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AUSTRALIAN CAPITAL TERRITORY DISCRIMINATION TRIBUNAL

CITATION: **DANIEL EMLYN-JONES AND FEDERAL CAPITAL PRESS [Interevener: HUMAN RIGHTS COMMISSIONER]**

DT 577/2005

Catchwords: Discrimination – interpretation of the Act - sexuality – homosexuality - unfavourable treatment – causal connection – standard of proof - discrimination in the provisions of goods, services and facilities – vilification – incitement – public act - human rights – freedom of expression – right to privacy – right to reputation – publication – on-line forum.

Provisions considered

Discrimination Act 1991 (Republication No. 19), ss. 4, 7, 8, 20, 65 and 66.
Human Rights Act 2004 (Republication No. 1), ss. 8, 12, 16, 28, 30, 31 and 36.

List of cases cited

ACT Department of Education & Training v Prendergast [2000] ACTDT 6
Almassey and Omari and ACT Multicultural Council Inc [2008] ACTDT 2
Australian Capital Television P/L v Commonwealth (2) (1992) 177 CLR 106
Brandenberg v Ohio 395 U.S. 44 [89 S.Ct. 1827 (1969)]
Briginshaw v Briginshaw [1938] HCA 34; (1938) 60 CLR 336
Bropho v Human Rights & Equal Opportunity Commission [2004] FCAFC 16
Burns v Dye [2002] NSWADT 32
Burns v Laws (No 2) [2007] NSWADT 47
Burns v Laws (EOD) [2008] NSWADTAP 32
Burns v Radio 2UE Sydney Pty Ltd & Ors [2004] NSW ADT 267
Catch the Fire Ministries Inc & Ors v Islamic Council of Victoria Inc [2006] VSCA 284

Edgley v Federal Capital Press of Australia Pty Ltd [1999] ACTSC 95

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Hagan v Trustees of the Toowoomba Sports Ground Trust [2001] FCA 1615
Hagan v Trustees of the Toowoomba Sports Ground Trust [2001] FCA 123
Harrison v ACT Housing [2002] ACTDT 3
I W v City of Perth (1997) 191 CLR 1 at 11
Johnston v Dallarooma Pty Ltd [1999] ACTDT 8
Kazak v John Fairfax Publications Limited [2000] NSWADT 77
Lange v Australian Broadcasting Corporation [1997] 189 CLR 520
Lewin v ACT Health & Community Care Service [2002] ACDT 2
Michael Firestone v Australian National University [2009] ACTDT 1
Peters v Constance [2005] QADT 9
Purvis v NSW (Department of Education and Training) [2003] HCA 62
Re Prezzi and Discrimination Commissioner and Quest Group Pty Ltd (1996) 39 ALD 729
Sunol v Collier (EOD) [2006] NSWADTAP 51
Theophanous v The Herald and Weekly Times Ltd [1992-1994] 182 CLR 104
Toben v Jones [2003] FCAFC 137
Veloskey v Karagiannakis [2002] NSWADTAP 18

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AUSTRALIAN CAPITAL TERRITORY)
DISCRIMINATION TRIBUNAL) NO: DT 577 OF 2005

RE: **DANIEL EMLYN-JONES**

Applicant

AND: **FEDERAL CAPITAL PRESS OF AUSTRALIA**
Respondent

AND: **HUMAN RIGHTS COMMISSIONER**

Intervener

ORDER

Tribunal : Mr R J Cahill, President

Date : 31 July 2009

THE TRIBUNAL ORDERS:

1. That the Applicant's complaint that the Respondent unlawfully discriminated against him in providing a service and facility of on-line forum, because of the Applicant's sexuality, be dismissed, pursuant to section 102(2)(a)(ii) of the *Discrimination Act 1991* (as it stood at the time the complaint was made), on the ground that the complaint has not been substantiated.

2. That the Applicant's claim that the Respondent breached section 66(1) of the Act by unlawfully vilifying a group of persons on the ground of their sexuality has been substantiated, but no claim to unlawful vilification of the Applicant individually has been established.

3. That the Respondent has not been liable for unlawful vilification on the ground that it has established to the satisfaction of the Tribunal the defence under section 66(2) of the Act, namely, that its publications were a public act, done reasonably and honestly, for

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purposes in the public interest, including discussion or debate about and presentations of any matter.

4. That the Respondent's claim that the Discrimination Commissioner acted outside the Commissioner's jurisdiction in investigating the Complainant's complaint has not been established.

5. That the parties bear their own costs in relation to this matter.

.....
President

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AUSTRALIAN CAPITAL TERRITORY)
DISCRIMINATION TRIBUNAL)

NO: DT 577 of 2005

RE: **DANIEL EMLYN-JONES**
Applicant

AND: **FEDERAL CAPITAL PRESS**
Respondent

AND: **HUMAN RIGHTS COMMISSIONER**
Intervener

REASONS

R J Cahill, President

31 July 2009

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PART 1 – PRELIMINARY MATTERS

Background to the complaint

1. On 24 August 2005, the Applicant, Dr Daniel Emlyn-Jones, initiated a complaint with the ACT Discrimination Commissioner against the Respondent, the Federal Capital Press of Australia Pty Ltd, in its role as registered proprietor of The Canberra Times. [The Respondent is also sometimes referred to in this decision as the TCT or the Canberra Times.]

2. The Applicant alleged that the Respondent had:

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(a) discriminated against him on the ground of his sexuality within the meaning of section 7 and section 20 of the *Discrimination Act 1991* (also referred to as "the Act'); and

(b) engaged in conduct amounting to unlawful vilification within the meaning of section 66 of the Discrimination Act.

3. Section 7 of the Act lists the grounds of discrimination, including sexuality. Section 20 provides that it is unlawful to discriminate against a person in the area of providing goods, services or facilities. Section 66 deals with unlawful vilification. Vilification on the ground of sexuality is unlawful.

4. The *Discrimination Act* has been amended a number of times since the date of the complaint of Dr Emlyn-Jones. The relevant version of the Act that applies to the complaint is the "Republication No. 19 (effective 10 January 2005 – 10 January 2006)", which was operative at the time the complaint was made to the ACT Human Rights Office in August 2005.

5. The conduct complained of was that, from July to August of 2005, the Canberra Times allowed certain posts to be included in the Canberra Times' "Have Your Say" on-line community forum. This service is also described as an "on-line forum" or "the forum" for the purposes of this decision.

6. Since the complaint was lodged with the Commissioner, the Canberra Times has removed the forum. When it was available, the on-line community forum could be accessed through the Canberra Times on-line home page. The site invited readers to comment on any Canberra Times' articles or highlight a topic affecting the community.

7. The Applicant asserts that particular comments posted on the forum discriminated against, and vilified, him on the basis of his sexuality, in particular because the Applicant is a gay.

8. On 24 September 2005, after the ACT Human Rights and Discrimination Commissioner (sometimes in this decision referred to as the Human Rights Commissioner or the Discrimination Commissioner, by which title the Commissioner is currently known) requested a formal reply to the Applicant's allegations, but prior to the Commissioner receiving any formal reply from the Respondent, the Canberra Times published an article (purportedly on 24 September 2005) written by the editor of the forum (T-document 10). This article pertained directly to the Applicant's complaint and questioned the power the ACT Human Rights and Discrimination Commissioner had to make any orders with respect to the complaints by the Applicant. This article also described the comments

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complained of as "debates" and stated that the Respondent had allowed these debates to continue uncensored in consideration of the benefits of free speech.

9. In a letter (email) to the ACT Human Rights Commissioner of 27 September 2005 (T – document 12), the editor of the forum stated that he scrutinised and approved material for publication on the on-line community forum. The editor explained that, from time to time, he edited or even rejected letters to remove particularly offensive comments. The basis for edit or rejection included grounds such as defamation, contempt, taste, unacceptable levels of personal abuse, patent errors of fact and discriminatory material amounting to vilification. The editor also stated that the community forum was a general forum for citizens and, therefore, in the discretion he exercised over the edit of the site, he maintained a high threshold for acceptable material and barred no subject areas from discussion or even robust debate.

10. The Respondent denied any act of sexuality discrimination and claimed that, in any event, asserted that its conduct was protected by all of the general doctrines of freedom of speech and freedom of political dissemination. The Respondent also questioned the jurisdiction of the Human Rights Commissioner. I have addressed this issue PART 6 of this decision.

11. On 24 October 2005, in reply to a request to furnish further information, the Respondent wrote to the Human Rights Commissioner, addressing only the contention that the Commission was not acting within jurisdiction.

12. After consideration of the submissions placed before her, the Human Rights and Discrimination Commissioner determined that Dr Emlyn-Jones' complaint raised issues under the *Discrimination Act* with respect to discrimination, but not with respect to vilification. The Commissioner's submissions to the Tribunal state that:

> '16. The Discrimination Commissioner formed the view that the material complained of was in part "very contemptuous of homosexuals", and that it contained "specific abuse and contempt of homosexuals" that went beyond "mere statement of opinion" (T – document 19, p.6).
>
> 17. The Discrimination Commissioner determined the vilification as defined in s66 of the Discrimination Act required a "high level of conduct" on the part of the person alleged to have engaged in the conduct (T - document 19, p.7). The Commissioner considered

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that the actual conduct of the Respondent may not meet that test.'

13. Also, the Human Rights and Discrimination Commissioner determined that "it was [The Canberra Times'] responsibility to ensure that the website was operated in a manner that did not enable discriminatory material to be published." (T-document 19, p.7).

14. The Commissioner further determined that these issues were unlikely to be resolved by conciliation. On that basis, on 22 December 2005, the Commissioner referred the complaint to the Determination Tribunal, with the consent of the Applicant.

Procedural History

15. On 4 January 2006, the Discrimination Tribunal set a hearing for 3 February 2006. On 20 January 2006, Dr Emlyn-Jones wrote to the editor of the forum, stating that he had no interest in damaging the reputation of the Canberra Times or the reputation of the editor, and that he was willing to conciliate. In a return e-mail to Dr Emlyn-Jones on 23 January 2006, the Respondent advised that it considered that the underlying issue to the complaint was defence of the right to freedom of speech and that the Respondent would not engage in conciliation.

16. At the hearing of 3 February 2006, the Tribunal made Orders that Dr Emlyn-Jones provide the Respondent with the basis of the discrimination and vilification claims, identifying sections of the Act, remedies sought, proofs of evidence and witness statements.

17. The next hearing of the matter was on 3 March 2006. At this hearing, the Tribunal ordered the Respondent to provide a reply to the Applicant's claims by 17 March 2006 and for the Applicant to serve the Respondent with any material in reply by 27 March 2006.

18. At the next hearing on 28 March 2006, the Tribunal ordered the Respondent to provide material in reply to the Applicant's particulars by 7 April 2006, and the Tribunal ordered the Applicant to provide any response to that by 21 April 2006. The Tribunal also granted leave to the ACT Discrimination Commissioner, who is also the Human Rights Commissioner[1] to intervene in the proceedings, pursuant to section 36 of the *Human Rights Act 2004*, which states:

"36 Human rights commissioner may intervene

(1) The human rights commissioner may intervene in a proceeding

[1] *Human Rights Act 2004*, s.40 provides that the Discrimination Commissioner of the ACT is the Human Rights Commissioner of the ACT.

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before a court that involves the application of this Act with the leave of the court.

(2) The court may give leave subject to conditions."

19. The basis for the Commissioner to be joined to the proceedings lay in the claims by the Respondent that the Commissioner had acted outside her jurisdiction and the involvement of human rights in this case. The Tribunal made orders that the Human Rights and Discrimination Commissioner provide submissions by 1 May 2006.

20. At the next hearing on 5 May 2006, in accordance with requests made by the Applicant, the matter was re-listed for hearing on 11 July 2006.

21. The matter was given a final hearing on 11 July 2006.

Scope of the complaint

22. The facts in this case are not in dispute. The focus of any inquiry must be the acts complained of, and any evidence must be relevant to the complaint. The material and documents lodged with, and submitted to, the Tribunal, constitute the factual matrix upon which this decision is based (see, *De Dominico v Marshall* (unreported) [2001] ACTSC 52).

23. The hearing before the Tribunal is a hearing de-novo (see, De Dominico v Marshall (unreported) [2001] ACTSC 52), but based on the original complaint made to the Human Rights and Discrimination Commissioner. Although the Human Rights and Discrimination Commissioner did not consider there was a case to be answered with respect to the vilification aspect of the Applicant's complaint, the Tribunal's enquiry includes vilification and discrimination.

24. This inquiry also examines issues raised by the Respondent with respect to the jurisdiction of the Human Rights and Discrimination Commissioner.

Submissions from the parties

25. In this matter, the Tribunal has received submissions from the Applicant, the Respondent and the ACT Human Rights Commissioner. Additional submissions on the issue of discrimination were sought by the Tribunal and submitted by the parties. I will briefly set out the main points from the submissions and the additional submissions.

The Applicant's submission

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26. In submissions to the Tribunal, the Applicant claims that

- he is homosexual (paragraph 2);
- he participated in the forum throughout 2005 (paragraph 5);
- the Respondent published grossly offensive posts (paragraph 5);
- the offensive posts occurred in the context of debate on the rights of gay people (paragraph 7);
- he felt as if posts containing other types of prejudice weren't published with the frequency or degree of contempt as the "anti-gay posts" (paragraph 9);
- by publishing these posts the Respondent discriminated against him and treated him unfavourably (paragraph 11);
- he felt vilified by the posts that the Respondent published (paragraph 11);
- he was frightened by the posts, he felt he was not respected by the Canberra community or its main newspaper (paragraph 10);
- he felt angry that the Respondent "deemed it perfectly acceptable for gay people to be publicly humiliated" and exposed to hatred (paragraph 10);
- he thought that children and teenagers who might read the forum could be adversely affected (paragraph 10);
- he felt that the published material could have the effect of fuelling violence against lesbians and gay men (paragraph 10);
- he objected to the hateful language in the posts which 'had no purpose but to incite others to such hatred' (paragraph 14);
- the unfavourable treatment to members of the gay and lesbian community occurred due to the Respondent not living up to its responsibility not to disseminate views likely to promote hatred and violence (paragraph 11);
- it was the positive act of the Respondent in publishing anti-gay views on its website, to a wide audience, that amounted to unfavourable treatment and incitement to hatred (paragraph 11);
- the unfavourable treatment is the publishing of "extreme myths" such as equating gay sex with bestiality and gay people to criminals, paedophiles, to disease and to the mentally ill (paragraph 14); and
- obligations to prevent vilification and discrimination (which the Applicant claims the Respondent owes to the users of the forum) are not incompatible with free speech (paragraph 14).

27. The remedy sought by the Applicant, in paragraph 15 of his submission, is that the Respondent make a public apology to the gay community for the material it has published which has incited hatred and treated them unfavourably. The Applicant suggests that the Canberra Times

> "publish a full page apology, in a form of words to be agreed, reviewing the facts of this case, noting that inciting hatred is an

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unlawful act and one that produces substantial negative effects on the targets of the language, noting that the messages they published on their web site amounted to inciting hatred against gay men and lesbians and amounting to treating them unfavourably and apologising unreservedly for allowing such material to be published."

The Respondent's submissions

28. The Respondent's submission deals with two separate issues:

1. the Applicant's claim of vilification; and
2. the Respondent's claim that the Commissioner was acting outside her jurisdiction.

29. The Respondent submits that it did not discriminate against the Applicant in providing the service of on-line forum.

30. The Respondent admits to publishing the material complained of and admits that this was a public act. However, in paragraph 66 of its submission, the Respondent denies that its publication was about people on the ground of sexuality.

31. Of course, the whole process occurred in the context of the then current debate on civil marriages.

32. The Respondent rejected the allegations that the publication incited hatred, serious contempt for or severe ridicule of, the Applicant or other members of the group in question. It also stated, in the alternative, that its conduct was protected by provisions within the *Discrimination Act*. The Respondent contends that principles of free political speech protect its actions. These claims are discussed further in this decision.

33. The Respondent also contends in its submission, that it supports the rights of citizens to have and express opinions and that it has a duty to allow people to express their views freely.

34. With regard to the other matter, which the Respondent put as "the conduct of the Discrimination Commissioner", the Respondent claims that the Discrimination Commissioner misconceived the functions given to her under the Act[2] and has indicated that the Tribunal could provide some guidance to the Commissioner with respect to her duties and functions under the Act.

35. The Respondent claims that

[2] Respondent's submission, p. 17, paragraph [2].

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- the Commissioner forwarded the Applicant's complaint to the Respondent without making any preliminary determination on whether or not the complaint was within the jurisdiction of the Discrimination Commissioner (page 17, paragraph 6); and
- the Discrimination Commissioner should have dismissed the complaint as that was out of her jurisdiction.

36. Alternatively, the Respondent argues that the Discrimination Commissioner should have dismissed the complaint under section 81 of the *Discrimination Act*. Section 81 requires the Discrimination Commissioner to dismiss a complaint on the grounds such as that the complaint is frivolous, vexatious, misconceived or lacking in substance or was not made in good faith, or that the matter complained of was not unlawful discrimination or vilification.[3] The

---

[3] Section 81, *Discrimination Act* -

81 Declining complaints

(1) If, because of the investigation of a complaint lodged under section 72, the commissioner decides that a relevant ground exists in relation to the complaint, the commissioner must decline the complaint.

