

## Human rights, legal frameworks, and Christian responses

(A report from the Standing Committee.)

### Introduction

1. At its meeting on 26 May 2008 the Standing Committee received an initial discussion paper from the Social Issues Executive about the debate surrounding human rights and a proposed human rights framework for Australia. In order to progress consideration of this matter, the Standing Committee appointed a working group comprising Mr Robert Tong (chair), the Rev Dr Andrew Cameron, Mr Neil Cameron, Bishop Robert Forsyth, Mr Darren Mitchell, Dr Karin Sowada, Ms Lisa Watts and Justice Peter Young to consider the discussion paper and to report back on the following matters –

- (a) what an Australian human rights framework is likely to look like, and
- (b) the concerns Christians might have about any human rights framework, and
- (c) how we might participate in the consultation process about the desirability of a human rights framework and influence the design of any such framework,

together with recommendations about any action that should be taken at the forthcoming session of the Synod or elsewhere in relation to this matter.

2. The working group met on 3 occasions and has prepared a discussion paper for the Synod which is attached to this report as an annexure. The recommendations of the working group are set out below.

### Comment

3. In preparing the discussion paper, the working group has been made aware of the complexity of the issues surrounding human rights and human rights frameworks. Despite this complexity, the working group considers that the on-going debate on these matters raises important issues for Christians and is therefore a debate that Christians cannot and must not avoid.

4. The working group has opted to provide the Synod with a paper aimed at raising awareness among Sydney Anglicans of the broad parameters of the human rights debate without offering any firm conclusions at this stage. The working group has taken this approach because it is firmly of the view that our theological understanding of human rights needs to be developed further before we seek to draw meaningful conclusions as Christians about human rights and the best way human rights should be protected in Australia.

5. The working group is also aware that the Federal Government is yet to indicate the way it intends to recognise and protect human rights in Australia. Such protection may or may not involve a charter of rights. Accordingly any detailed comment at this stage on the operation and effect of a legal framework for the protection of human rights in Australia would be somewhat premature.

6. In the course of preparing its report, the working group became aware of a recommendation made by HREOC to the Senate Standing Committee on Legal and Constitutional Affairs that all substantive exemptions in the Sex Discrimination Act 1984 including the exemption available to religious organisations be subject to a 3 years sunset clause. The sunset clause is being proposed by HREOC on the basis that the right to religious freedom and to gender equality under the Act “must be appropriately balanced in accordance with human rights principles”. From this example, it can be seen that appeals to human rights can cross public debate in a variety of policy areas and it is thus important for our position to be biblical and thoughtful.

### Recommendations

7. In response to the recommendation of the working group, the Standing Committee requested that the following motion be moved at the Synod “by request of the Standing Committee” –

“Synod –

- (a) welcomes the proposed Federal Government consultation process on the protection of human rights in Australia, and
- (b) thanks the Social Issues Executive for the work they have undertaken in the area of human rights to date and requests that they maintain a watching brief on developments in this area, and
- (c) requests the Diocesan Doctrine Commission, in consultation with the Social Issues Executive, to prepare for the Standing Committee as a matter of priority a paper clarifying our theological understanding of human rights, and
- (d) requests the Standing Committee to engage with the Federal Government consultation process and report progress to the next session of the Synod.”

For and on behalf of the Standing Committee

ROBERT WICKS  
*Diocesan Secretary*  
23 September 2008

## Human rights, legal frameworks, and Christian responses

(A discussion paper from the Human Rights Working Group of the Standing Committee.)

*There is clearly a strong body of opinion amongst some religious institutions that opposes any change to the religious exemptions [in the Sex Discrimination Act 1984]. However the right to religious freedom and to gender equality must be appropriately balanced in accordance with human rights principles.*

(Submission of the Human Rights and Equal Opportunities Commission to the Senate Legal and Constitutional Affairs Committee on the Inquiry into the Effectiveness of the Commonwealth Sex Discrimination Act 1984 in Eliminating Discrimination and Promoting Gender Equality, 1 September 2008 at page 166)

