

Executive Council of Australian Jewry Inc.

הוועד הכולל של
יהודי אוסטרליה

The Representative Organisation of Australian Jewry

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6 February 2018

The Hon Philip Ruddock
Chairman
The Expert Panel on Religious Freedom
C/O Department of the Prime Minister and Cabinet
PO Box 6500
Canberra ACT 2600
Australia

Email: religiousfreedom@pmc.gov.au

Dear Mr Chairman

The Executive Council of Australian Jewry (ECAJ) makes the following Submission to the Review of Freedom of Religion and Other Human Rights in Australia. This Submission will address the Terms of Reference, from the perspective of the Australian Jewish community. We consent to the Submission being made public.

The ECAJ is the elected national body representing the Australian Jewish community. This Submission is also made on behalf of the ECAJ's Constituent and Affiliate organisations throughout Australia.

As well as representing the Jewish community to the Federal government and to the general public, the ECAJ is a partner of other ethnic communities and other faith communities in Australia with which it engages in regular dialogue. It also participates in human rights consultations hosted by the Department of Foreign Affairs and the Department of the Attorney-General and the community consultations on Australia's Humanitarian Program conducted by the Minister for Immigration and Citizenship. Further, the ECAJ represents the Australian Jewish community internationally, most notably as an affiliate of the World Jewish Congress, which represents Jewish communities in more than 100 countries.

Complete lists of the ECAJ's Constituent and Affiliate organisations, the interfaith and inter-communal partnerships and dialogues in which it is involved and the international organisations with which it is affiliated are accessible on the ECAJ's website (www.ecaj.org.au/about/partners/).

The ECAJ has made detailed written submissions on the right of freedom of religion and belief in Australia to inquiries conducted by the Australian Human Rights Commission (and its predecessor body) in 1997 and 2009, and to the Federal Parliament's Joint Standing Committee on Foreign Affairs, Defence and Trade in 1999 and 2017.

Our most recent written submission dated 10 February 2017 is attached. Although most of the issues addressed in that submission remain relevant for the Australian Jewish community, in the context of the review you are undertaking we respectfully refer you in particular to the sections of that submission headed "International legal framework", "Constitutional protections" and "Religious freedom and anti-discrimination laws".

We note that your review is being undertaken specifically in the context of the recent enactment of legislation giving recognition to same sex marriage in Australia. In terms of the possible implications for religious freedom in Australia, the ECAJ's views are set out in the following policy which was adopted unanimously by ECAJ Councillors from across Australia following our recent Annual Conference:

55. Same Sex Civil marriage

This Council:

- 55.1 NOTES the high response rate to the survey on same sex marriage conducted by the Australian Bureau of Statistics in 2017, participation in which was entirely voluntary;
- 55.2 NOTES FURTHER that there was a strong majority in favour of same sex marriage being recognised in Australia's civil law;
- 55.3 RECOGNISES that the survey did not relate in any way to religious marriages;
- 55.4 COMMENDS the Federal Government, the Federal Opposition and other parties and independents for acting promptly to enact an amendment to the civil law definition of marriage in the Marriage Act in order to give effect to the clear result of the survey;
- 55.5 CALLS ON the federal government to:
 - (a) ensure that members of the clergy will continue to have the right to refuse to perform or participate in any marriage ceremony at their discretion, as is provided for at present under section 47 of the Marriage Act;
 - (b) ensure that religious institutions and religious schools will continue to have the same rights they currently enjoy under the law to practice, teach and preach their religious beliefs, including their beliefs about the institution of marriage being between a man and a woman; and
 - (c) ensure that parents and legal guardians will continue to have the same freedoms they currently enjoy to ensure the religious and moral education of their

children in conformity with their own convictions;

55.6 REJECTS any proposal that would permit businesses to refuse to provide goods, services and facilities on the basis that these are to be used in connection with a same-sex marriage ceremony; and

55.7 AFFIRMS that in matters of ordinary trade and commerce, as distinct from matters of religious practice and belief, all people are entitled to be protected from adverse discriminatory treatment on the basis of their race, colour, sex, sexual orientation, age, physical or mental disability, marital status, family or carer's responsibilities, pregnancy, religion, political opinion, national extraction or social origin.

Paragraphs 55.3, 55.5, 55.6 and 55.7 bear directly on the issues under review by your Expert Panel.

Whilst we are concerned that religious freedoms and rights, and eligibility for government funding by religious institutions and their personnel, that existed prior to the recent change to the civil law definition of marriage should not be eroded, in our view the case has yet to be made that that change will necessarily have any such effect. If such an effect does occur or become apparent in the future, then we would at that time urge the government to restore the *status quo ante* by specific remedial measures including, if necessary, additional legislation. It is likely that many Australians voted 'Yes' to recognition of same-sex marriage based on public assurances during the debate from advocates of the 'Yes' case, including senior members of the Federal Government and Federal Opposition, that it would not result in any erosion of religious freedom. A public commitment by the Federal Government and Federal Opposition at this time to take such measures in future should it prove to be necessary to do so in order to preserve the position of religious bodies and their personnel, would be welcome.

