

9 November 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 – QUESTIONS ON NOTICE

1. Following our recent appearance at the inquiry into Australia's Human Rights Framework on October 20, Senator O'Sullivan put several questions on notice to us, to which we provide the answers below. For more information please refer to the HRLA and ACL submissions which give thorough details on each of the issues raised below.

Your submission on page 15 says "freedom of religion and the freedoms of expression already lack protection in Australia." Does the AHRC model improve the situation or make it worse?

2. The AHRC model would make the lack of protection for freedom of religion and freedom of expression worse. The model selectively devalues the ICCPR protection for freedom of religion and reinforces the imbalance that already exists in Australian law that prioritises other rights over the freedom of religion. It would make the situation for freedom of religion worse in at least three ways:
 - 2.1. The rights favoured in the AHRC model are those that most often contend with freedom of religion;
 - 2.2. "Freedom of thought, conscience, religion and belief" is defined in the AHRC model with key rights deleted, absolute rights not recognised as absolute, and others redrafted;
 - 2.3. The "limitations clause" in the AHRC model for non-absolute right is a general limitations clause, as opposed to the specific and narrow limitations contained for certain rights in the ICCPR.

Is the AHRC model compatible with Australia's treaty obligations?

3. No, the AHRC model is not compatible with Australia's treaty obligations, particularly the ICCPR. It fails to enact in law the protection of religious freedom required to give effect to ICCPR rights, as required by the ICCPR itself. To the extent that it does articulate ICCPR rights it does so in a way that is imbalanced and that devalues the rights to freedom of religion compared to other rights.

How does the AHRC model misinterpret ICCPR rights?

4. Two of the most concerning examples of how the AHRC model misinterprets the ICCPR right to freedom of religion are:
 - 4.1. The right of parents to “ensure the religious and moral education of their children in conformity with their own convictions” has been moved away from the right to religious freedom to the right to education. It has been redrafted to give parents the right to “choose schooling for *the* child” (not “*their*” child as previously), and to ensure religious and moral education “in conformity with their convictions” (not “*their own*” convictions as previously). This no longer unambiguously means the parents’ convictions but may refer to the child’s convictions. The right to “choose schooling” is also much more limited than the rights contained in the ICCPR as well as the International Covenant on Economic, Social and Cultural Rights (ICESCR). Together, these Covenants allow for education and schools “other than those established by the public authorities”.
 - 4.2. The AHRC model does not recognise the absolute protection required by the ICCPR for specified aspects of the freedom of religion. The UN Human Rights Committee has stated, in General Comment 22, that article 18 of the ICCPR contains the absolute rights of “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 the religious and moral education of their children”. The very narrow limitations in article 18(3) of the ICCPR to “manifest” religion or belief are broadened in the AHRC’s general limitations clause and applied to the whole right to freedom of religion. This is a misinterpretation of the ICCPR freedom of religion and would have a significant impact on the interpretation of this right in domestic law. Similar concerns arise for the lack of absolute protection of freedom of expression under article 19 of the ICCPR.
5. There are numerous other misinterpretations of ICCPR rights, notably the AHRC misapplication of the ICCPR’s freedom from torture and its misapplication of the ICCPR’s right to non-discrimination. However, the two noted above are the most egregious with relation to freedom of religion.

Which currently has a higher priority in your view - a Human Rights Act or a Religious Discrimination Bill?

6. A Religious Discrimination Bill providing meaningful protection against discrimination on the basis of religious belief should be a higher priority for legislation in Australia than a Human Rights Act. This would not cure the lack of legislative protection for freedom of religion and expression, but it would go some way to correcting the imbalance in discrimination law, which often comes into conflict with freedom of religion, but which does not cover discrimination on the basis of religion itself.

Does the Commission's proposal depart from the structure of the ICCPR?

7. Yes, the AHRC model departs significantly from the ICCPR's structure. This is primarily in the ways noted above, and in particular:
 - 7.1. moving the right of parents to ensure the religious and moral education of their children in accordance with their own convictions to a different part of the Act, the right to education, rather than including it as part of the right to religious freedom;
 - 7.2. the replacement of narrow and specific limitations clauses within individual rights with a general limitations clause; and
 - 7.3. the failure to acknowledge numerous rights identified as absolute rights under the ICCPR as absolute under the AHRC model.

Yours sincerely,

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