

**IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY**

**I TE KŌTI MATUA O AOTEAROA
TĀMAKI MAKĀURAU ROHE**

**CIV-2018-485-000705
CIV-2019-485-000539
[2021] NZHC 411**

UNDER The Broadcasting Act 1989
IN THE MATTER of appeals against decisions of the
Broadcasting Standards Authority
BETWEEN NICHOLAS PAUL ALFRED REEKIE
Appellant
AND DISCOVERY NZ LTD (formerly known as
MEDIWORKS TV LIMITED
Respondent

Hearing: 11 February 2021

Appearances: Appellant in person
T Turton for Respondent
A Scott Howman and R Ng for Broadcasting Standards Authority

Judgment: 8 March 2021

JUDGMENT OF LANG J
[on appeals against decisions of the Broadcasting Standards Authority]

*This judgment was delivered by me on 8 March 2021 at 3.30 pm,
pursuant to Rule 11.5 of the High Court Rules.*

Registrar/Deputy Registrar

Date.....

Solicitors:
Appellant in person

[1] Each weekday morning TV3 broadcasts a news and current affairs programme called The AM Show. The show features several well-known presenters who discuss topical matters of social and political interest. One of these is Mr Duncan Garner.

[2] The appellant, Mr Reekie, took issue with comments made by Mr Garner on The AM Show in programmes screened on 20 March 2018 and 19 March 2019. He laid formal complaints with MediaWorks NZ Ltd (MediaWorks), the broadcaster that operates TV3.¹ Mr Reekie contended Mr Garner's comments had breached the broadcasting standards prescribed by the Broadcasting Act 1989 (the Act). MediaWorks' Standards Committee dismissed Mr Reekie's complaints.

[3] Mr Reekie then appealed to the Broadcast Standards Authority (the Authority). The Authority dismissed both appeals in written decisions delivered on 10 August 2018 and 23 August 2019 respectively.²

[4] Mr Reekie has now exercised his right to appeal to this Court against the Authority's decisions.³

The legislative framework

[5] Section 4(1) of the Act imposes the following obligations on every broadcaster in New Zealand:

- 4 Responsibility of broadcasters for programme standards
 - (1) Every broadcaster is responsible for maintaining in its programmes and their presentation, standards [that] are consistent with—
 - (a) The observance of good taste and decency; and
 - (b) The maintenance of law and order; and
 - (c) The privacy of the individual; and
 - (d) The principle that when controversial issues of public importance are discussed, reasonable efforts are made, or reasonable opportunities are given, to present significant points

¹ MediaWorks changed its name to Discovery NZ Ltd on 1 December 2020.

² *Reekie v MediaWorks TV Ltd*, BSA 2018-045, 10 August 2018; and *Reekie v MediaWorks TV Ltd* BSA 2019-033, 23 August 2019.

³ In CIV-2018-485-705 Mr Reekie appeals against the decision delivered on 10 August 2018. In CIV-2019-485-539 Mr Reekie appeals against the decision delivered on 23 August 2019.

of view either in the same programme or in other programmes within the period of current interest; and

- (e) Any approved code of broadcasting practice applying to the programmes.

...

[6] The Authority was established under s 20 of the Act and is required to ensure broadcasters comply with broadcasting standards.⁴ The functions of the Authority are prescribed in s 21. These include an obligation “to issue to any or all broadcasters, advisory opinions relating to broadcasting standards and ethical conduct in broadcasting”.⁵ Section 21(1)(e) also requires the Authority:

- (e) To encourage the development and observance by broadcasters of codes of broadcasting practice appropriate to the type of broadcasting undertaken by such broadcasters, in relation to—
 - (i) The protection of children:
 - (ii) The portrayal of violence:
 - (iii) Fair and accurate programmes and procedures for correcting factual errors and redressing unfairness:
 - (iv) Safeguards 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:
 - (v) Restrictions on the promotion of alcohol:
 - (vi) Presentation of appropriate warnings in respect of programmes, including programmes that have been classified as suitable only for particular audiences:
 - (vii) The privacy of the individual:

[7] To meet these obligations so far as free-to-air broadcasters are concerned the Authority periodically publishes codebooks (the FTA Code) in consultation with free-to-air broadcasters. The FTA Code identifies the broadcasting standards prescribed by the Act. It is designed to provide guidance to both broadcasters and the public regarding the purpose and practical application of those standards. The Authority published the FTA Code relevant to Mr Reekie’s complaints in April 2016. This identified eleven separate standards and provided commentary in relation to each.

