30 June 2023

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

By e-mail: human.rights@aph.gov.au

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

Who are we?

1. This submission is on behalf of, and co-signed by:

   - Australian Baptist Ministries
   - Australian Christian Churches
   - Anglican Church Diocese of Sydney
   - Presbyterian Church of Australia in NSW
   - Seventh-day Adventist Church

2. The submission was coordinated by *Freedom for Faith,* a Christian legal think tank that exists to see religious freedom for all faiths protected and promoted in Australia and beyond. Freedom for Faith is led by people drawn from a range of denominational churches including the Anglican Church Diocese of Sydney, The Catholic Church, the Australian Christian Churches, Australian Baptist Churches, the Presbyterian Church of Australia, and the Seventh-day Adventist Church in Australia. It has strong links with, and works co-operatively with, a range of other faith groups in Australia.

3. We welcome the opportunity to make this submission and we give consent for this submission to be published. Our contact details are as follows.

Freedom for Faith

Chair:	The Right Reverend Dr Michael Stead Executive
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Executive Summary

4. We are concerned about the ongoing and systematic imbalance in the status of the right to freedom of religion with respect to other rights. The current balance in Australia does not reflect international conventions such as the International Covenant on Civil and Political Rights (**ICCPR**).

   A. The Human Rights Framework (**HRF**) has not been effective in addressing this imbalance. This is not due to a failure of the HRF as a concept, but to the lopsided implementation and failure to recognise religious freedom as a human right.

   B. Recent legislative developments have exacerbated this lopsidedness; increasing protections for other human rights and creating new "rights" not found in international treaties. Australian governments continually fail to protect religious freedom. As other rights are increasingly protected, religious freedom is incrementally undermined.

   C. In principle, a federal Human Rights Act could address this issue by giving the full suite of ICCPR rights legal force as actionable rights under Australian law. This could help to balance overlapping rights. However, the Human Rights Charter proposed by the AHRC modifies many rights, reading-down religious freedom in comparison to other rights, lowering the bar for overriding religious freedom, and introducing new "rights" that are held to be absolute contrary to international law. We oppose the AHRC's proposed Human Rights Charter.

   D. Existing Federal mechanisms have failed to address this imbalance. The AHRC has consistently worked to undermine religious freedom in comparison to other human rights, despite the AHRC's duty to uphold the ICCPR. There is a decades-long pattern of submissions and proposals that undermine religious freedom or rank it as subordinate to other human rights.

   E. There is no evidence that existing Human Rights Acts or Charters in the ACT, Victoria, or Queensland have protected (or sought to protect) religious freedom as a human right. Like the AHRC, they distort and misrepresent ICCPR rights, reading-down religious freedom. Additionally, in multiple examples of legislation that risked significantly impinging on religious freedom, there is no indication that the mechanisms built into the Acts triggered consideration of the human rights implications, especially for religious freedom.

Terms of Reference

5. We welcome the long overdue review of the Australia's Human Rights Framework introduced in 2010, noting that the planned review in 2014 did not take place.

6. The terms of reference established by the Attorney General cover:

   - the scope and effectiveness of Australia's 2010 Human Rights Framework and the National Human Rights Action Plan, and whether the Framework should be re-established or improved; and
   - relevant developments since 2010 in Australian human rights laws.

7. The Parliamentary Joint Committee on Human Rights has invited specific comment on the following matters.

   - whether the Australian Parliament should enact a federal Human Rights Act, including consideration of the recently announced AHRC proposals;
   - The adequacy of existing federal mechanisms to protect human rights:
     - the Parliamentary Joint Committee on Human Rights;
     - the Australian Human Rights Commission;
     - the process of how federal institutions engage with human rights, including requirements for statements of compatibility; and
   - the effectiveness of existing human rights Acts/Charters in protecting human rights in the Australian Capital Territory, Victoria and Queensland

8. This submission will make brief comments on each of the above.

A) The scope and effectiveness of Australia's 2010 Human Rights Framework and the National Human Rights Action Plan, and whether it needs to be improved.

9. The Human Rights Framework (HRF) launched in 2010 was based on 5 principles: Reaffirm, Educate, Engage, Protect and Respect.

10. The HRF **reaffirms** that its basis is the seven core UN human rights treaties to which Australia is a party.[1]

- the International Covenant on Civil and Political Rights;
- the International Covenant on Economic, Social and Cultural Rights;
- the Convention on the Elimination of All Forms of Racial Discrimination;
- the Convention on the Elimination of All Forms of Discrimination Against Women;
- the Convention Against Torture and other Cruel, Inhuman and Degrading Treatment or Punishment;
- the Convention on the Rights of the Child; and
- the Convention on the Rights of Persons with Disabilities.

