ANTI-DISCRIMINATION TRIBUNAL QUEENSLAND

CITATION:	*Menzies & Ors v Owen* [2008] QADT 20
PARTIES:	**RICHELLE MENZIES** First Complainant AND **TINA JOY COUTTS** Second Complainant AND **RHONDA BRUCE** Third Complainant AND **SUZANNE MARGARET TURNER** Fourth Complainant AND **RON OWEN** Respondent
FILE NO/S:	HEA06/131, 06/125, 06/133, 06/132, 06/139
PROCEEDING:	Final Hearing
DELIVERED ON:	19 September 2008
DELIVERED AT:	Brisbane
BEFORE:	Member Rangiah
HEARING DATES:	3 and 4 April 2008
ORDER:	1. The respondent is to pay the amount of $5,000 to the first complainant. 2. The respondent is to pay the amount of $5,000 to the second complainant. 3. The respondent is to pay the amount of $2,500 to

the fourth complainant.

4. The complaint made by the third complainant is dismissed.

5. The respondent is to cause the following statement to be published in the *Gympie Times* newspaper within 45 days:

   "The Anti-Discrimination Tribunal Queensland has found that I contravened the Anti-Discrimination Act 1991 by:

   - *displaying a bumper sticker on a vehicle;*
   - *publishing a report to the Cooloola Shire Council;*
   - *making a comment in an interview broadcast on television;*
   - *publishing a letter on a website;*

   that incited hatred, serious contempt for or severe ridicule of homosexuals.

   My conduct caused offence to members of the homosexual community in Gympie.

   I acknowledge that my conduct was unlawful."

6. As to the costs of this proceeding:

   (a) the complainants are to file and serve any submissions within 14 days;

   (b) the respondent is to file and serve any submissions within a further 7 days;

   (c) any submissions in reply are to be filed and served by the complainants within a further 7 days.

CATCHWORDS:	Alleged vilification in contravention of s.124A(1) of Anti-Discrimination Act 1991 – public act – incitement – on the ground of sexuality – burden of proof and matters to be proven for s.124A(2) – no weight given to documents filed in the Tribunal where unsworn and untested and not accepted by the opposite party – standing for vilification complainant – extent of statutory immunity under s.240 *Local Government Act* 1993 – circumstances in which Tribunal can consider the constitutional validity of State legislation – remedy.
CASES CITED	*GLBTI v Wilks* [2007] QADT 27 *Deen v Lamb* [2001] QADT 20 *Kazak v. John Fairfax* (2000) NSWADT 77 *John Fairfax Publications Pty Ltd v Kazak* [2002] NSWADTAP 35 *Catch the Fire Ministries v Islamic Council of Victoria Inc* (2006) 15 VR 207 *Haron-Sourdon v TCN Channel Nine Pty Limited* (1994) EOC 92-604 *Magafas v Carantinos* [2008] NSWSC 691 *McGlade v Lightfoot* (2002) 124 FCR 106 *Colbran v State of Queensland* [2007] 2 Qd R 235 *Australian National Airlines Commission v Newman* (1987) 162 CLR 466 *Benning v Wong* (1969) 122 CLR 249 *Jones v Toben* (2002) 71 ALD 629 *Project Blue Sky v. Australian Broadcasting Authority* (1998) 194 CLR 355 *Kable v. Director of Public Prosecutions (NSW)* (1996) 189 CLR 51 *Attorney-General v. 2UE Sydney Pty Ltd* [2006] NSWCA 349 *Clampett v. Hill* [2007] QCA 394 *Burns v. 2UE Radio Pty Ltd (No. 2)* [2005] NSWADT 24
LEGISLATION CITED:	*Anti-Discrimination Act* 1991 *(Qld)* - ss. 4A, 12-113, 124A, 134(1)(a), 194, 195, 196, 198, 199, 204, 205, 206, 208, 209, 212(1), 212(3) *Anti-Discrimination Amendment Act* 2001 *(Qld)* *Racial and Religious Tolerance Act 2001 (Vic)* - s.11 *Local Government Act* 1993 *(Qld)* - ss.240, 444, 464(4), 465(5) *Criminal Code (Qld)* - s.208 *Constitution of the Commonwealth of Australia* - s.116

Queensland Constitution Act 1867 *(Qld)* - s.53

REPRESENTATION: Ms K Clease of Counsel, instructed by Caxton Legal Centre Inc. for the Complainants

The Respondent was self-represented.

SUMMARY

1. Ron Owen is entitled to be a homophobe and he is entitled to publicly express his homophobic views. That much is required in a society that values freedom of thought and expression.

2. However, there are limits. One of those limits is established by s.124A of the *Anti-Discrimination Act* 1991 ("the Act") which provides:

> *"**124A Vilification on grounds of race, religion, sexuality or gender identity unlawful***
>
> *(1) A person must not, by a public act, incite hatred towards, serious contempt for, or severe ridicule of, a person or group of persons on the ground of the race, religion, sexuality or gender identity of the person or members of the group.*
>
> *(2) Subsection (1) does not make unlawful—*
>
> *(a) the publication of a fair report of a public act mentioned in subsection (1); or*
>
> *(b) the publication of material in circumstances in which the publication would be subject to a defence of absolute privilege in proceedings for defamation; or*
>
> *(c) a public act, done reasonably and in good faith, for academic, artistic, scientific or research purposes or for other purposes in the public interest, including public discussion or debate about, and expositions of, any act or matter."*

3. The complainants have alleged that Mr Owen contravened s.124A of the Act by engaging in a number of public acts in 2005 that incited hatred towards, serious contempt for, or severe ridicule of homosexuals on the ground of their sexuality. He was a well-known public figure in the Gympie area, then being an elected councillor for the Cooloola Shire Council and having an association with a local gun shop.

4. The complainants have alleged that Mr Owen engaged in the following acts in contravention of s.124A(1) of the Act:

- On at least 23 August 2005 Mr Owen drove a motor vehicle on public roads displaying a sticker that read:

  "GAY RIGHTS? UNDER GOD'S LAW THE ONLY 'RIGHTS GAYS HAVE IS THE RIGHT TO DIE

  LEV.20:13"

- On 23 August 2005 Mr Owen made the following comment during a meeting of the Cooloola Shire Council:

  "That's because I probably don't class the gays as being human".

- On 30 August 2005 Mr Owen provided a report to the Cooloola Shire Council tabled on 6 September 2005 which contained a number of statements that vilified homosexuals, including *"Sodomite's (sic) cannot reproduce, their only means of recruitment to their way of life is by preying on the children of normal human beings …"*.

- On 7 September 2005 Mr Owen participated in a television interview broadcast on Channel 7 in which he stated:

  "I think it is a very perverse lifestyle. … Can our health services cope with the sodomite's epidemic? … As you have prisoners who break the law lose certain rights and I do believe homosexuals lose rights. … I think that they know they are going to die shortly I mean AIDS is pretty prevalent."

- In about September 2005 Mr Owen published a document entitled *"What's Going On In Council?"* which contained a number of statements vilifying homosexuals, including statements similar to those made by him on 23 August 2005 during the Council meeting.

- In mid to late 2005 Mr Owen caused a letter written by him to be

published on the website lockstockandbarrel.org entitled *"No Human Rights For Non-Humans"* which included a number of statements vilifying homosexuals, including *"Any person who commits acts that no ignorant animal would commit declares war on his community, and therefore may be destroyed by any or all of that community …"*.

5. For the reasons that follow, I have found that Mr Owen contravened s.124A(1) of the Act in respect of the first, third, fourth and sixth of the allegations made by the complainants.

6. However, Mr Owen did not contravene s.124A(1) in respect of the second and fifth of the allegations.

7. I have decided that Mr Owen must pay each of the first complainant, Richelle Menzies, and the second complainant, Tina Joy Coutts, the amount of $5,000 by way of compensation. Mr Owen must pay the fourth complainant, Suzanne Margaret Turner, the amount of $2,500 by way of compensation. Mr Owen must also cause a form of apology to be published in a newspaper.

8. I have found that the third complainant, Rhonda Bruce, does not have the standing to make her complaint of vilification and I have dismissed her complaint.

THE FIRST ALLEGATION

A public act

9. The complainants allege that on 23 August and 20 September 2005 Mr Owen drove a white Ford 4WD (registration number 967-GJV), to the rear bumper of which was affixed a sticker which read:

"GAY RIGHTS? UNDER GOD'S LAW THE ONLY 'RIGHTS' GAYS HAVE IS THE RIGHT TO DIE.

LEV.20:13"

10. Pursuant to s.204 of the Act, but subject to ss.205 and 206, it is for the complainants to prove, on the balance of probabilities, that Mr Owen contravened the Act.

11. Section 124A(1) of the Act requires that there must be a *"public act".* That expression is defined in s.4A of the Act as follows:

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

12. The issues that require consideration include whether Mr Owen drove the vehicle and, if so, when, whether he knew that the bumper sticker was affixed to it and whether he knew or could reasonably be expected to know the content of the sticker.

13. One of the complainants, Rhonda Bruce, saw the vehicle with the bumper sticker parked outside the Cooloola Shire Council chambers in Gympie on 20 September 2005 and took a digital photograph of it[1]. The chambers

1 Statement of Ms Bruce para 6

were located in the Old Bank Building at the corner of Nash and Channon Streets in Gympie. The photograph shows part of the back of the vehicle, the registration number and the bumper sticker.

14. There is no evidence that Mr Owen was the registered owner of the vehicle (in fact, he claims to own no property). There are, however, several pieces of evidence that suggest that he drove or otherwise had the use of the vehicle.

15. Frank Lightfoot, a witness called by Mr Owen, was shown the photograph taken by Ms Bruce of the vehicle during cross-examination. When asked whether he recognised that vehicle he answered *"I think it would be Ron Owen's vehicle, yes"*[2].. Although that answer in written form may suggest that Mr Lightfoot was uncertain as to whether the vehicle was Mr Owen's, my impression of his oral evidence was that he answered in a manner that admitted no such uncertainty. I have confirmed that initial impression by listening to a recording of the evidence.

16. Mr Lightfoot also said that he recognised the bumper sticker as being on the car driven by Mr Owen[3].

17. Shane Jocumsen, a former councillor of the Cooloola Shire Council, was also called to give evidence on behalf of Mr Owen. He said that he had seen Mr Owen driving a similar vehicle, although he could not be sure if it was the same vehicle without seeing a photograph of the front of it[4]. Mr Jocumsen had seen that vehicle parked outside the council offices on 23 August 2005[5].

18. The evidence concerning the second allegation against Mr Owen (a statement made by him at a meeting of the Cooloola Shire Council on

2 Transcript 153/1
3 Transcript 153/10
4 Transcript 148/30-40
5 Transcript 148/20

23 August 2005) is relevant to the question of who had the use of the vehicle. There is some dispute as to precisely what was said during the Council meeting on 23 August 2005 but it is common ground that during that meeting Councillor Cantrell asked Mr Owen a question about how Mr Owen could claim to support the downtrodden when he had a sticker on his vehicle that said:

> *"GAY RIGHTS? UNDER GOD'S LAW THE ONLY 'RIGHTS GAYS HAVE IS THE RIGHT TO DIE."*[6]

19. Mr Owen did not respond to the question by denying that the vehicle was his or saying that he was not aware of the bumper sticker being on the vehicle. Instead, on the evidence of each of the witnesses, his answer sought to explain and justify having the bumper sticker on the vehicle.

20. Mr Owen led evidence from Mr Jocumsen to the effect that at times following an accident in 2005 Mr Owen had been driven by his wife, Mr Jocumsen and staff of Owen Guns to the Council chambers[7]. The purpose of this evidence seems to have been to try to demonstrate that Mr Owen did not drive the vehicle on 23 August 2005.

21. The evidence suggests that even though Mr Owen may not have been the registered owner of the vehicle, he had the use of it. An inference is available that he must have been aware that the bumper sticker was affixed to it, given that it was displayed prominently on the bumper and given his answer at the meeting on 23 August 2005. An inference is also available that Mr Owen used the vehicle on that day when he attended the meeting at the council chambers.

22. Mr Owen was in the best position to explain whether he used the vehicle and whether he knew that the bumper sticker was attached to it. He did

---

6 Affidavit of Mr Primrose para 6, affidavit of Mr Jocumsen para 7, affidavit of Mr Sachs para 8

7 Transcript 150/32-42

not give evidence, even though he represented himself and was present throughout the hearing. He has not sought to rebut by giving evidence the inferences that are available concerning his use of the vehicle and his knowledge of the bumper sticker. In these circumstances, I draw the inference that Mr Owen's evidence about these issues would not have assisted his case.

23. I find that Mr Owen used the vehicle on 23 August 2005, in that he either drove it to the Council chambers or had someone else drive him there. The complainants' points of claim allege Mr Owen drove the vehicle, but Mr Owen led evidence that suggests that he may have been driven in the vehicle on that day, rather than driving it himself. Whichever was the case, I am satisfied that he had the use of the vehicle.

