

ACT CIVIL & ADMINISTRATIVE TRIBUNAL

BOTTRILL v BAILEY (Civil Dispute) [2018] ACAT 45

XD 1023/2017

Catchwords: **CIVIL DISPUTE** – defamation – whether the material is defamatory – whether the respondent is the publisher of the material – whether the respondent is able to avail herself of any of the defences upon which she relies – whether the applicant has made out a case for an award of damages for non-economic loss – whether the respondent’s conduct subsequent to publication gives rise to liability to pay aggravated damages – quantum of damages – whether any award of damages should be reduced pursuant to section 139I of the *Civil Law (Wrongs) Act 2002*

Legislation cited: *ACT Civil and Administrative Tribunal Act 2008* ss 8, 18
Civil Law (Wrongs) Act 2002 ss 118, 120, 124, 125, 126, 127, 135, 136, 137, 138, 139, 139A, 139B, 139C, 139I
Human Rights Act 2004

Cases cited: *Amalgamated Television Services Pty Ltd v Marsden* (1998) 43 NSWLR 158
Bishop v New South Wales [2000] NSWSC 1042
Bottrill v Christian and Anor [2016] ACAT 7
Bottrill v Sunol and Anor [2017] ACAT 81
Bottrill v Van Lieshout and Ors [2015] ACAT 26
Byrne v Deane [1937] KB 81
Christian v Bottrill [2016] ACAT 104
Emmens v Pottle (1885) 16 QBD 354
Favell v Queensland Newspapers Pty Ltd [2005] HCA 52
Frawley v New South Wales [2006] NSWSC 248
Frawley v New South Wales [2007] NSWSC 1379
Haddon v Forsyth [2011] NSWSC 123
Hird v Wood (1894) 38 SJ 234
Ives v State of Western Australia [2013] WASC 277
Lee v Wilson and Mackinnon (1934) 51 CLR 276
Newspapers Ltd v World Hosts Pty Ltd (1979) 141 CLR 632
Parmiter v Coupland (1840) 151 ER 340
Piscioneri v Brisciani [2015] ACTSC 106
Prince v Malouf [2014] NSWCA 12
Scott v Sampson [1882] 8 QBD 491
Sim v Stretch [1936] 2 All ER 1237

Urbanchich v Drummoyne Municipal Council (1991) Aust Torts Reports 81-127

Visscher v Maritime Union of Australia (No 6) [2014] NSWSC 350

Weatherup v Nationwide News Pty Ltd [2016] QSC 266

Webb v Bloch (1928) 41 CLR 331

Wishart v Murray [2015] NZCA 3363

List of

Texts/Papers cited: Balkin, RP and Davis JLR, *Law of Torts*, 5th ed, 2013
 Turner, DJ ‘Internet Defamation Law and Publication by Omission: a Multi-Jurisdictional Analysis’ (2014) 37(1) *University of New South Wales Law Journal*

Tribunal: Senior Member L Donohoe SC

Date of Orders: 20 April 2018

Date of Reasons for Decision: 20 April 2018

AUSTRALIAN CAPITAL TERRITORY)
CIVIL & ADMINISTRATIVE TRIBUNAL) XD 1023/2017

BETWEEN:

DAVID BOTTRILL
Applicant

AND:

KATRINA BAILEY
Respondent

TRIBUNAL: Senior Member L Donohoe SC

DATE: 20 April 2018

ORDER

The Tribunal orders that:

1. Judgment is entered for the applicant in the amount of \$18,750 plus \$130 allowable costs.
2. The respondent, immediately upon service of these orders upon her, is to remove the Van Lieshout Material from her Facebook page.
3. The respondent, immediately upon service of these orders upon her, is to publish an apology on her Facebook page and to provide the applicant with a hard copy of the apology.
4. The respondent is to pay the sum of \$18,880 to the applicant within 28 days of this order.

.....
Senior Member L Donohoe SC

REASONS FOR DECISION

Summary of Tribunal Decision

1. The applicant brought a claim against the respondent alleging that, on or about 27 June 2017, she had published on her Facebook site a link to a YouTube video in which Teresa Van Lieshout appeared and, in her monologue made comments which contained defamatory imputations about him personally and by virtue of his involvement with the Ordo Templi Orientis (**the OTO**).
2. Accompanying her spoken words, there appeared text of some 300 words, which repeated the defamatory imputations and also contained an additional defamatory imputation. (Audio/visual and text referred to as the **Van Lieshout Material**).
3. The applicant sought an order for an award of damages, an order that the respondent permanently remove the Van Lieshout Material, that she publish an apology and that she provide a hardcopy of the apology to him.
4. The Tribunal has found that the Van Lieshout Material contained the defamatory imputations as alleged by the applicant.
5. The Tribunal has found that the respondent has not made out any of the statutory defences upon which she relied pursuant to sections 135, 136, 137, 138, 139, 139A, 139B, and 139C of the *Civil Law (Wrongs) Act 2002* (**the CLW Act**).
6. The Tribunal has found that the applicant is entitled to an award of damages for non-economic loss.
7. The Tribunal has found that the respondent's conduct subsequent to publishing the defamatory imputations aggravated the damages to which the applicant is entitled.
8. Subject to section 139I of the CLW Act, the Tribunal has assessed the applicant's damages for non-economic loss as \$25,000 being the limit of the jurisdiction of the tribunal.
9. The Tribunal has also found that the respondent was entitled mitigate the applicant's damages pursuant to section 139I of the CLW Act.

10. The Tribunal has assessed the applicant's damages for non-economic loss including aggravated damages, interest and costs at \$18,880.
11. In these reasons, a reference to the 'tribunal' refers to the ACT Civil and Administrative Tribunal generally or a previous tribunal and a reference to the 'Tribunal' refers to the current member who heard the matter.

Background

12. Sometime on or about 27 June 2017, an acquaintance of the applicant alerted him to a Facebook post by a person known as Kat A Klayton. The post contained an image of a YouTube video and some written words, namely "David Bottrill; Ordo Templi Orientis (OTO, Australia)".¹ The OTO is an organisation to which the applicant belongs.²
13. He logged on to Facebook and entered 'Kat A Klayton'.³ He located the post and clicked on to the linked YouTube video⁴ and found that, in it, a woman spoke certain words.
14. The woman was Teresa Van Lieshout. The applicant recognised her.⁵ In the YouTube video, Ms Lieshout referred to litigation in the ACAT involving the applicant, herself and others.⁶ She also said certain things about the applicant and the OTO. Some of the content of Ms Lieshout's spoken words on the YouTube video allegedly contain defamatory imputations.⁷
15. In addition to the words spoken by Ms Van Lieshout on the YouTube video, there appeared text consisting of some 300 words, which contained, *inter alia*, the words, "The former treasurer, now confessed "life member" of the satanic group...".⁸ That text also contained two other references to the word 'satanic'.

¹ Transcript of proceedings 21 February 2018 page 46, line 27; page 47, line 37

² Extract from Notice of Concern

³ Transcript of proceedings 21 February 2018 page 47, line 30

⁴ Transcript of proceedings 21 February 2018 page 48, line 34

⁵ Transcript of proceedings 21 February 2018 page 48, line 12

⁶ *Bottrill v Van Lieshout and Ors* [2015] ACAT 26

⁷ Transcript of proceedings 21 February 2018 page 25, line 1; Tribunal viewed the Van Lieshout YouTube video

⁸ Transcript of proceedings 21 February 2018 page 46, lines 28-29; Exhibit A

16. Sometime later, the applicant learned that the subject Facebook page containing the link to the Van Lieshout YouTube video belonged to the respondent. There is no dispute that the respondent has in the past and still uses the pseudonym, Kat A Klayton, as well as another, Anirtak 76 to publish material on the Internet.⁹ There is no dispute that the respondent posted the link on her Facebook page to the Van Lieshout YouTube video.

The proceedings

The applicant

17. On 3 November 2017, the applicant filed an amended civil dispute application in the Tribunal.
18. The applicant alleges that the respondent was the publisher of alleged defamatory material, which named him because, by posting the link to the Van Lieshout YouTube video on her Facebook page:
- (a) she intentionally lent her assistance to the existence of the Van Lieshout Material for the purposes of it being published;¹⁰ or
 - (b) she had “ratified or assumed responsibility”¹¹ for the alleged defamatory imputations contained in the Ms Van Lieshout Material; and
 - (c) she ought reasonably to have known that the Van Lieshout Material was defamatory. Alternatively, the applicant alleged that the respondent’s lack of knowledge in this respect was negligent.
19. The applicant alleges that persons other than himself and the respondent had viewed the Van Lieshout Material. The applicant alleges that he has been defamed by the publication by the respondent of the Van Lieshout Material. He claims damages and interest. The applicant also claims aggravated damages for the respondent’s subsequent conduct. The applicant submitted that, if he is entitled to an award of damages for non-economic loss, such damages ought not be reduced by reason of the fact that on two recent occasions he had obtained two

⁹ Respondent’s submissions/evidence

¹⁰ The applicant did not make this submission in his written submissions. However, it is implicit from the evidence upon which he relied and his oral submissions

¹¹ Applicant’s written submissions filed 3 November 2017

awards of damages in respect of the publication of material that contained the same meaning and effect as the alleged defamatory imputations alleged in this case.¹²

The respondent

20. In addition to filing her formal response on 29 November 2017, the respondent filed evidence and submissions. Further evidence and submissions were filed in December 2017 and January 2018.
21. In both her formal response and her later amended response,¹³ the respondent denied that she was the publisher. She also denied that she had been negligent and she invoked all of the defences available to her pursuant to the CLW Act. Further, she submitted that she was entitled to mitigate the applicant's damages because the applicant had, on two recent occasions, obtained two awards of damages in respect of the publication of material that contained the same meaning and effect as the alleged defamatory imputations alleged in this case.
22. The respondent also raised other matters of concern to her, which were strictly speaking, not defences, but rather, were more in the nature of evidentiary issues and procedural complaints. The distinction between defences in the conventional sense or answers to the applicant's claim and other matters sometimes became blurred.

Interlocutory matters

23. The respondent made a number of procedural and other complaints regarding, *inter alia*, the service of documents, notice, the applicant's conduct, his alleged procedural shortcomings and the management generally of this application by Tribunal members and staff. The litigation was the subject of numerous directions hearings, which, amongst other things, attempted to address these issues of concern and complaint.

¹² The applicant conceded that the defamatory imputations are the same. See transcript of proceedings 21 February 2018 page 141, line 40

¹³ Contained at page 11 of a bundle of documents, one of which bore the title 'Multiple cases of the same material matter', dated 27 November 2017

24. The respondent sought interim relief. She sought to strike out or to have the applicant's claim summarily dismissed. That application was heard on 31 January 2018 and, after hearing submissions from both parties, her interim application was dismissed by a differently constituted tribunal.
25. On 20 February 2018¹⁴, the matter was listed for a return of subpoena to which the applicant had given notice of his intention to seek orders that the subpoena be set aside. The ground for seeking the order was that the subpoena was too wide. After some examination of the documents produced the applicant withdrew his objection and the Tribunal ordered that access to the documents produced to the Tribunal be granted to the respondent.
26. On that day, the respondent raised another concern. It was that, by copying the supplementary written submissions filed by the applicant on 14 February 2018, which contained words that she maintained defamed her, the Tribunal staff had published defamatory material. The Tribunal addressed her concern thus; were her concern to amount to anything substantive, it may give rise to a cause of action, which the respondent was at liberty to bring at the appropriate time.¹⁵

The hearing

27. This application was heard on 21 February 2018.
28. Both the applicant and the respondent represented themselves.
29. Both parties had identified the issues in written material filed in the Tribunal. The parties filed evidentiary material. In the respondent's case, the evidentiary material she filed was voluminous. Both parties filed comprehensive written submissions. The issues were clear.
30. Prior to the matter proceeding, the Tribunal explained the procedure that it proposed to adopt in relation to the conduct of the proceedings.¹⁶ It was the customary procedure. It was necessary to explain this to the parties, because, although the applicant was conversant with such procedure, as he had appeared

¹⁴ The day before the hearing

¹⁵ Transcript of proceedings 20 February 2018 page 10, line 45, to page 13, line 35

¹⁶ Transcript of proceedings 20 February 2018 page 15, line 42, to page 17, line 25

for himself in previous cases of this nature in the ACAT and other jurisdictions, the respondent had not.

The evidence

31. It was also necessary to explain to the parties that, although section 8 of the *ACT Civil and Administrative Tribunal Act 2008* did not mandate compliance with the rules of evidence, the Tribunal would, nonetheless have some regard to them.¹⁷ That was because, as the Tribunal explained, some serious allegations relating to the applicant had been made in the allegedly defamatory material and because of the potential for there to be an adverse order against the respondent. For those reasons, the Tribunal explained that the evidence would need to be both probative of the issues in dispute and persuasive.¹⁸
32. At the outset, the Tribunal observed that much of that potential evidentiary material that had been filed was unsatisfactory. Where that evidence consisted of screenshots, those documents were often difficult to read. Nevertheless, many such arguably relevant documents were, in due course, admitted into evidence.
33. The respondent filed a bundle of documents in the Tribunal (the **Respondent's Filed Evidence**). It contained her defence, submissions as well as evidence. The Respondent's Filed Evidence can be described thus:
 - (a) 'Video Transcript' with Internet comments – consisting of a complete transcript of the Van Lieshout video and Internet comments on it.
 - (b) 'Multiple cases with the same material matter' – material consisting of references to cases involving the applicant, Oxford Dictionary extract and a response;
 - (c) 'Examples of public domain matter...' – consisting of fifty-one URLs together with the respondent's editorial comments regarding the content of the hyperlinked material; and

¹⁷ Relevance and hearsay – transcript of proceedings 20 February 2018 page 14, line 44, to page 15, line 40

¹⁸ See President Crebbin in *Christian v Bottrill* [2016] ACAT 104 at [39]

- (d) ‘To whom it may concern’ – consisting of sixty-six more URLs together with either the respondent’s editorial comment or reproduced extracts from material hyperlinked or what might be described as submissions, argument or comment made, presumably by the respondent (the **URL Documents**).
- (e) ‘By-laws of Ordo Templi Orientis’ - self-explanatory.

