

# BSA GUIDANCE: COMPLAINTS CONCERNING GENDER IDENTITY ISSUES

June 2023

Gender identity issues are of particular significance to society and assuming greater prominence in media reporting. Society's response to gender identity has drawn polarising opinions and controversy, corresponding with an influx in complaints, from both sides of the various debates, to the Authority (and other regulators) on these issues.

As an Authority tasked with reflecting community standards, we acknowledge the free and frank exchange of opinions is an important aspect of the right to freedom of expression, and is fundamental to the operation of our democratic society. However, the right to freedom of expression is not absolute: individual freedoms are necessarily limited by membership of society and by the rights of others and the interests of the community.<sup>1</sup> The High Court has recently suggested the right would be justifiably limited where it needs 'to give way to the right of vulnerable communities to be free from discrimination', such as gender minorities in this case.<sup>2</sup>

We issue this guidance in this context. It highlights some of the key matters recognised and determined by the Authority in its decisions on gender identity issues. Future complaints will be assessed on their own merits in the particular context of the relevant broadcast.

## 'Gender identity' issues are not new

Gender identity refers to a person's internal sense of their gender.<sup>3</sup> As the BSA has noted: 'A person's concept of their self may be male, female, a blend of both or neither. Gender identity can be the same as, or different to, the sex assigned at birth'.<sup>4</sup>

'Gender identity' issues are not a modern phenomenon: some cultures throughout the Pacific accept gender diversity in ways that Western cultures traditionally have not. One such cultural identity, in an Aotearoa New Zealand context, is that of takatāpui (a term used to embrace all Māori with diverse genders, sexualities and sex characteristics).<sup>5</sup>

Further, NZ law recognises sex is not immutable. Our legal system has allowed changes to nominated sex on a birth certificate since the introduction of the Births, Deaths, and Marriages Registration Act 1955 through a declaration of the Family Court,<sup>6</sup> and as of 15 June 2023, through an application to the Registrar-General.<sup>7</sup>

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<sup>1</sup> Andrew Butler and Petra Butler, *The New Zealand Bill of Rights Act: A Commentary* (2nd ed, LexisNexis, Wellington, 2015) at [6.5.1]

<sup>2</sup> [Auckland Pride v Minister of Immigration](#) [2023] NZHC 758 at [71]

<sup>3</sup> Laurel Wamsley "[A Guide to Gender Identity Terms](#)" *NPR* (online ed, 2 June 2021)

<sup>4</sup> *Oxley and Radio New Zealand Ltd*, Decision No. 2022-105 at [17] citing Jeannie Oliphant, Jaimie Veale, Joe Macdonald, Richard Carroll, Rachel Johnson, Mo Harte, Cathy Stephenson, Jemima Bullock "Guidelines for gender affirming healthcare for Gender Diverse and Transgender Children, Young People and Adults in Aotearoa New Zealand" (2018) Transgender Health Research Lab, University of Waikato

<sup>5</sup> *Adam & Crawford and Radio New Zealand Ltd*, Decision No. 2022-067 at [27]

<sup>6</sup> Births, Deaths, and Marriages Registration Act 1955, s 28

<sup>7</sup> Births, Deaths, Marriages, and Relationships Registration Act 2010, s 24

## Trans people protected under the discrimination and denigration standard

The Authority has found trans people are a ‘section of the community’ protected by the discrimination and denigration standard.<sup>8</sup> In reaching this finding, it referenced a Crown Law opinion (interpreting a similar provision in the Human Rights Act).<sup>9</sup> This approach, and the relevant Crown Law opinion, is worth consideration when assessing the standard’s application to other relevant groups, for example, non-binary people.

## Misgendering and deadnaming

When referring to issues of gender identity in a broadcast, it is important to remember the person being affected by the particular broadcast: harm can be caused regardless of the speaker’s intentions.<sup>10</sup>

The BSA has acknowledged the trans community is particularly vulnerable. It noted trans and non-binary people are sometimes deliberately misgendered (where they are referred to using a name or pronoun that does not accurately reflect their gender), which is inconsistent with:<sup>11</sup>

- a. the Human Rights Commission’s | Te Kāhui Tika Tangata acknowledgment of the importance of the right to be recognised, particularly in the context of an individual’s affirmed gender
- b. a United Nations’ report acknowledging the very basis of individual rights is the right of persons to be recognised as unique and distinguishable from others.

