



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 Expert Panel

Submission to the Religious Freedom Review

The ACT Human Rights Commission welcomes the opportunity to provide a submission to this inquiry on whether Australian law (Commonwealth, State and Territory) adequately protects the human right to freedom of religion.

The primary purpose of our submission is to set out how ACT law and institutions protect human rights, including freedom of religion in the ACT. The ACT has a comprehensive human rights framework in place to protect freedom of religion and to protect against discrimination and vilification on the basis of religious conviction. Accordingly, we would like to ensure that any changes to federal law to improve protection of religious freedom do not result in any diminution of existing rights or protections currently enjoyed by Territorians.

OVERVIEW OF THE PROTECTION OF RELIGIOUS FREEDOM IN THE ACT

(i) Human Rights Act 2004

The starting point for the protection of religious freedom in the ACT is international human rights law, which is given expression in the ACT *Human Rights Act 2004* (HR Act). The ACT is one of just two Australian jurisdictions that give statutory protection to a broad range of fundamental human rights, including religious freedom:

- Section 14 of the HR Act is based on articles 18(1) and 18(2) of the International Covenant on Civil and Political Rights (ICCPR), and provides that every person has the right to freedom of thought, conscience, and religion. This includes the right to have or to adopt a religion or belief and demonstrate one's religion or belief in worship, observance, practice and teaching in public or in private, either individually or as part of a community. It also protects against coercion or restraints that limit freedom of religion.
- Section 8 of the HR Act, which is modelled on the non-discrimination clauses in the ICCPR, including article 26, protects the right to equal and effective protection against discrimination on any ground, including religion.
- Section 27(1) of the HR Act, which is drawn from article 27 of the ICCPR, protects the rights of ethnic, religious or linguistic minorities to declare and practice their religion, enjoy their culture and use their language.

- Section 27(2) of the HR Act protects the rights of Aboriginal and Torres Straits Islander peoples to maintain their spiritual practices, observances and beliefs. This is in line with the understanding that article 18 ICCPR is not limited in its application to traditional religions or to religions and beliefs with institutional characteristics (or practices analogous to those of traditional religions), and that the terms ‘belief’ and ‘religion’ are to be broadly construed.¹
- Section 27A of the HR Act protects the right to education, which includes the rights of parents expressed in article 18(4) of the ICCPR to ensure the religious and moral education of their children in conformity with their convictions.

The HR Act protects the human rights of all people in the ACT, including the right to freedom of religion, by placing particular functions and duties on the three arms of government. In particular:

- Section 37 requires a Statement of Compatibility to be prepared for every government bill and tabled in the Assembly, stating whether the bill is compatible with human rights. Section 38 allows for scrutiny of all bills by the Scrutiny of Bills Committee and reporting to the Assembly of human rights compatibility. These measures increase public scrutiny and debate of the human rights impacts of legislation, and by all accounts, the HR Act’s main influence remains clearest within the Legislature, where there are signs that it has made a genuine cultural difference to the way the Assembly goes about its work. Members across the political divide frequently invoke the HR Act and the standards that it upholds in parliamentary debates. Significantly, and in contrast to comparable human rights scrutiny committees in Victoria and the Commonwealth, the ACT Scrutiny of Bills Committee’s reports are routinely referred to in second reading debates of bills. The committee’s concerns are also often cited as the basis for Government amendments to bills.
- Section 30 requires courts to interpret legislation as far as possible in a way that is compatible with human rights. The Supreme Court has the power to issue a declaration of incompatibility, declaring a law incompatible where such an interpretation cannot be adopted (s 32). This is consistent with a dialogue-based model of rights protection, where the courts are not the final arbiter of whether laws are consistent with human rights, but rather one participant in a discussion that also involves the executive and the legislature.
- Section 40B requires public authorities, such as ACT government departments and agencies and people delivering services on behalf of government, to act and make decisions compatibly with the human rights in the HR Act. A person has the right to apply to the Supreme Court for relief if their human rights have been breached by a public authority, and the Supreme Court has the ability to grant the person ‘the relief it considers appropriate’ except for damages (s 40C). A person may also raise human rights arguments in other legal proceedings in ACT courts and tribunals.

