HRLA
HUMAN RIGHTS • LAW ALLIANCE

22 June 2023

Parliamentary Joint Committee on Human Rights
PO Box 6100,
Parliament House
Canberra ACT 2600

BY E-MAIL: human.rights@aph.gov.au

Dear Sir/Madam,

INQUIRY INTO AUSTRALIA'S HUMAN RIGHTS FRAMEWORK

We refer to the invitation by the Parliamentary Joint Committee on Human Rights for submissions to the above Inquiry. HRLA welcomes the opportunity to provide this submission.

HRLA is Australia's only religious freedom law firm specialising exclusively in the areas of religious liberty and freedom of thought, speech and conscience. We regularly represent clients and litigate religious freedom matters in all States and Territories under Anti-Discrimination and Equal Opportunity Acts.

We enclose our submission with this letter. We are happy to appear for any oral hearing to speak to our submission.

Yours sincerelv.

John Steenhof
Principal Lawyer

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Human Rights Law Alliance Submission to the Parliamentary Joint Committee on Human Rights Inquiry into Australia's Human Rights Framework

Introduction

1. This submission focuses on whether the Australian Parliament should enact a federal Human Rights Act, and if so, what elements it should include, and whether existing mechanisms to protect human rights in the federal context are adequate and whether improvements should be made.

2. There is a deep-seated mistrust of freedom of religion in Australia. This is not helped by the fact that freedom of religion, protected under the International Covenant on Civil and Political Rights (**ICCPR**), is not properly supported in Australia law. Nor is freedom of expression. Other ICCPR rights do not suffer a similar degree of inadequacy in legal protection in Australia. A negative perception of freedom of religion is enhanced by a politicised environment in which the freedom is repeatedly subjected to legislative encroachment, backed by an agenda which is antagonistic to religion and religious followers. The model proposed for a Human Rights Act by the Australian Human Rights Commission (**AHRC**), as detailed in its position paper (the **AHRC model**), perpetuates rather than corrects this trend. HRLA cannot support it.

Summary

3. The AHRC model is deeply flawed. HRLA takes issue with the AHRC's claim that its model amounts to the enactment, incorporation or implementation of treaty rights, at least as required by the ICCPR, from which most rights in the AHRC model are adapted. The inherent limits of any Human Rights Act in this "dialogue form" mean that the AHRC model does not enact in law the protection required to give effect to rights under treaties like the ICCPR where that protection is currently lacking. The AHRC model suffers the additional failing of being fundamentally inconsistent with Australia's treaty obligations. So much so that it should be rejected in its entirety.

4. The AHRC model grossly misrepresents ICCPR rights. It selectively devalues the protection which the ICCPR requires for freedom of religion. It does a deep disservice, not only to Australians of faith, but to all Australians and their rights to freedom of thought, speech and conscience.

5. We believe that if enacted the AHRC model will make matters far worse in Australia for religious freedom and freedom of expression, for the following reasons.

    5.1. The rights which are favoured in the AHRC model are those which most often contend with freedom of religion and freedom of expression in the "balancing" of rights in policy

proposals and legislation. These are "Freedom from discrimination," and "Protection from torture and cruel, inhuman or degrading treatment", the latter being an adaptation of the ICCPR's torture provision that would apply at an excessively low threshold (of being "treated" "in a degrading way"). It could be used in a similar way to a vilification or discrimination prohibition.

5.2. "Freedom of thought, conscience, religion and belief" is defined in the AHRC model with key rights deleted, absolute rights not recognised as such, and others redrafted to be mean something irreconcilable with the ICCPR.

5.3. The "limitations clause" proposed for those rights which are not absolute is unworkable, unprincipled and diverges from fundamental norms of international law. Support for this type of clause comes from the fact that the ACT, Victoria and Queensland have done something similar. Just as with the definitions of rights, this erodes protection without coherent explanation, and aggravates uncertainty to an unacceptable degree.

6. It is difficult to understand why the AHRC would choose to deviate, or allow itself to be influenced to deviate, so radically from the ICCPR by proposing the AHRC model, so as to put in question its independence and impartiality.

7. The AHRC model, with so many deliberate departures from the ICCPR, also creates avoidable need for judicial interpretation. The scope for judicial interpretation has always been a reason for many resisting a charter in principle.

8. If enacted, the AHRC model would compromise already weak protections for fundamental freedoms. In the last few years, the influence of informal guidelines, internal policies, codes of practice, and diversity and inclusion programs has expanded rapidly, with serious human rights implications, especially in the areas of health, education, medical regulation and throughout public and private sector workplaces. This proposal would not only empower but oblige, with the force of law, all federal public authorities (and commercial workplaces, if they opt in) to implement policies and practices that match the AHRC's image of human rights. There would be no mechanism by which these processes could effectively be supervised and challenged for non-compliance with the ICCPR and other treaties, since they would cease to be the reference point for determining human rights standards.

9. HRLA's experience, of which we provide samples below, demonstrates that existing internal policies and programs are already problematic for human rights protection, especially freedom of thought, conscience and religion. This AHRC model would compound the problem without proper control or constraint. Australians are entitled to express concern at or dissent from ideology, without this producing accusations of bigotry, discrimination and/or vilification, with resulting job loss or removal of professional accreditation.

10. HRLA recommends that the AHRC's proposal be abandoned altogether. If a Human Rights Act is proposed in future, it should have the following essential features.

10.1. It should adopt treaty-based rights, in the exact form of those treaties, i.e. the rights as stated in the ICCPR and the International Covenant on Economic Social and Cultural

Rights (**ICESCR**), including any limitation terms that apply to each provision taken individually.

10.2. It should therefore include limitation terms only for those rights for which the treaty prescribes a limitation provision, and in the form specified (such provisions are few and relate mainly to freedom of religion and the different freedoms of expression – including freedom of assembly and of association).

10.3. Interpretation of those treaties should be in accordance with the General Comments of the applicable treaty bodies and should prevail over conflicting interpretations based on non-treaty sources.

10.4. It should provide for independent supervision of the practical implementation of obligations of public authorities, with transparency, accountability and liability on the part of public authorities for their fault in implementing human rights in a misguided or erroneous way, measured by relevant treaty standards.

10.5. It should entrust oversight of the Human Rights Act to a body other than the AHRC.

11. Legislative protection for freedom of religion, and all forms of freedom of expression, should first be established in line with the ICCPR before introducing such a Human Rights Act.

12. The highest priority, ahead of any further consideration of a Human Rights Act, is a religious discrimination Bill of generous ambit, providing meaningful protection.

13. We expand on these points in our detailed submissions below. We also provide examples within the direct experience of HRLA of the current legal imbalance in respect of religious freedom which would be aggravated not alleviated by the AHRC model.

Detailed Submissions

Should the Australian Parliament enact a federal Human Rights Act, and if so, what elements should it include?