The broader context of a broadcast (including the above) is likely to be relevant when assessing whether a broadcast breached standards: broadcasts do not occur in a vacuum.

Further, language continues to evolve over time and the BSA has acknowledged the importance of keeping pace with audience’s changing expectations of language used.<sup>12</sup> It has encouraged broadcasters to stay alert to such developments, such as by utilising research on the issue by UK regulator Ofcom where participants considered it was the responsibility of presenters and reporters to know who they are speaking to and to use the correct name/pronouns.<sup>13</sup>

However, the BSA has also recognised the importance of freedom of speech in this context. Broadcasts will always be assessed on a case-by-case basis to determine whether they have caused harm at a level meriting restriction of the right to freedom of expression.

In one broadcast, where a non-binary interviewee was able to explain the impact of, for example, deadnaming, to an interviewer who had not been intentionally disrespectful, the Authority did not uphold the complaint. In the context, it did not find harm at a threshold necessary to limit freedom of expression although it acknowledged the interviewer’s questioning was ‘potentially insensitive and harmful’ to the interviewee.

## Inclusive Language

The BSA has found inclusive language is unlikely to breach broadcasting standards, particularly in a context reporting on harm to often underrepresented communities or particular

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<sup>8</sup> *Adam & Crawford and Radio New Zealand Ltd*, Decision No. 2022-067 at [35]

<sup>9</sup> Cheryl Gwyn “Solicitor-General’s Opinion on the Human Rights (Gender Identity) Bill” (2 August 2006) Crown Law Office | Te Tari Ture o te Karauna at [25] and [30]

<sup>10</sup> *Bell and RNZ* at 19

<sup>11</sup> *Adam & Crawford and Radio New Zealand Ltd*, Decision No. 2022-067 at [26]

<sup>12</sup> *Bell and Radio New Zealand Ltd*, Decision No. 2023-016 at [19]

<sup>13</sup> Ipsos MORI “Public attitudes toward offensive language on TV and radio: summary report” (September 2021) Ofcom <Ofcom.org.uk> at 49-59

groups adversely affected by a particular practice. For example, in an item reporting on trans men and non-binary people missing out on cervical screenings, the Authority noted the reference to 'people with cervixes' was accurate and did not constitute denigration of women.<sup>14</sup>

### **Complaints relying on transphobic tropes are unlikely to be successful**

Several complaints determined by the BSA referred to, or relied on, transphobic stereotypes. Most commonly, a variation of the trope that gender identity is a mechanism to exploit women. The Authority has acknowledged the evidential foundation for such views is 'strongly disputed' and reliance on such tropes is 'capable of embedding long-standing prejudice'. Complaints along these lines are unlikely to find favour with the BSA and may result in the Authority declining to determine the complaint.<sup>15</sup>

### **Relevant Decisions**

This guidance is drawn from the following decisions, all of which concerned complaints that were not upheld by the BSA:

[Adam & Crawford and Radio New Zealand Ltd](#), Decision No. 2022-067 (interview with gender critical philosopher on her perspective on gender identity)

[Bell and Radio New Zealand Ltd](#), Decision No. 2023-016 (interviewer misgendered and deadnamed non-binary interviewee)

[Oxley and Radio New Zealand Ltd](#), Decision No. 2022-105 (report on trans men and non-binary people missing out on cervical screenings notifications referred to 'people with cervixes')

[Drinnan and Radio New Zealand Ltd](#), Decision No. 2021-083 (Interview with lecturer focused on transgender issues following Laurel Hubbard's selection as one of the first transgender athletes to compete in Olympics)

[Johnson & MacKinnon and Radio New Zealand Ltd](#), Decision No. 2020-176 (use of the term TERF as descriptor of people holding particular views did not refer to section of community protected by discrimination and denigration standard)

[Cross and Television New Zealand Ltd](#), Decision No. 2023-035 (report on public figure's entry into New Zealand referred to them as an 'anti-transgender activist')

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<sup>14</sup> *Oxley and Radio New Zealand Ltd*, Decision No. 2022-105 at [13]

<sup>15</sup> *Cross and Television New Zealand Ltd*, Decision No. 2023-035