Freedom of religion has been considered in a small number of ACT cases. For example:

- In *R v AM* [2010] ACTSC 149, the ACT Supreme Court considered whether the right to freedom of religion in the HR Act provided a lawful excuse for acts that would otherwise be criminal. AM contravened interim Domestic Violence Orders purportedly in accordance with her conscience, which is protected by s 14 of the HR Act. Refshauge J held that even if her

¹ UN HRC General Comment 22: Article 18, (1992), para 2.

right had been limited, protection orders are demonstrably justified because they uphold public safety and order.

- In *Concerned Citizens of Canberra v Chief Planning Executive (Planning and Land Authority)* [2014] ACTSC 165, the applicant challenged a decision to approve a development application for the construction of a mosque in Gungahlin as contravening s 14 of the HR Act because it did not include a condition of approval in a form equivalent to s 14(2), which provides that 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. The ACT Supreme Court dismissed the challenge, stating that 'By merely approving the construction of a building in which religious worship can occur the Territory does not authorise coercion of persons in a way that would limit their religious freedom. In the same way, just because the Territory approves a development on land by a third party without imposing conditions expressly requiring users not to infringe the various other human rights it does not authorise a denial of those rights.'
- In *Islam v Director General of the Justice and Community Safety Directorate (No 2)* [2015] ACTSC 314, the ACT Supreme Court rejected the contention that the Discrimination Act and the HRC Act provide an exclusive regime for dealing with issues of religious discrimination. The Court confirmed that conduct could amount to a contravention of both the Discrimination Act and the HR Act and there is nothing in either Act that prevents a person relying on the HR Act in proceedings in the Supreme Court in those circumstances. The Court ultimately was not satisfied that there had been any contravention of the plaintiff's right to religious freedom in s 14 of the HR Act based on the facts.²
- In *Trustees of the Roman Catholic Church for the Archdiocese of Canberra and Goulburn & ACT Heritage Council (Administrative Review)* [2012] ACAT 81, the ACT Civil and Administrative Tribunal suggested that third party applications by parish members to be heard in proceedings involving the revocation of a heritage declaration on a parish church could engage s 14 of the HR Act as the right 'includes the freedom to worship as part of a community'. The Tribunal ultimately concluded that the parish members all had sufficient interest in the matter to be able to be heard even without taking s 14 into account.

(ii) Discrimination Act 1991

The ACT has specific laws that protect individuals against discrimination, including on the grounds of religious conviction. Recent amendments to the ACT *Discrimination Act 1991*, which commenced in April 2017, have clarified and expanded the definition of religious conviction under that Act to provide for a more inclusive understanding of belief systems, as required under international human rights law. This included recognising Aboriginal and Torres Strait Islander spiritual beliefs, as well as agnostic or atheist beliefs. The Discrimination Act was also amended in August 2016 to provide specific protections against religious vilification, so it is now unlawful to vilify someone in the ACT because of their religious conviction.

The Commission handles enquiries and complaints about religious discrimination and vilification in areas of public life such as education, employment and the provision of goods and services. Experiences of discrimination and/or vilification can have a significant impact on a person's ability to

² See *Islam v Director-General Justice and Community Safety Directorate (No 3)* [2016] ACTSC 27 (25 February 2016)

participate in key areas of public life that can affect economic participation, their wellbeing and connection with community³. The types of matters that the Commission has received include:

