

BEFORE THE BROADCASTING STANDARDS AUTHORITY

Decision No: 6/90

Dated the 6th day of June 1990

IN THE MATTER of the Broadcasting Act 1989

AND

IN THE MATTER of a complaint by

DR RANGINUI WALKER

of Auckland

Broadcaster

TRIPLE M LIMITED

I.W. Gallaway Chairperson

J.B. Fish

J.L. Hardie

J.R. Morris

DECISION

Dr Walker's Complaint to the Broadcasting Standards Authority

On 24 October 1989 the Authority received from Dr Walker a faxed message that he wished to lay a complaint pursuant to ss4(1)(c) and 8(c) of the Broadcasting Act 1989 with respect to statements broadcast on the 89FM radio station. (Section 4(1)(c) of the Broadcasting Act imposes an obligation upon broadcasters to maintain, in their programmes and the presentation thereof, standards which are consistent with the privacy of the individual. Section 8(c) empowers the Authority to deal with such complaints directly, ie without the complainant first making the complaint to the broadcaster concerned.)

Dr Walker stated that his complaint arose from the broadcast, on the "Top Marks" programme of 26 September 1989, of his home address and telephone number together with a message which "encouraged listeners to visit my home and call me to challenge my views." (Extracts from an interview with Dr Walker, in which he expressed his views on crime, with particular reference to Maori offenders, had been broadcast by 89FM earlier that day and his comments paraphrased in subsequent news items.) The complainant stated that as a result of the broadcast he "was harassed by numerous obscene, abusive and hostile calls."

By letter dated 26 October 1989, the Authority acknowledged receipt of Dr Walker's message and sent him a Broadcasting Complaint Referral Form so that his complaint might be elaborated. The completed Form was returned to the Authority on 6 November



1989 together with several attachments. They made plain (as did a letter received by the Authority in the meantime - from the Auckland District Maori Council) that Dr Walker had also referred his complaint to the Race Relations Conciliator and that it was being investigated by the Conciliator's Office.

On the Broadcasting Complaint Referral Form, Dr Walker not only repeated his claim that his privacy had been infringed by 89FM's broadcast of the Top Marks' statements but also asserted that s4(1)(a) and (b) of the Broadcasting Act 1989 had been breached by the broadcast. (Those provisions require broadcasters to maintain standards consistent with the observance of good taste and decency and the maintenance of law and order.) Pursuant to ss.6, 7 and 8 of the Act, a complaint based on s4(1)(a) or (b) must be made to the broadcaster concerned before it may be referred to the Authority. Because Dr Walker did not make a formal complaint to the broadcaster alleging a breach of s4(1)(a) or (b), the Authority can only consider the privacy element of his complaint, ie the allegation that s4(1)(c) of the Broadcasting Act 1989 was breached by the broadcast of the Top Marks' statements.

In elaborating his privacy complaint on the Complaint Referral Form, Dr Walker stated:

The breakfast/morning show hosts known as the Top Marks on 89FM ... did not agree with my comments on a news item broadcast on their station. I did not hear their comments as I have never listened to Radio 89FM. However, a number of listeners contacted me and reported that the station broadcast my name, address and telephone number and invited listeners to ring up and/or go around to my home and "help themselves" to my property. Their comments as you can see from the appended witnesses were irresponsible and incited ill-will and obscene phone calls which plagued me for three weeks.

I have lodged a complaint with the Race Relations Office and now I am lodging the complaint with you. Mr Everard the Station Manager and one of the directors have been to see me to try and have the complaint withdrawn. Their explanation that their announcers were being funny or facetious is not acceptable to me as I was the one who was harassed by obscene calls at all hours of the night. As far as I am concerned the station has breached Section 4(a) (b) and (c) of the Broadcasting Act.

Triple M's Comments

On 8 November 8 1989, the Authority wrote to Mr Everard, the Executive Chairman of Triple M Limited - the company which operates 89FM. Comments were sought upon Dr Walker's complaint and a request was made for a tape and transcript of the Top Marks' programme of 26 September 1989. Copies of all Dr Walker's correspondence to the Authority were enclosed.



By letter dated 17 November 1989, Mr Everard informed the Authority that the part of the programme which inspired the complaint had not been taped or transcribed. However, several attachments were enclosed with the letter: a statement by the Top Marks (Mark Kennedy and Mark Staufer) of their recollection of what they had said about Dr Walker on their programme of 26 September 1989; a statement by the journalist who had interviewed Dr Walker of his recollection of the parts of the interview that were broadcast on 89FM early on 26 September 1989; and transcripts of the news items broadcast later on the same day which paraphrased Dr Walker's statements in the interview.

The letter of 17 November also informed the Authority of the action which 89FM had taken in response to Dr Walker's complaint to the Race Relations Conciliator. First, the Executive Chairman of Triple M Ltd had visited Dr Walker:

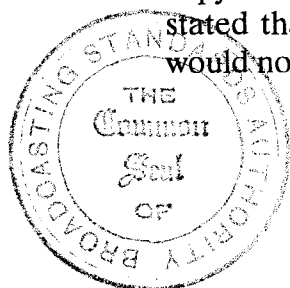
primarily to apologise for the grievance to him and his family and to look for a more positive solution to the root cause of the incident rather than going through a formal complaint procedure.

