SECTION 11 OF THE BROADCASTING ACT 1989

I have been requested to review some decisions of the Broadcasting Standards Authority involving the power in section 11 to "decline to determine" a complaint. Section 11 provides as follows:

> The Authority may decline to determine a complaint referred to it under section 8 if it considers ---
> (a) that the complaint is frivolous, vexatious, or trivial; or
> (b) that, in all the circumstances of the complaint, it should not be determined by the Authority.

It will be convenient to discuss the two paragraphs of s11 separately, and to deal with the relevant decisions in the course of that discussion.

SECTION 11(a) – FRIVOLOUS, VEXATIOUS OR TRIVIAL

Introduction

As the Authority says in its online Guidance on section 11, the obvious purpose of this provision is to ensure that the resources of the Authority "should not be wasted on having to deal with matters which objectively have no importance". It is a necessary tool.

There are similar provisions in most other statutes which set up courts and tribunals – for example the District and Senior Courts, the Human Rights Review Tribunal, and the Waitangi Tribunal. The words "frivolous" "vexatious" and "trivial" are thus common currency in our legal system. Some might say that they are ordinary English words which barely need definition because everyone knows what they mean. But they have been defined, and in many and various ways. "Trivial" conveys a sense of small or insignificant, "frivolous" suggests lacking in serious purpose, and "vexatious" suggests annoying (often, but not necessarily, intentionally so). The Broadcasting Standards Authority has developed its own definitions which appear in its Guidance on the BSA Complaints Process:

> A ***frivolous*** complaint is one which the BSA considers to be unworthy of being treated in the same way in which it would treat a complaint which is not frivolous or which has some merit. Frivolous means not serious or sensible, or even silly.

A ***trivial*** complaint is one which is of little or no importance and is at such a level not to justify it being treated as a serious complaint.
A ***vexatious*** complaint is one which has been instituted without sufficient justifying grounds. In some cases a person putting forward a vexatious complaint may do so with the intention of causing annoyance, but such an intention may not be necessary….

An Authority decision applying section 11 is appealable to the High Court, but the Court would only overturn the decision if it found that the Authority had acted on a wrong principle, had taken the wrong considerations into account, or was simply "plainly wrong". That is a high threshold. In one case which was appealed to the High Court[1] Justice Simon France was reluctant to overturn the exercise of the Authority's judgement. He said the assessment of "trivial" or not was "an assessment to be made by a specialist body which considers hundreds of complaints".[2] Elsewhere he referred to the "specialised skills of the Authority". [3]

Nevertheless, while the High Court would not often overturn an Authority decision on this matter, a decision that a complaint should be dealt with under section 11(a) should not be taken lightly. Complainants who are genuine in their belief that their complaint has merit may feel that justice has been denied them if it is rejected out of hand. Moreover in our increasingly diverse society what seems trivial to one person may not to another. Social media echo chambers can distort the sense of proportion. Summary "declines to determine" could have the potential to generate a lack of confidence in the Authority among some sectors of the community.

I shall compare and discuss two decisions and the issues arising from them. Both the decisions involve the word "trivial", as do most of the decisions under s11(a), so most of the discussion will centre round that.

Parvomai and Radio New Zealand Ltd, 2021-111.

An episode of *Our Changing World* described the results of a New Zealand Garden Bird Survey which it said was based on an English model. Mr Parvomai complained that this was inaccurate in that the survey model was British, not

[1] McDonald v Television New Zealand Ltd HC Wellington CIV 2011-485-1836
[2] At [31]
[3] At[28}

English. The Authority declined to determine the complaint on the grounds that it was trivial.

I think almost everyone would agree with the decision. This was a survey of New Zealand birds, and whether the model on which the survey was based was described as English or British made no difference at all to the substance of the programme. It might be described as a totally insignificant error – if indeed it was an error at all.

