

VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL

HUMAN RIGHTS DIVISION

ANTI DISCRIMINATION LIST

VCAT REFERENCE NOS. A93/2005 AND A96/2005

CATCHWORDS

Religious vilification – Incitement – Summary dismissal of claim – Free speech – Witchcraft and Wicca – Christian religious program at Victorian prison – Whether Alpha program incites hatred of witches – Distinction between inciting hatred of an idea or practice, and inciting hatred of a person – Recommendations of reform – Mediation – *Racial and Religious Tolerance Act 2001*, ss 8, 15, 23(1) – *Equal Opportunity Act 1995*, ss 6-8, 42, 108, *Equal Opportunity Act 1984*, s 6 – *Victorian Civil and Administrative Tribunal Act 1998*, s 75

APPLICATION NO A93/2005

APPLICANT

Robin Fletcher

RESPONDENT

The Salvation Army Australia
Southern Territory General Work

APPLICATION NO A96/2005

APPLICANT

Robin Fletcher

RESPONDENT

CMC Australasia Pty Ltd

WHERE HELD

Melbourne

BEFORE

Justice Stuart Morris, President

HEARING TYPES

Applications to summarily dismiss

DATE OF HEARING

15 June 2005

DATE OF ORDERS

1 August 2005

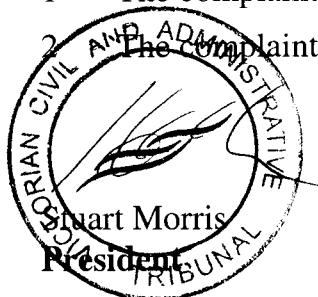
CITATION

Fletcher v Salvation Army [2005] VCAT 1523

ORDERS

1 The complaint the subject of proceeding A93/2005 is summarily dismissed.

2 The complaint the subject of proceeding A96/2005 is summarily dismissed.



APPEARANCES

Mr Robin Fletcher	In person by video link
Salvation Army	Mr Greg Doran of counsel
CMC Australasia Pty Ltd	Mr Stewart J Maiden of counsel
State of Victoria (Corrections Victoria)	Ms Melanie Young of counsel

REASONS

- 1 In recent months there has been community concern that Victoria's *Racial and Religious Tolerance Act 2001* impairs legitimate free speech about racial and religious matters. This is not the case. The Act is reserved for extreme circumstances: such as where a person engages in conduct that inflames others to hate a person or persons because they adhere to an idea or practice or are of a particular race. The present proceedings, in which a person who says he practises a religion that involves nature worship and witchcraft has made a claim that certain Christian teaching amounts to religious vilification, come nowhere near the mark. In short, the claim is preposterous.
- 2 Before discussing the law, I should set out some relevant facts. Early this year Robin Fletcher, a prisoner in Victoria's prison system, made a complaint to the Equal Opportunity Commission.¹ The Commission declined to entertain the complaint on the basis that it lacked substance.² Mr Fletcher then required the complaint to be referred to the tribunal.³ The respondents maintain that the complaint is so lacking in substance that it should be summarily dismissed.⁴ For the reasons which follow, I agree.
- 3 Mr Fletcher's complaint⁵ concerned the conduct of a religious course that was offered at a Victorian prison, known as the Alpha program. The program included an introduction to the Christian religion. Mr Fletcher, who claims to be a traditionalist witch and a Wiccan⁶, was a participant in the Alpha program. He said that during the presentation of the program a number of disparaging remarks were made about "witches" and

¹ The Equal Opportunity Commission exists by reason of section 160 of the *Equal Opportunity Act 1995*. The Commission has the initial responsibility of considering complaints concerning any alleged breach of that Act or the *Racial and Religious Tolerance Act 2001*.

² The Commission reported that the complaints alleged discrimination in the provision of services on the basis of religious belief or activity; and religious vilification, and authorising and assisting religious vilification. It observed that the complaints appeared to rely on section 6-8 and 42 of the *Equal Opportunity Act 1995* and sections 8 and 15 of the *Racial and Religious Tolerance Act 2001*.