URL Documents

- 34. A URL is not a document. A URL is not evidence. The document *in* the URL address may be evidence. However, in this form submitted by the respondent, the URL Documents were inadmissible.
- 35. Moreover, to the extent that the documents described in (c) above contained the respondent’s editorial comments, the Tribunal regarded them as submissions, not evidence. To the extent that the documents described in (d) above contained extracts or summaries of publications by other authors, those were, *prima facie*, inadmissible unless the entire publication was tendered for the Tribunal’s assessment of admissibility.
- 36. At the outset, the Tribunal communicated these evidentiary difficulties to the respondent and invited her to download or arrange to have downloaded as many of the those documents identified in the URL Documents and the extract/summary documents that she relied upon to be tendered by her in her case.¹⁹
- 37. Both parties gave evidence and both parties were cross-examined.

The oral evidence

- 38. The applicant called one witness, who gave evidence in person. He was Mr Tony Lee Edwards. He was cross-examined.
- 39. The respondent called two witnesses by telephone. They were Ms Van Lieshout and Ms Tina Mason. Only Ms Van Lieshout was cross-examined.

¹⁹ Transcript of proceedings 21 February 2018 page 8

Evidence generally

40. Some remarks regarding the evidence generally in this case are warranted.
41. The respondent's presentation of her case and to a far lesser extent, the applicant's as well, was a combination of evidence and submission. In the respondent's case that was so even when she was not formally giving sworn evidence. When the respondent did give sworn evidence that too consisted of submission or argument rather than evidence in the strict sense.
42. Litigants in person are not criticised for confusing the two concepts. That is particularly the case in the ACAT where so many litigants appear without legal representation.
43. However, the distinction between the two concepts is important in a case such as this because evidence is required and submission is not evidence. Moreover, in a case such as this – as the Tribunal was at pains to explain to the parties – the need for cogent evidence, even if the rules of evidence, strictly speaking, did not apply, is very important when it comes to assessing the evidence in each party's case.
44. The manner in which the parties presented their respective cases necessitated questions from the Tribunal, which were, at times both obvious and necessarily provocative.

The YouTube video

45. The Tribunal indicated to the parties that it had viewed the YouTube video prior to the hearing in preparation for it.
46. It was also viewed as part of the hearing.²⁰ In both those ways therefore, the Tribunal had informed itself as to the contents of the Van Lieshout YouTube video.

The documentary evidence

47. Both parties tendered a number of documents in evidence. The Tribunal admitted the following documents into evidence.

²⁰ Transcript of proceedings 21 February 2018 page 25

Applicant's Evidence

Exhibit 1	Partial/summary transcript of the Van Lieshout Video
Exhibit 2	Screenshot of a Facebook page headed 'Kat A Klayton shared her post'
Exhibit 3	Three pages of screenshots posted by Kat A Klayton
Exhibit 4	Screenshot of post by Anirtak 76
Exhibit 5	Screenshot of Facebook page re ACAT procedures
Exhibit 6	Screenshot of Kat A Klayton on 'Pedohunters Anonymous Australia'
Exhibit 7	Screenshot of Pauline Hanson's One Nation Supporters group discussion page
Exhibit 8	Statutory Declaration of Mr Edwards declared 30 October 2017
Exhibit 9	Formally MFI 1A and 1B – two screenshots of Kat A Klayton's Facebook page showing the Van Lieshout YouTube video.

Respondent's Evidence

Exhibit A	Two screenshots of Kat A Klayton's Facebook page showing the Van Lieshout YouTube video
Exhibit B	Transcript of the audio Van Lieshout YouTube video; Full text as visualized appearing beneath image on the Van Lieshout Video and seven pages of the YouTube video link page contents containing the comments section
Exhibit C	Screenshot of respondent's Facebook settings
Exhibit D	Respondent's Facebook log records
Exhibit E	Google screenshot of 'David Bottrill' posts
Exhibit F	Document – Articles posted online by Kat A Klayton
Exhibit G	Three screenshots – two Kat A Klayton posts re ACAT and Australian Human Rights Commission hearing, 30 June 2017; two Kat A Klayton posts 20 May 2017 re OTO; and two Kat A Klayton post re AHCT and ACAT hearings 30 June 2017 (appears to be the same as the first post in Exhibit G)
Exhibit H	Copy OTO gnostic mass document
Exhibit I	Copy by-laws of OTO
Exhibit J	Statutory Declaration of respondent, declared 11 December 2017 attaching Statutory Declaration of Teresa Van Lieshout, declared 4 December 2017
Exhibit K	Screenshot of material posted on the Internet 'Thelema and Yezidi 'Devil Worshipers' regarding OTO

Exhibit L	Screenshot of OTO – Australian Capital Territory material posted on the Internet
Exhibit M	Screenshot of Kat A Klayton Facebook page containing four posts - timeline June 2017 – 1. “Pastors say no to radical LGBT program in public schools; not in our city; not our children”; 2. Kat A Klayton shared a link 27 June “David Bottrill; Ordo Templi Orientis (OTO, Australia) The former national treasurer and confessed ‘Life Member, of...’ Like – Comment – Share; 3. Kat A Klayton added 2 more photos 27 June – “So lots of you know.....my little safe schools theory....”; 4. Notification (remainder unable to be read).

Applicant’s contentions

48. The applicant’s contentions are contained in attachment A to his civil dispute application filed on 25 August 2017 and his amended civil dispute application filed 3 November 2017 under the heading ‘What is the dispute about?’. In both, he alleges that:

- (a) on 27 June 2017, the respondent published on Facebook materials, which defame him;
- (b) the published materials consist of text and an embedded audiovisual file of some 9.5 minutes duration;
- (c) the audiovisual file is the YouTube video;
- (d) the text has the plain meaning that the applicant is a member of a satanic group;
- (e) the spoken words contain the defamatory imputations that:
 - (i) the applicant is a member of a paedophile group, which kills and tortures victims; and
 - (ii) the applicant uses his employment to facilitate the entry into Australia of minors for paedophilia by Muslim men.
- (f) the ‘published’ materials have been viewed in the ACT; and
- (g) A notice of concern delivered to the respondent on 16 August has not been responded to before the application was filed.

Respondent's contentions

49. The respondent filed a response to the civil dispute application²¹ and, under the heading, 'disputed claim', she set out her summary of contentions. They were:

- (a) that the application should be dismissed as it has no basis in law;
- (b) that the application was misconceived and frivolous;
- (c) the application did not fit the definition of negligence;
- (d) the respondent did not owe the applicant a duty of care;²²
- (e) that the respondent re-posted a public link on her Facebook page;
- (f) that the respondent did not make any of the statements alleged in this complaint and nor had she acted as an accused in the 'Notice of Concern' issued by the applicant;
- (g) that attachment C²³ was a blatant misrepresentation of the video transcript – referring to an ACAT case in 2014; and
- (h) that the respondent was concerned about the way in which the applicant had obtained her residential address, which was a significant breach of privacy and security.

50. Included in the respondent's filed evidence at (c) is a further response, where she helpfully set out a number of points. She contended that:

- (a) she did not prepare or issue the YouTube video link. This was the action of Ms Van Lieshout;
- (b) the item in question was not printed. It is digital;
- (c) she did not create the video. She did not upload the content. She cannot change or edit the video or its description or its associated link; and
- (d) she did not formally announce or comment on the content.

51. Leaving aside contentions already dealt with in the respondent's interim application and leaving aside contentions that were moot and those that were

²¹ 29 November 2017

²² A number of her contentions were dealt with in the interim application and were not the focus of the hearing

²³ Now Exhibit 1

procedural complaints, properly construed, the remaining contentions set out in both documents amount, amongst other things, to a substantive contention by the respondent that she did not publish the Van Lieshout material. Publication in this case is the threshold issue.

52. In addition to her contentions, and in answer to the whole of applicant's claim, the respondent invoked the defences provided for in Part 9 the CLW Act. She relies upon all nine of the statutory defences.

The law to be applied

53. Defamation is a complex tort. Liability is described as strict. It exists to protect a person's reputation, an interest, which is highly prized but intangible. The tort protects a person against the loss of their right to or interest in their reputation. That is achieved by the imposition on others of a duty not to infringe that right or interest. An award of damages remedies harm to reputation.²⁴ In *Scott v Sampson*,²⁵ Cave J explained the nature of the right, which is concerned in an action for defamation:

Speaking generally the law recognizes in every man a right to have the estimation in which he stands in the opinion of others unaffected by false statements to his discredit; and if such false statements are made without lawful excuse, and damage results to the person of whom they are made, he has a right of action.

54. The range and variety of the defences available seek to strike a balance between the interest in one's reputation and a mainstay of democracy, freedom of speech.
55. It is governed by uniform defamation legislation throughout Australia and, in the Territory, it is contained in Chapter 9 of the CLW Act. The general law also governs it.²⁶ That is informed by judicial decisions. Set out below are the relevant sections of the CLW Act:

118 Tort of defamation

(1) This chapter relates to the tort of defamation at general law.

²⁴ Turner, DJ 'Internet Defamation Law and Publication by Omission: a Multi-Jurisdictional Analysis' (2014) 37(1) *University of New South Wales Law Journal*, page 5

²⁵ [1882] 8 QBD 491

²⁶ Section 118 of the CLW Act

- (2) *This chapter does not affect the operation of the general law in relation to the tort of defamation except to the extent that this Act provides otherwise (whether expressly or by necessary implication).*
- (3) *Without limiting subsection (2), the general law as it is from time to time applies for the purposes of this Act as if this chapter as in force immediately before the commencement of this section had never been enacted.*

120 Single cause of action for multiple defamatory imputations in same matter

A person has a single cause of action for defamation in relation to the publication of defamatory matter about the person even if more than 1 defamatory imputation about the person is carried by the matter.

56. Sections 124-127ff of the CLW Act deal with resolution of such disputes without recourse to litigation. Relevantly, they provide:

124 Application—div 9.3.1

- (1) *This division applies if a person (the **publisher**) publishes matter (the **matter in question**) that is, or may be, defamatory of another person (the **aggrieved person**).*
- (2) *The provisions of this division may be used instead of the provisions of any rules of court or any other law in relation to payment into court or offers of compromise.*
- (3) *Nothing in this division prevents a publisher or aggrieved person from making or accepting a settlement offer in relation to the publication of the matter in question otherwise than in accordance with the provisions of this division.*

125 Publisher may make offer to make amends

- (1) *The publisher may make an offer to make amends to the aggrieved person.*
- (2) *The offer may be—*
 - (a) *in relation to the matter in question generally; or*
 - (b) *limited to any particular defamatory imputations that the publisher accepts that the matter in question carries or may carry.*
- (3) *If 2 or more persons published the matter in question, an offer to make amends by 1 or more of them does not affect the liability of the other or others.*
- (4) *An offer to make amends is taken to have been made without prejudice, unless the offer provides otherwise.*

126 When offer to make amends may be made

- (1) *An offer to make amends cannot be made if—*

- (a) 28 days have elapsed since the publisher was given a concerns notice by the aggrieved person; or
 - (b) a defence has been served in an action brought by the aggrieved person against the publisher in relation to the matter in question.
- (2) A notice is a **concerns notice** for the purposes of this section if the notice—
- (a) is in writing; and
 - (b) informs the publisher of the defamatory imputations that the aggrieved person considers are or may be carried about the aggrieved person by the matter in question (the **imputations of concern**).
- (3) If an aggrieved person gives the publisher a concerns notice, but fails to particularise the imputations of concern adequately, the publisher may give the aggrieved person a written notice (a **further particulars notice**) requesting the aggrieved person to provide reasonable further particulars about the imputations of concern as specified in the further particulars notice.

126 When offer to make amends may be made

- (1) An offer to make amends cannot be made if—
- (a) 28 days have elapsed since the publisher was given a concerns notice by the aggrieved person; or
 - (b) a defence has been served in an action brought by the aggrieved person against the publisher in relation to the matter in question.
- (2) A notice is a **concerns notice** for the purposes of this section if the notice—
- (a) is in writing; and
 - (b) informs the publisher of the defamatory imputations that the aggrieved person considers are or may be carried about the aggrieved person by the matter in question (the **imputations of concern**).
- (3) If an aggrieved person gives the publisher a concerns notice, but fails to particularise the imputations of concern adequately, the publisher may give the aggrieved person a written notice (a **further particulars notice**) requesting the aggrieved person to provide reasonable further particulars about the imputations of concern as specified in the further particulars notice.