(2) For subsection (1), the following are relevant grounds:

(a) the complaint is frivolous, vexatious, misconceived or lacking in substance or was not made in good faith;

(b) a more appropriate remedy in relation to the matter complained of is reasonably available to the complainant;

(c) the complaint relates to an act, or the last in a series of acts, that took place more than 12 months before the lodgment of the complaint;

(d) the matter complained of is not unlawful under part 3, part 5 or part 7 or section 66;

(e) the matter complained of has already been adequately dealt with by the commissioner or tribunal;

(f) the matter complained of has already been adequately dealt with otherwise than by the commissioner or tribunal;

(g) the complainant does not want the complaint investigated;

(h) having regard to the complaint and any other relevant matter before the commissioner, in the opinion of the commissioner it is not necessary to pursue the complaint.

(3) If the commissioner declines a complaint under subsection (1), the commissioner must give written notice of the decision to the parties no later than 60 days after the lodgment of the complaint.

(4) A notice to a complainant under subsection (3) must include a statement to the effect that—

(a) if, within 60 days after the date of the notice, the complainant does not require the commissioner to refer the complaint to the tribunal, the commissioner will dismiss the complaint and take no further action in relation to it; and

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Respondent does not question the *bona fides* of the Applicant in making the complaint anyway.

(b) should the complaint be so dismissed, the complainant may apply to the tribunal for the complaint to be heard if exceptional circumstances prevented him or her from requiring the referral.

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The Human Rights Commissioner's decision and submission

37. The submissions made by the Human Rights Commissioner set out the legislative requirements and duties that require the Commissioner to investigate complaints. The particular provisions referred to by the Commissioner are reproduced in this decision under the heading "PART 6 - THE COMMISSIONER'S ROLE TO INVESTIGATE A COMPLAINT".

38. The Commissioner contends that, on the basis of the function of her office as provided in the *Discrimination Act*, the Respondent's claim with regard to her jurisdiction is entirely misconceived. In her decision (conveyed to the parties on 25 October 2005), the ACT Human Rights and Discrimination Commissioner advised that the complaint appeared to raise the issues of unlawful discrimination on the ground of sexuality and that only a hearing of the Discrimination Tribunal could establish whether or not the complaint is proved. In regard to vilification, the Commissioner was of the view that some of the postings were very contemptuous of homosexuals but did not meet the high threshold required of the conduct to amount to vilification (T-document 19).

39. The Commissioner discusses the way that the *Human Rights Act* affects the interpretation of the *Discrimination Act*, and explains that the restriction the relevant provisions of the *Discrimination Act* (namely, sections 20(c) ((Goods, services and facilities) and section 66 (Unlawful vilification – race, sexuality etc)) place on the right to freedom of expression is legitimate in terms of section 28 of the *Human Rights Act*[4] and Article 19(3) of the International Covenant on Civil and Political Rights (ICCPR)[5].

---

[4] Section 28, *Human Rights Act* (as at 2005) -

> **"28 Human rights may be limited**
>
> Human rights may be subject only to reasonable limits set by Territory laws that can be demonstrably justified in a free and democratic society."

[5] Article 19(3), *International Covenant on Civil and Political Rights 1966* –

> "**Article 19**
>
> .....
>
> 3. The exercise of the rights provided for in paragraph 2 of this article carries with it special duties and responsibilities. It may therefore be subject to certain restrictions, but these shall only be such as are provided by law and are necessary:
>
> (a) For respect of the rights or reputations of others;

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Issues

40. The relevant issues for resolution in this matter are -

(1) whether any of the posts published in the forum amounted to unlawful discrimination against the Applicant under the *Discrimination Act* on the ground of his sexuality;
(2) whether any of the said posts were unlawful vilification of the Applicant or a group of people, under section 66(1) of the *Discrimination Act* on the ground of their characteristics of sexuality; and
(3) if such posts amounted to unlawful vilification under section 66(1) of the *Discrimination Act*, whether the Respondent established the defence under section 66(2)(c) of that Act.

41. There is sufficient material before the Tribunal to decide on the issue of vilification, but not the issue of discrimination. Therefore, the Tribunal had invited the parties to make further submissions on the issue of discrimination. Even though the further submissions were received at the late stage of the proceedings, I will first deal with the issue of discrimination as it is the primary focus of the *Discrimination Act*.

42. In view of the submission made by the Respondent, I will also be dealing with the jurisdiction of the Human Rights and Discrimination Commissioner in relation to the Applicant's complaint.

PART 2 - UNLAWFUL DISCRIMINATION

43. I will set out the relevant legislative provisions that apply to the claim for discrimination in this matter.

Legislative scheme – discrimination

Objects of the Discrimination Act

44. The objects of the ACT are stated in section 4 as follows:

> "(a) to eliminate, so far as possible, discrimination to which this Act applies in the areas of work, education, access to premises, the provision of goods, services, facilities and accommodation and the activities of clubs; and

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(b) For the protection of national security or of public order (ordre public), or of public health or morals."

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(b) to eliminate, so far as possible, sexual harassment in those areas; and

(c) to promote recognition and acceptance within the community of the equality of men and women; and

(d) to promote recognition and acceptance within the community of the principle of equality of opportunity for all people."

Relevant attribute

45. The Act applies to discrimination on the ground of any of the several attributes specified in section 7(1), which *inter alia* includes sexuality. There is no dispute that the Applicant has an attribute that falls within the purview of section 7(1).

Discrimination

46. Section 8 of the Act states what constitutes discrimination.

"8 What constitutes discrimination

(1) For this Act, a person ***discriminates*** against another person if—

(a) the person treats or proposes to treat the other person unfavourably because the other person has an attribute referred to in section 7; or

(b) the person imposes or proposes to impose a condition or requirement that has, or is likely to have, the effect of disadvantaging people because they have an attribute referred to in section 7.

(2) Subsection (1)(b) does not apply to a condition or requirement that is reasonable in the circumstances.

(3) In deciding whether a condition or requirement is reasonable in the circumstances, the matters to be taken into account include—

(a) the nature and extent of the resultant disadvantage; and

(b) the feasibility of overcoming or mitigating the disadvantage; and

(c) whether the disadvantage is disproportionate to the result sought by the person who imposes or proposes to impose the condition or requirement."

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Discrimination in a relevant area

47. For conduct to be unlawful it must occur in a relevant area. The Applicant's allegations include that the Respondent discriminated against him by reference to section 20 of the Act. Section 20 proscribes various forms of discrimination in the provision of goods, services and facilities, stating:

> "It is unlawful for a person (the ***provider***) who (whether for payment or not) provides goods or services, or makes facilities available, to discriminate against another person—
>
> (a) by refusing to provide those goods or services or make those facilities available to the other person; or
>
> (b) in the terms or conditions on which the provider provides those goods or services or makes those facilities available to the other person; or
>
> (c) in the way in which the provider provides those goods or services or makes those facilities available to the other person."

48. By providing the on-line forum, the Respondent provided a service and facility within the meaning of section 20. [In the circumstances of this case, the reference to "services" in relation to section 20 includes "facilities".) What is in dispute is whether the manner in which services and facilities were provided amounted to discrimination.

Allegation of discrimination – acts and omissions

49. The Applicant alleges that he was treated unfavourably by the Respondent in two main ways.

> First, by publishing extremely homophobic material on its website, TCT committed discrimination. Secondly, TCT also committed discrimination by failing to properly monitor and control the posts it was publishing on its website and failing to consider the effects such posts might have on the gay and lesbian community. The conduct complained about here is thus a mixture of positive acts and omissions (Applicant's submission, page 9).

50. In my reading of this complaint, it seems that the positive act of publishing the material is constituted by the same act as any alleged failure to properly monitor and control.

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51. It is irrelevant, when applying the *Discrimination Act* to this scenario, to inquire whether the acts complained of are positive acts or whether they are omissions. This is because section 4A(1) of the Act provides that doing an act includes failing to do an act. This means that the conduct or proposed conduct and the imposition or proposed imposition of a condition may be constituted by a failure to undertake conduct or a failure to impose a condition.

52. In *Lewin v ACT Health & Community Care Service* [2002] ACDT 2, the omission to prevent the complainant's exposure to the perfume to which she was allergic was taken to be unfavourable treatment. Deputy President of the Discrimination Tribunal, M H Peedom, said that (at paragraph 49),

> "The failure by the respondent to take steps at the complainant's request which avoided the risk of harm to the complainant by her exposure to perfume, having regard to the undisputed nature of her condition, was clearly an adverse outcome for the complainant. She was, in that event, treated unfavourably by the respondent."

53. Any failure by a person to consider the effects of their behaviour on others, including a relevant class of persons for the purposes of the Act, may assist this inquiry – particularly in respect of establishing the causal connection between the act and the relevant attribute. However, this not a separate cause of action for the Tribunal to determine.

Direct/indirect discrimination

54. Under section 8(1)(a) of the Act, discrimination is conduct that treats another person unfavourably because of that person's relevant attribute. This has been accepted as "direct" discrimination. It is not relevant consideration that the conduct complained of is reasonable.

55. Section 8(1)(b) refers to indirect discrimination, which is "imposing or proposing to impose a condition that has, or is likely to have, the effect of disadvantaging people because they have an attribute referred to in section 7". Section 8(2) provides for the distinction between direct and indirect discrimination in that it will not be indirect discrimination if the condition or requirement is reasonable in the circumstances.

56. The Applicant's claim is of direct discrimination. To determine whether conduct is discriminatory under this first limb of section 8, the considerations this Tribunal must make are whether there was unfavourable treatment of the Applicant by the Respondent and

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whether the necessary causal link between the alleged acts or omissions by the Respondent and the relevant attribute of the Applicant is established. That is, whether the Respondent treated or proposed to treat the Applicant in any way because of the Applicant's attribute.

57. "It is necessary,....,to seek out the true basis of the respondent's conduct insofar as it may be found to constitute unfavourable treatment. It is unnecessary, however, to establish that the conduct complained of was intended or motivated by a discriminatory attitude (Edgley v Federal Capital Press of Australia Pty Ltd)." (see, *Harrison v ACT Housing* [2002] ACTDT 3 (paragraph 37).)

Unfavourable treatment

58. To constitute "direct" discrimination under section 8(1)(a), there must be unfavourable treatment or proposed unfavourable treatment directed toward, or aimed at, a person because of a relevant attribute. What is relevant under section 8(1)(a) is the Respondent's reason for doing an act, not its causative effect.

59. When identifying unfavourable treatment in the ACT, it is not necessary to make comparison between the treatment complained of and the experience of those without a relevant attribute. In *Harrison v ACT Housing* [2002] ACTDT 3 at 35, the Tribunal stated:

> "[u]nlike other anti-discrimination legislation in Australia which involves differentiation or distinction in the consequences of the impugned treatment as between persons with different characteristics or attributes, discrimination under section 8 of the Discrimination Act is constituted by conduct which treats another person unfavourable (see, *Edgley v Federal Capital Press of Australia Pty Ltd* [1999] ACTSC 95 (1 October 1999)]."

60. This Tribunal must inquire into whether the consequences of publishing the posts complained of are favourable to the Applicant's interests or are adverse to the Applicant's interests, and whether the dealing has occurred because of the Applicant's attribute (see, *Johnston v Dallarooma Pty Ltd* [1999] ACTDT 8 at 20 referring to *Re Prezzi and Discrimination Commissioner and Quest Group Pty Ltd* (1996) 39 ALD 729 at 736).

61. The Discrimination Commissioner considered many of the postings as very contemptuous of homosexuals. In a letter to the parties that summarised the Commissioner's findings, in referring to five extracts from the posts submitted as evidence, the Commissioner stated:

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> "…the specific comments outlined above contain specific abuse and contempt of homosexuals, and go beyond the mere statement of opinion. For example the use of the terms "*pervert*", "*slimy, smelly specimens*", and "*pathogens*" in extract 1 above you allege are made in relation to homosexuals, indicate a view that homosexuals are lower forms of human lives. Also extract 4 equates the provision of information about homosexuality to defecation, specifically it states, this information "*defecate(s) over our children's opportunity to grow up free of their piteous influence*", and refers to this information as "*repulsive*". The comment in this posting that homosexuals "*cannot naturally have children…stay away from mine*" also appears ridiculing and condescending. Extract 5 does not attempt to be providing any particular opinion of use to any public debate, but appears to be gratuitously insulting. The comments in extract 5 "*infantlosers*" and "*dropkicks*" and other comments in this extract posted the same day as extract 4, also appear to relate to homosexuals (see, page 6, T-document 19)."

62. In terms of whether this was unfavourable treatment, the Applicant states:

> 'On the facts, there is little doubt that having highly offensive posts directly attacking homosexuality repeatedly posted on the HYS forum clearly constitutes "unfavourable" treatment of gay and lesbian users of the forum. As a gay man and a user of the forum the complainant was undeniably treated "unfavourably" as per s 8(1)(a).'

63. The Applicant states that he felt he was treated unfavourably and that he felt he was discriminated against. It is evident that his position is that the act of discrimination against him was publication of the allegedly offensive posts and the harm suffered was initially fear and then a feeling that he was not respected.

64. In his witness statement to the Tribunal, the Applicant states:

> "These posts initially frightened me. I am a decent and hard-working member of the Canberra community and these posts left me feeling that I wasn't respected by the community or its main newspaper…" (paragraph 10).

> "Not only did I feel vilified by these posts and concerned that they might incite others to homophobia, I also felt that TCT was discriminating against me and treating me unfavourably….As a reputable media outlet promoting responsible debate based on fact, TCT has a responsibility not to disseminate views likely to promote hatred and violence…." (paragraph 11).

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> "Obligations to prevent vilification and discrimination are not incompatible with free speech. I have never objected to any of the substantive opinions expressed in the posts to the HYS forum. I have objected to the hateful language which had no purpose but to incite others to such hatred. I have objected to the extreme myths published by TCT (equating gay sex with bestiality and gay people to criminals, paedophiles, to disease and to the mentally ill) which amount *per se* to unfavourable treatment...." (paragraph 14)

65. The Applicant submits 'that the offensive posts complained of are not those which merely presented anti-gay view points nor those which weighed into constructive debates on issues such as gay marriage or gay rights. The posts being complained of are those which sought to accuse homosexuals of being (amongst-other-things) "pervert infiltrators of institutions" and the posts that equated homosexuality to bestiality and paedophilia. These posts sought to degrade other users of TCT's online forum and their opinions on the basis of their presumed homosexuality.'[6]

66. In his further submission, the Applicant specifically argues that vilifying and harassing nature of the posts contributed to the environment of harmful abuse, "where it was impossible for gay and lesbian people feel respected" and participate in the debate. The Applicant claims that he felt that he was excluded from the debate and gave up trying to participate in it. The Applicant submits that this exclusion from the provision of services (that is, the on-line forum), was unfavourable treatment of him under the *Discrimination Act*.

Causal connection

67. The unfavourable treatment must occur because of a relevant attribute. However, section 4A(2) provides a qualification on interpreting section 8(1)(a), in that the role of the "attribute" need not have been the sole or even the dominant reason for the treatment complained of.

68. Any unfavourable treatment that results from an act does not have to be the intentional result of that act. In *ACT Department of Education & Training v Prendergast* [2000] ACTDT 6, in reference to *Re Prezzi and the Discrimination Commissioner*, the Tribunal stated:

> "It was sufficient that the person taking the action knew about the impairment suffered by the person affected by the action. Moreover, it is not necessary to show that the person

[6] Applicant's Legal Submission, p.10.

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> discriminated has been treated differently from a person without the relevant attribute. It is sufficient that the consequence of the action on that person is unfavourable because of the impairment."

69. The Applicant must establish a causal nexus between the treatment by the Respondent and the relevant attribute of the Applicant. This causal nexus is the "reason" not the "motive" for doing an act and these two concepts must be distinguished. This is supported in *ACT Department of Education & Training v Predergast*, where the Tribunal stated, citing *Clayton Eric v Australia Post* [1999] VCAT 65:

> "In *Clayton Eric v Australia Post* (footnote omitted), Deputy President Wolters discussed the development of the relevant case law in accepting unconsciously applied factors that may trigger unconscious discrimination. He found that, '[s]uch unconscious application of relevant factors allows a tribunal of fact, given the appropriate causal relationship between the alleged discriminatory act and the ultimate act constituting the illegal discrimination, to draw conclusions as to the ground or reason that may have motivated the alleged discriminator."

70. Benevolent motivation does not preclude an act from constituting discrimination (see, *Purvis v NSW (Department of Education and Training)* [2003] HCA 62) and, in relation to this point of law, the Applicant submitted that it is irrelevant if the Editor had a benevolent motive (such as promoting community debate) in his actions. Motivation must be distinguished from "real reason".

