

LEGAL OPINION OF THE BECKET FUND FOR RELIGIOUS LIBERTY

(A NON-GOVERNMENTAL ORGANIZATION IN CONSULTATIVE STATUS

WITH THE ECONOMIC AND SOCIAL COUNCIL (ECOSOC) OF THE UNITED NATIONS)

WASHINGTON, DC USA

IN THE SUPREME COURT OF VICTORIA AT MELBOURNE
IN THE COURT OF APPEAL

No 3751 of 2005

CATCH THE FIRE MINISTRIES, INC.
DANIEL NALLIAH AND
DANIEL SCOT

APPLICANTS

AND

ISLAMIC COUNCIL OF VICTORIA INC.

RESPONDENT

The Becket Fund for Religious Liberty is an international, interfaith, public interest law firm dedicated to protecting the free expression of all religious traditions. For over ten years, The Becket Fund has represented Buddhists, Christians, Hindus, Jews, Muslims, Sikhs, and others in American domestic courts and before international tribunals such as the European Court of Human Rights and the United Nations Human Rights Committee.

As a Non-Governmental Organization (NGO) in consultative status with the Economic and Social Council (ECOSOC) of the United Nations, The Becket Fund's global interest in protecting religious exercise and expression is implicated by the Victorian Civil and Administrative Tribunal's punishment of Pastors Daniel Scot and Danny Nalliah for expressing their religious beliefs.

ARGUMENT

The Tribunal's Judgment against Pastors Scot and Nalliah Violates International Human Rights Law

As a signatory to the International Covenant on Civil and Political Rights ("ICCPR"), Australia has an obligation under international law to guarantee each of its citizens the religious liberty, freedom of expression, and equal protection of the laws secured by ICCPR Articles 18, 19, and 26. The Tribunal's judgment burdens Pastors Scot and Nalliah's religious-motivated expression, and should the Supreme Court of Victoria at Melbourne uphold that judgment, Australia will be in violation of all three of these bedrock principles of international human rights law.

A. Australia Is Bound to Adhere to the Terms of the ICCPR and is Subject to Its Enforcement Mechanisms

Article 26 of the Vienna Convention on the Law of Treaties (the “Vienna Convention”)¹ specifically provides that “[e]very treaty in force is binding upon the parties to it and must be performed by them in good faith.” Article 27 further provides that adherence to domestic law is no justification for failure to perform the obligations of a particular agreement.² The Commonwealth of Australia officially ratified the ICCPR³ on the 13 August 1980, and acceded to the Optional Protocol to the ICCPR⁴ on the 25 September 1991. Accordingly, pursuant to the Vienna Convention, Australia is bound to adhere to the terms of the ICCPR and the Protocol.

Moreover, in accordance with Article 1 of the Protocol, Australia has recognized the authority and competence of the United Nations Human Rights Committee (“HRC” or the “Committee”)⁵ to enforce the ICCPR in the event that the Australian government violates any of its provisions. Article 1 also authorizes individuals to submit a communication to the Committee if they believe their rights under the ICCPR have been violated. If the Human Rights Committee finds a violation on such a complaint, remedies

¹ Vienna Convention on the Law of Treaties, May 23, 1969, 8 I.L.M. 679, 1155 U.N.T.S. 331, *entered into force* January 27, 1980.

² International agreements, to which the Commonwealth is bound, such as the ICCPR, preempt domestic law, such as the Criminal Code, under the doctrine of *lex superior*.

³ International Covenant on Civil and Political Rights, G.A. Res. 2200A, U.N. GAOR, 31st Sess., Supp. No. 16, at 52, U.N. Doc. A/6316 (1966), *entered into force* 23 March 1976.

⁴ Optional Protocol to the International Covenant on Civil and Political Rights, G.A. Res. 2200A (XXI), 21 U.N. GAOR Supp. No. 16, at 59, U.N. Doc. A/6316 (1966), 999 U.N.T.S. 302, *entered into force* March 23, 1976.