- A complaint was made about religious vilification against an author of a website. The man is a member of a Ordo Templis Orientis. The complaint followed a series of cases in which the complainant had taken action to have the respondent remove material from his website which states, amongst other claims, that members of the OTO are paedophiles.
- A young Muslim man complained that another employee said to him that all Muslims are terrorists and made other derogatory comments about Muslims in the workplace that led to him leaving the workplace.
- A young Muslim woman was asked to remove her headscarf which she wore for religious reasons as a condition of entry to a local club.
- A young Muslim woman who was a patient of a medical clinic complained that during a consultation with a medical practitioner he expressed his dislike for Muslim people and Islam and that he agreed with President Donald Trump that they should not be able to travel into western countries.
- A man complained that a religious organisation is providing counselling services to members of the community and was advising people using the service that mental illnesses are the result of demonic interference.
- It was alleged that a general practitioner advised a patient who discussed his homosexuality with her, to undergo hormone treatment to cure their same-sex attraction and refuses to prescribe contraception to students.
- A complaint was made by a patient of a psychologist who was also a minister of religion in relation to his treatment of her regarding his strong views on homosexuality. The complainant claimed he had inappropriately tried to counsel her regarding her homosexuality when she was participating in church events.
- A woman complained that during a consultation regarding her worker's compensation claim she was asked about her sexual orientation. In a report by the medical practitioner, it was asserted that injury was partly due to her being a lesbian (despite the claim being for a physical injury) and that she may need to be on a mental health plan.
- A man complained that he was vilified because of his sexuality on a Christian organisation's Facebook page.
- A complaint was received from a woman who worked as a room assistant against her employer, a faith based school about her treatment by the school. She made a number of allegations including that the requirements of the job were not appropriate for the role as the key performance indicators for position included 'regular attendance to Church' and key result areas and behaviour competencies included 'active promotion of the Christian lifestyle as outlined in the word of Christ'.

³ <https://www.vichealth.vic.gov.au/media-and-resources/publications/mental-health-impacts-of-racial-discrimination-in-victorian-aboriginal-communities>

(iii) ACT Human Rights Commission

The ACT Human Rights Commission is established by the *Human Rights Commission Act 2005* (ACT) and encompasses a number of Commissioners, including the ACT Human Rights Commissioner and the ACT Discrimination Commissioner, with distinct statutory functions that give effect to, support, or are otherwise relevant to fundamental human rights, including religious freedom. The role of the Commission is to promote the human rights and welfare of people in the ACT.

The Commission handles complaints and conducts alternative dispute resolution in relation to disputes about discrimination, health services, disability services, and services for children and young people and older people provided by both public and private entities. These accessible and inclusive processes contribute in a significant way to the ACT's existing human rights framework.

The Commission also works closely with public authorities and organisations to help them meet their human rights obligations. The ACT Human Rights Commissioner has various functions in relation to the HR Act, including the right to intervene, with the leave of the court, in any legal proceedings, which relates to the application of the HR Act (s 36); reviewing the effect of ACT laws on human rights (s 41); and providing community education and information about human rights, and advising the Attorney-General on the operation of the HR Act (*Human Rights Commission Act 2005*, s 27).

The Commission regularly advises on the compatibility of legislative and policy proposals, including measures that may encroach on religious freedom. For example:

- ***Health (Patient Privacy) Amendment Act 2015***: The Commission provided advice on an exposure bill by the ACT Greens to introduce appropriately defined exclusion zones around abortion clinics. The Commission considered that the proposed laws were a justifiable limitation of freedom of religion and freedom of expression as they were (i) directed at protecting women's right to access reproductive health services in safety, security and privacy; (ii) applied only to a limited area; and (iii) operated only during a specific and limited time. We considered that the inclusion of time, place and manner restrictions in the legislation were important safeguards that went towards ensuring that the right balance is struck between competing interests. Human rights law generally considers time, place and manner restrictions to be less offensive to the values of freedom of expression than an outright ban on a particular kind of speech. In this respect, the ACT legislation improved on the Tasmanian and (proposed) Victorian models, which did not apply time restrictions to the operation of an exclusion zone.
- ***Public service participation in the SSM Plebiscite***: The Commission provided advice at the request of the ACT Opposition on the human rights implications of ACT public servants participating in the ACT Government's campaign to achieve marriage equality. We noted that a situation where a public servant was required to undertake duties in relation to the same sex marriage campaign, which the public servant believes to be contrary to their religious beliefs, would engage the right to freedom of thought, conscience and religion in s 14. However, whether these rights were breached would depend on the nature of the duty required to be undertaken and the way in which any requirement was implemented. The Commission considered that it was unlikely that a requirement to participate in general marketing activities such as installing or displaying rainbow 'We are CBR' banners would

unreasonably limit the rights of a public servant to demonstrate their religious beliefs. Nevertheless, each situation would need to 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. We also advised that it was important to ensure that in participating in the marriage equality campaign, the ACT Government did 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 that basis would limit the rights of public servants to equality and could amount to unlawful discrimination under the ACT Discrimination Act.

