Civil and Administrative Tribunal
New South Wales

Medium Neutral Citation:	**Burns v Sunol [2018] NSWCATAD 10**
Hearing dates:	14 July 2017, 6 September 2017
Date of orders:	10 January 2018
Decision date:	10 January 2018
Jurisdiction:	Administrative and Equal Opportunity Division
Before:	A Britton (Principal Member) J Newman (General Member)
Decision:	1. The complaint alleging unlawful vilification in relation to Statement 1, is substantiated. 2. The balance of the complaint alleging unlawful vilification is dismissed. 3. The matter is listed for a directions hearing on 16 January 2018 at 9:30am.
Catchwords:	HUMAN RIGHTS — homosexual vilification — meaning of "public act" — whether the publication had the capacity to incite hatred towards, serious contempt for, homosexual persons HUMAN RIGHTS — victimisation — whether person was subjected to "a detriment" PROCEDURAL FAIRNESS — bias — apprehended bias
Legislation Cited:	Anti-Discrimination Act 1977 (NSW) Civil and Administrative Tribunal Act 2013 (NSW) Criminal Code Act 1995 (Cth)
Cases Cited:	British American Tobacco Australia Services Ltd v Laurie (2011) 242 CLR 283; [2011] HCA 2 Burns v Dye [2002] NSWADT 32 Burns v Sunol [2012] NSWADT 246 Burns v Sunol [2014] NSWCATAD 192 Burns v Sunol [2015] NSWCATAD 178 Burns v Sunol [2016] NSWCATAD 74 Burns v Sunol [2016] NSWCATAD 81

	Burns v Sunol [2017] NSWCATAD 215 Burns v Sunol (No 2) [2017] NSWCATAD 236 Commissioner of Police, NSW Police v Mooney (No 3) (EOD) [2004] NSWADTAP 22 Ebner v Official Trustee in Bankruptcy (2000) 205 CLR 337; [2000] HCA 63 Isbester v Knox City Council (2015) 255 CLR 135; [2015] HCA 20 Jones v Trad [2013] NSWCA 389 Kazak v John Fairfax Publications Limited [1995] EOC 92-701 Kazak v John Fairfax Publications Limited (EOD) [2000] NSWADT 77 Lee v Cha & Ors [2008] NSWCA 13 Margan v Manias [2014] NSWCATAP 16 Margan v Manias [2015] NSWCA 388 Michael Wilson & Partners v Nicholls (2011) 244 CLR 427; [2011] HCA 48 Nicholls & Nicholls v Director-General Department of Education and Training (No 2) [2009] NSWADTAP 20 ResMed Limited v Australian Manufacturing Workers Union [2015] FCAFC 106; FCR 152 Shaikh v Commissioner, NSW Fire Brigades (1996) EOC 92-808 Sivananthan v Commissioner of Police [2001] NSWADT 44 South Western Sydney Area Health Services v Edmonds [2007] NSWCA 16 Sunol v Burns [2015] NSWCATAP 207 Sunol v Collier and anor (No 2) [2012] NSWCA 44 Webb v The Queen (1994) 181 CLR 41; [1994] HCA 30
Category:	Principal judgment
Parties:	Garry Burns (Applicant) John Sunol (Respondent)
Representation:	In Person (Applicant) In Person (Respondent)
File Number(s):	2017/00100865

REASONS FOR DECISION

1 In a YouTube video posted on his website John Sunol states that Garry Burns is a “child molesting faggot”. Mr Burns complained to the President of the Anti-Discrimination Board (the **President**), alleging that by posting the video on the internet he was victimised and vilified by Mr Sunol (the **Complaint**).

2

The *Anti-Discrimination Act* 1977 (NSW) ('**the Act**') makes it unlawful for a person, by a "public act", to incite hatred towards, serious contempt for, or severe ridicule of a person on the ground that the person(s) is, or is thought to be, homosexual: s49ZT. In addition, the Act makes it unlawful for a person (the **discriminator**) to victimise another person on the ground that that among other things that person brought proceedings under the Act against the discriminator.

3 On 14 July 2017, after conducting a hearing, we reserved our decision in relation to the Complaint. While the decision was reserved, Mr Burns made an application seeking that the members of this Tribunal (Principal Member (PM) Britton and General Member (GM) Newman) disqualify themselves from determining the Complaint on the ground of apprehended bias (the **recusal application**). He asserted that a recent decision made by this Tribunal was "incongruous and discombobulated rubbish".

