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

6 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*

The Executive Council of Australian Jewry (ECAJ) makes the following submission to the above-named Inquiry. The ECAJ is the peak, elected, representative body of the Australian Jewish community. This Submission is also made on behalf of the ECAJ's Constituent and Affiliate organisations throughout Australia. We consent to this submission being made public.

For the purposes of this submission, the expression "the Bill" refers to the *Religious Discrimination Bill 2021*, and "the Bills" refers to all three Bills. We have used the expression "faith-based" as a short-hand description for bodies which are conducted in accordance with the doctrines, tenets, beliefs or teachings of a particular religion. A list of Recommendations concerning the Bill appears at the conclusion of this document.

Executive summary

The Bill and Explanatory Memorandum are a significant improvement on the earlier exposure drafts. From the perspective of the Jewish community the main improvements are: greater clarity about the scope for the institutions of smaller faith communities to preference people of their own faith in various aspects of their operations and governance; more focus on maintaining consistency with standards mandated by international law; the adoption of the 'genuine belief' test for religious doctrine in accordance with well-established case law; the expanded definition of 'religious body' so as to include all religious charities; and greater clarity concerning the protection of associates. Our recommendations are aimed at providing further clarity about certain additional matters which, whilst important, would not require a fundamental re-write of the Bill. Accordingly, we support the passage of all three Bills in their present form, or something approximating their present form.

1. Introduction

Overall, we commend the government for consulting extensively with faith community representatives and other stake-holders, including our organisation, in the process of drafting all three Bills. Many of the concerns expressed in our 2019 submission in response to the first set of exposure drafts, and in our 2020 submission in response to the second set of exposure drafts, have now been satisfactorily addressed, wholly or in part. Whilst we have some remaining concerns, as set out in this submission, we support the passage of all three Bills in their present form, or something approximating their present form.

2. The need for new legislation

Although Australia overall remains a stable, vibrant and tolerant democracy, where Jews face no official discrimination, and are generally free to observe their faith and traditions, unofficial antisemitism, including discrimination against Jews, is becoming more serious, and there have been worrying signs that it is creeping into mainstream institutions and society.

There were 447 recorded antisemitic incidents in Australia during the year ending 30 September 2021, according to the annual Report on Antisemitism in Australia[1], a report which has been published by our organisation each year for more than 30 years. The incidents were logged by the ECAJ, Jewish community roof bodies in each State, and other Jewish community groups and included physical assaults, abuse and harassment, vandalism, graffiti, hate and threats communicated directly by email, letters, telephone calls, posters, stickers and leaflets. In the previous 12-month period, these same bodies logged a total of 331 incidents. Accordingly, there was **an increase of 35%** in the overall number of reported antisemitic incidents compared to the previous year.

Behind the statistics lie some horrific personal stories of persistent antisemitic bullying of Jewish students at schools, the brutal physical assault of a man on his way to synagogue, the spray painting of "Free Palestine. F..k Zionist. Free Palestine" on the signage at the front of a synagogue in Adelaide, the flying of a Nazi flag above a synagogue in Brisbane, and the draping of two Palestinian flags and two shredded Israeli flags at the front entrance of a synagogue in Sydney. What is perhaps worse is the disgraceful discourse online and occasionally in the mainstream media of those who, for whatever reason, seek to rationalise or minimise this egregious behaviour.

As recorded in the ECAJ's antisemitism reports, hate or prejudice motivated behaviour directed at Jews has included:

- refusal to supply a good or service to a person who is, or is believed to be, Jewish;
- antisemitic verbal abuse and bullying of Jewish students as young as five years old at public and private schools, resulting in their departure from those schools;
- victimisation of employees in the workplace because they are, or are believed to be, Jewish, with employers unwilling to intervene, and resulting in the employees being forced or pressured out of their employment; and
- Jewish university students being confronted in class, or at on-campus events celebrating Jewish religious festivals, with anti-Jewish statements, including statements which deny, relativise or trivialise the Holocaust, by lecturers, tutors and certain other students.

[1] Executive Council of Australian Jewry, *Annual Report on Antisemitism in Australia 2021*, pp. 23-25

Whether these cases involved discrimination on the ground of race or on the ground of religion, or some combination, has no bearing on the negative emotional and psychological impact on those who were targeted, and their sense of safety and security in going about their daily lives. It is therefore anomalous in our view that at present there is a Federal law dedicated to prohibiting discrimination on the ground of race, and Federal laws dedicated to prohibiting discrimination on the ground of certain other attributes, namely sex, age and disability, but not on the ground of religion.

This gap is only partially filled by State and Territory laws. In NSW there is at present no law which prohibits discrimination on the ground of religion. In South Australia, there is only a limited prohibition against discriminating against a person on the basis of the person's religious appearance or dress.[2] It seems anomalous in 21st century Australia that something as fundamental as legal protections of religious freedom, and against religious discrimination, vary between States and Territories and are not the same for all citizens.