24. I am not satisfied that Mr Owen drove or otherwise used the vehicle on 20 September 2005. There is evidence that the vehicle was parked outside the Council chambers on that day, but there is no evidence that Mr Owen was at the chambers on that day or that otherwise establishes that he used the vehicle on that day.

25. There is no evidence as to who placed the bumper sticker on the vehicle. It was placed in a prominent place on the vehicle. Even if someone other than Mr Owen placed it there, it is clear that Mr Owen drove the vehicle or had someone else drive him in it knowing that the sticker was attached and thereby displaying it and intending that it should be read by members of the public.

26. The vehicle was driven to the Council chambers on 23 August 2005 and parked outside the chambers. It was observable by members of the public when it was being driven and when it was left outside the chambers. The display of the bumper sticker involved a form of communication to the public and it was also the display of a sign that was observable by the

public.

27. I am satisfied that Mr Owen knew the content of the bumper sticker when he used the vehicle. I am therefore satisfied that Mr Owen engaged in a public act by driving or having someone else drive him in the motor vehicle on 23 August 2005 and thereby displaying the bumper sticker to the public.

Incite

28. The meaning of the expression *"incite"* has been the subject of extensive consideration by Courts and Tribunals in various jurisdictions. The principles were conveniently summarised by Member Savage SC (as the President was then) in *GLBTI v Wilks* [2007] QADT 27 as follows:

> *"(a) The respondents' intent to incite is irrelevant: Burns v Dye [2002] NSWADT 32, para 21; John Fairfax Publications Ltd v Kazak [2002] NSWADTAP 35 at para 10; Veloskey & Anor v Karagiannakis & Ors [2002] NSWADTAP 18, para 24, Burns v Radio 2UE Sydney Pty Ltd & Ors [2004] NSWADT 267, para 12.*
>
> *(b) What is required is that there has been incitement to another to hate etc rather than a mere conveyance of a hatred already held by the speaker cf Burns v Dye supra, 20; Wagga Wagga Aboriginal Action Group v Eldridge (1995) EOC 92-701, 78-266.*
>
> *(c) "Incite," "hatred", "contempt" and "ridicule" should all be given the ordinary natural meaning i.e. to incite - urge on, stimulate or prompt to action cf Burns v Dye supra para 19; John Fairfaz Publications Ltd v Kazak supra para 40.*
>
> *(d) It is not necessary that it be proved that any particular person was incited but that the capacity of the public act to incite the ordinary reasonable person is what must be made out cf Deen v Lamb [2001] QADT 20 see also John Fairfax Publications Ltd v Kazak supra; Catch the Fire*

> *Ministries v Islamic Council of Victoria [2006] VSCA 284; Burns v Laws (No 2) [2007] NSWADT 47.*
>
> *(e) The incitement to hatred must be on "the grounds of sexuality" meaning that that matter was a "substantially contributing factor" cf Waterhouse v Bell (1991) 25 NSWLR 99, 106 per Clark JA; Veloskey supra, Burns v Dye supra at para 24. Sexuality is defined in the Act's scheduled Dictionary as inter alia homosexuality."*

29. In *Deen v Lamb* [2001] QADT 20, President Sofronoff QC described the test of *"incitement"* as follows:

> *"The question arises how one determines whether a publication has the character referred to in s.124A. The test is plainly an objective one rather than a subjective one. In the law of defamation the test adopted has been to assume a reader who is of fair average intelligence, and who is neither perverse nor morbid, nor of a suspicious mind, nor one who is avid of scandal: see Lewis v. Daily Telegraph (1964) AC 234 at 259. This test has been adopted in the context of racial vilification legislation: see Kazak v. John Fairfax (2000) NSWADT 77 at paras. 31-34.*
>
> *I agree that that is the appropriate test, but would add that it is also necessary to exclude on the one hand those persons who are either over-sensitive to criticism of their race, religion or culture, and on the other hand, those who are too thick-skinned to appreciate the nature of an act as one which has the relevant tendency to incite. Cf. Lewis v. Daily Telegraph at 259."*

30. In *John Fairfax Publications Pty Ltd v Kazak* [2002] NSWADTAP 35 at [16] it was held that the practical application of the objective test involves asking the question *"could the ordinary reasonable reader understand from the public act that he/she is being incited to hatred towards or contempt for, or severe ridicule of a person or persons on the ground of race?"*

31. In *Catch the Fire Ministries v Islamic Council of Victoria Inc* (2006) 15 VR 207 the Victorian Court of Appeal held that the concept of *"a reasonable member of the class may be inappropriate in the context of racial or religious vilification".* The Court held at [116], [132] and [158] that the more appropriate test is to consider the effects of the word or conduct on an *"ordinary"* member of the class to which it is directed, taking into account the circumstances in which the conduct occurs.

32. The Victorian Court of Appeal rejected the view expressed in *Kazak* (supra) that any special characteristics or proclivities of the audience or potential audience must be ignored. It held at [13] – [18] and [157] that it will be necessary to consider the nature of the audience and bring it into account and consider whether there has been the requisite incitement.

33. In the present case, the communication consisting of the display of the bumper sticker was directed to and accessible to members of the public generally in Gympie.

34. The expression *"gays"* is a well known and understood colloquial reference to homosexuals. It is used more frequently to refer to male homosexuals, but, in my opinion, is also used to refer to female homosexuals.

35. On one view of it, the bumper sticker could be regarded as containing what is referred to as *"bumper sticker humour"*, making a play on the word *"rights"*. A trivial joke or comment will not breach s.124A(1): see *Haron-Sourdon v TCN Channel Nine Pty Limited* (1994) EOC 92-604.

36. However, the sticker went well beyond a mere joke and communicated a message that was both contemptuous and threatening. The bumper sticker implies that homosexuals have no rights, that others do not have to respect the rights of homosexuals, that the death of homosexuals is a

good thing and that the killing of homosexuals is justified under God's law. It conveys an attitude of contempt for the idea that homosexuals have rights. It carries the sinister undertone that homosexuals do not deserve to live.

37. The ordinary member of the public would, in my opinion, understand that he or she was being urged to hate and to have serious contempt for homosexuals.

38. The bumper sticker ridicules and is derisory of any claim by homosexuals that they have rights. Its tone is mocking. I find that its display also incited severe ridicule of homosexuals.

On the ground of sexuality

39. The *"on the ground of … sexuality"* requirement of s.124A(1) of the Act relates to the ground on which the public is incited to hatred, serious contempt or severe ridicule, rather than the person's motive in engaging in the relevant conduct: *Kazak v John Fairfax Publications Ltd* [2000] NSWADT 77 at 69-72, *Catch the Fire Ministries v. Islamic Council of Victoria Inc. (supra)* at 218.

40. The expression *"sexuality"* is defined in the dictionary for the Act to mean *"heterosexuality, homosexuality or bisexuality"*.

41. The word *"homosexuality"* is defined in the Macquarie Dictionary (3rd Ed) as *"sexual feeling for a person of the same sex"*. In my opinion, homosexuals are persons who feel sexual attraction only for persons of the same sex.

42. It is apparent from the reference in the bumper sticker to *"Lev 20:13"* (the text of which is set out later in these reasons) that Mr Owen's conduct

incited hatred towards, serious contempt for and severe ridicule of homosexuals was because such persons feel sexually attracted to members of the same sex or engage in sexual acts with members of the same sex. I find that Mr Owen's incitement was on the basis of the sexuality of homosexuals.

Exemption

43. Under s.124A(2) of the Act, certain publications and public acts that would otherwise be contrary to s.124A(1) are not unlawful. Mr Owen has not specifically claimed, either in his points of defence or his lengthy written submissions, that s.124A(2) applies to any public acts done by him. That may be because he simply denies that his conduct breached s.124A(1).

44. Mr Owen has asserted that homosexual sexual activity is immoral and that there are public health implications of such activity. He has also argued that s.124A(1) unlawfully impinges upon freedom of speech.

45. Given that Mr Owen is not legally represented, I will proceed on the basis that he should be taken to be asserting that any relevant public acts engaged in by him in contravention of s.124A(1) are not unlawful because his acts were done reasonably and in good faith for purposes in the public interest, in particular, public discussion or debate about and expositions of the morality of sexual activity of homosexuals and public health issues concerning such activity.

46. Section 124A(2), relevantly for present purposes, provides:

> *"(2) Subsection (1) does not make unlawful—*
>
> *…*
>
> *(c) a public act, done reasonably and in good faith, for academic, artistic, scientific or*

> *research purposes or for other purposes in the public interest, including public discussion or debate about, and expositions of, any act or matter."*

47. A number of issues concerning the interpretation and application of s.124A(2) fall to be considered.

Onus of proof under s.124A(2)

48. An initial question arises as to whether it is the complainants or the respondent who carries the onus of proving that s.124A(2) applies.

49. Section 206 of the ADA provides that.

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

50. As s.124A does not use the word *"exemption"* it is not entirely clear whether s.206 applies to a claim that s.124A(2) applies.

51. The word *"exemption"* is not defined in the Act, but its meaning may be ascertained by reference to the context in which it appears elsewhere in the Act.

52. Part 4 of Chapter 2 of the Act comprises ss.12 to 102 and has the heading *"Areas of activity in which discrimination is prohibited"*. Part 5 consists of ss.103 to 113 and has the heading *"General exemptions"*. The structure of Parts 4 and 5 is explained by s.12 which provides:

> *"(1) This part specifies the areas of activity in which discrimination is prohibited and the exemptions that apply in relation to those areas.*
>
> *(2) Part 5 specifies general exemptions that apply to all the areas."*

53. Part 4 consists of 11 divisions. Each division deals with a different area of activity. For example, division 2 deals with work and work related areas, division 3 with education and division 4 with goods and services.

54. Each division of Part 4 consists of two subdivisions. Subdivision 1 of each division consists of a number of sections each prohibiting discrimination in an area of activity. For example, s.14 is contained within subdivision 1 of division 2 and provides, inter alia, that a person must not discriminate in the arrangements made for deciding who should be offered work.

55. Subdivision 2 of each division of Part 4 then deals with exemptions for discrimination in the particular area with which the division is concerned. For example, subdivision 2 of Division 1 of Part 4 is headed *"Exemptions for discrimination in work and work-related areas"* and s.24, which is within that subdivision, provides:

> *"It is not unlawful to discriminate in the work or work-related area if an exemption in sections 25 to 36 or part 5 applies."*

56. Subdivision 2 of each division in Part 4 contains a number of sections setting out particular exemptions. For example, s.26(1) provides:

> *"(1) It is not unlawful for a person to discriminate—*
>
> *(a) in the arrangements made for deciding who should be offered work; or*
>
> *…*
>
> *if the work is to perform domestic services at the person's home."*

57. Each section in subdivision 2 of each division of part 4 begins with the words "*It is not unlawful".*

58. Similarly, s.103, which is found within part 5 of Chapter 2, provides:

> *"It is not unlawful to discriminate with respect to a matter that is otherwise prohibited under part 4 if an exemption in sections 104 to 113 applies."*

59. Sections 104 to 112 then set out a number of circumstances in which a person may do a particular act that would otherwise amount to unlawful discrimination. For example, s. 104 provides:

> *"A person may do an act to benefit the members of a group of people with an attribute for whose welfare the act was designed if the purpose of the act is not inconsistent with this Act"*

60. The structure and content of these provisions suggests that the expression *"exemption"* is used to designate a provision that declares an act that would otherwise be unlawful under the Act to be lawful.

61. Section 124A is found in Part 4 of Chapter 4 of the Act. Chapter 4 has the heading *"Associated objectionable conduct (complaint)"*. The expression *"exemption"* is not used in the heading for s.124A or anywhere else in Chapter 4.

62. However, the language and structure of s.124A are reminiscent of the language and structure of each division of Chapter 2 Part 4 – s. 124A(1) prohibits certain acts, but then s.124A(2) provides that subsection (1) *"does not make unlawful"* such acts in the circumstances it describes.

63. Confirmation that s.124A(2) is intended to operate as an exemption is found in the Explanatory Notes for the *Anti-Discrimination Amendment Bill* 2001 which state that *"the new section 124A contains exemptions which strike a balance between freedom of expression and freedom from racial*

or religious vilification". The exemptions said to be contained within s.124A must be those in s.124A(2).

64. Further, the Explanatory Notes for the *Discrimination Law Amendment Bill* 2002, which brought s.124A to its present form, say:

> *"Clause 22 Amends section 124A by introducing new prohibitions on vilification on the basis of sexuality or gender identity. As with racial and religious vilification, the prohibition is subject to a range of exemptions."*

65. The exemptions referred to in the Explanatory Notes cannot be those in Parts 4 and 5 of Chapter 2, because those exemptions apply to discrimination, not to vilification. Therefore, the *"range of exemptions"* must be those set out in s.124A(2).

66. In my view, the two sets of Explanatory Notes confirm what is evident from the language and structure of s.124A. Section 124A(2) operates as an *"exemption"* in that it makes lawful conduct that would otherwise be unlawful under s.124A(1).

