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Submission to the Parliamentary Joint Committee on Human Rights inquiry into the human rights framework.

The Rule of Law Institute of Australia ("the Institute") thanks the committee for agreeing to accept this late submission. If required, we would be happy to appear before the committee to expand on the following points.

The Institute is an independent, non-partisan, not for profit organisation formed to promote and uphold the rule of law in Australia. Our work is supported by more than 2,300 members. Our objectives include promoting good governance in Australia by the rule of law and encouraging transparency and accountability in state and federal government.

Summary

This submission will focus on one aspect of the inquiry's terms of reference:

> *" Whether the Australian Parliament should enact a federal Human Rights Act, and if so, what elements it should include (including by reference to the Australian Human Rights Commission' s recent Position Paper)."*

The Human Rights Commission's model for a Human Rights Act is flawed and should be abandoned. Failing that, it should be rewritten. We make these suggestions for two reasons:

Like all charters and bills of rights it would weaken our system of parliamentary democracy as it would require the judiciary, and not the legislature, to make value judgements when setting the limits on fundamental rights. Defining human rights for Australians is, in essence, a political decision. It should be confined to the greatest extent possible to the legislature which is the body best equipped to do this work. It is the branch of government most capable of gauging community standards.

The structure of the commission’s model for a Human Rights Act is a retrograde departure from the International Covenant on Civil and Political Rights (“ICCPR”). The commission’s model would make it easier to erode human rights and is a weaker approach than the original wording of that treaty. All rights would be subject to a single limitation clause that would use terms that are, compared to the ICCPR, vague and vulnerable to subjective application.

Religious freedom, freedom of expression and freedom of movement have little in common apart from this: under the ICCPR these rights can only be limited in line with an exhaustive list of purposes. The limited and specific nature of the permissible limitations on rights under the ICCPR is clearly intended to provide people with the broadest possible freedoms.

This would not be the case under the model favoured by the Human Rights Commission. Limitations on all rights would be allowed whenever a judge considered this to be “ reasonable” and “demonstrably justified in a free and democratic society” [1]. This would open the door to an almost unlimited number of restrictions on human rights. It would also be more susceptible to subjective application than the far more specific approach to limitations that is used universally in the ICCPR.

We therefore suggest that the commission’s proposed model for a Human Rights Act should not proceed. It falls short of the standard set by the ICCPR. If, however, the committee is inclined to support the introduction of a Human Rights Act, we suggest that such a bill should adopt the structure of the ICCPR in which rights each have their own exhaustive list of specific and permissible limitations. This should replace the Human Rights Commission’s proposal in which a single limitation clause, framed in open-ended terms, would provide greater scope to restrict human rights.

This suggestion should not be viewed as endorsement of any resulting charter of rights. It is aimed at reducing the adverse impact of a system that would still transfer responsibility from the legislature to the judiciary.

The relevant principles of the rule of law

The assessments in this submission are apolitical. They are based on relevant principles of the rule of law: The law should be known and accessible; there should be a separation of powers between the judiciary and the legislature; and it is wrong to impose a function on the judiciary that would undermine the appearance, if not the reality, of impartiality.

[1] Australian Human Rights Commission, Free and Equal, Position Paper: A Human Rights Act for Australia, page 255

The position paper of the Human Rights Commission that is referred to in the inquiry's terms of reference was developed as part of the commission's Free and Equal project and outlines the content and structure of its proposed Human Rights Act.

The position paper says the proposed Act would primarily incorporate two core treaties, the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights (I CESCR). It also proposes to codify common law rights that are reflected in those treaties.

The commission's proposal amounts to a departure from the structure of the ICCPR. Unlike the ICCPR, the commission proposes to have a single " limitation clause" . This clause would be used by judges to determine what limits should be imposed on these rights when they come into conflict with other rights or initiatives.

The proposed Human Rights Act would inevitably be known as a federal charter of rights and would have a national impact. The commission's position paper says it should include an overarching statement that says:

> *" The rights and freedoms contained in this Act may be subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society." (Emphasis added)*

When deciding whether a limit is reasonable and justifiable, the commission's model would provide judges with a " proportionality" test which appears to be similar to the technique known as "structured proportionality" that has been used by the High Court and subjected to criticism. It suggests these factors could form part of that test:[2]

- Whether the limitation is in pursuit of a legitimate purpose
- The relationship between the limitation and its purpose, including whether the limitation is necessary to achieve the legitimate purpose, and whether it adopts a means rationally connected to achieving that purpose
- The extent of the interference with the human right
- Whether there are any less restrictive and reasonably available means to achieve the purpose
- Whether there are safeguards or controls over the means adopted to achieve the purpose.

[2] Australian Human Rights Commission, Free and Equal, Position Paper: A Human Rights Act for Australia, page 255

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There is, however, no avoiding the fact that this process would make it possible for human rights to be restricted on grounds that are not included in the exhaustive lists that are part of the ICCPR - a treaty that Australia ratified in 1980.

