

CORRECTED

REPORT OF PROCEEDINGS BEFORE

STANDING COMMITTEE ON LAW AND JUSTICE

INQUIRY INTO A NEW SOUTH WALES BILL OF RIGHTS

At Sydney on Monday, 10 April 2000

The Committee met at 10.00 a.m.

PRESENT

The Hon. R. D. Dyer (Chairman)

The Hon. P. Breen
The Hon. J. Hatzistergos
The Hon. Janelle Saffin

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GEORGE JOHN WILLIAMS, Academic, Barrister and Senior Lecturer in Law, Faculty of Law, Australian National University, Canberra, affirmed and examined:

CHAIR: In what capacity are you appearing before the Committee?

Mr WILLIAMS: Private capacity.

CHAIR: Did you receive a summons issued under my hand in accordance with the provisions of the Parliamentary Evidence Act 1901?

Mr WILLIAMS: Yes, I did.

CHAIR: Are you conversant with the terms of reference for this inquiry?

Mr WILLIAMS: Yes.

CHAIR: Could you please briefly outline your qualifications and experience as they are relevant to the terms of reference of this inquiry?

Mr WILLIAMS: As an academic I have written on these issues and taught on these issues and as a barrister I have appeared in several relevant cases in different courts.

CHAIR: I think I am correct in saying that you have a short written submission in the form of a letter. However, it is your intention to virtually submit your book *A Bill of Rights for Australia* as part of your submission to the Committee this morning?

Mr WILLIAMS: Yes, that is right.

CHAIR: I take it that you wish your submission to be included as part of your sworn evidence?

Mr WILLIAMS: Yes, please.

CHAIR: I will now invite you to briefly elaborate, for a period such as 15 or 20 minutes if you wish, on your submission by way of an opening statement to the Committee.

Mr WILLIAMS: Thank you, very much, Mr Chair. The Committee has put several issues before me that I understand the Committee would like to discuss, and I will not go into those in detail now. I think they are better left for discussion. But what I would like to do is actually to start with one of those issues and also outline, if you like, the model of a proposal which I would put to you.

The issue I wanted to start with and look at in my opening words was the first issue. You asked me: Apart from the Hindmarsh Island case what other contemporary examples of inadequate protection of human rights are there in Australian law?

There is an easy answer and a harder answer to this question. The first easy answer is simply that the whole system is inadequate as it currently stands, and it is inadequate in three ways. Firstly, there is too little rights protection in the Australian system.

Many Australians take for granted the fact that we have a robust political system that does tend to protect rights, but it is also true that for many people in the community - they may be minority people, they may be others - their rights are not protected. It even comes down to many of the basic rights. For example, Australians are not aware that at the State level there is no protection for acquisition of property on just terms.

Many Australians have seen the movie *The Castle*. They have looked at it and thought, "This gives us some sense of the rights we have," but the fact is that this right only exists at the Federal level. This Government, or this Parliament, and indeed any other State Parliament, is able to remove property without giving just compensation.

It is also true that there is no entrenched right to vote at the State or the Federal level in this country, and people too often forget that.

The second way the system is inadequate is that the system, and in particular the very few rights that are in the system, is not owned by the people. There is very little sense within the community that they have participated in the forging of the few rights that are there.

I think, indeed, in reforming the system, one of the most important components is to give the community a sense of involvement, a sense of ownership and a sense that it is their rights which are being determined and their rights as regards the political process.

The third area where the system as a whole is inadequate is that there are no structures in place to better protect and state what rights are worth protecting and stating. Other countries have recognised this imperative. Indeed, Australia is now alone among comparable Western nations in not having realised the necessity of setting out basic structures for determining and protecting human rights, and that may or may not include things like responsibilities, but a structural approach is needed as opposed to the very much ad hoc approach we have in this country that we see in other areas like mandatory sentencing or euthanasia. There is no considered response. We seem, instead, to have a plethora of private members' bills that seem to be directed often at issues rather than some up-front approach.

Now, that is, if you like, the easy answer. The inadequate protection as a whole is not working, but I also take the question as wanting me to address a few more specific instances. There are many, there are hundreds that could be given, and I am sure that in talking to people in the community, through constituencies and other places, it is easy to recognise that there are many, many concerns about how people's rights are protected or not protected under Australian law.

The obvious one I start with in my book is the Hindmarsh Island case, which shows quite dramatically, I think, the fact that not only does the Constitution not

entrench a freedom from racial discrimination but it seems that it entrenches the right of the Federal Parliament to expressly discriminate against people on the basis of their race.

