ACT CIVIL & ADMINISTRATIVE TRIBUNAL

REP v CLINCH (Appeal) [2021] ACAT 106

AA 31/2020

Catchwords: **APPEAL** – discrimination – vilification on basis of gender identity – victimisation – social media posts – whether the Human Rights Commission and ACAT lacked jurisdiction because the complainant resided in Queensland – whether the posts constituted unlawful vilification – nature of vilification – whether a party can be responsible for the posts by others – whether the posts constituted unlawful victimisation – whether compensation can be ordered for intangible loss – whether injunctive orders by the Original Tribunal were excessively broad

Legislation cited:
ACT Civil and Administrative Tribunal Act 2008 ss 6, 7, 8, 57, 60, 79, 82
Anti-Discrimination Act 1977 (NSW)
Anti-Discrimination (Racial Vilification) Amendment Act 1989 (NSW) s 49ZT
Australian Capital Territory (Self-Government) Act 1988 (Cth) s 22
Australian Constitution
Australian Human Rights Commission Act 1986 (Cth) s 46PO
Civil Law (Wrongs) Act 2002 s 139E
Criminal Code 2002 s 750
Discrimination Act 1991 ss 2, 4, 4A, 4AA, 67A, 68, Dictionary
Human Rights Act 2004 ss 8, 16, 30
Human Rights Commission Act 2005 ss 42, 43, 47, 53A, 53E, 71
Human Rights Commission Legislation Amendment Act 2010
Legislation Act 2001 ss 5, 6, 122, 179
Racial Discrimination Act 1975 (Cth) ss 18C, 18D
Sexuality Discrimination Legislation Amendment Act 2004

Subordinate Legislation cited: ACT Civil and Administrative Tribunal Procedures Rules 2020 r 91

Cases cited:

Alexander v Home Office (1988) 1 WLR 968
Australian News Channel Pty Ltd v Voller [2020] NSWCA 102
Barry v Futter [2011] NSWADT 205
Bateman v Fairfax Media Publications Pty Ltd [2013] ACTSC 72
Bottrill v Sunol [2017] ACAT 81
Bropho v Human Rights & Equal Opportunity Commission [2002] FCA 1510
Bropho v Human Rights & Equal Opportunity Commission [2004] FCAFC 16
Brosnahan v Ronoff [2011] QCAT 439
Burns v Corbett [2018] HCA 15
Burns v Dye [2002] NSWADT 32
Burns v Laws (No.2) [2007] NSWADT 47
Burns v Sunol [2012] NSWADT 246
Burns v Sunol (No.2) [2012] NSWADT 247
Catch the Fire Ministries Inc v Islamic Council of Victoria Inc [2006] VCSA 284
Clarke v Nationwide News Pty Ltd (2012) 201 FCR 389
Clinch v Rep [2020] ACAT 13
Clinch v Rep (No.2) [2020] ACAT 68
Collier v Sunol [2005] NSWADT 261
Damiano v Wilkinson [2004] FMCA 891
David Syme & Co (Receivers and Managers Appointed) v Grey (1992) 38 FCR 303
Dempster v National Companies and Securities Commission (1993) WASC 174
DLH v Nationwide News Pty Ltd (No.2) [2018] NSWCATAD 217
Dow Jones & Company Inc v Gutnick (2002) 210 CLR 575
Eatock v Bolt [2011] FCA 1103
Fairfax Media Publications Pty Ltd v Voller [2021] HCA 27
Fairfax Media v Voller [2020] NSWCCA 102
Gaynor v Burns [2015] NSWCATAD 211
Grey v David Syme & Co (Receiver and Manager Appointed) (1992) 106 FLR 103
Hall v A & A Sheiban (1989) 20 FCR 217
Jones v Toben [2002] FCA 1150
Jones v Trad [2013] NSWCA 389
Jumbunna Coal Mine NL v Victorian Coal Miners' Association (1908) 6 CLR 309
Kovac v The Australian Croatian Club Limited (No.2) [2016] ACAT 4
Lipohar v The Queen (1999) 200 CLR 485
Margan v Manias [2015] NSWCA 388
Momcilovic v R [2011] HCA 34
Potter v Minahan (1908) 7 CLR 277
Qantas Airways Ltd v Gama [2008] FCAFC 69
R v College of Policing & Anor; ex parte Miller [2020] EWHC 225 (Admin)

Richardson v Oracle Corporation Australia Pty Ltd (No.2) [2014] FCAFC 139
Scottow v Crown Prosecution Service [2020] EWHC 3421 (Admin)
Sunol v Collier (No.2) [2012] NSWCA 44
Stevens v Hancock [2015] NSWCATAD 126
Toben v Jones (2003) 129 FCR 515
Union Steamship Co of Australia Pty Ltd v King (1988) 166 CLR 1
Uren v John Fairfax & Sons Pty Ltd [1966] HCA 40
Young v Cassells (1914) 33 NZLR 852

List of Texts/Papers cited:

ACT Law Reform Advisory Council, *Review of the Discrimination Act 1991 (ACT)* (Final Report, 18 March 2015)
Australian Human Rights Commission, *Federal Discrimination Law* (2016)
Australian Law Reform Commission, *Multiculturalism and the Law* (ALRC Report No 57, April 1992)
Convention on the Prevention and Punishment of the Crime of Genocide, opened for signature on 9 December 1948, 78 UNTS 277 (entered into force 12 January 1951)
DC Pearce and RS Geddes, *Statutory Interpretation in Australia* (LexisNexis Butterworths, 8th ed, 2014)
International Convention on the Elimination of All Forms of Racial Discrimination, opened for signature 21 December 1965, 660 UNTS 195 (entered into force 4 January 1969)
International Covenant on Civil and Political Rights, opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976)
LexisNexis, *Halsbury's Laws of Australia*
Luke McNamara, *Regulating Racism, Racial vilification laws in Australia* (Federation Press, 2002)
Bill Swannie, 'Racially derogatory cartoons and racial vilification laws: Where to draw the line' (2020) 45 *Alternative Law Journal* 291

Appeal Tribunal: Acting Presidential Member R Orr QC
Senior Member Prof. P Spender

Date of Orders: 3 November 2021
Date of Reasons for Decision: 3 November 2021

AUSTRALIAN CAPITAL TERRITORY)
CIVIL & ADMINISTRATIVE TRIBUNAL) AA 31/2020

BETWEEN:

BETHANIE REP
Appellant

AND:

BRIDGET CLINCH
Respondent

APPEAL TRIBUNAL: Acting Presidential Member R Orr QC
Senior Member Prof. P Spender

DATE: 3 November 2021

ORDER

The Tribunal orders that:

1. The appeal is upheld in part.

2. The orders made by the Original Tribunal on 8 September 2020 are set aside and replaced by the following orders.

3. The posts numbered 1.1, 1.2 (first part), 1.4, 1.6, 1.8, 1.13, 1.17, 4 and 31 in exhibit A4 in the Original Tribunal proceedings are vilification, and therefore Ms Rep (the respondent in the Original Tribunal proceedings and appellant in this appeal) must remove those posts from any website, social media or other publication of any type that she owns or controls, and in particular her Facebook page "Beth Rep.".

4. Ms Rep not repeat or continue the publication of those posts, or posts in substantially the same terms.

5. Ms Rep pay to Ms Clinch (the respondent in the Original Tribunal proceedings and this appeal) the sum of $5,000 by way of compensation.

……..
Acting Presidential Member R Orr QC
For and on behalf of the Tribunal

REASONS FOR DECISION

Introduction

1. The reasons below explain why this Tribunal has made the orders set out above. In the reasons below, a reference to 'ACAT' or 'tribunal' refers to the ACT Civil and Administrative Tribunal generally, whereas 'Tribunal' or 'Appeal Tribunal' refers to the current panel. When referring to the first instance decision, the Tribunal uses the expression 'Original Tribunal' or 'Senior Member/s.'

2. These proceedings concern a complaint by Bridget Clinch (**Ms Clinch, applicant** and **appeal respondent**) against Bethanie Rep (**Ms Rep, respondent** and **appellant**) of vilification on the basis of gender identity under section 67A, and victimisation under section 68, of the *Discrimination Act 1991* (**Discrimination Act**) in relation to a range of social media posts.

3. Ms Clinch describes herself as a trans woman and resides in Queensland,[1] Ms Rep describes herself as a gender critical feminist and resides in the Australian Capital Territory (**ACT**).[2] Ms Clinch complained to the ACT Human Rights Commission (**Human Rights Commission** or **Commission**). These complaints were then referred to ACAT under section 53A of the *Human Rights Commission Act 2005* (**Human Rights Commission Act**).

4. These referrals were considered by the Original Tribunal. First some preliminary issues were considered in relation to jurisdiction (**Jurisdictional hearing** and **Jurisdictional decision**).[3] Then the substantive issues were considered by a panel of Senior Members (**Original Tribunal hearing** and **Original Tribunal decision**).[4]

5. In summary, in the Original Tribunal hearing Ms Clinch's first claim was that 18 posts by others on Ms Rep's Facebook page in response to an apology posted there by Ms Rep as part of the settlement of earlier proceedings by Ms Clinch (**apology response posts**) amounted to vilification or victimisation. Ms Clinch's second claim was that 32 subsequent posts by Ms Rep on her Facebook page

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[1] Complaint to ACT Human Rights Commission received about 31 August 2018 page 5
[2] Statement of Bethanie Rep dated 11 October 2019 at [15]
[3] *Clinch v Rep* [2020] ACAT 13
[4] *Clinch v Rep (No.2)* [2020] ACAT 68

amounted to vilification or victimisation (**general posts**). Some of the posts concerned Ms Clinch in particular, some concerned trans women more generally. In this decision we use the numbering for these posts proposed by Ms Clinch in exhibit A4[5] in the Original Tribunal hearing (**exhibit A4**), namely 1.1 to 1.18 for the apology response posts and 2-33 for the general posts.

6. The Original Tribunal decision found that there was unlawful vilification or victimisation by all the posts the subject of the claim by Ms Clinch, and made orders that Ms Rep remove all the posts and similar posts, refrain from making the posts or similar posts, and pay $10,000 compensation to Ms Clinch.

7. Ms Rep appealed this decision by Application for appeal dated 8 September 2020 (**Application for appeal**) to this Appeal Tribunal. In summary terms she raised six issues in the appeal:

   (a) The Commission and ACAT lacked jurisdiction because the Discrimination Act does not have extra-territorial operation (**jurisdiction ground**).

   (b) The posts by Ms Rep and others did not constitute unlawful vilification (**vilification ground**).

   (c) Ms Rep did not incite the comments by others or was otherwise responsible for them (**responsibility for third party posts ground**).

   (d) The decision in *Fairfax Media v Voller*[6] (***Voller* case**) was not applicable to the third-party posts (**Voller case ground**).

   (e) The posts by Ms Rep and others did not constitute unlawful victimisation (**victimisation ground**).

   (f) Compensation should not have been ordered and the injunctive orders were excessively broad (**remedies ground**).

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[5] All references to exhibits in this decision refer to evidence that was adduced in the first instance proceedings. No additional evidence was received in the appeal.

[6] [2020] NSWCA 102. The grounds of appeal in the present case considered the NSW Court of Appeal judgment in *Voller*. This judgment was subsequently affirmed by the High Court in *Fairfax Media Publications Pty Ltd v Voller* [2021] HCA 27 delivered on 8 September 2021.

Summary of this decision

8. In relation to the jurisdiction ground of appeal, this Tribunal finds that the Human Rights Commission and ACAT had jurisdiction to consider this matter. Ms Clinch resides in Queensland. But the posts the subject of these proceedings were published in the ACT and accessible to residents here; if they amounted to vilification, they could have incited hatred toward, revulsion of, serious contempt for, or severe ridicule of (which we sometimes shorten to **hatred etc.**) Ms Clinch and trans women generally in the ACT. In addition, Ms Rep is a resident of the ACT and posted the material and managed her site here.

9. In relation to the vilification ground of appeal, the Original Tribunal gave reasons why some of the posts were vilification, but then indicated that the other posts were the same. We agree with the appellant that this was not correct, and that in fact there was a range of different posts which needed to be considered. Further, in our view in order to amount to vilification, it is necessary that there be more than insults, invective, abuse or even expression of hatred, revulsion, contempt or ridicule. The post needs to incite hatred toward, revulsion of, serious contempt for, or severe ridicule of, a person or group of people, objectively assessed. The Original Tribunal imposed at times a lesser standard than that required by section 67A of the Discrimination Act for vilification. In light of this, this Appeal Tribunal has reconsidered the posts to determine whether the Original Tribunal was correct, and if not to make our own decision in relation to them. The detail of this reconsideration is at Schedule 1.

10. In summary, our approach is that in order to amount to vilification it is necessary that the post incite hatred toward, revulsion of, serious contempt for, or severe ridicule of Ms Clinch or the group of trans women on the ground of gender identity.[7] This can involve words which command, request, propose, advise or encourage hatred etc. But it can also involve words which incorporate strong and abusive language about the person or group which is likely to incite hatred etc. In particular where the words indicate that because of being a trans woman a person is inherently inferior, a threat, or a criminal, the issue of vilification will arise. Words directed at the physical attributes of trans women can be vilification, if

[7] Discrimination Act section 67A(1)

they meet this test. Generally, we do not think that referring to a trans woman as a man will necessarily do so.

11. In order to come within the exception to vilification for discussion or debate in the public interest (section 67A(2)(c) of the Discrimination Act) the comment must be reasonable, that is objectively rational and proportionate. Generally, it must also be in the context of a discussion or debate on an issue; we do not think that generally insults, invective or abuse is such reasonable discussion or debate.

12. Context is relevant. One element of context here is that of Ms Rep's apology. Ms Rep had a particular responsibility not to allow vilification of Ms Clinch in the context of her apology, and words used in this context are more likely to amount to vilification. In relation to the general posts, these were mostly made in the context of a vigorous discussion or debate, and these are less likely to amount to vilification. But some of these general posts are directed specifically at Ms Clinch and such a personal attack on an individual is more likely to incite hatred etc.

13. We think that, as the Original Tribunal found, Ms Rep was responsible for the apology response posts, even though they were made by others.

14. On this basis we find that seven of the apology response posts amount to vilification by Ms Rep (namely posts 1.1, 1.2 (first part), 1.4, 1.6, 1.8, 1.13 and 1.17 in Schedule 1 and exhibit A4). The remaining apology response posts do not. We also find that two of the general posts amount to vilification (posts 4 and 31), but the remaining posts do not.

15. In relation to the victimisation ground of appeal, in the circumstances of this case, section 68 of the Discrimination Act requires that Ms Rep subjected, or threatened to subject, Ms Clinch to a detriment, because Ms Clinch had taken or proposed to take discrimination action, in this case including these proceedings in ACAT, in order for Ms Rep's actions to amount to victimisation. We find that none of the relevant posts victimised Ms Clinch in this way.

16. In relation to the remedies ground of appeal, we think that compensation in the nature of general damages, not based on economic loss, can be awarded to

Ms Clinch for the intangible loss suffered by any vilification or victimisation. We have found that fewer posts amount to vilification and none amount to victimisation. The purpose of the compensation is not the punishment of Ms Rep, but the compensation for the personal distress and hurt caused to Ms Clinch by the publications. Although the posts which we have found to be vilification would have been particularly distressful and hurtful to Ms Clinch, we think that the significantly reduced number of posts which we have found to be vilification and victimisation should be reflected in a reduction in the amount of compensation. On this basis we find that the assessment of the amount of compensation by the Original Tribunal should be reduced to $5,000.

17. The Original Tribunal made very broad orders in the nature of injunctions, including that Ms Rep refrain from making any statements on any website or social media that she owns or control posts which are the same or similar to those complained about. We make orders in relation to the specific posts found to be vilification, and posts substantially the same, but find that it is not appropriate to the make broad orders like the Original Tribunal did in relation to posts of similar effect, whether directly or indirectly.

Earlier complaint

18. Ms Clinch had made a previous complaint of vilification against Ms Rep to the Human Rights Commission which was referred to the tribunal (DT 12/2018). This led to a mediated outcome, that is an outcome which was agreed by the parties, not imposed by the tribunal. As part of that agreed outcome Ms Rep posted on her Facebook page an apology on 25 July 2018, which stated: "I apologise for any hurt I have caused Bridget and for any way I have vilified or victimised her." This posting attracted the apology response posts which are part of the complaint at issue in these proceedings.[8]

Current complaint

19. Ms Clinch made a new complaint to the Human Rights Commission which was received on about 31 August 2018. The complaint stated in part that Ms Rep had previously mediated a complaint through ACAT, the new complaint was about

[8] Jurisdictional decision at [4]-[5]; Original Tribunal decision at [17]

instances of vilification that were not part of the previous complaint, some of which had come about "as a result of her [i.e. Ms Rep] feigning an apology as agreed at ACAT, that she used as a platform for further vilification…".[9]

20. Apparently, Ms Clinch by email dated 23 April 2019 requested the Human Rights Commission to refer her complaint to the tribunal. By letter dated 8 May 2019 to the tribunal the Human Rights Commission noted that Ms Clinch had requested that the Commission refer her complaint to the tribunal under section 53A of the Human Rights Commission Act. The complaint and other documents were enclosed with this letter.

Jurisdictional decision

21. Ms Rep made an Application for interim orders on or about 20 September 2019 seeking that the proceedings in the tribunal be dismissed; to determine as a preliminary matter whether any of the posts are reasonably capable of constituting vilification or victimisation; to dismiss those that are not; and that the applicant file a schedule with appropriate particularisation.[10] This application was heard on 5 December 2019 with the Jurisdictional decision given in response to this Application for interim orders on 20 February 2020.

22. The first argument of Ms Rep in relation to her Application was that it was unconstitutional for the power to be given to the tribunal to hear the matter, based on *Burns v Corbett*.[11] This argument was abandoned.[12] It has not been followed up in this appeal.

23. Ms Clinch resides in Queensland, and Ms Rep in the ACT. The second argument was that the tribunal did not have jurisdiction on this basis. The Jurisdictional decision held that "in the absence of further argument … [the Senior Member] would have no difficulty in concluding that there is territorial jurisdiction

[9] Complaint by Bridget Clinch dated 31 August 2018 (exhibit A1 in the Original Tribunal hearing)
[10] Jurisdictional decision at [7]
[11] [2018] HCA 15
[12] Jurisdictional decision at [15]

especially if there is evidence led that others had accessed the posts in the ACT."[13] This argument has been further pursued in this appeal.

24. The third argument was that the posts should be limited to those which were the subject of the referral from the Human Rights Commission. The Jurisdictional decision held that this must be so and an order was made that the posts should be described in a manner that both parties accepted.[14] This was done by Ms Clinch in the document which became exhibit A4.

25. The fourth argument was about whether the respondent was responsible for, in summary, just those comments she posted herself, or those and in addition those posted by others in response and not removed by her. There was some confusion about this issue, confusion which continued in the appeal. As noted, Ms Clinch did confine the posts she relied upon.[15] This argument has been further pursued in this appeal.

26. The fifth argument was that the posts were not capable of breaching the sections of the Discrimination Act. The Jurisdiction decision did not decide to strike out the complaint on this basis, nor did the Senior Member decide that the posts breached the Discrimination Act. Ms Clinch was however required to particularise the basis of her claim.[16] She did so in exhibit A4. This argument has been further pursued in this appeal.

