

Introduction

This note is in further response to the Questions on Notice put by Sen. O'Sullivan following the appearance by ACL before the Parliamentary Joint Committee on Human Rights on 20 October.

By way of introduction, it may help to explain the limits of a Human Rights Act, of the type proposed by the Australian Human Rights Commission (AHRC). Such an Act would not offer underlying protection for freedom of thought, conscience and religion as understood under the International Covenant on Civil and Political Rights (ICCPR).

Australia ratified the International Covenant on Civil and Political Rights (ICCPR) in 1980, and thereupon became bound to "give effect" in substantive Australian law to its guarantees.¹ Australia has adequate protection in relation to most rights, but the standout failure is the lack of protection, 50 years on, for freedom of thought, conscience and religion (and freedom of expression), and discrimination on grounds of religion.

The reason is that human rights legislation of that "dialogue model" is intended to preserve the supremacy of Parliament, and therefore has very limited functions, relating mainly to statutory interpretation (within limited parameters), scrutiny obligations in the passage of legislation (which have proved to be ineffective), and requiring public authorities to act human rights compatibly.

Of these, the only charter function with any real effect is the obligation on public authorities to act human rights compatibly, but it would produce the wrong outcomes for two reasons. Firstly, human rights are defined in a way that is incompatible with the ICCPR. Secondly, because the AHRC which would oversee the operation of its Human Rights Act has demonstrated that ICCPR compliance is not a priority to it. The AHRC has failed to adequately uphold Australia's treaty obligations, especially under the ICCPR and the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW), as demonstrated in the ACL's submission (see pages 21-32). The AHRC has a strong preference for interpreting and enforcing human rights legislation (the Sex Discrimination Act 1984 especially) in a way that prioritises the Yogyakarta Principles over such treaties. In the ACL's submission Australia's treaty obligations should prevail.

In order to prevent the AHRC and other similar bodies from putting Australia in breach of its treaty obligations (and detracting from the human rights guarantees to which all Australians are entitled) by a subjective or illegitimate interpretation of its obligations under the ICCPR, it is more compelling now than ever before that the necessary steps be taken to enact in Australian law the rights which Australia has failed to implement in the way that the ICCPR requires. This is most obvious in the case of the freedom of thought conscience and religion, and freedom of expression. It is also appropriate for the AHRC and other similar bodies to be reminded of all their obligations under the seven treaties to which Australia is bound, and which are intended to be the bedrock of Australia's Human Rights Framework. Only then, when domestic law

¹ Article 2(2):

"Where not already provided for by existing legislative or other measures, each State Party to the present Covenant undertakes to take the necessary steps, in accordance with its constitutional processes and with the provisions of the present Covenant, to adopt such laws or other measures as may be necessary to give effect to the rights recognized in the present Covenant."

complies with treaty standards, and those treaty standards are properly respected by bodies with statutory functions to uphold them, could a Human Rights Act of a dialogue model be considered. Such legislation would then only be appropriate if it served a positive purpose, on top of treaty-compliant legislation, and treaty-compliant practices by public bodies with human rights oversight functions.

Australian followers of different religions are now acutely aware of the inadequacy of various proposals which they are offered in substitution for the freedom of thought conscience and religion, and related rights, to which they are entitled under international law. Current examples include the proposals advanced by different governments in the context of religious education, a Religious Discrimination Bill, and a Misinformation Bill. Any claim that the proposals support that freedom are not remotely matched by the proposals themselves. This situation is no longer sustainable.

The AHRC's proposal for a human rights act purports to perfect Australia's acknowledged treaty non-compliance, because of its current deficient law. It does not do that. The terms of the Human Rights Act proposed by the AHRC exacerbate current deficiencies in existing law, for the reasons given below. The outcome would be devastating for freedom of thought, conscience and religion for all Australians.

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

The AHRC model would make matters much worse for the protection of freedom of religion and freedom of expression.

Of all the rights in the ICCPR to which Australia is bound to give effect in its domestic law in accordance with article 2 of the ICCPR,² these two rights are the least protected in Australia to the ICCPR standard.

