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THE LEGISLATIVE ASSEMBLY FOR THE AUSTRALIAN CAPITAL TERRITORY

**Ombudsman Amendment Bill 2018
EXPLANATORY STATEMENT**

**Presented by
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Chief Minister**

Introduction

This Explanatory Statement relates to the *Ombudsman Amendment Bill 2018* (the Bill) as presented in the Legislative Assembly. It has been prepared in order to assist the reader of the Bill and to help inform debate on it. The Explanatory Statement does not form part of the Bill and has not been endorsed by the Legislative Assembly.

The Statement must be read in conjunction with the Bill. It is not, and is not meant to be, a comprehensive description of the Bill. What is said about a provision is not to be taken as an authoritative guide to the meaning of a provision, this being a task for the courts.

Overview of the Bill

The purpose of the Bill is to expand the scope of the Reportable Conduct Scheme (the Scheme) to include institutions that provide spiritual care and pastoral activities.

In 2016 the Council of Australian Governments (COAG) welcomed the ACT's proposal for nationally harmonised reportable conduct schemes to improve oversight of responses to allegations of child abuse and neglect. While the ACT scheme was modelled on the NSW scheme, the amendments in this Bill align the scheme with the approach that the Victorian scheme has taken with respect to religious institutions, who have been in scope since 1 January 2018.

In its Inquiry, the Royal Commission into Institutional Responses to Child Sexual Abuse (the Royal Commission) was directed to focus on systemic issues and make findings and recommendations to better protect children against sexual abuse and alleviate the impact of abuse on children when it occurs. The Royal Commission's inquiry has revealed many common failings of religious institutions in their response to allegations of child sexual abuse, detrimentally affecting the lives of survivors, their families and the broader community.

In outlining its guidance for how institutions should handle allegations, and the need for independent oversight of allegation handling, the Royal Commission recommendations aim to improve the reporting of child sexual abuse in institutional contexts to external authorities, enhance institutional allegation handling policies and procedures, and ensure implementation of nationally consistent reportable conduct schemes.

Independent oversight of allegation handling is vital to address problems that have arisen in the way that some religious institutions have historically handled allegations. It can also assure the public that institutions entrusted to care for children cannot minimise or ignore allegations, and that leaders and employees of these institutions cannot operate with impunity.

The Royal Commission considers reportable conduct schemes as a best practice model for cross-sector oversight of institutional handling of employee-related child protection matters. As stated in Volume Seven of the Final Report:

There is overwhelming information before us that warrants religious institutions being covered by reportable conduct schemes. A high proportion of child sexual abuses cases we heard about in our case studies and private sessions occurred in religious institutions. In our case studies relating to religious institutions, we found evidence of multiple inadequate institutional responses. The particular

nature and characteristics of religious institutions, such as closed governance and complicated legal structures, have also contributed to the heightened risk of child sexual abuse.

In examining religious institutions, the Royal Commission found common factors contributing to abuse of children, and common failings in those institutional responses, and made recommendations to prevent child abuse from occurring in religious institutions, and where it does occur, to help ensure effective responses.

Despite structural and theological differences between the religious institutions examined by the Royal Commission, it found remarkable similarities in the institutional responses to child sexual abuse across religious institutions.

This Bill represents an important step in addressing those common failings in institutional responses, as well as an important step in implementing recommendations of the Royal Commission.

The scope of the Scheme

Regulation and oversight should be consistent, balanced and proportionate to an institution's risk, in order to avoid placing unnecessary or excessive regulatory burden on institutions and government.

In its Final Report, of the 4,029 survivors the Royal Commission heard from in private sessions about child sexual abuse in religious institutions, most spoke of the position held by a perpetrator. The Royal Commission heard about perpetrators who were people in religious ministry, and also frequently heard about perpetrators who were teachers or residential care workers. Other perpetrators the Royal Commission heard about included housemasters, foster carers and volunteers. In some instances, over a quarter of survivors speaking about the identity of perpetrators identified volunteers. Further, the Royal Commission heard that children often took part in religious or recreational activities in unregulated and unsupervised environments, in many instances where volunteers were involved in running or participating in the activities.