11. The HRF established two key mechanisms to **protect** and **respect** human rights:

- The Parliamentary Joint Committee on Human Rights, which will provide greater scrutiny of legislation for compliance with Australia's international human rights obligations under the seven core UN human rights treaties to which Australia is a party.
- Legislation to ensure that each new Bill is accompanied by a statement which assesses its compatibility with the seven core UN human rights treaties to which Australia is a party.

12. We support the principle that the basis of Australia's Human Rights Framework is the group of seven core UN human rights treaties to which Australia is a party.

13. We underscore this point as a foundation for much of the critique that follows. As we will show below, we are concerned that the implementation of the HRF has not been a balanced implementation of these seven core UN human rights treaties. This is due to:

- The lopsided implementation of rights that privileges one right over others;
- The introduction of novel human rights not articulated in the UN treaties; and
- The reinterpretation of UN treaty commitments via the Yogyakarta Principles, even though these principles have not been formally accepted by the UN General Assembly, the UN Human Rights Council and other UN bodies.

[1] https://www.aph.gov.au/-/media/Committees/Senate/committee/humanrights_ctte/Aus_Human_Rights_Framework/Aust_HR_Framework_2010.pdf, Page 4.

14. An early example of this lopsided implementation is the **National Human Rights Action Plan 2012**. The word "religion" appears in the very first sentence of the National Human Rights Action Plan 2012.

> "Australia's National Human Rights Action Plan builds on extensive work by Australian governments to create an inclusive society where all are valued and all have the opportunity to participate fully regardless of factors, such as age, gender, race, ***religion*** or disability." [emphasis added]

15. After this promising start, however, there is not a single reference to religion in the 356 itemised action points of the plan. The National Human Rights Action Plan 2012 is not a balanced implementation of Australia's international treaty obligations. It did not identify a *single* action to respect or protect the right to freedom of religion.

16. It ought to be a source of international embarrassment that Australia continues not to have a Religious Discrimination Act or proper protection for the right of faith-based organisations to employ, or prefer to employ, staff who are committed to the religious beliefs of the organisation in accordance with accepted understandings of international human rights law.

17. Relevant international instruments, for example, include Article 6(b) of the Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief, 1981 and Article 18.4 of the ICCPR). As HREOC commented in 1999:

> "[S]pecial provision for religious institutions is appropriate. It is reasonable for employees of these institutions to be expected to have a degree of commitment to and identification with the beliefs, values and teachings of the particular religion… Accommodating the distinct identity of religious organisations is an important element in any society which respects and values diversity in all its forms."[2]

18. To answer the question posed by the terms of reference, we do not believe that the framework itself needs to be re-established or improved, but rather that it is the lop-sided implementation of the framework that needs to be addressed, which we will explain in the analysis that follows.

[2] https://humanrights.gov.au/sites/default/files/content/pdf/human_rights/religion/article_18_religious_freedom.pdf. Page 109

B) Relevant developments since 2010 in Australian human rights laws.

19. Since 2010, there has been a gradual erosion of the right of faith-based organisations to maintain their religious beliefs and ethos. Things that were taken for granted only a few years ago are no longer accepted. Most egregiously, Victoria has removed or severely restricted the right of faith-based organisations to maintain their ethos and values in the employment of staff in Christian schools and other organisations in the changes it introduced to protections for religious bodies via the *Equal Opportunity (Religious Exceptions) Amendment Act 2021*.

20. All other exemptions were wiped out by this legislation. The message is clear: faith-based organisations in Victoria may still be allowed to have their religious beliefs within the limitations the law permits, but they are not entitled to uphold the sexual morality taught by their religion, even for heterosexual relationships. Similar laws were passed in the Northern Territory at the end of 2022.

21. Victoria has also made prayer for particular purposes unlawful in the context of the *Change or Suppression (Conversion) Practices Prohibition Act 2021*. To illustrate how extreme this law is, it would appear to be unlawful for a pastor (or indeed any person) to pray with a bisexual man or woman to help the person to be sexually faithful in a heterosexual marriage, since this would be to "suppress" that part of their sexuality that involves same-sex attraction. A similar law to prohibit so-called conversion therapy exists in the ACT, although it is not so specific about prayer.

22. There are threats to religious freedom in other states and territories as well. The rights of faith-based organisations to maintain their values and standards in relation to employment of staff is quite limited in Tasmania: see s.51 of the *Anti- Discrimination Act 1991* (TAS). In Queensland, Section 25(3) of the *Anti- Discrimination Act 1991* (QLD) imposes severe limitations on the right of faith-based schools to select staff on the basis of religious belief. Now the Queensland Human Rights Commission wants to restrict that right further by providing in legislation that a school cannot insist on a science teacher being an active adherent of the religion.[3] Other jurisdictions are considering similar reforms.

