

<b>COMPLAINT NUMBER</b>	18/332
<b>COMPLAINANT</b>	S Hyde & 2 Others
<b>ADVERTISER</b>	New Zealand AIDS Foundation
<b>ADVERTISEMENT</b>	New Zealand AIDS Foundation, Television
<b>DATE OF MEETING</b>	30 October 2018
<b>OUTCOME</b>	Not Upheld

## SUMMARY

The television advertisement for the New Zealand AIDS Foundation's 'Ending HIV' campaign shows men performing a range of activities including shaving the buttock region, unpacking condoms, appearing to take selfies of genitals, douching in the shower and visiting a clinic for an HIV test. The graphics say "Good sex is more than just sex." The advertisement ends with the website "endinghiv.org.nz".

Three complaints were received for this advertisement. The Complainants raised concerns about decency and offensiveness and a lack of social responsibility, saying the advertisement is too explicit. There were also concerns about when the advertisement screened.

The Advertiser said the television advertisement is part of a campaign to end HIV and to promote biannual HIV testing. It said its aim is to position HIV testing as part of a healthy sex life. It confirmed the advertisement has an S9 rating meaning it can only be played after 9:00pm. The Advertiser said the advertisement is not gratuitous and uses humour as part of the advocacy message.

The Complaints Board acknowledged that some consumers, for a variety of reasons, may be offended by the subject matter of the advertisement which is unfamiliar to them and confronting. However, taking into account the provision under the Advocacy Principles for a more liberal interpretation of the Code for advocacy advertisements, the majority of the Complaints Board said the scenes in the advertisement, supported an important health message in the media and reflected a shift in societal views about sexual health issues.

The majority of the Complaints Board said the advertisement was not likely to cause serious or widespread offence. The majority said the advertisement had been prepared with a due sense of social responsibility and did not reach the threshold to breach Basic Principle 4 or Rules 4 and 5 of the Code of Ethics.

A minority of the Complaints Board were concerned about the implied 'sexting' scene in the advertisement normalising this behaviour given the potential peer pressure and privacy issues associated with sharing explicit personal images. For the minority of the Complaints Board this scene within the advertisement was not socially responsible and breached Basic Principle 4 and Rule 4 of the Code of Ethics.

However, in accordance with the majority, the Complaints Board ruled the complaint was Not Upheld.

**[No further action required]**

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 complaint with reference to Basic Principle 4 and Rules 4, 5 and 11 of the Code of Ethics.

The Complaints Board was required by Basic Principle 4 to consider whether the advertisement had been prepared with a due sense of social responsibility.

Rule 4 Decency required the Complaints Board to consider whether the advertisement contained anything which in light of generally prevailing community standards is likely to cause serious or widespread offence taking into account the context, medium, audience and product.

Rule 5 Offensiveness required the Complaints Board to consider whether the advertisement contained anything which in the light of generally prevailing community standards is likely to cause serious or widespread offence taking into account the context, medium, audience and product (including services).

Rule 11 required the Complaints Board to consider whether the advertisement fell within the category of 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.

**The Complaints Board ruled the complaint was Not Upheld.**

**The Complaints**

Three complaints were received for this advertisement. The Complainants raised concerns about decency and offensiveness and lack of social responsibility, saying the advertisement is too explicit. There were also concerns about when the advertisement screened.

**The Advertiser's Response**

The Advertiser said the television advertisement is part of a campaign to end HIV and to promote biannual HIV testing. It said its aim is to position HIV testing as part of a healthy sex life. It confirmed the advertisement has an S9 rating meaning it can only be played after 9:00pm. The Advertiser said the advertisement is not gratuitous and uses humour as part of the advocacy message.

The Advertiser also clarified the activities shown in the advertisement as demonstrating a "good" and healthy sex life, including buying condoms, grooming, and the hygienic rinsing of body cavities.

### **The Media Response**

The Commercial Approval Bureau said the advertisement had been classified with S9pm ratings as a deliberate measure to ensure there was a full half hour window after the 8.30pm watershed to Adult Only programming.

