

QUEENSLAND CIVIL AND ADMINISTRATIVE TRIBUNAL

CITATION: *Valkyrie and Hill v Shelton* [2023] QCAT 302

PARTIES: **JOHNNY VALKYRIE**
DWAYNE HILL
(applicants)

v

LYLE SHELTON
(respondent)

APPLICATION NO/S: ADL057-20 and ADL058-20

MATTER TYPE: Anti-discrimination matters

DELIVERED ON: 10 August 2023

HEARING DATE: 28 to 30 November 2022

HEARD AT: Brisbane

DECISION OF: Member Gordon

ORDERS:

- Lyle Shelton’s blog of 16 January 2020, and his posts of 25 January 2020, 25 July 2020, 29 August 2020, 19 September 2020, 2 October 2020 and the video podcast of 17 November 2020 did not and do not amount to vilification of Johnny Valkyrie or Dwayne Hill in contravention of section 124A of the Anti-Discrimination Act 1991 (Qld).**
- ADL057-20 and ADL058-20 are dismissed.**

CATCHWORDS: HUMAN RIGHTS – DISCRIMINATION LEGISLATION – GROUNDS OF DISCRIMINATION – OTHER MATTERS – where complaints of vilification – how to interpret and apply the Queensland vilification law

HUMAN RIGHTS – DISCRIMINATION LEGISLATION – GROUNDS OF DISCRIMINATION – OTHER MATTERS – where complaints of vilification – where the respondent published a blog and other posts critical of the complainants’ drag queen performance for children in a library – whether the publications incited hatred towards, serious contempt for, or severe ridicule of the complainants on the ground of their sexuality or gender identity

HUMAN RIGHTS – DISCRIMINATION LEGISLATION – GROUNDS OF DISCRIMINATION – OTHER MATTERS – where complaints of vilification – where the complainants made their complaints as individuals but relied on vilification of various groups of persons of which they were members – whether such complaints may be made –

whether the tribunal should treat the complaints as representative complaints

Anti-Discrimination Act 1991 (Qld), s 4A, s 34, s 124A, s 146, s 194, s 199, s 204, s 206

Human Rights Act 2019 (Qld), s 5(2)(a), s 8, s 13, s 17(b), s 20, s 21, s 26, s 48

Australian Broadcasting Tribunal's decision in Inquiry Into Broadcasts by Ron Casey (1989), as cited in the NSW Law Reform Commission's *Report 92(1999) - Review of the Anti-Discrimination Act 1977 (NSW)*

Australian Macedonian Advisory Council Inc. v LIVV Pty Limited trading as Australian Macedonian Weekly (Anti-Discrimination) [2011] VCAT 1647

Bennett v Dingle (Human Rights) [2013] VCAT 1945

Bropho v. Human Rights and Equal Opportunity Commission (2004) 135 FCR 105

Burns v Dye [2002] NSWADT 32

Burns v Laws (No 2) [2007] NSWADT 47

Burns v Laws (EOD) [2008] NSWADTAP 32

Burns v McKee [2017] NSWCATAD 66

Burns v Radio 2UE Sydney Pty Ltd & Ors [2004] NSWADT 267

Burns v Smith [2019] NSWCATAD 56

Burns v Sunol [2014] NSWCATAD 2

Burns v Sunol [2014] NSWCATAD 61

Burns v Sunol [2015] NSWCATAD 131

Burns v Sunol [2016] NSWCATAD 16

Burns v Sunol (No 2) [2017] NSWCATAD 236

Catch the Fire Ministries v Islamic Council of Victoria [2006] VSCA 284

Cottrell v Ross [2019] VCC 2142

Deen v Lamb 2001 [QADT] 20

DLH v Nationwide News (No 2) [2018] NSWCATAD 217

Ekermawi v Commissioner of Police, NSW Police Force [2019] NSWCATAD 79

Ekermawi v Jones (No 3) [2014] NSWCATAD 58

Ekermawi v Nine Network Australia Pty Ltd [2019] NSWCATAD 29

GLBTI v Wilks & Anor [2007] QADT 27

Huenerberg v Murray [2023] QCAT 175

John Fairfax Publications Pty Ltd v Kazak (EOD) [2002] NSWADTAP 35

Jones v Scully [2002] FCA 1080

Jones v Trad [2013] NSWCA 389

Kazak v John Fairfax Publications Limited [2000] NSWADT 77

Kerslake v Sunol (Discrimination) [2022] ACAT 40

Lamb v Campbell [2021] NSWCATAD 103

Margan v Manias [2015] NSWCA 388

Menzies and anor v Owen [2014] QCAT 661
Ms RA v Mr NC [2018] QCAT 94
M v S and G [2008] QADT 24
Owen v Menzies & Ors; Bruce v Owen; Menzies v Owen
 [2012] QCA 170
Purvis v New South Wales (2003) 217 CLR 92
Rep v Clinch (Appeal) [2021] ACAT 106
Riley v State of New South Wales (Department of Education) [2019] NSWCATAD 223
Sisalem v The Herald and Weekly Times [2017] VSC 254
Sloan v State of Victoria (Human Rights) [2021] VCAT 933
Sunol v Collier (No.2) [2012] NSWCA 44
Sun v Nationwide News Pty Limited [2021] NSWCATAD 147
Unthank v Watchtower Bible and Tract Society of Australia (Human Rights) [2013] VCAT 1810
Veloskey & Anor v Karagiannakis & Ors (EOD) [2002] NSWADTAP 18
Vines v Djordjevitch (1955) 91 CLR 512
Western Aboriginal Legal Service Limited v Jones & anor [2000] NSWADT 102

APPEARANCES & REPRESENTATION:

Applicant: Greg Barns SC, Benedict Coyne and Evan Mijo (counsel), instructed by LGBTI Legal Service.
 Respondents: Anthony JH Morris KC and Simon Fisher (counsel) instructed by Human Rights Law Alliance Limited.

REASONS FOR DECISION

- [1] These are complaints of vilification brought by Johnny Valkyrie and Dwayne Hill (the complainants) against Lyle Shelton (the respondent).
- [2] The complaints are about the respondent's blog and subsequent posts and a podcast following a drag queen story time event at Brisbane Library presented by the complainants dressed as drag queens.
- [3] The complaints were made to the Queensland Human Rights Commission (QHRC). There was no conciliated resolution and the complainants asked for the complaints to be referred to the tribunal to be heard and determined.
- [4] The first complaint to QHRC was made by Mr Valkyrie on 27 January 2020 about the respondent's blog dated 16 January 2020. He said that the respondent:

described me as 'dangerous' for children as I am transgender, homosexual and do drag
- [5] On 12 June 2020 Mr Hill made a complaint to QHRC based on the same material as Mr Valkyrie's complaint.

- [6] Although it was said on Mr Hill's behalf that his complaint was to be conducted jointly with Mr Valkyrie's complaint,¹ the QHRC treated it as a separate complaint. When, on 15 September 2020, the complaints were referred to the tribunal, Mr Hill's complaint was given case number ADL057-20 and Mr Valkyrie's was given case number ADL058-20.
- [7] After the referral to the tribunal, further posts of the respondent were added to the complaint, with the leave of the tribunal.
- [8] The relevant vilification law in Queensland is contained in section 124A of the *Anti-Discrimination Act 1991 (Qld)* (ADA). It renders unlawful certain public behaviour which incites hatred towards, serious contempt for, or severe ridicule of the complainants on the ground of (of relevance here) their sexuality or gender identity. There are exceptions for fair reporting of existing material and where there is absolute privilege in defamation (proceedings in parliament, courts and inquiries) and (of relevance here) debates and discussions in the public interest.
- [9] The vilification law uses a model stated in simple terms but whose meaning and application is unclear.
- [10] This is the same model as is used in other States and Territories around Australia. In Queensland there is little case law to clarify how the law should be interpreted. There is more case law in the other States and Territories, but it is inconsistent.
- [11] This has made it difficult to decide the correct way to decide these complaints. How I approach this will directly affect the outcome of the matter.

The hearing

- [12] The hearing was over three days 28 to 30 November 2022. Regrettably, the legal uncertainties required further submissions from the parties after the hearing and that has delayed the final determination of these complaints.

Application to add claim for victimisation

- [13] At the commencement of the hearing, on behalf of the complainants an application was made to amend the complaint to add a victimisation claim. Objections were taken to the proposed amendment and for reasons given orally in the hearing I refused this application.²

Application for disclosure

- [14] On day 3 of the hearing after evidence had been given about the moderation of third party comments, on behalf of the complainants two applications for disclosure were made. One was for disclosure of the moderator's contract of employment, and that was offered without opposition.³ The other was for disclosure of the third party comments which had been removed by moderation and for reasons given orally in the hearing I refused this application.⁴

¹ Email of 12 June 2020.

² Transcript 1-14.

³ Transcript 3-27 line 1.

⁴ Transcript 3-32.

Liability only

- [15] Although the parties seemed ready to deal with liability and remedy at the hearing, due to certain time and witness difficulties it was decided on day 3 of the hearing to convert the hearing to liability only, leaving remedy to be dealt with at a subsequent hearing if required. This was on the basis that evidence as to remedy adduced during the liability hearing could be taken into account in any remedy hearing.

Presentation of the evidence

- [16] I was greatly assisted by the preparation of a searchable trial bundle containing all relevant filed material up to just before the hearing.
- [17] This was supplemented by the following documents which were not in the bundle:
- (a) Complainants' Submissions on Facts in Issue and Issues for the Tribunal's Determination dated 18 November 2022 (provided electronically).
 - (b) Respondent's written submissions dated 24 November 2022 (provided in paper form).
 - (c) Affidavit of Mr Hill dated 25 November 2022 exhibiting all the respondent's published material and third party comments, and referring to the respondent's recent posts.
 - (d) Statement of Facts in Relation to Drag Queen Story Time dated 25 November 2022.
 - (e) Complainants' particulars of loss and damage dated 25 November 2022.
 - (f) Affidavit of Mr Valkyrie dated 27 November 2022 referring to the respondent's recent posts.
 - (g) Affidavit of Nelson Tang (solicitor) dated 28 November 2022 about particulars sought from the respondent.
- [18] After the hearing, I was assisted by a full transcript of the evidence given over three days provided by the parties.

Exhibits

- [19] The exhibits were:
- 1: 'Love Makes a Family' by Sophie Beer.
 - 2: Facebook advertisement for the drag queen story time event.
 - 3: Law Clerk agreement dated 7 October 2020.
 - 4: Courier Mail articles.

Challenges to the evidence

- [20] In the bundle were lists of the complainants' objections to parts of the respondent's evidence and expert evidence and lists of the respondent's objections to the complainants' evidence and expert evidence. I decided to let all the evidence be put before the tribunal on the basis that the lawyers could cross examine if they wished to

but they could also explain their position about the evidence in submissions even if a point had not been put in cross examination.⁵

Expert evidence

- [21] On behalf of the respondent there were three experts and Mr Valkyrie had one expert.⁶
- [22] The respondent's expert evidence, with one exception,⁷ was relied on only to the limited extent to show the nature and extent of the discussion and debate which was alleged to be in the public interest.⁸ On behalf of the complainants even this limited reliance was said to be unnecessary because it was admitted that the issue of gender identity or gender dysphoria was in the public interest as topics of public discussion or debate.⁹ As it turned out, only Prof Parkinson needed to be called.¹⁰

Evidence of Keira Lee Bell

- [23] On behalf of the respondent, Keira Lee Bell provided an affidavit which I read.

Post hearing submissions

- [24] The submissions given after the hearing were:
- (a) Complainants' closing submissions on liability dated 24 February 2023.
 - (b) Respondent's closing submissions on liability dated 17 March 2023.
 - (c) Complainants' closing submissions in reply on liability dated 6 April 2023.
 - (d) Claimant's submissions re: nature of complaints dated 3 May 2023.
 - (e) Respondent's submissions on representative complaints and related issues dated 4 May 2023.
 - (f) Respondent's closing submissions on grounding and capacity to incite dated 28 July 2023.
 - (g) Complainants' further submissions re: interpretation and application of s.124A *Anti-Discrimination Act 1991* (Qld).

The vilification complaints

- [25] It is important for me to identify precisely what acts are said in the complaints to QHRC, as amended by the tribunal, to have been acts of vilification in contravention of section 124A of the ADA.

⁵ Transcript 1-19.

⁶ For Mr Valkyrie was Dr Julian Dodemaide a consultant psychiatrist, and for the respondent were Dr Mary Rice Hasson, an American attorney and Fellow at the Ethics and Public Policy Center Washington DC, Professor Dianna Theadora Kenny, a consultant psychologist and psychotherapist who treats for gender dysphoria, and Professor Patrick Parkinson AM, a professor of law with particular expertise in family law and child protection.

⁷ Prof Parkinson was relied on for evidence about the drag queen label: respondent's written submissions dated 24 November 2022 paragraph 65.1.

⁸ Respondent's written submissions dated 24 November 2022 paragraphs 13 to 15.

⁹ Complainants' submissions on facts in issue and issues for the tribunal's determination dated 18 November 2022 paragraph 4 and transcript 1-19 line 39.

¹⁰ Transcript 3-34.

- [26] The complaints to QHRC were much more limited than the amended complaints before me. They were only about a blog published by the respondent on 16 January 2020, and only about vilification directed at the complainants as individuals. There was no complaint of vilification of a group of persons where the complainants were members of the group.
- [27] On 12 November 2020, pursuant to the usual tribunal directions, ‘contentions’ were filed on the complainants’ behalf.¹¹ These referred not only to the original blog of 16 January 2020 but also to further posts up to 2 October 2020. Also the contentions relied not only on vilification directed at the complainants as individuals but on vilification of groups of persons of which complainants were members. On 20 November 2020, a video podcast on 17 November 2020 was added to the contentions.¹²
- [28] By a tribunal consent order of 8 April 2021, the complaint was amended to add all the new posts relied on, that is 25 January 2020, 25 July 2020, 29 August 2020, 19 September 2020, 2 October 2020 and the video podcast of 17 November 2020.
- [29] The original blog of 16 January 2020 and all the other posts which are the subject of the complaints including a transcript of the video podcast of 17 November 2020 have been exhibited to Mr Hill’s affidavit dated 25 November 2022. In these reasons I have called these ‘the respondent’s published material’.
- [30] Although there was no order of the tribunal expressly amending the complaint to include a complaint about vilification of groups of persons where the complainants were members of the group, no point is taken by the respondent about this. Since it could be said that the effect of the tribunal’s directions was to permit such amendment, I shall take it that the complaint in its final amended form, is before me.
- [31] On 23 July 2021 the complainants amended their contentions again, this time to include details about comments made by members of the public in reaction to the respondent’s published material and as posted on the Facebook site concerned.¹³ In these reasons I have called these comments ‘the third party comments’. Most of these comments printed out from the Facebook site have been exhibited to Mr Hill’s affidavit dated 25 November 2022. It is not being said on the complainants’ behalf that the respondent is liable also for these third party comments.¹⁴ They are only relied on as showing how people reacted to the respondent’s published material.
- [32] On 25 November 2022 the complainants set out particulars of loss and damage, as directed by the tribunal on 23 November 2022. This referred to subsequent publications of the respondent. They are not relied on as contraventions of the ADA but are relied on in support of a claim for aggravated damages.

¹¹ Bundle page 137.

¹² Bundle page 142.

¹³ Bundle page 173.

¹⁴ Transcript 2-90 line 19.

The passages to which particular objection is taken

- [33] It has been made clear on the complainants' behalf that not all the respondents' material is complained of.¹⁵ Instead, the passages mostly relied on have been selected and listed in a document called 'Amended Index of Publications and Comments'.¹⁶
- [34] It is convenient to split these lists into two parts, although when considering whether they amount to vilification, the parts must be taken in the context of each other and in the context of the respondent's published material as a whole. To do this, it is necessary to look at the respondent's published material as a whole, as exhibited to Mr Hill's affidavit dated 25 November 2022.
- [35] The parts of the respondent's published material which, it is said, particularly support the vilification complaint for Mr Valkyrie, drag queens and transgender persons generally are:

In the blog of 16 January 2020

- (a) The title: *Why Queeny and Diamond Good-Rim are dangerous role models for children*. The complainants were pictured in drag.
- (b) The sub-title: *Warning: words and images below are shocking. But if we want to protect kids, we need to know who the left want their role models to be*.
- (c) *The wrongdoing is done by those who put drag queens in front of children and who want to spread their radical sexual expressionism and gender confusion to children everywhere*.
- (d) *It's also worth recognising that in taking a reactionary "stand against" Drag Queen Storytime they were taking a "stand for" something very precious – the innocence of children*.
- (e) *Queeny is a woman who goes by the name of Johnny Valkyrie. Johnny is crowd funding under the name of Jean Genie to help pay for her breasts to be surgically sliced off so she can present as a man*.
- (f) *What are the kids to make of role models like Queeny? Will this lead to more or less confusion among children about their biological gender? Will there be class actions against the likes of Brisbane City Council in the future brought by adults with transgender regret and mutilated bodies*.
- (g) After referring to the complainants, stating *Have we learned nothing from creeps like Harvey Weinstein, Jeffrey Epstein and Prince Andrew?*
- (h) *Drag queens are not for kids*.

In the post of 25 January 2020

- (a) A repeat of the statement *Drag queens are not for kids*.
- (b) *LGBTIQ+ activists are hell bent on trashing the purity and innocence of the next generation*.

¹⁵ Transcript 1-16 line 46.

¹⁶ In the bundle starting on page 181.

In the post of 25 July 2020

- (a) *Johnny Valkyrie is a woman who presents as a man.*
- (b) *I objected to Johnny being placed in front of children as a role model because Johnny represents and celebrates the idea that gender is fluid, a dangerous idea to sow into the minds of children.*
- (c) *Drag Queens and what they represent are not for kids. They are dangerous role models and they should not be provided a place in front of children in public libraries.*

In the post of 2 October 2020

- (a) *My crime was to assert that they are dangerous role models for children.*
- (b) *Passages stating that drag queens are ‘advocates’ for ‘gender fluidity’ and the adult entertainment industry in presenting Drag Queen Storytime, ‘inducting’ children ‘into the worlds of gender fluidity and sexual expressionism’.*

In Pellowe Talk Live

- (a) *The drag queens [are] suing me for saying that they are dangerous role models to children, which they are.*
- (b) *[HOST: Did you say they personally are, or drag queens generically are?] Well both because if you put gender fluid role models in front of children, in my opinion I think that’s a dangerous role model.*

- [36] The parts of the respondent’s published material which, it is said, particularly support the vilification complaint for Mr Hill, but also support the case for drag queens and persons generally on the ground of sexuality:

In the blog of 16 January 2020

- (a) *Referring to Diamond Good-Rim *The homo-erotised name, a reference to the anus, should be enough to ring alarm bells in the minds of thinking parents let along (sic) the geniuses at Brisbane City Council who thought it was a good use of ratepayers’ resources to put him in front of kids.**
- (b) *Good-Rim is a 2019 winner of an X Award from the Adult Entertainment Industry.*
- (c) *Have we learned nothing from creeps like Harvey Weinstein, Jeffrey Epstein and Prince Andrew?*
- (d) *Whose idea was it to put a porn star in front of children?*
- (e) *Let’s hope the kiddies watching Drag Queen Storytime last Sunday don’t go exploring on Good-Rim’s Facebook page. Or ask their mum what “good-rim” means in the wonderful world of drag queens.*

In the post of 25 January 2020

- (a) *When referring to images in the Twitter account of the presenter of drag queen story time events in Melbourne: .. I felt it necessary to publish because of the deceitful nature of the rainbow political agenda and the debauched world to*

which it seeks to induct children, and here he is in the debauched LGBTIQ+ world to which he is seeking to induct children.

- (b) When referring to images in the Facebook account of the presenter of drag queen story time events in Perth *Admittedly this is a private facility but is (the provider of the facility) being responsible putting (the presenter) out there with children given what he represents in his debauched queer world? Note the simulated sexual violence (hair pulling).*
- (c) *Good-Rim's name is a deliberate reference to obscene and filthy homosexual activity. "Mummy what's a good rim?" a child might ask. Don't answer that.*
- (d) *LGBTIQ+ activists are hell bent on trashing the purity and innocence of the next generation.*

In the post of 25 July 2020

- (a) *Good-Rim is a reference to a homosexual sex act and he is also involved in the sex trade as an "adult entertainer".*
- (b) *It would be obvious to the overwhelming majority of mainstream Australians that Good Rim is a dangerous role model for children.*

In the post of 19 September 2020

The drag queen Diamond Good-Rim, whose name is a reference to anal sex ..

Generally

- (a) Passages incorrectly saying that Mr Hill used the name 'Diamond Good-Rim' when performing to child audiences. He only used that name when performing to adult audiences; when performing to child audiences he used the name 'Diamond'.
- (b) Passages incorrectly saying that Mr Hill was in the pornography and 'sex trade' industries.

The two limbs of the complaints

[37] The vilification complaints as amended have two limbs:

- A. Vilification directed to the complainants as individuals.
- B. Vilification of groups of persons where the complainants were members of the group.

[38] In addition to these two limbs it can be seen that the vilification complaints rely on two different ways of viewing the words used in the respondent's published material:

- 1. General vilification of the complainants as individuals and as members of a group arising from the literal meaning of the words in the articles.¹⁷

¹⁷ Second further amended complainants' contentions dated 27 November 2022 paragraph 6.

2. Vilification of the complainants as individuals and as members of a group arising from imputed meanings of the words in the articles, namely that the complainants were a danger to children and were child sex offenders.¹⁸

Individual complaints

- [39] Limb A offers no challenges as far as jurisdiction is concerned.
- [40] For A2, that is complaints as individuals based on imputations, the complainants say that the relevant passages in the respondent's published material effectively asserted that:¹⁹
- (a) The complainants when dressed as drag queens, were dangerous to children.
 - (b) Mr Valkyrie, however dressed, was dangerous to children due to the fact that he was a transgender person.
 - (c) The complainants were child sex offenders.
 - (d) Mr Hill, however dressed, was dangerous to children.
- [41] In the amended contentions, the complainants give particulars explaining why it is said that the relevant passages in the respondent's published material make those assertions. This is supported by a document entitled 'Further Particulars on Behalf of the Complainants',²⁰ and also written submissions.

Vilification of groups of persons where the complainants were members of the group

- [42] Limb B of the complaints, that is vilification of groups of persons where the complainants were members of the group, may present some jurisdictional challenges.
- [43] The groups of persons in their final form are:²¹
- (a) drag queens;
 - (b) transgender persons;
 - (c) persons with a homosexual sexual orientation;
 - (d) members of the numerous and diverse LGBTIQ+ community; and/or
 - (e) LGBTIQ+ human rights and community advocates.
- [44] Collectively, in the complainants' submissions, these groups of persons are called the 'Named Groups' or the 'Representative Identity Groups'. Hence the complainants say that they can make a complaint of a contravention of section 124A on the basis that they are members of the groups concerned.

¹⁸ Second further amended complainants' contentions dated 27 November 2022 paragraphs 7 and 8.

¹⁹ Second further amended complainants' contentions dated 27 November 2022 paragraphs 7 and 8.

