1. **Is there a potential that the HRC model "steps around" High Court decisions? Does it have any impact on separation of powers? If so, how?**

In respect of the first question, the Australian Human Rights Commission's (AHRC's) proposal is as follows:

> State and territory Human Rights Acts provide that if a court cannot reasonably interpret a law in a manner that is consistent with human rights though applying the interpretive clause, the court has the power to issue a 'declaration of incompatibility' (DOI). DOIs are designed to notify Parliament that a law is considered incompatible with human rights, and trigger a process for Parliament to review the legislation. Parliament can choose whether or not to respond to the declaration.
>
> However, the High Court's comments in *Momcilovic v The Queen* have led to legal uncertainty about the constitutionality of DOIs at the federal level. This poses a risk that a federal Human Rights Act could not validly include a provision empowering federal courts to make them.
>
> In the course of applying the interpretive clause in the Human Rights Act, a court may, as part of its reasoning process, indicate whether a statute can be interpreted in line with the Human Rights Act or whether the statute demonstrates a parliamentary intention to depart from Australia's human rights obligations. If a court finds that it is not reasonably possible to interpret a statute in a way that is consistent with the Human Rights Act, this would usually be indicated in the reasons for judgment regardless of whether a 'formal' DOI power exists.
>
> The Commission proposes that when a court has found a parliamentary intention to override human rights contained in the Human Rights Act, the Attorney-General should be required to trigger a process for reviewing the law in question. This will require the Attorney-General's Department to have processes in place to monitor cases that arise under the Human Rights Act. It will not require a formal DOI to be issued by the court to Parliament.[1]

Momcilovic v R[2] concerned an appeal to the High Court from the Victorian Court of Appeal. The appeal was made in the federal jurisdiction as a matter between a State (Victoria) and a resident of another

[1] Australian Human Rights Commission, *Free & Equal, Position Paper: A Human Rights Act for Australia, Summary Report* (2022) 23-4 ('*Summary Report'*).

[2] (2011) 245 CLR 1 ('*Momcilovic*').

State within s 75(iv) of the Constitution.[3] The relevant sections of the *Charter of Human Rights and Responsibilities Act 2006* (Vic) (the Victorian Charter) were sections 32 and 36. Section 32 provides:

> 32 Interpretation
>
> (1) So far as it is possible to do so consistently with their purpose, all statutory provisions must be interpreted in a way that is compatible with human rights.
>
> (2) International law and the judgments of domestic, foreign and international courts and tribunals relevant to a human right may be considered in interpreting a statutory provision.
>
> (3) This section does not affect the validity of—
>
> > (a) an Act or provision of an Act that is incompatible with a human right; or
> >
> > (b) a subordinate instrument or provision of a subordinate instrument that is incompatible with a human right and is empowered to be so by the Act under which it is made.

Section 36(2) provides:

> (2) Subject to any relevant override declaration, if in a proceeding the Supreme Court is of the opinion that a statutory provision cannot be interpreted consistently with a human right, the Court may make a declaration to that effect in accordance with this section.

As David Bennett QC and David Lewis explain:

> It appears that, on the approach of French CJ and Bell J (that a declaration can be made in an exercise of State power) and of Crennan and Kiefel JJ (that making a declaration is incidental to an exercise of judicial power), a State court that has exercised federal jurisdiction may proceed to make a declaration of inconsistent interpretation under s 36 of the Charter in an appropriate case ([101]).
>
> However, on the approach of 5 justices of the Court that the making of a declaration of inconsistent interpretation under s 36 is neither an exercise of judicial power nor incidental to

[3] Ibid [6], [9], [99] (French CJ), [134]-[139] (Gummow J), [594] (Crennan and Kiefel JJ).

> it (French CJ, Gummow, Hayne, Heydon and Bell JJ), a Commonwealth law could not provide for a federal court to make a declaration of inconsistent interpretation having the characteristics of those made under s 36 ([100], [146](viii)).[4]

Justice Gummow, with whom Hayne J agreed, relayed the concern I hold with the AHRC's proposal most succinctly:

> In the division between judicial and legislative functions it is appropriately the responsibility of the legislature to decide whether the existing statute law should be altered or replaced. It is no part of the judicial power, in exercise of a function sought to be conferred on the courts by statute, formally to set in train a process whereby the executive branch of government may or may not decide to engage legislative processes to change existing legislation.[5]

Justice Heydon stated:

> A s 36 declaration does not involve the exercise of a judicial function and it is not an incident of the judicial process. The work of the Supreme Court of Victoria, sitting as such, is limited to the judicial process. The power to make a s 36 declaration takes the Supreme Court of Victoria outside the constitutional conception of a "court".[6]

Earlier his Honour had said:

> The conferral on the Supreme Court of Victoria, for example, of legislative power means that it is not a "Supreme Court" or a "court of [a] State" within the meaning of s 73 of the Constitution. In 1900 the expression "court" meant a body which exercised judicial power, and the expression excluded bodies having "some non-judicial powers that are not ancillary but are directed to a non-judicial purpose." The expression still has that meaning.[7]

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[4] David Bennett and David Lewis, 'Inconsistency of Commonwealth and State Laws; Validity and operation of Victorian Charter of Human Rights' (2011) 21 *Litigation Notes* 1.

