Executive Council of Australian Jewry Inc.

הועד הפועל של יהודי אוסטרליה

The Representative Organisation of Australian Jewry

Level 2, 80 William Street
Sydney NSW 2000

Address all correspondence to:
PO Box 1114, Edgecliff NSW 2027

Tel (+61 2) **8353 8500**
Fax (+61 2) **9361 5888**
Web: www.ecaj.org.au
E-mail info@ecaj.org.au

PRESIDENT
Jillian Segal AO

DEPUTY PRESIDENT
Robert M Goot AO, SC

HON. TREASURER
Peter Wise AM

HON. SECRETARY
Daniel Aghion

Co-CEOs
Peter Wertheim AM
Alex Ryvchin

VICE PRESIDENTS
Lesli Berger (NSW)
Daniel Aghion (VIC)
Geoff Midalia (WA)
Jason Steinberg (QLD)
Annetay Henderson-Sapir (SA)
Jeff Schneider (TAS)
Karen Tatz (ACT)

IMM. PAST PRESIDENT
Anton Block

CONSTITUENTS
NSW Jewish Board of Deputies
Jewish Community Council of Victoria Inc
Jewish Community Council of Western Australia Inc
Queensland Jewish Board of Deputies
Jewish Community Council of South Australia
Hobart Hebrew Congregation
ACT Jewish Community Inc

AFFILIATES
Australasian Union of Jewish Students
Australian Federation of WIZO
Union for Progressive Judaism
Federation of Jewish Aged Care Services
Maccabi Australia Inc
National Council of Jewish Women
B'nai B'rith of Australia/ NZ
Jewish National Fund of Australia
Joint Distribution Committee Australia

OBSERVERS
Council of Progressive Rabbis
Federation of Australian Jewish Ex-Service Associations
New Zealand Jewish Council
Zionist Federation of Australia
Council of Orthodox Synagogues of Australia

24 January 2022

Committee Secretary
Senate Legal and Constitutional Affairs Committee
PO Box 6100
Parliament House
Canberra ACT 2600

Email: legcon.sen@aph.gov.au

Dear Committee Secretary

Re: Inquiry into *Religious Discrimination Bill 2021*, *Religious Discrimination (Consequential Amendments) Bill 2021* and *Human Rights Legislation Amendment Bill 2021*

I refer to my appearance before the Committee on 20 January 2022 together with Dr Colin Rubenstein and Ms Naomi Levin of the Australia/Israel & Jewish Affairs Council. During the course of the hearing we were asked two questions on notice. Those questions and our responses follow.

1. Amendment of clauses 11 and 12 of the primary Bill proposed by Professor Nicholas Aroney

According to Professor Anne Twomey (Submission 31), if clauses 11 and 12 of the primary Bill were enacted in their present form this would probably be an invalid exercise of legislative power, to the extent that these provisions purport to control the interpretation and operation of certain State and Territory laws rather than establish a direct inconsistency with them, as required by section 109 of the Constitution. We have not been asked to express a view about the correctness of Professor Twomey's analysis, nor do we presume to do so. On the assumption that Professor Twomey's analysis is correct, we have been asked to express a view about the alternative drafting of clauses 11 and 12 proposed by Professor Nicholas Aroney (Submission 145).

We would have no objection to Professor Aroney's proposed redraft of clause 11. In our view, the redraft would not alter the intended effect of clause 11, as set out in paragraphs 146 to 150 of the Explanatory Memorandum to the primary Bill.

We have given careful consideration to Professor Aroney's proposed redraft of clause 12 and regret that we cannot support it. In our view this proposed redraft, if enacted, would enlarge the scope of the protection to be given to statements of

belief well beyond that which is contemplated by the express words of the current clause 12, and would sweep aside many of the critical limitations to the operation of clause 12 which are explained in paragraphs 151 to 194 of the Explanatory Memorandum to the primary Bill.

In essence, the current clause 12 provides that a statement of belief "does not constitute discrimination" for the purposes of the Bill and existing Commonwealth, state and territory anti-discrimination law (Explanatory Memorandum, para 177). Professor Aroney's proposed redraft would provide that a statement of belief "is not unlawful" under those laws. This would have the effect of excepting statements of belief from *any* contravention of those laws, and not merely from a contravention of their *anti-discrimination* provisions. The difficulty is that Commonwealth, state and territory anti-discrimination laws prohibit not only forms of conduct that constitute discrimination, but other forms of conduct as well.

