

Recent decisions involving “transgender vilification” Associate Professor Neil Foster

Recently, in two cases directed at Ms Kirralie Smith, it was ruled by a Local Court magistrate that Ms Smith had “vilified” two transgender persons who were biologically male but were playing in a woman’s football competition- see *Blanch v Smith* (Local Court of NSW; 26 Aug 2025) and *Dennis v Smith* (Local Court of NSW, 26 Aug 2025).

In my view both cases were wrongly decided- that is, I don’t think Ms Smith actually contravened the legislation. There is also a significant question as to whether the law, in its application to these circumstances, is contrary to the implied freedom of political communication under the Constitution. And in any event, it is arguable the law as it stands (even if valid) is too restrictive on free speech and should be amended.

Application of the law

In *Blanch v Smith*, Ms Smith made a number of comments on social media about the fact that Stephanie Blanch, the plaintiff, was a biological male who was playing on a rural women’s soccer team. Her comments included (to summarise) statements that:

- Blanch was a “bloke in a frock ... playing women's soccer”- see eg para [5](b)
- "A bloke in a frock playing soccer in the women's comp doesn't make him a woman"- para [5](g)
- The football club “allow[s] men who appropriate stereotypes of women to play as women”- para [5](i).

These statements were sometimes accompanied by a photo of the plaintiff.

The Local Court (Deputy Chief Magistrate Freund) was hearing a claim for “transgender vilification” under s 38S of the *Anti-Discrimination Act 1977* (NSW) (“ADA”), as it was conceded that the more common venue, the NSW Civil and Administrative Tribunal (NCAT) was not able to hear the matter. (As there was a good faith claim that the relevant legislation was invalid under the Federal Constitution, and the High Court had previously ruled in *Burns v Corbett* [2018] HCA 15 that tribunals which were not actually courts, could not hear matters in federal jurisdiction.)¹

The magistrate was satisfied that Blanch “identifies [as] a member of the opposite sex by living as a member of the opposite sex since 2016”- see [24]. The next question was whether what the defendant had said “vilified” the plaintiff, within the terms spelled out in s 38S(1):

(1) It is unlawful for a person, by a public act, to incite hatred towards, serious contempt for, or severe ridicule of- (a) a person on the ground that the person is a transgender person.

It is at this point where, with respect, the magistrate is in error. The comments made by the defendant, in my view, are not designed to, nor do they, “incite” the relevant emotions. There is no call to hatred. There is no expression of “serious contempt” or “severe ridicule”. As the plaintiff’s lawyers submitted,

¹ I commented on this earlier aspect of Ms Smith’s case in a blog post: see ““Gender critical” victories in tribunal cases” (Jan 28, 2024) <https://lawandreligionaustralia.blog/2024/01/28/gender-critical-victories-in-tribunal-cases/>. The comment mentions the decision on the point in NCAT: *Blanch v Smith* [2024] NSWCATAD 20 (22 January 2024).

there is no call to action, urging, rousing, command, request, proposition or encouragement for the community to take any particular action in respect of the Plaintiff. (at [50](d))

The comments are directed at the policy of allowing a biological male to compete in a sporting competition set up for women. As DCM Freund notes at [52], quoting Basten JA from *Sunol v Collier (No 2)* [2012] NSWCA 44 at [79], “Mere insults, invective or abuse will not engage the prohibition”.

Perhaps the strongest point made by the magistrate is a comment at [63] about generation of “fear”:

Moreover, the January Article sought to evoke fear in the reader regarding the fact that the Plaintiff, who is described and referred to as a man/ male/ bloke is playing in a women's team (and transgender women playing in women's sport generally) by the following:

- a. “How can girls, women and families feel safe when they are not even permitted to question the presence of a man in their space or on the field?”
- b. “Why should it be left up to girls who just want to play soccer for fun, to risk their safety ... ?” and
- c. “Why should parents be put in the terrible situation of having to deal with an adult man in their daughter's bathroom?”

It seems clear that these comments are directed to genuine concerns that parents of girls playing in a team may have- not being able to “question” because of a fear they will be attacked by the officials of the club; a genuine risk of physical safety on the field given the height and weight differential of males from females; and a concern about appropriate modesty in a changing room.

But a concerning feature of the magistrate’s finding here is that her Honour moves very directly from statements about “fear and safety matters” in [64], to a conclusion in [65] that these statements would “encourage or spur others to harbour emotions of hatred towards, severe contempt for and or severe ridicule of the Plaintiff, on the grounds that the Plaintiff is transgender”. There is no attempt to explain how “fear and safety concerns” would lead to these logically distinct emotions.

In particular, it seems to me clear that any concerns were expressed, not at the fact that the plaintiff was “transgender”, but that the plaintiff was a biological male person playing in a sporting competition designated for biological women. The magistrate said that the statements were made “because the Plaintiff was living as someone of the opposite sex”- see para [89](d). But the defendant made no general comments about the plaintiff’s feelings about their gender; her concerns were the very specific concerns about a male playing in a female sporting competition. On this basis alone, I think the decision is wrong and I hope it might be appealed.

