought to operate as the very framework within which the BSA’s overall assessment is conducted. The exercise of judgment required of the BSA when determining whether a complaint ought to be upheld is so similar to the exercise of judgment that is required under s 5 that the two are best thought of as indistinguishable.

We do not think that such a reorientation would significantly disrupt the BSA’s current decision-making processes. As we have already acknowledged, much of the BSA’s general reasoning already discloses elements of the kind of balancing that, we suggest below, s 5 requires. Explicit acknowledgment of s 5 as the framework within which this balancing is to occur would simply add a degree of discipline and systematicity to the balancing exercise.

¹⁰³ For example, *BSA Quarterly* No 25, February 2005, p 1.

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“Prescribed by law”

The first perhaps somewhat neglected requirement that s 5 imposes is that limits on rights must be “prescribed by law.” This aspect of the s 5 inquiry has particular significance for the BSA when engaging in its standard-setting duties. It must ensure that the codes that it approves are clearly authorised by the statute and that they are formulated with sufficient precision to enable broadcasters to regulate their conduct.¹⁰⁴ It must also be wary of undue reliance on subsidiary sources of guidance such as advisory opinions or practice notes as these are not “law” for the purposes of s 5.

The focus of this paper is, however, on the BSA’s adjudicative function.¹⁰⁵ The “prescribed by law” requirement has less significance in that context if for no other reason than having already approved the codes, the BSA will have (or ought to have) also formed a view that they are “prescribed by law” and is unlikely to want to revisit that conclusion when determining an individual complaint.¹⁰⁶ Nevertheless, the BSA ought to give some consideration on each complaint as to whether its proposed action is contemplated with sufficient clarity in the Act and the codes to be “prescribed by law”.

One aspect of this is that the “prescribed by law” standard reinforces the requirement of general law that the BSA must interpret and apply the codes so as to ensure that they are intra vires the authorising statute.¹⁰⁷ More generally, the “prescribed by law” standard demands great care when interpreting general or amorphous concepts such as “privacy” or “fairness”. The BSA ought to ensure that its interpretation and application of such concepts do not transgress the requirement that limits on rights be formulated with sufficient precision to enable broadcasters to regulate their conduct. As this concern with the dangers of vague or overly broad standards also pervades other aspects of the s 5 inquiry, we explore it further below.

¹⁰⁴ See *Sunday Times v United Kingdom* (1979) 2 EHRR 245 (ECHR).

¹⁰⁵ This should not be taken as reflecting complacency on our part as to whether the standards found in the Act and the codes would, in every respect, pass muster under s 5 of the Bill of Rights. We think that deserves careful independent examination.

¹⁰⁶ It would of course be open to a court to take a different view: see, for example, the suggestion above at n 19 that some aspects of the codes are ultra vires.

¹⁰⁷ For example, the BSA’s decision in *Vandenberg v CanWest RadioWorks* 2007-004 at para [13] to uphold a complaint on the grounds that it was “socially irresponsible” in breach of Principle 7 of the Radio Codes was probably ultra vires: see n 19 above. See also J F Burrows, “Assessment of Broadcasting Standards Authority Decisions”, paper commissioned by Broadcasting Standards Authority, April 2006 <http://www.bsa.govt.nz/publications-booksandreports.php> (accessed 9 May 2008), p 6, describing the ground of “social responsibility” as “dangerously open-ended”. The *Vandenberg* decision is, however, saved by the BSA’s subsequent reliance on the effect on children and on the law and order principle.

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“Reasonable” and “demonstrably justified”

It is generally accepted that these two concepts combine to mandate an inquiry into the “proportionality” of the proposed limit on free speech. At the heart of proportionality is the simple idea that in each case, the loss to the free speech ought not to be greater than the gain for the competing rights and interests served by the speech-limiting law.

The essence of this proportionality inquiry is thus a balancing exercise between two sets of values: those underlying the right to freedom of expression and those underlying the broadcasting standards regime. This does not have to be a technical exercise but it does require some understanding of the values underlying free speech and how they might inform the kind of situations that the Act contemplates. It also requires a case-specific assessment in which consideration is given to the “essence of the particular situation” and the extent to which the competing values are implicated in the particular circumstances of the case.¹⁰⁸

In *Brooker*, McGrath J suggested that this balancing process ought to be conducted “through structured reasoning rather than an impressionistic process”.¹⁰⁹ We agree, although we also endorse Professor Burrows’ suggestion that there is a limit to how far this structured reasoning process can be taken. As McGrath J accepts, the judgment as to whether particular conduct passes the point at which freedom of expression is no longer protected is “in every case a matter of degree”.¹¹⁰ Accordingly, the BSA’s ultimate conclusion as to whether or not a particular measure is proportionate may well be highly impressionistic. Where the notion of structured reasoning has most bite is in the BSA’s prior identification and exploration of the nature of the competing values at stake and the extent to which they are implicated in the particular case. If this is done thoroughly then the BSA’s ultimate judgment is likely to be a robust one.

The essence of a good proportionality analysis, then, involves teasing out the weight to be given to the competing rights and interests in the circumstances of the particular case and then weighing them. We expand on this below by considering, first, how to tease out the free speech side of the equation; secondly, how to tease out the significance of the competing legislative objectives; and finally, how to conduct the ultimate weighing process.

(I) Exploring and evaluating free speech values

Perhaps the most fundamental precept of Bill of Rights law is the importance of taking a purposive approach to the rights and freedoms

¹⁰⁸ *Brooker v Police* [2007] 3 NZLR 91 (NZSC) at paras [131]-[132] per McGrath J dissenting.

¹⁰⁹ *Brooker v Police* [2007] 3 NZLR 91 at para [132], citing *Gisborne Herald Ltd v Solicitor-General* [1995] 3 NZLR 563 (CA).

¹¹⁰ *Brooker v Police* [2007] 3 NZLR 91 at para [133], quoting *Wainwright v Police* [1968] NZLR 101 (CA).

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that it protects.¹¹¹ What this means is that the scope of protection offered by a particular right is to be determined by reference to the purposes or values underlying it. At the core of the notion of proportionality is a further intuition — that the values underlying a right may be implicated more or less depending on the circumstances of the particular case. The greater the intrusion on those purposes or values, the stronger the justification required to legitimise the interference.

Despite the voluminous literature on free speech, there is a surprising degree of consensus as to what the core values are that it is designed to protect.¹¹² The three most frequently cited are:

- *The discovery of “truth”*. This theory is sometimes known as the “marketplace of ideas”. It suggests that unfettered competition between different ideas promotes the discovery of truth, or at least provides the best test of truth.¹¹³ Under this rationale, interferences with the marketplace by regulation or restriction distort the knowledge-generating mechanism. In particular, attempts by government to identify and suppress “falsehoods” are viewed with great suspicion.
- *Democratic self-government*. This view values speech as the lifeblood of democracy, facilitating political participation by speakers and the provision of vital information and criticism to the public, and allowing policy to be shaped by the public will. It covers, with varying intensity, a wide range of civic discourse from criticism and debate about politicians and policies through to art imbued with messages about social ordering.
- *Self-fulfilment*. According to this rationale, speech is part of who we are. Self-expression and the exchange of ideas are necessary for us to develop emotionally and intellectually. This covers all communicative expression and is closely related to liberty theory generally.