Accordingly, the Religious Freedom Review Report in 2018 concluded that "*'religious belief or activity' (including not having a religious belief) should be a protected attribute under federal anti-discrimination law*."[3] It recommended:

> "*The Commonwealth should amend the Racial Discrimination Act 1975,* ***or enact a Religious Discrimination Act****, to render it unlawful to discriminate on the basis of a person's 'religious belief or activity', including on the basis that a person does not hold any religious belief. In doing so,* ***consideration should be given to providing for appropriate exceptions and exemptions, including for religious bodies, religious schools and charities***."[4] (Emphases added)

This recommendation is in accordance with Article 26 of the International Covenant on Civil and Political Rights (ICCPR), to which Australia is a party, which requires Australia's domestic law to provide "*all persons equal and effective protection against discrimination on any ground such as…religion*".[5]

Finally, as we noted in our 2019 submission, there has been a consistent decline over many decades in the proportion of Australians who identify themselves in the Census as an adherent of a religion. Religious freedom in Australia can no longer be taken granted, and its protection by legislation is therefore timely.

3. Applicable international standards

Under Article 18.1 of the ICCPR:

> "*Everyone shall have 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 individual-*

[2] *Equal Opportunity Act 1984* (SA), Part 5B
[3] *Religious Freedom Review: Report of the Expert Panel*, 18 May 2018, para 1.390, p.94
[4] *Religious Freedom Review: Report of the Expert Panel*, 18 May 2018, Recommendation 15, p.5
[5] *International Covenant on Civil and Political Rights*, 16 December 1966, 999 *UNTS* 171 (entered into force 23 March 1976) art 26.

> *ly or in community with others and in public or private, to manifest his religion or belief in worship, observance, practice and teaching.*"

Article 18.3 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*" (emphases added).

In clarifying what "necessary" means in this context, the Religious Freedom Review Report recommended that:

> "*Commonwealth, State and Territory governments should have regard to the Siracusa Principles on the Limitation and Derogation Provisions in the International Covenant on Civil and Political Rights when drafting laws that would limit the right to freedom of religion.*"[6]

The Siracusa Principles[7] stipulate that whenever a limitation to a right, including the right to freedom of thought, conscience and religion, is required by the ICCPR to be "necessary," the limitation must inter alia respond to a pressing public or social need, pursue a legitimate aim and be proportionate to that aim (Principle #10), and the limitation must "*use no more restrictive means than are required for the achievement of the purpose of the limitation*" (Principle #11).

The other question raised by Article 18.3 of the ICCPR is which rights and freedoms are, or are not, to be regarded as "fundamental" so as to take priority over the right to freedom of religion if there is a conflict. A possible answer is provided by Article 4.2 of the ICCPR. Article 4.2 nominates seven rights from which no derogation is permitted, even "*in time of public emergency*". These are:

- the right to life (Article 6);
- the right not to be subjected to torture or to cruel, inhuman or degrading treatment or punishment and from medical or scientific experimentation (Article 7);
- the right not be held in slavery or involuntary servitude (Article 8.1 and 8.2);
- the right not to be imprisoned merely on the ground of inability to fulfil a contractual obligation (Article 11);
- the right not to be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence, under national or international law, at the time when it was committed (Article 15);
- the right to recognition everywhere as a person before the law (Article 16)
- the right to freedom of thought, conscience and religion (Article 18).

Principle #69 of the Siracusa Principles specifies four of the above rights, namely those protected by Articles 6, 7, 8.1 and 8.2 and 15 of the ICCPR, and prohibits any State, including States that are not parties to the ICCPR, from suspending or violating "*such fundamental rights*", even in times of public emergency. The expression "*such*" fundamental rights implies that the Siracusa Principles acknowledge the existence of other fundamental rights, but these are not specified. However, the designation as "fundamental" of four of the rights nominated in Article 4.2 of the ICCPR, to the exclusion of the other three rights nominated in that Article, indicates that the expression "fundamental rights" in Article 18.3

[6] *Religious Freedom Review: Report of the Expert Panel*, 18 May 2018, Recommendation 2, p.1
[7] UN Commission on Human Rights, *The Siracusa Principles on the Limitation and Derogation Provisions in the International Covenant on Civil and Political Rights*, 28 September 1984, E/CN.4/1985/4

of the ICCPR is intended to have a restricted meaning, and is possibly limited to rights that protect the physical life, bodily integrity and freedom from servitude or arbitrary imprisonment of the individual.

For reasons which appear in later sections of this submission, on matters such as preferencing and the protection of statements of belief, the Bills appear to prioritise a broader range of rights over the right to freedom of religion than those which the Siracusa Principles would recognise as "fundamental rights".[8] We do not contend that this is inappropriate, quite the contrary. We merely observe that any suggestion that the Bills give insufficient weight to other human rights and excessive weight to the right to freedom of religion is not borne out when measured against Article 18.3 of the ICCPR and the Siracusa Principles.

4. Definition of "religious body"

In sub-clause 5(1), the Bill continues to include faith-based educational institutions in the definition of "religious body", and rightly so in our view. We welcome the addition of a Note in the Bill in sub-clause 5(1), immediately following the definition of "educational institution", which confirms that that expression "*includes child care centres and early learning centres at which education or training is provided*". This gives effect to Recommendation 3 in our 2020 submission.

Sub-clause 5(1) also expands the definition of "religious body" to include all faith-based charities. Previously, in the two exposure drafts, a distinction was made between registered public benevolent institutions and registered charities. Faith-based hospitals, aged care facilities and accommodation providers were expressly excluded (including those which are public benevolent institutions), as were other registered charities which engage solely or primarily in "commercial activities", such as the sale of goods or services to the public.