71. The Applicant referred to an editorial comment published in The Canberra Times purportedly on 24 September 2005 (T-document 10) to support the contention that the Respondent was aware of the attribute of homosexuality in some of its forum users. That editorial included the following:

> "[t]here can be no doubt that some HYS letters did say some things which annoyed not only homosexuals but ordinary decent and tolerant Australians who have no truck with homophobia. Indeed a good many HYS forum users rejected such views in no uncertain terms.....
>
> Indeed, even under my liberal regime, a number of letters on both sides seemed to cross the line of proper, if willing, discourse, and were not posted."

72. One issue here is whether the Respondent knew the Applicant was a homosexual and, therefore, a person with a relevant attribute under the Act. However, it is the Applicant's contention that it is not

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necessary that the Respondent actually knew the Applicant possessed the relevant attribute of homosexuality and the Respondent knew some of the forum users would have this attribute.

73. The Applicant claims that, as was the case in *Prendergast*, the absence of specific knowledge of the complainant's attribute is no defence for the Respondent. In other words, that it is sufficient if the Respondent knew that some of the forum users would have this attribute. Notwithstanding this contention, the Respondent was formally notified that the Applicant was a homosexual on 14 September 2005 (T-document 7) and some of the allegedly offensive homophobic comments were posted on the forum as late as 17 and 18 October 2005 (T-document 16).

74. The Applicant also argues that the Respondent took the sexuality of the forum users into consideration. This raises the question of whether the acts of the Respondent were advertent to the Applicant's sexuality. The Applicant further states that the Respondent "was aware of the presence of homosexual forum users who were offended by the homophobic material published by the TCT", and "[]indeed the complainant himself protested in the HYS forum about the homophobia being expressed".[7]

75. The unfavourable treatment the Applicant alleges consisted of the positive act of the Respondent publishing to a wider audience the views that were likely to promote hatred towards the members of the gay and lesbian community.[8]

Discrimination in providing services

76. The unlawfulness the Applicant complains about is that stated in section 20(c) of the *Discrimination Act*. That is, that the Respondent discriminated against the Applicant and other members of the gay and lesbian community in the way it provided services, namely, the on line forum.

77. I do not believe providing such a service to the community in general, albeit with offensive elements published in it being directed at homosexuality, could amount to discrimination of the Applicant. To constitute discrimination, an act should be directed against an individual because of the individual's attribute.

78. In paragraphs 64 and 66 above, I referred to the Applicant's argument in his further submission that the environment created by the posts in the on-line forum prevented him from participating in the debate, and that this was direct discrimination under section 20(c) of

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7 Applicant's Legal Submissions, p.14.
8 Applicant's witness statement, paragraph [11].

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the *Discrimination Act*, namely, unfavourable treatment in the way in which the Respondent provided the on-line forum services.

79. In particular, the Applicant states any member of society must have opportunity to participate in such a forum, on a fully equal basis with all other members of society, and that the Respondent not ensuring this amounted to unfavourable treatment. It is evident that the Applicant's claim is that such a denial arose from the Respondent's act of publishing the posts offensive of homosexuals and omitting to preclude their publication.

80. The Applicant also alleges that "it can be inferred that the Canberra Times either knew, or ought to have known, that that the material it allowed to be published in the Forum was false, harmful and had been held by Tribunals in other jurisdictions to amount to vilification (particularly statements equating homosexuality with bestiality and paedophilia)" and that "(knowing or reckless) publication of such false and harmful material is in and of itself unfavourable treatment." Therefore, the Applicant's position is that "it is impossible to address" his claim of discrimination "in isolation from" the vilification claim.

81. This explains why the Applicant's arguments in relation to discrimination and vilification were not clearly delineated. However, I must say that submissions from all parties were such that this Tribunal did not have difficulty in examining the issues separately. As has been the practice in relation to anti-discrimination matters, I have also given the highest in favour of the evidence presented by the Applicant in relation to the claim for discrimination (see, *Michael Firestone v Australian National University [2009] ACTDT 1* at [24] and [25])

Respondent's submission on discrimination

82. The Respondent, in its further submission, denies discrimination against the Applicant and, under protest, states that "it is not at all clear....that any act of discrimination was specifically alleged". It submits that the question in relation to publication on a website "is not whether the complainant is capable of feeling discriminated against (the effect) but whether there was an act which treated the applicant differently because of his sexuality (the cause)".

83. The Respondent claims that it "effectively treated everyone the same, not that it treated people in the class of the complainant differently from others". The Respondent also addressed the issue of failing to extend the censorship to matters involving sexuality and submits that "the grounds of the censorship, or the reasons for the act of censorship, are not focused in any way for the purpose of discriminating in any manner for or against homosexuality".

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84. With regard to consideration of unlawful discrimination in providing goods, services and facilities under section 20, the Respondent's position is that "[t]he notion of different, or unequal, treatment is fundamental".

Different treatment

85. In essence, the Respondent's position is that the Applicant was treated no different to any other people. As I said in paragraph 59 above, when identifying unfavourable treatment in the ACT, it is not necessary to make comparison between the treatment complained of and the experience of those without the relevant attribute [*Harrison v ACT Housing*].

86. However, as I noted in paragraph 52 above, in *Lewin V ACT Health & Community Care Service*, the respondent's failure to treat the complainant differently amounted to unlawful treatment in providing services.

87. About direct discrimination under section 8(1)(a) of the *Discrimination Act*, Beaumont ACJ said (at paragraph 55) in *Edgely v Federal Capital Press of Australia Pty Ltd* (Federal Court of Australia), that it "is directed at adverse behaviour towards a person, because of an attribute. I emphasise that the conduct must be aimed at, or towards, the person complaining of discrimination".

88. Unfavourable treatment of the complainant in *Lewin*'s was the respondent not treating the complainant, in the circumstances, differently from others in view of her impairment and not requiring others to accommodate the complainant to avoid the risk of harm to her. The conduct, therefore, was adverse conduct towards the complainant. This unfavourable treatment had an adverse "effect" on the complainant.

89. As the Respondent argues that it is the cause of conduct that will mark out unlawful discrimination. Any adverse effect will be the consequence of such conduct. In other words whether the cause, which was true reason for the alleged conduct, was the attribute of the Applicant. It would be so, if the conduct was "aimed at, or towards, the person complaining of discrimination".

90. Important considerations are

- whether the Applicant was treated in the same way as other forum users, that is, whether he was not treated differently from others; and
- if so, whether that amounted to conduct adverse towards him.

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91. It is clear from the submissions received by the Tribunal that the parties agree that the Applicant was not treated differently in view of his sexuality by the Respondent's conduct of publishing posts in the forum. Should the Applicant be treated differently so that some of the posts, in particular, those which the Discrimination Commissioner considered as insulting or ridiculing, should not have been published? In other words, should the Respondent have applied a rigorous censoring of the material to avoid publishing those posts?

92. I have to consider the issues within the parameters of the *Discrimination Act*, not in accordance with laws relating to censorship or defamation.

On-line forum environment

93. The adverse effect the Applicant alleges was the feelings that he had when he read the posts, namely that he was frightened, that he felt angry, that he felt that the posts could have the effect of fuelling hatred against lesbians, and that he felt that he was not respected by the Canberra community or its main newspaper. Hurtful feelings of an individual cannot themselves make the relevant conduct, as here, the way services were provided, to amount to discrimination.

94. I find that what the Applicant endeavours to impress on the Tribunal is that because of the strong feelings he had by reading the "offensive" posts against homosexuality, he was prevented from continuing to participate in the forum.

95. It is expected that a passionate debate about a contemporary and controversial subject is likely to generate comments amounting to be offensive or hurtful to one section of the readers and they may view those comments with strong feelings. In the circumstances of this case, this applies. Whether or not to continue to participate in the forum was a matter of choice for the Applicant. I do not find that he was prevented from participating in the forum by the act or omission of the Respondent. I find that no act or omission advertent to the Applicant's sexuality was involved in the way the Respondent provided the forum. This was so even though the Respondent seemed to have become aware of the grievance of the Applicant. The true reason for the publication of the alleged posts was not the Applicant's sexuality.

96. Certainly, the remarks in the posts such as those noted by the Human Rights and Discrimination Commissioner (such as, "pervert", "slimy, smelly specimens", and "pathogens") (see, paragraph 61 above) were offensive to homosexuals. I consider that the Respondent should have taken care in deciding whether or not to publish them, particularly when the Respondent as a responsible media entity should have known that a number of its readers who have respect for it would be deeply offended by the offensiveness (amounting to hatred,

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contempt or ridicule) emerging from the remarks. However, the alleged posts cannot be said to be advertent to, or aimed at, the Applicant because of his attribute.

97. In the way the Respondent provided the service, I do not believe it should make special efforts to make any person or group of persons to feel welcome to participate in the forum. In other words, I do not accept that the Respondent should have treated the Applicant differently to any other participants in the forum. If I may make a comparison with a sport, for example, a game of football - a willing player cannot be heard to say that he or she was prevented from taking part because of the force and speed, which sometimes may amount to roughness, displayed by other players. Nevertheless, the referee should keep the game under supervision and control to ensure that the players' conduct is kept within the game's rule and does not become unruly.

98. In a debate sponsored by it, the Respondent has a responsible supervisory role to check that published views do not exceed acceptable levels of standard expected of the forum by its readers, who may come from different sections of the Canberra community. I would expect the Respondent to be sensitive to this role, where the expressions in the debate have the potential to give rise to strong emotions from sections of the community.

99. In his article in the Canberra Times (T-document 10), the editor of the forum stated that his understanding about publishing the posts in the forum was providing a platform for expressing views for and against laws relating to homosexuality so far as they did not amount to preaching violence towards or persecution of homosexuals or to discriminating against homosexuals in providing goods and services or making available facilities.

100. This statement, I note, expresses the policy relating to publishing in the forum. It is evident that the Respondent was aware of the requirement not to breach the law of discrimination. It is also evident that the true reason for the Respondent's conduct was not treating the Applicant unfavourably because of his sexuality.

101. In the same article, the editor states that his "impulse was to let debates run, even with an amount of personal abuse (particularly if the original correspondent himself or herself showed the capacity to dole it out), subject to fairly bullish view of the law of defamation".

Discrimination - finding

102. I find that the Applicant was hurt in his feelings by the type of posts that appeared in the forum and chose not to seek the services of the forum. However, I am not satisfied that he was subjected to

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discrimination in the provision of services by the Respondent. It is evident from the material before me that the Respondent expected a robust debate on the issue of homosexuality in the context of the strong public interest in the Government proposal to recognise same sex marriages and had not acted advertently to the Applicant's sexuality in publishing the alleged posts.

103. In making this finding, I applied the objective test of discrimination (see, *Almassey and Omari and ACT Multicultural Council Inc* [2008] ACTDT 2 (at paragraph 24).

104. As I said in my recent decision in *Michael Firestone v Australian National University* [at paragraph 177]

> "It is not always easy to prove discrimination on the ground of disability within the meaning of the Act to the "reasonable satisfaction" of this Tribunal, in particular, with the requirement to establish the causal link between the alleged act or omission and the disability. While it is very difficult to know the intention or motive of a person who is alleged to have unlawfully discriminated against another, the Tribunal has the responsibility to find the true reason principally on the basis of the objectively ascertainable evidence presented to it."

105. I agree with the Discrimination Commissioner's submission about the need to not interpreting the anti-discrimination legislation narrowly (*I W v City of Perth* (1997) 191 CLR 1 at 11-12 per Brennan CJ and McHugh J) and "the appropriateness of construing human rights legislation so as to achieve the statutory purpose".

Discrimination Commissioner's views on discrimination and human rights

106. In her submission on discrimination, the Discrimination Commissioner mirrors the submission made by the Applicant, in that she states that "[t]he failure to edit the published material and the grossly offensive nature of the material, render the provision of the web site service discriminatory in that Mr Emlyn Jones was, as a member of a class, the subject of discriminatory abuse".

107. The Discrimination Commissioner submits that

- the *Discrimination Act*, so far as it is possible to do so with its purpose, must be interpreted in way that is compatible with human rights (see, section 30, *Human Rights Act 2004*);
- the freedom of expression enshrined in section 16 of the Human Rights Act is not an unlimited right and may be

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subject to some restrictions, such as for the respect of the rights and reputations of others; and

- Section 28 of the *Human Rights Act* provides that "Human Rights may be subject only to reasonable limits set by Territory laws that can be demonstrably justified in a free and democratic society".

108. The Commissioner's first submission (dated 1 May 2006) with regard to limits to freedom of expression was focused more in relation to the topic of vilification rather than discrimination. However, I appreciate the relevance of that submission in relation to preventing both discrimination of the Applicant or vilification.

109. The Commissioner's further submission refers to section 8 of the *Human Rights Act*, which enshrines the rights to enjoy human rights without discrimination of any kind, to equal protection of the law without discrimination, and to equal and effective protection against discrimination on any ground.

110. In her decision of 25 October 2005 (T-document 19) (at page 8), the ACT Human Rights and Discrimination Commissioner applied this right to the *Discrimination Act* and considered that discrimination on the ground of sexuality should be widely interpreted and includes act of omission as well as facilitating others to discriminate. She also submits that "Not only was the complainant subjected to an unfavourably hostile environment when seeking to access the respondent's service, but arguably his privacy was violated by an unlawful attack on his reputation under s.12 of the *Human Rights Act 2004*."

111. It appears that the Commissioner was of the view that the Applicant suffered detriment because the posts that the Applicant alleged to be vilifying of homosexuals was of the grossly offensive nature, created a hostile environment to the Applicant when seeking the service of the forum, and was therefore, discriminatory against the Applicant in relation to the Respondent's provision of the services.

112. The Discrimination Commissioner's submission provides useful information on the indignity and prejudice that gays and lesbians experience in the society, and states that a person's right to dignity "is inevitably violated by entering a public domain such as a community discussion forum and being confronted without warning by material that denigrates their sexuality, an integral and possibly defining feature of their being".

113. I note the substance in this argument is that manner in which the Respondent provided services in the forum exposed the Applicant to the infringement of his human rights and hence, discriminatory. At the same time, I am conscious of the right of the Respondent to

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conduct its affairs within the bounds of the *Discrimination Act*. I note from the article published in the Canberra Times (T-document 10) that the debates in the forum were to accommodate sincere views on issues even with an amount of personal abuse to the extent that they did not breach laws relating to defamation and discrimination.

114. Competing rights can operate only with appropriate limitations in relation to them, consistent with section 28 of the *Human Rights Act*. The right to freedom of expression and the right to not to be discriminated against will have their respective limits in relation to the operation of both rights. In other words, the right to freedom of expression should not amount to abuse resulting in discrimination or vilification of a person, and the right not to discriminate should not stifle the freedom of expression. I agree that unlawful discrimination under section 20(c) can place undue restriction on a person's right to freedom of expression. In my view, the pre-condition for applying that restriction is the finding about the existence of such unlawful discrimination.

115. While being conscious of interpreting the *Discrimination Act*, consistently with its objectives and not narrowly, I had had regard to the rights of the Applicant, including his right to reputation and right to not to be discriminated against, and also the right of the Respondent (and derivatively the right of the participants of the forum) to freedom of expression.

116. The *Almassey*'s case involved discrimination of the complainant under section 20(c) of the *Discrimination Act*. In that case, I held that the respondent's words and conduct amounted to discrimination of the complainant because of her attribute (that is, mental instability). I took the view that the use of words was part of the "way in which the provider…provides …goods or services or facilities". Even though that case did not discuss human rights, it is clear that the decision supported restriction on the right to freedom of expression in the face of discriminatory words.

117. Both *Almassey*'s and *Lewin*'s involved discrimination under section 20(c) of the *Discrimination Act*, and the discriminatory conduct occurred in the presence of the complainants. On the other hand, in the present matter, the way in which the Respondent provided services did not occur in the presence of the Applicant. Therefore, proving that the alleged posts were unfavourable treatment of the Applicant because of his sexuality is not as straightforward as in the above cases. In this case, the Respondent did not know the Applicant, and the Applicant disclosing his identity to the Respondent later does not affect the issue of discrimination under examination.

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Need to address legal issues

118. While applying the *Discrimination Act*, consistently with its objectives and human rights, the Tribunal will also need to address the relevant legal issues that the Applicant needs to establish, such the onus of proof and causative link between the Respondent's act or omission and the unfavourable treatment on the ground of the Applicant's sexuality.

119. If the 'true reason' for the discriminatory act or omission was the Applicant's sexuality, any consequent infringement of his human rights would make that act or omission more serious than otherwise would be the case. Nonetheless, as I found in paragraph 100 above, the 'true reason' for the Respondent's act or omission relating to the posts in the forum was not the Applicant's sexuality. Nevertheless, I acknowledge reluctantly that an offensive act or omission which is not discriminatory within the meaning of the *Discrimination Act* may still be capable of infringing certain human rights of complainants to some extent.

120. The scheme under the *Discrimination Act* does not envisage an applicant to claim discrimination as a member of a class to which he or she belongs. A person has a standing in relation to a discrimination claim only in relation to discrimination of him or her as an individual. Section 72 of the *Discrimination Act* provides a complaint in relation to unlawful discrimination may be made by a person aggrieved by the act or by an agent acting on behalf of 1 or more aggrieved persons with their written authorisation. The Applicant in this matter is not an agent of any other aggrieved persons.