### Why is this paper necessary?

1. Whether Australia should or should not have a Bill of Rights has been the subject of many Federal parliamentary debates since Federation. With the sixtieth anniversary of the Universal Declaration of Human Rights on 10 December this year and the commitment by the Federal ALP in its recent election platform to look at the protection of human rights, the question has once again emerged as a matter of Government interest. However a particular underlying driver for the debate at this time appears to be a concern about the recent exercise of executive power at the Federal level, particularly in the treatment of refugees.
2. The Federal Attorney-General Robert McClelland has signaled the Government's intention to undertake a formal consultation process with the Australian people to determine how best to recognise and protect human rights and responsibilities in Australia. The matter received attention at the 2020 Summit in April 2008, and in the May Federal budget the Government made provision for the consultation process.
3. Once settled, the Federal Government has indicated that the details of the consultation will be widely advertised to encourage the broadest possible participation by the Australian public. Christians will undoubtedly want to have a say, although for many it is unclear exactly what ought to be said.
4. Discussion about human rights is a complex matter. It comprises three distinct discourses; *philosophical* (where do human rights come from); *political* (how should human rights be used to achieve political ends); and *legal* (the legal expression and application of human rights). Adding to this complexity is the fact that often these discourses do not intersect.
5. Despite this complexity, the HREOC submission quoted at the beginning of this paper highlights the importance of Christians engaging in the debate in an informed way to ensure Christian witness and mission are preserved and, where possible, enhanced.

### What is the intention of this paper?

6. This paper has been prepared by a Working Group on behalf of the Standing Committee of the Synod of the Anglican Church Diocese of Sydney.
7. Our intention is not to give a 'final word' on human rights, but to assist Sydney Anglicans to begin considering human rights in a biblical and thoughtful way, in preparation for the consultation process. Our aim is to apprise Synod members of the main parameters of this discussion, but in doing so we will undoubtedly raise some points that require much deeper inquiry.
8. The Working Group is indebted to the Standing Committee's Social Issues Executive whose briefings have provided the basis for this paper. (For more detail, two earlier briefings of the Social Issues Executive can be viewed under 'Reports' at <http://sie.moore.edu.au>. The Social Issues Executive intends to write more on the subject.)
9. This paper is structured as follows –
  - I. The concept of 'human rights'
    - a. What are human rights?
    - b. Do we find human rights in the bible?
  - II. The legal protection of rights
    - a. How do charters operate?
    - b. What 'human rights' might be protected?
    - c. Arguments for and against a Federal charter
    - d. What are some key Christian concerns?

## I. The concept of 'human rights'

### a. What are human rights?

10. The term 'human rights' has entered common usage, particularly since WWII, as the *lingua franca* term for respect of persons, and refers to moral claims that all people have. Human rights law seeks to defend and uphold basic standards of treatment that all people may expect from others. (An obvious example is the 'right' not to be arbitrarily killed. To 'have' this 'human right' means that you may insist upon a basic standard of 'non-killing behaviour' from others.)

11. When we think about it, any 'right' is a moral claim upon people concerning their 'duty' or 'responsibility' towards others. The 'right' is a statement of expectation about what others should or should not do to us. In many cases these moral claims are also enforced by the law. In popular usage, a 'right' can sound like a selfish demand upon others. Indeed, rights language can degenerate into a melee of selfish assertions.

12. But proponents of human rights law suggest that human rights are not intended to promote such selfishness. Rather, they attempt to hold those with power accountable, to use that power in a way that respects others. Human rights law is therefore initially directed at the way the State and its officers are to treat individuals. However as the State makes choices about how human rights should be upheld, particularly competing rights, human rights law also shapes the way individuals relate to one another.

### b. Do we find human rights in the bible?

13. This section of our report is admittedly too brief. We will simply overview three conclusions that might be drawn from the biblical material. We will suggest that further biblical enquiry is needed, and will then offer a final comment. (For some other preliminary detail on the biblical issues, see an earlier briefing of the Social Issues Executive to the Standing Committee, which can be viewed under 'Reports' at <http://sie.moore.edu.au>.)

14. Old Testament law and instruction uses several different terms in relation to justice,<sup>1</sup> none of which directly corresponds to the modern term 'human rights'. Furthermore, God himself is presented throughout Scripture as the first and final word on morality; yet rights language usually makes moral claims for the self without reference to God.