In addition, an inquiry into the incident had been arranged by the radio station, conducted by three prominent Auckland Maori people and the News Director and Executive Chairman of Triple M Ltd. As a result of that group's discussions, the letter stated:

- regular meetings will be held to develop station staff's appreciation of Maoridom and generate ideas and promotions that the station could implement to promote good race relations;
- key people from the station will undertake a cultural sensitivity course;
- a list of Maori tribes and their nominated spokespeople will be compiled for possible distribution to all media with an explanation of protocols to be observed;
- an effort will be made to have an allocation of positions set aside at the ATI for the training of Maori journalists; and a promotional event on the theme "One Land, One People" is being discussed.

Further Correspondence

Triple M's response and the attachments were sent to Dr Walker by the Authority on 23 November 1989 for his comments. Dr Walker's comments, which are referred to later in this decision, were contained in a letter dated 1 December 1989, a copy of which was sent to Triple M Ltd on December 8 1989. By letter dated 15 January 1990, Triple M Ltd concluded the correspondence pertaining to the complaint, stating that the remaining areas of debate depended on the subjective views of Dr Walker and 89FM personnel and that, as a result, it would be difficult to continue the correspondence. Attached was a copy of a letter to 89FM from the Race Relations Conciliator, dated 8 January 1990. It stated that the Conciliator's investigation of Dr Walker's complaint against the station would not be investigated further "as there is appropriate recourse for action through the



Broadcasting Standards Authority."

The Statements Broadcast by 89FM

As has been noted, the Top Marks' statements which inspired Dr Walker's complaint were not taped or transcribed by 89FM. This has meant that the Authority has had to rely upon the recollections of the parties and others as to the exact content of those statements. Fortunately, there is little dispute between the parties as to this matter.

It may be noted that since Dr Walker's complaint was made, 89FM has installed a device - a total airtime soundscribe - which records all spoken words broadcast by the station. The Authority commends 89FM on this action, which will preclude the need for any future complaints against the station to be determined on the parties' and listeners' recollections of the broadcast statements.

The Top Marks' statements which led to the complaint were the culmination of a series of statements broadcast by 89FM on 26 September 1989. First, extracts from an interview with Dr Walker were broadcast, in which Dr Walker was asked to comment upon the (then) recent fatal shooting of a Maori burglar by a man who lived in the neighbourhood of the burgled house, an incident about which the (then) Minister of Police had already made statements. Although no tape was made by 89FM of those interview extracts, the parties do not disagree significantly upon the content of Dr Walker's comments. In his letter to the Authority of 1 December 1989, Dr Walker stated his own recollection of the interview in these terms:

I recall very clearly what I said because I was interviewed by several journalists on the same matter.

I said Mr Tapsell needed a lesson on the history of 150 years of colonisation and oppression of the Maori. The real thieves were past governments who expropriated Maori land, resources and fisheries and gave them to incoming Pakeha settlers. They used state force, confiscation and legal artifice through the Native Land Court to get the land. Whole tribes were dispossessed by putting only ten names on a certificate of title to land. The end result of colonisation is Maori landlessness, deprivation and a structural relationship of Pakeha dominance and Maori subjection. As a consequence, Maori are disproportionately represented among the unemployed and the recipients of social welfare. When such people are sitting at home watching T.V. and are invited by advertisers to go and get/pick up/buy the latest product, and their children say "when are we going to get ours?" there is only one way they can get it, and that is by stealing.

I personally have been ripped off by thieves who burgled my house. I resent the invasion of my privacy and personal space more than the loss of property. I am well paid and in any case the losses are covered by insurance. Theft is a form of income redistribution. The rich have it, the poor haven't so they take it.



The recollections of the interviewer, of the extracts from Dr Walker's statements which were broadcast on 89FM, are contained in an attachment to Triple M's letter of 17 November. They are:

To the best of my memory, which is good, the clip that actually went to air basically had Dr Walker make the following points:

That the high Maori crime rate had a lot to do with the oppression of the last 150 years, that it had to be understood that this was the young Maori way of redistributing wealth.

He pointed out that he too had been burgled in the past, but figured those who took his goods needed the money more than he did, and he could always get another TV or video on the insurance money anyway.

In his letter of 1 December 1989, Dr Walker disputes that his comment about wealth redistribution was confined to Maori offenders. He maintains that the comment was a general one, ie it applied "equally to Pakeha and Maori offenders." The Authority notes its view that, from Dr Walker's own recollection of his interview statements, it was a reasonable inference, from his historical and sociological explanation of the relative positions of Pakeha and Maori, that his later comments about wealth redistribution were intended to be confined to Maori offenders.