4 For the reasons that follow we refused the recusal application and proceeded to determine the Complaint.

Background to the recusal application

5 Mr Burns has lodged with the President a large number of complaints about Mr Sunol. Mr Sunol estimates the number to be 74. All involve allegations of homosexual vilification. Some also include allegations of victimisation. A number of these complaints have been determined by the Tribunal presently constituted (PM Britton and GM Newman):*Burns v Sunol* [2017] NSWCATAD 215; *Burns v Sunol (No 2)* [2017] NSWCATAD 236. Others have been determined by differently constituted tribunals of which PM Britton and GM Newman were members: see for example, *Burns v Sunol* [2014] NSWCATAD 192; *Burns v Sunol* [2015] NSWCATAD 178; *Burns v Sunol* [2016] NSWCATAD 74; *Burns v Sunol* [2016] NSWCATAD 81. Some complaints have been determined by Tribunals of which PM Britton and GM Newman were not members: see for example, *Burns v Sunol* [2014] NSWCATAD 62;

6 In our most recent decision, one of the two vilification complaints made by Mr Burns we found substantiated in part and dismissed the second vilification complaint and the victimisation complaint: *Burns v Sunol (No 2)* [2017] NSWCATAD 236 (the **2017 Decision**).

The recusal application

7 Shortly after handing down the 2017 Decision and while the decision in relation to the Complaint the subject of these proceedings was reserved, Mr Burns wrote to the Registrar of NCAT describing the 2017 Decision as "incongruous and discombobulated rubbish" and stating "[T]hese two individuals [PM Britton and GM Newman] should not sit on any cases where I'm the Applicant from this day forth".

8 A hearing was held to determine the recusal application and, in addition, we invited both parties to provide written submissions.

9

Mr Burns attached to the recusal application copies of material downloaded from the internet said to be written by Luke McKee. The material contains disparaging comments about a number of NCAT members, including PM Britton and GM Newman. Mr McKee writes that PM Britton "[L]ets tranny hitchhiker killer out of jail and runs around a woman prison with AIDS AND RAPE!" Among other things the material describes PM Britton as a "pro-paedophile NCAT NSW judge" and asserts that she and another NCAT member "[R]uled it a crime for Australian citizens to link YouTube videos … to the work of Robert Oscar Lopez". Mr Lopez is apparently an academic and an opponent of same sex marriage in the USA.

10 In addition, the downloaded material contains a commentary provided by Mr McKee about the 2017 Decision:

> Read this … where Gary Burns lost in court against John Sunol was declared a member of the "Sparkles the Pony" paedophile ring.

11 Immediately following that comment is an extract taken from the reasons for the 2017 Decision. To put Mr McKee's commentary in context. we set out below the whole section of the reasons, from which the extract was taken:

> **Did the offending comment have the capacity to incite hatred towards or serious contempt of Mr Burns on the ground of homosexuality?**
>
> 29 Mr Burns must establish that at least one of the "real", "genuine" or "true" reasons for the offending passage having the capacity to incite hatred towards or serious contempt of him was on the ground of his homosexuality: Jones v Trad [2013] NSWCA 389 at [98].
>
> 30. The offending comment reads :
>
> This shows you what Gary Boylover Burns is up to and it's not everything but enough to get you started on who he is normalizing pedophilia. Search "Sparkles the pony" to see why he IS a paedophile.
>
> (spelling uncorrected)
>
> 31. The offending comment, in particular the statement that Mr Burns is "a paedophile", undoubtedly had the capacity to incite hatred towards, contempt of Mr Burns. It implies that Mr Burns engaged in or approves of child sexual abuse. There are few stronger taboos in our society and such behaviour is both condemned on moral grounds and is criminalised by our penal laws. However, for the reasons that follow, we are not satisfied that the offending comment had the capacity to incite either hatred towards, or contempt for Mr Burns on the ground of Mr Burns' sexuality.
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> 32. The 25 comments posted on the subject website, following the article posted by McKee, involved a colourful and sometimes abusive exchange between Mr McKee and "Jacob" about a wide range of topics. These include the purported link between homosexuality and paedophilia.
>
> 33. Mr Burns did not explain in either the initiating complaint or Points of Claim filed in these proceedings, the basis for his contention that the offending comment has the capacity to incite one or both of the relevant emotions on the ground of his sexuality. He concedes that the offending comment does not expressly draw a connection between the allegation that he is a paedophile — an allegation he vehemently denies — and his sexuality. Nor does he argue that the reader would understand the term "boy lover" to mean a homosexual male who is a paedophile. He argues that the writer seeks to draw a link the link between his sexuality and the paedophilia allegation by the reference to "Sparkles the Pony". He claims that the statement "Search 'Sparkles the Pony' to see why [Mr Burns] IS a pedophile" constitutes an invitation to the reader to make inquiries about Sparkles the Pony, which if made, are likely to result in a connection being drawn between his sexuality and the paedophilia allegation.

