

Anti-Discrimination Decisions

[2015] TASADT

Citation:	<i>Williams v 'Threewisemonkeys' and Durston</i> [2015] TASADT
Parties:	WILLIAMS, Robert (Complainant) v 'THREEWISEMONKEYS' (First Respondent) DURSTON, James (Second Respondent)
File No:	M/2014/1870
Delivered on:	30 June 2015
Decision of:	M Otlowski

Catchwords:

Equal opportunity – sexual orientation – whether publishing and distribution of a pamphlet with 'homosexual statistics' amounted to conduct that created offence, humiliated, insulted and ridiculed homosexual persons on the basis of their sexual orientation; whether it constituted inciting hatred towards homosexuals because of their sexuality, and whether publishing and posting this material amounts to promoting prohibited conduct - *Anti-Discrimination Act* 1998 (Tas) ss 3, 16, 17, 19, 20, 55, 89, 92; Consideration also of the 'right to freedom of religion' under s 116 of the Australian *Constitution*.

Cases cited: *Wood v Gerke and Samjack Pty Ltd* [2007] TASADT 03, *Burns v Dye* (2002) NSWADT 32, *Turner v State Transit Authority & nor* (2004) NSWADT 8, *Kazak v John Fairfax Publications Limited* (2000) NSWADT 77, *Wagga Wagga Aboriginal Action Group & Ors v Eldridge* (1995) EOC 92-701, *Amalgamated Television Services Pty Ltd v Marsden* (1998) 43 NSWLR 158, *Burns v Radio 2UE Sydney Pty Ltd & Ors* (2004) NSWADT 267, *Western Aboriginal Legal Service Limited v Jones & anor* (2000) NSWADT 102, *Harou-Sourdon v TCN Channel Nine Pty Limited* (1994) EOC 92-604, *Velosky & Anor v Karagiannakis & Ors* (EOD) NSWADTAP 18, *Brinkley v Davies Bros Ltd* [2008] TASADT 07, *Burns v Laws* (No 2) (2007) NSWADT 47, *Bropho v Human Rights & Equal Opportunity Commission* (2003) EOC 93-259 at 77,156 and *Brown v Classification Rev Bd* 154 ALR 67, *The Attorney General for the State of Victoria (at the relation of Black) and Ors v The Commonwealth of Australia* (1981) 146 CLR 559, *Grace Bible Church v Redman* (1984) 36 SASR 376, *Krygger v Williams* [1912] HCA 65, *Adelaide Company of Jehovah's Witnesses Incorporated v Commonwealth* [1943] HCA 12, *Kruger v Commonwealth* [1997] HCA 27, *Cosmos v Stuart Dunlop* [2003] TASADT 6, *A v G* [2005] TASADT 16, *Jones v Scully* [2002] FCA 1080.

Representation:

Counsel:	
Complainant:	In Person
Respondent:	In Person
Solicitors:	

Complainant:	In Person
Respondent:	In Person
Decision Number:	[2015] TASADT
Number of paragraphs:	59

Reasons for Decision

Introduction

1. This decision relates to a complaint made by Mr Robert Williams, the complainant, an openly gay man, against ‘Threewisemonkeys’, the respondent in relation to a pamphlet entitled ‘Homosexuality Stats’ published and distributed in the Sandy Bay area of Hobart in 2013. This pamphlet stated that ‘homosexuality should not be tolerated’ and that ‘Scripture rejects homosexuality as utterly abominable’ and set out alleged statistics on lifespan expectations and causes of death for gay men and lesbians compared to heterosexual men and women. The complainant alleges that the conduct of the respondent in publishing and distributing this pamphlet contravened provisions of the *Anti-Discrimination Act 1998 (Tas)* (‘the Act’) on the basis of sexual orientation, in particular, ss17, 19 and 20.