23. Together, these laws constitute a major attack on the right of religious institutions, of whatever faith, to remain distinctive, and to adhere to their religious values. The restrictions apply to Jewish and Islamic organisations as well as to Christian ones.

24. The Australian Government ultimately has a responsibility to the international community to uphold the commitments it has made by signing international conventions. While it is a responsibility shared with the states, Federal Parliament has overridden state laws in the past under the external affairs power. It can do so again. There were provisions in the Religious Discrimination package of legislation before the Federal Parliament in early 2022 to override Victoria's *Equal Opportunity Amendment*

[3] https://www.qhrc.qld.gov.au/__data/assets/pdf_file/0012/40224/QHRC-Building-Belonging.WCAG.pdf

Act to the extent to which its provisions were incompatible with the proposed federal law, but this bill failed to pass.

25. The Federal Government and Parliament have held (or commissioned) a substantial number of inquiries on religious freedom issues. Despite huge concern in the community on these issues, no legislation has been enacted that give any comfort to people of faith who perceive their fundamental rights and freedoms to be under threat.

C) A federal Human Rights Act?

26. We note that, when the Human Rights Framework was implemented in 2010, the then Attorney-General stated:

> The Framework does not include a Human Rights Act or Charter. While there is overwhelming support for human rights in our community, many Australians remain concerned about the possible consequences of such an Act. The Government believes that the enhancement of human rights should be done in a way that as far as possible unites, rather than divides, our community. The Government is committed to positive and practical change to promote and protect human rights. Advancing the cause of human rights in Australia would not be served by an approach that is divisive or creates an atmosphere of uncertainty or suspicion in the community.[4]

27. Had the Australian Human Rights Commission's proposal for a Human Rights Act for Australia been a measured and balanced implementation of the seven core UN human rights treaties to which Australia is a party, it might have gone a long way to addressing the "concern", "uncertainty" and "suspicion" in the community identified by the Attorney-General in 2010. Instead, this proposal is so inadequate for this task that it can only serve to confirm community fears that the Government is unconcerned to protect religious freedom rights.

28. We believe that the Australian Human Rights Commission's proposal for a Human Rights Act is fundamentally flawed, for the following five reasons.[5]

(1) Unwarranted diminution of some UN Treaty Rights

29. The proposed Human Rights Act is based on a "list of rights" which purport to encapsulate treaty rights, such as the ICCPR and the International Covenant on Economic Social and Cultural Rights (**ICESCR**). However, some rights are materially altered from the UN treaty form.

30. For example, the implementation of the ICCPR Article 18 protection of freedom of thought, conscience and religion is significantly impaired in the HRA version. ICCPR 18(2) has been rewritten as follows (emphasis added).

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[4] https://www.aph.gov.au/-/media/Committees/Senate/committee/humanrights_ctte/Aus_Human_Rights_Framework/Aust_HR_Framework_2010.pdf. Page 3.

[5] The following analysis draws on the work of Dr Paul Taylor, published: https://lawandreligionaustralia.blog/2023/03/20/a-human-rights-charter-for-australia-a-guest-blog-post/ and https://lawandreligionaustralia.blog/2023/04/14/chart-a-better-course-guest-post-on-an-australian-human- rights-charter-part-2/

ICCPR 18(2)	Proposal
No one shall be subject to coercion which would impair his freedom to have or to adopt a religion or belief of his choice.	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***.

31. The addition of the limiting clause "in worship, observance, practice or teaching" is both unclear and unnecessary. Somewhat bizarrely, it would seem to permit coercion of an internal belief to the extent that the belief was not openly manifest in worship, observance, practice or teaching. This is contrary to the ICCPR, in which the freedom to hold a belief is absolute.

32. There is a similar reading-down of the right in ICCPR 18(4) requiring "respect for the liberty of parents…to ensure the religious and moral education of their children in conformity with their own convictions". This has been excised, and only partially replaced with a proposed "Right to Education":

ICCPR 18(4)	Proposal – under "Right to Education"
… 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.	A child's parents or guardian ***may choose schooling*** for the child 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.

33. This redrafting significantly limits a broadly expressed "liberty of parents … to ensure (etc)" to a limited right to "choose schooling … to ensure (etc)". It is also unclear whether "their convictions" in the proposed redrafting includes the child's conviction.

34. There are other instances where the rights of parents have been diminished or removed altogether. For example, the ICCPR right to a child's protection "on the part of his family" has been omitted, and the role of the State enhanced.