As discussed in detail in our 2020 submission, the justifications advanced for these distinctions did not withstand scrutiny. Many prestigious, faith-based schools provide their services to the public at large on a commercial fee basis to at least the same extent as, say, a faith-based aged care facility that is a registered charity. The Bill has done away with these distinctions as regards registered charities, thereby effectively expanding to all faith-based charities the protections provided to religious bodies under the Bill. We welcome this change, which was recommended in our 2020 submission (Recommendation 2).

However, as regards faith-based not-for-profit organisations which are not registered charities, we note that the same artificial distinction between those which engage solely or primarily in "commercial activities" and those which do not has been preserved. Not-for-profit organisations can and do engage in "commercial activities", even if they do not do so for profit. Given the very large number of faith-based organisations that exist in the community which are not registered charities but, for example, sell goods and services to the public on a not-for-profit basis as an expression of their religious ethos, we can see no reason in logic or principle why they too should not enjoy the same protections under the Bill as faith-based registered charities.

[8] For example, clauses 12 and 15 of the Bill prioritise a person's right to be protected from statements that are malicious or that a reasonable person would consider would threaten, intimidate, harass or vilify a person or group, over another person's right to express a religious belief. See section 9 of this submission below.

Recommendation 1: Consideration should be given to including in the definition of "religious body" faith-based organisations which engage in commercial activities, but do so on a not-for-profit basis.

5. "Genuine belief" test

The standard for determining whether conduct is "in accordance with the doctrines, tenets, beliefs or teachings" of a religion has undergone a significant evolution since the first exposure draft was published. In the first exposure draft, the standard was what a generic reasonable person would consider to be in accordance with the doctrines, tenets, beliefs or teachings of the religion. In the second exposure draft, the standard was what a person of the same religion would consider to be so.

Neither standard would have accommodated the fact that within a religion, and even within a particular denomination, sect, stream or tradition of a religion, there can be a diversity of doctrines, tenets, beliefs or teachings, and sometimes a conflict between them. Paragraph 40 of the Explanatory Memorandum to the Bill implicitly acknowledges this by stating that the Bill is not intended to solely protect the beliefs or activities of a religion as a whole but also to protect the beliefs or activities of different denominations or sects within a particular religion. It specifies Judaism and its Orthodox and Progressive streams as an example. However, even within both Orthodox and Progressive Judaism, a variety of beliefs, practices and traditions exist.

Conflicts in matters as subjective and irreducible as fundamental faith and belief are simply not amenable to resolution by the application of any objective test, including reliance on the evidence of religious experts or reference to the beliefs of other members of the same faith community, or a segment of it.

As detailed in our 2020 submission, Courts in Canada, the UK and the US, and the High Court of Australia, have all acknowledged that civil courts should not be placed in the position of being arbiters of religious doctrine. In cases where a question has arisen as to whether conduct is in accordance with, or furtherance of, the doctrines, tenets or teachings of a person's religion, the test should revolve around the genuineness of the person's conviction that the conduct meets that requirement. The courts have regarded such a conviction as genuine unless it is fictitious, capricious or an artifice, thereby excluding sham or insincere assertions of religious belief. In our 2020 submission we argued that the government should adhere to this time-honoured approach, and the well-recognised principles underpinning it (Recommendation 14). We welcome the fact that the Bill has now adopted this approach with regard to the protection of statements of belief in clause 12.[9]

Nevertheless, the test adopted in the second exposure draft has survived with regard to other provisions of the Bill which relate to the determination of the beliefs of a religious body, as distinct from those of a natural person. A court may still be called upon to decide whether a person of the same religion as the religious body could reasonably consider conduct of that body to be in accordance with the doctrines,

[9] As noted in the Explanatory Memorandum (p.53, para 153): "*The intent of the clause is to ensure that **genuine and sincerely held** religious views and non-religious views may be freely expressed without legal repercussion in relation to the statement in and of itself, provided they are expressed in good faith and are not malicious*".

tenets, beliefs or teachings of that religion. The relevant provisions of the Bill in relation to which this could arise are:

(a) Clause 7(2) – the general exception;
(b) Clause 9(3) – concerning religious hospitals, religious aged care facilities, religious accommodation providers and religious disability service providers; and
(c) Clause 40(2)(c) - religious camps and conference sites.

Whilst a religious body, not being a natural person, cannot have a conscious state of mind amounting to religious faith or belief, it does not follow that the only way of gauging whether its conduct is in accordance with its professed religion is by reference to whether a person of the same religion would reasonably consider that to be the case.

Paragraph 125 of the Explanatory Memorandum to the Bill seems to assume that adherents of the same religion (or of a relevant denomination or stream of that religion) would be capable of coming to a consensus view, arising from foundational documents or on some other basis, as to what could *reasonably* be considered to be in accordance with the doctrines, tenets, beliefs or teachings of that religion (or denomination or stream). Yet, as already noted, beliefs and practices within any religion or denomination or stream of a religion may vary widely and fundamentally. There may not be any "reasonable" standard that can be identified by a consensus among adherents, let alone by a judge of a civil court.