Original Tribunal hearing

27. This matter was heard by the Original Tribunal on 10 July 2020.

Applicant's documents

28. Ms Clinch relied on the referral from the Human Rights Commission (**exhibit A1**). She provided a Schedule of posts which were the subject of her complaint (**exhibit A4**). Ms Clinch also relied on an email of 2 July 2020 (**exhibit A5**) and a statement from Jennifer Atkinson (**exhibit A6**).

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[13] Jurisdictional decision at [23]
[14] Jurisdictional decision at [24]
[15] Jurisdictional decision at [33]
[16] Jurisdictional decision at [58]

29. Ms Clinch also provided an outline of submissions dated 14 July 2019 (**exhibit A2**), and 7 March 2020 (**exhibit A3**). Ms Clinch gave evidence.[17]

Respondent's documents

30. Ms Rep provided a statement dated 11 October 2019 (**exhibit R1**). She also provided other posts (**exhibit R2**) and a table of responses to the Schedule of posts compiled Ms Clinch (**exhibit R3**). Ms Rep provided submissions dated 14 July 2019 (**exhibit R4**). She also gave evidence.[18]

Original Tribunal decision

31. In the Original Tribunal hearing, the respondent again relied on an argument that the Human Rights Commission and ACAT lacked jurisdiction. The applicant tendered a statement by Jennifer Atkinson that she was an ACT resident and had accessed the posts. The Original Tribunal held that for the reasons given in the Jurisdictional decision, coupled with this further evidence, the tribunal had jurisdiction.[19]

32. There was consideration as to whether the respondent was responsible for third party postings. The Original Tribunal made some specific findings, including that the respondent could have deleted the third-party comments made.[20] They also noted that the respondent's position was that her 'liking' a comment by someone else did not imply approval of it, but found that while "that may be the intention, …it was not what a normal reader would think".[21]

33. The Original Tribunal assumed that it was necessary for them to be persuaded that the elements of the contravention relied on were known to the respondent at relevant times, and that unlike defamation the absence of innocent dissemination needs to be proved by the applicant. The Original Tribunal had regard to the

[17] Original Tribunal decision at [10]-[12]
[18] Original Tribunal decision at [13]-[15]
[19] Original Tribunal decision at [20]-[22]
[20] This position was accepted by the appellant in the appeal, see transcript of proceedings on 2 March 2021 at page 82
[21] Original Tribunal decision at [19]

Jurisdiction decision and *DLH v Nationwide News Pty Ltd (No.2)*[22] (***DLH***) for the basic principles concerning vilification.[23]

34. The respondent posted her apology as a result of the previous proceedings, as discussed above at paragraph [18], and this attracted the many apology response posts. The Original Tribunal found[24] that comments 1.1, 1.2, 1.3, 1.4, 1.5, and 1.14 were vilification and breached section 67A of the Discrimination Act, and in relation to 1.14 there was also victimisation which breached section 68. In relation to 1.19 (which seems to be item 1.10 in exhibit A4) it was said that this is an example of the impact of the incitement; it is not clear whether this was also said to breach section 67A but we assume it was. It is then said that: "The balance of comments at item 1 of Exhibit A4 are all the same."[25] The Original Tribunal then found that "the sample of comments relied upon by the applicant which were 'liked' by the respondent contravene section 67A or section 68 and do not attract any of the exemptions in that provision."[26] The Original Tribunal found that the respondent could have deactivated the comments from the beginning or when things escalated, and that the situation was compounded by the respondent reacting to certain comments. It was held that the respondent's conduct "contravenes section 67A without exception".[27]

35. Two further comments are made by the Original Tribunal which figured in this appeal, so we note them. First, the Original Tribunal decision stated that "we do not see any greater public purpose in promoting a debate that consistently falls below any standard of respectable discourse on both sides and there is no justification for the comments to remain."[28] Second, they noted that the respondent said that the comments concerned political affiliation and not gender identity, but the Original Tribunal did not agree.[29]

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[22] [2018] NSWCATAD 217 at [10]
[23] Original Tribunal decision at [32]-[38]
[24] At [42]
[25] Original Tribunal decision at [43]
[26] Original Tribunal decision at [44]
[27] Original Tribunal decision at [42]-[44]
[28] Original Tribunal decision at [46]
[29] Original Tribunal decision at [47]

36. In relation to the general posts the Original Tribunal noted some of these general posts of the respondent and related comments by others as a representative sample. It was said that posts 2 and 5 breached section 67A. It is not clear if post 4 was found to be in breach, but we assume from the overall decision and orders made that it was. It was then said that the remaining posts all fall within similar categories, that the Original Tribunal went through them all at the hearing and reviewed them to prepare their reasons.[30] The Original Tribunal stated[31] that the applicant claimed that after the apology posts, 24 of the general posts breached section 67A. The Original Tribunal agreed and did not think that any of the exceptions applied. That the posts were said to be light-hearted or pejorative did not save them.[32]

37. The applicant also argued that four posts constituted victimisation. The Original Tribunal found post 3 was victimisation, and post 33.1 was plainly victimisation, and seems to find that posts 16 and 23 were also victimisation.[33] As noted, it also seems to have found that post 1.14 was victimisation.[34]

38. The Original Tribunal ordered the respondent to delete or otherwise remove all the posts complained of. Further, the respondent was to remove posts which were of the same or similar effect, and refrain from making posts which were the same or similar. The respondent was ordered to pay the applicant $10,000. There was no order for an apology.[35]

Appeal Tribunal hearing

39. In addition to the Application for appeal, the appellant sought removal of these proceedings to the Supreme Court by Application dated 15 October 2020. This was refused on 2 December 2021. The appellant also provided a List of errors dated 2 February 2021 (**List of errors**) and an Appellant's outline of submissions dated 2 February 2021 (**Appellant's submissions**).

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[30] Original Tribunal decision at [48]-[53]
[31] Original Tribunal decision at [54]
[32] Original Tribunal decision at [48]-[57]
[33] Original Tribunal decision at [50],[58]-[60]
[34] Original Tribunal decision at [42]
[35] Original Tribunal decision at [61]-[73]

40. The respondent provided a response to the list of errors dated 15 February 2021 (**Respondent's appeal response**).

41. A hearing was conducted on 2 March 2021. No additional evidence was received in the appeal so all references to the exhibits in this decision refer to the evidence adduced in the Original Tribunal hearing. The appellant provided a document which correlated the numbering of the posts in exhibit A4 provided by Ms Clinch and the numbering of the posts in the appellant's submissions.

42. The appeal was dealt with as a review under section 82(b) of the *ACT Civil and Administrative Tribunal Act 2008* (**ACAT Act**). On that basis, the appellant, Ms Rep, needs to establish an error of fact or law in the Original Tribunal decision in order to succeed.[36]

What posts are the subject of the complaint?

43. There was some confusion about what posts were the subject of the complaint. As we have noted, the Original Tribunal dealt with the complaint in three tranches.

44. First, there are the apology response posts considered in the Original Tribunal decision.[37] None of the apology response posts were by Ms Rep, though they are on her site and she 'liked' at least some of them. In exhibit A4 Ms Clinch lists and sets out 18 responses to the apology. Although not completely clear, it does seem from the way Ms Clinch put her case that she argued that the apology response posts are vilification by Ms Rep. The way the Original Tribunal discussed the claim, they seemed to accept that approach. The consideration by the Original Tribunal was of the apology response posts, and not the apology itself which they accepted could not be vilification. The Original Tribunal found that "the respondent's reaction to those comments falls within section 67A",[38] which we take to mean her 'liking of' the posts and allowing them to remain on her Facebook page. The order made by the Original Tribunal relates to all the posts contained in exhibit A4, including all the apology response posts (**order 1**).

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[36] ACAT Act section 79(3)
[37] Original Tribunal decision at [39]-[47]
[38] At [47]

45. Although still somewhat confused, the parties in the Appeal Tribunal hearing do seem to have agreed that the relevant issue was whether the apology response posts by other people were contraventions of section 67A by Ms Rep because she was in effect adopting those posts.[39]

46. Second, there are the general posts alleged to be vilification by Ms Rep which were considered by the Original Tribunal.[40] Exhibit A4 sets out 32 of these posts by Ms Rep. It also sets out a range of posts that Ms Rep either responded to or which responded to her posts. Although not completely clear, it does seem that here Ms Clinch is focussing on the posts by Ms Rep herself, and refers to other posts only to show that the posts by Ms Rep did in fact incite hatred etc. The Original Tribunal seemed also to approach them in this way. All the posts specifically considered by the Original Tribunal decision in this category are by Ms Rep.[41] The posts are listed, and are said to be posts 2, 4-6, 8-15, 17-22, 24, 26, and 28-31, that is all the posts by Ms Rep except 3, 7, 16, 23, 25, and 27, and it was said that these posts "by the respondent contravene section 67A".[42] None of the comments by others were discussed by the Original Tribunal. Rather they stated: "we regard the comments as evidence of incitement",[43] suggesting that their relevance was limited to this. On this basis we do not think that the posts by others in relation to the general vilification posts were found to be vilification by Ms Rep. It is true that the orders refer to all posts contained in exhibit A4. But given the reasons of the Original Tribunal we do not think there was a finding that each of the posts by other people amounted to vilification by Ms Rep.

47. There is no cross-appeal by Ms Clinch in relation to these posts by others.

48. The discussion of these posts in the Appeal Tribunal hearing was also confused. But when in that hearing the general posts referred to at paragraph [54] of the Original Tribunal decision were being discussed, Ms Clinch stated: "The

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[39] Transcript of proceedings on 2 March 2021 at pages 76-78

[40] Original Tribunal decision at [48]-[57]

[41] Original Tribunal decision at [48]-[53]

[42] Original Tribunal decision at [54]. Posts 3, 16, 23 and 33 are considered as victimisation, see paragraph [49]. It is not clear what was the position in relation to posts 7, 25 and 27, but the orders of the Original Tribunal included these, so we assume they were also found to be vilification by Ms Rep.

[43] Original Tribunal decision at [56]

comments by the other people are the response that Ms Rep has incited… That can either (sic) confirm that the original comment made by her was vilification".[44] This suggested that she was saying that in this context it was Ms Rep's posts alone which were vilification, and that the posts by others proved this, rather than that Ms Rep adopted these posts by others as her own.[45]

49. Third, there are posts alleged to be victimisation which were discussed by the Original Tribunal.[46] This is in relation to general posts 3, 16, 23, which are only posts by Ms Rep, and 33.1, which is a response by Ms Rep to her own post. It seems that here also, it is only the posts by Ms Rep which were argued to be victimisation. The Original Tribunal found that these posts were victimisation. It also seems that the Original Tribunal found post 1.14 of the apology response posts to be victimisation by Ms Rep.[47]

50. Therefore, in our view the finding of the Original Tribunal was that the apology response posts by people other than Ms Rep were vilification by Ms Rep, that the general vilification posts by Ms Rep but not others were vilification by Ms Rep, and that the relevant posts by Ms Rep were victimisation. The appeal is against these findings. There was no finding by the Original Tribunal that the general vilification posts by others were vilification by Ms Rep, and it is not possible therefore for Ms Rep to appeal these issues, and the appeal does not need to consider them directly.

51. We consider the posts which were found to be vilification or victimisation generally below, and in detail in Schedule 1.

Legal framework

52. The Discrimination Act and the concepts of vilification it contains sit within and are informed by two broader streams of law. First, international and Australian human rights law. Briefly, the *International Convention on the Elimination of All Forms of Racial Discrimination* provides an obligation to prevent incitement of

[44] Transcript of proceedings on 2 March 2021 at page 106
[45] Transcript of proceedings on 2 March 2021 at page 106 and see also pages 127-128
[46] Original Tribunal decision at [58]-[60]
[47] Original Tribunal decision at [42]

racial discrimination,[48] and the *International Covenant on Civil and Political Rights* provides an obligation to prevent advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence.[49]

53. The Australian Law Reform Commission published its Report on *Multiculturalism and the Law* in 1992, which provided a definition of vilification as words that "promote hatred, hostility, contempt or serious ridicule",[50] a formulation very similar to section 67A of the Discrimination Act. The first vilification law drawing on these features was the NSW *Anti-Discrimination (Racial Vilification) Amendment Act 1989*, which amended the *Anti-Discrimination Act 1977* (NSW), and these provisions are similar to those in the Discrimination Act.[51] Vilification provisions were contained in the Discrimination Act from its commencement in 1991. Vilification on the basis of transsexuality was included in 2004,[52] which became gender identity in 2010.[53] As noted below, the Discrimination Act contains an objects clause (section 4) and a section providing for its interpretation in a way that is beneficial to people with protected attributes (section 4AA). The specific provisions of the Discrimination Act need to be read in light of this broad human rights tradition within which it sits.

54. Second, vilification law also draws on defamation law. The legal notion of vilification is related to that of defamation, and the 'defences' to vilification, in particular in section 67A(2) of the Discrimination Act, are related to defamation defences. Again, in our view the specific provisions of the Discrimination Act need to be read in light of the terms and concepts it borrows from defamation law.

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[48] *International Convention on the Elimination of All Forms of Racial Discrimination*, opened for signature 21 December 1965, 660 UNTS 195 (entered into force 4 January 1969) article 4

[49] *International Covenant on Civil and Political Rights,* opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976) article 20(2); see also *Convention on the Prevention and Punishment of the Crime of Genocide*, opened for signature 9 December 1948, 78 UNTS 277 (entered into force 12 January 1951) article 3(c) concerning public incitement to genocide

[50] Australian Law Reform Commission, *Multiculturalism and the Law* (ALRC Report No 57, 1992) at [7.42.]

[51] See generally Luke McNamara, *Regulating Racism, Racial Vilification Laws in Australia* (Federation Press, 2002) pages 9-22, 122-126

[52] *Sexuality Discrimination Legislation Amendment Act 2004*

[53] *Human Rights Commission Legislation Amendment Act 2010*

Vilification

55. Section 67A of the Discrimination Act deals with vilification, and provides relevantly:

> *(1) It is unlawful for a person to incite hatred toward, revulsion of, serious contempt for, or severe ridicule of, a person or group of people on the ground of any of the following, other than in private:*
>
> *…*
>
> *(b) gender identity;*
>
> *…*

56. 'Gender identity' is defined by section 2 and in the Dictionary as "…the gender expression or gender-related identity, appearance or mannerisms or other gender-related characteristics of a person, with or without regard to the person's designated sex at birth".

57. There are a number of relevant points which can be made in relation to this provision, based on a growing number of judicial and tribunal decisions in this area.[54] First, this involves an objective test. What Ms Rep meant or intended by the posts is not directly relevant. Nor is what Ms Clinch thought the posts meant or intended.

58. Second, there needs to be incitement. 'Incite' means to "rouse, to stimulate, to urge, to spur on, to stir up, to animate".[55] While this can cover a wide range conduct, it is not enough simply to make insensitive, disrespectful, offensive, or insulting comments, or even just to express hatred, revulsion, contempt or ridicule, inappropriate as this is. The post must be one which could encourage or spur others to hatred, revulsion, serious contempt, or severe ridicule. Such vilification can include words which command, request, propose, advise or encourage hatred etc. But it can also be words which simply incorporate such

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[54] These are taken from *DLH v Nationwide News Pty Ltd (No.2)* [2018] NSWCATAD 217 (***DLH***) see esp at [10]; *Sunol v Collier (No.2)* [2012] NSWCA 44 (***Sunol v Collier (No.2)***), see esp Bathurst CJ at [25]-[41]; *Burns v Sunol* [2012] NSWADT 246; *Jones v Trad* [2013] NSWCA 389; *Margan v Manias* [2015] NSWCA 388; *Bropho v Human Rights & Equal Opportunity Commission* [2002] FCA 1510; [2004] FCAFC 16.

[55] *Young v Cassells* (1914) 33 NZLR 852 at 854, quoted in *Sunol v Collier* (No.2) [2012] NSWCA 44 at [26] (Bathurst CJ)

strong and abusive language about the person or group that it is likely to encourage hatred etc.

59. Third, there are four things, one or more of which, need to be incited:

(a) hatred toward,

(b) revulsion of,

(c) serious contempt for, or

(d) severe ridicule of,

a person or group of people …

60. These terms take their ordinary meaning.

61. Arising from the second and third points, a key issue in this case is to distinguish between, on the one hand, the many postings which are only insensitive, disrespectful, offensive, or insulting comments, or even just express hatred, revulsion, contempt or ridicule, but fall short of vilification, and, on the other hand, those postings which in addition are also likely to incite hatred, revulsion, serious contempt, or severe ridicule on the basis of gender identity and therefore amount to vilification.

62. It is not necessary to show that anyone was actually incited. It flows from this and the objective test for vilification that even if someone is incited, this may not be enough to show vilification.

63. Fourth, the unlawful act needs to take place "other than in private", that is in public. This can be in the posting of comments on an internet site, indeed section 67A(1) contains as an example "writing a publicly viewable post on social media". There was no dispute in these proceedings that the posts on Ms Rep's Facebook page were "other than in private."

64. Fifth, the context in which the post is made is relevant. An aspect of this context is the audience for the purpose of determining vilification, which raises particularly difficult issues in this case.

65. Sixth, the incitement of hatred toward, revulsion of, serious contempt for, or severe ridicule of, a person or group of people needs to be on the ground of gender identity. As noted, this involves the gender expression or gender-related identity of a person, with or without regard to the person's designated sex at birth. Ms Rep is a trans woman, that is, she has the gender expression and gender-related identity of a woman. She complains of vilification on this basis of herself, and other trans women. There was no dispute that she had this status, that others had this status, that Ms Clinch could complain on behalf of herself and others, and that this status was protected by the Discrimination Act including section 67A.

66. But seventh, there are exceptions, most relevantly here is that:

> *(2) However, it is not unlawful to–*
>
> *...*
>
> *(c) do an act mentioned in subsection (1) reasonably and honestly, for academic, artistic, scientific or research purposes or for other purposes in the public interest, including discussion or debate about and presentations of any matter.*

67. It was not argued in this case that academic, artistic, scientific or research purposes were relevant. It was argued that the posts were for purposes in the public interest, that is discussion and debate on the nature and position of trans women. We accept that discussion and debate of this issue is in the public interest.

68. But to come within the exception, the act must be done reasonably and honestly. This involves a subjective and objective test, at least in relation to reasonableness, that is, the person must believe they are acting reasonably, and they must be actually doing so, objectively assessed. Unreasonable presentation of an argument, objectively assessed, does not fall within the exception.

69. Further, the section states that such purposes in the public interest include discussion or debate, and suggests that it could include other activities. It is not clear what those other activities could be, and certainly Ms Rep did not suggest any. Her position seemed to be that the posts were rather discussion or debate. Discussion and debate are not defined and therefore take their general meaning. Discussion generally means "1. …critical examination by argument; debate". Debate means "1. Discussion …2. Deliberation; consideration 3. A systematic

contest of speakers in which two opposing points of view of a proposition are advanced …."[56]

70. Thus, while we think that the nature and position of trans women are a matter of public interest, in order to fall within the exception in this context there needs to be a reasonable and honest discussion or debate on that issue.