127 Content of offer to make amends

- (1) An offer to make amends—
- (a) must be in writing; and
 - (b) must be readily identifiable as an offer to make amends under this division; and
 - (c) if the offer is limited to any particular defamatory imputations—must state that the offer is so limited and particularise the imputations to which the offer is limited; and

- (d) *must include an offer to publish, or join in publishing, a reasonable correction of the matter in question or, if the offer is limited to any particular defamatory imputations, the imputations to which the offer is limited; and*
 - (e) *if material containing the matter has been given to someone else by the publisher or with the publisher's knowledge—must include an offer to take, or join in taking, reasonable steps to tell the other person that the matter is or may be defamatory of the aggrieved person; and*
 - (f) *must include an offer to pay the expenses reasonably incurred by the aggrieved person before the offer was made and the expenses reasonably incurred by the aggrieved person in considering the offer; and*
 - (g) *may include any other kind of offer, or particulars of any other action taken by the publisher, to redress the harm sustained by the aggrieved person because of the matter in question, including (but not limited to)—*
 - (i) *an offer to publish, or join in publishing, an apology in relation to the matter in question or, if the offer is limited to any particular defamatory imputations, the imputations to which the offer is limited; or*
 - (ii) *an offer to pay compensation for any economic or non-economic loss of the aggrieved person; or*
 - (iii) *the particulars of any correction or apology made, or action taken, before the date of the offer.*
- (2) *Without limiting subsection (1) (g) (ii), an offer to pay compensation may comprise or include 1 or more of the following:*
- (a) *an offer to pay a stated amount;*
 - (b) *an offer to pay an amount to be agreed between the publisher and the aggrieved person;*
 - (c) *an offer to pay an amount determined by an arbitrator appointed, or agreed on, by the publisher and the aggrieved person;*
 - (d) *an offer to pay an amount determined by a court.*
- (3) *If an offer to make amends is accepted, a court may, on the application of the aggrieved person or publisher, determine—*
- (a) *if the offer provides for a court to determine the amount of compensation payable under the offer—the amount of compensation to be paid under the offer; and*
 - (b) *any other question that arises about what must be done to carry out the terms of the offer.*
- (4) *The powers conferred on a court by subsection (3) are exercisable—*
- (a) *if the aggrieved person has brought proceedings against the publisher in any court for defamation in relation to the matter in question—by that court in those proceedings; and*
 - (b) *except as provided in paragraph (a)—by the Supreme Court.*

The issues

57. The issues for determination by the Tribunal are:

- (a) Is the Van Lieshout material defamatory?
- (b) Is the respondent the publisher of the Van Lieshout material?
- (c) If (b) is answered in the affirmative, is the respondent able to avail herself of any of the defences upon which she relies?
- (d) if (c) is answered in the negative, has the applicant made out a case for an award of damages for non-economic loss?
- (e) Has the respondent's conduct subsequent to publication given rise to liability to pay aggravated damages?
- (d) If (d) and (e) are answered in the affirmative, what is the quantum of damages including aggravated damages?
- (f) Should any award of damages be reduced pursuant to section 139I of the Act?

Consideration – the issues

(a) Is the Van Lieshout Material defamatory?

58. The classic definition of what constitutes defamation is that given by Lord Wensleydale (then Parke B) in *Parmiter v Coupland*.²⁷ He said that in cases of libel, it was for the judge to give a legal definition of the offence, which he defined as being:

A publication, without justification or lawful excuse, which is calculated to injure the reputation of another, by exposing him to hatred, contempt, or ridicule . . .

59. However, in *Sim v Stretch*,²⁸ Lord Atkin expressed the view that the definition in *Parmiter v Coupland* was probably too narrow and that the question was complicated by having to consider the person or class of persons whose reaction to the publication provided the relevant test. He concluded this passage in his speech:

²⁷ (1840) 6 M & W 105 at [108]; 151 ER 340 at [341]-[342]

²⁸ [1936] 2 All ER 1237 at [1240]

....after collating the opinions of many authorities I propose in the present case the test: would the words tend to lower the plaintiff in the estimation of right-thinking members of society generally?

60. This last expression of the definition has been accepted in Australia.²⁹
61. So the relevant question to be asked is this:³⁰ Would a fair-minded person of average intelligence, who was not overly suspicious or naïve, who was not straining or forcing meanings, who was not avid for scandal and who read the entirety of the publication about which the complaint is made think that the words complained of tended to lower the applicant's reputation in the eyes of the public at large?
62. The defamatory imputations were:³¹
 - (a) That the applicant is a member of a satanic group.³²
 - (b) That the applicant is a member of a paedophile group.
 - (c) That the paedophile group has victims.
 - (d) That the paedophile group is involved in criminal activity including torture and murder.
 - (e) That the applicant uses his employment to facilitate paedophilia through importation of children into Australia.³³
63. The Van Lieshout Material identifies the applicant by name and also by his association with the OTO.
64. To determine whether the imputations were conveyed, consideration must be given to whether ordinary reasonable readers would have understood the words complained of, read as a whole, as being defamatory.³⁴ Regard is had to the

²⁹ Butterworths Concise Australian legal Dictionary, 3rd ed. 2008. See also *Piscioneri v Brisciani* [2015] ACTSC 106 per Burns J at [53]

³⁰ *Amalgamated Television Services Pty Ltd v Marsden* (1998) 43 NSWLR 158; *Haddon v Forsyth* [2011] NSWSC 123

³¹ Transcript of proceedings 21 February 2018 page 5, line 1 to line 25

³² Readily ascertainable from the text accompanying the Van Lieshout video

³³ (b) to (e) defamatory imputations from the audio Van Lieshout video; Transcript of proceedings 21 February 2018 page 5, line 0 to line 20

³⁴ *Favell v Queensland Newspapers Pty Ltd* [2005] HCA 52 at [9]; *Marsden* at 164 to 167

natural and ordinary meaning of words, which includes inferences and conclusions, which the ordinary man draws from the words used.³⁵

65. There is no complexity, subtlety or ambiguity in the words used, which are set out in the imputations. The meaning of the words is readily ascertainable. When given their ordinary and natural meaning the impression³⁶ given to the ordinary person reading them could only have been that they are clearly defamatory.
66. The Tribunal is satisfied that ordinary members of society would understand that the words complained of were capable of being defamatory.

(b) Is the respondent the publisher of the Van Lieshout Material?

Introduction

67. Sometime in or around mid 2017, the respondent posted a link on her Facebook page to the Van Lieshout Material. It contained defamatory imputations. She was not the author of it and nor did she have any editorial control over the matter. *Prima facie*, all she did was post a link to the Van Lieshout video. The respondent's Facebook page, as viewed on 27 June 2017 can no longer be viewed.
68. Whether or not the respondent can be held responsible as the publisher of the Van Lieshout Material within the common law meaning of that term depends upon establishing the requisite positive act or conduct of omission on her part.
69. What is required at law, however, to establish publishing by positive act is proof of a mental element of intention to publish or assist in the publication or an inference of conduct amounting to an omission to act evidenced by notice and a failure to act.

Publication by positive act – what appeared on the respondent's Facebook page as at 27 June 2017?

70. Presumably,³⁷ the Van Lieshout YouTube video remains in the state it was when the respondent posted the link to it on her Facebook page. Immediately below the image of Ms Van Lieshout on the screen who is seen holding a piece of paper,

³⁵ *Mirror Newspapers Ltd v World Hosts Pty Ltd* (1979) 141 CLR 632 at 641; *Prince v Malouf* [2014] NSWCA 12 at [99] to [100]

³⁶ *Ives v State of Western Australia* [2013] WASC 277 at [38]

³⁷ No evidence was led to the contrary

words are seen (the **Introductory Words**)”³⁸. They accompany the screen image. They read:

David Bottrill; Ordo Templi Orientis (OTO, Australia)

71. The Introductory Words are bland. Without more, they are innocuous. Read objectively, they do not alert the browsing viewer to the fact that, behind the post, there are materials containing defamatory imputations. The Introductory Words do not therefore necessarily contain an enticement to click on the screen image of Ms Van Lieshout in order to see and hear more.
72. When the image of Ms Van Lieshout is clicked on (opened), her audio monologue commences. There is no doubt that her monologue contains defamatory imputations.
73. Significantly, at the same time the audiovisual content commences, more written words appears. The best way to describe this text is that it is hidden, in the sense that it does not appear on the Van Lieshout YouTube video site or form part of the Introductory Words. To view it, the browsing viewer must do something more (click on it).
74. This text is relatively substantial³⁹ compared to the Introductory Words. It repeats some of the audio material, but, in addition, it also contains further defamatory imputations. That defamatory imputation is that the applicant is member of a satanic group.
75. Returning to the audio part of the Van Lieshout video file. Ms Van Lieshout commences her audio monologue with the words:⁴⁰

David Bottrill, the OTO. A very weird situation I've found myself in here. I'm getting sued by a man, by Mr David Bottrill who's the national treasurer of a group believed in the public to be a pedophile group similar to the type of allegations the public makes against groups like the Freemasons...

³⁸ Exhibit A, numbering 7 words

³⁹ Some 300 words

⁴⁰ A complete transcript was tendered by the respondent without objection or submission as to its accuracy. Besides, the bracketed bold and italicised words, which is editorial comment by the respondent, that part of Exhibit B is complete and accurate transcript of the audio Van Lieshout Video file

76. Of perhaps critical significance is that the Van Lieshout audiovisual monologue *does not* use the words ‘satanic’ or ‘member of the satanic group’.
77. However, it is a different story with respect to the hidden text. Relevantly, that text commences thus:

Public Education Video, in the Public domain. The former National Treasurer, now confessed ‘Life Member’, of the Satanic group, Ordo Templi Orientis (OTO) – Grand Lodge of Australia, Mr David Bottrill, has taken legal action against 6 of us, in the ACT Civil and Administrative Tribunal... (Tribunal’s emphasis)

78. As is evident, the opening words of the hidden text do use the words “member of the satanic group.” The text then makes two more references to ‘satanic’ namely, “satanic pedophile group and satanic men.”
79. Had the Introductory Words contained the words ‘life member of the satanic group’ there is no doubt that they would, not only have carried a defamatory imputation, but it is reasonable to conclude that the objective meaning of those words would have conveyed an inducement for the browsing viewer to do something more, namely, to click on the screen image and discover more. In those circumstances, the intention to assist in publishing would have been present.
80. Because there is no evidence of precisely what appeared on the respondent’s Facebook page at the relevant time, the Tribunal must do the best it can to determine this question. It does so by a consideration of what the Tribunal viewed in the hearing and the evidence relied upon by the parties. The parties gave evidence and relied on respective versions in the form of screenshots, which were tendered.⁴¹

The applicant’s evidence and exhibit 9

81. Apparently, out of necessity, the applicant created⁴² a version that he says accurately depicts what he saw and read on the 27th of June 2017 on the

⁴¹ Exhibit 9 (applicant) and Exhibit A (respondent)

⁴² By use of the word ‘created’, the Tribunal is attempting to make sense of the evidence at Transcript of proceedings 21 February 2018 page 46 in relation to MFI A & B (later Exhibit 9) to the effect that the text therein viewed was a consequence of the applicant ‘isolating’ a page containing text and superimposing it near where he says he viewed it

respondent's Facebook page. The applicant's evidence and submissions were that, when the respondent's Facebook page was displayed on 27 June 2017, the text he saw (**Applicant's Version of the Introductory Words**) read:

David Bottrill; Ordo Templi Orientis (OTO, Australia) The former National Treasurer, now confessed 'Life Member' of the Satanic group, Ordo Templi Orientis (OTO) – Grand Lodge of Australia, Mr David Bottrill, h... . (the Tribunal's emphasis)

82. The Applicant's Version of the Introductory Words⁴³ contains more words than the Introductory Words seen by the Tribunal. This text certainly contains the word 'satanic'. It is the applicant's case that it was this text that was immediately visible on the respondent's Facebook page to the browsing viewer.
83. He submitted that the respondent's Facebook pages was analogous to a noticeboard and the words 'member of the satanic group' invited people to view the video and thus to hear the audio containing the defamatory imputations.⁴⁴
84. He submitted that the respondent's act of posting a link on Facebook, which contained the Applicant's Version of the Introductory Words, was equivalent to sitting under a sign containing defamatory imputations and pointing to it.⁴⁵ Implicit in his submission is that the words 'member of a satanic group' is the operative invitation.⁴⁶
85. The applicant relied on Exhibit 9. It comprised two documents. One was a blurry, faint with partly obliterated text screenshot (here referred to as **Part A**) containing words of the Applicant's Version of the Introductory Words. Part A could best be described, as the Tribunal understood the applicant's evidence/submission, as being a working document.
86. The other part of the tender (here referred to as **Part B**) was a clear screenshot of the Applicant's Version of the Introductory Words. It could best be described the

⁴³ See also the applicant's oral evidence and submission at transcript of proceedings 21 February 2018 page 46, line 26 and page 137 line 5 to line 18, respectively

⁴⁴ Transcript of proceedings 21 February 2018 page 139, line 5

⁴⁵ The applicant referred to 'original cases'. They are discussed below

⁴⁶ That submission may better be understood as a submission in relation to publication by omission

resulting or finished document. The applicant created both documents, because, as noted above, the respondent's Facebook page could no longer be seen.

87. There are inherent problems with documents that are not original or true copies of the original and are entirely recreated, as these were.
88. The applicant attempted to explain the provenance of the words appearing on his screenshot (Part A), which displays the text with the words 'member of a satanic group' in it. He tried to explain how that screenshot had come into existence or, in other words, how it had come to be recreated. He said:⁴⁷

I'm not saying that that is, that is a screenshot made of the item as it appears. If I could submit this one. This is of the Facebook page. Then in Facebook, if you isolate a particular entry it will appear in a screen on its own. The second material that I've just submitted to you is how Facebook appears if you print it. There's overlapping in that document because Facebook has certain controls on it which fold things in if you're printing without any expertise. That's how it appears. If you actually then click on the individual item it will appear and that's why I've tendered the item on its own. That's for clarity because of the small font.