15. These aspects of the biblical material produce *the first conclusion*: to reject the concept of 'human rights' and any comprehensive human rights legal framework.

16. It is tragic and wrong when modern societies deny that morality ultimately springs from God's character and goodness; and Christians are rightly suspicious of ethical claims to 'know good and evil' without reference to God. According to this first conclusion, it is deeply flawed for Christians to support a human rights discourse which does not refer to God.

17. However let us pause to consider one of the OT terms used, the term *mišpāt*. It appears in Exodus 23:6: 'You shall not pervert the justice due (*mišpāt*) to your poor in his lawsuit' (ESV). This term may be seen as corresponding to something like our modern concept of 'human rights', insofar as the poor person might expect a basic standard of behavior from others. Such a concept can also be seen in Lamentations 3:34-36 –

*To crush underfoot all the prisoners of the earth, to deny a man justice in the presence of the Most High, to subvert a man in his lawsuit, the Lord does not approve.* (ESV)

18. Again, what is defended here might be regarded as very similar to what 'human rights' seeks to defend. Indeed one translation even goes as far as to translate *mišpāt* in Lam. 3:35 as 'human rights' –

*When all the prisoners in a country are crushed underfoot, when human rights are overridden in defiance of the Most High, when someone is cheated of justice, does not the Lord see it?* (New Jerusalem Bible)

19. Therefore *the second conclusion* is to uphold the concept of 'human rights' on the basis that it has a foundation in Scripture, namely that humanity can rightly expect those in authority not to transgress basic minimum standards of behavior. According to this second conclusion, God's creation has a moral order intrinsic to it which is 'spelt out' in the command of God; and some human rights coincide with this order and command.

20. But a possible weakness in the second conclusion is that in both the Exodus and Lamentations passages, God's commands establish the behaviour he expects from those in authority. This is not necessarily the same as giving the poor or oppressed person the grounds for a moral demand to be treated in this way (contrary to the NJB translation of Lam 3:35).

21. The drawbacks of the first two conclusions lead to the *third conclusion*: to uphold the concept of 'human rights' to the extent it reinforces our corresponding God-ordained responsibilities to one another, while recognizing there is little or no direct engagement in Scripture with the contemporary concept of human rights.

22. For people organise themselves around various plans, projects and ways of seeing the world, and in 1 Peter 2:13, subjection 'for the Lord's sake to every human institution' is literally to every human 'creation'. Peter suggests that God

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<sup>1</sup> These are *mišpāt*, a judgment or verdict; *hōq*, a canon, rule or regulation; *tōrā*, an instruction or teaching; *miswā*, a command; and *dabār*, 'word' or 'saying'.

works through the various ways in which human imagination forms government, and the verse generally affirms this human activity. Human rights are just such a human construct—a political tool for the ordering of society. Since Christians support whatever promotes the good of the neighbor, they may agree with some human rights. But at the same time, we are also free to strongly disagree where we judge ‘human rights’ to be poor constructs for the common good.

23. Before we decide what to conclude, a more extensive biblical enquiry and discussion will be needed. That enquiry will also need to take into account the complexity of the term ‘human rights’, for this one term refers to a variety of concepts. Once these different usages are identified, we will be in a better position to evaluate them biblically.

24. A further comment is needed.

25. Proponents of human rights have a noble intent. They seek for a ‘good’ society, where the vulnerable are more protected than is now the case, and where governments are more transparent and accountable. But when God is explicitly excluded, Christianity’s profound vision of the truly ‘good’ society is lost.

26. When Jesus is pressed to state what matters most, his answer is immediate: that we ‘love’ one another, and ‘love’ God. Christians long for a society where as God rules in our hearts, we learn the kind of seriously deep *affection* for each other that results in our serving each other’s good.

27. With all our faults, our churches long to be such ‘societies’ in miniature, and in a way that becomes irresistibly contagious. The fourth century theologian Augustine summarised the Bible’s teaching on how churches and Christians are mingled into the society they inhabit. He saw it as an epic story of “two Cities ... mixed indistinguishably together in every earthly State” –

*Though there are many great nations throughout the world, living according to different rites and customs, and distinguished by many different forms of language, arms and dress, there nonetheless exists only two orders, as we may call them, of human society: and, following our Scriptures, we may rightly speak of these two as cities. The one is made up of those who live according to the flesh, and the other of those who live according to the spirit. Each desires its own kind of peace, and, when they have found what they sought, each lives its own kind of peace.<sup>2</sup>*

28. In extreme secularist expressions of human rights, ‘peace’ is only found in a barren landscape of enforced rights and responsibilities, all against a pervasive backdrop of fear.