### **The Complaints Board Discussion**

The Complaints Board said the likely consumer takeout of the advertisement was that men who have sex with other men should regard HIV testing as a normal part of a healthy sex life. As an advocacy advertisement, the Complaints Board considered its intention was to normalise HIV testing through mainstream media to reach a target audience of men who may not have previously received the 'End HIV' message.

Rule 11 of the Code of Ethics provides for robust expression of belief or opinion being as expressed by the Advertiser and, therefore, such opinions may be robust. However, opinion should be clearly distinguishable from factual information.

The Advocacy Principles, developed by the Complaints Board in previous Decisions for the application of Rule 11 applied. 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 discussed whether the identity of the Advertiser was clear. The Board said the advertisement had made its position clear by including the website address 'endinghiv.org.nz' at the end of the advertisement. The Complaints Board agreed that as both the identity and the position of the Advertiser were clear, in compliance with Rule 11, the advertisement should be reviewed in the context of advocacy advertising, which is advertising designed to express an opinion. As such, and in the interests of freedom of expression under section 14 of the Bill of Rights Act 1990, a more liberal interpretation of the Code was appropriate.

The Complaints Board agreed that upon first viewing it may have been unclear to some viewers as to what was being advertised and this could have contributed to confusion and misunderstanding for some consumers. The Board said the Advertiser was employing a valid advertising construct of engaging the viewer's attention as it leads consumers to the important health message at the conclusion the advertisement.

Having carefully reviewed the advertisement, the Complaints Board said the scenes were mostly implied behaviour and the advertisement used innuendo and humour rather than explicit content. Whilst the Board said this would certainly offend some sections of society, it was unlikely this offence would be widespread in the context of an advertisement promoting safe sex.

The Complaints Board noted the S9 rating meant the advertisement could not play before 9pm and was the most restrictive rating available. The Advertiser had consulted with both the Commercial Approvals Bureau and the television networks in order to target its intended audience.

The Complaints Board noted the Advertiser and Media had acknowledged the advertisement had played outside its afforded rating on one occasion during *Top 10 on The Edge TV* at 20:14pm on the 28 September 2018. This breach was due to human error which is being investigated by the Network and internal processes reviewed.

The Complaints Board acknowledged that some consumers, for a variety of reasons, may be offended by subject matter of the advertisement which is unfamiliar to them and confronting. However, taking into account the provision under the Advocacy Principles for a more liberal interpretation of the Code for advocacy advertisements, the majority of the Complaints Board said the scenes in the advertisement, supported an important health message in the media and reflected a shift in societal views about sexual health issues.

The majority of the Complaints board said the advertisement was not likely to cause serious or widespread offence. The majority said the advertisement had been prepared with a due sense of social responsibility and did not reach the threshold to breach Basic Principle 4 or Rules 4 and 5 of the Code of Ethics.

A minority of the Complaints Board were concerned about the implied 'sexting' scene in the advertisement and normalising this behaviour given the potential peer pressure and privacy issues associated with sharing explicit personal images. For the minority of the Complaints Board this scene within the advertisement was not socially responsible and breached Basic Principle 4 and Rule 4 of the Code of Ethics.

However, in accordance with the majority, the Complaints Board ruled the complaint was Not Upheld.

## **DESCRIPTION OF ADVERTISEMENT**

The television advertisement for The New Zealand AIDS Foundation's 'Ending HIV' campaign shows men performing a range of activities including shaving the buttock region, unpacking condoms, appearing to take selfies of genitals, douching in the shower and visiting the clinic for an HIV test. The graphics say "Good sex is more than just sex." The advertisement end with the website endinghiv.org.nz

### **COMPLAINT FROM S HYDE**

Unappropriate viewing involving too much detail on homosexual sex preparation. Naked man in shower getting anal pleasure with a turkey baster. man shaving his anal area..another guy semi naked taking pictures of his privates Come on guys this is TMI and unappropriate you can get the message across in a respectful and classy way..not like this.

### **COMPLAINT FROM K HARRIS**

The ad was very explicit - showing a man take a 'dick pic' and calling it 'good sex'. Not only was this totally unnecessary in raising awareness about a health issue, but is totally inappropriate for younger audiences who would be watching tv at this time of night. It is also offensive for some peoples family values and normalizes sexting which is a huge issue.