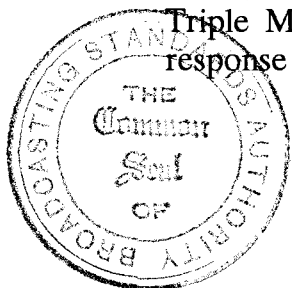
Dr Walker also disputes that he specifically mentioned "young Maori" at any time during the interview. Although the reference to "young Maori" offenders appears several times in the paraphrased versions of Dr Walker's statements which were broadcast by 89FM in its news items on 26 September 1989, it is unnecessary for the Authority to venture an opinion upon the accuracy of that paraphrasing: the complaint is directed at other statements made on 89FM - by the Top Marks. However, since the Top Marks' statements were made as a result of their hearing the news items (rather than hearing the original interview with Dr Walker) the transcripts of those items are reproduced, for information, in Appendix A to this Decision.

The Top Marks' recollection of what they said about Dr Walker, set out in an attachment to the Triple M letter of 17 November, is in these terms:

We think Dr Walker's comments are racist. If he's sticking to them maybe you would like to join his redistribution of wealth scheme.

Perhaps you would like to call him. His address and phone number are in the book, but in case you do not have a phone book, they are ... [Dr Walker's home address and phone number were then read out].

Triple M's letter states that the Top Marks "said they did this twice and put some response calls to air."



Dr Walker did not hear the Top Marks' programme so cannot offer his own recollection of the statements which they made on air. In support of his complaint, however, Dr Walker submitted to the Authority the paraphrased recollections of four people who had listened to the Top Marks' programme on 26 September 1989. Those four people had been telephoned by staff of the Race Relations Conciliator on 19 October 1989, during the Conciliator's investigation of Dr Walker's complaint, and their recollections were taken down in writing at that time. Triple M Ltd was sent the paraphrased statements of the four listeners and, in response, supplied the Authority with the Top Marks' own recollection (quoted above) of the comments they made on air.

In the absence of a verbatim record of the Top Marks' comments, it is the Authority's view that the recollections of the four listeners are entitled to, at least, the same respect as the recollections of the Top Marks themselves. The full record of the four listeners' statements are attached to this Decision as Appendix B.

Comparing the recollections of the Top Marks with those of the four listeners, one difference emerges which is relevant to the Authority's determination of Dr Walker's complaint: the Top Marks' do not recollect giving encouragement to listeners to call at Dr Walker's home and steal his property whereas all four of the listeners recall the Top Marks either making explicit comments to that effect or making comments which implied it.

In the Authority's view, even if the Top Marks did not expressly encourage listeners to go to Dr Walker's home and steal his property, a reasonable inference from their statements was that they were encouraging that conduct. Support for this view is found in the Top Marks' own recollection of what they said, ie "If he's sticking to [his comments] maybe you would like to join his redistribution of wealth scheme", followed by the broadcast of Dr Walker's address - not just his telephone number.

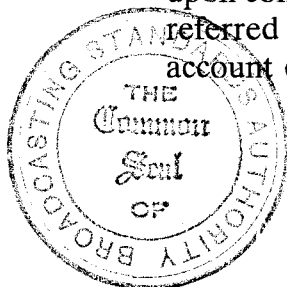
In his letter of 17 November 1989 the Executive Chairman of Triple M Ltd states that when he visited Dr Walker to apologise, he said:

... that the Marks quite regularly satirised news items and/or public figures with the intention always to be funny rather than harmful.

The announcers' intention in broadcasting their statements about Dr Walker will be discussed subsequently.

The Concept of Privacy

In Decision No: 5/90, dated 3 May 1990, the Authority has set out some general principles about the legal notion of privacy which it believes should guide its decisions upon complaints alleging a breach of s4(1)(c) of the Broadcasting Act 1989. Readers are referred to the section in that Decision entitled The Concept of Privacy for a fuller account of the principles which are merely summarised below.



The first principle is that an individual's privacy cannot be protected to such an extent as to override the legitimate interests of other members of society.

The second principle is that an individual's privacy may be infringed by the public disclosure of private or public facts pertaining to that individual, provided, in both cases, that the facts disclosed would be highly offensive and objectionable to a reasonable person of ordinary sensibilities.

The third principle recognises that an individual's privacy may be infringed by unreasonable intrusions upon his or her solitude or seclusion. Again, the intrusion must be of a nature which would be offensive or objectionable to the reasonable person.

One of the features of the present complaint which distinguishes it from the circumstances before the Authority in Decision No: 5/90 is that the complainant, about whom statements were broadcast, is a public figure. In the Authority's view, that fact affects the application of the principles summarised above, as will be discussed subsequently.

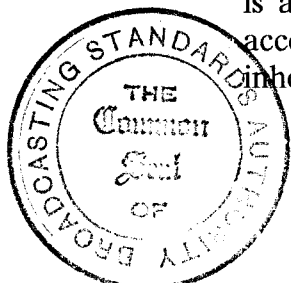
Decision

In the Authority's view, three uncontested features of the present complaint are germane to its determination whether s4(1)(c) of the Broadcasting Act was breached by the broadcast of the Top Marks' statements. They are:

- (a) the fact that Dr Walker's home address and telephone number are published in the telephone directory;
- (b) the fact that comments encouraging listeners to use that information were broadcast in conjunction with it;
- (c) the fact that Dr Walker is a prominent spokesperson on issues affecting Maori.