ICCPR 24	Proposal
1. Every child shall have, without any discrimination as to race, colour, sex, language, religion, national or social origin, property or birth, the right to such measures of protection as are required by his status as a minor, ***on the part of his family,*** society and the State. 2. Every child shall be registered immediately after birth and shall have a name. 3. Every child has the right to acquire a nationality.	1. Every child has the right, without discrimination, to the protection that is needed by the child by reason of being a child. ***2. Public authorities shall take into account the best interests of every child as a primary consideration in all actions concerning them***. 3. Every child shall be registered immediately after birth and shall have a name. 4. Every child has the right to acquire a nationality.

(2) Putting the Definition of Discrimination beyond Review

35. The HRA proposal states that:

> "Discrimination in the context of the Human Rights Act has the same meaning as discrimination in federal discrimination laws…"

36. The commentary on p.341 argues that this "ensures consistency between the Human Rights Act and discrimination law regime."

37. However, this approach undermines the very rationale and purpose of a Human Rights Act because it puts the legislative definition of discrimination beyond review. As noted in chapter 4 of the HRA proposal, the AHRC proposes a ***dialogue model*** for a federal Human Rights Act. Central to this model is the opportunity to assess the human rights compatibility of legislation against an external standard. However, if discrimination in the external standard (i.e., the HRA) is defined to mean whatever it means in federal discrimination laws, there is never scope for a statement of incompatibility, regardless of whether the legislative definitions are inconsistent with the ICCPR and ICESCR definitions of discrimination.

38. It is also noteworthy that, whereas ICCPR Articles 2 and 16 use the following phrase to give examples of prohibited discrimination – "such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status", the HRA definition of discrimination omits this description. Not only does this reinforce the omission of religion as a protected attribute, but it also opens the door for novel protected grounds to be asserted.

(3) "Recognition before the Law" has been redefined by the Yogyakarta Principles

39. In the ICCPR, the right to recognition as a person before the law ensures the limited but vital right that every individual is able to enjoy and assert their legal rights, which would be denied them if they were not recognised as having legal personality. Yogyakarta Principle Three materially extends this right, as follows:

> "Everyone has the right to recognition everywhere as a person before the law. Persons of diverse sexual orientations and gender identities shall enjoy legal capacity in all aspects of life. Each person's self-defined sexual orientation and gender identity is integral to their personality and is one of the most basic aspects of self-determination, dignity and freedom."

40. The Yogyakarta Principles were drawn up by activists associated, for the most part, with universities or non-government organisations. They are not part of the accepted body of international human rights law because they have never been incorporated into any Convention to which countries are signatories, or a formal Declaration of the United Nations. Recognition as a person before the law is an absolute right which, by definition, does not have to yield to other rights. If sexual orientation and gender identity is inserted into this category, there would never be any question of "balancing" the right to legal recognition of a person's "self-defined…gender identity" with any other right that might be in conflict with this.

(4) ICCPR Article 7 is redefined as "treated [in a] degrading way".

41. The prohibition in ICCPR Article 7 against "cruel, inhuman or degrading treatment" has been reframed as being "treated or punished in a cruel, inhuman or degrading way".

ICCPR 7	Proposal
No one shall be subjected to torture or to ***cruel, inhuman or degrading treatment or punishment***	A person must not be— (a) subjected to torture; or (b) ***treated or punished in a cruel, inhuman or degrading way***;

42. The guidance provided by the Attorney-General's Department in relation to the prohibition on torture and cruel, inhuman or degrading treatment or punishment demonstrates that "degrading treatment" is a relatively high threshold.

> Conduct not meeting the threshold of torture may be regarded as cruel, inhuman or degrading treatment or punishment ('ill treatment') and, if so would be prohibited under article 16 of CAT as well as article 7 of the ICCPR. The ill treatment may be either physical or mental.
>
> While ill treatment is not defined in the ICCPR or CAT, the UN treaty bodies responsible for overseeing the implementation of these treaties have provided guidance on the sort of treatment that is prohibited. Examples of cruel, inhuman or degrading treatment include acts carried out by police officers using excessive force, such as using restraints where they are not required, using a weapon to punish an offender for not cooperating or unduly prolonged detention that causes mental harm. Punishment may be regarded as degrading if, for instance, it entails a degree of humiliation beyond the level usually involved in punishment.[6]

43. The proposed reframing of Article 7 materially lowers the threshold, because "treated… in a degrading way" could include speech and/or religious practice that an individual claims is "degrading".

(5) The standardised limitations clause is inconsistent with the ICCPR.

44. The Human Rights Act proposed a one-size-fits-all "limitations clause" for all rights (except those which are absolute), in the following terms:

> 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.