- **‘No Jab, No Play’ uniform laws:** The Commission provided advice on the Prime Minister's proposal for uniform 'No Jab, No Play' laws, which would prevent unvaccinated children from enrolling in childcare centres. We noted that the proposal to improve vaccination rates by withholding access to early childhood education and care would involve limitations of a range of rights guaranteed in the HR Act, including the right to freedom of thought, conscience, religion and belief. Compliance with the HR Act would therefore require compelling evidence of (i) the need to enact ‘No Jab, No Play’ laws in the ACT; (ii) the anticipated effectiveness of such measures; and (iii) the proportionality of the measures, which required demonstrating why less restrictive and non-punitive alternatives - such as ensuring that families have improved access to appropriate health services and vaccination, and implementing targeted education programs on the importance of vaccination – would not be suitable for achieving the improved coverage rates being sought. It was not apparent why it would be necessary to exclude vaccination objection as a valid objection, as it would appear possible to achieve improved coverage by addressing access issues and improving education about vaccinations, while retaining the right to conscientious objection.

THE ADEQUACY OF EXISTING PROTECTIONS FOR RELIGIOUS FREEDOM IN AUSTRALIAN LAW

The Australian Law Reform Commission in its *Final Report on Traditional Rights and Freedoms – Encroachments by Commonwealth Laws* concluded that:

There are very few, if any, provisions in Commonwealth laws that interfere with freedom of religion. The main areas of tension arise where religious freedom intersects with anti-discrimination laws, which have the potential to limit the exercise of freedom of conscience outside liturgical and worship settings.

There is no obvious evidence that Commonwealth anti-discrimination laws significantly encroach on freedom of religion in Australia, especially given the existing exemptions for religious organisations. Nevertheless, concerns about freedom of religion should be considered in future initiatives directed towards the consolidation of Commonwealth anti-discrimination laws, or harmonisation of Commonwealth, state and territory anti-discrimination laws.⁴

⁴ Australian Law Reform Commission: *Traditional Rights and Freedoms— Encroachments by Commonwealth Laws* Summary Report 129 (December 2015), at [29]-[30].

To our knowledge, there has been no finding to date by the UN Human Rights Committee that Australia has been in violation of article 18 of the ICCPR or article 26 on the basis of religion.⁵ The absence of evidence of any serious transgressions of religious freedom, however, does not mean that freedom of religion is adequately protected in Australian law. While the laws and processes described above ensure that the ACT has clear, explicit and positive protection of religious freedom, current protections vary across the rest of Australia, and are at best piecemeal:

- The protection of freedom of religion in s 116 of the Commonwealth Constitution is expressed as a negative protection that only applies to prevent certain Commonwealth laws being enacted. Section 116 is not an individual right in the form expressed by the ICCPR, in that it only acts as a limit to Commonwealth legislative power and is not a constitutional guarantee of the rights of individuals to freedom of religion.
- The UN HRC has expressed concern about the lack of express protection against discrimination on the basis of religion at the federal level.⁶ In addition, while all states and territories have anti-discrimination laws, some do not include religion as a protected attribute (for example, NSW and South Australia). As noted above, ACT discrimination laws go further by also protecting against vilification on the basis of religious conviction – only Victoria, Queensland and Tasmania have similar protections.

The absence of statutory human rights instruments at the national or state/territory levels, with the exception of the ACT and Victoria, means that freedom of religion – like other fundamental human rights – receives inadequate protection under Australian law. It is clear that more needs to be done to ensure Australia's compliance with international human rights law. This deficit was noted recently by the Human Rights Sub-Committee of the Joint Standing Committee on Foreign Affairs, Defence and Trade in its Interim Report on the status of the human right to freedom of religion or belief:

The Sub-Committee notes that the ICCPR has not been adopted into Australian legislation. Some rights have been adopted in some jurisdictions, but the Commonwealth has failed to implement the range of ICCPR rights despite committing to do so. Although there is legislative protection for some ICCPR rights, notably the Article 26 right to non-discrimination, religious freedom has very little legislative protection and there is a risk of an imbalanced approach to resolving any conflict between the right to freedom of religion or belief and other rights.⁷

⁵ However, there have been violations on the prohibition on discrimination on the basis of 'sex' in article 26, which includes sexual orientation: see, eg, *Young v Australia* (941/2000), September 2003.

