

What's *Not* So Wrong About Rights

A Christian Response to Human Rights and the Proposal for a Federal Charter of Rights

How Charters of Rights work in Practice: One Story

Recently I heard of a family which was facing eviction from their public housing. Their story shows how reforming our system to better protect human rights can make a real difference to people's lives. Michael, the lawyer who told me about this case, got involved when he took it on *pro bono* (ie. at no charge). It involves a public housing tenant, a single mother and her two young children. The family was settled in the local area and the children were flourishing at the local school they attended. The mother's boyfriend grew some marijuana in the backyard of the property and a neighbour reported this to the police. Following a raid on the premises the mother, as tenant, was charged with cultivating marijuana on the property. When the Ministry of Housing became aware of the charge they issued an eviction notice for illegal conduct on public property. However, eviction was likely to force the mother and her two children into homelessness. The mother appealed to the Ministry to reconsider its eviction notice. The Ministry responded by informing her that the matter was no longer in their hands but had been forwarded to VCAT (Victorian Civil and Administrative Tribunal). VCAT rejected the application by the mother to remain in the property and she then appealed to the Supreme Court.

Michael, a barrister, was briefed at this stage of the case. Aware of the responsibilities of public servants under the Victorian Charter of Rights and Responsibilities, Michael approached the Ministry to suggest they reconsider their duties in terms of human rights. Section 38 of the Charter explains that public servants need to be mindful of their duty to provide public housing to those in need, to consider the tenant's rights under the lease and her right to family life. In the circumstances eviction was unreasonable and excessively harsh. The Ministry withdrew the eviction notice and the case never went to the Supreme Court.

This anecdote is one of hundreds of similar stories where people's lives are improved under a Charter of Rights. The Human Rights Law Resource Centre has numerous similar examples from Victoria, the ACT and overseas available on its website [see www.hrlrc.org.au]. Reviews of human rights Charters and Bills demonstrate that these aren't isolated anecdotes but common experiences. Many vulnerable and disadvantaged members of our community are receiving tangible assistance in difficult situations under better human rights implementation. The latest review of the UK Human Rights Act states the following in its conclusion:

The Human Rights Act makes a positive difference to people's lives, and to the effective delivery of public services which focus on individual needs. Human rights, by focusing on the needs of the individual, can help to restore the power balance between the State and individuals, and between service providers and service users, and can contribute to a fairer, equal and more inclusive society. (*UK Human Rights Inquiry*, [2009] p171)

There are numerous reviews of Charters and Bills of Rights, they include: The Australian Human Rights Commission report *Let's Talk About Rights* (Feb 2009), which highlights gaps in the

current Australian system, and also see the *ACT Human Rights Commission Report* (2008). Overseas there is *The Canadian Human Rights Act Review* (2000); the UK's *Review of the Implementation of the Human Rights Act* (2006); and the *UK Human Rights Inquiry* (June 2009). Geoffrey Robertson's book, *The Statute of Liberty* provides numerous examples of improvements to human rights through Charters or Bills of Rights. In the light of the evidence from these reviews, how is it that Christians appear satisfied with the existing human rights regime in Australia? Shouldn't the church not only encourage the bureaucracy (at all levels of government) to take into account people's dignity, welfare and basic right to a fair go, *and* do everything practicable to support that outcome? This is what human rights Charters seek to achieve, and what, despite no Charter being perfect, the reviews show they do achieve.

A Culture of 'self-seeking' Rights?

One argument against reforming our system with something like a Charter of Rights is that it fosters and entrenches a self-centred 'rights' culture. This is a furphy. To begin with, human rights are intended to uphold *responsibility* as much as rights. People often fail to realise that human rights documents are full of responsibilities and place heavy emphasis on the role of family and community in the well-being of society [see the *Universal Declaration of Human Rights*; the *International Covenant on Economic, Social and Cultural Rights*; the *Convention on the Rights of the Child*; the *ILO Convention Concerning Indigenous and Tribal Peoples in Independent Countries*, etc.] The opening example shows that human rights can (perhaps surprisingly to some) engender *responsibility*, such as reminding public servants about the use of their discretion. Indeed, as the UK Inquiry into their Human Rights Act [2009] states:

The Human Rights Act not only protects people from abuse by public authorities but also imposes some 'positive obligations' on public bodies to take proactive steps to secure people's human rights. (*UK Inquiry into Human Rights*, p31)

Rights need reciprocal responsibility to work, particularly from the 'powerful', such as public servants who can make life changing decisions for disadvantaged members of the community. The responsibilities of human rights reflect Elisha's message from the Lord condemning Queen Jezebel and King Ahab about the misuse of power (in their case stealing Naboth's vineyard, 1 Kings 21:1-19), and the many provisions in Scripture that ordinary Israelites care for the widow, the orphan, the alien and the poor.