> 34 This argument cannot be accepted. First, the question for determination is whether the communication of the offending comment has the capacity to incite one or more of the relevant emotions on the claimed ground, not whether when read together with other unspecified information, the communication of the offending comment had that capacity.
>
> 35 Second, the available evidence does not support a finding that the ordinary reader would have understood "Sparkles the Pony" to be a reference to homosexuals who are paedophiles. Relying on an extract purportedly downloaded from the "Sparkles the Pony" Facebook, Mr Sunol contends that "Sparkles the Pony" is "a network of homosexual men" who are paedophiles. Mr Burns agrees "Sparkles the Pony" is a reference to a network of paedophiles, but not homosexual paedophiles.
>
> 36 But more to the point, the issue is not what the parties understand to be the meaning conveyed but what the ordinary reader of the subject website is likely to have understood by the reference to "Sparkles the Pony". Mr Burns has produced no evidence which might assist us to determine this question. There is no support for the contention that it is a matter of common knowledge, to which we may have regard, that Sparkles the Pony is a reference to a paedophile ring, or a paedophile ring whose members are homosexual. (See s144 of the Evidence Act 1995 (NSW))
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> 37 By inviting the reader to search the term "Sparkles the Pony", Mr McKee may have been seeking to persuade the reader that Mr Burns is a paedophile because he is a homosexual. Mr McKee makes no secret of his belief that male homosexuals have a predisposition to paedophilia. However, the issue we must determine is not what Mr McKee meant by the reference to "Sparkles the Pony", but what meaning was likely to have been conveyed to the ordinary reader.
>
> 38 On the available material we are not satisfied that Mr Burns' sexuality was at least one of the real reasons for the offending passage having the capacity to incite hatred towards, contempt of Mr Burns.
>
> 39 Accordingly, the first vilification complaint must be dismissed.

12 Following the above passage, Mr McKee wrote: "The judges in this case know I have dirt on them now and they are playing ball for me now". Mr McKee goes on to make disparaging remarks about a member of GM Newman's family and the decision made by a NSW magistrate (whom Mr McKee mistakenly believes to be PM Britton) to release from custody a "tranny hitch hiker killer".

13 In written submissions, Mr Burns in effect contends that the only logical explanation for the 2017 Decision to dismiss part of the Complaint was that we were intimidated by the material published by Mr McKee and his boasts that they "are playing ball for me now". In oral submissions, Mr Burns retracted that submission and stated the reason he made the recusal application was out of concern for the reputation and safety of PM Britton and GM Newman and "respect for the Bench". At the hearing, when questioned, he confirmed that the application was made on the ground of apprehended not actual bias.

Mr Sunol's response

14 Mr Sunol opposes the recusal application, which he describes as a "desperate attempt" by Mr Burns to "forestall a feared adverse decision". He asserted that Mr Burns experienced a "psychological breakdown" during the 14 July 2017 hearing, when the Tribunal prevented him from "controlling the agenda". He wrote that the reason Mr Burns made the application was that he was concerned that the upcoming decision may not be favourable to him. He set out at some length the history of "vexatious" complaints made by Mr Burns.

15 We note that in *Burns v Sunol* [2017] NSWCATAD 215 we dismissed a recusal application brought by Mr Sunol on the grounds of prejudgement and conflict of interest.

Apprehended bias: the governing principles

16 The Tribunal is obliged to afford each party procedural fairness: s 38(2) of the *Civil and Administrative Tribunal Act 2013* (NSW) (the **NCAT Act**). As part of that obligation, we must determine the Complaint itself and any issue that might arise in its determination, without bias or the appearance of bias.

17 Apprehended bias arises where a "fair-minded lay observer might reasonably apprehend that the [decision-maker] might not bring an impartial and unprejudiced mind to the resolution of the question the [decision-maker] is required to decide": *Ebner v Official Trustee in Bankruptcy* (2000) 205 CLR 337; [2000] HCA 63 (**Ebner**) at [6]; *Michael Wilson & Partners v Nicholls* (2011) 244 CLR 427; [2011] HCA 48 (**Michael Wilson & Partners**) at [31]. The test is an objective one.

18 The application of the apprehension of bias principle involves a two-step process. The first is the identification of what it is said might lead the decision-maker to decide a case other than on its legal and factual merits. The second is an articulation of the logical connection between that matter and the feared deviation from the course of deciding the case on its merits: *Ebner* at [8] and *Michael Wilson & Partners* at [63]. As the High Court explained in Michael Wilson & Partners:

> First, it requires the identification of what it is said might lead the judge to decide a case other than on its legal and factual merits. And second, there must be an articulation of the logical connection between that matter and the feared deviation from the course of deciding the case on its merits. The plurality in Ebner went on to say[15] that "[t]he bare assertion that a judge (or juror) has an 'interest' in litigation, or an interest in a party to it, will be of no assistance until the nature of the interest, and the asserted connection with the possibility of departure from impartial decision making, is articulated.

