

17 July 2023

**Senate Standing Committee on Legal and Constitutional Affairs**

PO Box 6100

Parliament House ACT 2600

**By e-mail:**

[legcon.sen@aph.gov.au](mailto:legcon.sen@aph.gov.au)

## Submission to Inquiry into the Australian Capital Territory (Self-Government) Amendment Bill 2023

### Who are we?

1. This submission is on behalf of, and co-signed by:
  - Australian Christian Churches
  - Anglican Church, Sydney Diocese
  - Baptist Union of Australia
  - Seventh-day Adventist Church in Australia
2. The submission was coordinated by Freedom for Faith, a Christian legal think tank that exists to see religious freedom for all faiths protected and promoted in Australia and beyond. Freedom for Faith is led by people drawn from a range of denominational churches including the Anglican Church Diocese of Sydney, The Catholic Church, the Australian Christian Churches, Australian Baptist Churches, the Presbyterian Church of Australia, and the Seventh-day Adventist Church in Australia. It has strong links with, and works co-operatively with, a range of other faith groups in Australia.
3. We welcome the opportunity to make this submission and we give consent for this submission to be published. Our contact details are as follows:

### **Freedom for Faith**

Chair: The Right Reverend Dr Michael Stead  
Executive Director: Mr Mike Southon  
Email address: [info@freedomforfaith.org.au](mailto:info@freedomforfaith.org.au)  
Postal Address: PO Box H92 Australia Square NSW 1215

1. Members of the committee will of course be aware of the background to the Australian Capital Territory (Self-Government) Amendment Bill 2023 (the **Bill**), but we summarise it briefly. The Bill will require the ACT government to conduct an inquiry into the *Health Infrastructure Enabling Act 2023* (ACT) (the **Act**). That is the legislation which was rushed through the ACT Legislative Assembly, acquiring the land and property on which the Calvary Public Hospital was operating, as well as assets of that undertaking.
2. Calvary Hospital was owned and run by the Roman Catholic church for 44 years, well prior to self-government. It was highly regarded as a provider of health care to the whole community. But it was the subject of negative commentary in a recent Legislative Assembly report,<sup>1</sup> criticising the hospital for not offering abortion services. (These procedures, of course, are condemned by the Roman Catholic church and are not offered by any hospitals run by the church.)
3. It has also become clear in recent days that the ACT government is moving to introduce legislation dealing with “voluntary assisted dying” (commonly called “euthanasia”), and that Calvary Hospital has on religious grounds objected to these proposals. This may be connected with the more recent announcement that Clare Holland House, a centre for palliative care, will also be taken over by the ACT government.<sup>2</sup>
4. In May 2023 the ACT government announced it was going to introduce legislation to acquire the main hospital and to run it as part of the general Territory health system.<sup>3</sup> Professor Joanna Howe, in her comment on the announcement, noted that, while the government claimed that the above issues were not involved, it was hard to take this claim seriously:

In my view, the decision to compulsorily acquire Calvary Hospital is driven by ideology and not efficiency, as the Health Minister Rachel Stephen-Smith asserts. Walter Abheyeratna, the ACT president of the Australian Medical Association, acknowledged as much when he said it was important to deliver public healthcare services without being bound by ideology.<sup>4</sup>
5. Other commentators have noticed the irony of referring to a need not to be bound by “ideology”, when it seems fairly clear that it was precisely the government’s ideological commitment to abortion on demand (and arguably to expansion of euthanasia in the future) that was driving the decision.
6. The government then introduced, and rushed through the single-chamber ACT Legislative Assembly, the [Health Infrastructure Enabling Act 2023](#) (ACT).

---

<sup>1</sup> See [https://www.parliament.act.gov.au/data/assets/pdf\\_file/0008/2208554/Report-10-Inquiry-into-abortion-and-reproductive-choice-in-the-ACT.pdf](https://www.parliament.act.gov.au/data/assets/pdf_file/0008/2208554/Report-10-Inquiry-into-abortion-and-reproductive-choice-in-the-ACT.pdf) .

<sup>2</sup> See <https://www.health.act.gov.au/news/clare-holland-house-transition-canberra-health-services> .

<sup>3</sup> <https://www.abc.net.au/news/2023-05-10/calvary-hospital-to-be-acquired-by-act-government/102325324> .

<sup>4</sup> <https://www.abc.net.au/religion/act-takeover-of-calvary-hospital-overrides-freedom-of-conscience/102356586>.

7. The church made an attempt to delay the process by challenging the provisions of the Act which purport to provide for “just terms compensation”, as not being effective. The Full Court of the ACT Supreme Court rejected this challenge and ruled that the legislation was valid, in its decision in [Calvary Health Care ACT Limited v Australian Capital Territory](#) [2023] ACTSCFC 1 (23 June 2023).
8. However, so far there has been no legal challenge to the decision made on the grounds of interference with religious freedom. We want to suggest that there are two avenues which might be explored, given that it seems that the religious views of the operators of the hospital have played a major role in the decision to acquire it.

### **Human Rights Act 2004**

9. One avenue would be to consider a possible challenge to the decision based on the right to freedom of religion in the ACT *Human Rights Act* 2014. Section 14 provides:

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

(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.