67. Therefore, it is for a respondent to raise one or more issues under s.124A(2) and prove, on the balance of probabilities, that it applies.

Construction of s.124A(2)

68. There are several aspects of construction of s.124A(2) that I have found difficult. I think the difficulties extend from the drafter of the provision attempting to encapsulate a number of different concepts in only one paragraph and consequent ambiguities caused by the drafter's use of punctuation.

69. The first issue is what anterior part of paragraph (c) the words *"including public discussion or debate about, and expositions of, any act or matter"*

refer to. The first possibility is that it is the public act that includes public discussion or debate about, and expositions of any act or matter. However, I do not think this can be right because the expression *"public act"* is already defined and the words *"including public discussion or debate about, etc"* would add nothing more.

70. A second possibility is that the words *"including public discussion or debate about, etc*" refer to each of the academic, artistic, scientific, research and other purposes in the public interest. A third possibility is that those words refer only to other purposes in the public interest. It is unnecessary to decide which of these possibilities is in fact intended because Mr Owen can be taken to rely only upon *"other purposes in the public interest"* and not academic, artistic, scientific or research purposes.

71. The next issue is whether the words *"done reasonably and in good faith"* apply to the public act, or whether they are directed to the purpose for which the act was engaged in, or both.

72. In *Deen v Lamb (supra)*, President Sofronoff considered that the requirement of good faith refers to the purpose for which the act is done, saying at p.7:

> *"In my view a person doing an act which incites hatred or contempt is acting in 'good faith' within the meaning of s.124A(2)(c) of the Act when the act is done in order to fulfil one or more of the purposes permitted by the sub-section".*

73. In *Catch the Fire Ministries Inc. v. Islamic Council of Victoria (supra)*, the Victorian Court of Appeal considered s.11 of the *Racial and Religious Tolerance Act 2001* (Vic) which is, relevantly, in the following terms:

> *"A person does not contravene section 7 or 8 if the person establishes that the person's conduct was engaged in reasonably and in good faith —*

…..

(b) in the course of any statement, publication, discussion or debate made or held, or any other conduct engaged in, for —

(i) any genuine academic, artistic, religious or scientific purpose; or

(ii) any purpose that is in the public interest".

74. In the course of considering the approach to be taken to applying s.11, Nettle JA (with whom Ashley and Neave JJA agreed on this issue) said:

[88] *On one view of what was said, it appears that the tribunal was simply not satisfied that Pastor Scot's statements to the seminar about the meaning of the Koran reflected Pastor Scot's true belief about the meaning of the Koran. Hence, the tribunal was not satisfied that Pastor Scot acted with subjective good faith. With respect, if that were the tribunal's process of reasoning, there would be no error. Whatever else the concept of goodwill* [sic. good faith] *entails, I consider that it demands subjective honesty. Consequently, it could not be an exercise in good faith for the purposes of s 11 for a person to make a statement which the person knew to be untrue, even if he or she honestly believed in the purpose for which the statement was made and honestly believed that it was necessary or desirable to make the statement in order to achieve that purpose.*

[89] *In case the matter is remitted to the tribunal, however, it is appropriate that I say something further about the effect of s 11. … Under s 11, the question is whether the conduct in which a person ("the defendant") has engaged should be seen as having been engaged in reasonably and in good faith for a genuine academic, artistic, religious or scientific purpose. In my view it follows that, assuming no lack of honesty, one should ordinarily start with the identification of the purpose for which the defendant is said to have engaged in the conduct and determine whether it answers the description of an academic, artistic,*

> *religious or scientific purpose.*
>
> **…**
>
> **[92]** *Having reached that point, I think that one should move next to the question of whether the defendant had engaged in the conduct reasonably and in good faith for the genuine religious purpose. According to ordinary acceptation, to engage in conduct bona fide for a specified purpose is to engage in it honestly and conscientiously for that purpose. In my view that appears to be the intent of s 11. The legislative requirement that the conduct be engaged in not only in good faith but also reasonably means that objective standards will be brought to bear in determining what is reasonable… In my view, the requirement that conduct have been engaged in bona fide for a genuine religious purpose within the meaning of s 11 will be established if it is shown that the defendant engaged in the conduct with the subjectively honest belief that it was necessary or desirable to achieve the genuine religious purpose.*
>
> **[93]** *That then leaves the question of whether the conduct was engaged in reasonably for the genuine religious purpose, and plainly as I see it that does involve an objective analysis of what is reasonable and therefore calls for a determination according to the standards of the hypothetical reasonable person."*
>
> (underlining added)

75. Nettle JA regarded *"good faith*" requirement in the Victorian legislation as requiring an honest belief in the statement made *and* an honest belief that it was necessary or desirable to make the statement to achieve the relevant purpose.

76. Section 124A(2) of the Act is capable of being applied in the same way. Although the language of the Victorian provision is somewhat different, it does not seem to me that it is relevantly distinguishable on this issue.

77. In my opinion, s.124A(2) requires that the public act, must be done in good faith. Such a construction is consistent with the words and structure of paragraph (c), although it would be clearer if there were no comma after *"a public act"*. In addition, it hardly seems likely that the legislature would intend to excuse the making of a statement that incited hatred, serious contempt or severe ridicule of a class of persons that s.124A(1) is designed to protect in circumstances where the maker of the statement does not have an honest belief in the truth of the statement. If a public statement is to attract the application of s.124A(2), the person making the statement must have an honest belief in its truth.

78. In addition, the public act must be done in the honest belief that it was necessary or desirable for academic, artistic, scientific or research purposes or other purposes in the public interest.

79. The public act must also be done reasonably for the relevant purpose. In *John Fairfax Publications Pty Ltd v. Kazak* (supra), the Appeal Panel held at [25] in relation to the NSW equivalent of s.124A(2)(c) that "*it is clearly the doing of the public act which must be reasonable and in good faith."*

80. In *Deen v Lamb* the President left open the question of whether a person can be said to be acting in good faith when the person has a number of motives, some proper and some improper. It is unnecessary for me to consider this issue in the circumstances of the case.

81. The use of the word "*including"* in paragraph (c) indicates that a public act done reasonably and in good faith for the purpose of public discussion or debate about or exposition of any act or matter is treated as being in the public interest. The word *"including"* means *"containing as part of the whole being considered"*: see *Magafas v Carantinos* [2008] NSWSC 691 at [17]. It is unnecessary to separately consider whether such purposes are in fact in the public interest – paragraph (c) deems them to be so.

Application of s.124A(2)

82. Returning to the present case, the first issue is whether the public act consisting of the display of the bumper sticker on the vehicle by Mr Owen was done *"for"* the purpose of public discussion or debate or exposition of the morality of homosexual acts or health implications of such acts. As Mr Owen did not give evidence, this issue must be examined by reference to the nature of the public act, namely the display of the bumper sticker, the content of the bumper sticker and any other evidence given in the proceeding.

83. There is little about the mode of communication of the public act or the content of the bumper sticker that suggests that its purpose, or that one of its purposes, was to promote public discussion or debate about the morality of homosexual activity or to expose such activity. The only reference that may suggest such a purpose is found in the notation *"LEV.20:13"*. There is no reference on the bumper sticker to any health issues affecting the sexual activity of homosexuals.

84. The tone of the bumper sticker, as I have already said, is that it conveys contempt for the idea that homosexuals have rights and ridicules and is derisory of any claim that homosexuals have rights. It also appears to be an attempt at *"bumper sticker humour"* in that it contains a play on the word *"rights"*. This does not suggest to me that the purpose of displaying the bumper sticker, or one of its purposes was to promote public discussion or debate about or expose the immorality of homosexual activity.

85. Bearing in mind that Mr Owen carries the onus of proof on this issue, I am not satisfied that the display of the bumper sticker was *for* any purpose in the public interest, including public discussion or debate or exposition of any act or matter.

86. Even if it were shown that the display of the bumper sticker was for such a purpose, I would not be satisfied that Mr Owen has shown that it was done reasonably and in good faith.

87. Mr Owen has not given evidence that he honestly believed the content of the bumper sticker. I am not willing to infer an honest belief from the content on the bumper sticker itself or from any other evidence led in the case. That other evidence includes the comments made by Mr Owen during the council meeting on 23 August 2005 and in the report to the Cooloola Shire Council tabled on 6 September 2005, in the television interviews he participated in and in a document he later wrote entitled *"What's going on in council"*. However, mere repetition of the matter and sentiments contained in the bumper sticker does not establish an honest belief in the truth of them. In the leaflet Mr Owen asserted that he honestly expressed his personal beliefs when answering the question asked in Council about the bumper sticker. I am not prepared to give this unsworn and untested assertion sufficient weight to allow me to conclude that he has satisfied the onus of proof on the issue of whether he had an honest belief in the content of the bumper sticker.

88. I pause to mention that I give no weight to the facts asserted by any party in their pleadings and written submissions, except to the extent that they consist of admissions against interest or are supported by evidence. Although it is open to take into account assertions of fact made in the pleadings and submissions under s.208 of the Act, I do not think it is appropriate to give weight to such assertions where they are not accepted by the opposite party and are unsworn and untested.

89. Even if the display of the bumper sticker was done for the purpose of public discussion or debate about homosexuals or the morality of sexual activity of homosexuals, I would not regard it as having been done *reasonably* for such purpose, having regard to the content of the sticker.

The language of the bumper sticker is derisory and contemptuous. It contains the disturbing undertone that homosexuals deserve to die and that they may legitimately be killed. While strong language and disturbing ideas may legitimately form part of public discussion or debate, it seems to me that the nature, tone and language used in the bumper sticker here goes beyond what is reasonable for the promotion of the requisite purpose.

90. For these reasons, I find that s.124A(2) does not operate to excuse Mr Owen's contravention of s.124A(1) in respect of his display of the bumper sticker.

THE SECOND ALLEGATION

A public act

91. The second allegation made by the complainant concerns a statement made by Mr Owen at a meeting of the Cooloola Shire Council on 23 August 2005. The complainants allege that Mr Owen said *"That's because I probably don't class the gays as being human"* in response to a question asked of him.

92. The meeting was attended by Arthur Gorrie, a journalist employed by the *Gympie Times* newspaper. Mr Gorrie wrote an article entitled *"Owen's Anti-Gay Stance Stirs Council",* published in the *Gympie Times* on 26 August 2005[8]. The relevant parts of the article read as follows:

> *"A blistering attack on homosexuals has put Cooloola Shire Councillor Ron Owen in the civil liberties firing line.*
>
> *Remarks that gays are not human and have the right only to die stunned councillors at their weekly meeting.*
>
> *…*
>
> *Cr Owen, already known for his strongly anti-gay views*

8 Statement of Mr Gorrie Ex A

made the remarks in response to a question by Cr Peter Cantrell.

Cr Cantrell had asked how Cr Owen could claim to be a champion of the underdog in society and a protector of the downtrodden when he also had a bumper sticker on his car saying that 'The only right gays have is the right to die'.

'That's because I probably don't class the gays as being human,' Cr Owen said.

'I think the word 'gay' is a misappropriation of the word'.

'I've come out publicly on this before'.

'I don't think the gays are downtrodden. In fact, they are in the ascendancy in our community. It's an illness, isn't it?'

..."

93. The meeting was not recorded and no minutes of the meeting were kept.

94. Mr Owen led evidence from a number of other persons present at the meeting. Their versions of what happened are different to that given in the article written by Mr Gorrie.

95. Wayne Sachs was a councillor of the Cooloola Shire Council at the time of the meeting. His version of events is as follows:

> *"7. I attended the Tuesday General Council meeting on 23rd August 2005 in my capacity as a Councillor and was sat at the Council table for the duration of the meeting.*
>
> *8. During General Business at approx 10am I can remember Councillor Peter Cantrell reading from a written text and asking a question to Cr Owen saying 'Cr Owen is always defending the underdog why does he have a sticker on his vehicle that says, 'Gay Rights? Under Gods Law the only Rights Gays have is the Right to Die'.*
>
> *9. I called, 'Point of Order', Mr Mayor', but before I*

> *could speak to the Point of Order, the Mayor Councillor Venardos, the chairman of the meeting, over ruled my motion and said words to the effect of. No, No I wish to hear what Councillor Owen says about this.*
>
> *10. I recall that Councillor Owen said words to the effect of 'if a person chooses to follow Non-Human Acts, if they break the law, they lose their Human Rights, as with a murder, the State removes their rights. He mentioned that he disapproved of their activities and that we all had a right to die but when some groups took up a more dangerous pursuit they would die sooner. He referred to Aids as an illness and said that he never referred to them as that name as he believed that they had subverted the word and were not very happy people.*
>
> *11. At no time did I hear Councillor Owen mention the words Gay or Homosexual."*[9]

96. Another former councillor of the Cooloola Shire Council, Shane Jocumsen, gave the following evidence:

> *"7. During that meeting I sat next to Councillor Peter Cantrell and at General Business, I can remember Councillor Peter Cantrell asking a question to Cr Owen saying 'Cr Owen is always defending the underdog why does he have a sticker on his vehicle that says, Gay Rights? Under Gods Law the only Rights Gays have is the Right to Die'.*
>
> *8. Then Cr Sachs put a 'Point of Order', and said this had nothing to do with Council business. The Mayor said he would allow the question, because he would like to hear his (Cr Owen) answer.*
>
> *9. Through gestures observed at the time, I gained the distinct impression the question was a deliberate set up between Cr Peter Cantrell and the Mayor Cr Venardos.*
>
> *10. I recollect that Councillor Owen said words to the effect of, 'if a human choses to follow un Human Acts, they lose their Human Rights.' He said, we all had a right to die but when some people took up*

9 Affidavit of Mr Sachs

unsafe lifestyles they would die earlier.

