Submission on

Human Rights

This submission was prepared by Dr E D Watt, a retired academic (Politics Department, The University of Western Australia) with a long-standing research interest in clarifying concepts of human rights.

1. What are rights?

Rights are entitlements to benefits of some kind. If I have a right to some benefit, it would be unjust to deny me that benefit. For example:

Some rights are conferred by one person on another. For example, if my neighbour has lent me his lawnmower, I have a right to use it; if not, I can claim no right to use it, and he does me no injustice if he keeps it locked up.

Some rights are conferred by groups of people. For example, if the local tennis club allows me to play tennis on their courts, then I have a right to do so; if not, I have no such right, and the club members do me no injustice if they exclude me from their courts.

Some rights are conferred by law, and may be called civil rights. For example, adult Australian citizens who are registered to vote have a right to vote in Australian elections. If I were not an adult Australian citizen, or if I had not registered, I would have no such right, and no injustice would be done to me if I were prevented from voting.

2. What are human rights?

Human rights are entitlements that humans are believed to have, simply by being members of the human species.
3. Can human rights be created by law?

No, because every human is believed to have these rights inherently, innately, not merely as a concession granted to him or her by other people or groups of people.

The law can do no more than endorse and protect human rights; it cannot create human rights.

Any right created by law cannot be a human right, a right of all humans, everywhere: it can only be a civil right of citizens within that particular jurisdiction.

4. Can human rights be abrogated by law?

No. If there are rights possessed by all humans, simply by virtue of their humanity, then the law at any particular place and time can neither create nor abrogate those rights. The law can either endorse and protect inherent human rights, or it can fail to protect them, or violate them.

If any person or group of people takes it upon themselves to decide which humans are to count as humans with rights and which are not, then the very idea of human rights, inherent in every human being, has been abandoned.

5. How is the right to life understood?

As the right not to have one's life taken if one is 'innocent'.

6. Is the right to life a human right?

If it is not, then there is no point in talking about a human right to anything else. 'Rights' to free speech, political participation, privacy and so on can only be exercised if one is alive. And if there are some categories of humans ('the weak', for short) who have no inherent right to their lives, and may be rightly killed by other humans ('the strong'), then 'the weak' have no right to anything else either. In that case there are no such things as inherent human rights for all. There are only such civil rights as 'the strong' bestow on, or withhold from, whomever they please.

7. Why is the exclusion of humans before birth arbitrary and unjust?

Because humans are organisms, and their life is a continuum. Unlike an artefact, whose order is imposed on it from outside, the order exhibited in an organism is innately controlled and directed. The life of an organism does not begin at birth, but at conception, when an organism is already genetically complete - all the genetic information that will direct its development to maturity is already present - there will never be any more. A wombat fetus is just as much a wombat as an adult wombat. In the same way, a human fetus is just as much a human as an adult human. This is no more than basic biology.
If human rights are supposed to be inherent in all humans, then once you introduce any exclusions, on the basis of race, sex, age, immaturity, dependence, etc., you are no longer talking about human rights at all, but merely about concessions allowed to favoured groups of humans, for the time being.

The quarantining of the law on abortion, under Section 48, from the operation of the Charter, is just such an exclusion of one category of humans – those who have not been born – from the circle of humans-with-rights.

This arbitrary exclusion has already led to threats to another category of humans, doctors and nurses. If in a doctor’s professional judgment, an abortion would be unlikely to lead to favourable medical outcomes for his (adult) patient, current Victorian law does not require him to perform the abortion himself, but it does require him to find someone else who will - that is, to make himself complicit in a procedure that, in his professional judgment, is contrary to the medical interests of his patient (It is by no means clear that the law allows nurses even that much scope for their professional judgment).

The exclusion of unborn humans, if it is allowed to stand, could serve as a precedent for other exclusions. Humans at the other end of their lives may become demented, and so totally dependent on others (and, of course, increasingly expensive to care for, and increasingly numerous). In a few years, could we see an amendment deleting their right-not-to-be-killed?

The exclusion of children before birth from a right to life could also have the effect of eroding or abrogating such limited recognition and protection as they already have in law, e.g., in the Western Australian Criminal Code s.271, and in the common-law right to sue in respect of injuries sustained before birth at the hands of negligent doctors, motorists, etc. (see, for example Watt v. Rama [1972] VR 353).

8. Human rights as the overriding standard

If human rights are to function as the overriding standard, superior to existing law or practice, they must be the kind of rights which can be applied without exception. It follows that such rights are few in number. A right-not-to-be-raped can be applied without exception. It does not have to be ‘balanced’ against any other considerations – benefits, preferences, expectations, habits, practices, or anything else.

By contrast, a ‘right to privacy’ or a ‘right to free association’, of their nature, cannot be exceptionless. They can only be understood with reference to other considerations. For instance, a child’s ‘right to free association’ can only be understood in relation to the parents’ legal (and moral) responsibility to safeguard the child’s welfare, to the age of the child, to the sort of people the child is associating (or may associate) with and any dangers they may pose to the child’s welfare, and to any number of other considerations.

This complexity cannot be captured in any manageably brief form of words.
9. Human rights and delays in the law

Despite periodic reorganizations and the appointment of more judges, litigants in Australia often face long delays in having their cases heard. These delays are exacerbated by any form of 'human rights' structure. Whatever its form, it cannot fail to lead to an increase in litigation. Increased delays are not restricted to cases involving 'human rights'.

10. Human rights and uncertainty in the law

'Human rights' legislation, so its advocates tell us, clarify the law. Nothing could be more implausible.

On the contrary, a multiplicity of 'human rights', of the kind (e.g., privacy, free association) that inescapably have to be 'balanced' against other rights and other considerations, call for an expansion of discretion in the hands of judges. The judges have little or no precedent to guide them, and anyway, stare decisis does not enjoy the reverence it once did.

It is inevitable, then, that different judges interpret these rights in divergent ways, according to their personal predilections – what else have they got to guide them?

This makes it more difficult for officials, and indeed for everyone, to be sure what the law requires of them.

11. Recommendations:

11.1 The Charter of Rights should be repealed. It is conceptually muddled concerning what can count as a human right. In practice Human Rights Acts, in any form, make it harder for people to know where they stand in law, not easier. They are more likely to lead to a culture of litigation than to a 'human rights culture'. They greatly extend the scope for judicial hubris. And they inevitably exacerbate the overload on the courts.

11.2 If the Charter is not abandoned, no attempt should be made to fortify it against the ordinary procedures of statutory amendment and repeal, in the all too likely event of further difficulties arising in practice.

11.3 The law in every Australian jurisdiction already permits the intentional killing of humans at two stages of their lives: the embryonic stage, when they may be destroyed in experiments and in the IVF industry, and the fetal stage, when they may be destroyed by abortion, The presence of those laws on the statute book entails, in the minds of legislators who voted for them, the rejection of any notion of human rights, that is, of rights that belong to all members of the human species simply by virtue of their humanity.
Unless these laws in violation of human rights are first repealed, the presence on the statute books of any bill on human rights, whatever its form or content, is a nonsense.

11.4 If existing laws permitting abortion and the destruction of human embryos are not repealed, and if the Charter is retained, there should be no attempt to restrict rights under the Charter to humans who have been born.

Parliament would then have the task of attempting to justify, in the light of the new Charter, leaving laws on the statute books which violate the right (i.e., the 'right to life') which is indispensable to the exercise any other rights.