Second, human rights are first and foremost civic tools for citizens of modern nation states rather than a belief system for humanity. Their intention is to protect relatively powerless individuals from the relatively powerful state. Their primary application is in legal codes not in the 'heart'. Hence, as valuable and inspiring as they are, they aren't able to satisfy humanity's transcendent longings or create inner, personal transformation. This should reassure Christians. Scripture has much to say about the limits of 'Law' and the power of the Spirit. We bring an important angle to public ideas about what rights can achieve.

Third, it's essential to distinguish between the inherent nature of rights and the culture or ideology in which they are applied. It's easy to throw around the idea that because the language of "rights" *sounds* selfish, therefore they are. But it's all about application. Once again, the UK Inquiry makes the point explicitly:

Properly applied, the Human Rights Act should not encourage a culture of individual rights at the expense of responsibilities. (p30)

Obviously cultural effects occur with changes in societal systems. But many factors far beyond the scope of international human rights norms or instruments shape society's cultural values, such as the role of individuals versus community. African states which were breaking away from Colonialism in the post-World War 2 period drew on international human rights norms. They called for their rights from a non-Western, community-based culture. Their reliance on human rights didn't transform African culture into the kind of individualistic one we know in the West.

Finally, human rights need not create a more litigious society where individuals sue one another over entitlements. In fact the evidence from reviews of Charters shows that the impact on court work is negligible. They are intended to avoid this. As Brian Walters SC notes:

The Victorian Charter, for example, is not intended to create any new, independent cause of action [ie. grounds to litigate] and does not entitle a person to an award of damages for a breach of their human rights. [*Memo of Advice to Religious Groups Regarding A Federal Charter*, p5]

See s 39 of the Victorian Charter which Walters is referring to, where paragraph (3) states "A person is not entitled to be awarded any damages because of a breach of this Charter." In other words, law makers can decide how human rights can be litigated and can shape a Charter to minimise possible contentious litigation.

Key human rights grew from situations such as when Protestants needed protection from non-Protestant States which denied their 'right' to freedom of religion. Do we think our Protestant forebears, who demanded their right to freedom of religious conscience, pioneered a 'selfish culture of rights'? If human rights are judged by intention it is evident that they don't intend to elevate the individual over the community. If they are judged in terms of practice, it is evident that they uphold responsibilities, not merely rights. And if they are judged by effect, it is probably a case of 'guilt by association' with the values of individualistic Western society. There is no clear basis for claiming that human rights are necessarily more self-seeking than any other area of civic life, such as politics, economics or media.

A Lawyer's Picnic?

The example above from the housing commission family also shows how misguided the refrain is that reforming our human rights system will make lawyers rich and jam up the courts. Michael took on this woman's case *pro bono*, that is, for free. Anyone who knows lawyers working in 'public service' law, such as legal aid centres, knows that they are paid a fraction of what they would earn in the corporate sector. The corporate lawyers who do take on public interest cases typically do so *pro bono*. The story also illustrates how Charters of Rights are hardly about legal battles waged in court between highly paid lawyers out to make money. It was the Council which forced this matter to Court (VCAT) by not exercising its discretion. Michael didn't pursue it in the Supreme Court but sought resolution directly with the Council. His use of the Charter gave him a tool to avoid any further legal action.

Increased judicial activism is often cited as an inevitable consequence of human rights Charters or Bills. But in the case of the Victorian Racial and Religious Tolerance Act, a Charter would likely reduce the need for judicial re-interpretation by recommending that such legislation be reviewed by Parliament to better reflect human rights to religious freedom. To explain this further it's necessary to look at how human rights and courts work in practice.

Human Rights in *Practice* (not in Abstract)

How human rights are applied in practice and how they are claimed to apply can be quite different. There are a number of 'scary stories' being circulated about what a human rights Charter will allow to take place. Since there are no cases of religious freedom being curtailed by the two Australian Charters already in place (Victoria, ACT), consider how a notoriously poor piece of legislation can still work in regard to religious freedom.

We all know about the Catch the Fire ministries litigation under the Victorian Racial and Religious Tolerance Act (2001). The legislation has been rightly criticized by churches as well as human rights advocates and others.

As an aside, please note that this legislation was passed by the Victorian Parliament five years before the Victorian Charter of Rights and Responsibilities was enacted. There are very good reasons to believe that a Charter would have improved the legislation significantly [as Brian Walters SC, among others point out]. Nevertheless, under our existing system, our democratically elected Parliamentarians passed this legislation eight years ago. Despite widespread criticism and strong protests by the church, it is yet to be amended. It is thus not entirely clear from the Catch the Fire example just how wonderfully our existing Parliamentary system does protect religious freedom.

