

<b>COMPLAINT NUMBER</b>	17/318
<b>COMPLAINANT</b>	A Kirton, S Elgoran & D ten Have
<b>ADVERTISER</b>	Saving Downs Syndrome
<b>ADVERTISEMENT</b>	Saving Downs Syndrome, Facebook and Twitter
<b>DATE OF MEETING</b>	12 September 2017
<b>OUTCOME</b>	Settled

### **SUMMARY**

Three complaints were received raising issue with an advocacy advertisement on the Saving Downs Syndrome (SDS) Facebook page and Twitter account. The advertisement used similar imagery to the Labour Party advertising and included a statement from SDS reacting to the Labour Leader's support on decriminalisation of abortion.

The Complainants said the advertisement used the Labour Party logo without written authorisation and intended to falsely impersonate the Labour Party. Complainants said the advertisement "communicates misleading and false information about Jacinda Ardern and the Labour Party's position and policies."

The Advertiser said the advertisement was published in reaction to comments from the Labour Leader during a television debate on 4 September "in which she said that abortion "shouldn't be in the Crimes Act". In the same interview, she said "I want women who want access to be able to have it as a right".

In response to the use of the Labour Party imagery the Advertiser said "the Advertisement is a meme-style political attack on Ms Ardern's position. It uses the line, 'Let's do this', the campaign slogan of the Labour Party, to reinforce the parody."

The Complaints Board said that it was not clear the image was a parody. It said that consumers may consider the Post showed a Labour Party advertisement and the organisation's reaction to it. This was exacerbated by the official Labour Party logo, election tagline and an image of the Labour Party Leader in a similar style to Labour Party Election advertising, without qualification.

The Complaints Board confirmed that the advocacy principles allowed for the Advertiser's interpretation of the risks of such a law change, however the execution of the advertisement had reached the threshold to breach the Code of Ethics.

The Complaints Board ruled that as the Advertiser had removed the posts, the Complaints before it were Settled.

### **[Advertisement removed]**

Please note this headnote does not form part of the Decision.

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## COMPLAINTS BOARD DECISION

The Chair directed the Complaints Board to consider the advertisement with reference to Basic Principle 4 and Rules 2 and 11 of the Code of Ethics. This required the Complaints Board to consider whether the advertisement contained any statement or visual presentation or created an overall impression which directly or by implication, omission, ambiguity or exaggerated claim was misleading or deceptive, was likely to deceive or mislead the consumer, made false and misleading representation, abused the trust of the consumer or exploited his/her lack of experience or knowledge. (Obvious hyperbole, identifiable as such, is not considered to be misleading).

The Complaints Board was also required to consider whether the advertisement had been prepared with a due sense of social responsibility to consumers and society.

The Complaints Board said advertisement before it fell into the category of advocacy advertising and noted the requirements of Rule 11 of the Code of Ethics. The Complaints Board noted Rule 11 allowed for expression of opinion in advocacy advertising, provided that the expression of opinion is robust and clearly distinguishable from fact and the identity of the advertiser was clear. Also applicable were the Advocacy Principles, developed by the Complaints Board in previous Decisions on Rule 11. These said:

1. That Section 14 of the Bill of Rights Act 1990, in granting the right of freedom of expression, allows advertisers to impart information and opinions but that in exercising that right what was factual information and what was opinion, should be clearly distinguishable.
2. That the right of freedom of expression as stated in Section 14 is not absolute as there could be an infringement of other people's rights. Care should be taken to ensure that this does not occur.
3. That the Codes fetter the right granted by Section 14 to ensure there is fair play between all parties on controversial issues. Therefore in advocacy advertising and particularly on political matters the spirit of the Code is more important than technical breaches. People have the right to express their views and this right should not be unduly or unreasonably restricted by Rules.
4. That robust debate in a democratic society is to be encouraged by the media and advertisers and that the Codes should be interpreted liberally to ensure fair play by the contestants.
5. That it is essential in all advocacy advertisements that the identity of the advertiser is clear.

The Complaints Board said that political advertisements were not only acceptable, but encouraged as they were an essential and desirable part of the functioning of a democratic society. The Complaints Board also observed that in a free and democratic society, differences of political opinion should be openly debated without undue hindrance or interference from authorities such as the Complaints Board, and in no way should political parties, politicians, lobby groups or advocates be unnecessarily fettered by a technical or unduly strict interpretation of the rules and regulations.