⁴ Broadcasting Act 1989, s 4.

⁵ Section 21(1)(d).

[8] Part 2 of the Act prescribes a framework for complaints against free-to-air broadcasters. A formal complaint must be made in the first instance to the broadcaster about whom the complaint is made.⁶ If the complainant is dissatisfied with the broadcaster's response there is a right of appeal to the Authority.⁷ In investigating and determining an appeal the Authority has the powers of a Commission of Inquiry established under the Commissions of Inquiry Act 1908.⁸

Appeals to the High Court

[9] Section 18 of the Act provides a further right of appeal to this Court. Section 18(4) provides that the Court shall hear and determine any appeal "as if the decision or order appealed against had been made in the exercise of a discretion". Under s 18(5) the Court has the power to confirm, modify or reverse the Authority's decision and to exercise any of the powers that could have been exercised by the Authority in the proceedings to which the appeal relates. The decision of this Court is final.⁹

[10] In *Browne v Canwest TV Works Ltd* Wild J summarised the approach the Court is required to take in the following way:¹⁰

[20] When summarising the threshold which must be met by an appellant from a discretionary decision, the Court of Appeal now again routinely applies the formula outlined in *May v May*: the appellant must show that the decision-maker acted on the wrong principle, failed to take into account some relevant matter, took into account some irrelevant matter, or was plainly wrong. That formula precludes the appellate Court re-weighting relevant considerations.

(citation omitted)

[11] In *May v May* the Court of Appeal observed:¹¹

It is a feature of cases of this kind that in determining where the interests of justice lay a number of counterbalancing facts must be considered. And the balancing process is not an exact one. Two judges may arrive at different conclusions on the same points without it being said that either one is wrong.

...

⁶ Broadcasting Act 1989, ss 6 and 7.

⁷ Section 8.

⁸ Section 12.

⁹ Section 19.

¹⁰ *Browne v Canwest TV Works Ltd* [2008] 1 NZLR 654 (HC).

¹¹ *May v May*, (1982) 1 NZFLR 165 (CA) at [23].

[12] In *Canwest Wild J* also observed that the term “plainly wrong” establishes a higher threshold than “simply wrong”.¹² It requires the appellant to establish that, although the Authority’s discretion may permit of more than one tenable answer, the decision subject to appeal was not such an answer. In other words, the decision falls outside the range of tenable decisions open to the decision maker.

The standards allegedly breached in this case

[13] The present case involves alleged breaches of the standards identified and explained in the FTA Code as follows:

Standard 1 – Good Taste and decency

Standard: Current norms of good taste and decency should be maintained, consistent with the context of the programme and the wider context of the broadcast.

Explanation: The purpose of this standard is to protect audience members from viewing or listening to broadcasts that are likely to cause widespread undue offence or distress or undermining widely shared community standards.

Standard 4 – Violence

Standard: Broadcasters should exercise care and discretion when referencing violence.

Explanation: The purpose of this standard is to protect audiences from unduly disturbing violent content.

Context is crucial, and the different codes reflect this. A broadcast’s context may justify the inclusion of violent material or minimise its harmfulness. Broadcasters should protect audiences by ensuring violent content is justified by context, and by ensuring viewers are adequately informed of likely content and warned if content is likely to disturb a significant number of viewers.

Standard 5 – Law and Order

Standard: Broadcasters should observe standards consistent with the maintenance of law and order, taking into account the context of the programme and the wider context of the broadcast.

Explanation: The purpose of this standard is to prevent broadcasts that encourage audiences to break the law, or otherwise promote criminal or serious antisocial activity.

Context is crucial in assessing the programme’s likely practical effect. A distinction will usually be drawn between factual, and fictional dramatic

¹² At [23].

depictions, and the level of public interest in a programme will be a significant factor for consideration.

Standard 6 – Discrimination and Denigration

Standard: Broadcasters should not encourage discrimination against, or denigration of, any section of the community on account of sex, sexual orientation, race, age, disability, occupational status or as a consequence of legitimate expression of religion, culture or political belief.

Explanation: The purpose of this standard is to protect sections of the community from verbal and other attacks, and to foster a community commitment to equality.

The importance of freedom of expression means that a high level of condemnation, often with an element of malice, or nastiness, will be necessary to conclude that a broadcast encouraged discrimination or denigration in breach of the standard.