¹¹¹ See, for example, *Ministry of Transport v Noort* [1992] 3 NZLR 260 (CA) at 279 per Richardson J; *R v Te Kira* [1993] 3 NZLR 251 (CA) at 271 per Richardson J; *R v Big Drug Mart* [1985] 1 SCR 295 (SC) at para [116] per Dickson J. See also Rishworth et al *The New Zealand Bill of Rights* Auckland, Oxford University Press, 2003, pp 43-44 and Butler and Butler *The New Zealand Bill of Rights Act: A Commentary* Wellington, LexisNexis, 2005, para 4.2.

¹¹² For judicial accounts of free speech values see, for example, *Brooker v Police* [2007] 91 (NZSC) at para [114] per McGrath J, at para [244] per Thomas J; *Hosking v Runting* [2005] 1 NZLR 1 (CA) at para [178] per Tipping J; *Lange v Atkinson* [1998] 3 NZLR 424 (CA) at 460-461; *Jennings v Buchanan* [2005] 2 NZLR 577 (PC) at para [6] per Lord Bingham of Cornhill; *Secretary of State for the Home Department, ex parte Simms* [2000] 2 AC 115 (UKCA) at 126 per Sedley LJ; *New York Times v Sullivan* (1964) 376 US 254 (SC) at 269-271 per Brennan J; *Irwin Toy Ltd v Quebec* [1989] 1 SCR 927 (SC) at 976 per Dickson CJ, Lamer and Wilson JJ; *R v Keegstra* [1990] 3 SCR 697 (SC) at 762-764 per Dixon CJ for the majority, and at 802-807 per McLachlin J dissenting.

¹¹³ *Abrams v United States* (1919) 250 US 616 at 630 (SC).

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Other values that are sometimes said to underlie free speech include checking abuses of public power and fostering social stability by promoting dialogue rather than violence.¹¹⁴

In order to be able to conduct a proportionality analysis the BSA needs to understand what those underlying values are and think about the extent to which they are engaged in the particular case. As Lord Steyn said in *Secretary of State for the Home Department, ex parte Simms*, “[t]he value of free speech in a particular case must be measured in specifics”.¹¹⁵

It follows that some classes of speech are generally more valuable than others because they better fall within the rationales justifying the protection of speech. For example, political speech is at the heart of the workings of democracy, and advances the search for truth and the self-fulfilment of the speaker. The publication of private facts unconnected with a public issue, on the other hand, does little to advance truth, democracy or self-fulfilment (and may even undermine the self-fulfilment of the subject of the information).¹¹⁶

These sorts of distinctions have been recognised in the case law and by a large body of commentators. For example, in *Campbell v MGN Ltd*, Baroness Hale said:¹¹⁷

There are undoubtedly different types of speech, just as there are different types of private information, some of which are more deserving of protection in a democratic society than others. Top of the list is political speech. The free exchange of information and ideas on matters relevant to the organisation of the economic, social and political life of the country is crucial to any democracy Intellectual and educational speech and expression are also important in a democracy, not least because they enable the development of individuals’ potential to play a full part in society and in our democratic life. Artistic speech and expression is important for similar reasons, in fostering both individual originality and creativity and the free-thinking and dynamic

¹¹⁴ For secondary literature on free speech rationales see generally F Schauer *Free Speech: A Philosophical Enquiry* New York, Cambridge University Press, 1982; K Greenawalt, “Free Speech Justifications” (1989) 89 Columbia LR 119; E Barendt *Freedom of Speech* 2nd ed, Oxford, Oxford University Press, 2005, ch 1; H Fenwick and G Phillipson *Media Freedom Under the Human Rights Act* Oxford, Oxford University Press, 2006, pp 12-19; R Smolla *Free Speech in an Open Society* New York, Alfred A Knopf, 1992, ch 1; T Emerson *The System of Freedom of Expression* New York, Random House, 1970; and D Feldman *Civil Liberties and Human Rights in England and Wales* 2nd ed, Oxford, New York, Oxford University Press, 2002, pp 762-767.

¹¹⁵ *Secretary of State for the Home Department, ex parte Simms* [2000] 2 AC 115 (HL) at 127. See also *Irvin Toy Ltd v Quebec* [1989] 1 SCR 927 (SC) at 976-977 per Dickson CJ, Lamer and Wilson JJ.

¹¹⁶ See *Hosking v Runting* [2005] 1 NZLR 1 (CA) at para [239] per Tipping J; and Fenwick and Phillipson *Media Freedom Under the Human Rights Act*, p 15.

¹¹⁷ *Campbell v MGN Ltd* [2004] 2 AC 457 (HL) at para [148]. See also *A Bill of Rights for New Zealand: A White Paper* (1985) I AJHR A6, para [10.58] and Fenwick and Phillipson *Media Freedom Under the Human Rights Act* Oxford, Oxford University Press, 2006, p 50.

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society we so much value. No doubt there are other kinds of speech and expression for which similar claims can be made.

From this jurisprudence a tentative hierarchy of classes of speech can be seen to emerge:

- *High-value speech*
 Political speech (including protest speech and satire)¹¹⁸
 Religious speech¹¹⁹
 Artistic speech¹²⁰
 Scientific and educational speech¹²¹
- *Mid-value speech*
 Commercial speech¹²²
 Popular entertainment
- *Low-value speech*
 Pornography and obscenity¹²³
 Personal abuse unconnected to an important issue¹²⁴
 Revelations of private personal facts¹²⁵
 Incitement that is likely to cause immediate violence¹²⁶

Hate speech (in the broad sense of speech that attacks or denigrates a class of people on the basis of, for example, race, religion, sexual

¹¹⁸ See, for example, *Lange v Atkinson* [1998] 3 NZLR 424 (CA) at 460-461; *New York Times v Sullivan* (1964) 376 US 254 (SC) at 269-271; *Hustler Magazine v Falwell* (1988) 485 US 46 (SC) at 50-52; *Lingens v Austria* (1986) 8 EHRR 407 (ECHR) at para [42]. Fenwick and Phillipson, *Media Freedom Under the Human Rights Act* pp 50-51, suggest that political speech belongs in a category of “first rank” protection of its own.

¹¹⁹ See, for example, *New York Times v Sullivan* (1964) 376 US 254 (SC) at 271, citing *Cantwell v Connecticut* (1940) 310 US 296 (SC).

¹²⁰ See, for example, *Muller v Switzerland* (1988) 13 EHRR 212 (ECHR) at para [33]; *R v Keegstra* [1990] 3 SCR 697 (SC) at 762; *Campbell v MGN Ltd* [2004] 2 AC 457 (HL) at para [148].

