

ACT CIVIL & ADMINISTRATIVE TRIBUNAL

BOTTRILL v SUNOL (Discrimination) [2018] ACAT 21

DT 4/2017

Catchwords: **DISCRIMINATION** – vilification – religious conviction – what is a religion – what relief should be ordered

Legislation cited: *ACT Administrative Tribunal Act 2008* s 8
 Discrimination Act 1991 s 67A
 Human Rights Commission Act 2005 ss 53A, 53E
 Racial and Religious Tolerance Act 2001 s 8

Cases cited: *Best Practice Education Group Ltd T/as Blue Gum School v Department of Education & Community Services* [2002] ACTDT 1
 Cristian v Bottrill [2016] ACAT 104
 Burns v Sunol [2017] NSWCATAD 215
 Burns v Sunol (No 2) [2017] NSWCATAD 236
 Church of the New Faith v Commissioner of Pay-Roll Tax (Vict.) (1983) 154 CLR 120
 Cooper v Western Area Local Health Network [2012] NSWADT 39
 Harrison & Commissioner for Social Housing in the ACT and Minister for Community Services and Minister for Aboriginal and Torres Strait Islander [2012] ACAT 10
 Margan v Taufaa [2017] NSWCATAD 216
 Ordo Templi Orientis v Legg (Anti-Discrimination) [2007] VCAT 1484
 Ordo Templi Orientis Inc & Anor v Devine & Anor (Anti-Discrimination) [2007] VCAT 2470
 Purvis v State of New South Wales (2003) 217 CLR 92
 RSSB Australia Pty Ltd v Ross [2017] VSC 314

Tribunal: Senior Member B Meagher SC

Date of Orders: 13 March 2018

Date of Reasons for Decision: 13 March 2018

AUSTRALIAN CAPITAL TERRITORY)
CIVIL & ADMINISTRATIVE TRIBUNAL) **DT 4/2017**

BETWEEN:

DAVID BOTTRILL
Applicant

AND:

JOHN SUNOL
Respondent

TRIBUNAL: Senior Member B Meagher SC

DATE: 13 March 2018

ORDER

The Tribunal orders that:

1. The respondent remove from any website or social media, that he owns or controls, any statements, information, suggestions or implications, including hyperlinks, to the same or similar effect, whether directly or indirectly, as those, as are contained in the post attached to the complaint to the Human Rights Commission in this matter.
2. The respondent refrain from making, publishing or distributing any statements, information, suggestions or implications, including hyperlinks on any website or social media that he owns or controls, to the same or similar effect, whether directly or indirectly, as those, as are contained in the post attached to the complaint to the Human Rights Commission in this matter, including allowing any such matter to remain on any website or social media that he owns or controls.
3. The respondent otherwise refrain from making, publishing or distributing in the ACT any statements, information, suggestions or implications to the same or

similar effect, whether directly or indirectly, as those, as are contained in the post attached to the complaint to the Human Rights Commission in this matter.

.....
Senior Member B Meagher SC

REASONS FOR DECISION

1. The background to this matter has been set out in an earlier decision¹ in the same matter made on 9 October 2017. The Attorney General for the ACT had intervened and provided submissions in respect of that decision. The Attorney General has since informed the Tribunal that he does not propose to take any further part in the hearing.
2. The matter was heard on 13 February 2018 and both parties attended and were self-represented.
3. The background, as earlier described, is as follows.
4. On 19 January 2017, David Bottrill, an ACT resident, made a complaint to the ACT Human Rights Commission against John Sunol, a resident of NSW. He complained that he was discriminated against by conduct that was directly or indirectly because of his religious conviction, being his membership of ‘OTO’ (later described as Ordo Templi Orientis).
5. The complaint was that Mr Sunol operated a number of blog pages on which are published publicly viewable materials which vilify him on the ground of his religious conviction. The documents were attached to the complaint and, as he said, contain pictures of him and a number of extremely derogatory comments concerning him and OTO and identified him as a member. The attachments indicate they were printed from the web address referred to.
6. The complaint was referred to ACAT under section 53A of the *Human Rights Commission Act 2005*.
7. In the complaint Mr Bottrill said he wanted the materials removed; that Mr Sunol be required not to publish any further materials of this nature and an apology.
8. The attached pages assert that the OTO is a satanic paedophile cult. It shows a picture of the applicant adjacent to this description and also says clearly about the applicant those into sodomy of infants and the like are always promoted into

¹ *Bottrill v Sunol & Anor* [2017] ACAT 81

Australian Government. These statements are made numerous times in different ways and all describe the OTO and ascribe to the applicant these crimes. In addition, ‘child rape’ and ‘boy murder’ are words used to describe the applicant and adherents of the OTO. It is not necessary to repeat every such statement but clearly the writer is conveying to his readers that the applicant as a member of the OTO is a person who engages in criminal acts such as murder, rape and child molestation.