**The Complaints Board ruled the complaint was Settled.**

### **The Complaints**

Three complaints were received. The Complaint from A. Kirton on behalf of the New Zealand Labour Party said the advertisement used the Labour Party logo without written authorisation and intended to falsely impersonate the Labour Party. A. Kirton said the advertisement “communicates misleading and false information about Jacinda Ardern and the Labour Party’s position and policies.”

Complainants S. Elgoran and D. ten Have raised similar issues about the use of the logo and the misleading claim.

### **The Advertiser’s response from Saving Downs Syndrome**

The Advertiser provided background information about the organisation and said: “Saving Down’s Syndrome (SDS), a community of activists founded in New Zealand but with a global network of supporters and organisers in countries including the UK, Germany, the USA and Canada. We are not a registered charity under New Zealand law, and are an unincorporated association. SDS campaigns to change the use of prenatal screening by providing education, conducting advocacy, and providing support to parents of children with Down’s Syndrome.”

The Advertiser stated the advertisement was not in breach of Rules 2 or 11 and Basic Principle 4 of the Code of Ethics.

The Advertiser said:

“Our advertisement was published following the comments by Jacinda Ardern in a television debate on 4 September 2017 in which she said that abortion ‘shouldn’t be in the Crimes Act’. In the same interview, she said “I want women who want access to be able to have it as a right”.

Abortion is covered by the Crimes Act 1961 at ss.182, 182A, 183, 186, 187 and 187A (ss.184 and 185 have been repealed), which is available at <http://www.legislation.govt.nz/act/public/1961/0043/125.0/DLM327382.html>.

The gestational time limit for terminations is contained within s.187A, which is available at <http://www.legislation.govt.nz/act/public/1961/0043/125.0/DLM329364.html>. Repealing that section of the Crimes Act would remove the current time limit on abortion in the case of a pregnancy of more than 20 weeks’ gestation under s.187A(3). Thus, it is wholly correct for the thrust of the wording in the Advertisement to claim that Ms Ardern would allow abortion up to birth for babies with disabilities.

The Advertisement does not put speech marks around the words over the image; it does not attribute the words to Ms Ardern directly. Rather it characterises the direct implications of what she has said.”

The Advertiser also responded to the issues raised in the complaints and in response to the use of the Labour Party imagery stated:

“The mere use of the Labour Party logo and ‘Party vote’ slogan is not impersonation, but clearly a parody of official Labour Party advertising. This is further reinforced when the overall context, medium and political nature of the Advertisement are considered. No complaint shows any evidence of any potential voter being deceived or tricked by the Advertisement. Instead, the Advertisement is a meme-style political attack on Ms Ardern’s position. It uses the line, ‘Let’s do this’, the campaign slogan of the Labour Party, to reinforce the parody.”

The Advertiser also said: “I can confirm that that the Advertisement has been removed from Facebook and Twitter. We have published a new post to reflect the progress of the public discussion on this issue.”

### **Possible Precedent**

The Complaints Board considered a possible precedent Decision 17/303 about a National Party advertisement on Twitter. The video advertisement on the National Party Twitter account showed farm scenes and on-screen text said: “Let’s work with farmers. Not against them.” The video is interrupted with a message featuring the New Zealand Labour Party logo and states the following on-screen:

“Labour. Tax Agenda:

- A water tax
- A capital gains tax
- Farming into the ETS
- Land taxes & wealth taxes.”

The advertisement concludes with the on-screen message: “Only National will deliver for regional NZ. Party vote National. Authorised by G Hamilton, 41 Pipitea St, Wellington.”

The Decision said in part:

“The Complaints Board said the advertisement presented the National Party’s opinion on the kinds of tax the Labour Party may introduce if elected which was part of a political discourse allowed under the provisions of Rule 11 of the Code of Ethics. Further, the Complaints Board said the reference to ‘Labour’s Tax Agenda’ in the context of an advertisement on Twitter did not meet the threshold to be likely to mislead voters into thinking the Labour Party was going to introduce a Capital Gains Tax if elected and therefore, was not in breach of Rule 2 of the Code of Ethics.