121. As I said before in this decision, unlawful discrimination within the parameters of the *Discrimination Act* requires the Applicant to prove to this Tribunal's reasonable satisfaction that the Respondent's act or omission in the way of providing services was advertent to the Applicant's attribute.

122. Offensive posts, contemptuous of homosexuals, cannot by themselves amount to discrimination of the Applicant, irrespective of whether or not they may amount to vilification.

123. I am satisfied that the Applicant wanted to engage in a wide-ranging debate on the issue of homosexuality at the time that topic drew considerable attention from the society due to proposals to legislate for same sex marriages.

124. I had the benefit of perusing an extract of a number of posts from the forum that the Respondent provided to this Tribunal. I find

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that the posts were full of colloquial terms and expressed various views for and against homosexuals and homosexuality. When I look at the totality of those posts, including those which are abusive of homosexuality and those vehemently responding to the Applicant's posts, I am unable to conclude that a reasonable person in the position of the Applicant would have been forced not to participate in the debate if he or she wanted to.

Nature of the posts in the forum

125. Even though I have concluded that the alleged posts were not discriminatory of the Applicant, I would like to express the following views.

126. As members of a civilised society generally and in particular, as a society in Canberra, which has a high level of living standards and literacy rate, it should not be in our culture to cause indignity to, or hurt the feelings of, our fellow humans, intentionally or unintentionally, or to act in a way that cause them fear of their rights being infringed. The Respondent has a social and moral obligation to ensure that publication in a community forum which it caters to all people equally should be conscientiously controlled in a way that does not seriously offend a reasonable person with a particular attribute. Such a threshold would ensure it to avoid any risk of a breach of law.

127. It is also not appropriate for a well respected media entity to assert the freedom of expression without the corresponding responsibility to ensure that that freedom is not used as a vehicle for offensive and contemptuous remarks that are capable of hurting the feelings of people with certain attributes set out in the *Discrimination Act*. My strong recommendation to the Respondent on this matter is set out later in this decision.

128. Anyone in the position of the Respondent should have a repeated warning to readers that the forum may include robust emotional debate and contain material that may be offensive to some readers.

129. I will now turn to the Applicant's claim that he was vilified by the posts published in the forum.

PART 3 - VILIFICATION

Legislative scheme – vilification

130. Part 6 of the *Discrimination Act* deals with racial, sexuality and HIV/AIDS vilification. There are two levels of vilification provided for in the Act, namely, unlawful vilification and serious vilification.

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131. The Applicant's allegations are for unlawful vilification. Section 66, which provides for unlawful vilification, is as follows:

"66 Unlawful vilification—race, sexuality etc

(1) 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 people on the ground of any of the following characteristics of the person or members of the group:

(a) race;

(b) sexuality;

(c) transsexuality;

(d) HIV/AIDS status.

(2) This section does not make unlawful—

(a) a fair report of an act mentioned in subsection (1); or

(b) a communication or the distribution or dissemination of any matter consisting of a publication that is subject to a defence of absolute privilege in a proceeding for defamation; or

(c) a public act, done reasonably and honestly, for academic, artistic, scientific or research purposes or for other purposes in the public interest, including discussion or debate about and presentations of any matter."

Elements of unlawful vilification

132. Four elements must be satisfied in order for the allegation of vilification under section 66(1) to be proven. These are:

1. there must be a 'public act' carried out by a 'person';
2. the act must amount to incitement;
3. the effect of the act of incitement must be to incite hatred towards, serious contempt for, or severe ridicule of, the Applicant; and
4. the incitement must be on the ground of the characteristics listed in section 66(1).

I will now examine these elements.

(1). Public act carried out by a person

133. Section 65 of the Act provides a non-exhaustive definition of a public act, which includes, inter alia, the distribution or dissemination of any matter to the public.

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134. Although the Respondent admits that it engaged in a public act,[9] the Respondent proposed that the public act was the provision of the internet site and the broad act of publishing a host of letters. It is the Tribunal's position that the public act was the specific act of posting of individual messages, including the decision of edit and deletion of messages, onto the forum.

135. In relation to section 18C(2) of the *Racial Discrimination Act 1975* (Cth), which made racial vilification unlawful by an act, otherwise than in private, Branson J (Federal Court of Australia) said in *Jones v Toben* [2002] FCA 1150 (at paragraphs [73] and [75]) that, "the placing of material, whether text, graphics, audio or video, on a website which is not password protected is an act which causes words, sounds, images or writing to be communicated to the public in the sense that they are communicated to any person who utilises a browser to gain access to that website" and that the act of placing them "on a website which is not password protected is an act of publication".

136. The Respondent admits to being a person within the meaning of the Act, but proposed that it was the editor of the site that was the relevant person that carried out the public act. It is the Tribunal's position that the Respondent is the Federal Capital Press, not its individual employee.

(2). Act amounts to incitement

137. The second element in the test of incitement under section 66 is to ask whether the public act amounted to incitement.

138. In *Sunol v Collier* (EOD) [2006] NSWADTAP 51, the NSW Administrative Decisions Tribunal, Appeal Panel, discussed homosexuality vilification in terms of section 49ZT of the *Anti-Discrimination Act 1977* (NSW), which requires that there be:

1. a public act
2. which incites
3. hatred towards, serious contempt for, or severe ridicule of, a person or group of persons
4. on the ground of the homosexuality of the person or members of that group.

139. The similarity between the elements required to prove vilification in NSW and in ACT means that the Tribunal's construction of "incite" in *Sunol v Collier*, set out below, is directly relevant to the construction of "incite" for the purposes of section 66.

[9] Respondent's submission, paragraph [17].

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"9 ..... As this ground of appeal concerns the construction of s 49ZT of the *AD Act* it may be properly characterised as an appeal on a question of law. In its decision the Tribunal referred to the summary of the law given in an earlier homosexual vilification case, *Burns v Dye* [2002] NSWADT 32 at [19]- [23]. In *Burns* the Tribunal set out the principles which could be drawn from numerous earlier cases concerning the racial vilification provisions in the Act. As similar language has been used in all of those parts of the *AD Act* which render it unlawful to engage in public acts of vilification on various grounds, this approach to the proper construction of s 49ZT was clearly correct.

10 The summary of the law provided in *Burns* and relied upon by the Tribunal in this case was accurate. It is supported by ample authority. In *Veloskey v Karagiannakis* [2002] NSWADTAP 18 at [25]- [26] the Appeal Panel stated:

> [25] Nor is it necessary that the complainant prove that a person or persons were actually incited by the public act to respond in a requisite manner. That much has never been doubted, although evidence that the public act has had an actual effect may be relevant, both on the question of the public act to incite, and on the question of damages.
>
> [26] In determining whether the public act is capable, in an objective sense, of inciting others to feel hatred towards or serious contempt for, or severe ridicule of a person or persons on the ground of race, the approach taken to the characterisation of the audience for these purposes is crucial. Analogies have been drawn with defamation law and with media law...

11 A similar approach has been taken to the interpretation of the incitement to racial hatred provisions in Part IIA of the *Racial Discrimination Act 1975* (Cth). There are significant differences between the vilification provisions in the NSW Act and the racial hatred provisions in the Commonwealth Act. The most notable is the perspective from which the impact of the conduct in question is assessed. However, both bodies of law require that the impact of public conduct be ascertained in order to determine whether it is unlawful. The approach which has been taken by the federal courts to assessing the impact of conduct in incitement to racial hatred cases is well illustrated by statements made by Drummond J in *Hagan v Trustees of the Toowoomba Sports Ground Trust* [2001] FCA 1615 at [15]:

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> It is apparent from the wording of s 18C(1)(a) [of the *Racial Discrimination Act 1975*] that whether an act contravenes the section is not governed by the impact the act is subjectively perceived to have by a complainant. An objective test must be applied in determining whether the act complained of has the necessary offensive, insulting, humiliating or intimidatory quality for it to be within the sub-section.

12 The decision in this case was upheld by the Full Court of the Federal Court in *Hagan v Trustees of the Toowoomba Sports Ground Trust* [2001] FCA 123; (2001) 105 FCR 56.

13 No arguments have been advanced which persuade us that the earlier authorities dealing with the proper construction of the various vilification provisions in the Act were incorrectly decided. Consequently, there is no merit in the first appeal ground that the Tribunal misconstrued s 49ZT(1) of the *AD Act* when it held that the provision requires an objective assessment of the capacity of the public act to incite the requisite impact."

140. On this basis, incitement does not require evidence that someone was actually incited. The test I must apply is whether the ordinary reasonable user of the forum, drawing on their knowledge and experience of worldly affairs, could have understood from the website posting that they were being incited to hatred towards, serious contempt for, or severe ridicule of, homosexuals. The Human Rights and Discrimination Commissioner referred to a similar test propounded in *Burns v Radio 2UE Sydney Pty Ltd & Ors* [2004] NSW ADT 267, which is "ordinary reasonable audience, reader or listener (that is not overly sensitive or too thick-skinned)".[10]

141. This objective test must still be contextualised within the environment in which the actions complained of occurred (see, *Veloskey v Karagiannakis* [2002] NSWADTAP 18 (at 25-26) in *Sunol v Collier* (at 10). My assessment of whether the acts complained of amount to incitement must be made in the context of the on-line forum and my understanding of its users.

142. An example of the contextualisation is found in *Kazak v John Fairfax Publications Limited* [2000] NSWADT 77, where in relation to an allegation that an article in *The Australian Financial Review* was racial vilification in terms of section 20C of the *Anti-Discrimination Act 1977* (NSW), the NSW Administrative Decisions Tribunal said that ".. the objective test which must be applied is the ordinary, reasonable reader of The Australian Financial Review, who is not malevolently inclined nor free from susceptibility to prejudice", and that '[t]he

[10] T-document 19, page 4.

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audience is the "ordinary" reader, not the reader who is so sagacious that he or she would not react to the publication as an ordinary reader'.

143. The decision in *Burns v Dye* considered the objective test of "ordinary reasonable person", which is similar to the tests adopted in the above cases. I am satisfied that the ordinary reasonable person test is relevantly applicable in this matter, because I drew mostly from the decision of *Burns v Dye* on the issue of "incitement" to unlawful vilification.

144. I am of the view that the majority of those who read the Have Your Say on-line forum were residents of the ACT and surrounding areas. If I have an overview of this population, I consider that ordinary, reasonable readers of the Canberra Times, which is the newspaper with largest circulation in the region, to be those that fall into the audience described in the *Kazak* case. I do not have any reason to depart from that view in relation to the participants in, and readers of, the Have Your Say on-line forum. In this context, I am also of the view that anyone who accesses the site should have their attention drawn to the warning I mentioned in paragraph 128 above.

145. The alleged posts appeared at the time when strong community views were prevalent in the context of the proposal for legislating for same sex marriages. The issue is whether ordinary, reasonable participants and readers of the forum were capable of being incited to hatred towards, serious contempt for, or severe ridicule of, the Applicant or homosexuals, by reading the posts which are the subject of complaint in this case. It is not necessary that the words actually "incited" persons.

146. I find the following observation by Nettle JA in *Catch the Fire Ministries Inc & Ors v Islamic Council of Victoria Inc* [2006] VSCA 284 at [14], in relation to the Victorian provision on vilification (i.e. section 8 of the *Racial and Religious Tolerance Act 2001*), (as cited in the NSW Administrative Decisions Tribunal in *Burns v Laws (No 2)* [2007] NSWADT 47 at 99), is applicable with regard to the matter before me:

> "I accept that "incites" in s.8 means "urge[s], spur[s] on…stir[s] up animates[s] or stimulate[s]". That accords with the plain and ordinary meaning of the word and also with the criminal law's conception of incitement, upon which s.8 appears loosely to be based. I also allow that incitive conduct is capable of contravening s.8 without necessarily causing hatred or serious contempt or revulsion or serious ridicule. As with the common law criminal offence of incitement, I view s.8 as directed to inchoate or preliminary conduct, whether or not it

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causes the kind of third party response it is calculated to encourage. In that sense, the section is prophylactic…"

147. The NSW Tribunal also observed that requiring proof of "actual incitement" in relation to the vilification provision would appear to "involve a departure from the text of the subsection" (see, *Burns v Laws (No 2)* at paragraph [103].

148. I observe that the NSW Tribunal in that case preferred not to use the expression whether words were "capable" of inciting an ordinary reasonable person for the reason that the terms "capacity" and "capable" have the potential to understate what must be proved, and bear upon "what is in essence a threshold question only" in defamation law. It preferred the issue to be "would the relevant 'public act' have had the 'effect' of inciting, in the sense of urging or prompting, a hypothetical 'ordinary reasonable person' but continued to say that "if terms such as 'capacity' or 'tendency'…are to be employed instead, it should be understood that they refer to the actual effect rather than the potential or possible effect" (see, *Burns v Laws (No 2)*, at paragraphs [110 -111]).

149. I agree with this statement but am of the view that using the reference to "capable" of inciting is consistent with authorities and when it is used as "capable of inciting an ordinary reasonable person", its meaning is "having the effect of inciting" (that is, "urging, spurring on, stirring up, animating or stimulating") such a person" (see also, *Catch the Fire Ministries Inc v Islamic Council of Australia*, at [14]).

(3). <u>The effect of the act of incitement must be to incite hatred toward, serious contempt for, or severe ridicule of, the Applicant</u>

150. In its submissions to the Tribunal, the Respondent denies that the act of publishing the material amounted to incitement to hatred towards, serious contempt for, or severe ridicule of, the Applicant or members of the group in question.

151. With regard to the construction of this third element of vilification, the Tribunal in *Burns v Dye* [2002] NSWADT 32 at 33 stated:

> "23 The third element the complainant must establish is that the public act must be capable of inciting *hatred towards, serious contempt for or severe ridicule of a person or group of persons*. These words are to be given their ordinary dictionary meaning. *Kazak v John Fairfax Publications Limited* [at 40] set out the following definitons :

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"hatred" means "intense dislike; detestation" (Macquarie), "a feeling of hostility or strong aversion towards a person or thing; active and violent dislike" (Oxford);

"serious" means "important, grave" (Oxford); "weighty, important" (Macquarie);

"contempt" means "the action of scorning or despising, the mental attitude in which something or someone is considered as worthless or of little account"(Oxford); the feeling with which one regards anything considered mean, vile, or worthless (Macquarie);

"severe" means "rigorous, strict or harsh" (Oxford); "harsh, extreme"(Macquarie);

"ridicule" means "subject to ridicule or mockery; make fun of, deride, laugh at"(Oxford); "words or actions intended to excite contemptuous laughter at a person or thing; derision" (Macquarie)."

152. The Applicant submits that the posts fall within these definitions. The Respondent contends (at paragraph 34 of the Respondent's submission) that the test in *Burns v Dye* is wrong. Its contention is that the ACT does not have power to make mere vilification illegal and that under the ACT Human Rights Act, this is not an intended result. In this sense, the Respondent contends that 'judicial decisions in other (Australian) jurisdictions which are founded upon the notion of vilification being of itself illegal are not of any direct relevance to the elucidation of the offence. Specifically those (such as *Burns v Dye* [2002] NSWADT 32 at 56) which consider that the test is whether the protected group is "targeted" by the complained-of words are wrong'.

153. The issue is not whether the posts were "mere vilification". The Respondent's argument seems to be influenced by the American jurisprudence he cites which ruled against law penalising mere vilification in the light of the Constitutional guarantee of freedom of speech and of press. What the Tribunal has to consider is whether the alleged posts were unlawful vilification within the meaning of section 66 of the *Discrimination Act*. For this purpose, decisions of other jurisdictions which have similar provisions as section 66 will be certainly helpful. A number of such decisions applied the principles of international human rights law, for example *Toben v Jones* and *Kazak v John Fairfax Publications Ltd*.

154. It appears to me that in referring to the ACT *Human Rights Act* the Respondent wants to impress upon me that in the ACT the right to freedom of expression should receive a higher consideration than in

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other jurisdictions when considering the question of vilification, similar to the higher level of consideration that right received in cases from the United States.

155. Freedom of expression is in the fabric of the democracy in all Australian jurisdictions, and is an implied right in the Australian Constitution. I will have regard to the requirement under section 30 of the *Human Rights Act* in interpreting section 66 in a way that is compatible with human rights. The Discrimination Commissioner submitted that the restriction on rights placed by section 66 meets the requirement under section 28 of the *Human Rights Act*.

156. The Respondent prefers United States' authorities, in particular *Brandenburg v Ohio* 395 US 444. The Respondent relies upon the interpretation of "incitement" in the context of criminal law and, in paragraphs 28, 29 and 30 of the Respondent's submissions, the Respondent states:

> "28. ....The incitement, in short, must be to some unlawful end, implicitly, the use of violence or the achievement of some prohibited end, for example, an act of discrimination.
>
> 29. Or, at the least, it must be to some act taking "dislike of" to "hatred towards", "contempt for" to "serious contempt for", and "ridicule" to "serious ridicule".
>
> 30. Determining when this point is reached is a value judgment that the tribunal cannot make casually or without taking into account countervailing rights of freedom of belief, expression and speech, or of the intention of the legislature or international human rights on the subject."

