

10 February 2011

By email: nhrap@ag.gov.au.

The Secretariat
National Human Rights Action Plan
Attorney-General's Department
3-5 National Circuit
BARTON ACT 2600

Dear Secretariat

Re: National Human Rights Action Plan

The Executive Council of Australian Jewry (ECAJ), the elected representative organisation of the Jewish community in Australia, presents the following submission on behalf of the Australian Jewish community, in response to your call for submissions in relation to the above Action Plan.

The Australian Jewish Community strongly supports the development of a new action plan, and set out our requests for action items below.

Human rights are a priority for the Australian Jewish community

The maintenance of Australia's free, democratic and welcoming society and the preservation of all Australians' rights and freedoms are important priorities for the Australian Jewish community. By way of illustration, we attach some extracts from the Policy Platform of the ECAJ, which is affirmed and revised at every annual conference in the light of currently relevant issues. The full platform, which was endorsed at our Annual General Meeting on 22 November 2010, appears at www.ecaj.com.au

Members of our community, like all Australians, have enjoyed the benefits of a well-established tradition of freedom of religion, from the earliest years of European settlement. Indeed our right to establish places of worship, and to freely practice our religious tradition, was taken for granted long before such protection was formalised in section 116 of the Constitution.

1. Protection against racial vilification, harassment and threats

We do, however, see some difficulties in the adoption of a formal statement or “Framework” of Rights. Some rights compete and we urge that the need for appropriate balancing be explicitly recognised.

We request inclusion in the new action plan of the goal of effective protection against racial vilification, and also against the threat and actuality of physical attacks on person and property. In these areas of concern it is necessary to find a balance between individual freedoms and the essential human right to personal safety and security. We acknowledge that the appropriate balance may well vary according to the relevant circumstances from time to time.

By way of example we set out the terms of Article 20 of the *International Covenant on Civil and Political Rights* together with text of Australia’s Reservation, as follows:

Article 20:

- 1. Any propaganda for war shall be prohibited by law.*
- 2. Any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence shall be prohibited by law.*

Australia’s Reservation:

Article 20

"Australia interprets the rights provided for by articles 19, 21 and 22 as consistent with article 20; accordingly, the Commonwealth and the constituent States, having legislated with respect to the subject matter of the article in matters of practical concern in the interest of public order (*ordre public*), the right is reserved not to introduce any further legislative provision on these matters."

Articles 19, 21 and 22 referred to in the Reservation provide for the rights to freedom of expression and freedom of assembly and association, and incorporate a “right to impart information and ideas of all kinds”. However these rights are specifically made subject to “respect of the rights or reputations of others” and “the protection of national security or of public order”.

Australia's "interpretation" thus appears to state (in reverse fashion) that the prohibition of "any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence" is qualified by countervailing rights of freedom of speech, assembly and association, which are themselves qualified by provisions for the protection of reputation, national security and public order.

We submit that this "interpretation" is problematic and reflects historical circumstances which no longer prevail. Moreover, the International Covenant does not contemplate the possibility that the actual incitement of hatred can ever be justified as an exercise of freedom of expression. We would urge the Government to withdraw its reservation to Article 20, and to consider the enactment of more effective remedies.

In particular our view is that the present civil remedies are inadequate and inappropriate for dealing with determined racist agitators, and that the Government should consider suitable criminal sanctions for intentional racial incitement and for serious offensive behaviour on the ground of "race". In our submission the provisions of Chapter XI of the *Criminal Code* of Western Australia (racist harassment and incitement to racial hatred) deal with the matter of serious and intentional incitement to racial hatred in an appropriate and effective manner. Substantially similar provisions should be enacted for Australia as a whole by the Federal Parliament.

On the other hand, it will be recognised that the prohibition of offensive behaviour on the ground of religious belief presents more difficult problems in reconciling competing rights. Certainly the right to engage in civilised debate about religion is central to our democracy, and anything in the nature of blasphemy laws would be intolerable.

Anti-vilification case law has defined "race" to include ethno-religious identity. The test articulated by the Court of Appeal in New Zealand (Richmond P, Woodhouse and Richardson JJ) in *King-Ansell v Police* [1979] 2 NZLR 531, a criminal law case, has stood the test of time.

In that case the appellant had been convicted by a magistrate of an offence under the New Zealand Race Relations Act 1971, the offence consisting of publishing a pamphlet with intent to incite ill-will against Jews, 'on the ground of their ethnic origins'. The question of law arising on the appeal concerned the meaning to be given to the words 'ethnic . . . origins of that group of persons' in s 25(1) of the Act. The decision of the Court of Appeal was that Jews in New Zealand did form a group with common ethnic origins within the meaning of the Act.

