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Joint Standing Committee on Foreign Affairs, Defence and Trade

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Submission to the Joint Standing Committee on Foreign Affairs, Defence and Trade Inquiry into freedom of religion or belief

Dear Mr Andrews

Thank you for the opportunity to provide a submission to the Human Rights Sub-Committee of the Federal Joint Standing Committee on Foreign Affairs, Defence and Trade *Inquiry into freedom of religion or belief*. The Chief Minister, Mr Andrew Barr MLA, has passed your correspondence to me to reply on behalf of the ACT Government, as I have portfolio responsibility for human rights and anti-discrimination policy.

Our Government is committed to protecting and promoting human rights. As the first Australian jurisdiction to introduce a statutory rights instrument - the *Human Rights Act 2004* (HRA) - the ACT Government has led the way in giving formal recognition to a range of civil and political rights (and later, economic, social and cultural rights) including the right to freedom of thought, conscience, religion and belief.¹

Human rights instruments and jurisprudence express and expand on the principles and values that are fundamental in a liberal democratic society. Although the rights and freedoms that Australians cherish and uphold are, to some extent protected by the common law and by convention, they are less concretely enshrined in our laws than many people would realise.

¹ Section 14, HRA.

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Freedom of religion or belief

Freedom of religion is one of a small handful of rights that are contained in, or can be implied from, the Australian Constitution. Section 116 of the Constitution provides that “the Commonwealth shall not make any law for establishing any religion, or for imposing any religious observance, or prohibiting the free exercise of any religion and no religious test shall be required as a qualification for any office of public trust under the Commonwealth”.

This simple guarantee of a *negative* freedom of religion, expressed as freedom from government coercion to adopt a particular religion, has been interpreted narrowly by Australian courts. It does not necessarily provide a guarantee of *positive* freedom to actively enjoy religious freedom in any particular way.²

The HRA clearly provides a positive right for an individual to have or adopt a religion or belief of his or her choice, and 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. This is in addition to the freedom from coerced adoption of religious belief or practice, also protected under the HRA.³

Other rights that also support the right to freedom of religion and belief include:

- 1) the right to peaceful assembly;⁴
- 2) the right to freedom of expression;⁵
- 3) the rights of minorities to declare and practise their religion;⁶
- 4) the rights of Aboriginal and Torres Strait Islander peoples to maintain their spiritual practices, observances and beliefs;⁷ and
- 5) the right to ensure religious and moral education of a child in conformity with the convictions of the child’s parents⁸.

Canberra is one of the most multicultural Australian cities, and community harmony, and indeed our social and economic wellbeing, is built on respect for diversity, inclusion, fairness and common humanity. The ACT Government is committed to a full suite of measures, legislative and social, to protect and promote human rights, including the right to freedom of religion and belief.

Discrimination protections

Anti-discrimination and vilification laws indirectly protect religious freedom. These types of laws are in place in all Australian jurisdictions.

² Australian Law Reform Commission (2016) Chapter 4 - Freedom of Religion, *Traditional Rights and Freedoms—Encroachments by Commonwealth Laws*, ALRC Report 129, p 99.

³ s 14(2) HRA.

⁴ s 15 HRA.

⁵ s 16 HRA.

⁶ s 27(1) HRA.

⁷ s 27(2) HRA.

⁸ s 27A(3) HRA.

As an example, the ACT *Discrimination Act 1991* protects against discrimination on the grounds of religious or political conviction. In 2016 amendments were made to the Discrimination Act which clarify the definition of religious conviction.⁹ The amendments also give it a separate status from political conviction, so that it is a 'protected attribute' in its own right. These amendments commence on 3 April 2017. They were introduced in response to recommendations made by the ACT Law Reform Advisory Council (LRAC) following its inquiry into the scope and operation of the Discrimination Act.

The definition of religious conviction will include:

- a) having a religious conviction, belief, opinion or affiliation;
- b) engaging in religious activity;
- c) the cultural heritage and distinctive spiritual practices, observances, beliefs and teachings of Aboriginal and Torres Strait Islander peoples;
- d) engaging in the cultural heritage and distinctive spiritual practices, observances, beliefs and teachings of Aboriginal and Torres Strait Islander peoples;
- e) not having a religious conviction, belief, opinion or affiliation; and
- f) not engaging in religious activity.

The revised and expanded definition clearly articulates an inclusive understanding of belief systems, including in recognising Aboriginal and Torres Strait Islander spiritual beliefs and agnostic or atheist beliefs.

The amendments also include changes to protect against religious vilification. The introduction of religious vilification was recommended by the Law Reform Advisory Council, but also by the ACT Human Rights Commission which had recent complaints of vilifying acts that had proved difficult to assess on their merits because they were not able to be clearly established to be on grounds of race.

The threshold test was revised to clarify that vilification is prohibited in respect of any act done "other than in private" to avoid technical argument about what constitutes a public act. Other changes (which have already commenced) make the complaints process less onerous on complainants. In practice the complaints process had been difficult to navigate for community members from culturally and linguistically diverse communities who are often most vulnerable to vilification and least able to enforce their rights.