9. Mr Bottrill relies on section 67A of the *Discrimination Act 1991*. It provides (with key words in bold):

67A Unlawful vilification

*(1) It is unlawful for a person to **incite** hatred toward, revulsion of, serious contempt for, or severe ridicule **of a person or group of people on the ground of any of the following, other than in private:***

- (a) disability;*
- (b) gender identity;*
- (c) HIV/AIDS status;*
- (d) intersex status;*
- (e) race;*
- (f) **religious conviction;***
- (g) sexuality.*

Examples—other than in private

1 screening recorded material at an event that is open to the public, even if privately organised

*2 **writing a publicly viewable post on social media***

3 speaking in an interview intended to be broadcast or published

4 actions or gestures observable by the public

5 wearing or displaying clothes, signs or flags observable by the public

Note 1 Serious vilification is an offence under the Criminal Code, s 750.

Note 2 An example is part of the Act, is not exhaustive and may extend, but does not limit, the meaning of the provision in which it appears (see Legislation Act, s 126 and s 132).

*(2) However, **it is not unlawful** to—*

- (a) make a fair report about an act mentioned in subsection (1); or*

(b) *communicate, distribute or disseminate any matter consisting of a publication that is subject to a defence of absolute privilege in a proceeding for defamation; or*

(c) *do an act mentioned in subsection (1) reasonably and honestly, for academic, artistic, scientific or research purposes or for other purposes **in the public interest, including discussion or debate about and presentations of any matter.***

10. The orders that may be made by the Tribunal are contained in section 53E(2) of the *Human Rights Commission Act 2005*. It provides:

(2) *The ACAT must make 1 or more of the following orders:*

(a) *that the person complained about not repeat or continue the unlawful act;*

(b) *that the person complained about perform a stated reasonable act to redress any loss or damage suffered by a person because of the unlawful act;*

(c) *unless the complaint has been dealt with as a representative complaint—that the person complained about pay to a person a stated amount by way of compensation for any loss or damage suffered by the person because of the unlawful act.*

(3) *In making an order under subsection (2) (c), the ACAT must consider—*

(a) *the person’s right to equality before the law and the impact of the discrimination on the enjoyment of that right; and*

(b) *the inherent dignity of all people and the impact of the discrimination on the person’s dignity; and*

(c) *the public interest in ensuring an appropriate balance between the right to equal and effective protection against discrimination and equality before the law without distinction or discrimination and other human rights; and*

(d) *the nature of the discrimination; and*

(e) *any mitigating factors.*

Examples—par (b)—impact of discrimination

distress, humiliation, loss of self-esteem, loss of enjoyment of life

Example—par (c)—other human rights

freedom of expression

Examples—par (d)

serious or repeated discrimination, intentional or malicious discrimination, discrimination on the grounds of 2 or more protected attributes under the Discrimination Act 1991

Examples—par (e)

a public apology, systemic changes to protect against further discrimination

11. In the earlier decision it was decided that there was jurisdiction for ACAT to hear the matter where the words were describing an ACT resident and were viewed here.
12. At the hearing on 13 February 2018 Mr Bottrill gave sworn evidence and was cross examined. He tendered some documents. He had earlier provided a written submission that also contained documentary evidence. They have all been received into evidence² and will be described when referred to herein. Mr Sunol also gave sworn evidence and was cross examined. He did not provide any other material. Both witnesses appeared to me to be candid and there was no contested issue of fact. I accepted the evidence of Mr Bottrill and in the main accept the evidence of Mr Sunol. There was one aspect of the timing of his removal of the offending post that he at first overstated, but he agreed with Mr Bottrill when questioned about that issue

The Evidence

The applicant

13. The applicant said he was a member of an organisation that's shortened name is OTO. Its full name is Ordo Templi Orientis – Latin for 'Order of the Temple of the East'.
14. Following is a summary of his evidence in chief.
15. According to Mr Bottrill, its history is that it is:

...about 100 years old created out a congregation, a collection of the Masonic rights in Europe and then was infused with a religious current by Aleister Crowley... Since about 1912 it's been the main vehicle for promoting the religion of Thelema... It's a religion based on revelations given to and then published by Aleister Crowley. The primary religious text is a book called The Book of Law which Crowley claims to have received when he was in Cairo and subsequently buttressed by other, of [what we consider] holy [writings]... [The vast majority are writings by Crowley.] Three times he has offered various expositions and explanations of the meaning, of the content of his doctrine... I was formerly the national

² The rules of evidence do not apply: section 8 *ACT Administrative Tribunal Act 2008* (the **ACAT Act**)

treasurer of the OTO. I am also a member of an internal tribunal which is for disputes between members.

