



CHAIRPERSON'S REPORT 2004 – 2006

I. INTRODUCTION

With twelve years of democracy behind us, it is a privilege to report on current trends in broadcasting content control in South Africa. Three years ago a new Broadcasting Code was adopted by the BCCSA. The principles, in essence, remain the same as before, but the new code contains more detail on the protection of women and children against violence on television.

Two aspects were, however, not sufficiently covered by the new Code: the first is hate speech and the second, dignity. In 2004 the Commission approached the ICASA so that these two omissions could be rectified. From 1 May 2005 the ban on hate speech and the protection of dignity once again formed part of the Broadcasting Complaints Commission's Code. These additions have contributed substantially to a more principled approach to these matters: hate speech covers the extraordinary cases, whilst dignity protects against material which might, to a lesser extent, invade the relevant fundamental rights.

II. VARIETY

Looking back over the past year, it is quite astounding what a wide variety of matters came before us. Many of these matters represented very real issues in South African society and, ultimately, in the global electronic village. World events did not escape the South African eye: the Middle-East conflict, the war in Iraq, the war in Afghanistan, the aftermath of 9/11, earthquakes, beheadings, political strife in Zimbabwe, the tsunami, sabotage in the London underground, an interview with "Jesus" based on Mel Gibson's "Passion of the

Christ” film, sexism, racism, HIV/AIDS, the visit by the Nigerian President to South Africa on the inauguration of the President two years ago, Scientology, the abuse of children, maintenance of divorcees, privacy, dignity, the taking in vain of the Lord’s name, mocking the Prophet Mohammed, mocking Yom Kippur, mocking ardent Christians by taking the Lord’s name in vain, swinging, dirty songs, sexual advice by Dr Eve, the film “Boondock Saints” shown by eTV at 8 o’clock in the evening, satirising Dr HF Verwoerd and his death at the hand of Dimitri Tsafendas, denigrating certain sexual orientations, not countering criticism against well-known public figures (in this case three journalists), using racially derogatory terms, pornography on midnight television and, finally, more mundane matters such as the use of bad oil in certain fast food outlets, a used condom in a cooldrink bottle, and allegations of rat-tailed maggots in the Cape Town municipal water system.

III. FREEDOM OF EXPRESSION

In December 1994 the Task Group appointed by the Minister of Home Affairs to advise him on the constitutionality of the Publications Act of 1974 stated in its published report that freedom of expression lies at the heart of democracy. The same sentiments were expressed by the Constitutional Court in 1996 and, ultimately, it has been recognised that freedom of expression includes the right to offend within reasonable limits. Thereby, the old tests of “offensive”, “indecent” and “obscene” fell away. Clarity in legislation, which includes the Broadcasting Code, has become a hallmark of regulation in the field of film and broadcasting in South Africa. In broadcasting there is no prior control, and the BCCSA is not permitted to initiate a complaint itself. The right to information and to convey information also includes the right to convey that which is offensive – subject to such information being in the public interest. At the heart of the duty to convey information lies transparency, which is one of the pillars of democracy. Ultimately, the paradigm has been shifted in films, publications and broadcasting regulation: from no to yes, from distrust to trust, from fundamentalism to realism, from despotism to democracy. This shift has its roots in the work done by the Publications Appeal Board in the 1980s, the Ministerial Task Group in 1994, the Independent Communications Authority in 2000, the Constitutional Court from 1996, and the BCCSA. Since 1993, more

than a thousand Tribunal judgments have been handed down by the BCCSA, and more than three hundred may be read on our website.

IV. PUBLIC INTEREST

The principle of “public interest” should not be confused with that which interests the public. It is a legal concept, which rises above the ordinary rules and demands that material be published. Thus, when SABC’s Special Assignment team dealt in one of their programmes with the maintenance of children of divorced parents, and the identities of the particular children were disclosed, the BCCSA Tribunal held that in spite of the prohibition on such identification in divorce and maintenance legislation, the Tribunal had the authority to permit such disclosure in terms of the Broadcasting Code. Public interest demanded that television should even move into the homes of such children and shock viewers into an awareness of their plight. The same principle has been applied in the case of HIV-positive children.