The Royal Commission acknowledged that risk assessment and effective mitigation of risk in relation to people in religious ministry can be challenging for religious institutions. Some ministry roles include a wide range of duties that are difficult to limit. These duties can include regular preaching in a formal place of worship or teaching in a school; leading youth groups and religious studies in informal settings; providing pastoral care and spiritual guidance on a one-on-one basis in a personal setting such as in a hospital or in a person's home; performing religious ceremonies such as weddings or funerals; and performing religious rites such as confession.

People in religious ministry can often have both personal and professional relationships with people in their pastoral care. This can increase the risk of boundary violations, whether advertent or inadvertent. Often, people in religious ministry are also often considered to occupy a particular position of trust and authority in the eyes of people in the community, and this can influence how people respond to them.

Further, the broad nature of religious ministry means that there are a wide variety of activities which a person in religious ministry may be required to perform, in both professional and private settings. Consequently, there are many ways a person in religious ministry could come into contact with children outside of planned duties.

As such, reportable conduct schemes should require the reporting of conduct by any individual engaged by an institution who have access to children, whether as religious ministry, leaders, members of boards, councils or governing bodies, employees or volunteers.

The amendments in this Bill have been drafted to give clarity to religious institutions in the development of their policies and procedures in order to assist compliance with their obligations under the Reportable Conduct Scheme.

The treatment of religious confession

Many of the religious institutions examined in Royal Commission case studies had an institutional culture that discouraged reporting of child abuse. This culture was often based on traditions and practices that acted as an institution-wide barrier to reporting abuse to an external authority. One of those traditions is the practice of religious confession, which is relevant to the adherents of Judaism, and other Christian churches including the Catholic, Anglican, Orthodox and Lutheran churches.

Confession, or the Sacrament of Penance as it is known to Catholics, is considered to be a central tenet of Catholicism. The Catholic Code of Canon Law states that *'The sacramental seal is inviolable; therefore it is absolutely forbidden for a confessor to betray in any way a penitent in words or in any manner and for any reason: Can. 983 §1'*.

In the Australian Uniform Evidence Act jurisdictions – the Commonwealth, Victoria, New South Wales, Tasmania, the Northern Territory, and the Australian Capital Territory – a religious confessions privilege operates so that clergy can refuse to disclose to a court the fact or content of a religious confession, except where the confession was made for a criminal purpose: section 127 *Evidence Act 2011*.

It is unsettled at law whether a privilege for religious confession is recognised in the common law, or whether religious confession privilege is a rule of substantive law. In any event, the High Court of Australia has repeatedly reaffirmed that clear statutory words are necessary to extinguish a common law privilege, and particularly a privilege that may have achieved status as a substantive law.

If the religious confession privilege is substantive law, there is a tension between section 127 of the Evidence Act 2011 (ACT) and section 11 of the Ombudsman Act, which empowers the Ombudsman to obtain information and documents.

The proposed amendment in this Bill excludes allegations of reportable conduct divulged in the course of religious confession until 31 March 2019 in acknowledgement of the tension between the legislation and the religious laws of churches that prevent their clerics from revealing what is disclosed in a formal confession, even in court proceedings.

Overview of human rights considerations

The amendments in this Bill have been carefully considered in the context of the recommendations of the Royal Commission, and will improve child safety and enhance the protection of children through enhanced reporting and oversight of allegations of employee misconduct.

The Bill engages, supports and places limitations on, the following rights in the *Human Rights Act 2004* (the Human Rights Act):

- Section 9 (Right to life);
- Section 10 (Protection from torture and cruel, inhuman or degrading treatment etc.);
- Section 11 (Protection of family and children);
- Section 12 (Privacy and reputation); and
- Section 14 (Freedom of thought, conscience, religion and belief).