The majority of the Complaints Board said the brief use of the colour red and Labour Party logo in the advertisement did not reach the threshold to be misleading when the overall context, medium and political nature of the advertisement were considered.

A minority disagreed. It said the use of the Labour Party logo could give the impression it was the official position of the Labour Party, not the opinion of the National Party, and the use of an opposition party logo in political advertising presenting opinion, was likely to cause confusion for consumers.

However, in accordance with the majority, the Complaints Board ruled to Not Uphold the complaint.”

The Complaints Board noted the complaint about the use of the Labour Party logo within a National Party advertisement referring to Labour’s Tax Agenda was not upheld.

### **The Complaints Board Discussion**

The Complaints Board noted the Advertiser raised issues with the complaints process. The Secretariat will respond directly to the Advertiser on these matters.

### **Is the content an advertisement?**

The ASA definition of advertisement, updated in 2016 states:

“Advertising and advertisement(s)’ are any message, the content of which is controlled directly or indirectly by the advertiser, expressed in any language and communicated

in any medium with the intent to influence the choice, opinion or behaviour of those to whom it is addressed.”

The Complaints Board noted the content before it was posted to the Saving Downs Syndrome Facebook page and Twitter account. The post criticising the announcement made by Jacinda Arden that abortion would be decriminalised under a Labour Government used an image of Ms Arden, the Labour Logo with a party vote statement and the Labour campaign slogan. The image also included the words “Abortion up to birth for babies with disabilities” and the overall image was similar to current Labour Party election advertisements.

The Complaints Board agreed that the content was clearly intended to influence the choice, opinion or behaviour of its audience and it met the ASA definition of an advertisement. The Complaints Board noted the Advertiser agreed that the material fell within this definition but the Advertiser considered the more appropriate definition was in the ASA Social Media Guidance Note which said:

“For the purposes of the ASA Codes of Practice, the word “advertisement” is to be taken in its broadest sense to embrace any form of advertising and includes advertising which promotes the interest of any person, product or service, imparts information, educates, or advocates an idea, belief, political viewpoint or opportunity.”

The Complaints Board confirmed this was an extract from the previous ASA definition of advertisement which had been simplified in 2016 to refer to any message controlled by an advertiser.

Having determined the content before it was an advertisement, the Complaints Board turned to discuss the substance of the complaints and confirmed it would consider them in conjunction with a liberal interpretation of the Code under the application of the Advocacy Principles.

#### **Have the identification requirements of Rule 11 been met?**

The Complaints Board said the advertisement was an advocacy advertisement under Rule 11 of the Code of Ethics. Rule 11 says the identity of an advertiser in matters of public interest or political issue should be clear.

The Complaints Board noted the advertisement was posted on the SDS Facebook and Twitter pages and agreed these were clearly controlled by the Advertiser, Saving Downs Syndrome (SDS). The Advertisement consisted of two parts.

The first was an image showed Ms Arden with the Labour logo and “Party vote” in the top right corner. In the middle of the lower quarter of the image was the Labour election tagline “Let’s do this.” On the left hand side of the image is the statement “Abortion up to birth for babies with disabilities”.

The image was accompanied by a statement from SDS that said:

“This sends a strong discriminatory message and a progressive New Zealand can do better for people with disabilities like my daughter than introducing abortion up to birth. Jacinda Arden should be putting her focus on positive policy changes that will create a better future for people with disabilities and their families, and lead the world in showing how better information and support for parents with a prenatal disability diagnosis is the real and humane response to prenatal disability.

Saving Downs spokesperson Mike Sullivan comments on the announcement from New Zealand Labour Party Leader Jacinda Ardern that, if elected, they will decriminalise abortion, introducing abortion right through to birth for disabilities.”

A link to the organisation’s full press release was included.

The Complaints Board confirmed that Ms Ardern had made a statement about the decriminalisation of abortion. The Complaints Board affirmed that SDS was entitled to comment on that announcement and present its interpretation of the outcome of such a legislative change and it should not be unduly fettered in this action.