(a) Because Dr Walker's home address and telephone number are published in the telephone directory, those facts can be reasonably readily ascertained by anyone concerned to discover them. As a result, the broadcast of Dr Walker's address and telephone number was of public facts as opposed to private facts. (See Decision No: 5/90 for discussion of public and private facts.) This point is made in the Report of the Ombudsman Concerning Disclosure of State-Owned Enterprise Remuneration Under the Official Information Act 1982, at p14, as follows:

3.4.5 Information should not be regarded as private simply because it relates to an identifiable person. Otherwise, any information about an individual would have to be private. Our society simply does not recognise such an argument. There is an abundance of information about individuals which is published or freely accessible as a matter of course without any suggestion that such information is inherently private. For example, in the case of telephone directories, unless a



person takes the definite step of applying for an unlisted number (and paying the required fee) their number and information about where they live are freely available.

The Authority is of the view that the broadcast of public facts can infringe an individual's privacy - where the facts broadcast would be highly offensive and objectionable to a reasonable person of ordinary sensibilities (see Decision No: 5/90). It does not believe, however, that the mere broadcast of the information about an individual which can be found in a telephone directory meets the criterion of being "highly offensive" etc.

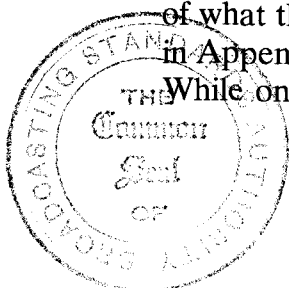
(b) Turning to the second feature: the fact that comments were broadcast encouraging listeners to use the information about Dr Walker which is found in the telephone directory.

It is not disputed that the announcers expressly encouraged listeners to telephone Dr Walker and, in light of the announcers' opening statement, ie that Dr Walker's comments were racist, it is a reasonable inference that listeners were being encouraged to telephone Dr Walker to state opposition to his views rather than to express support for them.

Further, as has already been noted, the Authority is satisfied that even if the Top Marks gave no explicit encouragement to listeners to call at Dr Walker's home and steal his property, the encouragement of that conduct was suggested by their words, although it may not have been intended to be taken seriously. With regard to the intention of the announcers on this matter, it is the Authority's view that broadcasters who make controversial remarks which they do not intend seriously must take special care to make those intentions plain to their audience. The Executive Chairman of Triple M has said that the Top Marks quite regularly satirise news items and/or public figures with the intention always to be funny rather than harmful. The Authority acknowledges that regular listeners of the Top Marks' programme may well know this and may, as a result, have inferred from the programme on 26 September 1989 that the announcers' encouragement to listeners to call at Dr Walker's home, and, perhaps, the encouragement to telephone Dr Walker, were given flippantly.

However, the Authority is not persuaded that any "tongue in cheek" intention of the announcers was made plain by their comments. From their own account of what they said, the Top Marks had first accused Dr Walker of making racist comments, which is a serious matter. They then suggested that listeners might like to join, what they termed, Dr Walker's redistribution of wealth scheme. Finally, they expressly encouraged listeners to telephone Dr Walker and read out his home address and telephone number.

In light of the seriousness of the topics being commented upon by the announcers, ie racism and crime, the Authority cannot discern, from the Top Marks' own recollections of what they said, and certainly not from the recollections of the four listeners (set out in Appendix B), any clear intention that their comments were not to be taken seriously. While one might instinctively believe, in a society such as ours, that an announcer's



suggestion that listeners should behave in an anti-social or criminal manner must not be intended seriously, in the circumstances of the Top Marks' programme of 26 September 1989, that credence cannot be sustained. As a result, it is the Authority's view that the Top Marks' statements, and the inferences reasonably drawn from them, must be taken at their face value.

(c) The third feature of the present complaint which is of importance is the fact that Dr Walker is a prominent spokesperson on issues affecting Maori. One consequence of this, in the Authority's view, is the fact that his statements may often be expected to provoke some anger in a sizeable sector of New Zealand society. In this regard, the Authority notes that the group, convened by 89FM to inquire into Dr Walker's complaint to the Race Relations Conciliator, comprising three prominent Auckland Maori people and two senior Triple M Ltd personnel, drew the following conclusions about Dr Walker's statements about the causes of crime in New Zealand:

Especially in light of the Rapata shooting, Dr Walker's statement was provocative, insensitive, and somewhat irresponsible. That in making such statements Dr Walker as a public figure could expect to be subject to comment and ridicule. [Triple M Ltd's letter of 17 November 1989.]

However, it must be noted that the group also concluded, in the context of the race relations issues being investigated, that the Top Marks, unintentionally or not, went beyond acceptable satire and were wrong in broadcasting Dr Walker's address and phone number and encouraging people to call him, with the result that Dr Walker had good cause to lodge a complaint [with the Race Relations Conciliator].

Another consequence of Dr Walker being a prominent spokesperson upon issues affecting Maori is that he is a public figure. Notable comments upon the privacy of a public figure have been made by the Broadcasting Tribunal - the Authority's predecessor - in Decision No: 6/90, dated 26 January 1990. One of the complaints there decided arose out of the radio broadcast of the complainant's name in conjunction with statements which identified him as the Treasurer of HART and the chief protagonist in a "campaign" against the announcer for breaches of the Broadcasting Act 1976 and the Race Relations Act 1971.