For reasons already given, a Human Rights Act (as proposed) would not improve upon the fundamental failures which already exist in Australian law concerning those rights.

In fact, a Human Rights Act (as proposed) would exacerbate that absence of protection, for three reasons.

1. It would create a redrafted set of rights (based on the ICCPR but with unjustifiable departures) which would give greater protection than the ICCPR allows to precisely the rights which are frequently claimed as the basis for restricting freedom of religion and freedom of expression. These are discrimination-based rights, the right “not be treated in a degrading way” (not recognised by international law though derived from the prohibition against torture), and the right to recognition as a person before the law (which also has been expanded in the AHRC's proposal beyond its original ICCPR meaning, with significant adverse ramifications

² ICCPR art 2.2: “Where not already provided for by existing legislative or other measures, each State Party to the present Covenant undertakes to take the necessary steps, in accordance with its constitutional processes and with the provisions of the present Covenant, to adopt such laws or other measures as may be necessary to give effect to the rights recognized in the present Covenant.”

if the legal recognition of gender change does not have suitable limits (see the ACL's submission which comments on how the AHRC has advocated for the expansion of that right in ways that detract from Australia's treaty obligations). The impact of the AHRC's Human Rights Act on freedom of religion and freedom of expression would be to reduce their value when asserted in contention with such other "inflated" rights.

2. The AHRC model would also wrongly suggest that it is appropriate to limit freedom of religion and freedom of expression in the way described in the single "limitations clause", when these particular rights can only be restricted, under the ICCPR, in much more confined circumstances of "necessity" (not "reasonableness"), on particular grounds (which are not specified in the AHRC model), applying principles well established by the UN Human Rights Committee, including that the least restrictive approach towards these rights should be adopted wherever possible.

3. The text of the freedom of religion right in the AHRC's human rights act has been redrafted in ways that are inexplicable and adversely impact the protection which Australia has guaranteed to secure towards its people – see next heading.

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

No. The AHRC model cannot be said to be compatible with Australia's treaty obligations.

1. Australia's treaty obligations concerning freedom of religion and freedom of expression remain unfulfilled. The freedoms do not exist in Australian law so as to enable anyone to resist incursion, with a remedy, the ICCPR requires. The AHRC model does not cure this.

2. Worse still, the ICCPR text for freedom of religion has been rewritten in departure of the clearly defined requirements of the ICCPR for that right.

There was some confusion in discussion in the Parliamentary Joint Committee on Human Rights hearing on 20 October, about the extent to which Article 18 of the ICCPR contains absolute rights. It may help to explain that the whole of Article 18 is "non-derogable", which is important to acknowledge because it speaks to the fundamental importance of this right in the scheme of the ICCPR, when very few rights have that status.

However only certain components of article 18 are "absolute" in the sense that in no circumstances is it permissible to limit them in any way. The only right within article 18 that can be restricted at all is the right to manifest religion or belief, which may only be limited in the circumstances set out in article 18(3).

Two provisions of article 18 (article 18(2) and article 18(4)) are "absolute" in their entirety, as acknowledged by the UN Human Rights Committee.

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." It is an important provision with no substantive legal protection in Australia. Properly enacted it should provide protection against being punished for holding particular beliefs, which is especially important when prominent figures in Australian society, as well as ordinary Australians, increasingly are punished merely for holding particular beliefs, or are subjected to pressures inconsistent with article 18(2). Instead of recognising the need for such protection, the AHRC model removes it, by turning this right into an incomprehensible provision related to the manifestation of religion or belief,

which would then remove its absolute status and allow restrictions on it under the excessively broad “limitations clause”.

The other absolute right is Article 18(4), by which Australia undertook “to have respect for 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”. The AHRC model only recognises the similar looking but quite different right under the International Covenant on Economic Social and Cultural Rights, where it is not a right to the nature freedom of religion, it is not absolute, it is confined to a right to schooling, which rule out alternatives to formal schooling (such as homeschooling, common amongst Christians), and it is not a right based on the choice of parents any longer.

In both cases, the incompatibility with the ICCPR is that these rights are so completely rewritten in the AHRC model as to no longer resemble the rights contemplated in the ICCPR, and certainly to deprive them of absolute status which is central to nature.