The case involves the Accuracy standard. The great majority of section 11(a) cases do.[4] In giving its reasons the Authority said the use of the word "English" was *immaterial* to the understanding of the broadcast. Given that immaterial inaccuracy is no breach of the Accuracy standard, why did the Authority not reach a substantive decision that the complaint should not be upheld, rather than resorting to section 11(a) and deciding not to determine it?

There have been earlier Authority decisions involving the use of the word "England" where immaterial inaccuracy did result in a "not upheld" decision, (although in some of them where the complainant persisted in bringing similar complaints the Authority did resort to its s11(a) power). [5]

In the present case there is no indication that Mr Parvomai had a past history which influenced the decision. So why then did the Authority use section 11(a) rather than deciding not to uphold the complaint? It was surely simply a question of degree. To qualify as "trivial" the complaint must be trifling or unusually lacking in merit. By no means all complaints involving immaterial inaccuracy fall into that category. Drawing on its experience of "hundreds of cases" (in Justice France's words) the Authority made the call that in this case it met that very low level of merit. There would be few people who would disagree.

The Parvomai decision also raises some important questions of process. I shall deal with those after examining the second case referred to me.

Dobson and Discovery NZ Ltd T/A Warner Bros Discovery 2022-140

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[4] See the examples given in the BSA's online guidance on the Power to Decline in its commentary on the Complaints Process

[5] See the cases involving Mr Lowes, 2005-025, 2005-050, 2006-04, 2016-072, and 2020-104

On the *AM* programme the host was interviewing the Leader of the Opposition Christopher Luxon about a recent poll on words viewers associated with him and the then Prime Minister, Jacinda Ardern. The words viewers associated with Mr Luxon included such as “average”, “inexperienced” and so on. They were accompanied by a graphic. The host then chose “some of the worst words” used about Ms Ardern. They included such as “evil” and “liar”. No graphic was shown.

Mr Dobson complained that the programme was misleading in that it did not compare the leaders on an equal footing. It used only the “worst” words about Ms Ardern and not the commonly used favourable ones such as “good”, “caring” and so on. He based his complaint on the Accuracy and Balance standards.

The Authority declined to determine the complaint. It indicated that viewers would not be misled by the programme, because the host made it clear that the words shown about Ms Ardern were only “some of the worst”, thus indicating that there were other words. Moreover the full graphics had been shown by the broadcaster in other programmes on the same, and on the preceding, day.

As in *Parvomai*, the Authority in its reasons briefly examined the substance of the complaint, and effectively found the viewing audience would not be misled by the programme. So why did it not simply decide not to uphold the complaint on that substantive ground? Mr Dobson had been involved in a number of recent complaints, but the Authority did not refer to them and there is no indication that it was influenced by them. As in *Parvomai,* it was simply the Authority’s assessment of the low merit of this complaint which led the Authority to attach the word “trivial’ to it.

Although the matter is just one of impression (as questions of degree usually are), I do not find the categorisation of “trivial” in this case quite as compelling as in *Parvomai.* For my part I thought Mr Dobson’s complaint was not entirely devoid of merit. By confining the words used about Ms Ardern to the “worst words” there was at least the beginnings of an argument that she was portrayed in a misleading way. The availability of the full graphics goes some

way to mitigating that, but not all viewers might have seen them. I am certainly not saying that the complaint should have been upheld; nor that many other viewers would share my view. Nor do I think that an appeal by Mr Dobson to the High Court would succeed; as Justice France indicated in the High Court case referred to above[6], the Authority, with its greater experience of complaints, is in a better position than anyone else to make a comparative assessment on these matters.

All this shows, I think, is that whether a complaint is trivial or not is a question of degree, and involves an element of judgement which is to some extent subjective. Apart from the various definitions of the word, there are no hard and fast objective criteria.

Conclusions on section 11(a)

Parvomai and *Dobson* raise a number of important issues.

It may first be asked what is to be gained by using section 11(a) as opposed to a substantive decision declining to uphold? That is reasonably clear.