On the question whether the naming of the complainant on air infringed his privacy, the Tribunal stated at p15 of its Decision:

The fact that it allegedly resulted in abusive telephone calls is not in itself conclusive. It has to be accepted that Mr Cuthbert is a public figure. Mr Cuthbert has taken a prominent position in protests over a number of issues relating to sporting contacts with South Africa. He is not a private person in the context of this complaint but rather a public figure. It is quite possible that public figures will receive telephone calls as a result of references to them in broadcast programmes and others in other media.



For this Tribunal to find that mention of a public figure in an unfavourable way is in itself a breach of privacy, whether the comment is fair or unfair, would be to limit the freedom of speech quite remarkably. We can identify no allegation of the programme having urged people to contact Mr Cuthbert or in any way having advocated any course of action which would have in itself constituted a breach of his privacy. It is not necessary for us to decide the question of whether an invitation to contact a person is in itself an infringement of the right to privacy when that person is a public figure. It is however - for the purposes of broadcast regulation - a matter that raises serious issues and care needs to be taken in arriving at a decision on the basis of particular circumstances.

Plainly, the very matter which the Tribunal did not need to decide in its Decision No. 6/90 arises squarely for the Authority's determination in the present complaint. Dr Walker has complained of being "plagued ... for three weeks" by "numerous obscene, abusive and hostile" telephone calls, made "at all hours of the night". He attributes these calls to the statements made by the Top Marks on 89FM, encouraging listeners to telephone Dr Walker.

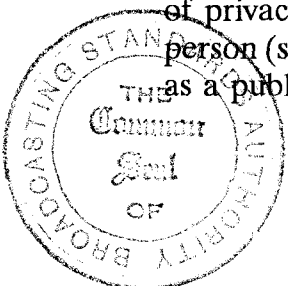
In the latter part of the passage quoted from its Decision, the Broadcasting Tribunal implies that if it had been considering a complaint such as the present one, it would have approached it by considering the following questions:

1. Were the Top Marks encouraging their listeners to act in a manner which would constitute an infringement of Dr Walker's privacy?
2. If so, does a broadcaster infringe an individual's privacy by broadcasting statements encouraging listeners to infringe the individual's privacy?
3. If the Top Marks were not encouraging their listeners to act in a manner which would infringe Dr Walker's privacy, did the broadcast of their comments, encouraging listeners to use the information in the telephone directory, itself infringe his privacy?

Further, the Tribunal makes plain that it is relevant to the consideration of those questions that the complainant is a public figure. The Authority will deal with the above questions in turn.

1. *The first question is whether or not the conduct that was encouraged by the Top Marks would, if performed, invade Dr Walker's privacy.*

Plainly, the unlawful taking of property from a person's home would involve an invasion of that person's privacy. It would comprise, in the phraseology of the United States' tort of privacy, an "unreasonable intrusion" upon the physical solitude or seclusion of that person (see Decision No: 5/90). Further, this would be so regardless of the person's status as a public figure.



With regard to persistent and unwanted telephone calls made to an individual's home, the Authority is of the view that an ordinary (ie non-legal) understanding of the notion of privacy would hold such calls to infringe the individual's privacy. However, the legal view of the matter is less clear. The Authority is aware of United States' court decisions indicating that the privacy action for unreasonable intrusion is apt to cover "persistent and unwanted telephone calls" (see Decision No: 5/90). Further, Australian and Canadian courts have imposed liability in the tort of nuisance for the making of telephone calls which are "repeated with persistence, and in the midst of night, so as to interfere unreasonably with comfort or sleep" (Fleming, The Law of Torts, Seventh Edition, p575).

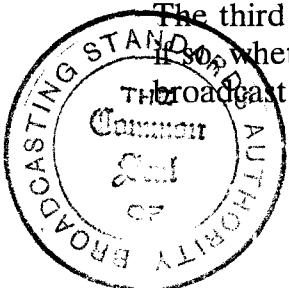
In New Zealand, however, there are hurdles in the path of an individual seeking to establish that his or her privacy has been infringed by persistent and unwanted telephone calls. The first is the uncertain extent of the protection afforded by New Zealand law to individual privacy (see Decision No: 5/90). Thus, it may be that our courts will not recognise such conduct as an actionable infringement of privacy, even if it may be actionable in the tort of nuisance.

If New Zealand law does recognise persistent and unwanted telephone calls made to an individual as infringing his or her privacy, another hurdle arises - for public figures only. As the Broadcasting Tribunal has noted, public figures may warrant less privacy protection in this regard than is afforded to other individuals. This is because media attention to the views of public figures may be expected to lead to some adverse reactions affecting their private lives and it would be unrealistic to regard all but the most serious as actionable invasions of public figures' privacy when, by their prominence, they "invited" attention. Accordingly, it would seem that a public figure might establish an invasion of his or her privacy by persistent and unwanted telephone calls only when a caller or group of callers mounted something in the nature of a "campaign" of calls to the person's home, thereby seriously interfering with the person's right to be let alone.