45. This is inconsistent with the ICCPR, which tailors the limitation clause appropriate to the right in question. The implication of the HRA proposal is to make the limitation clause much weaker for certain rights, such as freedom of thought conscience and religion, freedom of expression, freedom of assembly and freedom of association. The concept of "necessity" (which is present in the ICCPR limitation clauses such as Articles 12(3), 19(3), 21 and 22(2), and implicit in Art. 18(3)) has been replaced with the lower test that a

[6] https://www.ag.gov.au/rights-and-protections/human-rights-and-anti-discrimination/human-rights-scrutiny/public-sector-guidance-sheets/prohibition-torture-and-cruel-inhuman-or-degrading-treatment-or-punishment

restriction needs only to be "demonstrably justified in a democratic society". This is a much easier test to satisfy than "necessary".

46. Furthermore, there are some rights which the ICCPR recognises as absolute, which are not recognised as such in the Human Rights Act proposal. For example, Article 4 of the ICCPR allows "derogation" from some rights in times of public emergencies, but art 4(2) provides that some rights cannot be derogated from under this general provision, including rights under Article 18. Article 18 includes its own provision allowing qualification of "manifestation" of religion, but other aspects of Article 18, such as the right not to be coerced into changing religion, are not qualified at all.

Conclusion to this section

47. The model for the Human Right Act proposed by the Australian Human Rights Commission is fundamentally flawed, for the reasons set out above. If Australia is to have a Human Rights Act, the Act should schedule Australia's covenanted commitments to the ICCPR and ICESCR in full, in the same way that the UK Human Rights Act schedules the European Convention rights in full.

48. The departures from the text of the ICCPR and ICESCR identified above suggest an intention to implement these rights at variance from the covenanted standards. This means that existing jurisprudence and General Comments on the international covenants become irrelevant in an Australian context. Since the constitutionality of any proposed HRA will rest primarily, if not entirely, on the external affairs power, a lack of concordance with Australia's international obligations may cast doubt upon the validity of the legislation.

D) The adequacy of existing federal mechanisms to protect human rights

(D1) The Parliamentary Joint Committee on Human Rights;

49. There seems to be a lack of serious research as to whether the role of scrutiny committees considering human rights has made any difference to the enactment of legislation. One of the few attempts to review this question has been made by Professor Jeremy Gans from Melbourne Law School. Professor Gans notes:

> …the vast majority of SARC's reports about human rights matters are met with rejection, in the form of contrary human rights assessments, stonewalling or simply being ignored. Such is life in a country with a strong party system, where all the real decisions are made long before a law ever reaches parliament and where any actual parliamentary decisions are made with an eye to deals and spectacles.[7]

[7] https://hrscrutiny.wordpress.com/2014/11/04/some-self-scrutiny-in-victoria/

50. Professor Gans' comments relate primarily to the Victorian human rights scrutiny scheme, but he suggests that they apply to the Federal scheme as well. He does note that sometimes these recommendations, even if ignored at the time, may be picked up in later amendments. But it seems that this mechanism is not very effective in guarding human rights values as laws make their way through Parliament.

51. We are not aware of any substantive legislative changes that have occurred because a bill has had an adverse assessment from the Parliamentary Joint Committee on Human Rights. This tends to call into question of the utility of the process.

(D2) The Australian Human Rights Commission

52. AHRC has a legislative mandate to champion for freedom of religion, because this is integral to Australia's obligations under its international commitments. However, they have failed in this role, often arguing against religious freedom or advocating that this be overridden at a lower threshold than international law stipulates.

53. Whatever the views of different Presidents and Commissioners might be, there seems to be a pattern of submissions to Senate Committees and other such inquiries consistently reflecting a very restrictive view of freedom of religion and conscience over the last 20 years.

54. This is in contrast to the position the Commission took in its major inquiry in 1999: *Human Rights and Equal Opportunity Commission, Article 18: Freedom of Religion and Belief*. Indeed, in recent years the commission has demonstrated a hostility to freedom of religion if it conflicts with other more favoured rights. A few examples showing how long-standing this bias has been are set out below.

55. A conference paper was given in 2009, by Tom Calma, a Commissioner who was leading a review of religious freedom, and a senior official of the Commission.[8] They were reporting on some early findings of the religious freedom project. The paper began with the remarkable sentence:

> The compatibility of religious freedom with human rights is the subject of the most comprehensive study ever undertaken in Australia in this area.

56. No doubt this contrast between freedom of religion and human rights, as if religious freedom was not a human right, was unintended and unconscious; but it was revealing. The title of their paper wasn't much better. The title, "Freedom of religion and belief in a multicultural democracy: an inherent contradiction or an achievable human right?", certainly recognizes that religious freedom is a human right. However, the implication within the question contained in that title is that perhaps freedom of religion cannot, or should not, survive in a multicultural democracy. The contrast with the ICCPR could not be more marked.