Standard 8 - Balance

Standard: When controversial issues of public importance are discussed in news, current affairs or factual programmes, broadcasters should make reasonable efforts, or give reasonable opportunities, to present significant points of view either in the same programme or in other programmes within the period of current interest.

Explanation: The purpose of this standard is to ensure that competing viewpoints about significant issues are presented to enable the audience to arrive at an informed and reasoned opinion. The objective of this standard – a well-informed public – is important to the operation of an open and democratic society and is consistent with the principles of freedom of expression.

Standard 9 – Accuracy

Standard: Broadcasters should make reasonable efforts to ensure that news, current affairs and factual programming:

- Is accurate in relation to all material points of fact
- Does not mislead.

Explanation: The purpose of this standard is to protect the public from being significantly misinformed.

The standard applies only to news, current affairs and factual programming. News and current affairs programmes or items will usually be readily identified, taking into account what audiences would reasonably expect to be news and current affairs.

The appeal in CIV 2018-485-705 – complaints relating to Mr Garner’s comments on 20 March 2018

[14] Mr Reekie complained about two aspects of The AM Show that screened on 20 March 2018. The first complaint related to comments made by Mr Garner during the programme about an interview broadcast earlier on the programme with the Honourable Kelvin Davis. The other related to comments Mr Garner made both during the programme and in a promotional item for The AM Show (known as a “promo”) that screened on the evening of 20 March 2018. These related to proceedings in the High Court taken by two prisoners who challenged the legality of strip searches of prisoners undertaken in Auckland Prison.

Mr Garner’s comments about the interview with the Hon Kelvin Davis

[15] The AM Show that screened on 20 March 2018 featured an interview with the Honourable Kelvin Davis. This related to a series of nationwide hui the government had arranged for the purpose of rejuvenating the relationship between the Crown and Māori. After the interview had screened the presenters discussed it. During this discussion Mr Garner observed:

This is about one thing. Labour owns the Māori seats. They want to own them forever. This is about going out there saying “Thank you very much, here’s some free tucker, and can you please vote for us for the rest of your lives”.

[16] Mr Reekie contended these comments breached the broadcasting standards imposing obligations on broadcasters relating to Good Taste and Decency, Law and Order, and Discrimination and Denigration.

[17] Before considering Mr Reekie’s grounds of appeal the Authority made the following observations by way of background to both aspects of the appeal:

[11] When determining a complaint we first recognise the importance of the right to freedom of expression – which includes both the broadcaster’s freedom to present information and ideas to the public, and the audience’s right to receive that information. We weigh the value of the broadcast item, as well as the broadcaster’s right to freedom of expression, against the level of actual or potential harm that might be caused by the broadcast either to an individual or to society or the audience generally.

[12] Audiences expect that Mr Garner will at times make provocative statements that some people may find challenging. Controversial and provocative speech is valued in a free and democratic society and the threshold for us justifiably restricting this speech is high.

[13] We have not identified any actual or potential harm arising from the broadcasts which justifies restricting the right to freedom of expression. Both topics discussed carried public interest. It is the responsibility of news and current affairs programmes, such as *The AM Show*, to not only keep the public informed on these kinds of issues, but also to challenge and examine the surrounding viewpoints in a way that encourages constructive public discourse. *The AM Show* did this in a way that was consistent with broadcasting standards.

[18] The Authority went on to dismiss the complaint about Mr Garner's comments for the following reasons:

[14] In summary, we find Mr Garner's comments about his interview with Hon. Kelvin Davis and the Government's planned Hui did not breach the standards raised for the following reasons:

- *Good taste and decency:* Context is important, including audience expectations. While some viewers may have found Mr Garner's comments controversial or dismissive of the Crown/Māori relationship, there is an audience expectation that *The AM Show* and Mr Garner will sometimes give provocative opinions on important issues. In the context of the broadcast as a whole, we note Hon. Kelvin Davis had ample opportunity during the interview to present his views. Ultimately, these criticisms offered robust political discourse and carried public interest considering the importance of the issue. While provocative, they were not likely to cause widespread undue offence or seriously violate community norms.
- *Law and Order:* Neither Mr Garner's comments nor the discussion of this topic in general encouraged criminal behaviour or undermined law and order.
- *Discrimination and Denigration:* A high level of condemnation, usually with an element of malice or nastiness, is necessary to find a breach of this standard. Mr Garner's criticisms were focused on the Labour Party and their political engagement with Māori, not Māori as a section of the community. Again, while possibly insensitive and dismissive, the comments did not carry the level of malice required to amount to a breach of this standard.