- A decline to determine enables the Authority to clearly convey the message to the complainant, and future complainants who read it, that its time is a scarce resource and that it will not waste it by considering unmeritorious complaints. That message is clearly put in the two decisions I have reviewed. Some might take the view that the emphasis on wasting time is disrespectful to a complainant who genuinely believes in their cause. But it is hard to think how else one can convey the message. One could leave out the reference to wasting time altogether, I suppose, but the word "trivial" which remained is capable of causing upset also. There might perhaps be a softer form of words – "the Authority finds it unnecessary to further investigate the complaint" perhaps – but that is just a euphemism which is easily enough seen through. It might be better simply to continue with the present practice which clearly conveys the truth of the matter.

[6] See fn [1] above.

- It may reduce the flow of future complaints on the same topic. However that is not guaranteed, because some potential complainants will be unaware of the decision, or will be determined to persist anyway.
- It opens the door to the possibility of an award of costs to the other party. That is provided in section 16(2). This is not a power that is much exercised, but it does exist for appropriate cases.
- Most obviously and importantly, a decline to determine does not (or should not) take up anywhere nearly as much time as a substantive decision.

Streamlining
(i) Reasons

It would obviously be counterproductive – indeed it would be absurd - if the Authority spent as much time on its decisions under s11(a) declining to determine as it does on its substantive determinations. It does not. The reasoning in decline decisions is notably shorter – in *Parvomai* 10 lines and in *Dobson* 19 lines, as compared with the two and a half page average in a group of substantive Accuracy decisions I reviewed recently.

In *Parvomai* three topics were touched on in the reasons: a definition of "trivial", the immateriality of the designation of "English" in the programme, and the need to avoid wasting the Authority's time. There was really nothing else to say. In *Dobson* there was likewise a definition of "trivial" and references to time wastage, but a little more time was spent on the substance of the complaint, with a brief explanation of *why* the Authority thought the complaint was trivial.

I am not sure why the reasons were a little fuller in *Dobson,* but as someone who hesitated a little over whether this complaint could designated as trivial, I found them helpful in understanding the Authority's thinking.

(ii) Process

Although it does not appear on the face of its decision, in *Parvomai* the Authority adopted a modified process to streamline its decision making. It

departed from its normal process of asking the broadcaster to provide a copy of the broadcast and submissions on the complaint. It regarded the triviality of the complaint as so obvious from a reading of the written complaint that those other steps were unnecessary. This truncated process was as much for the benefit of the broadcaster as the Authority itself.

I support this process. Anything that can be done to save resources while at the same time ensuring that justice is done to all parties is to be encouraged. However there are a few risks in what is proposed, so I would qualify the proposal by saying the truncated process should only be used (i) if the trivial nature of the complaint is very clear on its face and (ii) if the Authority is sure that viewing or listening to the broadcast will not affect the impression created by the written words of the complaint. The second of these conditions is as important as the first, because the impression created by words can be affected by the material which surrounds them, and by the context in which they appear – and broadcasts are a different medium from the written word. But I think the truncated process was correctly used in *Parvomai.* It would be hard to imagine a clearer case.

There is one further issue. In *Parvomai* the use of the truncated process was not apparent on the face of the decision. There probably should be an indication somewhere, perhaps on the BSA website, that the Authority may use this process in appropriate cases. Currently there is a statement in the Online Guidance that the Authority "does not expect [from broadcasters] a comprehensive analysis of a complaint when, on its face, it is frivolous or trivial", but that does not seem to go quite far enough. Greater transparency could reduce the risk of complainant dissatisfaction.

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SECTION 11(b) – "SHOULD NOT BE DETERMINED"

Introduction

Section 11(b) provides that the Authority may decline to determine a complaint if it considers –

> that, in all the circumstances of the complaint, it should not be determined by the Authority

This is an unusual provision. The word “may” appears to give the Authority a wide discretion, but the phrase “*should* not be determined” indicates that there must be a good reason for the decision. “Should not” is equivalent to “ought not”; it indicates that “not determining” must be the right thing to do.