14. The AHRC model should be scrapped altogether. It cannot be described as upholding human rights when it undermines so significantly key rights which are intended for Australians under international law.

15. An assessment should first be made of those rights in the ICCPR which are not adequately protected in Australian law. Freedom of thought, conscience and religion, freedom of opinion and expression, and the missing prohibited ground of religion in discrimination legislation are the most obvious candidates. Shortcomings should be remedied by legislation, meeting the enactment requirements of the ICCPR.

The AHRC model should not be enacted because it undermines human rights in the following respects

The AHRC model would radically alter ICCPR rights by expanding some at the cost of freedom of religion and the freedoms of expression

16. Australia's human rights framework (Framework) in 2010 noted that the seven treaties ratified by Australia "reflect international agreement about the fundamental values that make

up 'human rights' protected under the treaties." We agree that each of the rights intended for the federal Human Rights Act should be upheld, in every respect. By this we mean that each such treaty right in the ICCPR and ICESCR should be reproduced in such an Act (if there is to be one) without any departure. We suggest that all such rights should be scheduled.

17. This would reduce the range of interpretive difficulties which are otherwise introduced by a Human Rights Act which deliberately changes the text, meaning and sense of individual rights. It would also avoid loss of standing associated with a proposal which has all the appearances of being politically oriented. If human rights are intended for all Australians, a credible proposal would not put at a disadvantage, as this proposal does, Australians of faith, and those Australians who are not able to subscribe to certain ideologically-based propositions.

The AHRC model has changed article 18 of the ICCPR beyond recognition

18. The "Freedom of thought, conscience, religion and belief" in the AHRC model has undergone the most adverse alteration of all rights when adapted from the ICCPR.

19. The AHRC's Position Paper does not acknowledge the absolute protection that is required by article 18 of the ICCPR, even when discussing the rights which should be treated as absolute. The article 18 rights which are absolute are eliminated from or redrafted in the proposal to become indecipherable. It is obvious and astounding.

20. The United Nations Human Rights Committee's General Comment 22 on article 18[1] states that the absolute rights within article 18 are "freedom of thought and conscience…the freedom to have or adopt a religion or belief of one's choice," and "the liberty of parents and guardians to ensure religious and moral education".

> [1]: "[t]he freedom of thought and the freedom of conscience are protected equally with the freedom of religion and belief. The fundamental character of these freedoms is also reflected in the fact that this provision cannot be derogated from, even in time of public emergency, as stated in article 4.2 of the Covenant."
>
> [3] "Article 18 distinguishes the freedom of thought, conscience, religion or belief from the freedom to manifest religion or belief. It does not permit any limitations whatsoever on the freedom of thought and conscience or on the freedom to have or adopt a religion or belief of one's choice. These freedoms are protected unconditionally, as is the right of everyone to hold opinions without interference in article 19.1. In accordance with articles 18.2 and 17, no one can be compelled to reveal his thoughts or adherence to a religion or belief."
>
> [5] "Article 18.2 bars coercion that would impair the right to have or adopt a religion or belief, including the use of threat of physical force or penal sanctions to compel believers or non-believers to adhere to their religious beliefs and congregations, to recant their religion or belief or to convert. Policies or practices having the same intention or effect, such as, for example, those restricting access to education, medical care, employment or the rights guaranteed by article 25 and other provisions of the Covenant, are similarly inconsistent with article 18.2"
>
> [8] "The freedom from coercion to have or to adopt a religion or belief and the liberty of parents and guardians to ensure religious and moral education cannot be restricted."

21. The absolute rights in article 18 of the ICCPR (and article 19, protecting freedom of opinion) are taken so seriously that the UN Human Rights Committee has said that they cannot even be

[1] *CCPR General Comment No. 22: Article 18 (Freedom of Thought, Conscience or Religion)*, 30 July 1993, CCPR/C/21/Rev.1/Add.4.

the subject of a reservation by a country on becoming bound to the ICCPR, since this "would be incompatible with the object and purpose of the Covenant."[2]

22. The absolute rights within article 18 include "freedom of conscience".

Issue

Freedom of conscience is not recognised as absolute in the AHRC's position paper. Yet, as noted above, "Article 18 …does not permit any limitations whatsoever on the freedom of thought and conscience."

Problem

It is difficult to imagine the AHRC rolling out a program of compliance for public authorities which acknowledges freedom of conscience, without it being substantially overridden by competing rights. It is also doubtful that "statements of compatibility" under the AHRC model would recognise issues of conscience and engage with them appropriately. The Human Rights Act 2019 (Qld) failed to achieve this.

Real World Examples

Voluntary Assisted Dying Bill 2021 Queensland

The Statement of Compatibility for the Voluntary Assisted Dying Bill 2021 prepared in accordance with Part 3 of the Human Rights Act 2019 (Qld) understood that religious organisations for reasons of conscience did not want to provide access to voluntary assisted dying, and it acknowledged that the Bill engaged the freedom of conscience of health practitioners and other workers with a deeply-held belief that any complicity in depriving a person of life is sinful or wrong.

> Many facilities are run by religious organisations or other organisations that will not provide access to voluntary assisted dying for ethical, moral or religious reasons. However, [the Bill] will still require that 'relevant entities' do various things to allow access to voluntary assisted dying for people in their facilities. Clause 87 defines 'relevant entity' as not including individuals. That means that relevant entities will not have human rights, as only human beings have human rights. Of course, relevant entities – such as churches – are comprised of human beings.
>
> To the extent that…the Bill impacts on the rights to freedom of conscience and freedom of expression of individuals, those impacts are justified.

The analysis in the statement of compatibility did not have sufficient regard to:

- the seriousness of the conscience-related implications for individuals of taking life, which in the case law of the UN Human Rights Committee engages that aspect of freedom of conscience which is not subject to limitation.
- the extent to which conscience-related injunctions against taking life are embedded in the ethos of Catholic aged care providers, with a specific religious mission incompatible with voluntary assisted dying, and that such providers employ individuals committed to that mission, for whom it is also intolerable to participate in any way in the taking of life.
- the ready availability of voluntary assisted dying at other facilities, which challenges the need to require such Catholic aged care providers to participate in voluntary assisted dying.

We would therefore emphasise the need for proper protection, and more formal recognition, in Australian law of the element of "conscience" in the freedom of thought, conscience and religion, especially as workplace demands are increasingly placed on employees that conflict with their conscience.

[2] *General comment No. 34 Article 19: Freedoms of opinion and expression*, 12 September 2011, CCPR/C/GC/34, (GC 34) [5].