[5] *Momcilovic* (n 2) [184] (Gummow J), [280] (Hayne J).

[6] Ibid [457].

[7] Ibid [437].

The AHRC's proposal is 'that when a court has found a parliamentary intention to override human rights contained in the Human Rights Act, the Attorney-General should be required to trigger a process for reviewing the law in question.' The proposal fails the test set out by Gummow J with which Hayne J agreed. According to the AHRC's proposal a Court finding 'a parliamentary intention to override human rights' will, in the words of Gummow J 'formally … set in train a process whereby the executive branch of government may or may not decide to engage legislative processes to change existing legislation.'[8] In substance the outcome is the same as that admonished by Gummow and Hayne JJ in *Momcilovic v R.*

It is also noteworthy that in March 2021 the Equality and Human Rights Commission of England and Wales clarified that between the *Human Rights Act 1998* (UK) coming into force in October 2000 and July 2020, 43 declarations of incompatibility have been made. This is not an insubstantial number. 'Of those, nine have been overturned on appeal; five related to provisions that had already been amended by the time of the declaration; eight were addressed by remedial order and 15 were addressed by later legislation'.[9] During Parliamentary debates before the introduction of that Act, in the House of Lords Lord Cooke of Thondon stated a common objection, arguing that the role of courts with respect to statutory interpretation will fundamentally change: "Traditionally, the search has been for the true meaning; now it will be for a possible meaning that would prevent the making of a declaration of incompatibility." Lord Cooke went on to say, "The common law approach to statutory interpretation will never be the same again; moreover, this will prove a powerful Bill indeed."[10] Because the process proposed by the AHRC has the same substantive effect as a declaration of invalidity, being that both 'set in train a process whereby the executive branch of government may or may not decide to engage legislative processes to change existing legislation',[11] the same substantive concern arises under the AHRC's proposal.

The second limb of the first question asks: 'Does [the AHRC's proposal] have any impact on separation of powers? If so, how?' I have four main concerns with the AHRC's proposal which together illustrate

[8] Ibid [184] (Gummow J), [280] (Hayne J).

[9] Equality and Human Rights Commission (UK), *Independent Human Rights Act Review Call for Evidence Response of the Equality and Human Rights Commission* (03 March 2021) 21.

[10] United Kingdom, *Parliamentary Debates*, House of Lords, 3 November 1997, vol. 572, col. 1272-1273 (Lord Cooke of Thondon).

[11] *Momcilovic* (n 2) [184] (Gummow J), [280] (Hayne J).

its impact on the separation of powers. Each of these concerns proceed from an understanding of the ways in which human rights are to be distinguished from legal rights. From the pre-Socratic philosophers Heraclitus and Parmenides to Aristotle to Aquinas and to Rawls, justice has always been understood as an exercise in spanning the divide between the general and the particular, where 'the general universal statement is inadequate insofar as it is indeterminate with respect to particular situations, while the more specific universal statement, though more determinate, is nevertheless liable to mislead.'[12] Human rights charters sit at the general end of this ancient spectrum; justice applied to individual circumstances in a court room sits at the specific. My concerns are as follows:

First, human rights claims are often made as a *fait accompli* intended to conclude a debate, but closely observed are often simply another political claim among many. As Professor John Griffith has said, abstract rights formulations are 'the statement of a political conflict pretending to be a resolution of it.'[13] It follows that the claim that human rights charters enable consensus must be questioned.

Second, the proposal undermines confidence in the judiciary. It requires judges to interpret Australian law against principles that are purposely abstract and imprecise; requiring judges to determine the substantive content of the law in question and thus make law. Being abstract, human rights do not in themselves state what justice requires in any given situation. Within the context of the Australian Human Rights Commission's proposal this concern arises in two main ways. First, through the requirement that all Commonwealth legislation be interpreted according to the imprecise abstract human rights stated in the Charter. The second is through the 'proportionality test' within the proposed general limitations clause. The potential of this test to turn judges into law-makers is plainly seen in the direction the proportionality test has taken under the United Kingdom's Human Rights Act, which also purports to enshrine a dialogue model. That test is considered in the detailed comments provided in response to question 3 below.

Professors Aroney and Ekins have written that 'Statutory bills of rights encourage activist elements in the legal profession to press for judicial intervention in support of politically contested moral and political positions.'[14] Because human rights are politically contested, canvassing matters such as the entitlements of suspected terrorists, restrictions in a pandemic, the limits of surveillance or the

[12] Daniel T Devereux, 'Particular and Universal in Aristotle's Conception of Practical Knowledge' (1986) 39(3) *The Review of Metaphysics* 483, 496.

[13] JAG Griffith 'The Political Constitution' (1979) 42 *Modern Law Review* 1.

[14] Nicholas Aroney and Richard Ekins, Submission 474 to the Queensland Parliament Legal Affairs and Community Safety Committee, *Human Rights Inquiry* (22 April 2016) 14. Available at https://documents.parliament.qld.gov.au/com/LACSC-4B8C/HRI-CC35/submissions/00000474.pdf.

expression of religious views in public life, judges can then be seen to be taking sides in a political debate, undermining confidence in the impartiality of the judiciary and its independence from executive government. Such matters should be resolved through vigorous democratically accountable Parliamentary debate, not unelected and unaccountable judges.