The scope of the provision was once interpreted narrowly by Justice Asher in the High Court[7]. He said that while section 11(a) covers complaints that should be rejected for substantive reasons, he would be inclined to the view that “s11(b) is reserved more for complaints where there is a gross problem in form, such as an unintelligible complaint, or a complaint not properly signed or authorised”. However this was a tentative view only, and was not necessary for his decision in the case before him. The provision does not seem in its wording to be so confined, and it has been used in a variety of situations. It has in fact considerable scope.

For example, it is suggested that under the section the Authority could decline to determine a complaint if:

- there is conflicting evidence in an accuracy complaint, and the Authority cannot arrive at a conclusion on the truth of the matter[8];
- the matter is before another tribunal (for example a court}[9];
- a recording of the broadcast is unavailable, or incomplete[10];
- the broadcast complained about cannot be identified in the records of the broadcaster[11] ;
- having decided a complaint under one standard, it would involve unnecessary repetition to deal with it under another[12];

[7] Reekie v Television New Zealand Ltd HC Auckland CIV 2010 404-4893 3 Nov 2010 at [27]-[28]
[8] E g CYFS and TV3 Network Services Ltd 2003-107 at [128] I am indebted for the references in this footnote and footnote 9 to Steven Price’s book “Media Minefield”. The introduction in 2009 of a “reasonable efforts” qualifier in the Accuracy standard reduces the need for the use of s11 in this context, but not entirely. As Joe Williams J held in *Radio New Zealand and Bolton* CIV-2010-485-225 for an accuracy complaint to be upheld it must still be shown that the broadcast was inaccurate.
[9] E G EllIs and Radio New Zealand Ltd 2004-115 at [145]
[10] BSA in its Guidelines on the Complaints Process
[11] As in fn 10 above.
[12] For example the complainant may cite both Fairness and Privacy, but the considerations to be taken into account in each may be so similar that it is enough to rely on only one of them.

- the complaint is framed in offensive, abusive or threatening language (although in such a case the complaint might also be characterised as frivolous or vexatious);
- the complaint is poorly expressed or otherwise difficult to follow.

Section 11(b) and lack of jurisdiction

In addition to the above examples of cases where the Authority *may* decline to determine the complaint, there are other complaints that the Authority *cannot* deal with under its Act of Parliament. Section 6 lays down the preconditions of a valid formal complaint. In these cases reliance on section 11(b) is unnecessary. If the preconditions are not met the Authority simply lacks jurisdiction in the matter. There is no formal complaint. Examples would include:

- complaints about advertising which are the province of the Advertising Standards Authority;
- complaints about programmes which have not been broadcast as that term is narrowly defined in the Act;
- complaints about programmes accessed on demand where they have not been previously broadcast within the statutory time limit;
- complaints not lodged within the statutory time limit;
- complaints which are not about a specific programme.

In these cases, I would suggest, s11(b) is inapplicable. There is no complaint to decline. The Authority has no jurisdiction over the matter.

But another requirement of section 6 of the Broadcasting Act is less easy to apply. I shall introduce it here, and then consider the decision in *KS and Television New Zealand Ltd* which directly raises the issue.

Section 6 of the Act requires that a formal complaint must constitute “an allegation that the broadcaster has failed to comply with section 4”. In other words the complaint must allege that the programme complained about has broken one or more of the broadcasting standards, either the statutory standards laid down in the Act itself, or those contained in the Broadcasting Code. While most complainants expressly name the standards they are relying

on (Accuracy, Balance, Fairness, etc) it appears that it is enough that the relevant standard is obvious by implication[13].

So if the complaint is about something other than standards it is not part of the Authority's business; the Authority cannot determine it. The FAQ page on the Authority's website makes it clear that it only considers complaints "that fit within broadcasting standards". Recent decisions by the Authority use the language that a complaint does not comply if it "does not raise any issue of broadcasting standards".

