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Attorney-General's Department
3-5 National Circuit
BARTON ACT 2600

[By email: ForConsultation@ag.gov.au]

SUBMISSION ON THE RELIGIOUS FREEDOM BILLS

The ACT Human Rights Commission welcomes the opportunity to provide a submission to the public consultation being conducted by the Attorney-General's Department on this package of legislative reforms to religious freedom.

About the ACT Human Rights Commission

The Commission is an independent agency established in 2006 by the *Human Rights Commission Act 2005* (ACT). Its main object is to promote the human rights and welfare of people in the ACT. The Commission comprises 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 Commission's functions include handling complaints about unlawful discrimination, that is, where a person is treated unfavourably in areas of public life, such as employment, education and the provision of goods and services, because of a particular attribute, including religion.

The Commission is a co-signatory to the submission provided by the Australian Council of Human Rights Authorities (ACHRA). We have also had the opportunity to read the submission made by the Australian Human Rights Commission. We support the views expressed in both those submissions, and seek to elaborate on some of the relevant issues from the perspective of current protections for religious freedom in the ACT.

Overview of the protection of religious freedom 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.

i) Human Rights Act 2004

The *ACT Human Rights Act 2004* (HR Act) provides statutory protection to a broad range of fundamental human rights drawn from international human rights law, 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, which deals with the right to education, includes the right of parents and guardians to choose schooling for their children that conforms with their religious and moral convictions, as per Article 18(4) of the ICCPR.

ii) Discrimination Act 1991

The ACT Discrimination Act 1991 protects individuals against unlawful discrimination on a range of protected attributes. Since its enactment in 1991, the Discrimination Act has included religious conviction as a protected attribute. Section 4AA of the Discrimination Act requires that the Act must be interpreted in a way that is beneficial to a person who has a protected attribute to the extent possible while remaining consistent with the objects of the Act (which includes eliminating discrimination and promoting the right to equality under the HR Act) and human rights under the HR Act.

Following amendments that passed in 2016, vilification on the ground of religious conviction became unlawful in the ACT (section 67A). In these amendments, a new definition was inserted into the dictionary of the Discrimination Act to clarify that religious conviction includes the having of, and engagement in, the cultural heritage and distinctive spiritual practices, observances, beliefs and teachings of Aboriginal and Torres Strait Islander people as well as atheist or agnostic beliefs.

The Discrimination Act includes several exceptions to unlawful discrimination that relate to religious conviction:

- Section 32 of the Discrimination Act states that the part dealing with unlawful discrimination does not apply to the ordination, training or selection of members of religious orders to exercise functions in connection with religious observance or practice, or any other act or practice (other

¹ UN Human Rights Committee, General Comment 22: Article 18, (1992), [2].

than a defined act)² that conforms to the doctrines etc. of that religion and considered necessary to avoid injury to the religious susceptibilities of adherents to that religion.

- Section 44 of the Discrimination Act does not make unlawful discrimination on the ground of religious conviction in relation to employment in an educational institution conducted by an education authority or a hospital conducted by a religious body where the duties of employment involve participation in the teaching, observance or practice of the relevant religion.
- Section 46 of the Discrimination Act does not make unlawful discrimination on the ground of religious conviction in relation to failure to accept a person's application for admission as a student at an educational institution conducted solely for students with a religious conviction different to the applying student.³

Human rights implications of the proposed reforms

The Commission considers that, on the whole, the proposed reforms, in particular those contained in the Religious Discrimination Bill 2019 (the main bill) would appear to strengthen protections against discrimination, consistent with the right to non-discrimination, which is a cross-cutting right in international human rights law. The right to non-discrimination, including on the ground of religion, is contained in articles 2, 3 and 16 of the ICCPR, and articles 2(2) and 3 of the International Covenant on Economic, Social and Cultural Rights (ICESCR). In addition, article 26 of the ICCPR contains an independent guarantee of equal protection of the law.

The Commission has long noted that the absence of statutory human rights instruments at the national or State/Territory levels, with the exception of the ACT and Victoria (and Queensland from January 2020), 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, and the Commission considers that these reforms are a step in the right direction.

The primary object of the main bill is to make it unlawful to discriminate on the ground of religious belief or activity in a range of areas of public life and provide for enforceable remedies where discrimination is established. The Commission welcomes the introduction of this new ground in to the suite of Commonwealth discrimination laws. Although continuing the trend of enacting separate discrimination legislation for protected attributes, many of the protections contained within the main bill mirror existing protections in the ACT. While discrimination law in most States and Territories includes religion as a protected attribute, protection against religious discrimination is not universal. We are therefore pleased to see that this bill will ensure that all Australians will have an avenue of complaint in relation to religious discrimination in areas of public life.

