APPLICATION OF STANDARD 6 –

PROHIBITING DISCRIMINATION & DENIGRATION

The Broadcasting Standards Authority (the Authority) has asked for a review of its application of the discrimination and denigration standard in five of its recent decisions. In particular, it is interested in the legal robustness of the decisions, the impact on freedom of expression and whether its application of the standard was reasonable and appropriate and the outcome, correct. Should this prove not to be the case, the Authority is interested in knowing whether it applied the right reasoning in reaching its decision. It has also asked whether the analysis was consistent and provided useful guidance on interpretation of the standard. More generally, the Authority is interested in comment on the way in which the decisions have been written and the wording of the standard itself.

STATUTORY CONTEXT

The Broadcasting Act 1989 (the Act) imposes an obligation on broadcasters to maintain … standards that are consistent with the observance of good taste and decency; the maintenance of law and order; and the principle that when controversial issues of public importance are discussed, reasonable efforts are made, or reasonable opportunities are given, to present significant points of view either in the same programme or in other programmes within the period of current interest[1]. Broadcasters are also required to receive complaints relating to broadcasts and establish a proper procedure to deal with them.[2]Under s.8 a complainant may refer a complaint to the Authority if the complainant has made a complaint and is dissatisfied with the decision of the broadcaster or the action taken by the broadcaster.

The functions of the Authority include encouraging the development and observance by broadcasters of codes of broadcasting practice appropriate to the type of broadcasting undertaken by the broadcaster, in relation to (inter alia) safeguarding against the "portrayal of persons in programmes in a manner that encourages denigration of, or discrimination against, sections of the community on account of sex, race, age, disability, or occupational status or as a consequence of legitimate expression of religious, cultural, or political beliefs"[3]. To comply with its statutory responsibility the Authority, in consultation with broadcasters, has developed a Codebook – *Broadcasting Standards in New Zealand Codebook* – which outlines its functions in the various broadcasting contexts and sets out the relevant broadcasting standards together with guidelines to the complaints process and how it is administered.

Discrimination and denigration standard

Under standard 6 broadcasters must not encourage discrimination against, or denigration of, any section of the community on account of sex, sexual orientation, race, age, disability, occupational

[1] s.4 BA 1989
[2] s.5(a)
[3] s.21(1)(e)(iv)

status, or as a consequence of the legitimate expression of religion, culture or political belief. Because of the significant role that freedom of expression plays in the area of broadcasting, 6b includes a requirement that a high level of condemnation, often with an element of malice or nastiness, is necessary to reach a conclusion that a broadcast contravenes the standard.

There is an exemption for the broadcast of material which is:

i) factual; or
ii) a genuine expression of serious comment, analysis or opinion, or
iii) legitimate humour, drama or satire[4].

Whether the standard is breached also involves taking into account contextual issues such as the nature of the programme, the time it was broadcast, whether the broadcast was live or pre-recorded, used audience advisories, the target and likely audience, audience expectation and public interest in the programme. In deciding whether a broadcast has gone too far, the following factors will be considered:

- the language used
- the tone of the person making the comments
- the forum in which the comments were made, for example, a serious political discussion or a satirical piece
- whether the comments appeared intended to be taken seriously, or whether they were clearly exaggerated
- whether the comments were repeated or sustained
- whether the comments made a legitimate contribution to a wider debate, or were gratuitous and calculated to hurt or offend.

LEGAL CONCEPTS

Applicable legal issues include the definition of discrimination and denigration, the impact of freedom of expression, what amounts to hate speech, when there is a conflict between rights in the New Zealand Bill of Rights Act 1990 (NZBORA) and the test for justifying a restriction on a right or freedom in the NZBORA.

Definition of discrimination

Discrimination in standard 6 is defined as encouraging different treatment of members of the community to their detriment. While this may seem straightforward, it is not always the case.