89. Apart from the inherent difficulties of reliability involved with recreated documents, the applicant's explanation was neither informative nor persuasive. To the extent that it attempted to explain a technical act of his, it failed to do so. His oral testimony was therefore unhelpful and consequently, Exhibit 9 was of little evidentiary weight. The Tribunal is therefore, not persuaded by the applicant's evidence in this regard.
90. It seems to the Tribunal that a reasonable inference to be drawn from an analysis of the Van Lieshout YouTube video file is that the only way for the words 'member of the satanic group' could have become part of the Applicant's Version of the Introductory Words, is if they were taken from the hidden text contained in the video file itself. That appears to the Tribunal to be the probable provenance of the Applicant's Version of the Introductory Words.
91. The applicant also relied upon the evidence of Mr Tony Edwards. The same observations in relation to the probable provenance of the Applicant's Version of

⁴⁷ Transcript of proceedings 21 February 2018 page 22, line 13

the Introductory Words may be made in relation to his evidence. By reason of the Tribunal's conclusion based upon its analysis of the Van Lieshout YouTube video file, Mr Edwards' evidence contained in his Statutory Declaration⁴⁸ does not therefore bear scrutiny. It failed to prove what it purported to prove about the Applicant's Version of the Introductory Words. Tendered for that purpose, the Tribunal similarly finds his evidence unpersuasive. However, other comments are warranted.

92. Mr Edwards described himself as a very good friend of the applicant.⁴⁹ He gave oral evidence.⁵⁰ His oral evidence was, generally speaking, poor. It was vague and imprecise.⁵¹ Moreover, in his evidence in chief, Mr Edwards had to be prompted by the applicant to remember critical points. Notwithstanding prompting, with the exception of one piece of his evidence, Mr Edwards failed to address and identify the alleged defamatory imputations that he said he heard in Ms Van Lieshout's monologue.
93. However, not only was Mr Edwards' oral evidence deficient in this respect, but also, it was troubling. When asked what he saw when he logged on to Facebook and saw the Kat A Klayton link to the Van Lieshout YouTube video, the 'noticeboard', as the applicant described it, he said:

*It was a link relating to a matter involving something that was called a blasphemy case or something like that regarding a Mr Sunol.*⁵²

94. Exhibit B contains the complete transcript of the Van Lieshout monologue and also a copy of the hidden text. It was admitted without objection and the applicant did not submit that it was anything other than accurate. Neither the transcript nor the hidden text makes any mention of or a reference to a blasphemy case and neither mention or refer to Mr Sunol.

⁴⁸ Exhibit 8

⁴⁹ Transcript of proceedings 21 February 2018 page 40, line 40

⁵⁰ Transcript of proceedings 21 February 2018 page 39 to page 41

⁵¹ Transcript of proceedings 21 February 2018 page 40

⁵² Transcript of proceedings 21 February 2018 page 40, line 10

95. Mr Edwards' evidence in this respect may have been sloppy, but it is also is untrue. One regrettable inference that might be drawn from this evidence is that he simply made it up or didn't care whether his evidence was true or false.
96. He was not cross-examined on this point and the applicant did not invite Mr Edwards to correct this obviously misleading evidence. The untruth damaged his credit and tainted the Tribunal's overall impression his evidence. The Tribunal regarded his oral evidence being generally unreliable. Moreover, he simply failed to address the issue of whether or not the Applicant's Version of the Introductory Words appeared on the respondent's Facebook page on 1 July 2017.
97. The Tribunal finds that the Applicant's Version of the Introductory Words were not visible on the respondent's link to the Van Lieshout YouTube video on 27 June or 1 July 2017 unless the viewer did something – click on the link.
98. Therefore, the Tribunal is unable to identify the requisite intention on the part of the respondent to assist in publication.⁵³ It is perhaps unnecessary to consider the respondent's evidence. But, the Tribunal will consider it to determine whether or not it adds anything to a determination of this question.

The respondent's evidence – Exhibit A

99. The respondent strongly denied the applicant's version of what appeared on her Facebook page at the relevant time. She was adamant that her Facebook page displaying the link to the Van Leishout YouTube video did not contain the words 'member of a satanic group'. She led evidence of what she maintained were the words appearing on her Facebook page.⁵⁴
100. Her evidence was that, as at the relevant time, her Facebook page contained this text only⁵⁵:

*David Bottrill; Ordo Templi Orientis (OTO, Australia) **The former National Treasurer, now confessed 'Life Member of...'*** (the Tribunal's emphasis).

⁵³ *Webb v Bloch* (1928) 41 CLR 331

⁵⁴ Transcript of proceedings 21 February 2018 page 86, line 20; Exhibit A

⁵⁵ Exhibit A; Transcript of proceedings 21 February 2018 page 86, line 22; page 89; page 115, line 30

101. Objectively, these words are relevantly meaningless. The respondent offered no explanation of how or why these words came to be present on her version. She was not cross-examined on her evidence in this respect.
102. In addition, it was the respondent's submission that the applicant's Exhibit 9 had come into existence by way of tampering on his part.⁵⁶ She led no evidence in this regard.
103. Exhibit A did not assist the Tribunal in determining this issue.

Conclusion

104. The Tribunal is therefore not satisfied that the applicant has established publication by a positive act on the part of the respondent.

Publication by omission

105. The applicant submitted that this was a case of publication by omission.⁵⁷
106. In such a case, a person who is authorised to remove or amend defamatory matter, which is the work of another, and who has failed to do so is deemed to have published it.
107. The rules governing publication by omission are derived, originally, from the English Court of Appeal's decision in *Byrne v Deane*⁵⁸ in which Slessor LJ referred approvingly to *Hird v Wood*,⁵⁹ which was a case in which such peripheral involvement in publication as sitting under and pointing to a defamatory sign was held to amount to publication.⁶⁰
108. In Australia, development of the publication-by-omission line of authority commenced with Hunt J in *Urbanchich v Drummoyne Municipal Council*.⁶¹

⁵⁶ Transcript of proceedings 21 February 2018 page 21

⁵⁷ See the applicant's written submissions and the cases cited therein

⁵⁸ [1937] KB 81

⁵⁹ (1894) 38 SJ 234

⁶⁰ Turner, DJ 'Internet Defamation Law and Publication by Omission: a Multi-Jurisdictional Analysis' (2014) 37(1) *University of New South Wales Law Journal* at page 4

⁶¹ (1991) Aust Torts Reports 81-127. See also *Bishop v New South Wales* [2000] NSWSC 1042, the separate interlocutory determinations of Simpson J and Berman J in *Framley v New South Wales* [2006] NSWSC 248 at [17] and [2007] NSWSC 1379 at [6] and Beech-Jones J in *Visscher v Maritime Union of Australia (No 6)* [2014] NSWSC 350

109. *Urbanchich* concerned posters that contained a photograph of persons in Nazi uniforms in the company of Adolf Hitler that were glued to bus shelters under the control of the NSW Urban transit Authority at six locations. The face of one of the men had been circled and was identified as the plaintiff in the accompanying text, which contained further defamatory imputations.
110. *Urbanchich* was followed in *Visscher v Maritime Union of Australia (No 6)*⁶² which concerned a publication by the defendant on its website of an article. The article was brief, but it contained defamatory material about the plaintiff who had been the master of a tug caught up in cyclonic conditions. The article contained a hyperlink in the words “*READ MORE*”.
111. When the reader clicked on those words, the reader was taken to the website of the Cootamundra Herald, which had published a rather more comprehensive article about the plaintiff. It contained similarly defamatory material. The question was therefore had the defendant union, by publishing the hyperlink *READ MORE*, published the defamatory imputations contained in the article written under the masthead of the Cootamundra Herald? Beech-Jones J held that the defendant had published that material, as well as the material on its own website.
112. On the question of publication, both the applicant relied upon *Visscher*.⁶³ The applicant submitted that the respondent was the publisher of the impugned material because she had ratified or assumed responsibility for the defamatory material.

⁶² [2014] NSWSC 350 per Beech-Jones J

⁶³ The applicant also relied upon *Urbanchich*, *Wishart v Murray* [2015] NZCA 3363 and *Lee v Wilson and Mackinnon* (1934) 51 CLR 276. *Wishart* dealt with the authorities in relation to the publication by omission stream and both cited *Urbanchich* and *Visscher* with approval. *Lee* has nothing to do with the rules governing publication by omission

113. He submitted further that:

The inclusion of the written words⁶⁴ and audiovisual content on the respondent's Facebook page amounts to an adoption or promotion of the content of these – which gives rise to responsibility for its publication.”⁶⁵

114. The foundational test of publication by omission as expressed by Green LJ in *Byrne*⁶⁶, is whether:

Having regard to all of the facts of the case is the proper inference to be drawn that by not removing the defamatory matter the defendant really made himself responsible for its continued presence in the place where it had been put.

115. In *Urbanchich* Hunt J said:

In a case where the plaintiff seeks to make the defendant responsible for the publication of someone else's defamatory statement which is physically attached to the defendant's property, he must establish more than mere knowledge on the part of the defendant of the existence of that statement and the opportunity to remove it. According to the authorities, the plaintiff must establish that the defendant consented to or approved or adopted or in some way ratified the continued presence of a statement on his property so that persons other than the plaintiff may continue to read it - in other words, the plaintiff must establish in one way or another an acceptance by the defendant of a responsibility for the continued publication of that statement.

116. *Urbanchich* is therefore authority for the proposition that an entity will only be a publisher by way of omission after they have had a reasonable period, after being notified of the defamatory material, in which to remove it.

117. Failure to remove the offending material *after that time* invites the inference of approval, adoption, promotion⁶⁷ and so forth. Conversely, prior to the expiration of a reasonable period after which they have been notified, it is *not* a reasonable inference to draw that they have ratified or assumed responsibility for the material.⁶⁸

⁶⁴ It is not clear whether the applicant was referring to his version of the Introductory Words or the hidden text. The Tribunal assumes that he is referring to both

⁶⁵ Applicant's written submissions filed on 3 November 2017

⁶⁶ At page 338

⁶⁷ *Visscher* at [20]

⁶⁸ Turner, DJ 'Internet Defamation Law and Publication by Omission: a Multi-Jurisdictional Analysis' (2014) 37(1) *University of New South Wales Law Journal* at pages 3 to 5

118. That test gives rise to two implications. The first is that notice⁶⁹ is required. Such notice must inform the putative publisher of the existence on his property of the defamatory material *and* that it is required to be removed within a reasonable period of time and perhaps other relevant demands.
119. Section 126 of the CLW Act deals with offers to make amends, the purpose of which is to promote the early resolution of defamation cases without necessity of going to court. It provides for notices of concern. Such a notice is expressed as being a notice *for the purposes of* section 126. The purpose of section 126 is to set out a timeframe for when an offer to make amends may be made. The plain purpose of the amends provisions of Chapter 9 of the CLW Act is encourage early resolution of defamation cases without the need for courts.
120. Critically, section 126 is not expressed as being a notice for the purposes of anything else, let alone determining whether or not there has been publication by omission. *Notice*, for the purposes of inferring ratification of or the assumption of responsibility for defamatory imputations is not the same as a notice in relation to the amends system, although they share a similar feature.⁷⁰

Notice [of Concern]

121. Evidence of notice is therefore a fundamental element to the requisite inference. On 16 August 2017, the applicant sent a written notice to the respondent.⁷¹ It was the subject of some discussion at the hearing. The Notice was not included in any of the formal documents filed with the Tribunal. The Tribunal asked to see it.⁷² The applicant asserted that it was his understanding that the Notice was not generally submitted with the application. He explained why thus; he said that it might not be appropriate for the Tribunal to see it because it could constitute a Calderbank offer.⁷³

⁶⁹ The CLW Act does not prescribe the content of such a notice

⁷⁰ *Imputations of concern*

⁷¹ An attachment to respondent's written submissions dated 11 January 2108; Attachment A to applicant's civil dispute application dated 25 August 2018

⁷² Transcript of proceedings 21 February 2018 page 54, line 37; page 61, line 36; and page 62, line 29

⁷³ Transcript of proceedings 21 February 2018 page 62, line 42

122. However an extract of it was located in material filed in the Tribunal on 11 January 2018. It was entitled ‘Concerns Notice pursuant to the Civil Law (Wrongs) Act 2002’ (**the Notice**).
123. Relevantly, the extract of the applicant’s Notice asserted that the respondent had, on 27 June 2017 at 8.28, embedded a video on her Facebook page with the title ‘David Bottrill; Ordo Templi Orientis (OTO, Australia)’.
124. The Notice then asserted that the ‘text displayed in this item’ read⁷⁴:

The former National Treasurer, now confessed “Life Member”, of the Satanic group Ordo Templi Orientis (OTO) – Grand Lodge of Australia, Mr David Bottrill, has taken legal action against 6 of us in the ACT Civil and Administrative Tribunal;

125. In his Notice, the applicant further asserted that:

*The video consists of a monologue by Ms Van Lieshout in which she makes a number of statements which identify me by name, asserts that I am a member of a paedophile group, claims I have victims and that I use my work to facilitate the entry into Australia of others to engage in paedophilia.*⁷⁵

126. The Notice is not in evidence. The Tribunal does not therefore have any documentary evidence or indeed any oral evidence regarding the precise contents of the Notice and, in particular, what he required the respondent to do and when he required that to be done.
127. There is however, some evidence of these matters. The applicant gave evidence that his Notice required the respondent to remove the material, plainly referring to the Van Lieshout Material.⁷⁶ There is no evidence of when he required that to be done. However, having regard to other such notices issued by the applicant recent in other such cases before the ACAT⁷⁷, it is not unreasonable to infer that

⁷⁴ ‘text displayed in this item’ is a reference the hidden text in Exhibit B. That is further evidence that the applicant’s version of the Introductory Words did not contain the word ‘satanic’

⁷⁵ Note: “...to facilitate the entry into Australia of others to engage in paedophilia.” Contrast with Attachment “A” to the civil dispute application filed on 25 August 2017 “...to facilitate the entry into Australia of minors for paedophilia by Muslim men

⁷⁶ Transcript of proceedings 21 February 2018 page 61, line 36

⁷⁷ *Bottrill v Van Lieshout and Ors* [2015] ACAT 26; *Bottrill Christian and Anor* [2016] ACAT 7

he required the removal of the offending material either forthwith or within twenty-four hours.