[8] Calma and Gershevitch (2009). *Freedom of religion and belief in a multicultural democracy: an inherent contradiction or an achievable human right?*

57. The Australian Human Rights Commission has also been strongly opposed to extending the right of conscientious objection. An example is its submission to the Select Committee on the Exposure Draft of the Marriage Amendment (Same-Sex Marriage) Bill.[9] The Commission's rationale for opposition to the legal recognition of the human right of conscientious objection is not entirely clear. Freedom of conscience, in Art 18.1, does not come with an asterisk saying "only in extremely limited circumstances". In contrast to the AHRC, the UN Human Rights Committee has sought to draw to the attention of States parties "the fact that the freedom of thought and the freedom of conscience are protected equally with the freedom of religion and belief".

58. The AHRC has also consistently failed to come to the defence of religious freedom, even in cases of egregious breach. An example is its views on the Religious Discrimination Bill for a Senate Committee which held hearings in January 2022.[10]

59. One of the issues was whether the federal law (in clause 12 of the Bill) should override s17 of the Tasmanian Anti-Discrimination Act 1998. The Commission came to the defence of the Tasmanian law. It did not address the most serious concerns of the faith community about its application, namely, the case brought against Archbishop Porteous for explaining Catholic teaching on marriage. While the case was eventually dropped by the complainant, this was only after a prolonged process being initiated and supported as a legally valid complaint by the Tasmanian Anti- Discrimination Commissioner. The costs of defending the claim were borne by the Church and not by the complainant.

60. One might have thought that a submission dealing with this issue, in the context of a Bill concerned with religious freedom and discrimination, would have given a more rigorous consideration to the protection of religious freedom.

61. Another example is the AHRC's submission to the Australian Law Reform Commission's Inquiry into Religious Educational Institutions and Anti-Discrimination Laws.[11] In that submission, the AHRC elevated the "opportunity to be employed by a faith-based school" over the human rights of freedom of belief, association, and the right of parents to have their children educated in conformity with their moral and religious convictions.[12] Disturbingly, the AHRC took an even more radical position than the controversial ALRC report it was responding to, and opposed two proposals that were moderately supportive of religious freedom.[13] Proposal 7 exempted the curriculum from the SDA, and Proposal 9 allowed a faith-based school to terminate an employee for "actively undermining the ethos of the institution". The AHRC opposed even these minor concessions to the religious ethos of a school. These are two of the many examples in

[9] https://humanrights.gov.au/sites/default/files/AHRC_170117_Submission_to_Marriage_Amendment_Exposure_Draft.pdf. Pages 109 ff.
[10] https://humanrights.gov.au/sites/default/files/ahrc_submission_on_second_exposure_draft_of_religious_freedom_bills.pdf.

[11] https://www.alrc.gov.au/wp-content/uploads/2023/03/384.-Australian-Human-Rights-Commission.pdf.
[12] Ibid, para 88.
[13] Ibid, paras 152, 197.

the AHRC submission where religious freedom is subordinated to other interests – including interests that are not recognised human rights.

62. The justification of this re-balancing of rights comes from their interpretation of Human Rights Committee General Comment No. 31, from which they extrapolate grounds to limit religious freedom.[14] However, General Comment No. 31 does not give grounds for limiting ICCPR 18.3. Rather, the Comment states that "any restrictions on any of those rights must be permissible under the relevant provisions of the Covenant." That is, the only grounds for limitation are those explicitly stated in the ICCPR. Furthermore, General Comment No. 22, states that that "the liberty of the parents and guardians to ensure religious and moral education cannot be restricted".

63. This failure to correctly represent these foundational human rights instruments is unacceptable in a body created to uphold Australia's international human rights obligations.

64. In another section of their submission, the AHRC noted the jurisdictions that did not allow faith-based schools to preference staff who lived out their faith on matters of sexuality. The Commission asserted, without any supporting evidence, that this overriding of religious freedom "does not appear to have had any adverse impact on the ability of religious educational institutions to teach according to their faith."[15] The Commission appears to believe that the mere existence of jurisdictions that do not protect human rights are sufficient evidence that the rights do not need protecting. This impression is reinforced in another section, where the Commission specifically states that a previous recommendation was designed to "preserve what was then the status quo across most Australian jurisdictions", rather than advocate for changes needed to preserve human rights on religious freedom.[16]

65. The Commission's failure to identify or acknowledge examples of the detriment caused to faith-based schools and parents in those jurisdictions is not a basis for declaring that those rights do not deserve protecting.