A more readily applicable test which could be adopted by courts having to determine such a question would be to gauge the organisation's conduct against the doctrines of that religion (or denomination or stream), as interpreted and applied by the organisation and its members in practice, including any evolution in their understanding of doctrine that has occurred over time. The court would not concern itself with deciding whether this accords with some "reasonable" standard more broadly among adherents of the religion or of any denomination or stream of that religion.[10] The religious doctrine to be attributed to a faith-based organisation could be ascertained from the evidence of witnesses as to:

(a) the governing documents, organising principles, statement of beliefs or statement of values adopted by the members or governing body of the organisation; and
(b) the consistent conduct of the organisation, where a consistent pattern of conduct can be demonstrated.

Consideration should be given to adopting such a test in the Bill with respect to religious bodies.

Recommendation 2: Consideration should be given to adopting a test for gauging the doctrines, tenets, beliefs or teachings of a religious body by reference to:

(a) the governing documents, organising principles, statement of beliefs or statement of values adopted by the members or governing body of the religious body; and

(b) the consistent conduct of the religious body, where a consistent pattern of conduct can be demonstrated.

[10] *OV & OW v Members of the Board of the Wesley Mission Council* (2010) NSWCA 155 (6 July 2010)

6. Freedom of religious bodies to act in accordance with their faith, including preferencing people of the same faith

Clause 7 of the Bill provides that it is a legitimate exercise of freedom, and not discrimination, for a religious body to act in good faith in accordance with the doctrines, tenets, beliefs or teachings of that religion. This reflects the provisions of relevant international conventions to which most States, including Australia, are parties, including Article 18.1 of the ICCPR, which provides that the right to freedom of thought, conscience and religion is a universal right, and includes the freedom to manifest one's religion or belief **"*either individually or in community with others*".**[11]

Clause 7 of the Bill provides that a religious body may give preference to persons of the same religion as the religious body in employment and in other aspects of its operations. This is consistent with the interpretation of Article 18 of the ICCPR by the UN Human Rights Committee:

> "*Finally, the Committee observes that not every differentiation of treatment will constitute discrimination, if the criteria for such differentiation are reasonable and objective and if the aim is to achieve a purpose which is legitimate under the Covenant.*"[12]

It is implicit in this passage that differentiation of treatment by a religious body between adherents and non-adherents need not necessarily be the most appropriate means of achieving the purpose. It is sufficient if the criteria for the differentiation are a reasonable and objective way of achieving the purpose.

In our view, the Bill gives reasonable effect to these international standards. For example, the freedom of a faith-based school to employ teachers who share the school's religious ethos ought not to be contingent upon the subject matter of what they teach being characterised as having some form of connection to the religion. Teachers are role models and moral examples, in addition to being educators. A religious school may wish to operate not only as a strictly educational facility but also as a community of faith, with daily prayer meetings and other religious observances, so that students have before them the example of the religion as a way of life. The Bills thus provide for a limited override of the Victorian *Religious Exceptions Act 2021* to the extent that it restricts religious schools' employment freedoms, but the Bills do not override other parts of that Act applicable to other kinds of religious bodies or which restrict religious schools' student conduct rules.

Faith-based institutions are not alone in promoting a shared culture and sense of values. Many non-religious organisations have mission statements, codes of practice and the like in which they commit themselves to certain values, and they may prefer to hire, at least for some positions, only those people who are prepared to bind themselves contractually to promote those values, or at least not to engage in conduct or make statements which are antithetical to those values. Political parties, MPs and Ministers usually prefer to hire and retain staff who share their political beliefs. It would be extraordinary if faith-based institutions were to be singled out as the only category of employer not to be free to prefer to

---

[11] *International Covenant on Civil and Political Rights*, 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976) art 18.1.

[12] Human Rights Committee, General Comment 18, Non-discrimination (Thirty-seventh session, 1989), Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies, U.N. Doc. HRI/GEN/1/Rev.1 at 26 (1994), para 23.

employ people who share their beliefs and values, and were instead forced by law to hire and retain staff whose statements and conduct may repudiate their beliefs and values.

As regards faith-based schools wishing to preference people of the same faith in employment sub-clause 7(6)(a) of the Bill would require that practice to be in accordance with a publicly available policy, something which may not be required under the current law.

On balance, we believe that this requirement is appropriate. For example, a prospective employee of a faith-based school who is of a different faith, or of no faith, ought to be in a position to know before applying for employment at the school whether the difference in faith may act as a bar or an impediment to the employee's future advancement, or to being offered employment in the first place.

However, sub-clauses 7(6)(b) and 7(7) of the Bill, whilst apparently intended to empower the relevant Minister to determine the kinds of matters that must be addressed in such a policy, and how it is to be presented and made available[13], are expressed in such broad terms that they might empower the Minister to determine the content of the school's policy.

As a condition of overriding any State or Territory legislation prohibiting preferencing in employment, clause 11 would also require a faith-based school to have a publicly available policy concerning any such practice. However, clause 11 itself sets out the kinds of matters which the policy must address, and how and when it is to be made available, rather than granting power to the Minister to determine "the requirements" for such policies.

Sub-clause 11(1)(b) provides that the policy will meet the requirements of that sub-clause if is in writing, and:

> "*(i) outlines the religious body's position in relation to particular religious beliefs or activities; and*
>
> *(ii) explains how the position in subparagraph (i) is or will be enforced by the religious body; and*
>
> *(iii) is publicly available, including at the time employment opportunities with the religious body become available*."