Nevertheless, a case in 2005 run under the current legislation, shows how the courts can and do exercise discretion in *favour* of religious freedom. It involves a prisoner, who also happened to be a Satanist, claiming that a Salvation Army course in his prison vilified witches and the occult. The complaint was heard before VCAT. The tribunal, stressing the right of the Salvation Army to proselytise and evangelise in prison, summarily dismissed the claim. [Fletcher v Salvation Army [2005] VCAT 1523 1 August 2005]

In this case we have poor legislation which can be used to restrict religious freedom, particularly criticism of other beliefs and evangelism. But the court sought to avoid using its discretion to limit Salvation Army ministry in prisons. This case is now part of case history, giving a precedent for others to apply the legislation. Inevitably courts will make poor decisions. But so do politicians (and the source of the problem for religious freedom here is poor legislation). What has happened is that judges have pro-actively interpreted the Act's meaning to protect religious freedom. There is no reason why judgments under a Charter cannot also be used to preserve religious freedom, especially given the Declaration on the Elimination of All Forms of Intolerance and Discrimination Based on Religion or Belief (1981). Article 1 states:

Freedom to manifest one's religion or belief may be subject only to such limitations as are prescribed by law and are necessary to protect public safety, order, health or morals or the fundamental rights and freedoms of others.

Article 6 details religious freedoms, including worship, welfare work, resource production, publishing, teaching (preaching), training, employing “appropriate leaders” and other observances which are protected subject to the article above. How the balance is struck between fundamental religious freedoms and the fundamental rights of others is explored next.

A Tradition of Strong Human Rights Protection of Religious Freedom

Human rights law has a whole tradition of interpretation surrounding it which strongly reinforces religious freedom. One of the most vivid examples is a Canadian Supreme Court case involving a Sikh student (Reference: *Multani v. Commission scolaire Marguerite-Bourgeoys*, [2006] 1 S.C.R. 256, 2006 SCC 6). In the case, a Sikh student wished to wear his traditional religious dress to school, which included a (hidden) small dagger, or *kirpan*. School policy, quite understandably, prohibited students from bringing weapons of any kind to school and the authorities decided that the *kirpan* was a weapon and they could restrict the student from wearing that part of his traditional religious dress. The court faced obvious competing ‘fundamental’ rights: safety versus religious freedom. Here is where the importance of jurisprudence can be seen in deciding how rights are balanced. The court considered the following grounds for limiting religious freedom (the list below is actually from s 7 (2) of the Victorian Charter of Rights and Responsibilities, which draws from the same jurisprudence):

- (a) the nature of the right;
- (b) the importance of the purpose of the limitation on the right;
- (c) the nature and extent of the limitation;
- (d) the relationship between the limitation and its purpose; and
- (e) whether there are any less restrictive means reasonably available to achieve the purpose that the limitation seeks to achieve.

Looking at (b) for a moment; grounds for limiting a religious right include the health and safety of others. So the *purpose* of not allowing someone to bring a dagger to school (even if it’s ceremonial) is obviously important. At (c), the nature and extent of the limitation needs to be ‘reasonable and rational’ (not explicit in this list but part of its fuller meaning). Again, no problem, knives at school are rationally and reasonably a threat to safety. Yet it was at (d) that the argument for limiting religious freedom fell down. The court decided that the limitation was not proportionate to the likely threat (that the ceremonial knife would be used violently). This case shows that several stringent grounds must be established for a religious right to be limited. Commentators on how religious freedom is likely to suffer under a Charter of Rights, or under human rights generally, need to realise that the law doesn’t operate in a vacuum.

Myths in the Media

No doubt some will be thinking of various anecdotes where reasonable freedoms have been curtailed under human rights ‘laws’. Most of these stories are untrue or misunderstood. Examples from the UK media are notoriously unreliable, particularly those from the tabloid media. The antagonism in the press is, as Geoffrey Robertson argues, quite possibly linked to loss of revenue from headline-grabbing exposes of high profile individuals (see ch6, *The Statute*

of Liberty). The Human Rights Act protects individuals from invasion of privacy (where it is not justified by the public interest). In one example, papers reported that the UK Human Rights Act stopped the deportation of a murderer. In fact it was decided under European Union laws regarding freedom of movement. Another story involved the alleged prohibition on filming nativity plays. This was simply a myth. Another involved a convicted murderer who, according to the media, was given access to pornographic magazines under the Act. It is true that he claimed a right to the magazines on the basis of the Act. What the press coverage failed to make clear was that his claim was rejected at the first instance. Yet another, fairly bizarre media story, involved a prison escapee provided with Kentucky Fried Chicken whilst cornered on the roof of his prison (!). The Daily Telegraph reported this was done to preserve the man's "human rights". The Act had nothing whatsoever to do with this decision. Another example is the story that the Royal Navy was prevented from detaining Somali pirates by the Act. Completely false. This calvalcade of stories could go on for much longer. (The examples above come from the 2009 UK Inquiry referred to above; find more examples in Geoffrey Robertson's book, *The Statute of Liberty*)