V. LOW PERCENTAGE OF CONTRAVENTIONS

It should not be inferred from the above examples that broadcasters have been in frequent contravention of the Code. About 20% of complaints are entertained, some complaints are mediated, many complaints do not, on a *prima facie* basis, fall within the Code, and others are simply dismissed because they are frivolous or vexatious. It might safely be said that 10% of complaints were adjudicated against broadcasters under our jurisdiction: this includes all SABC television and radio stations, all commercial radio stations, and also a few community broadcasters. Community broadcasters mostly fall under the direct control of the Broadcasting Monitoring and Complaints Committee of the ICASA insofar as content is concerned.

VI. THE WATERSHED CRISIS

Most broadcasting codes provide for a television watershed in the evenings. The policy is that after the watershed, on a sliding scale, more explicit material may be broadcast. Of course, it is a reality that large numbers of children are often still part of the audience after 21:00. However, it is the approach of the BCCSA that it is the duty of parents and other custodians of children to take

the necessary precautions at that time of night. This does not mean that any material whatsoever would be permissible after the 21:00 watershed. Our Tribunal, as well as regulators in Australia, New Zealand, the UK and Canada, have held that the watershed is not a “waterfall”: therefore it would be unacceptable, for example, to screen explicit sex immediately after the commencement of the watershed. In the light of this approach, promotions for what is known as soft pornography may only be broadcast from 23:00 in the evenings. The actual programmes may be broadcast from midnight to 5:00, when the watershed comes to an end. As a result of problematic broadcasting schedules, free-to-air television has, on occasion, broadcast films with an 18 age restriction from 20:00. The Commission has held such broadcasts to be impermissible. Eight o’clock in the evenings is simply too close to family time. Although the watershed commences at 20:00 for subscription television, the sliding scale should, at that time of the evening, be applied with due sensitivity. Of course, subscription television provides the subscribers with parental control mechanisms. In practice, however, subscribers are not always sensitive to the issue. M-Net has, accordingly, taken steps to ensure consistent and constant information to subscribers of how parental-control mechanisms operate. A very real problem is that children usually know more about these mechanisms than their parents do! The so-called V-chip, which acts as a censor, has not been successful. M-Net’s approach of using a green and a red channel seems to work more effectively: on the green channel a substantially sanitised dialogue may be heard, whilst on the red channel the viewer may legitimately listen to whatever is broadcast, apart from hate speech, that is. But even hate speech may form part of bona fide drama and relevant news, and thus not amount to a contravention of the Code.

VII. “DIRTY TALK” ON EARLY MORNING AND LATE AFTERNOON RADIO STATIONS

It is an international phenomenon in radio broadcasting that disc-jockeys and presenters attempt to build “fan clubs”. However, it seems to be the case that certain disc-jockeys believe that such fan clubs can only be built through the use of risqué language and jokes. It has often been argued that what is said by such presenters serves the interests of the modern-minded young person

at whom these broadcasts are directed. However, it is a reality that large numbers of children are also part of the audience at that time of the morning or afternoon broadcasts, whether they are passengers in motorcars on the way to or returning from school, or simply during breakfast time at home. The BCCSA has been fairly strict insofar as crude language is concerned during these times of the day. In certain instances of very crude or derogatory language, fines have been imposed on broadcasters.

VIII. CONSTITUTIONAL PROTECTION

Section 9 of the Constitution of the Republic of South Africa provides for special protection of certain groups and accentuates protection for previously disadvantaged sections of the community. Areas which have been identified as particularly sensitive by the BCCSA are those that pertain to race, gender and sexual orientation. The use of derogatory terminology has been subjected to strict rulings of the Tribunal. The philosophy is that within this constitutional democracy, where equality and dignity are fundamental and extremely important rights, broadcasters should not permit the use of such words, even when used off-the-cuff.

IX. CHALLENGES

The main challenge which South African broadcasters have had to meet, especially in the light of the apartheid past, has been to ensure their independence. This independence is guaranteed by the Constitution as well as in broadcasting legislation. News and comment can only be relied upon for constitutionally guaranteed information if the voice that carries the news or the comment is independent. Independence also requires that the voice be fearless. Of course "fearless" should not be equated with mere licence to publish without thorough analysis and meticulous news-gathering.

This Commission can, in the light of its experience of broadcasting during the past decade, state with confidence that South African broadcasters are independent, and that they fully participate in what Justice Holmes of the US Supreme Court has called the free and open marketplace of ideas. Broadcasters have fearlessly attacked issues such as corruption, the abuse of

children and women, poverty, the high crime rate, and they have, in the process, had the benefit of the service of top anchors, presenters and journalists.