So matters such as scheduling, or the complainant's disagreement with an opinion expressed in a broadcast, are not the Authority's business. This receives endorsement from section 5(c) of the Act which lays down as a principle of the Act that "complaints based merely on a complainant's preferences are not, in general, capable of being resolved by a complaints procedure". Sometimes the issue of whether the complaint is linked to a standard is clear cut; sometimes it is not, and requires an exercise of judgment by the Authority.

If a complaint is found not to be based on a standard, how does one frame that decision? Rather than saying that the complaint is beyond the Authority's jurisdiction so that the Authority *cannot* deal with it, can the Authority instead consider the complaint, and exercise its discretion under s11(b) to decline to determine it?

The answer is not straightforward. The *KS* case raises the question directly.

KS and Television New Zealand Ltd 2020 – 135

KS complained about the use of te reo Māori in a number of news and current affairs programmes. KS alleged this was a breach of the Discrimination and Denigration, and Fairness, standards. They argued that the use of te reo was discriminatory against non-Māori speaking New Zealanders, and said the vast majority of the population were being purposefully excluded. The broadcaster made no formal decision on the complaint, saying it was no breach of programme standards to broadcast in Māori.

[13] *TV3 Network Services Ltd v Holt* [2002] NZAR 1013 at [27]

The Authority used s11(b) and declined to determine the complaint, saying that Māori is an official language of New Zealand, and its use is an editorial decision for broadcasters. The decision to decline to determine was thus expressed: "The Authority finds that the use of te reo Māori does not raise any issue of broadcasting standards."

I take this to mean that the Authority accepted jurisdiction over the complaint, but after considering it made the decision to decline to determine it.

I think that, in strict law, that approach is correct. By alleging that the programme breached two named broadcasting standards, the complaint met the requirements of s6 of the Broadcasting Act. It did "constitute an allegation that the broadcaster has failed to comply with [broadcasting standards]." As a formal complaint, it was thus within the Authority's jurisdiction.

The Authority then decided, after consideration of the complaint, that the complaint "did not raise any issue of broadcasting standards", and so declined to determine it. The phrase "did not raise any issue" is a very strong one, and I think it is best interpreted to mean not just that there was no *breach* of broadcasting standards, but that the named broadcasting standards *had no sensible application to the case at all.* The complainant's reliance on them was entirely misconceived. (I shall return at the end of the discussion of this decision to examine how the Authority reached the conclusion that the case raised no issue of standards.)

Thus understood, the decision opens the door for the Authority to say that future complaints about the use of te reo are not the Authority's business, and it will not entertain them. Persons who wish to complain about that matter can be directed to the broadcaster. I think that is an appropriate and sound course of action.

Comparison with HM

The *KS* decision can be instructively compared with a decision from 2017, ***HM and Radio New Zealand Ltd,*** **ID2017-063.** The facts of *HM* were very much the same as those in *KS.* HM complained about the use of te reo greetings and

closings by presenters on RNZ National, noting that the announcers' pronunciation of Māori words was often poor.

The broadcaster did not accept this as a formal complaint, saying the use of Māori greetings was a matter of editorial discretion rather than an issue of broadcasting standards. It thought the "complaint" related to the complainant's personal preferences and was not capable of being resolved by the complaints procedure. Having had his complaint rejected by the broadcaster, HM took it to the Authority. The Authority, rather than declining to determine it under s11(b), held that it had no jurisdiction over it at all. The closing words of the decision are: "the Authority declines jurisdiction to accept the complaint".

While these two decisions may seem to be at odds there is a difference between them. In *KS* the complainant expressly named two standards which he said had been breached. His complaint thus met the definition of a formal complaint under s6 of the Broadcasting Act. In *HM* on the other hand HM cited no standards at all. His complaint did no more than disagree with the views of the broadcaster, and did not link his disagreement to any standards. It was thus not within the definition of a formal complaint under the Act.