Section 28 of the Human Rights Act allows the legislature to reasonably limit human rights by laws that can be demonstrably justified in a free and democratic society. In deciding whether a limit is reasonable, consideration must be given to the nature of the right, the importance of the limitation, the nature and extent of the limitation, the relationship between the limitation and its purpose and any less restrictive means reasonably available to achieve the purpose.

The amendments in this Bill have been developed consistent with the premise that governments not only have responsibility to ensure human rights are free from violation, but that governments are required to provide for the full enjoyment of rights, subject to any reasonable and justifiable limitations. Consideration of this responsibility supports the positive protection of the right to life, protection from torture and cruel, inhuman or degrading treatment, and the protection of children and young people, consistent with sections 9, 10, and 11 of the Human Rights Act.

The Bill also seeks to embody and express relevant international human rights standards for children and young people such as the *Convention on the Rights of the Child* (the Convention). For instance, the Convention requires states to act in the best interest of the child and undertake to ensure the child such protection and care as is necessary for his or her well-being (article 3). Article 3 of the Convention further requires states to ensure that the institutions, services and facilities responsible for the care or protection of children shall conform to the standards established by competent authorities, particularly in the areas of safety, health, in the number and suitability of their staff, as well as competent supervision. Further, the Convention requires states to ensure that children are properly cared for and protect them from violence, abuse and neglect by their parents, or anyone else who looks after them (article 19) and that states should protect children from sexual abuse (article 34).

The limitation placed on the right to privacy and reputation and freedom of thought, conscience, religion and belief by the amendments to the *Ombudsman Act 1989* are reasonable for the reasons set out below.

Limitation on human rights – section 28 of the Human Rights Act

Section 28 of the Human Rights Act provides that rights may be subject only to the reasonable limits, set by law, that can be demonstrably justified in a free and democratic society.

The ACT Government acknowledges that the amendments in the Bill engage and limit the human rights of particular sections of the ACT community – children, young people and a wide range of people working in religious organisations and who may

have responsibility for reporting allegations of misconduct against children and young people.

Section 28(2) of the Human Rights Act provides the framework that is used to determine the acceptable limitations that may be placed on human rights in the Territory. In determining if a limit is reasonable and demonstrably justifiable the following factors are considered:

- the nature of the right affected
- the importance of the purpose of the limitation
- the nature and extent of the limitation
- the relationship between the limitation and its purpose; and
- the least restrictive means reasonably available to achieve the purpose the limitation seeks to achieve.

Section 10 Protection from torture and cruel, inhuman or degrading treatment etc. and Section 11 Protection of family and Children

According to section 10 of the Human Rights Act no one may be tortured or treated or punished in a cruel, inhuman or degrading way.

Section 11 of the Human Rights Act states that –

(1) The family is the natural and basic group unit of society and is entitled to be protected by society; and

(2) Every child has the right to the protection needed by the child because of being a child, without distinction or discrimination of any kind.

These rights are dealt with together as they are both limited by the exclusion of religious confession from the scope of the Scheme.

The nature of the right affected (section 28(2) (a))

It is recognised that children have a fundamental right to protection by virtue of being a child (article 3) and a right to life (article 6) as outlined in the *Convention on the Rights of the Child*. Children do not have autonomy or the right to make decisions on their own for themselves, and are instead dependent on those vested with the authority of an adult caregiver, and because of this, are vulnerable and deserving of special treatment and protection from all forms of abuse.

The importance of the purpose of the limitation (section 28(2) (b));

The Bill seeks to temporarily limit the circumstances in which a head of a religious entity is required to disclose in order to protect the confidentiality of religious confession.

