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Australia Will Violate Its International Obligations to Protect Fundamental Rights if the Victorian Racial and Religious Tolerance Act 2001 Is Used to Punish Religiously Motivated Speech

The Becket Fund for Religious Liberty is an international, interfaith law firm and NGO¹ that defends the free expression of all religious traditions. We represent Muslims, Jews, Buddhists, Christians, Hindus, Sikhs and others in American courts and before regional and international tribunals such as the European Court of Human Rights and the United Nations Human Rights Committee.

We write to you now on behalf of a diverse coalition of organizations dedicated to preserving freedom of religion and freedom of speech.²

This coalition does not question Australia's desire to foster a pluralistic society in which diverse social groups coexist peacefully. However, the coalition is deeply concerned that Australia has chosen a misguided—and unlawful—means to achieve that goal: censorship of individual religious expression. By allowing its court system to censor religious expression that others find personally objectionable, Australia not only violates international law, but also undermines the true basis for tolerance, that is, the freedom to openly discuss and debate views that differ from one's own.

Current Application of Victoria's Racial and Religious Tolerance Act Violates International Law

On 17 December 2004, the Victorian Civil and Administrative Tribunal found that two pastors, Daniel Scot and Danny Nalliah, and Catch the Fire Ministries Inc. had breached the Victorian Racial and Religious Tolerance Act of 2001 for statements made critiquing Islam at a religious seminar and in a newsletter.³ If the Tribunal is allowed to issue its punishments as scheduled on 2 May 2005, Australia will default on its obligation to protect the pastors' fundamental rights to religious liberty, freedom of expression, and equal protection of the laws secured by Articles 18, 19, and 26 of the International Covenant on Civil and Political Rights ("ICCPR"). We ask that you

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¹ With special consultative status at the United Nations Economic and Social Council.

² We note that the United States government is also tracking developments in this case with interest as noted in the U.S. State Department's 2004 Religious Freedom Report for Australia.

³ *Islamic Council of Victoria v. Catch the Fire Ministries Inc.*, VCAT 2510 (22 December 2004).

offices intervene in this matter as quickly as possible to prevent these violations of Australia's international legal obligations.

Australia's International Legal Commitments

Australia recognizes the authority and competence of the United Nations Human Rights Committee to enforce the ICCPR in the event that the Australian government violates any of its provisions.⁴ The Victorian Racial and Religious Tolerance Act *can* be applied consistently with ICCPR's free speech and religious liberty guarantees—and thereby avoid suits before the Human Rights Committee—but only if Australian courts show proper respect for the Act's statutory exceptions for speech that has a "religious purpose."⁵ Despite clear legislative guidance on this point,⁶ the Victorian Tribunal refused to grant the pastors a religious speech exemption, even though their purposes were quintessentially religious. Ironically, the Tribunal construed the Act's religious speech protections to *presume* the pastors were acting unreasonably, in bad faith, and insincerely until they could prove otherwise. As demonstrated below, this "guilty until proven innocent" interpretation is contrary to international law and cannot be allowed to stand.

The Act as Applied by the Tribunal Impermissibly Censors Religious Speech

"Everyone has the right to freedom of thought, conscience, and religion. This right shall include . . . freedom, either individually or in community with others and in public or private to manifest his religion or belief in . . . *practice and teaching*." ICCPR Article 18(1) (emphasis added). The Victorian Tribunal found the two pastors liable for nothing more than religious *preaching and teaching*, in direct contravention of Article 18. The Tribunal seeks to hide this fact—and thus avoid the Act's statutory exceptions for religious discussion and debate—by claiming that the pastors preached "unreasonably" and in "bad faith." According to the Tribunal, the pastors failed to present "a balanced discussion [instead] taking literal translations from the Qur'an and making no allowance for their applicability to modern day society." Taking on the role of a sermon review board, the Tribunal asserted that the pastors presented a "one-sided delivery of a view of the Qur'an and Muslims' beliefs, which were not representative." The Tribunal even made the startling determination that Islam "agrees substantially with Christian beliefs save for particular events" and condemned the pastors for dissenting from this secular pronouncement of supposed religious orthodoxy. Regardless of whether one thinks the Tribunal's or the pastors' opinion is correct, the Tribunal overstepped its authority by making a *secular* court the ultimate arbiter of the true meaning of *religious* texts and theology.⁷