⁵ The United Nations Human Rights Committee 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 Council is authorized to examine allegations of human rights violations by individual citizens against their state governments.

include *reversing judgment* under the offending law, *compensation* for the victim of the violation, and subsequent *monitoring* of the Australian government to assure compliance with the Committee's decision.

B. The Tribunal's Judgment Against Pastors Scot and Nalliah for the Expression of Their Religious Beliefs Violates the Guarantee of Religious Liberty Secured by Article 18 of the ICCPR

Article 18 of the ICCPR provides in pertinent part as follows:

Everyone has the right to freedom of thought, conscience, and religion. This right shall include freedom to have or to adopt a religion or belief of his choice, and freedom, either individually or in community with others and *in public or private to manifest his religion or belief in worship, observance, practice and teaching.*

ICCPR art. 18(1) (emphasis added).⁶ Thus, ICCPR Article 18 protects not only the freedom to change one's religious beliefs, but also the freedom to manifest those religious beliefs in public or private by teaching and explaining them to others.

Here, Pastors Scot and Nalliah's religious expression falls squarely within the protections of Article 18. The Pastors held religious seminars and published articles in which they interpreted Muslim teachings, and compared them to their interpretation of Christian teachings. They thus taught from an irreducibly religious viewpoint: that the theological claims of Christianity are true, and that certain theological claims of Islam are not. Far from censoring the ability of religious leaders like Pastors Scot and Nalliah to teach religious views to a congregation, Article 18 expressly protects the "freedom . . . in community with others . . . to manifest his religion or belief in . . . *teaching.*" Nor were

⁶ Articles 1 and 18 of the Universal Declaration of Human Rights, G.A. Res. 217A, U.N. GAOR, 3rd Sess., U.N. Doc. A/810 at 73 (1948), similarly identify the freedom of thought, conscience, and religion as a fundamental right to be protected and preserved.

the Pastors' teachings and preaching concerning Islam and Christianity removed from the protection of Article 18 by virtue of their public dissemination in seminars and publications. To the contrary, Article 18 explicitly protects the freedom to teach and otherwise manifest one's religion "*in public.*"

To be sure, the Pastors chose a topic – analyzing Islamic beliefs and the Qur'an from a Christian standpoint – that was potentially offensive to the many Muslims. However, the fact that Pastors Scot and Nalliah taught a controversial religious viewpoint that offended others does not remove their religious teaching from Article 18's protections. Article 18 does not exclude from its scope the expression of religious views that are contentious. Nor does it deny protection to those views that may offend others by claiming, explicitly or implicitly, that their religion is wrong. Instead, Article 18's protection of the "right to freedom of thought, conscience and religion . . . is far-reaching and profound; it encompasses freedom of thoughts *on all matters*, . . . whether manifested individually or in community with others." General Comment⁷ to Article 18, No. 22[48](1) (emphasis added).⁸

Nor could it be otherwise. Many religions claim that they contain the absolute truth and that other religions are, in varying degrees, false. The propensity of religious groups to make claims of absolute truth against all others may inevitably cause offense

⁷ "General Comments are statements made by the [Human Rights Committee] in which it conveys to state parties its understanding of the meaning of the rights in the ICCPR." Conte, Alex *et. al.*, *Defining Civil and Political Rights: The Jurisprudence of the United Nations Human Rights Committee*, England: 2004.

⁸ Furthermore, Comment 22[48](8) explicitly states that the "[l]imitations imposed . . . must not be applied in a manner that would vitiate the rights guaranteed in article 18." Consequently, even if Pastor Scot's teaching did somehow threaten the fundamental freedom of another or endanger the public order, subjecting the speaker to legal sanctions similar to those in this case is too severe a limitation that will inevitably chill the rights of those considering whether to express other religious viewpoints that the government or society might deem controversial.

when one citizen teaches that another's deeply held beliefs are flawed or untrue. Article 18 is not blind to this reality. Instead, it embraces the reality that humans will inevitably differ in their quest to define what is absolutely true and good. Accordingly, Article 18 provides that it is not the role of a government composed of men to declare what a reasonable or balanced view of religion is by punishing those who publicly teach one religious interpretation, *even if* that view may offend others.