16. Mr Bottrill stated that there a number of adherents to the OTO. Within Australia membership is quite small. In terms of persons who ascribe to Thelema, it's probably in the matter of hundreds. In terms of membership of the OTO, it tends to hover around 100 or less through time. The largest collection of followers is in America where they have about 4000. There are members in Scandinavia, Germany, England, Croatia, Serbia, Israel and some in Asia. There's a small group in Japan.
17. He said he has a belief in aspects of the teachings of the organisation. It provides 'a spiritual element in his life that gives it structure and purpose, pretty much as a Muslim, a Sikh or a Hindu would.
18. He has been a member since 1994. He was an associate member of the organisation then but his belief in Thelema predates that. It goes back to the 70s and then he became a formal member of the order some time in 1994.
19. He described the matters in the blog which he complained about. They included sexual abuse of children, murder and various other criminal acts, which previously, he said, have been used against other minority religious groups through time.
20. He said they were all untrue in respect of the organisation, its teachings and himself.
21. He drew attention to a report he had provided by a Professor Ezzy. He said in a prior Tribunal case he had provided this report referring to *Cristian v Bottrill* [2016] ACAT 104. This report is discussed later.
22. He referred to a reference in *Ordo Templi Orientis v Legg (Anti-Discrimination)* [2007] VCAT 1484 to a statement by a Mr King. He knows him, and he is another member of the OTO. He knew about the statement as he had also provided a statement to VCAT in the case. He described the statement as much the same as his statement but Mr King provided more detail and with more authority and was more knowledgeable.

23. He explained that a Professor Ireland had provided an earlier report in respect of a Victorian case, but he had now retired. Professor Ezzy refers to it in his report. Thelema, generally, at that stage, wasn't well documented or researched in academic areas so his understanding is that Professor Ireland went basically to the primary texts. Now, as evidenced by the Ezzy report, there is more increased academic interest in Thelema as a religion and the OTO so that's why he contacted Professor Ezzy and sought his opinion because it would be more up-to-date.
24. He added that in terms of establishing Thelema as a religion, in 1994 the OTO was trying to get status as a religious organisation from the Australian Taxation Office (ATO) and the ATO were applying criteria which was based on the 1984 Scientology case.³ Mr Bottrill negotiated with the ATO for that and tax exemption as a religious institution was granted by the ATO as well. He provided a copy of this ruling. It is still exempt. He provided a current ruling from the Charities and Not-for-Profit Commission and it is attachment 8 to his submissions.
25. In respect of Mr Sunol's control of the website and responsibility for the offending blog Mr Bottrill said he had an ability to actually remove materials. Earlier in this proceeding, at directions hearing, there was an agreement and a document was drafted to go to the blog administrators requesting that it be removed. That subsequently was not necessary because Mr Sunol managed to facilitate the closure of the entire blog, so Mr Bottrill considers that is evidence that Mr Sunol was, at all times, in control of the blog and able to take materials off at will.
26. Mr Bottrill did not dispute that the item complained about was written by someone called Luke McKee.
27. He first became aware of the item sometime before he made the complaint to the Human Rights Commission.⁴

³ See later

⁴ 19 January 2017

28. Mr Bottrill stated that Mr McKee had been attacking him in various forums, calling him at work and then he noticed that Mr McKee was publishing on Mr Sunol's blogspot. Other people were drawing it to his attention also. People in Canberra have seen it. People in Western Australia, Sydney and Melbourne have seen it and were drawing it to his attention.
29. He could not remember when he first saw it but it was sometime before he complained to the Human Rights Commission and before he printed out the attachment to the complaint.
30. Before he approached the Human Rights Commission, he sent Mr Sunol a notice of concern advising him of the presence of this material on his site and had a telephone conversation with him. He told Mr Sunol that there was material on his blog site that defamed and vilified him and that it should be removed. Mr Sunol, on the blogspot, had placed his telephone number and said if anybody has any complaints to call him and he would remove the materials.
31. He could not recall what Mr Sunol said. It was a very short conversation and he thinks he undertook to remove the materials. Later on that evening they were removed and later again in that evening they were reinstated. Mr Sunol called him back. He can't remember the details of the conversation but thinks he said something about his religious convictions and because he wanted to confirm that it was Mr Bottrill.
32. Mr Bottrill inferred that somebody had called him and complained that his initial response was that of a reasonable person and he removed the materials and then, for whatever reason, he decided to reinstate them.
33. Mr Bottrill then lodged the complaint with the Human Rights Commission.
34. The material remained on the website until these proceedings were initiated and the directions hearing. He then closed the blog site in its entirety.
35. Since the hearing about jurisdiction Mr Bottrill says that Mr Sunol has created another blogsite where he provided hyperlinks which take the reader away from his blog site to other materials which repeat the religious vilification. Mr Sunol