This seems to us to be a preferable approach. The requirements specified in sub-clause 11(1)(b) are reasonable, meet the intended purposes specified in paragraph 129 of the Explanatory Memorandum, provide certainty and avoid vesting a potentially over-broad power in the Minister.

For the same reasons, and for the sake of internal consistency, the wording in clause 11(1)(b) should be substituted for all other provisions in the Bill which require a faith-based body engaging in preferencing practices to do so on the basis of a publicly available policy.

[13] According to para 129 of the Explanatory Memorandum: "*Beyond providing general guidance on the kinds of matters that a policy could address, guidance would be limited to the form, presentation and availability of policies*".

Recommendation 3: **Delete sub-clause 7(7) and amend sub-clause 7(6) to read:**

(6) If a religious body that is an educational institution engages in conduct mentioned in subsection (2) or (4) in relation to the matters described in section 19 (about employment), the conduct must be in accordance with a publicly available policy that is in writing; and

(i) outlines the religious body's position in relation to particular religious beliefs or activities; and
(ii) explains how the position in subparagraph (i) is or will be enforced by the religious body; and
(iii) is publicly available, including at the time employment opportunities with the religious body become available.

Similar amendments should be made *mutatis mutandis* to sub-clauses 9(3)(d) and (e) and 9(5)(d) and (e), including the deletion of sub-clause 9(7), and to sub-clause 40(2)(d) and (e), including the deletion of sub-clause 40(3).

Finally, it has been argued by some that the freedom of faith-based bodies to preference people of their own faith in employment may be an indirect way for them to discriminate against people in employment on the basis of other attributes, such as sexual preference or identity. However, the Bill neither adds to nor detracts from the existing law that applies in such situations, including section 38 of the *Sex Discrimination Act* which has been in force since 1984. We note that that section is due to be reviewed by the Australian Law Reform Commission.

7. Accommodation of associated cultural needs of smaller faith communities

Overall, the freedom of religious bodies to preference people who share the same religious beliefs can be essential for the viability of smaller faith communities, including the Jewish community. As noted in our 2020 submission:

> "*Like other numerically small faith communities, the Jewish community would be very much the poorer if it did not have its own institutions to cater, not only to the needs of its community members for educational, hospital, aged care and accommodation services, but also to the religious and cultural needs of Jewish users of those services. Institutions in the wider community usually do not, and cannot realistically be expected to, accommodate these religious and cultural needs.*
>
> *It would hardly be possible to speak in any meaningful sense of a Jewish community if we did not have the option of sending our children to Jewish day schools, long day care centres and pre-schools, or if our community members in need of hospital care did not have the option of attending a Jewish hospital, or if frail or elderly Jews did not have the option of residing in a Jewish aged care centre or retirement village.*
>
> *These charitable Jewish institutions were established many decades ago with significant financial contributions from the Jewish community. Although many (but not all) faith-based institutions which provide charitable benefits receive some level of government funding, this is at a far smaller*

cost than the government would incur if it were forced to provide substitute services, either by taking over these institutions itself, or by overburdening existing government institutions.

In providing their services, most charitable Jewish institutions have a stated policy of giving priority to meeting the needs of members of the Jewish community. Consequently, students at Jewish schools are mostly, and in some cases, exclusively, Jewish. Residents at Jewish aged care facilities are almost all Jewish. Residents at one Jewish retirement village are all Jewish. There is only one Jewish hospital in Australia. It welcomes patients of all backgrounds. At times, depending on the circumstances, it gives admission priority to Jewish patients and at other times to non-Jewish patients.

It is fatuous to suggest that these long-standing practices somehow disadvantage people who are not Jewish. People who are not Jewish do not need to be provided with kosher food, Jewish prayer facilities and observance of the Jewish Sabbath and festivals, in addition to the educational, hospital, aged care and accommodation services they require. There is a plethora of quality service-providers in the wider community which are more than capable of meeting their needs. In contrast, religiously-observant Jewish patients or residents often will not have the totality of their needs met in other institutions, which is a key reason why Jewish institutions were established as an alternative in the first place."

Clause 10(1) of the Bill provides that it is not discrimination for a person to engage in conduct that (a) is reasonable in the circumstances, (b) is consistent with the purposes of the Bill, and (c) is either:

"i. *intended to meet a need arising out of a religious belief or activity of a person or group of persons; or*
ii. intended to reduce a disadvantage experienced by a person or group of persons on the basis of the person or group's religious beliefs or activities."

For the purposes of sub-clause 10(1) we believe that a genuine attempt to meet a need or reduce a disadvantage should at least *prima facie* be regarded as reasonable.

We remain of the view, as expressed in our 2020 submission (and Recommendation 4 therein), that the additional need to determine whether such conduct is consistent with the purposes of a Bill which is primarily directed at prohibiting discrimination on the ground of religion, introduces an unnecessary element of complexity.

A noticeable improvement in this clause compared to the equivalent clauses in the two exposure drafts is the addition of a Note in the Bill as follows:

"*For example, a residential aged care facility or hospital does not discriminate under this Act by providing services to meet the needs (including dietary, cultural and religious needs) of a minority religious group, such as a Jewish or Greek Orthodox residential aged care home or hospital that provides services specifically for the Jewish or Greek Orthodox community.*"

Clause 10, and the Note to it, are entirely in keeping with the observation of the UN Human Rights Committee, quoted in the previous section of this submission, that differentiation of treatment will not

constitute discrimination if the criteria for such differentiation are reasonable and objective and if the aim is to achieve a legitimate purpose.