For the time being, our view remains that there is nothing in the recently-enacted legislation to recognise same sex marriages which has taken away any rights that people who did not support that change to the law might have previously enjoyed. Nothing in the legislation prevents people continuing to hold whatever beliefs they may hold, to express them privately or publicly, or to teach them in faith-based schools. Nothing in the new legislation permits discrimination against people who hold such views.

Nevertheless, there are genuine concerns amongst religiously observant people and communities more generally about a gathering trend in Australia and elsewhere in the western world to seek to curtail existing religious freedoms. These concerns long pre-dated the debate over same sex marriage, although the debate has highlighted them.

The provisions of relevant international conventions to which most States, including Australia, are parties include Article 18 of the Universal Declaration of Human Rights which provides that everyone "*has the right to freedom of thought, conscience and religion*" and Article 18.1 of the International Covenant on Civil and Political Rights, (ICCPR), which emphasises the fundamental character of that right, and provides that it cannot be derogated from, even in time of public emergency. Further, Article 27 of the ICCPR protects the rights of minorities to enjoy their

religion, language and culture. The Australian Government has also supported the adoption of the Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief (1981), article 6 of which provides that “*Every child shall enjoy the right to have access to education in the matter of religion or belief in accordance with the wishes of his parents*” or guardians.

Australia has not for the most part enacted these international commitments into the domestic law of Australia. There is almost no protection for freedom of religion, conscience, speech and association anywhere in Australian law beyond exceptions and exemptions in anti-discrimination laws. A key concern of religious communities is that the protection of human rights through defences and exemptions, which in any given case may have to be established to the satisfaction of a public official, is an inadequate way of implementing Australia’s international human rights obligations.

This is underlined by the tendency in recent years of official bodies such as the Australian Human Rights Commission and non-government human rights organisations such as the Castan Centre for Human Rights Law and the Human Rights Council of Australia to publish statements and submissions which argue in favour of narrowing or eliminating the current exceptions and exemptions in anti-discrimination law that protect religious institutions. This has occurred in the context of increasing evidence of intolerance and even hatred against people of faith in the Abrahamic religions across the secular western world - See Peter Kurti, *The Tyranny of Tolerance: Threats to Religious Liberty in Australia* (Brisbane: Connor Court Publishing, 2017), p 6.

More fundamentally, many faith-based organisations consider that their right to operate in a manner that genuinely fulfils their religious ethos ought to be affirmed positively, and should not be treated – even *prima facie* - as a form of discrimination against any person who does not share that ethos.

Australians in good faith can and do have divergent views about whether the existing exemptions of religious organisations from anti-discrimination legislation should be removed, narrowed or widened. We do not support any reduction in the existing exemptions for religious organisations from anti-discrimination legislation. Were a case is to be put forward for those existing exemptions to be removed, narrowed or widened, then in our view that case needs to be made and assessed not only in light of the recent change to the civil law definition of marriage, but also having regard to a range of wider implications.

Further, in our view the concerns of religious communities have substantially been met in one important field - employment law. Sections 153, 195, 351 and 772 of the *Fair Work Act 2009* (Cth) provide that hiring, firing or other action taken by an employer in respect of an employee (including a prospective employee – s.342) is not unlawful if the employer is “*an institution that is conducted in accordance with the doctrines, tenets, beliefs or teachings of a particular religion or creed*” and the action is taken “*(i) in good faith; and (ii) to avoid injury to the religious susceptibilities of adherents of that religion or creed*”. Importantly, the onus is on the person alleging unlawful discrimination to prove that either or both of these requirements have not been met. This is the reverse of the onus which applies with regard to establishing exemptions under anti-discrimination laws.

In our view, great caution would need to be exercised before extending these or similar provisions to non-employment situations, for example in the content of school curricula at religious schools. Whilst religious schools are, and should remain, free to educate their students in the tenets of their faith, including beliefs about marriage and sexuality, that freedom ought not to extend to vilification of entire groups on the basis of race, colour, sex, sexual orientation, age, physical or mental disability, marital status, family or carer's responsibilities, pregnancy, religion, political opinion, national extraction or social origin. As for the content of school curricula at both religious and secular schools, education towards respect for different faiths and the diversity of faiths in our Australian community must be maintained and strengthened.

For the present, we believe that the Jewish community continues to have no major difficulties with the balance presently struck in Australian law between religious freedom and anti-discrimination laws, although this could change in the future. We stand by the recommendations made in our submission dated 10 February 2017 to the Parliamentary Inquiry into Freedom of Religion and Belief. We believe that the implementation of those recommendations would be a desirable enhancement of religious freedom in Australia, but we do not go so far as to say that the fact that some of these recommendations have not thus far been implemented constitutes a threat to religious freedom in Australia.

The ECAJ does not consider that the practice of the Jewish faith is in any way incompatible with current Australian law (including the recent civil law recognition of same sex marriage) or public policies. There is, however, some evidence of a growing animus against people of faith in the Abrahamic religions across the secular western world, and for this reason vigilance will be needed to guard against the erosion of religious freedoms in the future, and to make good on the recent assurances given by politicians in the major parties that religious freedoms will not be diminished.

Yours sincerely



Anton Block
President



Peter Wertheim AM
Executive Director