The provision does contain a series of qualifications clarifying that certain behaviour is not discriminatory; most relevant is this:

ADA s 38S(2) Nothing in this section renders unlawful-...

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

It is clear that the question whether biological males should be allowed to play in sporting teams set up for women is one of great “public interest”. What Ms Smith was doing was engaging in “discussion” (or perhaps “debate”) on that “matter”. Indeed, something of the sort was conceded by the plaintiff- see [102]:

[T]he Plaintiff conceded that public advocacy with respect of issues of gender equity and transgender sport participation would be a “particular purpose in the public interest” within the meaning of section 38(2)(c).

See also para [108] where the magistrate agrees. Ms Smith also argued that making her point that this was happening in sporting competitions, required some photographic evidence so that readers would not think it was a fictional concern. This seems reasonable.

However, the magistrate ruled that the comments were not “reasonable” as including the photographs of the plaintiff was “disproportionate” to the point being made, and that in doing so the defendant had acted unreasonably- see [120]. And the acts were also not in “good faith” as there was:

careless disregard to the effect, namely the hurt that the Social Media Posts and January 2023 Article would have had on the Plaintiff and therefore lacked objective good faith.

While the “careless disregard” criterion is part of a comment in a previous case,² it is obviously a very subjective basis on which to penalise someone’s speech.

The case of *Dennis* is very similar, though the facts are slightly different. The plaintiff Riley Dennis is a biological male but has “lived as a woman”- para [11]; there is no reference to having had any medical procedures. The plaintiff was the top goal scorer in a women’s football competition, and initially identified as such- but later the plaintiff’s name was removed from public versions of the scoreboard.³ In this case a number of statements by the defendant Ms Smith were reproduced by other outlets; DCM Freund ruled that they were still “public acts” by the defendant as she knew the media and other outlets would publish her comments- see [32].

As with the *Blanch* case, despite the comments made being made in relation to issue of biological males in women’s sport, the magistrate at [60] found that “the vilification of the Plaintiff was on the basis that the Plaintiff was a transgender person”, and had “the ability to incite hatred towards, serious contempt for and severe ridicule of the Plaintiff”- [71]. Again, the comments were found to be “disproportionate” and hence not “reasonable”- [86]; and there was “careless disregard” for “the hurt that the Social Media Posts would have had on the Plaintiff”- [91].

Final orders by way of remedy had not been handed down at the time this paper was being written. But remedies being sought (see eg *Blanch* at [1]) include monetary damages, an injunction restricting future speech on the matters, a forced apology and removal of material from social media, and development of a “policy” of some sort to prevent further repetition.

² See the quote from *Faruqi v Hanson* [2024] FCA 1264 at [293]-[296] at para [119] of the *Blanch* decision.

³ See the events recounted in para [4]; these statements by the defendant were not ruled on by the magistrate, but they do not seem to have been denied by the plaintiff.

In this comment I have not canvassed the issues around whether this legislation, in its application in these cases, could be seen to be invalid due to undue impairment of the freedom of political speech found in the federal Constitution. That would require much more comment, but suffice to say that the matter is one that should be addressed by the High Court at some stage.⁴

But these cases, in my opinion, illustrate the general problems with broadly framed “hate speech” laws. As I have said in my [previous paper](#) on the issues, I think it is justified to ban speech inciting violence against others. But when comments on a major issue of public interest can be classified as in this case as inciting “hatred towards, serious contempt for, or severe ridicule of” persons, then the parameters of the law are so unclear as to amount to a serious impairment of legitimate public comment. The issues around involvement of biological males in women’s sport are matters of great concern and potentially involve serious interference with women’s safety and the rights of women to single-sex activities. We already know from at least one Australian case, *Rep v Clinch* [2021] ACAT 106, referred to in detail in my previous paper, that simply referring to a trans woman as a male is not automatically vilification. The Tribunal there ruled as follows:

[117] In particular, many of the posts refer to Ms Clinch as man, or trans women as men. We can understand that such comments are insensitive, disrespectful, offensive and insulting to Ms Clinch and trans women. They are certainly inconsistent with the general principles of the Discrimination Act. But without additional aspects, we do not think that such comments are necessarily vilification.

In my view Ms Smith’s comments here amount to little more than reporting that the plaintiffs are biological males and should not be allowed to play in a women’s sporting competition. As with the *Clinch* case (not referred to by the magistrate) the comments may be unwelcome but did not amount to vilification. Even if this legislation is valid, these cases illustrate why the law ought to be interpreted to only respond to the most serious issues of incitement, and arguably ought to be amended to preserve much more space for free speech.

⁴ For previous comment see N Aroney, “The Constitutional (In)Validity of Religious Vilification Laws: Implications for their Interpretation” (2006) 34 *Federal Law Review* 287.