

FREEDOM OF RELIGION AND BELIEF IN THE 21ST CENTURY

Submission by the Executive Council of Australian Jewry

The Executive Council of Australian Jewry (ECAJ) is the elected representative organisation of the Jewish community in Australia, and we welcome this opportunity to participate in the process of consultation and research being pursued by the Human Rights Commission.

Introductory Note

By way of introduction we note that the section headed: "Focus: What this report will explore": observes among other things that a factor contributing to "a revitalisation of religion and the rise of religious fundamentalism " is "an increased presence of Muslims, Buddhists, Hindus, Jews and other religious communities who in practicing their religion sometimes challenge current public policies".

The ECAJ does not consider that the practice of the Jewish faith in any way challenges public policies. Indeed central to Jewish practice is the concept that "The law of the land is the law". (The concept is known in Jewish law as the rule of *dina demalchuta dina*.)

Section 1: Evaluation of 1998 HREOC Report on Article 18: Freedom of Religion and Belief

1.1, 1.2 Issues and areas of concern regarding freedom to practice religion

The Jewish community has no current issues. In general we support religious communities wishing to establish schools and places of worship.

Some faiths have on occasion been misinterpreted by some adherents, to require the defamation of the followers of other religions, or the incitement of hatred against

them. It is our view that there should be no protection under the guise of freedom of religion, for such activities.

1.3 Protection against Discrimination on the ground of Religion

Discrimination on the basis of religion is unlawful in the ACT, Western Australia, Queensland, the Northern Territory, Tasmania and Victoria. In NSW, the Jewish community (and the Sikh community and possibly others) are protected against discrimination on the ground of ethno-religious origin.

There is no protection against specifically religious discrimination in South Australia or the Commonwealth. However it is settled law that Jews are protected under such legislation as a “race”, and are considered to be protected against discrimination in these jurisdictions on that basis.

1.4 Protection against Incitement of Religious Hatred

The present law

Vilification based on ‘religion’ is against the law in Queensland, while vilification based on ‘religious belief or activity’ is against the law in Victoria and Tasmania, with the Tasmanian provisions also covering vilification based on ‘religious affiliation’.

There is also protection against vilification on the ground of “race” under the federal Racial Discrimination Act (RDA), and in the ACT, South Australia, Western Australia and the Northern Territory, and it is settled law that Jews are protected under these provisions as they are for discrimination. In NSW Jews are similarly more clearly protected by the inclusion of “ethno-religious origin” in the definition of “race”. (For example, in Australia, with regard to the Jewish community, see *Miller v Wertheim* [2002] FCAFC 156)

The experience of the *Catch the Fire Ministries Case* has demonstrated the problems which can arise if religious belief rather than religious affiliation or identity is protected. Our view is that the right to discuss the content of religious belief in a

civilised manner is an essential part of our democratic liberties. However we know from experience that the vilification of religious groups, based on the identity of those who are vilified, can represent a serious infringement of the right of the members of those groups to live a peaceful life free from insult or danger.

Defects in the law

The Jewish community's main difficulties with the current anti-vilification laws are the lack of effective straightforward remedies, and the slow and cumbersome nature of the proceedings. The *Jones v Toben* proceedings have continued for a decade, and the vilification of Jews by Toben continues unabated.

The present law provides for the availability of a process of conciliation, and this has proved useful on occasion in cases involving the media. On the other hand a process of conciliation with dedicated racists such as Nazis is obviously inconceivable.

The next step is to seek a court order for remedies under the RDA, which include damages, and orders for apologies and retractions, or against repetition etc. However these remedies require separate contempt proceedings for enforcement if the orders are ignored, and this has proved to be a difficult process.

It is also the view of the ECAJ is that in cases which can continue for years, the law cannot work effectively if further vilification continues throughout the process.

We would therefore propose that the Court should be given the power to make an Interim Order in appropriate circumstances, at any time after the complaint has been lodged.

Difficulties have sometimes arisen in establishing the legal standing of the complainant to bring a complaint under Part IIA of the RDA. In one case, *Executive Council of Australian Jewry & Anor v Olga Scully & Anor* [1998] FCA 66 (13 February 1998), a complaint was set aside and restored on appeal, on the basis of varying interpretations of the standing provisions in the statutory predecessors of section 46PB of the Human Rights and Equal Opportunity Act.