The Advertiser stated in its response:

“The mere use of the Labour Party logo and ‘Party vote’ slogan is not impersonation, but clearly a parody of official Labour Party advertising. This is further reinforced when the overall context, medium and political nature of the Advertisement are considered. No complaint shows any evidence of any potential voter being deceived or tricked by the Advertisement. Instead, the Advertisement is a meme-style political attack on Ms Ardern’s position. It uses the line, “Let’s do this”, the campaign slogan of the Labour Party, to reinforce the parody.”

The Complaints Board turned to assess whether the identity of the Advertiser was clear, as part of the application of Rule 11.

The Complaints Board noted the position of the Advertiser that the parody intent of the advertisement was clear and as the advertisement was only on the organisation’s Facebook and Twitter pages, that there was no issue about the Advertiser’s identity.

However, in the Complaints Board view, there were not sufficient signals contained in the image or in the SDS statement that it was a parody of Labour Party advertising to highlight the organisation’s concerns with the policy announcement. The Complaints Board agreed the statement from SDS presented the organisation’s serious concerns in reaction to the Labour Party announcement, which appeared to be summarised in the image.

The Complaints Board agreed that consumers may consider the post showed a Labour Party advertisement and the organisation’s reaction to it. This was exacerbated by the official Labour Party logo, election tagline and an image of the Labour Party Leader in a similar style to Labour Party Election advertising, without qualification. The words in the accompanying post “This sends a strong discriminatory message...” reinforced the view that the image was a Labour Party advertisement.

The Complaints Board agreed the identity of the Advertiser in relation to the image was not clear and its use was therefore likely to mislead or confuse consumers in breach of the requirements of Rule 2 and Rule 11 of the Code of Ethics.

The Complaints Board confirmed that the advocacy principles allowed for the Advertiser’s interpretation of the risks of such a law change, however the execution of the advertisement had reached the threshold to breach the Code of Ethics.

The Complaints Board then noted the self-regulatory action taken by the Advertiser. In their response to the complaints, the Advertiser stated: “I can confirm that the Advertisement has been removed from Facebook and Twitter. We have published a new post to reflect the progress of the public discussion on this issue.”

The Complaints Board ruled that as the Advertiser had removed the posts, the Complaints before it were Settled.

**Decision:** Complaints **Settled**

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## **DESCRIPTION OF ADVERTISEMENT**

A post on the Saving Downs Syndrome Facebook page and Twitter account showed a picture of Ms Ardern, Leader of the Labour Party with the Labour logo and “Party vote” in the top right corner. In the middle of the lower quarter of the image was the Labour election tagline “Let’s do this.” On the left hand side of the image was the statement “Abortion up to birth for babies with disabilities”.

The image was accompanied by a statement from SDS that said:

“This sends a strong discriminatory message and a progressive New Zealand can do better for people with disabilities like my daughter than introducing abortion up to birth. Jacinda Ardern should be putting her focus on positive policy changes that will create a better future for people with disabilities and their families, and lead the world in showing how better information and support for parents with a prenatal disability diagnosis is the real and humane response to prenatal disability.”

Saving Downs spokesperson Mike Sullivan comments on the announcement from New Zealand Labour Party Leader Jacinda Ardern that, if elected, they will decriminalise abortion, introducing abortion right through to birth for disabilities.”

A link to the organisation’s full press release was included.

### **COMPLAINT FROM A KIRTON – NEW ZEALAND LABOUR PARTY**

This advert uses the Labour Party logo without written authorisation from the party secretary. It intentionally uses Labour Party brand and style without permission in order to falsely impersonate the Labour Party.

It communicates misleading and false information about Jacinda Ardern and the Labour Party's position and policies.

### **COMPLAINT FROM S ELGORAN**

This is an entirely false claim, associated with the use of Party graphics. This is misleading and damaging.

### **COMPLAINT FROM D ten HAVE**

This posting on twitter and (it’s associated Facebook posting) is a falsehood. Neither the Labour Party or Jacinda Ardern has ever made that claim.

## **CODE OF ETHICS:**

**Basic Principle 4** - All advertisements should be prepared with a due sense of social responsibility to consumers and to society.

**Rule 2 - Truthful Presentation** - Advertisements should not contain any statement or visual presentation or create an overall impression which directly or by implication, omission, ambiguity or exaggerated claim is misleading or deceptive, is likely to deceive or mislead the consumer, makes false and misleading representation, abuses the trust of the consumer or exploits his/her lack of experience or knowledge. (Obvious hyperbole, identifiable as such, is not considered to be misleading).