29. Of course, and as we observed above, the law needs to help human society at its worst. In that respect human rights law may be a helpful tool.

30. But it cannot substitute for the kind of ‘peace’ found when God enables people to care for each other, with the kind of deep affection and concern that eclipses an emphasis upon human rights. In the Apostle Peter’s words, God can enable people to ‘love one another deeply, from the heart.’ (1 Peter 1:22). Perhaps this is the kind of ‘peace’ that secularist advocates of human rights truly yearn for.

## II. The legal protection of rights

31. What can the law achieve for the protection of human rights? After all, when people respect and care for each other in a society, our ‘rights’ tend to look after themselves. But in fallen human society, people do not always protect and care for each other and we hope for laws that enforce a minimum ‘baseline’ of behaviour.

32. In Australia, our human rights are currently protected through a combination of government policy, common law, the Constitution and specific laws (such as Federal and State Anti-discrimination laws). Many argue that this system is working well.

33. Others believe the current system is patchy and inadequate, and that a charter of rights would enhance our existing legal system and better protect human rights.

34. So is it best to introduce a charter of rights, or to leave the law as it is? To a large extent, this will be a matter of human discernment and will require a good understanding of our legal and political system.

35. Also, the international community has forged a number of agreements about human rights over several decades. Australia has participated in this process, and the nation’s eventual decision will be informed by it. However in this paper we will not say much more about the international human rights movement. (For further information see other briefings of the Social Issues Executive under ‘Reports’ at <http://sie.moore.edu.au>.)

### a. How do charters operate?

36. We need firstly to clarify what is meant by a ‘charter of rights’ and a ‘bill of rights’.

37. A ‘bill of rights’ often reminds us of the 1791 U.S. Bill of Rights, which is embedded in the U.S. Constitution as its first ten Amendments. In modern times, many countries have enacted bills of rights; but these differ significantly from the U.S. model.

<sup>2</sup> Augustine, *The City of God Against the Pagans*, tr. R.W. Dyson, *Cambridge Texts in the History of Political Thought* edition, (Cambridge: Cambridge University Press, 1998), 581 (XIV.1).

38. The phrases 'bill of rights' and 'charter of rights' can be used synonymously, but to avoid confusion with the U.S. model, people in the Anglo-Australian context tend to refer to a 'charter of rights'. Accordingly, we will refer to a 'charter of rights' from here on.

39. The two main distinctions between types of charters of rights are entrenched and statutory charters.

40. An entrenched charter is inserted into the constitution. In Australia, that requires a referendum. Historically, referenda are often unsuccessful and so an entrenched charter would be difficult to achieve. But should it succeed, it would be difficult to change at a later date (which could be a strength or a weakness). Such 'entrenched' rights enable courts (that is, judges) to declare laws to be invalid if they are inconsistent with the Charter.

41. A statutory charter is an Act of Parliament, which like any other act can be amended or repealed by Parliament. It enables judges to test laws for their consistency with charter rights. In general, such a charter could include all or some of the following –

- list what human rights are to be protected;
- empower courts to inform Parliament when existing legislation is incompatible with any of these rights;
- invite or require Parliament to review the 'offending' legislation (in order for Parliament to decide whether the 'offending' legislation is to be amended, repealed, or left as-is);
- require that new legislation coming before Parliament be accompanied by a 'human rights impact statement'; and
- require public authorities to adopt policies and to act in accordance with charter rights.

42. Charters of rights do not function independently of the social and political system in which they operate. The success or failure of charters is heavily dependent on the quality of the existing legal and political system of which it is a part. (For example, the efficacy of a Charter of Rights in Zimbabwe will be different to that of New Zealand.)

43. International experience (with the notable exception of the U.S. Bill of Rights) demonstrates how rights are not always expressed in absolute terms. One right may need to be balanced against other rights. The way this can be achieved depends on the model adopted. In many charters a general clause is included to place 'reasonable limits', where justified, on certain rights.