11. The only person that mentioned the word Gay was Councillor Cantrell. Councillor Owen did not refer or say the words Gay or Homosexual."[10]

97. Mr Owen also called Anthony Stower, a member of the public who regularly attended meetings at the Cooloola Shire Council, to give evidence. As to what happened at the meeting on 23 August 2005, Mr Stower said:

"7. During the General Business section, at the end of the meeting, I observed Councillor Peter Cantrell reading out aloud from a prepared statement which culminated in a question to Cr Owen saying word to the effect of 'Cr Owen is always supporting the underdog why does he have a bumper sticker on his vehicle that says, Gay Rights Under Gods Law The only Rights Gays have is the Right to Die.

8. Cr Wayne Sachs interjected with a forceful 'Point of Order'. Mayor Cr Venardos, just as forcefully dismissed Cr Sachs Point of Order and ordered Cr Owen to respond to Cr Cantrell's question.

9. I recollect that Councillor Owen said words to the effect of 'if human choses to perform in human Acts, they lose their Humanity. Then he mentioned convictions against humanity. Cr Owen then said, he has never made any secret of the fact he opposes these groups on humanitarian ground.

10. I heard Councillor Cantrell refer to GAYS, however, I did not hear Councillor Owen say the words Gay or Homosexual or any other associated words.

11. I do not believe that Councillor Owen said anything defamatory or objectionable against any person, persons or groups of people. I believe that Cr Owen was requested by the questioning of Cr Cantrell and the insistence of Cr Venardos to expound his personal Christian views."[11]

---

10 Affidavit of Mr Jocumsen
11 Affidavit of Mr Stower

98. There are three major differences between the article written by Mr Gorrie and the witnesses called by Mr Owen. The first is that the exchange about the point of order was not reported by Mr Gorrie. The second is that Mr Gorrie did not report some of the words attributed to Mr Owen by the other witnesses. The third concerns whether Mr Owen said *"That's probably because I don't class the gays as being human"*.

99. Mr Gorrie conceded under cross-examination that a point of order may have been taken by Mr Sachs. He also conceded that his article may have been inaccurate because Mr Owen may have used the pronoun *"they"* rather than the word *"gays"*. I prefer the evidence of Mr Sachs and Mr Jocumsen as to what was said by Mr Owen.

100. I find that Mr Owen did not say *"That's probably because I don't class the gays as being human"*.

101. I accept that after Councillor Cantrell asked Mr Owen about the bumper sticker, Mr Owen said words to the effect:

> *"If a person chooses to follow non-human Acts, if they break the law, they lose their human rights"*

102. On one view, there may be no difference in the substance of or the meaning of the words used. I will deal with this possibility.

103. The meeting was open to the public and there were a number of people in the public gallery. Mr Owen's statements were, in these circumstances, a public act within s.4A and s.124A(1).

Incite

104. The witnesses called by Mr Owen each suggested that Mr Owen had been ambushed or set up by Councillor Cantrell and Mayor Venardos.

105. There is evidence of at least two factions within the Cooloola Shire Council. Mayor Venardos and Councillor Cantrell were members of one faction and Councillors Owen, Sachs and Jocumsen were members of another. There seems to have been some animosity between the two factions[12].

106. Mr Sachs gave evidence that when the question was asked by Councillor Cantrell he called a point of order because he could not see how the question was relevant to the general business of the Council[13]. The point of order was overruled by Mayor Venardos. Councillor Sachs believed that there was collusion between Councillor Cantrell and Mayor Venardos to allow the question to be asked[14]. I accept Mr Sachs' evidence.

107. Mr Gorrie also thought that Mr Owen had been ambushed at the meeting. In cross-examination, Mr Owen referred to an editorial written by Mr Gorrie about the incident and the following exchange then took place:

> *"And in here you mention that Achilles had his heel, councillor Owen had his mouth, you fell for a decoy and was ambushed?-- Yes. I felt so, yeah.*
>
> *Yes?-- I felt - I felt that you were trapped but I also felt you'd walked into it. Easy in hindsight and easy as a spectator to lecture you about what you should've said or done but there was no doubt that - I think I said - did I say something about hook, line and sinker there as well?"*[15]

108. Although the question did not have any relevance to the general business of the Council, the point of order taken by Mr Sachs was overruled. I find that when he was asked the question about the bumper sticker, Mr Owen was ambushed or trapped by his political opponents. Mr Owen then sought to explain or defend his views about homosexuality.

---

12 Transcript 131/10-30
13 Affidavit of Mr Sachs para 9, transcript 135/35, 143/25-30, 151/1-50
14 Transcript 144/40-43
15 Transcript 108/5-15

109. I have no doubt that Mr Owen's statements about homosexuals were deeply offensive to those who were the subject of them and to others who heard them or heard of them. His comments expressed hatred of and severe contempt for homosexuals.

110. However, I am not satisfied that his comments *incited* hatred of, serious contempt for or severe ridicule of homosexuals. An ordinary bystander, hearing the whole of the exchange, would have regarded Mr Owen as defending his personal views about homosexuals in circumstances where he had been caught by surprise. The making of the comments are in the category of mere conveyance of a hatred already held by the speaker. An ordinary bystander, would not, in the circumstances have regarded the comments as urging on or stimulating the bystander to hatred of, severe contempt for, or severe ridicule of homosexuals.

111. I find that Mr Owen did not contravene s.124A(1) on 23 August 2005 by making derogatory comments about homosexuals at the meeting of the Cooloola Shire Council.

112. It is unnecessary for me to consider whether s.124A(2) applies or to consider an argument raised by Mr Owen that his comments attract the protection of s.240 of the *Local Government Act* 1994.

THE THIRD ALLEGATION

A public act

113. The *Gympie Times* article entitled *"Owen's Anti-Gay Stance Stuns Council"* was accompanied by a sidebar entitled *"What the other councillors said"*[16]. Mayor Venardos was quoted as saying:

> *"My comment is that bumper sticker is there for everybody to see. I'm aghast. I believe we live in a tolerant society"*

16 Statement of Mr Gorrie Ex A

"We as Australians are a very tolerant people and I certainly distance myself from his remarks."

114. Deputy Mayor Col Chapman said, inter alia:

"We like to think it is a free country, so he can think what he likes".

115. Mr Owen provided a report to the Cooloola Shire Council. The report was published by the Council in the agenda for its meeting on 6 September 2005.

116. The following appeared in the agenda:

7/13	Report from Cr Ron Owen re Community Morals and Youth Protection

Re: Report from Cr Ron Owen re Community Morals and Youth Protection

From: Cr Ron Owens

File:

Date: Fax received on 30 August 2005

Re: What the other councillors said to GT 26 August 05:

Congratulations to councillor Chapman the Deputy Mayor.

I would like to congratulate the Deputy Mayor councillor Chapman for upholding the freedom of thought and speech in his statement to the Gympie Times on Friday the 26th August 2005. Stating 'Let him think the way he likes to think' and 'we like to think it's a free country, so he can think what he likes'.

Has the Mayor been wrongly quoted?

I cannot believe that the Mayor has been quoted correctly. I have always read that the Mayor is a deeply religious man. God-fearing and a conscientious member of the Greek Orthodox Church. Until reading these comments I was sure he was a straight minded person.

Surely the Mayor will ask the Gympie Times for a retraction as claiming that the Mayor made two statements advocating tolerance to Sodomite behaviour is beyond belief. The Mayor is not an 'Anything Goes', type of person, as an ex-policeman he would know that Sodomy is still a valid section of the Criminal Code. I am sure the Mayor would appreciate that the Christian Bible has guided our legal and moral philosophy for nearly 2000 thousand years, its inspiration and laws of moral behaviour has placed the Western Civilisation into world ascendancy. The Mayor would not wish to ignore the teachings of the Christian Bible such as to name two of many other verses,

"If a man also lie with mankind, as he lieth with a woman, both of them have committed an abomination: ***they shall surely be put to death****; their blood shall be upon them"*

Leviticus 20:13 KJV

"For this cause God gave them up unto vile affections: for even their woman did change that natural use into that which is against nature: and likewise also the men, leaving the natural use of the woman, burned their lust one toward another; men with men working that which is unseemly, and receiving in themselves that recompence of their error which was meet … Who knowing the judgment of God, that they which commit such things are worthy of death, not only do the same, but pave pleasure in them that do them." Romans 1:26-32.

"Sentence deleted on legal advice.

"The Mayor would always take a stand to defend the family, defend normal moral behaviour, and I am sure he will shortly be quoted correctly, warning for the breakdown of standards and ethics within our community. I was told by a person accused of looking at under aged porn on a computer that he had known the Mayor for over twenty years and went to the Mayor and asked him for a reference on his past character, as he was pleading guilty and needed a reference to assist him in sentencing and staying out of jail, the Mayor refused, giving reasons of his strong commitment to moral standards and the Christian way.

Sodomist's cannot reproduce, their only means of recruitment to their way of life is by preying on the

children of normal human beings, this drastically reduces their child's life expectancy. If we had lions and tigers or wild dogs stalking our children, mothers would fight to the death to protect their children. Tolerance on this issue is a perversion of family defence.

Fact or Fiction??

The sodomite magazine "Gay Pride" from http://www.australianspirit.org/page%20068.htm are quite proud of these figures (and even though a dubious source),

1. *73% of homosexual men surveyed had at some time had sex with boys 16 to 19 years or younger!*
2. *Homosexual teachers are 90 to 100 times more likely to be involved sexually with pupils!*
3. *Of 3,808 indecent assaults, 88.1% were homosexual offences against boys less than 16 years!*
4. *Homosexuals are fourteen times more likely to have syphilis!*
5. *Homosexuals are eight times more likely to have had hepatitis!*
6. *Homosexual males are 5,000 times more likely to have AIDS! (90% of all cases).*

I believe that this proves, that you should not allow sodomites anywhere near schools, scouts, churches or government, or railways in fact I cannot think of anywhere on this planet I could recommend them to.

For Council's consideration.

Recommendation: Cr Ron Owen

For Council's consideration" [17]

117. In his points of defence Mr Owen admits that he wrote the report and handed it to the chief executive officer of the Council[18]. He asserts that his act of providing the report to the chief executive officer was a private one and that it was the decision of the Council to make the report public by

17 Statement of Ms Bruce Ex B
18 Paragraphs 56 and 78 of the points of defence

including it in the agenda.

118. An examination of the remainder of the agenda shows that extracts taken from correspondence received were placed in italics in the agenda. I find that the report written by Mr Owen and handed to the chief executive officer contained the italicised words set out in paragraph 116.

119. Mr Sachs gave evidence that the agenda would be sent to the councillors prior to each meeting. He indicated that councillors could put an item on the agenda in a report form. This could be done by emailing or hand delivering a typed item to the chief executive officer[19]. Mr Sachs indicated that if a letter containing a question to another councillor were handed to the chief executive officer, it would be tabled in the agenda for the following meeting[20].

120. Mr Sachs also gave evidence that the agenda would be made available to whoever was in the public gallery on the morning of the Council meeting[21]. Ms Bruce stated that she obtained a copy of the agenda paper for the meeting of 6 September 2005 at the commencement of the meeting. I note that s.464(4) of the *Local Government Act* 1993 ("the LGA") requires a Council to make open for inspection a list of matters which are to be discussed at the Council meeting when the agenda is made available to Council.

121. The report written by Mr Owen ended with the words *"For Council's consideration"*. This indicates that Mr Owen wished to have his report considered by Council. The most natural and obvious way to have that report considered was by inclusion in the agenda.

122. There was evidence that Mr Owen attempted to read his report at the

19 Transcript 132/20-32
20 Transcript 133/40
21 Transcript 133/50-55

meeting of 6 September 2005, but was prevented by the Mayor from doing so[22]. This tends to confirm that Mr Owen's intention in handing the report to the chief executive officer was to have it published in the agenda so that he could read it during a Council meeting.

123. As I have already indicated, Mr Owen contended the provision of the report to the chief executive officer was a private act and the decision to publish the report in the agenda was one made by the Council, for which he was not responsible.