19 In the recent decision of *Isbester v Knox City Council* (2015) 255 CLR 135; [2015] HCA 20 (**Isbester**), the High Court re-affirmed that the question of whether a fair-minded lay observer might reasonably apprehend a lack of impartiality with respect to the decision to be made, is largely a factual one, albeit one which it is necessary to consider the legal, statutory and factual contexts in which the decision is made. The fair-minded lay observer is taken to be aware of "nature of the decision and the context in which it was made as well as to have knowledge of the circumstances leading to the decision": *Isbester* at [23]. As the NSW Court of Appeal pointed out in *Lee v Cha & Ors* [2008] NSWCA 13 at [40], the application of the test requires an evaluative judgment as to "what the 'fair minded lay observer' can be taken to know".

20 As the rule is concerned with the appearance of bias, and not the actuality, it is the perception of the bystander that provides the yardstick: *British American Tobacco Australia Services Ltd v Laurie* (2011) 242 CLR 283; [2011] HCA 2 at 333 [139]. The

reasonable apprehension of bias test rests on the reasonable lay observer's perception not a party's fear of an adverse result: *ResMed Limited v Australian Manufacturing Workers Union* [2015] FCAFC 106; FCR 152 at [33].

What is the 'matter' alleged to lead to an apprehension of bias?

21 Mr Burns asserts that an apprehension of bias arises due to the possibility that the members of this Tribunal have an interest in the outcome of the proceedings: see *Webb v The Queen* [1994] HCA 30; (1994) 181 CLR 41 at 74 per Deane J.; That interest, it is claimed by Mr Burns, is an interest in protecting ourselves from future attacks and threats being made on social media of the type which have been in this case. The subject of the recusal application.

22 According to Mr Burns, the published attacks about us and the implied threats directed at our respective families may lead the Tribunal to decide the case other than on its legal and factual merits. He contends that, because of these attacks and implied threats, the ordinary reasonable observer might reasonably apprehend that consciously or otherwise we might make a decision to appease Mr McKee.

Might the fair-minded lay observer reasonably apprehend that the Tribunal might not bring an impartial and unprejudiced mind to the determination of the Complaint?

23 To answer this question, we must first identify the material facts that the hypothetical fair-minded lay observer could be taken to know. In addition to having read the reasons for the 2017 Decision, the fair-minded lay observer would probably be taken to know:

(1) That there is a long history of disputation between Mr Burns and Messrs Sunol and McKee;

(2) The Tribunal recently dismissed two of three complaints made by Mr Burns (the **2017 Decision**);

(3) Mr McKee has published material on the internet attacking members of this Tribunal and suggesting that they were now "playing ball for him". [It was only when Mr Burns drew this material to our attention that we became aware of the material published by Mr McKee, on which the recusal application is based];

(4) Mr McKee publishes widely on the internet on many topics. Some of the material relating to homosexuality might be regarded by a reasonable person as intemperate, ill-informed and evangelistic. Some might be regarded as vulgar, if not obscene;

(5) Members of NCAT are subject to a Code of Conduct which requires that they make unbiased and impartial decisions;

(6) Each member of this Tribunal is an experienced Tribunal member and has worked in a range of jurisdictions;

(7) On occasion, members of the judiciary and Tribunals and/or their decisions are publicly criticised by the media, members of the public and the parties. On occasion, these attacks are highly emotive and vitriolic and may constitute contempt. The commentary on social media can be especially intemperate.

24 The question posed is whether, having knowledge of these facts and having read the reasons for the 2017 Decision, a fair-minded lay observer might reasonably apprehend that we might not bring an impartial mind to the determination of the Complaint itself, or

any issue that might arise in relation to the Complaint.

25 In our view the reasonable lay observer is likely to conclude that Tribunal members would not be immune from criticism and attacks of the type made by Mr McKee. In addition, the reasonable lay observer is likely to conclude that Tribunal members would be concerned about veiled threats directed at members of their families. While the reasonable lay observer would be aware that in discharging the obligations of office, Tribunal members are bound to act with impartiality and integrity, they would not necessarily assume that all Tribunal members would always comply with this obligation. On the other hand, we think it unlikely that the observer would assume that attacks on individual members and their decisions would influence their decisions. We think it likely that the reasonable lay observer would assume that from time to time Tribunal members are likely to be, or witness their colleagues to be, the target of colourful criticism from those who disagree with their decisions. Further, we think it unlikely that having read the 2017 Decision that the reasonable lay observer would conclude that the decision to dismiss two of the three complaints lacked a proper basis or as more colourfully described by Mr Burns “incongruous and discombobulated rubbish”.

26 French CJ observed in *British American Tobacco Australia Services Limited v Laurie* at [3] that the test of apprehended bias “is not always easy to apply for it may involve questions of degree and particular circumstances may strike different minds in different ways”. Having regard to those difficulties, we are not persuaded that the reasonable lay observer might apprehend that we might not bring an impartial mind to the determination of the Complaint.