Closer to home, myths about rights and Charters are being circulated by prominent people. In an opinion piece in *The Age* (5 June, 2009), Bob Carr claims that the Victorian Charter forces Christians to act *against* their religious conscience. Carr writes:

Victoria has just decriminalised abortion. Section eight of the Abortion Law Reform Act requires doctors and nurses who conscientiously object to abortion to nonetheless perform such a procedure in an emergency. An issue of conscience, surely. A group of doctors and nurses sought the protection of the Victorian Charter of Rights. They were turned away. I am, incidentally, a supporter of abortion rights. But this episode confirms the criticism you hear that those seeking a charter only want respect for the rights they are happy with.

Perhaps Bob hasn't had time to read the Victorian Charter for he seems to have overlooked s 48, which states:

Nothing in this Charter affects any law applicable to abortion or child destruction.

This is a special exemption inserted by the Parliament following negotiations with the Catholic Church in 2006, three years before the Victorian Parliament revised its abortion legislation. The exemption means that Parliament must ignore the Charter whenever it considers "abortion or child destruction". So it was really the Victorian Parliament (not a Charter) which issued in the changes affecting religious conscience about which Carr is so scathing. Yet it is also Parliament that Carr simultaneously relies upon as the best protector of religious freedoms.

The example he cites makes more sense as an argument for a Charter (one without blanket exemptions). Had the Catholic Church not got its exemption it would have stood an excellent chance under the Charter of protecting the religious conscience of Christians from the pro-life lobby groups which it opposes. Unfortunately the rest of Carr's article is just as misleading, as Professor Spencer Zifcak and Phil Lynch pointed out in *The Age* on the following Monday (8 June, 2009). Far from eroding religious freedoms, human rights jurisprudence demonstrates a tradition of their protection. Seeking protection for religious freedoms by lobbying contests

between special interest groups (plus the vagaries of politician's attitudes towards the church) risks leaving religious interests in an increasingly uncertain position.

Conclusion

There is a great deal of evidence that human rights reforms, such as through a Charter, *are needed* and *will improve* how we as a society deal with the vulnerable. Of course human rights tools, like any instrument, are open to abuse and misunderstanding by members of the public, special interests, and even by courts. But only blind faith in politicians would suggest that politicians and Parliament are less fallible. The Victorian Racial and Religious Tolerance Act is a prime example of the limitations of the Parliamentary system for protecting religious rights, quite apart from the failings, nationally, regarding treatment of refugees (eg. children in detention), immigration procedures (eg. Cornelia Rau) and terrorism laws (eg. Dr Haneef), just to name a few prominent examples.

Are there issues for Christians to negotiate around human rights and their implementation? Of course. The church is heavily involved in lobbying Parliamentarians and putting its point of view across in public debate. It can and will continue to be able to do so with human rights playing a stronger role in our systems of governance.

There is a great deal of caution, if not criticism from some Christians over a Charter proposal. Yet there has been little, if anything, *concrete* put forward to improve our existing system. It is not good enough for Christians to simply come back with criticisms and negatives regarding a possible Charter, or human rights generally. Proposing vaguely conceived mechanisms in alternative to a Charter is little more than tokenism. James warns us that it's no good to espouse values without putting them into practice:

If a brother or sister is naked and lacks daily food, and one of you says to them, 'Go in peace; keep warm and eat your fill,' and yet you do not supply their bodily needs, what is the good of that? So faith by itself, if it has no works, is dead. [James 2:15-17]

Faith is dead without the works that it should produce. How is it that some are able to so confidently determine that our existing system is the *best possible* regime? (Especially *ahead* of the results of the National Consultation on Human Rights.) What is their response to the many examples documented in the reviews which point to failings in the existing system for the disadvantaged? It appears that practical concern for wider society is being forgotten by many who stridently (yet questionably) concentrate on safeguarding their own religious rights. In other words, as Jesus' story of the Good Samaritan shows, the question which should arise for Christians is not, 'what can I do to safeguard my interests?' It is, 'what can I do to safeguard my neighbour's interests?'