Victimisation

71. Section 68 of the Discrimination Act provides:

> ***68 Victimisation***
>
> *(1) It is unlawful for a person (the **first person**) to subject, or threaten to subject, another person (the **other person**) to any detriment because—*
>
> *(a) the other person, or someone associated with the other person—*
>
> *(i) has taken discrimination action; or*
>
> *(ii) proposes to take discrimination action; or*
>
> *(b) the first person believes the other person, or someone associated with the other person—*
>
> *(i) has taken discrimination action; or*
>
> *(ii) proposes to take discrimination action.*

72. 'Discrimination action' includes to begin a proceeding in the ACAT or a court in relation to the Discrimination Act; make a discrimination complaint; reasonably assert any rights that the other person, or someone else, has under the Discrimination Act; claim that a person has committed an act that is unlawful under the Discrimination Act, or is an offence against the *Criminal Code 2002* section 750, other than a claim that is false and not made honestly; and do anything else in accordance with the Discrimination Act.[57]

Jurisdiction (appeal ground 1[58])

73. As noted, it was accepted that Ms Clinch resided in Queensland, not the ACT, but that Ms Rep resided in the ACT. It seems that Ms Rep did post the material

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[56] Macquarie Dictionary Online
[57] Section 68(2) Discrimination Act
[58] Appellant's submissions at [1]-[23]

in the ACT.[59] Ms Clinch provided evidence from Ms Atkinson that she was an ACT resident and she saw the ongoing public posts by Ms Rep.[60] There was no argument by Ms Rep that there were no trans women in the ACT, so we accept that there are members of that relevant group, to which Ms Clinch is also a member, who reside here.

74. The appellant rightly argued that ACAT's jurisdiction flowed from the jurisdiction of the Human Rights Commission to receive and consider a complaint. Section 42(1) of the Human Rights Commission Act provides that complaints may be made about an unlawful act under the Discrimination Act. Under section 43 a complaint about an act may be made by "a person (the ***aggrieved person***) aggrieved by the act, service or conduct", or if the complaint is a discrimination complaint, which includes a vilification or victimisation complaint – "a person who has sufficient interest in the complaint". Section 43(2) provides that a person has a sufficient interest in a complaint if "the conduct complained about is a matter of a genuine concern to the person because of the way conduct of that kind adversely affects … the interests of the person or interests or welfare of anyone the person represents." There was no dispute Ms Clinch was an aggrieved person; the only issue raised was whether the Commission and ACAT had jurisdiction when she resided in Queensland.

75. The key element of jurisdiction is therefore an unlawful act. In relation to vilification in this case as we have noted the unlawful act is for a person to incite hatred etc. toward a person or group of people on the ground of gender identity.

76. The Original Tribunal seems to have taken the view that if this act of incitement took place in the ACT, then the Human Rights Commission and ACAT had jurisdiction. The evidence of Ms Atkinson was that this was the case.

77. In the Jurisdiction decision the Tribunal relied on *Bottrill v Sunol*[61] (***Bottrill [No. 1]***) to take the view that there could be unlawful conduct where potential incitees can read the posts.[62] In that case David Bottrill, the complainant, was an

[59] Transcript of proceedings on 2 March 2021 page 12
[60] Exhibit A6 in the Original Tribunal hearing
[61] [2017] ACAT 81
[62] Jurisdiction decision at [18]

ACT resident and his complaint was against John Sunol who was a resident of New South Wales. The Tribunal there held the Human Rights Commission and ACAT had jurisdiction because although the conduct of uploading material took place in NSW, it had an effect in the ACT, and there was a clear statutory purpose to protect persons that have the attributes specified, and those persons are ACT persons.[63]

78. The appellant complained that the Jurisdictional decision inappropriately expands *Bottrill [No. 1]*. As noted in that case the complainant was resident in the ACT and it was held that they were protected by the Discrimination Act, but here the complainant resides in Queensland. The appellant also argued that the principles in *Dow Jones & Company Inc v Gutnick*[64] (***Gutnick***) should be applied and raised the presumption against extraterritoriality. It is necessary to consider what are the underlying principles to determine this ground of appeal.

79. First, the ACT can make laws with extra-territorial effect, provided there is some connection with the Territory.[65]

80. But second, there is a common law presumption against legislation having extraterritorial effect. This presumption has statutory form in the ACT in the *Legislation Act 2001* (**Legislation Act**), section 122. But these presumptions are generally weaker in respect of interstate operation in a federation, and at any rate are subject to a contrary intention.[66]

81. It is necessary therefore to assess the legislation itself, and in particular what the act of vilification involves. As noted, the unlawful act is for a person to incite hatred toward, revulsion of, serious contempt for, or severe ridicule of, a person

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[63] *Bottrill [No. 1]* at [68]-[76]

[64] (2002) 210 CLR 575

[65] *Union Steamship Co of Australia Pty Ltd v King* (1988) 166 CLR 1 at [12]-[26]; *Australian Capital Territory (Self-Government) Act 1988* (Cth) section 22, which provides that the ACT Legislative Assembly has power to make laws for the "peace, order and good government of the Territory".

[66] *Jumbunna Coal Mine NL v Victorian Coal Miners' Association* (1908) 6 CLR 309, O'Connor J at 363; *Dempster v National Companies and Securities Commission* (1993) WASC 174; WAR 215 (FC), 241-242; *Lipohar v The Queen* (1999) 200 CLR 485 at [37] Gleeson CJ, [99]-[103] Gaudron, Gummow and Hayne JJ; Legislation Act sections 5, 6(3), 122 - section 122 is not a determinative provision and can therefore be displaced by a contrary intention; DC Pearce and RS Geddes, *Statutory Interpretation in Australia* (LexisNexis Butterworths, 8th ed, 2014) at [5.9].

or group of people on the ground of gender identity. The relevant act is the incitement. The publication of the posts in the ACT suggests that the alleged incitement took place in the ACT.

82. As noted, the appellant argued that for the Human Rights Commission and ACAT to have jurisdiction in this case would expand *Bottrill [No. 1]*. We do not agree.

83. There had been some earlier cases in which it was said that a posting in one State or Territory could not be complained of in another State or Territory.[67] But these earlier cases all took the view that a posting in a State or Territory could be complained of in that State or Territory. There is nothing in *Bottrill [No. 1]* which questions this position.

84. Rather what *Bottrill [No. 1]* was considering was the more difficult question of whether a posting in one State or Territory (in that case NSW) could be complained of in another State or Territory (in that case ACT). The Tribunal there held that the Human Rights Commission and ACAT did have jurisdiction in such a case. This conclusion was supported in part by *Jones v Toben*,[68] *Collier v Sunol*,[69] *Gutnick*, and section 4AA of the Discrimination Act.

85. But this broad reading of jurisdiction does not in any way bring into doubt the established narrow reading that where the posting is done in the ACT and there is publication here, the Human Rights Commission and ACAT have jurisdiction. Such a position does not expand *Bottrill [No. 1]*, rather it simply confirms the established position which was, if anything, itself 'expanded' in *Bottrill [No. 1]*.

86. In *Bottrill [No. 1]* the Senior Member does note that the clear statutory purpose of the Discrimination Act is to protect persons who may be vilified and "those persons are ACT residents" and "they may also be other persons if the post occurs in the ACT or if it is done elsewhere by an ACT resident" but he did not have to decide that since the complainant was an ACT resident.[70] In our view the purpose of the Discrimination Act is not just to prevent ACT residents being vilified, but

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[67] *Gaynor v Burns* [2015] NSWCATAD 211
[68] [2002] FCA 1150
[69] [2005] NSWADT 261 at [35]
[70] *Bottrill [No. 1]* at [73]

also to prevent ACT residents from vilifying others, and even more generally to prevent vilification occurring in the ACT. Such a reading is supported by the objects of the Discrimination Act which include to eliminate discrimination "to the greatest extent possible", and to "promote and facilitate the progressive realisation of equality as far as reasonably practical".[71] Section 4AA (which was relied on in *Bottrill [No. 1]*) also states that the Act "must be interpreted in a way that is beneficial to a person who has a protected attribute, to the extent it is possible to do so, consistently with" the objects of the Act and the human rights under the *Human Rights Act 2004* (**Human Rights Act**). Ms Clinch has a protected attribute. The Discrimination Act is able to protect her even though she resides in Queensland in relation to posts published in the ACT. It is possible to read the Discrimination Act as extending its protections to Ms Clinch even though she resides in Queensland consistently with the purposes of that Act. It is also possible to do so consistently with human rights under the Human Rights Act (which we discuss further below at [141]]). Therefore, in our view section 4AA requires that the Discrimination Act be read to do so. Insofar as the common law or statutory presumption against territoriality applies here, we think it has been overridden by the terms of the Discrimination Act.

87. Third, in our view these provisions should be read in light of the law of defamation in Australia, to which the concept of vilification is analogous. The appellant takes a similar position in principle, and argues that the High Court decision in *Gutnick* should be applied. But we do not see how this case supports her argument on this issue.

88. In *Gutnick* a resident of Victoria wished to sue in defamation a United States corporation in the Supreme Court of Victoria. The High Court allowed that claim to proceed, and held that defamation proceedings can ordinarily be brought where damage to reputation occurs, which ordinarily will be where the relevant material is available if the person defamed has in that place a reputation that is thereby damaged. Defamatory material uploaded to the internet in the United States and available in Victoria where Mr Gutnick had a reputation could therefore be

[71] Discrimination Act, section 4

subject to a defamation claim in Victoria. Gleeson CJ, McHugh, Gummow and Hayne JJ stated:

> *39. …those who post information on the World Wide Web do so knowing that the information they make available is available to all and sundry without any geographic restriction.*
>
> *40. Because publication is an act or event to which there are at least two parties, the publisher and a person to whom material is published, publication to numerous persons may have as many territorial connections as there are those to whom particular words are published.*
>
> …
>
> *44. …ordinarily, defamation is to be located at the place where the damage to reputation occurs. Ordinarily that will be where the material which is alleged to be defamatory is available in comprehensible form assuming, of course, that the person defamed has in that place a reputation which is thereby damaged.*
>
> …
>
> *48. As has been noted earlier, Mr Gutnick has sought to confine his claim in the Supreme Court of Victoria to the damage he alleges was caused to his reputation **in Victoria** as a consequence of the publication that occurred **in that State**. The place of commission of the tort for which Mr Gutnick sues is then readily located as Victoria. That is where the damage to his reputation of which he complains in this action is alleged to have occurred, for it is there that the publications of which he complains were comprehensible by readers. It is his reputation in **that State**, and only that State, which he seeks to vindicate. It follows, of course, that substantive issues arising in the action would fall to be determined according to the law of Victoria. But it also follows that Mr Gutnick's claim was thereafter a claim for damages for a tort committed in Victoria, not a claim for damages for a tort committed outside the jurisdiction.* [Emphasis in the original]

89. It is true that in that case Mr Gutnick was a resident of Victoria. But as the High Court clearly noted in the extract above, it was the publication in Victoria and the damage to his reputation in that State which was significant. In relation to defamation in the ACT, it is the case that it is publication in the Territory and that the damage to reputation occurs in the Territory which are relevant.[72]

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[72] See for example *Grey v David Syme & Co (Receiver and Manager Appointed)* (1992) 106 FLR 103; on appeal *David Syme & Co (Receivers and Managers Appointed) v Grey* (1992) 38 FCR 303; *Bateman v Fairfax Media Publications Pty Ltd* [2013] ACTSC 72

90. Applying these principles in the related context of vilification, it is not where Ms Clinch resides which is determinative. Rather it is whether there has been publication in the ACT which incites hatred toward, revulsion of, serious contempt for, or severe ridicule of her or the group of people to which she belongs. In this case there has been publication in the ACT. She is known here, indeed many of the posts refer to her directly or indirectly, and therefore she can be vilified here, as can members of the group of which she is a member. This is probably sufficient, but in addition Ms Rep resides in the ACT and posted the material here. In our view the Human Rights Commission and ACAT have jurisdiction to determine her complaint.

91. At the appeal hearing, Ms Rep also argued that because the complainant was not an ACT resident, and the complaint did not contain the statement by Ms Atkinson (which was later provided and became exhibit A6), and nor did the referral to the tribunal, that neither the Human Rights Commission nor the tribunal had jurisdiction.[73] As discussed above, we do not think that the complainant necessarily has to reside in the ACT, provided the vilification of her takes place in the ACT. This has been Ms Clinch's case from the beginning, and she provided at an appropriate time evidence from Ms Atkinson that the alleged vilification was published here. In our view there was no requirement that this evidence be provided with the original complaint.

92. In relation to the jurisdiction ground of appeal the appellant has not demonstrated an error of fact, law or discretion. This ground of appeal is not upheld.

Vilification (appeal ground 2[74])

93. The appellant raises a number of matters in relation to the findings of vilification by the Original Tribunal. We discuss them here, and then apply this reasoning to each post in Schedule 1.

[73] Appellant's submissions at [17]-[20]; transcript of proceedings on 2 March 2021 at pages 9-10
[74] Appellant's submissions at [24]-[45]

Insufficient reasoning

94. The appellant argues that there was insufficient reasoning as to the bulk of the posts.

95. In relation to the apology posts the Original Tribunal found that comments 1.1, 1.2, 1.3, 1.4, 1.5, 1.14, and 1.19 (which seems to be 1.10 in exhibit A4) breached section 67A (see paragraph [34] above). It is then said that: "The balance of comments at item 1 of Exhibit A4 are all the same". This balance was made up of 1.6-1.13, 1.15-1.18, that is 12 other posts. It was then found that the respondent's conduct "contravenes section 67A without exception".[75]

96. The Original Tribunal also only briefly considered in its reasons some of the general posts and related comments as a representative sample. It was said that posts 2, 4 and 5 breached section 67A (see paragraph [36] above). It was then said that the remaining posts all fall within similar categories, that the Original Tribunal went through them all at the hearing and reviewed them to prepare their reasons. There were in fact other posts numbered 6-33, a total of 27 other posts. The Original Tribunal did not think that any of the exceptions applied.[76]

97. In our view the general approach of the tribunal needs to take into account the objects of simple, quick, inexpensive and informal resolution of disputes by ACAT.[77] The tribunal is very busy with a large jurisdiction and a large number of matters. Therefore, when dealing with a complaint which raises a large number of acts, considering them on the basis of key examples taken from this large number can often be appropriate. But in this case there are three concerns we have about the process.

98. First, whatever process is adopted, the tribunal needs to ensure procedural fairness and compliance with other basic administrative law principles, and the appellant argued that the consideration of only a few examples of the posts in the reasons for the decision did not consider her case fairly. Further, the reasons of

[75] Original Tribunal decision at [42]-[44]
[76] Original Tribunal decision at [48]-[57]
[77] Sections 6 and 7 of the ACAT Act

the tribunal need to comply with section 60 of the ACAT Act and section 179 of the Legislation Act.

99. Second, and importantly in this case, we do not agree that the other posts in the tranches are all the same as the examples chosen. To use item 1.16 as an example, it says:

> *I apologise that Bridget has been given the impression by this system that his views about himself must be upheld by others at all times. It is evident that under capitalism, 'human rights' means white male rights. It is not Bridget who has been victimised here, but who has manipulated a system already constructed in his favour.*[78]

100. As we discuss below, we think that stating that Ms Clinch is a man who has not been victimised but has manipulated the system is offensive and insulting, but it does not meet the test of inciting hatred etc. This post also raises the issue as to whether it falls within the exception for reasonable and honest discussion of transgender issues. In our view there is a real issue as to whether this is vilification and is "like the others". On our analysis in Schedule 1, it is not vilification.[79]

101. To mention another, item 18 responds to a post which says:

> *Disappointed at @ConversationUK running a vapid piece, that's contrary to lived experiences of transwomen. Oppression is related to gender presentation, not sex, ask any professional who's trans and they'll tell you they either went up or down the privilege scale post transition.*

102. Ms Rep replied:

> *'Oppression is related to gender presentation, not sex.' Thousands of years of oppression and all females had to do was stop wearing dresses apparently, who knew.*[80]

103. The first sentence by Ms Rep is an attempted restatement of the basic position of the post being responded to. In our view it is a reasonable summary. We do not think that it can be vilification. The second sentence is Ms Rep putting forward her contrary position, which we would summarise as being that such oppression is not just related to gender presentation. She states this in in a somewhat flippant or colloquial way, but does address the issue and it is not offensive or insulting.

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[78] Exhibit A4 at [1.16]
[79] See paragraphs [267]-[268]
[80] Exhibit A4 at [18]

> We do not think that this post is inciting hatred etc. to trans women or Ms Clinch. Even if it was, we think that it falls within the exception in section 67A(2)(c) as a statement reasonably and honestly made in discussion or debate in the public interest of transgender issues. We find it is not vilification.[81]

104. In Schedule 1 we analyse all the posts. We do not think that each can be said to be vilification on the basis that they are like other posts which the Original Tribunal considered and found did vilify.

105. Third, the Original Tribunal made orders in relation to all the posts. In order to provide reasons for the decision and these orders, the Original Tribunal needed to set out why all the posts were vilification, and importantly if there are relevant differences, these needed to be considered.

106. We agree with the appellant that the posts are not all the same as those specifically considered by the Original Tribunal in their reasons. Many are relevantly different. Therefore, we think that the appellant is correct in arguing that the Original Tribunal decision contained an error in not considering fully the examples it chose, and in particular in finding that the balance of the posts were relevantly the same as the examples.

107. This aspect of the vilification ground of appeal is upheld.

Approach to further vilification grounds

108. The fact that the Original Tribunal briefly considered a few posts, but did not consider many in any detail except for noting they were similar, raised some problems for the appellant. For many of the postings there was no specific reasoning by the Original Tribunal as to why they were vilification that the appellant could attack. Therefore, the approach the appellant took was to raise a number of general grounds about the vilification findings, and then consider each post to argue that the Original Tribunal was wrong to find it constituted vilification, and that this Appeal Tribunal should find that it was not vilification.

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[81] See paragraphs [312]-[314]

109. This Appeal Tribunal takes a similar course. We discuss generally the issues which arise from this aspect of the appeal immediately below. We then apply this discussion to the specific posts in Schedule 1. In our view the consideration of these general principles applied to the particular posts indicates that the conclusion of the Original Tribunal in relation to some of the posts constituted an error. At this stage of the reasoning process the Appeal Tribunal could remit the proceedings to another first instance tribunal to rehear the matter. But in our view a more appropriate process is for this Appeal Tribunal to deal with each post and substitute its decision for that of the Original Tribunal where we think they were in error. The Appeal Tribunal has all the powers of the Original Tribunal.[82] This is the simpler, less expensive and quicker process which still achieves justice for the parties.[83] The appellant argued for this course, and the respondent seemed to accept it. For these reasons in Schedule 1 we look at each post and set out what we think is the correct conclusion as to whether it amounts to vilification, and the brief reasons for this, and therefore why we think the conclusion of the Original Tribunal was in some cases an error.

Appellant's argument

110. The appellant referred to the comments of the Original Tribunal that the debate in the posts "consistently falls below any standard of respectable discourse" and that "many of the posts contain language that is vile and offensive"[84] and argued that it appeared that the Original Tribunal were prejudiced by this opinion and wrongly imposed a further requirement for vilification.

111. The context of these comments is important. The second comment was given by the Original Tribunal as a reason for not repeating the posts in the reasons for decision. This was not therefore said in the context of the substantive issues, and there is no error there. We do note that in this decision we have set out the posts,

[82] ACT Civil and Administrative Tribunal Procedures Rules 2020, rule 91
[83] Sections 6 and 7 of the ACAT Act
[84] Original Tribunal decision at [46] and [48]

since this is the traditional course taken in reasons for vilification and defamation decisions,[85] and in our view assists in understanding the decision and the reasons.