at this point spoke and confirmed there was such a new blogsite and identified it. The new site, he said, contains a commentary on this case and hyperlinks to other sites. Mr Bottrill provided a printout of a 13 January 2018 posting on the new site, referring to the case and saying he – Mr Sunol – was going to Canberra to fight the devil.

36. He did not provide the material relating to the hyperlinks.
37. Later in submissions, he said the report of Professor Ezzy⁵ that he provided to the Tribunal was an accurate explanation of the OTO and the Thelema religion. He also explained that the Wikipedia entry about OTO has many inaccuracies although the entry in the Encyclopedia Britannica was reasonably accurate. He referred to the statements made about him and the OTO in the offending blog and said they were not true. He pointed out that the Ezzy report had been accepted after Professor Ezzy had been cross examined in the Tribunal in *Bottrill v Cristian* [2016] ACAT 7 at [85] – [91]. It is informative to set out the relevant passages from that decision. Whilst this case must be decided on the evidence before it, no request was made to have Professor Ezzy attend for questioning and indeed the respondent did not in his cross examination of the applicant suggest that what Professor Ezzy said was wrong or that there was any truth in the matters contained in the blog. In addition, Mr Sunol said that he agreed that the OTO and Thelema were religions and the applicant was entitled to follow his religion just as he, Mr Sunol, was entitled to follow his own religion as a Pentecostal Christian. He did not contest that Mr Bottrill had such a religious conviction.
38. In *Bottrill v Cristian*⁶ Presidential Member Symons said:

85. *The applicant called evidence in relation to the O.T.O. from Professor Douglas Ezzy, Professor of Sociology and previously Head of the School of Sociology and Social Work at the University of Tasmania. He is the current president of the Australian Association for the Study of Religion, which is the main academic association for the study of religion in Australia. He is also a member of the Contemporary Pagan Studies Group, the American Academy of Religion and on their steering committee and the editor of the Journal for the Academic*

⁵ An academic at the University of Tasmania with a speciality in religious studies

⁶ Affirmed on appeal *Cristian v Bottrill* [2016] ACAT 104

Study of Religion, the main Australian based journal that publishes religious studies and academic work.

86. *Professor Ezzy stated in his report he was:*

... significantly informed by a 2006 report to VCAT on the O.T.O. by Professor Rowan Ireland. I have quoted extensively from that report and provided additional information based on my own research. My information about the O.T.O. is based on reading of various Crowley and Thelemic texts, academic literature about the O.T.O. and similar new religious movements and informal conversations I have had with other academics about the O.T.O.

87. *Professor Ezzy described the OTO as a small international religious movement modelled on Freemasonry and heavily influenced by the writings of Aleister Crowley who became the head of the OTO for much of the first half of the twentieth century. The report stated that the OTO is clearly a religious organisation; it has rules of association; the ritual practices are clearly set out and policed and there is an established set of interpretations of religious beliefs and texts.*

88. *In response to the question*

Do you think it likely if the OTO was practicing child sacrifice, paedophilia and cannibalism that may have actually come to the attention of law enforcement?

Professor Ezzy said:

Yes, indeed.... I would say it was extremely unlikely that this is a systemic or organisationally organised aspect of the OTO.

89. *Professor Ezzy stated in his report:*

Some aspects of the O.T.O. are informed by erotic ideas and make use of sexual symbolism as part of their ritual practice. ... It is easy to misunderstand the role of sexuality in the O.T.O. ...