X. BALANCE

This Commission has often held that, in the interest of freedom of expression and opinion, always ensuring balance in programmes dealing with public issues is an unattainable ideal. Accordingly, it has often been held that Code provisions dealing with balance will only be held to have been contravened where it is absolutely clear that a contravention has taken place. Phone-in programmes on issues of public importance have created particular problems in this regard: unless organised beforehand, a pot-pourri of views reaches the ears of the audience. Of course, programme producers generally attempt to ensure that callers do not misuse their opportunity, or that the repetition of certain offensive views does not take place. Despite this, however, talk shows have been the subject of many complaints. In judging certain of these talk shows as a whole, the BCCSA has held that a follow-up programme should be broadcast – such a follow-up is necessary if an important view was omitted on the original programme. Panel discussions are, of course, subject to stricter rules. A variety of views should be ensured insofar as the panel is concerned.

Broadcasts that deal with the inequities of the apartheid regime have often led to complaints. The general complaint from certain white persons is that insufficient or no time at all is devoted to the “good” that may have been done during this era, in spite of its inequities. The BCCSA’s approach has been that it is common knowledge that while some attempts were made by white people at improving the situation of the disenfranchised majority, these attempts were generally ineffective, and the voice of the majority was kept out of Parliament. Programmes which have dealt with issues relating to the apartheid era have, accordingly, not been found to be in contravention of the Code, in spite of their clear accent on the plight of the oppressed. These films are a constant reminder that such oppression may never be repeated. It has also been held that the dignity of persons who have passed away is not

protected in law, and that political ideology is also not protected by the Broadcasting Code.

XI. THE FUTURE OF THE BCCSA

The first question is whether there should be a body such as the BCCSA, which deals with complaints from the public against broadcasters. The answer is that our broadcasters must, so far as is possible, be kept out of the courts. The Broadcasting Complaints Commission provides an alternative route for complaints and is justifiable in terms of section 34 of the Constitution in that it provides an alternative, independent mechanism by means of which rights are determined. For the public, it provides a route which is readily accessible and not costly.

The challenge is, accordingly, to remain a constitutionally recognised judicial body of the highest order: a body which ensures that the rights of broadcasters to freedom of expression, freedom of drama, freedom of art, freedom of scientific and documentary material are balanced against the interests of the public. The result must always be compatible with what is justifiable in a society where the rule of law prevails, a democratic and free society that protects fundamental rights.

XII. INTERNATIONAL CONTACTS

This Commission has, since its inception in 1993, maintained contact with overseas regulators. We have held two international conferences: one in 1995 and the other in 2005. In order to demonstrate the role of the BCCSA, it is appropriate to repeat here the introduction to the 2005 Conference at Monash University, Johannesburg.

“Welcome to the second South African International Conference on Broadcasting Content Regulation at the Monash Campus, Johannesburg!”

It has taken ten years to do it again and this time we have much wider representation: Welcome to regulators from Canada, Germany, Australia, New Zealand, and experts from Zambia and Slovakia, the Commonwealth

Association of Broadcasters and our special guest speaker, Jeffrey Cole, from the United States and, of course, welcome to South Africa. The French CSA, which was sending two delegates, had to apologise as a result of a referendum.

We also welcome delegates and guests from the Judiciary, Parliamentary Portfolio Committee on Communications, the Department of Communications, the Independent Communications Authority of South Africa, the Broadcasting Monitoring and Complaints Committee, the National Association of Broadcasters, the Advertising Standards Authority, the Films and Publications Board, the Press Ombudsman, the BCCSA and from the 47 broadcasters under our jurisdiction. Welcome also to our satellite broadcaster, DSTV. And, of course, welcome to listeners, viewers, academics, researchers, journalists and representatives from Sanlam and Monash University.

Although the subject is academically serious, we have attempted to give it a lighter touch so that the conference does not turn into a solemn slumber!

The BCCSA will be 12 years old in August 2005. We have dealt with more than 9000 complaints in this period. About a1000 complaints have led to full hearings of the Tribunal and on the whole, we have upheld 10% of the complaints. Indeed a splendid record for South African broadcasters!