Other examples are the stolen generations themselves. They went to the High Court in 1997, and the High Court said there is nothing in the Constitution to prevent (a) genocide or (b) children being taken from their families - at least theoretically. I am not saying it is likely to happen.

Both of those things could happen again, or, indeed, other like things could happen. There is no such protection there. Other examples: in 1996 Albert Langer was put in gaol for 10 weeks for simply advocating what was an effective vote under the then Federal electoral system. Amnesty International declared him, in effect, to be our first political prisoner in 20 years. Now, that law was repealed by the Federal Government but not until after Albert Langer went to gaol.

Other areas of freedom of speech: the song *Backdoor Man* by Pauline Pantsdown was banned. It cannot be played. It may not be a song you are interested in, but for the youth of Australia that song has a very important political resonance. That has been banned. It can no longer be played on Australian radio. It was declared not to be important free speech and, to my mind, whatever your political views, that shows the paucity of free speech protection in this country.

Another example is the fact that the right to protest has been severely limited in the past in Queensland under a government there, and it is also quite limited in Victoria at the moment. I am not quite sure of the New South Wales status, but in Victoria, for example, it is illegal to protest within a certain distance of Parliament House, and it is a very wide distance. You would not see in Victoria what you see out the front of this building quite often.

Mandatory sentencing: another example I will not go into. Some people would argue sexuality rights in this State have a long way to go in terms of being more broadly protected.

If you talk to people in this State about mental health and other disability, there is no doubt they would say very strongly that there is fundamental protection needed there that is not currently within the law.

Talk to people in the bush. They will talk about phone services, health services, basic services which they would regard as their basic human rights. They would say that unless there is some greater structural protection for those things, we will see the continual erosion that we see within those communities. Or indigenous communities within the bush. Even basic things like adequate supplies of water. They are things, coming to the end there, which are often dealt with at a State rather than at a Federal level.

My point is that whatever level of government you look at in Australia it is true that governments and parliaments have a broad responsibility to better protect human rights, and it is obvious, looking across the board, that much more needs to be done.

I would argue that we need a structural response rather than the continual ad hoc response. I think one of the consequences of that is because we have this ad hoc response at the moment Australians continually turn to international standards. That, in itself, I am not sure is a bad thing, to be influenced by international developments, but it strikes me that political debate in this country is impoverished and far weaker for the fact that we have never determined domestic responses to many of these issues, and that is just as true in New South Wales as it is at the Federal level.

My aim then in this book and elsewhere has been to try to set out a broad program by which different levels of government might move to legislate for bills of rights, not constitutionally entrenched bills of rights.

My aims are several, before I actually outline the model. The first is a very basic one. It is simply to improve respect and tolerance for human rights within Australia, to develop a culture of liberty and also to actually underpin that by greater awareness for human rights in parliaments, the community and courts.

Within that general aim I think it is very important to retain ultimate sovereignty in the Parliament itself. I do not suggest that courts be given the final say on these issues, but the Parliament ultimately should be able to decide these within a democratic framework.

I also think that, whatever rights are put in, such a bill should not be set in stone but, indeed, we should think of this as the beginning point where the community and parliaments and courts can work together to better develop protection for human rights over a longer period of time.

It must also be a cost-effective system, and it should be a gradual, careful and pragmatic model that seeks to have minimal change at the beginning and perhaps working for greater change over time depending on the community's reaction to these things.

What, then, I am suggesting is that this Parliament in New South Wales should enact its own bill of rights. I think it is entirely appropriate that New South Wales would begin this process. That has occurred in this way in other federations in the world where states and provinces have begun the process. It is particularly appropriate in Australia's Federal structure.

This Parliament does have specific responsibility over a number of areas which the Commonwealth does not have responsibility over, which, arguably, are in dire need of some structural response to human rights.

Many human rights issues are State issues; they are not Federal issues; they are not international issues. Indeed, I think it is very clear that New South Wales, whatever the Federal Government were to do, has a specific responsibility over these issues which could be met in this particular way.

The model, then, that I would outline, as I have said, is designed to meet the aims I have started with to create a culture of liberty, retain sovereignty with the Parliament and be quite pragmatic and also to be cost effective.

I am not proposing constitutional change; I am proposing a legislative change, a modified version of what we have already seen working successfully in New Zealand and what will soon come into force in the United Kingdom, the United Kingdom, of course, being the source of our own legal system.