For example, Part IIA of the *Racial Discrimination Act 1975* (Cth) prohibits "*offensive behavior based on racial hatred*", in contrast to Part II which prohibits "*discrimination*". The conduct that is prohibited by Part IIA does not fall within the definition of "vilify" in clause 5 of the Bill, and would not be excluded from protection by sub-clause 12(3)(b) of Professor Aroney's proposed redraft, whereas it would be outside the protection given by the current clause 12 because the conduct does not constitute "*discrimination*". The Explanatory Memorandum (at paragraph 178) confirms that the protection given by the current clause 12 does not extend to the making of statements of belief that would constitute offensive behaviour based on racial hatred under Part IIA of the *Racial Discrimination Act*.

Similarly, conduct that constitutes sexual harassment or sex-based harassment is prohibited under Division 3 of Part II of the *Sex Discrimination Act 1984* (Cth), in contrast to Divisions 1 and 2 which prohibit "*discrimination*". Even if a statement of belief constitutes sexual harassment or sex-based harassment under that Act, it would not be unlawful under Professor Aroney's proposed redraft of clause 12, whereas it would be outside the protection given by the current clause 12 because the conduct does not constitute "*discrimination*". The Explanatory Memorandum (at paragraph 178) confirms that the protection given by the current clause 12 does not extend to the making of statements of belief that would constitute sexual harassment or sex-based harassment under the *Sex Discrimination* Act.

Further, various State and Territory laws prohibit conduct that constitutes vilification of a person on the basis of certain protected attributes. Those laws define vilification differently to the way that "vilify" is defined in the Bill. Accordingly, a statement of belief that constitutes vilification under a State or Territory law would not necessarily be unlawful under Professor Aroney's proposed redraft of clause 12. This would be contrary to the assurance given in the Explanatory Memorandum (at paragraph 178) that clause 12 is intended to protect a statement of belief "*solely*" from "*an action for discrimination under those Acts"*. The intention is not to protect a statement of belief from actions that may be available under those Acts for other forms of conduct, including vilification.

Were it not for the potential invalidity highlighted by Professor Twomey, our preference would be to retain clause 12 in its present form, as the limitations on its application are in our view clearer and stricter than in Professor Aroney's proposed redraft. However, if the government were to

accept Professor Twomey's analysis, and a redraft of clause 12 is necessary, then we would propose the redraft set out in in the Appendix to this letter, which we put forward in order to avoid the problems we perceive in Professor Aroney's proposal.

2. Prompt dismissal of manifestly unmeritorious complaints

The submission made by the Australian Human Rights Commission (Submission 32) states (at paragraph 86) that Clause 12 of the Bill will not assist in preventing unmeritorious complaints about statements of belief from being made under Federal, State and Territory anti-discrimination laws, and recommends that clause 12 be removed from the Bill. The submission contends that procedural changes to State and Territory laws, similar to those introduced by amendments to the *Australian Human Rights Commission Act 1986* (Cth) in 2017, are the most effective and appropriate way to screen out unmeritorious complaints about statements of belief. We have been asked to respond to the Commission's views.

In our view, clause 12 is not primarily about screening out unmeritorious complaints that might be made about statements of belief. It is about protecting from legal action any statement of religious belief that is made in good faith, is not malicious, is not such that a reasonable person would consider would threaten, intimidate, harass or vilify a person or group, and does not amount to the urging of a serious criminal offence, even though the statement might constitute low-level, possibly unintended, denigration and thus give rise to a *valid* complaint, say under section 17 of the *Anti-Discrimination Act 1998* (Tas).

Underpinning clause 12 is a policy judgement that the right to be protected against the making of such a statement, as important as that right may be, is not a *fundamental* human right, and should therefore not over-ride a freedom of such basic importance as the freedom to manifest one's religion by making such a statement. This policy judgement is in accordance with the provisions of Article 18.3 of the *International Covenant on Civil and Political Rights*, which permits limitations on the manifestation of religious belief and activity only to the extent that it is "*necessary to protect public safety, order, health, or morals or the* ***fundamental*** *rights and freedoms of others*" (emphasis added). Our reasons for arriving at this conclusion are set out in detail in part 3 of our submission.