112. The first comment was made by the Original Tribunal in consideration of the apology response posts and whether these were for purposes in the public interest, including discussion or debate about and presentations of any matter. It therefore seems that the Original Tribunal decided that the public interest exception did not apply because the posts fell below any standard of respectable discourse. It is true that the exception is only available for statements which are reasonably and honestly made, and perhaps the Original Tribunal was indirectly referring to this. But generally, we do not think that respectable discourse is part of the relevant standard for either vilification itself, or the public interest exception.

113. In addition to the comments made, the argument of the appellant was that applying the appropriate standard to the posts suggested that they were not vilification. Generally, the appellant argued that the approach in the Original Tribunal decision and its conclusions were in conflict with the relevant principles, in particular as set out in *DLH*.[86] In order to determine this we need to say more about what is the appropriate standard.

Insults

114. In our view, in order to amount to vilification it is necessary that there be more than language which is insensitive, disrespectful, offensive, insulting, abusive or even an expression of hatred, revulsion, contempt or ridicule.[87]

115. Some of the posts complained of are general insults. This includes calling someone a bully, a misogynist, anti-women, delusional, or hateful. Of course, much depends on the context and what other comments are included with such insults. But without additional aspects, we do not think that such insults are necessarily vilification.

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[85] See for example *DLH)* at [2]; *Burns v Sunol (No.2)* [2012] NSWADT 247 at [29] and [41]; *Eatock v Bolt* (2011) 197 FCR 261, annexures; *Stevens v Hancock* [2015] NSWCATAD 126 at [15], [23]-[26], [47].

[86] [2018] NSWCATAD 217

[87] Basten JA in *Sunol v Collier (No.2)* at [79]; see also the other cases in footnote 57 above

Physical characteristics

116. Many of the posts concern the physical attributes of trans women, that is that they identify as women and have male genitalia, or that this male genitalia has been modified. In our view comments about these physical attributes can be comments about a trans woman or trans women. Similarly, hatred toward, revulsion of, serious contempt for, or severe ridicule of these physical attributes, or people with these attributes, can be hatred etc. towards a trans woman or trans women. In our view this is clear from the definition of 'gender identity' which includes the gender expression or gender-related appearance or other gender-related characteristics of a person without regard to the person's designated sex at birth.

117. In particular, many of the posts refer to Ms Clinch as man, or trans women as men. We can understand that such comments are insensitive, disrespectful, offensive and insulting to Ms Clinch and trans women. They are certainly inconsistent with the general principles of the Discrimination Act. But without additional aspects, we do not think that such comments are necessarily vilification.

118. We do not think that calling someone a man has the same derogatory connotations as many racial slurs[88] or homosexual slurs.[89] This does not of itself suggest that the person is a lesser human being. It does not of itself suggest criminality or disease. It does not of itself even suggest hatred toward, revulsion of, serious contempt for, or severe ridicule of, a person or group, let alone incitement of these things. Ms Clinch seemed to accept that saying trans women are not women and are men was "low level", though she thought that constantly misgendering someone was the start of vilification.[90]

119. But to some extent this depends on the context, including the surrounding comments, as cases about gender identity vilification show. In *DLH*, referring to someone who allegedly committed a serious offence as "a tranny", and as "having been chopped", was described as being deeply offensive and dehumanising to the

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[88] *Toben v Jones* (2003) 129 FCR 515; *Clarke v Nationwide News Pty Ltd* (2012) 201 FCR 389

[89] *Burns v Dye* [2002] NSWADT 32; *Burns v Sunol (No.2)* [2012] NSWADT 247 at [31]-[32]; *Burns v Sunol* [2012] NSWADT 246 at [63] referring back to the comments at [44]

[90] Transcript of proceedings on 2 March 2021 page 102

person but not vilification.[91] In *Turner v State Transit Authority*[92] it was held that calling a trans woman "a cross-dresser" was not vilification. In *Stevens v Hancock,*[93] the Tribunal found that a statement that a trans woman was "an old man in a dress" was not vilification in one context, but that on another occasion calling her a "fat man in a dress" in the courtyard of a housing complex in which she lived was vilification, because in that context it presented her as a "pathetic figure of fun" and constituted an invitation or encouragement to others to share these views. It not only conveyed serious contempt and severe ridicule but incited the same reaction in others.[94]

120. More extreme statements have been found to be vilification. In *Barry v Futter*,[95] it was held that the relevant comments were not made in public, but the Tribunal none-the-less considered them and found that they "could be seen as tending to encourage members of the public … to treat transgender persons as less than fully human and to suggest that physical abuse of such persons was justifiable". If a public act, the Tribunal said this would therefore have been vilification.[96] But this involved much more than misdescribing the person's gender identity.[97]

121. Ms Rep seemed to argue that calling a trans woman a man could never be vilification. Ms Clinch seemed to argue it was always vilification. In our view neither position is correct. Calling a trans woman a man will not necessarily be vilification, but it may be.

Vilification is different to offensive comments

122. We note that the concept of vilification in section 67A (and the NSW vilification provision) is different in significant aspects to the concept in other discrimination laws, in particular offensive behaviour in section 18C(1) of the *Racial Discrimination Act 1975* (Cth) (**Racial Discrimination Act**). This refers to acts which "offend, insult, humiliate or intimidate another person or group." There is

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[91] *DLH* at [55]
[92] [2004] NSWADT 89 at [93]-[95]
[93] [2015] NSWCATAD 126
[94] *Stevens v Hancock* [2015] NSWCATAD 126 at [51], [54]
[95] [2011] NSWADT 205
[96] Original Tribunal decision at [85]-[86]
[97] See also *Brosnahan v Ronoff.* [2011] QCAT 439

significant discussion in the cases and elsewhere about whether, and if so by how much, this test is different to that in section 67A. In this case it is different. Many of the comments considered here which call trans women men may be offensive or insulting to them. But in our view they do not amount to the higher test of inciting hatred etc.

123. In *Eatock v Bolt*,[98] a case concerning vilification under the Racial Discrimination Act, Bromberg J stated at [334]-[335]:

> *334. In seeking to promote tolerance and protect against intolerance in a multicultural society, the RDA must be taken to include in its objective tolerance for and acceptance of racial and ethnic diversity. At the core of multiculturalism is the idea that people may identify with and express their racial or ethnic heritage free of pressure not to do so. Racial identification may be public or private. Pressure which serves to negate it will include conduct that causes discomfort, hurt, fear or apprehension in the assertion by a person of his or her racial identity. …*
>
> *335. People should be free to fully identify with their race without fear of public disdain or loss of esteem for so identifying. Disparagement directed at the legitimacy of racial or religious identification of a group of people is a common cause for racial or religious tension. A slur upon the racial legitimacy of a group of people is just as, if not more, destructive of racial tolerance than a slur directed at the real or imagined practices or traits of those people.*

124. These comments are important, but they are made in relation to different legislation to the Discrimination Act. The Discrimination Act has the purpose of eliminating discrimination and its causes, and to promote the progressive realisation of equality (section 4). But as we have discussed, in section 67A it does not protect from simply intolerant or offensive comments towards a person or group.[99]

Context

125. The context of statements has generally been seen to be relevant to vilification cases. In this case three elements of context are particularly important.

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[98] [2011] FCA 1103

[99] We note that the ACT Law Reform Advisory Council, *Review of the Discrimination Act 1991 (ACT)* (Final Report, 18 March 2015) at pages 91-98, and recommendations 17.1 and 17.2 has recommended some amendments to address these issues.

126. First, the apology was posted by Ms Rep on 25 July 2018, and the response to apology posts occurred in the context of that posting up to about 29 July 2018. The apology was agreed to in the context of proceedings in ACAT. The apology was not required of her by the tribunal or anyone else. In our view allowing the posts which responded to the apology and to which Ms Clinch complained completely undercut the purported apology Ms Rep made. This action, or more properly inaction, on Ms Rep's part demonstrated disrespect for Ms Clinch and the tribunal process. It was inaction which was clearly unreasonable in the circumstances. This was particularly so in that Ms Clinch had settled her proceedings on the basis that a true apology would be given.

127. Ms Rep argued generally that she was merely providing a forum for debate, but this was clearly inappropriate in the context of what purported to be an apology for past action. In that context Ms Rep in effect facilitated more comments similar to the very comments for which she was purportedly apologising. In our view in this context Ms Rep had a particular responsibility not to allow vilification of Ms Clinch. Further, in this context, some comments which in other contexts may be acceptable, are in our view more likely to amount to the incitement of hatred etc., and are less likely to be reasonable and honest discussion or debate.

128. Second, the general posts occurred from about 30 July 2018 to 12 April 2019. They were not directly linked to the apology. These were made in the context of a general but vigorous discussion or debate.

129. Ms Clinch sometimes linked these back to the response to apology posts as did the Original Tribunal.[100] In our view these posts should be seen as occurring in a different context to that of the apology. In this different context some comments are less likely to amount to the incitement of hatred etc. and are more likely to be reasonable and honest discussion or debate.

130. Also Ms Clinch and the Original Tribunal seem to take the view that because some posts were vilification, that other posts which in their own terms were not, can none-the-less be found to be vilification. We do not agree. The fact that Ms Rep made some posts which were in their own terms vilification, does not

[100] Original Tribunal decision at [49]

mean that other posts by her should be infected by this and found to be vilification, even though in their own terms they were not.

131. Third, some of these general posts are directed specifically at Ms Clinch. This is a different context again. In focussing on Ms Clinch, posts are no longer just a vigorous discussion of issues, but at times a personal attack on an individual. In this context, in our view, language which may only be offensive and insulting when generally expressed can become strong and abusive language in relation to Ms Clinch.

132. The appellant argued for the relevance of a fourth aspect of context, that is that the comments by Ms Rep and her supporters complained of were often made in response to offensive comments, perhaps even vilification, by Ms Clinch and her supporters directed at Ms Rep and her supporters. Apparently this occurred even in relation to the apology response posts.[101] We agree that it is relevant that words are said in the context of a debate, in particular debate where Ms Rep and her supporters are responding to offensive comments.

Political views and freedom of speech

133. One of the key arguments of the appellant was that the Original Tribunal decision failed to make a distinction between statements which attacked a particular political ideology and conduct, as distinct from vilification on the basis of gender identity. This was part of a broader argument that the appellant was exercising her free speech rights regarding a matter of public policy, and that this could not amount to vilification. It seems appropriate to deal with these issues together.

134. Ms Rep gave evidence as to her beliefs. She summarised these in her statement as follows:

> *As a gender critical feminist, I support gender non-conforming behaviours. However, I do not support aggressive trans activism of individuals, regardless of their gender identity, when it involves undermining women and girls' sex-based rights and safety.*
>
> *I do not "hate" transgender people, nor do I propose to deny anyone's "existence" as claimed by the applicant. I admire males who aren't afraid to be feminine and respect females who don't feel obliged to conform to femininity. What I do oppose is the growing efforts by some trans activists*

[101] Exhibit R2; Appellant's submissions at [60]

> *to redefine sex as "gender identity". Gender identity ideology undermines free speech, denies biological reality and when legislated into law, violates the human rights of women and girls.*[102]

Political ideology, free speech and section 67A

135. These views provide some background to the appellant's posts. But the fact that she holds these views does not prevent her statements being vilification. The test for vilification is set out in section 67A and discussed above. The key issue here is whether the incitement of hatred etc. is of a person or group of people on the ground of their gender identity. There is no binary distinction between political ideology and gender identity; a statement can be both. There is the need for an assessment in each case as to whether the statement incites hatred etc. on the basis of gender identity. If it does, the fact that it might also be an expression of political ideology is irrelevant, except to the extent that the statement falls within the exception in section 67A(2)(c).

136. As we have noted, to come within section 67A(2)(c) the comments need to be reasonably and honestly expressed for the purpose of discussion or debate about any matter. If there is vilification, then these requirements need to be met in order to avoid unlawfulness. The Racial Discrimination Act provides a similar exception in section 18D(b), though it uses the terms "reasonably and in good faith" rather than "reasonably and honestly". Justice French said in relation to this provision in the Racial Discrimination Act that such exceptions require a recognition that the law condemns racial vilification of the defined kind but protects the freedom of speech and expression in the areas defined. This means that the exercise of the freedom allowed should seek to honestly and conscientiously endeavour to have regard to and minimise the harm it will inflict, and not use the exception as a cover to offend, insult, humiliate or intimidate (the terms used in section 18C(1)(a) of the Racial Discrimination Act) people by reason of their race. French J thought that an act would be done reasonably if it bore a rational relationship to that activity and was not disproportionate to carrying it out.[103] In *Sunol v Collier (No.2)* the Court summarised the reasonable

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[102] Statement of Bethanie Rep dated 10 October 2019 (exhibit R1 in the Original Tribunal hearing) at [15]-[16]; Appellant's submissions at [33]

[103] *Bropho v Human Rights and Equal Opportunity Commission* [2004] FCAFC 16 at [79], [95]

requirement as meaning the comment must bear a rational relationship to the protected activity and not be disproportionate to what is necessary to carry it out.[104] In this case, this means that to fall within the exception the comments must bear a rational relationship to discussion or debate about the nature and position of trans women, and be proportionate to what is necessary to engage in that discussion or debate.

137. In relation to good faith, the term used in the Racial Discrimination Act, Justice French thought this required more than subjective honesty, and included an objective assessment of honouring the non-discrimination values.[105] The need for any objective assessment about the good faith element here has been doubted in other cases, and in *Sunol v Collier (No.2)*[106] the Court did not think this was necessary, and that there was only a need for the act to be done bona fide for the protected purpose. However, the Discrimination Act uses the term "honestly" which supports the view that that what is required is that that statement be expressed in good faith and be sincerely held for the purpose of discussion and debate.

138. In our view, the arguments of the appellant that her statements were an expression of her particular political ideology and against the political ideology of Ms Clinch, and an expression of her free speech rights, and therefore not vilification, need to be addressed through the express terms of section 67A. They have limited legal relevance outside of section 67A.

Other sources of free speech rights

139. There are other possible arguments for free speech protections additional to section 67A(2)(c), and therefore a limitation on the reach of the vilification prohibition, but we do not think that those arguments should be accepted. First, it is arguable that there is a limitation arising from the Constitution. The decision of the NSW Court of Appeal in *Sunol v Collier (No.2)* held that section 49ZT of

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104 *Sunol v Collier (No.2)* at [41]

105 *Bropho v Human Rights and Equal Opportunity Commission* [2004] FCAFC 16 at [79], [86] (French J), discussed in *Sunol v Collier (No.2)* at [35]-[40] (Bathurst CJ)

106 *Sunol v Collier (No.2)* at [35]-[40] (Bathurst CJ), agreeing with *Catch the Fire Ministries Inc v Islamic Council of Victoria Inc* [2006] VCSA 284 at [92] (Nettle J) and *Burns v Laws (No.2)* [2007] NSWADT 47 at [191]

the *Anti-Discrimination Act 1977* (NSW) was not invalid as inconsistent with the implied freedom of communication about governmental or political matters arising from the Constitution. Section 49ZT is similar to 67A of the Discrimination Act, and the decision strongly supports a similar conclusion in relation to section 67A.

140. Second, there is no Commonwealth law giving rise to a general freedom of speech right.

141. Third, however, there is an argument arising from the ACT's Human Rights Act, which in section 16 provides for freedom of expression. But there is also in section 8 provision for recognition and equality before the law, including that "everyone has the right to equal protection against discrimination on any ground". The Discrimination Act, including section 67A, seeks to pursue the relevant concepts of equality and non-discrimination, even when they are in tension with freedom of speech. The relevant effect of section 16 is in section 30, which provides that so far as it is possible to do so consistently with its purpose, a Territory law must be interpreted in a way that is compatible with human rights, including the right to freedom of expression. But section 30 also applies to the recognition of equality and prohibition of discrimination in section 8 of the Human Rights Act. And section 30 provides that any interpretation must be consistent with the purpose of the Discrimination Act, set out in section 4, and importantly the interpretive principle in section 4AA. Given the terms of sections 4, 4AA, and 67A of the Discrimination Act, in our view the interpretive provision in section 30 of the Human Rights Act has little room within which to operate.

142. Fourth there is the principle of legality, which provides that statutes are to be construed, where constructional choices are open, to avoid or minimise their encroachment upon rights and freedoms at common law, which includes freedom of speech.[107] But the Discrimination Act in section 67A has expressed in clear terms that it intends to limit freedom of speech, so the presumption has little room within which to operate.

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[107] *Momcilovic v R* (2011) 245 CLR 1 at [43] (French CJ); see also *Potter v Minahan* (1908) 7 CLR 277 at 304 (O'Connor J)

143. Fifth, we note that in relation to the remedies for vilification and victimisation, section 53E(3)(c) of the Human Rights Commission Act provides that the tribunal must take into account the public interest in ensuring an appropriate balance between the right to equal and effective protection against discrimination and equality before the law without distinction or discrimination and other human rights. Freedom of speech is one of those rights. We note the relevance of this provision below at paragraph [215] but this is limited to the issue of compensation.

144. Therefore in our view, Ms Rep's free speech argument does not have a free standing basis, but needs to be supported by the requirement for the incitement of hatred etc. and the express exception in section 67A(2)(c). We accept that there can be public discussion and debate about gender identity for the purposes of section 67A(2)(c). But this requires that the speech falls within the requirements of that section, in particular that Ms Rep acts act reasonably and honestly. Ms Rep is of course able to disagree with the terms of section 67A, and to seek to have it changed. But her disagreement cannot mean she is not subject to the specific current terms of that law.

Recent cases

145. Ms Rep referred to two recent English cases which deal with vilification on the basis of gender identity. One was *R v College of Policing; ex parte Miller*[108] which concerned a complaint about some tweets by Mr Miller on the basis that they were, in summary 'transphobic,' the investigation of this complaint by the police, and a challenge by Mr Miller to aspects of that investigation. The decision contains an extensive discussion of the human rights issues in the English context, which is very different to the Australian context outlined above. The decision finds that there is a "vigorous ongoing debate about trans rights",[109] and that there is a tension between hate speech legislation and freedom of speech, which it extensively discusses. We accept these basic positions, but the case does not

[108] [2020] EWHC 225 (Admin)
[109] *R v College of Policing; ex parte Miller* [2020] EWHC 225 (Admin) at [250]

provide much assistance in resolving the issues under section 67A of the Discrimination Act.

146. Another was *Scottow v Crown Prosecution Service*[110] which concerned an appeal against a conviction for causing annoyance, inconvenience or needless anxiety to another by persistently making use of a public electronic network. The complaint which led to the prosecution was by a trans woman against a radical feminist. The appeal was allowed in particular because of the failure of the trial judge to take into account freedom of speech principles in the English context. Again we accept that there is a tension between hate speech legislation and legislation which criminalises causing anxiety, on the one hand, and freedom of speech, on the other, but in the complaint before this Tribunal this needs to be resolved under the terms of section 67A of the Discrimination Act.

Summary in relation to free speech

147. The Original Tribunal sought to apply the terms of section 67A and accepted that there can be quite robust language used in advancing an argument, and that the implied freedom of political communication in the Constitution will ensure some latitude may be afforded participants in discussion, and stated that they had borne this in mind in assessing the posts.[111] We do not think there was an error in that approach.