History of the Matter

2. Mr Robert Williams, the complainant, lodged a complaint with the Anti-Discrimination Commissioner on 2 May 2013 attaching a copy of the pamphlet entitled ‘Homosexuality Stats’ alleging contravention of ss17, 19 and 20 of the Act on the grounds of sexual orientation. The Anti-Discrimination Commissioner advised Mr Williams on 25 June 2013 that his complaint had been accepted as a valid complaint under the Act and that the matter would be investigated. Through inquiries with Australia Post and the Electoral Commissioner, the Anti-Discrimination Commissioner was able to establish that the pamphlet produced under the name ‘Threewisemonkeys’ may be linked to a Mr James Durston, who may have been responsible for the distribution of the same material in Launceston.

3. On 30 April 2014, the Anti-Discrimination Commissioner referred the matter to the Anti-Discrimination Tribunal (the ‘Tribunal’), enclosing her Referral Report and copies of documents listed in the Report. The Referral Report notes under ‘Reasons for Referral’ that the time limit on investigation had expired. On 7 July, the complainant and respondent were sent a letter from the Tribunal listing the matter for a directions conference on 4 August 2014. Mr Durston responded and it was organised for him to participate by phone. Directions were made for the filing and serving of witness statements, exchange of documents, and identification by Mr Williams of orders sought, in preparation for the Inquiry. In a directions conference held on 25 September 2014, Mr Durston conceded that he was the person responsible for the dissemination of the pamphlet mentioned in the complaint. Further, he agreed that he is part of and represents ‘Threewisemonkeys.’

4. The matter went to conciliation on 10 December 2014 but no agreement was reached. Following one further directions conference, held on 19 February 2015, the matter was set down for Inquiry for 8 May 2015.

Hearing of the Inquiry

5. The complainant, Mr Williams and Mr Durston for ‘Threewisemonkeys’ appeared in person at the Inquiry.

Summary of the complainant’s submissions

6. The complainant presented clear and cogent submissions to the Tribunal. He sought to rely on the following documents which were admitted into evidence: his witness statement (C1); the witness statement of Mrs Sharni Roberts (C2), the Referral Report from the Anti-Discrimination Commissioner and attached documents (C3), the pamphlet, ‘Homosexuality Stats’ (C4), printed materials from the Beyond Blue website (C5), and the transcript from the High Court case *Robertson v DPP and Durston v DPP* (C6).

7. The complainant commenced his submission stating that the pamphlet the subject of these proceedings demonstrates that bigotry, prejudice and hatred is still a plague in our community. He described how this pamphlet has caused him and others to feel insulted and sickened (e.g. his friend Mrs Sharni Roberts who is a grandmother). The complainant noted that the pamphlet had also disturbed his friend, Mr Devine.

8. The complainant described how he has worked hard to contribute positively to society, through education, a strong career, and strong family relationships and networks of friends. He noted the freedoms that have been won for homosexuals through the lifting of criminality. He stated that it is not just the impact on him that is in question; his motivation in bringing these proceedings is also on behalf of others who struggle with their sexuality.

9. The complainant gave examples of the impact that such material has on people, referring to research from the Beyond Blue website, including reference to suicide rates which are highest amongst the LGBTI community. Drawing on this material (C5), the complainant noted that discrimination and exclusions are the key factors linked with mental illness and suicide; this is not due to sexual orientation of itself, but discrimination and exclusion, stress, and psychological distress. It was suggested that the majority of this abuse occurs in schools through non-physical abuse.

10. The complainant noted the transcript from a High Court matter involving Mr Durston and the Commonwealth Director of Public Prosecutions (C6); the complainant noted that this matter in the High Court had nothing to say about the present case and established no fact or precedent. Further, he argued that any argument on Constitutional law grounds was wrong and should not be entertained. The complainant submitted that freedom of speech exists but it has never been without restrictions (as illustrated by the existence of defamation and libel laws).

11. The complainant noted that Mr Durston has accepted that he is the person who published this material under the name of ‘Threewisemonkeys’. With respect to the contents of the published material, although noting that it may seem unnecessary to argue that the statistics are fallacious, the complainant highlighted that the author, Dr Cameron, has been discredited in the academic community with bodies including the American Psychological Association going to some lengths to disassociate themselves from his writings and condemning his research. The complainant referred to a growing body of opinion that has rejected Dr Cameron’s research because of lack of scientific validity and credibility and on the grounds that he has consistently misrepresented homosexuality.