157. I agree with these submissions except that the threshold for incitement, under section 66, is incitement to hatred toward, serious contempt for, or severe ridicule, of a person or group on the ground of an attribute specified in section 66(1).

158. In *Brandenburg v Ohio*, the appellant, who was a leader of a Ku Klux Klan group, was convicted under the Criminal Syndicalism Act, for advocating, among others, voluntarily assembling to advocate the doctrines of syndicalism. The appellant took part in a rally where speeches were made derogatory of Negroes and, in one instance, of Jews and he also spoke at the rally. The US Supreme Court decided that the statute under which the appellant was convicted was invalid.

159. The Court took the view that the statute that did not distinguish between mere advocacy from incitement to imminent lawless action

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was not valid in light of the freedoms guaranteed by the First and Fourteenth Amendments to the US constitution. The First Amendment, among others, prohibits the abridging of freedom of speech and of press. The Fourteenth Amendment prohibits denial to any person the equal protection of the laws.

160. I find that the Respondent wants to persuade the Tribunal to apply the *Brandenburg* decision to interpret section 66 and, thereby, to give preponderance to its and the forum users' right to freedom of expression consistent with the ACT's *Human Rights Act*.

161. While the interpretation of *Brandenburg v Ohio* provided by the Respondent is persuasive on the Tribunal, I prefer to be directed by the construction of the New South Wales Administrative Decisions Tribunal in *Burns v Dye*.

162. The question considered in *Brandenburg* revolved around the distinction between mere advocacy of use of force and incitement to imminent lawless action. The decision seems to justify intrusion into the right to freedom of speech and of press only when an act amounts to inciting to imminent lawless action. This high threshold backed by the Constitutional guarantees in the United States is different to the law this Tribunal has to consider in the present matter.

163. What we are considering is not the issue of mere vilification, but unlawful vilification. Restriction on the right to freedom of expression results under section 66 of the *Discrimination Act* where conduct amounts to incitement to hatred, serious contempt or severe ridicule on the ground of a specified attribute. Human rights are applied by way of interpretation of laws rather than as guarantees and the value the former approach accords to human rights has been no less significant than that accorded by the latter approach which has been stricter in favour of the rights.

164. As the ACT Human Rights Commissioner submitted, so far as possible to do so consistently with its purpose, ACT legislation must be interpreted in a way compatible with the human rights set out in the *Human Rights Act*. The right to freedom to hold opinions and the right to freedom of expression are enshrined in section 16 of the *Human Rights Act*, the rights derived from Article 19 of the ICCPR. That Act also provides that:

(1) everyone has the right to have protection against discrimination on any ground (section 8(3)); and

(2) human rights may be subject only to reasonable limits set by Territory laws that can be demonstrably justified in a free and democratic society (section 28).

165. The ACT Human Rights and Discrimination Commissioner, in her decision of 25 October 2005, referred to Article 20(2) of the ICCPR,

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which provides that "Any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence shall be prohibited by law", and took the view that anti-vilification provisions that are limited to a strict test of "incitement" of hatred, serious contempt or severe ridicule satisfy the proportionality test in section 28.

166. I am in agreement with this view. Section 66 of the *Discrimination Act* does curtail the freedom of expression only to the extent the exercise of that freedom amounts to incitement to hatred, serious contempt or severe ridicule, in relation to four attributes specified in it. Further, I find that the right to freedom of expression also, in turn, qualifies vilification through the operation of defences provided in subsection 66(2).

167. In line with its views on the right to freedom of expression, the Respondent submits, at paragraph 50, that:

> "Its instinct is to publish everything, other than that which is clearly unlawful, improper, or in poor taste, because it believes that it is essential in a working democracy that citizens have the right to hold and express and advocate their opinions on all matters concerning them."
>
> The Respondent further submits, at paragraph 52, that:
>
> "It is the nature of passionate debate that people will have strong views, and express themselves with vigour."

168. In paragraph 52 of its submission, the Respondent also states that "[n]or would the ordinary deduce from passionate words – even one like to be offensive (about protected groups) – any offer of, threat of, or incitement to violence". However, as I have said before, what is unlawful vilification is not necessarily incitement to violence.

169. In *Burns v Dye* [2002] NSWADT 32 (at [20]), the NSW Administrative Decisions Tribunal said, in relation to NSW vilification provisions, that,

> "the vilification provisions of the Act do not make unlawful the use of words that merely *convey* hatred towards a person, or the expression of serious contempt or severe ridicule: *Wagga Wagga Aboriginal Action Group v Eldridge* [1995] EOC 92-701 at 78-266."

This statement equally applies in relation to ACT vilification provisions.

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170. What the Tribunal has to consider is whether the published posts amounted to inciting the ordinary reasonable person, who participates in the forum or reads the posts, to hatred towards, serious contempt for, or severe ridicule of, the Applicant or homosexuals.

(4). The incitement must be on the ground of the characteristics listed in section 66(1) (which includes sexuality).

Applicable test

171. There is no dispute about the Applicant's capacity as a member of a relevant class of persons. Under this element, my reasoning will examine "incitement" in relation to the Applicant's sexuality.

172. I agree with the Applicant's submission that the question of incitement is an objective one. As argued by his counsel in the proceedings of 11 July 2007, incitement does not need to have the actual effect and that it is sufficient if the nature of the alleged posts was capable of inciting.[11] This requires an objective standard to prove. The Applicant referred to *Burns v Dye,* in which, as I said in paragraph 143 above, the objective standard used was that of the ordinary reasonable person.

173. That case concerned a complaint of homosexual vilification in four incidents in 1999. The Tribunal said (at paragraph [22]) that

> "the audience or potential audience of the public act should be assumed to be the "ordinary reasonable person" as defined by the Australian Broadcasting Tribunal in *Inquiry Into Broadcasts by Ron Casey* (1989) 3 BR 351 at 357 and quoted with approval in *Harou-Sourdon v TCN Channel Nine Pty Ltd* [1994] EOC 92-604 at p.10:
>
> The test to be applied is, in the Tribunal's view, an objective one. 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."

174. The NSW Tribunal raised the following questions for its answer (at paragraph [56]):

[11] Proceedings, pp.16-17.

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> "Would the ordinary reasonable person have understood Mr Dye to be targeting and/or referring to Mr Burns?
>
> If so, would Mr Dye's conduct have incited or have the capacity to incite the ordinary reasonable person to feel hatred towards, or serious contempt for, or severe ridicule of Mr Burns on the grounds of his sexuality?"

175. I agree with the Applicant's submission that the first of these tests was satisfied in the present case to the extent that the ordinary reasonable person would have understood the alleged posts to be targeting and/or referring to homosexuals. The Applicant's submission refers to specific posts to support his position.[12] The Respondent does not refute it. However, I do not find that such a person would have understood the posts to be targeting and/or referring to the Applicant.

Whether ordinary reasonable person would have been incited

176. It is the second test in *Burns* case that is crucial for deciding the nature of the homosexuality related posts in the forum. The Applicant submits that the following expressions targeting or referring to homosexuals meet the second test:

- "*pervert*" ("*Canada's crazy parliament enacts pervert 'marriage'*" posted by *"GAT"* on 30 June 2005),
- "*pathogens*" ("*Factophobes shriek and reek*", posted by "GAT" on 23 August 2005),
- "*slimy, smelly specimens*" ("*Factophobes shriek and reek*", posted by *"GAT"* on 23 August 2005),
- *"while they defecate over our children's opportunity to grow up free of their piteous influence..Stay away from schools Sad Lobby..you cannot naturally have children of your own. Stay away from mine." ("Sexualising the Child via Government funded Schools"*, posted by *"Darryl Potts"* on 17 October 2005),
- *"promotion of homosexual influence over children"* (*"Should Nohope hold a plebiscite on pervert revolution?"*, posted by *"GAT"* on 9 August 2005)

177. Except the posts of 23 August 2005, others were not attached to the Applicant's original complaint to the ACT Human Rights Office. Yet, this Tribunal finds that it is appropriate to admit the evidence of the above posts in order that all the alleged posts will become relevant to determine the issue of unlawful vilification. Under section 81 of the Act, the Commissioner must decline a complaint if it relates to an act, or the last in a series of acts, that took place more than 12 months before the complaint is lodged. The posts were published within this

[12] Applicant's Legal Submission, pp.3-4.

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time period and one was posted in October 2005, soon after the date of the complaint.

178. The Applicant argues that,"[o]rdinary, reasonable people fear criminals, perverts and paedophiles and often express that fear in contempt and hatred."

179. His further argument is as follows:

> "Given that homosexuality is still not visible in our society, the ordinary reasonable person may have little by way of accurate information to counter the opinion of others, so vehemently expressed. Further, the image of homosexuals as sexual perverts and child molesters is one commonly found in popular culture, from movies to news reporting. Given all these factors, an ordinary reasonable person would be swayed by the forceful opinions expressed and would be likely to feel hatred and serious contempt for homosexuals, believing there to be truth in the allegations of perversion and paedophilia."

180. The Applicant's allegation that the posts imply homosexuality with paedophilia seems to be connected to last two posts referred to in paragraph 176 above.

181. In support of his argument, the Applicant refers to the decision of *Peters v Constance* [2005] QADT 9, where the Acting President of the Queensland Anti-Discrimination Tribunal, Jean Dalton SC, held that she was satisfied 'that the word "paedophilia" is a characteristic often wrongly attributed to homosexual men' and took the view that the allegation of paedophilia was "sufficient to incite hatred, serious contempt or severe ridicule of the person to whom it was directed".

Issue of context

182. Two other matters the Applicant argues why the ordinary, reasonable person would be incited to act in response the forum posts are

(a) the standing of The Canberra Times in the community which added credibility to the vilifying posts associated with it, thus having more power to incite; and

(b) the "tone" of the posts in the Have Your Say forum, which, the Applicant states, conveyed strong messages that homosexuals were a threat to "normal" people and such a tone incites hatred, serious contempt or severe ridicule of, homosexuals.

183. In the first of the four incidents considered in *Burns v Dye* the defendant (Mr Dye) verbally abused the complainant (Mr Burns) as "faggot", and "poofter" along with other abusive words. The

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complainant felt terrified. To the defendant's argument that these words were of general insult, the Tribunal said (at paragraph [60]) that, '[w]hile we accept that over time certain terms of abuse take on a more general connotation we find that the words "poofter" and "faggot" retain a specific meaning: they are derisory terms used for homosexual males'.

184. The Tribunal said further (at paragraphs [62], [63] and [64]) that,

> "[i]t does not follow automatically that verbal abuse directed at a homosexual person or persons that includes words understood to be insulting of homosexuals, is capable of inciting the requisite ill-feeling required to establish a complaint of homosexual vilification. The circumstances in which the abuse occurred are critical. Relevant factors will include the context in which the abuse occurred, the tone of voice used by the alleged vilifier and the observable relationship between the vilifier and his/her victim.
>
> 63 To establish capacity to incite, it is not enough in our view to merely prove that the offending communication identified or "outed" Mr Burns as homosexual. Nor is it sufficient to prove that the victim was deeply wounded or concerned for their privacy, or indeed safety. It is also insufficient to establish that the conduct simply *conveyed* hatred towards a person, or the expression of serious contempt or severe ridicule: *(Wagga Wagga Aboriginal Action Group v Eldridge).*
>
> 64 Mr Burns must establish, on balance, that all or part of Mr Dye's conduct was capable of urging on, stimulating, or prompting to action the ordinary reasonable person to the requisite feelings of ill will towards Mr Burns. How would such person react on hearing Mr Dye's attack on Mr Burns? In our view a section of the community would have dismissed this conduct as the rantings of a drunken, possibly mentally-ill individual and, if anything, the attack may have engendered feelings of hatred towards, serious contempt for, or severe ridicule of Mr Dye himself."

185. The type of ordinary reasonable person, for the purpose of the present matter (adopting the *Burns v Dye* test), is a reasonable person not immune from susceptibility to incitement, nor holding a prejudiced view about homosexuality. The NSW Tribunal, applying the ordinary reasonable person test, decided that there was no homosexual vilification when the defendant verbally abused the complainant. The Tribunal considered the characteristics of the defendant, as a simple, poorly educated man and the circumstances

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where the drunken defendant who, from outward appearance, "would not appear to enjoy any position of respect or influence", "would be unlikely to influence, urge or prompt, any witness to this assault to feelings of ill will towards Mr Burns".

186. However, Tony Silva, a member of the Tribunal, in his minority decision, applying the same test, came to a different conclusion. He said (at paragraph [113]) that,

> "[t]he evidence shows, on the late evenings of 1 September 99 (or 31 August 99) & 2 September 99, Mr. Dye hurled abuse at Mr. Burns. Mr Dye's abuse would have made it abundantly clear to the hypothetical observer that he hated or held feelings of serious contempt and /or severe ridicule for Mr. Burns. *I am comfortably satisfied* that this abuse would have incited feelings of severe ridicule in third parties, including those not immune from susceptibility to incitement or prejudice."
>
> The reason for his decision was as follows:
>
> 'I believe use of the words "cocksucker", "faggot cunt", "you're a fucking faggot aren't you", "Faggot Burns come out and talk to me." Etc, especially the first two are of such extreme ridiculing nature that an ordinary reasonable person not immune from susceptibility to incitement nor holding prejudicial view about homosexuals would be incited to serious ridicule. I believe this incitement to serious ridicule could take place independent of whatever unpleasant feeling or even ridicule, they may have for Mr. Dye, the abuser. I believe people react to what they see and hear, straightaway and though they may have second thoughts about their feelings later. Being late evening/late night it adds to the incitement to serious ridicule." (at paragraph [116])

187. I note that the decision of all members of the Tribunal was influenced by the context that they considered important. While the majority decision had had regard to the drunken state of the defendant and the lack of influence he could have on others, the minority decision gave weight to the nature of the words and evidently, the possibility of the defendant's feelings of severe ridicule towards the complainant influencing an ordinary reasonable person as soon as they heard those words.

188. Tony Silva provides a useful description of a relevant ordinary reasonable person in "the contemporary society" as follows:

> "Let us look at this ordinary reasonable person. This person is from contemporary society and not from a utopian society.

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> That is, the society at the relevant time, August 99 - March 2001. This person is part of the society and as such his attitude would be that of an average person. In my opinion, in matters related to homosexuality, the society in general has been struggling to come to terms with it. This is seen by the anti-homosexual attitude often taken by religious and other institutions, which are very powerful in influencing the attitude of the society in general. In my opinion not only in the relevant period but even now an uncomfortable and un-accepting feeling in the society about homosexuality exists and thus in my opinion an ordinary reasonable person, while not necessarily holding prejudicial view, could be more susceptible to incitement against homosexuals." (at paragraph [117])

189. I agree that what I have to decide is whether or not the posts complained of were capable of inciting an ordinary reasonable person in the contemporary society at the relevant time when the posts were published on the Have Your Say forum.

190. In relation to another incident heard in *Burns v Dye*, that is, the defendant defacing the complainant's front door with drawing on it a large penis and the words "fag lives here, faggots should die", the Tribunal held that it was capable of inciting third parties. The Tribunal formed the view that the drawing and writing were implicitly addressed to passers-by as well as to the complainant, and found that this communication "was capable of stirring up, spurring on, or urging hatred of, or at the very least severe contempt for," the complainant.

Relevant context

191. I take into account the context in which the debate about homosexuality took place in the on-line forum. It was the time when there was a proposal to legally recognise same sex marriages. That being a new idea at the time, to use Tony Silva's words in *Burns v Dye*, when the society in general had been "struggling to come to terms with it", the issue naturally gave rise to a passionate debate. The forum posts mirrored the views of the society, and the publications were in colloquial language – which, unlike formal language, could be easily used to express strong, passionate, and even unrefined, views on issues.

192. The question of vilification must be viewed in the context of a particular debate. In this connection, the following extract from *Kazak v John Fairfax Publications Limited* (at paragraph [59]) is relevant for me to consider:

> "We do not accept that the existence of intense discussion or debate about a particular issue is a factor which would

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tend to suggest that a public act does not amount to vilification. Indeed the existence of an intense and ongoing debate is a likely breeding ground for racially vilifying comments."

193. The vulnerability of homosexual people to discrimination and vilification in the light of homophobia prevalent in the society is explained by the Human Rights Commissioner in her submission. She also referred to reports of the Australia Institute and a 2003 report commissioned by the NSW Attorney-General's Department to support her submission. The Commissioner also refers to a survey in March 2006 by the Australian Research Centre in Sex, Health & Society at La Trobe University which indicated that homosexuals experienced harassment and fear of prejudice and discrimination.

194. In this context of the society, it is quite natural for the Applicant (and also any member of the gay community) to have the feelings that he claimed to have had when he read the posts. Also, in that context, a public act of vilifying homosexuals would have the potential for people to have hatred, contempt or ridicule, including serious contempt or severe ridicule, towards homosexuals, depending on the gravity of the words and situation.