²⁰ Bundle page 191.

²¹ Complainants' closing submissions dated 24 February 2023 paragraph 10(a). For previous forms see second further amended complainants' contentions dated 27 November 2022 paragraph 6(b) and complainants' submissions on facts in issue and issues for the tribunal's determination dated 18 November 2022 paragraph 12(b).

- [45] The vilification of the named groups is said to be because, by implication, the respondent's published material asserted:²²
- (i) That drag queens, and therefore also transgender persons and persons with homosexual sexual orientation, are dangerous to children.
 - (ii) That drag queens are 'advocates' for gender fluidity and the adult entertainment industry in presenting Drag Queen Storytime, '*inducting*' children '*into the worlds of gender fluidity and sexual expressionism*'.
 - (iii) That transgender persons are dangerous to children.
 - (iv) In the 25 January 2020 article, that 'LGBTIQA+ activists are hell bent on trashing the purity and innocence of the next generation.'
- [46] I had some concern about how far the complainants could go with this limb of the complaints, and therefore about my jurisdiction to hear and determine it, bearing in mind groups (a), (d) and (e) do not as whole hold the protected attributes of sexuality or gender identity under section 124A. There are comprehensive provisions in the ADA when dealing with representative complaints, and about who can complain to QHRC. I asked for submissions on this issue and I am grateful for the additional submissions received on behalf of the parties.
- [47] I have considered this matter in schedule 1 of these reasons. I have concluded that it is appropriate to treat the complainants as members of sub-groups of the named groups of persons (a), (d) and (e). Taking Mr Hill and the drag queen group as an example, Mr Hill was a member of a homosexual sub-group of the drag queen group. On that basis he would have standing to make the complaint and could show a contravention of section 124A if the offending material would incite hatred etc. towards the drag queen group on the ground of the sexuality of his sub-group.

Uncertainties in the vilification law

- [48] Identifying the law to apply to these complaints has been difficult. I am grateful to the lawyers on both sides for their written and oral submissions before during and after the hearing, and for their extensive citation of authority.
- [49] The Queensland vilification provision (leaving aside for the moment the exceptions for fair reporting and public interest discussion) is in these terms:²³
- A person must not, by a public act, incite hatred towards, serious contempt for, or severe ridicule of, a person or group of persons on the ground of the race, religion, sexuality or gender identity of the person or members of the group.
- [50] In *Menzies and anor v Owen* [2014] QCAT 661 at [17], Member Fitzpatrick set out the legal principles identified by Member Savage SC, in *GLBTI v Wilks & Anor* [2007] QADT 27 as applicable here, with slight amendments to the source references:
- (a) The respondents' intent to incite is irrelevant: *Burns v Dye* [2002] NSWADT 32, para 21; *John Fairfax Publications Ltd v Kazak* [2002] NSWADTAP 35 at para 10; *Veloskey & Anor v Karagiannakis & Ors*

²² Second further amended complainants' contentions dated 27 November 2022 paragraph 8, also in the same terms complainants' submissions on facts in issue and issues for the tribunal's determination dated 18 November 2022 paragraph 15.

²³ Section 124A of the ADA.

[2002] NSWADTAP 18, para 24, *Burns v Radio 2UE Sydney Pty Ltd & Ors* [2004] NSWADT 267, para 12.

- (b) What is required is that there has been incitement to another to hate etc rather than a mere conveyance of a hatred already held by the speaker cf *Burns v Radio 2UE Sydney Pty Ltd & Ors* [2004] NSWADT 267, para 33.
- (c) “Incite”, “hatred”, “contempt” and “ridicule” should all be given the ordinary natural meaning i.e. to incite – urge on, stimulate or prompt to action cf *Burns v Dye* supra para 19; *John Fairfax Publications Ltd v Kazak* supra para 40.
- (d) It is not necessary that it be proved that any particular person was incited but that the capacity of the public act to incite the ordinary reasonable person is what must be made out cf *Deen v Lamb* [2001] QADT 20 see also *John Fairfax Publications Ltd v Kazak* supra; *Catch the Fire Ministries v Islamic Council of Victoria* [2006] VSCA 284; *Burns v Laws* (No.2) [2007] NSWADT 47;
- (e) The incitement to hatred must be on “the grounds of sexuality” meaning that that matter was a “substantially contributing factor” cf *Waterhouse v Bell* (1991) 25 NSWLR 99, 106 per Clark JA; *Velskey* supra, *Burns v Dye*. Sexuality is defined in the Act’s schedule (Dictionary) as inter alia homosexuality.

[51] In *Menzies*, Member Fitzpatrick accepted submissions that (d) should read ‘ordinary member of the class to which the public act is directed, taking account of the circumstances in which the conduct occurs’, in line with *Catch the Fire Ministries v Islamic Council of Victoria* [2006] VSCA 284 and should not read ‘ordinary reasonable person’.

[52] When deciding the complaints before me, it quickly became clear from reading the submissions of the parties and some of the authorities cited, that although most of the legal principles set out in *Menzies* were properly applicable, there were uncertainties about some of them.

[53] One uncertainty was how the hypothetical audience should be constructed in order to apply the objective test of whether the public act would incite members of that audience on the relevant ground. The answer to this question is of central importance to this complaint and directly affects its outcome.

[54] This uncertainty can be described in this way (using words borrowed from the various cases which have considered this):

When deciding whether the hypothetical audience would be incited by the public act, should people who hold extreme views or who are unthinking and not susceptible to being roused to enmity be filtered out? Or should such people be included? Is it appropriate to filter the hypothetical audience by taking an ‘ordinary reasonable person’, or should it be an ‘ordinary person’, or an ‘ordinary member of the class to which the public act is directed, taking account of the circumstances in which the conduct occurs’? Or should some other test be used such as whether ‘the natural and ordinary effect’ of the public act would be to incite?

[55] A second uncertainty was for a public act to be vilification, whether it was sufficient for it to have the ‘capacity to incite’ the hypothetical audience or whether it should be ‘likely to incite’ or whether some other formulation was required. *Menzies* referred

in (d) to the ‘capacity to incite’. But in *Burns v Laws (No 2)* [2007] NSWADT 47 Deputy President Chesterman sitting with Members Mooney and Quayle said that these words had the potential to understate what must be proved, and if such words were used it should be understood that they refer to the actual effect of the public act rather than the potential or possible effect.²⁴

- [56] A third uncertainty which would have a direct effect on the outcome of the complaints was whether ‘on the ground of’ in the vilification law refers to the public act (requiring the public act to be done on the ground of the attribute) or refers to the reaction of the audience (requiring the audience to react on the ground of the attribute) or both.
- [57] Despite this law being in place for some 22 years now, how the words should be applied has never been considered by the QCAT Appeal Tribunal or by a higher court in Queensland.²⁵
- [58] As stated in the explanatory note to the Bill which first introduced the Queensland vilification law,²⁶ it was modelled on the New South Wales racial vilification law. Closely similar wording is also used in the ACT, Tasmania and Victoria. So ideally I could look to case law in those States and Territories to see how to apply the test.
- [59] A survey of that case law however shows otherwise. Schedule 2 to these reasons demonstrates that there is no consensus across the jurisdictions about the uncertainties mentioned above, despite as shown in schedule 3 the law in those jurisdictions is closely similar.
- [60] The vilification law is an important prohibition against behaviour which is protective of those with certain attributes, but which also impacts human rights of free speech. It is regrettable that the test for vilification remains unclear after so long.
- [61] The uncertainty about these things must make the task of lawyers trying to assess the merits in these cases very difficult. And for the decision maker there are so many different tests to choose from, that this is difficult to do so without applying a subjective view. As Principal Member Britton in the NSW tribunal has said in several decisions, applying the test is ‘inevitably impressionistic and does not lend itself to empirical measurement or scientific assessment’,²⁷ and that it is apparent that ‘reasonable minds may differ on whether a particular public act has the capacity to incite’.²⁸

²⁴ [110] and [111]. This has been cited with approval by several subsequent NSW tribunals, but nothing higher, for example *Burns v McKee* [2017] NSWCATAD 66 at [75], and it has been ‘borne in mind’ in *Burns v Sunol* [2012] NSWADT 246 at [16] and *Burns v Sunol* [2015] NSWCATAD 131 at [50] (not questioned in an appeal).

²⁵ The closest was *Owen v Menzies & Ors; Bruce v Owen; Menzies v Owen* [2012] QCA 170 but that dealt only with the applicant’s standing in QCAT, whether QCAT was a court of a State within Chapter III of the Commonwealth Constitution, and whether section 124A of the ADA infringed the implied constitutional freedom of communication about government and political matters.

²⁶ Explanatory note to the *Anti-Discrimination Amendment Bill* 2001 (Qld) page 2.

²⁷ For example, *Burns v Sunol (No 2)* [2017] NSWCATAD 236 at [62].

²⁸ For example, *Burns v Sunol* [2015] NSWCATAD 178 at [51]. The Appeal Panel of the NSW tribunal in *Veloskey & Anor v Karagiannakis & Ors (EOD)* [2002] NSWADTAP 18 at [43] also described the test elements as ‘largely matters of impression and as such, they are matters upon which minds may reasonably differ.’

The elements of vilification

- [62] In these reasons, with the assistance of persuasive rather than any binding authority, I need to decide which approach to take to apply the Queensland vilification law.
- [63] Vilification is prohibited by section 124A of the *Anti-Discrimination Act* 1991 (Qld) (ADA). If there is a contravention of section 124A then this is unlawful and it can be the subject of a complaint despite not being related to an ‘area of activity’ under the ADA, such as the provision of services or accommodation. So section 124A is a standalone prohibition against certain behaviour. The section provides:

124A Vilification on grounds of race, religion, sexuality or gender identity unlawful

- (1) A person must not, by a public act, incite hatred towards, serious contempt for, or severe ridicule of, a person or group of persons on the ground of the race, religion, sexuality or gender identity of the person or members of the group.
 - (2) Subsection (1) does not make unlawful—
 - (a) the publication of a fair report of a public act mentioned in subsection (1); or
 - (b) the publication of material in circumstances in which the publication would be subject to a defence of absolute privilege in proceedings for defamation; or
 - (c) a public act, done reasonably and in good faith, for academic, artistic, scientific or research purposes or for other purposes in the public interest, including public discussion or debate about, and expositions of, any act or matter.
- [64] In section 131A there is another vilification provision where there are threats of, or incitement to, violence and which can result in a criminal prosecution. In this complaint I am not concerned with that provision.

Public act

- [65] For an act to be vilification under section 124A of the ADA the act must be a ‘public act’. Section 4A of the ADA defines ‘public act’ as follows:

4A Meaning of public act

- (1) A **public act** includes—
 - (a) any form of communication to the public, including by speaking, writing, printing, displaying notices, broadcasting, telecasting, screening or playing of tapes or other recorded material, or by electronic means; and
 - (b) any conduct that is observable by the public, including actions, gestures and the wearing or display of clothing, signs, flags, emblems or insignia.
- (2) Despite anything in subsection (1), a public act does not include the distribution or dissemination of any matter by a person to the public if the person does not know, and could not reasonably be expected to know, the content of the matter.

- [66] It can be seen that the definition includes any communication to the public, or conduct observable by the public. It can be seen that there can be no vilification where the act is one in which only the perpetrator and the complainant are involved.
- [67] Here there is no dispute between the parties that each part of the respondent's published material was a public act.²⁹

Somebody to incite

- [68] A slightly different requirement before vilification can be found, is that there must be somebody who could be incited to hatred etc. by the public act. As Nettle JA said in *Catch the Fire*:

[16] Evidently, there can be no incitement in the absence of an audience. It is not a contravention of s.8 to utter exhortations to religious hatred in the isolation of an empty room. If conduct is to incite a reaction, it must reach the mind of the audience. And if conduct is to be perceived as inciting a particular reaction, it must reach the mind of an audience as something which encourages that reaction. So, for conduct to incite hatred or other relevant emotion it must reach the mind of an audience as something which encourages those emotions.

- [69] It is conceivable that it might be found as a fact by the tribunal that, although there was a public act, for one reason or another, there was no one upon whom the public act could have had an impact. This would seem to be fatal to the complaint of vilification on the above authority.
- [70] For example, the facts of the QCAT case of *Ms RA v Mr NC* [2018] QCAT 94 were that a man in a lift spoke in Arabic in a disparaging way about the prophet Mohamad to a woman wearing a hijab. There was another man in the lift, and so the tribunal found that the speaking was a public act. But on the authority of the passage cited above, if it were a fact that the man did not understand Arabic then it would seem to be open to tribunal to find that there was no one who could be incited by the public act, at least by the spoken words.

Hatred, serious contempt or severe ridicule

- [71] Unless an exception such as fair comment or public interest applies, vilification occurs under section 124A of the ADA if a person incites hatred towards, serious contempt for, or severe ridicule of, a person or group of persons on the ground of the race, religion, sexuality or gender identity of the person or members of the group. Hatred, serious contempt and severe ridicule are strong words.
- [72] The words can be contrasted with the words used in the sexual harassment provision, section 119, which refers to offending, humiliating or intimidating a person even in private. It is to be noted that the ADA only prohibits sexual harassment and not harassment on the ground of race, religion, sexuality or gender identity. It was obviously a deliberate decision to protect people with those attributes not by way of harassment law but by way of the vilification provisions for public acts.

²⁹ Complainants' second further amended statement of contentions dated 27 November 2022 paragraph 12, complainants' submissions on facts in issue and issues for the tribunal's determination dated 18 November 2022 paragraph 25, and respondent's written submissions dated 24 November 2022 paragraph 4.

[73] I note the respondent's submission relying on *M v S and G* [2008] QADT 24 at [77] that the words used in the ADA indicates 'that the relevant incitement, to attract the operation of the Act, must be towards the extreme end of the spectrum of comment'.³⁰

[74] The difficulty of course is that what I regard as 'extreme' will differ from what other decision makers regard as extreme. Meanwhile it seems, my decision on whether the public act amounts to vilification will be a question of fact.³¹ This makes it more difficult to appeal and try to get a second opinion.

Who must be incited (how to construct the hypothetical audience)?

[75] It is well established that in vilification cases, the complainant does not actually have to prove that anyone was incited to hatred etc. by the public act.³²

[76] This was also recognised in the explanatory note when the vilification legislation was first enacted in Queensland by the *Anti-Discrimination Amendment Act 2001* (Qld). The relevant part of the explanatory note to the Bill says:

Consistent with the interpretation that has been accorded "incite" in other jurisdictions, the section will not require proof that anyone was actually incited to be satisfied.

[77] In *Deen v Lamb* 2001 [QADT] 20, Walter Sofronoff QC, President, having explained that it was not necessary to show that any particular person was incited, said:

The section directs attention towards the nature of the act, not the result of it.

[78] This means that (a) if there is actual evidence that none of the possible witnesses to the act were incited, this does not mean that the complaint will fail; conversely (b) if there is evidence that that a witness was incited this does not mean that the complaint will succeed.

[79] (a) was envisaged by Neave JA in *Catch the Fire*.³³

I therefore agree with Nettle, J.A. that the Tribunal did not err in finding that s.8 covers conduct which is capable of causing hatred of or other relevant emotion towards a person or class of persons on the grounds of their religious belief, even if it does not actually succeed in provoking that response.

[80] (b) was envisaged by Senior Member Orr QC in *Kerslake v Sunol (Discrimination)* [2022] ACAT 40.³⁴

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

³⁰ Respondent's written submissions dated 24 November 2022 paragraph 56.1.

³¹ *Margan v Manias* [2015] NSWCA 388 at [77].

³² See cases cited in *Jones v Trad* [2013] NSWCA 389 at [50], also *Catch the Fire*, Nettle JA at [14] and Neave JA at [154].

³³ [154].

³⁴ [76].

- [81] This also means that the vilification test needs to be applied to a hypothetical audience. The explanatory note to the 2001 Bill explains:

The test of whether incitement has occurred is an objective one based on a hypothetical listener or viewer.

- [82] On the question how the hypothetical audience should be constructed, two opposing views were described in the NSW Law Reform Commission's *Report 92(1999) - Review of the Anti-Discrimination Act 1977 (NSW)*:

7.123 Who must be incited?

There are two views on who must be incited. The EOT in *Harou-Sourdon* quoted with approval from the *Casey* decision that:

the yardstick should not be a person peculiarly susceptible to being roused to enmity, nor one who takes an irrational or extremist view of the relations among racial groups. The hypothetical listener should in the Tribunal's view, be described as an ordinary, reasonable person not immune from susceptibility to incitement, nor holding racially prejudiced views.¹²⁵

7.124 A contrasting view which is considered to be a more realistic test¹²⁶ is that it must be "anybody, even the most malevolent or unthinking person, who might be inspired to treat the targets with hatred or contempt".¹²⁷

¹²⁵ (1989) 3 BR 351 at 357.

¹²⁶ N Hennessy and P Smith, "NSW Racial Vilification Laws Five Years On" (1994) 1(1) *Australian Journal of Human Rights* 249 at 253.

¹²⁷ *Nealy v Johnston* (1989) 10 CHRR 6450 at 6470.

- [83] N Hennessy and P Smith in the article in note 126 above, having cited the *Casey* test, pointed out:³⁵

In contrast, the Canadian Human Rights Tribunal held in *Nealy v. Johnston* that in assessing the impact of an allegedly vilifying message upon recipients, the test to be used is not the objective one of

. . . the reasonable listener, but whether there is anybody, even the most malevolent or unthinking person, who might be inspired to treat the targets with hatred or contempt.

This is a more realistic test than the one quoted by the EOT in *Harou-Sourdon* because if a person does not hold racially prejudiced views, presumably he or she could not, in any circumstances, be incited to hate others on the ground of their race.

- [84] Whether those with extreme views, or who are unthinking and not susceptible to being roused to enmity, should be filtered out from the hypothetical audience seems to be a very similar question to whether the hypothetical audience should be an 'ordinary member of the class to which the public act is directed, taking account of the circumstances in which the conduct occurs' or whether it should be 'the ordinary reasonable person', or whether this should be 'an ordinary person' or whether it should

³⁵

[2.6].

be some other formulation. The task of identifying the hypothetical audience has been described as finding ‘descriptors’ for the audience.³⁶

- [85] In their submissions the parties have suggested various tests. On behalf of the complainants it is said that the test is ‘ordinary members of the audience for the publications’, ‘an ordinary member of the relevant class who access the material’, ‘an ordinary member of the class to whom the act is directed/the audience or likely audience’, ‘an ordinary reasonable reader’, ‘an ordinary reasonable person’, or ‘an ordinary reasonable person not immune from susceptibility to incitement, nor holding prejudiced views’.³⁷
- [86] On behalf of the complainants a ‘tinderbox’ argument has also been presented in which it is said that the ordinary members of the relevant class were a tinderbox ready to be set alight by the respondent’s inflammatory words, because ordinary members of the relevant class would be likely to have conservative views on social issues and be more readily triggered or incited by the respondent’s published material.³⁸ This test is therefore quite different from the ‘ordinary reasonable reader’ test also contended for on the complainant’s behalf.
- [87] Later submissions on the complainants’ behalf revisited this issue and proposed a ‘more nuanced approach’. Although it was said that the test might be ‘whether the natural or ordinary effect of the conduct is to incite .. in the circumstances of the case including the appropriate social and historical context’, the preferred test is the ‘ordinary person in the relevant social/historical context in the class of persons in the audience or likely audience to which the impugned public act was directed’.³⁹
- [88] On behalf of the respondent the test is also put in various ways. It is said that for vilification the words must incite ‘an ordinary and reasonable member of the public’, or ‘an ordinary member of the relevant class who accessed the material’ that is ‘internet users at large’, or the words must have a ‘natural and ordinary effect’ to incite the audience.⁴⁰ In later submissions on behalf of the respondent it is said that the test was whether the ‘natural and ordinary effect was to incite .. an ordinary reasonable member of the public’ or ‘an ordinary member of the respondent’s audience which – according to prior authorities – is an ordinary user of the internet’.⁴¹
- [89] The way the hypothetical audience is constructed needs to cope with all the following scenarios and produce the ‘correct’ outcome in each case. My difficulty, and no doubt the difficulty faced by first instance decision makers in such cases, is knowing what, in accordance with the intention of the legislature, is the correct outcome. In the table below I have made assumptions about this. I do not think this can be helped. The table is of course subject to the fair comment and public interest defences.

³⁶ *John Fairfax Publications Pty Ltd v Kazak (EOD)* [2002] NSWADTAP 35 at [13].

³⁷ Complainant’s submissions on facts in issue and issues for the tribunal’s determination dated 18 November 2022 paragraphs 17(b), 29 and 34, complainant’s closing submissions dated 24 February 2023 paragraph 9, B4, 23(d), 23(j), 34(a), 34(b), and 44.

³⁸ Closing submissions dated 24 February 2023 paragraphs 36 and 41.

³⁹ Complainants’ further submissions re: interpretation and application of s.124A of the *Anti-Discrimination Act* 1991 (Qld) dated 4 August 2023 paragraphs 21, 41, 51 and 61.

⁴⁰ Respondent’s written submissions dated 24 November 2022 paragraphs 60.1, 60.2, 61, 62, and 66; respondent’s closing submissions on liability dated 17 March 2023 paragraphs 61, 63(a), 63(b) and 64.

⁴¹ Respondent’s closing submissions on grounding and capacity to incite dated 28 July 2023 paragraph 9.

| | Scenario | Is it vilification subject to the fair comment and public interest defence? |
|---|--|--|
| A | An internet blog whose audience is the general public 'outs' the complainant, a prominent politician, as homosexual. | No |
| B | A man enters a bar frequented by homosexual persons and shouts abuse about homosexuality. Only those in the bar are witnesses. | No |
| C | Academic research reports that people of a certain race do worse in Western style intelligence tests than other races. The report is presented by a speaker at a conference attended mostly by those interested in promoting equal opportunities. | No |
| D | A man stands outside a bar frequented by homosexual persons and shouts abuse about homosexuality. Members of the public passing by are witnesses. | Possibly |
| E | A strongly worded internet blog written by neo-Nazis recommends that Muslims and Jews be identified and deported. The audience is the general public. | Yes |
| F | A speaker at a neo-Nazi rally open to the public makes a strongly worded speech recommending that Muslims and Jews be identified and deported. | Yes |
| G | The complainant, a prominent politician, is 'outed' as homosexual in a highly charged public rally attended mostly by people who are vehemently against homosexuality. | Yes |
| H | Academic research reports that people of a certain race do worse in Western style intelligence tests than other races. The report is presented by a speaker at a neo-Nazi conference open to the public to support proposals to identify and deport people of that race. | Yes |

[90] I now apply the 'ordinary reasonable person' test to the scenarios in the table. In other words the audience is taken to be reasonable – not holding extreme views, not unthinking, and not susceptible to being roused to enmity. It seems to me that the outcomes are all 'correct' except for G which has the outcome of 'no' yet the outcome should be 'yes'. And depending on how reasonable this audience is supposed to be, the answer to E and F and H might also be 'no' when it might be thought the answer should be 'yes'. It can be seen that the 'ordinary reasonable person' test is not universally successful.