This appears to be at odds with the spirit of Article 5(1) of the ICCPR which encourages those countries that adhere to the ICCPR not to impose limitations on each of the rights that are more extensive than the limitations set down in that treaty. Article 5(1) says:

> *Nothing in the present Covenant may be interpreted as implying for any State, group or person any right to engage in any activity or perform any act aimed at the destruction of any of the rights and freedoms recognized herein or at their limitation to a greater extent than is provided for in the present Covenant. (Emphasis added)*

The single limitation clause proposed by the Human Rights Commission, and its use of the proportionality test gives rise to two concerns:

1) Because value judgements have been incorporated in commission's proposed limitation clause there is a risk of inconsistent outcomes which erodes the requirement for legal certainty which is a fundamental requirement of the rule of law.

2) Because the overarching clause and the proportionality test require judges to explicitly make value judgements there is a risk that this will erode the standing of the judiciary as impartial decision-makers.

These concerns are in line with those of former High Court judge Dyson Heydon whose judgement in Momcilovic v The Queen [2011] HCA 34 at paragraph 432 cited with approval a journal article that said proportionality

> *" . . . could be applied almost infinitely forcefully or infinitely cautiously, producing an area of discretionary judgement that can be massively broad or incredibly narrow - and anything else between."*

Concerns about the use of proportionality in a constitutional context have been expressed by former Chief Justice Murray Gleeson. His judgement in Roach v Electoral Commissioner [2007] HCA 43 at paragraph 17 says:

> *" Human rights instruments which declare in general terms a right, such as a right to vote, and then permit legislation in derogation of that right, but only in the case of a legitimate objective pursued by means that are no more than necessary to accomplish that objective, and give a court the power to decide whether a certain derogation is permissible, confer a wider power of judicial review than that ordinarily applied under our Constitution."*

The most obvious weakness with the commission's model is the way in treats freedom to manifest religious belief. But there are also problems with the way it treats freedom of expression.

Under the ICCPR, the right to manifest religious belief can only be limited if those limitations are :

> *" . . . prescribed by law and are necessary to protect public safety, order, health, or morals or other fundamental rights and freedoms of others."* [3]

But under the commission's model, those limited grounds for restricting freedom of religion have been expanded to permit restrictions to be imposed whenever a judge considers a restriction is " reasonable" and " justified in a free and democratic society" according to the proportionality test.

In 2021, when Amanda Stoker was assistant minister to the Attorney-General, she criticised the High Court's use of structured proportionality because she said it " takes judges perilously close to the role of the legislator" by allowing them " to pick and choose policy prescriptions".[4]

If the commission's model is enacted, the way will be open for freedom of religion, freedom of expression and other fundamental rights to be wound back for reasons that extend beyond the limited grounds outlined in the ICCPR.

Article 19 of the ICCPR protects freedom of expression and says it can only be restricted by law and if this is necessary in order to respect the rights and reputations of others or to protect national security, public order, public heath or morals.

Compare this to the commission's model. Restrictions under the ICCPR that are " necessary" in order to achieve a limited set of goals are, by definition, narrower than restrictions that might be considered " reasonable" in order to achieve an additional set of goals - even when the restrictions are proportional to those additional goals. The goals themselves are broader than permissible under the ICCPR.

By departing from the structure of the ICCPR and favouring an open-ended test for permissible restrictions on human rights, the commission's model would enable the legislature to avoid taking responsibility for difficult public policy issues such as setting the limits on the manifestation of religious freedom.

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[3] Article 18(3) International Covenant on Civil and Political Rights

[4] Amanda Stoker, " Mr McGowan, Tear Down this Wall! Section 92 after Palmer v Western Australia," address to the Samuel Griffith Society, 2021 online speaker series, co-authored with Jye Beardow

Under the commission's model, those decisions would move from parliament to the judiciary but they would remain, in essence, political. That would inevitably erode the public standing of the judiciary as impartial decision-makers.

This would risk undermining one of the core values of the rule of law by leaving the community uncertain about how far each human right could extend. This could have serious practical consequences if the committee accepts another proposal from the commission and accompanies the Human Rights Act with a cause of action, and financial damages, for breaches of the proposed rights by public authorities.[5]

Together, those proposals mean public authorities - and therefore taxpayers - could be left with damages bills for breaching human rights standards that had been intentionally left uncertain by the legislature. The remedy is to rework the commission's model by abandoning the proposal for a single limitations clause that would apply to all rights. Instead, parliament should - to the greatest extent possible - apply an exhaustive list of permissible limitations to every right listed in the proposed Act. This would reduce but not eliminate the transfer of responsibility from the legislature to the judiciary.

But such a change would eliminate the risk of endless costly attempts to expand the list of permissible restrictions on human rights.

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[5] Australian Human Rights Commission, Free and Equal, Position Paper: A Human Rights Act for Australia, ibid, page 272

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