⁶ UN Human Rights Committee, Concluding observations on the sixth periodic report of Australia (December 2017), at [17]. Religion, however, is a protected ground under the *Fair Work Act 2009* (Cth), and the terms 'race' and 'ethnic origin' in the *Racial Discrimination Act 1975* (Cth) have been interpreted by the courts to include some ethno-religious groups, such as the Jewish people. In addition, a person who suffers discrimination in employment on the basis of religion can make a complaint to the Australian Human Rights Commission (AHRC), pursuant to the *Australian Human Rights Commission Act 1986* (Cth) and the *International Labour Organization Convention (No 111) concerning Discrimination in respect of Employment and Occupation*. AHRC also has the function of inquiring into complaints about acts or practices by or on behalf of the Commonwealth or under a Commonwealth Act which may be inconsistent with the ICCPR or the Declaration on the Elimination of All Forms of Intolerance and Discrimination Based on Religion and Belief. AHRC's findings with regard to these type of complaints, however, are not enforceable.

⁷ Joint Standing Committee on Foreign Affairs, Defence and Trade, Interim Report: Inquiry into the status of the human right to freedom of religion or belief, December 2017, at [2.33].

The Interim Report canvassed a range of opinions on how to strengthen religious protection in Australian law:

There has been general agreement about the need to formally implement the right to freedom of religion or belief, if not the ICCPR in its entirety. Australia is rare among modern liberal democracies in its lack of a federal bill of rights instrument. There are various arguments in support of and opposing the implementation of such an instrument at federal level. Some contributors favour a Religious Freedom Act directly implementing Article 18 in federal law. Others have suggested protecting religious freedom through federal anti-discrimination law, either in a separate act or by consolidating anti-discrimination law into a single act. ... The Sub-Committee notes that the preponderance of evidence from all sides of the issue support the claim that religious freedom should be specifically protected in Commonwealth law, however this is achieved.⁸

INTERRELATIONSHIP OF HUMAN RIGHTS NORMS

Our view is that Australia should adopt a comprehensive human rights act that protects all fundamental human rights, including freedom of religion. While we would support the option of extending federal anti-discrimination protection to explicitly cover religion (provided that it allows for the concurrent operation of state/territory discrimination laws), for protection to be comprehensive it is also necessary to have broader positive obligations to respect the right to freedom of religion, freedom of speech and other human rights. The ACT HR Act has operated successfully for over a decade and demonstrates that having a structured framework for the consideration of human rights assists government and public authorities to appropriately balance and manage rights and freedoms. The existence of human rights legislation has ensured a rights-based evaluation of laws and prevented the government from ignoring questions of proportionality and necessity when formulating such measures.

We would therefore be wary of adopting a stand-alone Religious Freedom Act as there can be inadvertent consequences to formally implementing only the right to freedom of religion – or even a range of select rights – into law. This is because international standards on freedom of religion do not arise solely from provisions addressing religion specifically. They come also from other rights, such as those relating to association, expression, privacy and rights of parents and children.⁹ As Professors Aroney and Parkinson have noted:

It is a fundamental principle of international human rights law that human rights are indivisible. This means, among other things, that rights not to be discriminated against must be interpreted and applied in a manner that is consistent with other rights, including rights to freedom of speech, religion, association and cultural expression. As we put it in our earlier submission: The full range of human rights that are protected under the International Covenant on Civil and Political Rights and other international human rights conventions offer a principled basis for determining an appropriate balance between the accommodation of

⁸ Ibid, at [6.31].

⁹ For example, in *Hoffmann v. Austria* 17 EHRR 293 ((ECHR 1993), a decision that had important implications for religion, the European Court of Human Rights did not rely on the right to freedom of religion, but on the right to family life.

ethno-cultural minorities and their assimilation to Australian values, particularly as they relate to anti-discrimination law.¹⁰

There are also dangers that statutory protection of the right to freedom of religion either through a stand-alone act or through insertion into existing legislative schemes could result in inadvertent overreach if it cherry picked particular aspects of article 18 of the ICCPR for incorporation. In particular, care must be taken to ensure that any attempt to legislate in this area does not result in the diminution of rights already available in the States and Territories. This is a particular concern for the ACT, which already has comprehensive protections in this area via the HR Act and the Discrimination Act.