We fully support the addition of this Note. We especially welcome the addition of the bracketed words "*including dietary, cultural and religious needs"* which we recommended in our 2020 submission (Recommendations 5 and 6).

The Note clarifies that under sub-clause 10(1) a residential aged care facility or hospital may provide for the dietary, cultural and religious needs of a particular faith community, especially where those needs are not generally met in those sectors. This is a form of preferencing in service delivery that has been, and should remain, entirely uncontroversial, yet it would be prohibited by virtue of clause 8 were it not for clause 10(2) which provides that clause 10 applies "*despite anything else in this Act*". The outcome is the right one in our view, although it is arrived at in a complex way.

An alternative ground of protection may in some cases be found in clause 43, which permits as exceptions to the prohibition against religious discrimination certain conduct by voluntary bodies, including "*the provision of benefits, facilities or services to members of the body*". This would appear to apply, for example, to any member-based Jewish community organisation whose activities are not engaged in for the purpose of making a profit, where access to the organisation's services is conditional upon membership of the organisation, rather than being generally available to members of the public.

8. Membership of faith-based organisations and of their governing boards

As we noted in our 2020 submission:

> "*Another issue for Jewish and other faith-based hospitals, aged care facilities and accommodation providers, among other charities and not-for-profit institutions, is that many of them are member-based organisations, and currently have constitutions which restrict their membership (or a class of membership), or that of their governing boards and committees, wholly or mainly to people of their own faith, or give preferential treatment to people of their own faith (e.g. in eligibility for life membership).*
>
> *This is especially important for numerically small faith communities like the Jewish community (and also, for example, the Greek Orthodox community). If these Jewish institutions were to be prohibited from giving preference to Jewish people in their membership and that of their governing boards and committees, they may eventually find themselves with a non-Jewish majority of members or governors who would be free to vote to abandon the organisation's Jewish ethos and religious practices.*
>
> *It would be a tragic irony if the religious values which the Jewish community is currently free to live by were to be restricted in operation by legislation that is motivated by the desire to preserve religious freedoms.*"

Clause 43 of the Bill appears to permit a voluntary body (other than a club) which was founded by, and serves, a particular faith community, and whose activities are not engaged in for the purpose of making a profit, to continue to restrict membership of the body to persons of that faith. We consider this provision to be essential to enable any such body to preserve its founding purpose and ethos. It involves no

injustice to people who adhere to other faiths, or no faith, who are free to establish or join other voluntary bodies. As noted in paragraph 475 of the Explanatory Memorandum to the Bill:

> "*This provision protects the right to freedom of assembly as it allows a voluntary organisation to choose its members, and provide benefits to those members. This exception is broadly consistent with the existing exemptions for voluntary bodies in section 36 of the Age Discrimination Act and section 39 of the Sex Discrimination Act.*"

Under clause 42 of the Bill, a similar exception applies with regard to clubs whose membership is restricted to persons of a particular faith. As noted in paragraphs 463 and 464 of the Explanatory Memorandum:

> "*This* [ie the exception in clause 42] *includes situations in which any class or type of membership is restricted to people of a particular religious belief or activity, such as voting membership.*
>
> *Boards of management are thus able to preference people of faith, even if their membership is not restricted to people of faith and if they are not a 'religious body' as defined by subclause 5(1).*"

There is a possible difficulty with the drafting of clause 42. In order to have the benefit of that clause it would not appear to be sufficient for the club's rules simply to provide that only persons of that faith may be elected to the board of management. It would appear that the club's rules would need to define members of the club who adhere to the relevant faith as a separate class of members, and provide that only members in that class are eligible to be elected to the club's board of management. There does not seem to be any good reason for this complexity. Clubs whose boards of management are restricted to persons of a particular faith may need to go to the trouble of amending their constitutions merely to preserve the status quo.

The problem could be avoided if clauses 42 and 43 were amended so as to permit membership (however described) of the organisation, ***or membership of its board of management (however described)***, to be restricted to persons of a particular faith.

> **Recommendation 4: Amend clauses 42 and 43 so as to permit membership (however described) of a clubs and voluntary body, *or membership of its board of management (however described)*, to be restricted to persons of a particular faith.**

9. Protection of statements of belief

To date, much of the public debate about the Bill has focused on the protection to be given by clause 12 to statements of belief, and in particular to statements of religious belief. In our view, the criticisms which have been levelled against clause 12 have been misconceived. The sorts of statements of religious belief that would be protected by clause 12 of the Bill are subject to express limitations which are specified in the Bill, and are thus likely to fall within a much narrower band than some commentators have suggested.

Firstly, as noted in paragraph 42 of the Explanatory Memorandum to the Bill, the definition of 'statement of belief' in clause 5 as it relates to religious beliefs will not capture beliefs which are not

fundamentally connected to religion and are essentially beliefs about politics, history, ideology or other matters.

Secondly, the statement must be made in good faith as a statement of belief. As noted earlier, the case law accepted in Australia requires that the statement not be fictitious, capricious or an artifice for promoting sham beliefs.