124. In *McGlade v Lightfoot* (2002) 124 FCR 106 the Federal Court considered whether a politician who consented to being interviewed by a journalist had caused his words to be communicated to the public. Carr J said:

> *"37 In my view, the question whether the respondent's act caused his words to be communicated to the public is one of fact which must be determined by applying common sense to the facts of the particular case: March v Stramare (E & MH) Pty Ltd (1991) 171 CLR 506 at 515.*
>
> *38 ... When Mr Kitney from the Australian Financial Review requested an interview, the respondent must have realised (and I so infer) that the interview had the purpose of obtaining his views on such matters as might be raised at the interview and that there was a reasonable likelihood that what he said would be published in the Australian Financial Review. Mr Kitney recorded the interview with the assent of the respondent. There is no evidence to suggest that the respondent asked that his comments be 'off the record'. ...*
>
> *40 However, on the facts of this matter I find that by the respondent's act he caused his words to be communicated to the public within the meaning of s 18C(2)(a). The respondent*

22 Transcript 35/28

> *deliberately and intentionally engaged in conduct, the natural consequence of which was the publication of his words. I infer that he intended that consequence, although it is not necessary to make that inference in order to find causation: Alphacell Ltd v Woodward [1972] AC 824 at 839. Accordingly, I find that when the respondent made the respondent's statements he did an act otherwise than in private."*

125. The reasoning of Carr J is apposite here. I find that Mr Owen wrote the report and handed it to the chief executive officer of the Council. The report was said to be "*For Council's consideration".* The natural and probable consequence was that the chief executive officer would cause the report to be published in the agenda. That was what in fact happened. I also find that Mr Owen intended that consequence.

126. The publication of the report in the agenda was a form of communication to the public.

127. In these circumstances, I am satisfied that Mr Owen engaged in a public act by writing and providing the report to the chief executive officer.

Incite

128. In the report Mr Owen quoted from Leviticus 20:13 and Romans 1:26-32 from the King James Version of the Bible. I have given serious consideration to the question of whether quoting from a version of the Bible widely accepted by many Christians from the time it was first published in 1611 may be regarded as inciting hatred or serious contempt for a relevant group and as coming within s.124A(1) of the Act. If it does, the same result would flow from publicly quoting parts of the Torah, the Koran and other religious texts.

129. I have concluded that although the source of a published statement may be relevant to the question of whether there has been incitement, the mere fact that the source is an ancient religious text such as the Bible, the Torah or the Koran does not of itself mean that there is no incitement of the relevant emotions. However, it may well be that giving a sermon or lecture or expressing a view consistent with the teachings of a religious text or illustrated by passages from such a text will attract protection of s.124A(2)(c).

130. That the operation of s.124A(1) cannot be excluded merely because the relevant statement is taken from a particular source is, in my view, reinforced by Nettle JA in *Catch the Fire Ministries Inc. v Islamic Council of Victoria Inc (supra)* at [36]:

> *"…. The question for the purposes of s 8 was whether what was said by Pastor Scot taken as a whole and in context was such as to incite hatred of or other relevant emotion towards Muslims on grounds of their religious beliefs. Whether his statements about the religious beliefs of Muslims were accurate or inaccurate or balanced or unbalanced was incapable of yielding an answer to the question of whether the statements incited hatred or other relevant emotion. Statements about the religious beliefs of a group of persons could be completely false and utterly unbalanced and yet do nothing to incite hatred of those who adhere to those beliefs. At the same time, statements about the religious beliefs of a group of persons could be wholly true and completely balanced and yet be almost certain to incite hatred of the group because of those beliefs. In any event, who is to say what is accurate or balanced about religious beliefs? In point of fact, the most that could ever be said is that a given point of view may diverge to a greater or lesser degree from generally accepted views on the subject. In my view it was calculated to lead to error for a secular tribunal to attempt to assess the theological propriety of what was asserted at the seminar."*

131. This passage emphasises that hatred may be incited regardless of the

truth or falsity of the statement. In my view, the same reasoning compels the view that publication of a statement may incite hatred regardless of whether the statement is taken from an ancient religious text, a disreputable modern publication or any other source.

132. The passage from *Leviticus* quoted by Mr Owen seems to indicate that if a man performs sexual acts with another man then they should both be put to death. On the face of it, the passage is not necessarily restricted to the act of sodomy.

133. The passage from *Romans* may refer only to sodomy. It seems to indicate that anyone who commits the act of sodomy or anyone who takes pleasure in being sodomised is worthy of, or deserves, death.

134. At times in the report Mr Owen refers to "sodomists" and at other times to "male homosexuals" and to "homosexuals". Although it is possible for a heterosexual man to engage in the act of sodomy, he seems to use the term *"sodomists"* to describe male homosexuals.

135. The paragraph of the report that begins *"Sodomist's* [sic] *cannot reproduce …"* indicates that male homosexuals are paedophiles. They are said to prey upon the children of heterosexuals. Homosexuals are equated with wild animals.

136. The report prepared by Mr Owen set out statistics that a magazine called *"Gay Pride"* is said to be proud of. Even though Mr Owen expressed doubt about the accuracy of the figures in the report, he still proceeded to set them out. The statistics assert that the vast majority of homosexual men have had sex with boys 16 – 19 years or younger. They indicate that homosexual teachers are much more likely to be involved sexually with pupils than heterosexuals. They suggest that the vast majority of indecent assaults are committed by homosexuals against boys younger than 16

years. They indicate that homosexuals are much more likely to have syphilis, hepatitis and AIDS.

137. At this stage of the enquiry, the truth or otherwise of the statements made by Mr Owen and of the statistics quoted by him are not relevant. The question is whether the statements made by Mr Owen were such as to incite hatred of or serious contempt for homosexuals.

138. The statements, the effect of which I have set out earlier, must be read in the context of the whole letter, including the statement that the Mayor advocating tolerance of homosexuality is beyond belief and the implication that any right minded person should condemn homosexuality. The statements made by Mr Owen go beyond merely expressing a personal view. The statements have an evangelical flavour, urging the reader to share or adopt the views expressed by Mr Owen.

139. In my opinion, an ordinary reader of the report would understand that he or she was being incited to hatred towards and serious contempt for homosexuals.

140. I find that the publication of the report incited hatred towards and serious contempt for homosexuals.

On the ground of sexuality

141. The statements I have described incited hatred for and severe contempt of homosexuals because they engage in sexual acts with members of the same sex and because Mr Owen ascribes paedophilic tendencies towards them. I find that Mr Owen's incitement was on the basis of the sexuality of homosexuals.

142. I note that the statements made by Mr Owen were substantially, but not

exclusively, directed towards male homosexuals. The quoted statistic that homosexual teachers are 90 to 100 times more likely to be involved sexually with pupils appears to refer to male and female homosexuals, as do the statements that homosexuals are 14 times more likely to have syphilis and 8 times more likely to have hepatitis.

Exemption

143. Mr Owen's comments at the Council meeting on 23 August 2005 were widely publicised by the article in the *Gympie Times* published two days later. A number of councillors publicly criticised Mr Owen. His conduct was also criticised in two letters written to the council and also published in the agenda for the meeting (although it is not clear when Mr Owen became aware of these letters). Certainly, something of a furore appears to have erupted as a result of Mr Owen's comments at the meeting.

144. In the report Mr Owen sought to attack the Mayor's comments and sought to justify his own views and to promote those views to other councillors and members of the public who might read them. I am prepared to infer, in these circumstances, that Mr Owen's publication of the report was *for* the purpose of public discussion and debate about the morality of homosexual conduct and health issues concerning such conduct.

145. Mr Owen did not give evidence that he held an honest belief in any of the relevant statements found in the report. He did not give evidence as to the source of the statistics he quoted and that he believed those statistics to be true. In fact, he described the source of his statistics as *"dubious"*. Mr Owen has not proved that he had an honest belief in the truth of the relevant statements contained in the report to the Council. I am not satisfied that he made the relevant statements in good faith, bearing in mind that he has the onus of proof on this issue.

146. The next issue is whether Mr Owen has proved that the relevant statements were made *reasonably* for the purpose of public discussion or debate or exposition of any matter.

147. The language used by Mr Owen was highly inflammatory. He chose to describe the alleged behaviour of homosexuals by using words like *"preying"* and *"stalking"* and he compared homosexuals to wild animals. He implied that all male homosexuals engage in paedophilia, an implication that is patently untrue. The veracity of the statistics quoted can only be judged by Mr Owen's description of the source as *"dubious"*. He made no attempt in the report to place the statistics in any context. For example, he asserted that of 3,808 indecent assaults, 88.1% were homosexual offences against boys less than 16 years, but did not indicate from what group the sample was taken. At first blush, Mr Owen appears to suggest that the statistics he quoted were published by a magazine called *"Gay Pride"* and is necessary to read Mr Owen's words closely to realise that he merely says that the magazine is *"proud"* of these figures, whatever that means.

148. I do not regard Mr Owen's use of passages from *Leviticus* and *Romans* as being an act done reasonably for the purpose in the public interest. The use of the quotations in the context was to advocate the idea that homosexuals do not deserve to live. The position might have been different if the quotations had been accompanied by more moderate language and a measured exposition of why Mr Owen regards homosexuals and homosexual acts as being immoral. The reasonableness of the quotations must be judged in the context of the document as a whole and I do not regard their use as being reasonable.

149. In my view, the hostile and inflammatory language used by Mr Owen, the patently false implication that all homosexuals are paedophiles and the use of statistics which were not placed in context even though the source

was regarded by Mr Owen as being dubious, all tell against the report being published reasonably for a purpose in the public interest.

150. I find that Mr Owen has not established that s.124A(2) applies in respect of the relevant statements contained in the report written by him.

Immunity

151. Mr Owen relied on s.240 of the LGA in respect of the report submitted to him by the Council. That section provides:

> *"240 Indemnity for councillors*
>
> *(1) A councillor does not incur civil liability for an act or omission done honestly and without negligence under this Act.*
>
> *(2) A liability that would, apart from this section, attach to a councillor attaches instead to the local government."*

152. The relevant act for the purpose of s.240 of the LGA must be causing the report to be published in the agenda.

153. In *Colbran v State of Queensland* [2007] 2 Qd R 235 at [34], Jerrard JA held that the ordinary meaning of the phrase *"acts or omissions done pursuant to the Act"* in a statute with a similar immunity provision is *"acts or omissions directly or expressly authorised or required by the terms of the Act"*.

154. Jerrard JA went on to say:

> *"**[35]** The High Court has consistently held for at least the last 50 years against construing an immunity granted when exercising power to take steps "under" an enactment, or an immunity granted when exercising powers conferred by an act or exercising the functions of a statutory body, to include an immunity for acts or*

things done or able to be done without any need for the exercise of a statutory power."

155. Later His Honour concluded:

> *"**[46]** With respect to those submissions, the decisions cited earlier reveal that the ordinary meaning of a statutory provision giving public officers immunity for acts done or omitted to be done "pursuant to" the statute, is that it describes acts or omissions which affect the rights and interests of others, done under or pursuant to an authority given by the statute; those being acts or omissions directly or expressly required or authorised by the Act. The expression does not describe acts or omissions which happen in the course of a consensual dealing and which therefore require no special or statutory authority. That construction accords too with the approach the High Court has taken in administrative law, in construing decisions made "under an enactment". In* Griffith University v. Tang *(2005) 221 C.L.R. 99, the joint judgment held that such a decision must be expressly or impliedly authorised or required by the enactment, and also itself confer, alter, or otherwise affect legal rights and obligations."*

156. In *Australian National Airlines Commission v Newman* (1987) 162 CLR 466, Brennan J said at 477:

> *"Freedom under the common law to engage in conduct requires no grant of statutory power to confirm it, and a limitation provision which affects liability for things done or purportedly done 'under' the statute does not affect liability for things which are and can be done without reliance on a statutory power to do them."*

157. Section 444 of the LGA (Reprint No. 9K) requires a local government to hold meetings. Section 464(4) envisages that an agenda for the meeting is to be made available to councillors. Section 465(5) contemplates that items arising after the agenda for the meeting is made available to councillors may be discussed with or dealt with at the meeting.

158. There is no provision in the LGA which directly or expressly authorises or requires a councillor to cause material to be placed on the agenda for a meeting of a council in order to raise it. Further, an item can be placed on an agenda for a meeting by a councillor without reliance on any statutory power to do so. Indeed, the agenda for the meeting of 6 September 2005 included a number of letters and items raised by members of the public.

159. For these reasons, I do not think that Mr Owen's act of causing the report to be published in the agenda by handing the report to the Chief Executive Officer of the council was done *"under"* the LGA.

160. In addition, I am not satisfied, on the balance of probabilities, that Mr Owen did the act honestly. The onus of proof on this issue lies with Mr Owen. In *Benning v Wong* (1969) 122 CLR 249, Barwick CJ said at 381:

> *"…a person who has to justify his otherwise tortious act by an assertion of statutory authority must show as part of this justification in defence that he did the authorised act skilfully and carefully …"*

161. I do not have the benefit of Mr Owen's evidence on this issue and I am not prepared to infer honesty from the content of the document or circumstances in which it came to be published in the agenda or any other evidence before me.