This brings me to my third concern. Because the proposal draws the judiciary into law making, the charter undermines the proper function of the Parliament. The difficult questions that arise in the context of human rights concerns should be the subject of the great contest of ideas that ensues in the public forum of Parliament where their wide-ranging implications for all members of our diverse society can be properly considered and weighed. In the Australian context, the Senate adds a further layer of accountability through its important role of scrutinising legislation. Instead a Charter leaves the difficult matters that arise in the context of human rights claims to the courtroom, a setting only suitable for consideration of the particular circumstances of an individual claimant and respondent. In litigation a court's attention is directed to the precise fact-specific matter before it. Unlike a Parliament, a court is neither equipped nor able to take into account the general, the full range of human rights implications of the particular claim for all groups within wider society.

Further, as Professor Janet Hiebert has argued, Charters can affect the process of democratic deliberation and debate. She argues that human rights laws induce parliamentarians to 'govern like judges' by producing 'legalistic legislation which distorts policy and political judgments regarding human rights concerns'.[15]

Fourth, notwithstanding claims that the proposal respects the sovereignty of the Parliament and the independence of the judiciary, in light of the foregoing concerns, the proposal impacts upon the classical relationship between the three arms of government. It can thus be conceived as being quasi-Constitutional in nature. Given this expansive reach, if a Human Rights Act is to be progressed it should only be legislated with bipartisan support.

It should be noted that all of the foregoing contentions are completely coherent with a sincere respect for human rights. Indeed, by introducing significant ongoing uncertainty through the positing of abstract rights and tests such as the 'proportionality' limitations requirement (considered in the detailed comments provided in response to question 3 below) a human rights charter can ironically have the effect of undermining human rights. Australia enjoys a comparably high level of freedom of association largely due to prevailing cultural beliefs and social practices in this country, supported by the common

[15] Janet Hiebert, 'Governing Like Judges?' in Tom Campbell, K.D. Ewing and Adam Tomkins (eds), *The Legal Protection of Human Rights: Sceptical Essays* (Oxford University Press, 2011) 41.

law's traditional respect for freedom of association and a democratic system of open political contestation. If a specific concern arises that the human rights of citizens are not protected, targeted legislation can be crafted to address that concern while avoiding all of the concerns raised in this document.

2. Are you generally concerned that in recent times there has been a gradual erosion of freedom of religion in Australia? If yes, can you provide examples?

The proposal for an Australian Human Rights Act illustrates the erosion in the protections afforded to the manifestation of religious freedom in this country that has been effected through State and Territory based Charters. First, the Commission's proposed Act allows that religious freedom may be limited where 'necessary, reasonable and proportionate'.[16] It provides that all human rights, including religious freedom, '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.' This follows the regime for limitations under State and Territory Charters, which also contain express limitation clauses that allow human rights to be limited on very broad 'balancing' grounds, such that human rights are 'subject to reasonable limits that can be demonstrably justified in a free and democratic society based on human dignity, equality and freedom'.[17] At two levels, the AHRC's proposed standard for limitation does not equate to the stricter applicable protections ratified by Australia in the *International Covenant on Civil and Political Rights 1966* (ICCPR).

First, Article 18(3) of the ICCPR provides that limitations on religious manifestation may only be permitted to the extent that they are 'necessary'. That a requirement of 'necessity' imposes a more stringent standard than that of 'reasonableness' has been affirmed by the European Court of Human Rights in *Handyside v UK*, where the European Court of Human Rights held that 'necessary' does not have 'the flexibility' of 'reasonable'.[18] That principle has also been affirmed in Australian law, in the oft-cited view of Bowen CJ and Gummow J interpreting the *Sex Discrimination Act 1984* in *Styles*: 'the test of reasonableness is less demanding than one of necessity'. [19] Similarly in *Mahommed v State of Queensland* Dalton P stated:

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[16] *Summary Report* (n 1) 33, see also 23.

[17] Eg, *Human Rights Act 2019* (Qld) s 13. See also *Charter of Human Rights and Responsibilities Act 2006* (Vic) s 7(2); *Human Rights Act 2004* (ACT) s 28.

[18] *Handyside v United Kingdom*, Merits, App No 5493/72, A/24, [1976] ECHR 5, [48].

[19] *Secretary, Department of Foreign Affairs & Trade v Styles* (1989) 23 FCR 251, 263. This passage was also approved by the High Court in *Waters v Public Transport Corporation* (1991) 173 CLR 349, 395-396 (Dawson and Toohey JJ, with whom Mason CJ and Gaudron J agreed, 365), 387 (Brennan J) 383 (Deane J); applied in *Australian Medical Council v Wilson* (1996) 68 FCR 46, 60 (Heerey J, with whom Black CJ, 47, and Sackville J, 79, agreed), see also Law Council of Australia, *Submission 415*, 32.

