



**Human Rights of ACT Public Servants re Participation in the  
Marriage Equality Campaign**

**Final Advice to Mr Alistair Coe MLA**

**September 2017**

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**Summary of advice**

- A situation where a public servant is required to undertake duties in relation to the same sex marriage campaign, which the public servant believes to be contrary to their religious beliefs, will engage the right to freedom of thought, conscience and religion in s 14 and potentially, the right to equality in s 8 of the *Human Rights Act 2004*.
- However, whether these rights are breached will depend upon the nature of the duty required to be undertaken and the way in which any requirement is implemented. While the right to hold and adopt a religious belief is regarded as absolute and unqualified at international law, the right to manifest or demonstrate that belief through actions or omissions may be subject to reasonable limitations.
- Comparative law indicates that in an employment context, requiring an employee to perform expected duties in furtherance of a legitimate objective will not be an unreasonable limitation on the right to demonstrate their religious beliefs, where those duties are rationally and proportionately connected to that legitimate objective.
- Support for the human rights of LGBTIQ Canberrans is a legitimate objective, and consistent with the stated policies and approach of the ACT Government in creating an inclusive community. The ACT Government has previously attempted to legislate for same-sex marriage in the ACT, to give effect to the human rights of LGBTIQ people in Canberra.
- Public servants are expected to implement the policies of the government of the day, regardless of their personal beliefs. Guidance issued to public servants confirms that public servants retain the right to campaign on either side of the marriage equality debate in their own time, and there is no suggestion that public servants will be asked to vote in the voluntary survey in a particular way.
- In our view it is unlikely that a requirement to participate in general marketing activities such as installing or displaying rainbow 'We are CBR' banners would significantly limit the rights of a public servant to demonstrate their religious beliefs. In this context we consider that any limitation would be considered reasonable, and that such a requirement would not breach a public servant's human rights.

- However, each situation must be considered on its own facts to determine the extent of any limitation of rights. Requirements to participate in campaign activities more directly connected to the voluntary postal survey, such as lobbying, leaflet distribution or rallies or marches to support same sex marriage could pose more of a serious limitation on the right to thought, conscience and religious belief and such requirements may not be reasonable.
- It is important that in participating in the marriage equality campaign, the ACT Government does not allow public servants to be treated unfavourably (for example by being subject to bullying or harassment) in the workplace because of their religious beliefs about same-sex marriage. Unfavourable treatment on this basis would limit the rights of public servants to equality and could amount to unlawful discrimination under the *Discrimination Act 1991*.
- Any public servant who feels that they have been discriminated against in their employment on the grounds of their religious beliefs or political conviction may make a complaint to the ACT Discrimination Commissioner, and if the matter cannot be resolved, the complaint can be determined by the ACAT.

## Background

In August 2017 the Federal Treasurer announced his intention to ask the Australian Bureau of Statistics (ABS) to conduct a voluntary postal survey on whether or not the law should be changed to allow same sex couples to marry. The ABS has indicated that survey forms will be posted from 12 September 2017 to all Australians on the Commonwealth Electoral roll, and must be returned before 7 November 2017, with results to be published by 15 November 2017. The voluntary postal vote does not have the status of a plebiscite and the results will not bind the Federal Government to take any immediate action in relation to laws on same sex marriage.

On 14 August 2017 guidelines were issued by the ACT Public Service Commissioner regarding the conduct of ACT public servants during the postal survey period.<sup>1</sup> These guidelines confirm that that ACT public servants may, in their own time, participate in activities in relation to the postal survey (on either side of the debate) including doorknocking, letterboxing, phone polling and other volunteer campaign activities; engaging in political debate including making comment in a private capacity; and participating in rallies and events. The Guidelines note that it is important that participation in these activities does not give the impression that the public servant is acting in an official capacity.

On 17 August 2017 ACT Chief Minister Andrew Barr introduced the following motion in the Legislative Assembly, which was passed by a majority of the Assembly.

I move:

That this Assembly:

(1) notes that:

- (a) the Federal Government is seeking to instruct the Australian Bureau of Statistics to conduct a non-binding voluntary postal survey on whether the law should be changed to allow same sex couples to marry;

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<sup>1</sup> Guidelines for ACT Public Service Employee Conduct during the 2017 Same-Sex Marriage Postal Survey Period

(b) the Assembly supported a motion on 10 August 2016 which called on the ACT Government to:

(i) demonstrate that the ACT is the most LGBTIQ friendly jurisdiction by supporting the case for marriage equality; and

(ii) support the LGBTIQ community through the anticipated marriage equality plebiscite debate; and

(c) consistent with this resolution the ACT Government will provide additional support to the LGBTIQ community throughout the period of the voluntary postal survey;

(2) supports the ACT Government joining and actively participating in the campaign to achieve marriage equality; and

(3) reaffirms its view that all Australians should be treated equally under the law and that includes being able to marry the person they love. LGBTIQ Australians should have the same opportunities for love, commitment and happiness as everyone else.