THE FOURTH ALLEGATION

162. On 7, 8, 27 and 29 September 2005, extracts of interviews between a reporter and Mr Owen were broadcast on television by Channel 7 as part of its news programme. Ms Bruce watched each of the news programmes and recorded them[23].

23 Statement of Ms Bruce para 12

163. In their written submissions, the complainants relied only upon statements made by Mr Owen on 7 September 2005 as constituting a breach of s.124A of the Act.

164. The statements made by Mr Owen broadcast on 7 September 2005 were the following:

> *"'I think it's a very perverse lifestyle'.*
>
> *"Can our health services cope with the sodomites' epidemic?"*
>
> *"As you have prisoners who break the law lose certain rights and I do believe homosexuals lose rights".*
>
> *"I think that they know they are going to die very shortly. I mean AIDS is pretty prevalent."*

165. Mr Owen was interviewed by a Channel 7 reporter and the interview was filmed. There is nothing about Mr Owen's demeanour to suggest that Mr Owen was an unwilling participant in the interview. He must have realised that parts of the interview, particularly his more inflammatory comments, would be or were likely to be broadcast on television.

166. I find that Mr Owen deliberately made the comments that were broadcast to the reporter, the natural consequence of which was that they were broadcast on television. I find that by participating in the interview broadcast on 7 September 2005, he engaged in a public act.

Incite

167. Mr Owen submitted that only excerpts of the interview with the Channel 7 reporter were broadcast, so that the context in which the comments were made could not be judged and that no assessment of the meaning of the comments can therefore be made. It is true that regard must usually be had to the whole of a publication in order to understand the meaning of

particular words contained in it.

168. However, Mr Owen was in the best position to adduce evidence as to what else may have been said between he and the reporter. He did not do so. Therefore, I am left only with the statements of Mr Owen that were broadcast.

169. I do take into account that the words spoken by Mr Owen in the news item may not all have been connected. There may have been other comments in between. I do not think that the words can necessarily be regarded as a single statement.

170. In assessing the context, I can infer that Mr Owen must have known that the more strident and inflammatory remarks made by him were likely to attract publicity. That was certainly the case with the bumper sticker and the subsequent comments he made at the council meeting.

171. The first statement made by Mr Owen and complained of by the complainants is:

> *"I think it's a very perverse lifestyle."*

172. Having regard to the comments made by Mr Owen at the Council meeting and in the report to the Council and to the other statements broadcasts by Channel 7, it is clear that Mr Owen was referring to the lifestyles of homosexuals

173. I am not satisfied that this comment goes beyond the mere conveyance of a personal opinion. The Act does not necessarily prohibit the broadcasting of personal opinions in a public forum. I do not think that the statement can be said to capable of urging on others to hatred towards or to have severe contempt for homosexuals.

174. Mr Owen also posed the question *"Can our health services cope with the sodomites' epidemic?"* The question contained somewhat inflammatory language and assumed that there is an epidemic amongst male homosexuals, presumably AIDS. Nevertheless, it was posed as a question and any factual assertion contained within it was again a mere conveyance of a personal opinion. I do not think that the requirement of incitement has been established in relation to this comment.

175. The next statement made by Mr Owen was *"As you have prisoners who break the law lose certain rights and I do believe homosexuals lose rights"*. By making this comment Mr Owen was equating homosexuals with prisoners who had broken the law. The implication is that homosexuals are criminals. Mr Owen implied that homosexuality is against the law, or that it ought to be. He indicated that homosexuals should lose rights. His comments applied to all homosexuals, not merely some.

176. Although Mr Owen's statement used the words *"I believe"*, his comment taken as a whole goes beyond mere conveyance of a personal opinion. The language used is inflammatory and derogatory. It has the same evangelical air that his report to the Council had. The context is quite different to the use of similar words during the Council meeting.

177. In my opinion, an ordinary member of the public watching the television broadcast would regard these words as urging them to hate and have serious contempt for homosexuals.

178. The final statement made by Mr Owen broadcast on 7 September 2005 that the complainants rely upon was:

> *"I think they know they are going to die very shortly. I mean AIDS is pretty prevalent."*

179. I do not think this statement goes as far as suggesting that all

homosexuals have AIDS or that only homosexuals have AIDS. In today's society, I think that people who have AIDS tend to be regarded by most, although not all, ordinary members of the community with sympathy. Although it seems unlikely that Mr Owen intended to solicit sympathy for AIDS sufferers, the test is an objective one and, in my view, these comments did not incite hatred or serious contempt for homosexuals.

On the ground of sexuality

180. I have found that Mr Owen's statement that *"As you have prisoners who break the law lose certain rights and I do believe that homosexuals lose rights"* ("the relevant statement") incited hatred towards and severe contempt for homosexuals.

181. It is apparent that Mr Owen incited hatred and serious contempt for homosexuals on the basis of their sexuality.

Exemption

182. I will again proceed on the basis that Mr Owen should be taken as asserting that the relevant statement attracts s.124A(2)(c) on the basis that the statement was done reasonably and in good faith in the public interest. In particular, he may be taken to assert that his comments were made for public discussion or debate or exposition of the morality of the sexual activity of homosexuals.

183. As to the question of whether Mr Owen's statement was made *for* such purposes, his case again suffers from the absence of evidence from him on this point. Mr Owen certainly publicly discussed his asserted views about the morality of homosexuality. However, I think that the expressions *"public discussion"* and *"public debate"* indicate that the purpose must be to promote discussion or debate amongst others. There is a range of

possibilities as to why Mr Owen might have wanted to publicly discuss his own views. These possibilities include self-promotion or obtaining political advantage, as well as having a desire to promote public discussion or debate or to expose issues about morality. Each of these possibilities is merely a matter of speculation in the absence of evidence.

184. I would not, in any event, be prepared to find that Mr Owen made the statement in good faith. The suggestion that all homosexuals break the law is patently wrong. It is not, of course, against the law, to be homosexual or to engage in homosexual sexual activity. Even if Mr Owen is taken to be referring only to sodomy, the general offence of having "*carnal knowledge of any person against the order of nature"* under s.208 of the *Criminal Code* was removed in 1991. It remains an offence under s.208 for a person to sodomise, or to permit himself or herself to be sodomised by, a person under the age of 18 years or an intellectually impaired person, but these provisions apply to heterosexuals as well as homosexuals.

185. It was factually wrong for Mr Owen to suggest that homosexuals as a class break the law. I would not be prepared to find that he held an honest belief in the truth of what he said in the absence of evidence given by him.

186. I would not accept that Mr Owen made his statement reasonably for the purpose of public discussion or debate or exposition of the morality of homosexuality. It was not reasonable to suggest that all homosexuals break the law.

187. I find that the exemption under s.124A (2) does not apply to the relevant statement made by Mr Owen and broadcast on Channel 7 on 7 September 2005.

THE FIFTH ALLEGATION

188. The complainants allege that Mr Owen published a leaflet entitled *"What's going on in council?"* ("the leaflet")[24] and had copies distributed to a number of households in his electoral area.

189. The leaflet bears Mr Owen's picture at the top of it. It has his name and address beside the picture. It is written in the first person. It purports to give Mr Owen's perspective of what occurred at the council meetings on 23 August and 6 September 2005 and purports to set out Mr Owen's views concerning homosexuality.

190. Mr Owen admits in his points of defence that he wrote the words included in the leaflet[25].

191. Mr Owen does not admit that he caused the leaflet to be distributed, alleging that he wrote the words in private, but that others published it and distributed it.

192. The title and content of the document indicate that it was written by Mr Owen with the intention that it should be published. The title *"What's going on in council?"*, together with Mr Owen's picture and name suggests that it was intended to provide information to residents about Mr Owen's views about Council business. The content gives Mr Owen's perspective about what happened at the meetings of 23 August and 6 September 2005. In relation to the latter meeting he says *"This is what I wanted to say but was silenced each time I spoke"*. The leaflet promotes the views about homosexuality that Mr Owen had expressed in other public forums, such as at the council meeting, in the materials he had published in the council's agenda and in the television interview of 7 September 2005. These matters suggest that the newsletter was written for the purpose of

24 Statement of Ms Bruce Ex C
25 Points of defence paragraph 79

publication and distribution.

193. In Mr Owen's points of defence he admits that 6,500 copies of the leaflet were *"delivered to Gympie's urban mailboxes, to counter the mis-information printed in the Gympie Times"*[26]. It is his view, therefore, that the distribution of the leaflet was of benefit to him. There is nothing to suggest that the distribution of the leaflet would benefit any person other than Mr Owen.

194. In circumstances where Mr Owen has admitted that he wrote the words appearing in leaflet and where the leaflet bears his photograph and name and contains his views and it was distributed for a purpose that would benefit Mr Owen, I am prepared to infer that he caused the leaflet to be published and distributed. In reaching this conclusion I take into account the absence of any evidence to the contrary from Mr Owen.

195. I find that Mr Owen engaged in a public act by causing the leaflet to be published and distributed to a number of households in Gympie.

Incite

196. The complainants complain of a cartoon printed on the leaflet. The cartoon bears the words *"New Orleans"* and *"Gay Mardi Gras"* and *"Cancelled Due to Katrina"*. The cartoon contains drawings of a flooded city, the Grim Reaper and a number of people dancing. It also depicts caricatures of George W Bush and Mayor Vernados in a boat called *"CSC Flood Boat"*. In the cartoon, the caricatures of Mr Bush and Mr Vernados engage in the following exchange:

> *"*Bush*: 'Thanks for the help Mick. Where are you from again?'*
>
> Venardos*: 'Gympie, Australia George!'*

26 Points of defence paragraph 96

Bush: *'What state is that?'*

Vernardos: *'Same state as here!'"*

197. The complainants allege that the cartoon is capable of inciting severe ridicule of or serious contempt for homosexuals.

198. The cartoon appears to be a reference to the story of Noah's Ark in which God sent a flood to destroy the people and animals of the earth because of the corruption of the people, saving only those on the ark made by Noah[27]. The complainants say that the cartoon implies that the flooding in New Orleans due to Hurricane Katrina occurred because of the presence of homosexuals and the celebration of homosexuality in the Gay Mardi Gras and that the same thing could happen in Gympie because of a presence of homosexuals. The Grim Reaper is depicted and the complainants say that image is synonymous with AIDS awareness advertisements of the 1980s and is designed to cause Gympie residents to fear the consequences of tolerating homosexuality. After spending some time trying to understand the cartoon, I accept that it may bear the meaning placed upon it by the complainants.

199. However, I think that any ordinary resident of Gympie who could be bothered to look closely enough at the cartoon to try to decipher its meaning would not take it seriously. I doubt that any ordinary resident would regard it as inciting the resident to serious contempt for or severe ridicule of homosexuals. In my view, it is a fairly trivial attempt at a joke and does not contravene s.124A(1).

200. The text in the leaflet accuses the *Gympie Times* of creating a hoax in its reporting of events at the meeting of 23 August 2005.

27 *Genesis* 6:17-20

201. Then comes the following:

> *"I expressed my personal beliefs to honestly answer his question. There are no minutes but I used words to the effect of, 'I believe, that if a person chooses to partake in un Human activities, that they lose their Human Rights.' In the same way that if a person breaks the law and is convicted of murder the State removes their rights and freedom of movement. I said that, 'We all have a right to die, (no one lives forever) but if these people follow these practices they die a lot sooner, (Aids, HIV, Hepatitis) they have the right to die sooner than others'. 'It is an Illness they Choose'."*

202. In this passage Mr Owen seeks to give his version of what he said at the meeting, implying that the *Gympie Times* did not report the correct version or give the full version. The words Mr Owen claims to have used are consistent with the versions given by Mr Sachs and Mr Jocumsen. They are different to the version given in the article by the *Gympie Times* in that, as I accept, Mr Owen did not say *"That's probably because I don't class the gays as being human"*.

203. I have already found that the statements made by Mr Owen during the Council meeting on 23 August 2005, taken in the context that he was trapped into answering a question on the spur of the moment, did no more than convey a personal view and did not amount to incitement for purpose of s.124A(1). Mr Owen set out in the leaflet what he correctly thought was a more accurate statement of what he actually said in the meeting. I do not think that his words would be viewed by an ordinary member of the public in Gympie as going further than attempting to correct what he thought was inaccurate reporting of his comments and conveying his personal views.

204. The leaflet goes on to criticise the *Gympie Times* and Mayor Venardos. It embarks upon a defence of Mr Owen's right to free speech and to publicly speak about Christian philosophy. No complaint is made about these

aspects of the leaflet.

