UNION FOR PROGRESSIVE JUDAISM

20 January 2019

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Dear Peter,

The Human Rights Legislation Amendment (Freedom of Religion) Bill 2019

As promised, the Union for Progressive Judaism is providing its input to the Australian Jewish community response to the second exposure draft of the Human Rights Legislation Amendment (Freedom of Religion) Bill 2019.

The UPJ is the roof body that resources 27 congregations, schools, youth groups and communal organisations across Australia, New Zealand and Asia, serving about one fifth of the region's affiliated Jewish community.

1. Some relevant background relating to the need for the new legislation

The colonies of NSW had an intriguing combination of public supremacy for the Church of England (Anglican), and an absence of restrictions upon the private practice of religious observances. This absence of restrictions was different to the "mother country". Hence, in the Australian colonies, Jews had more religious freedom than they did in Britain.

The Commonwealth Constitution does not contain provisions entrenching religious freedom, but does prevent the establishment of a State religion. The intriguing combination noted above continues into our governance model. Our Head of State, namely, the Queen, must be an Anglican, whereas her Viceroy, the Governor-General could come from any faith community. We, of course, have had two Jewish Governors-General.

This governance structure has served the Australian Jewish community well, and so our acid test for the proposed legislation must be whether it makes living in Australia more or less consistent with the Jewish values that we are so free to pursue in this country. Applying that test, we are unconvinced of the benefits of the proposed legislation, and see a number of its aspects as antithetical to Jewish values.

It is to those aspects to which we now turn. We endeavour to do so without repeating the issues raised in the ECAJ submission on the previous draft dated 27 September 2019 (the "Earlier Submission") except to note some of the instances where:

- the Second Exposure Draft does not but should heed the calls made in that submission;
- those instances intersect with our specific concerns; and
- we urge you to press those calls.

2. All human rights intersect and when they do, they cannot have equal status

The proposition that "all human rights have equal status" which flows from Recommendation 3 of the Religious Freedom Review and which appears in the description of the objects clause in the document entitled: "Key changes from first exposure draft" is unworkable and will create unnecessary headaches for the courts. Nothing in the explanatory memorandum assuages that concern.

Inevitably some human rights compete with each other. We identify below some instances where competing rights have to be addressed in relation to this bill.

The definition of religious body still does not work

In the Earlier Submission you observed as follows:

> *There is important case law to suggest that a religion must be a system of belief and worship that is held in good faith and is "neither fictitious, nor capricious" and "not an artifice". The absence of a definition of religion in the Bill potentially raises questions as to whether a denomination or stream of a particular religion is itself a religion for the purposes of the Bill. In his speech when he released the Bill, the Attorney-General spoke of the desirability of the judiciary being "guided and narrowed by a set of legislative guardrails" in interpreting the Bill's provisions. For that reason, it would be desirable for the Bill to include a definition of so fundamental a concept as religion.*

Those guardrails remain absent, and this is a substantial defect in the bill.

Further, the second exposure draft bill contains the following circular definition.

> *religious belief or activity means:*
>
> *(a) holding a religious belief; or*
>
> *(b) engaging in lawful religious activity; or*
>
> *(c) not holding a religious belief; or*
>
> *(d) not engaging in, or refusing to engage in, lawful religious activity.*

To know what constitutes a "religious activity", for example, one is directed to see if it is lawful, but before ascertaining whether it is lawful one must first identify whether the activity is a "religious activity". The definition is painfully circular. The same circularity applies to the attempt to define "religious belief".

The circularity undermines the operation of the provision for "Discrimination on the ***ground*** of a person's religious belief or activity" in clause 6, the prohibitions on different types of discrimination in clauses 8, 9 and 10, and the intended carve-out in clause 12. It further adversely affects the workability of:

- the more specific prohibitions in Part 3 Division 3, for example, relating to sports in clause 24, clubs in clause 25 (about which more below) and Commonwealth programs in clause 27; and
- the exceptions and exemptions in Part 3 Division 4.

The issues you raised in the Earlier Submission have not been addressed adequately, and in any event can only be considered once the circular definition is replaced and the replacement carefully considered.