> The test of reasonableness (of the term) is an objective one, less demanding than a test of necessity, but more demanding than a test of convenience. I am required to weigh "the nature and extent of the discriminatory effect, on the one hand, against the reasons advanced in favour of the term on the other and all other circumstances, including those specified in section 11(2)"[20]

Although these latter statements are made in relation to domestic Australian law, they are illustrative of the differentiation between the requirements of a standard of 'reasonableness' and that of a standard of 'necessity', as applied within anti-discrimination law. Correspondingly, in its General Comment 22 the United Nations Human Rights Committee (UNHRC) describes the right to religious freedom as a 'fundamental' right, 'which is to be strictly interpreted: 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.'[21]

This particular concern is however not limited to just the freedom of religion or belief. To illustrate how concerning the issue is for the purportedly 'protected' individual, consider the list of other rights protected by the ICCPR's 'necessity' standard, but subjected to 'reasonable' limitations in the Commission's proposal: the right to liberty of movement (Article 12); the right to privacy during court proceedings (Article 14); the 'right to hold opinions without interference' (Article 19); the right to peaceful assembly (Article 21) and the right to freedom of association (Article 22). The AHRC general limitations proposal departs from the limitation standards imposed under the ICCPR for each of these rights. For example the AHRC's general limitations clause contrasts with the more rigorous standard required by Article 22(2), which emphatically prohibits the placing of any restrictions on the exercise of the right to freedom of association unless the restriction is 'prescribed by law' and is 'necessary' in the interests of certain particular identified ends.[22] In its submission the AHRC cites the UNHRC's General Comment 31 as authority for its general limitations clause. General Comment 31 pertains to the 'general obligation … imposed on States Parties to respect the Covenant rights and to ensure them to all individuals in their territory and subject to their jurisdiction' at Article 2. It is not a basis for analysing the specific limitations on the freedom of religion or belief or any of the other specific limitation standards in the ICCPR.

Returning to the right to freedom of religion or belief, the second major area of concern is that the Australian Human Rights Act (AHRA) general limitations clause permits of limitations not only on religious manifestation, it also permits the State to impose limitations on the right to hold a belief. The

[20] (2006) QADT 21, 37, referring to *HM v QFG & KG* (1998) QCA 228.

[21] Human Rights Committee, *General Comment No 22: Article 18*, 48th sess, (20 July 1993), [8].

[22] ICCPR, Art. 22(2). See Paul Taylor *A Commentary on the International Covenant on Civil and Political Rights* (Cambridge University Press, 2020) 619-627.

ICCPR makes clear that limitations may only be imposed upon the right to *manifest* a religious belief under Article 18(3). The 'freedom to have or to adopt a religion or belief of his choice' under Article 18(1), the freedom from 'coercion which would impair his freedom to have or to adopt a religion or belief of his choice' are not subject to any form of limitation. The same is true of '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' under Article 18(4). The UNHRC confirms this plainly in its General Comment on Article 18:

> [The ICCPR] 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 … The freedom from coercion to have or to adopt a religion or belief and the liberty of the parents and guardians to ensure religious and moral education cannot be restricted.[23]

The AHRC proposal fails to acquit this standard. Paradoxically, a case brought in New South Wales in the absence of a human rights charter offered a more generous interpretation to the associational rights of a religious organisation than a corresponding case brought in Victoria where a human rights charter existed.[24] Such outcomes are suggestive of an erosion of religious freedom under Charters.

These concerns are only accentuated when one considers the reach of the proposed Act (also modelled on the position in Victoria and the ACT), including the requirement of public sector compliance, the required Parliamentary assessment of legislation and the requirement that the Courts must interpret '[a]ll primary and subordinate Commonwealth legislation … so far as is reasonably possible, in a manner that is consistent with human rights'[25] as stated in the Australian Human Rights Act and also international law.[26] The proposal thus permits the executive, parliament and the judiciary to infringe the requirements of international law, while in the same movement giving an unsuspecting populace the perception that they are acting in conformity with 'human rights'.

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[23] UN Human Rights Committee, *CCPR General Comment No. 22: Article 18 (Freedom of Thought, Conscience or Religion)*, 30 July 1993, CCPR/C/21/Rev.1/Add.4, [3]. Available at: https://www.refworld.org/docid/453883fb22.html

[24] Nicholas Aroney, 'Can Australian Law Better Protect Freedom of Religion?' (2019) 93(9) *Australian Law Journal* 708, 716-717.

[25] Ibid 22.

[26] Ibid 14, 21.

Recalling that the proposal is that Courts are to interpret '[a]ll primary and subordinate Commonwealth legislation … so far as is reasonably possible, in a manner that is consistent with human rights'[27] as stated in the AHRA and also international law,[28] if the limitations clause does not reflect international law, how can the Charter be interpreted in a manner that is consistent with that law? The concern is exacerbated by the proposal that the Attorney-General must commence a review of the law wherever a Court finds that legislation is incompatible with the AHRA and bring this finding 'to the attention of Parliament'.[29] Having ratified the ICCPR, the Commonwealth has the obligation to ensure its compliance. Person's asserting a breach of Australia's obligations under the ICCPR may take the matter to the United Nations Human Rights Committee. As noted in Eleanor Roosevelt's famous speech in support of the draft UN Declaration on Human Rights in 1948: 'The field of human rights is not one in which compromise on fundamental principles are possible.' There is however a demonstrable reformist shift disclosed by contemporary human rights legislation when measured against the international standards settled in the post-War period. This does little to inspire public confidence in the purported *raison d'etre* of the legislation – its ability to protect minorities against democratic majorities. Rather, such Acts appear to prove the long held fear expressed by Thrasymachus against Socrates, that 'justice is nothing else than the interest of the stronger'.