⁴ The United Nations Human Rights Committee (HRC) is the designated interpreter of the International Covenant on Civil and Political Rights by authority granted to it in ICCPR Article 28. Under Article 1 of the Optional Protocol to the ICCPR, the Committee is authorized to examine allegations of human rights violations by individual citizens against their state governments. Australia officially ratified the ICCPR and the Optional Protocol to the ICCPR on 13 August 1980 and 25 Sep 1991 respectively.

⁵ Under section 11(b)(i) of the Religious Tolerance Act, "[a] person does not contravene Section 7 or 8 if the person establishes that the person's conduct was engaged in reasonably and in good faith . . . for any genuine academic, artistic, **religious** or scientific purpose." (emphasis added).

⁶ "[Religious] purposes are intended to have a broad meaning. For example, the discussion of religious issues includes a statement of religious belief, religious instruction and discussion concerning the conduct and practices of religious bodies." Victorian Religious Tolerance Act Explanatory Memorandum, page 1775.

⁷ Interestingly, the Tribunal referred to evidence submitted by a Christian priest in determining whether Pastor Scot's seminar was "a fair representation of *Islamic* religious beliefs." (emphasis added).

The Tribunal's power to determine what religious instruction is "reasonable" forces all religious persons (not just Christians) to preach and teach only beliefs that adhere closely to state approved interpretations of religious texts and tenets or risk losing their chance at the safe harbor provided by the Act.⁸ Again, according to the Tribunal, the burden is on *the accused religious believers* to prove that they acted reasonably, genuinely, and in good faith when critiquing religious beliefs, even (presumably) when critiquing their *own* religion. Faced with the prospect of being hauled before a Tribunal empowered to second guess their teachings, many sincere religious believers and organizations will be forced to simply limit or eliminate controversial parts of their teaching to avoid the risk of inadvertently violating such a standardless law. Thus the chilling effect of the Tribunal's decision not only prevents genuine pluralism in Australian society, it violates international law.

The Act as Applied by the Tribunal Impermissibly Regulates Religious Belief

ICCPR Article 18 guarantees the freedom of thought and conscience as well as the right to manifest religious beliefs without government interference. Yet the Tribunal found Pastor Scot's account of his personal religious beliefs to be "unbalanced" and "inconsistent and exaggerated," thus finding "subjective bad faith" as grounds for withdrawing the Act's protections for religious speech. But this finding is equivalent to a ruling that the pastor does not actually *believe* what he preaches, and is therefore preaching for non-religious purposes in violation of the Act. Under Article 18 however, one has the absolute right to religious beliefs free from government intrusion *even if* others think those beliefs are "inconsistent," "exaggerated," or "unbalanced." Article 18 recognizes that a person believes what he believes, and no court can breach that internal sanctuary in order to regulate an individual's conscience. Yet this is precisely what the Victorian Tribunal has done by questioning the validity of Pastor Danny's deepest held religious beliefs.

The Freedom to Preach Religious Truth

The Tribunal cannot defend its decision to censor the pastors' religious expression by relying on the fact that their teaching criticized Islam. That the pastors' religious discussions compared their views of Islam with their views of Christianity poses no legal impediment to their speech. To the contrary, one naturally expects leaders of "truth-claiming" religions to scrutinize the propositions of contradicting and competing "truth-claiming" religions during standard teaching and preaching to members. Such religious, apologetic discussions are not only expected, but are also protected by international law—whether the discussant is comparing Monotheism and Polytheism, Buddhism and Christianity,⁹ or Catholicism and Protestantism. If it were otherwise, the freedom to choose a religion from among alternatives, as guaranteed by Article 18, would be rendered meaningless. In short, although the Tribunal may not have cared for the pastors' particular critique of Islam, Article 18 does not permit religious truth claims to be treated as second-class speech.