4. Protection for the conduct of a religious body

An underlying principle (subject to some exceptions) in the proposed legislation is that conduct is only acceptable if it is "reasonable". It follows that the approach to reasonableness is of considerable importance.

In the Earlier Submission, you observed as follows:

> *A solution might be to define the standard of reasonableness as that of a reasonable person who is observant in that religion or the relevant denomination or stream of that religion. The question might then at least be determined on the basis of expert evidence from recognised faith leaders and teachers. Even this solution could present problems in the case of Judaism, with its well-established tradition of argument, dissent and, on occasions, conflicts of views between relevant religious authorities that occur even within each stream of Judaism. For this reason we would also recommend that the word "ethos" be added to the words "doctrines, tenets, beliefs or teachings so that the final phrase of clause 10(1) reads: "in accordance with the doctrines, tenets, beliefs, ethos or teachings of the religion, or a denomination or stream of the religion," in relation to which the religious body is conducted."*

Your call was not taken up. The issue is problematic in a number of applications, a few of which we highlight below.

a. Educational institutions

Educational institutions conducted in accordance with the doctrines, tenets, beliefs or teachings of a particular religion are defined to be religious bodies. Acting in accordance their doctrines, tenets, beliefs or teachings is not statutory discrimination. Does that however mean that one denomination or stream within a particular faith community is free to discriminate against another, as presently is the case? This needs to be considered in light of clause 19, which creates a competing right for a student from outside the faith community to be admitted to the educational institution. Moriah College, for example, which already limits admission to children of some converts to Judaism, may have to admit not only them but also non-Jews. Carmel College, which discriminates against some Jews may no longer be permitted to do so. It is not entirely clear that clauses 11(1) and 11(3) overcome these concerns.

If they do not, then is the Jewish mandate to educate our children, one source of which is the Sh'ma, sufficient to enable these schools to rely on clause 12(a)(c)(i)?

More importantly, can discrimination by one stream of Judaism against another ever be "reasonable in the circumstances" under clause 12(a)(a)? Would we want a civil court deciding that point as occurred in England in 2009?[1]

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[1] *See*: Regina (E) v Governing Body of JFS and another (United Synagogue and others intervening) [2010] 2 AC 728; https://www.nytimes.com/2009/12/17/world/europe/17britain.html;

The Union for Progressive Judaism would prefer that such discrimination not continue, but we appreciate that in Sydney and Melbourne at least there is a choice of Jewish Day schools.

b. Education begins before school

The Earlier Submission validly asked that the definition of educational institution be broadened to cover kindergartens and pre-schools (and in our view should also cover long day care centres). That has not been taken up, and exposes Jewish kindergartens and preschools to claims that a school would not have to face.

How would, for example, Emanuel School deal with this when both the Kornmehl Preschool and the Liberal Jewish Day School are on one premises, with an overarching administration?

Please press the point again.

c. Retirement homes and aged care facilities

Next, owners of Jewish retirement homes and aged care facilities necessarily undertake commercial operations as that term is understood generally. As the Earlier Submission points out they are still acting in accordance with their religious ethos. The draft legislation still does not define the term:" commercial activities", and so the ability of such entities to rely on the religious body exemptions is unclear.

For some, which are "a registered public benevolent institution", such as B'nai B'rith Retirement Villages, the commerciality of some of their activities will not matter because they would be classified as a "Religious Body" under clause 11(5)(b) rather than under clause 11(5)(c), but they still would not qualify for statutory protection because of the closing words of clause 11(5) which exclude from protection as a "Religious Body" any "institution that is a hospital or aged care facility, or that solely or primarily provides accommodation."

Moreover, even if the closing words in clause 11(5) were removed, having to find a religious basis for preferring Jewish persons in the provision of accommodation and social services is not straightforward. Nor should it be required of Jewish communal institutions which look after our ageing community, and not only the remaining Shoah survivors in our midst.

For those like the Montefiore Homes and BBRV that provide accommodation, they would be subject to the prohibitions in clause 22. They would be dependent on the exemption in clause 29 to continue to serve solely the Jewish community. This is insufficient and ought to be unacceptable.