Discrimination has been not easy to define in other areas of the law[5]. The difficulties of defining discrimination in the human rights context, for example, led to years of litigation before the Court of

[4] Guideline 6c
[5] Other legislation apart from the NZBORA and the HRA which refers to the concept of discrimination includes the Harmful Digital Communications Act 2015 and the Films Videos and Publications Act 1993 and the Employment Relations Act 2002

Appeal in *Ministry of Heath v Atkinson* [6]and *Child Poverty Action Group v Attorney-General*[7] established that for the purposes of Part 1A of the Human Rights Act 1993 (HRA)[8] an act will be considered discriminatory if it involves different treatment on one of the prohibited grounds resulting in material disadvantage to a person or group in comparable circumstances which cannot be justified in terms of s.5 of the NZBORA[9].

As a result, to establish discrimination for human rights purposes, it is necessary to find that an individual or group has been treated differently from somebody else in comparable circumstances. If a comparator cannot be identified, there is no discrimination. The type of difficulty that can arise is illustrated by cases such as *Webb v EMO Cargo (UK) Ltd*[10] which was a case involving sex discrimination. Women who became pregnant were dismissed because they were considered no longer able to do the necessary work as a result of their condition. The employer argued that it was not discriminatory because everybody was treated the same.

While similar issues could theoretically arise in the broadcasting context, there are some significant differences between the HRA and the broadcasting standards. For example the definition in standard 6 refers to denigration and malice or nastiness which colours the meaning of discrimination in the broadcasting context[11]. Standard 6 also only applies to broadcasting while the HRA applies to a wide variety of areas including employment, the provision of goods and services, accommodation, educational facilities and access to public places principally in relation to private actors.

The Codebook states that Standard 6 applies to sections of the community which are consistent with the grounds for discrimination listed in the HRA[12]. These are listed in the Code as sex, sexual orientation, race, age, disability, occupational status or the consequence of legitimate expression of religion, culture or political belief. This is not an exhaustive list of the grounds in the HRA which also include colour, ethical belief, marital status, family status and receipt of a benefit.

Freedom of expression

[6] [2012] 3 NZLR 456
[7] [2013] 3 NZLR 729
[8] Part 1A applies to the legislative, executive and judicial branches of Government as well as those who carry out public functions. By extension it also applies to the NZBORA and to Part 2 of the HRA (which deals with the private sector) although the wording in the different areas to which the Act applies is more prescriptive.
[9] It is worth noting that before it was accepted that this was the appropriate test, some commentators suggested that a more purposive approach based on human dignity should be applied to identifying discrimination. Deriving from the Supreme Court of Canada case, *Law v Canada (Minister of Employment and Immigration)* [1999] 1SC 497, an action was considered to be discriminatory if it caused disadvantage, was irrelevant to the functional values underlying the measure in question and involved an affront to human dignity. In practice the test proved difficult to apply and the Supreme Court eventually resiled from its position in *R v Kapp* 2008 SCC 41 citing in part the subjectivity of the concept. However, the approach could be useful in this context. See, for example, the comments in the codebook on freedom of expression at page 06 which refer to the standards being designed to avoid unfairly harming the dignity or reputation of the people they depict.
[10] [1994] QB 718, [1994] All ER 115
[11] See *Mental Health Commission and CanWest RadioWorks* Decision no.2006-030 – denigration means devaluing the reputation of a class of people
[12] This could include particular occupational groups. Practice Note *Denigration and Discrimination as Broadcasting Standards* citing decision no.2004-135

As free speech is integral to the operation of broadcasters in a democracy, it is logical that the Authority should have a particular concern about the concept of freedom of expression and how it is applied.

There are conflicting views about the extent to which free speech should be regulated. Civil libertarians emphasise the importance of freedom of expression including that which is unpopular or controversial in the belief that vigorous debate is essential in a democracy. This is justified by the benefits that are said to accrue as a result including ensuring a marketplace of ideas, maintaining a democracy and general issues of the public good[13]. A contrasting view is based on equality and non-discrimination and promotes the idea that people should be spared the harm that could result from the suppressed material. Those who endorse this position consider the civil libertarian perspective flawed as it ignores the harm that can be inflicted on target groups and minimises fundamental values.

In addressing how the right to free speech should be balanced against the right not to be discriminated against or reputation, denigrated, the Codebook states that

> *... Freedom of expression, including the broadcaster's right to impart ideas and information and the public's right to receive that information, is the starting point in our consideration of complaints. We may only uphold complaints where the limitation on the right is reasonable, prescribed by law and demonstrably justified in a free and democratic society*[14].