We would be interested to know what the AHRC advised, if consulted, in connection with the ACT Government's proposed takeover of Calvary Public Hospital, operated by the Little Company of Mary, facilitated by waiving the standing order requirement of the ACT legislative assembly, with no upper house, that bills be referred to a committee inquiry, and only after a report is issued can the bill be debated and voted on. It came less than a month after a government inquiry into abortion and reproductive choice described Calvary as "problematic … due to an overriding religious ethos".[3]

GP discriminated against for declining consultation according to her Christian conscience

In 2019, a WA GP practised medicine according to her Christian conscience, referring patients she could not assist to other doctors. She displayed a notice in her practice advising patients that she did not consult on contraception, assisted reproduction technology or the termination of life. A patient posted a photo of her notice on social media, criticising her for her conscientious practice. Print media picked up the story, condemning her and her religious beliefs.

She, her family and her work colleagues felt intense stress from the public pressure, receiving a substantial amount of hate mail and online abuse. She resigned from the practice out of concern for her family and colleagues. Just before her resignation, two activists lodged a complaint to the Medical Board, arguing that she should not be able to practice according to her conscience. The Medical Board investigated the complaint and found she had done nothing wrong.

Unfortunately, the targeted harassment against her forced her out of a job before she was exonerated by the Medical Board. Freedom of conscience needs to be secured positively and substantively in law, not in the form of the AHRC model.

23. In accordance with articles 18(2) and 17 of the ICCPR, no one can be compelled to reveal their thoughts or adherence to a religion or belief.

Issue

The AHRC model fails to acknowledge that the right not to be compelled to reveal one's thoughts or adherence to a religion or belief is an absolute right.

Problem

One side-effect of increasingly intrusive workplace demands, and evolving diversity and inclusion policies, is that they force individuals to reveal their beliefs, against their wishes. In practice, workplace practices and such programs can be sufficient to cause individuals to lose their jobs.

Real World Examples

Support worker terminated because of Christian beliefs

A support worker who helped troubled youth in the community was asked to sit a psychological suitability assessment, which he was deemed to have failed due to his traditional views on sexuality and gender. He was fired from his position and suspended from working with youth at any residential facility for 12 months. He now has a record lodged with the regulatory authority, which will make it difficult for him to find future employment in his field of work.

[3] Calvary takeover 'rammed' through ACT legislative assembly: ACT Liberals call process 'undemocratic' after due process suspended, by Adam Wesselinoff, May 10, 2023 (https://www.catholicweekly.com.au/act-government-will-take-over-calvary-hospital-one-month-after-scathing-abortion-inquiry/).

Senior Employee terminated for expressing beliefs on gender and ideology

A general manager at a digital services company was terminated in his role after answering unexpected questions at work about the Safe Schools program. Despite his reasoned response about why he opposed it, he was allegedly creating an unsafe workplace through his comments. He had to pursue lengthy legal action and eventually received compensation but had to find another job.

Notes.

The ideology on which certain beliefs concerning sexuality and gender are based should not be coerced. Individuals should be free to conduct themselves in the workplace free of such coercion, and without detriment for not holding particular ideologically-based beliefs or not putting them into practise.

The Safe Schools program has been notoriously controversial. It is inevitable and proper that it should be the subject of public debate. Australians are entitled to have differing views on it. One of its most controversial aspects is that it conveyed the post-modern idea that gender is non-binary and is fluid, and is unrelated to biological sex. As an idea it is not universally supported. It also leads to policy conclusions concerning the use of bathrooms and participation in sport that few Australians support. The Safe Schools Program was defunded by the federal government in 2016.

24. To emphasise the importance of all aspects of freedom of religion (not just those which are absolute), article 4 of the ICCPR treats the whole of article 18 as non-derogable, meaning that it cannot be suspended even in a time of public emergency threatening the life of the nation.

25. What does the AHRC model do to these rights? It decimates them.

25.1. The article 18(1) freedom "either individually or in community with others and in public or private, to manifest his religion or belief in worship, observance, practice and teaching" has become "the freedom to manifest their religion or belief in worship, observance, practice and teaching, either individually or as part of a community and whether in public or private". The original words in article 18(1) have been reordered, with significance. Freedom to manifest religion or belief "in community with others" in article 18(1) is meant to clarify that this may be exercised by someone solitarily, or with others. It is different from doing so "as part of a community," as the AHRC model requires to qualify it for protection, which would exclude e.g. the situation where a small number of people meet together but are not joined as "a community", or any "part of a community". It suggests that the AHRC is not aware of the implications of changing the text around.

25.2. Article 18(2) states, "No one shall be subject to coercion which would impair his freedom to have or to adopt a religion or belief of his choice". This has been turned into "No-one may be coerced in a way that would impair their freedom to have or adopt a religion or belief in worship, observance, practice or teaching". It seems to relate to coercion in the way religion is manifested. If so, it is no longer an absolute right. It certainly does not mean what is intended by article 18(2). It is very unclear what it means.

25.3. The "limitation" text of article 18(3) has been replaced with the general "limitations clause" in the AHRC model which is to apply to all rights which are not absolute, contrary to the ICCPR text, and ICCPR limitation principles (see next heading).

25.4. The "liberty of parents and, when applicable, legal guardians to ensure the religious and moral education of their children in conformity with their own convictions," an absolute right in article 18(4), is completely missing from the AHRC model for "Freedom of thought, conscience, religion and belief." It also exists in article 13.3 of the International Covenant on Economic Social and Cultural Rights (ICESCR) but is also missing from the AHRC model's adaptation of article 13. The AHRC is wrong in claiming that "Article 18(4) ICCPR (regarding religious education) has been included in the right to education." All that remains of article 13.3 in the AHRC model is a parent's right to choose schooling for "the" child (not "*their*" child, as before) "to ensure the religious and moral education of the child in conformity with *their* convictions, provided that the schooling conforms to the minimum educational standards required under law". This removes key aspects of the original rights in article 18(4) of the ICCPR and article 13(3) of the ICESCR.

(a) "Their convictions" in the AHRC model no longer unambiguously means the "parents' convictions," as it does in article 13(3) of the ICESCR by "their" appearing three times when mentioning parents; and as it does in article 18(4) of the ICCPR by the qualification "their own convictions." The AHRC model can be interpreted as meaning the "child's convictions" when referring to "their convictions".

(b) The right "to ensure… religious and moral education" in article 18(4) of the ICCPR and article 13(3) of the ICESCR has been removed. This has major significance. In article 18(4) of the ICCPR it is a religious right and it is absolute. In article 18(4) of the ICCPR and article 13(3) of the ICESCR it is wide enough to include home schooling, whereas the AHRC model is only a right to education, and only specifies "schooling", which suggests educational institutions.

(c) The AHRC model obscures the original purpose of article 18(4) of the ICCPR and article 13(3) and (4) of the ICESCR, which was to allow for "education," and "schools…other than those established by the public authorities". In Australia such schools are, famously, religious.

The AHRC seems as determined as the Australian Law Reform Commission to undermine the rationale and proper functioning of religious schools.

26. In the AHRC Model, freedom of religion rights are not just simplified, they are obscured, subjected to lower standards of protection than the ICCPR requires, or nullified. This is in contravention of the ICCPR. Similar treatment is given to certain rights in the ICESCR.