For example, the amendment to Marriage Amendment (Definition and Religious Freedoms) Bill 2017 that was proposed by Senators Brandis and Canavan could have had the inadvertent consequence of incorporating an absolute right to religious freedom into Australian law.¹¹ The proposed amendment, which was drawn from article 18 (1) of the ICCPR, stated that:

Nothing in this act limits or derogates from the right of any person, in a lawful manner, to manifest his or her religion or belief in worship, observance, practice and teaching.¹²

As noted by Maguire and Hilkemeijer, the proposal, however, omitted the content of Article 18(3) of the ICCPR, which provides that:

Freedom to manifest one's religion or beliefs 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.

Article 18(3) reflects the principle that very few human rights are absolute.¹³ Most rights can be subjected to permissible limits, and the right to manifest religion and belief is one of them. Enacting this proposal into legislation, therefore, would have risked turning a qualified right under international law into an absolute right under Australian law, and undermined existing non-discrimination provisions in State and Territory legislation.

¹⁰ Submission by Professor Nicholas Aroney and Professor Patrick Parkinson AM to the Senate Legal and Constitutional Affairs Committee Inquiry on the Exposure Draft of Human Rights and Anti-Discrimination Bill 2012, January 2013, available at: <http://www.aph.gov.au/DocumentStore.ashx?id=f80ded54-8bf5-441d-b7a9-e3347dd059a3>

¹¹ See Amy Maguire and Anja Hilkemeijer, 'Labor is right to block 'religious freedom' amendments to protect same-sex marriage bill', November 2017, available at: <http://theconversation.com/labor-is-right-to-block-religious-freedom-amendments-to-protect-same-sex-marriage-bill-88235>.

¹² Available at: http://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;query=Id%3A%22legislation%2Famend%2Fs1099_ame nd_0b2d0fc5-491f-44ad-9caf-04aea10102cb%22.

¹³ Absolute rights are different to non-derogable rights (ie rights that cannot be suspended even in a state of emergency). The non-derogable rights listed in article 4(2) of the ICCPR may be either absolute or non-absolute. While non-derogable rights cannot be suspended, some non-derogable rights provide for limitations in their ordinary application. For example, the right to freedom of religion in article 18 of the ICCPR is non-derogable under article 4(2) but may be subject to limitations in accordance with article 18(3). For further information, see Cth Attorney-General's Department, Information Sheet on Absolute Rights, available at <https://www.ag.gov.au/RightsAndProtections/HumanRights/Human-rights-scrutiny/PublicSectorGuidanceSheets/Pages/Absoluterights.aspx>

PERMISSIBLE LIMITS

Similarly, care must be taken when constructing the nature and scope of permissible limitations on the right to manifest religion so that these accurately reflect international standards. In this regard, the Commission notes that the Human Rights Sub-Committee of the Joint Standing Committee on Foreign Affairs and Trade was concerned that the reasonable limits clause in the ACT HR Act and Victorian Charter applied a lower threshold for when religious freedom may be limited, suggesting that ‘the threshold of “reasonable” rather than “necessary” diverges from the ICCPR and international human rights jurisprudence.’¹⁴

These concerns are repeated in a submission to this current review, which was prepared by Professor Patrick Parkinson on behalf of *Freedom of Faith*:

[B]oth these statutes authorise governments to override freedom of religion and conscience for reasons other than that such encroachments are “necessary to protect public safety, order, health, or morals or the fundamental rights and freedoms of others” (Article 18(3) ICCPR). They are therefore not consistent with Australia’s international human rights obligations insofar as the protection of religious freedom is concerned. For example, in contrast with the word ‘necessary’ in Article 18, s.7(2) of the Victorian *Charter of Rights and Responsibilities Act 2006* provides:

“A human right may be subject under law only to such reasonable limits as can be demonstrably justified in a free and democratic society based on human dignity, equality and freedom, and taking into account all relevant factors including—

- (a) the nature of the right; and
- (b) the importance of the purpose of the limitation; and
- (c) the nature and extent of the limitation; and
- (d) the relationship between the limitation and its purpose; and
- (e) any less restrictive means reasonably available to achieve the purpose that the limitation seeks to achieve.”¹⁵

With respect, these views would appear to misunderstand the nature of the test in article 18(3) of the ICCPR. It is also disappointing that, beyond asserting these differences, no evidence is offered to demonstrate how and where the protection of religious freedom under the HR Act has fallen short of the standards required by article 18(3) of the ICCPR.