[Professor Rowan] Ireland makes the point that the primary aim is self-discovery: Magick [Crowley's spelling] in Thelemic religion refers to Aleister Crowley's system of spiritual; discovery of individual will/vocation. The magical instructions underpinning the system involve use of tarot cards, yoga, meditation and several other practices including Tantric-based sex magick. The latter refers not to specific sex acts, but to a variety of practices which are believed to advance the recovery of the occluded, unconscious

self through acknowledgement, stimulus and harnessing of the libido

90. *In his report Professor Ezzy also stated:*

3.6 Crowley, child sacrifice and the O.T.O.

In Crowley's writings there is an often misunderstood reference to child sacrifice: For the highest spiritual working one must accordingly choose that victim which contains the greatest and purest force. A male child of perfect innocence and high intelligence is the most satisfactory and suitable victim. And in a footnote: It appears from the Magical Records of Frater Perdurabo that he made this particular sacrifice on an average about 150 times every year between 1912 e.v. and 1928 e.v. (Crowley 1994:204)

In a version of this Crowley text published by the O.T.O., the editors provide a commentary on this quotation in a footnote: Although Crowley intersperses cautions against literal interpretations of his remarks throughout this chapter, his detractors frequently cite this statement out of context to assert that he advocated literal human sacrifice, a practice he repudiated (Crowley 1994:204)

The academics Jenkins and Maier-Katkin (2008:81) observe that: He was actually parodying a statement by the Catholic Church that each ejaculation contained a potential human life and that masturbation and contraception thus ended this life. The thelemite Duquette (1993: xv) shares this interpretation.

Symbolic language and language that is deliberately deceptive and obfuscatory is extremely common in magical treatises such as those by Crowley and by practitioners of other magical traditions of a similar nature. The argument that Crowley was speaking symbolically is consistent with his other writings and his character. In the biographies and literature on Crowley that I have read, there is no mention of any historical evidence that Crowley actually engaged in human sacrifice. I think the suggestion is quite implausible.

It is clear that the thelemites and the O.T.O. reject the idea of human sacrifice. There is no evidence that it is part of their practice.

91. *Notwithstanding the respondent's vigorous cross examination of Professor Ezzy, his evidence was not shaken. He was a credible witness. The Tribunal accepted his evidence. He corroborated the applicant's evidence about the OTO.*

Mr Sunol's evidence

39. He said he was not responsible as he did not write the offending blog, had no idea this was written on his website and as soon as he found out he took the blog down.
40. He also said he could not apologise as he is a Pentecostal Christian and his point of view is diametrically opposed to Mr Bottrill's. He believes Mr Crowley was a wicked man into witchcraft and a whole group of things. He called himself 666 The Beast and a number of issues like that. He conceded he didn't know much about it and didn't want to vilify anyone.
41. He did not dispute he had links to other websites and material that may vilify the OTO and Mr Bottrill in the same manner as here and agreed he would get rid of them if he has to.
42. He agreed that he did not oppose the existing position whereby he was required not to publish further the material of like nature to the material in the blogs that have brought on this matter to the extent that he could control it. He did not agree with the OTO. He saw it with different eyes entirely than the way that Mr Bottrill does. He said he respected Mr Bottrill for having his religion as long as Mr Bottrill can respect him.
43. He was cross examined and from that it was clear that he has had a number of complaints in NCAT in respect of vilification of homosexuals. Mr McKee had written many of those pieces and put it on his website. He had enabled that by giving Mr McKee the password. This sort of complaint was not new. He could remove the material and as he later did take down the website. He said he did not because he didn't want to close it down immediately at the time.
44. He thought he site had 2400 hits per day.
45. He was asked about his finances and said he was bankrupt and agreed he was immune from orders for the payment of money.
46. He said he agreed that the OTO was a religion but not one he was willing to follow. He aptly summed up the situation saying We all have our own rights to our beliefs and own religions, our own areas of theological belief. Mr Bottrill has

his rights. I have my rights. I don't want to take away Mr Bottrill's rights. That's his. He's got his rights, but I have no wish or intention to accept it.

Religion and religious conviction

Statute

47. In the dictionary of the *Discrimination Act* the following definition occurs

religious conviction includes—

- (a) *having a religious conviction, belief, opinion or affiliation; and*
- (b) *engaging in religious activity; and*
- (c) *the cultural heritage and distinctive spiritual practices, observances, beliefs and teachings of Aboriginal and Torres Strait Islander people; and*
- (d) *engaging in the cultural heritage and distinctive spiritual practices, observances, beliefs and teachings of Aboriginal and Torres Strait Islander peoples; and*
- (e) *not having a religious conviction, belief, opinion or affiliation; and*
- (f) *not engaging in religious activity.*

Cases

48. In *Church of the New Faith v Commissioner of Pay-Roll Tax (Vict.)* (1983) 154 CLR 120,⁷ (the **Scientology case**), the High Court found that Scientology was a religion and canvassed the varying criteria that might be sufficient to satisfy that description. There were three separate decisions and the tests were not exactly the same. Mason ACJ and Brennan J said at [17]:

