

21/3/00

The Hon R Dyer MLC
Chairman
The Standing Committee on Law and Justice
Legislative Council
Parliament House
Macquarie Street
SYDNEY NSW 2000

Dear Mr Dyer,

Attached is a submission from this organisation to the Standing Committee on Law and Justice Inquiry into a Statutory Bill of Rights for New South Wales.

The NSW Council of Churches welcomes the initiative by the government in addressing this very complex issue and determining to conduct an inquiry into the full ramifications of the establishment of a Bill of Rights for this state.

The attached document raises a number of intrinsic issues relating to a Bill of Rights and in so doing, also reflects on the inherent difficulties associated with the administration of such a piece of legislation.

We have tried to examine the 'pros' and 'cons' objectively.

Indeed, the reviewers of the paper from within our own organisation amplified their sentiments of being in favour of such legislation in some respects but against it in others.

We would request the Committee keep us informed of procedures as they unfold as we welcome the opportunity of being actively involved in the debate, albeit a little difficult at this time when there is no legislation draft yet in existence.

Yours sincerely,

Wayne Magee
Public Affairs Director

SUBMISSION TO:

*The Standing Committee
on
Law and Justice*

*Inquiry into a
Statutory Bill of Rights
for
New South Wales*

Care of:-

**The Hon R Dyer MLC
Committee Chair
Legislative Council
Parliament House
Macquarie Street
SYDNEY NSW 2000**

SUBMISSION FROM:

The NSW Council of Churches

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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; 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 specific groups of people, regardless of their ethnic 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 rights 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.

Interpretation of 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 rights of others and be contrary to the basic Judeo-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 PN Bhagwati, former Chief Justice of India, observed:

"The basic theme in the discourse on human rights to which we must address ourselves is how we can convert the rhetoric of human rights into reality."

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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 Covenant 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 CHALLENGES AND THE SYSTEM:** If there were to be 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 alleging 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 rights of both the all persons and citizens only groups are protected.

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However, many are too poor to afford legal representation even though they are above the cut-off point for legal aid.)

In hearing any brief on human rights violations, there is a always 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 NSW 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 -v- 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 funding 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 being available to administer and enforce the legislation covering a statutory Bill of Rights. 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."

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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' laws, state governments may enact differing 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 & 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. 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 co-operation rather than imposing the necessity of a right, which needs 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, Matthew 7:12 & Galatians 5:14).

HINDU

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

BUDDHISM

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

ISLAM

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

TAOISM

"Regard your neighbour's gain as your own gain, and your neighbour's loss as your own loss."

CONFUCIUS

"Do not unto others what you would not have them do unto you."

JUDAISM

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

14TH CENTURY PROVERB

"Do as you would be done by"

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In view of the catholic belief that humankind is required to respect the human rights of others, few would question the needs 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 of the NSW Bill of Rights proposal.**

This involves the debate of Duty Based Law -v- Rights Based Law. Classic English law (inherited by the colony of NSW) was essentially "duty based law" not a "rights based law". At that time English law was profoundly influenced by the Christian faith of the English who generally adopted a Biblical world view and subscribed to a Christian ethic. Biblical law is clearly a "duty based law" (as the example given earlier in Matthew 7:12 & Galatians 5:14). As with the Biblical template, the English established a "duty based system" that has enjoyed tremendous success and maintained by many of its previous colonies for a considerable period of time. This issue is often discussed as the "rights -v- 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 rights".

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. Sub-section 37(17) of the *Constitution* of Papua New Guinea provides 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 plunges 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. CONCLUSION:

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 adhere to the latter. If that is true and according to first principles of English law, we are free then; Why then do we need rights? We are already free! 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", "the right to _____"?

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

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 as 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 your own opinion), etc. *

Are we truly prepared to have governments define and redefine us and then base laws on these descriptions? From a ground level perspective, government is an authority construct designed by and for mankind. Man exists 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/ redefining process may well bind us to governing systems in ways we have to fully appreciate. Under "duty based law" we are dealt with straightforwardly as men and women, whilst under a "rights based system", we are to be dealt with according to new "government-issued" describers.

** (These examples come from the U.N. Universal Declaration of Human Rights.)*

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 "rights based" system of law will involve the government declaring a list of amoral rights:

- (i) as the very standard against which all other laws are measured, accepted or rejected (notwithstanding that such laws were otherwise validly enacted), and/or
- (ii) then pass laws prohibiting infringement of those rights.

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 function properly 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 in a situation. With such proliferation comes the inevitable conflict of 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 or 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?

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This is extremely difficult in a multicultural society such as NSW! If a rights conflict 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 laws with the relevant moral or ethic embodied in the law must be retained and not left to be determined by individual adjudicators or according to changing and diffuse "social norms".

The whole debate is surprising in the context of a 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 a rights based system comes not from the people but from the international arena. In the much vaunted "Universal Declaration of Human Rights" 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 50 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, 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 one must also question if a new legal structure is or is not necessary to ensure basic human rights in our own environment here in NSW.

Conversely, the dilemma arises in that one may also argue without a Bill of Rights, there is a great difficulty stopping the State preventing freedom of speech.

A pertinent example of this is the proposed decision by the State to ban religious freedom in being able to share the Gospel within the precincts of any Olympic 2000 venue. One would imagine that a Bill of Rights would endorse religious freedom of expression and prevent the State from suppressing the freedom of speech in regards to such an event.

From these conclusions, it is evident that before any decision is made on content and composition of a Bill of Rights for NSW, there is dire necessity for a bipartisan investigative procedure to be undertaken involving political parties, the public and the church.