¹²¹ See, for example, *Campbell v MGN Ltd* [2004] 2 AC 457 (HL) at para [148]; *R v Keegstra* [1990] 3 SCR 697 (SC) at 762. See also Greenawalt (1989) 89 Colum Law Rev 119 at 136.

¹²² See, for example, *Central Hudson Gas and Electricity Corporation v Public Service Commission* (1980) 447 US 557 (SC); *R J R McDonald Inc v Attorney-General of Canada* [1995] 3 SCR 199 (SC).

¹²³ See, for example, *Miller v California* (1973) 413 US 15 (SC).

¹²⁴ See, for example, K Greenawalt, “Insults and Epithets: Are they Protected Speech?” (1998) 42 Rutgers L Rev 287 and Barendt, *Freedom of Speech* 2nd ed, Oxford, Oxford University Press, 2005, p 230.

¹²⁵ See, for example, *Hosking v Runting* [2005] 1 NZLR 1 (CA) at para [233] per Tipping J.

¹²⁶ See, for example, *Chaplinsky v State of New Hampshire* (1942) 315 US 568 (SC).

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orientation, or gender) is difficult to categorise.¹²⁷ The Canadian Supreme Court has said that it is low value speech because it contributes little to the search for truth or the workings of democracy.¹²⁸ The US Supreme Court, on the other hand, thinks that hate speech laws amount to restrictions on expressing political viewpoints and is loathe to countenance them.¹²⁹ We think the latter view is probably correct. To the extent that hate speech is legitimately regulated, it is because the values on the other side of the proportionality equation also weigh heavily.¹³⁰ For that reason, the BSA is right to apply a high threshold to cases involving denigration or discrimination.¹³¹

It should be borne in mind that the categories listed above cannot be precisely defined and that they sometimes overlap.¹³² Further, identifying a category by no means ends the analysis. Categories are helpful because they give some guidance as to the weight that might be accorded particular types of speech,¹³³ but the fundamental task is to evaluate the significance of the particular exercise of speech in the case at hand. In conducting that evaluation, some other helpful ways of thinking about the extent to which particular broadcasts implicate free speech values are as follows.

The concept of “public interest”

In *Hosking v Runting* Tipping J proffered another way of thinking about what kinds of speech are particularly deserving of protection because of the way they advance free speech values. He suggested that the concept of public interest — or matters of “legitimate public concern” — can be helpful in identifying speech that may be of sufficient significance to

¹²⁷ Hate speech is notoriously difficult to define, involving, for example, contested parameters of intent, effect, incitement and harm causation, and contested exceptions for fact, comment, religious belief, and humour.

¹²⁸ *R v Keegstra* [1990] 3 SCR 697 (SC) at 762-764 per Dixon CJ for the majority. Compare the dissent of McLachlin J at 859-860, emphasising the chilling effect of prosecuting political speech.

¹²⁹ See *RAV v St Paul* (1992) 505 US 377 (SC).

¹³⁰ Barendt *Freedom of Speech* p 173 makes the same point.

¹³¹ See, for example, *Van Son v Sky TV* 2006-075 at para [11] and *Hewens v Radio NZ* 2006-114 at para [11].

¹³² See, for example, *Nike Inc v Marc Kasky* (2003) 539 US 654 (SC) and *Kasky v Nike* (2002) 27 Cal 4th 939, 45 P 3d 243 (Calif SC), concerning Nike advertising that responded to allegations that Nike mistreated and underpaid workers.

¹³³ For example, the BSA found a talkback host unfair when, in the course of a discussion about a High Court Judge who had viewed pornographic sites on a work computer, she talked of the Judge “jerking off at work”. The host quickly corrected the statement to “jerking around”. Had the BSA characterised this as political discussion concerning the conduct and accountability of the judiciary it may have been prepared to provide her with a little more latitude. (The full text of her remark was: “if you think it is perfectly natural and normal for him to be jerking off at work, watching pornography at work ... jerking around wasting time, then I’m going to respond”): *Pabl v The Radio Network* 2002-087.

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outweigh the rationale for restricting it.¹³⁴ This is a test that is already familiar to the common law¹³⁵ as well as to the jurisprudence of the BSA.¹³⁶ We agree that this notion may be helpful in some cases.

Propositional speech

Speech that is propositional — that seeks to assert a fact, opinion or idea — lies at the heart of the marketplace of ideas and, where it relates to civic deliberation, of the democratic self-government theory. This is especially so when such speech is playing into a process of rational deliberation such as a political or scientific debate. By contrast threats, abuse, requests and encouragement, non-symbolic conduct, and explicit depictions of sex are less likely to reflect free-speech values significantly. The BSA should be particularly careful about restricting propositional speech.

Viewpoint neutrality

It should be clear from the above that s 5 is not, in its broadest sense, “content-neutral”.¹³⁷ The proportionality evaluation is premised on value judgments being made about particular classes of speech and the worth to be attached to them (political speech vs commercial speech, and so on). This should not, however, be confused with favouring particular viewpoints. At the heart of the free speech justifications is the idea of “viewpoint neutrality” — that speech ought not to be regulated on the basis of the particular ideologies being advanced.¹³⁸ The BSA should take particular care not to side against unpopular, radical, or politically unfavourable views, no matter how apparently unpalatable.¹³⁹

The standards in the Act and in the codes generally reflect this concern for viewpoint neutrality. There are, however, exceptions, the clearest being the denigration and discrimination head, which quite plainly involves a statutory judgment about the worth of expressions of

¹³⁴ *Hosking v Runting* [2005] 1 NZLR 1 (CA) at para [233].

¹³⁵ It is a defence to invasion of privacy, breach of confidence and perhaps infringement of copyright, and is closely related to developments in the defence of qualified privilege in defamation, particularly in the United Kingdom.

¹³⁶ See, for example, *Balfour v TVNZ* 2005-129 at paras [59]-[61].

¹³⁷ See P Rishworth et al *The New Zealand Bill of Rights* Auckland, Oxford University Press, 2003, pp 314-315.

¹³⁸ See, for example, *Columbia Broadcasting System Inc v Democratic National Committee* (1973) 412 US 94 (SC).

¹³⁹ The BSA has on occasion crossed this line. In the course of a talkback discussion about incest at 3 am, a talkback host provocatively asked what was wrong with a father having sex with a consenting adult daughter, noting that the topic was “taboo”. The broadcaster gave the host a warning but the BSA held that this was not enough: it should write a letter of apology to the listener who had complained. The BSA’s decision contains no hesitation in ruling such a viewpoint off-limits, even though it had been so tentatively advanced, and at 3 am: *Dickinson v Radio Works* 2001-047.