66. The Commission has also demonstrated a tendency to re-interpret established human rights instruments, such as the ICCPR or CEDAW, through the Yogyakarta Principles, which are not recognised by either the United Nations or Australia. The Commission described the Yogyakarta Principles as "persuasive in shaping our understanding of how existing binding human rights obligations apply and relate to people who are sex and gender diverse."[17]

67. For example, in AH & AB v State of Western Australia, the Commission intervened to argue for a particular statutory construction of the *Gender Reassignment Act 2000* (WA)

[14] Ibid, paras 9, 27.

[15] Ibid, para 82.

[16] Ibid, para 160.

[17] https://humanrights.gov.au/sites/default/files/document/publication/SOGII%20Rights%20Report%202015_Web_Version.pdf. Page 82.

that, in their words, "was consistent with the right to recognition as a person before the law under article 16 of the ICCPR and the right to privacy under article 17 of the ICCPR *as understood by the Yogyakarta Principles*".[18] From this language, it appears that the Commission's conclusions could not be reached through established human rights instruments, such as the ICCPR, and instead needed this to be reinterpreted through the lens of the Yogyakarta Principles to reach their desired position. Again, it must be emphasised that the Yogyakarta Principles are not a recognised part of the binding international human rights regime, and reliance on the Principles to change the understood meaning of articles in the ICCPR is problematic.

68. The submitters, at this time, do not have confidence in the AHRC as a defender of religious freedom. We perceive a systemic bias against people of faith – or at least the more socially and theologically conservative traditions of faith. Freedom for Faith has argued for the appointment of a Religious Freedom Commissioner to help provide a counterbalance to the secular and anti-religious voices within the Commission's professional staff. It is important that such an office-holder be called a Religious Freedom Commissioner, not a religious discrimination commissioner. The latter is a much narrower role. There is much more to human rights than just freedom from discrimination, as Article 18 of the ICCPR makes clear.

(D3) statements of compatibility

69. The requirement for a Bill to be accompanied by a Statement of Compatibility with Human Rights has not proved to be an effective mechanism to safeguard the right to freedom of thought, conscience and belief. Two recent examples demonstrate this.

70. Victoria's conversion therapy legislation impinged significantly on basic religious freedoms such as consensual prayer between adults. The "statement of compatibility" produced as required by Victoria's charter failed to disclose or address the extent of the prohibitions on religious freedom.

71. A more recent example can be found in the compulsory acquisition of Calvary Hospital in the ACT. Clearly, when a religious institution is taken over by the State in order to enable medical procedures that were previously not practiced on religious grounds, there are significant issues of freedom of religion and association that deserve careful consideration. Instead, the Compatibility Statement provided with the legislation only lists two possible human rights issues – Privacy and Reputation, and the Right to Work.[19] Regardless of this blatant omission, the legislation was passed, and there is no indication that the ACT Human Rights Commission attempted to intervene to even consider issues of religious freedom. The Parliament and the Commission completely failed to engage with the human rights issue, without consequence.

[18] Ibid, page 52. C.f. submission text: https://humanrights.gov.au/our-work/legal/intervention-annotated-submissions-behlaf-australian-human-rights-commission

[19] https://www.legislation.act.gov.au/DownloadFile/es/db_67633/20230511-80965/PDF/db_67633.PDF

72. In both cases, statements of compatibility appear to be mere pro-forma exercises that do not experience any rigorous examination and fail to trigger any significant debate about the human rights implications.

E) The effectiveness of existing human rights Acts/Charters

73. There are currently charters in place in in the Australian Capital Territory, Victoria and Queensland. These charters have proven themselves to be limited and selective".[20]

74. Firstly, they do not read into law the full rights as defined in international instruments such as the International Covenant on Civil and Political Rights. Instead, rights are re-worded, altering their impact.

75. For example, the charters contain very little protection for the liberty of parents to educate their children in conformity with their convictions as required by ICCPR 18(4). The Australian Capital Territory charter merely protects the religious freedom of parents to educate their children in non-government schools (effectively excluding the majority of parents unable to afford the cost of private education from the international law protection), while the Victoria and Queensland charters provide no protection at all.[21]

76. Secondly, the State and Territory charters adopt lower thresholds for limiting religious freedom than the strict standards of Article 18 of the ICCPR.[22] The charters allow limitations where "reasonable", which is a softer standard than the ICCPR's "necessary". The charters also indicate that all aspects of freedom of religion are potentially subject to limitation, where the ICCPR only allows limitations on the freedom to "manifest one's religion". This contradicts a clear principle of international law; that freedom of belief is inviolable and cannot be limited.

77. Thirdly, the protections in the state charters are 'at a high level of generality' which fail to provide sufficient protection in the many specific ways law and religion may interact.