128. The applicant contended that the Notice had not been complied with.⁷⁸ The respondent did not deny that she had received the Notice. The applicant contended that there had been no response from the respondent prior to the date of filing his application. Strictly speaking, a contention made in an application is not evidence.
129. The respondent did however, in her written submissions maintain that, after she received his Notice she had sent the applicant a further particulars notice⁷⁹, in respect of which she alleged the applicant had not complied. She appeared to be submitting that, in those circumstances, she was entitled to rely on section 126(5) of the CLW Act as a defence to the allegation of publication. That document was not tendered. Its contents are unknown.

Conclusion - evidence

130. The state of the evidence establishes that the applicant sent the respondent a Notice that set out the imputations of concern. It required her to remove the Van Lieshout Materials from her Facebook page. The respondent received the Notice. The respondent failed to comply with the demand to remove the Van Lieshout Material prior to the commencement of these proceedings.
131. Finally, there was no dispute that, prior to commencing these proceedings, besides this Notice, the applicant did not contact or attempt to contact the respondent by any means regarding the link to the Van Lieshout Material appearing on her Facebook page. But he did not have to take further action, as he had done in past cases.⁸⁰

Exhibit 4

132. This exhibit was part of the comments posted on the Van Lieshout YouTube video. It appears to have been posted on or about December 2017. It reads:

⁷⁸ Filed 25 August 2017

⁷⁹ The respondent's written submissions containing, *inter alia*, her statutory defences

⁸⁰ *Bottrill v Van Lieshout and Ors* [2015] ACAT 26; *Bottrill Christian and Anor* [2016] ACAT 7

This is crazy. I literally just shared your link. That's it I didn't even give it the thumbs up! [added an emoji of a sad face]
Have now though [added an emoji of a happy face]

133. The applicant tendered this evidence in support of his claim for aggravated damages. One may well ask why this evidence may not also be relevant to the question of publication in that one of the tests as to whether linked material is part of the publication is whether it has been ratified by or the responsibility for it has been assumed by the respondent.
134. However, because this post appeared some five months after the impugned material, it cannot therefore be part of the Van Lieshout Material. The determination of the question of whether the linked Van Lieshout Material is 'published' must be made according to the material as at 27 June 2017.
135. With that in mind, this evidence can only be relevant to the question of aggravated damages.

The applicant's alternative basis of liability

136. The applicant also submits that the respondent ought reasonably to have known that the Van Lieshout Material was defamatory or that alternatively, her lack of knowledge in this respect was negligent. This is the language of a statutory defence contained in section 139C(1) of the CLW Act. That provides a defence for the innocent dissemination of defamatory material.⁸¹
137. Liability for defamation is generally strict. It is irrelevant to determining publication that the respondent did not intend the words to injure to injure the applicant's reputation or that she failed to take reasonable care in what was published.
138. This submission is misconceived. One cannot transform a defence to the publication of defamatory matter at common law and provided for in Chapter 9 of the CLW Act into a basis for liability. The submission is logically flawed. It is bad in law.

Publication - Conclusion

⁸¹ First espoused in *Emmens v Pottle* (1885) 16 QBD 354

139. The Tribunal finds that the applicant's evidence in this regard is adequate. The Tribunal is satisfied that notice was given to the respondent, identifying the alleged defamatory imputations and demanding that they be removed from her Facebook page and that she failed to comply with that demand.
140. Only when there has been failure by a person/entity to comply with a notice, which notice, not only informs the recipient of the existence of defamatory matter on his or her property, but also demands that the recipient remove the defamatory matter within a stipulated timeframe will an inference be drawn that the recipient of the notice has ratified or assumed responsibility for the defamatory matter remaining on his or her property, thus establishing publication by omission.
141. The Tribunal is accordingly satisfied that the applicant's evidence has satisfied the test for publication by omission.

The Defences

(c) Is the respondent able to avail herself of any of the statutory defence upon which she relies?

Justification

Sect 135 - Defence of justification

142. It is a defence to the publication of defamatory matter if the defendant **proves** that the defamatory imputations carried by the matter of which the plaintiff complains are substantially true.

Consideration

143. It is no part of the applicant's case to establish that the Van Lieshout Material is untrue. He merely has to prove the publication of a statement defamatory of him. If, however, the respondent can prove that the defamatory imputations in the Van Lieshout Material is true that is a complete defence to the applicant's claim.
144. As to this defence, the respondent did not lead any evidence of truth of the defamatory imputations contained in the Van Lieshout Material. All she did was to merely submit⁸² that this defence is applicable because there are "...vast quantities of this material plus this specific video available online." Presumably,

⁸² Unnumbered page of written submissions

what the respondent means to convey by this submission is that, as well as the Van Lieshout Material, there is a great deal of like material in the public domain.⁸³

145. The evidence that the respondent wished to rely upon in this respect were the documents to be found at the one hundred and seventeen URL addresses contained in URL Documents 1 and 2. The respondent did not take up the Tribunal's invitation to download these documents or some of them to tender in evidence. Therefore, there was no evidence of this material before the Tribunal.
146. However, even if the Tribunal were to regard the respondent's submissions regarding the vast amount of like material posted on the Internet as evidence, that evidence would not assist her because it is probably not relevant to this defence, unless it was actual proof of the truth of the defamatory imputations.
147. Some of the extract and summary articles relied upon by the respondent included no more than opinions or repeated opinions. Some of the material she relied upon⁸⁴ was just gossip and Internet chatter, albeit it nasty gossip and chatter. None of this material was any evidence of the truth of the defamatory imputations.
148. The mere fact that something is repeated or replicated by some or many different people in some or many different forums using different modes of publication does not go to the truth of the material or truth the defamatory imputations that may be contained in it. A falsehood, no matter how many times it may be repeated, remains a falsehood.
149. Exhibit B was admitted without objection.
150. That exhibit contained first, the respondent's version of the transcript of the Van Lieshout video together with a copy of the hidden text. The second part of the document is entitled "YouTube link page and comments (comment section incomplete)". As the title suggests, this part of the document contains more than twenty comments from a number of people. Many of the comments refer to the OTO. Some do not. Some are simply abusive.

⁸³ Transcript of proceedings 21 February 2018 page 11, line 35; page 57, line 25; page 96, line 28; page 108, line 5; and page 109, line 10 line 18

⁸⁴ 'Comments Section', Exhibit B

151. This second part of Exhibit B was admitted without objection, even though it was potentially objectionable. It was objectionable because its contents overwhelmingly comprised hearsay and arguably irrelevant material.
152. The fact that the second part of Exhibit B as described above was admitted without objection does not mean that the Tribunal must give such evidence full weight.⁸⁵ The Tribunal will give that evidence such weight as is warranted and the Tribunal gives it no weight.
153. The respondent gave sworn evidence.⁸⁶ The tenor of her evidence was that her action in posting the link to the YouTube Van Lieshout video on her Facebook page, which she never denied doing, was, in all of the circumstances, fair, and that it was in the public interest to do so. Her evidence in that respect was not challenged in cross-examination. However, that evidence was not relevant. It did not prove that the defamatory material is true.
154. Her oral testimony did not address this defence. There is therefore no evidence, either oral or documentary to support this defence.
155. The Tribunal is not satisfied therefore that the respondent has made out a defence pursuant to section 135 of the CLW Act.

Contextual Truth

136 Defence of contextual truth

It is a defence to the publication of defamatory matter if the defendant proves that—

- (a) the matter carried, in addition to the defamatory imputations of which the plaintiff complains, 1 or more other imputations (**contextual imputations**) that are substantially true; and*
- (b) the defamatory imputations do not further harm the reputation of the plaintiff because of the substantial truth of the contextual imputations.*

Consideration

156. A fundamental difficulty facing the respondent with this defence is that she has not isolated and proved the truth of any defamatory imputation contained in the material

⁸⁵ Transcript of proceedings 21 February 2018 page 15, line 34 to page 15, line 36

⁸⁶ Transcript of proceedings 21 February 2018 page 120

that if proved would cause the Tribunal to hold that the defamatory imputations asserted by the applicant did the applicant no further harm.

157. Therefore the Tribunal is not satisfied that the respondent has made out a defence pursuant to section 136 of the CLW Act.

Absolute Privilege

137 Defence of absolute privilege

- (1) *It is a defence to the publication of defamatory matter if the defendant proves that it was published on an occasion of absolute privilege.*
- (2) *Without limiting subsection (1), matter is published on an occasion of absolute privilege if—*
 - (a) *the matter is published in the course of the proceedings of a parliamentary body, including (but not limited to)—*
 - (i) *the publication of a document by order, or under the authority, of the body; and*
 - (ii) *the publication of the debates and proceedings of the body by or under the authority of the body or any law; and*
 - (iii) *the publication of matter while giving evidence before the body; and*
 - (iv) *the publication of matter while presenting or submitting a document to the body; or*
 - (b) *the matter is published in the course of the proceedings of an Australian court or Australian tribunal, including (but not limited to)—*
 - (i) *the publication of matter in any document filed or lodged with, or otherwise submitted to, the court or tribunal (including any originating process); and*
 - (ii) *the publication of matter while giving evidence before the court or tribunal; and*
 - (iii) *the publication of matter in any judgment, order or other determination of the court or tribunal; or*
 - (c) *the matter is published on an occasion that, if published in another Australian jurisdiction, would be an occasion of absolute privilege in that jurisdiction under a provision of a law of the jurisdiction corresponding to this section.*

Consideration

158. Certain occasions are deemed to be so important for the functioning of society that those making statements upon those occasions are not liable for defamation even though the words are untrue and spoken or written maliciously.⁸⁷
159. In her written submissions, the respondent submits that this defence applies to her because first, she submits that she was researching the application of the ACT's religious vilification law when she shared the link to the Van Lieshout Material.
160. Secondly, the respondent submits that the Van Lieshout video was "...about an ACAT hearing on the same 'material matter'." Those submissions amount to no more than an explanation of how she came to post a link to the Van Lieshout video on her Facebook page.
161. Her evidence in this respect was articulated thus:

*My submission, I believe, actually makes it clear that I was following a matter that I believed was of the public interest and researching a matter of the public interest and that the piece that I am accused of publishing was a fair record of matters that are publicly recorded on ACAT from the hearing in question which was directly related to the other matter.*⁸⁸

162. The matter that the respondent was following was *Bottrill v Sunol and Anor* [2017] ACAT 81 (the **Sunol Matter**).⁸⁹ Factually, that case concerned the posting on blogs of material identifying the applicant and making derogatory comments about him. The reasons for the decision in the Sunol Matter do not identify what that material was. It may or may not have included the Van Lieshout Material. But that is immaterial for the purposes of this defence.
163. In her video, Ms Van Lieshout refers only and, indeed fleetingly, to the case in which she was a party (the **Van Lieshout Matter**).⁹⁰
164. The respondent's evidence goes on to the effect that the Van Lieshout Material was a fair record of the Van Lieshout Matter, which, in turn was "directly related"

⁸⁷ Balkin, RP and Davis JLR, *Law of Torts*, 5th ed, 2013, ch 19

⁸⁸ Transcript of proceedings 21 February 2018 page 13, line 10

⁸⁹ Transcript of proceedings 21 February 2018 page 35, line 30

⁹⁰ *Bottrill v Van Lieshout and Ors* [2015] ACAT 26

to the Sunol Matter. Whether either of those assertions is true is also immaterial. In any event, neither is true.

165. This defence applies only to materials published on “occasions of absolute privilege”. Absolute privilege is defined in section 137(2) of the Act.
166. On any view of it, the Van Leishout Material was not published *in the course of* the Van Lieshout Matter.
167. The Tribunal is therefore not satisfied that the respondent has made out a defence pursuant to section 137 of the Act.