Religious confidentiality is vitally important to the maintenance of religious organisations as well as to their individual members. An atmosphere of trust, made possible by the knowledge that communications made in secret will remain secret, is the keystone of strong clergy-communicant relationships which are in turn the cement that holds many religious organisations together. In a very real sense, then, the value of religious confidentiality is the value to society of religion and religious organisations generally.

These societal interests are intuitively compelling, if they acknowledge a privilege in those uncommon situations where the confidentiality of a relationship is so fundamental that breaching it would do more harm than good to society. In those circumstances, public policy would be promoted at the cost of the search for truth.

The nature and extent of the limitation (section 28(2) (c));

The proposed Part 11 of the *Ombudsman Act 1989* excludes allegations of reportable conduct divulged in the course of the confessional from the scope of the Scheme, until 31 March 2019 allowing time for further discussions in a national context and ongoing consultation with key local stakeholders.

The Chief Executive Officer of the Catholic's Truth Justice and Healing Council has said that evidence put before the Royal Commission about abuse of the seal of confession was, at best, selective and patchy, and made it difficult to see systemic abuse of the seal of confession. However, the Royal Commission found that the particular nature and characteristics of religious institutions, such as closed governance and complicated legal structures, also contributed to the heightened risk of child sexual abuse.

The ACT Government welcomes measures being undertaken by the Archdiocese of Canberra and Goulburn to develop child safe policies, strengthen governance arrangements, and to undertake independent investigation of all reportable conduct allegations.

The relationship between the limitation and its purpose (section 28(2) (d))

The purpose of the limitation is to address the tension between section 11 of the Ombudsman Act and section 127 of the Evidence Act and to ensure that public consultation and further policy development is conducted, prior to introducing statutory provisions that will have a profound and lasting impact on the free exercise of religion.

The least restrictive means reasonably available to achieve the purpose the limitation seeks to achieve (section 28(2) (e))

There are no other avenues to achieve the purpose which are less restrictive.

Issues relating to exemptions for a failure to report offence are currently subject to public consultation in the context of the ACT Government's criminal justice law reforms.

Additionally, further policy development and consultation is necessary in order to inform possible changes that would see religious confession subject to the scope of the Scheme.

These amendments represent a reasonable and justifiable limitation on the rights of children, which is outweighed by the importance of ensuring the public interest is met in upholding the seal of confession while further policy development and consultation is conducted.

Section 12 Privacy and reputation

Under section 12 of the Human Rights Act

Everyone has the right—

(a) not to have his or her privacy, family, home or correspondence interfered with unlawfully or arbitrarily; and

(b) not to have his or her reputation unlawfully attacked.

The nature of the right affected (section 28(2) (a))

Under the Human Rights Act, ACT residents have the right to privacy and the right to be protected from unlawful attacks on their reputation. This means that when reportable conduct information is shared, that information should be shared in such a way that does not compromise the privacy and reputation of either the alleged victim or the person the subject of an allegation of reportable conduct. Sharing reportable conduct information is necessary to protect the rights of children and young people, and this may limit related parties' rights to privacy and reputation.

The proposed amendments in the Bill expands the scope of Ombudsman oversight to include institutions providing spiritual care and pastoral activities. By amending the definition of *designated entity* at section 17EA of the *Ombudsman Act 1989*, religious institutions not only become subject to Ombudsman oversight and reporting requirements, but also come within scope of reportable conduct information sharing provisions contained within the *Children and Young People Act 2008*.

The importance of the purpose of the limitation (section 28(2) (b))

The Royal Commission in its Inquiry heard more allegations of child sexual abuse in relation to institutions managed by religious organisations than any other management type. In several of the religious institutions examined by the Royal Commission, the central factor that contributed to the occurrence of child sexual abuse, underpinning and linked to all other factors, was the status of people in religious ministry. The power and authority exercised by people in religious ministry gave them access to children and created opportunities for abuse, as people in religious ministry were viewed as figures who could not be challenged and, equally, as individuals who could be trusted.

