THE AUSTRALIAN

State and territory legislation risks breach of international treaty

New Australian Human Rights Commission president Rosalind Croucher.

MARK FOWLER THE AUSTRALIAN 12:00AM June 30, 2017

The appointment of Rosalind Croucher as Australian Human Rights Commission president has been widely welcomed. However, the protection of human rights in Australia requires more than a welcome appointment.

As I pointed out to the federal parliamentary inquiry into the status of the human right of freedom of religion or belief this month, the commonwealth is held responsible for the failure of the states and territories to acquit Australia's obligations to protect religious freedom under international law.

To illustrate the extent of the commonwealth's exposure to an action before the UN Human Rights Committee, I wish to draw attention to four inadequacies.

The first is the failure of the Victorian and ACT charters of human rights to enact the protections of religious freedom contained in the International Covenant on Civil and Political Rights. For those rights that may be limited by state incursion, the ICCPR permits only "necessary" limitations, imposed through "no more restrictive means than are required". The ACT and Victorian charters draw the boundary much further into the heartland of an -individual's rights, permitting "reasonable" state incursion.

Importantly, the issue is not limited to religious freedom. The following rights also are protected by the ICCPR's necessity requirement: 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); and the right to freedom of association (article 22).

The next glaring example is the failure of the Tasmanian Anti-Discrimination Act 1998 to accord religious bodies their rights in respect of the protected attributes of marital or relationship status. Absent an unlikely argument that federal law prevails, a Tasmanian religious body cannot require that its leaders refrain from married or de facto relationships.

The third illustration I wish to draw is provided by the recent threat by the University of Sydney Union to deregister the Evangelical Union on the basis of its "discriminatory" requirement that new members affirm that "Jesus is Lord". The concern arises as religious belief is not a protected attribute under the Anti-Discrimination Act 1977 (NSW).

This issue also was highlighted by social media calls for Macquarie University lecturer Stephen Chavura to be dismissed based on his association with conservative charity the Lachlan Macquarie Institute.

In the absence of an equivalent protection under federal law, the Evangelical Union and Chavura are left without protection. A federal enactment protecting organisations and individuals from discrimination on the basis of religious belief, drafting for which is provided in my submissions to the parliamentary inquiry, would address this concern.

The final illustration flows from the Australian Charities and Not-for-profits Commission position that a religious purpose cannot be expressed through a public benevolent institution. Given a recent judgment of the Victorian Court of Appeal, the ACNC's position, if a correct statement of the law, has the effect that faith-based PBIs cannot argue they satisfy the requirement for exemption granted religious bodies under anti-discrimination law in Victoria.

The Court of Appeal decision will be influential on other courts interpreting state anti-discrimination legislation.

This approach to PBIs also has meant that in Queensland the St Vincent de Paul Society has been held to not be a religious body. The result was that it was not able to require that a president of a local conference be a Catholic.

If the ACNC is correct, a position I have contested in my submissions to the inquiry, charity law disentitles such bodies from exemptions under anti-discrimination law.

This would have the practical consequence that such charities will not be able to require that their governing members or staff (the persons who effect their purposes) ascribe to, or act in accordance with, the organisation's religious beliefs. They thus forego discretion over the character and voice of their institutions.

Ironically, such a position would remove the foundational convictions grounded in faith that inspired their establishment. The concern is not abstract, nor is it consigned solely to PBIs. Twenty-three of the largest 25 charities in Australia (after pure religious charities are removed) are faith-based. The concern is not limited to any particular faith; in a pluralistic society it extends to all faiths.

The first clause of the 1215 Magna Carta states: "quod Anglicana ecclesia libera sit" — the English church shall be free. In its historical context, this clause was directed at preserving the church's right to determine appointments to bishoprics, and hence the right to determine doctrine independently. Citing that clause, US Chief Justice John Roberts observed in 2012 that these principles were not to be relegated to historical curiosities and the fundamental contribution of church-state separation to societal freedom continued to resonate.

An association's ability to offer its conception of truth to the wider society is a necessary condition of an open and flourishing democratic society. Any removal of the ability of faith-based charities to determine and espouse their beliefs would be a restriction on these historically hard-won liberties, which arguably are characteristic of the Western legal tradition.

It behoves commonwealth, state and territory institutions to review their practices to ensure compliance with international law. Failing such, it falls to the commonwealth to enact protections to ensure that compliance.

Mark Fowler is a lawyer and doctoral candidate in law at the University of Queensland.

FROM THE HOMEPAGE

US warns of 'massive military response'

MICHAEL C. BENDER

US Defence Secretary Jim Mattis issued a stark warning to North Korea after it claimed it had tested a hydrogen bomb.

Moment of truth for Trump

GREG SHERIDAN

Dictator Kim Jong-un has created the moment of truth for US President Donald Trump and China's Xi Jinping.

'Show it or shut up'

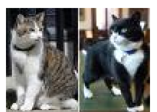
GREG BROWN

PoliticsNow: Tony Abbott has come out swinging at Bill Shorten, demanding proof that he has renounced his British citizenship.

Catfight over Chief Mouser title

JACQUELIN MAGNAY

Larry the No.10 Downing Street cat has been upstaged by his political rival across the street.



Activists bid to deregister Dr No

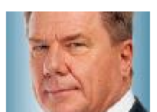
DENNIS SHANAHAN

Supporters of the Yes campaign for same-sex marriage are aiming to deregister a doctor in the first TV ad for the No case.

Fitting the left-wing agenda

CHRIS MITCHELL

It is hard not to notice the lack of curiosity and journalistic scepticism among the left-wing media lately.



Shorten on slide in PM stakes

DAVID CROWE

Newspoll shows Malcolm Turnbull has gained his biggest personal lead over Bill Shorten since last year's federal election.

The Endeavour's fiery landing

TRENT DALTON

First contact at Botany Bay - an Endeavour for the age: here is part two of our special Cook Rediscovered series.

A NOTE ABOUT RELEVANT ADVERTISING: We collect information about the content (including ads) you use across this site and use it to make both advertising and content more relevant to you on our network and other sites. This is also known as Online Behavioural Advertising. You can **find out more about our policy and your choices, including how to opt-out here**

Back to top

LOG IN SUBSCRIBE

NewsFlash

The Australian app

Terms of Use

- Editorial Code of conduct
- Standards of Practice
- Subscription terms
- Group Subscription Terms
- Accessibility
- Privacy Policy
- Relevant Ads Opt-out
- Cookie Policy

Contact Us

- Help
- Contact Us info
- Photo Sales
- News Archive

About Us

- About The Australian
- Advertise with us
- Our journalists
- Subscribe
- The Australian Plus member benefits
- Sign up to Newsletters
- Manage Your Newsletters

Copyright The Australian. All times AEST (GMT +10:00)