Vilification - finding

195. The expressions "*pervert*", "*pathogens*", "*slimy, smelly specimens*", "*while they defecate over our children's opportunity to grow up free of their piteous influence..Stay away from schools Sad Lobby..you cannot naturally have children of your own. Stay away from mine.*" "*promotion of homosexual influence over children*" found in the alleged posts and their tones were of similar gravity as the words we have seen in *Burns v Dye*. At the time when there was "uncomfortable and un-accepting feeling in the society about homosexuality", I am satisfied that these words were capable of being more than mere vilification and were seriously disturbing the feelings of the readers of the posts.

196. I find the alleged posts, when they were read by an ordinary reasonable person in the society at the relevant time, were capable of inciting such a person to hatred towards, serious contempt for, or severe ridicule of, homosexuals, the group of people of whom the Applicant is a member. Incitement relating to any one of these specified mental attitudes is enough to meet the existence of unlawful vilification within the meaning of section 66 of the *Discrimination Act*. In this case, I am satisfied that the posts were capable of inciting an ordinary reasonable person to any of those attitudes.

197. Had the alleged words concerning homosexuals appeared in the Canberra Times, it would be patent that they would be capable of

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inciting an ordinary reasonable reader, as soon as they read the expressions, to feel hatred towards, serious contempt for, or severe ridicule of, homosexuals, while feeling the same generally about the authors (who were not known to the readers) of the writing. I do not find that publication in the forum, although it had limited readership and limited exposure unlike the Canberra Times, made any different to the vilifying capability of the words it carried.

198. The Respondent argued that the Canberra Times was not lending its authority to any particular views expressed in the forum.[13] The on-line forum was popular because it was sponsored by the Canberra Times, a newspaper well-respected by, and widely circulated in, Canberra. However, there is no evidence before the Tribunal that the Respondent's standing had had the effect of influencing an ordinary reasonable person to be incited.

199. I consider that those who know the standing of the Canberra Times would acknowledge that the on-line forum sponsored by it was to serve the members of the public to air their views freely and was not to be used for inciting violence, hatred, contempt or ridicule. Nevertheless, this perception did not prevent me from finding that some words used in the forum amounted to unlawful vilification of homosexuals.

200. The Applicant, in his submission (at page 7) claims that he 'was "a person affected by" the vilifying posts as he describes himself as 'a homosexual ("gay") man' and, in his witness statement states that he felt vilified by the posts. He also states that he "thus possesses the characteristic which was the basis of incitement". I will take this statement as evidencing the Applicant's interest in bringing the claim of vilification of homosexuals, but the alleged posts were not vilification of the Applicant in his personal capacity. The posts were not capable of inciting an ordinary reasonable person towards the Applicant, whose identity no forum reader knew.

201. Counsel for the Applicant argued that allegations made of equating homosexuality with paedophilia can engender serious reactions amongst people. This is true even now when the society has can be said to have come to terms with accepting gays and lesbians. It would be possible to argue that certain words (such as "w*hile they defecate over our children's opportunity to grow up free of their piteous influence..Stay away from schools Sad Lobby..you cannot naturally have children of your own. Stay away from mine." "promotion of homosexual influence over children"*) were not implying that homosexuals are paedophiles. Nevertheless, in the context of the community perception (see, paragraph 195 above) the thought that would spring up in the minds of an ordinary reasonable person, when

[13] Proceedings, p.22.

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the person read the words, would be that the words either insinuate or directly mean that homosexuals are paedophiles and so that parents and children should keep away from them. The tone of the expressions also would add to this thought.

202. Different grounds of unlawful vilification under section 66 will have different threshold for incitement, for example, the threshold for racial vilification would be lower than sexuality vilification. In *Kazak*'s case, the NSW Administrative Decisions Tribunal said that "Communications about a historically oppressed minority group are far more likely to cause harm to that group than communications which relate to the dominant majority." This Tribunal has not applied the lower threshold applying to racial vilification matters. Hence, decisions relating to racial vilification were considered only where they are relevant to the matter before the Tribunal.

203. Nevertheless, the Tribunal bears in mind the approach taken by the High Court in *Bringinshaw v Briginshaw* [1938] HCA 34; (1938) 60 CLR 336 in this connection of applying a sliding scale of standard of proof in accordance with gravity, significance and consequences of the decision.

204. For finding "incitement" in the context of unlawful vilification under the *Discrimination Act*, the criminal standard of proof advocated by the Respondent is not appropriate. I also find that the circumstances and law relating to decisions from the United States referred to by the Respondent were different to those in relation to which this Tribunal must make a decision. In particular, a higher threshold for "incitement" is required in the United States in the context of the operation of the constitutional guarantee of freedom of speech and of press in relation to criminal law.

205. The Human Rights and Discrimination Commissioner expressed the opinion that 'the published comments of anonymous people such as "GAT" convey opinions of serious contempt, but may not be capable of inciting serious contempt of homosexuals". The Commissioner's interpretation was based on her view that a high threshold was required of conduct to amount to incitement in the light of the right to freedom of expression. I agree that a high threshold is required for conduct to amount to incitement under section 66 but it is not measured by the criminal standard.

206. As I found in paragraph 189 above, the relevant threshold to apply is the objective standard of whether an ordinary reasonable person would have been incited to hatred, contempt or ridicule when the person read the relevant words in the posts.

207. With regard to limitation placed on the freedom of expression by the anti-vilification provision, the Commissioner had had regard to

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Article 20(2) of the ICCPR, which provides that "[a]ny advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence shall be prohibited by law." While the threshold for incitement under this Article of the ICCPR is "discrimination, hostility or violence", incitement under the *Discrimination Act* is unlawful if it relates to hatred, serious contempt or severe ridicule. The ordinary reasonable person test applied by me meets the balance between the right to privacy and reputation and the right to freedom of expression and is the appropriate restriction on the right to freedom of expression in the context of this case.

208. For the reasons I have set out above, I find, as I stated in paragraph 196 above, that the Applicant's claim of unlawful vilification to the extent of vilifying homosexuals is substantiated.

209. I need to re-emphasise that unlawful sexuality vilification in this case involved a class of homosexuals in society and not the Applicant in particular.

210. I will now turn to consider the Respondent's defence to unlawful vilification.

PART 4 – DEFENCE UNDER SECTION 66(2)(C)

Elements of the defence

211. In submissions to the Tribunal, the Human Rights and Discrimination Commissioner reiterates that the actual conduct of the Respondent may not meet the very high level of conduct required by section 66. (See, paragraph [17], and T-document 19, page 7.)

212. Notwithstanding the position of the Commissioner, I found that claim for unlawful vilification was proven in favour of the Applicant for the reasons I have given in PART 3 above.

213. The Respondent submits that if the act complained of did amount to vilification according to section 66(1), the defence in section 66(2)(c) would apply. The defence under section 66(2)(c) is where the public act (within the meaning of section 65) is **"**done reasonably and honestly for….purposes in the public interest, including discussion or debate about and presentations of any matter."

214. The Respondent also submits[14] that "reasonableness and honesty go to the act of promoting forum discussions and debates on matters of public interest". I agree with this submission. In paragraph 134 above, I said that the "public act" here is the specific act of posting of individual messages, including the decision to edit

[14] Respondent's submission, paragraph [73].

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and deletion of messages, onto the forum. For the purpose of the defence under section 66(2)(c), I find that I have to widen the scope of inquiry from the actual posts to the circumstances in which those posts were published. The elements of "reasonableness and honesty", "public interest" and "discussions or debate" warrant this approach.

215. My consideration of the defence to the claim of vilification involves the balancing of rights, in particular the right to freedom of expression and the rights to reputation and privacy.

216. The Respondent submits that,

> "the intention of the respondent goes no higher than to provide a platform or forum at which citizens can express opinions on matters of public interest or concern. Its instinct it to publish everything, other than that which is clearly unlawful, improper, or in poor taste, because it believes that it is essential in a working democracy that citizens have the right to hold and express and advocate their opinions on all matters concerning them."[15]

217. The Respondent contends that an ordinary reader of publications of the Canberra Times, including the Have Your Say column, "would clearly understand that the publisher did not itself adopt or endorse any particular views in matters in controversy in HYS, or that, if it had any views of its own, they would be separately expressed".[16]

Respondent's justification for publishing the posts

218. As regards its action being in the public interest, the Respondent argues "that in providing a forum for different points of view, including unpopular views and views which some people might find offensive or distasteful, the respondent is acting in the public interest".[17]

219. As regards the strong statements by "GAT" (a contributor to the forum), some of whose statements were also the subject of the complaint, the Respondent denies that they amounted to inciting disaffection against homosexuals or inciting discrimination or unlawful acts against them. It submits that "[t]hese are neither the intended nor the likely consequences of his remarks".[18]

220. The editor of the forum states that he was "entirely satisfied" that GAT's views were honestly and sincerely held by him. I assume

[15] Ibid, paragraph [50].
[16] Ibid, paragraph [51].
[17] Ibid, paragraph [56].
[18] Ibid, paragraph[64].

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that the Respondent's position is the same in relation to homosexuality vilifying posts from others.

221. The editor also states the following:

> "GAT's views have been vigorously expressed, and have attracted vigorously expressed responses……These have involved personal attacks on him."[19]
>
> "I have considered that a degree of latitude in relation to abuse has, in the circumstances, been acceptable, in a manner somewhat akin to the qualified privilege accorded under defamation law to person defending their honour and their reputation. However, I have edited or rejected letters from GAT in cases where I have judged that they amount to sheer abuse – which is to say that they introduce no matter or principle into the debate, merely ad hominem attack."[20]

222. Since the forum was for the public to debate on issues, the editor could not have ignored the views of persons opposing or strongly opposing homosexuality when there was strong concern in the community about the proposal to place homosexuality on an equal footing with heterosexuality and, would not be expected to take steps to selectively avoid publishing offensive or hurtful views expressed by those persons.

223. Because the forum is a people's forum, the editor explains the difference in the procedures for publishing between the Canberra Times and the forum, in that in relation to the on-line forum "[t]hose who wrote letters were obliged to supply their name and address – which might not be published". He also states,

> 'Any contributions they made were inspected, usually by myself, before being allowed to go online. It was not a "chat-room", where participants vetted or otherwise, had their contributions immediately appear.'
>
> "Since organising and editing such correspondence is time-consuming, and, often, tedious, I decided at an early stage of the on-line column that I would not sub-edit contributions so as to remove infelicities of grammar, illiteracies, misspellings or bizarre or questionable logic."
>
> "Contributions were however vetted for material which was judged defamatory, in contempt of court, in breach of various intellectual property laws, otherwise in breach of the law, or

[19] Respondent's witness statement, paragraph [28].
[20] Ibid, paragraph [29].

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> breach of taste. Some submitted correspondence was censored on such grounds by the excision of words, other contributions were simply rejected…."

224. In the hearing on 11 July 2006, Jack Waterford, editor in charge of The Canberra Times, said,

> "It's fundamental to any sort of free speech advocacy that the best way of ferreting out bad opinions is by exposing them to public gaze and to public debate, and having them identified as such.
>
> ……..if views are proscribed, censored, unallowed to be entertained, then they will gain currency by the very virtue of their being illicit and wicked, or whatever, and gain strength."

225. In his article in the Canberra Times of 24 September 2009, the editor of the forum says that "even under his liberal regime, a number of letters on both sides seemed to cross the line of proper, if willing, discourse, and were not posted".

> An extract from this article is as follows:
>
> "What people are not allowed to do, as I understand it, is to incite hatred, serious ridicule or serious contempt against homosexuals – a phrase which, from its foundation in the old sedition laws, means, in effect, to preach violence towards or persecution of homosexuals."

226. Although the editor's understanding that vilification is preaching violence is not entirely correct, the statement signifies his, presumably honest, view. This understanding explains why the Respondent, in its submission, was relying on American decisions which dealt with the issue of advocacy of inciting violence.

227. The Respondent's justification for publishing views that some may regard as offensive or distasteful is as follows:

> "….in providing a forum for different points of view, including unpopular views and views that some people might find offensive or distasteful, the respondent is acting in the public interest, indeed the public interest recognised and supported by the law courts."[21]
>
> "…[*GAT's*] remarks are focused on the wisdom of public acts and policies designed to promote the view that homosexuality is

[21] Respondent's submission, paragraph [56].

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> morally equivalent to any other sexuality (*words in italics added*)."[22]

228. It is evident from the Respondent's submission and statements above, that he honestly held the view that the alleged posts were nothing more than opinions even though they were offensive or distasteful.

Principles followed by the Respondent

229. It appears that the Respondent seeks to draw support from the principles of the defence of qualified privilege in defamatory publication matters. It argues that the fact that it vetted posts for compliance with the law as well as of taste supports the proposition of reasonableness and honesty. I find that the threshold for the defence of qualified privilege is higher than the defence under section 66(2)(c), but the principles behind the defence to defamation will be useful in considering what level of reasonableness and honesty applies in the defence to unlawful vilification.

230. In regard to the elements of reasonableness and honesty, the Respondent cited the cases of *Theophanous v The Herald and Weekly Times Ltd* [1992-1994] 182 CLR 104 and *Lange v Australian Broadcasting Corporation* [1997] 189 CLR 520.

231. In *Theophanous v The Herald and Weekly Times Ltd* (at p.141), the High Court took the position that the implied freedom of communication was consistent with the defence of qualified privilege. The Respondent refers to the High Court's interpretation (at p.137) of "reasonableness"[23] but I note that it relates to where the publication involved falsity. I also observe that that case was concerned with a political discussion. In the matter before me, the falsity is not an issue. However, the requirement that the publisher, to benefit from the defence, must show, "in the circumstances which prevailed, it acted reasonably, either by taking some step to check the accuracy of the impugned material or by establishing that it was otherwise justified in publishing without taking such steps or steps which were adequate" (see, *Theophanous*, at p.137), is relevant for me to consider.

232. In *Lange v Australian Broadcasting Corporation*, the High Court said as follows in relation to "reasonableness" in the context of the defence of qualified privilege:

> "Having regard to the interest that the members of the Australian community have in receiving information on government and political matters that affect them, the

[22] Ibid, paragraph [64].
[23] *Theophanous* case, p.137

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> reputations of those defamed by widespread publications will be adequately protected by requiring the publisher to prove reasonableness of conduct. The protection of those reputations will be further enhanced by the requirement that the defence will be defeated if the person defamed proves that the publication was actuated by common law malice to the extent that the elements of malice are not covered under the rubric of reasonableness."

233. The posts in the forum were public acts. The debate in which posts were published in forum was in the context of the ACT Government's policy proposal for recognising same sex marriages, hence, a matter of public interest. As Jack Waterford, the Respondent's editor at large, said in the hearing of 11 July 2006[24] the debates in the forum "were about public policy proposals about the granting of certain additional rights to homosexual people, for example, as to gay marriage which is a live and controversial issue in the community, or to rights of adoption…."

234. This Tribunal finds that a policy that impacts on, or is of interest, to the members of the public, is a political matter, and that the issue of homosexuality was a matter of public interest at the time when there was current a policy proposal for recognising same sex marriage.

Defence – finding

235. The right to freedom of expression that enlivens the defence in section 66(2)(c) places restriction on the right to reputation. A similar restriction is seen operating in the sphere of law relating to defences to defamation involving political matters. The effect of which is, using the terms in section 28 of the *Human Rights Act*, a reasonable limit demonstrably justified in a free and democratic society. This is so in relation to the defence under section 66(2)(c) which will require a lower threshold than the qualified privilege in relation to "reasonableness". This lower threshold is commensurate with the gravity of vilification which is comparatively of less gravity than defamation.

236. From the submissions made by the Respondent and the relevant case law, I am satisfied that the Respondent has established the defence under section 66(2)(c). Its honesty in relation to publishing the posts, including the vilifying posts, is accepted. There is no doubt that the Respondent had no intention to vilify homosexuals. Of course, intention is not necessary to establish unlawful vilification, but the absence of intention is relevant to

[24] Page 23.

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establish the defence, in particular the elements of reasonableness and honesty.

237. I am convinced that the Respondent honestly believed that it complied with law in relation to editing the publications. What I consider not supportive of the Respondent in its editing the posts was that there was no clear guidance as to when would a publication amount to unlawful vilification, although it could be said that what would amount to serious vilification may be obvious to any responsible media if it acted reasonably and honestly. In light of

(a) the nature of the forum where people feel free to use colloquial terms,
(b) the policy that the Respondent considered appropriate and applied in the belief that it complies with law, and
(c) the Respondent's subsequent conduct of ceasing the operation of the forum pending the outcome of this case,

I find that the action taken by the editor were that of a responsible media editor.

238. In view of the above considerations, I am satisfied that the Respondent acted reasonably and honestly in publishing the vilifying posts.

239. About taking into account the subsequent conduct of the Respondent to a vilification claim, I observe the NSW Tribunal in *Burns v Laws (No 2)* (at paragraph [257]) considered the steps taken by the respondent to apologise to the homosexual community as supporting his good faith.