27 The judiciary and members of tribunals should not lightly accede to applications of this nature. In our view, the reasonable lay observer would expect that disappointed litigants, or their supporters, might sometimes express themselves intemperately but that judicial officers and tribunal members would have broad shoulders. Bad behaviour, insults and even contempt on the part of litigants and others should never be rewarded. The reasonable lay observer, in our view, would expect that the members of this Tribunal have integrity and sufficient moral fortitude to withstand abuse and insults and the means to deal with them appropriately without being intimidated or coerced into appeasing the badly behaved or contemptuous.

28 We are not satisfied that a reasonable, objective lay observer, in possession of all relevant facts, might come to a view that this Tribunal might deviate from dealing with facts and the law appropriately. The recusal application is dismissed.

The substantive complaint: vilification allegation

29 Mr Burns alleges that comments made by Mr Sunol in a YouTube video posted on Mr Sunol’s website amount to unlawful homosexual vilification.

30 Entitled, “Message to Gary Richard Burns over my $55,000 Debt”, the video is just over five minutes in length. In the video, Mr Sunol voices his displeasure with Mr Burns’ pursuit of complaints against him made under the the Act and, in particular his recent

attempts to enforce a judgement debt said to be in the sum of $55,000. After stating that the complaints of homosexual vilification brought by Mr Burns were based on "hyped up rubbish" and a "bunch of lies" and should be thrown out, Mr Sunol goes on to say:

> I ain't paying a child molesting faggot $50,000 for a bunch of cases, which on balance of probabilities are substantiated on fraud, false lies, which I refuse to recognise … I refuse to pay and all the other child molesting faggots, that's all they are child molesting fags … they will decide they have been vilified... they will want money as well … they will put me through more court cases.

31 Mr Sunol goes on to claim that Mr Burns' actions will result in him being declared bankrupt. Looking directly to camera he says "I totally refuse to apologise … I totally refuse to pay you anything … I'm going hard line". The video ends with Mr Sunol saying:

> On another issue it's [the complaints made by Mr Burns] nothing to do with same sex marriage. It's all politics. Blatant cold hard Marxist politics …

32 Mr Sunol devotes a significant proportion of the video to outlining the steps he has taken to protect his assets in the event he is again declared bankrupt. Apparently Mr Sunol has recently been discharged from bankruptcy.

33 The trigger for making and posting the video was the commencement of recovery proceedings by Mr Burns in respect of money orders made by NCAT and one of its predecessor tribunals, the Administrative Decisions Tribunal (the **ADT**) under the Anti-Discrimination Act. In October 2016, Mr Burns filed a certificate issued by the NCAT Registrar, certifying that Mr Sunol owed him $49,500 in the NSW Local Court. As a result a judgement debt in the amount of $55,000 (which apparently includes a component for interest) was created: s78(3) of the NCAT Act. In late 2016, a sheriff of the NSW Local Court arrived at Mr Sunol's home seeking to enforce the judgement.

34 According to Mr Sunol, when he made and posted the video on his website he was "in a state of anger … justified anger as [Mr Burns] was attacking me, making my innocent wife upset, and I reacted the way that has got me in trouble big time".

Statutory framework: homosexual vilification

35 Section 49ZT of the Act makes it unlawful for a person to engage in a "public act" which amounts to homosexual vilification:

> **49ZT Homosexual vilification unlawful**
>
> (1) It is unlawful for a person, by a public act, to incite hatred towards, serious contempt for, or severe ridicule of, a person or group of persons on the ground of the homosexuality of the person or members of the group.
>
> (2) Nothing in this section renders unlawful:
>
> (a) a fair report of a public act referred to in subsection (1), or
>
> (b) a communication or the distribution or dissemination of any matter on an occasion that would be subject to a defence of absolute privilege (whether under the Defamation Act 2005 or otherwise) in proceedings for defamation, or

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

36 A "public act" is defined by s 49ZS of the Act to include:

> (a) any form of communication to the public, including speaking, writing, printing, displaying notices, broadcasting, telecasting, screening and playing of tapes or other recorded material, and
>
> ...

37 Section 49Z of the Act states:

> A reference in this Part to a person's homosexuality includes a reference to the person's being thought to be a homosexual person, whether he or she is in fact a homosexual person or not.