This will involve an assessment of harm caused in particular cases. As stated in the Codebook:

> *For us, this is about assessing in each case, how important the right to freedom of expression is on the one hand and on the other, how much harm the broadcast has done to people in society by potentially breaching broadcasting standards.*[15].

The BSA has consistently stated that in light of the right to free expression contained in s.14 NZBORA, a high threshold must be crossed before a breach of the standard will be found. Examples include:

- where a high level of invective is directed at a particular group (2004 – 193);
- a section of the population is depicted as inherently inferior or having inherently negative characteristics (2004-129);
- a section of the community is portrayed in a highly offensive way (2004-104);
- negative racist stereotypes are encouraged (1996-133, 1999-193); or
- what is said or disseminated amounts to hate speech or vitriol (2004-001).

The Authority's approach and some recommendations on how it might be improved are considered in a paper by Steven Price in 2012 - *The BSA and the Bill of Rights: A Practical Guide.*

[13] Tipping J in *Hosking v Runting* [2005] 1 NZLR 1; (2004) 7 HRNZ 301 (CA) [233] et seq
[14] Broadcasting Standards in New Zealand Codebook (2016) at page 06
[15] Broadcasting Standards in New Zealand Codebook (2016) at page 06

Hate speech

Hate speech is an extreme form of discrimination and has assumed greater relevance in the wake of the Christchurch attack with calls for suppression of speech relating to white supremacy.

Because of the high threshold that is applied in relation to freedom of speech, the Authority upholds comparatively few complaints but when they have, the decisions provide a useful illustration of the level of invective which is unacceptable. For example, the case broadcast on *Voice of Islam* on Triangle Television in which the Authority had to consider a complaint about a lecture titled "Challenges Facing Muslims in the New Millennium".[16] Towards the end of the lecture, the lecturer expressed his views about homosexuality saying that AIDS is caused by the "filthy practices" of homosexuals. Homosexuals are dropping dead from AIDS and "they want to take us all down with them". The Islamic position on homosexuality is "death". Homosexuals are "sick" and "not natural" Muslims are going to have to take a stand [against homosexuals] and it's not enough to call names". A complainant complained that the comments were "deeply disturbing" and described the dialogue as "a hateful and bitter diatribe against homosexuals". The Authority upheld the complaint stating that

> *… a high threshold applies before a broadcast contravenes Guideline 6g. For a breach to occur, the Authority has required that a broadcast actually encourages denigration or discrimination. In the Authority's view, the threshold was clearly crossed on this occasion. The comments made in the programme were extreme and the Authority considers that they are aptly described as "hate speech". They went far beyond mere criticism of those with a homosexual orientation. Of particular concern, the speaker advocated death for homosexuals and suggested that Muslims should take an active stand against them, which a viewer might have interpreted as an incitement to violence. The Authority considers that these comments were particularly odious and were in stark contrast with the reasonable and moderate tone which had characterised the rest of the lecture.*

The provision in the HRA most similar to standard 6 is section 61 which deals with exciting racial hostility and hate speech in relation to race. Section 61 makes it unlawful to publish or broadcast material which is threatening, insulting or abusive and likely to excite hostility against, or bring into contempt, any group on the ground of their colour, race, ethnic or national origin. While the publication of material by broadcasters is subject to section 61, there is an exemption which allows the publication of reports that accurately convey the intention of the person who distributed the material. As one commentator has put it, the application of the section is limited by s.61(2) which creates an exception for media coverage of material which otherwise violate s.61(1)[17].

[16] *Clayton and Voice of Islam*: Decision 2004-001 [2004] NZBA 3

[17] For more on this - including criticism of how it has been interpreted - see the chapter by Grant Huscroft "Freedom of Expression" in Huscroft and Rishworth (eds) *Rights and Freedoms.* Wellington, Brookers, 1995 at 197

Because of the need to balance racial disharmony against freedom of expression, the Human Rights Commission seldom finds complaints under s.61 have substance and when it does, it has often been able to mediate a settlement[18]. To successfully invoke s.61 the impugned speech or report must be likely to have an effect on those who hear it leading them to take action against those who are the subject of the comment.