In referring to the 'ACT Government', it appears that this motion sought support for both the ACT Executive and the ACT Public Service 'joining and actively participating' in the campaign to achieve marriage equality.

Although the terms of the motion are broad, we understand from your letter and from media reports that the official involvement of public servants in the campaign will largely be limited to conducting 'in kind' marketing activities such as the installation and display of rainbow 'We are CBR' banners, bus wraps, murals and pedestrian crossings. In addition, public servants will be involved (in their usual roles) in the provision of a range of direct supports such as counselling to LGBTIQ Canberrans who may be negatively affected by the public debate about marriage equality.

You have noted that you have been contacted by a Muslim public servant whose duties are stated to be 'within the scope of these activities,' who believes that participation in these activities would be contrary to his religious beliefs regarding marriage.

### **Rights protected under the *ACT Human Rights Act 2004***

The *ACT Human Rights Act 2004* (HR Act) gives legal effect in the ACT to a range of human rights recognised in international law. Key rights that may be engaged in this context are the right to freedom of thought, conscience, religion and belief (s 14), and the right to equality and non discrimination (s 8).

#### *Right to freedom of thought, conscience and religion*

Section 14 of the HR Act provides that:

- (1) Everyone has the right to freedom of thought, conscience and religion. This right includes –
  - (a) the freedom to have or to adopt a religion or belief of his or her choice; and
  - (b) the freedom to demonstrate his or her religion or belief in worship, observance, practice and teaching, either individually or as part of a community, and whether in public or private.

- (2) No one may be coerced in a way that would limit his or her freedom to have or adopt a religion or belief in worship, observance, practice or teaching.

### *Recognition and Equality before the Law*

Section 8 of the HR Act provides that:

- (1) Everyone has the right to recognition as a person before the law.
- (2) Everyone has the right to enjoy his or her human rights without distinction or discrimination of any kind.
- (3) Everyone is equal before the law and is entitled to the equal protection of the law without discrimination. In particular, everyone has the right to equal and effective protection against discrimination on any ground.

Discrimination because of religion and political or other opinion are specifically listed as examples of discrimination under sub-section (3).

### **Obligations of public authorities**

Public authorities, including the ACT Executive and ACT Government Directorates have an obligation under s 40B of the HR Act to act in a way that is compatible with human rights and to give proper consideration to relevant human rights in decision-making:

- (1) It is unlawful for a public authority –
  - (a) To act in a way that is incompatible with a human right; or
  - (b) In making a decision, to fail to give proper consideration to a relevant human right.

For the purposes of this advice, the key issue is whether it is compatible with the right to religious freedom and the right to equality to require a public servant to undertake duties in relation to the marriage equality campaign which the public servant believes to be contrary to their religious beliefs. We consider that these rights would be engaged and potentially limited by such a requirement, however, in assessing compatibility, it is necessary to consider whether a potential limitation would be reasonable under s 28 of the HR Act.

### **Reasonable limitations**

Section 28 provides that human rights may only be subject to reasonable limitations set by laws that can be demonstrably justified in a free and democratic society.

Sub-section 28(2) provides that:

- (2) In deciding whether a limit is reasonable, all relevant factors must be considered, including the following:
  - (a) the nature of the right affected;
  - (b) the importance of the purpose of the limitation
  - (c) the nature and extent of the limitation
  - (d) The relationship between the limitation and its purpose

- (e) Any less restrictive means reasonably available to achieve the purpose the limitation seeks to achieve.

### **Nature of the rights affected**

In interpreting the scope of relevant rights, s 31 of the HR Act provides that international law, and the judgments of foreign and international courts and tribunals relevant to a human right may be considered.