...for the purposes of the law, the criteria of religion are twofold: first, belief in a supernatural Being, Thing or Principle; and second, the acceptance of canons of conduct in order to give effect to that belief, though canons of conduct which offend against the ordinary laws are outside the area of any immunity, privilege or right conferred on the grounds of religion. Those criteria may vary in their comparative importance, and there may be a different intensity of belief or of acceptance of canons of conduct among religions or among the adherents to a religion. The tenets of a religion may give primacy to one particular belief or to one particular canon of conduct. Variations in emphasis may distinguish one religion from other religions, but they are irrelevant to the determination of an individual's or a group's freedom to profess and exercise the religion of his, or their, choice. (emphasis added)

⁷ Discussed in *RSSB Australia Pty Ltd v Ross* [2017] VSC 314 Per Emerton J [22]-[29]; *Best Practice Education Group Ltd T/as Blue Gum School v Department of Education & Community Services* [2002] ACTDT 1

49. At [23] it was said not to be limited to theistic religions and the test of religious belief was satisfied by belief in supernatural ‘Things’ or ‘Principles’ and not to be limited to belief in God or in a supernatural ‘Being’.

50. Wilson and Deane J gave similar but not identical tests and said at [18]:

*One of the more important indicia of a religion is that the particular collection of ideas and/or practices involves belief in the supernatural, that is to say, belief that reality extends beyond that which is capable of perception by the senses. If that be absent, it is unlikely that one has a religion. Another is that the ideas relate to man’s nature and place in the universe and his relation to things supernatural. A third is that the ideas are accepted by adherents as requiring or encouraging them to observe particular standards or codes of conduct or to participate in specific practices having supernatural significance. A fourth is that, however loosely knit and varying in beliefs and practices adherents may be, they constitute an identifiable group or identifiable groups. A fifth, and perhaps more controversial, indicium (cf. *Malnak v. Yogi* [1979] USCA3 125; (1979) 592 F (2d) 197) is that the adherents themselves see the collection of ideas and/or practices as constituting a religion.*

51. They also said at [19]:

As has been said, no one of the above indicia is necessarily determinative of the question whether a particular collection of ideas and/or practices should be objectively characterized as a religion. They are no more than aids in determining that question and the assistance to be derived from them will vary according to the context in which the question arises. All of those indicia are, however, satisfied by most or all leading religions. It is unlikely that a collection of ideas and/or practices would properly be characterized as a religion if it lacked all or most of them or that, if all were plainly satisfied, what was claimed to be a religion could properly be denied that description. Ultimately however, that question will fall to be resolved as a matter of judgment on the basis of what the evidence establishes about the claimed religion. Putting to one side the case of the parody or sham, it is important that care be taken, in the exercise of that judgment, to ensure that the question is approached and determined as one of arid characterization not involving any element of assessment of the utility, the intellectual quality, or the essential Truth or worth of tenets of the claimed religion.

52. In *Harrison & Commissioner for Social Housing in the ACT and Minister for Community Services and Minister for Aboriginal and Torres Strait Islander* [2012] ACAT 10 at [50] it was said:

There is no definition of the phrase in the Discrimination Act 1991. The word conviction is used in this context in its ordinary meaning - to indicate a settled or strongly held belief.

53. In fact, there is a definition as set out above for religious conviction and it is much wider.

Conclusion about religious conviction

54. The test is wider than that explained in the Scientology case as it extends to non-belief. No doubt atheism was intended to be covered. Thus, the element of the supernatural is not essential. On the undisputed evidence in this case the OTO did satisfy the criteria described in the Scientology Case and the applicant had a conviction based on its teachings. If the crimes attributed to the applicant and OTO in the blog complained of were true, it would be likely that it would not be regarded as a religion as they would constitute:

...canons of conduct which offend against the ordinary laws are outside the area of any immunity, privilege or right conferred on the grounds of religion

55. It might also be open to argue that there would be a defence under section 67A(2)(c)
56. On the basis of the evidence and the concession made by Mr Sunol, I find that the applicant has the religious conviction he describes. I should add that there was nothing about the way the applicant gave evidence or presented his case that would lead me to doubt his sincerity or truthfulness.

Incites

57. The meaning of this was discussed in the earlier decision in this matter at [25]-[26]. Clearly the crimes attributed to the applicant would incite the stated responses of hatred toward, revulsion of, serious contempt for or severe ridicule of the applicant.