148. The error in treating the posts as all the same, and of not applying the requirements of incitement of hatred etc. has none-the-less led us to reconsider the posts in Schedule 1, and in some cases this has necessitated further consideration of section 67A(2) to some of them. Where we have found vilification, we have considered whether the incitement of hatred etc. was in fact on the ground of gender identity, and fell within the exception in section 67A(2).

Erroneous assumption about audience

149. The appellant argued that an "important aspect of the vilification is the identification of the audience and effect on the ordinary reasonable member of

[110] [2020] EWHC 3421 (Admin)
[111] Original Tribunal decision at [34]

the audience".[112] This seems correct,[113] though there are a number of difficult issues involved in this seemingly simple statement.

150. Ms Rep gave evidence as to the audience when she said that many of her followers "are lesbians and feminists who, like me, are supportive of gender non-conformity but are concerned about the impact of trans activism on women's spaces, services and opportunities".[114] The appellant argued that the Original Tribunal did not have regard to this evidence but concluded that somehow Ms Rep's followers were susceptible to be whipped up "into some frenzy of violent hatred towards trans people".[115] (We note this is not a fair summary of the requirements of section 67A, but leave that to one side.). It was then said there was no evidence of this.

151. We do not agree. The Original Tribunal did have regard to Ms Rep's views as to her followers. They quote these in the Original Tribunal decision.[116] The fact that many of her followers have similar views to her is relevant to how they may respond to her comments. And there is extensive evidence, in particular in exhibit A4, that they responded with, in many cases, insensitive, disrespectful, offensive, and insulting comments, some of which expressed hatred, revulsion, contempt or ridicule. In our view it is open to Ms Rep to argue that her comments were not vilification, but the evidence of the posts before the Original Tribunal and this Appeal Tribunal make it completely clear that her comments often attracted extreme and inappropriate responses.

152. The more difficult issue is as to the relevance of this aspect of context and the response of Ms Rep's audience. Part of this difficulty arises from the fact that there have been a number of judicial and tribunal views as to who are the relevant audience when deciding whether a statement could incite them and therefore amount to vilification. This consideration indicates that there are three

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[112] Appellant's submissions at [44]
[113] *Sunol v Collier (No.2)* see esp at [32]-[34] (Bathurst CJ), at [61] (Allsop P)
[114] Statement of Bethanie Rep dated 11 October 2019 at [2]
[115] Appellant's submissions at [45]
[116] Original Tribunal decision at [18(a)]

possibilities.[117] The first is an "ordinary reasonable reader", that is, a reasonable member of the public. The second is "a reasonable member of the class of persons to whom … [the publication] is directed", which directs attention to the actual audience. The third is "an ordinary member of the class rather than a reasonable member", who may not be reasonable at all. In *Sunol v Collier (No.2)*, Chief Justice Bathurst considered this issue and preferred the ordinary member of the class test. He stated that the incitement of hatred towards, in that case homosexuals, can be measured only by reference to the "ordinary member of the class to whom the public act is directed". He went on to state that to "determine the issue by reference to a reasonable person without considering the particular class to whom the speech or public act is directed would … impose an undue restriction on the operation of the legislation".[118] Justice Basten appeared to agree,[119] though without discussing this issue.

153. Allsop P in that case generally agreed with the Chief Justice, but noted that this issue may be important in any individual case, since it will be connected with the whole context of the public act.[120] He then said:

> *Thus, in an emotionally charged public meeting where reason has been pushed aside by passion or hatred, it may be inappropriate to posit the alternative standard of the "reasonable" member of the class which may be aptly described as a group of impassioned bigots.*

154. He then states that the question is ultimately one of fact in the context, but that if the general public is being addressed, bearing in mind the high value of freedom of expression, it may be appropriate to consider the ordinary and reasonable members of the public.[121]

155. These issues are starkly highlighted by this case, and three factors are relevant. First, the posts were generally on Ms Rep's Facebook page which was publicly

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[117] These possibilities are usefully summarised in *Sunol v Collier (No.2)* [2012] NSWCA 44 by Bathurst CJ at [32]-[34].
[118] *Sunol v Collier (No.2)* at [34] (Bathurst CJ)
[119] *Sunol v Collier (No.2)* at [79] (Basten JA)
[120] *Sunol v Collier (No.2)* 44 at [61] (Allsop P)
[121] *Sunol v Collier (No.2)* 44 at [61] (Allsop P)

available, that is anyone could look at them. This suggests that reasonable members of the public are the relevant audience.

156. But second, as we have noted, Ms Rep said that many of her followers had views like hers and were concerned about the impact of trans activism on women's spaces, services and opportunities.[122] This class of people are in our view like those at the emotionally charged public meeting to which Allsop P referred. This is demonstrated starkly by the response to the apology by Ms Rep. It is clear to us that this apology was not vilification, or even insensitive, disrespectful, offensive or insulting to Ms Clinch and trans women. None-the-less the responses to it by those in this class were insensitive, disrespectful, offensive, insulting and indeed arguably vilification towards Ms Clinch and trans women. Indeed it seems that to some extent whatever Ms Rep posted, no matter how innocuous, she was likely to get this type of response. On the one hand this might suggest that given this reaction, this class should be seen as the audience. But in our view, following on from the comments of Allsop P, this may make it inappropriate to posit the 'reasonable' or ordinary member of this class as the audience, rather, given that the general public is being addressed, and bearing in mind the high value of freedom of expression, the ordinary and reasonable member of the public may be the appropriate audience to consider.

157. The third factor is that it is also clear that many of those who read the posts by Ms Rep were in fact trans women, or supporters of trans women and Ms Clinch. Ms Rep provided extensive evidence of their participation in the 'debates' which followed the posts by Ms Rep.[123] Indeed Ms Rep stated that in the posts she sought to participate in debate on transgender issues and in doing so oppose and criticise those with views contrary to hers which she generally described as 'gender identity ideology'.[124] These people with views contrary to hers are less likely to be incited to hatred toward, revulsion of, serious contempt for, or severe ridicule of, a person or group of people on the ground of gender identity, but on

[122] Statement of Bethanie Rep dated 11 October 2019 (exhibit R1) at [2]
[123] Exhibits R2 and R3
[124] Statement of Ms Rep dated 11 October 2019 (exhibit R1) at [14]-[17]

the basis of their posts more likely to be incited to hatred toward, revulsion of, serious contempt for, or severe ridicule of Ms Rep and her supporters.

158. In summary, the posts were available to anyone to read on the internet, which included Ms Rep's supporters, who generally agreed with and often amplified her strongly expressed views, and Ms Clinch's supporters, who generally disagreed with Ms Rep and her supporters in strongly expressed terms. Because of this, in this case, we think that the relevant audience for assessing whether there was vilification is an ordinary and reasonable member of the public. This reflects the position of Allsop P,[125] rather than Bathurst CJ.[126] We think this approach is warranted in this case since this reflects the actual diverse audience, and the position that the test for vilification is an objective one. To have regard to only Ms Rep's supporters, or Ms Clinch's supporters, would distort the operation of section 67A and run the risk of making either everything Ms Rep says, or nothing she says, vilification. Such extreme positions would not appropriately balance the non-discrimination and freedom of expression principles.

159. It is not clear that the Original Tribunal was in error in this regard. In their summary of the law the Original Tribunal noted that the legal principle for vilification was an objective test, the audience is relevant and that an assessment must be made by reference to the ordinary member of the relevant audience.[127]

160. However, we think that this is only one aspect of the relevant context, which we discussed at paragraphs [119]-[132] above. We think that other aspects of the context in which the statements are made are also relevant. In particular, the assessment of whether there is vilification should take into account the context of the apology and a personal attack on Ms Clinch, which makes vilification more likely, or the context of general discussion and debate of gender identity, which makes vilification less likely.

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[125] *Sunol v Collier (No.2)* at [61] (Allsop P)
[126] *Sunol v Collier (No.2)* at [34] (Bathurst CJ)
[127] Original Tribunal decision at [38]

Summary in relation to vilification ground of appeal

161. In summary, in relation to the vilification ground, in finding that the balance of the posts were relevantly the same as the examples chosen, in our view the Original Tribunal fell into error. Further, in our view in order to amount to vilification, it is necessary that there be more than insults, invective, abuse or even expression of hatred, revulsion, serious contempt, or severe ridicule. Insofar as the Original Tribunal imposed a lesser standard than section 67A provides, and our assessment in Schedule 1 shows that in some cases they did, this was also an error.

162. This Appeal Tribunal has all the powers of the Original Tribunal. In light of this we think it appropriate that the Appeal Tribunal reconsider the posts. The detail of this reconsideration is at Schedule 1. The principles applied in this reconsideration are as set out above and are in summary as follows.

163. In our view in order to amount to vilification, it is necessary that a person incite hatred toward, revulsion of, serious contempt for, or severe ridicule of a person or group on the ground of gender identity, objectively assessed. This can involve words which command, request, propose, advise or encourage hatred etc. But it can also be words which incorporate strong and abusive language about the person or group which is likely to encourage hatred etc. In particular where the words indicate that because of the protected attribute a person is inherently inferior, a threat or a criminal, the issue of vilification will arise.

164. Words directed at the physical attributes of trans women can be vilification, if they meet this test. Generally we do not think that referring to a trans woman as a man will necessarily do so.

165. In order to come within the exception in section 67A(2) the comment must be reasonable, that is an objectively rational and proportionate contribution to a discussion or debate.

166. Context is relevant. One relevant context here is that of Ms Rep's apology. Ms Rep had a particular responsibility not to allow vilification of Ms Clinch in the context of her apology, and words used in this context are more likely to amount to vilification. In relation to the general posts, these are mostly given in

the context of a vigorous discussion or debate, and these are less likely to amount to vilification. But some of these general posts are directed specifically at Ms Clinch and such a personal attack on an individual is more likely to amount to vilification.

167. On this basis and as set out in Schedule 1 we find that posts 1.1, 1.2 (first part), 1.4, 1.6, 1.8, 1.13, 1.17, 4 and 31 are vilification, but the balance are not. The appellant has demonstrated errors in relation to the other posts found to be vilification by the Original Tribunal. This ground of appeal is upheld in part.

Responsibility for third party posts and the *Voller* case (appeal grounds 3 and 4[128])

168. Another ground of appeal was that the Original Tribunal proceeded to hold the appellant liable for all the comments by third parties, as if she had posted those comments herself and despite Ms Clinch expressly disavowing any case of aiding and abetting and expressly relying only on direct posts by Ms Rep. It was argued that the Original Tribunal wrongly relied on the *Voller* case[129] to do so.

169. We have discussed the basis for this issue above at [43]-[51]. As noted there, we think that the Original Tribunal decision found that Ms Clinch argued, and the Original Tribunal itself accepted, that Ms Rep was responsible for the postings which responded to her apology (that is posts 1.1-1.18 in exhibit A4 and Schedule 1). However, in relation to posts 2-33, the Original Tribunal found that Ms Rep was responsible for her own posts, but not responsible for the posts of others, which Ms Clinch presented only to show that in fact the posts by Ms Rep herself did incite hatred etc. On this basis the issue of the responsibility of Ms Rep for the posts by others only arises in relation to the response to apology posts.

170. Ms Rep could have had a private Facebook page. Even if public, the Original Tribunal found that Ms Rep could have not allowed comments, or deleted the comments made in relation to her apology. Ms Rep 'liked' some of the posts, which was clearly a matter within her control. We agree with the Original Tribunal that a normal reader would think that Ms Rep 'liking' a post meant that

[128] Appellant's submissions at [54]-[62]
[129] [2020] NSWCA 102

she 'approved' of the post.[130] There was no challenge to any of these findings in the appeal.

171. As we have noted the apology was agreed to by Ms Rep in the context of proceedings in the tribunal. In our view allowing the posts which responded to the apology and to which Ms Clinch complained completely undercut the purported apology Ms Rep made. This action, or more properly inaction, on Ms Rep's part demonstrated disrespect for Ms Clinch and the tribunal process. It was inaction which was clearly unreasonable in the circumstances. This is particularly so in that Ms Clinch had settled her proceedings on the basis that a true apology would be given. Ms Rep argued that she was merely providing a forum for debate, but it was clearly inappropriate in the context of what purported to be an apology for past action to allow for more comments similar to the very comments for which she was purportedly apologising. In these circumstances, in our view, Ms Rep had similar obligations to those of a commercial news outlet.[131]

172. Contrary to the submission of the appellant, in our view it is appropriate in effect to impose on Ms Rep a requirement of moderating comments in response to her apology.[132] The fact that some comments were made which were offensive to Ms Rep herself does not excuse her inaction.[133]

173. As noted, we leave to one side and do not need to decide whether Ms Rep was responsible generally for the posts on her site, though there would seem to be support for this broad position in *Voller* case, now affirmed by the High Court.[134] But we agree that she was responsible for the posts which responded to her apology.

174. In relation to the responsibility for third-party posts and the *Voller* case ground of appeal, the appellant has not demonstrated an error. On this basis, this ground of appeal is not upheld.

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[130] Original Tribunal decision at [19] and [44]
[131] Appellant's submissions at [56]
[132] Appellant's submissions at [58]
[133] Appellant's submissions at [59]
[134] *Fairfax Media Publications Pty Ltd v Voller* [2021] HCA 27 (8 September 2021)

Victimisation (appeal ground 5[135])

175. Section 68 of the Discrimination Act in relation to victimisation as it applies here provides that it is unlawful for:

- Ms Rep to do an act which;
- subjects, or threatens to subject, Ms Clinch;
- to a detriment;
- because Ms Clinch has taken or proposes to take discrimination action, in this case including these proceedings in the tribunal (or other identified proceedings).

176. Each element is necessary, that is first there must be a relevant act, in this case posts on Facebook, which second, subject or threaten to subject Ms Clinch, third, to a detriment, and fourth because Ms Clinch has taken or proposes to take discrimination action.

177. The appellant argues that Ms Rep did not make any threats towards Ms Clinch, nor was she in any position to impose a detriment.

178. The Original Tribunal found victimisation in relation to five posts. This was on the basis that post 1.14 breaches section 68,[136] that posts 3, 16 and 23 "are implicitly about the applicant",[137] and post 33.1 is "calling out the applicant for making a complaint and taking the matter to the tribunal … [the] comment which names the applicant and these proceedings is plainly victimisation".[138] We consider each of these posts.

Item 1.14

179. Item 1.14 is by a third party in response to the apology post by Ms Rep and states:

> *Bridget makes a mockery of human rights legislation. s/he has made a vexatious and trivial complaint and can't even demonstrate any evidence of harm, and the govt has shown how useless it is by upholding hatred,*

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[135] Appellant's submissions at [46]-[53]
[136] Original Tribunal decision at [42(f)]
[137] Original Tribunal decision at [59]
[138] Original Tribunal decision at [60]

> *vilification and abuse of the spirit of the law (and lack of evidence of harm) as a virtue.*

180. This post asserts that Ms Clinch's original complaint was a mockery, vexatious, trivial and without evidence of harm. This may be untrue, but this does not make it victimisation. There is reference to the original complaint proceedings, which were a discrimination action, but what is required is a detriment or threat of detriment to Ms Clinch. We cannot see any basis for thinking there was a detriment or threat of detriment to Ms Clinch. The comment that the government is useless cannot be victimisation of Ms Clinch. We do not think that the finding of victimisation by this post was correct.

Item 3

181. Item 3 seems to be a response to a news headline: "'I was shocked and afraid': Women say Greens botched their complaints". The comment posted by Ms Rep is:

> *I thank these women for speaking up! I have been bullied harassed and defamed by a Greens candidate for calling out misogyny and the bs woke bloke culture that permeates the party these days. I made an official complaint to the Greens about ongoing harassment on April 12. Still waiting for a reply.*

182. This is about a complaint by Ms Rep. It is unclear from the terms of the posting whether the complaint is in relation to Ms Clinch; but the Original Tribunal found it was in the context of other posts.[139] The appellant points out that the reader of the post would have had no knowledge of this, but this is not relevant to victimisation. At any rate we accept the Original Tribunal's finding that it was a complaint about Ms Clinch.

183. But we cannot see that Ms Rep posting this comment is victimisation. The relevant act is the post. This does not subject, or threaten to subject, Ms Clinch to any detriment at all.

184. The complaint talked about by Ms Rep to the Greens may have resulted in some form of detriment to Ms Clinch, but it would be necessary to consider the terms of the complaint and the complaint mechanism to determine if it could result in

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[139] Original Tribunal decision at [59]

detriment. Further, we do not think that Ms Rep pursuing her rights through proper legal channels can be a relevant detriment. Further, there is no basis for finding that the bullying, harassment or defamation complained of was any discrimination action.

185. But at any rate the complaint by Ms Clinch of victimisation by Ms Rep was not on the basis of Ms Rep's complaint to the Greens, but on the basis of the post. We do not think that the Original Tribunal finding of victimisation by the post is correct.

Item 16

186. In item 16 Ms Rep states:

> *I'm back.* [emoji omitted] *Whoever keeps getting me banned is clearly not a woman, otherwise they'd know how resilient we are. You'll never wear me down and you'll never shut me up. Those who have to silence the opposition have already lost the argument.*

187. There is a response by a third party which states:

> *I wondered. I also thought you might be dealing with too much from a certain person. Bloody lot of banning of women happening. Can't say I've seen too many men being banned.*

188. We cannot see that Ms Rep posting this comment is victimisation of Ms Clinch. The relevant act is the post. The post talks about Ms Rep being banned from Facebook and then that ban being lifted. The implication is that it was Ms Clinch who complained to get Ms Rep banned. But the banning of Ms Rep was not an act by Ms Rep, nor was the lifting of that ban an act by Ms Rep.

189. Further, the banning of Ms Rep cannot be a detriment to Ms Clinch. Ms Rep suggests in the context of her return to Facebook that whoever had her banned they will never wear her down or shut her up. The lifting of the ban on Ms Rep, and the fact that others may never wear her down or shut her up, may be an annoyance or irritation to Ms Clinch, but we do not think that allowing Ms Rep back on Facebook to speak there is the type of detriment referred to in section 68. The term 'detriment' is not defined, but in similar contexts it has been held to involve placing a complainant under a disadvantage as a matter of substance, or resulting in a complainant suffering a material difference in treatment which is

real and not trivial.[140] Allowing someone to speak who takes a position contrary to Ms Clinch cannot amount to this sort of detriment to Ms Clinch.

190. Even if Ms Rep being able to participate on Facebook, and never being able to be worn down or shut up, is a detriment to Ms Clinch, there is no basis for finding that this was because Ms Clinch had taken or proposed to take discrimination action.

191. We do not think therefore that the finding of victimisation by the post is correct.

Item 23

192. In item 23 Ms Rep states:

> *It has now been almost a year since I lodged an official complaint with The Australian Greens about one of its employees/members being a serial harasser of women. Despite following up on the complaint, I am yet to receive a reply. This is just more proof that the Queensland Greens don't care if women get harassed, and the ACT Greens don't care about their female constituents.*

193. As with item 3, we cannot see that Ms Rep posting this comment is victimisation. The post does not subject, or threaten to subject, Ms Clinch to any detriment at all.

194. The complaint by Ms Rep to the Australian Greens may have resulted in detriment to Ms Clinch. But Ms Rep was on the face of it entitled to complain, and it would be necessary to consider the terms of the complaint and the legal process involved to determine if it could result in detriment.

195. Further there is no basis for finding that the harassment complained of was any discrimination action.

196. But at any rate the complaint of vilification by Ms Rep was not on the basis of her complaint to the Greens, but on the basis of the post. We do not think that the finding of victimisation by the post is correct.