[19] Mr Reekie's arguments on appeal to this Court were confined to alleged breaches of the standards relating to Good Taste and Decency and Discrimination and Denigration. He contended Mr Garner's comments breached these standards because of the way they portrayed Māori. Mr Reekie says any reasonable person viewing the programme would have concluded Mr Garner was saying that Māori would commit

to supporting the Labour Party in return for promises that they would get free food. He says such comments constituted “casual racism” that would be particularly hurtful to Māori, who have already suffered significant deprivation and hardship for many years as a result of the colonisation process.

[20] The Authority did not interpret Mr Garner’s comments in this way and nor do I. Furthermore, I do not accept that any reasonable viewer would have interpreted Mr Garner’s observations in the manner suggested by Mr Reekie. Mr Garner was not expressing an opinion about Māori. Rather, he was expressing his opinion about the Government’s motive for organising the hui. He clearly considered this lay in a desire to ensure the Labour Party attracted Māori voters in the future rather than in a genuine desire to rejuvenate the relationship between Māori and the present Government. The Authority made this point in the passage set out above when considering whether the comments breached the standards relating to Discrimination and Denigration. When Mr Garner’s comments are viewed in this light the factual basis for Mr Reekie’s argument under this ground of appeal disappears. It follows that the Authority’s decision on this complaint cannot be said to be plainly wrong. Rather, I consider it was plainly right.

Mr Garner’s comments regarding Court action taken by prisoners to challenge the legality of strip searches of prisoners

[21] The trial of the proceeding instituted by the two prisoners was held in this Court between 19 and 21 March 2018 and attracted significant news media interest.¹³ During the programme that screened on 20 March 2018, mid-way through the trial, the presenters discussed the proceeding and its implications. During this discussion Mr Garner made the following comment:

Diddums lads. What are you embarrassed about? It’s a waste of Court time.

[22] The other presenters did not support Mr Garner’s view on this topic. They pointed out that, although prisoners lost their freedom, they did not lose other rights and were entitled to enforce these through the courts.

¹³ This culminated in a judgment delivered by Peters J on 28 September 2018: *Taylor and Smith v Attorney-General* [2018] NZHC 2557. The judgment held that strip searches of the two plaintiffs, Messrs Arthur Taylor and Phillip Smith, were unlawful and unreasonable.

[23] Mr Garner repeated his sentiments about this issue in a promo for The AM Show that was broadcast on TV3 at 6.30 pm on 20 March 2018:

What about these prisoners who have gone to Court to moan about the strip search? Toughen up, harden up and get with it. I mean if you are going to have a riot then there's a right to strip search you and that's going to happen every single time. What are you scared of showing?

[24] Mr Reekie contended Mr Garner's comments in both the programme and the promo breached the broadcasting standards relating to Good Taste and Decency, Law and Order, Discrimination and Denigration, and Balance. The Authority dismissed his appeal for the following reasons:

[15] We also find Mr Garner's comments about the legal action being taken by prisoners, in the episode and in the later promo, did not breach the standards raised, for the reasons below:

- *Good taste and decency:* Our comments above in relation to the first segment also apply here. Although Mr Garner's comments in the broadcast and in the promo were provocative, they related to an issue of social significance. Free and frank discussion about this type of issue is valuable and carries public interest. The comments did not undermine community standards of taste and decency, in the context.
- *Law and order:* There was nothing in the discussion that undermined law and order. Mr Garner's co-hosts clearly acknowledged prisoners' rights.
- *Discrimination and denigration:* The hosts' comments about prisoners did not comment at all on Māori as a section of the community so could not be said to discriminate against, or denigrate, all Māori.
- *Balance:* Strip-searching prisoners and the rights of prisoners is a controversial issue of public importance for the purposes of this standard. However the broadcast was sufficiently balanced and allowed viewers to arrive at their own reasoned and informed opinion by presenting a range of viewpoints through the co-hosts, viewer feedback and a panel discussion. For example:
 - 'I guess they have legal rights and that is what they are fighting ... They have legal rights and that is their bottom line.' (co-host Amanda Gillies)
 - 'Look at Norway, they treat their prisoners with basic human respect, they try to train them up. They have a 20% recidivism rate, which is the lowest in the world, because they don't treat their prisoners like crap.' (co-host Mark Richardson)

- 'The only right that a prisoner really loses is the right to freedom. The other basic human rights they maintain and I guess we have to respect them.' (co-host Mark Richardson)
- *Accuracy*: Mr Garner's statements were clearly identifiable as analysis, comment or opinion, so the accuracy standard does not apply (guideline 9a).