- [91] In other words, this test allows a respondent to escape liability for a public act which would amount to vilification if witnessed by an audience in an emotionally charged public meeting where reason had been pushed aside by passion or hatred, on the grounds that no reasonable person would be incited by the public act.⁴² The test would also allow a respondent to try to escape liability for a public act which would amount to vilification if, by luck, the only witness was or witnesses to the public act were, ‘unthinking’,⁴³ or ‘immune to susceptibility to excitement’.⁴⁴
- [92] The ‘reasonable member of the class of persons to whom the publication is directed’ test seems to give the same outcomes as the ‘ordinary reasonable person’ test. It does not seem to work in every case.
- [93] I now apply the ‘ordinary member of the class’ rather than a ‘reasonable member’ test, that is containing people who may not be reasonable at all. It seems to me that this produces better outcomes except that in A is a ‘yes’ when it should be ‘no’. Again the test is not universally successful.
- [94] It can be seen that the ‘ordinary person’, ‘ordinary reasonable person’ and ‘ordinary member of the class to whom the publication is directed’ tests can be made to work if the ‘right’ test is selected to achieve the ‘correct’ outcome. So it is possible to say that usually the test can be the ‘ordinary member of the class rather than a reasonable member’ test but that when this gives the ‘wrong’ outcome then the ‘ordinary reasonable person’ test should be used instead.
- [95] Nettle JA referred to this in a postscript to his judgment in *Catch the Fire* where he said:
- [115] Since writing this judgment, I have had the opportunity to read in draft the reasons for judgment of Neave, J.A. and Ashley, J.A. and, with the benefit of their insight, I wish to add three things to what I have written.
- [116] First, for the purposes of determining what constitutes “incitement”, although I have concluded that one may usually assume a degree of reasonableness among an audience, as Neave, J.A. demonstrates, that will not always be so.
- [96] And this is what happened in *Rep v Clinch (Appeal)* [2021] ACAT 106. This concerned Facebook posts which were said to be vilification of the complainant on the ground of gender identity. The appeal panel said:⁴⁵

[152] The more difficult issue is as to the relevance of this aspect of context and the response of Ms Rep’s audience. Part of this difficulty arises from the fact that there have been a number of judicial and tribunal views as to who are the relevant audience when deciding whether a statement could incite them and therefore amount to vilification. This consideration indicates that there are three possibilities. The first is an “ordinary reasonable reader”, that is, a reasonable member of the public. The second is “a reasonable member of the class of persons to whom ... [the publication] is directed”, which directs attention to the

⁴² As contemplated by Neave JA in *Catch the Fire* at [157] and Allsop P in *Sunol v Collier (No 2)* [2012] NSWCA 44 at [61].

⁴³ As discussed in *Veloskey & Anor v Karagiannakis & Ors* [2002] NSWADTAP 18 at [26].

⁴⁴ As discussed in *Burns v Dye* [2002] NSWADT 32 at [65].

⁴⁵ Acting Presidential Member R Orr QC and Senior Member Prof. P Spender.

actual audience. The third is “an ordinary member of the class rather than a reasonable member”, who may not be reasonable at all.

Then having cited the views of Bathurst CJ and Allsop P in *Sunol v Collier (No.2)* [2012] NSWCA 44 and having considered the three possible tests, the appeal panel said:

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

- [97] So in *Rep v Clinch*, having identified three possible ways of filtering the views of the hypothetical audience, as can be seen from the summary in [158], the appeal panel chose the one to use by deciding which test seemed to give the correct outcome.
- [98] The obvious problem with this approach is that the tribunal has to decide the correct outcome first, and then choose the test to achieve that outcome. This means that on appeal, the losing party would need to understand how the tribunal decided upon the correct outcome, yet this may not be apparent or expressed.
- [99] There is also a paradox if it is necessary to add the ‘reasonable person’ filter for a general audience, because it makes it feasible for example for exactly the same video podcast to amount to vilification when played to people fired up in a neo-Nazi rally, yet not to amount to vilification when viewed by the general public. This is because there would be no filtering of the people at the rally (the audience would be taken to *include* the most unreasonable people) but there would be filtering of the general public (the audience would be taken to *exclude* the most unreasonable people). It is difficult to see that the legislature intended such a distinction to be made.
- [100] These outcomes are also affected by the degree of reasonableness of the hypothetical audience. If the most unreasonable people are to be filtered out of the hypothetical audience how unreasonable must they be? Again this can be adjusted by the decision maker to achieve what seems to be the correct outcome.
- [101] A different type of test was proposed in *Catch the Fire*, although it was proposed in parallel with the ‘ordinary member of the audience’ test. It was said that the tribunal should consider the ‘natural and ordinary effect’ of the public act having regard to the nature of the audience.⁴⁶

⁴⁶ Nettle JA at [19] and [30], and Neave JA at [158] where the test was said to be the ‘natural *or* ordinary effect’.

- [102] Assuming that the use of these words means that *unnatural and extraordinary responses for that audience* should be ignored, which is an easier way to look at this, then this test produces the ‘correct’ outcome in every scenario in the table above.
- [103] The ‘natural and ordinary effect’ test has only been expressly applied in a few later decisions after *Catch the Fire*⁴⁷ and notably it has not been applied in the subsequent NSW Court of Appeal decisions where the ‘ordinary member of the audience’ test has been preferred.
- [104] Since the ‘natural and ordinary’ effect test seems to work in all the scenarios in the table, and it seems likely to reduce the impact of the subjective views of the decision maker, I propose to adopt it to decide these complaints.
- [105] Therefore my conclusion is that the test that I should apply to these complaints is:

Whether on the balance of probabilities the natural and ordinary effect of the public act having regard to the nature of the audience being considered, would be to incite members of that audience on the ground of (the attribute). The test is easier to apply by considering whether the audience being considered would be incited to hatred etc., ignoring unnatural and extraordinary reactions of that audience.

- [106] This test makes redundant I think, any other test of whether the public act was ‘capable’ of inciting or had ‘the capacity to incite’ or was ‘likely’ to incite or any such formulation. Although these expressions can be found in *Catch the Fire*, I think the following passage in the judgment of Nettle JA shows that the ‘natural and ordinary effect’ test can stand alone and can be used as the full vilification test:

[107] .. I also note in passing that the Tribunal found only that the totality of the article was “likely to incite a feeling of hatred towards Muslims” whereas the test is whether it incited hatred and so whether the natural and ordinary effect of the article was to encourage hatred of Muslims because of their religious beliefs. It may be that the two things are the same, but considerable care needs to be exercised.

- [107] This passage also demonstrates that there needs to be a causal connection between the public act and the reaction of the hypothetical audience. It does seem to be well understood that when considering this, the public act does not have to be the sole or dominant ground for the reaction and that it would be sufficient if the public act was ‘a real, operative and substantial ground’ of the reaction.⁴⁸
- [108] Returning to the table of scenarios set out above, each row of the table has an audience. To understand whether the public act would have the natural and ordinary effect to incite, the understanding and perception of the public act of that audience needs to be understood, and the proclivity of that audience to incitement by the public act also needs to be understood. But there is no advantage in dividing the audience into sub-groups with different understanding, perceptions and proclivity and applying the test to each sub-group. The outcome of the test will be the same. This is because the test

⁴⁷ *Australian Macedonian Advisory Council Inc. v LIVV Pty Limited trading as Australian Macedonian Weekly (Anti-Discrimination)* [2011] VCAT 1647 at [66], *Sisalem v The Herald and Weekly Times* [2017] VSC 254 (on appeal) at [4] and [10], and *Sloan v State of Victoria (Human Rights)* [2021] VCAT 933 at [60].

⁴⁸ *Jones And Harbour Radio Pty Limited v Trad (EOD)* [2011] NSWADTAP 19 at [64], not disturbed on appeal: *Jones v Trad* [2013] NSWCA 389 at [97].

does not require it to be likely that the majority of the people in the audience being considered would be incited. It is sufficient if some of them would be.

- [109] The test does not mean that merely providing an opportunity for a person to react (for example by providing a website or Facebook page for posts) could itself amount to vilification. It can be seen from the third party comments which have been put in evidence in these complaints that some of the comments were quite extreme and would have been extremely offensive to the complainants. But rightly it seems to me, it is not suggested on the complainant's behalf that merely providing the opportunity to make those comments could itself be a contravention of section 124A of the ADA.

What 'on the ground of' refers to

- [110] Returning to the provisions of section 124A(1):

A person must not, by a public act, incite hatred towards, serious contempt for, or severe ridicule of, a person or group of persons on the ground of the race, religion, sexuality or gender identity of the person or members of the group.

- [111] It is clear that the attribute of race, religion, sexuality or gender identity which is of relevance here is that of the 'person or group of persons' referred to in this subsection.
- [112] But there is nothing to show whether it is the public act or the reaction of the audience, which needs to be 'on the ground of' that attribute. It is clearly important to know which of these applies or whether they both do. It seems to me that the outcome of these complaints will be affected by this.
- [113] In most of the reported cases it is said that it is the 'incitement' which needs to be on the ground of the attribute.
- [114] The difficulty with this is that it does not answer the question whether:
- (a) it is the act of incitement, that is the public act, which needs to be on the ground of the attribute; or
 - (b) it is the incitement, that is the effect of the public act, in other words the reaction of the audience, which needs to be on the ground of the attribute.
- [115] The semantic problem arises from the fact that the word 'incitement' can mean either the public act or the reaction to that public act. Since the word 'incite' means 'cause the incitement' the word 'incite' also has these two possible meanings.
- [116] As can be seen from the survey of cases in schedule 1, there are a number of first instance decisions which clearly state that the public act needs to be on the ground of the attribute, and others which clearly state that the reaction of the audience needs to be on the ground of the attribute.
- [117] In these complaints both sides originally presented their cases on the basis that the public act needs to be on the ground of the attribute.⁴⁹ After closing submissions however, it seemed to me that on the authorities, it was more likely that the reaction

⁴⁹ I raised this with the parties on day 2 of the hearing, transcript 2-94 and this is also how it was argued in submissions: respondent's second further amended statement of contentions dated 14 July 2022 paragraph 25.1, respondent's written submissions dated 24 November 2022 paragraphs 63 and 64 and respondent's closing submissions on liability dated 17 March 2023 paragraph 49. The complainants' closing submissions in reply on liability dated 6 April 2023 do not say that this is incorrect and argue the question in the same way: paragraphs 26 to 28.

of the audience needs to be on the ground of the attribute and I invited submissions on the matter.

- [118] In submissions on behalf of both sides it now is accepted that the reaction of the audience needs to be on the ground of the attribute.⁵⁰ Despite this now being agreed it may be helpful if I explain why I formed the view that this must be the case.
- [119] It seems to me that the key to the correct answer here is that the intention behind the public act is irrelevant. This has been recognised in all the authorities, except for those dealing with the criminal vilification law. This is because the civil test for vilification, that is whether the public act would incite, is entirely objective.
- [120] This was said to be significant when considering what ‘on the ground of’ refers to in *Western Aboriginal Legal Service Limited v Jones & anor* [2000] NSWADT 102:⁵¹

[113] The fifth element of section 20C(1) concerns the ground upon which the requisite degree of ill-feeling must be incited. The public act by a person must incite hatred towards, serious contempt for or severe ridicule of a person or a group of persons “on the ground of the race of the person or members of the group”. As we have determined that it is not necessary to prove that the person who performed the public act intended to incite anyone **it is clearly not relevant to look at his or her reasons or grounds for performing the public act** in question. It seems that we must ask whether the ordinary, reasonable person would have been incited by the public act to have the requisite degree of ill-feeling on the ground of race. There **must be a causal connection between the persons about whom the requisite degree of ill-feeling is held and the race of those persons** which is produced by the public act in question. In other words, the **reason or ground** for the ordinary, reasonable person having the requisite degree of ill-feeling as a result of the public act must be the race of the person or group of persons about whom that requisite degree of ill-feeling is generated.

Emphasis added

- [121] Although the decision in *Western Aboriginal* was set aside by the Appeal Panel on appeal, this was because the complainant did not have standing to bring the complaint,⁵² and the above dicta was not disturbed.
- [122] On the same lines, in *Kazak v John Fairfax Publications Limited* [2000] NSWADT 77, Deputy President Hennessy with Members Farmer and Jowett said:

[69] .. “on the ground of” in the vilification provisions relates to the relationship between race and incitement, not race and the public act. In other words, the grounds on which the public act was performed is not relevant, it is the ground on which the reader was incited to hatred etc which is relevant.

⁵⁰ Complainants’ further submissions re: interpretation and application of s.124A of the *Anti-Discrimination Act* 1991 (Qld) dated 4 August 2023 paragraphs 5, 6 and 8. Respondent’s closing submissions on grounding and capacity to incite dated 28 July 2023 paragraph 2.

⁵¹ Judicial Member N Rees sitting with Members Silva and Luger.

⁵² *Jones & anor v Western Aboriginal Legal Service Limited (EOD)* [2000] NSWADTAP 28.

- [123] Although *Kazak* went on appeal the above dicta was not challenged.⁵³
- [124] The same approach was taken by the Appeal Panel of the NSW tribunal in *Veloskey & Anor v Karagiannakis & Ors (EOD)* [2002] NSWADTAP 18, where having explained that the public act must be capable of inciting intense dislike or hostility towards a person or group of persons, or grave scorn for a person:⁵⁴
- Moreover, these reactions must be aroused because of the race of the person or group of persons, said to be vilified by the public act.
- [125] The irrelevance of the intention behind the public act is also what led the Victorian Supreme Court of Appeal in *Catch the Fire Ministries v Islamic Council of Victoria Inc* [2006] VSCA 254 to take the same approach as in *Kazak*.⁵⁵ In section 9(1) of the Victorian vilification law the person's motive in engaging in the conduct is expressly stated to be irrelevant, and this was considered to be significant.⁵⁶
- [126] Therefore it was said that the statutory provisions did not require any intention that the public act was on the ground of the stated attribute, but required the person incited to react on the ground of the stated attribute. This differed therefore from the Commonwealth prohibition against public offensive behaviour on the ground of an attribute, that is 18C(1) of the *Racial Discrimination Act* 1975 (Cth) (set out in schedule 3 to these reasons) expressly stating that the act must be on the ground of the attribute. Hence in *Bropho v. Human Rights and Equal Opportunity Commission* (2004) 135 FCR 105, French J held that section 18C(1) required a causal connection to exist between the public act and the attribute of the person or group affected by the act.
- [127] In *Catch the Fire* the statutory wording was different. Nettle JA recited the tribunal reasoning and then said:

[30] With respect, there are several aspects of that reasoning which I take leave to doubt. The first of them arises out of the adoption of the *Bropho* test and, consequently, the Tribunal's conclusion that the words "on the ground of [religious beliefs]" imply a causal connection between religious beliefs and impugned conduct. In effect the Tribunal decided that the Seminar contravened s.8 because the Tribunal was satisfied that Pastor Scot was moved or caused by the religious beliefs of Muslims to make the statements which he did at the Seminar, and that an ordinary reasonable person who was not malevolently inclined or free from susceptibility to prejudice would be inclined by Pastor Scot's statements to hate Muslims. But, for the reasons which I have given, I do not consider that that was the question which needed to be decided. In my view the question was whether, having regard to the content of the statements in the context of the whole of the Seminar, and to the nature of the audience in the sense that I have described, the natural and ordinary effect of what was stated was to encourage the hatred of Muslims based on their religious beliefs.

⁵³ *John Fairfax Publications Pty Ltd v Kazak (EOD)* [2002] NSWADTAP 35.

⁵⁴ [30].

⁵⁵ Neave JA at [144] and [149].

⁵⁶ Section 9(1) of the *Racial and Religious Tolerance Act* 2001 (Vic), as explained by Nettle JA at [23], Ashley JA at [131], and Neave JA at [141].

Then Neave JA, having considered the wording of section 18C of the *Racial Discrimination Act* 1975 (Cth) and the *Bropho* test said:

[141] By contrast, s.8 of the *Racial and Religious Tolerance Act* determines whether the words or conduct are unlawful by reference to their effect on the relevant audience. To put it another way, the Victorian legislation is not concerned with whether the alleged inciter has been actuated by the religious belief of a person or class of person, but with whether the audience was incited to hatred (or other relevant emotion) of another group, because of that groups' religious beliefs.

- [128] Although the Queensland and New South Wales law does not contain the equivalent of section 9(1) in the Victorian law, the principles which are applied are to the same effect. It is the consistent view expressed in the authorities that the intention behind the public act is irrelevant.⁵⁷ In those circumstances it cannot be said that whether the public act was done on the ground of an attribute is relevant. Hence 'on the ground of' must refer to the reaction of the audience.

Causal connection between the attribute and reaction of the audience

- [129] The question now arises how close and direct the causal connection between the attribute and the reaction of the audience needs to be for there to be vilification. Allied to this question is whether it would be sufficient for there to be vilification for the reaction of the audience to be because of a characteristic which might be held by someone with the attribute.
- [130] This is important for me to decide because (as I have found below) the first blog could have incited persons to hold contempt for Mr Hill because the blog stated (incorrectly as it turned out) that he was a porn-star and used a sexually explicit name when performing as a drag queen even to child audiences. It might be possible to find that an audience which reacted in this way was in fact reacting on the ground of Mr Hill's sexuality.
- [131] It seems to me that the terms of section 124A require a close connection between the reaction of the audience and the attribute. In this respect it is unlike the 'discrimination on the basis of an attribute' test in section 10 of the ADA, which is greatly enlarged by the operation of section 8 of the ADA to include less favourable treatment on the basis of characteristics which a person with the attribute generally has, or which is often imputed to the person, or which the person is presumed to have. It seems to me that because of the express terms of section 124A there is no room to understand 'on the ground of' as including 'on the ground of such characteristics'.
- [132] For the same reason the 'but for' test would seem to be inappropriate when considering whether the reaction of the audience was 'on the ground of' an attribute for the purposes of section 124A. In this respect, the High Court when applying the 'less favourable treatment because of the aggrieved person's disability' test in *Purvis v New South Wales* (2003) 217 CLR 92, said that the 'but for' test would not be fairly

⁵⁷ The relevant authorities are set out by Member Fitzpatrick in *Menzies*, to which I would add *Sunol v Collier (No 2)* [2012] NSWCA 44 Bathurst CJ at [41], Allsop JA at [61] and Basten JA at [79]), and *Kerslake v Sunol (Discrimination)* [2022] ACAT 40, Senior Member R Orr QC at [73].

applied,⁵⁸ and was not an accepted test for causation in the context of anti-discrimination legislation.⁵⁹

- [133] It does seem to be well understood however that when applying the ‘on the ground of an attribute’ test, the attribute does not have to be the sole or dominant ground for the reaction and that it would be sufficient if the attribute was ‘a real, operative and substantial ground’ of the reaction.⁶⁰

Evidence about the audience and its actual reaction – admissibility and relevance

- [134] Since there are third party comments in evidence showing reactions to the respondent’s published material I need to consider the extent to which this is admissible and relevant to the test whether the natural and ordinary effect of the public act would be to incite the audience being considered to hatred etc. on the ground of the attribute.
- [135] The first way in which such evidence is relevant it seems to me, is in helping to identify the nature of the audience.
- [136] The importance of the nature of the audience was emphasised in *Catch the Fire*, where Nettle JA contrasted a ‘select’ audience of academics with the general public,⁶¹ and by Neave JA who considered that the tribunal was in error by failing to consider the effect of the public act on the audience to which it was actually directed.⁶²
- [137] The characterisation of the audience was said to be ‘crucial’ in *Veloskey & Anor v Karagiannakis & Ors (EOD)* [2002] NSWADTAP 18 when applying the ‘capable of inciting others’ test.⁶³ In *Jones v Trad* [2013] NSWCA 389 the tribunal’s failure to identify the audience was a successful ground of appeal.
- [138] A second way in which such evidence could be relevant it seems to me, is showing how the public act was understood and perceived by the audience. This would include for example, how certain words or phrases were understood in the modern vernacular or whether the juxtaposition of certain passages held a particular meaning to the particular audience.
- [139] A third way such evidence could be relevant it seems to me, is showing the proclivity to incitement of the audience by the public act. That this is very relevant can be seen from the vilification test to the scenarios in the table set out above.
- [140] Apart from these possibilities it seems also that the way people actually reacted might also assist to show how the hypothetical person might react. This is not to say that if there is an actual reaction to hatred etc. on the relevant ground this proves that the public act was vilification. The value of the evidence is limited to showing objectively, whether the natural and ordinary effect of the public act on the audience would be to incite to hatred etc. the ground of the attribute. In considering this, it

⁵⁸ Gleeson CJ at [13].

⁵⁹ McHugh and Kirby JJ at [166].

⁶⁰ *Jones And Harbour Radio Pty Limited v Trad (EOD)* [2011] NSWADTAP 19 at [64], not disturbed on appeal: *Jones v Trad* [2013] NSWCA 389 at [97].

⁶¹ [17]. Also Neave JA in *Catch the Fire* at [159] where her Honour said that it was relevant to consider the characteristics of the audience to which the words or conduct is directed.

⁶² [162] and [164].

⁶³ The Appeal Panel of the NSW tribunal at [26].

would be necessary to ask whether the reaction was unnatural or extraordinary and should therefore be ignored.

- [141] There is some dicta in support of the suggestion that this guidance can be gleaned from evidence of actual reactions. In *Catch the Fire*, evidence was adduced of the deep offence of Muslims who witnessed a presentation critical of certain aspects of the Koran. Both Nettle JA and Neave JA expressed the view that such evidence could be relevant as to whether the public act was sufficiently vehement to invoke hatred or other relevant emotion of or towards Muslims on the basis of their religious beliefs.⁶⁴
- [142] As Nettle JA pointed out however, since in that particular appeal the evidence had come from Muslim attendees it was ‘largely if not wholly irrelevant’ because it was the effect of the public act on non-Muslims which had to be considered.⁶⁵ This dicta appears to suggest that if evidence had been adduced about the effect of the public act on non-Muslims it could have been relevant.
- [143] A similar thing was said by the Appeal Panel in the NSW tribunal in *Burns v Laws (EOD)* [2008] NSWADTAP 32:⁶⁶
- it is not necessary to supply evidence that any person was actually incited, though the existence of any such evidence is a matter that might be taken into account by the trier of fact
- [144] The Appeal Panel in *Burns v Laws* cited *Jones v Scully* [2002] FCA 1080 for the proposition put forward. However that was an appeal heard by Hely J in a complaint under section 18C(1)(a) of the *Racial Discrimination Act* (1975) (Cth) where the wording is quite different.⁶⁷ But like the Queensland vilification laws, Hely J said that the test was objective, and so it was not necessary to have any evidence of actual impact. His Honour said that where there was actual evidence of impact, or even opinion evidence of likely impact on others, this would be admissible but not determinative.⁶⁸
- [145] In *Burns v Radio 2UE Sydney Pty Ltd & Ors* [2004] NSWADT 267 the tribunal said that the evidence of actual impact supported the view that the tribunal had reached independently, that the public act was capable of inciting ridicule of homosexual men on the ground of their sexuality.⁶⁹
- [146] Also in *Veloskey & Anor v Karagiannakis & Ors (EOD)* [2002] NSWADTAP 18, the Appeal Panel of the NSW tribunal said that evidence that the public act had an actual effect may be relevant both on the question of the capacity of the public act to incite, and on the question of damages.⁷⁰
- [147] It is interesting to note that the possibility of opinion evidence as to the likelihood of incitement was not rejected by Senior Member Noreen Megay in *Unthank v*

⁶⁴ [65] and [185].