Yet, 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.” 2002 VCAT A392 at 138. The Tribunal even made the startlingly inappropriate theological 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' evaluations of Islam and Christianity are correct, the Tribunal overstepped its authority by making a *civil* court the ultimate arbiter of the true meaning of *religious* texts and theology.⁹

Allowing the Tribunal to decide what constitutes a “mainstream” interpretation of Christianity or Islam threatens the religious freedom of all people. The Tribunal's claimed 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

⁹ Interestingly, the Tribunal referred to evidence submitted by a *Christian* priest in determining whether Pastor Scot's seminar was, as the Tribunal put it, “a fair representation of *Islamic* religious beliefs.” (emphasis added).

harbor provided by the Act's religious exercise exemption.

The Tribunal cannot defend its decision to censor the Pastors' religious expression by relying on the fact that their teaching criticised 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 religions that make truth claims to scrutinize the propositions of other religions that make competing and contradictory truth claims, and explore these tensions 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,¹⁰ 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, *especially* strongly held ones, 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 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

¹⁰ 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>.

available in Australia. A simple internet search turns up scores of secular Australian opinions highly critical of specific religions. For example the Victorian Secularists Society 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”¹¹ 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.

C. The Tribunal Failed to Carry the Burden Required to Justify the Limitations its Judgment Placed on Pastors Scot and Nalliah’s Religious Expression

Because Pastors Scot and Nalliah’s religious teaching is so firmly protected by Article 18, the Tribunal bears a heavy burden in order to justify sanctioning Pastors Scot and Nalliah for their religious teaching. Specifically, the Tribunal’s censorship of Pastors Scot and Nalliah can be justified only if the Government can conclusively demonstrate that limiting their religious freedom is “*necessary* to protect public safety, order, health, or morals or the fundamental rights and freedoms of others.” ICCPR art. 18(3) (emphasis added). Simply put, however, there is *no* evidence in the record that Pastors Scot and Nalliah engaged in any discussion of religion that actually harmed or even threatened public safety, order, or morals, let alone the fundamental rights and freedoms of others. Far from engaging in any conduct that put others at risk, the evidence shows that Pastors

¹¹ See Australian Secularists website at <http://home.vicnet.net.au/~vicss/>.

Scot and Nalliah did nothing more than proclaim a particular religious viewpoint with which some strongly disagreed.

The Tribunal's judgment cannot be justified under the limitations to religious expression provided in Article 18, including alleged public safety concerns. The standard for limiting religious speech is not whether a judge subjectively believes that speech is offensive and "incites hatred" or "vilifies." Rather, the standard is whether the speech advocates violence toward individuals based on religion. Peaceful yet controversial speech is clearly not violent speech and poses no threat to public safety.¹²

Further, instead of cultivating social order, the Tribunal's interpretation of Victoria's Racial and Religious Tolerance Act of 2001 (the "Act") encourages religious strife by pitting religions against each other. It encourages Muslims to scout Christian worship services and Christians to retaliate by infiltrating mosques—with each group *actively seeking* to be offended. Those who wish to be subjectively offended will invariably get what they seek. Rather than promote understanding through a discussion of the merits of truth claims, the Act instead produces the sad spectacle of neighbors spying on neighbors of different faiths and measuring the level of offense. The Act has proven to be anything but ecumenical, and the divisive lawsuits will only continue to

¹² Instead of promoting public safety, the Tribunal's judgment and legal instruments of its kind encourages real criminals to hide behind the law to shield themselves from criticism of their criminal behaviour. Such an eventuality might sound unlikely if it had not already occurred. A self-described "witch" recently sued the Salvation Army because he felt "threatened" by alleged negative references to witchcraft in the Salvation Army's Alpha Program, which teaches the basic tenets of Christianity. The witch sued under Victoria's Racial and Religious Tolerance Act of 2001 *while in prison*, having been convicted of repeated child sex abuse, despite his protestations that he was merely "following the legal rites of a legal religion." Andrew Bolt, *Dump this law now*, Herald Sun, April 27, 2005. As a result of the Salvation Army being forced to waste precious time and money defending itself against this baseless suit, concerned citizens must think twice before discussing the danger posed by the illegitimate use of religion by this man (and others like him) as a shield for criminal behaviour. Such fear of discussion helps no one but criminals who seek to hide their criminality behind the good name of religion, and who will use the Tribunal's interpretation of the Act to sue their critics into silence.

multiply.