The ACT Government believes these changes are important steps in protecting rights to non-discrimination based on religious conviction and other attributes, and the ACT Legislative Assembly unanimously supported these changes.

However, conventional anti-discrimination laws are also limited in the way they apply in only various areas of public life or in response to particular acts – they do not provide a general guarantee of the right to freedom of religion or belief, but protect it indirectly.

Of course, there are also exceptions for discrimination done by religious organisations,¹⁰ which must be carefully defined to make sure that they strike an appropriate balance between supporting religious freedom and protecting non-adherents from unreasonable discrimination.

⁹ *Discrimination Amendment Bill 2016*.

¹⁰ Sections 32-33 Discrimination Act.

The LRAC recommended further reform to the Discrimination Act, including to create a general duty to eliminate discrimination, to refine the test for determining when exceptions should apply, and to prohibit discrimination in all areas of public life.

While further changes may provide additional safeguards against discrimination, they may also limit other rights, including rights of religious belief or conviction. If further changes are made they will need to be assessed against the guarantee of freedom of religion in the HRA – a clear demonstration of the benefits of having a statutory rights instrument.

The benefits of a statutory rights instrument in protecting freedom of religion and belief

The ACT Government recognises that there are limits to the scope and content of freedoms as understood and applied in traditional common law jurisprudence, and that discrimination laws are limited in their application. For these reasons and from the desire to make a clear statement about the commitment of the ACT Government to human rights, the ACT Government moved to introduce a statutory human rights instrument. These considerations also influenced the decision to expand the HRA to include positive duties on government to abide by and uphold those rights.

The HRA explicitly sets out those rights considered fundamental and significant to ACT society, and imposes obligations on ACT public authorities to comply with those rights in any administrative action or policy decision.

The HRA notes that rights, including the right to freedom of religion and belief, are not absolute and may be subject to reasonable limitations set by laws that can be demonstrably justified in a free and democratic society.¹¹

This ‘balancing test’ (when read with the other interpretive sections of the HRA) incorporates a clear mechanism for upholding parliamentary sovereignty to enact laws that limit rights, but also the common-law principle of legality which maintains that a Parliament can only be taken to encroach on and limit traditional rights and freedoms by clear, explicit and unambiguous legislative amendment.

As noted by Professor Rosalind Croucher AM, President of the Australian Law Reform Commission (ALRC), in an address on the ALRC’s recent inquiry into traditional common law rights and freedoms, while the government is entrusted by the public to make laws which can limit freedoms in the overall public and national interest, it must face and expect public scrutiny when making policy decisions which abrogate rights sufficiently clear enough to survive challenge.¹²

¹¹ s 28 HRA.

¹² Professor Rosalind Croucher AM, Speech to Australian Government Legal Network, 29 July 2016, Canberra available at <http://www.alrc.gov.au/news-media/speech-presentation-article/freedoms-government-lawyers-issues-horizon> accessed on 4 January 2017.

Arguably this is even more so the case in the ACT, under the HRA 'dialogue' model which also provides that the court can issue a declaration of incompatibility if a law cannot be interpreted in a way that is consistent with the rights in the HRA.¹³ It also provides a direct right of action allowing a victim of a breach of rights of religious freedom to begin civil proceedings in the ACT Supreme Court to seek a remedy for that breach (except monetary damages).¹⁴

There is also a range of levels of scrutiny, both internally to government and in the ACT Legislative Assembly, which supplement the well established 'checks and balances' that are foundational parts of our democratic system of government. For example all ACT Cabinet submissions must address rights impacts, including in the triple bottom line assessment, and explanatory statements must consider any limitations on rights and set out why they are justifiable. The Attorney-General certifies all government bills as compatible with human rights under the HRA.¹⁵ The Standing Committee on Justice and Community Safety (Legislative Scrutiny Role) reviews all bills and explanatory statements introduced into the Assembly in terms of their impact on human rights and other personal rights and liberties.¹⁶

Overall this means that government action which might encroach on the right to freedom of religion or belief is better scrutinised in the ACT than in other jurisdictions that rely only on convention or the courts to safeguard this right.

The right to freedom of religion is not protected by virtue of being absolute or concretely enshrined in a static document, but by the need to justify and demonstrate the need for any policy decision or law which would limit the positive and negative aspects of the right to freedom of thought, conscience, religion, or belief.

A clear example of the dialogue process as it relates to the right to freedom of religion, belief and conscience is provided by government's legislative work to safeguard rights to access abortion services in the ACT.

The *Health (Patient Privacy) Amendment Act 2015* amended the *Health Act 1993* to provide that it was an offence to protest, or film, in declared protected areas around health services with the intention of dissuading a person from accessing lawful abortion services.