⁶⁵ [76].

⁶⁶ [118], President O'Connor DCJ sitting with Judicial Member Grotte and Member Nemeth de Bikal.

⁶⁷ As can be seen from schedule 3 to these reasons, that section asks whether the act was ‘reasonably likely, in all the circumstances, to offend, insult, humiliate or intimidate another person or a group of people’.

⁶⁸ [99].

⁶⁹ [57].

⁷⁰ [25]. Deputy President Latham, DCJ sitting with Judicial Member Ireland and Member Edwards.

Watchtower Bible and Tract Society of Australia (Human Rights) [2013] VCAT 1810.⁷¹

The nature of the publisher and the publication

[148] It seems to me that whether the ‘natural and ordinary effect’ of the public act would be to incite on the relevant ground in cases where the publisher is known to the audience may also turn on how authoritative the publisher is. Clearly a prominent politician respected by colleagues and with much support would be much more likely to incite than an unknown person using exactly the same words.

[149] This was a factor in *Burns v Dye* [2002] NSWADT 32:

[65] Could the same be said, however, for the ordinary reasonable person, to use the language of the Casey test, “not immune from susceptibility to incitement, nor holding racially prejudiced views”? It is not in issue that Mr Dye is a simple, poorly educated man. The evidence shows, on the evening of 2 September in a drunk and incoherent state he hurled abuse at Mr Burns. Mr Dye’s rantings would have made it abundantly clear to the hypothetical observer that he hated or held feelings of serious contempt for Mr Burns (at least while in that drunken state). However we are not comfortably satisfied that this abuse would have incited the same feelings in third parties, including those not immune from susceptibility to incitement or prejudice. In our view, an observably drunk Mr Dye who, from the evidence available, from outward appearances would not appear to enjoy any position of respect or influence, would be unlikely to influence, urge on or prompt, any witness to this assault to feelings of ill will towards Mr Burns. This is not to suggest that it is necessary to establish that the vilifier commands a position of influence or power over the victim or his/her audience (or potential audience) but rather that in certain situations this may be a relevant consideration.

[150] The Casey test referred to here is the Australian Broadcasting Tribunal’s *‘Inquiry Into Broadcasts by Ron Casey’* in 1989, as cited in the NSW Law Reform Commission’s *Report 92(1999) - Review of the Anti-Discrimination Act 1977 (NSW)* paragraph 7.123.

[151] Also the nature of the publication will be relevant – so that a polished video webcast will be more influential than some rough looking graffiti on a train, despite both reaching a similar audience.

[152] As said in *Burns v Radio 2UE Sydney Pty Ltd & Ors* [2004] NSWADT 267:

[44] At the time Mr Price had been a journalist for 30 years, a radio presenter for 15 years and a program director. He is a nationally recognised broadcaster who was broadcasting at a prime time on one of Australia’s most-listened-to radio stations. His standing as a public figure and commenter, whose business was in part to propagate his opinion, gives his comments considerable weight in the minds of ordinary listeners.

[45] Those comments are the more influential for having been broadcast on radio station 2UE. Radio 2UE Sydney is widely known as a well-listened to radio station, particularly for its ‘talk back’ programs. In February 2000 the Australian Broadcasting Authority, in its report into Radio 2UE Sydney Pty Limited, said at page 1 of the Executive Summary “Talkback radio is an

⁷¹ [24].

influential medium, and 2UE was probably the most listened-to talk back radio station in Australia during the 1990s”. We are satisfied that in June 2003 Radio 2UE Sydney was a high profile radio station, reaching a significant listening audience. Mr Price’s comments were broadcast through the influential medium of talkback radio on a very well-listened to radio station.

- [153] In *GLBTI v Wilks & Anor* [2007] QADT 27, Member Savage SC was concerned with the publication of a letter to the editor of a newspaper which threatened violence to homosexuals at Mission Beach. He said:

[19] I was initially concerned that the entirely fictitious story invented by Mr Woodley could not be taken seriously by reasonable members of the community. But incite does not merely mean to bring into existence – the test is not whether conduct would create hatred, contempt or ridicule only where it had not previously existed. Here it is important to remember that Mr Wilks was the editor of a paper with wide circulation in Mission Beach – a paper which publishes both its own and others opinions publicly. To use the forum provided by the newspaper to publish such material to a population which may include people who are “reluctantly tolerant” of homosexuals, objectively incites those if not others to cease tolerance and proceed down the path of hatred, ridicule and contempt.

- [154] These authorities and examples show that when applying the vilification test it is relevant to consider the influence of the respondent and of the publication.

Exception for reasonable acts done in good faith for a purpose in the public interest

- [155] Section 124A(2) of the ADA contains certain exceptions so that it is not unlawful to incite hatred etc. on the stated ground in certain circumstances. One exception is the publication of a fair report of a public act of vilification, so it would be lawful in a fair way publicly to report on someone else’s material which was vilification. Another exception is the publication of material in circumstances in which the publication would be subject to a defence of absolute privilege in proceedings for defamation. So that would cover the fair reporting of court or proceedings in parliament or a court or inquiry. The respondent does not rely on either of these exceptions.⁷²

- [156] The respondent relies on that exception in section 124A(2)(c) which says that this is not unlawful:

a public act, done reasonably and in good faith, for academic, artistic, scientific or research purposes or for other purposes in the public interest, including public discussion or debate about, and expositions of, any act or matter

- [157] The intention of the exceptions appears from the explanatory note when sections 124A and its serious vilification counterpart (in section 131A) were introduced (then limited to racial and religious vilification):⁷³

The section contains a range of exceptions which are designed to strike a balance between the right to freedom of expression and freedom from racial and religious vilification.

⁷² Respondent’s written submissions dated 24 November 2022 paragraph 4.

⁷³ By the *Anti-Discrimination Amendment Act 2001* (Qld).

Burden of proof

- [158] Where does the burden of proof lie if an exception might apply? The options are that the complainant has to show that the exception does not apply; there is no burden; or to be able to rely on an exception the respondent has to show it applies.
- [159] Generally the complainant has the burden of proof to show a contravention of the ADA.⁷⁴ But this is subject to section 206 which reads:

206 Burden of proof—exemptions

If the respondent wishes to rely on an exemption, the respondent must raise the issue and prove, on the balance of probabilities, that it applies.

- [160] Are the exceptions in section 124A(2)(c) exemptions in section 206?
- [161] Section 12 of the ADA sets out the ‘structure’ of the ADA and explains that there are exemptions for each ‘area of activity’ of the ADA, and also general exemptions in part 5. The headings for each area of activity contain the word ‘exemptions’.
- [162] It seems to me that the exceptions in section 124A(2) are quite different in form and in substance from the exemptions in the ADA. I could not say that the respondent has the burden of proof to show an exception in section 124A(2) applies by reason of section 206.
- [163] In *Deen v Lamb* 2001 [QADT] 20, Walter Sofronoff QC, President, left open the question upon whom the burden of proof lies under section 124A(2).⁷⁵
- [164] In other jurisdictions, a definite position has been taken on this matter but the wording in the relevant statutes is different, so this is of no assistance. So for example, in NSW, section 104 of the NSW *Anti-Discrimination Act* 1977 (formerly section 109) uses the word ‘exceptions’ and provides that where conduct is excepted from conduct that is unlawful, the onus of proving the exception lies on the respondent.⁷⁶ In the ACT the same applies.⁷⁷ The Victorian wording can also be contrasted because it is expressly provided that the respondent must establish that the exception applies for it to be relied on.⁷⁸
- [165] The wording of the exceptions in Commonwealth law is closer to the Queensland wording, but at least the decision in *Jones v Scully* [2002] FCA 1080 was influenced by an express statement in the Explanatory Memorandum to the relevant Commonwealth Bill that the respondent had the onus to show one of the exceptions applied,⁷⁹ which does not apply in Queensland.
- [166] This leaves *Toben v Jones* [2003] FCAFC 137, where Carr J, with whom Keifel and Allsop JJ agreed, considered that the Commonwealth wording fell within the category of exemptions described by the High Court of Australia in *Vines v Djordjevitch* (1955)

⁷⁴ Section 204 of the ADA.

⁷⁵ Page 12.

⁷⁶ This was conclusive as to burden of proof in *Burns v Radio 2UE Sydney Pty Ltd & Ors* [2004] NSWADT 267 at [77], and in *Burns v McKee* [2017] NSWCATAD 66 at [50], for the tribunal to find that the respondent had the burden of proof if he wished to rely on the public interest exception.

⁷⁷ Section 70 of the *Discrimination Act* 1991 (ACT).

⁷⁸ Section 11 of the *Racial and Religious Tolerance Act* 2001 (Vic).

⁷⁹ *Jones v Scully* at [127].

91 CLR 512 at 519-520, namely that ‘it may be the purpose of the enactment to lay down some principle of liability which it means to apply generally and then to provide for some special grounds of excuse, justification or exculpation depending upon new or additional facts .. then it is evidence that such an enactment supplies considerations of substance for placing the burden of proof on the party seeking to rely upon the additional or special matter’.⁸⁰

[167] It cannot be said from these authorities that the issue about who has the burden of proof if a respondent relies on an exception under section 124A(2) of the ADA is resolved.

[168] Despite that, on behalf of the respondent it was accepted in submissions that the respondent has the burden.⁸¹ Since I have not had full argument about this it would have been right for me to approach the matter in that way if I had needed to consider the issue.

Effect of Human Rights Act

[169] The *Human Right Act 2019* (Qld) (HRA) is now in force, stating of relevance to the exceptions in section 124A(2), and of relevance to the respondent’s defence to this complaint, a right:⁸²

to freedom of thought, conscience, religion or belief including a right to demonstrate such belief in .. practice and teaching .. in public or private, and a right not to be restrained in a way that limits the person’s freedom to have .. such belief⁸³

to freedom of expression which includes the freedom to .. impart information and ideas of all kinds⁸⁴

[170] Also relevant to the respondent’s defence to this complaint, is a child’s right:

without discrimination, to the protection that is needed by the child, and is in the child’s best interests, because of being a child⁸⁵

[171] I note there are also human rights on which the complainants can rely. In living their lives in the way they have chosen and in presenting drag queen story time, and of relevance to this complaint of vilification, the complainants’ relevant rights under the HRA would be a right:

not to be treated .. in a cruel .. or degrading way⁸⁶

to freedom of thought, conscience, .. or belief including a right to demonstrate such belief in .. practice and teaching .. in public or private, and a right not to be coerced or restrained in a way that limits the person’s freedom to have or adopt .. such belief⁸⁷

⁸⁰ [41].

⁸¹ Respondent’s written submissions dated 24 November 2022 paragraphs 17 and 40.

⁸² These descriptions are paraphrased and the actual wording of the HRA should be considered.

⁸³ Section 20.

⁸⁴ Section 21.

⁸⁵ Section 26.

⁸⁶ Section 17(b).

⁸⁷ Section 20.

to freedom of expression which includes the freedom to .. impart information and ideas of all kinds⁸⁸

not to have .. their privacy .. unlawfully or arbitrarily interfered with and not to have their reputation unlawfully attacked⁸⁹

- [172] By sections 5(2)(a) and 48 of the HRA, I am obliged to interpret section 124A to the extent possible that is consistent with its purpose, in a way that is compatible with human rights or if that cannot be done, in a way that is most compatible with human rights.
- [173] When striking the balance between the provisions of section 124A and these human rights I am mindful of the combined effect of sections 8 and 13 of the HRA which provide that a decision is compatible with human rights if it does not limit a human right or limits the human right only to the extent that is reasonable and demonstrably justifiable in a free and democratic society based on human dignity, equality and freedom. Section 13(2) sets out certain things which may be relevant in deciding whether such a limit is reasonable and justifiable.
- [174] On behalf of the respondent, certain materials sourced from foreign jurisdictions have been provided and offered for consideration under section 48(3). I have read these with interest.
- [175] I also note that it is said on behalf of the respondent that the respondent's published material is 'protected' under the implied constitutional freedom of communication,⁹⁰ and seemingly therefore that section 124A cannot apply to them. The submissions also refer to *Owen v Menzies & Ors*; *Bruce v Owen*; *Menzies v Owen* [2012] QCA 170,⁹¹ where it was found on this very argument, that section 124A does not impact upon the implied constitutional freedom of communication. It was also found that the exception in section 124A for reasonable and good faith public discussion or debate⁹² was a reasonable balance between prohibiting objectionable conduct and the implied constitutional freedom, and therefore was not inconsistent with that freedom. As recognised in the submissions, at this level I must regard *Owen v Menzies* as conclusive on this matter.
- [176] I do not consider that making a decision under section 124A of the ADA upon a complaint referred to the tribunal by QHRC is acting in an administrative capacity. Hence I am not acting as a public entity within the meaning of the HRA,⁹³ and the direct prohibition in section 58 of the HRA from making a decision in a way that is not compatible with human rights does not apply to this decision.

Interpreting the exception for reasonable and good faith public discussion or debate

- [177] Consideration whether something is 'done reasonably and in good faith' seems to be a mixed objective and subjective test. If something is required to be 'done reasonably' then it is necessary to apply an objective test suitable for the context and the relevant community. I take into account that what may be reasonable to do in some countries

⁸⁸ Section 21.

⁸⁹ Section 25.

⁹⁰ Respondent's second further amended statement of contentions dated 14 July 2022 paragraph 32A, and respondent's written submissions dated 24 November 2022 paragraph 75.

⁹¹ [76].

⁹² [77] and [78].

⁹³ Because of the exclusion from the definition of public entity in section 9(4)(b) of the HRA.

might be quite unreasonable in Australia. It is the Australian test that I should apply because the respondent's website emanated from Australia.

- [178] If something is required to be 'done in good faith' then this is not an objective test but a subjective one.
- [179] Both tests need to be satisfied for the exception properly to be applied.
- [180] For the exception to apply the public act must be done for a purpose or purposes in the public interest, including public discussion or debate about, and expositions of, any act or matter.
- [181] At first sight, because the word 'including' seems to add to the meaning of 'public interest', these words would seem to deem any public discussion or debate about anything to be 'in the public interest' however raw or objectionable that discussion was. But if that construction were adopted, it would mean that the words 'in the public interest' would have no work to do.
- [182] The preferable construction seems to be that the words 'public discussion or debate about, and expositions of, any act or matter' is an example of something which may or may not be in the public interest.
- [183] It is clear from this I think, that it is not necessary for the debate to be in the 'public interest' in the sense that it must be 'for the good of the public'. It is sufficient for the debate to be about something which is legitimately the subject matter of public discussion or debate. This means that certain discussions or debates would not come within the exception, because they would be so out of bounds that they would not be 'for a purpose in the public interest'.
- [184] This is the construction I would have adopted if it had been necessary to consider this issue.

Discussion or debate relied on

- [185] Submissions on behalf of the respondent rely on this discussion and debate:⁹⁴

to promote public discussion and debate about the appropriateness of drag queen story time events and to promote discussion of the risks to children of promoting drag queens as role models for children

- [186] This is expanded to say:⁹⁵

The public interest issues include discussion about the purpose and nature of Drag Queen Story Time events, the sexualised and adult nature of drag queen entertainment, the risks of exposure of children to members of the adult entertainment industry, the risks to children of being taught genderfluid ideology, the dramatic increase in children presenting with gender confusion in Australia, and the risk of long-term regret of children subsequently rejecting genderfluid ideology.

⁹⁴ Respondent's second further amended statement of contentions dated 14 July 2022 paragraph 7.3

⁹⁵ Respondent's written submissions dated 24 November 2022 paragraph 11.

[187] Submissions on behalf of the complainants say:⁹⁶

It is self-evident that the issue of gender identity and/or gender dysphoria are matters of public interest, including as topics of public discussion or debate. To the extent that the Respondent seeks to adduce evidence to support the proposition that the issue of gender identity or gender dysphoria is in the public interest including as topics of public discussion or debate, it is irrelevant because it is not in issue in this case.

and⁹⁷

the Complainants broadly agree that there is a public interest in discussing issues of gender identity, sexuality, and Drag Queen Story Time

and⁹⁸

The Complainants accept that there is significant public discussion legitimately in the public interest about Drag Queen Storytime in Australia and overseas

[188] These concessions enabled this to be said on the respondent's behalf:⁹⁹

The Tribunal can take it that it is common ground between the parties that the publications of the Respondent which are impugned in these proceedings are within the umbrella of the public interest exception.

[189] Had I found any of the respondent's published material to amount to vilification under section 124A then I probably would have needed to decide with some precision what discussion or debate in the public interest was covered by the exception in section 124A(2)(c) but in the circumstances this is unnecessary.

Considering the complaints

[190] I am now in a position to consider the complaints before me. Firstly I shall set out the factual background leading up to the respondent's published materials. Then I shall find facts relevant to the elements of vilification. In case of it is of use in any other place I shall find facts relevant to the exception relied on. Then I shall consider whether the respondent's published material amounted to vilification.

Factual background

[191] On Sunday 12 January 2020 there was a children's holiday entertainment event called 'Drag Queen Story Time' organised by the Brisbane City Council and Rainbow Families at the Brisbane City Council Library.

[192] The complainants were engaged by Rainbow Families to dress as drag queens with the stage names of 'Queeny' (Mr Valkyrie) and 'Diamond' (Mr Hill).

[193] A group of between 10 and 20 children aged about 2 to 8 years old attended the event. It lasted about 1½ hours. The complainants sang 'Twinkle, Twinkle Little Star' to them and read a story book entitled 'Love Makes a Family' by Sophie Beer. They

⁹⁶ Complainants' submissions on facts in issue and issues for the tribunal's determination dated 18 November 2022 paragraph 4.

⁹⁷ Complainants' closing submissions dated 24 February 2023 paragraph 4.

⁹⁸ Complainants' closing submissions dated 24 February 2023 paragraph 7.

⁹⁹ Respondent's closing submissions dated 17 March 2023 paragraph 12.

supervised an art and craft activity where the children drew pictures of their family and some of them cut out paper dolls or made origami.¹⁰⁰

- [194] The book ‘Love Makes a Family’ is exhibit 1. It depicts various ordinary family scenes and says on the back cover:

Whether you have two mums, two dads, one parent, or one of each, there is one thing that makes a family a family and that’s LOVE.

- [195] The performance was advertised by a poster in the lobby of the library and on the Rainbow Families Facebook site.

- [196] The Facebook site is in Annexure C to Professor Parkinson’s expert report.¹⁰¹ This advertised the event as:

Drag Storytime at Bris Square Library

Event by Rainbow Families Queensland

Price: free – Duration 1 hr

Public: Anyone on or off Facebook

Join the glamorous Diamond and Queeny at Brisbane Square Library THIS SUNDAY 11.30-12.30 for bubbles, craft, and stories about diverse kids and families. This is a joint event presented by Brisbane City Council Libraries and Rainbow Families Qld.

- [197] The Facebook advertisement depicted what appears to be the complainants dressed and made up in drag. The advertisement had the tags ‘literature’ and ‘child-friendly’.

- [198] Although the event was open to the public and there was no fee to attend, it was performed in a closed room in the library.

- [199] The children were only in attendance as a result of their parents or guardians taking them there. Hence it would be a decision of the parent or guardian that the children should attend.

- [200] Near the end of the performance a group of university students attended the event as a protest and chanted repeatedly ‘drag queens are not for kids’.

- [201] One of the university students, Wilson Gavin, is reported to have taken his own life soon after this protest.

- [202] The ‘respondent’s published material’ which form the basis for these vilification complaints is a blog dated 16 January 2020 and various posts between 25 January and October 2020 which were critical of the event and expressed sympathy and regret for Mr Gavin. Later he spoke on a panel of speakers and published a video podcast of this show. The material is exhibited to Mr Hill’s affidavit of 25 November 2022.

- [203] The respondent has also published subsequent posts which are not part of these proceedings, but could have been relevant on the question of remedy.

¹⁰⁰ Evidence of Mr Valkyrie and Mr Hill at transcript 1-22 and 1-84.

¹⁰¹ Bundle page 472.

Finding of facts relevant to the elements of vilification

The complainants

- [204] Mr Valkyrie was born with female physiology, has received an affirmation procedure that is a double mastectomy to address gender dysphoria, and identifies as male. He has homosexual sexual orientation. He is a member of the LGBTIQ+ community. He is a human rights and community advocate and is trained in community services youth work.¹⁰²
- [205] Mr Hill was born as and identifies as male and has homosexual orientation. He is a member of the LGBTIQ+ community. He performs as a drag queen under the name Diamond Good-Rim but only for adult shows. Contrary to what was said or implied on numerous occasions in the respondent's published material, when working with children he only uses the name 'Diamond' and he had never been involved in the pornography or prostitution industries.¹⁰³

The respondent

- [206] As mentioned above, in deciding whether, taking an objective view, the published material would incite the audience to hatred etc. on a listed ground, the degree of authority of the publisher is relevant.
- [207] It is clear that the respondent could speak with some considerable authority and influence, about the subject matter of his published material.
- [208] He had a background as a journalist and at the age of 30 started a six year period as a member of Toowoomba City Council, and then worked as advisor to Senators Ron Boswell and also Barnaby Joyce. He was with the Australian Christian Lobby for 11 years first as its Chief of Staff and then its Managing Director. At the time of the blog of 16 January 2020 he was aged 51 and was working as Operations Manager at Advance Australia, which was a conservative political lobbying group, and in 2021 he became Director of Campaigns and Communications for the Christian Democratic Party of New South Wales.¹⁰⁴ By the time of the hearing the respondent was National Director of the Federal political party Family First.
- [209] The respondent had been a prominent campaigner on various social and cultural issues from a conservative Christian viewpoint, being against the legalisation of strip clubs and brothels, against same sex marriage, and in favour on internet pornography filtering.¹⁰⁵ He has written for the Spectator and has published a book.
- [210] The respondent's standing was shown by the fact that he was one of the guest speakers on the live webcast, Pellowe Talk Live. This became the video podcast of the 17 November 2020 which is part of the subject matter of these complaints.
- [211] The respondent says that he was targeted by activists with opposite views and that the Australian Christian Lobby office suffered a car bomb attack in 2016 when he was its General Manager.

¹⁰² Affidavit of Mr Valkyrie dated 24 May 2021 at [2] to [4] and transcript 1-81 to 1-83.

¹⁰³ Affidavit of Mr Hill dated 26 May 2021 at [2] to [6] and transcript 1-24, 1-29, 1-44, 1-55 and 1-65.

¹⁰⁴ Affidavit of Mr Shelton dated 7 September 2021 at [4].

¹⁰⁵ Affidavit of Mr Shelton dated 7 September 2021 at [6].