Aspects of "reasonableness" and "honesty"

240. I have examined above the facts and submissions available to me to uphold the reasonableness and honesty of the Respondent's conduct in meeting the defence to the unlawful vilification claim. I would like to explain that reasonableness and honesty are two elements of the defence. The Appeal Panel of the NSW Administrative Decisions Tribunal in *Burns v Laws (EOD)* [2008] NSWADTAP 32 (at paragraphs [73 – 75]) referred to the support in case law for not having separate inquiries in the assessment of "good faith" (which is "honesty" in the ACT provision) and "reasonableness" in the vilification defence provisions by treating both terms as a composite expression. This approach, which simply looks at all the evidence and making an objective judgement, was not favoured by the Appeal Panel.

241. However, looking at all the evidence would demonstrate whether the defendant acted reasonably and honestly, and if the evidence shows that the defendant acted reasonably but not honestly or honestly but not reasonably, the defence under section 66(2)(c) would not be established. French J in *Bropho* said (at paragraph [102]) said

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about the "good faith" exercise as follows: "A person acting in the exercise of a protected freedom of speech or expression .....will act in good faith if he or she is subjectively honest, and objectively viewed, has taken a conscientious approach to advancing the exercising of that freedom in a way that is designed to minimise the offence or insult, humiliation or intimidation suffered by people affected it".

242. I find that the Respondent had not acted dishonestly or for improper purpose or "carelessly disregarding or wilfully blind" to the effect of its publications. The Respondent had a policy in relation to the on-line forum and applied it in the way it understood to be complying with the law. It did not have an intention to vilify homosexuals. Its post-event act of ceasing to continue with the forum pending the outcome of this decision also supports the conclusion that it acted honestly.

243. That the Respondent acted reasonably is borne out by objectively viewing

(a) the fact that the Respondent acted honestly in relation to the publication of posts, and

(b) the fact that it applied policy and censorship to meet the requirement to exercise due care to avoid or minimise the consequences of offensive, vilifying posts.

244. The warning I mentioned above in paragraph 128 would have added to the reasonableness of the Respondent's conduct.

Vilification of the Applicant would make a difference

245. As a matter of caution, I state that this defence would not have been established had the unlawful vilification targeted the Applicant as opposed to a group of people with a characteristic of homosexuality. As I found in paragraph 196 above, vilification was of homosexuals.

246. Had vilification was against the Applicant, that is, situation similar to that in *Burns v Dye*, although the words expressed were not in the presence of the Applicant, the evidence presented by the Respondent would not amount to making its conduct a public act done reasonably and honestly in the public interest. Incitement of hatred towards, serious contempt for, or severe ridicule of, the Applicant in his personal capacity as a homosexual would call for a higher threshold for the Respondent to meet in proving its defence. This would be because the Respondent's knowledge about the Applicant would militate against its action being done reasonably and honestly, even as a public act and in the public interest, including discussion or debate. Intention to target the Applicant, in those circumstances, would be readily and strongly presumed, and the Respondent would need to displace that presumption.

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The human rights context

247. In the human rights context, I find that section 66 engages the rights to reputation, privacy and freedom of expression. I also find that in section 66(1) the right to reputation and the right to privacy place restriction on the right to freedom of expression, and that the defence in section 66(2)(c) enables the right to freedom of expression to place limits on the right to reputation and the right to privacy.

248. At this point, I refer to the Applicant's submission that "Free expression rights are protected by the onerous standards that must be satisfied before a complainant can prove a claim of ….vilification…".[25] I agree with this submission but also observe that, again as submitted by the Applicant, that section 66 is the "least restrictive means" of limiting the freedom of expression, consistent with the "proportionality" test propounded in section 28 of the *Human Rights Act*.[26]

249. Even though proof of unlawful vilification must meet the onerous standards so as to justify the limit on the right to freedom of expression, that right still has a significant role in establishing the defence under section 66(2)(c) of the *Discrimination Act*. In PART 5 of this decision, I have given reasons why I do not agree with the Human Rights Commissioner's argument, on the basis of the decision in *Toben v Jones,* that the defence in section 66(2)(c) should be interpreted narrowly.

250. The defence will also need to meet the onerous standards to establish that, in the face of vilification, its exercise of the right to freedom of expression was done reasonably and honestly. The resultant outcome would be the balancing of the limit on the right to freedom of expression under section 66(1) on the one hand, and the limit on the rights to reputation and privacy under section 66(2(c) on the other.

251. The warning process mentioned in paragraph 128 above would strengthen the Respondent's position in this respect.

PART 5 – HUMAN RIGHTS COMMISSIONER'S SUBMISSION ON THE APPLICATION OF *THE HUMAN RIGHTS ACT 2004*

Provisions of the *Human Rights Act*

252. The ACT Human Rights Commissioner intervened in the proceedings by leave granted by the Tribunal pursuant to section 36

[25] Applicant's witness statement, page 17.
[26] Ibid, page 16.

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of the *Human Rights Act*. The Commissioner seeks intervention in a proceeding before a court or tribunal where it involves the application of the *Human Rights Act*.

253. The Commissioner's submission and further submission have been helpful to this Tribunal in the interpretation of the relevant provisions of the *Discrimination Act* and also to assess the impact of human rights on issues raised by the Applicant and the Respondent. I have addressed the impact of human rights at the relevant parts of my findings.

254. For the purpose of completion, I set out below the aspects in the Human Rights Commissioner's submissions, which I have given consideration.

255. As I said before, the guarantee of freedom of political discourse is an implied principle in the Australian Constitution. This principle limits the powers of Parliament in the creation of laws that limit freedom of political discussion. However, when determining whether a Commonwealth, State or local law is inconsistent with this implied guarantee, the High Court will apply a balancing test between the interest being served by the incursion on the freedom and the level of imposition on the freedom (see, *Australian Capital Television P/L v Commonwealth (2)* (1992) 177 CLR 106; *Theophanous v Herald and Weekly Times*.

256. This is the context in which this Respondent's case is framed – that there must be a balance between the right that the Applicant alleges has been infringed and the implied guarantee of freedom of political discourse. The Respondent submits (at paragraph 7) that interpretation of the *Discrimination Act* must be guided by the existence of the ACT *Human Rights Act* and the general constitutional guarantee of freedom of political discourse.

257. The Human Rights Commissioner submits that

- interpretation of ACT legislation must be so far as possible consistent with the human rights set out in the *Human Rights Act*; and
- that section 16 of the *Human Rights Act* affects the interpretation of sections 20(c) and 66 of the *Discrimination Act*.

258. Section 16 of the *Human Rights Act* enshrines the right to freedom of expression.[27] The right to freedom of expression is not an unlimited right as made clear by Article 19 of the ICCPR.[28]

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[27] Section 16, *Human Rights Act*:

"16 Freedom of expression

(1) Everyone has the right to hold opinions without interference.

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259. Section 30 the *Human Rights Act* provides for the requirement that Territory laws be interpreted, as far as possible, in a way that is consistent with the human rights. Section 31 of the *Human Rights Act* provides that in interpreting a human right, the relevant international law, and the judgments of foreign and international courts and tribunals, may be considered. The Commissioner submits that this position is "an extension to the ordinary rule of interpretation as set out in s142 of the Legislation Act 2001 (ACT) which expressly permits reference to Australia's international treaty obligations to determine the meaning of statutory provisions". I quote sections 30 and 31 of the *Human Rights Act* as follows[29]:

"**30 Interpretation of laws and human rights**

(1) In working out the meaning of a Territory law, an interpretation that is consistent with human rights is as far as possible to be preferred.

(2) Subsection (1) is subject to the Legislation Act, section 139.

Note Legislation Act, s 139 requires the interpretation that would best achieve the purpose of a law to be preferred to any other interpretation (the purposive test).

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(2) Everyone has the right to freedom of expression. This right includes the freedom to seek, receive and impart information and ideas of all kinds, regardless of borders, whether orally, in writing or in print, by way of art, or in another way chosen by him or her."

[28] **Article 19, ICCPR**

"1. Everyone shall have the right to hold opinions without interference.
2. Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice.
3. The exercise of the rights provided for in paragraph 2 of this article carries with it special duties and responsibilities. It may therefore be subject to certain restrictions, but these shall only be such as are provided by law and are necessary:
(a) For respect of the rights or reputations of others;
(b) For the protection of national security or of public order (*ordre public*), or of public health or morals."

[29] These provisions were in the version of the Act as it stood at the time the complainant made the complainant, namely, 24 August 2005. The current form of section 30 is as follows:

"**30 Interpretation of laws and human rights**

So far as it is possible to do so consistently with its purpose, a Territory law must be interpreted in a way that is compatible with human rights."

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(3) In this section:

working out the meaning of a Territory law means—

(a) resolving an ambiguous or obscure provision of the law; or

(b) confirming or displacing the apparent meaning of the law; or

(c) finding the meaning of the law when its apparent meaning leads to a result that is manifestly absurd or is unreasonable; or

(d) finding the meaning of the law in any other case.

31 Interpretation of human rights

(1) International law, and the judgments of foreign and international courts and tribunals, relevant to a human right may be considered in interpreting the human right.

(2) In deciding whether material mentioned in subsection (1) or any other material should be considered, and the weight to be given to the material, the following matters must be taken into account:

(a) the desirability of being able to rely on the ordinary meaning of this Act, having regard to its purpose and its provisions read in the context of the Act as a whole;

(b) the undesirability of prolonging proceedings without compensating advantage;

(c) the accessibility of the material to the public.

Note The matters to be taken into account under this subsection are consistent with those required to be taken into account under the Legislation Act, s 141 (2).

(3) For subsection (2) (c), material in the ACT legislation register is taken to be accessible to the public."

260. The United Nations Human Rights Committee has upheld laws that restrict the right to freedom of expression where the restrictions related to the interests of other persons or to those of the community as a whole.[30]

261. The application of section 16 of the *Human Rights Act* is limited by the provision of section 28, which states:

"28 Human rights may be limited

Human rights may be subject only to reasonable limits set by Territory laws that can be demonstrably justified in a free and democratic society."[31]

[30] Human Rights Commissioner's submission (1 May 2006), paragraphs [26-29].

[31] The current version of section 28 is as follows:

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262. I have set out in footnote 31 the current version of section 28. Subsection 28(1) is the same as that in the 2005 version of the Act. Subsection 28(2) is a later addition, which helpfully sets out the factors that must be considered. I am of the view that these factors are relevant also to consider in relation to section 28 as it stood in 2005. Relevantly, I note that, in relation to subsection 28(2), the explanatory statement for the Human Rights Amendment Bill 2007 (which became the *Human Rights Amendment Act 2008*) states that

> "Section 28(2) is modelled on Section 7 of the Victorian *Charter of Human Rights and Responsibilities Act 2006* and section 36 of the Bill of Rights in the *Constitution of the Republic of South Africa 1996*. Its intention is to provide guidance in the application of the general limitation clause in section 28(1) and to reduce its uncertainty."

Limit to freedom of expression and other rights

263. The Human Rights Commissioner submits (at paragraph [30] of the submission of 1 May 2006) that:

> "Whether a limitation on the right to freedom of expression is reasonable depends upon whether it is proportionate to achieve a legitimate aim. This requires that the limitation be necessary and rationally connected to the objective; the least restrictive means reasonably available to accomplish the object; and not have a disproportionately severe effect on the person to whom it applies."

264. The *Discrimination Act* is specific and definitional and Australian authorities exist to assist interpretation and application of the Act. I agree with the Human Rights Commissioner's submission that "restrictions imposed upon the freedom of expression set out "in section 16 of the *Human Rights Act* by sections 20(c) and 66 of the

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"28 Human rights may be limited

(1) Human rights may be subject only to reasonable limits set by Territory laws that can be demonstrably justified in a free and democratic society.

(2) In deciding whether a limit is reasonable, all relevant factors must be considered, including the following:

(a) the nature of the right affected;

(b) the importance of the purpose of the limitation;

(c) the nature and extent of the limitation;

(d) the relationship between the limitation and its purpose;

(e) any less restrictive means reasonably available to achieve the purpose the limitation seeks to achieve."

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Discrimination Act "satisfy both the requirements of" section 28 of the *Human Rights Act* and Article 19(3) of the ICCPR.

265. With regard to the defence in section 66(2)(c) of the *Discrimination Act*, the Human Rights Commissioner submits that it is "relevantly identical" to section 18D(b) of the *Racial Discrimination Act 1975* (Cth) and, hence, the interpretation of the latter section by the Full Federal Court in *Toben v Jones* [2003] FCAFC 137 applies. This case concerned the publication of material on the internet, which the Human Rights and Equal Opportunity found to be 'racially vilificatory of Jewish people". The Human Rights Commissioner argues that "The Full Court construed the defence narrowly, requiring an analysis of the nature and purpose of the material actually published", and that that interpretation is "entirely consistent with the application of the principle of proportionality".

266. Taking this argument along with the Applicant's position that onerous standards are to be satisfied before a complainant can prove a claim of vilification, may give rise to an argument that the right to freedom of expression is already limited "proportionately" in section 66(1) of the *Discrimination Act* and the defence in section 66(2)(c) should be interpreted consistently with that limited right. Such an argument would diminish the value of the right to freedom of expression in its application to the defence.

267. I am of the view that the defence provision, like any other provision, also should be interpreted consistently with human rights in accordance with section 30 of the *Human Rights Act* and that in that exercise, each relevant right has their role subject to limitation the proportionality test warranted in section 28 of the *Human Rights Act*. In doing so, the section 66(2)(c) defence "may be seen as defining the limits of the proscription" in section 66(1) and "not as free speech exception to it" (see, *Bropho v Human Rights & Equal Opportunity Commission* [2004] FCAFC 16 at paragraph [16]). The Federal Court construed the defence broadly rather than narrowly. French J [at paragraph 94] said that the freedom the defence provision (i.e. section 18D) of the *Racial Discrimination Act 1975* (Cth) protects is broadly construed.]

268. I observe that the approach in *Toben v Jones* is different to the approach I have taken to the defence in section 66(2)(c) of the *Discrimination Act*. The Federal Court considered the defence in section 18D(b) of the Commonwealth Act in the context of an offence under section 18C of the Act.[32]

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[32] Section 18C, *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:

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269. Section 18D of the Commonwealth Act is as follows:

"18D Exemptions

Section 18C does not render unlawful anything said or done reasonably and in good faith:

(a) in the performance, exhibition or distribution of an artistic work; or

(b) in the course of any statement, publication, discussion or debate made or held for any genuine academic, artistic or scientific purpose or any other genuine purpose in the public interest; or

(c) in making or publishing:

(i) a fair and accurate report of any event or matter of public interest; or

---

(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.

Note: Subsection (1) makes certain acts unlawful. Section 46P of the *Human Rights and Equal Opportunity Commission Act 1986* allows people to make complaints to the Human Rights and Equal Opportunity Commission about unlawful acts. However, an unlawful act is not necessarily a criminal offence. Section 26 says that this Act does not make it an offence to do an act that is unlawful because of this Part, unless Part IV expressly says that the act is an offence.

(2) For the purposes of subsection (1), an act is taken not to be done in private if it:

(a) causes words, sounds, images or writing to be communicated to the public; or

(b) is done in a public place; or

(c) is done in the sight or hearing of people who are in a public place.

(3) In this section:

"***public place***" includes any place to which the public have access as of right or by invitation, whether express or implied and whether or not a charge is made for admission to the place."

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(ii) a fair comment on any event or matter of public interest if the comment is an expression of a genuine belief held by the person making the comment."

270. **In the words of Carr J in *Tobens v Jones***,

> "acts done in public which are objectively likely to offend, insult, humiliate or intimidate and which are done because of race, colour or national or ethnic origin are likely to incite other persons to racial hatred or discrimination or to constitute acts of racial hatred or discrimination. In my view, the Convention (*that is, International Convention on the Elimination of All Forms of Racial Discrimination*) can be seen to be directed not only at acts of racial discrimination and hatred, but also to deterring public expressions of offensive racial prejudice which might lead to acts of racial hatred and discrimination (*words in italics added*)." [at paragraph 19]

271. Even though the words of the Commonwealth section 18C and section 66(1) of the *Discrimination Act* appear to differ, the reference of Carr J that the Commonwealth provision covers "incitement to hatred" would make the reasoning of the Federal Court in *Toben*'s relevant to consider in relation to matters arising under section 66(1).

272. However, there are differences too between the circumstances in the *Toben v Jones* and the matter before me. In *Toben*'s, the published document was held to be 'deliberately provocative and inflammatory' as 'contrived to smear' Jews and as containing reference to 'paint Jews in a bad light'. Hence, the tenor of the document was taken to be designed to "smear, hurt, offend, insult and humiliate Jews".[33] In the face of the strong evidence on the motive of the publisher, the Federal Court had to consider the defence in Commonwealth section 18D(b) narrowly, thereby not accepting that the publication was in "good faith".