For entities that are a registered charity, clause 29 provides that if a particular provision of the entities governing rules enables charitable benefits to be conferred wholly or in part on persons who hold or engage in a particular religious belief or activity, implementation of that provision is immune from the specific prohibitions in Divisions 2 and 3 of the Bill. This drafting may not be as wide as needed.

it is not at all clear that the provision of the accommodation is the provision of "charitable benefits". If it is not, the exemption will not assist.

Moreover, it seems to focus on evidence of the recipient of the benefit engaging in some verifiable activity that demonstrates their religion. The statutory language ought to be extended to "persons of a particular religion".

Our retirement homes and aged care service providers ought to be allowed to prefer Jews in the provision of their services. As you have correctly pointed out no no-Jew is disadvantaged by

preferring Jews in the provision of, say, kosher food, or of a retirement home where everyone shares common Jewish values.

d. Other communal bodies

Many communal entities such as B'nai B'rith NSW are registered charities, but not public benevolent institutions, and would have to demonstrate that their activities are not commercial to qualify as a "religious body".

But for clause 36 (if it were to apply), clause 20 would preclude owners of Jewish community buildings who let public halls such as NCJW Woollahra from denying use of the hall for, say, Islamic prayer.

But for clause 35 or clause 36, depending on whether Maccabi qualifies statutorily as a "club", clause 24 would appear to preclude Maccabi sporting clubs from limiting membership to Jewish sportspeople.

In any event, the fall-back position appears to be reliance on section 12 which provides that it is not unlawful for a person to engage in conduct that is reasonable in the circumstances, is consistent with the purposes of this Act, and is either:

> *a. intended to meet a need arising out of a religious belief or activity of a person or group of persons; or*
>
> *b. 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.*

It is doubtful that preferring to provide social services to Jews is intended to meet a need arising out of a religious belief or activity. The draft legislation does not, and needs to, permit a faith-based hospital, aged care provider, retirement village or accommodation provider or communal hall provider such as NCJW, to give preference to members of the Jewish community in each of admission, operation and service delivery.

We agree with the Earlier Submission that in addition to removing the closing words from clause 11(5), a further subsection should be added to clause 10 to the effect that, without limiting the generality of the clause, it is not discrimination for a religious body to provide services or prefer to provide services to, or to appoint or prefer to appoint as employees and volunteers, or to make, or prefer to make, membership or a position or office of an organisation available to, persons who are adherents of the religion according to which the organisation is conducted. A similar protection should be added for accommodation providers, clubs and voluntary bodies which have as their object provision of services to person of the Jewish faith. Unincorporated entities such as Jewish youth movements, which offer social facilities and camps, should have the same protections. The point should be pressed and strongly.

e. An example of a competing right

Taken literally, under clause 11(1), if any person who happens to be Jewish considers that denigrating, say, LGBTI people by refusing participation in Jewish community activity to them, is in accordance with Jewish doctrines, tenets, beliefs or teachings, such a refusal could be lawful. It should not be. This is a good example of competing human rights which cannot be treated equally. Denigrating by exclusion people who happen to be, say, homosexual or transgender, ought not pass muster for any faith community. Such denigration is not the sort of respect for human dignity that our faith demands.

Clause 11(3) allows religious bodies to "to avoid injury to the religious susceptibilities of adherents of the same religion as the religious body." What kind of injury is anticipated? What kinds of susceptibilities are protected? A susceptibility can be understood as a feeling easily capable of being hurt. Taken this way, it provides a sweeping leave pass for discriminatory conduct by religious bodies. We are concerned that in providing that religious bodies do not discriminate by engaging in conduct to avoid injury to the religious susceptibilities of adherents of their faith, will this open the door to discrimination against, for example, other faith communities, racial minorities or LGBTIQ people. We are very much opposed to such a sweeping leave pass being given.

Further, despite the examples properly given in the Earlier Submission, under clause 11(5) aged care facilities do not get the benefit of such a leave pass in its present (or an improved) form.