- [212] Of particular relevance to the complaints I have to decide, the respondent says that from 2014 he was one of the first to warn of the dangers of the Safe Schools education program introduced in Victoria, because in his view it encouraged children as young as primary school age to gender fluidity and sexual experimentation. He says that he first became aware of drag queen story time in 2018 and was certain that it was part of an ongoing agenda to promote gender fluidity to children.¹⁰⁶

The platform

- [213] Since about February 2018 the respondent has operated a website where he posts a blog usually daily. He says the blogs primarily focus ‘on the natural family, protection of children, defence of human life, freedom of speech and religion, small government, economic development, and fiscal conservatism’.
- [214] He says that he regularly discusses harm to a child’s development from exposure to gender fluidity ‘as frequently disseminated in many Australian schools and across mainstream media channels’.
- [215] He says that his blog serves a wide audience through his public Facebook page and his Twitter account where he posts links to each of his blog posts immediately after they are published. In this way he drives traffic to the website and to his blogs.¹⁰⁷ He says that his Facebook page has more than 12,000 followers and his Twitter account has more than 11,000 followers.¹⁰⁸ The respondent says that his posts receive a great deal of attention, and there were many third party comments to his posts.
- [216] Although it was not possible for third parties to post a comment on the blog on the respondent’s website it is possible to post comments on the Facebook page, and this where the third party comments which are in evidence have come from.
- [217] The respondent’s published material remains available for viewing although as can be seen below, many of the third party comments have now been removed by a process of moderation.

The audience

- [218] As mentioned above,¹⁰⁹ the nature of the likely audience for the respondent’s published material is very relevant, and some assistance can be obtained from the actual third party comments to understand this.
- [219] The respondent’s published material could readily be seen online by using an ordinary internet browser or mobile phone. The audience was not restricted to Australia but was global. The third party comments help to show that the likely audience fell into these categories:
- (a) the respondent’s supporters or those who already firmly held views similar to the respondent;

¹⁰⁶ Affidavit of Mr Shelton dated 7 September 2021 at [6].

¹⁰⁷ Transcript 2-44 lines 35-42.

¹⁰⁸ Affidavit of Mr Shelton dated 7 September 2021 at [16].

¹⁰⁹ In the section ‘evidence about the audience and its actual reaction – admissibility and relevance’.

- (b) those who were sympathetic or supportive of the complainants or the groups of persons of which they were members, that is the LGBTIQ+ community or human rights and community advocates;
- (c) people with unformed, developing or changing views.

[220] It is suggested on the complainants' behalf that people in category (a) 'may be more readily triggered or incited by provocative and inflammatory statements'.¹¹⁰ But this would seem to depend on how firm their existing views were, how far they would be relying on information from the respondent or had their own source of information, and how far their views could be swayed by the respondent's published material. It is possible that, as supporters of the respondent, the views of people in this category on the issues raised in the respondent's published material were already settled.

[221] As a general impression I would say that people in category (c) would be the most likely to be influenced by material of the type published by the respondent where it was strongly worded and convincingly argued.

Actual third party comments

[222] As mentioned above,¹¹¹ the actual third party comments might assist to show:

- (a) how the public act was understood and perceived by the audience, for example how certain words or phrases were understood in the modern vernacular or whether the juxtaposition of certain passages held a particular meaning to the particular audience;
- (b) the proclivity of the audience to incitement to hatred etc.; and
- (c) any known actual reactions to the public act and whether such reactions were unnatural or extraordinary so as to show how the hypothetical person might react.

[223] There is a list of third party comments to the respondent's published material to which my attention is drawn in the complainants' contentions,¹¹² and in the complainants amended index of publications and comments.¹¹³ The base material from which these have been extracted is in evidence.¹¹⁴ That base material shows that there were, at the time of extraction,¹¹⁵ 752 posts by third parties to the original blog of 16 January 2020, 466 posts by third parties to the post of 25 January 2020, 890 third party comments to the post of 25 July 2020, 106 third party comments to the post of 29 August 2020, 127 third party comments to the post of 19 September 2020, and 43 third party comments to the post of 2 October 2020.

[224] Not all the third party comments have been printed out but most seem to have been. In the material before me, the respondent did not respond to any third party comment

¹¹⁰ Complainants' closing submissions on liability dated 24 February 2023 paragraph 36.

¹¹¹ In the section 'evidence about the audience and its actual reaction – admissibility and relevance'.

¹¹² Second further amended complainants' contentions dated 27 November 2022 paragraph 11A.

¹¹³ This is an amended version of the index at bundle page 181.

¹¹⁴ Exhibited to Mr Hill's affidavit of 25 November 2022 in pages 40 to 224.

¹¹⁵ On various dates between 26 August and 28 October 2020.

except when asked about his book,¹¹⁶ or to thank people for donations,¹¹⁷ and on one other occasion in the evidence when responding to a sympathetic comment.¹¹⁸

- [225] Many of the third party comments debated the main issue raised in the respondent's published materials – that is whether the drag queen story time events were appropriate. Some were supportive of the events, but most were critical. Many comments responded critically to views expressed by other commenters who they seemed to know from a social media presence. Many comments debated the death of Mr Wilson and many discussed paedophilia in organised religion.
- [226] A small number of the responses commented on the complainants themselves, and where these were critical I have referred to most of them when considering below whether the respondent's published material amounted to a contravention of section 124A.
- [227] In doing so I have had to consider them with some circumspection. This is because it has often been impossible to say whether the commenters were responding to the respondent's published material or to the third party comment debate; or whether the commenters were expressing their own pre-held views or assumptions. One assumption which seems to have been made by some people is that the drag queen story time performance had been similar to a drag queen performance for adults. If this assumption had been made it was quite incorrect. Those in support of the drag queen story events had to point out several times in the third party comment debate that this was not the case.

Moderation of third party comments

- [228] After the QHRC conciliation process, the respondent's lawyers, the Human Rights Legal Alliance, suggested that the third party comments ought to be moderated to remove the most extreme ones. The respondent unsuccessfully tried to do this himself at first, but then after the complaints had been referred to the tribunal, his lawyers engaged a moderator who was an independent contractor to do this.¹¹⁹
- [229] The moderator was instructed to remove or hide third party comments found on the Facebook page which contained:
- (a) Negative, offensive or pejorative references to drag queens or which stated or implied that they were predatory.
 - (b) Any discussion of paedophilia.
 - (c) Discussion using profanity or vulgar slang.
- [230] The moderator was also instructed to ban repeat offenders from commenting on the page and to watch for phoenix accounts from banned offenders. The moderator set up a system which automatically hid comments containing certain words.
- [231] The moderation started on 9 October 2020 and between then and 18 June 2021 the moderator worked on removing the third party comments back to the respondent's

¹¹⁶ Page 187 of the exhibit to Mr Hill's affidavit of 25 November 2022.

¹¹⁷ Page 192 of the exhibit to Mr Hill's affidavit of 25 November 2022.

¹¹⁸ Page 197 of the exhibit to Mr Hill's affidavit of 25 November 2022.

¹¹⁹ Evidence of Lyle Shelton, affidavit dated 7 September 2021 at [71], and affidavit of Hugh Craig dated 2 September 2021.

original blog of 16 January 2020, and well as removing new third party comments fitting the above criteria.

- [232] The third party comments which are in evidence in this complaint are the pre-moderation comments.

The respondent's published material

Blog of 16 January 2020

- [233] This blog appears most clearly as an exhibit to Mr Hill's affidavit of 25 November 2022. It was entitled 'Why "Queeny" and "Diamond Good-Rim" are dangerous role models for children'. This blog was posted on the respondent's website, and there was a link to the blog from his Facebook page.
- [234] The blog was written in the wake of the death of Mr Gavin. When referring to whether Mr Gavin had done anything wrong, the blog reads:

The wrongdoing is done by those who put drag queens in front of children and who want to spread their radical sexual expressionism and gender confusion to children everywhere.

It is worth considering just who the two drag queens are that Wilson and his courageous mates took a stand against last Sunday afternoon at a Brisbane City Council public library.

It's also worth recognising that in taking a reactionary "stand against" Drag Queen Storytime they were taking a "stand for" something very precious – the innocence of children.

- [235] Then there was criticism of those who organised the presentation in the library (described as the 'Left'), those on the Council who permitted it to happen, and references to the complainants.

- [236] The blog ended with the words:

Wilson Gavin and his courageous UQ LNC mates were right. Drag queens are not for kids.

RIP Wilson. You and your mates are heroes.

- [237] Hence it can be seen that the references to the complainants were sandwiched between the material about Mr Gavin. This would have increased the emotional impact of the blog for readers at the time.

- [238] The main reference to Mr Valkyrie was:

So what do we know about "Queeny" and "Diamond Good-Rim"

Queeny is a woman who goes by the name of Johnny Valkyrie. Johnny is crowd funding under the name of Jean Genie to help pay for her breasts to be surgically sliced off so she can present as a man.

"I am raising funds to sustain income whilst recovering from an affirmation procedure to reconstruct my chest. I have bound my chest for over five years now, and in an effort to stop gender dysphoria I have fractured ribs, damaged nerves and have multiple neck and back injuries. March 2020 will see me have my affirmation surgery so that I will no longer have to bind my chest." Valkyrie writes on her Go Fund Me page.

[239] The blog continues by referring to the ‘unprecedented epidemic of confused children presenting at gender clinics around the nation’, children as young as 10 being put on puberty blockers followed by hormone treatment, a statement about funding for gender clinics, that children are not told that gender dysphoria generally disappears naturally, and the State intending to jail doctors and counsellors who decline to ‘affirm’ a child’s gender confusion.

[240] Then there is this passage:

What are the kids to make of role models like Queeny? Will this lead to more or less confusion among children about their biological gender? Will there be class actions against the likes of Brisbane City Council who thought it was a good use of ratepayers’ resources to put him in front of kids.

[241] The blog then turned to Mr Hill:

Then there is “Diamond Good-Rim”.

The homo-erotised name, a reference to the anus, should be enough to ring alarm bells in the minds of thinking parents let alone (sic) the geniuses at Brisbane City Council who thought it was a good use of ratepayers’ resources to put him in front of kids.

Good-Rim is a 2019 winner of an X Award from the Adult Entertainment Industry.

This is an industry which exploits mainly (but not exclusively) vulnerable women for the sexual entertainment of mainly (but not exclusively) men.

Have we learned nothing from creeps like Harvey Weinstein, Jeffery Epstein and Prince Andrew?

Whose idea was it to put a porn star in front of children? In defence of LNP Lord Mayor Adrian Schrinner, I can only assume he was not aware of the program let alone the backgrounds of “Queeny” and “Diamond Good-Rim”.

By the way, this picture (below) celebrating Good-Rim’s award from the porn trade has been removed from his Facebook page. It’s always good to get screen shots.

Screenshot of the profile of the Facebook page of Diamond Good-Rim headed with an image with the words ‘Xwards Australian Adult Entertainment Business Awards Entertainment Winner 2019’

But what has not been removed from his Facebook page is this image (see below and apologies for the graphic nature).

Image headed ‘Photos from Diamond Good-Rim’s post’ depicting what appears to be a diamond ring on a penis shaped mount.

Let’s hope the kiddies watching Drag Queen Storytime last Sunday don’t go exploring on Good-Rim’s Facebook page. Or ask their mum what “good-rim” means in the wonderful world of drag queens.

Post of 25 January 2020

[242] This post appears as an exhibit to Mr Hill’s affidavit of 25 November 2022. It was entitled ‘Meet four drag queens reading to children’.

[243] The post is critical about ‘activists’ suppressing freedom of speech and ‘ensuring gender fluid and sexualised programs for children’ including drag queen story time. There is a reference to the story time event on 12 January 2020 at the library which is the subject of this complaint and Mr Gavin’s subsequent death. The post then follows with a critique of three such events, describing those involved with some graphic images.

[244] Then there is this passage:

Brisbane

Our fourth drag queen active with children is Diamond Good Rim (*internet link to the Diamond Good-Rim Facebook page*).

He and fellow drag queen Jonny Valkyrie were the subject of the peaceful protest at a Brisbane City Council library two weeks ago mentioned earlier. I wrote (*internet link to blog of 16 January 2020*) about them last week.

Good-Rim’s name is a deliberate reference to obscene and filthy homosexual activity.

“Mummy what’s a good rim?” a child might ask. Don’t answer that.

Good-Rim also boasts of being a recipient of a porn trade award (*internet link to blog of 16 January 2020*)

LGBTIQA+ activists are hell bent on trashing the purity and innocence of the next generation.

Then after various references to the Queensland Labor Party ..

I’m motivated by justice for children and the protection of their innocence. I’m also motivated by the rights of parent to be the moral guardians of their children, something rejected by the likes of Benjamin Law, if you care to read his Quarterly Essay from 2017.

Make no mistake, the LGBTIQA+ political movement is pursuing far horizons and it is only just beginning.

Finally, what is to be done. Awareness, awareness, awareness. Then activism, activism, activism. For those who pray, pray.

If you live in Brisbane, sign the petition (*internet link to a petition*) urging the Brisbane City Council to drop drag queen story time. Everyone should sign Binary Australia’s petition (*internet link to a petition*) as well as well.

This is a fight none of us can afford to sit out. It is a fight that must be won.

Wilson Gavin and his courageous young Liberals and Nationals were right. Drag queens are not for kids.

Post of 25 July 2020

[245] This post appears as an exhibit to Mr Hill’s affidavit of 25 November 2022.

[246] The post is headed by a photograph of the complainants dressed in drag, seemingly taken in the Brisbane City Library, with these words added to the image and also used as a title to the post:

drag queens take legal action against me in the human rights commission

[247] In this post the respondent says that he is ‘being dragged before a government commission for writing a blog about why drag queens are not for kids’.

[248] Then there is this passage:

I hoped this day would not come. But it has.

Last month I received a letter from the government. The Queensland Human Rights Commission is demanding that I appear before it for conciliation with a couple of aggrieved drag queens.

A blog post I wrote last January (*internet link to the blog of 16 January 2020*) about dangers of putting LGBTIQ+ drag queens in front of children has triggered action against me under the Queensland Anti-Discrimination Act of 1991.

Under the law, it is compulsory that I turn up. If I don’t I could be forced by court order. If I refuse, I could go to jail.

If I do turn up and refuse to apologise for my article or retract it or redact some of it, I could end up in front of the Queensland Civil and Administrative Tribunal.

If I lost there, I could be fined. If I refuse to pay a fine in protest against a judgement which impinges on the precious human right of freedom of speech, I could be sent to jail and have a criminal record.

But before I had even been served papers from the Commission, one of the drag queens, Johnny Valkerie, took to Twitter to announce that the QHRC had already decreed me guilty and that I must turn myself in.

I kid you not. (Sounds like a good title for a book (*internet link to a part of the respondent’s website*), the first chapter of the sequel of which is being written now).

Valkerie was frustrated because my address is suppressed and the QHRC was not able to find me easily.

The respondent then explains why he suppressed his address.

Johnny Valkerie is a woman who presents as a man. She tweeted that the QHRC had already “deemed” my “article to be vilification under the Queensland Anti-Discrimination Law 1991”

Inserted here is a copy of the tweet concerned.

In her tweet she asserted that I had said she was “dangerous for children”. That’s not true and you can read the blog I posted in January for yourself.

I objected to Johnny being placed in front of children as a role model because Johnny represents and celebrates the idea that gender is fluid, a dangerous idea to sow in the minds of children.

The second drag queen to join with Johnny in taking me to the QHRC goes by the name of Diamond Good-Rim.

Good-Rim is a reference to a homosexual sex act and he is also involved in the sex trade as an “adult entertainer”.

It would be obvious to the overwhelming majority of mainstream Australians that Good Rim is a dangerous role model for children.

The text then refers to a connection with the Labor Party.

I bear no ill-will towards Valkerie and Good-Rim because as human creatures like me, they are made in the image and likeness of God.

We are all equal before God but no all public policy ideas are equal and these should be contested in a free and open society using blogs if necessary.

A tragic event prompted me to write about Johnny Valkerie and Diamond Good-Rim.

The text then refers to the protest at the drag queen story event where the protesters chanted ‘Drag queens are not for kids’, and then the suicide of the group’s leader Mr Gavin having been subjected ‘to the most vile avalanche of on-line trolling by homosexuals and prominent leftists’.

Wilson and his mates did the right thing. They were brave. They never should have had to try and stop sexualised drag culture being normalised for children. That this is happening is a failure of political leadership. It is a further capitulation to the relentless march of the aggressive rainbow political movement.

Behind that aggression is the law. Valkerie and Good-Rim are getting legal advice from the taxpayer-funded (\$400,000 over the past three years) LGBTI Legal service (*internet link to them*) (click on the link to their annual report).

There is no equivalent tax-payer funded legal service for mainstream Australians.

I am being advised by the Human Rights Law Alliance (*internet link to them*) which gets no public money.

If mainstream Australians knew that their tax dollars were funding the suppression of reasonable free speech, they would be aghast.

Drag Queens and what they represent are not for kids. They are dangerous role models and they should not be provided a place in front of children in public libraries.

Even though I face this new pressure to be silent, I will not be apologising. I will not be taking my blog down. I will not amend it.

Post of 29 August 2020

[249] This post appears as an exhibit to Mr Hill’s affidavit of 25 November 2022.

[250] This was a post entitled ‘Help Defend Freedom of Speech’. In this post the respondent explains how far the complaint had progressed through the system and provides a link to a page on his website where a donation can be made.

[251] Then there is this passage:

My “crime” was to write a blog (*internet link to the blog of 16 January 2020*) in January asserting that drag queens are dangerous role models for children.

I stand by that post and will not be removing it. I believe in free speech and the right to speak up for protecting the innocence of children.

Nothing I said in that post was unreasonable but no reasoned rebuttal has been made. LGBTIQ+ activists don’t need to debate, our politicians have given them the privileged position of being able to launch litigation instead.

The discussion is over.

[252] After a reference to the QHRC conciliation the text continues:

Sadly, our anti-discrimination laws are rigged against free speech, allowing offended parties to conflate reasonable debate with subjective words written into law, like “vilify”. The purpose is to shut down debate.

Mine is a freedom of speech case which affects every Australian who thought this basic human right was already enshrined in our nation.

And if we can’t speak up for the innocence of children, what sort of a society have we become.

Sadly free speech has been undermined by years of political activism by rainbow radicals who do not share mainstream views about freedom, tolerance and diversity of opinion.

How our nation came to this is beyond comprehension.

Australians thought the same-sex marriage debate was about “love is love”. If only it was. As we said during the 2017 marriage plebiscite, Australia was in reality voting in a referendum on the future of freedom of speech and radical LGBTIQ+ indoctrination of children.

The day will come when Australians wake up and realise they were used to further much more radical agendas.

It is now over to politicians to de-fang anti-discrimination laws and abolish so-called human rights commissions so free speech and common sense can be restored.

In the meantime, if you can help by donating to my legal defence (*internet link to a page on his website where a donation can be made*), my family and I would be grateful.

Post of 19 September 2020

[253] This post appears as an exhibit to Mr Hill’s affidavit of 25 November 2022.

[254] The post is entitled ‘Drag Queens, Cancel Culture and the Courier Mail’. It said:

“We have a right to perform, regardless if it’s to children or adults.” – Diamond Good-Rim

Today’s Courier Mail contains a lengthy feature article extolling what it sees as the self-evident good of having sexualised and gender fluid drag queen role models reading to children in public libraries.

The two drag queens using Queensland taxpayers’ money to take me to court for dissenting to this growing practice, are featured at length in the QWeekend magazine (*internet link to the magazine*) accusing me of writing “degrading and dehumanising” things about them.

A blog I published in January about the dangers of drag queen role models for children landed me on charges of “vilification”. You can read the blog here (*internet link to the bog of 16 January 2020*) and be the judge as to whether or not my commentary is fair and reasonable.

But more importantly, be the judge of whether or not the freedom of speech should exist to say the things I have said.

The drag queens “Diamond Good-Rim” (pictured below) a recipient of an adult entertainment industry X Award and Johnny Valkyrie a woman presenting to children as a man, are using flawed anti-discrimination laws in a bid to have me punished and silenced for what I wrote.

There is then an image of the front of QWeekend.

In their statements to the Courier Mail today they give no examples of what “degrading and dehumanising” things about them I am supposed to have written. I’m just slurred as part of what is now a very public justification on their part for dragging me through the Queensland Human Rights Commission and now on to the Queensland Civil and Administrative Tribunal at great financial cost and stress.

Remember, their law firm, the LGBT Legal Service, received \$400,000 from the pockets of Queensland taxpayers over the past three years.

I’ve had to resort to crowd funding and am very grateful for the generosity of hundreds of people who have helped me so far.

The drag queens use the free kick the Courier mail gives them to reaffirm their determination to silence me and anyone else who dares to question the appropriateness of teaching children their gender is fluid and placing adult entertainment in front of them as role models.

Then there are references to the Courier Mail journalist who wrote the article.

Argent’s Yes campaign repeatedly ridiculed our concerns that de-gendering marriage would lead to children being taught that their gender is fluid and that they would be inducted into radical LGBTIQA+ sex education.

Despite the Yes campaign’s public denials while it was seeking the support of mainstream Australia for gay marriage, I was convinced we were right.

But even I have been surprised with how swiftly the rainbow political movement has moved to implement the things they said would never happen as a consequence of same-sex “marriage”.

The drag queen Diamond Good-Rim, whose name is a reference to anal sex, told (the journalist):

I want to show the community and our sisters as such – the drag community – we have a right to perform, regardless if it’s to children or adults.

The majority of Queensland parents, who are already opposed to the rainbow political movement’s so called “safe-schools” program, would disagree with Good-Rim.

But (the journalist’s) article is designed to make anyone who can’t see the self-evident good of institutionalised drag queen story time in public libraries feel marginalised.

In another betrayal of journalist principles, (the journalist) self-censors Good-Rim’s drag name, calling her (or is it him?) throughout the article simply Diamond.

To get the truth about drag queen story time, one has to resort to bloggers like me who captured screen shots of some of the inappropriate and harmful material on the drag queens’ social media pages.

None of this appeared in today's Courier Mail but I think most parents would want to know something of the background of the role models Brisbane City Council thinks are appropriate to place in front of children in ratepayer-funded libraries.

But if Valkyrie and Good-Rim get their way, bloggers like me will be crushed.

"This is an opportunity to really highlight the level of homophobia, transphobia and hatred that still thrives in Australia today", Valkyrie tells (the journalist).

By the way, despite taking me through the QHRC and now on to QCAT, Valkyrie is yet to provide me with an example of anything "homophobic, transphobic or hateful" that I have written.

These cancel culture terms continue to be thrown around with gay abandon (pun intended).

It's much easier to demonise than debate.

Valkyrie continues:

"It (homophobia, transphobia and hatred) is in the commenters we allow on platforms, and that needs to be stopped."

A date for my appearance in QCAT is yet to be set.

Post of 2 October 2020

[255] This post appears as an exhibit to Mr Hill's affidavit of 25 November 2022.

[256] The post is entitled 'Senator Claire Chandler's Legal Nightmare is Over, Mine is Just Beginning'.

The threat of legal action against ordinary Australians exercising freedom of speech needs to be addressed.

I'm pleased for Senator Claire Chandler. The legal action against her has been withdrawn (*internet link to an article in the Australian*) following a public outcry.

This is a rare victory for common sense.