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particular views.¹⁴⁰ In our view, the BSA should be particularly careful about interfering with speech on the basis of the viewpoint it contains and should only do so when clearly directed to by its statutory criteria. That is another reason why we agree that the BSA is right to establish a high threshold for upholding denigration and discrimination complaints.

Another dimension to this notion of viewpoint neutrality is that broadcasters and their sources should be given room to choose the manner in which they express views. The BSA should provide leeway to colloquial, provocative, passionate, exaggerated, shocking, vulgar or even offensive ways of conveying messages.¹⁴¹ Crowding out speech that may not be “civil” may prevent the dissemination of some ideas altogether. Moreover, sometimes people genuinely have to express themselves in a provocative way to get attention.

Truth versus falsehood

Finally, we emphasise that this exercise of teasing out the extent to which particular expression implicates the underlying free speech rationales is not about evaluating the truth of the speech. The BSA has said that “the right to freedom of expression is not a right to be inaccurate”.¹⁴² We disagree. Section 14 of the Bill of Rights does protect false speech. It covers “information and opinions of any kind in any form”. Indeed, the marketplace of ideas theory is all about truth and falsehood grappling in the open market. John Stuart Mill argued that even false ideas are valuable in the conflict they ignite with truth.¹⁴³ The US Supreme Court has said that the nurturing of public debate requires that speech be given “breathing space” — that is, tolerance of some falsities in order to ensure that truths are not mistakenly suppressed or deterred.¹⁴⁴

¹⁴⁰ Broadcasting Act 1989, s 21(1)(e)(iv). Other standards that may, in more limited circumstances, tempt the BSA towards viewpoint discrimination are good taste and decency (to the extent, for example, that it proscribes offensive discourse) and law and order (to the extent, for example, that it proscribes criticism of a Judge).

¹⁴¹ The BSA sometimes recognises this. For example, in *Welch v TVNZ* 2004-098 it held that it was acceptable for a primetime current affairs show to broadcast an interview with a man calling his son, who had burgled him three times, an “arsehole”, even though it had held in another case that it was unfair to call a named person an arsehole (*Peat v The Radio Network* 2003-027) and “arsehole” is regarded as one of the most offensive words by the New Zealand public: Broadcasting Standards Authority *Freedoms and Fetters: Broadcasting Standards in New Zealand*, Wellington, Dunmore Publishing, 2006, <http://www.bsa.govt.nz/publications-booksandreports.php> (accessed 9 May 2008), p 97. But see the discussion below under the heading “Good taste and decency”.

¹⁴² *Chief Ombudsman v TVNZ* 2001-216.

¹⁴³ J S Mill *On Liberty* New York, Norton & Co, 1975.

¹⁴⁴ *New York Times v Sullivan* (1964) 376 US 254 (US) at 272 per Brennan J for the Court.

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This is not to say that evaluating truth is irrelevant to the BSA's task. Penalising speech that is clearly false may well be readily justified under s 5. That is, however, dealt with on the other side of the proportionality equation, in particular, when evaluating the legislative objective behind the accuracy standard.

Conclusion

To summarise, the first exercise is to assess the extent to which the values underlying free speech are implicated by a particular exercise of expression. This need not be a complex task. It can be as simple as a sentence or two noting the nature of the speech and gauging its relative significance. Sometimes more will be required. As we have noted above, there are already hints of this kind of approach in a handful of BSA decisions, including where it has required extra sensitivity when considering political speech.¹⁴⁵

(2) Exploring and evaluating the conflicting legislative objectives

Next, the BSA should identify the contrary objectives that the Act is designed to serve and assess their strength in the particular case. This has two aspects to it. First, the BSA needs to reach a view as to the nature and significance of each of the broadcasting standards themselves and of the objectives they serve. Secondly, the BSA needs to consider the extent to which a decision to uphold the particular complaint will promote those objectives.

There is little guidance that we can offer as to the second inquiry. It involves a case-by-case assessment of the nature and likelihood of the harm to individuals or the community that will exist if the particular speech is not regulated, bearing in mind all the circumstances.

Concentrating therefore on the first inquiry, at its broadest the legislative objective is to “maintain standards of broadcasting in New Zealand”.¹⁴⁶ Created as part of a package of deregulatory broadcasting reforms, the broadcasting standards regime was designed to acknowledge the power and immediacy of broadcasting and to keep in check the potential excesses of an unregulated broadcasting market.¹⁴⁷ Expressed at this level of generality, however, this offers little assistance in coming to grips with the particular kinds of regulation that are thought to be justified. In an earlier Bill of Rights “boilerplate” the BSA described the social objective of broadcasting standards as “to guard against broadcasters behaving unfairly, offensively, or otherwise excessively”.¹⁴⁸ This is hardly more helpful. In order to assist with a meaningful

¹⁴⁵ Note 64 above.

¹⁴⁶ *TV3 Network Services v ECPAT* [2003] NZAR 501 (HC) at para [44] per Chambers J. But see the discussion below under the heading “Privacy”.

¹⁴⁷ See, for example, *NZ Parliamentary Debates — Hansard* vol 498, p 10499, Hon Jonathan Hunt, 16 May 1989 and vol 498, p 10524, Dr Peter Simpson, 16 May 1989.

¹⁴⁸ See, for example, *Lehmann v The RadioWorks Ltd* 2002-077-80 at para [40].

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proportionality analysis, it is necessary to think about the nature and significance of the discrete social objectives underlying the various subject heads found in ss 4 and 21 of the Act.¹⁴⁹

In our view, the BSA needs to do some hard thinking about the significance of each of the standards that it enforces, and this needs to take place against the background of the free speech values that we have already identified. Examined in this light, the BSA may well conclude that some standards are of more importance than others or that some require particular care in their application because of a heightened tendency to interfere with high-value speech. This exercise of ranking is exactly what the BSA is doing when it purports to apply a “high threshold” for denigration and discrimination complaints or, in a more ad hoc way, good taste and decency. Our suggestion is simply that this needs to be done thoroughly and systematically with respect to all of its standards.

Some examples of how that might be done, concentrating on the main standards, are as follows.

Balance

As the BSA has said, the balance standard aims to provide members of the public with competing arguments so that they can arrive at informed and reasoned opinions on significant issues.¹⁵⁰ In exploring the importance of this objective it is helpful to think about it in terms of the goals of free speech itself. On one level, a requirement on broadcasters that their programmes are balanced obviously clashes with these goals because, in particular, it distorts the “marketplace of ideas”. It requires broadcasters to publish ideas that they may not wish to and constrains the format that they can adopt.

On the other hand, many critics would say that, left unregulated, the so-called marketplace may be dominated by a few powerful (often commercial) voices that do not necessarily pursue or seek to pursue vigorous civic deliberation or truth.¹⁵¹ Looked at in this light, the balance standard can be seen as a principled correction to a market failure. A number of free speech commentators have emphasised that balance requirements can foster rather than undermine the values that freedom

¹⁴⁹ As expressed, for example, in *NZ Parliamentary Debates — Hansard* vol 495, pp 8826-8827, Hon Jonathan Hunt, 13 December 1988; and Ministry of Commerce *Broadcasting Policy in New Zealand* Wellington, 1997, <http://www.med.govt.nz/upload/12863/bpinnz.pdf> (accessed 9 May 2008), at para [11].

