Title: Draft Submission on an Inquiry into a Statutory Bill of Rights for NSW

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Synopsis

This Submission adopts the 'against' tack, questioning the ability for the State Government to fund legal claims, to have enough court time to process claims, duplication of existing law under international conventions already in place, duty based law versus rights based law, and existing Australian constitutional 'rights.'

Introduction

The NSW Council of Churches presents the following submission to the Standing Committee on Law and Justice Inquiry into the appropriateness of enacting a statutory Bill of Rights for New South Wales.

Constituent members of the NSW Council of Churches are: The Anglican Church (Diocese of Sydney); The Baptist Union of NSW; The Churches of Christ; The Presbyterian Churches of Australia (NSW); the Fellowship of Congregational Churches; The Salvation Army (Eastern Australia); and The Reformed Churches of Australia (NSW).

In the following, this Council will endeavour to address the issues relating to the 'Terms of Reference' as supplied by the chair of the Inquiry, as well as provide additional comment relating to the rights of the individual in regards to ethnicity. belief and general freedoms.

The NSW Council of Churches has for many years been pro-active in preparing and presenting submissions to government (both state and federal) on a myriad of issues which relate to our society and beliefs. We believe that this submission takes a balanced view of the subject matter in regard to the Inquiry's 'Terms of Reference'.

Why a Bill of Rights?

The first question for NSW in pondering the necessity for the drafting and enactment of a Bill of Rights in this state must be whether the existing statutes governing both Australian federal and NSW state laws are adequate to uphold human rights of the individual and individual groups of people, regardless of their ethnic or indigenous background, or their religious belief.

In general terms, most would agree that there are statutes already in place which do adequately and legally govern the risks of people under both domestic and international legal conventions.

Demands from some special interest groups within the NSW community would certainly be pressed in the formulation of any proclamation to be embodied within a NSW State Bill of Rights but some such demands, while being labeled as a human right, may not necessarily be for the betterment of the society in which some demands am made.

Interpretation on specific issues may change but the basic rudiment of rights remains constant. However, in any new Bill of Rights legislation, if enacted, the rights demanded by some may also infringe upon the risks of another and be contrary to the basic Judo-Christian Westminster system of justice, foundational to the society in which we live and the freedoms we strive to protect.

Documents such as the *Universal Declaration of Human Rights,* the *International Covenant of Economic, Social and Cultural Rights* and the *International Covenant of Civil and Political Rights* would all no doubt greatly influence the composition of any statutory Bill of Rights for NSW, The above-mentioned documents each contain general statements and objectives. However, there is a large gap between the ideals expressed in those documents and the provision of a remedy, in particular instances. As Justice P.N. Bhagwati, former Chief Justice of India, observed, "The basic theme in the discourse on human risks to which we must address ourselves is how we can convert the rhetoric of human rights into reality."

1. Specific rights

To address human rights provisions, one must explore *fundamental rights, qualified rights* and the *enforcement of those rights.*

1.1 *Fundamental rights* are something that we all expect and they do already exist in NSW:
- 1.1.1 The right to life
- 1.1.2 Freedom from inhuman treatment
- 1.1.3 Protection of the law

1.2 In addressing *qualified rights,* it is necessary to explore the rights in two sections:
- 1.2.1 The rights of *all persons*
- 1.2.2 The special rights *confined to citizens only*

1.3 The *qualified rights of all persons* under international convention requires:
- 1.3.1 Liberty of the person
- 1.3.2 Freedom from forced labour
- 1.3.3 Freedom from arbitrary search and entry
- 1.3.4 Freedom of conscience, thought and religion
- 1.3.5 Freedom of expression
- 1.3.6 Freedom of assembly and association
- 1.3.7 Freedom of employment
- 1.3.8 Right to privacy

However, some of the above may be questionable under existing NSW law because of contravention of sections of the Summary Offences Act (e.g. items 2.1.1.3; 2.1.1.5; and 2.1.1.6 – as above).