The nature and extent of the limitation (section 28(2) (c))

Sections 863B, 863C and 863CA of the *Children and Young People Act 2008* enable the head of a designated entity to request or provide reportable conduct information where they are satisfied on reasonable grounds that the information is relevant to the safety, welfare or wellbeing of a child or young person. This reasonable grounds limitation protects and restricts the sharing of information and is necessary to protect an individual's right to privacy, as it ensures that information can only be obtained and disseminated in the interests of an individual's safety, welfare or wellbeing.

A further safeguard is contained in section 863D of the *Children and Young People Act 2008*, which restricts the use of reportable conduct information only for a purpose associated with the safety, welfare or wellbeing of a child or young person.

The relationship between the limitation and its purpose (section 28(2) (d))

The purpose of the limitation is to safeguard and protect the safety, welfare or wellbeing of children and young people. This will be achieved by ensuring that information can be obtained and disseminated in the interests of their safety, welfare or wellbeing.

The least restrictive means reasonably available to achieve the purpose the limitation seeks to achieve (section 28(2) (e))

The ACT Government has concluded that, in balancing the respective rights of children and young people, these amendments do not unreasonably or unnecessarily limit the human rights of employees or volunteers of religious institutions. This is because people and organisations responsible for children and young people have a duty to ensure their safety, welfare and wellbeing. Consequently, there is a rational connection between the proposed amendments and the issues they aim to address.

The amendments represents a small and reasonable limitation on the right to privacy, which is greatly outweighed by the increased protections available to the rights of children to be protected from abuse and mistreatment.

Section 14 Freedom of thought, conscience, religion and belief

Section 14 of the Human Rights Act states that –

Everyone has the right to freedom of thought, conscience and religion. This includes –

- (a) the freedom to have or 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.

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

The nature of the right affected (section 28(2) (a))

The proposed amendments in the Bill expands the scope of Ombudsman oversight to include religious organisations, and makes religious institutions subject to the Ombudsman’s oversight and review powers. Of these powers, section 11 of the Act gives the Ombudsman the power to obtain information and documents, which is in tension with the tradition of religious confession, relevant to the adherents of Judaism, and other Christian churches including the Catholic, Anglican, Orthodox and Lutheran Churches. In particular, Catholic Canon Law forbids the disclosure, by word or manner and for any reason, that which is disclosed in religious confession.

The right to religious freedom is not absolute – it is limited in myriad ways and there are numerous examples of conflict between freedom of religious practice and belief and broader societal interests especially, but not limited to, the societal interest in the protection of children. Such examples include:

- Secret Aboriginal and Torres Strait Islander religious beliefs being exposed to intensive public scrutiny in order to satisfy legal requirements for native title claims;
- A person who was forbidden by the doctrines of his religion to bear arms was not exempted or excused from undergoing compulsory military service;
- The practice of female genital mutilation is outlawed in each state and territory of the Commonwealth;
- The prohibition of forced and servile marriage and bigamy;

- The requirements of Islamic divorce, child custody and parenting arrangements not accommodated by Australian family law;
- The refusal to allow Muslim women in niqab to give evidence in court;
- The refusal to allow exceptions for possession and smoking of cannabis for Rastafarians;
- The numerous instances in which the objections of Jehovah's Witness parents have been overridden to allow and authorise blood transfusions; and
- The Sikh requirement of wearing the kirpan is problematised by the prohibition on carrying concealed weapons.

The importance of the purpose of the limitation (section 28)(2) (b)

The Royal Commission has revealed that a substantial number of abuse victims who gave evidence to the Commission were abused within the Catholic Church, and between 1950 and 2010, many religious ministers were accused of abuse over that time. Priests and religious brothers who were perpetrators targeted, groomed and exploited vulnerable children wherever and whenever possible.

The nature and extent of the limitation (section 28)(2) (c)

Allegations of reportable conduct divulged in the course of the confession are excluded from the scope of the Scheme until 31 March 2019. After that time, religious confession privilege must be explicitly abrogated in the Act in order to facilitate the reporting of allegations that have been disclosed in the course of religious confession, in accordance with the law.