The law needs to be made clearer by granting standing to organisations to act as representative bodies in relation to the subject matter of the complaint or proceeding. In our view the kinds of “special responsibility” that would give rise to standing should be defined in broad terms so as to enable a body like the ECAJ, for example, to make complaints under Part IIA of the RDA on behalf of Australian Jews to seek redress against antisemitic behaviour, instead of compelling individual members of the Jewish community or individual officers of the ECAJ to make such complaints and participate personally in any consequent proceedings.

Reforms recommended

The ECAJ proposes the following reforms:

1. The racial hatred provisions of the RDA should be amended to include protection against vilification on the ground of ethno-religious origin.
2. There should be a special provision in section 18C of the RDA for interim administrative remedies in the nature of “*cease and desist*” orders, after lodgement of a complaint, and pending the outcome of conciliation or court action.
3. In appropriate cases there should be available:
 - a. a criminal sanction including a summary offence, in the case of “*offensive behaviour on the ground of race*”; as well as
 - b. an indictable offence of “*intentional incitement of racial hatred*”.

However the present civil proceedings, including the option of asking the Human Rights Commission to conciliate and arrange retractions and apologies, should remain available.

4. Representative bodies such as the ECAJ should be entitled to make complaints in circumstances where the court is satisfied that the body is generally representative of, and accountable to, the group of people on whose behalf the complaint is made. The formal consent of members of the group should not be required and it should be provided that it should not be necessary to establish

that every person in the group actually has or will be affected by the relevant conduct.

5. The ECAJ opposes any attempt to revive “blasphemy” laws.

1.5 Recommendations of the 1998 HREOC Report

The ECAJ does not support a federal Religious Freedom Act.

Otherwise we support the 1998 recommendations on indigenous rights, female genital mutilation, witchcraft, religious coercion, and a working group on medical procedures.

Section 2: Religion and the State – the Constitution, roles and responsibilities

2.1, 2.2, 2.5 Freedom of Religion

The ECAJ does not seek amendment of section 116 of the Constitution.

Whilst the ECAJ will separately address the national consultation process recently announced by the Attorney General on whether a Charter or Bill of Rights is necessary, its preliminary view is that it is possible that such a Charter might be interpreted in such a fashion as to limit the capacity of government to deal with threats and emergencies, or to deal effectively with outbreaks of serious vilification.

2.3 Separation of Religion and State

In a submission previously made by the ECAJ in conjunction with the Organisation of Rabbis of Australasia, the Australian Jewish community called for legislation to give the Family Court power to make orders which would assist innocent parties affected by refusal of the other party to consent to a Jewish divorce. The submission was approved by the Family Law Council, which recommended enactment to the Attorney General. Regrettably however this recommendation has yet to be implemented.

The ECAJ submits that any interpretation of the concept of the separation of Church and State which limited the power of government to deal with such problems is neither correct nor desirable. The concept of separation should be clarified to make it clear that it refers only to the provisions of section 116 of the Constitution, and in

particular to the exclusion of the idea of an established church in Australian constitutional law and practice.

2.4 Undue Influence by or over Religious Groups

All groups, including religious groups, have a democratic right to convey their concerns to government by lawful means, and we would strongly oppose any interference with that right.

Similarly all groups, including religious groups, have a right to freedom of expression and freedom of assembly within the law. However the ECAJ would not support any blanket rule which gave special rights to religious bodies or limited the lawful powers of the government or the judiciary to intervene in their affairs.

2.6 The roles, rights and responsibilities of religious, spiritual and civil society (including secular) organisations in implementing the commitment to freedom of religion and belief

The ECAJ submits that all religious, spiritual and civil society (including secular) organisations, have the same obligations as other participants in our society to preserve and foster democracy and freedom in Australia.

2.7, 2.8 A cooperative approach in responding to issues of freedom of religion and belief; interfaith understanding and inclusion?

Multi-faith and interfaith conversations with a number of religions exist on a range of levels, and the ECAJ on behalf of the Australian Jewish community, as well as many organisations and individuals within the community, are active participants. We find that personal communication enriches the cultural and spiritual perspective of those who are engaged, and we believe that such activities improve the texture and atmosphere of Australian life.