ACT connection

58. The applicant gave unchallenged evidence that it had been read in the ACT by others who had told him of it and that he had also read it here. I accept that evidence. In accordance with the earlier decision, there is geographical jurisdiction

Responsibility for the post and its continuance

59. The only challenge was whether the respondent should be held liable for the writing of another.
60. There was some evidence about this. Mr Sunol admitted in correspondence and submissions that it was his blog site that he had created and that he allowed another man a Mr McKee to post articles on the site. He has been involved in cases in NCAT about such posts concerning vilification of homosexuals.⁸ In those cases, there was a clear explanation of the control that Mr Sunol had over the website and he has admitted in his communications provided to the Tribunal that he does. He eventually removed the website entirely after the matter had been referred to ACAT. He gave evidence and was cross examined and agreed that this was so.
61. The applicant gave evidence that when he became aware of the post he rang Mr Sunol and asked him to take it down. It was taken down and then immediately reappeared. The applicant thought that Mr Sunol had deliberately put it back when he realised what the post was about.
62. Mr Sunol agreed there was such a call but said, and I accept, that it was Mr McKee that did this. The applicant said – and the respondent agreed – that thereafter he rang again but it was not taken down, so he referred the matter to the Human Rights Commission and then to ACAT and before orders for its removal were made, Mr Sunol took down the whole site.
63. Whilst Mr Sunol seems to feel that taking it down might not solve the problem because Mr McKee would keep reposting it, he was able to stop this by changing the password or removing the site. He did the latter eventually.
64. He has said that he agrees with Mr McKee but qualified that by saying he would not express such strong views and seems to be concerned with what he might believe were references to sex in the OTO teachings. He did not seek to assert that the crimes alleged were part of the OTO teaching. He was invited by the

⁸ see *Burns v Sunol* (No 2) [2017] NSWCATAD 236 and *Burns v Sunol* [2017] NSWCATAD 215

Tribunal to ask questions of the applicant about what he thought might be repugnant about OTO. He did not and did not seek to justify the allegations at all.

65. He maintained that he should not be responsible for the writings of another and he would not apologise as his religious views were inconsistent with those held by Mr Bottrill.
66. He did not oppose an order that prevented him from allowing any further posts of the same kind to be put on or remain on a website he created or controlled. He was concerned not to be the subject of an order that prevented conduct he could not control.
67. In this regard a webpage of a new website owned and controlled by Mr Sunol called the same name but with an addition 'No 4' – according to Mr Sunol – was provided to the Tribunal by the applicant. It refers to this case and says he is coming to Canberra to fight the devil. Although not clear this seems to be referring to Aleister Crowley not the applicant or the Tribunal. The applicant said, and the respondent agreed, that it had a links to other material including a video by a third person that has been alleged to contain similar material. There is obviously the technology available to insert links to the websites of others that would potentially contain the same kind of vilification of the applicant.
68. As was explained in the earlier decision in this matter at [82] the person with the capacity to remove offending material from a website will be responsible for it, if it is not removed, when known to be there. Here it was not for some time. The fact that it was written by someone else does not remove such responsibility.
69. There can be no doubt that Mr Sunol could take it down and he did so eventually by discontinuing the website.

Orders

An injunction

70. Bearing in mind this history it is necessary to indicate the Tribunal's disapproval of such posts and to the extent it can, to endeavour to prevent them continuing. In section 53E(2)(2) of the *Human Rights Commission Act 2005* the Tribunal must make at least one of the orders there set out. Here, as provided for in (2)(a)

it should order that the person complained about not repeat or continue the unlawful act.

71. Obviously, the conduct of allowing the offending post to be available for readers in the ACT for a period after it was known to have been read in the ACT is an unlawful act.
72. Pending this hearing, the respondent had agreed to an order that until further order he not post or cause to be posted on any website or social media that he has control of, any of the material contained in the attachments to the complaint by Mr Bottrill.
73. In *OTO v Legg*⁹ where VCAT found similar material about the OTO and others, including Mr Bottrill, to constitute religious vilification, the following orders were made:

That the Respondents forthwith remove from the website specified and refrain from making, publishing or distributing in Victoria, including on the Internet whether in writing or orally and whether directly or indirectly (including by the Internet or by inserting any hyperlink on the Internet), any statements, information, suggestions or implications to the same or similar effect as those set out in paragraphs 11 and 18 of the particulars of complaint.