**Rule 11 - Advocacy Advertising** - Expression of opinion in advocacy advertising is an essential and desirable part of the functioning of a democratic society. Therefore such opinions may be robust. However, opinion should be clearly distinguishable from factual information. The identity of an advertiser in matters of public interest or political issue should be clear.

## RESPONSE FROM ADVERTISER

I am writing in response to your letter of 8 September 2017 and the documents enclosed with your letter. Your letter contains details of three complaints made about a post issued by Saving Down's Syndrome on Facebook and Twitter. You have not defined the complained-of advertisement, but I understand it to be the photographic image of Jacinda Ardern with the strap lines "Abortion up to birth for babies with disabilities – Let's do this". I refer to this image as the Advertisement. I do not understand any of the complaints to be referring to the text that accompanied the Advertisement on either social media.

I am the spokesman for Saving Down's Syndrome ("SDS"), a community of activists founded in New Zealand but with a global network of supporters and organisers in countries including the UK, Germany, the USA and Canada. We are not a registered charity under New Zealand law, and are an unincorporated association. SDS campaigns to change the use of prenatal screening by providing education, conducting advocacy, and providing support to parents of children with Down's Syndrome. You can find more information about SDS on our website at [www.savingdownsyndrome.org](http://www.savingdownsyndrome.org).

### Your letter

As a preliminary point, I was shocked that your letter, dated 8 September and sent to me by email that day, asks for SDS's written response by midday on 11 September 2017. This is an extraordinarily short period in which to respond, and in any event, two of those three days are across a weekend. You have now given us two extra days to complete our response. As a result, I have tried to respond to you as soon as I possibly can, to engage with the spirit of the ASA's investigative process. However, please could you tell me how long the ASA usually gives to advertisers in which to respond? Effectively, I have been given three working days in which to respond to your letter and the complaints, which has been very difficult for a small organisation like SDS to do, especially given the compendious number of factors<sup>1</sup> that the ASA says it considers when considering a complaint (and which I must therefore address).

It appears to me that, notwithstanding your response to my question above, the ASA have acted extraordinarily quickly in issuing the complaint letter to me. The complaint letter has also been issued when only three individual complaints have been made. This leaves the ASA open to suspicion that it has acted so quickly because of the specific nature of the complaints, i.e. that they come from the Labour Party and not general members of the public. Notwithstanding your subsequent explanation that the ASA provides a 'fast track' complaints service prior to an election, the ASA does not exist to protect the Labour Party from attack, not least so close to a general election where, as I explain below, abortion has become a political issue following a very recent debate between the main party leaders. Nor does the ASA exist to suppress the exercise of my right to free speech and free expression, guaranteed under domestic and international law, especially on very controversial political matters and during a period of heightened scrutiny of New Zealand's political leaders.

I note that your letter includes complaints by the following people: A Kirton, S Elgoran and D ten Have. A Kirton is the General Secretary of the New Zealand Labour Party.<sup>2</sup> S Elgoran is

the Vice President of the Young Labour Executive; please see the official website at <http://www.younglabour.org.nz/executive>.

This Twitter user appears to me, from his Twitter postings, to be a supporter of the New Zealand Labour Party.

All three complaints are thus from Labour Party supporters, and not from ordinary members of the voting population. Given my comments above, I strongly suspect that the Labour Party is misusing the ASA's complaints process to stifle political speech, and as such, the Labour Party is engaged in an abuse of your process. It is not engaged in the "*fair play between all parties on controversial issues*" that the ASA says is at the heart of its evaluation of political advertising.

I note in your letter you say you have written to Facebook and Twitter. Please can you send me copies of that correspondence?

I can confirm that that the Advertisement has been removed from Facebook and Twitter. We have published a new post<sup>3</sup> to reflect the progress of the public discussion on this issue.

### **Definition of 'advertisement'**

You ask in your letter whether the material subject to the complaint is an advertisement and is thus within the jurisdiction of the ASA. Our intention in publishing the material was to influence the choice, opinion or behaviour of those to whom it is addressed, by educating the reader of the views on abortion held by Ms Arden. Thus it falls within the definition of advertising you cite. However, the definition you have applied is inappropriate (you do not say where in the ASA's myriad of codes and guidance notes you have drawn from). The appropriate definition is the one applicable to social media, at

<http://www.asa.co.nz/codes/codeguidance-notes/social-media/>. This is important because the social media definition makes specific reference to an advert which "advocates an idea, belief, political viewpoint or opportunity" which the definition cited in your letter does not refer to.