While I think this distinction is legally sound, I have long thought it to be somewhat unsatisfactory in common sense. It is based on a strict reading of the legislation, and the layperson might well have little patience with it. The actual facts of *KS* and *HM* were essentially the same, and the difference in decision-making depended on the fact that one complainant had embellished his complaint with the names of standards – and inappropriate ones at that – whereas the other had not. It really is a situation where form has prevailed over substance.

Yet perhaps this incongruity does not matter too much. In both cases the complainants ended up in essentially the same position – their complaints were rejected, albeit at different stages of the process. And both methods of approach enable the Authority to say, quite properly, that future complaints

about the use of te reo are not the Authority's business and should be directed elsewhere.[14]

However perhaps one day the Authority (or the High Court on appeal) might decide that a complaint which cites standards which are quite inapplicable to the facts of the complaint does not "constitute an allegation" for the purposes of s6 of the Act, and thus restore a little symmetry to this topic. However that would require a brave gloss on the words of the Act.

<u>The relevance of harm</u>

The *KS* case raises one further issue, and that is the reasoning by which the Authority reached the conclusion that the complaint did not "raise any issue of broadcasting standards". It used an interesting but novel argument to do so, based on the concept of harm.

The reasoning proceeded in this way. The purpose of broadcasting standards is to recognise and guard against the potential harms broadcasting can cause. Te reo Māori is an official language of New Zealand, and legislation promotes the use of it as a living language. A complaint about the use of te reo Māori does not <u>*raise any issue of potential harm as envisaged by the standards*</u>. Its use is an editorial decision for broadcasters. From these arguments the Authority proceeds to its conclusion that the use of te reo Māori does not <u>*raise any issue of broadcasting standards*</u>.

This may be a valid line of reasoning – I am not saying otherwise. But I would like to hear expanded argument on it so that I can better understand it. The Authority rightly states in its introduction to its online Guidance that harm can result when standards are not followed, and harm is routinely discussed in the Bill of Rights balancing exercise when the Authority is deciding whether or not to uphold a complaint. But I am not entirely sure that harm in the context of breach of standards translates easily to the question of whether the complaint raises any issue of standards in the first place. Perhaps it does, but, for this reviewer at least, a fuller explanation would be welcome. However I confess I

[14] There are differences though, particularly in the ability to award costs. See s16 of the Broadcasting Act 1989 and *Golden and Radio New Zealand Ltd* ID2018-005.

do not know how that could be done: a decision on a s11 decline to determine is no place to engage in an in-depth examination.

For myself, the question of whether a programme raises an issue of standards is one of interpretation. Is it sensibly arguable that the words of the standard, interpreted in the light of the guidelines, can apply to the content of the broadcast concerned? KS pleaded the Fairness standard, which was clearly inapplicable because it deals only with fairness to persons involved in the programme. He also cited Discrimination and Denigration which was likewise inappropriate because non-Māori language speakers are not among the protected classes. Nor can it be suggested that the broadcast reached the "high level of condemnation" that the Guideline to the Discrimination standard requires. and it cannot be alleged that the programme ***encouraged*** discrimination. The decision in *Morgan,* discussed below, is another very clear example.

Foster and RDU98.5FM Ltd 2021-035

Mr Foster complained about the broadcasting of a hip hop song called *When Tony Met Sosa.* It contained a stereotype about Jewish people, used the "n-word" fourteen times, and made references to criminal activity and violence. The song was aired during the school holidays and there was no prior content warning.

The broadcaster defended its playing music from the hip hop genre which it said has grown out of African American street culture and extreme poverty. It is of artistic and cultural interest, and has no context of racism. Nevertheless the broadcaster apologised to Mr Foster for any offence caused, and advised that it had withdrawn the song from its playlist to show its willingness to resolve the matter.

Mr Foster referred the complaint to the Authority. The Act states that complaints may be so referred if the complainant is dissatisfied with the decision *or the action taken* by the broadcaster. The Authority found that here the broadcaster had taken action in a satisfactory manner by working with Mr

Foster to resolve his concerns. Regulatory intervention by the Authority was thus unnecessary.