74. Here the respondent has removed the material but has a new website with links that have and may well have in the future similar vilifying material. The order should extend to removal of such links.
75. In respect of the issue of geographical jurisdiction, it is necessary to limit the order to some extent so that it does not purport to apply to conduct with no geographical link to the ACT. The post complained of has been found to have been read here and refer expressly to an ACT citizen. Any order will be confined to conduct involving the applicant, an ACT resident, and that consists of posting

⁹ *Ordo Templi Orientis v Legg (Anti-Discrimination)* [2007] VCAT 1484. The Victorian Act concerned Section 8 of the *Racial and Religious Tolerance Act 2001*-referred to engaging in conduct in or outside Victoria (see too the enforcement proceedings *Ordo Templi Orientis Inc & Anor v Devine & Anor (Anti-Discrimination)* [2007] VCAT 2470)

or not removing the same or similar words and pictures as are contained in the posts here.

76. If the order were to follow the language used in the *Legg* case by inserting the words ‘in the ACT’ in respect of internet dissemination, there may be some misunderstanding of what is prevented. So long as the order is directed at the outcome described in section 53E(2)(a) and is referable to this post over which there is jurisdiction there should be should be no misunderstanding.
77. The order is:
1. The respondent remove from any website or social media, that he owns or controls, any statements, information, suggestions or implications, including hyperlinks, to the same or similar effect, whether directly or indirectly, as those, as are contained in the post attached to the complaint to the Human Rights Commission in this matter.
 2. The respondent refrain from making, publishing or distributing any statements, information, suggestions or implications, including hyperlinks on any website or social media that he owns or controls, to the same or similar effect, whether directly or indirectly, as those, as are contained in the post attached to the complaint to the Human Rights Commission in this matter, including allowing any such matter to remain on any website or social media that he owns or controls.
 3. The respondent otherwise refrain from making, publishing or distributing in the ACT any statements, information, suggestions or implications to the same or similar effect, whether directly or indirectly, as those, as are contained in the post attached to the complaint to the Human Rights Commission in this matter.

Apology

78. The section refers to an apology as a means of mitigation but does not expressly refer to it being ordered. It may arguably be provided for in section 53A(2)(b).¹⁰

¹⁰ (b) *that the person complained about perform a stated reasonable act to redress any loss or damage suffered by a person because of the unlawful act;*

79. The respondent would not be sincere given his stated position, if ordered to apologise, and it would not really lessen the hurt, if any, suffered by the applicant. It would seem to be an order that would lead to an application for enforcement. Such an order if not consented to, in this case at least, is unlikely to assist the parties or add to the obvious disapproval of the current post implicit in the order under section 53A(2)(a). I am not persuaded that this order should be made.

Compensation

80. This was not sought in the complaint to the Human Rights Commission and was only mentioned in final submissions. Mr Sunol has said he is an undischarged bankrupt. This seems to have been accepted by the applicant who cross examined the respondent suggesting he saw himself as immune because he was bankrupt. The applicant suggested that the order would send a message even if it did not result in him getting any money. He did not lead any evidence of damage to reputation or injury to feelings. The section is intended to provide for compensatory damages not punitive damages and, in these circumstances, it is not appropriate to award damages.¹¹

Conclusion

81. The findings in this matter are based on the evidence that has been provided to the Tribunal in what are adversarial proceedings. It is not to be seen as any definitive inquiry into the nature of the OTO or the writings and behaviour of Aleister Crowley. Having said that, there was little contest between the parties about the facts and the applicant was, as earlier stated, a credible, intelligent and courteous witness and party. The acts ascribed to him and his religion were written in totally undisciplined language and with no attempt to provide any evidence that might warrant such claims. To use the vernacular, it is archetypal hate speech. Whilst the rights of non-adherents to the OTO and the religion of Thelema to be opposed to its teachings and practices should be respected, as Mr Sunol, himself, said:

We all have our own rights to our beliefs and own religions, our own areas of theological belief. Mr Bottrill has his rights. I have my rights. I don't

¹¹ *Purvis v State of New South Wales* (2003) 217 CLR 92; *Cooper v Western Area Local Health Network* [2012] NSWADT 39; *Margan v Taufaa* [2017] NSWCATAD 216

want to take away Mr Bottrill's rights. That's his. He's got his rights, but I have no wish or intention to accept it.

.....
Senior Member B Meagher SC

HEARING DETAILS

FILE NUMBER:	DT 4/2017
PARTIES, APPLICANT:	David Bottrill
PARTIES, RESPONDENT:	John Sunol
COUNSEL APPEARING, APPLICANT	N/A
COUNSEL APPEARING, RESPONDENT	N/A
SOLICITORS FOR APPLICANT	N/A
SOLICITORS FOR RESPONDENT	N/A
TRIBUNAL MEMBERS:	Senior Member B Meagher SC
DATES OF HEARING:	13 February 2018