We are proud to confirm with enthusiasm that our broadcasters have moved from a pre-constitutional suppressing Apartheid period of the rule by the minority to a proud independence within the rule of the majority, whose Constitutional Court has declared freedom of expression and the duty to inform as being at the heart of democracy and has accentuated the fundamental values of equality, dignity and the rule of law. The BCCSA is delighted to function within this climate!"

XIII. CONCLUSION

In conclusion, we wish to thank our colleagues for their diligent support over many years.¹ Prof Viljoen and Mr Mokwena have both acted as chairs of tribunals and we thank them for their special contributions. A special word of thanks to Mrs Shouneez Martin, the Registrar, who, with the assistance of the secretary, Ms Donna Mohammed, has done a sterling job. Our special thanks also go to the Executive Director of the National Association of Broadcasters, Johann Koster, as well as to the Executive and Council of the Association for their firm and loyal support.

XIV. CERTIFICATION OF COMPLIANCE

This Commission can also certify that all the broadcasters, which are subject to its jurisdiction and as listed below, have complied with all the directives of this Commission, and have given their full support of the procedures before the Commission. The National Association of Broadcasters has also supported the BCCSA in funding its reasonable costs.

KOBUS VAN ROOYEN SC
CHAIRPERSON
10 JUNE 2006

RATHA MOKGOATLHENG
DEPUTY CHAIRPERSON
10 JUNE 2006

**BROADCASTING COMPLAINTS COMMISSION OF
SOUTH AFRICA**

SIGNATORIES AS AT JUNE 2005

¹ Dr Willem de Klerk, Rev Danie du Toit, Ms Lauren Gower, Prof Sunette Lötter, Mr Barnard Mokwena, Prof Ravi Nayagar, Adv Robin Sewlal, Prof Henning Viljoen.
Ad Hoc Commissioners: Ms Zenobia Africa, Dr Lynda Gilfillan, Ms Refiloe Mokoena-Msiza, Ms Kate McCallum, Adv Tlharesang Mkhwanazi, Prof Gerrit Olivier, Dr Linda Venter.

- Association of Christian Broadcasters:
 - ◆CCFM
 - ◆Good News Community Radio
 - ◆Impact Radio
 - ◆Radio 7 FM
 - ◆Radio Khwezi
 - ◆Radio Namakwaland
 - ◆Radio Rippel 9.5 FM
 - ◆Rainbow FM 90.7
 - ◆East Rand Stereo 93.9
 - ◆Highway Radio
 - ◆Link FM
 - ◆Radio Alpha
 - ◆Radio Kingfisher
 - ◆Radio Pulpit
 - ◆Radio Tygerberg
 - ◆Studente vir Christus Radio

- Bush Radio
- Bay FM (BFM)
- Cape Talk
- Classic FM
- East Coast Radio
- e-tv
- East Rand Radio
- Fine Music Radio
- Gagasi 99.5FM (formerly known as P4 Durban)
- Highveld Stereo
- IFM 102.2
- Jacaranda 94.2 FM
- KFM
- Kaya FM
- M-Net
- MFM
- OFM
- Heart 104.9 FM 9 (formerly known as P4 Cape-Town)
- Radio 702
- Radio Algoa
- Radio Islam
- Radio Kingfisher
- Radio Pulpit
- Radio Puk
- Radio Ripple
- Radio Rosestad
- Radio Pretoria
- Radio Today
- Radio Tuks
- Radio Tygerberg
- Rainbow Community Radio
- Radio Shimla
- UJFM (RAU Radio)
- Rhodes Music Radio
- Transworld Radio
- Tut Top Radio
- The South African Broadcasting Corporation:

TELEVISION:

- ◆SABC1
- ◆SABC2
- ◆SABC3

RADIO:

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|---------------------|--------------------|
| ◆Radio Sunshine | ◆Ligwalagwala FM |
| ◆Munghana Lonene FM | ◆Radio Metro |
| ◆Ukhozi FM | ◆CKI Stereo |
| ◆Good Hope FM | ◆Radio 2000 |
| ◆Motsweding FM | ◆PhalaPhala FM |
| ◆Radio SonderGrens | ◆SAFM |
| ◆5FM | ◆Radio Lotus |
| ◆Thobela FM | ◆Ikwewezi FM |
| ◆Lesedi FM | ◆Umhlobo Wenene FM |

- Trinity Broadcasting Network
- Vaal Community Radio
- Voice of Wits
- Voice of the Cape
- YFM

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