Thirdly, sub-clause (2) of clause 12 expressly excludes from protection any statement that is malicious or which a reasonable person would consider would threaten, intimidate, harass or vilify a person or group, or which amounts to the urging of a serious criminal offence. Any such statement that is prohibited under any current law will remain so.

Fourthly, clause 12 will only serve to shield a statement of belief from a complaint that it constitutes *discrimination* under existing Federal, State and Territory anti-discrimination law. As noted in paragraph 178 of the Explanatory Memorandum to the Bill, clause 12 will not shield a statement of belief from a complaint that it constitutes *harassment, vilification or incitement* under those laws. In particular, "*clause 12 would not prevent the making of a complaint that a statement of belief constitutes offensive behaviour based on racial hatred that contravenes Part IIA of the Racial Discrimination Act*."

Courts in Australia have recognised in certain cases that mere words can amount to discrimination, as distinct from harassment, vilification or incitement, but none of those case has involved statements of religious belief. The kinds of statements that have been found to constitute unlawful discrimination have included "*racially abusive epithets* [in the workplace] *of a kind … could readily give rise to a racially hostile working environment*"[14]; "*remarks* [by fellow employees] *which are calculated to humiliate or demean an employee by reference to race, colour, descent or national or ethnic origin*" [15]; and racially insulting comments directed against an employee in front of fellow workers.[16] In all of these cases the statements would clearly be found to involve malice or to threaten, intimidate, harass or vilify a person or group.

It follows that in order to be protected under clause 12, a statement of religious belief would have to be egregious enough to rise to the level of discrimination, but not serious enough to involve malice, threats, intimidation, harassment or vilification. That would be a very narrow range of statements.

Clause 12 would also over-ride section 17 of the Tasmanian *Anti-Discrimination Act* which prohibits, *inter alia*, certain kinds of offensive and insulting statements. Section 17 applies only in Tasmania, and the thresh-hold for proving a complaint under that section appears to be much lower than for a complaint under other State, Territory and Federal anti-discrimination legislation. It is very much an outlier provision compared to those other laws.

Our view is that clause 12 will have an extremely limited application in terms of permitting statements that are at present prohibited by other laws. Perhaps its main effect will be to discourage the making of complaints about statements of religious belief which would in any event have only remote prospects of succeeding under the current law.

[14] *Nationwide News Pty Ltd v Naidu* [2007] NSWCA 377 at [378] *per* Basten J.
[15] *Qantas Airways v Gama* (2008) FCAFC 69 at [78]
[16] *Singh v Shafston Training One Pty Ltd and Anor* [2013] QCAT 008 (ADL051-11), 8 January 2013

In our view, the making of statements of belief within the four limitations noted previously may cause offence to some but would not impinge on their ***fundamental*** rights in terms of Article 18.3 of the ICCPR, and should not be subject to legal sanctions.

The express exclusion from protection of any statement that is malicious, or which a reasonable person would consider would threaten, intimidate, harass or vilify a person or group should, one hopes, negative any suggestion that the government is encouraging or sanctioning statements that disparage or are disrespectful of people on the basis of their faith, sexual orientation or identity, or any other personal attribute, even if the statements are allowed under the Bill and the current law. Nevertheless, we believe that messaging from political leaders is important. Accordingly, we remain of the view that the government should consider taking other measures, outside the Bill itself, including clear public announcements, to emphasise the message that any such statements, whether or not they are serious enough to be prohibited by law, remain repugnant to the values of contemporary Australia which are founded on diversity and mutual respect.

Recommendation 5: The Federal government should consider taking other measures, outside the Bill itself, including clear public announcements, to emphasise the message that any statements, whether or not they are serious enough to be prohibited by law, which disparage or are disrespectful of people on the basis of their faith, sexual orientation or identity, or any other personal attribute, remain repugnant to the values of contemporary Australia which are founded on diversity and mutual respect.

10. Exceptions for indirectly discriminatory conditions, requirements and practices that are 'reasonable'

Sub-clause 14(1) of the Bill follows the pattern of other anti-discrimination legislation in Australia by providing that the imposition of a condition, requirement or practice that will have the effect or likely effect of disadvantaging persons who hold or engage in a particular religious belief or activity will constitute indirect discrimination, if the condition, requirement or practice is not reasonable. Sub-clause 14(2) sets out the criteria for determining whether or not a condition, requirement or practice is "reasonable".

However, Article 18.3 of the ICCPR formulates the exceptions to the prohibition against religious discrimination in stricter terms. As noted in section 3 of this submission, Article 18.3 provides that the prohibition "*may be subject only to such limitations as are prescribed by law and are **necessary** to protect public safety, order, health, or morals or the fundamental rights and freedoms of others*" (emphasis added). The imposition of a condition, requirement or practice may be "reasonable" from the perspective of the imposer, even if it is not objectively "necessary".

Paragraph 15 of the Explanatory Memorandum to the Bill states:

> "*In accordance with the ICCPR and Siracusa Principles, this Bill only limits the right to freedom of religion and other rights in circumstances where it is necessary to do so."*

However, in the absence of any clarification as to how the "reasonable" limitation in sub-clause 14(2) will be harmonised with the "necessary" limitation in the ICCPR and the Siracusa Principles, it is far

from self-evident that this claim will be made good. One way of resolving the matter would be to add the words "necessary and" immediately prior to the word "proportionate" in paragraph (c) of sub-clause 14(2).