Relevant legal principles

38 The element of incitement in the unlawful vilification provisions of the Act has been the subject of extensive consideration by the NSW Court of Appeal, most recently in *Sunol v Collier and anor (No 2)* [2012] NSWCA 44 (**Sunol**), *Jones v Trad* [2013] NSWCA 389 (**Jones**) and *Margan v Manias* [2015] NSWCA 388 (**Margan**). The following statement of principles may be distilled from those authorities:

> (1) An objective test must be used to determine whether a public act had the capacity to incite hatred towards, serious contempt for, or serious ridicule of a person or group on the ground of their homosexuality (the relevant reaction): Jones at [53]
>
> (2) The word "incite" in s 49ZT means "to rouse, to stimulate, to urge, to spur on, to stir up or to animate and covers conduct involving commands, requests, proposals, actions or encouragement": Sunol at [41]; Margan at [11]
>
> (3) For a contravention of s 49ZT it is not necessary to establish that anyone was incited: Sunol at [41]), or there was an intention to incite (Sunol at [41]; Margan at [12]
>
> (4) It is not sufficient that the impugned public act conveys hatred towards, serious contempt for, or serious ridicule of homosexual persons. It must be capable of inciting those reactions in an ordinary member (or ordinary reasonable member) of the class to whom the act is directed/the audience or likely audience: Sunol at [41]
>
> (5) The assessment of the capacity of the public act to incite the relevant reaction must be undertaken by reference to the context in which it occurs: Sunol at [61]
>
> (6) In making that assessment, the particular class to whom the act is directed, the audience or likely audience must be identified and considered: Sunol at [34]; [61]; Jones at [62], [63].

39 NCAT and the ADT have consistently held that the words "hatred" and "serious contempt" in the vilification provisions of the Act are to be given their ordinary meaning and have applied the following definitions:

> 'hatred' means 'intense dislike; detestation' (Macquarie), 'a feeling of hostility or strong aversion towards a person or thing; active and violent dislike' (Oxford).
>
> 'serious' means 'important, grave' (Oxford); 'weighty, important' (Macquarie).
>
> 'contempt' means 'the action of scorning or despising, the mental attitude in which something or someone is considered as worthless or of little account'(Oxford); the feeling with which one regards anything considered mean, vile, or worthless (Macquarie).

40 See *Burns v Dye* [2002] NSWADT 32 at [23]; *Kazak v John Fairfax Publications Limited [2000] NSWADT 77* at [40]; *Burns v Sunol* [2012] NSWADT 246 at [17].

Issues for determination

41 The following key issues arise for determination:

(1) Whether the communication of the statement referring to Mr Burns as "a child molesting faggot" (**Statement 1**) had the capacity to incite hatred towards, or serious contempt for, Mr Burns.

(2) Whether the communication of the statement "homosexuals are child molesting faggots" (**Statement 2**) had the capacity to incite hatred towards, or serious contempt for, homosexual men.

(3) If the answer to Question 1 is yes, whether one or more of those emotions was incited on the ground that Mr Burns is, or is thought to be, homosexual.

(4) If the answer to Question 2 is yes, whether one or more of those emotions was incited on "the ground of" the homosexuality of the members of the group.

42 Mr Burns bears the burden of proving, on the balance of probabilities, each of the above matters.

Does Statement 1 have the capacity to incite hatred towards, or serious contempt for, Mr Burns?

The audience

43 The question to be determined is whether the Statement had the capacity to incite either of those emotions. To answer that question, we must first identify the composition of the likely audience of the video. There is scant evidence about the number and types of people who viewed the video. In addition, there is no evidence that Statement 1 incited any person to experience hatred towards, or serious contempt for, Mr Burns.

44 Mr Sunol estimates that the number of people who visit his website is in "the thousands". He claims that a wide range of people visit his website, including journalists and politicians together with individuals who share his views about same sex marriage and related issues and "trolls" aligned to Mr Burns. He says he bases these claims on "statistics". Mr Burns, on other hand, claims the audience should be taken to be simply "internet users at large".

45 It almost goes without saying that the task of identifying the composition of the video's likely audience is a difficult, if not impossible, task. Mr Sunol's claims about the number and type of people who visit his website is unsupported. Despite the views of the parties that the video has generated great interest on social media, it is possible that it has only been viewed by Messrs Burns and Sunol, members of this Tribunal and the police officers who prepared statements for subsequent criminal proceedings involving Mr Sunol. (In April 2017 Mr Sunol was convicted of the offence of "using a carriage service to menace, harass or cause offence" under s 474.17 of the *Criminal Code Act 1995* (Cth). The offence related to Mr Sunol's actions in posting the video on his website together with various documents relating to Mr Burns.) Equally, it is possible, as the parties believe, that Mr Sunol's website attracts numerous visitors, including like-minded people and people who do not share his views.

46

Doing the best we can on the available material, we find that the audience was not a homogenous group but probably held a range of views about homosexuality, some favourable, others unfavourable. In the absence of better evidence, we are unable to assume that the likely audience had any knowledge of the history of the long-running dispute between Messrs Burns and Sunol.

47 Adopting the approach taken by Bathurst CJ in *Sunol* at [34], we will evaluate the capacity of Statement 1 to incite, by reference to its effect on the notional "ordinary member" of the likely audience to whom the act is directed, namely visitors to Mr Sunol's website.