Rather than upholding or not upholding Mr Foster's complaint, however, the Authority resorted to s11(b) and declined to determine it. This means that it reached no decision on the substantive issue of whether the song breached broadcasting standards. That must wait for a future complaint.

I think that is a legitimate use of s11(b). Given the broadcaster's actions it was *unnecessary* to determine whether the broadcast was in breach of standards. The issue involved in the complaint was not a simple one, and it raised delicate cultural considerations. There are arguments on both sides as to the acceptability of the song. To make a reasoned decision on the question would take considerable time and research.

This use of s11(b) is not an isolated instance of its kind. The Authority has done this before in a similar context[15], and the higher courts not infrequently decline to pronounce on issues which are unnecessary for decision in the case before the court.

However the Authority in the *Foster* decision gave more than superficial consideration to the substance of the matter. In addition to acknowledging Mr Foster's objection that the song would offend some people, it set out some of the arguments which might be used to support the legitimacy of the broadcast. It noted the niche audience of RDU, the well-known and much discussed nature of the language used in the hip hop genre, and the context of the song which involved the rise of the singer "out of a ghetto". I think this brief exploration was helpful. The Authority might otherwise, by its "decline to determine" decision, have confused some readers as to what the Authority's views were of the merits of Mr Foster's complaint. More than that, it has left a future Authority which may have to deal with the issue some useful guidance about the pros and cons it will need to consider.

Resolution of the substantive issue will have to wait until another day.

[15] O'Callaghan and Radio Active Ltd 2004-063

Morgan and NZME Radio Ltd 2021-131

Mike Hosking Breakfast discussed the imminent Covid vaccine mandates for health workers. Mr Hosking was supportive of them, and spoke with concern about the low uptake of vaccination in some parts of the country, in the health sector in particular. He said "If that's the best they can do, mandates can't come fast enough. You either get jabbed or you don't work, simple as that."

Mr Morgan complained that the programme breached the Discrimination and Denigration standard because it discriminated against unvaccinated health workers. The complaint was bound to fail on this ground, because the protected groups under the discrimination standard are limited, and do not include people who oppose vaccination. But the Authority went further and said that the complaint involved "a matter of personal preference and editorial discretion which does not raise broadcasting standards issues". It declined to determine the complaint under s11(b). In this respect, then, the decision is like ***KS.,*** and I agree with it. It was a case where the complainant cited a standard which was clearly inapplicable to the facts of the complaint.

The decision raises another issue as well. Mr Morgan did not expressly base his complaint on the Balance standard, but that, or something like it, clearly underlay his concerns. In his complaint he said:

> "What I propose is equal and fair air time for representatives from [opponents of vaccination mandates]…..Only then can a Broadcaster claim to be stimulating a robust debate…."

The Authority did not mention the Balance standard by name any more than did Mr Morgan, but dealt with this point by noting that in previous decisions it had found there was consensus around the safety of the Pfizer vaccine, and the lack of evidence about Ivermectin as a Covid-19 treatment.[16] (This was presumably to make the point that there was no controversial matter of public importance to engage the balance requirement.) These previous decisions were cited by the Authority as another of its reasons for declining to determine the complaint.

[16] See para [6] of the decision

The brevity of the reasoning in this decision does not make for easy disentanglement in the reader's mind of the separate threads. But as I read it, the Authority's "decline to determine" under s11(b) serves two purposes:

- It gives effect to the finding that the complaint gave rise to no broadcasting standards issues.
- It acknowledges that if the Authority has decided a point in an earlier decision there may be no point in re-litigating it. That would be to reinvent the wheel.

The second of these purposes can be useful. It enables the Authority to dispose rapidly of complaints on major public issues where the point has already been decided. In times of public unrest there are likely to be a lot of those.

CONCLUSIONS ON SECTION 11

There are a few comments to make, and questions to ask, about the power in section 11.