3. Further fundamental incompatibility exists in the adoption of a “limitations clause”, already mentioned, which allows an impermissible range restriction of freedom of religion and freedom of expression.

How does the AHRC model misinterpret ICCPR rights?

See previous heading. The ACL would also repeat its observations concerning the AHRC’s position that treaties should be interpreted in accordance with the Yogyakarta Principles, and way round.

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

A Human Rights Act should have no priority at all over legislation that is needed to provide complete protection for freedom of thought conscience and religion, and freedom of expression. Given the limited functionality of a Human Rights Act, if even one that is properly conceived, it would be powerless to enable any individual to resist violation of those freedoms. Before a charter is considered, protection should exist on a level playing field for freedom of religion and freedom of expression, to the standard required by the ICCPR, alongside other rights, to avoid an inappropriate “hierarchy” of rights.

No government so far has made any proposal that gives proper protection for freedom of religion. Australians are entitled to that protection by legislation, to make up for the inadequate coverage of the common law and Constitution (section 116 and the implied freedom of political communication). This is the highest priority.

It is a continuing source of embarrassment on the world stage that in certain respects Australia does not fully protect against discrimination on grounds of religion. This obviously needs to be corrected, in clear and generous terms.

However, a Religious Discrimination Bill (RDB) is not the answer to Australia’s failure to protect freedom of thought, conscience and religion. The two are separate, but both are essential.

The outcome of the inquiry into the legal protection of religious freedom in Australia chaired by Hon. Philip Ruddock was the recommendation for an RDB. Two “Exposure Drafts” followed, and in 2021 the most recent RDB package was introduced but lapsed. These have principally focused on protection against discrimination on grounds of religion. The very fact that every RDB has been so controversial, even when proposing less than Australians are entitled to, is symptomatic of a serious problem.

Australia’s discrimination law is excessively protective, and supported to varying degrees across the Commonwealth, states and territories with anti-vilification laws. Even if this were remedied by an RDB, it would not be enough. The focus of a proposed RDB is protection against discrimination, not positive protection for freedom of thought, conscience and religion. Discrimination legislation is needed but it is the wrong vehicle for protecting freedom of religion.

For reasons previously given in the ACL’s submission (and here) AHRC’s model should be rejected in its entirety. It represents a further backward step in the protection owed to people of faith.

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

See previous headings, particularly concerning the “limitations clause”, the inflation of rights which are commonly used as the basis for limiting freedom of religion and freedom of expression, and the unsupportable rewriting of article 18.

In addition, some rights are treated as “absolute” in the AHRC’s analysis, when this is contestable, and rights within article 18 which have long been recognised as absolute are deprived of that status.

Conclusion

As noted in the ACL’s submission (Conclusion):

- “The AHRC’s proposals for the Human Rights Act disclose an unambiguous intention to impoverish the protection due to “freedom of religion” under the ICCPR, and to enlarge the protection given to the rights which contend against freedom of religion and religious interests in Australia’s contemporary political environment. The outcome of the Human Rights Act in this form would be to ensure that “freedom of religion” is defeated when “balanced” against “freedom from discrimination,” and when contending with the “absolute” rights of “recognition as a person before the law” and “protection against being “treated...in a...degrading way”. The proposed “limitations clause” exacerbates this, allowing greater scope for restricting rights than the ICCPR allows.
- The AHRC’s vision places higher value on some rights than others, and would promote the rights of some Australians to the cost of the rights of others. We instead support adherence to all the rights which are established under the ICCPR, on the precise terms of the ICCPR, as this better promotes rights protection than the proposed Human Rights Act ever could. The ICCPR gives full recognition to all rights of the individual, for everyone without discrimination, in keeping with inclusive democratic principles, in a way that we believe aligns with the expectations of Australians.
- The Human Rights Act proposal is deeply politically infused. A great deal of the division and tension in Australia would disappear if Australia stepped up its commitment to implementing its international law obligations, under the key treaties which already bind it. This would leave less room for fundamental rights to be the subject of constant political contest (which the Human Rights Act would inflame) through a continuous succession of Inquiries, in which fundamental human rights like freedom of religion are not properly acknowledged and respected. Such processes appear to be geared towards particular politically

targeted outcomes in a way that does not promote but rather undermines or even leads to the destruction of fundamental human rights.