While the ICCPR sets out the way in which the right to freedom of religion may be limited through the use of an ‘internal’ limitation clause, the ACT HR Act and Victorian Charter employ a ‘general’ limitation clause, similar to other modern human rights charters, such as the New Zealand *Bill of Rights Act 1990* (NZ BORA). However, there is little difference between general and internal limits

¹⁴ Joint Standing Committee on Foreign Affairs, Defence and Trade, Interim Report: Inquiry into the status of the human right to freedom of religion or belief, December 2017, at [5.50].

¹⁵ Submission of Freedom of Faith to the Religious Freedom Review, January 2018, at p 20. (available at: https://freedomforfaith.org.au/images/uploads/FFF_submission_Ruddock_Jan_15th.pdf). The submission also incorrectly suggests that the HR Act is ‘advisory only’ and that courts are not able to provide any remedies for human rights breaches. As noted earlier in this submission, under the ACT HR Act, a person has the right to apply to the Supreme Court for relief if their human rights have been breached by a public authority, and the Supreme Court has the ability to grant the person ‘the relief it considers appropriate’ except for damages. In this regard, the ACT HR Act differs from the Victorian Charter, which does not provide for a direct right of action for human rights breaches.

in practice. They both use proportionality as a key to unlocking whether a limitation on rights is permissible, or in other words 'reasonable'.

The essence of the test is that a statute or executive act will be proportionate where (i) it serves a legitimate objective, (ii) where it adopts a means that is rationally connected to that objective, and (iii) where those means are the least restrictive of the right engaged or within a reasonable range of restrictions. A limitation that does not meet these criteria will not be considered 'reasonable' under the ACT HR Act – and for the same reasons it will not be permissible under the ICCPR.

The proportionality test as expressed in the ACT HR Act and the Victorian Charter is consistent with formulations of permissible limitations in international human rights law. The test has been shown to be relevant to derogations;¹⁶ 'necessary' restrictions;¹⁷ 'arbitrary' interferences;¹⁸ and implied limitations¹⁹ of ICCPR rights. In General Comment No 22 on the right to religious freedom, the UN Human Rights Committee explained that 'necessary' limitations in the context of article 18(3) of the ICCPR meant that the limitation must be 'proportionate to the specific need upon which it is predicated'.²⁰ The UN Human Rights Committee has confirmed that proportionality is a cross-cutting test for assessing permissible limitations under the ICCPR:

... Where such restrictions are made, States must demonstrate their necessity and only take such measures as are proportionate to the pursuance of legitimate aims in order to ensure continuous and effective protection of Covenant rights. In no case may the restrictions be applied or invoked in a manner that would impair the essence of a Covenant right.²¹

It is worth noting that the use of general proportionality tests, such as those contained in the general limitations provisions in the NZ BORA, Canadian Charter, and South African Bill of Rights, has not drawn any adverse comment from the UN Human Rights Committee.

The Commonwealth Parliamentary Joint Committee on Human Rights uses a similar test for assessing limitations on rights across a wide variety of international human rights instruments. A similar methodology is also employed in the Statements of Compatibility prepared by Commonwealth departments. A specific outcome of the recent ALRC review into traditional rights and freedoms was to affirm the use of proportionality to provide a structured method of reviewing the justification of laws that limit rights and freedoms.

¹⁶ Article 4 ICCPR: Derogation measures must be limited 'to the extent strictly required by the exigencies of the situation', ie, they need to be proportionate.

¹⁷ See, eg, UN HRC, GC 22, at [8].

¹⁸ The concept of 'arbitrariness' encompasses notions of reasonableness and proportionality, see eg, *Toonen v Australia* (Comm 488/1992), [8.3]; UN HRC, GC 16. Also, article 9(4) effectively incorporates a right to challenge the lawfulness and the *arbitrariness* of one's detention: *A v Australia* (Comm 560/1993), [9.5].