The AHRC model's "limitations clause" contravenes the ICCPR

27. The AHRC model of "limitations clause" determines what is "compatible with human rights", since an act, decision or statutory provision is compatible with human rights if it does not limit human rights, or it limits a human right only to the extent that is reasonable and demonstrably justifiable in accordance with the "limitations clause".

28. The "limitations clause" in the AHRC model, based on wording in Queensland legislation, is much broader than any limitation clause in the ICCPR (limitation clauses are only found in articles 12(3) (freedom of movement), 18(3) (the right to manifest religion or belief), 19(3) (freedom of expression), 21 (freedom of assembly) and 22(2) (freedom of association)). The Queensland "limitations clause" reads:

> A human right may be subject under law only to reasonable limits that can be demonstrably justified in a free and democratic society based on human dignity, equality and freedom.

29. Nothing in the "limitations clause" confines the justification for restrictions to particular grounds, as it should, since the ICCPR require it. See e.g. those in article 18(3):

> 3. Freedom to manifest one's religion or beliefs may be subject only to such limitations as are prescribed by law and are necessary to protect public safety, order, health, or morals or the fundamental rights and freedoms of others.

This is why General Comment 22 on article 18 specifies that "restrictions are not allowed on grounds not specified there, even if they would be allowed as restrictions to other rights protected in the Covenant, such as national security".

30. Nothing in the "limitations clause" of the AHRC model requires restrictions to be justified on such grounds, as the ICCPR requires, let alone necessary on such grounds.

31. Subjecting human rights to "reasonable limits" under the AHRC model allows excessive control of Australians in a way that is prohibited under the ICCPR.

32. This kind of general "limitations clause" for ICCPR rights is contrary to the ICCPR text and principles of limitation.

    32.1. Different "limitation clauses" apply to different rights. General Comment 22 describes the principles that apply when restricting freedom of religion under article 18(3). General Comment 34 describes the principles that apply when restricting freedom of expression under article 19(3). Separate limitation terms also apply respectively to articles 21 (freedom of assembly), article 22(2) (freedom of association) and article 12(3) (freedom of movement, to choose residence, and to leave any country).

    32.2. General Comment 31 demands that "any restrictions on any of those rights must be permissible under the relevant provisions (i.e. the text of each right considered individually) of the Covenant".[4]

    32.3. The AHRC model of "limitations clause" is prohibited under the ICCPR, not only because the "relevant provisions of the Covenant" do not allow it, but article 5 of the ICCPR specifically states that "Nothing in the present Covenant may be interpreted as implying for any State, group or person any right to engage in any activity or perform any act aimed at…[the] limitation [of the rights and freedoms recognized herein] to a greater extent than is provided for in the present Covenant."

33. A broader "limitations clause" than is allowed under the ICCPR would provide the mandate for excessive restrictions to be placed on the freedom of religion and freedom of expression of Australians.

[4] *General comment no. 31 [80], The nature of the general legal obligation imposed on States Parties to the Covenant*, 26 May 2004, CCPR/C/21/Rev.1/Add.13.

34. The AHRC's "limitations clause" frames the justification for regulating rights around "a democratic society based on human dignity, equality and freedom". It is not clear why it does not follow the ICCPR in this respect, since no explanation is provided by the AHRC. "Human dignity and equality" are closely associated with and often asserted in the context of "freedom from discrimination" and the right not to "be subjected to inhuman or degrading treatment." These rights are already rewritten so that they are enlarged. The proposed concept of a "democratic society" may be understood as reinforcing the AHRC's expansion of those dignity-based, discrimination and equality rights. No ICCPR limitation clause bases justification for restrictions on "dignity" or "equality." Under the ICCPR a "democratic society" is one which is committed to the full protection of all rights.

Issue

The "limitations clause" allows excessive restriction of fundamental rights. Public authorities, including human rights commissions and similar bodies, are not likely to take an approach that strictly upholds freedom of religion or freedom of expression as required by articles 18(3) and 19(3) of the ICCPR, if the AHRC model of "limitations clause" gives them discretion to avoid it.

Problem

The AHRC model favours rights which are commonly asserted against those of faith, especially discrimination and other rights strongly associated with "dignity". An anti-religious bias is reflected in the AHRC model. Intolerance of religion does not reflect the values of a democratic society.

Real World Examples

Christian mother unable to invoke religious freedom rights to defend against activist complaint

Katrina Tait, a Catholic mother and professional photographer in Queensland posted on social media about her opposition to 'Drag Queen Story Time' in local Brisbane public libraries. An NSW activist made a vilification complaint. With legal assistance, the activist withdrew the complaint and the NSW Anti-Discrimination Board had to drop their investigation. However, it was a four-month ordeal for her that caused her much stress and anxiety.

University academic powerless to contest activist cancellation campaign

In 2017, Dr Stephen Chavura, an academic at Macquarie University, was targeted by activists who publicly pressured Macquarie University to fire him because he was a director of the Lachlan Macquarie Institute, a Christian training organisation. Activists claimed that his position at LMI conflicted with the university's support of LGBTQ+ issues. Legislative protection should have assisted him to prevent activist intervention curtailing his freedoms of religion and expression, and to prevent discrimination on grounds of religion.

Failure of public authorities to investigate firebombing of ACL by activist

In December 2016 an activist exploded a van at the ACT offices of the Australian Christian Lobby (ACL) substantially damaging the office premises. The activist driver admitted that he was unfavourably inclined towards ACL and the firebombing attack was religiously motivated. Police investigation failed to reflect the seriousness of the attack or properly pursue the anti-religious motive of the attacker. The poor support for freedom of religion in the AHRC model, by singling it out to be so downgraded from the protection that exists for it in the ICCPR, reflects an unjustifiably negative regard for the rights of Australians of faith. A properly formulated Human Rights Act would include proper implementation of ICCPR principles to provide a basis for holding public authorities to account for clear anti-religious attacks.

Notes

These cases highlight the hostility towards religion and the real threat that weaponised anti-discrimination and vilification laws pose to ordinary Australians who exercise their rights to share their convictions and beliefs on crucial issues of public interest. This shows how anti-discrimination and vilification laws are allowed to operate against Christians and others with more traditional beliefs, without them being able to assert their fundamental rights in law to freedom of religion and freedom of expression, by requiring strict justification for restrictions on these rights, including where the source of restriction is not a public authority. The AHRC model would aggravate this unsatisfactory situation.

The AHRC model does not implement treaty rights. Legislative protection for freedom of religion and the freedoms of expression is still needed

35. The AHRC's position paper suggests that the AHRC model will rectify the "limited protection in Australian law" of human rights. The key function of its model, the AHRC maintains "will be to coherently implement Australia's international obligations domestically, and to reflect and codify fundamental common law rights. It would provide the 'bedrock of rights' in Australian law." The AHRC's claims that its proposed model would do this is incorrect because:

    35.1. the ICCPR text has been radically adapted in the AHRC model, contrary to the ICCPR, including in rewriting rights, and by structural alteration with the "limitations clause".