These provisions were introduced in response to community concerns about potentially intimidating and harassing conduct occurring outside approved health facilities. The amendments clearly limited the protestors' right to freedom of expression (including expression of their religious beliefs and convictions).

¹³ Section 32, HRA.

¹⁴ Section 40C, HRA.

¹⁵ Section 37, HRA.

¹⁶ Section 38, HRA; Resolution of Appointment, Standing Committee on Justice and Community Safety (Legislative Scrutiny Role), available at <http://www.parliament.act.gov.au/in-committees/standing-committees-current-assembly/standing-committee-on-justice-and-community-safety-legislative-scrutiny-role> accessed on 5 January 2017.

Yet, because the rights in the HRA are not absolute, but can be limited if they are considered reasonable and proportionate to achieve a justifiable policy aim the HRA processes facilitated an open community debate about the merits of the laws. In this case the policy aim was to make sure that legal medical services can be accessed by people entitled to use them.

As required by the HRA the government made sure that the measures were the least restrictive necessary and carefully justified in light of considerable public scrutiny and commentary about the appropriate balance between the rights of protestors and health service consumers. Similar changes were subsequently passed in Victoria.

This example demonstrates the rights balancing process – it is inevitable that in any society rights, interests and responsibilities will compete and need to be arbitrated. Rights should not be seen as having a clear or fixed hierarchy. The ACT Government rejects the Commonwealth Attorney-General's assertion made when releasing the ALRC 'freedoms inquiry' report, that freedom is the most fundamental of all the human rights.¹⁷ This generalisation misses the point that what we consider 'freedom' is comprised of many specific rights, and liberties, which have equal applicability under law and therefore must be routinely balanced and limited against each other. Indeed, in many cases, specific rights cannot be enjoyed to their full extent if other supporting rights are not also respected, protected and fulfilled.

The ALRC review concluded that "there are very few, if any, provisions in Commonwealth laws that interfere with freedom of religion" and that "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".¹⁸

The ACT Government is confident that the laws of the Territory uphold freedom of religion and belief, and where that freedom is limited, it is a proportionate response to a particular policy aim.

Community dialogue

The ACT Government acknowledges the need for a free, positive and respectful discussion in the community on important social issues including discussions about balancing rights.

To this end the Government has provided funding to support the Human Rights Commission to deliver a campaign raising awareness of racism, vilification and intolerance – the '*Diversity. It Goes with Our Territory*' social media campaign. The campaign builds on similar campaigns conducted nationally including the '*Racism – it stops with me*' campaign supported by the ACT Government, and uses community leaders to champion diversity and reduce forms of racial, religious and other discrimination in Canberra by:

- letting people know what to do if they see or experience some form of discrimination;
- spreading good news stories about standing up against discrimination; and

¹⁷ The Hon Senator George Brandis QC, *Address at the launch of the Australian Law Reform Commission Report on Traditional Rights and Freedoms*, 2 March 2016, available at <https://www.attorneygeneral.gov.au/Speeches/Pages/2016/FirstQuarter/2-March-2016-Address-at-the-launch-of-the-Australian-Law-Reform-Commission-Report-on-Traditional-Rights-and-Freedoms.aspx> accessed on 9 January 2017.

¹⁸ Australian Law Reform Commission (2016) Chapter 1 – Executive Summary, *Traditional Rights and Freedoms—Encroachments by Commonwealth Laws*, ALRC Report 129, p 17.

- encouraging Canberra to embrace its cultural diversity and promote inclusion.¹⁹

Legislation providing statutory guarantees of rights will have limited effectiveness if there is little community awareness and understanding about measures that can be taken in response to harassment, intimidation, vilification or bigotry. Campaigns like *Diversity. It Goes With Our Territory* are important for building community conversations about the benefits of a diverse and inclusive society and fostering a culture in which people feel comfortable coming forward when their freedoms are not respected.

The ACT Multicultural Framework 2015-2020,²⁰ sets out a range of initiatives which the ACT Government is undertaking or supporting to increase social participation and community connection including delivering accessible and responsive services, enhancing social cohesion and capitalising on the benefits of cultural diversity to allow every Canberran the opportunity to reach their full potential.

The ACT Government is building and maintaining a stronger Canberra community where our citizens are not just 'free', but are actively supported by the government, business and community sectors to fully enjoy their rights and actively contribute to our society.

Thank you again for offering the ACT Government the opportunity to make a submission to this inquiry and to outline our positive experience with the real benefits of a statutory rights instrument that provides a range of mechanisms to respect, protect and fulfil rights, including the rights to freedom of religion and belief.

Yours sincerely

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Minister for Justice, Consumer Affairs and Road Safety

¹⁹ ACT Human Rights Commission (2016) Annual Report 2015-16, p 18.

²⁰ ACT Government (2015) *ACT Multicultural Framework 2015-2020*, available at http://www.communityservices.act.gov.au/data/assets/pdf_file/0005/826817/ACT-Multicultural-Framework-2015-2020.pdf accessed on 9 January 2017.