Her crime was to push back on the LGBTIQ+ political movement's demands that biological males should be allowed to compete in women's sport.

The taxpayer-funded Tasmanian anti-discrimination industry went after her so that it could close down free speech on such matters.

In the same way, taxpayer-funded legal action is being taken against me by two LGBTIQ+ drag queens.

My crime was to assert that they are dangerous role models for children (*internet link to the blog of 16 January 2020*).

I think that most parents would agree that placing gender-fluid advocates and advocates for the so-called adult entertainment industry in front of small children in public libraries is symptomatic of a society that has lost its way.

But the drag queens have already dragged me through a compulsory "conciliation" process at the Queensland Human Rights Commission.

When I refused to amend the comments on my blog, they notified me that they are now taking me to the Queensland Civil and Administrative Tribunal.

If found guilty, I could be fined.

The drag queens have made it clear their aim is to silence commenters like me.

Like Senator Chandler, I have been accused of “transphobia”.

“It (‘hatred, homophobia or transphobia’) is in the commenters we allow on platforms, and that needs to be stopped”, drag queen Johnny Valkyrie (a woman presenting to children as a man) told The Courier Mail (*internet link to the post of 19 September 2020*).

No examples of my alleged “hatred, homophobia or transphobia” have ever been presented to me. Not one.

Nothing of what I said in my defence at the QHRC (*internet link to the respondent’s site*) was considered.

Instead, the LGBTIQ+ activists run off to an activist journalist at the Courier Mail and slander me for being full of “hatred, homophobia or transphobia”.

The journalist (*name of journalist*) accepted this and ran these comments without providing one example. I was not interviewed for the article.

I would challenge anyone to go back through my public comments and find one example of this. Just one will do.

Instead of arguing their case in the public square and defending why they think local governments should open their ratepayers’ libraries so children can be inducted into the worlds of gender fluidity and sexual expressionism, they used flawed anti-free-speech laws to crush public discussion.

Perhaps they find it difficult to defend what many mainstream Australians would consider to be the indefensible.

It’s must (sic) easier to litigate than debate.

Senator Claire Chandler’s legal nightmare has just ended. Mine is only just beginning.

It’s great that a Senator can use her profile and the platforms of parliament and the media to push back. But the risk of legal action against ordinary Australians needs to be addressed.

Until it is, we have no claim to be a free society.

Video podcast of 17 November 2020

[257] There is a transcript of the video podcast exhibited to Mr Hill’s affidavit of 25 November 2022. The podcast was a Pellowe Talk Live episode, no. 33 aired live on 17 November 2020.

[258] In the podcast the respondent explained that the complaint was now in QCAT. The relevant part of the interview was as follows:

Respondent: They want to fine me or cause me to pay each of the complainants \$10,000 each, that’s \$20,000 to each of the drag queens that’s suing me for saying that they are dangerous role models to children, which they are.

Host: Did you say they personally are, or drag queens generally are?

Respondent: Well both because if you put gender fluid role models in front of children, in my opinion I think that’s a dangerous role model. We have an

epidemic of children presenting at gender clinics right around the nation. It's an epidemic. The numbers are in the hundreds. Where we never used to see these numbers at all. Children on puberty blocker, cross-sex hormones, in some rare cases – having double mastectomies as adolescents. This is very, very serious.

- [259] The respondent then explained how strongly he felt about the matter, that the complainants wanted censorship, that he had warned that this would happen and he was worried for the country as well as his own personal future. He said that the complainants had lawyers funded by taxpayer's money. He then said:

I am not going to pay \$20,000 to the drag queens. I will not be apologising. I will not be taking things off my blog. I will not refrain from commenting about women's human rights and the rights of children to be protected from harmful influences.

Finding of facts relevant to the tests for the exception

Public interest

- [260] As has been agreed by the parties, all the respondent's published material is capable of coming within the public interest exception in section 124A(2)(c), provided the publication was done reasonably and in good faith.

Good faith

- [261] I have decided this issue with the assistance of the parties' submissions up to closing submissions. Although on the complainants' behalf further submissions have been made on this matter,¹²⁰ it would not be fair to the respondent to take them into account since the respondent has had no chance to reply, and there has been no leave for the giving of these further submissions on this matter.
- [262] Although the parties are in agreement that a person shows good faith if they engage in conduct 'with the subjectively honest belief that it was necessary or desirable to achieve a genuine purpose'¹²¹ or a closely similar test, they disagree about whether lack of good faith can be shown by objective unreasonableness.
- [263] So on behalf of the complainants, it is said that the respondent was not acting in good faith as shown by his provocative and inflammatory language which he accepted when giving evidence was deliberate, and because he did not make 'every effort' to express his concerns with restraint and without being offensive and using inflammatory language, and knowingly made factually inaccurate references to the complainants of a highly controversial and provocative nature.¹²² Also when referring to Epstein, Weinstein and Prince Andrew followed by 'whose idea was it to put a porn star in front of children' because this was directly comparing Mr Hill to these men and they have all been accused of sex crimes.¹²³
- [264] The submissions on behalf of the complainants largely rely here on the strong words used by the respondent combined with his admission that the use of the strong words

¹²⁰ Complainants' further submissions re: interpretation and application of s.124A *Anti-Discrimination Act* 1991 (Qld) dated 4 August 2023 paragraphs 69 to 84.

¹²¹ Catch the Fire at [92] (Nettle JA).

¹²² Complainant's closing submissions on liability dated 24 February 2023 paragraphs 52 and 56, complainants' closing submissions in reply dated 6 April 2023 paragraph 45.

¹²³ Complainant's closing submissions on liability dated 24 February 2023 paragraph 49.

was deliberate. Hence it is said that he ‘went beyond what was reasonable or necessary for a good faith debate’.

- [265] The submissions on behalf of the complainants point to the respondent’s failure to research whether Mr Hill had ever participated in pornography photographs, videos or films before describing him as a porn star and did not check what the Australian Adult Entertainment Business Awards could be for before impugning Mr Hill, undermine the argument that the respondent’s published his material in good faith particularly as he should have known better as a former journalist.¹²⁴
- [266] To my mind it would be incorrect to say that it is impossible to prove lack of good faith from a display of ‘emotion, calumny or invective’,¹²⁵ or lack of care in research as submitted on behalf of the complainants. But ultimately ‘good faith’ must be assessed entirely subjectively. So it could be shown that a party claiming to have acted in good faith had not done so if invective had been used with the purpose of causing offence to the person being vilified, rather than as part of the campaign being conducted; equally if there was no reasonable explanation for the lack of care in research, the tribunal might doubt that the party claiming to have acted in good faith actually did so.
- [267] On my finding, I think that the respondent’s ready acceptance when giving evidence that the words he used were deliberately provocative in order to have greater effect, tends to show he honestly believes that this was the right approach to make a point on a matter in which he holds strong views. Although it is true as is said on the complainants’ behalf, that the respondent could have better researched the allegations made about Mr Hill, I am satisfied that the respondent did not think this was necessary, as he said.
- [268] Viewed entirely subjectively it is my finding that the respondent genuinely and honestly believed in the accuracy of his published material and that it was right to publish it, and that he did act in good faith in so doing.

Done reasonably

- [269] The parties agree that what is being considered here is whether the publication bore a rational relationship to the discussion or debate in the public interest in section 124A and was not disproportionate to carrying it out.¹²⁶
- [270] Had I found that any of the respondent’s published material to amount to vilification under section 124A then I would have needed to consider this for each head of the complaint. Since the respondent has accepted that he has the burden of proof to show that an exception applies, and the parties have approached this complaint on that basis it is unnecessary for me to consider the question of reasonableness further.

¹²⁴ Complainant’s closing submissions in reply dated 6 April 2023 paragraph 8.

¹²⁵ In the words of Allsop P in *Sunol v Collier (No 2)* [2012] NSWCA 44 at [72] as cited on the complainants’ behalf in closing submissions in reply.

¹²⁶ As expressed in *Sunol v Collier (No 2)* [2012] NSWCA 44 at [41].

Deciding whether there was vilification

[271] I propose to decide this in the first instance by relying on the contentions from which the heads of complaint can be identified. For the purpose of decision making it is convenient to merge the individual complaints and the complaints about named groups into five heads of complaint.

The five heads of complaint

[272] The complaint is, that the respondent's published material amounted to vilification by asserting directly or by implication that:

- (a) the complainants were child sex offenders and/or the complainants when dressed as drag queens, and drag queens generally (and therefore also transgender persons and persons with homosexual sexual orientation), were a danger to children;¹²⁷
- (b) drag queens were 'advocates' for gender fluidity and the adult entertainment industry in presenting drag queen story time, 'inducting' children 'into the worlds of gender fluidity and sexual expressionism';¹²⁸
- (c) transgender persons are dangerous to children, and Mr Valkyrie however dressed, was dangerous to children because he was a transgender person;¹²⁹
- (d) Mr Hill, however dressed, was dangerous to children because he uses the name 'Diamond Good-Rim' on Facebook, performs to adult audiences as a drag queen, and uses that name when doing so;¹³⁰
- (e) LGBTIQA+ activists are hell bent on trashing the purity and innocence of the next generation.¹³¹

Possible further complaints of overall vilification

[273] For the sake of completeness, although the complainant's case is not presented on this basis in the contentions, under the relevant head of complaint I shall also consider whether the respondent's published materials amounted to vilification on the basis that they:

- (a) suggested that drag queens performing drag queen story time were involved in some sort of child abuse or paedophilia;
- (b) were critical of those who presented drag queen story time events generally;
- (c) were critical of transgender persons or homosexual persons generally.

[274] I consider this to be justified because it is possible to see from the submissions made on the complainants' behalf that the case seems to be put rather more widely than in the contentions. For example, it is said that incitement is shown by the third party comments and it can be seen that many of those seemed to react on the above

¹²⁷ Second further amended complainants' contentions dated 27 November 2022 paragraphs 7(a), 7(c), and 8(a).

¹²⁸ Second further amended complainants' contentions dated 27 November 2022 paragraph 8(b).

¹²⁹ Second further amended complainants' contentions dated 27 November 2022 paragraphs 7(b) and 8(c).

¹³⁰ Second further amended complainants' contentions dated 27 November 2022 paragraph 7(d).

¹³¹ Second further amended complainants' contentions dated 27 November 2022 paragraph 8(d).

additional bases. Also the tinderbox argument considered just below seems wider than the case as set out in the contentions.

The tinderbox argument

[275] On behalf of the complainants it is said that the respondent's published material contained 'imputations' of many things critical or hostile towards the complainants and the groups of which they were members. Those things, it is said, were (for example) that they were 'dangerous', 'debaucherous', 'paedophiles', 'malevolent', 'violent criminals' and 'obscene and filthy'.¹³²

[276] The most hostile of these descriptions were not in the respondent's published material but most are in the third party comments. So the argument ties in with a 'tinderbox' argument where on behalf of the complainants it is said that such third party comments were a 'foreseeable and predictable response in (the respondent's) readership'. The way this is put is:¹³³

.. the Respondent knew very well the audience he was writing to, and, including with his past experience as a professional writer (journalist) the Respondent knew how to deploy a particular tone and literary devices such as inflammatory, provocative and gratuitous language and which trigger words to use in order to incite his readership.

.. the Respondent's ordinary audience was a tinderbox of hostility toward people who identified like the Complainants, and the Respondent's intentionally inflammatory use of words, expressions, implications and imputations were flaming matches thrown at his tinderbox audience ..

[277] In closing submissions in reply on behalf of the respondent it is said that the answer to the tinderbox argument lies in identifying the relevant audience as the 'ordinary reasonable reader'.¹³⁴

[278] It seems to me that there is a causation issue here which prevents the tinderbox argument from prevailing. Something more than merely providing an opportunity to react adversely is required before I can find that there was a contravention of section 124A. The public act must be the *cause* of the adverse reactions.

[279] To say otherwise would mean that for example, an uncritical public report of a Mardi Gras parade would amount to vilification because some people would respond with intense hostility. It should not be said that the report would have caused that hostility. Instead, it would have been caused by something else.

[280] This is not to dismiss the tinderbox argument altogether. I do need to take into account that the audience included the respondent's own supporters, or those who held views similar to the respondent. And I need to allow for the possibility that the views held by these members of the audience might have remained dormant, unexpressed or unconfirmed, until they read the respondent's published material.

¹³² The list of imputations appears in the further particulars on behalf of the complainants filed on 1 February 2022 in paragraph 4(B)(ii)(D) and repeated in the complainants' closing submissions on liability dated 24 February 2023 paragraph 24.

¹³³ Complainants closing submissions on liability dated 24 February 2023 paragraphs 40 and 41.

¹³⁴ Respondent's closing submissions on liability dated 17 March 2023 paragraph 64.

The heads of alleged vilification

(a) the complainants were child sex offenders and/or the complainants when dressed as drag queens, and drag queens generally (and therefore also transgender persons and persons with homosexual sexual orientation), were a danger to children

- [281] As clarified in the closing submissions of the parties, the complaint referring to child sex offenders is that the respondent's published material asserted that the complainants were a danger to children because of some sort of child abuse or paedophilia.¹³⁵ It is also said that when dressed as drag queens the complainants were a danger to children in a more general way. It is also said that respondent's published material asserted that drag queens generally (and therefore also transgender persons and persons with homosexual sexual orientation) were a danger to children.
- [282] These assertions are said to be in the blog, in the respondent's subsequent posts and in the video podcast.
- [283] I shall concentrate first on whether the respondent's published material asserted that the complainants or drag queens were a danger to children because of **some sort of child abuse or paedophilia**.
- [284] The main thing relied on here is this statement in the blog of 16 January 2020 which refers to Mr Hill's name as being 'homo-erotised' and 'a reference to the anus' and to 'Good-Rim being a 2019 winner of an X Award from the Adult Entertainment Industry'. After a description of that industry, the blog then contained this paragraph:
- Have we learned nothing from creeps like Harvey Weinstein, Jeffery Epstein and Prince Andrew?
- [285] On the complainant's behalf this paragraph is strongly relied on, on the basis that it appears to be linked to the complainants and therefore implies some sort of child abuse or paedophilia on their part. It is submitted on the respondent's behalf however, that the paragraph reads as linked to the paragraph in the blog immediately before about the adult entertainment industry, and therefore is innocuous.
- [286] I can see that the paragraph suggests that society should learn from the existence of (in the case of Harvey Weinstein and Jeffrey Epstein) sex predators and (in the case of Jeffrey Epstein) child sex predators. Exactly what society should learn is unclear.
- [287] I do not think that a reader would consider that paragraph referred to the complainants or to the adult entertainment industry. The paragraph seems to stand on its own. If the reader took account of the paragraph at all it would be I think, bearing in mind the context of the blog and the message it was trying to convey, to emphasise that children needed protection from 'radical sexual expressionism and gender confusion' which is the main point being made in the blog.
- [288] In addition to the Harvey Weinstein etc. paragraph, the complainants rely on the third party comments as showing that the respondent's material suggested that there was some sort of child abuse or paedophilia. As Mr Valkyrie said in his evidence:

.. why is it that the commentary made by those who have read these articles overwhelmingly state these are groomers, these are paedophiles, lock these sick

¹³⁵ Complainants' closing submissions on liability dated 24 February 2023 notes 6, 86, 88.

kiddy-fiddler creeps away, and, and, other such comments? Why is it that that was the one that they focused on? That is the issue I take here.

- [289] It is true that the word ‘grooming’ was used on several occasions in the third party comments to the respondent’s blog and subsequent posts.¹³⁶ The people who used the word fell into two camps: those who were critical of the drag queen story time events and those who supported the events.
- [290] A close study of how the word ‘grooming’ was used by those who were critical of the story time events shows that, in general, it was not used in the sense that it is sometimes understood, that is befriending and gaining the confidence of a child with a view to performing sexual acts with the child.
- [291] Instead in most cases, the word ‘grooming’ was used to say that the drag queen story time events were teaching or leading the children down a particular path – in this case ‘sexual perversions of all descriptions’,¹³⁷ a ‘questionable and unhealthy lifestyle choice’,¹³⁸ to ‘his/her mindset’,¹³⁹ ‘to let them think boys can be girls and girls can be boys’,¹⁴⁰ ‘into their perversions of the gay lobby’,¹⁴¹ ‘trying to normalise it’,¹⁴² and for ‘mass destruction of kid’s sexual boundaries’.¹⁴³
- [292] Those third party commenters who supported the drag queen story time events expressed incredulity that the word ‘grooming’ was being used, and they pointed out that the complainants had blue cards and every child was attended at the event by a parent. There was no suggestion of any continued contact with the children.
- [293] Some third party comments showed disapproval of drag queens generally.¹⁴⁴
- [294] Some third party comments were more hard hitting and suggestive that drag queens performing drag queen story time should be kept away from children and were perverts.¹⁴⁵
- [295] Some third party comments did demonstrate a hatred or serious contempt for drag queens, saying that they should be ‘dragged off to the lunatic asylum’,¹⁴⁶ that they ‘are attention seeking sickos’,¹⁴⁷ that they promote ‘unnatural and model deviant sexual behaviour’,¹⁴⁸ are ‘sexual deviants’,¹⁴⁹ creatures who were ‘very unwell’,¹⁵⁰

¹³⁶ In particular in debates starting on pages 46, 52, and 144 in the exhibit Mr Hill’s affidavit of 25 November 2022.

¹³⁷ See two posts of PP on pages 46.

¹³⁸ JA on page 50, JK on page 54.

¹³⁹ JM on page 55.

¹⁴⁰ MU on page 57.

¹⁴¹ JK on page 60.

¹⁴² MU on page 70.

¹⁴³ JLH on page 148.

¹⁴⁴ LK and GB discussion on page 68, FS on page 73, GJ on page 100, AS on page 108, DM on page 120.

¹⁴⁵ JL and MH on page 109, ES on page 123, CJBR on page 135, GM on page 178, CT on page 185.

¹⁴⁶ JT on page 149.

¹⁴⁷ LB on page 149.

¹⁴⁸ CE on page 167.

¹⁴⁹ GM on page 178.

¹⁵⁰ SL on page 186.

with an ‘evil devious look in the eyes’,¹⁵¹ ‘creeps’,¹⁵² ‘sexual confused men’ or claiming a right to ‘voyeurism’.¹⁵³

- [296] Some third party commenters did express their belief of some sort of child abuse or paedophilia in the drag queen story time event. One seemed to suggest that drag queens groomed children so that children would become ‘comfortable with them’, the implication being that in some way drag queens could then take sexual advantage of the children.¹⁵⁴ Another implied that the complainants were ‘perverts’ targeting children.¹⁵⁵ Another referred to ‘grooming potential victims’ which seemed to suggest a similar thing.¹⁵⁶ Another referred to the story time event being ‘nothing more than prepping kids to be agreeable to have any sort of sex’,¹⁵⁷ or causing them to ‘fall into sin’.¹⁵⁸ Another said ‘we can’t even get a pedophile register up here. What kind of people are at large’.¹⁵⁹
- [297] These third party comments demonstrate that some people had hatred for drag queens and held them in serious contempt particularly when they had access to children. Although it can be seen that the respondent’s website gave an opportunity for such comments to be made, the difficulty is in saying that these were reactions to the respondent’s published material. The respondent’s published material, together with the ability of people to post their own comments gave rise to considerable debate. As can be seen from that debate – in many cases people were responding to each other, and it appears, knew each other’s expressed views well.
- [298] The view I take when reading these particularly extreme and adverse third party comments is that they were more likely to be reactions to other posts by third parties or simply stating pre-existing views rather than as a result of the respondent’s material.
- [299] They are therefore of little assistance when applying the test under section 124A, that is whether the natural and ordinary effect of the respondent’s material on a hypothetical audience would be to incite people to hatred towards or serious contempt for the complainants or for drag queens.
- [300] The third party comments do demonstrate however, that it is likely that there would be people in the hypothetical audience who would believe that when performing drag queen story time the complainants were involved in some sort of child abuse or paedophilia. Quite why they would think that is unclear. In any event it is difficult to find anything in the respondent’s published material which would lead such people to think it. The closest may have been the innuendo arising from the suggestion that Mr Hill was a porn star who used the name “Diamond Good-Rim”, but it seems to me that this said no more than Mr Hill was capable of offering a raunchy performance. It did not suggest that he actually did so in the drag queen story time event.
- [301] It follows that the belief of those in the hypothetical audience that when performing drag queen story time the complainants were involved in some sort of child abuse or

¹⁵¹ PH page 186.

¹⁵² LS on page 199.

¹⁵³ GR on page 202.

¹⁵⁴ JQ on page 124.

¹⁵⁵ For example AM on page 144.

¹⁵⁶ AO on page 163.

¹⁵⁷ JB on page 201.

¹⁵⁸ MM page 202.

¹⁵⁹ JG on page 205.

paedophilia, would not have come from anything in the respondent's published material but from something else. This means that the causal connection between the public act and the incitement required by section 124A is missing.

- [302] It seems to me also that any belief of those in the hypothetical audience that when performing drag queen story time the complainants were involved in some sort of child abuse or paedophilia, would not be on the ground of a relevant attribute, that is (for Mr Valkyrie) on the ground of his gender identity or sexuality and (for Mr Hill) on the ground of his sexuality. I say that because any such belief would most likely arise because of the interaction in the drag queen story time event between the children and the complainants as drag queens. In other words, the people would hold the same belief even if the complainants did not have any such attribute.
- [303] If, contrary to my view above, it is possible to say that the respondent's published material would cause some of those in the hypothetical audience to believe that when performing drag queen story time the complainants were involved in some sort of child abuse or paedophilia, then my view would be that this would be an unnatural and extraordinary reaction to the material. Not being a natural and ordinary reaction of the relevant hypothetical audience means it would not be within section 124A.
- [304] If instead, the test should be the 'ordinary reasonable reader' then this produces the same outcome because such a reaction would not be reasonable having regard to the respondent's published material.
- [305] If instead, the test should be the 'ordinary reader (however unreasonable)' or 'ordinary member of a class of reader (however unreasonable)' then the complainants' case is stronger but I do not think this is the correct test.
- [306] Although from the complainants' contentions and submissions, it does not seem to be part of the complaint that the respondent's published material asserted that drag queens performing drag queen story time **were involved in some sort of child abuse or paedophilia**, it can be seen that any such complaint would suffer from the same difficulties as the complaint that the complainants were vilified in this way as considered above.
- [307] But there is further difficulty that any such reaction would be because the performers were drag queens. On the evidence I have heard and seen, some drag queens are transgender persons and some are persons with homosexual sexual orientation, but a substantial proportion of drag queens are neither. Hence I do not think it follows that an attack on drag queens is also an attack on transgender persons and persons with homosexual sexual orientation. The group of persons known as 'drag queens' is too wide and too diverse for that to be the almost inevitable consequence.
- [308] Turning to the other way this head of complaint is put, that is that the respondent's published material asserted that the complainants and drag queens were **dangerous to children generally**, it is important to note that the title does not say this; instead it says that they are dangerous *role models* for children. This is quite different and accords with the main point being made in the blog that its author believes that children need protection from radical sexual expressionism and gender confusion.
- [309] In this respect, the respondent's published material did not suggest that children should never be exposed to drag queens at all. To say that would be ridiculous bearing in mind the exposure of children and adults alike to those in the entertainment industry who dress in drag, and who therefore might be described as drag queens if their act is

exaggerating, flamboyant or acting in parody, and bearing in mind the wide use in children's animated films of characters who resemble drag queens.