    35.2. the AHRC model does not enact rights which suffer insufficient protection in law, as required by the ICCPR. General Comment 31 is clear (at para 13) that article 2.2 of the ICCPR

> requires that States Parties take the necessary steps to give effect to the Covenant rights in the domestic order. It follows that, unless Covenant rights are already protected by their domestic laws or practices, States Parties are required on ratification to make such changes to domestic laws and practices as are necessary to ensure their conformity with the Covenant. Where there are inconsistencies between domestic law and the Covenant, article 2 requires that the domestic law or practice be changed to meet the standards imposed by the Covenant's substantive guarantees.

    The AHRC model does not "meet the standards imposed by the Covenant's substantive guarantees".

36. A "dialogue form" of Human Rights Act does not enact in law the protection required to give effect to rights in the ICCPR which are otherwise not fully protected. For example, in relation to freedom of religion, the AHRC model certainly does not "render it part of domestic law to facilitate full realization of Covenant rights as required by article 2". Legislation is needed to do that, and it should precede any Human Rights Act. In this submission we provide numerous examples of rights violations which do not originate in the acts or omissions of public authorities. The AHRC model does not (and neither does a conventional dialogue Human Rights Act) intervene to provide a cause of action or remedy against such a non-public source of violation of an individual's rights, where protection in law is lacking.

The AHRC model gives greater protection (than the ICCPR does) to those rights which contend with freedom of religion in Australia

37. The AHRC model promotes "Recognition and equality before the law; and Freedom from discrimination" above ICCPR standards, by giving "discrimination" the same meaning that it has in federal discrimination laws, rather than the meaning under the ICCPR. It is therefore given advantageous protection relative to other ICCPR rights, particularly since federal antidiscrimination legislation is highly protective, and makes little room for freedom of religion, as the recent Australian Law Reform Commission Inquiry into religious exemptions shows.

38. The ICCPR's torture prohibition reads, "No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment". The AHRC model of this right bears a title which suggests that it is similar ("Protection from torture and cruel, inhuman or degrading treatment"). However, the text which defines the right is very different. It prohibits conduct at a new low threshold, of "treating" someone in a "degrading way." It would be an absolute right (like the prohibition of torture), meaning that every right in its path must give way. This is inconsistent with the ICCPR because the redrafting is so radical that it would impinge in a major way on other rights. The mindset of the AHRC over decades which been protective (at times famously over-protective) of those claiming to be victims of discrimination and vilification, and this "right" (which is no right at all) can be expected to be used to the same effect. The consequence would be that this absolute "right" could overlap with and reinforce existing discrimination and anti-vilification prohibitions with more extensive, more powerful and uncertain coverage.

39. The proposed AHRC model also severely detracts from ICCPR rights in its "Freedom of thought, conscience, religion and belief", as already noted.

40. These observations are especially pertinent to Vienna Declaration and Programme of Action, which solemnly declared that,

> All human rights are universal, indivisible and interdependent and interrelated. The international community must treat human rights globally in a fair and equal manner, on the same footing, and with the same emphasis. While the significance of national and regional particularities and various historical, cultural and religious backgrounds must be borne in mind, it is the duty of States, regardless of their political, economic and cultural systems, to promote and protect all human rights and fundamental freedoms.

41. The AHRC model, with its unjustifiable imbalances, gives the impression that the AHRC has given way to political pressure against the interests of those who depend on freedom of religion and freedom of expression, when it should support "all human rights" "on the same footing", and promote and protect them "regardless of…political, economic and cultural systems".

42. All Australians are entitled to freedom of thought and expression, which should allow them to voice concern at, and dissent from, any ideology, especially where there are implications for law or policy. In Australia such concern or dissent is conflated with bigotry, discrimination and/or vilification. A proper human rights framework would support them in their freedom of expression.

Issue

The changes to the *Sex Discrimination Act 1984* which the AHRC helped bring about in 2013 undermine the rights of biological women (under the ICCPR and the Convention on the Elimination of all Forms of Discrimination Against Women) relative to the rights of biological men identifying as women.

Problem

The imbalance of rights in the AHRC model aggravates rather than cures the situation.

Real World Examples

A Christian sole trader operating a female beauty salon was not comfortable being alone with male clients and only offered services to women. Since 2017, she experienced a disturbing pattern of harassment from activists, who opposed her female-only policy. In early 2021, a transgender activist reported her to the Victorian Human Rights Commission, accusing her of refusing to take a booking from a biological male who identified as a woman. The complaint caused her severe distress and anxiety, almost forcing her to shut down her business. The complaint was deliberately targeted harassment of her. The Commission still tried to pressure her into changing her policy to accept bookings from men identifying as women. After she resisted this pressure, the Commission was persuaded to drop its investigation and close the complaint.

A women's rehabilitation centre was threatened with legal proceedings by a biological male who identified as female. The rehab centre ran a Christian restoration program to house drug addicted women who suffered multiple traumas including sexual abuse and physical violence. The applicant was declined admission to the women's residential rehab program but was offered a place in a day treatment program for both men and women. The applicant rejected that assistance and threatened a discrimination claim through a lawyer. The rehab centre was largely run by volunteers on a small budget and did not have money to defend a legal claim. Expensive legal proceedings could force them to close down.

A proper Human Rights Act, operating in conjunction with effective legal protection for biological women in accordance with treaty obligations, should resolve the above issues without such complaints ever being made. The AHRC model will only weaken this legal protection.

The power of public authorities and the opt-in scheme under the AHRC model would bring about a new and unwelcomed human rights culture change

43. The impact of public authorities acting in accordance with the AHRC model would be extensive and misdirected. It would be difficult to monitor. Given the radical changes to ICCPR rights in the AHRC model, public authorities would be charged with disrupting the order intended for human rights under the ICCPR. This is a very real concern.

44. From our own experience we consider it is likely to affect the ability of Australians, particularly those with religious convictions, to continue in their normal work, for example if rendered unfit, or unsafe, by employers or by accreditation bodies.

Issue

Employers and accreditation bodies have excessive power to exclude individuals from working life, by demanding they meet ideologically based and other irrelevant criteria, following a misguided or subjective vision of human rights.

Problem

The AHRC model enlarges such power. It would widen the basis for employers to take action against staff, and accreditation to be removed, or conditions to be imposed, in the name of protection against discrimination and against being treated in a degrading way.

Real World Examples

Dianne Colbert had never received a complaint from an LGBTQ+ trainee or colleague in the 11 years that she ran courses with a mental health counsellor accreditation (as a "Master Mental Health First Aid instructor"). Mental Health First Aid suspended her accreditation after receiving a complaint from activists about her teaching videos on science and LGBTQ+ ideology given at Christian conferences. Mental Health First Aid told her that she had to affirm newly established LGBTQ+ guidelines which included controversial gender fluidity ideology, even though this topic had never come up in her courses. She could not agree to teach gender fluidity, so Mental Health First Aid cancelled her accreditation.