#### *Freedom of thought, conscience and religion*

The UN Human Rights Committee has confirmed that the right to freedom of thought, conscience and religion “is far-reaching and profound; it encompasses freedom of thoughts on all matters, personal conviction and the commitment to religion or belief, whether manifested individually or in community with others.”<sup>2</sup>

In a series of cases, the European Court of Human Rights has considered the equivalent right to freedom of thought, conscience and religion protected in Article 9 of the European Convention, and highlighted the fundamental importance of this right in a democratic society. The Court stated that:

[F]reedom of thought, conscience and religion is one of the foundations of a "democratic society" within the meaning of the Convention. In its religious dimension it is one of the most vital elements that go to make up the identity of believers and their conception of life, but it is also a precious asset for atheists, agnostics, sceptics and the unconcerned. The pluralism indissociable from a democratic society, which has been dearly won over the centuries, depends on it.

While religious freedom is primarily a matter of individual conscience, it also implies, inter alia, freedom to "manifest [one's] religion". Bearing witness in words and deeds is bound up with the existence of religious convictions.<sup>3</sup>

The Court has also confirmed that the right to freedom of thought, conscience and religion ‘denotes views that attain a certain level of cogency, seriousness, cohesion and importance’, but it is not otherwise the role of the State to assess the legitimacy of religious beliefs or the way in which those beliefs are expressed.<sup>4</sup>

The right to ‘have’ or ‘adopt’ a religion or belief is a matter of individual thought and conscience, and is considered to be absolute and unqualified in international law. However, the right to ‘manifest’ or ‘demonstrate’ a person’s religion or belief may impact on others and may be subject to reasonable limitation.<sup>5</sup> The Court has held that this aspect of the right will not extend to every act or omission which is in some way inspired, motivated or influenced by the belief but must be intimately linked to the religion or belief.<sup>6</sup>

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<sup>2</sup> UN Human Rights Committee General comment No. 22 (48) (art. 18) CCPR/C/21/Rev.1/Add.4, 27 September 1993.

<sup>3</sup> *Kokkinakis v Greece* no. [14307/88](#) § 31, Series A no. 260-A, ECHR 1993.

<sup>4</sup> *Bayatyan v. Armenia* [GC], no. 23459/03, § 110, ECHR 2011; *Leela Förderkreis e.V. and Others v. Germany*, no. 58911/00, § 80, ECHR 2008

<sup>5</sup> *Eweida and ors v United Kingdom*, nos. 48420/10, 59842/10, 51671/10 and 36516/10, ECHR 15 January 2013, p 30

<sup>6</sup> *Eweida* *ibid*.

The UN Human Rights Committee has indicated that the right to freedom of thought, conscience and religion may extend to conscientious objection, but has limited this consideration to conscientious objection to military service, where citizens “genuinely hold religious or other beliefs that forbid the performance of military service.” The Committee noted that:

The Covenant does not explicitly refer to a right of conscientious objection, but the Committee believes that such a right can be derived from article 18, inasmuch as the obligation to use lethal force may seriously conflict with the freedom of conscience and the right to manifest one’s religion or belief.<sup>7</sup>

The Committee did not consider a broader right to conscientious objection, but it would appear that this might be established in individual cases where an obligation imposed upon a person seriously conflicts with a religious or other belief that forbids the performance of that obligation, to the extent that this would unreasonably limit the ability of a person to manifest or demonstrate their religious or other beliefs.

In *Eweida v United Kingdom*<sup>8</sup> the European Court of Human Rights considered the situation of an applicant, Ms Ladele, who had been dismissed from her employment as a marriage registrar due to her refusal to participate in the creation of civil partnerships between same-sex couples because of her Christian beliefs. The Court found that it was clear that the applicant’s objection to participating in the creation of same-sex civil partnerships was directly motivated by her religious beliefs and thus fell within the scope of both the right to religious freedom and the right to non-discrimination (although a breach of these rights were not ultimately established because the limitation was found to be legitimate and proportionate).

### *Recognition and Equality before the law*

The scope of the right to equality has also been considered by the European Court of Human Rights which confirmed that differences in treatment based on a person’s religion are capable of amounting to discrimination, even where a breach of the right to religious freedom cannot be separately established. Generally, in order for an issue to arise under this right there must be a difference in the treatment of persons in analogous, or relevantly similar, situations. However, the right may also be breached where the State, without an objective and reasonable justification, fails to treat differently persons whose situations are significantly different.

The right to non-discrimination on the grounds of religion is also protected in the ACT *Discrimination Act 1991*, which prohibits both direct and indirect discrimination.

### **Importance of the purpose of the limitation**

From the context of the motion brought on 17 August 2017 it appears clear that the purpose of the ACT Government ‘joining and actively participating in the campaign to achieve marriage equality’ is to promote the human rights of LGBTIQ people in Canberra, in particular their rights to equality in access to marriage and to ‘have the same opportunities for love, commitment and happiness as everyone else’. The proposal is also aimed at supporting LGBTIQ people in Canberra

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<sup>7</sup> General comment No. 22 (48) (art. 18).