On one view, clause 12(1)(c)(i) gives a leave pass to any conduct which: "is intended to meet a need arising out of a religious belief or activity of a person or group of persons." Quite apart from this clause being adversely affected by the circular definition highlighted in section 3 above, would such a provision protect a Jewish community that feels mandated to care for its aged and infirm in *Jewish only* residential care places? We are not confident of the answer.

Why should there need to be reliance on an exception for Jewish community bodies to care for their fellow Jews? If the exception is not as broad as would literally appear to be the case, then, for example, Jewish aged care facilities many of which still house Shoah survivors would be constrained in who they hire and how they restrict employee conduct. Or even who can sit on their Boards? The Chevra Kadishas and Bet Olam Funerals would be constrained in providing Jewish burial services. This reinforces the need to broaden the scope of operation of clauses 35 and 36, but not so as to provide a leave pass to denigration of others protected classes within our social fabric.

In our view, mere tinkering with the drafting will not address these dangers. The provisions need a solid rethink.

5. The protection of life and human health

Clause 8(6) continues state laws which permit health practitioners to withhold services where they conscientiously object. Clause 8(7) provides an exemption as long as there is no "unjustifiable adverse impact." Note 2 suggests that: "this provision does not have the effect of allowing a health practitioner to decline to provide a particular kind of health service, or health services generally, to particular people or groups of people. For example, refusal to prescribe contraception to single women may constitute discrimination under the *Sex Discrimination Act 1984*." However, that is not what the drafting provides. As drafted, the service can be withheld unless the unjustifiable adverse impact can be demonstrated. Introducing a vague qualitative test as a threshold for withholding healthcare ought not be acceptable, let alone to a faith community for whom the sanctity of human life is a primary value.

The right to health care should not be subject to belief-based exceptions.[2]

6. Exemptions for clubs and voluntary bodies

Approached literally the definition of "Club" in section 3 is wide enough to cover a range of community bodies which would not be described as clubs in the vernacular. All that is required is

[2] Even if one gets past that proposition, there is no allowance here for different denomination or streams of a religion. There is no allowance for different rites within the Catholic Church not for different streams of Judaism.

that they comprise "persons associated together for social, literary, cultural, political, sporting, athletic or other lawful purposes that provides and maintains its facilities, in whole or in part, from the funds of the association".

Jewish community bodies, which restrict membership to persons of the Jewish faith, such as the Boards of Deputies and Jewish Community Councils (and by extension the ECAJ), this Union for Progressive Judaism, B'nai Brith NSW Inc. and B'nai B'rith Australia / New Zealand Incorporated. some Maccabi clubs, or even the Sydney Chevra Kadisha (which limits membership to particularly observant orthodox Jewish persons) could fall with in this definition. Zionist Youth movements could fall within this definition. They would then have to rely on clause 35 to maintain their faith-based membership restriction. Clause 35 is drafted as an exception to clause 25. It only allows somediscrimination in relation to membership, but not service provision. In our view, prohibiting Jewish communal bodies such as those listed above from preferring Jews in the provision of their services is unacceptable. That said, under clause 35 a club can require its members to be of particular faith, and provide that it only services its members. Thus, only if it provides no services to non-Jews could it limit services to person of the Jewish faith.

The definition of "voluntary body" picks up non-profit entities that are not clubs and which do not extend credit to members. Clause 36 allows discrimination by such bodies in relation to the admission of persons as members of the body, and also in relation to the provision of benefits, facilities or services to members of the body." Why clubs are treated differently is not made clear.

In any event, the definitions of club and voluntary body need to be reconsidered. For example, if non-profit associations were not included in the definition of "Club", they would automatically gain the benefit of clause 36.

All the above-mentioned faith community based bodies should not have to admit persons who are not Jewish or provide anything to them. The legislation should so provide.

7. Statements of belief by employees

Freedom for faith cannot extend to freedom to insult or intimidate. That offends the Kantian limit on human freedom which underpins the modern law of human rights.

We appreciate that the bill will also need to be considered in light of the Report of the Australian Law Reform Commission when it completes its review into the "Framework of Religious Exemptions in Anti-discrimination Legislation". However, it is important that the Australia Jewish community make clear that religious belief ought not be permitted to be relied upon to engage in discrimination or hate speech *inter alia* against a person who has other legislative protections under current laws such as persons with a disability, victims of sex discrimination, persons who are discriminated against by reason of sexual orientation or persons of a particular race, or even persons of another faith.