One case on the application of s.61 which did reach the High Court - *Wall v Fairfax New Zealand Limited*[19] - addressed the interface between the right to freedom of expression in s.14 of the NZBORA and the legislature's interest in promoting racial harmony by suppressing certain types of publications, the High Court concluding that the legislative response to this tension was the imposition of an objective "effects-based test". This was necessary as otherwise it was almost inevitable that the objective component of the first limb would be eroded by focussing on the impact of the perceived insult. The test serves to refocus the inquiry on the objective consequences (or assumed consequences) of the alleged infringing words[20]. It follows that s.61 is not about the suppression of repugnant ideas and the stigmatisation and punishment of those who discriminate, but preventing discriminatory effect which reinforces the need for a high threshold to establish a breach of s.61.

A conflict of rights? Balancing freedom of expression and freedom from discrimination

Difficulties can arise when two NZBORA rights conflict. In addition to s.14, s.19 protects the right to freedom from discrimination on the grounds in the HRA. As Professor Rishworth has put it (in relation to s.61), there is a contest between an individual's right to freedom of expression, which is limited by laws regulating racist speech, and the government's interest in promoting the equality of its citizens in their private dealings with one another[21]. While this may seem to be an issue, leading authorities in the area consider that it is not so much a conflict between two competing rights[22] but as Professor Rishworth has explained:

> *A careful analysis will in most cases of apparently conflicting rights reveal that the one right is being restricted because another is being promoted. That is essentially a clash of "right" against "interest", not right against right, and it lends itself to analysis on the basis of the criteria in section 5*[23].

This approach effectively legitimises the right to limit expression without unduly infringing the right to be free from discrimination. Where the two rights coexist - as in standard 6 – when freedom of

[18] Section131 HRA creates an offence of inciting racial disharmony allowing prosecution with the consent of the Attorney-General. It was included in the original Race Relations Act 1971 in deference to the International Convention on the Elimination of All Forms of Racial Discrimination but it proved difficult to establish the necessary *mens rea* and the lesser offence in s.61 was introduced when the Human Rights Commission Act was enacted in 1977

[19] [2017] NZHRRT 17. On appeal [2018] NZHC 104

[20] High Court at [47]

[21] Rishworth et al, *The New Zealand Bill of Rights Act* OUP Melbourne (2003) at 55. See also *Living Word Distributors Ltd v Human Rights Action Group Inc. (Wellington)* [2000] 3 NZLR 570 (CA) at [41] in which the Court of Appeal said that "The ultimate inquiry under s.3 [of the Films, Videos and Publications Classification Act 1993] involves balancing the *rights* of a speaker and of the members of the public to receive information under s.14 of the Bill of Rights as against a *state* interest under the 1993 Act in protecting individuals from the harm caused by the speech."

[22] Rishworth op cit.; Butler & Butler *The New Zealand Bill of Rights Act: A Commentary* LexisNexis (2005) at 6.6.27

[23] Rishworth ibid, at 56

expression is involved, the limitation of the other right must be proportionate and justified in relation to what is sought to be achieved.

Proportionality

In a paper on the NZBORA commissioned by the Authority, Steven Price described proportionality as …

A kind of check to ensure the social benefit of a restrictive rule is commensurate with the social loss caused by the encroachment on rights. The more severe the restriction on the right, the more powerful must be the justification in order to be proportionate[24].

He went on to say that when properly understood, proportionality strengthens the quality of the Authority's decisions as it begins with a presumption in favour of rights by putting an obstacle in the way of those that seek to restrict them, forcing them to rationalise their behaviour in a way that focuses on the competing principles and promoting consistency in decision making.

In deciding the appropriate methodology for assessing whether freedom of expression can be limited he considers various approaches that have been applied by the High Court concluding that the decisions are often inconsistent, opaque and unhelpful[25]. He recommended that the Authority could usefully apply the following principles in assessing the role of freedom of expression its decision making:

- Assess the value of the speech & the corresponding level of justification required;
- Announce the result early in the decision;
- The more significant the speech, the more detailed the reasoning should be;
- Be particularly careful with proportionality analysis when upholding a complaint;
- Better identify the purposes underlying the standard;
- Assess how deeply those purposes are engaged in the case involved;
- Seek information aimed at clarifying the harm;
- If upholding a complaint, make consideration of the penalty part of the analysis;
- Address the hard arguments, especially if they are raised in dissent;
- Take care with audience expectations.