Public Documents

138 Defence for publication of public documents

- (1) *It is a defence to the publication of defamatory matter if the defendant proves that the matter was contained in—*
 - (a) *a public document or a fair copy of a public document; or*
 - (b) *a fair summary of, or a fair extract from, a public document.*
- (2) *For the purposes of subsection (1), if a report or other document under the law of a country would be a public document except for noncompliance with a provision of that law about—*
 - (a) *the formal requirements for the content or layout of the report or document; or*
 - (b) *the time within which the report or document is prepared, or presented, submitted, tabled or laid to or before a person or body;**the report or document is a public document despite that noncompliance.*
- (3) *A defence established under subsection (1) is defeated if, and only if, the plaintiff proves that the defamatory matter was not published honestly for the information of the public or the advancement of education.*
- (4) *In this section:*

public document means—

- (a) *any report or paper published by a parliamentary body, or a record of votes, debates or other proceedings relating to a parliamentary body published by or under the authority of the body or any law; or*
- (b) *any judgment, order or other determination of a court or arbitral tribunal of any country in civil proceedings and including—*
 - (i) *any record of the court or tribunal relating to the judgment, order or determination or to its enforcement or satisfaction; and*

- (ii) *any report of the court or tribunal about its judgment, order or determination and the reasons for its judgment, order or determination; or*
- (c) *any report or other document that under the law of any country—*
 - (i) *is authorised to be published; or*
 - (ii) *is required to be presented or submitted to, tabled in, or laid before, a parliamentary body; or*
- (d) *any document issued by the government (including a local government) of a country, or by an officer, employee or agency of the government, for the information of the public; or*
- (e) *any record or other document open to inspection by the public that is kept—*
 - (i) *by an Australian jurisdiction; or*
 - (ii) *by a statutory authority of an Australian jurisdiction; or*
 - (iii) *by an Australian court; or*
 - (iv) *under legislation of an Australian jurisdiction; or*
- (f) *any other document issued, kept or published by a person, body or organisation of another Australian jurisdiction that is treated in that jurisdiction as a public document under a provision of a law of the jurisdiction corresponding to this section.*

Consideration

168. In her written submissions, the respondent merely submits that this defence is “applicable”. She does not submit why the defence is open to her.

169. As proof, the respondent refers to the Van Lieshout video as being a “fair record of matters that are recorded in ACAT from the hearing in question.”⁹¹ Presumably, in labelling the Van Lieshout video a ‘fair record’ the respondent was attempting to bring herself within the language of section 138(a) of the CLW Act.

170. Even if the respondent had managed to meet the other statutory requirements of section 138 of the CLW Act, the audio contents of the Van Lieshout video could never be described as being a fair record of what the Van Lieshout Matter was about.

⁹¹ Transcript of proceedings 21 February 2018 page 13, line 10

171. In any event, the Van Lieshout Material does not answer the description of a public document in section 138(4) of the Act.
172. The Tribunal is therefore not satisfied that the respondent has made out a defence pursuant to section 138 of the CLW Act.

Fair Report

139 Defences of fair report of proceedings of public concern

- (1) *It is a defence to the publication of defamatory matter if the defendant proves that the matter was, or was contained in, a fair report of any proceedings of public concern.*
- (2) *It is a defence to the publication of defamatory matter if the defendant proves that—*
 - (a) *the matter was, or was contained in, an earlier published report of proceedings of public concern; and*
 - (b) *the matter was, or was contained in, a fair copy of, a fair summary of, or a fair extract from, the earlier published report; and*
 - (c) *the defendant had no knowledge that would reasonably make the defendant aware that the earlier published report was not fair.*
- (3) *A defence established under subsection (1) or (2) is defeated if, and only if, the plaintiff proves that the defamatory matter was not published honestly for the information of the public or the advancement of education.*
- (4) *In this section:*

proceedings of public concern means—

 - (a) *any proceedings in public of a parliamentary body; or*
 - (b) *any proceedings in public of an international organisation of any countries or of the governments of any countries; or*
 - (c) *any proceedings in public of an international conference at which the governments of any countries are represented; or*
 - (d) *any proceedings in public of—*
 - (i) *the International Court of Justice, or any other judicial or arbitral tribunal, for the decision of any matter in dispute between nations; or*
 - (ii) *any other international judicial or arbitral tribunal; or*
 - (e) *any proceedings in public of a court or arbitral tribunal of any country; or*
 - (f) *any proceedings in public of an inquiry held under the law of any country or under the authority of the government of any country; or*
 - (g) *any proceedings in public of a local government body of any Australian jurisdiction; or*

- (h) *proceedings of a learned society, or of a committee or governing body of the society, under its relevant objects, but only to the extent that the proceedings relate to a decision or adjudication made in Australia about—*
 - (i) *a member or members of the society; or*
 - (ii) *a person subject by contract or otherwise by law to control by the society; or*
- (i) *proceedings of a sport or recreation association, or of a committee or governing body of the association, under its relevant objects, but only to the extent that the proceedings relate to a decision or adjudication made in Australia about—*
 - (i) *a member or members of the association; or*
 - (ii) *a person subject by contract or otherwise by law to control by the association; or*
- (j) *proceedings of a trade association, or of a committee or governing body of the association, under its relevant objects, but only to the extent that the proceedings relate to a decision or adjudication made in Australia about—*
 - (i) *a member or members of the association; or*
 - (ii) *a person subject by contract or otherwise by law to control by the association; or*
- (k) *any proceedings of a public meeting (with or without restriction on the people attending) of shareholders of a public company under the Corporations Act held anywhere in Australia; or*

Note **Corporations Act** is defined in the Legislation Act, dict, pt 1.

- (l) *any proceedings of a public meeting (with or without restriction on the people attending) held anywhere in Australia if the proceedings relate to a matter of public interest, including the advocacy or candidature of a person for public office; or*
 - (m) *any proceedings of an ombudsman of any country if the proceedings relate to a report of the ombudsman; or*
 - (n) *any proceedings in public of a law reform body of any country; or*
 - (o) *any other proceedings conducted by, or proceedings of, a person, body or organisation of another Australian jurisdiction that are treated in that jurisdiction as proceedings of public concern under a provision of a law of the jurisdiction corresponding to this section.*
- (5) *In this section:*
- law reform body**, of a country, means a body (however described and whether or not permanent or full-time) established by law to conduct

inquiries into, and to make recommendations on, reforming the laws of that country.

learned society means a body, wherever formed—

- (a) *the objects of which include the advancement of any art, science or religion or the advancement of learning in any field; and*
- (b) *authorised by its constitution—*
 - (i) *to exercise control over, or adjudicate on, matters connected with those objects; and*
 - (ii) *to make findings or decisions having effect, by law or custom, in any part of Australia.*

ombudsman, of a country, means a person (however described and whether or not permanent or full-time) authorised by law to investigate complaints about the actions or other conduct of any public officials or public bodies of that country.

relevant objects, of a learned society, sport or recreation association or trade association, means—

- (a) *in relation to a learned society—objects of the kind referred to in this subsection, definition of **learned society**, paragraph (a); or*
- (b) *in relation to a sport or recreation association—objects of the kind referred to in this subsection, definition of **sport or recreation association**, paragraph (a); or*
- (c) *in relation to a trade association—objects of the kind referred to in this subsection, definition of **trade association**, paragraph (a).*

sport or recreation association means a body, wherever formed—

- (a) *the objects of which include the promotion of any game, sport, or pastime to the playing of which or exercise of which the public is admitted as spectators or otherwise and the promotion or protection of the interests of people connected with the game, sport, or pastime; and*
- (b) *authorised by its constitution—*
 - (i) *to exercise control over, or adjudicate on, matters connected with the game, sport, or pastime; and*
 - (ii) *to make findings or decisions having effect, by law or custom, in any part of Australia.*

trade association means a body, wherever formed—

- (a) *the objects of which include the promotion of any calling, that is to say, a trade, business, industry or profession and the promotion or protection of the interests of people engaged in any calling; and*
- (b) *authorised by its constitution—*
 - (i) *to exercise control over, or adjudicate on, matters connected with a calling or the conduct of people engaged in the calling; and*

- (ii) *to make findings or decisions having effect, by law or custom, in any part of Australia.*

Consideration

173. The respondent merely submits that this defence is applicable. Yet again, she does not submit how that is so and she does not offer any evidence to support it.
174. Ms Van Lieshout certainly commenced her monologue in her video by referring to the Van Lieshout Matter. That was a proceeding in public of an arbitral tribunal.
175. However, Ms Van Lieshout's videoed monologue very soon degenerated into rambling abuse as she digressed and she went on to say the words that are the subject of the alleged defamatory imputations. Her words regarding the applicant and the other words that she spoke, which were also quite unrelated to the case in which she had been a party, made up the substantial content of the video and had were not relevantly related to the Van Lieshout Matter.
176. On an objective construction of what was said by her in her video, the substantial content of it could not therefore be construed as containing a fair report (copy, summary or extract) of that case as a 'proceeding[s] of public concern.'
177. The Tribunal is therefore not satisfied that the respondent has made out a defence pursuant to section 139 of the CLW Act.

Qualified Privilege

139A - Defence of qualified privilege for provision of certain information

139A *Defence of qualified privilege for provision of certain information*

- (1) *There is a defence of qualified privilege for the publication of defamatory matter to a person (the **recipient**) if the defendant proves that—*
- (a) *the recipient has an interest or apparent interest in having information on some subject; and*
 - (b) *the matter is published to the recipient in the course of giving to the recipient information on that subject; and*
 - (c) *the conduct of the defendant in publishing that matter is reasonable in the circumstances.*

- (2) *For the purposes of subsection (1), a recipient has an apparent interest in having information on some subject if, and only if, at the time of the publication in question, the defendant believes, on reasonable grounds, that the recipient has that interest.*
- (3) *In determining for the purposes of subsection (1) whether the conduct of the defendant in publishing matter about a person is reasonable in the circumstances, a court may take into account—*
 - (a) *the extent to which the matter published is of public interest; and*
 - (b) *the extent to which the matter published relates to the performance of the public functions or activities of the person; and*
 - (c) *the seriousness of any defamatory imputation carried by the matter published; and*
 - (d) *the extent to which the matter published distinguishes between suspicions, allegations and proven facts; and*
 - (e) *whether it was in the public interest in the circumstances for the matter published to be published expeditiously; and*
 - (f) *the nature of the business environment in which the defendant operates; and*
 - (g) *the sources of the information in the matter published and the integrity of those sources; and*
 - (h) *whether the matter published contained the substance of the person's side of the story and, if not, whether a reasonable attempt was made by the defendant to obtain and publish a response from the person; and*
 - (i) *any other steps taken to verify the information in the matter published; and*
 - (j) *any other circumstances that the court considers relevant.*
- (4) *For the avoidance of doubt, a defence of qualified privilege under subsection (1) is defeated if the plaintiff proves that the publication of the defamatory matter was actuated by malice.*
- (5) *However, a defence of qualified privilege under subsection (1) is not defeated merely because the defamatory matter was published for reward.*

Consideration

178. The respondent submits that the defence provided for in section 139A of the CLW Act is open to her because of "...free speech around social and political issues is everyone's concern and right."

Free Speech

179. Although the notion of free speech was not expressly articulated in the respondent's responses/defence she, throughout the hearing, referred to free speech as if it was

notoriously understood in Australian society as an absolute right unfettered by the individual's statutory right of and interest in his or her reputation.

180. As Presidential Member Symons correctly said in *Bottrill v Christian and Anor*:⁹²

Rights, including to freedom of expression, are rarely absolute. They carry with them special duties and responsibilities. Laws have placed limits on freedom of expression.

181. In so concluding, the learned Presidential Member referred to the relevant provisions of the *Human Rights Act 2004* dealing with privacy and reputation and interpreted those provisions with the relevant provisions dealing with defamation contained in the Act.⁹³ The Tribunal adopts her reasoning and conclusions.

182. Section 139A provides a defence of qualified privilege for the provision of certain, but not all, information.

183. The respondent must prove a number of elements. The statutory language is conjunctive. She must therefore prove all, not merely some, of those elements. Conversely, failure to prove one element is fatal.

184. The respondent fails to establish section 139A(1)(c), (3)(a), (b), and (d).

185. The Tribunal is therefore not satisfied that the respondent has made out a defence pursuant to section 139A of the CLW Act.

Honest Opinion

139B - Defences of honest opinion

139B Defences of honest opinion

- (1) *It is a defence to the publication of defamatory matter if the defendant proves that—*
 - (a) *the matter was an expression of opinion of the defendant rather than a statement of fact; and*
 - (b) *the opinion related to a matter of public interest; and*
 - (c) *the opinion is based on proper material.*
- (2) *It is a defence to the publication of defamatory matter if the defendant proves that—*

⁹² [2016] ACAT 7 at [110]

⁹³ Ibid at [107] to [112]

- (a) *the matter was an expression of opinion of an employee or agent of the defendant rather than a statement of fact; and*
- (b) *the opinion related to a matter of public interest; and*
- (c) *the opinion is based on proper material.*
- (3) *It is a defence to the publication of defamatory matter if the defendant proves that—*
 - (a) *the matter was an expression of opinion of a person (the **commentator**), other than the defendant or an employee or agent of the defendant, rather than a statement of fact; and*
 - (b) *the opinion related to a matter of public interest; and*
 - (c) *the opinion is based on proper material.*
- (4) *A defence established under this section is defeated if, and only if, the plaintiff proves that—*
 - (a) *in the case of a defence under subsection (1)—the opinion was not honestly held by the defendant at the time the defamatory matter was published; or*
 - (b) *in the case of a defence under subsection (2)—the defendant did not believe that the opinion was honestly held by the employee or agent at the time the defamatory matter was published; or*
 - (c) *in the case of a defence under subsection (3)—the defendant had reasonable grounds to believe that the opinion was not honestly held by the commentator at the time the defamatory matter was published.*
- (5) *For the purposes of this section, an opinion is based on **proper material** if it is based on material that—*
 - (a) *is substantially true; or*
 - (b) *was published on an occasion of absolute or qualified privilege (whether under this Act or at general law); or*
 - (c) *was published on an occasion that attracted the protection of—*
 - (i) *a defence under this section, section 138 (Defence for publication of public documents) or section 139 (Defences of fair report of proceedings of public concern); or*
 - (ii) *the defence of fair comment at general law.*
- (6) *An opinion does not cease to be based on proper material only because some of the material on which it is based is not proper matter if the opinion might reasonably be based on such of the material as is proper material.*

Consideration

186. The public interest in free discourse about matters of concern to all is regarded as outweighing the need to protect a person's reputation. Provided the defamatory

statement that is made comes within certain limits, the person making the defamatory statement may avail him or herself of the defence.⁹⁴

187. The respondent submits simply that a defence pursuant to section 139B of the CLW Act is applicable in her case. The relevant provisions are section 139B(1) and (3). Again, she does not submit why the defence is open to her. This defence protects opinions in certain circumstances.
188. The provision refers to the concept of ‘public interest’. The respondent emphasised and placed some importance upon the concept at various times during the hearing,⁹⁵ but, judging from her language it is likely that she did not fully understand the term.
189. ‘Public interest’ is generally understood to be an interest amongst citizens in the body politic, as well as the public wellbeing. It is not generally understood to be a sectional or factional interest in something held by only some or few members of the public, for example, a view that most politicians are corrupt or that many politicians and courts protect paedophiles. While undoubtedly some members of the public might hold such views, they are hardly mainstream views, so as to render them of public interest.
190. Upon a reasonable construction of the overwhelming substance of the Van Lieshout Material, it could not be said that she was expressing anything other than her opinion. Her material was not a statement of fact.
191. The respondent must then establish that opinion expressed in the Van Lieshout Material is an opinion related to a matter of public interest. Besides pointing to a vast numbers of references to like material available on the Internet of questionable or no evidentiary weight, the respondent led no evidence that the opinions expressed in the Van Lieshout Material was objectively a matter of public interest. Ms Van Lieshout’s opinions can hardly be regarded as being in the public interest, as that term is generally understood. Her opinion is irrelevant.

