LEGISLATIVE ASSEMBLY
FOR THE AUSTRALIAN CAPITAL TERRITORY

STANDING COMMITTEE ON ECONOMY AND GENDER AND ECONOMIC EQUALITY
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Submission Cover sheet

Inquiry into the future of the working week

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Standing Committee on Economy and Gender and Economic Equality
ACT Legislative Assembly
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Dear Committee,

Inquiry into the Future of the Working Week

The ACT Law Society welcomes the opportunity to comment on the Committee's *Inquiry into the Future of the Working Week.* We note the broad scope of the inquiry with views sought not on a specific legislative proposal, but on whether a four-day work week is desirable and how it might be implemented within the ACT.

We have consulted the Society's Employment Law Committee and seek to offer relevant comment on the terms of reference (d – e), concerning relevant industrial law considerations and the potential implications of a move to a four-day work week on the legal industry and the administration of justice more generally.

Industrial/Employment law considerations

The key hurdle for the ACT legislature acting in this area is constitutional. Section 122 of the *Commonwealth of Australia Constitution Act* (**the Constitution**) provides the Commonwealth with a plenary power to legislate for the territories; and utilising this power, it passed the *Australian Capital Territory (Self-Government) Act 1988* (**the Self-Government Act)**.

The Self-Government Act provides a general legislative power, at section 22 providing the Legislature with "power to make laws for the peace, order and good government of the Territory," a formulation that has provided jurisdiction for laws regulating the economy and employment within the Territory.

However, where laws made under this power come into conflict with laws enacted by the Commonwealth, the latter will prevail.

This poses a particular problem for the Territory in the regulation of hours of work (and employment more generally) insofar as the Commonwealth already extensively covers the field. Even the States, with more general freedom to act than the Territory, have been largely boxed out of the field, following *NSW v Commonwealth (2006)* HCA 52 (**the WorkChoices case**), in which section 51(xx) of the Constitution (**the Corporations power**) was held to be capable of justifying Commonwealth regulation of the employment relationships of corporate entities throughout the country. For the Territories, the lockout is virtually complete, with section 14 the *Fair Work Act 2009* (the Act) reading:

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(1) A ***national system employer*** is:

(a) a constitutional corporation, so far as it employs, or usually employs, an individual; or

(b) the Commonwealth, so far as it employs, or usually employs, an individual; or

(c) a Commonwealth authority, so far as it employs, or usually employs, an individual; or

(d) a person so far as the person, in connection with constitutional trade or commerce, employs, or usually employs, an individual as:

(i) a flight crew officer; or

(ii) a maritime employee; or

(iii) a waterside worker; or

(e) a body corporate incorporated in a Territory, so far as the body employs, or usually employs, an individual; or

(f) a person who carries on an activity (whether of a commercial, governmental or other nature) in a Territory in Australia, so far as the person employs, or usually employs, an individual in connection with the activity carried on in the Territory.

While section 14(2) provides that a Territory Minister may exempt a particular local government organisation from the operation of the Act, to the best of our knowledge this has not occurred within the ACT.

Noting that the Act is highly comprehensive and is accompanied by multiple regulations, more than 100 industry awards and innumerable Enterprise Agreements (which as statutory instruments, have the same ability to override Territory Acts as any other piece of Commonwealth legislation), the Legislature should consider the reach of the Fair Work Act 2009 when considering this proposal.

The Act itself, at section 62, establishes the 38 hour week as the maximum for a full-time employee, as an element of the National Employment Standards. Further, each of the Modern Awards includes provisions relating to the permissible patterns of hours, generally limiting ordinary hours to a band of hours on each day between Monday to Friday of each week. Working outside or beyond these hours, in most awards, results in additional payments to workers under penalty or shift provisions within those awards.

For the most part, any Territory law or act purporting to reduce hours worked each week, or modifying the pattern by which they are worked, is likely to be overridden for national system employers. Moreover, while ordinary contracts of employment (which remain in existence under the common law and are recognised and made enforceable under the *Fair Work Act* via the "safety net contractual entitlement" provisions at section 542) are not statutory instruments, interference with them in a manner that reduces the rights to payment or hours of work for either party may trigger the overriding constitutional right to compensation on "just terms" under s51(xxxi) of the *Constitution*.

For these reasons, a move to use legislative power or regulation to reduce the work week amongst ACT private sector employees or employees (direct or indirect) of the Federal government may not succeed. We would be happy to comment further on any options the government chooses to explore further at a later stage within the inquiry.

Impacts of a four day week on the legal industry

For the legal industry, the move to a four day week would raise a wide range of concerns., The legal sector comprises a range of actors – sole practitioners, firms, in-house lawyers in private, not-for-

profit and government organisations, community lawyers and others – who are continuously interacting with judicial and administrative agencies on the one hand, and lay clients on the other.

Anticipating that the Territory public sector will be the most practical avenue through which to implement a reduced working week, the primary concern for practitioners is in relation to the availability of services from judicial and administrative agencies that are subject to employment conditions set by the Territory. Any reduction of the capacity of the Territory's courts and administrative tribunals to deliver services raises significant concerns for the Society given the existing time and resourcing constraints keenly felt by these services already. For example, we note that efficiency increases may not translate to Registry operations where a baseline number of staff and particular delegations are necessary across a broad span of hours to provide continuous services. Reducing registry operations from 5 days to 4, would necessarily reduce the ability of the public to access these services, and would limit practitioners' ability to rapidly file and respond to matters that are not accessible via elodgement (such as Fair Work matters).

Reductions in sitting days, alternative dispute resolution proceedings and other justice system features are also unlikely to be capable of being compensated for by efficiency increases, and seem likely to simply increase the waiting time experienced by clients, absent a significant injection of resources into the sector.

For practitioners, any attempt to move to reduced hours in their practice is fraught with additional difficulty. The billing models used by firms and sole practitioners in relation to clients assess hours directly in costs, and accordingly any attempt to reduce hours while maintaining income would result in significant cost increases for clients. The expectations of clients (and courts) around availability and continuity of care from a single nominated practitioner, as well as the ethical and logistical issues attending the use of practitioner teams are already hurdles for practitioners seeking to share or distribute work so as to avoid existing overwork pressures. Any attempt to reduce the average hours of work in the legal sector is going to have to deal at an early stage, with public and judicial expectations of practitioners affected by the changes.

A vast number of legal processes are bound by time frames prescribed by legislation. Practically, a host of attendant legislative and regulatory changes would be required – foremost, changes to the statutory time limits embedded in many processes. Where "calendar days" are utilised (such as in the *Fair Work Act 2009*), time is both of the essence and disregards the personal circumstances of both clients and practitioners. As part of any such move, a general review of time limits in legislation would need to be implemented, and adjustments made to ensure that access to important processes are not further restricted by way of unintended consequence.

Additionally, compensation processes, such as those under the *Workers Compensation Act 1951*, and entitlements legislation such as the *Long Service Leave Act* that assign financial value to hours, days or weeks in a manner that is intended to mirror or parallel employment processes, would all require review and amendment, to ensure that the rights created by these pieces of legislation are not being either dramatically enhanced or reduced by the reduction of working hours under employment law.

We appreciate the opportunity to offer feedback towards this inquiry and welcome the opportunity for further consultation in future.

Yours sincerely,

[redacted]

Simone Carton

Chief Executive Officer