³ If the complainant is not satisfied with the response of the Commission, he or she may require the matter to be referred to the Victorian Civil and Administrative Tribunal. The relevant provisions are section 23(1) of the *Racial and Religious Tolerance Act 2001* and section 108(1B) of the *Equal Opportunity Act 1995*.

⁴ The applications to summarily dismiss the proceedings were made under section 75 of the *Victorian Civil and Administrative Tribunal Act 1998*. The relevant principles applicable to such an application are set out in *State Electricity Commission v Rabel* [1998] 1 VR 102.

⁵ The letter of complaint consisted of two pages and was received by the Equal Opportunity Commission on 11 January 2005.

⁶ According to the website "Answer.com", Wicca is a polytheistic, neo-Pagan, nature religion inspired by various pre-Christian western European beliefs, whose central deity is a mother goddess and which includes the use of herbal magic and benign witchcraft. It is said to have been founded by Gerald Gardner and first publicly revealed in 1954 (but as "Wica"). Wicca is said to be practised by about one million people throughout the world. Clearly Wicca is a religion. This is so despite the statement of George W Bush to the contrary: "I don't think witchcraft is a religion. I would hope the military officials would take a second look at the decision they made." (Interview on ABC's *Good Morning America*, 24 June 1999.)

“astrologers and occultists”. He claimed that there was an implication in the program that witches were “Satanists”; and he said that the program was inflammatory because it made reference to a verse in the Bible that implied that if a witch wants to become a Christian the witch must burn his or her scriptures.⁷ Mr Fletcher complained that the Alpha program caused hatred of Wiccans, occultists and pagans.

Racial and Religious Tolerance Act 2001

- 4 Unusually, in enacting the *Racial and Religious Tolerance Act 2001*, the Parliament included a Preamble. This commences by asserting that:

The Parliament recognises that freedom of expression is an essential component of a democratic society and that this freedom should be limited only to the extent that can be justified by an open and democratic society.

There can be no clearer sign that the Parliament intends that the Act be interpreted prudently, so as to preserve essential freedoms.⁸

- 5 Section 8 of the Act provides:

- (1) A person must not, on the ground of the religious belief or activity of another person or class of persons, engage in conduct that incites hatred against, serious contempt for, or revulsion or severe ridicule of, that other person or class of persons.

The key word is “incites”. In its context, this does not mean “causes”. Rather it carries the connotation of “inflame” or “set alight”. The section is not concerned with conduct that provokes thought; it is directed at conduct that is likely to generate strong and negative passions in the ordinary person. An example of such passions would be where persons are so moved that violence might result.⁹

- 6 It is clear that the test to be applied is an objective one.¹⁰ The outcome does not depend upon the reaction of the person making the complaint. Nor does it depend upon whether the conduct was intended to incite hatred.¹¹

⁷ The reference was to the King James version of the Bible, 18 Deuteronomy 10-12, which states: “There shall not be found among you any one that maketh his son or his daughter to pass through the fire, or that useth divination, or an observer of times, or an enchanter, or a witch, Or a charmer, or a consulter with familiar spirits, or a wizard, or a necromancer. For all that do these things are an abomination unto the Lord: and because of these abominations the Lord thy God doth drive them out from before thee.”

⁸ This sentiment is repeated in the Objects of the Act, which are set out in section 4. Section 4(2) states that it is the intention of the Parliament that the provisions of the Act are to be interpreted so as to further these objects.

⁹ Section 24 of the Act makes it a criminal offence for a person to intentionally engage in conduct that the offender knows is likely both to incite hatred against another person and to incite others to threaten physical harm to that other person. Section 8 involves a lesser standard, not just in relation to intention, but as to what is incited. However it remains necessary that the conduct in question “incite” hatred, etc, in respect of a person or a class of persons.