¹⁵⁰ *Prime Minister v TV3* 2003-055 at para [357].

¹⁵¹ See, for example, O Fiss *Liberalism Divided: Free Speech and the Many Uses of State Power* Boulder, Colorado, Westview Press, 1996, pp 16-19, 39-40 and 144-145; C Sunstein *Democracy and the Problem of Free Speech* New York, The Free Press, 1993, pp 28, 48-50 and 53-55; and Barendt, *Freedom of Speech* 2nd ed, Oxford, Oxford University Press, 2005, p 12.

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of expression is there to support.¹⁵² Perhaps most significantly, balance supports the democratic rationale. It helps more speakers to participate in debate and deliberation; it better fosters the pursuit of political truth; it assists in ensuring that policy reflects community will; it provides a better check on governmental tyranny, corruption and ineptitude; and it promotes greater acceptance of policies that result from the deliberative process.¹⁵³

For these reasons, we think that balance upholds are more readily justified than most others, particularly where the remedy is the order for a statement to be broadcast advising the public of the existence of the missing viewpoint.¹⁵⁴

This reasoning does not feature in BSA decisions, which appear to focus on balance purely as a restriction of broadcasters' speech. This may, therefore, be an example of where a better understanding of free speech values may actually free up the BSA to uphold complaints in circumstances where it currently feels inhibited from doing so.

An example is *Wicksteed v Radio NZ*,¹⁵⁵ a complaint that a current affairs interview and talkback show about the foreshore and seabed debate was unbalanced. The show's introduction touted it as exploring issues concerning the rightful ownership of the foreshore, whether anyone should have private title, and whether Maori ownership claims are "modern day opportunism or historical fact". The panelists were the chair of a Maori lobby group, a spokesperson for the foreshore and seabed claimants, their lawyer, and a constitutional law expert. Three callers apparently offered views from a similar perspective. No other viewpoints less sympathetic to the claimants were represented on what was an extremely important and topical issue.¹⁵⁶ The BSA found that the show did not breach the balance standard. It said that the programme largely provided background historical information to the debate and that the constitutional expert provided some comments at odds with those of the other panellists. The BSA's decision does not refer to the

¹⁵² See, for example, Fenwick and Phillipson *Media Freedom Under the Human Rights Act* Oxford, Oxford University Press, 2006, pp 565, 993, 1009; Barendt *Freedom of Speech*, pp 12-13, 426-27; Sunstein *Democracy and the Problem of Free Speech*, pp 149-150. See also *Red Lion Broadcasting v FCC* (1969) 395 US 367 at 394 (SC).

¹⁵³ Smolla *Free Speech in an Open Society* New York, Alfred A Knopf, 1992, p 12.

¹⁵⁴ It may be that this reasoning applies more strongly to very large broadcasters. The greater the reach of the broadcaster, the more power it has to effectively exclude others' speech, and arguably the more justifiable a balance obligation may be in many cases: Schauer *Free Speech: A Philosophical Enquiry* New York, Cambridge University Press, 1982 p 123. See also Sunstein *Democracy and the Problem of Free Speech* New York, The Free Press, 1993, p 18.

¹⁵⁵ 2004-008. The BSA's chairperson did not participate in this decision because of a conflict of interest.

¹⁵⁶ The minister responsible declined to participate but Radio NZ did not seek to include anyone else to represent the government's views, nor those of anyone else with views opposed to those of the claimants.

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particular importance of providing the public with a range of viewpoints on debates of such public moment, nor does it mention that requiring such diversity can be seen to support the marketplace of ideas and the workings of democracy. It is difficult to be confident that such considerations had any bearing on its decision.

Other cases in which the BSA has sought to confine the ambit of the balance standard may also suffer from overlooking this point. For example, in 2002 the BSA upheld Television New Zealand's decision to exclude the Christian Heritage Party from its televised debates.¹⁵⁷ The BSA's decision contained no reference to the heightened importance of the balance standard in the circumstances. This was particularly remarkable given the shifting basis of Television New Zealand's selection criteria, the potential democratic impact of televised debates, the uniqueness of the Christian Heritage Party's political perspective and the fact that there was no inquiry into whether that perspective, plainly a "significant viewpoint", had been conveyed elsewhere in Television New Zealand's coverage.¹⁵⁸

Accuracy

The accuracy standard is there to protect the public from being significantly misled. This is plainly an important goal. Inaccuracies can cause great harm to individuals (for example, to their reputations) and to the public (for example, by providing inaccurate health advice). Like balance, the accuracy standard can be seen as a corrective to deficiencies in the so-called marketplace of ideas. That marketplace is not always capable of delivering truth and arguably an independent, properly resourced agency tasked with hearing competing arguments and evaluating the evidence may do a better job. That is especially the case when the public do not have the expertise to evaluate the truth or falsity of particular claims (such as the effect of climate change) or where public passions are inflamed (in wartime, for example, or times of racial tension).

In general, however, upholding an accuracy complaint undermines the rationales for free speech much more than merely requiring balance.¹⁵⁹ In particular, it supplants the marketplace of ideas, at the heart of which is a deep suspicion of the notion of any body or institution setting itself

¹⁵⁷ *Christian Heritage Party v TVNZ* 2002-173.

¹⁵⁸ Contrast *Dunne v CanWest* [2005] NZAR 577 (HC). We think similar criticisms could be made of *Powell v CanWest TV Works* 2005-125.

¹⁵⁹ This reasoning is supported by recent developments in the common law of defamation. By allowing a defence to defamation of political figures if the media have behaved "responsibly" the Courts in New Zealand, the United Kingdom and Australia can be seen to be requiring "breathing space" for accuracy but in exchange for fairness and balance: see *Lange v Atkinson* [1998] 3 NZLR 424 (CA); *Lange v Atkinson (No 2)* [2000] 3 NZLR 385 (CA); *Reynolds v Times Newspapers* [2001] 2 AC 127 (HL); *Lange v Australian Broadcasting Corporation* (1997) ALJR 818 (HCA).

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up as the ultimate arbiter of truth. History is replete with governmental suppression of “falsehoods” that turned out to be truthful after all.

This means that there is a need for particular care in applying the accuracy standard. One implication of this might be that if the alleged error is minor or creates no danger that the public will be significantly misled, there will be little or no justification for interfering.¹⁶⁰ Where the alleged error is more serious, particularly where it plays into matters of significant public interest or is harmful to reputation, the situation is more difficult. On the one hand, such speech magnifies the importance of freedom of expression and the consequences of wrongly holding something to be false. Equally, however, the significance of the objective of protecting the public from misinformation is also magnified.