[25] Mr Reekie maintains his argument about breach of the standard relating to accuracy. He considers one aspect of Mr Garner's comments was factually incorrect. This relates to Mr Garner's observation that prisoners could expect to be strip searched every time there was a riot. Mr Reekie points out that Mr Garner's statement was factually inaccurate because Mr Taylor and Mr Smith, the plaintiffs in the Court proceeding, had not been involved in any prison riot.

[26] This may be a valid criticism but, as the Authority pointed out, Mr Garner was expressing his own opinion about this issue. He was not reporting it as a news item. The broadcasting standard relating to Accuracy only applies to news items and not to expressions of opinion. It follows that there is no ground for any complaint based on the alleged breach of that standard in the present case.

[27] Mr Reekie's principal argument under this ground is that Mr Garner's comments were discriminatory and denigrating of Māori because most viewers would be aware that Māori form a disproportionate segment of New Zealand's prison population. Viewers would therefore conclude they were the persons most likely to be strip searched. Mr Reekie emphasised the degrading nature of strip searches, having been subject to them himself as a sentenced prisoner. He contended Mr Garner's comments would re-traumatise prisoners who had been subject to this procedure, the vast majority of whom would be of Māori descent.

[28] As the Authority pointed out, however, Mr Garner did not refer to Māori prisoners in his comments. He referred to prisoners generically. Furthermore, the trial that was in progress when the programme screened did not relate to the treatment of Māori prisoners. Rather, it challenged a decision by management staff at Auckland Prison that all prisoners in five blocks within the prison complex were to be strip searched. Mr Taylor and Mr Smith contended, successfully as it turns out, that this

constituted an unlawful and unreasonable breach of their rights under the New Zealand Bill of Rights Act 1990.

[29] For these reasons, which mirror those given by the Authority, I do not consider reasonably informed viewers would conclude Mr Garner's comments had any connection with Māori prisoners as a group. I therefore do not consider Mr Reekie has provided a factual basis for this ground of appeal. The Authority's decision was not plainly wrong on this issue.

Result

[30] It follows that the appeal in CIV 2018-485-705 must be dismissed.

The appeal in CIV 2019-485-539 – complaints about Mr Garner's comments on 19 March 2019

[31] The second appeal arises out of comments made by Mr Garner at a time when the Christchurch mosque shootings, which occurred on Friday 15 March 2019, were attracting very considerable news media attention.

[32] The AM Show that screened on Tuesday 19 March 2019 featured a report by Mr Garner's co-presenter, Ms Amanda Gillies, about how different segments of the Christchurch community, including gangs, had united in their support for victims of the shootings. The presenters then discussed Ms Gillies' report. At the end of this discussion Mr Garner said:

I would like gangs to nominate a person to look after this man in custody ... I think ... if the gangs could nominate one of their finest behind bars ... I would think that would be a good thing wouldn't it...

[33] Mr Reekie contended these comments breached the broadcasting standards relating to Good Taste and Decency, Violence, and Law and Order. After setting out the purposes of these standards the Authority made the following findings:

Our findings

[9] When determining a complaint we first recognise the importance of the right to freedom of expression, which includes both the broadcaster's freedom to present information and ideas to the public,

and the audience's right to receive that information. We weigh the value of the broadcast item, as well as the broadcaster's right to freedom of expression, against the level of actual or potential harm that might be caused by the broadcast either to an individual or to society or the audience generally.

[10] Audiences expect that on the *AM Show* Mr Garner will, at times, make provocative statements that some people may find challenging. Controversial and provocative speech is valued in a free and democratic society and the threshold for restricting this speech is justifiably high.

[11] On this occasion, we acknowledge that the comment was discordant with the sensitive coverage that preceded it. But for the reasons set out below we do not consider that it reached the threshold which justifies restricting the broadcaster's right to freedom of expression.