The question therefore must be asked: "By incorporating the International Convention on Civil and Political Rights into domestic law through a NSW Bill of Rights, would there not also be a creation of anomalies within the state law, as it now stands, on a number of issues?

1.4 The *qualified rights,* which are confined to *citizens only,* we summarise as follows:
- 1.4.1 The right to vote and stand for public office
- 1.4.2 The right to freedom of information
- 1.4.3 The right to freedom of movement
- 1.4.4 Protection from unjust deprivation of property
- 1.4.5 Special provision in relation to certain lands
- 1.4.6 Equality of citizens

2. Legal challenge and the system

If there were to be legal challenges to *qualified human rights* for both *all persons* and *citizens only* groups, there are a number of aspects that must be covered. They include *access* to the courts for those alleged breaches of their human rights, *funding* of the courts (including aid for legal representation of individuals), and the approach to *interpretation* and the exercise of *judicial discretion*. These services are already in place and Legal Aid available to assist in areas of hardship to ensure adequate legal representation. From the judicial perspective, NSW already has the machinery in place to ensure the right of both the *all persons* and *citizens only* groups are protected.

In hearing any brief on human rights violations, them is always a danger that the judge will become prosecutor as well as judge, and the distinction between those roles can be maintained more readily if the judge has the benefit of assistance from a legal practitioner who heads the investigative aspects, leaving the Judge to focus on the issues requiring adjudication.

Alternatively, the judge who conducts the investigation may arrange for another judge to preside over any hearing arising from the investigation. A not uncommon approach by judges has been to require an appropriate person to show cause why a particular order should not be made.

All this costs money!

3. Funding

Cases involving the violation of human rights can become complex. Before any decision to rush ahead and legislate for a separate Human Rights Bill for NSW, a complete investigation would be warranted into the availability of court time, adequate numbers of the judiciary to handle such cases, funds to provide for the increased requests for legal aid by those challenging because of alleged violation of human rights.

Allowing people to have their day in court costs money, and “court time” in NSW is a precious commodity. If the judiciary is not provided with sufficient funding, then the adjudication of alleged breaches of human rights might be delayed or even denied.

Can the Attorney-General’s budget stretch this far? Do not the current laws cover the areas of concern to his department? Most would say – YES! This involves the debate of “duty based law” versus rights “based law,” which will be explored in the conclusion of this submission.

It is a Pyrrhic victory to have human rights provisions enshrined in an Act of the NSW State Parliament, free from political influences, if the ability to enforce breaches of those provisions is confined by finding limitations, which restrict the court’s ability to hear such cases.

Under the existing budgetary constraints imposed on many areas of state government control, it is difficult to imagine the necessary additional funds that are required to administer and enforce the legislation covering a statutory Bill of Rights being available. It would therefore be hard to justify the additional legislation when existing laws already provide the necessary sanctions and safeguards for human rights.

4. Interpretation

By reason of being at the apex of the appellate hierarchy for many members of the British Commonwealth, the Judicial Committee of the Privy Council has been called upon to interpret the human rights provisions of the constitutions of a number of countries. The consistent approach has been to give such provisions a broad interpretation, e.g. in *Attorney-General of The Gambia v Momodou Jobe,* per Lord Diplock:

> A constitution, and in particular that part of it which protects and entrenches fundamental rights and freedoms to which all persons of the state are entitled, is to be given a generous and purposive construction.

A similar approach has been taken with respect to the constitutions of other countries, such as Bermuda, Malaysia, Mauritius and Singapore.

Australian states do have a responsibility to uphold human rights, but surely the responsibility of formulation and administration of such laws rests with the federal government of a nation. Without a national perspective on human rights law, state governments may enact different legislation which would be a judicial nightmare.