The non-alignment of the AHRA with the relevant international law canvassed above is of particular concern for the Commonwealth, to the extent that the AHRA relies upon the external affairs power in legislating the AHRA. As I set out in the Annexure to my submission, in the seminal *Victoria v Commonwealth* (*Industrial Relations* case), the High Court outlined the applicable test for determining whether a Commonwealth statute is within the external affairs power: the law 'must be reasonably capable of being considered appropriate and adapted to implementing the treaty', and the law 'must prescribe a regime that the treaty has itself defined with sufficient specificity to direct the general course to be taken by the signatory states'.[30] The first aspect (conformity) entails a proportionality analysis which considers the purpose of the treaty and which recognises that 'it is for the legislature to choose the means by which it carries into or gives effect to the treaty'.[31] The second aspect (specificity) requires that the treaty embodies precise obligations, rather than mere aspirations which are 'broad objectives'

[27] Ibid 22.

[28] Ibid 14, 21.

[29] Ibid 24, 25.

[30] *Industrial Relations* (1996) 187 CLR 416, 486-487 (Brennan CJ, Toohey, Gaudron, McHugh and Gummow JJ).

[31] Ibid 487.

permitting 'widely divergent policies'.[32] The non-alignment between the general limitations clause in the proposed AHRA and the applicable standards for limitations under international law, gives rise to a real controversy as to the Constitutionality of the proposal, in so far as it relies upon the external affairs power.

A further concern is that it is not clear how the twofold watering down of religious freedom described above will interact with the existing exemptions for religious institutions and schools in anti-discrimination law. As those exemptions preserve religious manifestation in corporate capacities, will the exercise of those exemptions now be subject to the general requirement that their exercise 'be demonstrably justified in a free and democratic society based on human dignity, equality and freedom' and also the 'proportionality' test? It is not necessary to subject the religious institution exemptions to a proportionality test in order to comply with the requirements of international law. An approach could be adopted that conceives of the 'proportionality' test as being able to be satisfied at the level of the legislative exception itself, rather than at the level of the individual circumstances of a complaint. That legislation may be so crafted to comply with international law was endorsed by Richards J in *R (on the application of Amicus) v Secretary of State for Trade and Industry* ('*Amicus'*).[33] That is to say, if a religious institution or school satisfies the specific conditions of a statutory exemption, it would be acting in a way that is 'proportionate'. A model for reform of the exceptions for religious and educational institutions in Federal law based upon that understanding was posited by Justice Derrington in 2019, in her capacity as President of the Australian Law Reform Commission. Her Honour's model proceeded on the basis that such was consistent with international law.[34] In substance that model asserted that the requirements of international law can be satisfied where limitations 'prescribed by law' are themselves proportionate. There is no need to import a specific 'proportionality' test into legislative exemptions.

Finally, various legal commentators emphasise the role declining religious 'literacy' can play in the 'gradual erosion of freedom of religion'. For example, Professor Carolyn Evans has observed that refusal to recognise the religious character of a faith-based charity are symptomatic of the fact that 'as a society we are becoming less religiously literate' and that consequently, at times there is 'no real

[32] Ibid 486. Though the 'absence of precision does not… mean any absence of international obligation.' See *Tasmanian Dams* (1983) 158 CLR 1, 261-2 (Deane J).

[33] *R (on the application of Amicus) v Secretary of State for Trade and Industry* [2004] EWHC 860 (Admin) ('*Amicus'*).

[34] Sarah Derrington, 'Of Shields and Swords – Let the Jousting Begin!' Speech, Freedom19 Conference, 4 September 2019, https://www.fedcourt.gov.au/digital-law-library/judges-speeches/justice-s-derrington/s-derrington-j-20190904.

understanding of the way religious groups operate, [or] their ethos'.[35] Aroney et al express the concern that over time this decreasing awareness will populate the quiet unchallenged, assumptions underpinning judgements,[36] while Rivers laments a developing 'erosion of autonomy' as 'one of the characteristics of legal developments in the last decade'.[37] For Venter, the acknowledgement that 'no one is without profound views on matters associated with religion' has meant that courts are being 'exposed to close scrutiny for possible prejudice' and 'personal, extra-legal convictions'.[38] As competition between the freedom of religion or belief and other rights increasingly moves to the courtroom, the potential for these concerns to erode religious freedom come sharply into focus. In my reply to the following question, I make further specific comments on the potential of the proportionality test to operationalise these concerns.

3. Do human rights agencies potentially erode religious freedom? If so, how?

In administering the standards set in their respective Charters, human rights agencies have the potential to erode religious freedom in the manner described in the prior response.

The AHRC's proposal that public authorities limiting human rights must establish that their actions are '*proportionate*' also poses a particular unique problem for the protection of religious freedom. While the AHRC acknowledges that '[t]he Siracusa principles … provide guidance on limitations of rights within the ICCPR [and] set a clear standard in this regard',[39] the AHRA allows that religious freedom may be limited where 'necessary, reasonable and *proportionate*'.[40] The AHRC states: 'The limitations clause should be based on the "proportionality" test that is strongly established in international law and applicable to human rights instruments.'[41] Notwithstanding the AHRC's assertion, for the reasons put in reply to the preceding question, the general limitations clause is inconsistent with international law.