The relationship between the limitation and its purpose (section 28)(2) (d)

The purpose of the limitation is to safeguard and protect the safety, welfare or wellbeing of children and young people. This will be achieved by ensuring that reportable conduct allegations disclosed in the course of religious confession are reported in the interests of their safety, welfare or wellbeing.

The least restrictive means reasonably available to achieve the purpose the limitation seeks to achieve (section 28)(2) (e)

In balancing the right to religious freedom, these amendments do not unreasonably or unnecessarily limit the human rights of employees or volunteers of religious institutions.

These amendments represent a reasonable and justifiable limitation on the right to freedom of thought, conscience, religion and belief, which is outweighed by the importance of the rights of children to be protected from abuse and mistreatment.

What changes are provided for by the Bill?

The Bill amends the *Ombudsman Act 1989*.

Amendments to the Ombudsman Act

The Bill amends the definition of designated entity at section 17EA to expand the scope of the reportable conduct scheme to include institutions providing spiritual care and pastoral activities.

The Bill also amends the definition of employee and head of a designated entity.

Who will these changes affect?

The amendments will affect a range of people working in organisations that provide spiritual care and pastoral activities, including clergy and volunteers.

Who and what informed these changes?

The Royal Commission recommended in its Final Report that reportable conduct schemes should cover institutions that provide activities or services of any kind, under the auspices of a particular religious denomination or faith, through which adults have contact with children (recommendation 7.12).

Public consultation was undertaken by CMTEDD in development of this submission. This consultation included a public forum, and inviting comment on a discussion paper. In response to the discussion paper, nine written submissions were received from public office holders, non-Government and community agencies, as well as private citizens. No opposition to the expansion of the scope to include religious institutions was received.

Stakeholders of the reportable conduct scheme have also informed these changes, and include members of the Reportable Conduct Governance Group.

The Reportable Conduct Governance Group responsible for the implementation of the scheme is derived of representatives of government entities and independent authorities under the scheme. These members include all ACT directorates, the Ombudsman, Public Advocate and Children and Young People's Commissioner, ACT Policing, and the ACT Teacher Quality Institute. Input on implementation issues has been received from all members of this group.

Climate Change Impacts

This Bill has no identified climate change impacts.

Notes on Clauses

Part 1 Preliminary

Clause 1 Name of Act

This is a technical clause and sets out the name of the Act as the *Ombudsman Amendment Act 2018*.

Clause 2 Commencement

This clause enables the Act to commence on 1 July 2018.

Clause 3 Legislation Amended

This clause provides that the Act amends the *Ombudsman Act 1989*.

Clause 4 Definitions – div 2.2A

Section 17D, definition of *employee*, new paragraph (aa)

This clause amends the definition of employee, in order to clarify the scope of persons involved in religious bodies intended to be covered by the reportable conduct scheme to include not just those persons in religious ministry, but also lay religious people and volunteers that have access to children.

Clause 5 Section 17D, definition of *head*, paragraph (b)(ii)

This amendment allows religious entities with diverse governance arrangements to identify for reporting purposes, the individual with primary responsibility for the management of the entity.

Clause 6 Meaning of designated entity – div 2.2A

Section 17EA (1) (a), new paragraph (a) (viiia)

This amendment expands the definition of designated entity to include a religious body that is not already captured as an education, childcare, health or out-of-home care service provider.

Clause 7 Section 17EA (2), new definitions of *religious body*

This amendment defines a religious body to include a body established or operated for a religious purpose or a body that operates under a religious denomination or faith and that provides, or has provided, activities, facilities, programs or services that facilitate contact with children.

Clause 8 New part 11

This clause excludes from the scope of the Scheme, allegations of reportable conduct divulged in the course of religious confession until 31 March 2019.