[24] *The BSA and the Bill of Rights – A Practical Guide* (2012) at 5

[25] Compare for example the Supreme Court's decision in *R v Hansen*[25]and the earlier test in *Moonen v Film and Literature Board of Review* [2001] 2 NZLR 9 (CA). The High Court in *Fairfax* acknowledged that the NZBORA did not, in fact, compel any particular analytical approach.

At one point it was common for the Authority to use a standard clause (a "boilerplate clause") when it upheld a complaint simply stating that the NZBORA had been taken into account and given its full weight in arriving at its decision. This was criticised by a number of commentators - including Steven Price - and the matter was eventually resolved by Asher J in *TVNZ Ltd v West*[26] who observed that *the Authority should, in its own reasoning, show transparently why it has reached the conclusion that the limitation is justified under s.5 and not by reference to generic statements in other earlier decisions*[27] – although he did concede that a succinct summary of reasons should be enough in most cases.

SELECTED DECISIONS

The decisions I was asked to look at are all comparatively recent. Only one was upheld. I have considered the facts of each and listened to, or viewed, the relevant video/audio clips to decide whether the Authority reached the correct conclusion.

Beynon and NZME Radio Ltd – 2018 - 076

The complaint involved a discussion on printers in a segment of morning radio show *Sarah, Sam and Toni.* The complainant complained about the host's use of the word "gypped" claiming that it was a racial slur against the Romani people and meant "cheated" or "stolen" breaching the discrimination and denigration standards in the Radio Code of Broadcasting Practice. She claimed there was no excuse for such "casual racism" and that the use of comparative terms had declined over the years as a result of movements which had brought overt racism to the fore.

In deciding whether there was substance to her complaint the Authority first looked at the broadcaster's right to freedom of expression, weighing it against the potential harm to an individual or section of society. It concluded the complaint did not meet the criteria of standard 6.

The key issue was whether the comment was made with condemnation or malice. The broadcaster pointed out that the word has other meanings, for example pain or discomfort, and it was arguable whether people using the word in New Zealand would make a connection with the Romani people when using it.

The Authority concluded that it was unlikely that the use of the word had the potential to denigrate a section of the community (in this case, gypsies) causing harm. Further the host had not been maliciously motivated when using the word, had used it only once and was unaware of any possible offensive meaning.

This decision seems to me to be correct. The origins of the word are uncertain and, even if it is derived from gypsy, if the people who use it make no connection with that group and members of the ethnic group are not offended or hurt by it and it has no repercussions on the group targeted, it is questionable whether the comment could be considered harmful or offensive to the extent necessary to amount to discrimination.

[26] CIV-2010-485-002007 21 April 2011
[27] Ibid.at [104]

Hendry and Mediaworks TV Ltd – 2018-984

In an episode of *The Block* a new landscaper arrived to start work on the property of two of the contestants. There then ensued an exchange between the two girls, Chlo and Em, in which Chlo described the landscaper as "new meat for Em".

The complainant took exception to the man being described as 'meat' calling it sexist, unacceptable and amounting to sexual harassment. She made the point that were it the other way round and a woman had been described in this way, there would have been a strong public reaction. She commented that such behaviour is no longer acceptable in the workplace.

The Authority did not agree with the complainant. While it accepted the importance of respectful workplace relationships and the inappropriateness of treating people of either sex as objects, the Authority also recognised that the comment was consistent with the ribald humour evident in the programme overall. The Authority found Em's remarks reflected the way in which she presented herself during the programme and were clearly intended to be humorous.

Under the HRA sexual harassment is considered a form of discrimination[28]. In the context of a hostile work environment, it can involve a number of things including the inappropriate use of endearing names[29] and comments about a complainant's appearance or dress[30]. But there is a further distinguishing characteristic of sexual harassment – it is a subjective test. The behaviour must be unwelcome or offensive to the person themselves. A complaint cannot be made on behalf of someone else[31]. Given that the object of Em's comment laughed along with the girls, the behaviour complained of does not satisfy the criteria of what amounts to sexual harassment.