12. The complainant argued that any reasonable person would know for example that the lifespan statistics published in this pamphlet were wrong as is the claim that a lesbian getting into a car is 466 times more likely to die in traffic.

13. The complainant submitted that in publishing this material, Mr Durston has breached s17 of the Act, specifically through s16(c) relating to sexual orientation. In particular, he argued that the respondent had engaged in conduct that created offence, and humiliated, insulted and ridiculed homosexual persons on the basis of their sexual orientation, and that further, this was in circumstances in which a reasonable person, having regard to all the circumstances, would have anticipated that the other person would be offended, humiliated, insulted or ridiculed.

14. The pamphlet states: 'It is warned that homosexuality should not be tolerated, and this will benefit both the individual and society.' The complainant argued that this was a statement that offends, humiliates, insults and ridicules people who are homosexuals and therefore contravenes s17. The complainant referred to the statistics in the pamphlet which suggest that if you are a gay man you will have a shorter life expectancy e.g. that a homosexual man without AIDs will live to 42, a lesbian woman would live to 43 in comparison to their heterosexual counterparts who live into their 70s.

15. The pamphlet claims:

“4,708 male homosexuals:

The median age of death due to AIDS was 39 and only 1% reached 65 or older. Of 525 who died from non-AIDS causes, median age of death was 42, and only 7% reached 65 or older!

If not of AIDS, homosexuals died:

10 times more often in accidents; 17 times more frequently in traffic; 26 times more often from suicide; 87 times more often from murder; and 23 times more often of heart attacks as compared to white men age 25-44.

93 lesbians: death:

Median age of death was 45. Only 25% reached the age of 65 or older.

Lesbians died:

453 times more often from murder; 932 times more from suicide; 466 times more often in traffic; 307 times more from accidents as compared to white women aged 25-44, and almost a third died of cancer.”

16. The complainant stated that it beggars belief that any reasonable person could suggest those statistics could be valid. Indeed, he argued that they are not valid; they have been discredited. He submitted that prejudice and hatred contribute strongly to mental health issues including the risk of suicide. He stated that such discrimination can have particularly profound impacts on young people, sending them damaging information. This sort of material can scare people with the false statistics that it contains and generates mistrust, anxiety and prejudice. He pointed out that some people may believe this false information. On the question of scale of distribution of these pamphlets, the complainant referred to the Referral Report from the Anti-Discrimination Commissioner and related documentation (C3) which included advice from Australia Post that 3403 pamphlets were distributed to the Sandy Bay area between April-May 2013.

17. The complainant noted that if these facts were true, there would be an outrage in the insurance industry and they would not insure lesbians. He argued that this demonstrates that this information is not true as insurers base their premiums on actuarial advice and clearly there is no evidence to support this information.

18. With respect to the provision in the Act on inciting hatred, s19(c), the complainant submitted that for the same reasons that he relied on s17, this act of producing and posting this material, unsolicited in relation to non-tolerance of homosexuality is in breach of the Act. He submitted that Mr Durston through 'Threewisemonkeys' is spreading fallacious statistics which incite hatred towards people on the basis of their sexuality and that this is utterly abominable. He submitted that this is the exact sort of thing that the *Anti-Discrimination Act* provisions in relation to incitement of hatred are directed at.

19. With regard to s20 of the Act, the complainant submitted that the publishing and posting of this material is prohibited conduct and is discriminatory and that in doing so, Mr Durston has contravened s20 of the Act.

20. In conclusion, the complainant submitted that the pamphlet contains false offensive and hateful material which has offended him and others.