78. As Professor Nicholas Aroney of the University of Queensland argues; "there is no evidence to suggest that religious freedom has been more adequately protected [by human rights charters]... in fact, at times, religious freedom has received weaker protection in such jurisdictions".[23] Aroney demonstrates this by comparing the outcomes in a Victorian case where religious freedom was not protected despite the presence of a human rights charter to a similar case in New South Wales where religious freedom was upheld in the absence of a human rights charter.[24]

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[20] Extracted from Alex Deagon, A Principled Framework for the Autonomy of Religious Communities: Reconciling Freedom and Discrimination (Hart Publishing, 2023) 177-181.

[21] Nicholas Aroney, 'Can Australian Law Better Protect Freedom of Religion' (2019) 93(9) *Australian Law Journal* 708, 715.

[22] Harry Hobbs and George Williams, 'Protecting Religious Freedom in a Human Rights Act' (2019) 93(9) *Australian Law Journal* (n 2) 728-729

[23] Aroney, Freedom of Religion (n 7) 715

[24] Ibid 716-718. For further analysis, see Alex Deagon, 'The "Religious Questions" Doctrine': Addressing (Secular) Judicial Incompetence' (2021) 47(1) *Monash University Law Review* 60-87.

79. Two examples of the failure of such charters to protect religious freedom can be found in the passage of Victoria's conversion therapy legislation, which impinged significantly on basic religious freedoms such as consensual prayer between adults, and the compulsory acquisition of Calvary Hospital in the ACT (see paragraphs 60-63 above).

80. In contrast, examples where jurisdictions have protected religious liberty cannot be attributed to the implementation of charter requirements. Instead, they appear to be due to nothing more than democratic activity and the parliamentary process.[25]

81. Christian churches and organisations expressed deep concern in 2016 in a joint submission to Queensland Parliament regarding the proposed Human Rights Bill, arguing that,

> 'in Australia there are effective and well-developed legal doctrines that protect fundamental rights and freedoms from incursion by legislation'.[26]

82. Opposition to human rights charters and acts is not opposition to human rights. Contested human rights issues are ultimately a matter of public policy. A charter or act would ultimately remove these policy questions from the legislature and place them in the hands of judges. This presents a significant danger that human rights could be eroded from the bench.

83. Without specific regard to religious concerns, in their comprehensive submission to the same Queensland inquiry, Professors Aroney and Ekin argued that:

> …a statutory charter of rights is unnecessary, pointless and dangerous. It is unnecessary because human rights can and should be protected by the Parliament. It is pointless because charters of rights do not produce dialogue. It is dangerous because charters of rights encourage undisciplined law-making by the courts and distort the proper functioning of legislatures. Charters of rights undermine good government and responsible law-making and they imperil democracy and the rule of law.[27]

84. Furthermore, according to Aroney and Taylor in a recent joint paper concerning the effectiveness of international human rights standards to provide guidance on a way forward for Australian human rights:

> 'Perversely, the charters fail to provide the guarantees required by the ICCPR, and at the same time invite an interpretation of them that fundamentally detracts from the protection they purport to afford'.[28]

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[25] Aroney, Freedom of Religion (n 7) 715-716. See also Nicholas Aroney, Joel Harrison and Paul Babie, 'Religious Freedom under the Victorian Charter of Rights' in Colin Campbell and Matthew Groves (eds), *Australian Charters of Rights a Decade On* (Federation Press, 2017) 120.

[26] Ibid 5.

[27] Nicholas Aroney and Richard Ekin *Submission to Queensland Parliament Legal Affairs and Community Safety Committee Human Rights Inquiry* (18 April 2016) available at https://documents.parliament.qld.gov.au/com/LACSC-4B8C/HRI-CC35/submissions/00000474.pdf

[28] Nicholas Aroney and Paul Taylor, 'The Politics of Freedom of Religion in Australia: Can International Human Rights Standards point the way forward?' (2020) 47(1) *University of Western Australia Law Review* 42, (n 7) 47- 48.

85. This failure is further exacerbated by the continued dominance of other forms of rights in the popular discussion. UQ's Professor Patrick Parkinson summarises:

> The problem is when absolutist claims about the moral requirements of a charter are used to mask and provide some special authority for the policy positions of people with particular agendas. At the heart of Christian concerns about the development of a charter is that secular liberal interpretations of human rights charters will tend to relegate religious freedom to the lowest place in an implicit hierarchy of rights established not by international law but by the intellectual fashions of the day.[29]

We thank the Parliamentary Joint Committee on Human Rights for the opportunity to make this submission.

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[29] Patrick Parkinson, 'Christian Concerns about an Australian Charter of Rights' in Paul Babie and Neville Rochow (eds), *Freedom of Religion under Bills of Rights* (University of Adelaide Press, 2012) (n 14) 120-121. See also Patrick Parkinson, 'Christian Concerns about an Australian Charter of Rights' (2010) 15 *Australian Journal of Human Rights* 83.