² A definition of a 'defined act' was inserted into the Discrimination Act by the *Discrimination Amendment Act 2018* (ACT). Section 32(2) provides that a 'defined act' means the employment or contracting of a person by the religious body to work in an educational institution or the admission, treatment or continued enrolment of a student at an educational institution. This means that that it will be unlawful for a religious body to discriminate against a contractor or employee or a student in an educational institution, unless the exceptions in s 44 or s 46 (or other provisions) apply.

³ Amendments brought in by the *Discrimination Amendment Act 2018* (ACT).

However, we are also keen to ensure that 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. Critically, any reform of this nature should be consistent with Australia's human rights obligations, as reflected in the human rights regime operating successfully in the ACT.

The Commission considers that human rights concerns arise with respect to particular aspects of the main bill. These concerns are discussed below.

i) Complaints by corporations

Section 5 of the main bill includes a definition of 'person' in accordance with the *Acts Interpretation Act 1901* and clarifies through a note that 'person' may include a religious body or other religious institution. The Explanatory Notes at paragraphs 73 to 77 state that the note in s 5 is intended to clarify that it is open for a body corporate to make a complaint alleging that it has been discriminated against on the basis of its religious belief or activity. To make the complaint, the Explanatory Notes state that the body corporate must be able to establish that it has or engages in a religious belief or activity. In this way, the bill would allow a corporation to make a complaint of religious discrimination in its own right against an individual or another organisation (for example, a church could bring a complaint against a mosque). This approach is unprecedented in all other Federal discrimination law, and, in particular, would create a significant power imbalance in circumstances where a corporation seeks to vindicate its 'rights' against an individual.

These provisions are also at odds with established principles under international human rights law, whereby only natural persons qualify as beneficiaries of human rights. For example, under the ICCPR, legal persons are denied standing and direct protection as beneficiaries of the guaranteed rights, including the right to non-discrimination on the grounds of religion.⁴ As corporations cannot hold human rights, they therefore cannot be 'victims' of a rights violation for the purposes of bringing a complaint to the UN Human Rights Committee under the Optional Protocol to the ICCPR. This understanding is reflected in the ACT HR Act, which only allows a victim, that is, is a natural person who is directly affected or who is at risk of being directly affected by a human rights breach, the ability to enforce their rights under the Act.⁵

The Commission is opposed to the extension of standing to legal persons, and supports the recommendations contained in the AHRC and ACHRA submissions for the definition of 'person' to be removed from the bill and that the explanatory notes be amended to make clear that a complaint of discrimination on the ground of religious belief or activity may only be made by or on behalf of a natural person.

ii) Statements of belief

Section 41(1) of the main bill provides, among other things, that a 'statement of belief' does not constitute discrimination for the purpose of any anti-discrimination law. A 'statement of belief' is defined in s 5 of the bill and includes statements which are made in good faith and that may

⁴ Optional Protocol to the International Covenant on Civil and Political Rights, December 19, 1966, into force, March 23, 1976, 999 UNTS 302

⁵ *Human Rights Act 2004 (ACT)*, s 40C.

reasonably be regarded as being in accordance with the doctrines, tenets, beliefs or teachings of the religion. The protection afforded by s 41(1), however, does not extend to statements that are malicious; likely to harass, vilify or incite hatred or violence; or amount to the urging of a serious criminal offence (s 41(2)).

While the Commission welcomes the qualifications provided in s 41(2), we are concerned that they may not be sufficient to ensure these provisions will operate consistently with Australia's obligations under international human rights law to guarantee equal and effective protection against discrimination, including on the grounds of race, sex or other status. As noted in the AHRC submission, a 'statement of belief' may constitute unfavorable treatment in and of itself.⁶ Any unfavourable treatment arising from a 'statement of belief' must meet the test for legitimate differential treatment to be consistent with the right to non-discrimination. However, no such justification has been provided. The protection of religious freedom in article 18 of the ICCPR and the right to freedom of expression in article 19 of the ICCPR do not extend to an automatic entitlement for particular expressions to be quarantined from being assessed against reasonableness, in accordance with existing protections afforded under the right to non-discrimination.