⁹⁴ Balkin, RP and Davis JLR, *Law of Torts*, 5th ed, 2013, ch 19

⁹⁵ Transcript of proceedings 21 February 2018 page 13, line 10; page 35, line 39; page 63, line 37; and page 120, line 4

192. Section 139B(5) defines proper material. The respondent led no evidence that the opinion was based on proper material. Nor did the respondent make any meaningful submission in that regard.
193. The Tribunal is therefore not satisfied that the respondent has made out a defence pursuant to section 139B of the CLW Act.

Innocent Dissemination

139C - Defence of innocent dissemination

139C Defence of innocent dissemination

- (1) *It is a defence to the publication of defamatory matter if the defendant proves that—*
 - (a) *the defendant published the matter merely in the capacity, or as an employee or agent, of a subordinate distributor; and*
 - (b) *the defendant neither knew, nor ought reasonably to have known, that the matter was defamatory; and*
 - (c) *the defendant's lack of knowledge was not due to any negligence on the part of the defendant.*
- (2) *For the purposes of subsection (1), a person is a **subordinate distributor** of defamatory matter if the person—*
 - (a) *was not the first or primary distributor of the matter; and*
 - (b) *was not the author or originator of the matter; and*
 - (c) *did not have any capacity to exercise editorial control over the content of the matter (or over the publication of the matter) before it was first published.*
- (3) *Without limiting subsection (2) (a), a person is not the first or primary distributor of matter merely because the person was involved in the publication of the matter in the capacity of—*
 - (a) *a bookseller, newsagent or newsvendor; or*
 - (b) *a librarian; or*
 - (c) *a wholesaler or retailer of the matter; or*
 - (d) *a provider of postal or similar services by means of which the matter is published; or*
 - (e) *a broadcaster of a live program (whether on television, radio or otherwise) containing the matter in circumstances in which the broadcaster has no effective control over the person who makes the statements that comprise the matter; or*
 - (f) *a provider of services consisting of—*
 - (i) *the processing, copying, distributing or selling of any electronic medium in or on which the matter is recorded; or*

- (ii) *the operation of, or the provision of any equipment, system or service, by means of which the matter is retrieved, copied, distributed or made available in electronic form; or*
- (g) *an operator of, or a provider of access to, a communications system by means of which the matter is transmitted, or made available, by another person over whom the operator or provider has no effective control; or*
- (h) *a person who, on the instructions or at the direction of another person, prints or produces, reprints or reproduces or distributes the matter for or on behalf of that other person.*

Consideration

194. The respondent relies upon the defence contained in section 139C of the CLW Act. Again, she submits that the defence of innocent dissemination is applicable to her. She submits that she is a subordinate publisher within the meaning of section 139C(2)(a) to (c).
195. The Tribunal accepts that she was not the primary distributor of the defamatory material and nor was she the author of it. The Tribunal also accepts her evidence⁹⁶ and submissions that she had no editorial control over the content. She was therefore, a subordinate distributor within the meaning of section 139C of the CLW Act.
196. In order to avail herself of this defence, the respondent must also prove that she did not know or could not reasonably have known that the Van Lieshout Material was defamatory and that her lack of knowledge was not due to any negligence on her part.⁹⁷
197. Subsection (1)(b) has two elements; a subjective and an objective element. As to the first element, as a matter of fact, did she know that the Van Lieshout Material was defamatory when she published it? In her written submissions filed on 29 November 2017 and at the hearing on 21 February 2018, the respondent emphatically asserted that she did not *consider* the Van Lieshout Material to be defamatory.

⁹⁶ Given orally throughout the hearing and not merely when she was giving sworn evidence

⁹⁷ The *Emmens*' defence

198. Arguably, that is some evidence of her subjective state of mind at those times and goes some way to establishing that, when she posted a link to the Van Lieshout video on her Facebook site, she did not know or did not appreciate that the material was defamatory.
199. However, the next question in subsection (b) is whether or not she ought reasonably have known that the material was defamatory. That is an objective question. Having regard to the test for defamatory matter namely, something that would lower the estimation of the applicant in the minds of right-thinking people, the answer must be that the words spoken by Ms Lieshout and the accompanying text contained in the Van Lieshout Material were plainly defamatory. If she subjectively did not know that the Van Lieshout Material was defamatory when she posted the link to it on her Facebook page, then a reasonable man (person) ought to have known, either then or, at the latest, when she received the applicant's Notice of Concern.
200. Negligence is defined in the Act as being a failure to exercise due care and skill. By failing to appreciate that the Van Lieshout Material was defamatory, when it plainly was, the respondent failed to exercise reasonable care in her decision to post a link to the Van Lieshout Material on her Facebook page.
201. The Tribunal is therefore not satisfied that the respondent has made out a defence pursuant to section 139C of the CLW Act.

Triviality

Sect 139D - Defence of triviality

139D Defence of triviality

It is a defence to the publication of defamatory matter if the defendant proves that the circumstances of publication were such that the plaintiff was unlikely to sustain any harm.

202. It is a defence to the publication of defamatory matter if the defendant proves that the circumstances of publication were such that the plaintiff was unlikely to sustain any harm.

Consideration

203. The respondent submits only that this defence is open to her. Again, she submits that it is so because there is “vast quantities of this material plus this specific video available online.” Yet again this is a reference to her oft-repeated submission that there is a great deal of like material already in the public domain. That is, as the Tribunal has pointed out, irrelevant. Just as repetition of a falsehood does not make a falsehood the truth, nor does repetition lessen the harm.

204. It is difficult to imagine more egregious defamatory imputations.

205. The Tribunal is therefore not satisfied that the respondent has made out a defence pursuant to section 139D of the CLW Act.

(d) Has the applicant made out his case for an award of damages for non-economic loss?

Consideration

206. The applicant need only prove publication to be entitled to an award of damages for non-economic loss.

207. The applicant led evidence as to the audience. Mr Edwards gave evidence of having viewed the Van Lieshout Material.⁹⁸ While his evidence of what he in fact saw was unsatisfactory in a number of respects, inasmuch as it is tendered for the purposes of proving that he saw and heard something containing defamatory matter, it is accepted on that basis.

208. He was cross-examined. The thrust of that attack was that he could not have viewed the Van Lieshout Material because the respondent’s Facebook page was set to private. The respondent spent some time developing this argument. Again, she made some very serious allegations. She asserted that the evidence of viewing the Van Lieshout Material was false and that Mr Edwards and the applicant had perjured themselves.

⁹⁸ Both in his oral testimony and Exhibit 8

209. The Tribunal rejects those allegations. There was no credible evidence to support them. The evidence of Mr Edwards in this respect was not impeached and his evidence of having viewed the Van Lieshout Video is accepted.

210. The Tribunal is satisfied that the applicant has made out an entitlement for an award of damages for non-economic loss.

(e) Has the respondent's conduct subsequent to publication given rise to liability to pay aggravated damages?

Consideration

The aggravation

211. The applicant filed written submissions, gave oral evidence⁹⁹, tendered evidence¹⁰⁰ and made oral submissions in support of his claim that he was entitled to aggravated damages.

212. Aggravated damages may be awarded when the conduct of the respondent between the publication of the defamatory material and trial has been such as to increase the hurt suffered by the applicant. While such conduct need not be malicious, to justify such an award, it must be unjustifiable, improper or lacking in *bona fides*.¹⁰¹

213. In *Visscher*, Beech-Jones J noted that Mr Visscher's solicitors had sent a letter of complaint to the MUA and the newspaper seeking the removal of the article from their respective websites and the placement on the website of an apology. He noted that neither was forthcoming. His Honour said that the failure to apologise was, of itself not a justification for an award of aggravated damages. However, he said that the continued maintenance of the articles on the respective websites and a refusal to give even a limited apology to Mr Visscher after a reasonable time had elapsed after receipt of the letter of complaint from his solicitors amounted to unjustifiable conduct.

⁹⁹ Transcript of proceedings 21 February 2018 page 40 to page 74

¹⁰⁰ Exhibits 2, 3, 4, 5, 6 and 7

¹⁰¹ *Visscher v Maritime Union of Australia* (No 6) [2014] NSWLR at [251] and the cases cited therein; *Weatherup v Nationwide News Pty Ltd* [2016] QSC 266 per North J at [37] to [42]

214. In his written submissions, the applicant set out the manner in which he alleged that the respondent had engaged in post publication conduct that was unjustifiable:

- (a) She had displayed elements of the original materials complained of – republication of the material complained of and further defaming the applicant.
- (b) Making personal insults.
- (c) Alleging perjury, falsification of evidence and other offences in written submissions.
- (d) Providing instructions (directing viewers to the Van Lieshout YouTube site.
- (e) Endorsing the Van Lieshout Video.

215. Also in his written submissions the applicant alleged his damages were aggravated by the respondent's conduct in persisting in her actions by:

- (a) referring to his application as an abuse of process and the applicant as a vexatious applicant - interim application;
- (b) trivializing and misrepresent the complaint; and
- (c) suggesting in written submission that he had a bad reputation.

216. In *Weatherup*, North J said:

Conduct which is improper, unjustifiable or lacks bona fides may affect reputation. In such a case the damage "continues until it is caused to cease" by an avowal by the defendant that the defamation is untrue or a judgment in the plaintiff's favour. Accordingly, damages may be increased by an unjustifiable failure to apologise or retract, by unjustifiable persistence in making untrue allegations or by the conduct of the defence of proceedings in a manner which is unjustifiable, improper or lacking in bona fides. The robust but reasonable pursuit of a bona fide defence where there is evidence to support it does not permit an award of aggravated damages. Pleading and persisting in a defence of truth without a proper basis does.

217. Much of the alleged aggravating conduct relates to the manner, in which the respondent conducted her case, some of which also spilt over into social media.¹⁰²
218. Dealing first with the social media conduct, on the face of the documents tendered (screenshots), the Tribunal was unable to identify one way or another whether there was any evidence of instances of republishing of the defamatory materials, either by directing viewers to the YouTube link or by republishing express references to the defamatory imputations contained in the Van Lieshout Material.
219. The applicant's oral evidence and submissions did not relevantly improve the quality of his evidence in that regard. His various references to links under the heading "Audiovisual File" in his supplementary written submissions amounted to evidence that such links may have been posted but were now not able to be viewed. Without more, that evidence is not persuasive.
220. Nor did the Tribunal give much weight to the post on the Pauline Hanson's One Nation discussion site.¹⁰³ Except for her comment on free speech, it was not entirely clear what point the respondent was making. True it was that the video was mentioned, but in vague terms. The applicant was not mentioned by name, nor was the OTO and nor was Ms Van Lieshout.
221. The respondent's post on the 'Pedohunters Anonymous' site is more problematic because there the OTO was mentioned. That exhibit,¹⁰⁴ revealed that the respondent posted extracts of what someone else had said about the OTO. Those comments were, nevertheless, ugly and serious allegations regarding an organization with which the applicant was associated.
222. The respondent's comment that she repeated more than once on social media to the effect that all she had done was post a link to Facebook may be justified in one sense and yet, not in another. Certainly, the mere physical act of posting a link is all the respondent thought the mischief amounted to.