While there was comparatively little comment on discrimination and denigration, the Authority noted that when the comments were taken in context it was clear that no condemnation or malice was intended. It followed that the exchange did not breach the discrimination and denigration standard. The Authority reached the correct conclusion although the analysis might perhaps have benefited from greater comment on the application of the discrimination and denigration standard.

Avery and NZME Radio Ltd – 2018 – 076

On 15 August 2018 the song "Hurricane" by Bob Dylan was played on Coast FM. The song was written by Dylan in 1975 and was about the racism and profiling by the justice system that resulted in boxer Reuben Carter's wrongful conviction for murder. The lyrics included a reference to the African-American community's view of Carter as a "crazy nigger".

The complainant alleged that the use of the word breached the Broadcasting code as it was offensive, racist and unacceptable. In addition while the song was almost 50 years old, how the word is used had changed in that time and it was less acceptable now than when Dylan wrote the song. The complainant considered that use of the word can cause a significant amount of societal and individual harm.

[28] Section 62 HRA
[29] *Lenart v Massey University* [1997] ERNZ 253
[30] *Proceedings Commissioner v H* (1996) 3 NRNZ 239
[31] See for example, *New Zealand Private Prosecution Service Ltd v Key* [2015] NZHRRT 48 in which the tribunal struck out an allegation of sexual harassment against the then Prime Minister because the plaintiff herself was not affected by the behaviour (having her ponytail pulled) and did not consent to the action.

Although the Authority did not uphold the complaint it gave it careful consideration in light of the negative way in which the word has, and can be, used. Here it was not used in a racist or malicious way with intent to denigrate or demean anyone but as part of a narrative which had cultural significance and had served as a rallying cry for the anti-apartheid movement in the US.

Use of the word *nigger* is often criticised for casting a slur on the person referred to, but this ignores the context on how it is used on particular occasions. As the Authority notes, context is central to the way language works. In this case the aim of the song was to highlight the injustice of racial profiling in the US criminal justice system at the time. It was not intended to besmirch Carter himself.

Again, while there was comparatively little comment on standard 6 itself, the Authority had clearly given considerable thought to the implications of the use of the term and the significance of the song. Having balanced both the negative and positive aspects of its use, the Authority was right not to uphold the complaint given the impact it would have on the broadcaster's freedom of expression.

I consider the Authority came to the correct conclusion. Further the decision was tempered by the Authority's explicit recognition that their decision did not condone the use of the word in general parlance.

Singh and Radio Virsa - 2017- 001

Radio Virsa is a small radio station that broadcasts mainly in Punjabi and promotes a strict interpretation of Sikh language and culture[32]. The complaint involved a number of broadcasts by Radio Virsa. The complainant complained about a variety of issues alleging the station and its hosts were broadcasting lies and threats about him and other individuals in the Sikh community. He also claimed that aspects of the broadcast contained insulting language and statements that denigrated women.

The complaint concerned a number of broadcasting standards and the Authority found that there had been breaches of the good taste and decency, privacy and fairness standards but did not uphold the complaint in respect of the discrimination and denigration standard. I was only required to consider those parts that related to discrimination and denigration. The decision which addresses the standard in some detail at [91] et seq. includes some useful comment on discrimination and denigration.

The Authority found that the broadcasts contained divisive and coarse language and were insulting to individuals but concluded that while the comments about women were offensive, the level of vitriol was not such that it amounted to hate speech. Accordingly the broadcast did not reach the threshold required by standard 6 and did not encourage different treatment or devalue the reputation of women generally.

I am not entirely convinced that this is so clear cut. Taking into account the size and makeup of the target audience and the reference in standard 6 to devaluing the reputation of a section of the

[32] As the programme was broadcast in Punjabi the Authority obtained translations of a representative sample of extracts of the broadcasts.

community, some of the comments - for example, "…being ladies they don't know anything" - might have the effect of denigrating women in the Sikh community[33].

Having said this the Authority did note that the breaches of other standards were serious and certain aspects of the broadcast were unacceptable in New Zealand. In determining whether orders should be made, it also recognised the station had not had any previous complaints made about it and concluded that the complaint process and its outcome could serve a useful educative function by illustrating what was expected of a fair broadcasting regime. In this case, the Authority had sought cultural advice from Dr Choudhary, a respected member of the New Zealand Sikh community. Dr Choudhary, while recognising that aspects of the content were insulting and denigratory, observed that such community radio stations operate in a cultural vacuum and it was important that the broadcasters were well versed in their responsibilities under the broadcasting regime in New Zealand. He also suggested that an educative function rather than a punitive measure would be more meaningful.