21. In relation to remedies, the complainant referred to s89 of the Act, and the orders that the Tribunal can make if it finds after an inquiry that a complaint is substantiated, in particular (a) – '*an order that the respondent must not repeat or continue the discrimination or prohibited conduct*' and (h) '*any other order that it thinks appropriate.*'

22. The complainant reiterated the orders that he seeks as set out in his witness statement (C1), namely:

1. That the respondent apologise in writing to the complainant, Mrs Roberts and Mr Devine for the offensive material prepared and delivered, acknowledging the harm that such untrue and hurtful material causes, and that it is wrong to do so.
2. That the respondent make a public apology in the Mercury Newspaper to the same effect.
3. That the respondent provide the Tribunal and the complainant with a written statement acknowledging that he will not engage in such conduct again and that he understands the provisions of the *Anti-Discrimination Act 1998 (Tas)*.

Case for the Respondent

23. Mr Durston chose not to make any submissions to the Tribunal or adduce any documents into evidence, notwithstanding repeated invitations from the Tribunal Chair for him to do so. Instead, he stated that he had not broken the law and claimed to exercise his right to freedom of religion under s116 of the Australian *Constitution* and asserted that the Tribunal had no authority in relation to this matter.

Findings and Conclusions

24. The facts in this matter are not in dispute. Mr Williams, an openly gay man (see C1) has alleged that Mr Durston as the respondent (through 'Threewisemonkeys') by the publication

and distribution of the Homosexuality Stats pamphlet (C4) has contravened ss17, 19 and 20 of the Act. The legal issues for the Tribunal to determine are whether there has been a breach (or breaches) of the Act and, if so, what order(s) the Tribunal should make.

25. As noted in the above history of the matter, Mr Williams' complaint had alleged contravention of ss17, 19 and 20. The Referral Report from the Anti-Discrimination Commissioner (C3) had focused on ss19 and 20; s20 in turn relies on existence of discrimination or prohibited conduct. At the hearing of the Inquiry, the complainant reiterated his reliance on all three provisions.

26. Section 17, which deals amongst other things with prohibition of certain conduct, provides as follows:

(1) A person must not engage in any conduct which offends, humiliates, intimidates, insults or ridicules another person on the basis of an attribute referred to in ss16 (e), (a), (b), (c), (d), (ea), (eb) and (k), (f), (fa), (g), (h), (i) or (j) in circumstances in which a reasonable person, having regard to all the circumstances, would have anticipated that the other person would be offended, humiliated, intimidated, insulted or ridiculed.

27. Section 16 lists the attributes covered by the Act, specifying that a person must not discriminate against another person on the ground of any of these attributes. It includes in s16(c) reference to sexual orientation.

28. The Tribunal accepts the submission of the complainant that the conduct of the respondent in publishing and distributing the Homosexuality Stats pamphlet contravened s17 on the basis of targeting the sexual orientation of homosexuals. This seems to be the very purpose of the pamphlet which begins with the statement: 'It is warned that homosexuality should not be tolerated, and this will benefit both the individual and society' and then sets out statistics which clearly cannot be substantiated. The Tribunal is satisfied on the evidence that the complainant and others were offended by this material and that it was conduct which humiliated, insulted and ridiculed homosexuals on the basis of their sexual orientation and that in the circumstances of this case a reasonable person would have anticipated that the persons in the situation of the complainant would be offended, humiliated, insulted or ridiculed. Thus, the Tribunal finds that this particular category of prohibited conduct is made out.

29. Section 19, which deals with inciting hatred on which the complainant also relied provides as follows:

“A person, by a public act, must not incite hatred towards, serious contempt for, or severe ridicule of, a person or a group of persons on the ground of –
(a) the race of the person or any member of the group; or
(b) any disability of the person or any member of the group; or
(c) the sexual orientation or lawful sexual activity of the person or any member of the group; or
(d) the religious belief or affiliation or religious activity of the person or any member of the group.”

30. The onus is on the complainant to show that the respondent by a public act incited hatred towards, serious contempt for or severe ridicule of the complainant or group of persons on the basis of the sexual orientation or lawful sexual activity of the person or any member of the group.