205. The leaflet then contains the following:

> *"At 31 December 2003 the number of HIV cases was up to 23,306. In 2003 sexually transmitted infections (STI) were the most commonly reported communicable diseases, accounting for 37% (37,815) of all notifications. (ABS).*
>
> *Do we ignore the massive impact on our nations Health Services due to that chosen pursuits of sodomist?*
>
> *How do we, as councillors comfort one of the 5000 people awaiting hospital treatment on the Sunshine Coast, or a person dying for the use of a renal dialysis machine?*
>
> *Can our Health Services cope with the Sodomites epidemic and as it is a voluntary pursuit should they get preference over the general population who have not brought illness to themselves?*
>
> *Should councillors be charged for considering or debating these moral and health issues, who then, is going to judge you, for what you think? Who will be next?"*

206. This passage contends that HIV and other sexually transmitted diseases are prevalent and, although posed in the form of questions, suggests that the health system is being overburdened by the voluntary sexual conduct of homosexuals. It also indicates that councillors should not be *"charged"* for expressing their views about these matters.

207. At this stage of the enquiry, the question being considered is whether these comments incited hatred towards or serious contempt for homosexuals and the accuracy or otherwise of the comments is irrelevant. Having regard to the form and content of these comments, I do not think that the test is met. I think that an ordinary member of the community receiving the leaflet in Gympie would regard it as posing concerns held by

the author, rather than urging the reader to hate or have serious contempt for homosexuals generally.

208. The next relevant part of the leaflet is as follows:

> *"Will you go the Prison of Politically Correctness as gladly as Ron Owen? As councillors, how do we comfort the grieving Mother of the slightly retarded Nineteen year old son, who has moved in with two, thirty year old sodomites?*
>
> *What do we say, the law protects them? Consenting Adults? Anything goes? What people do in their own homes is their own business?*
>
> *This week a Brisbane Teacher was convicted of sexually abusing school children.*
>
> *As councillors how do we console the victim's parents? Do we tell them that we should be tolerant, that we must not discriminate, that we should encourage perverse sexual behaviour?"*

209. This passage suggests that Mr Owen should not be persecuted by the law for expressing his views about acts that he regards as immoral. He illustrates those acts he considers immoral by giving two examples. In my view, an ordinary member of the public would regard this passage as Mr Owen defending himself against criticism of his views and as defending his right to express his views, rather than inciting hatred towards or serious contempt for homosexuals.

210. In reaching these conclusions about the relevant passages in the leaflet, I have not overlooked the necessity to consider the leaflet as a whole. Although the issue is not free from doubt, I conclude that the publication of the leaflet did not incite hatred towards, serious contempt for or severe ridicule of homosexuals.

211. It is unnecessary for me to consider the application of s.124A(2) in relation

to the publication of the leaflet.

THE SIXTH ALLEGATION

A public act

212. The complainants allege that in mid to late 2005 Mr Owen caused a letter written by him to be published on the website http://www.lockstockandbarrel.org entitled *"No human rights for non humans"* which included a number of statements that vilified homosexuals.

213. Ms Bruce stated that she conducted a search on the internet which led her to the site identified above. At that site she accessed the following material located under the heading *"Letters to the editor"*[28].

> *"No Human Rights for Non Humans*
>
> *Ref, To Sexual Preferences, by 'name withheld', is obviously too ashamed have it printed. Not only because it identifies it as a Sodomist, but because of the mass of conjecture and inaccuracies that the letter perpetuates.*
>
> *The Laws of Nature bind men absolutely, although they have never made a friendship or settled on an agreement of what to do or what not to do. We are naturally induced to seek and remain by our consent in a community, and if a man breaks with the Law of Nature and seeks a life not fit for the dignity of his community, he has to either leave that community, or submit to the punishment of that community. Any person who commits acts that no ignorant animal would commit, declares war on his community, and therefore may be destroyed by any or all of that community, in the same way that the community can rightfully destroy wild tigers, crocodiles, or germs and viruses that endanger its security!*
>
> *What reliable survey does 'name withheld', draw its conjecture that almost half of youth suicide in our area are due to 'young people who are born sexually oriented towards people of the same sex'?. This is straight out of*

28 Statement of Ms Bruce Ex E

a Walt Disney imaginary world. There can be no genetic reason why any human is born into the world with that perversion implanted in them, if there was any evidence, common-sense would prove it was false. If it was the case, then as people of the same sex cannot reproduce themselves the genetic history would have died out many thousands of years ago.

That is probably one of the good reasons why the death sentence is proscribed for the perpetrators, and any who condone them, in the Old and New Testament of the Bible. In those early days they were much smarter than the apathetic near brain dead community of today, as they knew that the only way perverts get new recruits, is to woo or pay them. They woo them by making it acceptable and common place. They cannot have their own children, so they steal others. This makes normal parents very angry. They have spent a good part of their own lives educating their children to be useful members of society, and when their children are ill used and perverted, when they are told by their local teacher, churchman, pop singer, or radio talk back creeps that it quite okay to do things that uneducated dogs and cats cannot and won't do, then they become very confused. Some leave home, some commit suicide, but not because they had a defect when they were born, but because we have allowed creatures to prey on our young, who are just as savage as those tiger's earlier discussed.

I too was originally left handed, and was encouraged to use the right hand for writing, I was always grateful as it was always a pleasure to have the ability to change hands while boxing, shooting, or playing table tennis. Persecution and mistreatment for left-handers is another fairy story to disguise the way creatures of your ilk have persecuted and mistreated the young people that you induce to prostitute themselves, before you return them to the streets. You have no thoughts for their families, only your next depravity. They are not young gays sleeping 'rough' on the streets, they were once normal family kids that your kind have seduced, and then rejected. You re-orientated them.

Your nonsense, regarding 'utterly terrifyingly and soul destroying alone' in comparison with people suffering from racism, is proved false by the premise that they cannot choose if they are being born black, white, or

> *yellow, but you can. If you want to stop being terrifyingly and soul destroyingly alone, all you have to do is stop thinking about your deprived sexual habits.*
>
> *Your condemnation of parents calling them the abusers, when it is you that is preying on their young, is despicable. If there is tons of guilt to be placed on anyone's head it has to be on the perpetrator. Can you blame a mother for protecting her family from a predator like you?*
>
> *You resort to insulting animals as well as mothers, when you say that 'no other animal which turns on their young with such viciousness' over what you call a 'perfectly normal variation in sexuality'. Animals have the bravery to fight to the death to preserve their young, and we can learn from their tenacity. Animals do not normally engage in depraved acts, but when they realise they have made a mistake, they back off. It is only when human trash involve them in depravities does the word 'beastiality' come into being. Without the unnatural human, there is no such thing as 'bestiality'.*
>
> *Keep writing to these Senators, unfortunately it won't make any difference, but at least the letters make them feel bad when they still vote on party lines, and know that they are going to lose votes. These days, evil politicians make evil legislation to protect the evil. It is not real law, but it will condemn families, Mothers, Fathers and Grandparents, for protecting and guiding. Under the new Sexual Discrimination Act, they are the wrong doers, they will be penalised. Families will be destroyed, giving fiendish delight to the likes of 'Name withheld'. 'Name withheld' will inspire more opposition to the Sexual Discrimination Bill, as more natural people will realise the hate that the homosexuals have for the family, and any Christian/Jew/Moslem with back bone. (Yes, it does incur the death sentence in the Koran too).*
>
> *I will not withhold my name. I will wear the 'slings and arrows of outrageous fortune' that the homosexual Mafia who took over the Parliamentary benches and the bureaucracy of our State government may throw at me, as 'Battle Honours'.*
>
> *Ron Owen"*

214. The letter purports to be written by *"Ron Owen"*. In his points of defence,

Mr Owen admits that he wrote the letter, but contends that there is no evidence that he published it on the website[29].

215. The complainants argue that there is evidence of an association between Mr Owen and the website at which the letter is found. The URL for that website is www.lockstockandbarel.org. There is evidence that the website www.owenguns.com is related to the gun shop Owen Guns and that Mr Owen has an office at Owen Guns and appears to be the proprietor of that business.

216. Ms Bruce gave evidence that:

> *"They're one site, they have the same IP address. They use two separate URL's to point to the one IP"*[30].

217. I understand Ms Bruce to say that the URLs www.lockstockandbarel.org and www.owenguns.com originate from the same IP address. She did not elaborate, however, upon how she established that this was the case or as to any expertise in information technology. Therefore, I am not prepared to act upon this aspect of her evidence. The evidence is too tenuous to allow the conclusion contended for by the complainants that Mr Owen controls the website www.lockstockandbarel.org.

218. However, it is clear that Mr Owen wrote the letter and that the contents of the letter are consistent with the views about homosexuals that he has espoused in public on other occasions. I think it is fair to say that Mr Owen has been energetic in his attempts to disseminate to the public his views about the morality of homosexuals and their sexual activity.

219. There is no evidence from Mr Owen that it was not he who caused the letter to be published on the website, or that there was some way in which the person who controls the website might have got hold of the letter and

29 Points of defence paragraph 49
30 Transcript 41/15-18

published it without Mr Owen's consent.

220. Given that Mr Owen has admitted to writing the letter and that the publication and dissemination of his views about homosexuals has been something that he has encouraged on other occasions, I am prepared to draw the inference that Mr Owen caused the letter to be placed on the website www.lockstockandbarel.org.

221. Ms Bruce, as a member of the public, was able to access the letter on the website. In *Jones v Toben* (2002) 71 ALD 629 at [73] – [75], Branson J held that the placing of material on a website which is not password protected is an act of publication which is not done in private. I conclude that Mr Owen engaged in a public act by causing the letter to be published on the website www.lockstockandbarel.org.

Incite

222. Among the many relevant imputations that may be drawn from the letter published by Mr Owen are the following:

(a) homosexuals are less than human;

(b) any member of the community is entitled to destroy homosexuals;

(c) homosexuals endanger the security of the community in the same way that wild tigers, crocodiles, germs or viruses do;

(d) homosexuals steal children;

(e) homosexuals ill use and pervert children;

(f) homosexuals prey upon children;

(g) homosexuals have less sense of morality than animals.

223. The section of the public likely to access the www.lockstockandbarel.org website is people interested in guns, which includes a broad cross-section of the community including sporting shooters, gun club members and

hunters.

224. Much of the language used in the letter is strong and inflammatory, even extreme. For example, the letter is headed *"No human rights for non-humans"*. Some of the messages it conveys, such as advocating the right of members of the community to destroy homosexuals, are also extreme. Any ordinary member of the public reading the letter on the website would conclude that he or she was being exhorted or urged to feel hatred and severe contempt towards homosexuals.

225. I find that Mr Owen incited severe hatred for and serious contempt for the homosexuals by causing his letter to be published on the website www.lockstockandbarel.org.

On the grounds of sexuality

226. Having regard to the content of the letter, I have no doubt that Mr Owen's incitement was on the basis of the sexuality of homosexuals, including their alleged paedophiliac tendencies.

Exemption

227. I am not prepared to find that Mr Owen has shown that his publication of the letter was *for* the purpose of public discussion or debate or exposition of any matter. His failure to give evidence as to his purpose tells against him in this regard.

228. Mr Owen has not shown that he had an honest belief in the contents of his letter. I am not satisfied that he has proved good faith for the purposes of s.124A(2).

229. The letter published by Mr Owen is certainly not reasonable for the purpose of public discussion, debate or exposition of any matter, including

the morality of homosexuals and their sexual activity. The language used is extreme. It paints all homosexuals as being paedophiles when that is patently not the case. The message that it is acceptable for a member of the community to kill homosexuals is far beyond the bounds of what any reasonable person would consider acceptable for the purpose of promoting public discussion about or debate about or exposition of the morality of homosexuality.

230. I find that Mr Owen has not established that s.124A(2) applies in respect of the publication of his letter on the website www.lockstockandbarel.org.

STANDING

231. Mr Owen contended that none of the complainants have the standing to make this complaint.

232. The first complainant, Richelle Menzies, gave evidence that she is a lesbian who had resided in the Gympie area for 13 years until 2007[31].

233. The second complainant, Tina Coutts, gave evidence that she is a lesbian. She has resided in the Gympie area for 11 years[32].

234. The evidence of the fourth complainant, Suzanne Turner, was that she is a female homosexual who has lived in the Gympie area for over 3 years[33].

235. The expression "lesbian" describes a homosexual woman, that is, a woman who is sexually attracted only to other women.

236. Section 134(1)(a) provides, relevantly, that "*a person who was subjected to the alleged contravention*" may make a complaint. The language of that provision is perhaps more apt to describe a person subjected to

31 Statement of Ms Menzies para 2
32 Statement of Ms Coutts para 2
33 Statement of Ms Turner para 2

discrimination than a person who is the subject of vilification.

237. However, the Explanatory Notes for clause 25 of the *Discrimination Law Amendment Bill 2002* confirm that *"individuals within an affected group"* were considered by the legislature as being able to make a complaint of vilification.

238. I have found that such of Mr Owen's public acts as contravened s.124A(1) were done *"on the ground of …sexuality."* The group of people the acts were directed against is homosexuals. Each of Ms Menzies, Ms Coutts and Ms Turner is a homosexual woman.