Hence the need for great care. The higher the stakes, the more important it is to get it right, and not to interfere without appropriately convincing evidence. This has at least three implications.

First, the BSA should only uphold accuracy complaints against clear assertions of fact. As the US Supreme Court has said, “there is no such thing as a false idea”.¹⁶¹ Thus the BSA should be slow to penalise clear and attributed expressions of opinion, rhetorical hyperbole, loose figurative speech, and speech that is not stating a provable proposition, is clearly opinion in the context or is merely conjecture. When there is doubt, the BSA should err on the side of construing a statement as an opinion.¹⁶²

Secondly, the BSA should only uphold accuracy complaints where the evidence is compelling. Some significant inaccuracies may slip through the net but in our view that is what the Bill of Rights requires. The BSA may need to acknowledge the limits of its own fact-finding abilities, particularly as some matters do not lend themselves to proof one way or another.¹⁶³

¹⁶⁰ Consistently with this, the BSA is increasingly refusing to uphold complaints where it regards the inaccuracy as immaterial: see Steven Price *Media Minefield* Wellington, NZ Journalists Training Organisation, 2007, p 20.

¹⁶¹ *Gertz v Welch* (1974) 418 US 323 at 339 (SC) per Powell J.

¹⁶² This also accords with the usual approach of the BSA: see Price *Media Minefield*, Wellington, NZ Journalists Training Organisation, 2007, pp 14-19.

¹⁶³ Once again, this approach is reflected in some BSA decisions. See, for example, *Anderson v TVNZ* 2003-028 at para [68]; *Prime Minister v TV3 Network Services* 2003-055 at paras [378]-[379]. On the other hand, the BSA should be reluctant to decline to determine significant accuracy complaints where the broadcaster concerned has offered no or little substantiation of their assertion: see *Bulathsinghala v TVNZ* 2004-129 (“as much as 90 per cent of child abuse” in Sri Lanka occurs in the home; TVNZ provided no substantiating information), *Giles v TVNZ* 2002-073 (one of the alleged inaccuracies was that pornographic images had been found in a suspect’s home; TVNZ was reduced to accepting that no pornography was found but contending that this did not mean none was made) and *Anderson v TVNZ* 2003-028 (at least one of the inaccuracies alleged — that 90 per cent of Palestinians killed by Israelis were civilians — seems capable of verification).

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Thirdly, the BSA should ensure that it has the best possible information for determining complaints, especially where serious inaccuracies are claimed in speech of significant public interest. This means that it ought to be more willing to use the powers it does have to resolve significant factual disputes such as by holding hearings, seconding experts, ordering disclosure of relevant information or doing its own research. To date, the BSA has never exercised its power to hold a hearing, even where a hearing was sought and there were issues of credibility at stake.¹⁶⁴ It only exercises its powers to order disclosure of information if the complainant can show that such an order is “necessary to enable the Authority to deal effectively with the subject of the complaint”¹⁶⁵ and it takes a very narrow view of whether such material is likely to be of assistance, without having seen it.¹⁶⁶ No doubt this informal and non-technical approach is suitable to many cases.¹⁶⁷ We wonder, however, whether it meets the requirement implicit in s 10(2) of the Act that the BSA adopt a procedure, in every case, that is consistent with “a proper consideration of the complaint and the principles of natural justice”. We also wonder whether it is consistent with High Court and Court of Appeal authority.¹⁶⁸

It follows that the BSA should be reluctant to decline to determine significant accuracy complaints simply because there is some difficulty involved in evaluating the truth or otherwise of the statement at issue.

Good taste and decency

This standard protects (or enforces) community morals, particularly concerning language, sex and nudity. It is a problematic area of regulation. Historical attempts to control expression of immorality have often been misguided or oppressive. In addition, community norms are imprecise and changeable. Reasonable people disagree about their application. It is difficult to demonstrate real harm. The BSA should exercise restraint and tolerance.¹⁶⁹

As already suggested, it is particularly important to afford speakers some latitude over their manner of expression when they are engaging in debate or protest. The BSA is currently doing this. It seems very unlikely that it would repeat the (we would say mistaken) decisions of the 1990s, which upheld taste and decency complaints against Lindsay Perigo for

¹⁶⁴ *Wakefield Associates v TVNZ* 2002-159. See Broadcasting Act 1989, s 10(1), giving the BSA the power to dispense with a hearing if it chooses.

¹⁶⁵ For example, *Benson-Pope v Radio NZ* 2005-083 at para [18]. See Broadcasting Act 1989, s 12.

¹⁶⁶ See, for example *Simunovich Fisheries v TVNZ* 2003-185.

¹⁶⁷ See Broadcasting Act 1989, s 10(2).

¹⁶⁸ *TVNZ v Ombudsman* [1992] 1 NZLR 106 at 119 (HC); *Comalco v BSA* (1995) 9 PRNZ 153 at 161 (CA). Admittedly, the exercise of these powers can sometimes raise important issues about broadcasters’ rights to protect the identities of their sources.

¹⁶⁹ This also reflects current BSA practice. Upheld taste and decency complaints have become increasingly rare in recent years.

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calling Ministry of Education staffers “child molesters of the mind”¹⁷⁰ and Deborah Coddington for calling New Zealand on Air “Nazis on Air” and comparing it to Auschwitz guards.¹⁷¹ However, we think the current BSA still sometimes fails to distinguish between offensive language per se and swearing in the course of heated political speech.¹⁷² There is a difference between a song with obscene lyrics and a person using the same obscenities in the course of criticising police conduct. The latter ought to be allowed more leeway.¹⁷³

We have also suggested above that an unduly restrictive application of this standard may produce viewpoint discrimination. Offensive ideas (such as questioning whether consensual sex between a father and his adult daughter ought to be illegal) are the very sorts of ideas that are in need of the greatest protection because we are most unlikely to realise our own infallibility.¹⁷⁴ Community norms can also contain viewpoint biases. For example, the BSA’s research reveals that New Zealanders are uncomfortable with portrayals of homosexual conduct. The BSA has referred to this research in several decisions but did not uphold the complaints.¹⁷⁵ We think the BSA is right to treat this research gingerly. Reliance on community norms can be dangerous if it promotes unequal restrictions on speech by and about unpopular minorities.

We are inclined to think that the taste and decency standard should never be used to penalise the expression of a viewpoint. In extreme cases, the *manner* of expression may be penalised, or the speech may breach standards concerning denigration, fairness, children’s interests or law and order. However, no idea should ever, by itself, be ruled out of bounds as a matter of taste and decency.

Privacy

Whereas the standards discussed above are primarily about protecting community interests, privacy is one of the only standards to be primarily directed at protecting interferences with the rights and interests of individual citizens.¹⁷⁶ Although privacy is not directly protected by the Bill of Rights itself, it is protected from arbitrary interference in international human rights instruments to which New Zealand is a party¹⁷⁷ and is receiving increasing recognition in New Zealand and

¹⁷⁰ *Ministry of Education v Radio Pacific Ltd* 1997-051.