¹⁰² Exhibits 2, 3, 4, 5, 6, and 7

¹⁰³ Exhibit 7

¹⁰⁴ Exhibit 6

223. However, in not appreciating the gravity or at least the potential gravity of her actions after publication of the Van Lieshout Material in June 2017, the respondent's conduct might arguably be seen as trivializing the applicant's complaint. So too her comments about *just sharing a link* may be seen as trivializing the defamation or, indeed, as the applicant submitted, misrepresenting it.
224. The respondent did endorse the Van Lieshout video on social media and she did use abusive language in one post.¹⁰⁵ As to the abusive language two things may be said; first and of least significance, the language she used¹⁰⁶ might perhaps not be generally regarded these days as particularly off colour language, but more importantly, secondly, in the minds of ordinary and reasonable people, those words would not tend to injure the applicant's reputation.
225. True it is that the respondent did not offer an apology or offer redress.¹⁰⁷ As to her conduct of the proceedings, although the respondent relied on the defence of the truth, she did not pursue it with any vigour at the hearing.
226. Her conduct of the proceedings generally might be said to have been robust, bearing in mind her interlocutory application to strike out the application on a number of bases, chief amongst them being that the application disclosed no cause of action and was an abuse of process. However, on any view of that interim application, these and the other bases relied upon by the respondent were untenable and, understood in that sense, they were not brought *bona fide*.
227. These factors all played some part in aggravating the applicant's damages. The applicant gave evidence regarding the effect that these aggravating factors had on him. He said that the aggravating factors had increased his hurt ten times more.¹⁰⁸
228. The applicant gave evidence and made submissions both written and oral.¹⁰⁹

¹⁰⁵ Exhibits 4 and 5, respectively

¹⁰⁶ "Piece of shite"

¹⁰⁷ But see the Notice of Concern where neither were sought

¹⁰⁸ Transcript of proceedings 21 February 2018 page 54, line 39

¹⁰⁹ Transcript of proceedings 21 February 2018 page 17, line 22; page 28, line 22; page 62, line 32; and page 139, line 2

229. He was cross-examined by the respondent. The thrust of her cross-examination was to the effect that, because there existed such a vast quantity of arguably like material on the Internet regarding, not only the applicant, but also the OTO and because the applicant had not taken steps to have that material removed, an inference ought to be drawn that he had suffered no hurt and certainly that his hurt had not been aggravated.¹¹⁰
230. The applicant's evidence was that he had tried to have the offensive material removed but that he was unable to do so. Moreover, the tenor of the applicant's evidence in relation to damages generally and to aggravated damages was that this material and the grapevine effect of republication of the defamatory material now circulating on the Internet kept the defamatory matter alive and reinvigorated the hurt. The applicant was not challenged in cross-examination.
231. Although he did not invite the Tribunal to do so, the Tribunal comfortably draws the inference from his evidence that the applicant finds himself in the difficult and analogous position of having to try to put out multiple brush fires and that, in this regard, he was fighting a losing battle.
232. The applicant gave evidence and made submissions regarding the enquiries that the respondent caused to be made about him at his place of employment.
233. His evidence was to the effect that this had been extremely distressing and hurtful.¹¹¹ The Tribunal accepts his evidence and his submissions as to the real and potential harm done to him as a consequence of these enquiries. Those consequences are twofold. First they exacerbate the hurt and stress he has suffered as a consequence of publishing the defamatory imputations and secondly, given the nature of the enquiries and relationship of those enquiries to the very serious defamatory imputations that the applicant is a paedophile that he uses his employment for paedophilia.
234. While there were multiple aggravating factors, the substantial aggravating factor, in the Tribunal's view, was the making of enquiries of the applicant to the

¹¹⁰ Transcript of proceedings 21 February 2018 page 57, line 25

¹¹¹ Transcript of proceedings 21 February 2018 page 53, line 5; page 54, line 5; page 139, line 35; and page 140, line 5

applicant's workplace.¹¹² The applicant gave evidence about how much this had hurt him and the Tribunal accepts his evidence. He was genuinely distressed.

235. An award of damages in excess of the statutory cap is permitted, if the circumstances of publication are such to warrant an award of aggravated damages.¹¹³ However such an award is not assessed as a separate category of damages.¹¹⁴
236. Circumstances of aggravation may justify the Tribunal assessing compensatory damages at a higher figure than that which would have been appropriate without those aggravating factors.¹¹⁵
237. The Tribunal is satisfied that there are substantial aggravating factors warranting an increase in the applicant's award for non-economic loss.

What is the quantum of the applicant's damages including aggravated damages?

238. The applicant submitted in writing that he was entitled to an award of damages for non-economic loss pursuant to thirteen heads of damage. For the most part these heads of damages were generic, having been taken directly from a textbook. In that form, they were not particularly helpful.

Evidence of hurt

239. The applicant gave evidence of having been extremely hurt by the Van Lieshout Material.¹¹⁶ He gave evidence of having been very distressed on learning of it.¹¹⁷ His evidence was not challenged. Mr Edwards gave evidence of having observed the applicant's hurt and distress and stress.¹¹⁸
240. Both the applicant and Mr Edwards gave evidence that the applicant's hurt, distress and stress had continued since he learned of the publication of the Van

¹¹² Transcript of proceedings 21 February 2018 page 26, line 35; page 52, line 30; page 52, line 40; page 53, line 15; page 53, line 26; page 53, line 32; page 54, line 12; page 136, line 40; page 139, line 22; page 139, line 38; and page 140, line 20

¹¹³ Section 139F of the CLW Act

¹¹⁴ *Weatherup* per North J at [41]

¹¹⁵ Ibid

¹¹⁶ Transcript of proceedings 21 February 2018 page 52, line 15

¹¹⁷ Transcript of proceedings 21 February 2018 page 40; page 53, line 26

¹¹⁸ Transcript of proceedings 21 February 2018 page 41

Lieshout Material. The Tribunal accepts their evidence in this respect. The Tribunal finds the evidence in this regard to be persuasive.

241. The applicant submitted that there was both a wide and a narrow audience on Facebook who have viewed or may have viewed the Van Lieshout Material.¹¹⁹
242. He suggested that the respondent had as many as five hundred Facebook friends and followers.¹²⁰ The respondent did not concede this number.¹²¹
243. The applicant submitted that there was a narrow and actual group of Facebook friends and followers of the respondent in Canberra and Queanbeyan numbering some twenty persons.¹²²
244. However, he submitted that there was a Facebook or entire computer accessible public that could potentially view the matter and they numbered a billion people.¹²³ He submitted however, that the real number of the narrower group were the respondent's friends or followers on Facebook, who he said were five hundred, a number not conceded by the respondent.
245. There was no evidence of publication beyond Facebook. There is no other relevant evidence. The applicant need only prove that one person viewed the matter. He did that. But in assessing damages the Tribunal must consider the likely number of recipients of the matter. This has always been and remains an inexact science. Not every email notification of a posting on Facebook is opened or read by Facebook friends or followers, just as not every article in every newspaper is read by all subscribers.
246. Nonetheless, the Tribunal must make the best estimate it can on the evidence. While the respondent did not concede that the number of her Facebook friends and followers was in the vicinity of five hundred, nor did she expressly deny that it was so.

¹¹⁹ Transcript of proceedings 21 February 2018 page 138

¹²⁰ Transcript of proceedings 21 February 2018 page 53, line 45

¹²¹ Transcript of proceedings 21 February 2018 page 130 to page 133

¹²² Transcript of proceedings 21 February 2018 page 54, line 5

¹²³ Transcript of proceedings 21 February 2018 page 138, line 22

247. The evidence of audience is not strong. Nevertheless, the Tribunal can assess it as being as few as twenty and as many as five hundred. That is an extremely wide range. But in any event, realistically, it is a relatively small audience.
248. Against that, there was evidence that about twenty of the audience resided in Canberra or Queanbeyan. That is important because this is the geographical area where the applicant lives and works and where he would hold his reputation very dear.
249. There can be no doubt that the defamatory imputations fall to be considered at the most grievous end of the scale. That is a relevant consideration in relation to the amount to be awarded.
250. Section 18 of the *ACT Civil and Administrative Tribunal Act 2008* prescribes a jurisdictional limit in civil disputes of no more than \$25,000. The Tribunal is satisfied that, but for section 139I of the CLW Act, an award of the maximum allowable damages inclusive of aggravated damages is warranted.

(f) Should any award of damages be reduced pursuant to section 139I of the Act?

251. In his written and oral submissions, the applicant submitted that any such reduction should be minimal, if not nil because the respondent had neither apologized and nor had she published any correction. However, that is not an end of the consideration.
252. Section 139I(c) of the CLW Act provides that evidence is admissible on behalf of the respondent on the question of mitigation of damages where the aggrieved person has already recovered damages for defamation in relation any other publication of matter having the same meaning or effect as the defamatory matter.
253. In *Van Lieshout and Ors* and *Christian and Anor*¹²⁴, the same or substantially the same defamatory imputations were dealt with and an award of damages for non-economic loss at the maximum amount then awardable was made in each case. In each case, the applicant was awarded the maximum amount then prescribed by the *ACT Civil and Administrative Tribunal Act 2008*.

¹²⁴ [2016] ACAT 7

254. Therefore, in considering whether to apply this provision in reduction of an award of damages, the Tribunal has to consider the fact that the applicant has successfully sued other respondents over substantially the same defamatory material also published on the Internet and has been awarded the maximum damages.
255. The applicant submits that section 139I should not be applied in his case. He said that where there had been a lapse of time and the defamatory matter was published to essentially a different audience, fresh actions on the same defamatory matter¹²⁵ were permitted.
256. In the Tribunal's view, that submission fails, because it does not take account of the fact that in both the earlier ACAT matters, the material was published to an audience that could have included a local audience and the fact that the two earlier ACAT awards in 2015 and 2016 were close in time to this case.¹²⁶ The Tribunal is not persuaded by that submission.
257. He then submits that there ought to be some consideration given to the applicant's forbearance in bringing these defamation actions in the ACAT rather than the Supreme Court of the ACT where he might expect to be awarded significantly higher damages. The Tribunal is not persuaded by that submission either.
258. The applicant made deliberate decision to sue in the ACAT because the process is faster and he can get a faster practical result in terms of putting a stop to the defamatory material. He said, in effect, that the money was not important to him. What was important to him, he submitted, was bringing the defamers to heel quickly. However, putting a faster stop to the damage caused by the defamatory material by proceeding in the ACAT instead of the Supreme Court ignores the interim relief available in such matters in the Supreme Court jurisdiction, which could achieve the same result.

¹²⁵ The applicant conceded that the defamatory matter was the same as those for which he successfully litigated and was awarded damages in the Van Lieshout Matter and the Christian Matter

¹²⁶ Transcript of proceedings 21 February 2018 page 142, line 7; and page 142, line 25

259. Understood in that way, the Tribunal does not consider that to be a factor in respect of which it can take into consideration.¹²⁷ The jurisdiction in which he chooses to sue therefore is entirely a matter for him and is not relevant.
260. This question of mitigation involves two competing policy considerations. The first is that the object of defamation law is to protect reputation. It would be a perverse result if an award of damages in relation to a publication of defamatory imputations precluded a party from taking action and being awarded damages against a subsequent publisher of the same or similar defamatory imputations. It would expose that party to any number of repetitions of that material without redress. That would be both unjust and defeat one of the objects of the law of defamation.
261. The second competing interest is whether a party should be awarded the same amount of damages, here not expressed in monetary terms, but rather in terms of the maximum award that can be made in the jurisdiction, for subsequent publications by different publishers of the same or similar defamatory imputations based upon the same or similar material.
262. There is a compelling reason why not. Damages in defamation are awarded for, amongst other things, compensation for loss of reputation, hurt feelings and embarrassment and for vindication. To the extent that an applicant has already been vindicated and been awarded damages for the loss of reputation, hurt feelings and embarrassment caused by the publication of the defamatory imputations, subsequent publication of essentially the same defamatory imputations is likely to cause less loss of reputation, hurt feelings and embarrassment. Further, the vindication required would also be less.
263. The CLW Act reinforces that rationale. Section 139E provides that there be a rational relationship between the damages and the harm. It provides:

In determining the amount of damages to be awarded in any defamation proceedings, the court is to ensure that there is an appropriate and rational relationship between the harm sustained by the plaintiff and the amount of damages awarded.

¹²⁷ Section 139I(2) of the CLW Act

264. It would be neither appropriate nor rational to award precisely the same level of damages, expressed in terms of the maximum amount permissible for each and every subsequent publication, as if the applicant had been injured afresh each time.
265. For that reason, the Tribunal will reduce the award of damages for non-economic loss by one quarter. Therefore, the applicant is entitled to an award of damages for non-economic loss in the sum \$18,880.00, which is inclusive of aggravated damages, interest and costs.

Decision

266. The Tribunal is satisfied and finds that the respondent defamed the applicant by publishing the Van Lieshout Material on her Facebook page in or about June 2017.
267. The Tribunal is satisfied and finds that the respondent's conduct, subsequent to publication aggravated the applicant's damages.
268. Judgment is entered for the applicant in the amount of \$18,750 plus \$130 allowable costs.
269. The respondent, immediately upon service of these orders upon her, is to remove the Van Lieshout Material from her Facebook page.
270. The respondent, immediately upon service of these orders upon her, is to publish an apology on her Facebook page and to provide the applicant with a hard copy of the apology.
271. The respondent is to pay the sum of \$18,880 to the applicant within 28 days of this Order.

.....
Senior Member L Donohoe SC

HEARING DETAILS

FILE NUMBER:	XD 1023/2017
PARTIES, APPLICANT:	David Bottrill
PARTIES, RESPONDENT:	Katrina Bailey
COUNSEL APPEARING, APPLICANT	N/A
COUNSEL APPEARING, RESPONDENT	N/A
SOLICITORS FOR APPLICANT	N/A
SOLICITORS FOR RESPONDENT	N/A
TRIBUNAL MEMBERS:	Senior Member L Donohoe SC
DATES OF HEARING:	21 February 2018