### **Substance of the complaints**

#### *The rules to be applied*

I understand from your website that you are alleging breaches of the following rules:<sup>4</sup>

**Basic Principle 4:** All advertisements should be prepared with a due sense of social responsibility to consumers and to society.

**Rule 2: Truthful Presentation** – Advertisements should not contain any statement or visual presentation or create an overall impression which directly or by implication, omission, ambiguity or exaggerated claim is misleading or deceptive, is likely to deceive or mislead the consumer, makes false and misleading representation, abuses the trust of the consumer or exploits his/her lack of experience or knowledge. (Obvious hyperbole, identifiable as such, is not considered to be misleading)

**Rule 11: Advocacy Advertising** – Expression of opinion in advocacy advertising is an essential and desirable part of the functioning of a democratic society. Therefore such opinions may be robust. However, opinion should be clearly distinguishable from factual information. The identity of an advertiser in matters of public interest or political issue should be clear.

When interpreting an advertisement (like the Advertisement) which makes essentially a political point, a considerable degree of latitude should be given to interpreting the advertisement. The Advertisement was not made for financial profit but wholly as part of my and SDS' engagement with the political process and the democratic debate essential for a free and fair society in New Zealand. To that end, I note your guidance on advocacy principles and the Code of Ethics Rule 11 at

<http://www.asa.co.nz/codes/code-guidance-notes/advocacy-principles-and-the-codeofethicsrule-11/> and I draw to your attention the following:

(a) Abortion is one of the examples you give of a topic where “parties have differing views that are expressed in robust terms”.

(b) The Advertisement is thus clearly an example of where a “more liberal interpretation of the Code is appropriate”.

(c) The Advertisement should not be subject to “a technical interpretation of potential breaches” (or “minor” breaches).

(d) The evidence SDS needs to provide need only “support the opinion rather than being the full factual position”.

(e) The right of free expression must not be “unduly restricted”.

The Advertisement is clearly an advocacy advertisement and so the ASA should take a more liberal approach to the interpretation of the Code of Ethics because the Advertisement satisfies the stated criteria:

- The identity of the advertiser and a contact address is clear. The Advertisement was posted solely on SDS's official Facebook and Twitter pages which linked to SDS's website, which contained contact details. This information was clear and easy to see by the reader. This is illustrated by Neale Jones, the Chief of Staff of the Labour Party being able find my contact details and call me on both my mobile and home phone to demand that we remove the Advertisement from social media. The demand was declined because as a group we are entitled to engagement with the political process and the democratic debate essential for a free and fair society in New Zealand.
- The context in which the Advertisement was published clearly showed the view held and advocated by SDS. On the Facebook image supplied by you, the reader's attention is direct to the right hand side of the page which starts its comment with “This sends a strong discriminatory message and a progressive New Zealand can do better....”. The Twitter image supplied by you has the Advertisement with the comment “Abortion up to birth for #Down syndrome is not ok...”.
- It is not an advertorial-style advertisement.

### **The Advertisement**

Our advertisement was published following the comments by Jacinda Ardern in a television debate on 4 September 2017 in which she said that abortion “shouldn't be in the Crimes Act”<sup>5</sup>. In the same interview, she said “I want women who want access to be able to have it as a right”.

Abortion is covered by the Crimes Act 1961 at ss.182, 182A, 183, 186, 187 and 187A (ss.184 and 185 have been repealed), which is available at <http://www.legislation.govt.nz/act/public/1961/0043/125.0/DLM327382.html>.

The gestational time limit for terminations is contained within s.187A, which is available at <http://www.legislation.govt.nz/act/public/1961/0043/125.0/DLM329364.html>. Repealing that section of the Crimes Act would remove the current time limit on abortion in the case of a pregnancy of more than 20 weeks' gestation under s.187A(3). Thus, it is wholly correct for the thrust of the wording in the Advertisement to claim that Ms Ardern would allow abortion up to birth for babies with disabilities.