Moreover, it appears that the pastors were singled out for punishment because their teaching was religiously motivated. One need not search far to find that comparable "vilifying" statements are routinely made against religions in Australia from *secular* sources, however, Victoria has not moved to

⁸ The Tribunal's power to determine whether doctrines are "correct" or "reasonable" is equally problematic when interpreting "jihad" as in this case, or "original sin" and damnation in the next.

⁹ This particular example is not merely theoretical but occurs in Victoria. The Buddhist Vihara Victoria was founded by and preaches the teachings of a recently deceased anti-Christian monk (Ven. Soma Thero) that was widely "accused of creating religious disharmony. . . . What he did was point out facets or interpretations of belief systems that were detrimental to society." See <http://vihara.alphalink.com.au>.

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suppress them. For example the work of Salman Rushdie, whose secular book *The Satanic Verses* is highly critical of Islam (so much so that it earned him a death sentence from Iranian clerics), remains widely available in Australia. A simple internet search turns up scores of secular Australian opinions highly critical of specific religions, as for example the Victorian Secularists Society which exists to “make people aware of the dark side of religions.” This Society’s public allegation that “Christian bibles [are] mainly based on ancient mythology, superstition, plagiarisms, misinformation, absurdities, contradictions and phantasmagoria; literally, all the trappings of various notions of ignorant primitive humanity,”¹⁰ has not raised the ire of the authorities. In fact, to date no other persons but these pastors have had an adverse finding made against them under Victoria’s Racial and Religious Tolerance Act. Ironically, in the name of religious tolerance, the Act is being used to treat religious speakers *more harshly* than secular ones.

Australia Must Not be Allowed to Create Sermon Review Boards

As for remedies, the complainants ask the Tribunal to force the pastors to publicly repudiate their personal religious beliefs (on their own website!) by forcing them to:

- 1) state that they made “inaccurate and misleading” statements concerning Islam and Christianity
- 2) retract *all* statements made at the religious seminar without qualification
- 3) “sincerely apologise[] for the offense”
- 4) *never again* publish any “statements, suggestions and implications” similar to the religious critiques made at the seminar

Additionally, the complainants demand full reimbursement of legal costs and monetary damages, which could equal many thousands of dollars. None of these remedies can be granted without violating the bedrock principles of international human rights law outlined above. In fact, if the judgment is not overturned, Australia would stand alone in the democratic world in instituting what amounts to judicial sermon review boards.¹¹

Accordingly, we the undersigned urge your offices to intervene in this matter to restore meaning to the Racial and Religious Tolerance Act’s statutory exceptions for religious speech, and thus guarantee that Australia remains in compliance with its international obligations.

Sincerely,



Anthony Picarello

President - The Becket Fund for Religious Liberty

cc: The Hon. Asma Jahangir – United Nations Special Rapporteur on Freedom of Religion or Belief
His Excellency Michael Thawley – Australian Ambassador to the United States

¹⁰ See Australian Secularists website at <http://home.vicnet.net.au/~vicss/>.

¹¹ Sweden recently retreated from a similarly ill-advised attempt at penalizing religious speech in the case of Pastor Ake Green. In that case, Sweden prosecuted a pastor under “hate speech” laws for preaching a controversial sermon on homosexual behavior to his congregation, but the decision was overturned on appeal in light of international law. For the Becket Fund’s summary and legal brief in the case, see <http://www.becketfund.org/index.php/case/93.html>.

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cc: His Excellency Mike Smith – Australian Permanent Mission to the United Nations in Geneva
The Hon. James Syme – Victorian Government Solicitor

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