<sup>8</sup> *Eweida and ors v United Kingdom*, nos. 48420/10, 59842/10, 51671/10 and 36516/10, ECHR 15 January 2013.

who may be negatively affected by the campaign against marriage equality and the widespread discussion of issues that personally affect them.

In *Eweida* the Court considered the legitimacy of the purpose of the limitation imposed by the local authority on Ms Ladele's right to freedom of thought, religion and belief in requiring her participation in the creation of civil partnerships. It noted that:

[T]he aim pursued by the local authority was to provide a service which was not merely effective in terms of practicality and efficiency, but also one which complied with the overarching policy of being "an employer and a public authority wholly committed to the promotion of equal opportunities and to requiring all its employees to act in a way which does not discriminate against others."

The Court noted that "same-sex couples are in a relevantly similar situation to different-sex couples as regards their need for legal recognition and protection of their relationship." Against this background, the Court considered that it was evident that the aim pursued by the local authority was legitimate.<sup>9</sup>

In our view the aim pursued by the ACT Government in relation to joining and actively participating in the campaign to achieve marriage equality is legitimate, as it seeks to promote rights protected in the HR Act, and to support and protect the rights of LGBTIQ Canberrans.

### **Nature and extent of the limitation**

Although the terms of the motion are broad, we understand that the key duties that are likely to be required of ACT public servants in relation to the campaign for marriage equality are to participate in general marketing activities, such as the display of rainbow 'We are CBR' flags, banners and bus wraps that are supportive of the LGBTIQ community, and indirectly indicate support for marriage equality and a 'yes' vote in the voluntary postal survey.

While ACT public servants with strongly held religious beliefs may genuinely object to participation in such general marketing activities, which may indirectly contribute to changes to the federal marriage laws, the limitations on the right to demonstrate religious beliefs are less extensive than many situations considered in human rights case law. In cases considered by the European Court of Human Rights, for example, limitations have been found to be reasonable which have involved an obligation on an individual within their employment to directly participate in the creation of civil marriages;<sup>10</sup> to provide sexual counselling to same-sex couples,<sup>11</sup> to work on the Sabbath<sup>12</sup> and to sell contraceptives.<sup>13</sup>

In assessing whether an action is compatible with human rights in a particular case, it will be necessary to consider the particular duty required to be performed, and the way that such a requirement limits the right to manifest or demonstrate religious belief. The analysis may be different if ACT public servants who oppose marriage equality on religious grounds were required

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<sup>9</sup> *Eweida and others v United Kingdom*, nos. 48420/10, 59842/10, 51671/10 and 36516/10, ECHR 15 January 2013, p38.

<sup>10</sup> *Eweida ibid*– Applicant 3

<sup>11</sup> *Eweida, ibid* – Applicant 4.

<sup>12</sup> *Konttinen v. Finland*, no. 24949/94 ECHR 1996

<sup>13</sup> *Pichon and Sajous v. France* (dec.), no. 49853/99, ECHR 2001-X.

to participate in more direct campaigning activities that could imply personal support for marriage equality, such as directly advocating or lobbying for same sex marriage, distributing leaflets or actively participating in marches or rallies in support of a 'yes' vote, as this may be a more significant limitation on the right to freedom of thought, conscience and religion.

### **The relationship between the limitation and its purpose (rational connection)**

In our view, there is a rational connection between the particular duties required of public servants in relation to the marriage equality campaign, which may limit their rights to freedom of thought, conscience and religion, and the aim of promoting the human rights of LGBTIQ Canberrans. The ACT Executive is reliant on public servants to implement its policies, and the marketing activities which are being undertaken, such as installing and displaying rainbow flags, bus wraps and banners are rationally connected to the aim of supporting and promoting equality rights of LGBTIQ Canberrans.

### **Any less restrictive means reasonably available (Proportionality)**

The final consideration is whether the limitation on the rights of public servants is proportionate, that is, that it is the least restrictive means reasonably available to achieve the aim of supporting and promoting the equality rights of LGBTIQ Canberrans in relation to the voluntary postal survey.