31. Public act is defined in s3 as including:

- (a) any form of communication to the public; or
- (b) any conduct observable by the public; or
- (c) the distribution or dissemination of any matter to the public;

Sexual orientation is also defined in s3:

sexual orientation includes –

- (a) heterosexuality; and
- (b) homosexuality; and
- (c) bisexuality;

32. The Act does not define the words incite, hatred, contempt of ridicule which appear in s19. This provision is similar to legislation from other jurisdictions in Australia and these words have been interpreted by tribunals from those jurisdictions: see *Wood v Gerke and Samjack Pty Ltd* [2007] TASADT 03. That case provides a very useful summary of the relevant principles:

“Relevant cases that have considered the meaning of these terms and the approach to be adopted in determining whether conduct amounts to inciting hatred include the following: *Burns v Dye* (2002) NSWADT 32, *Turner v State Transit Authority & nor* (2004) NSWADT 8, *Kazak v John Fairfax Publications Limited* (2000) NSWADT 77, *Wagga Wagga Aboriginal Action Group & Ors v Eldridge* (1995) EOC 92-701, *Amalgamated Television Services Pty Ltd v Marsden* (1998) 43 NSWLR 158, *Burns v Radio 2UE Sydney Pty Ltd & Ors* (2004) NSWADT 267, *Western Aboriginal Legal Service Limited v Jones & anor* (2000) NSWADT 102, *Harou-Sourdon v TCN Channel Nine Pty Limited* (1994) EOC 92-604 and *Velosky & Anor v Karagiannakis & Ors* (EOD) NSWADTAP 18.

The principles derived from these cases concerning matters relevant to this case are now well established and it is not necessary to canvass here the cases in detail. Those principles are summarised as follows:

- The word “incite” should be given its ordinary and plain meaning, namely, to urge, spur on, stir up, animate, stimulate or prompt to action.
- It is not necessary to prove that there was an intention to “incite” or that people were actually incited to hatred, serious contempt or severe ridicule. Rather the test is whether the public act was capable of inciting others to feel hatred or serious contempt or severe ridicule. Merely engaging in conduct that conveys hatred or expresses serious contempt or severe ridicule is not unlawful.
- The words “hatred”, “contempt” and “ridicule” are to be given their ordinary meaning noting that the latter two are qualified by the adjectives “serious” and “severe” respectively. Thus the public act must be capable of inciting intense dislike or hostility towards a person or group of persons or grave scorn for a person or extreme derision

of a person or group of persons. The conduct must be capable of arousing reactions at the extreme end of the scale.

- The aspect of the conduct complained of must be assessed within the context of the entire statement or publication.
- In determining whether the public act is capable of inciting others to feel hatred a question arises as to the characterisation of the audience. The proper approach is to consider the impact upon an ordinary, reasonable person. The range of people captured by this test includes people who are not immune from susceptibility to incitement but excludes those who hold prejudiced views or are malevolently inclined.
- It must be established that the offending public act must incite hatred towards, serious contempt for or severe ridicule of a person or a group of persons *on the ground of* one of the attributes listed in sub-paragraphs (a) - (d) of s19 of the Act. The phrase “on the ground of” means a “significant factor”, “a substantially contributing factor” and “a causally operative effect” or “an operative ground”. There must be a causal connection between the attribute and the feelings of hatred, serious contempt or severe ridicule that are incited by the public act.”

33. This statement of principles was reiterated also in *Brinkley v Davies Bros Ltd* [2008] TASADT 07 with the following refinement:

“In the case of *Burns v Laws* (No 2) (2007) NSWADT 47 there was some refinement of the principle set out at paragraph (ii) above. The Administrative Decisions Tribunal framed the issue as whether the relevant "public act" had the "effect" of inciting, in the sense of urging or prompting, a hypothetical "ordinary reasonable person" to experience one or more of the relevant reactions towards one or more homosexual people (as identified by the Complainant), on the ground of their homosexuality (para 111). ...