Three issues arise from the above discussion. The first is whether persistent and unwanted telephone calls to an individual can be regarded in New Zealand as infringing that person's privacy. In the Authority's view, on the strength of ordinary notions of privacy as well as the United States', Australian and Canadian court decisions, such calls could well be so regarded in this country, even if another legal "label" may also be attached to them (eg nuisance).

The second issue is whether the Top Marks' encouragement to listeners to telephone Dr Walker can be said to be encouraging a "campaign" of calls such as would seriously interfere with the privacy of Dr Walker, a public figure. The Authority is inclined to the view, in light of the fact that their statements were broadcast on a popular radio station, that the announcers did encourage such a "campaign" of calls.

The third issue is whether Dr Walker actually received such a "campaign" of calls and, if so, whether it is necessary to establish that those calls were causally connected to the broadcast of the Top Marks' statements. The Authority has no reason to disbelieve Dr



Walker's description of the quantity and quality of the telephone calls he received after the broadcast of the Top Marks' programme. Mindful of the difficulty of proving the matter, the Authority accepts that Dr Walker received telephone calls in such quantity and of such quality as to amount to a "campaign" of calls.

It is, of course, impossible for Dr Walker to establish that the telephone calls he received, or any of them, were directly caused by the broadcast of the Top Marks' statements on 89FM. As a result, it would be most unjust if that matter were held to be fatal to the success of his complaint. In the Authority's view, a fair approach to the issue of causation in the present circumstances requires that the effect suffered by the complainant be a reasonably foreseeable consequence of the conduct which is alleged to have caused that effect.

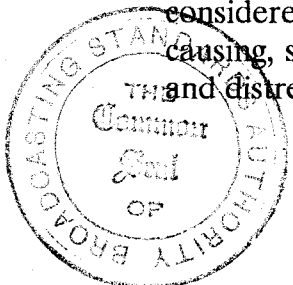
On that approach, if it could reasonably have been foreseen by the Top Marks that their encouragement to listeners to telephone Dr Walker might produce a "campaign" of calls to his home, then a sufficient causal relationship exists between their conduct and the calls Dr Walker received. As is explained below, the Authority is satisfied that the Top Marks must have, or should have, foreseen that their statements could cause, or contribute to causing, the "campaign" of telephone calls received by Dr Walker.

2. The second question to be determined is whether it is in itself an infringement of an individual's privacy to broadcast statements encouraging listeners to act in a manner that would infringe the individual's privacy.

In the Authority's view, the answer to this question must depend upon the circumstances of the situation being considered. If, for example, the action that was encouraged was of a type that would be unlikely to be performed, it would seem that the giving of the encouragement would not amount to an invasion of privacy. In the present situation, whatever encouragement was given by the Top Marks to steal Dr Walker's property, the fact is that no one acted upon it. But even if someone had gone to Dr Walker's home and stolen his property, in the Authority's view it would still be true to say that such action was very unlikely to occur, granted that most New Zealanders would not be influenced by the encouragement given.

The encouragement to telephone Dr Walker is, however, a different matter: it is perfectly predictable that some members of society who disagree with the views of a public figure may telephone that person to express their opinions, especially upon a topic involving race relations - about which views differ sharply. While some New Zealanders would not need encouragement to take that action, others might well be inspired by a broadcaster's suggestion to that effect.

In encouraging listeners to telephone Dr Walker, the Top Marks must surely have considered the possibility that their words might cause, or be a contributing factor in causing, such a number of calls to Dr Walker's home that he would be inconvenienced and distressed by them. The very fact that the announcers broadcast Dr Walker's home



telephone number and address, thereby facilitating telephone calls to his home, suggests that the announcers did consider those possible consequences and, indeed, sought to bring them about.

It remains to determine, on the strength of the above discussion, whether or not Triple M Ltd did infringe Dr Walker's privacy by broadcasting the Top Marks' statements encouraging listeners to act in a manner that would infringe his privacy. The Authority has been unable to find any suggestion of an answer to this question in the various texts and Reports on privacy which it has consulted.

The Authority is in no doubt that the Top Marks' conduct in their programme of 26 September 1989 was unethical - it was an abuse of the power of the media. Moreover, in light of the above discussion, it is the Authority's view that the broadcast of the Top Marks' statements did infringe the complainant's privacy. Thus, in the Authority's view, Triple M Ltd infringed Dr Walker's privacy by broadcasting the Top Marks' statements encouraging listeners to telephone Dr Walker because that encouragement could be reasonably foreseen to cause a campaign of calls to his home and in fact that result ensued.

3. Because of its views upon the first and second questions posed earlier, the Authority does not need to consider the third question.

The approach adopted by the Authority to this point in its consideration of Dr Walker's privacy complaint has been that suggested by the Broadcasting Tribunal in its Decision No: 6/90. As has been seen, on that approach, the Authority has concluded that the broadcast of the Top Marks' statements by Triple M Ltd on 26 September 1989 constituted an infringement of Dr Walker's privacy. It follows from that conclusion that the Authority is satisfied that Triple M Ltd breached the obligation imposed upon it by s.4(1)(c) of the Broadcasting Act 1989.