[34] The Authority then gave the following reasons for dismissing each of Mr Reekie's grounds of appeal:

Good taste and decency

[12] Under the good taste and decency standard, current norms of good taste and decency, consistent with the context of the programme and the wider context of the broadcast, must be maintained. Context is crucial when determining a complaint under this standard. We found the following contextual factors important in our determination:

- There is an audience expectation that *The AM Show* will sometimes feature provocative opinions on important issues.
- The *AM Show* is an unclassified news and current affairs programme and has an adult target audience.
- Mr Garner's comment was glib in tone.
- Mr Garner is renowned for making controversial and provocative statements.

[13] We understand some people may have found the implication of violence from Mr Garner's comments to be offensive. Mr Garner's comment also struck a particularly discordant note following the moving report from presenter Amanda Gillies, discussing how different communities were uniting in the wake of the attacks. However, it is clear the comment complained about was flippant in nature. Within this context we find Mr Garner's comment did not go beyond audience expectations for *The AM Show* and was unlikely to cause widespread undue offence or distress or undermine widely shared community standards.

[14] We therefore do not uphold the complaint under the good taste and decency standard.

Violence

[15] The purpose of the violence standard is to protect audiences from ‘unduly disturbing violent content’. Context is important when determining whether a broadcast amounted to unduly disturbing violent content. In addition to the contextual factors listed above at paragraph [12], we note the following:

- There was no accompanying graphic or violent images or footage.
- Mr Garner’s comment was not explicit or graphic. There was no description of any violence.

[16] Upon consideration of the contextual factors (including Mr Garner’s glib tone, audience expectations of Mr Garner and *The AM Show* and the lack of explicit or graphic language), we find Mr Garner’s comment did not amount to ‘unduly disturbing violent content’.

[17] While broadcasters are also required to exercise caution with context likely to incite or encourage violence or brutality, the same contextual factors lead us to conclude that Mr Garner’s comment did not reach that threshold.

[18] Therefore we do not uphold the complaint under this standard.

Law and order

[19] This standard requires broadcasters to observe standards consistent with the maintenance of law and order, taking into account the context of the programme and the wider context of the broadcast.

[20] The complainant submitted that Mr Garner was directly inciting audience members to break the law through his comment. Upon viewing the broadcast it is clear to us that Mr Garner’s comment was a flippant, provocative line delivered in passing. As discussed above, comments like these are within audience expectations of Mr Garner on the *AM Show* and we do not consider viewers would take the comment as a sincere direction to break the law.

[21] Considering the tone of Mr Garner’s comment combined with the other contextual factors discussed at [12], we do not consider the comment amounted to a ‘direct incitement to break the law’ or a promotion of illegal or serious antisocial behaviour.

[22] Therefore we find the law and order standard was not breached.

[35] Mr Reekie points out that Mr Garner made the comments at a time when the public did not know the suspect arrested in connection with the mosque shootings was being held in isolation at Auckland Prison. There were also reports in the news media at this time about gangs in the Christchurch area who were providing support for victims of the mosque attacks. Furthermore, Mr Reekie says Mr Garner could

reasonably anticipate that numerous members and associates of those gangs were in prison, and that they would be likely to respond to his comments by taking matters into their own hands and attempting to physically harm the suspect.

[36] Mr Reekie contends the comments therefore breached the standards relating to Good Taste and Decency, Violence, and Law and Order. Mr Reekie goes further than this. He contends Mr Garner's comments also amounted to criminal conduct because they directly incited others, and in particular gang members, to commit acts of violence against the person suspected of being the perpetrator of the mosque shootings. He relies for this submission on s 311(2) of the Crimes Act 1961, which makes it an offence to incite any other person to commit an offence.

[37] Mr Reekie also says the Authority took into account an irrelevant consideration and/or erred in principle by taking into account the context in which Mr Garner made the statements. He submits issues relating to context and the likely reaction of the programme's audience become irrelevant when a person directly incites others to commit an act of violence.

[38] In support of this submission Mr Reekie referred me to the commentary on s 311(2) in *Adams on Criminal Law*, in which the authors observe that the act of inciting a criminal offence may be directed at a particular person, a group of persons or the world at large.¹⁴ They also observe that the inciter must intend or believe that the person or persons incited will act with the mens rea (or intention) required by the offence in question.¹⁵ Based on Canadian authority¹⁶ they suggest a charge under s 311(2) may be established where the inciter either intended the offence to be committed or is reckless that the offence was likely to be committed. They observe that recklessness in this context requires the inciter to consciously disregard a substantial and unjustified risk that the person or persons incited would go on to commit the offence.