The Advertisement does not put speech marks around the words over the image; it does not attribute the words to Ms Ardern directly. Rather it characterises the direct implications of what she has said.

You should be aware that the main group who have been lobbying for the removal of the time limit, the Abortion Law Reform Association of New Zealand, have made it clear that they want to introduce abortion right up to birth<sup>6</sup> and they released a press release following Ms Ardern's comments celebrating "Labour Party Supports Decriminalisation of Abortion"<sup>7</sup>. Ms Ardern's comments on 4th September, and the Advertisement, would be interpreted in light of that campaign.

It should also be noted that in the handful of jurisdictions that have decriminalised abortion – China, Vietnam, Canada and two states in Australia – gestational time limits have been removed and abortion for babies with disabilities are available right up to birth.

As Ms Arden said, "People need to be able to make their own decisions". Our publication of the advertising is in the spirit of Ms Arden's call.

#### **Directly addressing the relevant sections of the Advertising Codes of Practice:**

**In my view the Advertisement does not breach any of the** relevant sections in the Advertising Codes of Practice identified by the ASA:

- **Code of Ethics - Basic Principle 4** - This principle states that "all advertisements should be prepared with a due sense of social responsibility to consumers and to society." Because the Advertisement correctly characterises the implication of what Ms Ardern has said (which is verifiable as detailed above) and is an issue of interest to consumers and society, the Advertisement meets this principle.
- **Code of Ethics - Rule 2** - This principle relates to truthful presentation. As stated earlier the Advertisement correctly characterises the implication of what Ms Ardern has said (which is verifiable as detailed above).
- **Code of Ethics - Rule 11** - This principle states opinion in an advertisement should be clearly identifiable from factual Information.

As stated earlier the Advertisement correctly characterises the implication of what Ms Ardern has said (which is verifiable as detailed above). As detailed above, this is factual information.

The principle also states the identity of an advertiser in matters of public interest or political issue should be clear. The identity of the advertiser and a contact address is clear. The Advertisement was posted solely on SDS's official Facebook and Twitter pages which linked

to SDS's website, which contained contact details. This information was clear and easy to see by the reader.

In summary, I believe the Advertisement complies with the relevant sections of the Advertising Codes of Practice above.

### **A. Kirton complaint**

In response to the individual complaints made by the Labour Party, it is utterly hopeless for A. Kirton to complain that the Advertisement "falsely impersonate[s] the Labour Party". Given the context of the Advertisements, which were published on the SDS Facebook and Twitter pages and not on the official Labour Party social media pages, and given the critical commentary that clearly accompanies the Advertisement, there can be no doubt in the mind of the reasonable reader that there is no impersonation of the Labour Party whatsoever. These social media platforms allow for direct interactions between advertisers and consumers, often acting as a forum for public debate.

The mere use of the Labour Party logo and "Party vote" slogan is not impersonation, but clearly a parody of official Labour Party advertising. This is further reinforced when the overall context, medium and political nature of the Advertisement are considered. No complaint shows any evidence of any potential voter being deceived or tricked by the Advertisement. Instead, the Advertisement is a meme-style political attack on Ms Ardern's position. It uses the line, "Let's do this", the campaign slogan of the Labour Party, to reinforce the parody.

A. Kirton's complaint that the Advertisement "communicates misleading and false information about Jacinda Ardern and the Labour Party's position and policies" is utterly incorrect.

Our Advertisement was published following the comments by Jacinda Ardern in a television debate on 4 September 2017 in which she said that abortion "shouldn't be in the Crimes Act"<sup>8</sup>. In the same interview, she said "I want women who want access to be able to have it as a right".

As I say above, abortion is covered by the Crimes Act 1961 at ss.182, 182A, 183, 186, 187 and 187A (ss.184 and 185 have been repealed), which is available At <http://www.legislation.govt.nz/act/public/1961/0043/125.0/DLM327382.html>.

The gestational time limit for terminations is contained within s.187A, which is available at <http://www.legislation.govt.nz/act/public/1961/0043/125.0/DLM329364.html>.

Repealing that section of the Crimes Act would remove the current time limit on abortion in the case of a pregnancy of more than 20 weeks' gestation under s.187A(3). Thus it is wholly correct for the thrust of the wording in the Advertisement to claim that Ms Ardern would allow abortion up to birth for babies with disabilities.