Despite my reservations I consider that the Authority was correct in adopting the approach that it did given the importance of educating the broadcaster.

Day & Moss and NZME Radio Ltd – 2018-090

The final decision – and the only one in the group in which the Authority upheld a complaint under the discrimination and denigration standard – related to a talk back programme hosted by Heather du Plessis-Allan in which she gave her opinion on why the Prime Minister should not have commissioned a return flight in a private plane to Nauru to attend the Pacific Islands Forum. Ms du Plessis-Allan suggested that New Zealand did not need to send the Prime Minister, commenting 'I mean, it's the Pacific Islands. What are we going to get out of them? They are nothing but leeches on us'. This provoked a significant reaction on twitter, causing Ms du Plessis-Allan to respond. In her response (in a subsequent broadcast) she claimed she had been referring to the Islands not the people. The Authority found this response disingenuous. It was also undermined by her comments later in the broadcast that New Zealand was also funding the island's pension system - presumably because of the portability of New Zealand superannuation to certain Pacific Islands (including Nauru).

The Authority received a number of complaints including allegations that Ms du Plessis-Allan's remarks were discriminatory in the sense of undermining the reputation of Pacific people and unacceptable even as part of a robust debate on talk back radio. The response from NZME was along similar lines to Ms du Plessis-Allan's, arguing that they were directed at the island - not the people – and did not encourage breaking the law or amount to antisocial behaviour. Further her comments were what could be expected of an ex-political journalist speaking as part of a talkback radio programme and as such did not reach the level of vitriol that could be considered to be hate speech.

[33] I note that women in the Sikh community have equal status with men but remarks of this type could reflect sexism prevalent in the wider community that would have a greater impact because of the nature of the broadcaster's audience. The section of the community affected would therefore be those Sikh women who comprised Radio Virsa's audience.

In reaching its decision, the Authority considered the right to freedom of expression and the role that it played in the radio talkback environment (which it described as a robust, opinionated environment designed to accommodate controversial ideas and opinions), concluding that the nature of Ms du Plessis-Allan's comments and the nature of her response to the original complaints went beyond what was acceptable in broadcasting, even in the context of a talkback show. The Authority referred to the tone in which she spoke and the deliberate use of inflammatory language that could be interpreted by listeners as encouraging the different treatment of Pasifika people, concluding that the comments contradicted the "purpose of standard 6, which is to foster a community commitment to equality in society"[34]. Although NZME had been given the opportunity to improve the situation, it had allowed Ms du Plessis-Allan a further opportunity to vent her feelings in a subsequent programme.

In my view the Authority was correct in deciding that there was a breach of the standard. While Ms du Plessis-Allan's comments could possibly have been justified in some contexts, her manner of delivery and reiteration of her position reflected a contempt for Pacific people that satisfied the requirement of denigration of a section of the community in standard 6.

Conclusion on specific cases

Having read the cases and viewed and listened to the material provided, I consider that the Authority reached the correct decisions. I have a residual concern about the Radio Virsa complaint mainly because of the size of the audience and the impact that community radio stations of this nature can have on a relatively isolated population. Their influence may be greater than talk back radio generally which has a wider audience. I note that Dr Choudhary had similar concerns. I think he was correct in concluding that it is important for community radio providers to recognise that they must comply with their responsibilities under broadcasting standards in New Zealand and by resolving complaints in this way an opportunity is created to educate talk back hosts on their role and its consequences.

THE DECISIONS GENERALLY

I found the decisions accessible and well written. The only drawback was the, at times, limited explanation of discrimination. The application of standard 6 on occasion amounted to citing the wording in the Codebook. I note that in the 2013 review of the Authority's decisions by the panel led by Simon Mount, the difficulties that can result from over prescriptive decisions were recognised, but the panel also felt that the tests relating to each standard needed to be clearly articulated[35].