The Tribunal's interpretation of the Act deals a blow to the fundamental rights of believers to hold and communicate religious beliefs.¹³ The Tribunal's ruling illustrates the new role of the state as the establisher of religious orthodoxy and as a sermon review board. Unless the Tribunal's ruling is overturned, the Tribunal will now have power to review sermons and arbitrarily punish interpretations of holy texts or faith doctrines they find "unreasonable." This means that they now determine the boundaries of "acceptable" Christianity, Islam, Hinduism, *etc.* as a matter of law. The effect is state suppression of peaceful religious speech on the one hand and state coercion of belief on the other. Believers can no longer express the dictates of their consciences if they contradict the state-approved body of religious beliefs or fail to use a state-approved vocabulary for expressing those beliefs.

Worse still, the Tribunal has demanded that Pastors Scot and Nalliah publicly renounce their sincerely-held religious views. By order of the Tribunal, Pastors Scot and Nalliah must publicly adopt and proclaim religious views that they explicitly reject as well as censor future religiously-motivated speech or risk incarceration for contempt of court. The Pastors have since vowed to go to jail before violating their consciences. This is exactly the type of coercion Article 18 condemns.

In sum, because the judgment against Pastors Scot and Nalliah was based upon their expression of a religious viewpoint that falls squarely within the protection of Article 18, the judgment and sanction must be overturned.

¹³ Additionally, the free speech rights of secular speakers will be infringed, as they, too, will self-censor in order to avoid lawsuits. So, for example, news outlets will be tempted to curb their speech to avoid costly suits for merely reporting on religious disputes.

D. Forcing Pastors Scot and Nalliah to Retract Their Statements and Apologise for the Expression of their Religious Belief Violates the Guarantee of Freedom of Expression Secured by Article 19 of the ICCPR

Article 19 of the ICCPR provides in pertinent part as follows:

- (1) Everyone shall have the right to hold opinions without interference.
- (2) Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and *impart information and ideas of all kinds*, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice.

ICCPR art. 19 (emphasis added).¹⁴ Thus, the scope of protection for free expression that ICCPR Article 19 affords is broad. Article 19 protects the right to “impart . . . ideas of all kinds . . . [in the] media of his choice.” Article 19 does not limit its protection to information that is “balanced,” “representative” or even objectively true. Here, the Pastors’ discussion of Islam falls comfortably within the Article’s broad protections.

Moreover, the Human Rights Committee applies heightened scrutiny to attempts to limit the freedom of expression secured by Article 19 when the individual is speaking, as the Pastors were in this case, in a *professional* capacity. For example, in *Victor Ivan Majuwana Kankanamge v. Sri Lanka*, a newspaper reporter was charged with defamation for articles that caused offense to government officials. The Committee held that because the reporter’s articles were “directly attributable to . . . his profession,” the government’s prosecution violated ICCPR Article 19. *See* Communication No. 909/2000.

A religious leader’s profession requires him to teach that certain social, philosophical, and religious views – specifically, those held by his religious group – are

¹⁴ *See also* UDHR, Article 19: “Everyone has the right to freedom of opinion and expression; this right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers.”

actually true. To do so requires that one interpret the beliefs of those other religions. Thus, comparing the doctrine and “fruits” of one religion to another is inherent to religious preaching. As pastors of a Christian church, Pastors Scot and Nalliah’s professional obligation is to preach that the claims of Christianity are true in contrast to competing claims of other religions, just as many leaders of other faiths teach that their religion presents the more compelling worldview in contrast to Christianity. Pastors Scot and Nalliah’s expression of their views on Islam is directly attributable to their professional obligations as pastors and is therefore entitled to a particularly high degree of protection under ICCPR Article 19.