For the sake of completeness the Tribunal notes the meaning of "ridicule" and synonyms referred to in the cases, namely - "mockery", "derision", "make fun of" and "laugh at". As for the qualifier of "severe" the Administrative Decisions Tribunal in *Burns v Laws* (No 2) recognised that there is no sharp dividing line between "ridicule" and "severe ridicule" and that in any case where the issue arises, a value judgment must be made (para 120, quoted with approval in *Burns v Laws* (EOD) 2008 NSWADTAP 32).”

34. It was made clear in the *Brinkley v Davies Bros Ltd* [2008] TASADT 07 case that in order to contravene s19, the conduct must be capable of arousing reactions at the extreme end of the scale/level of intensity required by the Act.

35. The Tribunal accepts the submissions of the complainant that the conduct of the respondent in publishing and distributing the Homosexuality Stats pamphlet contravened s19. The distribution of the pamphlet to over 3000 households satisfies the requirement of a ‘public act’ within the meaning of the section. The content of the pamphlet is likely to incite hatred towards, serious contempt for, or severe ridicule of, a person or a group of persons on the ground of homosexuality (meeting the ground of s19(c) which refers to ‘sexual orientation or lawful sexual activity of the person or any member of the group’). Indeed, the very wording of the pamphlet indicates the intention to warn people away from homosexuality which the pamphlet states is rejected by the Scriptures as ‘utterly abominable’.

36. There is a defence to ss17 and 19 contained in s55 of the Act. That provision states as follows:

55. *Public purpose*

The provisions of s17(1) and s19 do not apply if the person's conduct is –

- (a) a fair report of a public act; or*
- (b) a communication or dissemination of a matter that is subject to a defence of absolute privilege in proceedings for defamation; or*
- (c) a public act done in good faith for –*
 - (i) academic, artistic, scientific or research purposes; or*
 - (ii) any purpose in the public interest.*

37. As noted in *Wood v Gerke and Samjack Pty Ltd* [2007] TASADT 03 and *Brinkley v Davies Bros Ltd* [2008] TASADT 07: “s55 provides an exception to the application of s19 of the Act so that certain conduct of inciting hatred is not unlawful. This section reflects the compromise between the boundaries of inappropriate and unacceptable areas of public conduct and freedom of expression as a fundamental tenet of the common law (*Discrimination Law and Practice*, Ronalds and Pepper, 2nd ed. page 104, *Bropho v Human Rights & Equal Opportunity Commission* (2003) EOC 93-259 at 77,156 and *Brown v Classification Rev Bd* 154 ALR 67).”

38. There were no submissions from either the complainant or the respondent in relation to the applicability of this defence in this case. Section 55(a) and (b) are clearly not applicable but the respondent may have sought to rely on s55(c) in view of other material provided to the Tribunal in preparation for the hearing, although not formally put into evidence for the respondent. In any event, the Tribunal is satisfied that the defence does not apply, especially in the light of the requirement that the public act be done for a purpose in the public interest, which must be objectively assessed.

39. Accordingly, I find a clear breach of s19 by the respondent.

40. The final section to be considered is s20 which deals with promoting discrimination and prohibited conduct. That section provides as follows:

(1) A person must not publish or display, or cause or permit to be published or displayed, any sign, notice or advertising matter that promotes, expresses or depicts discrimination or prohibited conduct.

41. It was stated in *Brinkley v Davies Bros Ltd* [2008] TASADT 07 that the meaning of s20 is not ambiguous and that it is clear from the terms of the section that it requires a close link with discrimination or prohibited conduct.

42. The scope of this provision was considered in *Wood v Gerke and Samjack Pty Ltd* [2007] TASADT 03. There it was stated (at para 94) that:

“It seems from a consideration of the scheme of the Act that the Act only prohibits conduct covered by s20 if it has a connection with one of the areas of activity listed in s22 of the Act. Section 20, unlike the provision in relation to inciting hatred, is subject to s22(1).”

43. It had not been necessary in that case to examine areas of activity in s22 and it is not necessary to do so here as this case has raised the inciting hatred provision in s19. It is not in dispute that the respondent published and distributed the pamphlet which is at issue in this case.