10. If it could be shown that the acquisition of the hospital was made in order to prevent the “demonstration” of the Roman Catholic faith in the “practice” of health care by the local Roman Catholic community, there could be a breach of s 14(1)(b).
11. However, even if this were so (and it may not be an obvious proposition), the legislation may not be very helpful. For one thing, rights given by the 2014 Act may be qualified, under s 28, by “reasonable limits set by laws that can be demonstrably justified in a free and democratic society”. Arguments would no doubt be put forward as to why it was “justified” to acquire the hospital.
12. In any event, it is doubtful whether the provisions of the 2014 Act can override other, later, legislation passed by the ACT Legislative Assembly. While legislation is to be “interpreted” to be consistent with human rights (under s 30), it would be hard to conclude that a specific Act acquiring the particular land and business of the hospital could in any way be “read down” to protect the church’s rights in the hospital.

### **Section 116 of the Constitution**

13. A second and possibly more effective avenue of challenge would be to consider the impact of s 116 of the Commonwealth Constitution. That provides:

**Commonwealth not to legislate in respect of religion.**

The Commonwealth shall not make any law for establishing any religion, or for imposing any religious observance, or for prohibiting the free exercise of any religion, and no religious test shall be required as a qualification for any office or public trust under the Commonwealth.

14. It is recognised in international law and by religious freedom scholars that free exercise of religion is not merely religious rituals like prayer or attending a service, but also includes the ability of religious groups to form associations which contribute to the wellbeing of the community, such as charities, schools and hospitals. Part of freedom of religion is allowing these religious associations to be run in accordance with their religious beliefs and practices.
15. Here it seems strongly arguable that closing a Roman Catholic hospital because it was operating in accordance with deeply held Roman Catholic beliefs, amounts to “prohibiting the free exercise of [the] religion”.
16. The main Australian authority on the “free exercise” clause is the decision of the High Court in *Adelaide Company of Jehovah’s Witnesses Incorporated v The Commonwealth* [1943] HCA 12; (1943) 67 CLR 116. There, Latham CJ held that this clause would be breached, not only by a law which absolutely outlawed some religion, but by a law which imposed an “undue” infringement of freedom of religion (at 67 CLR, 128).
17. However, there is a possible barrier to the application of s 116 here. Does the clause operate as a limit on the Territory legislature? In the past the view has sometimes been taken that the Constitutional head of power under which laws are passed in relation to territories like the ACT, s 122, is not governed by the limits placed on Commonwealth law-making under other parts of the Constitution. Thus, in a similar way, it has been argued previously that the requirement for “just terms” compensation when the Commonwealth acquires private property, imposed by s 51(xxxi), is not applicable to property obtained for a Territory.
18. Without reviewing the whole history of the debate on the matter, it seems likely today that the High Court if presented with the question would find that s 116 *does* amount to a limit on the power of law-making given by s 122.
19. On the “just terms” issues, the High Court ruled in *Wurridjal v Commonwealth* (2009) 237 CLR 309 that s 122 *is* subject to the just terms limitation in s 51(xxxi). The Full Court of the Federal Court in *Yunupingu on behalf of the Gumatj Clan or Estate Group v Commonwealth of Australia* [2023] FCAFC 75 (22 May 2023) has recently supported this view in some detail.

20. The specific question as to whether s 116 itself applies to the territories was discussed in *Kruger v Commonwealth (the "Stolen Generations case")* [1997] HCA 27; (1997) 190 CLR 1, but not definitively resolved. Three members of the court held that it did apply, two that it did not, and the remaining member of the bench, Brennan J, did not say one way or the other (in that case even the members of the court who held that s 116 applied, did not think it was breached, so the resolution of the issue was not necessary for the disposition of the case.) One leading textbook states: "The court has not yet resolved the question whether s 116 applies to laws made under the territories power".<sup>5</sup>
21. Still, we would argue that the case for the application of s 116 to the territories is very strong. The ACT Legislative Assembly only gains its power to legislate from the *Australian Capital Territory (Self-Government) Act 1988 (Cth)*, an Act of the Commonwealth Parliament which is clearly limited by s 116. If the Commonwealth does not have the power to enact an undue interference with religious freedom, it cannot pass on that power to a subordinate body in the ACT.
22. While the legislation acquiring the Calvary Public Hospital seems on its face to be "neutral" as to religion, if the overall context of the law is considered, its purpose can be seen to unduly infringe on the freedom of the Roman Catholic church to offer healthcare in accordance with its religious beliefs. It seems that this legislation, then, will be contrary to s 116 of the Commonwealth Constitution, and hence invalid. That, at least, is an argument that ought to be very carefully considered in the committee's deliberations, and any subsequent inquiry.
23. Further to this point, any inquiry into the suitability and application of the *Health Infrastructure Enabling Act 2023 (ACT)* should account for the fact that Australia has ratified the *International Covenant on Civil and Political Rights (ICCPR)*. Article 18 of the ICCPR recognises that freedom of religion is a right exercised in community with others, including through incorporated and unincorporated entities. The application of Territory legislation, particularly with regard to interfering with the corporate public expression of faith, should respect Article 18 rights. An inquiry should seriously consider whether the acquisition of Calvary Public Hospital was in step with Australia's strong commitment to international human rights standards.

---

<sup>5</sup> Bateman, Will, et al. *Hanks Australian Constitutional Law: Materials and Commentary*, 11th ed, LexisNexis Butterworths, 2021, at 9.7.6.



**Rev Mark Wilson**  
National Ministries Director  
Australian Baptist Ministries



**Rev Mark Edwards OAM**  
Australian Christian Churches



**The Right Reverend Dr Michael Stead**  
Chair, Religious Freedom Reference Group  
Anglican Church Diocese of Sydney



**Michael Worker**  
Director Public Affairs & Religious Liberty  
Seventh-day Adventist Church



**Mike Southon**  
Executive Director  
Freedom for Faith