Despite the protection afforded the Pastors’ religious expression by Article 19, the Tribunal’s application of the Act found Pastors Scot and Nalliah liable based merely upon the “offense” their speech caused certain Muslims attendees, and to Victoria’s Muslim community. In the Tribunal’s view, it is permissible to toss aside the protections of freedom of expression secured by Article 19 unless the person acts “in good faith.” A person acts in good faith if he or she “takes a conscientious approach . . . designed to minimise the offence or insult” suffered by the object of the speech.¹⁵ Only after the person can demonstrate he or she acted “reasonably” and “in good faith” will the court apply the “genuine religious purpose” or “public interest” exceptions. *See* 22 December 2004 Judgment of Victorian Civil and Administrative Tribunal, Human Rights Division. Accordingly, the question in this case is whether the limitations on an individual’s right to freedom of religious expression can be based on a subjectively judged effort to minimise the subjective emotional and psychological effect of that expression on a given

¹⁵ [2004] VCAT 2510, 102.

audience.¹⁶ The answer is “no,” for to do so would completely vitiate the freedom of expression.

As an initial matter, permitting censorship of religious expression merely because it may offend those who hear it would represent a radical expansion of the narrowly defined circumstances in which Article 19 permits limits on freedom of expression.¹⁷ In particular, those exceptions do not permit limitations that would “put in jeopardy the right itself.” General Comment to Article 19, No. 10. It is nearly impossible to have a discussion about truth claims, inherent to religious viewpoints, without contradicting the viewpoints of those persons – presumably of contradictory religious faiths – who hold contrary viewpoints. There is thus always a possibility of offense in expressing a religious viewpoint. But allowing censorship of speech based on the possibility of “offense” would place the right to free expression in great jeopardy because the speaker would never know in advance if his or her ideas would rise to the level of “offense” that would permit censorship and criminal punishment.

Moreover, because there is no objective measure to determine what speech qualifies as “offensive,” the door would be open to an infinite number of limitations on the freedom of expression. Such a standard would greatly imperil the right to free speech itself. That, in turn, would place the security of democratic society at risk, which is

¹⁶ Of course, religious speakers who seek to teach in a non-secretive manner will normally not have full control over the composition of the audience that, someday or another, is exposed to their message.

¹⁷ See ICCPR Article 19(3) (“The exercise of the rights provided for in paragraph 2 of [Article 19] carries with it special duties and responsibilities. It may therefore be subject to certain restrictions, but these shall only be such as are provided by law and are necessary:

- (a) For respect of the rights or reputations of others;
- (b) For the protection of national security or of public order . . . or of public health or morals.”)

secured upon the foundations of the freedom to express ideas of all sorts and upon debate that is robust, wide-open, and uninhibited.

For this reason, the United Nations has never limited the right to freedom of religious expression according to mere perceptions of felt offense. For example, in *Mr. Kenneth Riley et al. v. Canada*, the Committee specifically refused to recognize an alleged harm that was based only on the psychological and emotional response of the observer. *See* Communication No. 1048/2002 (denying standing to Royal Canadian Mounted Police organization who opposed the wearing of turbans by Khalsa Sikh officers instead of Stetson hats).

Human rights are by definition *universal and inalienable* and not to be limited by relevance to a specific culture. Feelings of offense, and efforts to censor the potentially offensive, are not only personal and subjective, they are intrinsically related to one's culture and era. Taboos vary between cultures. Stigmas change over time. Minority and majority status fluctuate constantly. In contrast, the right to freedom of speech is not cultural, it is universal. It is not temporary, it is inalienable. When a human right, here, freedom of speech, is made subject to the judgment of what is likely to cause offense to the feelings of a particular group in a particular culture at a particular time, it ceases to be universal and inalienable.