- [310] It is true however that the third party commenters might have viewed the respondent's published material as saying that drag queens were dangerous to children generally. One third party comment referred to the complainants hurting 'children this way',¹⁶⁰ and another seems to refer to the event as 'abusing young children'.¹⁶¹
- [311] I do think that some people in a hypothetical audience might think from the respondent's published material that the complainants when dressed as drag queens, and drag queens generally, were a danger to children generally. It seems to me that the reason why they might think that would be because, as the respondent argued, children needed protection from radical sexual expressionism and gender confusion.
- [312] To be a contravention of section 124A as vilification of the **complainants as individuals** this reaction would have to be on the ground of a relevant attribute, that is (for Mr Valkyrie) on the ground of his gender identity or sexuality and (for Mr Hill) on the ground of his sexuality. But it is clear that such a reaction would not be on such a ground. The reason for such a reaction would be because the person was of the belief that children needed protection from radical sexual expressionism and gender confusion, and that the drag queen story time event was not giving that protection. In other words, the people would hold the same belief even if the complainants did not have any such attribute.
- [313] To be a contravention of section 124A as vilification of **drag queens generally** this reaction would have to be on the ground of a relevant attribute. There is a difficulty with this. Any such reaction would be because the performers were drag queens. On the evidence I have heard and seen, some drag queens are transgender persons and some are persons with homosexual sexual orientation, but a substantial proportion of drag queens are neither.
- [314] Hence I do not think it follows that an attack on drag queens is also an attack on transgender persons and persons with homosexual sexual orientation. The group of persons known as 'drag queens' is too wide and too diverse for that to be the almost inevitable consequence.
- [315] Although from the complainants' contentions and submissions, it does not seem to be part of the complaint that the respondent's published material was critical of the complainants **because they performed as drag queens at the drag queen story time event**, I consider this for the sake of completeness.
- [316] I can see that some third party commenters were clearly critical of the complainants for this reason,¹⁶² and so it seems likely that there would be some people in the hypothetical audience who would take the same view.
- [317] In the blog of 16 January 2020, the respondent did not directly criticise the complainants for performing in front of children. The direct criticism was reserved for the parents for allowing their children to attend the performance and the Council for allowing it to happen.

¹⁶⁰ MU on page 149.

¹⁶¹ EC page 180.

¹⁶² For example, EL on page 69, AC on page 82. ES on page 121, KG on page 134, SW on page 137, BS on page 144 and 145.

[318] The post of 25 January 2020 criticised the ‘activists’ in ‘the rainbow political movement’ who were ‘ensuring gender fluid and sexualised programs for children’ like drag queen story time and who are hell bent on trashing the purity and innocence of the next generation.

[319] The presence of these statements in the post of 25 January 2020:

Our fourth drag queen active with children is Diamond Good Rim

He and fellow drag queen Jonny Valkyrie were the subject of the peaceful protest at a Brisbane City Council library two weeks ago mentioned earlier

LGBTIQA+ activists are hell bent on trashing the purity and innocence of the next generation.

in the description of the story time event in Brisbane would say to the reader that the complainants were activists of the type criticised earlier in the post.

[320] Although such criticism could incite certain people to hatred or serious contempt of the complainants because they performed as drag queens at the drag queen story time event, such reaction would be because the respondent was saying that they were inducting the children ‘into the worlds of gender fluidity and sexual expressionism’. It would not be on the ground of a relevant attribute, that is (for Mr Valkyrie) on the ground of his gender identity or sexuality and (for Mr Hill) on the ground of his sexuality. In other words, the people would hold the same belief even if the complainants did not have any such attribute.

[321] This head of complaint therefore fails.

(b) drag queens were ‘advocates’ for gender fluidity and the adult entertainment industry in presenting drag queen story time, ‘inducting’ children ‘into the worlds of gender fluidity and sexual expressionism’;

[322] This complaint is an allegation of vilification of drag queens generally, and the complainants say that they may bring the complaint because they are members of the drag queen group of persons.

[323] This allegation relies on passages in the respondent’s post of 2 October 2020:

I think that most parents would agree that placing gender-fluid advocates and advocates for the so-called adult entertainment industry in front of small children in public libraries is symptomatic of a society that has lost its way.

and later, referring to LGBTIQA+ activists:

Instead of arguing their case in the public square and defending why they think local governments should open their ratepayers’ libraries so children can be inducted into the worlds of gender fluidity and sexual expressionism, they used flawed anti-free-speech laws to crush public discussion.

[324] There were 43 third party comments to the post of 2 October 2020 at the time they were extracted.¹⁶³ Although on behalf of the complainants some of these comments are relied on as showing that the commenters held drag queens in contempt, I do not

¹⁶³ Exhibit 13.1 to Mr Hill’s affidavit of 25 November 2022.

think this is the case. Most of the comments wished the respondent well in his defence to the complaints, or discussed Senator Chandler's case.

[325] One third party comment said:¹⁶⁴

Why can't they let children BE children and the 'ugly' adults stay out of their world until they reach the age of 16+ in order to fully understand what makes these kind of people "different" to most other adults!!!

[326] It is conceivable that others in the hypothetical audience may have been moved further than this particular commenter by what was said by the respondent in his post of 2 October 2020, but it seems to me that the natural and ordinary reaction to the post of 2 October 2020 upon those critical of drag queen story time would be only to confirm their disagreement. I cannot see that the post could increase that disagreement so that it became hatred or serious contempt of drag queens. Some readers may already have despised drag queens but again I cannot see that the post would make them despise drag queens any more than they already did.

[327] If instead, the test should be the 'ordinary reasonable reader' then this produces the same outcome because such a reaction would not be reasonable having regard to the respondent's published material.

[328] If instead, the test should be the 'ordinary reader (however unreasonable)' or 'ordinary member of a class of reader (however unreasonable)' then the complainants' case is stronger but I do not think this is the correct test.

[329] For readers who, prior to reading the post of 2 October 2020 had no firm view one way or the other about drag queens, it is difficult to see that the natural and ordinary effect of the post of 2 October 2020 would cause them to hate drag queens or hold them in serious contempt. It seems to me that the post would be more likely to make such a person consider whether or not drag queen story time events were appropriate, taking into account that the author of the post of 2 October 2020 was obviously strongly against such events.

[330] If instead, the test should be the 'ordinary reasonable reader' then this produces the same outcome because such a reaction would not be reasonable having regard to the respondent's published material.

[331] If instead, the test should be the 'ordinary reader (however unreasonable)' or 'ordinary member of a class of reader (however unreasonable)' then the complainants' case is stronger but I do not think this is the correct test.

[332] In any case, there is a difficulty in that, for there to be a contravention of section 124A the incitement to hatred or serious contempt would need to be on the ground of the sexuality or gender identity of drag queens.

[333] On the evidence I have heard and seen, some drag queens are transgender persons and some are persons with homosexual sexual orientation, but a substantial proportion of drag queens are neither.

[334] Hence I do not think it follows that an attack on drag queens is also an attack on transgender persons and persons with homosexual sexual orientation. The group of

¹⁶⁴ GSR on page 223.

persons known as ‘drag queens’ is too wide and too diverse for that to be the almost inevitable consequence.

[335] This head of complaint therefore fails.

(c) transgender persons are dangerous to children, and Mr Valkyrie however dressed, was dangerous to children because he was a transgender person

[336] In this part of the complaint one particular passage which is relied on is that in both the blog of 16 January 2020 and the post of 25 July 2020, Mr Valkyrie was referred to as a woman and there was a reference to his intimate physiological characteristics and in the 16 January 2020 blog a reference to his affirmation procedure to address gender dysphoria. The title to the blog was also relied on as are a number of other passages.¹⁶⁵

[337] The closing submissions filed on the complainants’ behalf explained:

On an objective reading .. the Respondent is saying that the First Complainant should not be in the presence of children and is a danger to them because he is a transgender person. Incitement on the grounds of gender identity plainly arises from these statements.

[338] The reference in this head of complaint to Mr Valkyrie’s affirmation procedure is to material in the respondent’s blog of 16 January 2020. There we can find two contiguous paragraphs which I have called paragraph 1 and paragraph 2 for reference:

Paragraph 1

Queeny is a woman who goes by the name of Johnny Valkyrie. Johnny is crowd funding under the name of Jean Genie to help pay for her breasts to be surgically sliced off so she can present as a man.

Paragraph 2

“I am raising funds to sustain income whilst recovering from an affirmation procedure to reconstruct my chest. I have bound my chest for over five years now, and in an effort to stop gender dysphoria I have fractured ribs, damaged nerves and have multiple neck and back injuries. March 2020 will see me have my affirmation surgery so that I will no longer have to bind my chest.” Valkyrie writes on her Go Fund Me page.

[339] Paragraph 1 read by itself in an objective and unemotional way, carries the message that Mr Valkyrie was still a ‘she’, that the surgical procedure was yet to be done and would be brutal, but when done would enable Mr Valkyrie to present as a man. Read less objectively and from the basis that the procedure was unnatural, it could be read as saying that the surgical procedure was brutal, animalistic and possibly illicit, and would not be successful anyway so that Mr Valkyrie could only pretend to be a man. Perhaps depending on how the likely audience would read the paragraph, it is conceivable that it could incite to hatred towards or serious contempt for or severe ridicule of Mr Valkyrie on the ground of his gender identity or sexuality.

[340] But paragraph 1 must be read in the context of the blog as a whole, in particular paragraph 2. It is not suggested that paragraph 2 is an inaccurate transcription of Mr Valkyrie’s own-source material.

¹⁶⁵ These are mostly set out in the section above ‘the passages to which particular objection is taken’.

- [341] The overall effect of paragraph 1 read with paragraph 2 is to leave the reader with the information that the affirmation procedure is an invasive, difficult and chronic one which requires determination to be completed and that Mr Valkyrie is willing openly to talk about it. I think that the content of paragraph 2 reduces the impact of paragraph 1 and makes it much less likely that any member of the relevant audience would be incited to hatred towards or serious contempt for Mr Valkyrie on the ground of his gender identity or sexuality, because of the determination and perseverance shown by his own description of the procedure in paragraph 2. Further I cannot see that the overall effect of paragraph 1 read with paragraph 2 could incite to severe ridicule of Mr Valkyrie on the ground of gender identity or sexuality because of the seriousness of the matters described. This is of course, considering the ‘natural and ordinary effect’ of the words, that is ignoring any unnatural or extraordinary effects amongst some people. In passing, I would say that the ‘ordinary reasonable reader’ test produces the same outcome.
- [342] It is conceivable that the respondent’s published material might cause some readers to be critical of Mr Valkyrie or to think that he might be a danger to children in some unspecified way **merely because he was a transgender person**. One person responding to the blog of 16 January 2020 for example, described Mr Valkyrie as ‘disturbed mentally and sexually’,¹⁶⁶ another seemingly describing him as a ‘lewd freak’,¹⁶⁷ another ‘a terrible lady’,¹⁶⁸ and another saying that ‘trans are overly sexualised men dressed as women, there is a definite agenda here, not just comedy’.¹⁶⁹ Later third party comments were possibly describing him as a ‘paedophile’,¹⁷⁰ another calling the complainants ‘freaks’,¹⁷¹ one seeming to say that transgender persons born biological women were suffering from a ‘terrible mental disorder’,¹⁷² and that gender dysphoria was a mental disorder.¹⁷³ Using these examples, it is possible to see that some people in the hypothetical audience would react in the same way.
- [343] However, I do not think there is anything in the respondent’s published material which would have the natural and ordinary effect of causing such a reaction. Such a reaction would be caused by something else. In any case it seems to me that in Australia, such a reaction lives in the past. These days, any such a reaction to the blog would be unnatural and extraordinary because of general understanding and respect in Australia of the attribute of gender identity, so if there was any such incitement it could not be vilification under section 124A.
- [344] If instead, the test should be the ‘ordinary reasonable reader’ then this produces the same outcome because such a reaction would not be reasonable having regard to the respondent’s published material.
- [345] If instead, the test should be the ‘ordinary reader (however unreasonable)’ or ‘ordinary member of a class of reader (however unreasonable)’ then the complainants’ case is stronger.

¹⁶⁶ JK at page 48.

¹⁶⁷ EL on page 69.

¹⁶⁸ FDHS on page 70.

¹⁶⁹ MU on page 71.

¹⁷⁰ ES on page 90.

¹⁷¹ BC on page 149.

¹⁷² DB on page 177.

¹⁷³ TT on page 177.

- [346] **Dealing with the complaints as members of a group of persons under this head,** I agree that the reference in the blog of 16 January 2020 to ‘role models like Queeny’ could be taken as referring to transgender persons generally. I agree that the material in the blog taken together and in context asserts that transgender persons would be a dangerous role model for children if permitted to inform children about gender fluidity. Since it is asserted that had happened at least in the event in the library, the assertion is that transgender persons had been a danger to children.
- [347] It is an overstatement however, to say that therefore the respondent’s published material asserted that ‘transgender persons are dangerous to children’. The assertion was not that children should have no contact with transgender persons. What was being said was that transgender persons would be a dangerous role model for children if they were inducting the children ‘into the worlds of gender fluidity and sexual expressionism’. In other words, transgender persons should not be permitted to educate children about gender fluidity.
- [348] It follows that the complaint under this head fails.
- (d) Mr Hill, however dressed, was dangerous to children because he uses the name ‘Diamond Good-Rim’ on Facebook, performs to adult audiences as a drag queen, and uses that name when doing so*
- [349] This is said to have been asserted in the blog of 16 January 2020 and the posts of 25 January 2020, 25 July 2020 and 19 September 2020. It is said that the assertion was that:¹⁷⁴
- (a) he performs drag queen shows to over 18 audiences, has a drag queen stage name when performing for over 18 years audiences, and a Facebook presence as, ‘Diamond Good-Rim’;
 - (b) the material implied falsely that he used his ‘adult’ name in children’s shows; and
 - (c) the material stated falsely that he was in the pornography and ‘sex trade’ industries.
- [350] The blog of 16 January 2020 implies that Mr Hill used the name Diamond Good-Rim in offering his performance to Brisbane City Council, and that he was presented to the parents and children under that name in promotional material about the event and at the event itself.¹⁷⁵ The blog says that Mr Hill was a ‘porn star’. All these things are in fact incorrect.¹⁷⁶
- [351] The blog of 16 January 2020 refers to Mr Hill’s name as being ‘homo-erotised’ and ‘a reference to the anus’ and to Good-Rim being a 2019 winner of an X Award from

¹⁷⁴ Second further amended contentions dated 27 November 2022 paragraph 7(d).

¹⁷⁵ This suggestion can be seen from the reference to alarm bells in the minds of thinking parents and the geniuses at the Council, and to the mayor and to children researching the Good-Rim name or asking their mothers about that name.

¹⁷⁶ In fact, Mr Hill only used the name ‘Diamond’ when performing to children: Dwayne Hill’s affidavit of 26 May 2021 at [5], also his evidence transcript 1-55 lines 25 to 34. Also his award was not for work as a porn star.

the Adult Entertainment Industry’. After a description of that industry, the blog then said:

Have we learned nothing from creeps like Harvey Weinstein, Jeffery Epstein and Prince Andrew?

I have considered the arguments about this particular paragraph under (a) above.

[352] The blog then implied that it was wrong to put Mr Hill ‘in front of children’.

[353] The blog expressed the hope that the children attending the event would not explore ‘Good-Rim’s Facebook page’ or ‘ask their mum what “good-rim” means in the wonderful world of drag queens’.

[354] The post of 25 January 2020 went further. It included this paragraph:

Good-Rim’s name is a deliberate reference to obscene and filthy homosexual activity.

[355] The post again referred to a child asking their mother ‘what’s a good rim’.

[356] The post of 25 July 2020 stated:

Good-rim is a reference to a homosexual sex act and he is also involved in the trade as an “adult entertainer”

It would be obvious to the overwhelming majority of mainstream Australians that Good Rim is a dangerous role model for children.

[357] The post of 19 September 2020 repeated the assertion that Mr Hill’s name was a ‘reference to anal sex’ and that he was ‘a recipient of an adult entertainment industry X Award’.

[358] In the respondent’s post of 25 January 2020 there were three references to a debauched world. One was to such a world that the ‘rainbow political agenda .. seeks to induct children’, another was to a drag queen story time presenter in Melbourne being in a ‘debauched LGBTIQA+ world to which he is seeking to induct children’ and the third was to a drag queen story time presenter in Perth who represented a ‘debauched queer world’. On the complainants’ behalf these comments are relied on under this head of complaint.

[359] The last debauched world comment seems to be a reference to the world of homosexuality but the earlier ones seem to be more general.

[360] As can be seen from the third party comments, as a result of the information about Mr Hill in the respondent’s published material the view was expressed by several people that he was unsuitable to present to children.¹⁷⁷ At its extreme, one person questioned whether, since Mr Hill had a ‘passion to the x-rated industry (an award winner)’ that he ‘had a passion for children?’,¹⁷⁸ and another possibly described him as a ‘paedophile’.¹⁷⁹

[361] I do not read from the respondent’s published material the assertion that Mr Hill was dangerous to children generally. The respondent’s message was that Mr Hill was

¹⁷⁷ For example, JK on pages 48, 50, 53 and 57, MKW and LB on page 64, SP on page 67, CJBR and FS on page 72, JR on page 85, ML on page 161.

¹⁷⁸ AG on page 201.

¹⁷⁹ ES on page 90.

unsuitable to be presented to children as a role model or be allowed to inform children about gender fluidity because children needed protection from ‘radical sexual expressionism and gender confusion’. This is quite different from saying that he was dangerous to children generally.

[362] It seems to me that the natural and ordinary reaction of the relevant audience to the respondent’s published material would be that Mr Hill was unsuitable to present to children because children needed protection from ‘radical sexual expressionism and gender confusion’.

[363] To be a contravention of section 124A as vilification of Mr Hill this reaction would need to be on the ground of his sexuality, in this case homosexuality. But it is clear that such a reaction would not be on such a ground. The reason for such a reaction would be because the person was of the belief that children needed protection from radical sexual expressionism and gender confusion, and that Mr Hill would undermine that. In other words, the people would hold the same belief even if Mr Hill did not have any such attribute.

[364] I have considered in passing whether in the respondent’s post of 25 January 2020 the words:

‘our fourth drag queen active with children is Diamond Good Rim’

was suggestive of some sort of paedophilia by Mr Hill, however in the context of the earlier parts of that particular post I do not think that it did so, and this is not the case as presented on his behalf.

[365] Although from the complainants’ contentions and submissions, it does not seem to be part of the complaint that the respondent’s published material was that the overall effect of the respondent’s published material would **incite people to hatred towards or serious contempt for Mr Hill on the ground of his sexuality in a general way**, I shall deal with this for the sake of completeness.

[366] Some of the third party comments do suggest that some people despised him for his sexuality, with one correspondent calling both complainants ‘freaks’,¹⁸⁰ another seemingly describing him as a ‘lewd freak’,¹⁸¹ another ‘a terrible lady’.¹⁸²

[367] It does seem likely that the respondent’s published material caused the people who made third party comments to despise Mr Hill for these expressed reasons, and could therefore have resulted in the same reaction in a hypothetical audience. The people who would be so moved, would be those who are unable to read about homosexual activity without feeling contempt for those who practise it. They would regard the homosexual world as debauched, as the respondent described it in the last ‘debauched world’ statement in the post of 25 January 2020.

[368] There is a causation problem with such a reaction because the reaction would seem to be caused by something other than the respondent’s published material. In any case it seems to me that, in Australia, such a reaction only lives in the past. These days, any such a reaction to the blog would be unnatural and extraordinary because of general understanding and respect in Australia of the attribute of sexuality, in Mr

¹⁸⁰ BC on page 149.

¹⁸¹ EL on page 69.

¹⁸² FDHS on page 70.

Hill's case homosexuality, so if there was any such incitement it could not be vilification under section 124A.

[369] If instead, the test should be the 'ordinary reasonable reader' then this produces the same outcome because such a reaction would not be reasonable having regard to the respondent's published material.

[370] If instead, the test should be the 'ordinary reader (however unreasonable)' or 'ordinary member of a class of reader (however unreasonable)' then the complainants' case is stronger but I do not think this is the correct test.

[371] It follows that the complaint under this head fails.

(e) LGBTIQ+ activists are hell bent on trashing the purity and innocence of the next generation

[372] This complaint is an allegation of vilification of LGBTIQ+ activists generally, and perhaps also human rights and community advocates or LGBTIQ+ human rights and community advocates, and the complainants say that they may bring the complaint because they are members of those group of persons.

[373] This allegation relies on passages in the respondent's post of 25 January 2020:

Since the Marriage Act was changed, activists have doubled down on suppressing freedom of speech and ensuring gender fluid and sexualised programs for children, like "Safe Schools", Project Rocket, Respectful Relationships and drag queen story time are rolled out nationally.

then after reviewing drag queen story time events around Australia:

LGBTIQ+ activists are hell bent on trashing the purity and innocence of the next generation.

[374] Also in the respondent's post of 2 October 2020 when referring to LGBTIQ+ activists said:

Instead of arguing their case in the public square and defending why they think local governments should open their ratepayers' libraries so children can be inducted into the worlds of gender fluidity and sexual expressionism, they used flawed anti-free-speech laws to crush public discussion.

[375] There were 466 posts third party comments to the post of 25 January 2020 and 43 third party comments to the post of 2 October 2020 at the time they were extracted.¹⁸³ One commenter confirmed her view that drag queen story time was 'started by activists and confuses children about gender'.¹⁸⁴ Most other comments to the later post wished the respondent well in his defence to the complaints, or discussed Senator Chandler's case.

[376] It is conceivable that others in the hypothetical audience may have been moved by what was said by the respondent about activists in these posts, but it seems to me that the natural and ordinary reaction to these posts upon those critical of the activists would be only to confirm their disagreement with them. I cannot see that the post could increase that disagreement to hatred or serious contempt to the activists. Some

¹⁸³ Exhibits 9.1 and 13.1 to Mr Hill's affidavit of 25 November 2022.

¹⁸⁴ MU page 102.

readers may have already despised the activists but again I cannot see that the post would make them despise the activists any more than they already did.