¹⁷¹ *NZ On Air v Radio Liberty Network* 1995-140.

¹⁷² See *Robbins v The Beach* 94.6FM 2004-108.

¹⁷³ See n 141 and associated text.

¹⁷⁴ See n 139 and associated text.

¹⁷⁵ *Francis v TVNZ* 2001-021, *Hodgkinson v TVNZ* 2002-107; *Rodley v TVNZ* 2002-182.

¹⁷⁶ The other key one is fairness, although a number of other standards straddle this divide and have some aspect of protection of individuals (including accuracy, balance, protection of children, and law and order in so far as it protects against prejudice to trials).

¹⁷⁷ International Covenant on Civil and Political Rights opened for signature 19 December 1966, 999 UNTS 171 (entered into force 23 March 1976), art 17

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elsewhere through the development of the common law.¹⁷⁸ For this reason, breaches of privacy weigh heavily on the other side of the proportionality equation, especially where children are concerned.¹⁷⁹ Obviously, the more intrusive the particular invasion of privacy, the more weight should be attached to it.

We would, however, add two other observations. The first is that though doubtless an important value, the concept of privacy is an amorphous one that requires careful definition and specification in order to reduce it to a legally manageable standard.¹⁸⁰ As the White Paper on the Bill of Rights reminds is, imprecisely worded restraints on expression are regarded as particularly suspect because of their tendency to have a “chilling” effect on legitimate speech.¹⁸¹ For this reason, the BSA ought to be extremely careful about upholding breaches of privacy that fall outside the “privacy principles” that it has developed.¹⁸² A similar point arises with respect to the fairness standard. Because of its amorphousness, straying outside the guidelines offered in the codes is particularly dangerous territory. We do not go so far as to suggest that the BSA should never do so; just that in doing so it should apply a particularly high threshold.

The other observation we would make about privacy (and indeed fairness) is that it is at least arguable that the fact that these standards are sourced in a concern about intrusions on individual rights and interests may itself place some limits on the way those standards ought to be applied.¹⁸³ In this sense, we think that the decision of the High Court in *ECPAT* was, at the very least, badly reasoned. In that case (involving the alleged privacy of child prostitutes in Fiji) Chambers J rejected an argument that the privacy standard should not, in effect, be given extraterritorial application because in his view the purpose of the Act

and Convention on the Rights of the Child opened for signature 20 November 1989, 1577 UNTS 3 (entered into force 2 September 1990), arts 16 and 40.

¹⁷⁸ See, for example, *Hosking v Runting* [2005] 1 NZLR 1 (CA); *Campbell v MGN* [2004] 2 AC 457 (HL).

¹⁷⁹ Once again, this generally accords with the BSA’s current approach. See, for example, *Kiro v CanWest TV Works* 2006-105. However, we wonder whether the BSA should have given more weight to a four-year-old’s privacy when a broadcaster aired a clip of her, visibly distressed, being handed over by her mother to CYFS: *Department of Child, Youth and Family Services v TV3* 2003-107.

¹⁸⁰ *Hosking v Runting* [2005] 1 NZLR 1 (CA) at para [181] per Keith J dissenting.

¹⁸¹ *A Bill of Rights for New Zealand: A White Paper* (1985) I AJHR A6, para [10.58].

¹⁸² These principles are incorporated by reference (and by being appended) into the Radio and Free-to-Air Television Codes and are therefore probably now “prescribed by law”. In *DA v TVNZ* 2001-214 the BSA upheld a breach of privacy independent of the privacy principles but the case involved a breach of established in-Court filming guidelines and so was not a grave departure from the BSA’s privacy framework.

¹⁸³ The recent decision of Simon France J in *TVWorks Ltd v du Fresne* (High Court, Wellington CIV 2007-485-2060, 13 March 2008), issued since the conference paper on which this essay is based was presented, is consistent with this view.

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was not to protect privacy but “programme standards”.¹⁸⁴ As we discussed above, we do not think it is helpful to express the purpose of the broadcasting standards regime at this level of generality,¹⁸⁵ and we doubt that such an amorphous objective would meet the standard of demonstrable justification in s 5.

The real goal of the privacy standard is to protect individuals from unwarranted harm to their dignity. Whether or not that ought to have resulted in a territorial limit to its application ought at very least to have been given more careful consideration. More generally, we wonder whether the same line of reasoning might compel the view that only those directly affected (or someone acting on their behalf, such as a parent) can bring complaints on this ground.¹⁸⁶

Denigration and discrimination

This standard aims to protect certain vulnerable groups from verbal and other attacks, and to foster a community commitment to equality. These are important commitments that should not be undervalued. They can even be seen as underpinning democratic self-government.

On the other hand, it is important to bear in mind that the broadcasting standards regime goes further than any other area of law in regulating such speech. For example, the “hate speech” protections in the Human Rights Act 1993 are limited to race¹⁸⁷ and New Zealand’s international commitments in this area go no further than race and religion.¹⁸⁸ Moreover, an attempt to read the censorship legislation broadly in order to protect against attacks on gay people was famously rejected by the Court of Appeal in *Living Word Distributors v Human Rights Action Group*.¹⁸⁹ The Court was concerned to limit the reach of our censorship laws so that they did not constrain the expression of opinions. This reflects the importance, already discussed, of not proscribing or favouring particular viewpoints and supports the BSA’s caution in upholding complaints of this sort.

Conclusion

In summary, therefore, the BSA needs to evolve a systematic jurisprudence in which it explores the particular rationales that underlie each of the standards contained in the Act and codes, and evaluates the

¹⁸⁴ *TV3 Network Services Ltd v ECPAT New Zealand Inc* [2003] NZAR 501 (HC) at para [11].

¹⁸⁵ See nn 146-149 and associated text.

¹⁸⁶ The distinction in the Broadcasting Act 1989, s 13 between the “complainant” and an “individual” whose privacy has been breached may suggest otherwise. However, this may be no more than an acknowledgment that, for example, parents can complain on behalf of their children.

¹⁸⁷ Human Rights Act 1993, ss 61 and 131.

¹⁸⁸ International Convention on the Elimination of All Forms of Racial Discrimination opened for signature 21 December 1965, 660 UNTS 195, (entered into force 4 January 1969).

¹⁸⁹ *Living Word Distributors v Human Rights Action Group* [2000] 3 NZLR 570 (CA).

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significance of those rationales for the overall scheme of broadcasting regulation and for the regulation of free speech. Clearly, this exercise does not need to be undertaken in every case — it would be sufficient for the BSA to develop a series of precedents that it can then make reference to in subsequent cases. That said, the BSA must always remain attentive to the facts of the particular case. It must not neglect the second stage of the inquiry — to consider, on a case-by-case basis, the extent to which a decision to uphold a particular complaint will promote the rationales that it has identified.