¹⁰ *Bropho v Human Rights and Equal Opportunity Commission* [2004] FCAFC 16, [2004] 135 FCR 105; *John Fairfax Publications Pty Ltd v Kazak* [2002] NSWADTAP 35; *Islamic Council of*

7 The Act is not concerned with the vilification of a religious belief or activity as such. Rather it is concerned with the vilification of a *person*, or a class of *persons*, on the ground of the religious belief or activity of the person or class. As the Chief Executive of the Equal Opportunity Commission recently explained:

[The Act] protects religious freedom by ensuring that people are not subjected to vilification because of their beliefs. This does not mean that people cannot evangelise and proselytise¹², just that they must do so without inciting hatred of those who follow differing religious beliefs.¹³

Hence it will be necessary to ask whether, looking at the matter objectively, particular conduct incites hatred against, serious contempt for, or revulsion or severe ridicule of, a person or class of persons. The law does not stop a person from engaging in conduct that involves contempt for, or severe ridicule of, a religious belief or activity, provided this does not incite hatred against, serious contempt for, or revulsion or severe ridicule of another person or a class of persons on the ground of such belief or activity. The law recognises that you can hate the idea without hating the person.

8 The concepts used in the Act require a balance to be struck between free speech and the avoidance of conduct that vilifies a person, or group of persons, on racial or religious grounds. In the context of similar legislation enacted by the Commonwealth, French J of the Federal Court has put it this way:

the ... Parliament appeared to have intended to strike a balance between the right to freely express or communicate certain matters and ideas and the right to live free from vilification.¹⁴

It is sometimes said that human rights legislation is to be given a “beneficial” interpretation,¹⁵ whatever that means. But, just as religious tolerance is a human right, so too is free speech.¹⁶ Hence the so-called

Victoria v Catch the Fire Ministries Inc [2004] VCAT 2510 at [14]; *Judeh v Jewish National Fund of Australia Inc* [2003] VCAT 1254.

¹¹ In Victoria, this is made clear by section 9 of the Act. However the outcome would appear to be the same without this section: see *John Fairfax Publications Pty Ltd v Kazak* [2002] NSWADTAP 35.

¹² To try and convert somebody to a religious faith or political doctrine.

¹³ *The Age*, 23 June 2005, page 17.

¹⁴ *Bropho v Human Rights and Equal Opportunity Commission* [2004] FCAFC 16 at [33].

¹⁵ See *IW v City of Perth* (1997) 191 CLR 1, at 15 (per Brennan CJ and McHugh J), 22-23 (per Dawson and Gaudron JJ) and 58-59 (per Kirby J). See also *Islamic Council of Victoria v Catch the Fire Ministries Inc* [2004] VCAT 2510 at [7].

¹⁶ The right to free speech is not defined by that which is left over after all limitations on free speech are taken into account. It is a right in itself, which must be given effect to in interpreting legislation that may infringe or limit the right: see the discussion by the Full Federal Court in *Bropho v Human Rights and Equal Opportunity Commission* [2004] FCAFC 16 at [72-73]. There is some authority for the proposition that a statutory provision which purports to make incursions into principles of free speech should be interpreted narrowly: see *Brown v Classification Review Board* (1998) 154 ALR 67 at 76-78; and *Coco v The Queen* (1994) 179 CLR 427 at 437.

“beneficial” method of interpretation is of no genuine assistance in the balancing process required by the *Racial and Religious Tolerance Act*.¹⁷

- 9 Even if the conduct of a person is *prima facie* in breach section 8 of the Act, any one of the exceptions in section 11 or 12 may apply to the conduct in question. For example, section 11 provides that a person does not contravene section 8 if the person establishes that the person’s conduct was engaged in reasonably and in good faith in the course of any statement or publication made for any genuine religious purpose or for any purpose that is in the public interest. It will not be easy to define what is meant by “a religious purpose” or to recognise a “genuine” religious purpose. As Sir John Latham famously observed in 1943 in the context of section 116 of the Commonwealth Constitution,