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[35] *Evidence to Human Rights Sub-Committee, Joint Standing Committee on Foreign Affairs, Defence and Trade, Inquiry into the Status of the Human Right of Freedom of Religion or Belief, Australian Parliament*, Melbourne, 7 June 2017 (Carolyn Evans).

[36] Nicholas Aroney, Joel Harrison and Paul T Babie, 'Religious Freedom Under the Victorian Charter of Rights' in Matthew Groves and Colin Campbell (eds), *Australian Charters of Rights a Decade On* (Federation Press, 2017).

[37] Julian Rivers, *The Law of Organized Religions* (Oxford University Press, 2010) 338.

[38] Francois Venter, 'The Justiciability and Adjudication of Religious Disputes' in Rex Ahdar (ed), *Research Handbook on Law and Religion* (Edward Elgar, 2018), 299, 304, 306.

[39] Australian Human Rights Commission, *Free & Equal, Position Paper: A Human Rights Act for Australia,* (2022) 254.

[40] *Summary Report* (n 1) 33, see also 23 (emphasis added).

[41] Ibid 22.

The following comments focus specifically on the implications of a 'proportionality' test and its potential to erode religious freedom. It must first be stated that concerns with the proportionality test are not limited to its application to just religious freedom, although unique considerations arising within the context of religious institutions may exacerbate those concerns. The test has been subject to strident critique in contexts not concerning religion.[42] Webber critiques the proportionality test for enabling decision-makers to avoid rigorous and transparent judicial analysis: 'The discourse of balancing and proportionality camouflages much of the scholar's and the court's thinking underlying rights.'[43] These factors mean that '[u]nder the cult of constitutional rights scholarship and jurisprudence, rights have become merely one reason among others in a process of proportionality reasoning. The result is perhaps nothing short of a loss of rights.'[44] In the United States Supreme Court Justice Brennan has called proportionality analysis 'doctrinally destructive nihilism', no more than 'a convenient umbrella under which a majority that cannot agree on a genuine rationale can conceal its differences.'[45]

The following summarises Urbina's précis of the main concerns with the 'proportionality' test as applied in secular contexts:

> 1) Proportionality tests avoid engaging with moral reasons, and instead is committed to assessing only technical considerations.
>
> 2) Proportionality requires judges to do something that cannot be done: to rationally commensurate the incommensurable.
>
> 3) Proportionality is reductionist, in that its method is committed to filtering out as irrelevant moral considerations that are in fact relevant—particularly, the special force of rights.
>
> 4) Proportionality fails to filter out considerations regarding the protection or promotion of illegitimate interests or aims, and treats them in the same way as considerations regarding the protection or promotion of legitimate interests or aims, the public good, or even rights.
>
> 5) Proportionality analysis is deceptive. It claims to be doing something that in fact it is not doing. It claims to be performing an objective and neutral analysis, while in fact judges are engaging in controversial moral reasoning.

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[42] See for eg, Grégoire Webber, 'Proportionality, Balancing, and the Cult of Constitutional Rights Scholarship' (2010) 23 Can JL & Jur 179, 179. See also Stavros Tsakyrakis, 'Proportionality: An assault on human rights?' (2009) 7 Int'l J Const L 468.

[43] Webber (n 43) 179. See also Tsakyrakis (n 43).

[44] Webber (n 43) 202.

[45] *New Jersey v TLO* 469 US 325 (1985), 369-71 (Brennan J).

> 6) Proportionality is opaque. Particularly when courts apply the balancing prong of the test, it is often the case that the reasons for the court's decision are not clear. Whether a measure satisfies this prong of the test is regularly "asserted rather than demonstrated."
>
> 7) Proportionality analysis gets moral questions wrong, in that courts typically purport to be considering all the interests of the parties and all the relevant moral considerations, while in fact they typically ignore some of these interests and considerations, and apply the test to the one or two more manageable ones. This objection is distinct from 3) and 4) in its target. It does not criticize a method, but a deficiency in the practice of courts. The latter could be an effect of adopting the former. But not necessarily so …[46]

Various of these concerns are exacerbated in application to religious institutions, particularly as far as deliberation on impugned actions requires value judgements or agitates questions of morality. Because the proportionality test is notoriously imprecise and fact-specific, it confers upon decision-makers (including human rights commissions) and judges an extraordinary granular discretion over the affairs of religious institutions. Moreover, this power operates over matters of religious practice, where personal judicial convictions as to what is 'proportionate' may well admit of significant variation. Owing to its ill-defined nature, both former Australian Chief Justices Gleeson and French have separately recognised that what is 'reasonable' is something upon which judicial minds may 'differ'.[47] The same concern might be expressed in respect of the 'proportionality' test.

The jurisprudence that now attends the proportionality test in the United Kingdom under the *Human Rights Act 1998* (UK) ably illustrates the transfer of law-making power from the legislature to the judiciary entailed in such a test. For the purposes of United Kingdom law the 'proportionality' test was summarised by Lord Reed JSC in *Bank Mellat v HM Treasury (No 2)*:

> it is necessary to determine (1) whether the objective of the measure is sufficiently important to justify the limitation of a protected right, (2) whether the measure is rationally connected to the objective, (3) whether a less intrusive measure could have been used without unacceptably compromising the achievement of the objective, and (4) whether, balancing the severity of the measure's effects on the rights of the persons

[46] Adapted from Franciso Urbina 'Is it Really That Easy? A Critique of Proportionality and 'Balancing as Reasoning' (2014) *27*(1) *Canadian Journal of Law & Jurisprudence*, 167, 167-8.