44. Charters are primarily intended to regulate the relationship between agents of the State (i.e. 'public authorities') and an individual, rather than between individual citizens.

#### **b. What 'human rights' might be protected?**

45. Most charters draw upon international treaties and covenants to determine what rights are protected.<sup>3</sup>

#### **c. Arguments for and against a Federal charter**

46. We will now identify some of the arguments offered for and against a Federal charter. At this point it is not our intention to agree or disagree with any of these positions. Nor is any position distinctively Christian—each is simply an opinion about what is best socially, legally and politically.

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<sup>3</sup> For example, the Victorian *Charter of Human Rights and Responsibilities Act 2006* specifies the following rights –

- Recognition and equality before the law
- Right to life
- Protection from torture and cruel, inhuman or degrading treatment
- Freedom from forced work
- Freedom of movement
- Privacy and reputation
- Freedom of thought, conscience, religion and belief
- Freedom of expression
- Peaceful assembly and freedom of association
- Protection of families and children
- Taking part in public life
- Cultural rights
- Property rights
- Right to liberty and security of person
- Humane treatment when deprived of liberty
- Children in the criminal process
- Fair hearing
- Rights in criminal proceedings
- Right not to be tried or punished more than once
- Retrospective criminal laws

## 47. Against a Federal Charter of Rights –

- ‘Rights are already well protected in Australia. A Charter would make no practical difference to the protection of rights.’
- ‘It remains to be seen whether Charters make a substantive difference to a country’s human rights record.’
- ‘A Charter might give unelected judges too much power over important social issues, and would undermine parliamentary sovereignty.’
- ‘The existence of a Charter might encourage frivolous claims and generate extensive litigation.’
- ‘Some right might become unhelpfully “fossilized” (as seems to have occurred with the American “right” to bear arms). Also, listing one set of rights might hinder our recognition of some other important but unlisted right.’
- ‘The administration of laws will become more burdensome by design (as law and policy is checked for human rights compliance).’
- ‘The administration of laws will become inadvertently more burdensome (since rights-language is very broad).’
- ‘Rights language can raise unrealistic expectations among minority groups about the impact of having these rights.’

## 48. For a Federal Charter of Rights –

- ‘Existing protections in common law, the Constitution and other legislation are not comprehensive and leave significant gaps.’
- ‘A Charter would give legal effect to our obligations under the international covenants to which Australia is signatory.’
- ‘A Charter would bring Australia into line with most other industrialized countries and common law jurisdictions.’
- ‘A Charter would uphold human rights above politics and the whim of governments.’
- ‘Government policy and administrative decision making would be enhanced by having clear human rights standards.’
- ‘A Charter would promote a culture of respect for human rights.’

49. While there are many arguments that can be offered for and against a Federal charter, a person's attitude towards a charter may ultimately depend on the particular perspective the person has on the matter. For example, some say that the principal effect of overseas charters has been to allow people to escape criminal conviction because the police have infringed their "charter rights". On the other hand, others say that it is these very people who need the full protection of the law against the police and others in authority.

**d. What are some key Christian concerns?**

50. As distinct from the previous arguments which could be put by any citizen, Christians often raise the following particular concerns –

- (a) *Will a Charter protect the most disadvantaged?* Christians have always rightly been concerned for those who are vulnerable or marginalized in our community. Mixed evidence is emerging about how well charters of rights can achieve this kind of protection.
- (b) *What rights will be upheld?* Christians express concern about rights being included in a Charter that emphasize special interests inconsistent with a Christian account of society.
- (c) *How are conflicting rights to be arbitrated?* Some Christians fear that freedom of religion will become a ‘secondary’ freedom; and that freedom of Christian assembly and expression (including gospel preaching) may therefore be threatened (for example some Christians in Canada and the United Kingdom have argued that the environment for evangelism has become more difficult under a charter).
- (d) *What kind of culture will a charter promote?* Some Christians worry that a charter of rights will entrench a culture of selfish individualism, rather than a society based upon personal responsibility.

For and on behalf of the Human Rights Working Group

ROBERT TONG

*Chair*

12 September 2008