I trust that this will be of assistance.

Yours sincerely

Peter Wertheim AM
co-CEO

[Appendix follows on next page]

APPENDIX

Alternative redraft of clause 12, if required

(1) The making of a statement of belief, in and of itself, does not constitute discrimination for the purposes of this Act.

(2) Notwithstanding any Federal, State or Territory laws, but subject to subsection (3), the making of a statement of belief, in and of itself, is lawful.
Note: This section does not protect a statement that has no relationship to religious belief (see the definition of ***statement of belief*** in subsection 5(1)).

(3) Subsection (2) does not apply to the making of a statement of belief:
(a) that is malicious; or

(b) that a reasonable person would consider would threaten, intimidate, harass or vilify a person or group; or

(c) that is covered by paragraph 35(1)(b); or
Note: Paragraph 35(1)(b) covers expressions of religious belief that a reasonable person, having regard to all the circumstances, would conclude counsel, promote, encourage or urge conduct that would constitute a serious offence.

(d) that constitutes an offence or incurs a penalty under any Federal, State or Territory law that is in force in the place where the statement is made; or

(e) that is prohibited by, or gives rise to a cause of action under, any Federal, State or Territory law, except to the extent that the making of the statement:

(i) constitutes discrimination under any of the following laws that is in force in the place where the statement is made:
(A) the *Age Discrimination Act 2004*;
(B) the *Disability Discrimination Act 1992*;
(C) the *Racial Discrimination Act 1975*;
(D) the *Sex Discrimination Act 1984*;
(E) the *Anti-Discrimination Act 1977* (NSW);
(F) the *Equal Opportunity Act 2010* (Vic.);
(G) the *Anti-Discrimination Act 1991* (Qld);
(H) the *Equal Opportunity Act 1984* (WA);
(I) the *Equal Opportunity Act 1984* (SA);
(J) the *Anti-Discrimination Act 1998* (Tas.);
(K) the *Discrimination Act 1991* (ACT); or
(L) the *Anti-Discrimination Act* (NT).

or

(ii) contravenes subsection 17(1) of the *Anti-Discrimination Act* 4 *1998* (Tas.); or

(iii) contravenes a provision of a law prescribed by the regulations 6 for the purposes of this paragraph,

or

(f) without limiting the generality of paragraph (e), that contravenes the provisions of any of the following laws that are in force in the place where the statement is made:

(i) Part V of the *Age Discrimination Act 2004*;
(ii) Divisions 3 or 4 of Part 2, or Part 5 or Part 7, of the *Disability Discrimination Act 1992*;
(iii) Part IIA or Part IV of the *Racial Discrimination Act 1975*;
(iv) Divisions 3 or 5 of Part II, or Part IV or Part V, of the *Sex Discrimination Act 1984*;
(v) Division 3A of Part 2, or Part 2A, or Division 5 of Part 3A, or Division 4 of Part 4C, or Part 4F, Part 5 or Part 10 of the *Anti-Discrimination Act 1977* (NSW);
(vi) Parts 6, 7 or 12 of the *Equal Opportunity Act 2010* (Vic.);
(vii) the *Racial and Religious Tolerance Act 2001* (Vic);
(viii) Chapter 3, Chapter 4, Chapter 5 or Chapter 5A of the *Anti-Discrimination Act 1991* (Qld);
(ix) Part V or Part X of the *Equal Opportunity Act 1984* (WA);
(x) Part 6 or Part 8 or Part 9 of the *Equal Opportunity Act 1984* (SA);
(xi) the *Racial Vilification Act 1996* (SA);
(xii) Division 10 of Part 9 of the *Civil Liability Act 1936* (SA);
(xiii) Division 2 (except for section 17) of Part 4, or Part 7, of the *Anti-Discrimination Act 1998* (Tas.);
(xiv) Part 5 or Part 7 or Part 12 of the *Discrimination Act 1991* (ACT); or
(xv) Division 2 of Part 3, or Part 8, of the *Anti-Discrimination Act* (NT).