- The AHRC's proposals for the Human Rights Act may be the product of extensive consultation, but engagement may not so far have occurred across a wide spectrum of opinion.
- The Human Rights Act's description of rights (and limitations) is wholly untenable. This is exemplified by the way that fundamental rights such as freedom of religion as guaranteed in the ICCPR have already been traded away. The fact that this has been facilitated by the AHRC when it has statutory duties to uphold the ICCPR is disturbing, particularly given its future role proposed under the Human Rights Act.
- We therefore reject the AHRC's proposal for a Human Rights Act entirely.
- The AHRC's Position Paper is rightly concerned that "UN Treaty bodies have repeatedly concluded that core treaties have not been adequately incorporated into Australia's legal system". The ICCPR is the standout example of such treaty failure, especially by not implementing protection required by the ICCPR for freedom of thought conscience and religion, and freedom of expression. As a "dialogue" form of Human Rights Act, preserving Parliamentary supremacy, it would not "adequately incorporate into Australia's legal system" the required protection for those freedoms, even if all the rights in that Act were exactly copied from the ICCPR. A dialogue model of Human Rights Act only has the limited functions already outlined.
- The outcome of the AHRC's proposal is much worse than failure to implement protection. It would produce a Human Rights Act which fundamentally distorts or removes key rights, and allows rights to be limited illegitimately, for reasons that the AHRC has not been able to explain in its Position Paper. If it cannot do so adequately in its Position Paper, how will it answer for this, e.g. in the next periodic review before the Human Rights Committee?
- If enacted now, it would become infamous as a Human Rights Act that is ineffective in exposing even the most profound shortcomings in legal protection required by the ICCPR. For example, because of the way it defines rights, the Act would find no fault in the lack of any enforceable protection against discrimination of proper scope on grounds of religion in federal legislation. On the contrary, the Act would endorse that situation as fully human rights compliant. The lack of such protection is one the most fundamental failures possible in any human rights legal system. The AHRC's model would be unable to raise an objection against it.
- We therefore submit that proposals should be advanced immediately to protect against discrimination on grounds of religion in a robust religious discrimination Act, as the first necessary step in the right direction.
- We would recommend that if any Human Rights Act is to be adopted:
 - the protection required by the ICCPR for freedom of religion, freedom of expression, freedom of assembly and freedom of association be implemented in Australia before any such Human Rights Act. These are closely related but inadequately protected in Australia. For reasons already given, a Human Rights Act is no substitute for incorporating these rights effectively in law.
 - the human rights protected should be scheduled, and exactly copy the text of all ICCPR rights including the specific terms of limitation that define them (as the UK Human Rights Act does in scheduling European Convention rights), and certain additional rights under the ICESCR.
 - such human rights be interpreted in accordance with treaty principles, in accordance with General Comments issued by the Human Rights Committee and the Committee on Economic Social and Cultural Rights, as the appropriate UN treaty bodies.
 - the operation of treaties which are binding on Australia (such as CEDAW) should have priority in interpreting human rights over other sources of international law.
 - greater expectations be placed on legislative scrutiny bodies to justify all restrictions on human rights in proposed legislation, in accordance with the justifications and principles required by the treaty bodies.
 - guidance to public authorities, and materials produced by public authorities, in implementing human rights be publicised, and processes be established for determining strict compliance with human rights, with remedies for deviation.
 - an impartial body with competence in the ICCPR and ICESCR be charged with overseeing the implementation of human rights.
- The Parliamentary Joint Committee on Human Rights was established with a specific mandate to examine Bills and legislative instruments for compatibility with human rights, by reference to the ICCPR, ICESCR and a number of other international instruments. We respectfully entrust this submission to the Committee, confident in its ability to appreciate the divergence between the proposed Human Rights Act, and the obligations of Australia under those treaties."