### **COMPLAINT FROM R ROBLES VARGAS**

I am writing on behalf of my household which comprises three adults and one child to make a formal complaint about the video Good Sex is More Than Just Sex which I have seen the night of Friday the 28th November and Saturday the 29th November on television and on TV3 on demand that weekend too.

I was taken aback by its explicitness. The video implies that the man in the shower is about to perform a sex act. .I found it obscene and unnecessary. I do not see the connection between this and educating people to refrain from risky sexual behaviour.

My reaction is not due to the fact that the men in the ad are males but that their actions do not speak to education but rather to steps to take before an act of masturbation, if that is the correct word. I am unsure.

TV on demand can be accessed by anyone. It is not a platform to be showing anyone performing a sex act, even if the genitalia are not visible.

We respectfully request that this ad not be shown again on demand or on live television.

### **CODES OF PRACTICE**

#### **CODE OF ETHICS**

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

**Rule 4: Decency** - Advertisements should not contain anything which clearly offends against generally prevailing community standards taking into account the context, medium, audience and product (including services).

**Rule 5: Offensiveness** - Advertisements should not contain anything which in the light of generally prevailing community standards is likely to cause serious or widespread offence taking into account the context, medium, audience and product (including services).

**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, NEW ZEALAND AIDS FOUNDATION**

I am writing in response to your letter dated 8 October 2018 regarding Complaint 18/332: Ending HIV 'Good Sex is more than just sex' advertisement on television and TV3 on demand.

Our response is in relation to each of the relevant sections of the Advertising Codes of Practice:

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

The New Zealand AIDS Foundation (NZAF) developed this advertisement as part of our community focused HIV prevention programme, Ending HIV. Gay, bisexual and other men who have sex with men are overwhelmingly the group most at risk of acquiring HIV in New Zealand and continue to be significantly over-represented in annual HIV diagnoses, with 89% of locally-acquired HIV transmission in 2017 occurring among this group.

The message to “test for HIV at least twice a year” is an integral component of the programme. We aim to increase rates of testing among this high-risk group to reduce undiagnosed HIV and subsequently reduce onward transmission. This is in line with the consensus statement on comprehensive HIV prevention in New Zealand, and NZAF’s Strategic Plan.

A 2018 survey by the New Zealand AIDS Foundation found that 1 in 4 sexually active men who have sex with men in New Zealand have never had an HIV test. This was extremely concerning, as the bulk of new transmissions come from people who either don’t know they are living with the virus or aren’t on treatment.

Under Ministry of Health guidelines, New Zealand enjoys a responsible, proactive and widely accessible approach to the sexual health of all New Zealanders. NZAF believes that the advertisement is socially responsible in that it is re-positioning regular HIV testing alongside a “good” and healthy sex life, including buying condoms, grooming, and the hygienic rinsing of body cavities. These are common, normal and appropriate behaviours that occur in our communities as part of a healthy sex life.

The advertisement has been prepared with a due sense of social responsibility to society. We believe that discussing these behaviours in a non-explicit and light-hearted way should be celebrated, not censored. This will ultimately increase the health and wellbeing of one of our most vulnerable communities, who continue to be proportionally disadvantaged in most health inequalities in New Zealand.

Further, as part of our combination prevention approach, we sought to ensure condoms featured prominently in the advertisement, as the most effective tool for preventing HIV and STI transmission.

***Rule 4. Decency – Advertisements should not contain anything which clearly offends against generally prevailing community standards taking into account the context, medium, audience and product (including services).***

***Rule 5. Offensiveness – Advertisements should not contain anything which in the light of generally prevailing community standards is likely to cause serious or widespread offence taking into account the context, medium, audience and product (including services).***

NZAF believes that it is generally socially acceptable to talk about sex and sexual health in the context of HIV and that this should not cause widespread offence.

The decision to place these advertisements in ‘mainstream’ mediums such as television and television on demand was based on two key considerations, the first being that gay, bisexual and other men who have sex with men live, work and socialize within the wider mainstream community; secondly, we know that most of these men cannot be reached through “gay” media alone. In 2016 the NZAF commissioned research into the media consumption habits of our audience. Results show that only 14% of gay and bisexual men read magazines or websites aimed at gay and bisexual men.