The field of human rights is an area where the judicial decisions of one jurisdiction may well be considered, followed or applied by the court of another jurisdiction (e.g. decisions of the United States Supreme Court on the issue of free speech have influenced decisions in India and Pakistan even though the constitutional free speech guarantees under consideration in those cases were not drafted in the absolute language of the First Amendment to the US Constitution.

5. Belief structures and human rights

From a Christian perspective, there have been past judicial decisions in Australian courts where Biblical passages have been considered. However, to the extent that human rights may be said to focus upon *how* people are treated, the field appears to involve common ground for many other religious beliefs as well. But most of those beliefs would also be built on a basis of common courtesy and consideration for another – which, in general terms, is more of an expectation in human cooperation rather than imposing the necessity of a right, which need to be enacted through legislation.

Christian

A general Christian ethic from Scripture highlights “do unto others as you would have them do unto you” – a formulation of what Christians commonly call the “Golden Rule” (found in the Bible in Matthew 7:12 and Galatians 5:14).

Hindu

“This is the sum of duty: do naught unto others which would cause pain if done to you.”

Buddhist

“Hurt not others in ways which you yourself would find hurtful.”

Islamic

“No one of you is a believer until he desires for his brother that which he desires for himself.”

Taoist

“Regard your neighbour’s gain as your own gain, and your neighbour’s loss a your own loss.”

Confucian

“Do not unto others what you would not have them do unto you.”

Jewish

“What is hateful to you, do not to your fellow man. That is the entire law: all the rest is commentary.”

Fourteenth century proverb

“Do as you would be done by.”

In view of the catholic belief that humankind is required to respect the human rights of others, few would question the need for international conventions on human rights and the embodiment of human rights in the national Constitutions of most nations of the world. The real difficulty is honouring those conventions and administering them legally. *This is the real question raised by the NSW Bill of Right proposal.*

This involves the debate of *duty based law* versus *rights based law*. Classic English law (inherited by the colony of NSW) was essentially the former. At that time English law was profoundly influenced by the Christian faith of the English who generally adopted a Biblical worldview and subscribed to a Christian ethic. Biblical law is clearly a "duty based law" (as the example given earlier in Matthew 7:12 and Galatians 5:14). As with the Biblical template, the English established a "duty based system" that has enjoyed tremendous success and has been maintained by many of their colonies for a considerable period of time. The issue is often discussed as the "rights versus responsibilities" debate. It is perhaps worth noting that our traditional "duty based law" requires us to regularly break from our self-focus to consider the interests and welfare of others. Whereas there is concern that a "rights based system" will give support to a continuing focus on us and "our right."

Why then is additional legislation needed when Australia is party, as a signatory, to numerous international UN conventions and upholds the dignity of human rights already within our own national constitution and national and state domestic law?

6. Judicial discretion

The breadth of the wording of human rights provisions often means that judges have a wide discretion (e.g. subsection 37 (17) of the Constitution of Papua New Guinea provide that "all persons deprived of their liberty shall be treated with humanity and with respect for the dignity of a human person").

Such a breadth of wording results in a wide variety of situations, which might be considered to involve breaches of the human rights provisions. This requires the judge to decide how far to go and where to "draw the line," having regard not only to the human rights provisions but to the competing demands of ordinary criminal and civil litigation.

Consider, by way of illustration, the position of an accused person who is mistreated while on remand and later acquitted: any hearing on human rights issues may well delay the hearing of the criminal charge which has been brought against him while a prompt trial will remove the opportunity for further mistreatment.

As can be seen from the above illustration, a similar situation could easily arise in the NSW judicial system. Before the government plunge headlong into adopting a Bill of Rights for this state, a full unbiased, independent evaluation of the implications of both the 'for' and 'against' cases must be undertaken.

7. Other issues

7.1 *Flight from freedom – the legal debate*

"Can we only do, day by day, what the law allows us to do?" or "Are we free to act except as otherwise proscribed by law?" The majority of legal experts vehemently subscribe to the latter view. If that is true, and according to first principles of English law, we are already free; why then do we need rights? Who took our freedom away that we must now approach government and ask for "the right to live," "the right to (freely) speak," "the right to food," "the right to seek information," "the right to otherwise express oneself," and other rights?