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[140] *Damiano v Wilkinson* [2004] FMCA 891

Item 33.1

197. In item 33.1 Ms Rep states: "Bridget is trying to sue me for 'vilification' because I call out the misogyny of the trans movement and his harassment and bullying of radical feminists". The Original Tribunal held that 33.1 is a comment by the respondent following a post by her calling out the applicant for making a complaint and taking the matter to the tribunal; this does not seem quite right according to the materials before us, but nothing turns on this. It then said: "The respondent's comment which names the applicant and these proceedings is plainly victimisation".[141]

198. It is true the comment says Ms Clinch is trying to sue Ms Rep. But much more than this is needed for victimisation under section 68. What is required is for Ms Rep to subject, or threaten to subject, Ms Clinch to a detriment because Ms Clinch has taken the discrimination action. Nothing in the post subjects or threatens to subject Ms Clinch to any such detriment. There is reference to discrimination action, and a statement of what Ms Rep says is the basis for that action, a position she has maintained in these proceedings, but there is no link to any way in which Ms Rep has subjected, or threatened to subject, Ms Clinch to any detriment because of the discrimination action.

199. The discrimination action proceeded to a hearing and decision at first instance and now this appeal. Ms Rep's defence to this action is not victimisation of Ms Clinch, and nor is her referring to the complaint of Ms Clinch and her position in relation to this complaint of victimisation.

200. We do not think there is a basis for finding that this was victimisation under section 68.

Summary in relation to victimisation

201. The Original Tribunal found that all the relevant posts were victimisation. We find that none are, and that the findings of the Original Tribunal involve error in this regard. This ground of appeal is upheld.

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[141] Original Tribunal decision at [60]

Remedies (appeal ground 6[142])

202. The remedies which the tribunal can order are set out in section 53E of the Human Rights Commission Act, which applies if the tribunal is satisfied that the person complained about engaged in an unlawful act. 'Unlawful act' is defined as an unlawful act under the Discrimination Act;[143] the Discrimination Act defines 'unlawful act' as an unlawful act under part 7, which includes vilification (section 67A) and victimisation (section 68).[144] Section 53E then provides in sub-sections (2) and (3):

> *(2) The ACAT must make 1 or more of the following orders:*
>
> *(a) that the person complained about not repeat or continue the unlawful act;*
>
> *(b) that the person complained about perform a stated reasonable act to redress any loss or damage suffered by a person because of the unlawful act;*
>
> *(c) unless the complaint has been dealt with as a representative complaint - that the person complained about pay to a person a stated amount by way of compensation for any loss or damage suffered by the person because of the unlawful act.*
>
> *(3) In making an order under subsection (2) (c), the ACAT must consider—*
>
> *(a) the person's right to equality before the law and the impact of the discrimination on the enjoyment of that right; and*
>
> *(b) the inherent dignity of all people and the impact of the discrimination on the person's dignity; and*
>
> *(c) the public interest in ensuring an appropriate balance between the right to equal and effective protection against discrimination and equality before the law without distinction or discrimination and other human rights; and*
>
> *(d) the nature of the discrimination; and*
>
> *(e) any mitigating factors.*
>
> ***Examples — par (b) — impact of discrimination***
>
> *distress, humiliation, loss of self-esteem, loss of enjoyment of life*
>
> ***Example — par (c) — other human rights***
>
> *freedom of expression*

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[142] Appellant's submissions at [63]-[77]

[143] Section 53 of the Human Rights Commission Act

[144] Section 2 and Dictionary of the Discrimination Act

Examples — par (d)

serious or repeated discrimination, intentional or malicious discrimination, discrimination on the grounds of 2 or more protected attributes under the Discrimination Act 1991

Examples — par (e)

a public apology, systemic changes to protect against further discrimination

Compensation

203. The Original Tribunal ordered that Ms Rep pay to Ms Clinch $10,000 by way of compensation.[145] This was not for economic loss, as no such claim was made, nor personal physical or psychological injuries, as no evidence was provided of such personal injury. It was said to be an award similar to that for the injury to feelings aspect of defamation awards. There was no award for aggravated damages. There was no element for interest or legal costs.[146]

204. The appellant argued this was wrong as the evidence relied upon was not identified, and compensation is for actual loss or damage which must be proved and quantified.[147]

205. We note that section 53E(2)(c) states that unless the complaint has been dealt with as a representative complaint an order for compensation can be made. Section 71 of the Human Rights Commission Act deals with representative complaints, and it is not clear that this complaint is such a representative complaint. It complains of vilification of Ms Rep, but also of other trans women, but it does not seem that this of itself makes it a representative complaint. At any rate it is clearly a claim by Ms Clinch personally and on this basis she can claim compensation under section 53E(2)(c).

206. The reference in section 53E(2)(c) states that it is to be "compensation for any loss or damage suffered by the person because of the unlawful act". These terms are not defined and therefore take their ordinary meaning, within a particular legal context.

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[145] Original Tribunal decision order 4
[146] Original Tribunal decision at [64]-[72]
[147] Appellant's submissions at [64]

207. Section 53E(3)(b) provides that in making an order for compensation, including for compensation for vilification, the tribunal must consider "the inherent dignity of all people and the impact of the discrimination on the person's dignity". The example given, which can be taken into account in interpreting the section, is "distress, humiliation, loss of self-esteem, loss of enjoyment of life". This suggests that distress and humiliation can be a basis for compensation for vilification.

208. It seems that generally in this context this compensation is for loss to the applicant; it is not a punishment of the respondent. In many cases of discrimination, as in damages awarded under other statutory claims, the appropriate measure of compensation will be based on that for the analogous tort.[148] For vilification it seems that defamation is the analogous tort. In defamation, general damages, not based on economic loss, can be awarded to compensate for the intangible loss suffered to the plaintiff's reputation, including an amount for consolation for the injured feelings and personal distress and hurt caused to the plaintiff by the publication. These damages must have an appropriate and rational relationship to the harm sustained. This element is generally seen as compensatory.[149]

209. In relation to vilification under the Racial Discrimination Act a court can make an order requiring a respondent to pay to an applicant damages by way of compensation for any loss or damage suffered because of the conduct of the respondent, a phrase very similar to that in section 53E(2)(c) of the Human Rights Commission Act.[150] Loss for injury to feelings has been regularly compensated for under this provision, on the basis principally of simply an assessment of the words used and having regard to previous decisions; the amount awarded by the Original Tribunal was within the range established by these cases.[151] It may be that this range should be reviewed in a way similar to that undertaken by the

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[148] *Qantas Airways Ltd v Gama* [2008] FCAFC 69 at [94] (French and Jacobson JJ)

[149] LexisNexis, *Halsbury's Laws of Australia* (at 25 January 2018) Defamation, '5 Remedies' [145-2630], [145-2655], [145-2640] by David Rolph; *Civil Law (Wrongs) Act 2002* section 139E; *Uren v John Fairfax & Sons Pty Ltd* [1966] HCA 40

[150] *Australian Human Rights Commission Act 1986* (Cth) section 46PO(4)(d)

[151] Australian Human Rights Commission, *Federal Discrimination Law* (2016) at [7.2.3]

Federal Court in *Richardson v Oracle*,[152] and by the tribunal in *Kovac v The Australian Croatian Club Limited (No.2)*,[153] but these were different contexts to here, and at any rate as there is no cross appeal by Ms Clinch such a review is not appropriate in this case.

210. Similarly, in relation to vilification under the NSW *Anti-Discrimination Act 1997* the NSW Tribunal can order the respondent to pay the complainant damages by way of compensation for any loss or damage suffered by reason of the respondent's conduct. Loss for injury to feelings has been regularly compensated for under this provision, on the basis principally of simply an assessment of the words used and having regard to previous decisions; the amount awarded by the Original Tribunal was appropriately within the range established by these cases.[154]

211. In *Hall v A & A Sheiban*,[155] in the context of sexual harassment damages, Wilcox J cited with approval the reasoning of May LJ in *Alexander v Home Office*,[156] who explained at page 975:

> *As with any other awards of damages, the objective of an award for unlawful racial discrimination is restitution. Where the discrimination has caused actual pecuniary loss, such as the refusal of a job, then the damages referrable to this can be readily calculated. For the injury to feelings however, for the humiliation, for the insult, it is impossible to say what is restitution and the answer must depend on the experience and good sense of the judge and his (sic) assessors.*

212. The Original Tribunal stated that Ms Clinch in her statement and her demeanour in the running of the case explained the impact on her both as a private citizen

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[152] *Richardson v Oracle Corporation Australia Pty Ltd (No.2)* [2014] FCAFC 139. There is some discussion about defamation at [111]-[112], but this was not particularly relevant in a case of sexual harassment, where compensation for pain and suffering and loss of amenity of life was at issue.

[153] [2016] ACAT 4

[154] See for example *Burns v Sunol* [2012] NSWADT 246; *Burns v Sunol* (No.2) [2012] NSWADT 247; see also Queensland Human Rights Commission, 'Vilification case studies' (Web Page) <https://www.qhrc.qld.gov.au/resources/case-studies/vilification>

[155] (1989) 20 FCR 217 at 256

[156] (1988) 1 WLR 968 at 979

and also in her public life as an aspiring politician and they accepted her evidence.[157]

213. The appellant argued that the particular evidence relied on is not identified in the reasons, and then that the evidence should have been struck out as not admissible or irrelevant, and that events other than the posts were also referred to by Ms Clinch as causing her distress.[158] As noted above, particular evidence for the compensation sought and awarded is not necessary, but at any rate it is summarised in the Original Tribunal decision which found that the posts in issue in these proceedings were a cause of Ms Clinch's distress, a position which seems appropriate in light of the nature of the posts.[159] No basis was provided by the appellant for thinking the evidence should not have been accepted by the Original Tribunal, or not considered by this Appeal Tribunal.[160]

214. We do not think that the appellant put forward cogent reasons for overturning the assessment of the Original Tribunal.

215. We do note that section 53E(3)(c) provides that in making a compensation order, the tribunal must take into account the public interest in ensuring an appropriate balance between the right to equal and effective protection against discrimination and equality before the law without distinction or discrimination, on the one hand, and other human rights. The relevant example refers specifically to freedom of expression. We do not understand why this limitation is restricted to compensation, rather than the other orders the tribunal can make. But it does suggest that the compensation award should not have an impact which unreasonably burdens other rights, such as freedom of speech. We do not think that the order made by the Original Tribunal unreasonably burdens freedom of speech, especially given the context in which the posts were made, in particular

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[157] Original Tribunal decision at [69], the evidence is summarised at [17(h)].
[158] Appellant's submissions at [64]-[69]
[159] Original Tribunal decision at [17(h)], [64]-[72]
[160] Noting that the tribunal need not comply with the rules of evidence, see section 8 of the ACAT Act.

the apology post, other awards made in relation to vilification claims,[161] and other orders made in defamation proceedings.

216. However, we do note that the Original Tribunal found that all the relevant posts were vilification (numbering 46[162]) and victimisation (numbering five[163]). We have found that only nine posts are vilification and none are victimisation. On this basis we think there is an argument that there should be a reduction in the compensation awarded to Ms Clinch.

217. It is true that the purpose of the compensation is not the punishment of Ms Rep. It is compensation for consolation for the personal distress and hurt caused to Ms Clinch by the publication. As we have noted, there was evidence of this in her statement before the Original Tribunal. In our view the response to the apology posts would have been particularly distressful and hurtful given the context in which they occurred, and we have found a number of these to be vilification. But the Original Tribunal did note that each case must be considered in light of its own facts and an assessment made of the amount which can be fairly regarded as reasonable compensation for the unlawful act.[164] On this basis it seems that the number of unlawful acts of vilification and victimisation which the Original Tribunal found would have been a factor in its assessment of compensation. We have significantly reduced that number, and this suggests that this reduction should flow through to the amount of compensation awarded. We also note that the Human Rights Commission Act in section 53E(3) sets out some considerations relevant to the assessment of compensation which include, in effect, the impact on freedom of speech (section 53E(3)(c)) and the nature of the discrimination, which the example refers to as whether there is "serious or repeated discrimination". This suggests the number acts of vilification and victimisation is relevant. Of course the nature and the impact of the vilification on Ms Clinch is still relevant.[165] But on this basis we think that the assessment of

[161] See paragraphs [209], [210]
[162] See Schedule 1; one of these 1.14 was also held to be victimisation
[163] See paragraphs [179]-[199]
[164] Original Tribunal decision at [66]
[165] Original Tribunal decision at [69]

the amount of compensation by the Original Tribunal should be reduced to some extent, but still be significant, and we think that $5,000 is appropriate.

218. On this basis, the appellant has demonstrated an error in the Original Tribunal decision in relation to compensation, flowing from her success in demonstrating that there should be a significant reduction in the number of unlawful acts, and this ground of appeal is therefore upheld in part.

Orders in the nature of injunctions

219. The Original Tribunal also made a range of orders in the nature of injunctions. These were, in summary, first, that Ms Rep remove from any website or social media that she owns or controls the posts contained in exhibit A4 (order 1). Second, that Ms Rep remove any posts to similar effect as those contained in exhibit A4 (order 2). Third, that Ms Rep refrain from making any statements on any website or social media that she owns or control posts which are the same or similar to those in exhibit 4 (order 3).

220. The appellant argued that these orders were excessively broad and should have been limited to removing only the particular posts found to be vilification or victimisation. It was said that the orders as made would extend to posts not the subject of the proceedings on similar topics expressing political and scientific views, irrespective of the language used, including links to the posts by a wide range of authors. It would in effect be a permanent ban against Ms Rep from making public statements about trans rights and feminism. It was submitted that the orders should go no further than taking down the particular posts and not reposting them, and should not prevent Ms Rep from engaging in debates on social media.

221. This Appeal Tribunal has upheld the appeal in part, and only finds that some of the posts the subject of these proceedings are vilification and none are victimisation. We think that an order for removal of posts should only extend to those posts found to be vilification by this Tribunal.

222. Section 53E of the Human Rights Commission Act does contain some relevant limitations (set out in paragraph [202] above). As the appellant argued, section 53E(2) contains three types of orders. First, that the person complained

about not repeat or continue the unlawful act (section 53A(2)(a)). This order is linked to the unlawful act. In its terms it does not extend to similar acts. Second, it extends to an order that the person complained about perform a stated reasonable act to redress any loss or damage suffered by a person because of the unlawful act (section 53E(2)(b)). Again this is focused on the unlawful act found, not possible future acts, and can allow for orders that redress any loss or damage from these, but not restrict future acts, even if potentially unlawful. Third, it provides for compensation (section 53A(2)(c)). We have significant doubts that this power extends to prohibiting a broad range of future posts which may or may not be unlawful.

223. Section 57 of the ACAT Act provides that an authorising law may set out the powers of the tribunal, and the decisions it may make on an application under the authorising law. In this case these are set out in section 53E of the Human Rights Commission Act. The tribunal may have other implied powers, but we do not think that they would be anything beyond ancillary or incidental powers to those specified.

224. As we have noted, the factors in section 53E(3) are only relevant to a compensation order, not the broader orders, notwithstanding that it is they which might have the most significant impact on other rights, such as freedom of speech.

225. But it is still relevant to note that section 67A of the Discrimination Act is a carefully constructed provision which in its terms balances equality and non-discrimination rights with freedom of speech rights. It is only statements which meet the specific requirements of this section which are rendered unlawful. It is only with the limitations contained in section 67A that a similar section has been found to comply with the implied freedom of political communication in the Constitution.[166] Orders 2 and 3 of the Original Tribunal contain none of the limitations in section 67A. They purport to prevent Ms Rep from making statements which do not incite hatred, revulsion of, serious contempt of or severe ridicule of Ms Rep or others under section 67A. Indeed they prevent her making statements which are just rude or inappropriate, or not even rude and

[166] *Sunol v Collier (No.2)*

inappropriate. They prevent her from making statements which are reasonably and honestly made for academic, artistic, scientific or research purposes or for other purposes in the public interest, including discussion or debate about and presentations of any matter. This is contrary to the exceptions in section 67A(2). We do not think this is appropriate.

226. If orders 2 and 3 were appropriately limited, the orders would in effect simply require Ms Rep to comply with section 67A. She is already obliged to do this.

227. For these reasons we think that as the appellant has demonstrated errors in relation to some of the findings of vilification and all of the findings of victimisation there are also errors in relation to the orders in the nature of injunctions granted. The relevant ground of appeal is made out in part. Order 1 therefore needs to be adjusted to take account of the fact that the Original Tribunal found that all the relevant posts were vilification and victimisation while we have found that only some posts are vilification and none are victimisation. It is appropriate that the order made should only apply to the posts that have been found to be vilification and that Ms Rep must remove those posts from any website, social media or other publication of any type that she owns or controls, and in particular her Facebook page entitled "Beth Rep". We do this in our order 3. We have also made an order (our order 4) that Ms Rep not repeat or continue the publication of the posts and those which are in substantially the same terms, that is posts which have minor, grammatical and non-substantive differences. This is a much narrower class of posts than those that are of similar effect, whether directly or indirectly, referred to in the Original Tribunal's orders. We note that we have taken into account the context of posts in finding them unlawful, in particular the apology response, and that there would be arguments that in other contexts they are lawful. But in our view the apology response posts which we have found to be vilification would be so in most contexts, and the order is therefore justified.

228. For these reasons we think that the appellant has demonstrated errors in relation to orders 2 and 3 of the Original Tribunal in that these were too broad. The relevant ground of appeal is made out in part. Section 53E(2)(a) of the Human Rights Commission Act does allow the tribunal to order that a person not repeat or continue the unlawful act. We think it is appropriate only that Ms Rep not

repeat or continue the publication of those posts found by this Appeal Tribunal to be vilification. We think this can also include posts in substantially the same terms. We do this in our order 4.

229. On this basis the injunction aspect of this ground of appeal is upheld in part.

Conclusion

230. For the reasons stated above, the appeal is upheld in part.

Schedule 1 –Detailed consideration of the posts

231. This Schedule briefly describes the relevant postings and our findings in relation to each of them. These posts are discussed by Ms Clinch in her submission of 14 July 2018 (exhibit A2) and in exhibit A4, and by Ms Rep in her response to social media posts (exhibit R3).

Apology response posts

232. Item 1 is the apology post.

233. Item 1.1 is a post by a third party, 'liked' by Ms Rep. It says: "Excuse me while I hurl my guts up at the thought of an open wound being compared to a vagina".

234. The Original Tribunal discussed this post,[167] and stated it was an attack on trans women in a humiliating way, and that whilst accepting robust language expressing a point of view was not necessarily vilification, they thought this breached section 67A.

235. In our view, this is very strong and abusive language. It is directed to a particular physical aspect of some trans women. It is incitement of, revulsion of or severe ridicule of, a person and a group on the basis of that physical attribute which is linked to gender identity. It is not a reasonable, that is a rational or proportionate, discussion or debate of transgender issues, especially in the context of the apology by Ms Rep, which it undermines. We find this is therefore vilification.

236. Item 1.2 is a post by a third party and refers to "I just went on Bridget's page. Penis people once again bullying women. Biology is reality".