2.9 The changing role and face of religion, nationally and internationally?

Participation in religious activity is growing in some faiths, and diminishing in others. This ebb and flow is far from new in history, and provided that all faith institutions behave respectfully towards one another, and act as responsible citizens, society will accommodate the ebb and flow, and accommodate the changes in the way in which religions operate in our civil society.

Section 3: Religion and the State - practice and expression

3.1 Faith-based Government service delivery

The ECAJ is opposed to the delivery of government services such as employment agencies, by religious bodies, as we feel that this may lead both to the possibility of discrimination and to the undue influence of religious doctrine in the provision of such services.

3.2 Accommodation of religious practices and needs

The ECAJ submits that governments and private enterprise should make reasonable efforts to accommodate the requirements of religious practice in the areas of education, employment and the provision of services. We believe that the accommodation of peaceful religious observance should be enshrined in employment legislation so that in exchange for an employer allowing time necessary for religious observance, the worker will make up the time to do the work which would otherwise have been performed.

One issue that continues to arise is in the employment context, where under WorkChoices Sabbath observance was no longer protected. The Fair Work Bill may need some fine tuning to restore that protection, and it is currently being reviewed by the ECAJ.

3.3 Burial practice and Autopsy

The Jewish faith requires prompt burial, and burial in perpetuity. Jewish law allows surgical autopsy only for the purpose of saving another life.

Australia does not have a uniform system of laws governing a coroner's power to order an autopsy, but *Abernethy v Deitz* (1996) 39 NSWLR 701 makes consideration of religious objections to autopsy relevant to the exercise of the discretion, at least in NSW. Radiological alternatives to surgical autopsy now exist, and the NSW coroner at least, has used CAT scanners where possible. See e.g., *Krantz v Hand* [1999] NSWSC 432.

Section 4: Security issues in the aftermath of September 11

4.1 Security Issues and changes in Federal and State Laws

The ECAJ expresses its appreciation for the legislative measures which have been implemented to date. These measures enhance our security against the possibility of terrorist attack, and have our strong support.

4.2 The balance of physical security and civil liberties

The ECAJ views the balance in the current legislation as appropriate.

In particular we recognise that the anticipation and prevention of attacks by organised groups requires the application of suitable investigative measures under responsible judicial control.

4.3 The relationship between legal administration and religious communities

The ECAJ supports measures to educate immigrant communities in their basic legal rights and obligations, and also about the appropriate channels of communication between communities and the relevant legal authorities.

4.4 Religious radicalism and political extremism

The ECAJ supports efforts to ensure that religious and political extremism does not present a threat to any group in the community. In particular, calls for violence against or vilification of, others by any religious person in authority, should not constitute protected speech in Australia.

4.5 Social exclusion on the ground of religion

This has historically been a serious problem for members of the Australian Jewish community. Fortunately only remnants of antisemitic exclusion now remain in Australia, and the protection which the ECAJ now seeks from government lies in the area of improving laws against discrimination and vilification.

We believe that it is also necessary to improve education in the general community about Jews in Australia, about Judaism and Israel, and against racism in general.

Section 5: The interface of religious, political and cultural aspirations

5.1 The interface between religion and politics and cultural aspirations in contemporary Australia

The ECAJ strongly supports the maintenance as government policy of multiculturalism, which we believe has led to the development of Australia as a highly successful multi-ethnic and multi-religious society. It is important that prejudice and bigotry be firmly denounced by our political and community leaders whenever they emerge, and that they remain totally unacceptable.

5.2 Tensions between aspirations

The ECAJ believes that the present harmony between the different religious groups in Australian society can be maintained and extended through contact and discussion at a personal level. We do not think that government involvement is particularly useful or necessary, except in setting the “*tone from the top*” as noted in the previous section.

5.3, 5.4 and 5.5 Gender in faith communities

Gender is not an issue in Liberal and Conservative Judaism, where women have complete equality in ritual and secular matters. There is, for example, no difficulty in women serving as Rabbis.