One of Hitler's first acts after seizing power in 1933 was to issue a presidential decree that severely limiting the right to assemble and the right to a free press. Among other things, the Nazis decreed that any newspaper that "insult[ed] or maliciously brings into contempt" "any religious society . . . or its practices" could be shut down. *See Verordnung des Reichspräsidenten zum Schutze des Deutschen Volkes vom 4. February*

1933 (*Reichsgesetzblatt* I S. 35) (“Decree of the Reichspräsident for the Protection of the German People”).¹⁸ The Nazis were thus using a ban on insulting religious groups, passed in the name of the common good, as a method of limiting freedom of speech and ultimately freedom of conscience. Hitler’s misguided attempt to protect the public good by censoring so-called “insulting” speech teaches that the right to enjoy a freedom is only as secure as it is for the smallest minority, in essence the individual.

In contrast, the Act, which Victoria claims is necessary to prevent religious conflict, has had the primary effect of actually increasing conflict between religious groups. Article 19 proceeds from the premise that the most effective way to promote an open, pluralistic society in which minority groups can flourish is rigorously to protect freedom of speech of all the parties involved. In pluralistic societies, there are very few viewpoints shared by all. Article 19 does not seek to eliminate those differences, but instead holds that the freedom for all is best served by respecting the right of others to express their opinions, even if most people think the opinions are wrong or even offensive. Protection of this right to be wrong in a pluralistic society also instills a respect for the inherent dignity of the person speaking. Accordingly, in enforcing Article 19, the Committee has urged governments to respect differences by giving voice to more diverse viewpoints, not less. *See John Ballantyne and Elizabeth Davidson v. Canada* (“*Ballantyne*”); *Gordon McIntyre v. Canada* 359/1989;385/1989/Rev.1 (urging Canada to protect the “vulnerable position” of Francophones in ways that did not preclude the freedom of expression of Anglophones).

¹⁸ “[W]enn in ihnen eine Religionsgesellschaft des öffentlichen Rechts, ihre Einrichtungen, Gebräuche oder Gegenstände ihrer religiösen Verehrung beschimpft oder böswillig verächtlich gemacht werden.” (Decree at Section 9.1.6) This decree is available at http://www.lsg.musin.de/Geschichte/natsoz/Notverordnung4_Feb_33.htm

In sum, by preserving the right of one individual to speak freely, Article 19 protects the right of every individual to speak according to his or her conscience. Because Pastors Scot and Nalliah were sanctioned for expressing a religious viewpoint that falls squarely within the protection of Article 19, the judgment must be vacated.

E. The Judgment Against Pastors Scot and Nalliah for the Expression of Their Religious Beliefs Violates the Guarantee of Equal Protection of the Law Secured by Article 26 of the ICCPR

Article 26 of the ICCPR provides:

All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, *religion*, political or other opinion, national or social origin, property, birth or other status.

ICCPR art. 26 (emphasis added).¹⁹

Under ICCPR Article 26, discrimination may be either direct or indirect. A law is discriminatory if it has either the “purpose or effect” of discriminating against a religion. General Comment to Article 26, No. 18 [37]. *See also Simunek, Hastings, Tuzilova and Prochazka v. The Czech Republic*, Communication No. 516/1992 (“an act which is not politically motivated may still contravene article 26 if its effects are discriminatory”).

To sustain the judgment against Pastors Scot and Nalliah in this case would be to apply Australia’s laws in such a way as to discriminate not just against one religion, but against all religions that do not comport with a homogenized “civic religion” whose boundaries are to be determined by judges.

While their arguments may offend, religious teachers have since time immemorial

¹⁹ *See also* General Comment, No. 18[37] ¶ 1.

compared the truth claims of their beliefs with the truth claims of a competing religion, and made moral assertions about these truth claims. Their religious duty is to expound upon these truth claims, not to teach that which will be well-received or inoffensive. However, the interpretation given to Victoria's Racial and Religious Tolerance Act by the Tribunal forces religious teachers to choose between their conscience and obedience to the law. Members of religious congregations will similarly be forced to choose between subscribing to religious teaching and compliance with the Act. To sustain the lower court's decision against Pastors Scot and Nalliah would be to place a disproportionate burden upon people who maintain largely minority, though sincerely-held religious beliefs.

Because the lower court's decision impermissibly discriminates against religion in violation of ICCPR Article 26, Pastors Scot and Nalliah's judgment must be vacated.