[47] *Bropho v Human Rights & Equal Opportunity Commission* HCA Transcript 9 (4 February 2005) (Gleeson CJ); *Bropho v Human Rights & Equal Opportunity Commission* [2004] FCAFC 16 (6 February 2004), [76] (French J).

> to whom it applies against the importance of the objective, to the extent that the measure will contribute to its achievement, the former outweighs the latter.[48]

In *R (on the application of SB) v Denbigh High School Governors*, Lord Bingham candidly stated that the judge's task in applying the proportionality test is to:

> make *a value judgment, an evaluation*, by reference to the circumstances prevailing at the relevant time: *Wilson v First County Trust Ltd (No 2)* [2004] 1 AC 816, paras 62–67. Proportionality must be judged objectively, by the court: *R (Williamson) v Secretary of State for Education and Employment* [2005] 2 AC 246 para 51. … it is in my view clear that the court must confront these questions, however difficult. ...[49]

The potential of the test to enable judges as law-makers was further displayed in June of this year in the Employment Appeal Tribunal decision of in *Higgs v Farmor's School*.[50] Therein Eady J further formulated the proportionality test in application to statements made in the workplace as follows:

> 94. … I can see that, within the employment context, it may be helpful for there to at least be some mutual understanding of the basic principles that will underpin the approach adopted when assessing the proportionality of any interference with rights to freedom of religion and belief and of freedom of expression.
>
> (1) First, the foundational nature of the rights must be recognised: the freedom to manifest belief (religious or otherwise) and to express views relating to that belief are essential rights in any democracy, whether or not the belief in question is popular or mainstream and even if its expression may offend.
>
> (2) Second, those rights are, however, qualified. The manifestation of belief, and free expression, will be protected but not where the law permits the limitation or restriction of such manifestation or expression to the extent necessary for the protection of the rights and freedoms of others. Where such limitation or restriction is objectively justified given the manner of the manifestation or expression, that is not, properly understood, action taken because of, or relating to, the exercise of the rights in question but is by reason of the objectionable manner of the manifestation or expression.
>
> (3) Whether a limitation or restriction is objectively justified will always be context specific. The fact that the issue arises within a relationship of employment will be

[48] [2014] AC 700, [74] (Lord Reed JSC), summarising *R v Oakes* [1986] 1 SCR 103 (Dickson CJ).

[49] *R (on the application of SB) v Denbigh High School Governors* [2007] 1 AC 100 (Lord Bingham) [30] (emphasis added).

[50] *Higgs v Farmor's School* [2023] EAT 89.

relevant, but different considerations will inevitably arise, depending on the nature of that employment.

(4) It will always be necessary to ask (*per* **Bank Mellat**): (i) whether the objective the employer seeks to achieve is sufficiently important to justify the limitation of the right in question; (ii) whether the limitation is rationally connected to that objective; (iii) whether a less intrusive limitation might be imposed without undermining the achievement of the objective in question; and (iv) whether, balancing the severity of the limitation on the rights of the worker concerned against the importance of the objective, the former outweighs the latter.

(5) In answering those questions, within the context of a relationship of employment, the considerations identified by the intervenor are likely to be relevant, such that regard should be had to: (i) the content of the manifestation; (ii) the tone used; (iii) the extent of the manifestation; (iv) the worker's understanding of the likely audience; (v) the extent and nature of the intrusion on the rights of others, and any consequential impact on the employer's ability to run its business; (vi) whether the worker has made clear that the views expressed are personal, or whether they might be seen as representing the views of the employer, and whether that might present a reputational risk; (vii) whether there is a potential power imbalance given the nature of the worker's position or role and that of those whose rights are intruded upon; (viii) the nature of the employer's business, in particular where there is a potential impact on vulnerable service users or clients; (ix) whether the limitation imposed is the least intrusive measure open to the employer.[51]

Albeit articulate, these lengthy principles are posited without reference to any substantive direction from the legislative. They are developed in response to the submissions of the parties in the particular matters that arise for consideration within a court. They have not been posited consequent upon a process of open, accountable and democratic deliberation, such as enfolds within the Parliament as representative of the people. In this way the proportionality test lends itself to outcomes that are not consistent with the principle of the separation of powers that underpins our democratic system of government.

[51] Ibid [94].

4. **In states and territories in Australia that have a Human Rights Charter, has its existence increased protections of religious freedoms for people of faith? If yes, how, if not, why.**

See the preceding responses generally. In addition, it is my view that at times Parliamentary Statements of Compatibility with Human Rights fail to provide a complete or accurate picture of the relevant human rights. State Charters require that such statements are to be provided by members of Parliament with proposed legislation, (see for example Part 3 of the Victorian Charter). The Statement of Compatibility accompanying the Equal Opportunity (Religious Exceptions) Amendment Bill 2021, resulting in amendments to the *Equal Opportunity Act 2010* (Vic) inaccurately stated that application of an inherent requirements test to religious institutions and schools was consistent with international human rights law. In the following attached article I have demonstrated how that statement was inaccurate: Fowler, Mark 'The Position of Religious Schools Under International Human Rights Law' (2023) 2 *The Australian Journal of Law and Religion* 36.