The reasoning of all members of the New Zealand court was substantially similar, but the following short passages from the Judgment of Richardson J are authoritative. Richardson J said (at 542):

'The real test is whether the individuals or the group regard themselves and are regarded by others in the community as having a particular historical identity in terms of their colour or their racial, national or ethnic origins. That must be based on a belief shared by members of the group.'

Then in the most famous passage he said (at 543):

'... a group is identifiable in terms of its ethnic origins if it is a segment of the population distinguished from others by a sufficient combination of shared customs, beliefs, traditions and characteristics derived from a common or presumed common past, even if not drawn from what in biological terms is a common racial stock. It is that combination which gives them an historically determined social identity in their own eyes and in the eyes of those outside the group, they have a distinct social identity based not simply on group cohesion and solidarity but also on their belief as to their historical antecedents.'

That last passage admirably captures the difference between a race for anti-discrimination law purposes and a race in the biological sense. These passages were cited approvingly and followed by the House of Lords in *Mandla v Dowell Lee* (1983) 2 AC 548 and by the Federal Court of Australia in *Jones v Scully* FCA 1080 (2 September 2002) at paras 110-113. and the Full Federal Court of Australia in *Miller v Wertheim* [2002] FCAFC 156) at paras 13-14. A group of people whose sole commonality of identity is a shared religious faith would not meet the test articulated by Richardson P.

Harmonisation Proposals

We also refer to paragraph 9 in the attached Extracts from the ECAJ Policy Platform. The paragraph was adopted at our last ECAJ Conference, and it cautions against any program for the "harmonisation" of State and Federal anti-vilification laws, since such "harmonisation" might well have a counter-productive "lowest common denominator" effect. We trust that the commitment to making anti-discrimination laws more "user-friendly", which was set out in the Attorney-General's announcement launching Australia's Human Rights Framework on 21 April 2010, will lead to better, and not diluted, protections under the law.

2. Intentional incitement to violence on the basis of race

Our organisation presented a detailed submission to the Senate Legal and Constitutional Affairs Committee on 21 April 2010 concerning the provisions of Subdivision C ("Urging Violence") of Division 80 of the Commonwealth Criminal Code as recently enacted by the National Security Legislation Amendment Act 2010. The reasons for our disappointment with that legislation are summarised in paragraph 3.6 of the Attachment to this submission. In our view the relevant provisions of the legislation are in urgent need of revision.

3. Anti-terrorism legislation

Similar difficulties arise in the area of preventing terrorist attacks, where special law enforcement procedures may be necessary in order to prevent serious physical crimes from occurring, rather than simply to punish such crimes after the event. The *ASIO Act*, for example, provides procedures for the compulsory questioning of relevant parties

where terrorist plans are suspected, with supervisory safeguards, as well as a provision that answers given under questioning are not admissible in criminal proceedings against the person questioned.

The procedure has aroused criticism from some human rights advocates, who see it as overriding the traditional protections of the citizen embodied in the Common Law systems of criminal law, as well as arguably constituting a breach of the provision in Article 14 of the International Covenant that a person is not to be compelled to "testify" against himself. Our view is that the procedures are presently necessary, particularly for the protection of our community, which intelligence and enforcement agencies recognise as facing greater risk of terrorist attack than Australians generally.

The three examples outlined above illustrate some controversial issues of law and policy of importance to our community which could arise out of the promulgation of a formal statement of rights. We would ask that such issues be taken into consideration in determining both the content and the effect, as well as the advisability of such a framework.

We appreciate the opportunity provided to make this submission, and we hope that it is of assistance. We should be very grateful if we could be kept informed of progress, so that we can make further representations, as and when appropriate. In particular, we ask to be included in the NGO Human Rights Forum as it goes forward.

Yours sincerely

Peter Wertheim AM
Executive Director

Attachment

THE POLICY PLATFORM OF THE EXECUTIVE COUNCIL OF THE EXECUTIVE COUNCIL OF AUSTRALIAN JEWRY

Relevant Extracts

Preamble

What follows is the current policy platform of the Executive Council of Australian Jewry (ECAJ). These policies are derived from the beliefs and values of the Australian Jewish community, which enhance general Australian values of democracy and human rights; individual freedom and the rule of law; social justice and compassion; mutual understanding and respect; and a fair go for all.