Gender is a theological issue for Jews affiliated to orthodox synagogues. Women are separated in the synagogue, excluded from a number of the rituals, and cannot serve as Ministers or Rabbis. This does not carry over to any other spheres of activity, with

a woman, for example, currently serving as President of the Board of the orthodox Great Synagogue in Sydney.

Two women have also been elected as President of the ECAJ, the representative body of Australian Jewry, which is responsible for this submission.

Respect between genders is an essential element of social cohesion. Discrimination on the ground of gender undermines Australian society and its prosperity as a nation and creates hurdles for social cohesions. That said, the law should not require religious bodies to appoint women to positions that theologically can only be occupied by men, or vice-versa.

5.6 Citizenship and Australian values

Jews have traditionally seen no issue whatsoever between full integration and the preservation of our religious and cultural heritage. We believe that a policy of multiculturalism should continue to encourage all religious and ethnic groups to maintain a pride in their various identities, while committing themselves to the essential values of Australian society.

5.7 Civic responsibility and participation

This is not an issue within the Australian Jewish community, which has provided two Governor-generals, a number of Chief Justices and many other judges in the Commonwealth and the States, leaders of the Australian armed forces and countless others discharging all manner of civic responsibilities. This is a tribute to the openness of the Australian civic culture, which will no doubt continue to provide such opportunities for all its citizens.

5.8 Religious voices in national policy debates

The genius of our democratic process allows for all voices to be heard, and we know this will continue.

Section 6: Technology and its implications

6.1, 6.2, 6.3 Technology and religion

Information technology has had a mostly positive impact on the practice or dissemination of Judaism. We are not aware of any substantial impact on Judaism by new religions or “*spiritualities*” using such technology.

6.4, 6.5 Impact of the media

The ECAJ’s main concern with the media relates to some reporting of events in Israel which at times is so inaccurate and tendentious as to imply an element of antisemitism. Reporting about Judaism and issues arising in the Jewish community is, however, generally unexceptional. Occasionally incidents of vilification do occur in the press, and these are usually dealt with adequately by the existing processes.

On occasions there are still gratuitous and irrelevant references in the media to the fact that a person is Jewish, but the ECAJ readily accepts that there have been great improvements in this area of concern over recent years.

6.6 Religious Vilification and the Internet

This is a problem for the Australian Jewish community, and it is increasing in intensity and frequency. However the legal remedies are inadequate (see above on vilification generally) and difficult to enforce where material appears on the internet. The provision of useful protection will require the development of appropriate legal and technological remedies in domestic and possibly international, law.

Section 7: Religion, cultural expression and human rights

7.1 Freedom of cultural expression and practice within the normative social and legal framework

There is no present problem for the Australian Jewish community in this regard.

7.2 Service providers and cultural security and competence

There is no significant problem for the Australian Jewish community in this regard.

7.3 and 7.4 Cultural aspirations and human rights of Aboriginal and Torres Strait Islanders

Aboriginal and Torres Strait Islanders face levels of discrimination that should long ago have disappeared, and the discrimination is often on multiple bases, race, religion, and culture being among them.

The Australian Jewish community actively supports reconciliation and redress for Aboriginal and Torres Strait Islanders. Individual members of the community have been active in medical and dental care and tertiary education programs.

7.5 Participation in the faith community for people with disabilities

The ECAJ recognises it has much to do to improve access and equity for Jewish persons with disabilities. We provide special resources in our schools and through our welfare organisations, but it is never enough.

7.6, 7.7 and 7.8 Religion and sexuality

This is not an issue for Liberal and Conservative Judaism which have occasional homosexual commitment ceremonies.

Orthodox interpretations of Jewish religious law forbid homosexual acts including those between consenting adult males. In practice however it is accepted as a matter of little if any, consequence at all in all Jewish religious organisations, including the orthodox.

7.8 Environmental concerns

Environmental concerns are central to Judaism, with Jewish poetry and law directed at the preservation of the beauties of nature and the fertility of the land, including the celebration of a “New Year for Trees”. The Jewish National Fund is recognised by the

Australian government as an environmental fund distinguished particularly for its work in afforestation in the land of Israel, and for tree-planting in Australia.

7.10 Fringe religious groups “of concern”

Our view is that all groups, religious or not, are bound by the law.

12 January 2009