- [377] If instead, the test should be the ‘ordinary reasonable reader’ then this produces the same outcome because such a reaction would not be reasonable having regard to the respondent’s published material.
- [378] If instead, the test should be the ‘ordinary reader (however unreasonable)’ or ‘ordinary member of a class of reader (however unreasonable)’ then the complainants’ case is stronger but I do not think this is the correct test.
- [379] For readers who, prior to reading the posts had no firm view one way or the other about the activists, it is difficult to see that the natural and ordinary effect of the posts would cause them to hate the activists or hold them in serious contempt. It seems to me that the posts would be more likely to make such a person consider whether or not drag queen story time events were appropriate, taking into account that the author of the posts was obviously strongly against such events.
- [380] If instead, the test should be the ‘ordinary reasonable reader’ then this produces the same outcome because such a reaction would not be reasonable having regard to the respondent’s published material.
- [381] If instead, the test should be the ‘ordinary reader (however unreasonable)’ or ‘ordinary member of a class of reader (however unreasonable)’ then the complainants’ case is stronger but I do not think this is the correct test.
- [382] In any case, there is a difficulty in that, for there to be a contravention of section 124A the incitement to hatred or serious contempt would need to be on the ground of the sexuality or gender identity of the LGBTIQ+ activists.
- [383] It is obvious that only some such activists would be transgender persons or have the attribute of sexuality.
- [384] Hence I do not think it follows that an attack on LGBTIQ+ activists is also an attack on transgender persons and persons with homosexual sexual orientation. The group of persons known as LGBTIQ+ activists is too wide and too diverse for that to be the almost inevitable consequence.
- [385] It follows that the complaint under this head fails.

Conclusion

- [386] I have concluded that the complaints must fail.

Schedule 1 - Can the complaints of vilification by being a member of a groups of persons be heard?

- [1] This issue arises because in limb B of the complaints, the complainants say that the respondent's published material vilified groups of persons and that they may bring the complaints as members of the group of persons. The groups of persons of concern here are drag queens, members of the numerous and diverse LGBTIQ+ community and LGBTIQ+ human rights and community advocates.
- [2] In submissions about this on behalf of the complainants it was said that the complaints as lodged with QHRC included the complaint about vilification as members of a group and therefore the Commissioner should have made a determination whether they were representative complaints under section 146.¹⁸⁵ However, on the papers I have seen at least, the original complaint to QHRC and referred to the tribunal were individual complaints only. The submissions accept that a representative complaint cannot continue in the tribunal as an individual complaint, but submit that this does not apply here because the complaints are all made by the complainants as individuals albeit on the second limb as members of a group which, relying on *Menzies and anor v Owen* [2014] QCAT 661, is permissible.
- [3] In *Menzies*, Member Ann Fitzpatrick accepted that it was possible for a member of a group to raise complaints of vilification under the ADA, where the allegedly vilifying acts are directed at the group rather than at an individual. In that case a homosexual person complained about vilification of a group of persons, that is a local group of homosexuals.
- [4] It was submitted on behalf of the respondent that the second limb of the complaint should not be permitted as representative complaints, because the ADA does not permit both an individual complaint and a representative complaint to be pursued at the same time.¹⁸⁶ The submissions do not suggest that the second limb is not available under section 124A; instead, the submissions say that *Menzies* was rightly decided in that respect.
- [5] That the complaints of vilification by being a member of a groups of persons is within the jurisdiction of the tribunal is less clear in these complaints than it was in *Menzies* because:
- (a) Some of the groups of persons said to have been vilified are not mentioned as protected under section 124A. So for example it is said that the group of persons described as drag queens were vilified, but this is not in the list of protected groups in section 124A. Section 124A protects groups with the attribute of race, religion, sexuality or gender identity.
 - (b) For some of the groups of persons said to have been vilified, the complainants were only members of a sub-group of the group. So for example some members of the group of persons described as drag queens will be homosexual persons, and so they form a homosexual sub-group of the drag queen group. But some members of the group of persons described as drag queens will not have any of the attributes protected by section 124A.

¹⁸⁵ Complainants' submissions re: nature of complaints dated 3 May 2023 paragraph 9.

¹⁸⁶ Respondents' closing submissions on representative complaints and related issues dated of 4 May 2023 paragraphs 10 and 14.

[6] An analysis of the jurisdictional questions arising requires an examination of the words of various sections of the ADA, that is section 34 (who may complain), section 124A(1) (vilification) already set out above, and sections 146 and 194, and associated sections (representative complaints).

[7] Section 134 of the ADA (who may complain) reads:

134 Who may complain

- (1) Any of the following people may complain to the commissioner about an alleged contravention of the Act—
 - (a) a person who was subjected to the alleged contravention;
 - (b) an agent of the person;
 - (c) a person authorised in writing by the commissioner to act on behalf of a person who was subjected to the alleged contravention and who is unable to make or authorise a complaint.
- (2) Two or more people may make a complaint jointly.
- (3) A relevant entity may complain to the commissioner about a relevant alleged contravention.
- (4) However, the commissioner may accept the relevant entity's complaint under section 141 only if the commissioner is satisfied that—
 - (a) the complaint is made in good faith; and
 - (b) the relevant alleged contravention is about conduct that has affected or is likely to affect relevant persons for the relevant entity; and
 - (c) it is in the interests of justice to accept the complaint.
- (5) In this section—

relevant alleged contravention means an alleged contravention of section 124A.

relevant entity means a body corporate or an unincorporated body, a primary purpose of which is the promotion of the interests or welfare of persons of a particular race, religion, sexuality or gender identity.

relevant persons, for a relevant entity, means persons the promotion of whose interests or welfare is a primary purpose of the relevant entity.

[8] Under sections 134(3) to (5) a group of persons may complain through a 'relevant entity' whose primary purpose is the promotion of the interests or welfare of persons covered by section 124A. These subsections were added by the *Discrimination Law Amendment Act 2002* (Qld), and it was said in the explanatory notes to the Bill that the changes were to:

overcome current restrictions in the Act which allow complaints to be made only by a person subjected to the alleged contravention (or the person's agent) and representative complaints (i.e. a complaint by an individual who has a common complaint with and seeks to represent all other individuals in a particular group who have been similarly affected by the alleged contravention). In relation to complaints of vilification these restrictions are unsatisfactory as many vilifying acts are directed at a group rather than an individual. In such

cases individuals within an affected group may be reluctant to make a complaint for fear of being singled out for victimisation or retribution.

[9] This is not what happened here. Instead, these complaints were made under section 134(1)(a) it being said that the complainants were ‘subjected to the alleged contravention’.

[10] For a complaint of vilification of a group of persons, whether a complainant was subjected to the alleged contravention depends on reading section 124A as (words not relied on being struck out):

A person must not, by a public act, incite hatred towards, serious contempt for, or severe ridicule of, a ~~person or~~ group of persons on the ground of the race, religion, sexuality or gender identity of the ~~person or~~ members of the group.

[11] There will be some complaints about vilification of a group of persons, where all members of the group would have suffered vilification. This would mean that all members of the group could make a complaint of vilification just by being members of the group. This is because each such member would be a ‘person who was subjected to the alleged contravention’ under section 134(1)(a).

[12] This happened in *Menzies* where Member Ann Fitzpatrick accepted that it was possible for a member of a group to raise complaints of vilification under the ADA, where the allegedly vilifying acts are directed at the group rather than at an individual.

[13] Member Fitzpatrick said:¹⁸⁷

I find that Ms Bruce and Ms Menzies have standing to bring the claim as individuals who claim that they were subjected to vilifying acts because they are homosexuals, even though the alleged acts were directed to homosexuals at large rather than to them personally.

It will be necessary to make findings as to whether they were in fact subjected to or experienced the acts complained about. That is a different issue to the question of their standing to make complaint.

[14] The last passage shows that the Member considered that the complainant had been ‘subjected to the alleged contravention’ and therefore came with section 134(1)(a) merely by being a member of the group.

[15] I can see that this works when vilification of the group of persons is necessarily vilification of each member of the group because all members of the group all have the same attribute, that attribute being protected by section 124A. In the complaints before me, this would apply to the following groups of persons who allegedly suffered vilification under section 124A:

transgender persons

persons with homosexual sexual orientation

[16] But it does not seem to work when the group of persons is made up of some persons whose attribute is not protected by section 124A. For example, the members of the group of persons known as ‘drag queens’ are not all transgender persons or persons with homosexual sexual orientation. There will be many drag queens who are neither. The same would be the case I believe for the members of ‘the numerous and diverse

¹⁸⁷ *Menzies and anor v Owen* [2014] QCAT 661 at [13] and [14].

LGBTIQ+ community’ group and the ‘LGBTIQ+ human rights and community advocates’ group.

- [17] Member of those groups would not be able to contend that merely because they are a member of the group they had been ‘subjected to the alleged contravention’ and therefore came with section 134(1)(a). Hence a person would not be able to make a complaint under the ADA about vilification of drag queens merely because the person was a drag queen; and a person would not be able to make a complaint under the ADA about vilification of the ‘LGBTIQ+ community’ merely because the person was a member of that community.
- [18] It is conceivable however that (for example) vilification of drag queens would effectively amount to vilification of those drag queens who were transgender persons, or those drag queens who were persons with homosexual orientation. These would be sub-groups of the group drag queens, and since these two sub-groups were protected from vilification under section 124A they would seem to come under the same principle as set out in *Menzies*. Of course to succeed under section 124A, and to have standing to make the complaint under section 134(1)(a), such a complainant would have to show:
- (a) That the public act had incited hatred etc. of the principal group (drag queens) and that this effectively amounted to vilification of a sub-group protected by section 124A in this case either because:
 - (i) the incitement was on the ground of sexuality of the sub-group of persons with homosexual sexual orientation; or
 - (ii) the incitement was on the ground of gender identity for the sub-group of transgender persons.
 - (b) And the complainant was a member of the protected sub-group, in this case a person with homosexual sexual orientation or a transgender person.
- [19] I cannot see that anything less than these requirements in a case such as this could be actionable under section 124A. If these things are shown, then I am satisfied I would have jurisdiction to hear and determine such a complaint.
- [20] In most cases, it would be simpler for a complainant just to complain that they had been vilified as a transgender person or as a person with homosexual sexual orientation, but the way set out above (alleging vilification of a group consisting of protected sub-groups) is the way this complaint has been made in its amended form.

Effect of the representative complaint provisions

- [21] I need to mention this because the ADA imposes some obligations on the QHRC and on the tribunal where it is alleged that a number of people were subjected to the alleged contravention of the ADA.
- [22] In this respect, section 146 reads:

146 Representative complaints

- (1) If a complaint alleges that a number of people were subjected to the alleged contravention by the respondent, the commissioner must determine whether the complaint should be dealt with by the commissioner as a representative complaint.

- (2) The tribunal may subsequently make its own determination under section 194

- [23] Section 147 provides guidance about whether a complaint may be dealt with as a representative complaint. This might be if the complaint is made in good faith as a representative complaint, and that the justice of the case demands that the matter should be dealt with as a representative complaint. Even if this is not the case the complaint may be dealt with as a representative complaint if the complainant was affected by the vilification in common with a class of numerous persons of which they are a member. It is not necessary that the same remedy is being sought, or indeed that any remedy is sought by the persons represented.
- [24] If the commissioner decides that a complaint should be dealt with as a representative complaint then by section 151 the complainant must choose whether to proceed with the complaint as a party to the representative complaint or to make an individual complaint.
- [25] There are similar provisions on referral to the tribunal.
- [26] Section 194 reads:

194 Representative complaints

If a complaint alleges that the respondent contravened the Act against a number of people, the tribunal must determine, as a preliminary matter, whether the complaint should be dealt with by it as a representative complaint.

- [27] Section 195 provides guidance about whether a complaint may be dealt with as a representative complaint in the same terms as section 147 applies to the commissioner.
- [28] Then section 199 ensures that a person cannot pursue both a representative complaint and an individual complaint in the tribunal. It reads:

199 Representative complainant must choose

A complainant in relation to a representative complaint must choose whether to—

- (a) proceed before the tribunal as a party to the representative complaint; or
- (b) make an individual complaint.

- [29] In this complaint it is said that a group of persons was vilified. As can be seen above, in order for a person who was a member of the group to have standing make a complaint in such circumstances *as a member of the group* the person will necessarily be alleging that there was a contravention against a number of people, hence the provisions of the ADA covering representative complainants would seem to be engaged.
- [30] In *Menzies*, no doubt with section 194 of the ADA in mind, Member Fitzpatrick raised this with the parties at the commencement of the hearing. She decided there was no reason for the complaint to proceed as representative complaint.¹⁸⁸

¹⁸⁸ As explained in the reasons at [11].

- [31] In the complaint before me, there was nothing in the complaint before the QHRC suggesting that the complaint could be a representative complaint. The complainants were clearly making only individual complaints.
- [32] The complaints had not changed during their time with QHRC and therefore when they were referred to the tribunal they did not appear to be representative complaints either. Hence section 194 was not engaged at that time.
- [33] On the documents I have seen, it was only when the complainants filed their contentions in the tribunal that it was first suggested that the complainants were contending that there had been a contravention of section 124A not only because the offending material was about them, but also because the offending material was about a group of persons and they were members of the group.¹⁸⁹
- [34] The proceedings before me have not been classified as representative proceedings, and no party has raised this with the tribunal. It is clear that it has not been, and should not be, dealt with by the tribunal as a representative complaint. This leaves the complainants free therefore to pursue the complaints as individual complaints.

¹⁸⁹ Hence it is incorrect I think, to say that from the outset the complaints were individual complaints alleging vilification against the complainants individually but also as members of a group: complainants' submissions re: nature of complaints dated 3 May 2023 paragraph 8.

Schedule 2 – survey of reported cases showing uncertainty in vilification law

- [1] This is a survey of first instance decisions in various Australian jurisdictions and also some decisions at the level of tribunal appeal panels. It is limited to 2013 onwards because by then there had been important Court of Appeal decisions in NSW and Victoria on the matter. And it does not cover Commonwealth decisions because the law is different.
- [2] Schedule 3 shows how similar the statutory vilification law is in the other jurisdictions whose decisions are surveyed here.
- [3] The vilification test has been applied to an **unfiltered hypothetical audience** (containing people with extreme views) in a number of cases, for example where the test was applied to ‘any ordinary (not necessarily reasonable) person’ of the general public who may have overheard the public act which occurred in a public park in the late afternoon in *Bennett v Dingle (Human Rights)* [2013] VCAT 1945 at [43], to a sub-group of internet users who, like Messrs Sunol and McKee, are strongly opposed to same sex marriage in *Burns v Sunol* [2016] NSWCATAD 16 at [48], to ‘observers who share some or all of Mr Campbell’s dreadful views’ (although this is described in [41] as an ordinary member of the public in a suburban street) in *Lamb v Campbell* [2021] NSWCATAD 103 at [40], to an ‘ordinary member of the class to which the public act is directed, taking account of the circumstances in which the conduct occurs’ in *Menzies and anor v Owen* [2014] QCAT 661 at [18], and to a section of the public even if they held racist views about Arabs in *Ekermawi v Jones (No 3)* [2014] NSWCATAD 58 at [32] (although the test was also applied to ‘ordinary members of the particular audience’ at [44] and [47]).
- [4] The vilification test has been applied to a **filtered hypothetical audience** (where those with extreme views are stripped out) in several cases for example, to ordinary members of the class of internet users at large with no greater propensity to be incited than a member of the general public in *Burns v McKee* [2017] NSWCATAD 66 at [82], to an ‘ordinary reasonable person’ in *Huenerberg v Murray* [2023] QCAT 175 at [55] and [58], to an ‘ordinary reasonable person’ in the general public in *Kerslake v Sunol (Discrimination)* [2022] ACAT 40 at [102], to an ‘ordinary reasonable reader’ in *Menzies and anor v Owen* [2014] QCAT 661 at [123], to ‘an ordinary and reasonable member of the public’ where the offending material could be read by anyone in *Rep v Clinch (Appeal)* [2021] ACAT 106 at [152] to [158], and possibly to an ‘ordinary member of the class of persons to whom it is directed’ in *Riley v State of New South Wales (Department of Education)* [2019] NSWCATAD 223 at [131].
- [5] **On the question what ‘on the ground of’ refers to** many cases simply say that ‘on the ground of’ refers to the **incitement** but as mentioned below, this is ambiguous: it could mean either the public act or the reaction of the audience or perhaps both, so this does not assist. In those cases where it can be discerned what ‘on the ground of’ was applied to, it can be seen that it was applied to the **public act** in *Burns v Sunol* [2014] NSWCATAD 2 at [61], [64], [73], [75], and [77], *Burns v Sunol* [2014] NSWCATAD 61 at [32], *Ekermawi v Nine Network Australia Pty Ltd* [2019] NSWCATAD 29 at [118], *Burns v Smith* [2019] NSWCATAD 56 at [43] and [55], and *Kerslake v Sunol (Discrimination)* [2022] ACAT 40 at [108], but was applied to the **reaction of the audience** in *Menzies and anor v Owen* [2014] QCAT 661 at [62]

and [87], *Burns v McKee* [2017] NSWCATAD 66 at [111], and *Cottrell v Ross* [2019] VCC 2142¹⁹⁰ at [48] and [49].

- [6] **On the question of how likely it is that the public act would incite**, this has been put in various ways, for example whether people ‘could have been incited’ by the public act in *Lamb v Campbell* [2021] NSWCATAD 103 at [41], whether it was ‘capable of inciting’ in *Riley v State of New South Wales (Department of Education)* [2019] NSWCATAD 223 at [62] and [127], whether it ‘had the capacity to incite’ in *Burns v Smith* [2019] NSWCATAD 56 at [30], also in several *Burns v Sunol* cases,¹⁹¹ *Menzies and anor v Owen* [2014] QCAT 661 at [18], *DLH v Nationwide News (No 2)* [2018] NSWCATAD 217 at [47], *Ekermawi v Commissioner of Police, NSW Police Force* [2019] NSWCATAD 79 at [66] and [90], and *Sun v Nationwide News Pty Limited* [2021] NSWCATAD 147 at [20], whether it had the ‘capacity or effect’ of inciting the ordinary internet user in *Burns v Sunol* [2014] NSWCATAD 62 at [31], whether it was capable of urging or spurring on ordinary internet users or ‘having the capacity to do this’ or having ‘the effect of’ this in *Burns v Sunol* [2015] NSWCATAD 131 at [67], [72], [77], [82], and [83], whether people were incited by ‘words which command, request, propose, advise or encourage hatred etc.’ but can also involve words which incorporate strong and abusive language about the person or group which is likely to incite hatred etc.’ in *Rep v Clinch (Appeal)* [2021] ACAT 106 at [10] and [163], the ‘likely effect of the public acts’ in *Ekermawi v Jones (No 3)* [2014] NSWCATAD 58 at [32], whether the public act was ‘likely to incite hatred’ etc. ‘in the minds of the persons to whom the statements were directed’ in *Unthank v Watchtower Bible and Tract Society of Australia (Human Rights)* [2013] VCAT 1810 at [21], ‘whether the natural ordinary effect is to incite hatred’ in *Sisalem v The Herald and Weekly Times* [2017] VSC 254 at [4], and ‘the natural and ordinary effect’ in *Sloan v State of Victoria (Human Rights)* [2021] VCAT 933 at [60].

¹⁹⁰ A criminal case of serious religious vilification.

¹⁹¹ *Burns v Sunol* [2016] NSWCATAD 16 at [48], *Burns v Sunol* [2016] NSWCATAD 74 at [29], *Burns v Sunol* [2016] NSWCATAD 81 at [22], *Burns v Sunol* [2017] NSWCATAD 215 at [64], *Burns v Sunol* [2018] NSWCATAD 10 at [59] and *Burns v Sunol (No 2)* [2017] NSWCATAD 236 at [38].

Schedule 3 – vilification law in the other jurisdictions

- [1] This concentrates on the vilification test in the relevant statutes and it is emphasised that in every case there is an exception for fair comment and public debate or other such exclusions.
- [2] The NSW vilification law for homosexuals is in these terms:¹⁹²
- It is unlawful for a person, by a public act, to incite hatred towards, serious contempt for, or severe ridicule of, a person or group of persons on the ground of the homosexuality of the person or members of the group.
- [3] The NSW vilification law for race is in these terms:¹⁹³
- It is unlawful for a person, by public act, to incite hatred towards, serious contempt for, or severe ridicule of, a person or group of persons on the ground of the race of the person or members of the group.
- [4] The NSW vilification law for transgender persons is in these terms:¹⁹⁴
- It is unlawful for a person, by a public act, to incite hatred towards, serious contempt for, or severe ridicule of: (a) a person on the ground that the person is a transgender person, or (b) a group of persons on the ground that the members of the group are transgender persons.
- [5] The Victorian vilification law for race is in these terms:¹⁹⁵
- A person must not, on the ground of the race of another person or class of persons, engage in conduct that incites hatred against, serious contempt for, or revulsion or severe ridicule of, that other person or class of persons.
- [6] The Victorian vilification law for religious belief or activity is in these terms:¹⁹⁶
- A person must not, on the ground of religious belief or activity of another person or class of persons, engage in conduct that incites hatred against, serious contempt for, or revulsion or severe ridicule of, that other person or class of persons.
- [7] The ACT vilification law is in these terms:¹⁹⁷
- It is unlawful for a person to incite hatred toward, revulsion of, serious contempt for, or severe ridicule of a person or group of people on the ground of any of the following, other than in private: (a) disability; (b) gender identity; (c) HIV/AIDS status; (d) intersex status; (e) race; (f) religious conviction; (g) sexuality.
- [8] The Tasmanian vilification law is in these terms:¹⁹⁸
- A person, by a public act, must not incite hatred towards, serious contempt for, or severe ridicule of, a person or a group of persons on the ground of – (a) the race of the person or any member of the group; or (b) any disability of the person or any member of the group; or (c) the sexual orientation or lawful sexual

¹⁹² Section 49ZT of the *Anti-Discrimination Act 1977* (NSW).

¹⁹³ Section 20C of the *Anti-Discrimination Act 1977* (NSW).

¹⁹⁴ Section 38S of the *Anti-Discrimination Act 1977* (NSW).

¹⁹⁵ Section 7 of the *Racial and Religious Tolerance Act 2001* (Vic).

¹⁹⁶ Section 8 of the *Racial and Religious Tolerance Act 2001* (Vic).

¹⁹⁷ Section 67A of the *Discrimination Act 1991* (ACT).

¹⁹⁸ Section 19 of the *Anti-Discrimination Act 1998* (Tas).

activity of the person or any member of the group; or (d) the religious belief or affiliation or religious activity of the person or any member of the group; or (e) the gender identity or intersex variations of sex characteristics of the person or any member of the group.

- [9] Other States and Territories have vilification laws but since they impose criminal sanctions which affects the test to apply, these are omitted from the above list.
- [10] The vilification laws set out above contrast with the alternative approach, which is to prohibit offensive conduct in public done on the ground of an attribute. The Northern Territory has recently added such a provision to its Anti-Discrimination legislation instead of using the NSW vilification model.¹⁹⁹ The NT model seems to have been based on the Commonwealth law prohibiting such conduct in section 18C(1) of the *Racial Discrimination Act 1975* (Cth):

Offensive behaviour because of race, colour or national or ethnic origin

- (1) It is unlawful for a person to do an act, otherwise than in private, if:
- (a) the act is reasonably likely, in all the circumstances, to offend, insult, humiliate or intimidate another person or a group of people; and
 - (b) the act is done because of the race, colour or national or ethnic origin of the other person or of some or all of the people in the group.
- [11] Both the Northern Territory and Commonwealth laws exempt, in a similar way to the NSW vilification law model, artistic performances and publications, public discussions and debates in the public interest, fair and accurate reporting fair comment about things of public interest.

¹⁹⁹ *Anti-Discrimination Amendment Act 2022* (NT), adding section 21A of the *Anti-Discrimination Act 1992* (NT).