237. We think that stating that Ms Clinch is a 'penis person', and is a bully, are not just offensive and insulting comments, but extend to strong and abusive language. They occur in the context of the apology, which they undermine, and are directed at a particular identified person, and as such meet the test of inciting hatred against that person. They are directed to a person with the particular physical attribute of some trans women which is linked to gender identity. It is not a reasonable, that is a rational or proportionate, discussion or debate of transgender

[167] Original Tribunal decision at [42(a)]

issues, especially in the context of the apology by Ms Rep. We find this aspect of the post is therefore vilification.

238. To state that that biology is reality may not be true, and certainly is not in the context of trans people consistent with the terms of the Discrimination Act and its protection of gender identity, but in our view does not amount to inciting hatred etc. We find this sentence in the post is therefore not vilification.

239. Item 1.3 is a post by a third party. It states:

> *You have never vilified or victimised her in any way, shape or form but I appreciate hearing an apology for hurt feelings. I wish more folks on Facebook would follow your example to be mindful of other's feelings..*
>
> *I feel vilified, victimised, bullied, harassed and hurt every time I hear of violence against any woman (whether emotional, physical, mental, legal or financial) perpetrated by transactivists.*

240. This was said by Ms Clinch to be a denial that the Commission and ACAT are legitimate. We do not agree, and at any rate the Commission and ACAT cannot be vilified. It was said by the Original Tribunal to be vilification because of what follows.[168] Whilst context can be relevant to vilification, we do not think that other comments which are vilification can make this comment vilification. This posting needs to be read as a particular communication. It was said to be vilification because of the reference of violence by transactivists. This would include some trans women and may include Ms Clinch. But this is within a statement of the author's feelings. There is no suggestion that all violence against women is by transactivists, or that all transactivists are violent towards women, or that violence is an inherent characteristic of transactivists; if it had said this there would be a much stronger argument that it amounts to vilification. But it only implies that some transactivists are violent towards women in the broad senses described. Even if this is not true, it does not amount to incitement of hatred etc. We find this is therefore not vilification.

[168] Original Tribunal decision at [42(c)]

241. Item 1.4 is a post by a third party 'liked' by Ms Rep. It states "Bridget Clinch is a male bully, and the Greens letting him swing his dick like this? I am showing this to every female supporter I know …".

242. This post is discussed by the Original Tribunal,[169] and they stated that this is in the same category as item 1.1, that there is an argument that calling the applicant a bully is not about gender identity, but that this was unpersuasive because the post attacks the applicant by attributing male aggression to her and uses offensive language.

243. We think that stating that Ms Clinch is male, a bully, and swings his dick are not just insensitive, offensive and insulting comments, but together extend to strong and abusive language. They occur in the context of the apology, which they undermine, and are directed at a particular identified person, and as such meet the test of inciting hatred etc. against that person. They are directed to a person with the particular physical aspect of some trans women, that is presenting as a woman and having male genitalia, which is linked therefore to gender identity. This comment has nothing to do with political ideology. The comments are not a reasonable, that is a rational or proportionate discussion of transgender issues, especially in the context of the apology by Ms Rep. We find this is therefore vilification.

244. Item 1.5 is a post by a third-party, 'liked' by Ms Rep. It says: "I'm not entirely sure what has happened here but … Beth has been made to deny reality".

245. The Original Tribunal discussed this and said: "… on its own it may not be so bad but in its context, it continues to incite what was already a growing list of vilifying comments".[170]

246. This statement is disrespectful and offensive to Ms Clinch. It may not be true, and certainly is not consistent with the terms of the Discrimination Act and its protection of gender identity. But it does not amount to inciting hatred etc. We do

[169] Original Tribunal decision at [42(d)]
[170] Original Tribunal decision at [42(e)]

not think it can be said to be vilification just because it sits with other comments which are vilification. We find this is therefore not vilification.

247. Item 1.6 says:

> *How ridiculous that u have to lie and pander to these anti women delusional haters. The good thing is that everyone knows that Bridget is a man no matter what he dictates people call him. Even the anti women men and handmaidens know he's a man. We can laugh at how pathetic he is and know he's angry that no-one actually believes his delusions – the only reason he's being supported is because he's helping support men's misogynistic views and desperate attempts to control women.*

248. In our view this statement moves beyond being just offensive and insulting, to strong and abusive language. It refers to Ms Clinch as anti women, delusional, a hater, a man, who dictates to others, is laughable, pathetic, angry, delusional, misogynistic and controlling of women. It does so in the context of the apology, which it undercuts. It directly attacks Ms Clinch. It does so on the basis that she is a man not a woman and is therefore linked to gender identity. This is incitement of, revulsion of, or severe ridicule of, a person and the group of trans women. It is not reasonable, that is a rational or proportionate discussion of transgender issues, especially in the context of the apology. We find this is therefore vilification.

249. Item 1.7 says: "Bridget is a sooky little boy and whatever Government piss-worm that has forced this from you needs to eat a bag of dicks…".

250. We think that stating that Ms Clinch is a "sooky little boy" is an insensitive, offensive and insulting comment, but do not think it is strong and abusive language which meets the test of inciting hatred etc. The focus of the comment is abuse of the government and ACAT; they cannot be subject to vilification. We find that this is not vilification.

251. Item 1.8 says:

> *Bridget: ur a narcissistic bully. U aren't being supported because people believe ur delusions, they are just using you to further their anti women agenda. Clearly you love trying to dominate women – but we are laughing at u. Women that I have talked to today are so shocked by ur hatred and attempt to dominate and silence women. Beth having to apologise for*

> *stating facts show how hate filled towards women u are, and ur need to control women like the misogynist u are is back firing big time.*

252. In our view this statement moves beyond being just offensive and insulting language, to strong and abusive language. It says that Ms Clinch is narcissistic, a bully, delusional, laughable, hateful and misogynistic and implies that Ms Clinch and trans women have an anti-women agenda which involves dominating and controlling, and that they undertake activities which are a threat to women. It occurs in the context of an apology which it undercuts, and targets Ms Clinch. The references to Ms Clinch's delusions and the broader agenda provide a link to gender identity. This is incitement of hatred towards, revulsion of and serious contempt for a person and a group on the basis of gender identification. It is not reasonable, that is a rational or proportionate discussion of transgender issues, rather it is just strong abuse, especially in the context of the apology. We find this is therefore vilification.

253. Item 1.9 says:

> *Bridget needs to understand that the only person responsible for Bridget's feels is Bridget. So does the AHRC. What world are we living in where a delusional white male uses a piece of legislation to protect people from delusional white males to force an adult human female into a public apology because she called him a male. You couldn't make this shit up.*

254. We think that stating that Ms Clinch is a "delusional white male" are insensitive, offensive and insulting comments, but do not meet the test of inciting hatred etc. The statement about Ms Rep being forced into an apology is incorrect, but that does not make the comment vilification. We find this is not vilification.

255. Item 1.10 says: "I hate Bridget and I don't even know who he is".

256. This is an expression of a feeling of hatred, but without any basis for this feeling. We think that this is offensive and insulting to Ms Clinch, but does not meet the test of inciting hatred etc. We find this is not vilification.

257. Item 1.11 says: "'Bridget' is a man. Fuck him".

258. We think that stating that Ms Clinch a man and swearing at her are insensitive, offensive and insulting comments, but do not meet the test of inciting hatred etc. We find this is not vilification.

259. Item 1.12 says: "Yes, Bridget is male. Not surgery, not drugs, not a piece of paper, can change a person's sex. This is NOT vilification, nor is it victimisation, incitement to hatred or violence in any way shape or form".

260. We think that stating that Ms Clinch is male is insensitive, offensive and insulting, but does not meet the test of inciting hatred etc. The following two sentences express an opinion. The second sentence is a statement that is not correct under the terms of the Discrimination Act and its protection of gender identity, but this does not of itself amount to inciting hatred etc. We find this is therefore not vilification.

261. Item 1.13 says: "The fact he won't accept. He will clearly go to great lengths in order to silence women from speaking up. Going so far as to refer to women using slurs to promote his insidious agenda. He will never know true womanhood".

262. We think that stating that Ms Clinch uses slurs is offensive and insulting, but does not meet the test of inciting hatred etc. But further, in our view this statement implies that Ms Clinch seeks to silence women, and promote an insidious agenda, that is undertake activities which are a threat to women. This is incitement of hatred towards and serious contempt of a person on the basis of gender identification, particularly in the context of the apology. It is not reasonable, that is a rational or proportionate discussion of transgender issues, especially in the context of the apology. We find this is therefore vilification.

263. Item 1.14 states:

> *Bridget makes a mockery of human rights legislation. s/he has made a vexatious and trivial complaint and can't even demonstrate any evidence of harm, and the govt has shown how useless it is by upholding hatred, vilification and abuse of the spirit of the law (and lack of evidence of harm) as a virtue.*

264. Item 1.14 is a post which is said to be victimisation by the Original Tribunal. It is discussed as such at [179]-[180]. This post was also implicitly found to be vilification by the Original Tribunal and is caught by the orders made.[171] We think that stating that Ms Clinch makes a mockery of human rights legislation, is

[171] Original Tribunal decision at [42(f)] and [43], and orders (1), (2) and (3)

vexatious, and made a trivial complaint without evidence, is offensive and insulting, but does not meet the test of inciting hatred etc. This statement is in part untrue to the extent that Ms Rep agreed to provide the apology, suggesting that she did not think the complaint was vexatious, trivial or without evidence. But this does not make it vilification. The criticisms of the government are unfounded, but cannot be vilification. We find this is not therefore vilification.

265. Item 1.15 says: "HE should be apologising for inciting violence against women. What a hateful person".

266. We think that stating that Ms Clinch is a man, should herself apologise and is hateful, is offensive and insulting, but does not meet the test of inciting hatred etc. While similar in some respects to item 1.13, we find this is not vilification.

267. Item 1.16 says:

> *I apologise that Bridget has been given the impression by this system that his views about himself must be upheld by others at all times.*
>
> *It is evident that under capitalism, 'human rights' means white male rights.*
>
> *It is not Bridget who has been victimised here, but who has manipulated a system already constructed in his favour.*

268. We think that stating that Ms Clinch is a man, has not been victimised, but has been manipulative is offensive and insulting, but does not meet the test of inciting hatred etc. Even if it was, we think that this would fall within the exception for reasonable, that is a rational or proportionate, and honest discussion of transgender issues. We find this is not therefore vilification.

269. Item 1.17 says:

> *They really are deluded if they think the hairy, pus filled, surgically created cocks turned inside out are 'vaginas'. No Bartholin's glands, no ability to self clean and lubricate. Typical for a man to think that a vagina is just a 'hole'.*

270. In our view this statement moves beyond being just offensive and insulting language, to strong and abusive language. This is incitement of revulsion or severe ridicule of a person and group on the basis of physical attributes which are linked to gender identity. It is not reasonable, that is a rational or proportionate

discussion of transgender issues, especially in the context of the apology. We find this is therefore vilification.

271. Item 1.18 says: "what was going to be the punishment for not catering to this man's sexual fetish on your personal facebook page".

272. We think that stating that Ms Clinch is a man is offensive and insulting, but does not meet the test of inciting hatred etc. This statement also implies that Ms Clinch had, and acted out of, a sexual fetish. It is unclear what this means. 'Fetish' is defined by the Macquarie Dictionary as a non-sexual part of the body, an action, or an inanimate object, which gives sexual stimulation.[172] This is not of itself suggesting that Ms Clinch was a threat to Ms Rep or women. On this basis we think that this was offensive and insulting, but does not meet the test of inciting hatred etc. We find this is therefore not vilification.

General posts

273. Item 2 is a cartoon with what seems to be a woman in a bathroom dressed in police like clothes saying: "We got a 10 92, that's an improperly parked penis in a penis free zone, over". Ms Rep then states: "I am 'sadly one of those bathroom TERFS'". Apparently, this is a response to a post which states that Ms Rep is "sadly one of those Bathroom TERFS".[173] Items 2.2, 2.2 and 2.3 appear to be responses to this by others, which includes: "Would 10/10 kick a TIM in the nuts if he showed his ugly ass face in a women's bathroom"; and that TIMs are deluded narcissists. TERF is an acronym which apparently means a 'trans exclusionary radical feminist', a derogatory term for people like Ms Rep, and TIM apparently means a 'trans identified male', a derogatory term for people like Ms Clinch.

274. The Original Tribunal noted that the cartoon might be amusing in less heated discourse, but predictably drew more vilifying comments and contravened section 67A.[174]

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[172] Macquarie Dictionary Online
[173] Exhibit R3 at item 3
[174] Original Tribunal decision at [49]

275. The cartoon raises the issue of trans women using women's bathrooms, and suggests that this is inappropriate, and perhaps should be illegal. This view is not expressed in an offensive, insulting or abusive way. We do not think this alone incites violence etc. against trans women. The post by Ms Rep identifies herself as a TERF. We do not think this incites violence etc. against trans women. The responses use the terms "ugly" and "deluded narcissists," are offensive and insulting, but in our view do not incite hatred etc. One response refers to violence by the author, which is clearly inappropriate and offensive, but does not incite hatred etc. But at any rate these responses do not show that Ms Reps' post was objectively provoking hatred etc. We think the post needs to be assessed on its own terms, not determined by the fact that there were other posts in response which may amount to vilification. We find this is therefore not vilification.

276. Item 3 seems to be a response to a news item headed: "'I was shocked and afraid': Women say Greens botched their complaints". The comment posted by Ms Rep is:

> *I thank these women for speaking up! I have been bullied harassed and defamed by a Greens candidate for calling out misogyny and the bs woke bloke culture that permeates the party these days. I made an official complaint to the Greens about ongoing harassment on April 12. Still waiting for a reply.*

277. The Original Tribunal found that the candidate was Ms Clinch, and that the post was victimisation,[175] and we discuss it at [181]-[185] and find that it was not victimisation. There was no finding by the Original Tribunal that it was vilification.[176]

278. Item 4 seems to be a response to a post which stated: "TERF is an acronym for Trans-Exclusionary Radical Feminist. Sometimes, 'exclusionary', is expanded as 'eliminationist' or 'exterminationist' instead to more accurately convey the degree to which TERFS advocate for harm towards trans people who were coercively assigned male at birth". Ms Rep responds to this by stating: "True

[175] Original Tribunal decision at [50]
[176] Original Tribunal decision at [54]

story. Tag yourself. I'm an exterminationist". It is followed by what was said to be "icons of googly eyes looking left … a type of emoji".[177]

279. The Original Tribunal stated that this was "intended to be self-mocking but could only have led to more extreme comments".[178]

280. Ms Rep argued that this was obviously a humorous response and that it was ridiculous that it should be read literally.[179] We think that this is not obvious, which gives rise to significant issues. Use of humour can raise difficult issues in vilification and defamation matters, including because it often involves exaggerated language or presentation.[180] It is necessary to objectively assess the statement, which in its terms conveys and condones a violent position towards trans women and encourages others to do so as well. As we have discussed, the context including audience is relevant. Ms Rep defended this as an exaggerated and humorous position, but it is not clear to us that the range of readers who may access this post would have seen it in this way, and importantly that the ordinary and reasonable member of the public would do so.[181] Some of Ms Rep's supporters may have seen it as humorous, but this is not enough. History shows that the use of such extreme language is often linked to actual violence, and sometimes extreme violence, and we are reluctant to too readily discount such comments as just a joke. In our view it is appropriate to require people who use such language as humour to make this clear, and we do not think Ms Rep has done so in this context. The use of the term 'exterminationist' refers to the extermination of transwomen, and is therefore clearly linked to gender identity. We recognise this as a difficult issue, but on balance we think this comment is an incitement to hatred or revulsion of a group on the basis of gender identification. It is not a discussion or debate at all, let alone a reasonable, that is, a rational or proportionate, discussion or debate of transgender issues. No attempt was made to defend this as an artistic presentation, which is another aspect of

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[177] Transcript of proceedings on 2 March 2021 at pages 65-66

[178] Original Tribunal decision at [51]

[179] Exhibit R3 at item 5; and transcript of proceedings on 2 March 2021 at pages 65-69, 99-100

[180] Bill Swannie, 'Racially derogatory cartoons and racial vilification laws: Where to draw the line', (2020) 45 *Alternative Law Journal* 291

[181] See paragraph [152]-[158] above

section 67A(2)(c) of the Discrimination Act, and we do not think there was a basis for this. We find it is therefore vilification.

281. Item 5 by Ms Rep states:

> *Newsflash: None of those things make someone a girl.*
>
> *What would make more sense in this scenario?*
>
> *(a) Encourage males to embrace their feminine side OR*
>
> *(b) Put them on dangerous drugs for life and a long painful journey of plastic surgery experiments while perpetuating the myth that sex change is actually possible?*
>
> *Never mind, don't answer that. Only one of those responses is making a lot of corporations insanely rich.*

282. Items 5.1, 5.2 and 5.3 are responses to this which include references to "physical mutilation and lifelong medication", "autogynophile [sic]" and "perverted porn freaks".

283. The Original Tribunal found that this post was consistent with incitement and contravened section 67A.[182]

284. The post by Ms Rep may be offensive, but we do not think it is vilification, objectively assessed. Further we think that the responses are offensive or abusive, but this does not make the post by Ms Rep vilification. Further the post by Ms Rep is a reasonable and honest discussion in the public interest. We find that this post is not vilification.

285. Item 6 replies to some posts, first by a woman, describing her experience of assault by a man and who wants all-woman spaces, and then a person who identifies as a trans woman and provides details of her experience and argues that trans people are more likely to experience violence. Ms Rep states: "Woman explains why she needs female only spaces – Male transplains why she doesn't." Items 6.1, 6.2 and 6.3 are responses to this.

286. The comments by Ms Rep are harsh and unsympathetic, and in calling the trans woman a man offensive and insulting. But we do not think that they reach the

[182] Original Tribunal decision at [52]

level of strong and abusive language about a person or group that amounts to inciting hatred etc. We find that they are not vilification.

287. Item 7 involves Ms Rep stating:

> *I was just cleaning out some screenshot albums and found this heartbreaking message that was sent to my old twitter account (before it was permanently shut down for 'hate speech'). I had three or four different accounts shut down before I was suspended from twitter for good. This is the fight we are up against. This is what happens when we centre women's voices. #nevergoingtoshutup.*

288. This post is not expressly found to be vilification by the Original Tribunal but is caught by the orders made.[183] We do not think that the statements are even insulting or offensive, and do not reach the level of strong and abusive language about a person or group which constitutes incitement of hatred etc. We find that this is not vilification.

289. Item 8 replies to some posts which state:

> *1/2 All you liberals looking at tweets from perfectly reasonable feminists such as 'women don't have penises', that choose not 2 'like' or retweet – sort yourselves out. You're the reason we've sleepwalked into this Orwellian nightmare, with rapists in women's prisons described*
>
> *2/2 as 'she'. You know it's crazy, and you know fine* [sic] *well it is not 'transphobic' to assert these truths. Stop being cowards, and start to speak out. I was more-or-less on my own for a decade with this shit, and it is not a nice place to be.*

290. Ms Rep responds: "THIS THIS THIS". We take this to be Ms Rep agreeing with the post.

291. This post primarily involves addressing liberals who are not supporting women with views like Ms Rep and presumably the author. The comments in relation to such liberals cannot be vilification of Ms Clinch and trans women. There are some comments about trans women, such as "women don't have penises," and whilst insulting and offensive to trans women, we do not think this is incitement to hatred etc. of them. The reference to "Orwellian nightmare, with rapists in women's prison's described as 'she'" seems to be referring to an event. There was no suggestion it referred to Ms Clinch, or even to more than one trans woman.