¹⁹ For eg, differentiations of treatment under article 26 are allowed if they are proportionate, ie they must be 'reasonable and objective' and designed to meet a legitimate objective: HRC, GC 18, [13]. Similarly, the HRC has noted that 'measures that have a certain limited impact on the way of life of persons belonging to a minority will not necessarily amount to a denial of the right under article 27': see, eg, *Lansman v Finland*, (Comm 511/1992), [9.4].

²⁰ UN HRC, GC 22, at [8].

²¹ UN HRC, General Comment No 31: Nature of the General Legal Obligation Imposed on States Parties to the Covenant, at [6].

The Commission therefore cannot agree with the view that the HR Act protects religious freedom to a lesser standard than that which is required under international human rights law. We believe that the HR Act provides an effective model to underpin the development of a similar framework for human rights protection at the federal level.

EXCEPTIONS FOR RELIGIOUS ORGANISATIONS

The ACT Discrimination Act currently excuses discriminatory conduct for some matters relating to religion. Specifically, discriminatory conduct on the basis of any protected attribute is excused for:

- training and appointing ministers of religion;
- appointing people in connection with a religious observance or practice;
- the acts and practices of religious bodies which:
 - conform with the ‘doctrines, tenets or beliefs of that religion’; and
 - ‘are necessary to avoid injury to the religious susceptibilities of adherents of that religion’; and
- religious educational institutions in respect of employment and the provision of education or training, when the discrimination is ‘in good faith to avoid injury to the susceptibilities of adherents of that religion or creed’.

The ACT Law Reform Advisory Council’s *Inquiry into the scope and operation of the Discrimination Act 1991* cautioned that many of the current exceptions provisions in the ACT Discrimination Act may be inconsistent with the requirements of the HR Act, because they permit limitations on rights that are protected by the HR Act, including the right to non-discrimination, in a manner that is not consistent with the limitations that are permitted under the HR Act.²² LRAC recommended replacing the exception provisions with a ‘general limitations clause’ would promote consistency with the rights protections afforded by the HR Act, and provide a more consistent, principled, straightforward and visible way of permitting discriminatory conduct than is the case with the current approach to exceptions.²³

The exception provisions in the Discrimination Act have been rarely used by religious organisations to date. We, however, support in principle the use of a general defence of justification in discrimination law in place of permanent statutory exceptions, including religious exemptions, provided that it aligns with international human rights law and does not undermine clarity or certainty. Reliance on a single general limitations provision would provide a more principled approach to defending allegations of unlawful discrimination and enable a careful assessment on a case-by-case basis whether the discrimination is justifiable.

The Commission does not support the introduction of additional broad-based statutory exceptions for religious organisations that provide facilities, goods or services in the public sphere as part of a commercial enterprise. The protection of religious freedom under article 18 of the ICCPR does not extend to an automatic exemption for religious organisations from obligations to act consistently with the right to non-discrimination. We consider that any discrimination arising from permanent

²² ACT Law Reform Advisory Council, *Review of the Discrimination Act 1991 (ACT): Final Report* (2015), at p 102.

²³ *Ibid.*

exceptions must be able to meet the requirements for legitimate differential treatment to be consistent with the right to non-discrimination under article 26 of the ICCPR.

CONCLUSION

In summary, we consider that:

- Federal law should give full effect to all of Australia's international human rights obligations, including religious freedom. Rather than engaging in ad hoc considerations, we submit that a more coherent way to approach the implementation of Australia's human rights obligations would be to revisit the recommendations made in the 2009 Report of the National Human Rights Consultation, specifically that Australia should enact a human rights charter and include a mechanism to make the obligations in the international conventions justiciable at the federal level.
- Any changes to the content and operation of national law with regard to religious freedom should maintain complementary coverage of related discrimination and human rights laws across jurisdictions. In particular, it should not result in the diminution of existing rights, responsibilities or protections.

If you have any questions or would like more detailed information on any of the issues raised in this submission, please do not hesitate to contact us on (02) 6205 2222.

Yours sincerely



Dr Helen Watchirs OAM
President and Human Rights Commissioner

Karen Toohey
Discrimination, Health Services, and Disability
and Community Services Commissioner

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