Consideration

48 Determining whether Statement 1 had the capacity to incite hatred towards, or serious contempt for, Mr Burns in the "ordinary member" of the audience requires consideration of the context in which the statement was made. While the video commences with light-hearted banter about the weather, Mr Sunol quickly moves to set out his views in a forthright manner about the history of complaints made by Mr Burns. He claims those complaints were based on falsehoods and motivated by avarice. It is in that context that he states that Mr Burns is a "child molesting faggot".

49 While there can be no argument that the insult "child molesting faggot" is highly offensive, it does not necessarily follow that it had the capacity to incite one of the relevant emotions towards Mr Burns in the ordinary member of the audience. We think it improbable that the ordinary member of the audience would be incited to hatred towards or serious contempt for Mr Burns, merely because they heard Mr Sunol insult Mr Burns in that way. In our view, an ordinary member of the public, hearing or seeing another person being insulted, without further information is likely to take a neutral stance rather than assuming the truth of an insult. Further information may alter that position but the mere offering an insult without further context seems to us to be insufficient to incite hatred of the target of the abuse in the ordinary bystander.

50 However, considered in context Statement 1 goes further than a mere insult or a throwaway line and carries the imputation that Mr Burns is a paedophile. That is implicit in the statement — "I ain't paying a child molesting faggot $50,000 …— and is reinforced by the repeated use of the label "child molesting faggot" both in relation to Mr Burns and homosexual men. The use of this technique emphasises and highlights the label.

51 We find it to be more likely than not that Statement 1 had the capacity to incite hatred towards and serious contempt for Mr Burns in the ordinary member of the audience.

On the grounds of homosexuality?

52 Mr Burns must establish that at least one of the "real", "genuine" or "true" reasons for Statement 1 having the capacity to incite hatred towards or serious contempt of him was on the ground of his homosexuality: *Jones* at [98]; *Nicholls and Nicholls v Director*

General, Department of Education and Training (No 2) [2009] NSWADTAP 20 at [28].

53 In our opinion Statement 1 plainly had the capacity to incite hatred towards and/or contempt for Mr Burns on the grounds that he is thought to be a paedophile. But was Mr Burns' sexuality a reason Statement 1 had the capacity to incite one of these emotions in the ordinary member of the audience? We accept, as is asserted by Mr Burns, that the term "faggot" is generally understood by the community to be a term of derision used to describe a homosexual male. We think it likely that the ordinary member of the audience would have assumed Mr Sunol believed Mr Burns to be homosexual and that he might in fact be. In our view the main or dominant reason Statement 1 had the capacity to incite one of the relevant emotions towards Mr Burns in the ordinary member of the audience, was because he was thought to be a paedophile. While not the main or dominant reason, we also conclude that homosexuality was one of the "real", "genuine" or "true" reasons Statement 1 had the capacity to incite those emotions.

Does Statement 2 have the capacity to incite hatred towards, or serious contempt for, homosexual men?

54 As was the case with Statement 1, there is no evidence that Statement 2 incited anyone to have hatred towards, or serious contempt for, male homosexuals. The question to be determined is whether the Statement had the capacity to incite one of those emotions towards homosexual men as a group.

55 Mr Burns argues that it would be plain to members of the audience that in Statement 2 — "other child molesting faggots, that's all they are child molesting fags" — Mr Sunol is referring to homosexual men.

56 Even if that proposition were to be accepted we doubt Statement 2 has the capacity to incite one or more of the relevant emotions in relation to homosexual men as a group.

57 First, the statement "other child molesting faggots" ran for a matter of seconds in a five minute video. Unless carefully viewed it is likely, in our view, that the ordinary member of the audience would not have registered the offending comment.

58 Second, it is obvious from a viewing of the video that Mr Burns, not homosexual men at large is the target of Mr Sunol's anger expressed on the video. In this context, the ordinary audience would be likely, in our view, to interpret this video as a particularly personal attack rather than an attack on a group. While the usage of the plural noun is suspicious it appears to us to relate to Mr Burns rather than to a broader group.

59 But even if the ordinary member of the audience understood homosexuals as a group to be one of the targets of the video, we think it unlikely that it had the capacity to incite hatred towards or severe contempt for the group. As the authorities consistently emphasise to come within the unlawful vilification provisions of the Act it is not enough that the offending public act conveys hatred towards or serious contempt for a person or group of persons. The act must be capable of inciting those reactions in the ordinary member of the likely audience: Sunol at [41].

60 We are not satisfied on the balance of probabilities that Statement 2 had the capacity to incite either of those emotions for homosexuals as a group. It follows, this part of the Complaint must be dismissed.

The victimisation complaint

61 Mr Burns alleges that the communication of Statement 1 via the internet, constitutes victimisation under s 50 of the Act.