The Commission is also concerned that the content of statements that 'may reasonably be regarded as being in accordance with the doctrines, tenets, beliefs or teachings' of a religion appears to set a standard that is lower than the standard of 'necessary' and may not fully reflect the requirement under international human rights law for interferences with human rights to be *necessary* to achieve a legitimate objective.

ACT Community members have raised concerns that comments that could constitute discrimination will be disguised as statements of belief. We have dealt with matters where women with disabilities for example have been the subject of comments claiming their disability was a punishment for sin and where women who are the victim of domestic violence, which is a protected attribute in the ACT, have been refused services because they have been told they are breaking the sacred bond of marriage.

The complexity of pursuing these matters as a discrimination claim given the new defence provided for by s41 will create an additional barrier to people seeking redress for acts of discrimination that are currently unlawful in the ACT.

Similarly we have had a number of matters where a statement of alleged religious belief by taxi drivers regarding dogs being unclean has meant people with guide dogs and assistance animals have been denied access to taxi and Uber services.

Concerns have also been raised by people in various faith based groups that this provision will enable an increase in inter religious discrimination regarding particular faith groups such as people of Muslim faith.

⁶ AHRC submission, [84].

We agree with AHRC's recommendation that s 41 should be removed from the bill.

iii) Employer conduct rules

Section 8(3) of the main bill states that an employer conduct rule imposed by a relevant employer (defined as a non-government employer with a revenue of at least \$50 million in the previous financial year) that would have the effect of restricting or preventing an employee from making a statement of belief outside work duties is not reasonable unless compliance with the rule is necessary to avoid unjustifiable hardship.⁷

This protection is not available to employees who work for employers with revenue of less than \$50 million. The Explanatory Notes state that this is to recognise that the largest businesses in Australia play a significant role in setting standards of workplace culture across the country, and that the purpose of this provision is to build a corporate culture that supports religious diversity.

Section 31(6) of the bill states that where an employer conduct rule is considered unreasonable under s 8, a requirement to comply with the rule is not an inherent requirement for the purposes of s 31(2) which deals with the inherent requirement exception.

We note that under international human rights law, it is well established that a difference in treatment on prohibited grounds, including religion, will be directly or indirectly discriminatory if it is not justifiable in the following terms: (i) aimed at achieving a purpose which is legitimate; (ii) based on reasonable and objective criteria, and (iii) proportionate to the aim to be achieved.

In our view, deeming certain conditions under which employer rules that restrict religious expression would not be considered reasonable, and according preferential treatment to the largest of employers is not justifiable in accordance with the above criteria. We agree with AHRC's submission that the provisions dealing with the separate treatment of employer conduct rules by private sector businesses with annual revenue of more than \$50 million in s 8 of the main bill should be removed.

iv) Conscientious objections by health practitioners

Section 8(6) of the main bill provides that health conduct rules that do not allow a health practitioner to conscientiously object to providing a health service because of a religious belief or activity is not reasonable unless compliance with the rule is necessary to avoid an unjustifiable hardship. However, s 8(6) does not apply if s 8(5) applies. Section 8(5) provides if a law of a State or Territory allows a health practitioner to conscientiously object to providing a health service because of a religious belief or activity held or engaged in by the health practitioner, a health practitioner conduct rule that is not consistent with that law is not reasonable.

The Commission notes that the precise interaction of ss 8(5) and (6) is unclear. We are not opposed to these provisions to the extent that they are intended to permit individual jurisdictions to set the

⁷ The Commission notes that this is a different approach to the *Fair Work Act 2009* (Cth) which has different rules for small business employers, but calculates small business employer based on the number of employees rather than the annual revenue.

right balance between conscientious objection and the necessity for treatment. For example, in the ACT, s 84A of the *Health Act 1993* (ACT), consistent with the requirements of the HR Act, provides that an authorised person may refuse to prescribe, supply or administer an abortifacient, or carry out or assist in carrying out a surgical abortion, on religious or other conscientious grounds (a conscientious objection), other than in certain specific circumstances such as an emergency.

However, given the breadth of the definition of a ‘health service’ in the bill, we are concerned that provision of health services that may be currently the subject of guidance in professional codes of conduct but which are not dealt with in under State or Territory law, could be at risk of being deemed to amount to religious discrimination. We consider that it would be more consistent with human rights standards for these matters to be assessed on a case-by-case basis for reasonableness, as is currently the case in the ACT.

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,



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