Recommendation 6: Add the words "necessary and" immediately prior to the word "proportionate" in paragraph (c) of sub-clause 14(2).

11. Protection of statements of belief from qualifying body conduct rules

Sub-clause 15(1) of the Bill protects people who hold professional, trade or other occupational qualifications from being barred from or losing their registration or qualifications, and hence their livelihoods, simply because they have expressed a religious belief outside the course of their profession, trade or occupation.

This protection is subject to the same applicable limitations that apply to protections of statements of belief under clause 12, including the limitation that any statement that is malicious or which a reasonable person would consider would threaten, intimidate, harass or vilify a person or group will not be protected. Sub-clause 15(4) also makes clear that this protection of statement of beliefs does not override the prohibition against indirect discrimination under clause 14.

A further limitation is that sub-clause 15(1) will only apply to a statement of belief that is made by a person other than in the course of practising the person's profession, trade or occupation. As noted in paragraph 228 of the Explanatory Memorandum to the Bill:

> "*Nothing in this subclause affects the ability of qualifying bodies to regulate religious expression by persons in the course of engaging in their profession, trade or occupation*".

In our view, a person making a moderate statement of belief outside the work context may cause offence to some but, for the reasons discussed in section 3 of this submission, this would not impinge on their *fundamental* rights in terms of Article 18.3 of the ICCPR, and should not be used as a pretext for denying a person the means to pursue their chosen career in order to earn a livelihood.

12. Protection of associates

Clause 16 of the Bill provides that the Bill's protection will extend to a person who is discriminated against on account of the religious beliefs or activities of the near relatives of the person (as defined in clause 5), or of others with whom the person has a close relationship, as listed in sub-clause 16(2). Under sub-clause 16(3), a body corporate with a religious ethos may be protected against religious discrimination that is directed against a natural person associated with that corporation, such as its Chief Executive Officer. (See paragraph 252 of the Explanatory memorandum to the Bill). This provides an important protection against religious discrimination to those acting in any capacity on behalf of religious bodies.

Whilst there are similar protections for associates in the *Disability Discrimination Act*, the *Racial Discrimination Act*, and State and Territory anti-discrimination Acts, one Federal Court judge has stated that the interpretation of the analogous provision in the *Disability Discrimination Act* is "*not free from*

doubt".[17] Paragraph 247 the Explanatory Memorandum to the Bill has expressed approval for that Judge's interpretation of the analogous associates provision in the *Disability Discrimination Act* (namely section 7 of that Act), and this provides welcome guidance for the interpretation of clause 16 of the Bill.

13. Periodic reviews

Like all significant new legislation, the Bills should be subject to periodic review. We note that clause 76 of the Bill requires the Religious Discrimination Commissioner to conduct a review of the Bills within two years after they are enacted and to provide the Minister with a report of the review. The Bill also requires the Minister to table the report in each House of the Federal parliament. We support these provisions. We believe that further reviews should be conducted at regular intervals.

14. Conclusion

We thank the Committee for the opportunity to comment on the Bills and wish it well in its deliberations.

Yours sincerely

Peter Wertheim AM
co-CEO

[Summary of Recommendations follows on next page]

[17] *Eisele v Commonwealth* [2018] FCA 15 at para 90, *per* Moshinsky J.

Summary of Recommendations

1. **Consideration should be given to including in the definition of "religious body" faith-based organisations which engage in commercial activities, but do so on a not-for-profit basis.**

2. **Consideration should be given to adopting a test for gauging the doctrines, tenets, beliefs or teachings of a religious body by reference to:**

   (a) the governing documents, organising principles, statement of beliefs or statement of values adopted by the members or governing body of the religious body; and
   (b) the consistent conduct of the religious body, where a consistent pattern of conduct can be demonstrated.

3. **Delete sub-clause 7(7) and amend sub-clause 7(6) to read:**

   (6) If a religious body that is an educational institution engages in conduct mentioned in subsection (2) or (4) in relation to the matters described in section 19 (about employment), the conduct must be in accordance with a publicly available policy that is in writing; and

   (i) outlines the religious body's position in relation to particular religious beliefs or activities; and
   (ii) explains how the position in subparagraph (i) is or will be enforced by the religious body; and
   (iii) is publicly available, including at the time employment opportunities with the religious body become available.

   Similar amendments should be made *mutatis mutandis* to sub-clauses 9(3)(d) and (e) and 9(5)(d) and (e), including the deletion of sub-clause 9(7), and to sub-clause 40(2)(d) and (e), including the deletion of sub-clause 40(3).

4. **Amend clauses 42 and 43 so as to permit membership (however described) of a clubs and voluntary body, *or membership of its board of management (however described)*, to be restricted to persons of a particular faith.**

5. **The Federal government should consider taking other measures, outside the Bill itself, including clear public announcements, to emphasise the message that any statements, whether or not they are serious enough to be prohibited by law, which disparage or are disrespectful of people on the basis of their faith, sexual orientation or identity, or any other personal attribute, remain repugnant to the values of contemporary Australia which are founded on diversity and mutual respect.**

6. **Add the words "necessary and" immediately prior to the word "proportionate" in paragraph (c) of sub-clause 14(2).**