Further, the Tribunal has already found in relation to s17 that the conduct of the respondent amounts to prohibited conduct being conduct which offends, humiliates, insults and ridicules another person on the basis of their homosexuality which comes within one of the specified attributes (s16(c)). It therefore follows that the respondent's conduct in publishing and distributing this pamphlet also contravenes this provision as promoting prohibited conduct.

Freedom of religion

44. As noted, the respondent chose not to make submissions, and instead sought to rely on his right to freedom of religion under s116 of the Australian Constitution. The complainant had, in his submissions, rejected reliance on any such constitutional arguments, and had noted that whilst rights exist (e.g. to free speech) these are not without limitations.

45. Section 116 says of the Constitution of Australia states:

“The Commonwealth shall not make any law for establishing any religion, or for imposing any religious observance, or for prohibiting the free exercise of any religion, and no religious test shall be required as a qualification for any office or public trust under the Commonwealth.”

46. This provision has been interpreted narrowly by the High Court of Australia. In *The Attorney General for the State of Victoria (at the relation of Black) and Ors v The Commonwealth of Australia* (1981) 146 CLR 559 per Stephen J at 610 it was stated that:

“It is not, in form a constitutional guarantee of the rights of individuals ... instead takes the form of express restriction upon the exercise of Commonwealth legislative power.”

47. Notably, there is no similar constraint imposed upon the legislatures of the States: *The Attorney General for the State of Victoria (at the relation of Black) and Ors v The Commonwealth of Australia* (1981) 146 CLR 559 at 605; *Grace Bible Church v Redman* (1984) 36 SASR 376.

48. Notwithstanding a number of challenges (*Krygger v Williams* [1912] HCA 65; *Adelaide Company of Jehovah's Witnesses Incorporated v Commonwealth* [1943] HCA 12; *Kruger v Commonwealth* [1997] HCA 27) the Australian High Court has not ruled a law to be in contravention of s116.

49. According to learned academic commentary: “Section 116 prohibits the Commonwealth Parliament from enacting legislation that would prohibit the free exercise of religion or establish a religion. This constitutional protection is, however, limited in many ways. It applies only to the Commonwealth and not to the States. It does not apply to all government action but only to legislation or actions taken under legislation. It does not, in its terms, protect beliefs that are not religious (although the High Court has interpreted it to extend to atheism and agnosticism at least). In addition, the High Court has interpreted s116 very restrictively so that it has little force: Associate Professor Carolyn Maree Evans, *Legal Aspects of the Protection of Religious Freedom, in Australia*, Centre for Comparative Constitutional Studies, Melbourne Law School 2009.

50. So, notwithstanding the apparently broad terms of s116 of the Constitution, this section does not amount to a complete guarantee of protection. In particular, it does not provide

individuals with any avenue of legal redress if their perceived right to freedom of religion has been violated. In any event, any 'freedom' must be balanced against the rights of others, as is the case with the rights to freedom of speech and freedom of association. Accordingly, the Tribunal finds no basis for the respondent's reliance on a right to freedom of religion by way of response or defence to this complaint.

Remedies and Orders Sought

51. Having found that the respondent has contravened ss17, 19 and 20 of the Act, it remains to be considered what orders should be made by the Tribunal. The Tribunal's power to make orders is set out in section 89 of the Act which provides as follows:

(1) If the Tribunal finds after an inquiry that a complaint is substantiated, it may make one or more of the following orders:

- (a) an order that the respondent must not repeat or continue the discrimination or prohibited conduct;*
- (b) an order that the respondent must redress any loss, injury or humiliation suffered by the complainant and caused by the respondent's discrimination or prohibited conduct;*
- (c) an order that the respondent must re-employ the complainant;*
- (d) an order that the respondent must pay to the complainant, within a specified period, an amount the Tribunal thinks appropriate as compensation for any loss or injury suffered by the complainant and caused by the respondent's discrimination or prohibited conduct;*
- (e) an order that the respondent must pay a specified fine not exceeding 20 penalty units;*
- (f) an order that a contract or agreement is to be varied or declared void in whole or in part;*
- (g) an order that it is inappropriate for any further action to be taken in the matter;*
- (h) any other order it thinks appropriate.*