A Christian doctor from Queensland was disciplined by the Medical Board for pro-life social media posts, even though he never discussed his religious views with his patients and never received a complaint from a patient. He voluntarily undertook professional development courses on ethics and social media. Not satisfied with his response, the Medical Board made him undertake compulsory one-on-one re-education with an approved supervisor on the use of social media, accompanied by demanding audit and reporting observations.

45. The proposed opt-in scheme is especially worrying, with financial incentives for businesses and other organisations who voluntarily accept responsibility to comply with the AHRC model. They are likely to be motivated by pecuniary benefits, rather than out of genuine respect for human rights. There is likely to be a strong propensity for businesses to favour some rights over others, adding to the imbalances already referred to.

46. In our experience the internal policies of public authorities and private employers have already proved to be a recurring source of interference with freedom of religion.

Issue

Inclusion and diversity programs have the capacity to be divisive and discriminatory, whether operated in the public service, or by private employers under an opt-in scheme.

Problem

If public authorities (and those opting-in) were bound to act in accordance with the AHRC model, a so-called "safe" working environment could require a monoculture in which individuals with more traditional views are marginalised, disadvantaged or terminated for holding or expressing their views. This would be enabled by measures taken in the name of discrimination and protection against being treated in a degrading way.

Real World Examples

A government employee objected to constantly receiving work emails encouraging involvement in "Pride" functions. When he expressed concern about the pressure placed on him, he was put under investigation for suspected breach of policy. While these investigations were dropped after he obtained legal assistance, he was dismissed on the basis of performance issues shortly after, despite 30 years of previous unblemished service.

A senior executive in the public service voiced her support for traditional marriage and the positions taken by Margaret Court and Israel Folau, in casual workplace conversations but had not expressly shared her Christian faith. Other employees mocked her position and complained that her statements make them feel "unsafe". In her workplace, she faced growing ostracism and was subjected to performance management in her role. She found her work environment increasingly hostile and intolerable.

Whether existing mechanisms to protect human rights in the federal context are adequate and whether improvements should be made?

Freedom of religion and the freedoms of expression already lack protection in Australia. The AHRC model makes matters worse

47. The AHRC model is proposed to operate in a legal environment in Australia in which protection is lacking for freedom of religion and freedom of expression. Legislative support for freedom of religion exists minimally under section 116 the Constitution, and to some degree in anti-discrimination legislation exemptions, which are currently in the process of being reduced to almost nothing. Freedom of expression has some support in an implied constitutional freedom which does not belong to the individual, and only applies when exercised for particular purposes. Otherwise, "freedom" is said to exist in the absence of prohibition or regulation. None of this equates to the positive protection in law required to the standards set by the ICCPR, which should enable the individual to assert freedom of religion or freedom of expression to stop all sources of interference (private and public) except when strictly justified as necessary on stated grounds in the applicable limitation provisions.

48. The Government should give the highest priority to legislate to correct Australia's long-standing failure with regard to these freedoms.

49. Fundamental legislative protection for freedom of religion and freedom of expression is required before a Human Rights Act of any kind is enacted, even one that is fully supportive of treaty rights (within the limits of such an Act). This is because a legislative (or other legal) basis is fundamentally lacking at present for the individual to challenge and seek a remedy for violation of these particular freedoms, whether the cause is private or public. Such redress is available in Australia for nearly all other freedoms.

50. A Human Rights Act cannot correct that failure and should not be enacted until there is complete legislative protection for freedom of religion and freedom of expression in

Australian law. Certainly any plans for progressing the AHRC model should be abandoned now.

Issue

Freedom of religion does not have legislative protection in Australia required by the ICCPR. Other rights easily extinguish it, especially those prohibiting discrimination, vilification and (under the AHRC model) being treated in a degrading way.

Problem

The AHRC model reinforces the imbalance that already exists in Australian law to cause rights of freedom of religion to be outweighed by other rights. Even a perfect Human Rights Act on its own would provide no redress against attacks on the freedom from private entities and individuals.

Real World Examples

Archbishop Julian Porteous became the focus of prominent media controversy after a discrimination complaint was filed against him in Tasmania because he expressed traditional Catholic doctrines of marriage. A transgender person filed a complaint over a pamphlet containing the traditional Catholic view on marriage after it was circulated by the Archbishop to Tasmanian Catholic schools. The complainant eventually dropped the claim.

After receiving permission to do so, a university student prayed with a fellow student struggling with anxiety, who subsequently complained to the university that he made her feel unsafe. The university disciplined and suspended him, instructing him that he could only return to university if he undertook training and received counselling once every two weeks. He was reinstated after obtaining legal assistance.

Clearly established positive rights to freedom of religion in Australian law would prevent the above restrictive action being taken against those exercising the freedom. The AHRC model fails to adequately reflect religious freedom rights in a way that allows substantive reliance on them.

Issue

Freedom of expression (including speech inspired by religious belief) is already inadequately protected in Australia, relative to other rights.

Problem

The AHRC model would deepen the imbalance that already exists against rights of freedom of expression.

Real World Examples

A teacher in the Northern Territory was subjected to a formal investigation by the Department of Education for his private social media posts about his religious beliefs after complaints were made by activists. The investigation was long and stressful for him, with the overarching threat of possible termination for his personal posts that linked to Christian news articles about same-sex marriage,

sexuality and gender issues. He had never been accused of discrimination or mistreatment of students. The Department of Education dropped its investigation.

A Christian studying social work in the Northern Territory was reported by her lecturer for expressing discomfort with the lecturer's promotion of the International Day Against Homophobia, Biphobia, Intersexism and Transphobia in a class-wide email. The student explained that, as a Christian, she had a different perspective about LGBTQ+ *ideology*, which she shared privately with her lecturer. The lecturer told her that her views were discriminatory and hateful, and reported her for potential breach of the university code of conduct. The university ultimately decided to take no further action when the student politely stood up for herself, but she was clearly told that she should keep her religious convictions to herself.

Clearly established positive rights to freedom of expression in Australian law would prevent the above incidents.

At federal level there is no real protection against discrimination on grounds of religion.

51. The AHRC should urgently correct Australia's failure to provide proper legislative protection against discrimination on grounds of religion.

Issue

At federal level there is no protection against discrimination on grounds of religion, except minimally and with limited operation under the Fair Work Act 2009.

Problem

Discrimination on grounds of religion occurs frequently and blatantly. (Many of the above incidents are examples.)

