Executive Council of Australian Jewry Inc.

הועד הפועל של יהודי אוסטרליה

The Representative Organisation of Australian Jewry

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17 December 2021

Committee Secretary
Parliamentary Joint Committee on Human Rights
PO Box 6100
Parliament House
Canberra ACT 2600 Email: religionbills@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 charities; and greater clarity concerning the protection of associates. Concerns that have been expressed about the Bill, as regards the alleged scope for sexual discrimination in the terms of employment with religious bodies and the protection of statements of belief are not well-founded in our view. Accordingly, we support the passage of all three Bills in their present form, or something approximating their present form.

1. The need for new legislation

Under Article 26 of the International Covenant on Civil and Political Rights (ICCPR), to which Australia is a party, Australia's domestic law is required to provide "*all persons equal and effective protection against discrimination on any ground such as…religion*".[1]

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[2], 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.

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

[1] *International Covenant on Civil and Political Rights*, 16 December 1966, 999 *UNTS* 171 (entered into force 23 March 1976) art 26.

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

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.[3] 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 in 2018 concluded that "*'religious belief or activity' (including not having a religious belief) should be a protected attribute under federal anti-discrimination law.*"[4] 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****.*"[5] (Emphases added)

Finally, 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.[6] Religious freedom in Australia can no longer be taken granted, and its protection by legislation is therefore timely.

2. 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 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*".**[7]

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:

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[3] *Equal Opportunity Act 1984* (SA), Part 5B

[4] *Religious Freedom Review: Report of the Expert Panel*, 18 May 2018, para 1.390, p.94

[5] *Religious Freedom Review: Report of the Expert Panel*, 18 May 2018, Recommendation 15, p.5

[6] Media Release 074/2017, Australian Bureau of Statistics, 2016 Census data reveals "no religion" is rising fast, 27 June 2017: https://www.abs.gov.au/AUSSTATS/abs@.nsf/mediareleasesbyReleaseDate/7E65A144540551D7CA258148000E2B85

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

> "*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.*"[8]

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 that Act 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 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 their enrolment policies, or faith-based institutions generally wishing to preference people of the same faith in employment, or in any other way, 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 institution who is of a different faith, or of no faith, ought to be in a position to know before applying for employment at the institution 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 made

[8] 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.

available, are expressed in such broad terms that they might empower the Minister to determine the content of the school's policy. We believe this should be ruled out in the Explanatory Memorandum.

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.

3. 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 we noted in an earlier 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 believe 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 to clause 10 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 an earlier submission.

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 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.

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

As we noted in an earlier 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 a particular

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.

5. 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. For example, 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*"[9]; "*remarks* [by fellow employees] *which are calculated to humiliate or*

[9] *Nationwide News Pty Ltd v Naidu* [2007] NSWCA 377 at [378] *per* Basten J.

demean an employee by reference to race, colour, descent or national or ethnic origin" [10]; and racially insulting comments directed against an employee in front of fellow workers.[11] 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.

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.

6. 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".

[10] *Qantas Airways v Gama* (2008) FCAFC 69 at [78]
[11] *Singh v Shafston Training One Pty Ltd and Anor* [2013] QCAT 008 (ADL051-11), 8 January 2013

However, Article 18.3 of the ICCPR formulates the exceptions to the prohibition against religious discrimination in stricter terms. It 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).

7. 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 first three 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. 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, the making of a moderate statement of belief outside the work context 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 used as a pretext for denying a person the means to pursue their chosen career in order to earn a livelihood.

Conclusion

We thank the Committee for the opportunity to make a submission.

Yours sincerely

P.S. Wertheim

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