The Advertisement does not put speech marks around the words over the image; it does not attribute the words to Ms Ardern directly. Rather it characterises the implications of what she has said.

You should be aware that the main group who have been lobbying for the removal of the time limit, the Abortion Law Reform Association of New Zealand, have made it clear that they want to introduce abortion right up to birth<sup>9</sup> and they released a press release following Ms Ardern's comments celebrating "Labour Party Supports Decriminalisation of Abortion"<sup>10</sup>.

Ms Ardern's comments on 4th September, and the Advertisement, would be interpreted in light of that campaign.

It should also be noted that in the handful of jurisdictions that have decriminalised abortion – China, Vietnam, Canada and two states in Australia – gestational time limits have been removed and abortion for babies with disabilities are available right up to birth.

### **S. Elgoran complaint**

S. Elgoran makes two points in her complaint which focus on the same two areas covered by A. Kirton's complaint. The first of these is that the Advertisement is "an entirely false claim", as I have covered above in response to a similar point in A. Kirton's complaint, this is utterly incorrect. The second is that the 'associated use of Party graphics' makes this 'misleading and damaging'. Again, this is substantively the same point made by A. Kirton, and I have outlined how this is incorrect in my response above to A. Kirton's complaint.

### **D. ten Have complaint**

The same points are again made by D. ten Have in relation to the Twitter and Facebook version of the image. claiming that these are 'a falsehood', which is utterly incorrect - I have addressed this point in my response to A Kirton's complaint above. D. ten Have also makes the point that "Neither the Labour Party o(r) Jacinda Ardern have made that claim". As I have again covered in response to A. Kirton's complaint, our advertisement was published following the comments by Jacinda Ardern in a television debate on 4 September 2017 in which she said that abortion "shouldn't be in the Crimes Act". In the same interview, she said "I want women who want access to be able to have it as a right". As we have outlined in this response, The Advertisement does not put speech marks around the words over the image; it does not attribute the words to Ms Ardern directly. Rather it characterises the direct implication of what she has said. We have elaborated on this in our response to A. Kirton's complaint.

### **Conclusion**

It is likely that the Labour Party's complaints are orchestrated by the Party. No reasonable, impartial viewer of the Advertisement has falsely thought that it was a formal Labour Party publication. The Advertisement was a fair interpretation of the legal implications of removing abortion from the Crimes Act.

The Labour Party has already engaged in a traditional method of political discourse by having a friendly journalist publish an attempted rebuttal of the message contained in the Advertisement and branding the Advertisement as fake news.

As such, the complaints should be dismissed.

<sup>1</sup><http://www.asa.co.nz/codes/code-guidance-notes/responding-to-a-complaint-about-misleading-claims/>

<sup>2</sup> Please see his official LinkedIn profile here: <https://www.linkedin.com/in/andrew-kirton-8b0b1648/?ppe=1>

<sup>3</sup><https://www.facebook.com/savingdowns/photos/a.266350963422303.66632.195879623802771/1556451064412280/?type=3&theater>

<sup>4</sup> <http://www.asa.co.nz/codes/codes/advertising-code-of-ethics/>

<sup>5</sup> <https://www.stuff.co.nz/national/politics/96494385/jacinda-ardern-abortion-shouldnt-be-a-crime>

<sup>6</sup> <http://alranz.org/change-the-law/sample-legislations/>

<sup>7</sup> <http://alranz.org/labour-party-supports-decriminalisation-abortion/>

<sup>8</sup> <https://www.stuff.co.nz/national/politics/96494385/jacinda-ardern-abortion-shouldnt-be-a-crime>

<sup>9</sup> <http://alranz.org/change-the-law/sample-legislations/>

<sup>10</sup> <http://alranz.org/labour-party-supports-decriminalisation-abortion/>

## **RESPONSE FROM FACEBOOK**

I will have this content reviewed under our Ad Guidelines:

<https://www.facebook.com/policies/ads/> and we will remove it if it does.

In the event that this content does not violate our ad guidelines but you notify us that it violates New Zealand law or applicable regulatory codes, we would typically restrict access to the content so that it is not available in New Zealand.