52. Regard should also be had to s92 which deals with apologies and retractions. That section provides:

(1) In respect of a substantiated complaint, the Tribunal may require the respondent to –

- (a) apologise to the complainant; and*
- (b) make any retractions the Tribunal considers appropriate.*

(2) If the complaint related to discrimination or prohibited conduct carried out in public, the respondent is to cause to be published any apology or retraction in a manner directed by the Tribunal.

(3) If the complaint related to discrimination or prohibited conduct carried out in private, any apology or retraction is to be made as directed by the Tribunal.

(4) A person must not fail to comply with a requirement or direction made by the Tribunal under this section.

Penalty:

Fine not exceeding 10 penalty units.

53. In this case, the complainant is not seeking an order for compensation or the imposition of a fine. The orders which are sought are: an apology for the conduct undertaken, as well as a public apology and a written statement from the respondent acknowledging that he will not

engage in such conduct again and that he understands the provisions of the *Anti-Discrimination Act 1998* (Tas).

54. There are a number of decisions of the Tribunal which have examined the appropriateness of ordering an apology. In *Cosmos v Stuart Dunlop* [2003] TASADT 6 ordering an apology was not considered appropriate in circumstances which would suggest that the apology will not be genuine and sincere. In *A v G* [2005] TASADT 16 the remedy of an apology was also rejected as unsuitable on the basis that little is to be gained by forcing somebody to apologise. In these cases, an apology was sought alongside other remedies (damages, a fine). Whilst the reasoning from these cases might weigh against ordering an individual apology, in this case however, given the very public nature of the conduct and the false information distributed (*Jones v Scully* [2002] FCA 1080) some form of public apology or retraction is warranted,

55. The Tribunal notes that Mr Durston has accepted responsibility for dissemination of the material and also appeared at the hearing. It is therefore appropriate to formally join him as a respondent to this complaint further to s 84 of the Act.

56. After careful consideration, the Tribunal is of the view that it is appropriate to make the following orders against Mr Durston in his personal capacity and as a representative of the organisation known as Threewisemonkeys:

57. Firstly, that Mr Durston make a public apology and retraction published in *The Mercury* acknowledging that his conduct in disseminating the ‘Homosexuality Stats’ pamphlet was discriminatory. More specifically, within 14 days of the date this decision Mr Durston is to organise publication of the following apology in the Wednesday and the following Saturday editions of *The Hobart Mercury* in a display advertisement of a size not less than 85mm wide x 94mm deep in black print, to appear in the Public Notices section of the paper:

“This apology is made pursuant to an order of the Anti Discrimination Tribunal of Tasmania made on 30 June 2015.

In April-May 2013, I distributed a pamphlet on ‘Homosexuality Stats’ in the Sandy Bay area.

On 30 June, the Anti Discrimination Tribunal found my comments amounted to conduct that created offence and humiliated, insulted and ridiculed homosexual persons on the basis of their sexual orientation; that it constituted inciting hatred towards homosexuals because of their sexuality, and that the publishing and posting of this material amounted to promoting prohibited conduct under the *Anti Discrimination Act 1998* (Tas).

I apologise for publishing this material. The information published was in breach of the *Anti Discrimination Act 1998* (Tas). I accept that the aim of this Act is to promote tolerance, understanding and acceptance in the community. I accept that the Act sets limits on what can be said and done in public.”

58. The Tribunal notes that by virtue of s92 of the Act, failure to give an apology and retraction as directed by the Tribunal results in the automatic imposition of a fine.

59. Secondly, the Tribunal orders that Mr Durston must not repeat the discriminatory conduct (s89(1(a))).

Dated this 30th day of June 2015

A handwritten signature in black ink, appearing to read 'M. Otlowski', written in a cursive style.

Professor M. Otlowski
TRIBUNAL MEMBER