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[183] Original Tribunal decision at [54], and orders (1), (2) and (3)

On this basis we do not think these comments reach the level of strong and abusive language which could incite violence etc. against Ms Clinch or the class of trans women. We find this is not vilification.

292. Item 9 involves a statement by Ms Rep: "White male flashes penis in women's change room before displaying some ugly racism to justify it [emoji omitted]". This seems to be a response to a post by a trans woman who stated she was naked in a women's locker room. Items 9.1, 9.2, 9.3, 9.4 and 9.5 are responses which include: "Are these men for real? They seriously equate themselves with black women and segregation? Pass the puke bucket. I'm about done playing nice. It's all out war now"; and "The whole point is to violate women".

293. The post by Ms Rep may be offensive, but we do not think it is vilification, objectively assessed. The responses are abusive, insulting and infer violence, that is "war", but this does not make the post by Ms Rep vilification. We find this is not vilification.

294. Item 10 replied to a headline which states: "'Not for men sorry': Transgender woman denied a Brazilian wax by spa files human rights complaint." Ms Rep states: "Canadian who identifies as a woman is so sad about salons refusing to wax balls that no less than FIFTEEN Human Right's complaints have been filed. More and more women are being sued for defending their own human rights and it's not ok". Item 10.1 are responses which include references to the person as "criminally insane" and a "monster".

295. The post by Ms Rep may be offensive and insulting, but we do not think it is vilification, objectively assessed. The responses are abusive, but this does not make the post by Ms Rep vilification.

296. Item 11 involves Ms Rep posting: "The federal government is reportedly set to ban Chelsea Manning from entering Australia. That's a shame". There are comments which refer to Ms Manning as a "woman hater", and to surgery she is assumed to have had, which is described as "disgusting" and "disturbing".

297. The post by Ms Rep may be offensive, and we assume ironic, but we do not think it incites hatred etc., objectively assessed. The responses are abusive, but this does not make the post by Ms Rep vilification.

298. Item 12 is a post by Ms Rep which states: "Please report this sad man baby for doxing a radfem. Report him for using a false name too, the POS. I would but I'm not allowed on twitter anymore because I make men cry." 'Doxxing' is apparently revealing personal information with malicious intent. This is a response to a posting by a particular person which states that another person is a "terf who has been tweeting hate speech pretty consistently".

299. We think that stating that a person who is a trans woman is a "sad man baby", uses a false name, and is a "POS", may be insensitive, offensive and insulting comments, but they do not meet the test of inciting hatred etc. Ms Rep is apparently responding to a post insulting those who take her position. We find that Ms Reps post is not vilification.

300. Item 13 is a post by Ms Rep which states:

> *Merseyside police officers have stopped monitoring high risk paedophiles because they're so overstretched, yet they seem to have time to investigate a harmless sticker campaign (because we all know upsetting TIMs is the worst crime of all).*

301. There are two responses in relation to the police.

302. This post is commenting on Merseyside police. We do not think this can be vilification of Ms Clinch or trans women.

303. Item 14 is a response to a press article headed 'Representing my country again'. Ms Rep states: "Imagine being the woman who's trained her whole life to represent her country in handball, only to be replaced by a player who just 3 years ago was in the men's team". There are responses which include references to the athlete as "a hyper-aggressive angry male-bodied man playing against women" and the tag "#FailedMaleAthleteCheat".

304. We think that this is insensitive and disrespectful, and perhaps, offensive and insulting, to the athlete, whom we assume is a trans woman. But we do not think this meets the test of inciting hatred etc. We find that this is not vilification.

305. Item 15 is a repost by Ms Rep of another post which states: "Women's Sport is dead … comment I saw on another post of these images, from HandsAcrossTheAisle …", an athlete "is 220 lbs and 6'2", he towers over the women he's been cleared to play contact sport with because he grew his hair out and took some soft-focus selfies in a Laura Ashley-style dress. Most men would be embarrassed to cheat like this …". There is a tag at the end which is illegible. Comments in response include "this is insane", "this is a man", "sick". Ms Rep responds further with: "No shame whatsoever. Has already broken one women's leg in a simple tackle too [emoji omitted]".

306. We think that this is insensitive and disrespectful, and perhaps offensive and insulting, to the athlete, whom we assume is a trans woman. But we do not think this meets the test of inciting hatred etc. We find that this is not vilification.

307. In item 16 Ms Rep states: 'I'm back [emoji omitted]. Whoever keeps getting me banned is clearly not a woman, otherwise they'd know how resilient we are. You'll never wear me down and you'll never shut me up. Those who have to silence the opposition have already lost the argument." There is a response by a third party which states: "I wondered. I also thought you might be dealing with too much shit from a certain person. Bloody lot of banning of women happening. Can't say I've seen too many men being banned". Ms Clinch states that this is referring to her, but there is no basis for this conclusion in the post itself.

308. The Original Tribunal found this post was victimisation, which we discuss at [186]-[191] above. This post was not expressly found to be vilification by the Original Tribunal, but in case there is doubt about this we make the following comments.[184] In this post Ms Rep is saying that whoever got her banned is not a woman. If this was Ms Clinch, and Ms Rep knows this, we think that this is offensive and insulting to Ms Clinch, but does not incite hatred etc. Ms Rep then says she, that is Ms Rep, is resilient, and she cannot be worn down or shut up. We think that this is not even offensive or insulting to Ms Clinch, and does not incite hatred etc. Ms Rep then says that those who have to silence the opposition have already lost the argument. Assuming this refers to Ms Clinch, we do not think

[184] Original Tribunal decision at [54], but see orders (1), (2) and (3)

saying that Ms Clinch tried to silence Ms Rep and has already lost the argument incites hatred etc. towards Ms Clinch or trans women. The response may be offensive or insulting to Ms Clinch but does not incite hatred etc. We find that this is not vilification.

309. In item 17 Ms Rep posts a statement apparently by a third party:

> *If people could stop spreading misinformation about vaginas, that would be great. The claim that any woman who has vaginal surgery has to dilate is TOTAL BULLSHIT. Literally just had surgery, can confirm my vagina is right where I left it, still open for business. I didn't have to insert a metal rod to keep it from closing up because that's not how vaginas work. It's not a wound trying to heal itself. It's a vagina.*

310. There are a number of responses on this subject, many of which of which suggest that medical procedures for trans women are not vaginas, including that they are "gross".

311. Ms Rep's post is wholly about unidentified people spreading misinformation. This might be about Ms Clinch, but there is no evidence of this. The third sentence is about the author herself. The remainder of the post is a general comment which is offensive and insulting to trans women but does not amount to inciting hatred etc. We find this is not vilification.

312. Item 18 responds to a post which states:

> *Disappointed at @ConversationUK running a vapid piece, that's contrary to lived experiences of transwomen. Oppression is related to gender presentation, not sex, ask any professional who's trans and they'll tell you they either went up or down the privilege scale post transition.*

313. Ms Rep responded: "'Oppression is related to gender presentation, not sex.' Thousands of years of oppression and all females had to do was stop wearing dresses apparently, who knew?". There are a range of further comments which refer to the author of the original post as an "idiot", "fucking moron", "fucking idiot", and "he doesn't understand sex based oppression because he's a man".

314. We discuss this post at [101]-[103]. We find this is not vilification.

315. Item 19 responds to a post apparently by a trans woman which says:

> *Have you ever seen a trans woman's penis? Estrogen changes the penis. … The feminine penis is very different from a cis man's penis. It might be a penis, but it is an extension of the female body and should be treated as one. Trans women are women too.*

316. Ms Rep replied: "Men just can't shut up about their dicks – even when they're pretending to be women [emoji omitted]". There are other responses which say "disgusting", "gross", "delusion", and "kill it with fire".

317. We think that stating that trans women "can't shut up about their dicks", and pretend to be women, is insensitive, disrespectful, offensive and insulting, but we do not think it amounts to inciting hatred etc. We find this is not vilification.

318. Item 20 is a response by Ms Rep to a post by Ms Clinch. Ms Clinch says: "I do think TERFs are analogous to MRAs [mens rights activists]. MRAs focus on being anti feminism, rather than doing anything to make society better for men or anyone else. Similarly, TERFs don't actively do much to progress feminist issues, they just actively tear down trans people." Ms Rep responded: "[emoji's omitted] #fridayfunny." Other comments state that: "All I hear is 'wah wah wah what about the penis?'"; and "we just want to retain the rights that we do already have, not let males remove our rights. Idiots".

319. In this post Ms Rep is calling a comment by Ms Clinch "funny". We do not think this is even offensive or insulting, let alone inciting hatred etc. We find that this is not vilification.

320. Item 21 is a post by Ms Rep of a banner which says: "If I have to listen to one more ugly dude in a dress explain to me what a woman is I'm going to lose my mind".

321. We think that calling trans woman an "ugly dude in a dress" is offensive and insulting, but we do not think that in this context as a general comment on an issue that it amounts to inciting hatred etc.

322. Item 22 is another response by Ms Rep to Ms Clinch. Ms Clinch stated: "Seems to be a global TERF uprising now. I reckon they'll crash and burn before the end of the year, once sunlight hits a crappy ideology its days are numbered". Ms Rep replies: "When a person who's fathered three children but claims to be female

thinks the reality of human biology is 'crappy ideology'". Other comments include: "Being #medicallyfemale hasn't removed your male privilege dickhead."; and "I don't get why he pretends to be a woman when he hates us so much [emoji omitted]".

323. Ms Rep's post is a response to a public post by Ms Clinch which refers to the views of Ms Rep as "crappy ideology". This is argumentative, but not offensive or insulting. Ms Rep responds by referring to the fact that Ms Clinch has children but "claims to be female", and by implication alleges that she also promotes "crappy ideology". The response by Ms Rep attacks Ms Clinch personally, rather than the ideology at issue. We think that this gives rise to a real question as to whether this is vilification. But this is in response to a post by Ms Clinch which raises an issue, and generally responds to that issue. On balance this is insensitive and disrespectful, offensive and insulting, but we do not think this meets the test of inciting hatred etc. If it did, we think on balance that it is reasonable, that is a rational or proportionate, discussion of transgender issues. We find that this is not vilification.

324. Item 23 is a post which is claimed to be victimisation but not vilification. It is discussed as such at [192]-[196]. This post is not expressly found to be vilification by the Original Tribunal but is caught by the orders made.[185] In case there is some doubt, we see no basis for finding it to be vilification.

325. Item 24 is a response to a new item headed "Defence tried to throw me out after a medical review of my gender". Ms Rep posted: "44 Australian soldiers have been treated for gender dysphoria, with 21 undergoing surgery to pretend to change sex – all funded by the ADF. This is your tax dollars at work". There is a further post by Ms Rep which states:

> *Mentally ill men in the military should absolutely be provided with all the help they need, but the fact that the ADF funds SRS lends credibility to the nonsense idea that human beings can actually change sex. We can't. THAT is why I'm against this.*

326. We think that stating that trans women "pretend to change sex", calling them "men," and stating that "it is a nonsense idea that human beings can actually

[185] Original Tribunal decision at [54], and orders (1), (2) and (3)

change sex", is insensitive, disrespectful, offensive and insulting, but we do not think in this context of a general comment on a news item that it amounts to inciting hatred etc. We find that this post is not vilification.

327. Item 25 was a response by Ms Rep to an article headed "I was the first trans women to access a women's residential ed program". Ms Rep said: "Now males are forcing their way into specialised clinics for women with eating disorders. Get your therapy somewhere else dudes, women need their own spaces for recovery". Other responses included: "Barging in female spaces like the entitled male he is"; "The last thing these women need is a psychotic narcissist making themselves the focus of all the attention".

328. This post is not expressly found to be vilification by the Original Tribunal but is caught by the orders made.[186] We think that calling a trans woman "male" and "dude" may be insensitive, disrespectful, offensive and insulting, but we do not think it in this context of a general comment on a news article that it amounts to inciting hatred etc. We find that this post is not vilification.

329. Item 26 is a post by Ms Rep: "A male has taken out a professional women's cycling event in Holland. Note the smug look on his face, compared to the dejected looks on the women who came second and third. They have a right to feel cheated. #peaktrans #sexnot gender #RIPfemalesport". Other comments include: "disgusting"; "creepy, hateful towards women, perverted, male entitlement. All the common signs of transgenderism".

330. We think that this is insensitive and disrespectful, offensive and insulting, to the athlete, whom we assume is a trans woman. The comment states that the other competitors "have a right to feel cheated"; it does not assert that the particular athlete cheated, or that all trans women athletes cheat. We do not think this meets the test of inciting hatred etc. We find that this is not vilification.

[186] Original Tribunal decision at [54], and orders (1), (2) and (3)

331. Item 27 is a reply to a heading "'What have you noticed about being in the world as a #woman' for a thoughtful discussion". Ms Rep responds: "Because who better to discuss womanhood than males [emoji omitted]".

332. This post is another one not expressly found to be vilification by the Original Tribunal but which is caught by the orders made.[187] We think that calling trans women "males" is insensitive, disrespectful, offensive and insulting. But we do not think that in this context this meets the test of inciting hatred etc. We find that this is not vilification.

333. Item 28 is a post by Ms Rep of a banner which states: "Tomorrow is International Women's Day. If you were born with a penis, tomorrow is not about you". A comment by someone else states: "Wow Beth, your memes bring all the delusional science and material reality denying trans activists to the yard".

334. This post implicitly states that trans women are not women. We think that this is insensitive, disrespectful, offensive and insulting, but do not think this meets the test of inciting hatred etc. We find that this is not vilification.

335. In item 29, Ms Rep responds to a headline "Meet the Greens candidate who transitioned". She states: "How to 'diversify' Australia's political landscape while maintaining an all white male line-up". Other comments include: "He looks ridiculous"; "He's such a nasty little boy".

336. We think that calling a trans woman a "male" is insensitive, disrespectful, offensive and insulting but in this context do not think this meets the test of inciting hatred etc. We find that this is not vilification.

337. Item 30 involves a response by Ms Rep to some posts by Ms Clinch. Ms Rep says: "Anyone else notice how people feel the need to label themselves 'progressive' are usually anything but? [emoji omitted]". In the posts by Ms Clinch she calls herself "Army veteran #Progressive #SocialJustice", and also "#guns are cool, fun to train with, competitively shoot & hone your skills". Comments by others include: "Captain Bully Boy is a mass of contradictions";

[187] Original Tribunal decision at [54], and orders (1), (2) and (3)

"BTW is this idiot a political candidate in Qld?"; and "And I will (hopefully other local women also) embarrass the fuck out of him at one booth at least!".

338. In this post Ms Rep implies that Ms Clinch is not in fact progressive because of her views on guns. Even if this is incorrect, we do not think this is offensive and insulting, and does not meet the test of inciting hatred etc. We find that this is not vilification.

339. In item 31, Ms Rep is responding to a press photo under which it is said: "From warship to Parliament to speak on the One Woman Project panel tonight about running for political office. Such an inspiring group of women. Thanks for having me!". The photo includes Ms Clinch, with Councillor Kara Cook, director of the One Woman Project. Ms Rep posts: "When a misogynistic male gets asked to be part of a One Woman Project panel, women need to ask why? Glad to see that's exactly what's happening in comments on OP [Original Post]. We need more strong women speaking up like this". Other comments include: "Who made this ridiculous decision?"; "misogynist makes me livid"; "hideous inside and out and wouldn't pass for a woman from a mile off".

340. These posts are directed at Ms Clinch herself, who is photographed, with two other political figures.[188] They all present as women. As we have discussed above, in the context of general discussion we think that stating that a person who is a trans woman is a "misogynistic man" is usually just insensitive, offensive and insulting. However in our view this is a different context. This is not a general discussion of issues, but a personal attack on Ms Clinch for appearing at a public event with other women. Also Ms Rep refers to comments posted in response to the picture and supports these. Further she encourages such responses. The responses include strong and abusive attacks on Ms Clinch which express serious contempt and severe ridicule of her. In this context we think that the post by Ms Rep does meet the test of inciting serious contempt and severe ridicule of Ms Clinch on the ground of her gender identity. Ms Rep calls Ms Clinch a male even though she presents as a women, which suggests she is referring to her trans identity, and the comments take a similar approach. As to whether the exception

[188] This post is discussed at exhibit R3, item 42; transcript of proceedings on 2 March 2021 at pages 45-49

in section 67A(2)(c) applies we doubt Ms Rep's comment is a discussion or debate, but even if it is, we do not think it is reasonable, that is a rational or proportionate discussion of transgender issues, in particular calling Ms Clinch a "misogynistic man". We find that this post is vilification.

341. Item 32 includes a post by Ms Clinch responding to a post which in summary says the trans community needs their allies more than ever. Ms Clinch says: "Yeah, damn right, my troll fan club are now attacking people I've been invited to speak on panels with and the organisers, TERFs are filth. #TransRightsAreHumanRights". Ms Rep responds: "Arrogant male bully tells more lies on twitter and reduces feminist concerns to 'trolling' and calls women 'filth'". One of the responses is by a person who wants their comment removed as a public post. Another says: "Men who loathe and despise women want to become women. I'll never understand it. White supremacists this racist do not want to become black. Or do they. Is it really all festering envy".

342. This post is not expressly found to be vilification by the Original Tribunal but is caught by the orders made.[189] Ms Rep is responding to a post by Ms Clinch which refers to her "troll fan club", by which she seems to mean Ms Rep and her supporters, now attacking people she has been invited to speak on panels with, which seems to be Councillor Cook referred to in item 31. She calls the attackers "filth", which is at least offensive and insulting. Ms Rep responds by calling Ms Clinch an "arrogant male bully", who lies, and inappropriately calls feminist concerns "trolling" and women "filth". Ms Clinch and Ms Rep are essentially trading insults here. We think that Ms Rep calling Ms Clinch an arrogant male bully who lies is offensive and insulting, but in this context we do not think this meets the test of inciting hatred etc. We find that this is not vilification.

343. Item 33 is a post by Ms Rep which says: "These men are obsessed with me. Get in line boys – my milkshake brings all the flaccid dicks to the yard". This relates to a post which says: "Beth Rep is a nasty ignorant piece of shit. If you get the chance return the favour. [emoji omitted]". Ms Clinch states: "I don't need to return the favour when I can accurately represent her to the ACT's HRC and

[189] Original Tribunal decision at [54], and orders (1), (2) and (3)

ACAT. Vilification laws exist to use them for a reason and I intend to use them, this little bit of misrepresentation I can let slide and focus on the bigger picture". Ms Rep replies: "Bridget is trying to sue me for 'vilification' because I call out the misogyny of the trans movement and his harassment and bullying of radical feminists".

344. Item 33 is a post which is claimed to be victimisation. It is discussed as such at [197]-[200]. This post is not expressly found to be vilification by the Original Tribunal but is caught by the orders made.[190] In case there is some doubt, we note that this is Ms Clinch, Ms Rep and others again essentially trading insults. We think that Ms Rep calling Ms Clinch a male bully is offensive and insulting, but in this context we do not think this meets the test of inciting hatred etc. We find that this is not vilification.

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Acting Presidential Member R Orr QC
For and on behalf of the Tribunal

Date(s) of hearing	2 March 2021
Counsel for the Appellant:	Dr A Greinke
Solicitors for the Appellant:	Ms A Kerr, Feminist Legal Clinic
Respondent:	In person

[190] Original Tribunal decision at [54], and orders (1), (2) and (3)