239. The bumper sticker referred to "gays". That expression, although used more commonly to describe homosexual men, also refers, in my opinion, to homosexual women.

240. The parts of Mr Owen's report to the council that infringed s.124A (1) referred both to male homosexuals and homosexuals generally, as did the letter published on the website.

241. The part of the interview given by Mr Owen and broadcast on 7 September 2005 referred to homosexuals, rather than being restricted to male homosexuals.

242. In these circumstances, I find that each of Ms Menzies, Ms Coutts and Ms Turner is a person subjected to each of the contraventions. Each of them was entitled to make a complaint and has standing to maintain this proceeding.

243. Ms Bruce is in a different position. She described herself as bisexual[34]. She explained that she could be attracted to both women and men[35].

34 Statement of Ms Bruce para 3
35 Transcript 31/9

I take the attraction she referred to as being sexual attraction.

244. The definition of "sexuality" in the Dictionary for the Act distinguishes between heterosexuality, homosexuality and bisexuality. As I have already indicated homosexuals are, in my opinion, persons who are sexually attracted only to members of the same sex. Bisexuals can be attracted to members of either sex.

245. The public acts that I have found to infringe s.124A of the Act incited hatred of, serious contempt for or severe ridicule of, homosexuals. They made no explicit reference to bisexuals. Mr Owen did use the expression "sodomists", but that expression is capable of describing heterosexuals, homosexuals and bisexuals. In the context, I think Mr Owen used that expression to refer to male homosexuals.

246. Ms Bruce gave evidence, which I accept, that she considers herself to be a part of the homosexual community of Gympie and that she felt offended and disturbed by Mr Owen's statements[36]. However, that evidence does not answer the question of whether she falls within the category of persons described in s.134(1)(a) of the Act.

247. I find that Ms Bruce does not come within the group, homosexuals, which Mr Owen's public acts incited the relevant emotions for. She is not "*a person who was subjected to the alleged contravention*" within s.134(1)(a). Her complaint must therefore be dismissed.

248. Mr Owen also argued that each of the complaints must be dismissed because s.194 of the Act was not complied with. Section 194 provides that:

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

36 Statement of Ms Bruce paras 3, 5, 9, 13, 15

complaint."

249. On 1 February 2007 I made a direction that the complainants file and serve submissions concerning whether the complaint should proceed as a representative complaint. The complainants did not file and serve such submissions, but indicated that they did not wish to make submissions as to whether the complaint should proceed as a representative complaint.

250. There was no suggestion by Mr Owen that the matter ought to proceed as a representative complaint. No evidence was placed before me by either party to establish the matters required by s.195 that could allow the matter to proceed as representative complaint.

251. On 29 March 2007 I made an order that:

> *"The complaints are to be dealt with individually, rather than as one representative complaint"*.

The order was made orally on that date in the presence of the parties and confirmed by letter from the acting registrar of the Tribunal dated 3 April 2007.

252. I therefore reject Mr Owen's submission that the complaint must be dismissed on the basis of what he asserts is a failure to comply with s.194.

CONSTITUTIONAL ARGUMENTS

253. Mr Owen argued that there are four constitutional reasons why the Act or parts of it are invalid. These are:

(a) the Tribunal is exercising judicial power and is a Court, it fails to meet the requirement of *"independence and impartiality"* and the provisions establishing it are contrary to Chapter III of the Commonwealth Constitution and are invalid: c.f. *Kable v. Director of Public*

Prosecutions (NSW) (1996) 189 CLR 51;

(b) s.124A of the Act is inconsistent with the protection of freedom of communication provided by the Commonwealth Constitution and is invalid;

(c) s.124A is inconsistent with s.116 of the Commonwealth Constitution, which protects freedom of religion, and is invalid;

(d) the *Anti-Discrimination Amendment Act* 2001, which amended s.124A(1) to apply to vilification on the ground of sexuality, is invalid because certain changes to the office of the Governor had previously been made without a referendum having been conducted, in breach of s.53 of the *Queensland Constitution Act* 1867.

254. The first three of these arguments assert that s.124A of the Act or the parts of the Act that confer power upon the Tribunal are invalid because of their inconsistency with the Commonwealth Constitution.

255. In *Attorney-General v. 2UE Sydney Pty Ltd* (2006) 236 ALR 385, the NSW Court of Appeal decided that a State tribunal is not entitled to consider the Constitutional validity of State legislation in circumstances where an order of the tribunal obtains judicial force upon registration in a Court. I note that Spigelman CJ at [88] described the issue as being virtually devoid of practical significance where there is a right of appeal on a question of law to a Court invested with federal jurisdiction.

256. Section 212(1) of the Act provides that an order of the Anti-Discrimination Tribunal may be enforced by filing a copy of it with a Court of competent jurisdiction. Under s.212(3), the order is then enforceable as if were an order of the Court.

257. I consider that I am not permitted to decide upon the first three of the

constitutional arguments raised by Mr Owen.

258. The fourth argument is in a different category because it does not raise any question of invalidity by reason of inconsistency with the Commonwealth Constitution. Rather, the argument is that the Act that introduced s.124A(1) is invalid because of a failure to follow a procedure required under the *Queensland Constitution Act*.

259. The fourth argument, as best as I can understand it, is the same argument described and rejected by the Court of Appeal in *Clampett v. Hill* [2007] QCA 394 in the following way:

> *"**[13]** The appellant's argument runs as follows. The Australia Acts (Request) Act 1985 (Qld), an Act of the Queensland Parliament, which preceded the Australia Act 1986 (UK) of the Parliament of the United Kingdom, was not preceded by a referendum. That was contrary to the requirements of s 53 of the Queensland Constitution Act 1867 (Qld) which, because the Queensland Act anticipated alterations to the office of Governor, necessitated a precedent referendum.*
>
> ***[14]** The respective Queensland Courts were duly constituted by the Queensland Parliament when it passed their constituting legislation. The commissions given to judicial officers, under the hand of the Governor, are valid because the authority of the Governor was unaffected by the legislation on which the appellant relies. The argument he seeks to advance has been agitated previously in this Court by persons without legal representation, and rejected. See Sharples v Arnison & Ors [2001] QCA 518;* Skyring v Electoral Commission of Queensland & Anor *[2001] QSC 080 and* Lohe v Gunter *[2003] QSC 150."*

260. **I therefore reject Mr Owen's fourth argument.**

PARTICULARISATION OF COMPLAINT

261. **Mr Owen contended, as I understood the argument, that the**

complainants should not be permitted to rely upon any matter of fact or law beyond those specifically articulated in the points of claim[37]. Mr Owen complains, for example, that the complainants' written submissions rely upon evidence given by witnesses that he called, that the complainants ask the Tribunal to draw inferences from evidence led to establish facts pleaded in the points of claim and that the complainants rely upon previous decisions of Courts and Tribunals not mentioned in the points of claim.

262. **This submission stems from a misconception about the purpose of pleadings, which is described in *Halsbury's Laws of Australia* [at 325-3210] in the following way:**

> ***"****The function of the pleadings is to define the issues to be tried. In the course of that process each party is given notice of the case to be made by the opposing party at the hearing. In a case in which there are pleadings*http://www.lexisnexis.com/au/legal/frame.do?tokenKey=rsh-23.909294.4018458078&target=results_DocumentContent&reloadEntirePage=true&rand=1221368096457&returnToKey=20_T4556280325&parent=docview - 325-3210.3#325-3210.3 *therefore, each party is, in general, bound by them, and may not call evidence relating to an issue that is not raised by the pleadings unless and until they are amended."*

263. Traditionally, facts are pleaded, not the evidence by which those facts are to be proved, and matters of law are not pleaded.

264. The complainants are entitled in their submissions to describe the evidence they rely upon, the inferences and conclusions they say should be drawn and the legal propositions they rely upon to establish their complaint. They are also entitled to make submissions upon the matters they perceive Mr Owen to be relying upon to defend the complaints. Mr Owen's contentions about the complainants' alleged departures from the points of claim are, in my opinion, misconceived.

---

37 **Respondent's written submissions pages 1-67**

RELIEF

265. The forms of relief that the Tribunal may give for a contravention of the Act are limited to those set out in s.209.

266. Under s.209(1)(c), the Tribunal may make an order requiring the respondent to do specified things to *"redress loss or damage suffered by the complainant".* The expression "damage" is defined in s.209(6) to include the *"offence, embarrassment, humiliation, and intimidation suffered by the person"*.

267. The evidence given by the complainants about the effects upon them of the acts that I have found to contravene the Act was slight.

268. Ms Menzies gave evidence that she was told about the bumper sticker and Mr Owen's comments at the Council meeting of 23 August 2005 and was offended that an elected public official could make such comments. She was informed about the report included in the Council's agenda and was shocked and alarmed[38].

269. Ms Coutts regarded the bumper sticker as offensive and disturbing. She was upset by Mr Owen's comments broadcast on Channel 7[39].

270. Ms Turner felt hurt and angered when she read the *Gympie Times* article that described the content of the bumper sticker and Mr Owen's comments at the Council meeting[40].

271. I have found that Mr Owen did not contravene the Act by making his statements at the Council meeting or by publishing the leaflet or by making all but one of the statements relied upon by the complainants broadcast on Channel 7. To the extent that the complainants suffered offence,

38 Statement of Ms Menzies paras 7, 10
39 Statement of Ms Coutts paras 3, 9
40 Statement of Ms Turner para 4

embarrassment, humiliation and intimidation as a result of those statements, that cannot be taken into account in assessing any compensation.

272. I find that each of Ms Menzies, Ms Coutts and Ms Turner experienced offence as a result of the display of the bumper sticker. I find that Ms Menzies was also offended by the content of the report made by Mr Owen to the Council. Ms Coutts was offended by Mr Owen's comments on Channel 7, which I take to include the comment that I have found infringed the Act.

273. I do not think there is evidence that these complainants suffered embarrassment, humiliation and intimidation as a result of Mr Owen's contraventions. The emotions they experienced seem to have been more in the nature of offence and anger.

274. There was no evidence concerning Ms Menzies', Ms Coutts' or Ms Turner's emotional response to the letter posted on the website.

275. It must have been anticipated by Mr Owen that the display of the bumper sticker on his vehicle would attract attention, particularly given his high profile in the Gympie area as a councillor. There can be no doubt that the inclusion of his report in the agenda was bound to attract public attention after the furore following the Council meeting of 23 August 2005. I find that Mr Owen gave the interview to the Channel 7 journalist knowing that at least some aspects of it were likely to be broadcast on Channel 7.

276. In these circumstances, I think that Ms Menzies, Ms Coutts and Ms Turner suffered damage and should be awarded compensation even though they did not directly see the bumper sticker. Similarly, Ms Menzies should be awarded compensation for the offence she took after hearing about the contents of the Council report, even though it does not appear that she

actually read the report. Ms Coutts should also be awarded compensation for the offence she experienced as a result of seeing a video tape with the offending comment broadcast on Channel 7 even though she did not see the original broadcast.

277. The complainants submitted that there should be an award of $10,000 for each complainant. Having regard to the very limited evidence about the effect on each complainant about the infringing acts, the fact that not all of the acts complained of infringed the Act and that none of the successful complainants alleged that she was offended by each of the infringing acts, that amount is too high.

278. In my opinion, the appropriate award of compensation for each of Ms Menzies and Ms Coutts is $5,000. For Ms Turner, there will be an award of $2,500, bearing in mind that she claimed only to be offended by the bumper sticker.

279. There is some controversy in the authorities as to whether an apology should be ordered in vilification cases. I think there should be a limited form of apology, made to acknowledge a finding of contravention of the Act, rather than as a statement of regret. I apply the reasoning in *Burns v. 2UE Radio Pty Ltd (No.2)* [2005] NSWADT 24 at [25] – [27] that the members of the public that have been incited to hatred, serious contempt or severe ridicule should be told by the respondent that such conduct was unlawful.

280. I will order, pursuant to s.209(1)(c) and (e), that Mr Owen cause the following statement to be published in the *Gympie Times* newspaper within 45 days of the date of publication of these reasons:

> *"The Anti-Discrimination Tribunal Queensland has found that in 2005 I contravened the Anti-Discrimination Act 1991 by:*

- *displaying a bumper sticker on a vehicle;*
- *publishing a report to the Cooloola Shire Council;*
- *making a comment in an interview broadcast on television;*
- *causing a letter to be published on a website;*

that incited hatred, serious contempt for or severe ridicule of homosexuals.

My conduct caused offence to members of the homosexual community in Gympie.

I acknowledge that my conduct was unlawful."

281. I will ask the parties to provide written submissions about the costs of the proceeding. The complainants should file and serve their submissions within 14 days after the date these reasons are published, the respondent should file and serve his submissions within a further 14 days and any submissions in reply should be filed and served within a further 7 days. If any party wishes to have an oral hearing on the question of costs, that should be indicated in the written submissions and I will consider the request.

Darryl Rangiah
Member
Anti-Discrimination Tribunal Queensland