273. In the matter before this Tribunal, as I have found earlier, the Respondent acted in the honest belief that it was promoting a debate on an issue of public interest and was supported by the right to freedom of expression. The Respondent also asserted that it would not allow publication if it was against law. Had there been a deliberate design on the part of the Respondent to vilify homosexuals, it would have warranted me to be strict in the application of the defence in section 66(2)(c) by interpreting it narrowly.

274. Even though by way of the act of unlawful vilification the right to reputation restricted the Respondent's right to freedom of

[33] *Toben v Jones*, at [161] and [163].

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expression, yet, the right to freedom of expression still has a significant role in relation to the defence. In particular, the element of 'reasonableness and honesty" would be enlivened by that right, particularly so, when the defence provision expressly includes the purpose of public interest and "discussion or debate about and presentations of any matter". Strict construction of the right to freedom of expression in relation to section 66(2)(c) would not give full force and effect to the defence.

275. For these reasons, I do not think it is appropriate to strictly construe the defence under section 66(2)(c) in relation to the matter before me. The Commissioner's submission and further submission helpfully inform this Tribunal on evidence about prevalent homophobia in the society.

276. However, unlike sexuality vilification, racial vilification is readily identifiable and will have more serious impact on those whose race is affected, as is shown in the history. In the face of racial vilification, it may be possible that the scope for the defence would become narrowed, calling for a strict interpretation. The right to freedom of expression would still have a role in that interpretation in the sense whether its restriction in such circumstances would meet the proportionality test in section 28 of the *Human Rights Act*.

PART 6 - THE COMMISSIONER'S ROLE TO INVESTIGATE A COMPLAINT

Respondent's contention

277. The Respondent submits that the Discrimination Commissioner acted outside her jurisdiction by investigating this complaint and by referring this complaint to the Tribunal.

278. The Respondent's contention is that the Commissioner did not make a preliminary determination about her jurisdiction, and that without any further reference to, and submissions from, the Respondent, and without according natural justice, the Commissioner proceeded to determine and uphold the complaint.

279. The Respondent submits that "it is appropriate that the Tribunal give" the Commissioner "some guidance not only as to the general interpretation of the laws, but as to her duties and functions under the Act".

280. I do not agree that this Tribunal should accede to the Respondent's request. However, I will deal with the other aspects of the Respondent's submission in relation to the Commissioner's role as follows.

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The basis for the Commissioner's action

281. The Commissioner contends, on the basis of legislative requirements setting out the function of her office, that the Respondent's claims with regard to the jurisdictional issues are entirely misconceived. In her submission, the Commissioner has set out clearly the legislative basis for her action.

282. The Discrimination Commissioner (according to the *Discrimination Act* as it stood at the time the complaint was made to her) was (and is, in her current designation) an independent statutory office-holder. The Commissioner's functions are set out in section 112 of the Act.

283. The *Discrimination Act*, like its counterparts in other Australian jurisdictions, provides for a government agency to conciliate between the parties to resolve a complaint. The anti-discrimination laws of Australian jurisdictions do not provide for the right of "direct access to a court or tribunal in order to enforce these laws".[34] They provide for a two-stage enforcement process. The first stage is a complaint to a designated government agency which has investigation powers and can resolve a dispute by primary dispute resolution methods, such as conciliation or mediation. If the complaint is not resolved by the agency, the complainant may elect to go to a court or tribunal.

284. Under section 72 of the *Discrimination Act*, a complaint relating to an unlawful act under the Act may be lodged with the Commissioner by an aggrieved person or his or her agent.

285. The Applicant lodged his complaint with the Discrimination Commissioner on 24 August 2005. The Commissioner proceeded with her investigatory role under section 73 of the Act.

286. Section 73 of the Act provides:

> "**73 Investigation**
>
> The commissioner must investigate a complaint made in accordance with section 72 to decide—
>
> (a) whether the complaint can be dealt with under this Act; and
>
> (b) whether the commissioner may decline the complaint; and
>
> (c) if the complaint can be dealt with and the commissioner does not decline it—whether resolution of the complaint by conciliation between the parties is reasonably likely."

[34] Rees N, Lindsay K, and Rice, S, *Australian anti-discrimination law, Text, Cases and Materials* (The Federation Press, Annandale, 2008), p.7 [1.3.2].

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287. Section 73(b) refers to whether the Commissioner may decline a complaint. The power for such action is conferred by section 81 of the Act, which, *inter alia*, provides:

> **"81 Declining complaints**
>
> (1) If, because of the investigation of a complaint lodged under section 72, the commissioner decides that a relevant ground exists in relation to the complaint, the commissioner must decline the complaint.
>
> (2) For subsection (1), the following are relevant grounds:
>
> (a) the complaint is frivolous, vexatious, misconceived or lacking in substance or was not made in good faith;
>
> (b) a more appropriate remedy in relation to the matter complained of is reasonably available to the complainant;
>
> (c) the complaint relates to an act, or the last in a series of acts, that took place more than 12 months before the lodgment of the complaint;
>
> (d) the matter complained of is not unlawful under part 3, part 5 or part 7 or section 66;
>
> (e) the matter complained of has already been adequately dealt with by the commissioner or tribunal;
>
> (f) the matter complained of has already been adequately dealt with otherwise than by the commissioner or tribunal;
>
> (g) the complainant does not want the complaint investigated;
>
> (h) having regard to the complaint and any other relevant matter before the commissioner, in the opinion of the commissioner it is not necessary to pursue the complaint.
>
> (3) If the commissioner declines a complaint under subsection (1), the commissioner must give written notice of the decision to the parties no later than 60 days after the lodgment of the complaint.
>
> (4) A notice to a complainant under subsection (3) must include a statement to the effect that—
>
> (a) if, within 60 days after the date of the notice, the complainant does not require the commissioner to refer the complaint to the tribunal, the commissioner will dismiss the

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complaint and take no further action in relation to it; and

(b) should the complaint be so dismissed, the complainant may apply to the tribunal for the complaint to be heard if exceptional circumstances prevented him or her from requiring the referral.

Commissioner and Respondent

288. The Commissioner did not consider that any relevant ground existed upon which she should decline the complaint. The Commissioner notified the Respondent about the complaint and sought its response. The Respondent was also advised that the Commissioner would also consider anything the Respondent wish to put forward on whether the Commissioner should investigate the complaint. In the meantime, the editor of the forum published an article in the Canberra Times, purportedly on 24 September 2005 referring to this complaint. As the Respondent's response was overdue, the Commissioner, in her letter of 7 October 2005 (T document – 11) stated that the ACT Human Rights Office (that was, the Commissioner's office) operates under principles of natural justice and asked whether the Respondent wished the Commissioner to regard the article as the formal response.

289. In his email sent on 26 September 2005, the editor of the forum denied discrimination and briefly set out the process he followed to publish posts in the forum. He admitted the publication of the article, but it is not clear whether as a response. He disputed that there was material capable of invoking the Commissioner's jurisdiction and stated that he thought that the matter should be dismissed. He also referred, in the general sense, to the Respondent's right to be heard and expected an interim determination in writing.

290. In his later email to the Senior Conciliator in the ACT Human Rights Office, dated 4 October 2005, the editor disputed the Commissioner's jurisdiction and sought the dismissal of the matter.

My conclusion

291. I find that the Commissioner had rightly proceeded to investigate the complaint. She decided that the complaint raised the issue of unlawful discrimination on the ground of sexuality. As the resolution of the complaint by conciliation was unlikely she proceeded, in accordance with sections 86 and 87 of the Act, to refer it to this Tribunal, with the consent of the Applicant - which was the correct procedure.

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292. As regards the issue of natural justice in relation to the Commissioner's investigation, my views are as follows. Even in the administrative review process, there is no absolute right to oral hearing and whether written submissions would be enough would depend on the context.[35] It is evident from the Commissioner's decision that she had enough material to conduct her investigation and not to dismiss the complaint under section 81. I do not agree that there was denial of natural justice to the Respondent in the Commissioner's investigation process.

293. The Commissioner was not obliged to make a preliminary determination about her jurisdiction to investigate a complaint. As submitted by the Human Rights Commissioner,

> "In the absence of any of the criteria set out in s81, the Discrimination Commissioner has a statutory duty to investigate a complaint within the meaning of s72. There is no statutory basis for a 'jurisdictional decision' by the Discrimination Commissioner of the type asserted by the Respondent."

294. I am of the view that the Commissioner acted within her jurisdiction under the *Discrimination Act*, by investigating the Applicant's complaint and, in view of the unlikelihood of conciliation, referring the complaint to this Tribunal. In view of what I have stated above, I do not agree with the Respondent's submission in relation to the role of the Commissioner with respect to this matter.

PART 7 - GENERAL COMMENTS

295. There were undoubtedly harsh comments made regarding the Applicant's sexuality and about homosexuality in general. It is certainly deplorable that people will stop to making such base comments. In reading a transcript of the posts from the forum, I will add that base comments flowed both ways in the argument and it seems to me that the main protagonist, with regard to the comments against which the Applicant complains, was himself also the recipient of very harsh comments.

296. The publishing of these comments did not amount to discrimination. There was no unfavourable treatment of the Applicant, nor was there the imposition of a condition or requirement that disadvantaged the Applicant.

297. The publishing of these comments did amount to unlawful vilification. The four prong test set out in the legislation was met.

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[35] Lane, W B, Young S M, *Administrative Law in Australia* (Law Book Co, Sydney, 2007), p.121.

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However, the Respondent was able to meet the defence in section 66(2)(c) of the *Discrimination Act*.

298. What I will say, with respect to the Respondent's conduct in publishing comments on the forum, is that this on-line public forum was accessible to the community and beyond.

299. There are similar Have Your Say forums in the Age and the BBC websites. They are very useful for people to express their views on a number of issues of their interest. In this computer age, I envisage this media to become more and more powerful in linking people from numerous places and of various backgrounds, strengthening their "free" thinking and right to freedom of opinion and expression. Of course, these rights will need to be moderated in such forums by the need to respect other rights and abide by laws. This calls for a high level of responsibility on the part of the editors of such forums.

300. The Respondent should be encouraged to re-open the on-line forum as a beneficial tool for the public to communicate in relation to matters of public interest. In short, it is a modern device for sharing of views and it would be sad if technical legal complaints or litigation on rights force its demise.

301. My recommendation to the Respondent is - frame and publish similar terms and conditions as in Have Your Say forums conducted by popular and respected media, and display a prominent notice about what will not be published. I also recommend that the service of a responsible dedicated staff be made available to quickly peruse postings and edit or reject expressions that are contrary to law. I will be happy if this decision serves as a guide for the Respondent to address these recommendations.

302. I would like to reiterate that the warning referred to paragraph 128 above should be part of the process.

303. I also welcome the editor's statement in his article of 24 September 2005 that "...HYS will be tightly monitored to be sure that it hurts the feelings of nobody".

304. In paragraph 6 of the Applicant's submission, reference is made to the rules for other, similar, forums to the one the Respondent provided. In support of my recommendations, I will reproduce some extracts from those forums, as examples.

305. An extract of the Age Forum Rules is as follows (http://www.theage.com.au/articles/2004/02/11/1076388427066.html) :

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“theage.com.au welcomes your participation in our Online Forums.

In order to keep these forums enjoyable and interesting for all of our users, we ask simply that you follow these minimal rules. Before posting messages in the forum, you should read this page. If you don't understand the Forum Rules, you may find that your messages are deleted. While theage.com.au values free speech, we also value the responsibilities that come with this freedom. To ensure that all participants enjoy and benefit from the discussion forum, we have established standards of participation.

1. You will not knowingly post content that violates the copyright, trademark, patent or other intellectual property right (including moral rights) of any third party. Likewise, you may not post content that is libelous, defamatory, obscene, abusive, that violates a third party's right to privacy, that otherwise violates any applicable local, state, national or international law, or that is otherwise inappropriate. You will indemnify theage.com.au, its employees, agents, and affiliates from any and all claims and/or damages resulting from any claim brought by any third party relating to content you have posted, and further agree to abide by the f2 Network's Terms of Use.

2. You understand and agree that theage.com.au will moderate the Online Forums at its own discretion and reserves the right to delete, edit, bar access, or otherwise alter content that it deems inappropriate for any reason whatever without consent.

3.....

4. The forums are for text only.....

5. You acknowledge and agree that you use and/or rely on any information obtained through the discussion forums at your own risk. theage.com.au is not in any manner endorsing the content of the forums and cannot and will not vouch for its reliability. the.age.com.au cannot accept responsibility for the actions of any participants in the forum discussions.

6. For any content that you post, you hereby grant to theage.com.au the royalty-free, irrevocable, perpetual, exclusive and fully sublicensable license to use, reproduce, modify, adapt, publish, translate, create derivative works from, distribute, perform and display such content in whole or in part, world-

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wide and to incorporate it in other works, in any form, media or technology now known or later developed.

7. theage.com.au staff assume that you have read the Forum Rules and will not take ignorance of any rules as an excuse for not following any rules, policies, and guidelines outlined here or at any other f2 Network site. "

306. Some rules of the BBC Have Your Say webpage (http://www.bbc.co.uk/terms/) are as follows:

"3. You agree to use bbc.co.uk only for lawful purposes, and in a way that does not infringe the rights of, restrict or inhibit anyone else's use and enjoyment of bbc.co.uk. Prohibited behaviour includes harassing or causing distress or inconvenience to any person, transmitting obscene or offensive content or disrupting the normal flow of dialogue within bbc.co.uk."

"14. You agree to use bbc.co.uk communities (including message boards) in accordance with the following Community Rules. These apply across all bbc.co.uk community sites and services. You should, however, read the local house rules of the particular site or service you're using, as there may be some local variations to these Community Rules.

(i) About your posts:

- Contributions must be civil and tasteful.
- No disruptive, offensive or abusive behaviour: contributions must be constructive and polite, not mean-spirited or contributed with the intention of causing trouble.
- No unlawful or objectionable content: unlawful, harassing, defamatory, abusive, threatening, harmful, obscene, profane, sexually oriented, racially offensive or otherwise objectionable material is not acceptable.
- Be patient: users of all ages and abilities may be taking part in the relevant bbc.co.uk community.
- No spamming or off-topic material: we don't allow the submission of the same or very similar contributions many times. Please don't re-submit your contribution to more than one discussion, or contribute off-topic material in subject-specific areas.
- No advertising or promoting.
- No spoilers: material which contains plot developments which haven't been transmitted on UK television will be deleted unless submitted in a designated 'spoilers' area or marked as a 'spoiler'.

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- Contributions containing languages other than English may be removed unless allowed in the relevant local house rules.
- No impersonation.
- No inappropriate (e.g. vulgar, offensive etc) user names.
- URLs (web site addresses) can only be posted if allowed under any relevant local house rules.
- Deliberate misuse of the complaints facility is not permitted. If you persist in doing this, action may be taken against your account."

PART 8 - REMEDY SOUGHT BY THE APPLICANT

307. The Applicant sought the remedy of public apology in relation to his discrimination, and of public apology to the gay community in relation to the vilification claim. He stated that he was not interested in any personal compensation.

308. Section 102 (2) of the *Discrimination Act* provides for the types of order the Tribunal may make if it is satisfied that an unlawful act under the Act is established. If I found the Respondent liable for an unlawful act, I would have ordered for the remedy sought, by acting under section 102(2)(b)(ii) of the Act (see, *Burns v Radio 2UE Sydney Pty Ltd* [2004] NSWADT 267). Under section 102(2(b)(ii), the Tribunal may order a respondent "to perform any reasonable act or acts to redress any loss or damage suffered by a person as a result of the unlawful conduct by the respondent".

309. I found that the Applicant's discrimination claim was not substantiated, hence, dismiss that claim under section 102(1)(a)(ii) of the *Discrimination Act*. Although the claim for unlawful vilification of gay community generally (not the Applicant per se) was substantiated under section 66(1) of the Act, the Respondent has established to the satisfaction of this Tribunal the defence under section 66(2)(c) of the *Discrimination Act* (namely, that its publications were a public act, done reasonably and honestly, for purposes in the public interest, including discussion or debate about and presentations of any matter).

310. Therefore, this Tribunal is not awarding the remedy sought by the Applicant. That does not preclude the Respondent taking any steps to address concerns that the Applicant or the gay community had or has about posts that they considered offensive to them. I believe such approach would be welcome by the community.

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311. I will be pleased if this decision encourages the Respondent to re-commence the Have Your Say forum and to address the recommendations I have made. This will enable rigorous expression of opinions subject to a warning that readers of the forum may find offensive materials and the decision to access them will be theirs.

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AUSTRALIAN CAPITAL TERRITORY DISCRIMINATION TRIBUNAL

APPEARANCE DETAILS

FILE NO: DT 577/2005

APPEARANCE:	**APPLICANT:**	Ms Bernadette Boss, Counsel
	RESPONDENT:	Mr Jack Waterford
	INTERVENER: [HUMAN RIGHTS COMMISSIONER]	Mr C S Ward, Counsel
TRIBUNAL MEMBER:		MR R J CAHILL, PRESIDENT
DATES OF HEARING:		3 February 2006, 3 March 2006, 28 March 2006, 5 May 2006, and 11 July 2006
DATE OF DECISION:		31 July 2009

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