(3) The weighing process

The ultimate question is whether the harm done by the alleged breach to the social objectives underlying the Act is sufficiently significant to justify intruding on the fundamental right to freedom of expression and the values it embodies. This is a question of weighing up the strength of the interests on both sides. On the one hand, as Tipping J said in *Hosking v Runting*:¹⁹⁰

The more value to society the information imparted or the type of expression in question may possess, the heavier will be the task of showing that the limitation is reasonable and justified.

On the other hand, the greater the strength of the contrary social objective and the greater the harm to individuals or society resulting from the alleged breach, the more ready the BSA should be to uphold the complaint.

An important point that is sometimes forgotten is that this weighing exercise needs to be conducted not once but twice: first, in relation to whether broadcasting standards have been breached and secondly, and separately in relation to proposed penalty. Both must be demonstrably justified.¹⁹¹

This weighing exercise is not a technical legal one. It is an exercise of judgment and one that has been entrusted to the BSA as representatives of community and industry interests. Further, it will not always be easy for the BSA to articulate at this point why it has reached one decision or the other. In our view, the discipline comes in properly identifying the weight of the interests on either side of the equation. If that has been done systematically, the weighing exercises themselves may be, as Professor Burrows said in his evaluation, “in the end matters of impression”¹⁹² but we can have confidence that they will be properly informed impressions.

¹⁹⁰ *Hosking v Runting* [2005] 1 NZLR 1 (CA) at para [235].

¹⁹¹ See n 59 above, discussing the BSA’s practice in this regard.

¹⁹² J F Burrows, “Assessment of Broadcasting Standards Authority Decisions”, paper commissioned by Broadcasting Standards Authority, April 2006 <http://www.bsa.govt.nz/publications-booksandreports.php> (accessed 9 May 2008), p 24.

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When conducting this balance, however, there are some questions that the BSA ought to be asking itself — a mental checklist of a sort. The BSA need only expressly address these factors in its decisions to the extent they impact on the particular case but its members should turn their minds to them in every case. They include:

- How precisely worded is the standard the BSA is being asked to enforce and how clear is it that this standard proscribed the particular behaviour at issue? We have already suggested with respect to privacy and fairness that the amorphous nature of these concepts justifies caution in some circumstances because of the potential for imprecise standards to have a “chilling” effect on speech. In general, the vaguer the language in which the standard is cast, the higher the threshold for intervention ought to be.
- Would upholding the complaint actually advance the social objectives underlying the legislation in a significant way?¹⁹³ In one of the few cases where the BSA moved beyond its Bill of Rights boilerplate, it used the Bill of Rights to find that a *Campbell Live* interview that was portrayed as live but in fact was pre-recorded did no significant harm to the audience and so an uphold was not warranted. The Code provision concerning programme information was technically breached but the show did not really undermine the purpose of that standard.¹⁹⁴ We think this is an exemplary application of the Bill of Rights.
- What might the ramifications of the decision be beyond the individual case? Is the BSA laying down a wide rule that might apply to (and perhaps chill) speech beyond the type at issue in the case at hand? In other words, could the ruling be expressed more narrowly and still protect the underlying interests?¹⁹⁵ Again, a recent case illustrates this approach. After upholding a complaint that *Close Up* had treated a woman convicted of drunk driving unfairly for naming and shaming her on television, the BSA invited TVNZ to comment on the appropriate penalty. TVNZ’s submissions indicated alarm at the ruling, we understand, and in response the BSA inserted more detail into its decision about the circumstances in which this sort of conduct would not be unfair.¹⁹⁶

¹⁹³ This might be seen to reflect the “rational connection” limb of the Oakes test: *R v Oakes* [1986] 1 SCR 103 (SC).

¹⁹⁴ *Dowler v CanWest TVWorks* 2006-074.

¹⁹⁵ This might be seen to reflect the “minimal impairment” limb of the Oakes test: *R v Oakes* [1986] 1 SCR 103 (SC).

¹⁹⁶ *Green v TVNZ* 2007-068 (judgment in an appeal against this decision was issued as this paper was going to press, but is not discussed here: *Television New Zealand v Green* (High Court, Wellington CIV 2008-285-24, 11 July 2008, Mallon J).

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- Would a lighter penalty than the BSA has in mind, or a warning, still protect the underlying interests?¹⁹⁷
- What are the likelihood and consequences of the BSA getting it wrong? How certain is the BSA of the facts upon which it founds its decision? Is there some possibility that the BSA's own decision will mislead the public to its detriment?

Finally, the standard prescribed by s 5 of the Bill of Rights is one of “demonstrable” justification. This means that the BSA must not uphold a complaint unless positively satisfied that to do so is a reasonable way of achieving a balance between the competing interests. This intuition already features in some BSA decisions. It has been expressed in different ways — through the notion that the Bill of Rights is a “starting point”, or that it can be used to “tip the balance” in a particular case.¹⁹⁸ Ultimately, the point is that the benefit of the doubt goes to freedom of expression.

In conclusion

To sum up, the Bill of Rights provides a helpful framework within which to conduct a structured process of justification of the BSA's decisions. When conducting that structured balancing exercise, underlying free speech values provide a series of insights that need to be factored into both sides of the equation.

We do not think that the balancing exercise that we prescribe above is technically complicated. We do accept that it requires a certain degree of knowledge of the values underlying free speech and some hard thinking of what those might mean for the individual broadcasting standards. We do not think that is too much to expect from a specialised tribunal whose only function is to regulate speech. It is the High Court's job to assist them with it.

As we have stressed throughout, our view is that the BSA's current approach frequently has much in common with the Bill of Rights methodology that we suggest. An explicit s 5 analysis, however, would add a degree of consistency and systematicity to the way free speech values are invoked in BSA cases and would make it less likely for their implications to be missed in important cases.

¹⁹⁷ This might also be seen to reflect the “minimal impairment” limb of the Oakes test: *R v Oakes* [1986] 1 SCR 103 (SC). Again, the BSA scores well here: when it upholds a complaint, it will only order additional penalties where the breaches are sufficiently serious or blameworthy or the public interest merits it.

¹⁹⁸ *Morrish v TVNZ* 2005-137; *Slocumbe v CanWest RadioWorks* 2004-102; *Jaspers v CanWest TVWorks* 2007-060; *Davidson v RadioWorks* 2001-116.

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Epilogue

We have tried to make this paper as rigorous and clear as Professor Burrows would have made it. Dreams are free. Professor Burrows' talent for the clear exposition of complex legal concepts is unrivalled, as is the esteem in which he is held among his former students.

At the 2007 Lord Cooke Lecture, which Professor Burrows delivered in typically incisive but entertaining fashion, one of us asked another attendee, a former student of Professor Burrows, whether he knew of anyone who had ever had a bad word to say about John Burrows. "Yes," he replied. "One of his old students, now in practice, grumbled that it had turned out the law wasn't as clear and simple as it seemed when Professor Burrows was there to explain it."