1. Social Inclusion

This Council:

- 1.1** NOTES that it is the vision of the ECAJ to create and support a community in which all Australians, including all Jewish Australians:
 - (a) feel valued and their cultural differences are respected;
 - (b) have a fair opportunity to meet their material and other needs; and
 - (c) are equally empowered as citizens to participate in and contribute to all facets of life in the wider community;
- 1.2** NOTES that as Australians we take great pride in what we see as the uniquely Australian values of social egalitarianism, "mateship" and a "fair go";
- 1.3** REAFFIRMS our profound commitment on behalf of the Australian Jewish community to the dignity of difference, gender equality, and a belief in the equality of humankind;
- 1.4** AFFIRMS our ongoing commitment to reconciliation with indigenous Australians, to a multiculturalism that draws people into, rather than separates them from, Australian life, and to an Australia that is inclusive for all Australians and respects gender equality;
- 1.7** ACKNOWLEDGES that across Australia there are numerous Jewish organizations whose role is to assist members of the Jewish community to overcome social exclusion and ameliorate poverty. There are community services, aged care services, and disability services, and there are educational institutions and synagogues that, inter alia, contribute to this work;

- 1.11** WELCOMES the efforts of the Federation of Jewish Aged and Community Service Organisations in assisting to achieve these objectives.

3. Anti-Racism Legislation

This Council:

- 3.1** NOTES the activities of extremist organizations, the currency of certain racist myths, the proliferation of racist material on the internet and the tolerance given to racist commentary by some sections of the mainstream media;
- 3.2** NOTES the incidence of racial vilification and racially-motivated violence in Australia;
- 3.3** AFFIRMS that effective responses to racism include moral and political leadership from public figures, legislation to give victims of racism legal remedies, and on-going public education;
- 3.4** COMMENDS those public figures who have taken a leadership position against racism, including Antisemitism;
- 3.5** CALLS ON the Federal Government to strengthen legislative measures to combat racial vilification in the public domain and especially on the internet and to provide more streamlined, expeditious and effective remedies to individuals and groups who are the targets of public acts of racial vilification.
- 3.6** COMMENDS the Federal Government for recognizing the need to reform the previous "urging violence in the community" offences in the Commonwealth Criminal Code BUT NOTES WITH DISAPPOINTMENT that, despite the Minister's assurance that workable provisions would be enacted to address this need, the relevant provisions of the National Security Legislation Amendment Act 2010 are unlikely to be at all workable because:
- the elements of the proposed offences have been formulated so restrictively that it will be effectively impossible for a prosecutor to prove those elements to the criminal standard; and
- the availability of defences under section 80.3 to charges under these sections is completely misconceived;
- 3.7** EXPRESSES ITS DISAPPOINTMENT that the Federal Government enacted the "urging violence" provisions in the National Security Legislation Amendment Bill 2010 in the same form in which they appeared prior to the inquiry conducted by the Senate Legal and Constitutional Affairs Committee in 2010

and without apparent regard for the written submissions and recommendations made by the Executive Council of Australian Jewry, the Australian Human Rights Commission and others to that inquiry;

- 3.8** CALLS ON the Federal Government to review as a matter of urgency the provisions of Subdivision C ("Urging Violence") of Division 80 of the Commonwealth Criminal Code and to adopt the recommendations for reform of the legislation made to the Senate Legal and Constitutional Affairs Committee by the Executive Council of Australian Jewry in its written submission dated 21 April 2010.

4. Aboriginal Reconciliation

This Council:

- 4.1** RECOGNISES Aboriginal and Torres Strait Islander people as the first Australians, with unique cultures, languages and spiritual relationships to the land and seas;
- 4.2** PURSUES a vision of an Australia that provides equal rights and life chances for all;
- 4.3** AFFIRMS the fundamental importance of reconciliation as the basis of an Australian Community which respects the diversity of values, cultures, ideas and the contribution of all people;
- 4.4** SUPPORTS Reconciliation Australia's National Program of Action which encourages organizations and individuals to turn their good intentions into action;
- 4.7** CALLS UPON the governments, business and civil communities and people of Australia to take action to reduce the relative disadvantage many Aboriginal and Torres Strait Islander people may face by improving education, health, housing, employment, governance, social and communal relationships and law and justice;

5. Multiculturalism

This Council:

- 5.1** AFFIRMS its support for Australia's policy of multiculturalism, which has served Australia well as a basis for the social harmony which for all Australians to enjoy;
- 5.2** CALLS ON the Australian Government to confirm its commitment to multiculturalism as a policy which respects the right of all Australians to express their individual cultural identity, and to maintain and share their cultural heritage, within an overriding commitment to Australia and the basic values of Australian democracy and the rule of law; and

- 5.3** COMMENDS the Government's policy of ensuring access and equity in the provision of government services, including the provision of mechanisms to address the barriers faced by immigrants who are not yet familiar with Australian culture and language.