Contrary to traditional English jurisprudence, a "rights based system" reject human freedom as foundational to law. The introduction of a "right based system" brings with it the inescapable conclusion that from now on our freedom is to be "government authorized."

7.2 *Government defined existence*

Human rights are very descriptive or definitional in character and thus, to a significant extent, a Bill of Rights constitutes an attempt by government to describe or define us, our attributes or qualities, such a life (the right to live), death (the right to die), speaking (the right to freely speak), memory (the right to seek information), thinking (the right to have one's own opinion), etc. (These examples come from the UN's Universal Declaration of Human Rights.)

Are we truly prepared to have governments define and redefine us, and then base laws on these descriptions? From a ground level perspective, a government is an authority construct designed by and for humankind. People exist before and independently of any government. We define government, not vice versa! The declaring of human rights is not then an appropriate role for government, and our acceding to such a defining and redefining process may well bind us to governing system in ways we have yet to fully appreciate. Under “duty based law” we are dealt with straightforwardly as men and women, whilst under a “right based system” we are to be dealt with according to new “government-issued” describers.

7.3 *Human rights are amoral*

Human rights of themselves possess no intrinsic ethical or moral content whatsoever. On what reasonable grounds, then, should we agree to have an amoral set of rights replace a duty to others as the very basis and standard for law? To move toward a “right based system” of law will involve the government declaring a list of amoral rights:

(a) as the very standard against which all other laws are measured, accepted or rejected (notwithstanding that such laws were otherwise validly enacted), and or
(b) then pass laws prohibiting infringements of those right.

We are here facing a brand new foundation without any ethical value. This is all very surprising given the widespread acceptance that, for a society to properly function, each member of that society must exercise a duty of care to others. A totally selfish existence has always been deplored by right thinking people.

7.4 *Conflicting rights*

Introduction of a “rights based system” will inevitably lead to a proliferation of rights as groups clamour for rights suitable to their particular interests. The US experience supports this conclusion. Until that process is substantially complete, those with rights will have the advantage over those without. After all, “rights based law” will only protect those with rights and the difficult resolution of such a conflict. On what basis will the matter be resolved? As outlined earlier, will it be according to the bias of belief of the particular judge because of the broad scope in interpretation of such laws? Perhaps according to the judge’s view of what is then socially acceptable or an accepted community standard, but in whose interpretation of law?

This is extremely difficult in a multicultural society such as NSW! If a conflict of rights is determined according to the predilections of a particular judge, we will soon have “rule by man” not “rule by law.” If a rights conflict is resolved by reference to socially accepted behaviour, all society had better conform.

To avoid these problems, a “duty based law” with the relevant moral or ethic embodied in the law mut be retained and not left to be determined by individual adjudicators or according to changing and diffuse “social norms.”

8. Conclusion

The whole debate around a Bill of Rights is surprising in the context of the long-standing controversy as to whether human rights even exist. Despite this, there remains a concerted push for the official recognition of such rights and for the establishment of a “rights based system” of law. In fact, the principal push for such a system comes not from the people but from the international arena.

In the much-vaunted “Universal Declaration of Human Right,” the signatory nations publicly committed themselves to actively and progressively promote the concept of human rights and to their “legal” enforcement. In all this, it helps to remember that we have just been through fifty years of such promotion, persuasion and propaganda!

In addressing the issue of human rights, and any proposal of legislation with a Bill of Rights for NSW, the difficulty will always arise that most would agree with the aims and ideals of human rights activists who seek to abolish torture, violence, subjugation, genocide, etc. However, to support such ideals does not require a new form of legal system. A “rights based system” is not the answer. “Duty based law” is the best model and, with adequate explanation, it would have the support of most people in NSW.