¹⁴ Simon France (ed) *Adams on Criminal Law* (looseleaf ed, Thomson Reuters) at [CA311.04].

¹⁵ At [CA311.05], citing *R v Claydon* [2006] 1 Cr App R 20 (CA).

¹⁶ *R v Hamilton* (2005) 255 DLR (4th) 283 (SCC).

[39] It was obviously well beyond the Authority's jurisdiction to consider whether Mr Garner's comments could have resulted in a criminal prosecution. I accept, however, that the issue may have relevance to determining whether Mr Garner breached the standard relating to Law and Order. Incitement of criminal offending would obviously breach Standard 5, which requires broadcasters to observe standards consistent with the maintenance of law and order.

[40] Taken literally, Mr Garner's comments encouraged gang members in prison to nominate one of their number to cause physical harm to the suspect then being held in custody. At first sight this would obviously be inconsistent with the maintenance of law and order. It would effectively amount to a call for gang members to take the law into their own hands and administer a form of vigilante justice.

[41] This is not, however, how the Authority viewed the comments. It concluded at [20] of its decision¹⁷ that they constituted "a flippant, provocative line delivered in passing". It also described them as being "glib". Furthermore, the Authority did not consider viewers of the programme would take it as a serious direction to break the law.

[42] In determining whether it was open to the Authority to reach this conclusion it is important to place Mr Garner's comments in context. Standard 5, which relates to Law and Order, expressly requires the context of the programme and the wider context of the broadcast to be taken into account. Wild J took a similar approach, albeit in a different context, in *Canwest*. In that case he observed that an alleged breach of the standard relating to good taste and decency "cannot be viewed in a vacuum, without regard for time, place, audience and so on".¹⁸

[43] I consider it important that Mr Garner did not make his comments during a programme or discussion that focussed on the person who had been arrested. Had that been the case it could be argued that he either intended gang members in prison to act on his words or was reckless as to whether that may occur. The programme and subsequent discussion did not, however, focus on the suspect. Rather, they focussed

¹⁷ Set out above at [34].

¹⁸ *Browne v Canwest TV Works Ltd*, above n 10, at [45].

on how the mosque tragedy had unified different segments of the Christchurch community.

[44] My own conclusion after viewing the programme as a whole is that Mr Garner made the comments virtually under his breath and very much as a “throwaway line” towards the end of the discussion. They were certainly not made in a way that highlighted them for viewers. There is no risk in my view that gang members or their associates in prison may have viewed the comments as a genuine call to arms. I am therefore satisfied the Authority was entitled to reach the conclusions that it did. It was far from being plainly wrong. It follows that I consider Mr Garner’s comments would not form a tenable basis for a charge laid under s 311(2) of the Crimes Act 1961. The Authority was entitled to conclude they did not breach the Law and Order standard either.

[45] For the same reason I am satisfied it was open to the Authority to conclude the comments did not breach the standard relating to Good Taste and Decency. They created no risk of widespread undue offence or distress, and were highly unlikely to undermine widely shared community standards.

[46] Mr Reekie also maintains the Authority was wrong to conclude the comments did not breach the standard relating to Violence. That decision was plainly correct, however, because Standard 4 relates to the portrayal of violence in a broadcast. The purpose of the standard, as set out above, is to protect audiences from unduly disturbing violent content. As the Authority found, Mr Garner’s comments fell outside that category. It consisted solely of the words spoken and did not portray any graphic or violent images. The Authority was therefore plainly correct to conclude the comments did not breach this standard.

Result

[47] The appeal in CIV-2019-485-539 must also be dismissed.

Costs

[48] The respondent has been the successful party and as such would normally be entitled to an award of costs and disbursements in its favour. These are Category 2 proceedings and Band B would appear to be appropriate for all steps taken in each proceeding. Given that both appeals were heard in the space of one day it seems appropriate that only one set of costs should be awarded for the hearing. The respondent would ordinarily be entitled to costs in relation to all other steps taken in each proceeding.

[49] The Authority has abided the decision of the Court but has assisted by providing copies of documents held on the Authority's file. My tentative view is that costs should lie where they fall as between the Authority and Mr Reekie.

[50] I would hope that these observations will be sufficient to enable the parties to reach agreement regarding costs. If they cannot do so all parties have leave to file memoranda of no more than three pages in length and I will determine the issue of costs on the papers.

Lang J