In earlier case law of the European Court of Human Rights, it had been considered that the right to religious freedom would not be limited in relation to duties required in an employment context, provided that an employee was free to leave their employment.<sup>14</sup> However, in *Eweida*, the Court modified this position, stating that:

Given the importance in a democratic society of freedom of religion, the Court considers that, where an individual complains of a restriction on freedom of religion in the workplace, rather than holding that the possibility of changing job would negate any interference with the right, the better approach would be to weigh that possibility in the overall balance when considering whether or not the restriction was proportionate.<sup>15</sup>

In *Eweida*, the Court underlined the particularly severe consequences for Ms Ladele, whose religious conviction led to her dismissal, and further noted that the applicant could not be said by accepting employment to have waived her right to manifest her religious belief by objecting to participating in the creation of civil partnerships, since this requirement was introduced by her employer at a later date. However, the Court reasoned that this was balanced against the fact that the local authority's policy aimed to secure the human rights of same sex couples, and found that the limitation was not disproportionate.

In our view, it is significant that the role of public servants is to implement the policies of the government of the day, and that it is reasonable for the Government to expect its public servants to implement its policies, and to undertake their usual duties, even though they may not personally agree with these policies.

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<sup>14</sup> *Konttinen v. Finland*, *ibid*.

<sup>15</sup> *Eweida* *ibid* p32.



Under the *Public Sector Management Act 1994* public servants are required to do their job with reasonable care and diligence, impartiality and honesty.<sup>16</sup> The ACT Public Service Code of Conduct made under the Act requires public servants to “serve the government of the day” and confirms that it is the role of public servants to “implement the policies of the government of the day and be responsive to its agenda.”

It is clear that the ACT Labor Government is committed to making the ACT an LGBTIQ friendly city, and has previously sought to legislate to implement same-sex marriage within the ACT, so it would be expected that public servants will be required to implement these policies and be responsive to the government agenda on same-sex marriage. It is not clear that the duties required of public servants in relation to this campaign are of a different quality or character to their normal duties.

While it may be possible for the ACT Government to put in place protocols to allow public servants with serious conscientious objections to participating in the campaign to be allocated to other duties, this will depend on whether such arrangements are practicable and whether they would allow work to be done efficiently (for example, if some buses have rainbow wraps, it is unlikely to be practicable for bus drivers with religious objections to be timetabled to drive other buses as this may reduce flexibility and timeliness).

The approach taken by the ACT Government in outlining the obligations of ACT public servants in relation to the voluntary postal survey does include important safeguards to ensure that they retain the right to demonstrate their religious beliefs and express their opposition to marriage equality outside their employment. Guidance issued by the Public Services Commissioner indicates that public servants remain free to campaign for or against marriage equality in relation to the voluntary postal survey in their own time, and there is no suggestion that public servants will be requested to cast their vote in the survey in a particular way.

Accordingly, on balance we consider that the limitations imposed on the human rights of public servants in relation to a requirement to participate in general marketing in support of LGBTIQ Canberrans are likely to be considered proportionate, and would thus fall within the scope of a reasonable limitation under s 28 of the HRA.

## **Unlawful discrimination**

We note that while it may be reasonable for the ACT Government to require public servants to undertake duties in support of marriage equality for LGBTIQ Canberrans, all public servants retain their rights to a non-discriminatory and respectful workplace, and the ACT Government is responsible for ensuring that public servants are protected from unlawful discrimination, including bullying and harassment by other employees.

The *Discrimination Act 1991* prohibits unfavourable treatment of employees in relation to a range of protected attributes, including religion and political conviction, as well as sex, sexuality and gender identity. Public servants who believe that they have been subject to unlawful discrimination may make a complaint to the ACT Discrimination Commissioner, who is based in the ACT Human Rights Commission. If the complaint cannot be resolved by the Commission, it can be referred to the ACT Civil and Administrative Tribunal, which can make a binding determination.

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<sup>16</sup> *Public Sector Management Act 1994* (ACT) s 9(d).

## **Conclusion**

Public servants, like all people in the ACT, have human rights and the ACT Government must consider relevant rights in its decisions and act compatibly with these rights. The right to thought, conscience and religious belief, and the right to equality, are fundamental rights protected under the HR Act and may only be subject to reasonable limitations that are demonstrably justifiable in a free and democratic society.

Whether the human rights of a public servant are breached in relation to obligations to participate in the campaign to support marriage equality will depend on the particular duties that they are asked to perform and the extent to which these duties limit their ability to demonstrate their religious beliefs.

However, based on international case law, a requirement to undertake general marketing activities, within the scope of a public servant's usual employment, which are supportive of the GLBTIQ community and same sex marriage, is unlikely to be an unreasonable limitation on the right to freedom of thought, conscience or religion or the right to equality.