Real World Examples

A committed Christian was banned from a capital city cafe for reading the Bible and praying with a friend. In July 2020, she and her good friend, who was autistic, had lunch together at a local cafe. When they went up to the counter to pay, the manager ordered the autistic woman outside, and confronted the other, cross-examining her about her faith, accusing her of "brainwashing" and telling her never to come back to the cafe again. Both women were shocked and distressed by the experience. The autistic woman, who holds tertiary qualifications, was particularly affronted at the assumption that she was vulnerable. Both women took up the matter directly with the cafe owners. They received an apology, and the cafe recognised their unjust discrimination and retracted the ban.

Byron and Keira Hordyk wanted to become foster parents and applied to the foster agency Wanslea to provide temporary foster care for children between the age of 0-5. They were initially considered to be a potentially fit household. The assessment process involved social workers asking a range of hypothetical questions about parenting, including case studies about how they would respond to a foster child who identified as LGBT. The couple spoke openly about their Christianity with the agency. As the issue of sexuality arose in the interviews the couple explained that a gay child would not be a good match for their family as they would not be able to affirm a child displaying SOGI issues, but they specified that they would only want children aged between 0-5 years old. How many parents of 0-5 year-olds have had to deal with their children's sexuality? After hearing their views, Wanslea terminated the couple's application to be foster parents, telling them that they failed to

provide a "safe" environment for a child. Wanslea also rejected their request for reconsideration on the basis that their religious convictions could easily be accommodated. The couple successfully contested proceedings against Wanslea before the State Administrative Tribunal for violation of the Equal Opportunity Act 1984 (WA), and were awarded damages for discrimination.

52. Even though a religious discrimination bill would not cure the lack of legislative protection for freedom of religion and freedom of expression it should be a higher priority than considering proposals for a Human Rights Act any further. Imagine a Human Rights act like the AHRC model which ought to be capable of detecting human rights deficiencies but in light of the proposed definition of "discrimination" would find no fault in the almost complete absence of protection against discrimination on the basis of religion.

Christians frequently face ideologically-driven, unjustified claims of discrimination and vilification, which human rights commissions fail to dismiss when they should

53. The AHRC and human rights commissions in states and territories are reluctant to dismiss claims lodged by activists, as the examples provided in this submission demonstrate. The Parliamentary Joint Committee on Human Rights will already be aware of the well-publicised concerns about the AHRC's complaints-handling procedures, from its Inquiry into the operation of Part IIA of the Racial Discrimination Act 1975 (Cth) and related procedures under the Australian Human Rights Commission Act 1986.

54. Failure to dismiss unmeritorious claims alleging discrimination or vilification would have the effect of restricting freedom of religion and freedom of expression even more than already occurs in Australia, without justification under the ICCPR, and contrary to what most would consider appropriate in a democratic society.

Issue

The AHRC does not have a strong record in dismissing unmeritorious claims of discrimination and vilification, leading to uncertainty for those subject to complaints, and a chilling effect on free speech, even on matters which should be the subject of open public debate.

Problem

The AHRC model would enable a wider range of claims to be brought, which are unjustified by ICCPR standards, by promoting protection against discrimination, vilification and degrading treatment above the freedoms of religion and expression.

Real World Examples

See the above examples concerning complainants that were eventually dropped but should never have been accepted:

- Archbishop Julian Porteous
- Katrina Tait
- sole trader operating a female beauty salon.

In January 2020, a 'drag queen story time' event was held for children at a public Brisbane library. Shortly after, Lyle Shelton published a blog post about the event. It included some facts about the

drag queens and discussed the need to protect the innocence of children. The two drag queens subsequently brought vilification complaints against him. The complaints were accepted by the Queensland Human Rights Commission. They alleged that Lyle had incited "hatred towards, serious contempt for, or severe ridicule of" the drag queens on the basis of their sexuality. For example, the complaints included claims that Lyle had misgendered one of the drag queens and had described them as dangerous role models for children. Lyle maintains that his blog post discussed factual matters, was not derogatory or insulting, and the point of the post was to express that such events should not be held for children. The matter is awaiting decision.

An Internet publisher was subjected to a long legal battle over his promotion of Christian views of marriage, gender and the family. An LGBTQ+ activist in New South Wales filed over 30 complaints of discrimination and vilification against his for the views expressed in his blog. Defending these accusations has been stressful, time-consuming and costly for him, incurring over $400k in legal fees. He has been unable to have complaints dismissed as vexatious harassment, despite the fact that not a single discrimination claim against him has ever been successful.

It is important that vilification laws should not be weaponised to shut down debate on important matters of public interest.

The significance of these illustrations for the AHRC's proposed Human Rights Act

55. In this submission we provide numerous examples of interference with the right to freedom of religion, freedom of expression, and of discrimination on grounds of religion. We hope these will be of interest to the AHRC, possibly even in updating its information sheet for faith-based communities. These examples also show that the AHRC model is likely to cause rather than cure, and certainly add to, existing problems related to those rights.

56. The AHRC model would place individuals of faith, and others whose beliefs do not correspond with the emergent cultural ideologies, at increased risk:

    56.1. by establishing a set of rights which fails to support freedom of thought, conscience and religion, and freedom of expression, according to the required standards

    56.2. by providing enhanced protection beyond that envisaged by the ICCPR to freedom from discrimination and the right not to be "treated in a degrading way", which would enable claims that merely adhering to a faith, practising it, or expressing some beliefs, is inherently discriminatory or treats a complainant in a degrading way.

    56.3. by public authorities promoting workplace and other cultures hostile to individuals with traditional values or whose views do not conform to new and uncertain human rights standards set by the AHRC.

57. We would point out the recent findings in a UK case involving Maya Forstater,[5] in which it was claimed that gender-critical beliefs are unworthy of respect in a democratic society, and therefore not even protected. Forstater was a researcher who posted various tweets which were gender-critical, in describing transgender women as men. Some of her colleagues found

[5] Maya Forstater v CGD Europe, Case Number: 2200909/2019; Appeal No. UKEAT/0105/20/JOJ, 2022.

her posts offensive and complained, and as a result her contract was not renewed. She took the matter to the tribunal. Her belief was simply that that biological sex is real, immutable, binary and important. (A contrary view, which corresponds with some aspects of gender identity theory, holds that biological sex is secondary to gender identity, that sex and gender are in effect the same, and that people are the gender they say they are, regardless of biology.) The President of the Employment Appeal Tribunal found that her more traditional belief fell within the protection of Article 9(1) of the European Convention (equivalent to article 18(1) of the ICCPR), reasoning that "only if the belief involves a very grave violation of the rights of others, tantamount to the destruction of those rights, would it be one that was not worthy of respect in a democratic society". The decision not to renew her position was found to be direct discrimination related to her "gender-critical" beliefs. Her complaint that she was victimised was also "well founded". This case demonstrates the importance of a Human Rights Act taking a firm position in allowing the expression of religious and other beliefs, so that public authorities are fully aware of this, and their internal policies are properly human rights compliant. The AHRC model would do the opposite, allowing subjective impressions of human rights to dominate.