It would be difficult, if not impossible, to devise a definition of religion which would satisfy the adherents of all the many and various religions which exist, or have existed, in the world. There are those who regard religion as consisting principally in a system of beliefs or statement of doctrine. So viewed religion may be either true or false. Others are more inclined to regard religion as prescribing a code of conduct. So viewed a religion may be good or bad. There are others who pay greater attention to religion as involving some prescribed form of ritual or religious observance. Many religious conflicts have been concerned with matters of ritual and observance. Section 116 must be regarded as operating in relation to all these aspects of religion, irrespective of varying opinions in the community as to the truth of particular religious doctrines, as to the goodness of conduct prescribed by a particular religion, or as to the propriety of any particular religious observance. What is religion to one is superstition to another. Some religions are regarded as morally evil by adherents of other creeds. At all times there are many who agree with the reflective comment of the Roman poet - "*Tantum religio potuit suadere malorum.*"¹⁸

Hence, in my opinion, a genuine religious purpose may include the purpose of asserting that a particular religion (or, indeed, no religion) is the true way; and that any way, but the true way, is false.

- 10 The context in which the conduct takes place will be relevant, not only to whether one or other of the exceptions apply, but also to whether the conduct incites hatred against, serious contempt for, or revulsion or severe ridicule of, another person or class of persons. Once again, I emphasise the word “incites”. For example, if the context is one of academic discussion or stand-up comedy, it is improbable that conduct would incite strong negative passions.

¹⁷ Contrast *John Fairfax Publications Pty Ltd v Kazak* [2002] NSWADTAP 35 at [9].

¹⁸ *Adelaide Company of Jehovah's Witnesses Incorporated v Commonwealth* [1943] HCA 12 at [3]; (1943) 67 CLR 116, at 123. *Tantum religio potuit suadere malorum* is a quotation from the Roman poet, Lucretius (96BC-55BC) and has been translated to mean: “So potent was religion in persuading to evil deeds.”

The present proceedings

- 11 Having explained what I understand to be the true meaning of Victoria's religious tolerance laws, it is easy to see why the present complaint is quite hopeless.
- 12 Mr Fletcher's first identifiable complaint is that the Alpha program implies that witches are "Satanists". But, assuming that this factual allegation can be made good, it cannot amount to a breach of the Act. No ordinary person could possibly be "incited" to hate those practising Wicca as a result of such an implication. To most people the question of whether witches are Satanists not only involves a concept which is nebulous, but also is an arid and irrelevant theological debate. It is not a vilification issue.
- 13 Mr Fletcher's second identifiable complaint concerns the use of the King James version of the Bible in the Alpha program. He claims that the words of this version of Deuteronomy incite hatred of witches as witchcraft is:

an abomination unto the Lord: and because of these abominations the Lord thy God doth drive them out from before thee.

I suspect that the words of William Blake are apposite:

The Vision of Christ that thou dost see
Is my vision's greatest enemy.
Thine has a great hook nose like thine,
Mine has a snub nose like to mine.
Thine is the Friend of all Mankind;
Mine speaks in parables to the blind.
Thine loves the same world that mine hates;
Thy heaven doors are my hell gates.
Socrates taught what Meletus
Loath'd as a nation's bitterest curse,
And Caiaphas was in his own mind
A benefactor to mankind.
Both read the Bible day and night,
But thou read'st black where I read white.¹⁹

There is nothing in Mr Fletcher's second complaint. It is misconceived. The choice of the King James version in a course of religious education could not possibly be regarded as "inciting" hatred against, serious contempt for, or revulsion or severe ridicule of, persons practising the Wiccan religion or some other version of witchcraft.

- 14 The third identifiable ground of complaint is a suggestion that the Alpha course claims that witchcraft "damages people, is Satanic or inspired by demons". Assuming this claim can be made out, once again it simply cannot amount to a breach of the Act. As I have explained, criticism of a religion or religious practice is not a breach of the Act; the Act is concerned with inciting hatred of *people* on the basis of race or religion.

¹⁹ William Blake, *The Everlasting Gospel*, circa 1810.