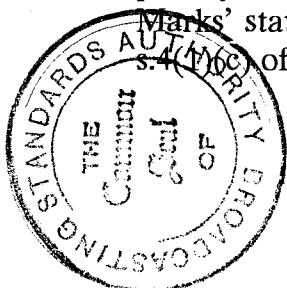
However, the Authority's decision does not rest solely upon the argument presented above: there is further support for its conclusion in the words of s.4(1)(c) itself. It is there provided that:

4(1) Every broadcaster is responsible for maintaining in its programmes and their presentation, standards which are consistent with -

...

(c) The privacy of the individual [emphasis added]

From the emphasised words in s.4(1)(c), the Authority infers that the provision may be breached by the broadcast of material which does not itself infringe an individual's privacy. Therefore, even if the Authority were of the view that the broadcast of the Top Marks' statements did not infringe Dr Walker's privacy, still it would be satisfied that s.4(1)(c) of the Broadcasting Act had been breached by that broadcast. This is because




the broadcast statements encouraged listeners to act in a manner which would infringe Dr Walker's privacy and, in the Authority's view, a broadcaster's encouragement of that conduct cannot be "consistent with" the privacy of Dr Walker.

Pursuant to s.13(1)(d) of the Broadcasting Act 1989, when the Authority has found that a broadcaster has failed to maintain standards that are consistent with the privacy of an individual, it is empowered to order compensation, of an amount not exceeding \$5,000, to be paid to the individual. While the Authority is satisfied that Triple M Ltd did infringe Dr Walker's privacy, it will be apparent from the above discussion that there are several points in the Authority's reasoning process at which a different view may have been taken of the facts and principles relevant to the determination of the complaint. As a result, the circumstances of Dr Walker's complaint do not constitute an indisputable breach of s.4(1)(c) of the Broadcasting Act. The Authority believes that this is relevant to its consideration of the amount of compensation, if any, which should be ordered to be paid to him by Triple M Ltd.

In the result, the Authority has determined that Triple M Ltd should pay Dr Walker compensation of \$500 for its failure to maintain standards consistent with his privacy. The Authority notes that, in deciding upon that amount, it was not influenced by the fact that 89FM has undertaken to improve its staff's awareness of race relations issues and to involve itself in broader measures which may improve race relations in the community, admirable as those proposals are. In the Authority's view, any action resulting from those undertakings does not compensate Dr Walker for the infringement of his privacy.

For the reasons set forth above, the Authority upholds the complaint and orders Triple M Ltd to pay compensation to Dr Walker in the amount of \$500.

Signed for and on behalf of the Authority


Iain Gallaway
Chairperson



6 June 1990

(i)

APPENDIX A

News items broadcast by 89FM on 26 September 1989:

There's been a heated reaction from Aucklanders to comments from an Auckland Maori leader this morning about the reasons for the high Maori crime rate.

District Maori Council chief - Dr Ranganui Walker - says young Maoris are committing crimes because their culture has been torn apart over 150 years by colonising Pakeha governments.

Dr Walker says things won't change until Maori people have their rights restored and are given full employment and equal status - and he's described burglary as a re-distribution of income.

However, those comments have prompted dozens of angry calls to 89FM this morning from Aucklanders saying there was no justification of burglary - culture or otherwise.

The debate continues to rage this afternoon over Auckland Maori leader Rangi Walker's provocative comments on the Maori crime rate.

Dr Walker says young Maoris won't stop committing crimes until society stops oppressing them and gives them all jobs and a decent income - and he told 89FM listeners this morning that Maori burglars are simply re-distributing wealth.

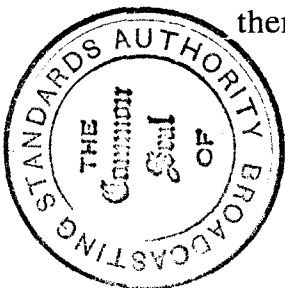
His comments sparked a barrage of calls to the radio station switchboards - many of them angry that Dr Walker seemed to be condoning burglary.

[At this point it seems that a caller's pre-recorded comments were broadcast.]

Meanwhile - National Maori Affairs spokesman Winston Peters has attacked both sides in the debate - saying it's simplistic to blame Maori crime on greed - and simplistic to blame it on Pakeha oppression.

Dr Ranginui Walker of the Auckland District Maori Council has been on air - saying that he understands why young Maori turn to crime.

He says they're outcasts from a white-dominated system - and he doesn't blame them at all for trying to rip-off that system.



(ii)

The leader of the Auckland District Maori Council has defended young Maoris who turn to crime - comparing them to Robin hood.

Ranginui Walker says as a group young Maori criminals have been robbed by white New Zealanders for the past 150 years.

They're outcasts from the system - and Dr Walker says he doesn't blame them preying on that system.



APPENDIX B

Recollections of four listeners of the Top Marks' programme of 26 September 1989
(as transcribed by staff of the Office of the Race Relations Conciliator)

Listener 1:

... said that she has known Ranginui Walker for quite a few years because he is on the same meeting circuit as her mother. She said she didn't know him well, but she knew the sort of community work he was involved in.