Statutory framework

62 Section 50 of the Act relevantly states:

> **50 Victimisation**
>
> (1) It is unlawful for a person ("the discriminator") to subject another person ("the person victimised") to any detriment in any circumstances on the ground that the person victimised has:
>
> (a) brought proceedings against the discriminator or any other person under this Act,
>
> (b) given evidence or information in connection with proceedings brought by any person against the discriminator or any other person under this Act,
>
> (c) alleged that the discriminator or any other person has committed an act which, whether or not the allegation so states, would amount to a contravention of this Act, or
>
> (d) otherwise done anything under or by reference to this Act in relation to the discriminator or any other person, or by reason that the discriminator knows that the person victimised intends to do any of those things, or suspects that the person victimised has done, or intends to do, any of them.
>
> (2) Subsection (1) does not apply to the subjecting of a person to a detriment by reason of an allegation made by the person if the allegation was false and not made in good faith.

63 Mr Burns bears the onus of establishing on the balance of probabilities, that:

(1) Mr Sunol caused him to undergo or experience something;

(2) He suffered some consequential detriment; and

(3) That detriment occurred “on the ground” that he did one of the things listed in s 50(1) of the Act: *Nicholls & Nicholls v Director-General Department of Education and Training (No 2)* [2009] NSWADTAP 20 at [28].

Was Mr Burns subjected to a detriment?

64 The word “detriment” in the context of s 50(1) of the Act means “loss, damage or injury” that is “real and not trivial”: see *Shaikh v Commissioner, NSW Fire Brigades* (1996) EOC 92-808; *Sivananthan v Commissioner of Police* [2001] NSWADT 44 at [40]; and *Burns v Sunol (No 2)* [2017] NSWCATAD 236 at [75]. Whether something constitutes a detriment requires an objective not subjective evaluation to be undertaken: *Sivananthan v Commissioner of Police, NSW Police Service* at [41].

Was Mr Burns subjected to a detriment?

65

In contrast to the complaints of victimisation considered in the 2017 Decision, in the Complaint the subject of these proceedings, Mr Burns provided some evidence of alleged damage.

66 In a statement of claim filed on 19 April 2017, Mr Burns wrote that, on hearing Statement 1, he suffered "damage to his public profile because paedophilia is a criminal offence". Further, he claimed he experienced "anger, shock and humiliation". In addition, in a statement dated 10 May 2017, Mr Burns wrote that, on hearing the allegation that he was a child molester, he was fearful that he might become the target of people's anger which could result in him being bashed or raped. He claimed he became upset because he found it extremely offensive that it had been suggested he had sex with children.

67 Mr Burns' claim that he suffered distress on learning of Mr Sunol's announcement that he is a paedophile is not implausible. It is a serious and damaging allegation. We are satisfied that the posting of the video on his website caused Mr Burns to suffer feelings of "anger, shock and humiliation". We find Mr Burns suffered a detriment as a result of viewing the video.

Did the detriment occur "on the ground" that Mr Burns did one of the things listed in s 50(1) of the Act?

68 Mr Sunol admits that one of the reasons he posted the video was that he was angry with Mr Burns for seeking to enforce the judgement debt. As he saw it, this was the culmination of a long saga whereby he had been relentlessly pursued for unmeritorious complaints made under the Anti-Discrimination Act.

69 No doubt other factors played a role in Mr Sunol's decision to make and place the video on his website, including his concern that he may lose his home. Nonetheless, we are satisfied that at least one of the 'real', 'genuine' or 'true' reasons for subjecting Mr Burns to the detriment of posting the video on his website was that Mr Burns had done something under or by reference to the Anti-Discrimination Act, namely seeking to enforce an order made under that Act.

Summary

70 That part of the complaint of homosexual vilification relating to Statement 1 is substantiated. The balance of the complaint of homosexual vilification is dismissed. The complaint of victimisation is substantiated.

Managing the claim for compensation

71 Mr Burns seeks an order for compensation for non-economic loss in the sum of $100,000.

72 At the hearing to determine the substantive complaint we refused an application made by Mr Sunol to adjourn the proceedings because he had been unable to obtain legal representation. However, we decided to give Mr Sunol the opportunity to obtain legal

advice in the event we found the Complaint to be substantiated in whole or part.

73 The matter is listed for a direction hearing on 16 January 2017 on 9:30am to put in place a timetable to determine whether an order should be made requiring Mr Sunol to pay compensation to Mr Burns.

Orders

74 In summary, the Tribunal orders are:

(1) The complaint alleging unlawful vilification in relation to Statement 1, is substantiated.

(2) The balance of the complaint alleging unlawful vilification is dismissed.

(3) The matter is listed for a directions hearing on 16 January 2018 at 9:30am.

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I hereby certify that this is a true and accurate record of the reasons for decision of the Civil and Administrative Tribunal of New South Wales.
Registrar

Decision last updated: 10 January 2018