The definition in clause 5 of "statement of belief" is very broad. A statement which "could" be reasonably considered to be in accordance with the doctrines, tenets, beliefs or teachings of a religion qualifies as a "statement of belief", if ***any*** person of the same religion reasonably considers it to be statement of belief.[3]

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[3] The second part of the definition which relates to statements by person who do not hold a religious belief is no better.

A wrongheaded or misguided statement supported by say an extreme sect of a religion could be used to insult, harass or intimidate a person from a minority racial group, or an LGBTI person.

Overbearing evangelical conduct can intimidate people of non-Christian faiths.

There should be no free pass for any such conduct. Such a free pass would be very much contrary to Jewish values.

The way in which clauses 8(1) - 8(5) are drafted admit of such a free pass. Substantial amendment is required.

Clause 8(3) is most problematic. Take for example a Jewish Day School which requires its employees not to make statements such as: "If you do not accept Christ as your Lord [or Allah] you will go to hell" in front of students. That could be a "Statement of Belief". It might lead to parents withdrawing their children from the school, but the school could only restrict its making if "compliance with the rule by employees is necessary to avoid unjustifiable financial hardship to the employer." That is an entirely inappropriate standard.

Clause 8(5) operates only to exclude the operation of clauses 8(3)&(4) if the statement "is likely to, harass, threaten, seriously intimidate or vilify another person or group of persons". It does not operate on clause 8(1). It should, although that might solve only part of the problem.

We appreciate that there may be a reluctance to expand the use of section 18C of the Racial Discrimination Act 1984 (RDA), and observe that clause 42(2)(b) does not track the language of section 18C: i.e., "reasonably likely, in all the circumstances, to offend, insult, humiliate or intimidate." Doing so would be an improvement on the proposed language in the bill. However, we appreciate that there is unlikely to be a political appetite to track the RDA language.

As a Jewish community we believe that we are all made in the image of Hashem, and we should oppose legislation that gives a leave pass – under any rubric – for denigration of human beings, or that puts the burden of proof on the victim of denigration.

The legislation should be amended at least to ensure that any statement which "is likely to, harass, threaten, seriously intimidate or vilify another person or group of persons", cannot qualify as a "Statement of Belief" and cannot be protected speech in any context. Whether statements such as those made controversially by the rugby player, Israel Folau, would "seriously intimidate" is unclear, but if they would, then they ought not be protected, even *prima facie*. As drafted the Bill allows our harmonious society to be undermined by newly protected "Statements of Belief".

Further, if one is employed by a faith community body you ought not be allowed to denigrate that faith community at all, regardless of your personal beliefs. Clause 32(6) precludes conduct restrictions which operate "other than in the course of the employee's employment" from being reasonable restrictions. This would mean that an employee of a Jewish Day School, especially one who is not teaching in the Jewish Life or Jewish Studies Department, could make statements such as: "If you do not accept Christ as your Lord [or Allah] you will go to hell" outside school hours, and any attempt by the school to restrict that conduct would not be an inherent requirement of working for a Jewish Day School as well as not being "reasonable" under clause 8(3).

Why should a Jewish Day School or any other Jewish communal institution that employs people not be able to require its employees to act at all times in a manner respectful of the Jewish faith and Jewish persons?

So, on the one hand the drafting leaves open potential for denigration of other minority groups, and on the other it fails generally to enable faith community bodies to be governed by and serve their own communities.

8. Conclusion

We ask that you incorporate the foregoing considerations into the ECAJ submission on the second exposure draft.

Above all, our Jewish values which we are free to exercise today ought not be restricted in operation by legislation that is motivated by preserving freedoms. We consider that the present draft has just such undesirable consequences.

Yours faithfully,

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Co-President

Brian Samuel OAM
Co-President

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[i] The second part of the definition which relates to statements by person who do not hold a religious belief is no better.

[ii] Julius Stone: Human Law and Human Justice: Maitland Publications Pty. Ltd., 1966