Before commencing the development of this advertisement, we engaged the Commercial Approvals Bureau (TV CAB) to seek advice and ensure it was in line with the appropriate standards and classification. Upon their advice, we then commenced development and engaged with our media partners to find appropriate time slots that align with the classification. On approval, we received an S9 classification. This advertisement has only been shown in programming that meets these classifications, and we believe the broadcaster provides the appropriate warnings before commencing the broadcast.

Please see appended spot list for September, per complaint, that shows no spots played on TV3 on the 29th September 2018.

The complaint also states “The video implies that the man in the shower is about to perform a sex act” and “their actions do not speak to education but rather to steps to take before an act of masturbation, if that is the correct word. I am unsure”. To clarify, the man in the shower is not performing a sex act, nor is it a step taken before an act of masturbation. The man is conducting a douche, a perfectly normal process, where you introduce a stream of water into a body cavity for medical or hygienic reasons. A douche is most commonly used to treat vaginal irritation, but the method is also commonly used by both men and women to cleanse and freshen a body cavity.

NZAF acknowledges that the advertisement may be confronting for some people and it is not uncommon for us to receive feedback about the resources we produce to improve the health and wellbeing of gay, bisexual, and other men who have sex with men. However, in the context of the message and desired outcome, we believe it is appropriate. Importantly, it is not gratuitous and has not used sexualised references simply to draw attention to an unrelated product. The advertisement is entirely relevant to the message and the target audience.

***Rule 11. Advocacy Advertising – Expression of opinion in 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.***

Ending HIV is an evidence-based social marketing programme specifically for gay, bisexual and other men who have sex with men, to encourage prevention, testing and early treatment amongst those most at risk of HIV.

Behavioural surveillance of this group consistently identifies common barriers to testing for HIV. Many people fear discussing their sex lives with their doctor or worry about having to disclose a possible HIV positive result to their friends, partners, and whanau. This advertisement is sex positive and celebrates the normalcy of HIV testing alongside other common behaviours associated with a healthy sex life.

Increasing testing rates has proven to reduce undiagnosed HIV in our community, and by having more people on HIV treatment we can prevent the onward transmission of this chronic illness. This led to the development of this advertisement and is a central component of the Ending HIV programme.

NZAF have found light-hearted humour to be a successful strategy for engaging men in HIV prevention and testing messages. We believe the advertisement to be an appropriate response to this challenge, and the way in which we engage with gay, bisexual and other men who have sex with men about their sexual health.

All Ending HIV promotional material, including the advertisement in question, are developed with this clear social marketing objective in mind.

We believe it is clear the message is intended for gay, bisexual and other men who have sex with men. We have made it clear that the advertiser is Ending HIV by providing the ENDINGHIV.ORG.NZ URL at the end of the advertisement.

## **RESPONSE FROM MEDIA, COMMERCIAL APPROVALS BUREAU**

**COMPLAINT: 18/313      KEY: NZAF 030 0001      RATING: S9**

Three complainants were offended by the graphic content of this advertisement.

This advertisement and its cutdown were both classified with S9pm ratings. This was a deliberate measure by CAB to ensure there was a full half hour window after the 8.30pm watershed to Adult Only programming.

There is no question that this advocacy advertisement is extremely confronting. However, it is essential that the message for routine testing for the HIV virus is reiterated. Though data shows that incidences of HIV are falling it is vital that these statistics continue and it is important that regular testing and early treatment, if required, persist. The sexual depictions, though undoubtedly provocative, are used to publicise a relevant service so that this downward trend may continue.

CAB acknowledges the concerns of the complainants but does not feel their complaints should be upheld against such an important advocacy message.

### **APPEAL INFORMATION**

According to the procedures of the Advertising Standards Complaints Board, all decisions are able to be appealed by any party to the complaint. Information on our Appeal process is on our website [www.asa.co.nz](http://www.asa.co.nz). Appeals must be made in writing via email or letter within 14 days of receipt of this decision.