First, paragraphs (a) and (b) are different, and serve different purposes. Paragraph (a) is concerned with complaints which are not to be taken seriously, and investigation of which would be a waste of the Authority's time. Every judicial, or semi-judicial, body needs powers to reject complaints of this kind.

On the other hand paragraph (b) casts its net more widely. It is capable of serving a number of different purposes. In addition to the examples provided at page 8 above, the three cases under review show that it can be used to decline to determine:

- a complaint that raises no issue of broadcasting standards (*KS* and *Morgan*)
- a complaint the substance of which the Authority does not need to determine at this time because the matter can be decided on other grounds (*Foster*)
- a complaint involving issues which have already been determined by the Authority in previous cases (*Morgan*)

All of these purposes can result in time saving, but not all are focussed on lack of merit[17] as the s11(a) cases are.

Second, a "decline to determine" does not mean the complaint is cast aside without being considered. It is a decision of the Authority which is made public, and like other decisions of the Authority can be appealed to the High Court[18]. One expects reasons to be given, although as discussed above[19] the reasons for decline under s11(a) can be very brief indeed. The very purpose of s11(a) is to avoid wasting the Authority's, and the broadcaster's, time.

However occasionally in cases on s11(b) the issues may be more difficult, and may need more attention to matters of substance. The cases under review, and the list of examples on page 8, demonstrate the very different purposes s11(b) may serve. In most of these decisions a very brief statement of reasons (even a one-liner) may be all that is required –obvious examples are where a recording is unavailable or where the complaint is offensive -, but in others it may not. A good example of that is *Foster,* where the Authority did (with advantage) venture some distance into the content of the complaint. Other cases demonstrate that sometimes an overly brief statement of reasons can be quite hard to follow. Particular examples for me were *Morgan*, which I thought cramped a number of different and quite difficult issues into a very short space, and *KS*, in the passage dealing with harm and standards. I think a little more explanation would have been advantageous here, and a few extra words would not have been out of place, although in *KS* I doubt whether even that would have satisfied determined doubters.

However one must remember that the audience for Authority decisions is varied, and many of its readers are not lawyers. The Authority is not a court, and is enjoined by the Broadcasting Act to avoid formality and technicality where possible. One should not expect lengthy technical disquisitions in its decisions. It is impossible to please everyone.

Third, in none of the decisions under review was there any mention of the Bill of Rights Act, but I do not think there needed to be. I cannot see that s14 (the

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[17] *Foster* is a good example.
[18] Section 18(1) of the Broadcasting Act 1989
[19] At page 6

right to freedom of expression) is in issue in this kind of case. I did wonder whether s27 (the right to justice) might ever be pleaded by a complainant who is aggrieved by the summary rejection of his or her complaint, but I do not think this necessitates a consideration of that provision in all decisions. As noted above an aggrieved person can appeal to the court from a decision under s11.

Fourth, there is helpful citation of earlier Authority decisions in this group of cases. They were cited to support decisions that in some contexts whether one uses the word “British” or “English” is immaterial (*Parvomai)*; that earlier decisions can be used as precedents rendering re-litigation unnecessary (*Morgan*); and that if the broadcaster has taken satisfactory action to make amends to the complainant it can be unnecessary for the Authority to decide the substantive issue in the complaint (*Foster*).

One would expect more precedent citations in cases on s11(b) than cases on s11(a). The former can involve questions of substance, whereas the latter are usually heavily fact dependent and will often require no precedent citation at all. When dealing with either paragraph of s11, though, over-citation could obviously defeat the purpose of efficient disposal.

Finally, it is appropriate to reiterate my view that the Authority performs a very difficult task very successfully. I did not think any of the five decisions referred to me were wrongly decided, although, as is almost bound to happen when matters of subjective judgement are involved, I hesitated when reading one decision as to whether my instincts would have been the same as the Authority’s. Some of the points raised in these decisions were difficult. What I had expected to be a simple review turned out not to be. The Authority has confronted these difficulties, and in each case reached a decision which accords with sound common sense.

John Burrows, 21 April 2023