58. Article 18(2) of the ICCPR provides that no-one shall be subject to coercion which would impair their freedom to have or adopt a religion or belief of their choice. It is important to mention this right, which the AHRC corrupts in the AHRC model, for the following reasons.

58.1. The AHRC has argued in its submission to the recent Australian Law Reform Commission Inquiry into religious exemptions, that article 18(2) (in its true ICCPR form) supports the narrowing of any exemption for religious schools concerning staff to a very slim "inherent requirements" type. The AHRC promoted the idea that an employee of a religious school could resist coercion, in the form of dismissal, if their beliefs in support of the school's ethos (which they were required to hold when appointed) changed once they were in position. The AHRC's reasoning is that article 18(2) provides the justification for requiring the school to retain the staff member (whose beliefs might even then be antagonistic to the ethos of the school) unless it was an "inherent requirement" of their specific job that they continue to hold the belief that has now changed. The AHRC's logic turns on the extent of the burden on a person once they have been taken on (in contrast to the burden on them of not being recruited).[6] We do not agree with the AHRC's position, which also depends on a particular interpretation of selected European Court sources. We would point to a wider range of European Court decisions which contradict the AHRC's position regarding religious schools exemptions.[7] It is interesting to note how the AHRC is keen to downgrade the article 18(2) right in the

[6] Submission of AHRC of 2 March 2023, para 171.

[7] HRLA does not agree with the AHRC's argument that for a person's employment to be justifiably terminated in the circumstances of an employee (rather than refusing a position to an application), it must be an "inherent" requirement of the role for which they were employed that they held a particular belief. In Siebenhaar v Germany, for example, the European Court upheld requirements of an employer with a religious ethos which were broader than the AHRC's notion of "inherent" requirements, to justify terminating the employment of an individual who had been in position for more than 18 months when it was discovered her beliefs had changed. HRLA also disagrees with the AHRC's representation of the other European case law it selectively cited at para 212.

AHRC model, yet trumpet it (in its full ICCPR form) when it can be used to take a position against religious schools.

58.2. We do, however, consider article 18(2) to be applicable to the employment context and for this we rely e.g. on *Ivanova v Bulgaria*, a European Court case involving the dismissal of a swimming pool manager in a vocational high school because of her religious beliefs. Her work performance was entirely satisfactory, but she was a member of an evangelical group, the "Word of Life", known to be evangelistic, and unpopular given the prevailing culture, and especially after hostility against this group had been whipped up in the media. Her dismissal was a by-product of that. The Government argued that any limitations imposed on her right to manifest her religion within the confines of the school had been justified. The European Court did not even consider this as a violation of her right to religious manifestation, because pressure was applied to her to abandon her beliefs in order to keep her job. This was a "flagrant" violation of her freedom of religion protected absolutely within article 9 of the European Convention,[8] equivalent to the absolute protection of 18(2) of the ICCPR. It was not necessary to analyse whether there was justification under article 9(2) (equivalent to article 18(3)).

58.3. We would therefore say that the AHRC is right to flag the importance of article 18(2) to employment, but we disagree with the way the AHRC has argued that it may be applied against religious schools, because its argument ignores obvious European case law. More concerning is that the AHRC is generally ill-disposed to rights of freedom of religion. Its leanings against freedom of religion are severely disconcerting.

59. Freedom of religion is meant to be protected in law, so that it is secured, with a remedy, against violation from any source, measured by ICCPR standards. The same is required to support freedom of expression. Freedom of discrimination on the basis of religion is a separate matter but similarly there is no proper substantive protection in federal law, and no corresponding remedy, to the standard required. A perfect form of Human Rights Act is incapable of meeting the AHRC's claims to implement the ICCPR because it would do nothing to cure these and other underlying defects in substantive protection. Substantive protection is exactly what is needed to uphold the rights of those who risk losing their jobs, accreditation, livelihood, or are otherwise subject to restriction or disadvantage in the above illustrations.

60. The AHRC model is a failure on its own terms, even within the limits of a "dialogue form" of Human Rights Act, because of the substantial and irredeemable defects outlined above.

Recommendations

61. We recommend that this AHRC model be abandoned altogether. If a Human Rights Act is proposed in future, as its starting point it should have the following essential features.

61.1. It should adopt treaty-based rights, in the exact form of those treaties, i.e. the rights as stated in the ICCPR and selected from the ICESCR, including any limitation terms that apply to each provision taken individually.

[8] Ivanova v. Bulgaria, No. 52435/99, § 84, 12 April 2007.

61.2. It should therefore include limitation terms only for those rights for which the treaty prescribes a limitation provision, and in the form specified (such provisions are few, and relate mainly to freedom of religion and the different freedoms of expression – including freedom of assembly and of association).

61.3. Interpretation of those treaties should be in accordance with the General Comments of the applicable treaty bodies, and should prevail over conflicting interpretations based on non-treaty sources.

61.4. It should provide for independent supervision of the practical implementation of obligations of public authorities, with transparency, accountability and liability on the part of public authorities for their fault in implementing human rights in a misguided or erroneous way, measured by relevant treaty standards.

61.5. It should entrust oversight of the Human Rights Act to a body other than the AHRC.

62. Legislative protection for freedom of religion, and all forms of freedom of expression, should first be established in line with the ICCPR before introducing such a Human Rights Act.

63. The highest priority, ahead of any further consideration of a Human Rights Act, is a religious discrimination Bill which provides meaningful protection.

Conclusion

64. Australia's human rights framework (Framework) in 2010 stated:

> The recognition of human rights in our schools, workplaces and the broader community actively contributes to building a more respectful, productive and inclusive society. Respect for human rights underpins a stable and robust democracy. It ensures freedom of belief and expression. Protection of human rights contributes to a safer and more secure Australia.

65. That statement no longer holds good. The growth of a misconceived human rights culture throughout schools, workplaces and the broader community, perpetuated by the AHRC among others, is precisely the source of the problem demonstrated in the real-world illustrations above. The obligation which is proposed to be placed on public authorities to spread a particular human rights culture of the AHRC's choosing is a major problem. If the proposal matched the ICCPR and other treaty rights it would have some legitimacy. But this one does not.

66. The AHRC model would deepen the existing trend towards marginalising freedom of religion, and freedom of expression, because it is easier to win political support to restrict rather than promote those freedoms. Legislation is already being proposed or passed on the flimsiest of claims that the expression of religious belief is inherently discriminatory or harmful. Evidence of harm is accepted, rather than challenged, even though the evidence in rebuttal may be far stronger. This is an entrenched problem, which this AHRC model is unable to correct, but would aggravate, with all its biases and misconceptions even in the simple description of rights to be protected.

67. We thank the Parliamentary Joint Committee on Human Rights for the opportunity to make a submission and welcome any opportunity to appear in support of this submission.

Yours sincerely,

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