She said that she lives with [Listener 2]. They have three stereos in the house and they have them all tuned to the same station, 89FM.

[Listener 2] heard Ranginui Walker's name mentioned and she called out to [Listener 1] to listen. They were getting ready to go to work at around 9 am on 26 September.

[Listener 1] said she heard the 2 announcers talking and they were sounding very negative about Dr Walker.

They said he was at the University and then they put his name and address over the air. They rang his home number but there was none at home. They said: "It was a good time to go over."

[Listener 1] couldn't understand why they were saying it about Dr Walker so she stayed tuned.

A broadcaster called "Kerry" then came on the air and [said] something about "Rangi Walker didn't blame Maori people for stealing."

Straight after that a log (sic) of people rang in and said they were offended at what Rangi Walker said, according to [Listener 1].

[Listener 1] said that she had taken her mother over to Rangi Walker's house for a meeting and she recognised the address they broadcast as being his because of the "b" after the street number. She remembered having difficulty finding the correct drive.

[Listener 1] said that the announcers were whipping up feeling against Dr Walker and they said they claimed the station had received 1000 calls about him.

[Listener 1] said that one woman rang up and asked for Dr Walker's address so she could go around and steal his T.V. because he could afford it.



(iv)

[Listener 1] said she didn't agree with what they were doing because they were redefining Rangi Walker's message and distorting the meaning of it. Their report was unprofessional and childish. She thought it was "quite sick" they just went overboard.

[Listener 1] said it was inciting people by saying "Just go around and help yourself." She thought they created a very negative response and had a way of saying "Maori" in a very "snarky" way.

She said that she was offended by the programme because Dr Walker was their rangitira, he has kaumatua status with her people and when they do things like that they are attacking the Maori people.

[Listener 1] said that 89FM should have a tape of the broadcast because when she rang up and spoke over the air a few weeks ago, they played back a recording of her conversation at a later date.

She said that she rang 89FM and told them how offended she was at what they had done to Dr Walker. They had put his phone number and address over the air several times, but they stopped doing it after that. It was near to 10 am.

Listener 2:

... said that she was listening to 89FM on 26 September with [Listener 2]. There was an interview with Dr Rangi Walker where he made some flippant remark about Peter Tapsell's comment on Maori crime. He said something about crime being a form of "redistribution" of wealth.

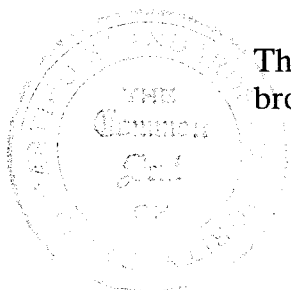
[Listener 2] said the announcers then said to the listeners "How would you like to take part in Dr Walker's "redistribution" scheme?", and they broadcast his home number and address and said: "Just go around and help yourself." [Listener 2] said that she clearly understood this to mean that the announcers were encouraging listeners to go around to his place or telephone him.

Every 10 minutes the lines were opened for an "opinion poll" for listeners to give their views. She thought they were encouraging people to make a joke about him.

She heard the announcers give out Dr Walker's address and telephone number about 3 times in the space of an hour.

[Listener 1] then rang the station to complain about their conduct on what they were doing to Dr Walker. The broadcasts of his name and address stopped after that.

The announcers telephoned Dr Walker but he was not at home - that was broadcast over the air.



(v)

[Listener 2] said the show was usually taped because the previous week when [Listener 1] rang up, her comments were played again over the air.

Listener 3:

...rang in response to an article she claimed she read in the 18 October Star saying that the assistant manager of 89FM Radio had denied that his station had broadcast Dr Ranginui Walker's address and phone number.

She said that around 8am on 26 September she heard the Top Marks on 89FM broadcasting Dr Walker's address and telephone number and inviting listeners to call him and tell him what they thought of him.

She did not hear the proceeding [sic] interview or any reference to what Dr Walker had said.

I asked if she heard any comment about "redistribution" and she thought she had heard them say something about "redistributing his goods" meaning Dr Walker's property.

[Listener 3] said she was very angry when she heard it because it was inviting people to be very abusive and we shouldn't live in a society like that.

She said they also rang up his home, but he didn't answer the phone.

Listener 4:

... said that she was listening to 89FM between 7.45 and 8.05 am on 26 September. She heard the announcers talking as if they were going to ring Rangi Walker for a planned interview, but there was nobody at home.

[Listener 4] said it wasn't clear what the issue being discussed was, but then the announcer said "If anyone is interested they might like to go around to his place" and gave out his address. Then they encouraged listeners to ring him up and gave out his home telephone number. She thought they said something about redistribution of wealth.

One woman listener rang up and said: "Give me his address. I haven't got a T.V. or video and I might go around there."

[Listener 4] said it was just trying to create a reaction, she thought it was ridiculous "you don't do that." She said it was inviting people to go around and steal his stuff - break into his house.



(vi)

When her partner got home that night she asked him what it was all about, because he teaches at the same school as Dr Walker's wife, and she thought he would know more about it.

Her partner discussed it with [Dr Walker's wife] the next day, and on the basis of that discussion [Listener 4] decided to complain to the Race Relations Office.