7. Refugees and Asylum Seekers

This Council:

- 7.1** NOTES with grave concern the increase in the number of people around the world who have been made refugees as a result of war and civil conflict;
- 7.2** NOTES that a small number of these refugees seek asylum in Australia;
- 7.3** RECOGNISES the difficulties faced by successive Australian Governments in balancing the Government's obligations to its citizens to carry out proper screening (including health and security checks) on all potential new entrants to Australia, in particular unauthorised arrivals, and the Government's humanitarian obligations under the International Convention on the Status of Refugees (1951) (the Refugee Convention) and the 1967 Protocol to the Refugee Convention, as well as under customary international law;
- 7.4** RECALLS WITH SHAME that especially prior to, but also during and immediately after, World War II many thousands of Jewish refugees attempting to flee persecution in Europe were denied entry into other countries or forced to engage "smugglers" to try to escape to freedom;
- 7.5** RECALLS that the Refugee Convention came into existence in belated recognition by the international community of the great wrong that had been done by ostensibly civilised nations in refusing to grant asylum to Jewish refugees fleeing from Europe prior to and during World War II, and as a principled and compassionate response to the moral imperative of assisting European Jews in seeking new homes after the Holocaust;
- 7.6** NOTES the important and positive contribution that Jewish and other refugees, from many countries, have made to Australian society and the development of Australia;
- 7.7** NOTES that in the past, after proper processing of their claims by Australian officials, the vast majority of those seeking asylum in Australia have been found to be genuine refugees who had fled their country of usual residence because of a well-founded fear of persecution;
- 7.8** ACCORDINGLY CALLS UPON the Australian Government:
- a. to process applications by persons seeking asylum in Australia as expeditiously as possible and in a spirit of compassion, regardless of

- whether those applications are made through the offices of the United Nations High Commissioner for Refugees;
- b. to work constructively with other governments and appropriate non-government organisations, to ameliorate the plight of refugees around the world and in Australia;
 - c. to implement in good faith and with humanity, Australia's important legal and moral obligations with respect to refugees;
 - d. not to hold women and children asylum seekers in mandatory detention while their applications for recognition of their refugee status are processed; and
 - e. to desist from actions that are likely to result in persons who seek asylum in Australia being sent to countries which are not parties to the Refugee Convention;

8. Accommodation of Religious Practices

This Council:

- 8.1** NOTES decisions by a number of instrumentalities which recognise and support the right of all staff to meet their religious and ceremonial obligations, regardless of religious, ethnic or cultural background;
- 8.2** RECOGNISES the right of all Australians to observe religious and ceremonial obligations;
- 8.3** SUPPORTS the work of the Australian Human Rights Commission in enhancing religious freedom in Australia;
- 8.4** CALLS UPON government and employer organizations to respect and accommodate, as a matter of policy, the right of employees to meet the obligations of their faiths; and
- 8.5** CALLS UPON the Australian Government to make provision in Australia's industrial relations legislation to ensure that religious and ceremonial obligations can be observed without attracting the threat of loss of employment.

9. Australian Charter of Human Rights

This Council:

- 9.1** NOTES the decision of the Australian Government to abandon the proposal to

introduce an Australian Charter of Human Rights;

- 9.2** NOTES that the Australian Government has published a 'National Framework of Human Rights' which, among other things, proposes 'harmonisation' of State and Federal laws prohibiting racial and religious discrimination and vilification;
- 9.3** NOTES the significant differences that exist between Federal and State law on these issues and between the laws of the various States;
- 9.4** CAUTIONS the Australian Government against embracing any concept of 'harmonisation' that might result in the adoption of a 'lowest common denominator' legislative regime which would wind back hard-won legal protections that are now in place in some jurisdictions in Australia but not in others including, but not limited to, Western Australia's criminal sanctions against racial intimidation and harassment.

36. Terrorism

This Council:

- 36.1** JOINS in mourning the victims of terrorism in Israel and throughout the world, and extends condolences to the relatives and friends of those who have been murdered, and sympathy and best wishes for a full recovery to the injured;
- 36.2** SUPPORTS efforts to prevent terrorist attacks, including the enactment of effective anti-terrorism laws, the allocation of resources for the efficient investigation of terrorist crimes and the arrest and prosecution of terrorist suspects, and Australia's participation in the international war against terrorism;
- 36.3** URGES the United Nations and all governments to take effective action against countries which serve as a haven and provide bases and support for terrorists;
- 36.4** NOTES the importance of legislation designed to counter terrorism and to provide security in a manner that properly recognises the required balance between civil liberties and law enforcement, and recognising that the great majority of Australian Muslims abhor terrorism;
- 36.5** CALLS ON the Federal Government to take effective measures and make appropriate arrangements where necessary with other governments, to prevent the transmission into or within Australia, by television or radio or through the internet, of material that promotes any form of terrorism, and applauds all efforts that help to ensure that the cohesion of Australia's multicultural society is not prejudiced;
- 36.6** URGES the Australian and other governments to act against Palestinian and other anti-Israeli terrorist organizations such as Hamas, the Al Qsa

Martyrs Brigade, Hezbollah and Islamic Jihad;

36.7 CALLS ON the Federal Government to make appropriate arrangements with other governments to develop more refined and effective norms of international law to deal with the problems posed by armed attacks carried out by non-State actors.