- 15 The fourth identifiable ground advanced by Mr Fletcher is to similar effect to the other grounds: essentially it is that the Alpha course teaches the need for Christians to avoid witchcraft and the occult; and that if a person has been involved in these things they must repent and “burn their books”. Once again, assuming the factual basis of this claim is made out, it does not amount to a breach of the Act. The course is intended to explain Christian thinking and, possibly, to persuade persons to follow Christian ways. Christians are entitled to say to a witch: “if you want to be a Christian, you must renounce witchcraft”. Likewise, a witch is entitled to say to a Christian: “if you want to be a witch, you must renounce Jesus Christ”. This is the stuff of evangelism and religious debate. It has nothing to do with the law of Victoria.
- 16 It has not been necessary to refer to the defences that are available under section 11 of the Act. However the defence in relation to conduct engaged in reasonably and in good faith for a “genuine religious purpose” would be bound to succeed if this matter proceeded to a full hearing. This provides another ground to summarily dismiss the claims.
- 17 I have dealt with the various claims under the *Racial and Religious Tolerance Act*. Similar claims have been made under the *Equal Opportunity Act 1995*. However much the same reasoning applies to both Acts. In addition, for the reasons given in the respondents’ submissions, there are additional grounds for summarily dismissing these claims. For example, there is no allegation of any refusal to provide a service to Mr Fletcher; nor is there any allegation that the terms of provision of the Alpha course were different to the terms of provision to any other person; nor is there any causal connection between the provision or non-provision of a service to Mr Fletcher and any harm he claims to have suffered. Hence it is appropriate that Mr Fletcher’s claims under the *Equal Opportunity Act* also be summarily dismissed.

Reform of the law and practice

- 18 Publicity about unmeritorious vilification claims can undermine the intentions of the *Racial and Religious Tolerance Act*. This is so even if unmeritorious claims are dismissed by the tribunal; indeed, even if *summarily* dismissed. Once the genie is out of the bottle (in the sense that there is widespread publicity that a colourful, but hopeless, claim has been made), it is hard to put it back (that is, to explain to the public that the claim did not succeed). Hence I recommend²⁰ that consideration be given to the amendment of the Act to require a person seeking to pursue a claim before the tribunal to obtain the leave of the tribunal before the proceeding is

²⁰ Section 31 of the *Victorian Civil and Administrative Tribunal Act 1998* provides that it is a function of the President of the tribunal, inter alia, to advise the Minister with respect to any action that the President considers would lead to any enabling Act being rendered more effective.

initiated.²¹ The question as to whether leave should be given should be decided on the papers.

- 19 Whether or not my recommendation to amend the Act is adopted, the tribunal intends to promote mediation as the initial dispute resolution procedure for racial and religious vilification claims. Mediation seeks to build tolerance. Although arbitration can play an important role in publicly setting standards, it can generate fresh tensions and can actually inflame a dispute. For mediation to be successful, it must take place out of the glare of publicity. This brings into question the right of a person who is not a party to a tribunal proceeding, such as a newspaper company, to obtain access to tribunal files before a mediation takes place.²² In recent times this has been a matter of contention.²³ It is vital that the relevant provisions of the *Victorian Civil and Administrative Tribunal Act 1998* be amended to protect the mediation process and to provide reasonable privacy to individuals engaged in civil or administrative disputes. Certainly the process of hearing and determining disputes should be held in public;²⁴ but it has been widely recognised that the principle of public justice does not extend to providing unlimited public access to documents filed with a court or tribunal.²⁵



²¹ This may also involve a relevant amendment to the *Equal Opportunity Act 1995*. It is to be noted that a prosecution under the Act can only be instigated with the written consent of the Director of Public Prosecutions: see sections 24(4) and 25(4); a similar filter is required in relation to civil actions.

²² See section 146 of the *Victorian Civil and Administrative Tribunal Act 1998*.

²³ *Herald and Weekly Times Pty Ltd v VCAT* [2005] VSC 44 (4 March 2005); *Herald and Weekly Times Pty Ltd v VCAT* [2005] VSC 188 (1 June 2005).

²⁴ This is provided for in section 101(1) of the *Victorian Civil and Administrative Tribunal Act 1998*. There are certain exceptions set out in section 101(4).

²⁵ See for example: New South Wales Law Reform Commission, *Contempt by Publication*, Report No 100 (June 2003) [Ch 11]; and Dr Ros Macdonald and Professor Brian Fitzgerald (eds), *Courts for the 21st Century: Public Access, Privacy and Security* (2003) published by the Queensland School of Technology School of Law.