5. **A 2016 combined churches submission to a parliamentary inquiry into the QLD Human Rights Act said the *"that a Human Rights Act was not necessary because 'in Australia there are effective and well-developed legal doctrines that protect fundamental rights and freedoms from incursion by legislation'."***

   Do you agree with this statement, and has anything changed since 2016 that would warrant a federal Human Rights Act at this point in time?

I am in broad general agreement with the above statement. The following observations draw upon comments made in a forthcoming paper with Professor Nicholas Aroney.[52] Australian citizens enjoy comparably very high levels of freedom of association, as well as freedom of assembly and expression.[53] By international standards, Australia is consistently assessed as maintaining high levels of personal freedom, political rights, civil liberties and the rule of law.[54] This is due to the existence of cultural norms and historical traditions that undergird respect for freedom of association in social, economic and political life. It is supported by the common law's traditional respect for freedom of association and a democratic system of open political contestation which enables civil society organisations to mobilise against proposals that would unreasonably curtail their freedoms.

[52] Nicholas Aroney and Mark Fowler 'Freedom of Association in Australia' (27 October 2023). Available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4587217

[53] Our World in Data, *Freedom of Association Index* (2022). Available at https://ourworldindata.org/grapher/freedom-of-association-index

[54] World Justice Project, *Rule of Law Index* (2022) 45; Freedom House, *Freedom in the World* (2017) 20.

As legal sociologists have long observed, while law shapes society, society also shapes the law.[55] Australia has a social, political and legal culture that generally respects the rule of law and the maintenance of fundamental freedoms. This is undergirded by comparably very high levels of associating and volunteering in the country.[56] These social realities place practical limits on the extent to which governments consider themselves able or entitled to regulate spheres of civil society.

I am not aware of any concern arising since 2016 that would warrant the implementation of a Commonwealth Human Rights Act as the means to address that concern. Certainly the limitations imposed by Governments during the COVID 19 pandemic have been the subject of significant contestation within the community. However to my knowledge it has not been evidenced that the existence of local Human Rights Charters had any real bearing on the protections to citizens recognised by the Courts. Similar judicial outcomes followed in jurisdictions that had Charters and those that did not.[57] Notably, in its Summary Report the AHRC provides various examples in support of the claim that an AHRA would have been of benefit during the pandemic. However various of the persons referenced therein would have been able to argue that they were protected under existing legislation. For, example the Queensland woman with a disability could argue that she was protected under the *Anti-Discrimination Act* (Qld) and the *Disability Discrimination Act 1992* (Cth).[58] If 'Edna' were in Australia she would have had an arguable claim under the *Age Discrimination Act 2004* (Cth).[59] As noted above, if a specific concern arises that the human rights of citizens are not protected, targeted legislation can be crafted to address that concern while avoiding all of the concerns otherwise listed herein.

6. If a Human Rights Act was passed by the Commonwealth Parliament, why would it be important to enable a corporate entity to be able to litigate protections? Can you give an example?

The Annexure to my submission to the Committee Inquiry argues that whether non-natural legal persons (i.e. corporations and unincorporated groups) should receive the benefit of any legislative protection is a critical question for the Committee. The submission argues that this consideration is 'central' to religious discrimination protections precisely because of the universally recognised propensity of religious believers to engage in mutual undertakings through institutional forms. Appeal Judge Redlich

[55] Compare Eugen Ehrlich, *Fundamental Principles of the Sociology of Law* (Harvard University Press, 1936) and HLA Hart, *The Concept of Law* (Oxford University Press ,1961).

[56] Lester Salamon, Wojciech Sokolowski and Megan Haddock, *The Scope and Scale of Global Volunteering* (2018) 26.

[57] See, eg, *Kassam v Hazzard; Henry v Hazzard* [2021] NSWSC 1320. Cf. *Loielo v Giles* [2020] VSC 722.

[58] *Summary Report* (n 1) 39.

[59] *Summary Report* (n 1) 37.

put it mildly when he said '[c]orporations have a long history of association with religious activity.'[60] If religious institutions are precluded from the protections, those protections will fail to adequately address the mischief in view, the protection of religious believers.

At page 5 of the Annexure to my submission to the Committee Inquiry I provide a range of examples. These include a religious corporation that is refused a booking of a venue operated by government because the religious body intends to teach its traditional view of marriage during its use of the facility and a hospital that is compulsorily acquired where the acquisition could be evidenced to be 'on the ground of' the 'religious conviction' of the institution, or those of its associates.

7. In relation to question 6, would it be important to have clear and concrete mechanisms? If yes, why?

Yes. The reasoning underpinning the need for such protections is set out at pages 6 to 11 of the Annexure to my submission to the Inquiry.

8. Are the existing representative complainant mechanisms sufficient? If not, why?

No. The reasoning underpinning the need for such protections is set out at pages 9 to 11 of the Annexure to my submission to the Inquiry.

[60] *Christian Youth Camps Ltd v Cobaw Community Health Services Ltd* 308 ALR 615 ('*Cobaw*') [481] (Redlich J).