As I noted earlier, discrimination is not an easy concept to work with or understand. If the decisions are to provide some guidance on the nature of discrimination and when it is unacceptable, the comments on what amounts to discrimination at times could have been more detailed. Simply quoting the standard does not necessarily explain why a complaint does not amount to discrimination, particularly if a reference to detriment is omitted. In some cases a more nuanced explanation would have been useful, particularly when a reasonably full description of the

[34] At [33]
[35] Mount, Mora & Miller, *Review of the Broadcasting Standards Authority Decisions*, June 2013 at [6]

importance of freedom of expression is usually provided. Some comment on the reason for penalising discrimination - as was the case in the Du Plessis-Allan case - is also helpful.

The decisions reflect a principled and nuanced approach to free speech issues. This is as it should be given the importance of the right to free expression in the broadcasting context[36]. The paper by Steven Price[37] made a number of suggestions for dealing with freedom of expression which appear to be reflected in the Authority's current approach. However, this can mean a relatively lengthy description of freedom of expression is given, which may downplay the impact of the standard itself. Overall, I agree with previous commentators[38]who endorsed a simple approach that was accessible to lay people, particularly if one aim of the process is to educate the parties involved in their responsibilities under the broadcasting regime.

Although I only viewed a relatively small sample, I found the Authority's approach and the conclusions it reached, consistent and well expressed. It gave reasons for its views and identified the factual issues that led to its dismissing (or, in the last case, upholding) the complaints in relation to the discrimination standard. I was particularly impressed with the discussion in the du Plessis-Allan case and the explanation of the role that contextual factors can have on whether the standard is breached[39].

COMMENTARY ON WORDING OF STANDARD

I found the commentary on the wording of the standard and the explanation in the Codebook, impressive. However, there is a discrepancy in the text between the HRA and the Broadcasting Act. For example, the wording of standard 6 on p.15 refers to the grounds of discrimination listed in the HRA while the text on p.26, p.37 and p.47 reflects s.21(1)(e)(iv) of the Broadcasting Act by identifying some, but not all, of the grounds on which it is unlawful to discriminate in the HRA. The BSA may want to consider whether the standard should align with the HRA on this point and whether the Broadcasting Act should be amended to reflect this.

One matter which I do think could usefully be included in the Codebook, possibly as part of the general commentary on freedom of expression, is some reference to exciting racial disharmony in the HRA given its application to broadcasters. Hate speech has assumed a greater profile since the events of March 15th with the Minister of Justice indicating he intends to review the HRA - and s.61 in particular- because it is not working as intended and this may be an opportune moment to do the same in relation to standard 6.

A further issue that might be worth considering is some explicit guidance on the conflict of rights. This can be a significant problem in relation to freedom of expression and discrimination particularly given the emphasis of standard 6 on the importance of promoting equality in the community. While

[36] It is also consistent with the approach in other areas. For example, principle 10 of the Harmful Digital Communications Act 2015 states that a digital communication should not denigrate an individual by reason of his or her colour, race, ethnic or national origins, religion, gender, sexual orientation, or disability and that when exercising its powers under the Act, the Approved Agency and courts must act consistently with the rights and freedoms contained in the NZBORA.
[37] Supra, fn 23
[38] Burrows, *Assessment of Broadcasting Standards Authority Decisions* April 2006 cited in Mount et al.
[39] *Day & Moss and NZME Radio Ltd* at [21]

there is comment on proportionality and balancing rights, for many lay people a NZBORA analysis is complicated and often does not resolve the dilemma of why some comments are permissible and others not.

CONCLUSION

Overall, the decisions I was asked to review were consistent, well written and accessible. The format that has been adopted allowed for a coherent explanation of the logic underlying the Authority's decisions and guidance on the application of the standard itself. I could find no flaw in the legal reasoning in each case - although I had some reservations about the Radio Virsa case because of the disparate impact that such community radio station can have on a small relatively isolated communities.

The text in the Codebook proved a useful tool for complementing and contextualising the decisions although the existing text could usefully be supplemented by a couple of changes. Given the present discussion about hate speech and white supremacy it might be useful if the extra grounds in the HRA were specifically mentioned in the definition. I also wonder whether it might be useful to have some reference to s.61 HRA relating to exciting racial disharmony. This could provide support for the approach adopted by the Authority.