I would argue that we should only protect what might be regarded as core rights that have broad community agreement with them. We should not be entrenching or protecting things such as a right to life, where there is a very broad community debate over what that would mean, or things like equality, which I think is just too broad. I think people in general may agree with equality but it is too hard to draft a definition of something like equality. We need to be much more specific.

I think, if you look to Canada and some of the legitimate criticisms of the Canadian system, that indeed it has been a lawyers' paradise. Much of that, from my experience - I was in Canada a couple of weeks ago looking at these issues - flows exactly from the fact that the Parliament has not defined rights precisely enough and, indeed, has left too much to the courts.

What I think we should be putting in a rights framework is much more specific rights that have a greater resonance within the community and within the political process. I would suggest we should be looking at consolidating things like anti-discrimination rights on the basis of race, sex and disability, which have worked successfully within legislative schemes already and, indeed, have a body of understanding as to what those mean.

I think also we should be looking to freedom of speech and freedom of association, again carefully defined and limited, and also a right to vote - surely the most important and basic right within the parliamentary system - which is not adequately protected at the moment.

There is another broad area of rights which I think would be open to debate as to whether they are to be put in such a bill, and they are the ones relating to the criminal process and the law and order process as well. I have got no doubt that, indeed, certain rights within what you might call the criminal process ought to be protected but, again, I take a very pragmatic view to these things, and if it meant, at least initially, that it was not possible to adequately define how those rights should be put in such a bill, it might be thought that rights within the criminal process could wait until a later stage.

I would also argue that even after carefully drafting these particular rights they should be limited by a reasonable limits clause, as we see in Canada and other jurisdictions, in order to ensure that they are not seen as absolute but are balanced against other community needs and interests.

How would such a bill work in process once we have defined the rights? My model is quite different, if you like, from the other models you have seen proposed in Queensland, and indeed at the Federal level.

My own perspective is that a bill of rights is necessary and important because of what it would achieve within the community and within the parliamentary process, in that it would heighten respect and scrutiny of human rights issues, particularly within the parliamentary process.

I am not after a court-centred model; I am not sure that that is appropriate here. I am after a parliament-centred model and a model I think that would also satisfy the object of being more cost effective than is argued within other comparable systems.

The way my model would work is this: a bill would be introduced into the Parliament after the Government had received appropriate advice as to how it might impinge upon the list of rights, duties and responsibilities. Any bill which arguably infringed one of the list of rights would be referred to an appropriate parliamentary committee. We are seeing that process also set up now in the United Kingdom in the House of Commons.

That committee would report, would take submissions from the community, through media coverage would heighten awareness of these issues and focus on whether human rights concerns are evident.

The Parliament itself could then decide to simply pass the bill or amend the bill if appropriate, and if it did infringe upon a particular right, it could, if it wished to, decide to override a particular right. That is the same process as found in Canada, where an override clause permits the overriding of listed rights.

Now, the override has worked successfully in Canada in the sense that it is a very difficult thing to actually use. It can be used by parliaments, but the focus or scrutiny as a result of using an override clause that is saying, "We pass this legislation despite the fact we realise it, say, infringes freedom of speech," raises the issue at such a political level that, indeed, community groups become highly involved in the debate. It is very difficult for parliaments to achieve that unless they have got very strong overriding reasons. You, therefore, end up with an Act of Parliament.

My preference would be that the courts could declare an Act to be invalid for a breach of right. There are other options. One might be that a court could simply declare it incompatible. That is the United Kingdom approach, where you do not strike down the law; you simply say it is incompatible and it goes back to Parliament. Or the New Zealand approach, where you do not even do that; the courts have the role of interpreting legislation in accordance with the rights.

My own view is that an invalidation system is appropriate. Even though it does give courts more power, perhaps, I think for two reasons it is the way to go. The first reason is that I think it is important to recognise that parliaments do not always make just laws. Indeed, majorities have not always made just laws, particularly as regards certain minority groups.

The second thing is that, in any event, the Parliament would have an override. If the Parliament disagreed with the courts' interpretation of its statute, it could firstly simply pass the statute with the statement "This statute is to operate notwithstanding the right" or, if it did not do that and the actual Act was struck down by a court, it would simply repass the Act, again with the heightened community and political awareness that indeed this particular right is directly involved.

Now, I think if you consider how this would have worked differently in practice, think of mandatory sentencing. The difficulty with mandatory sentencing, and indeed one of the most fundamental problems we have, is the fact that no-one was aware of this within the community for three years until after its passage.

Mandatory sentencing has operated within the Northern Territory since March 1997, yet it is only in the last few months that we have actually become even aware that it existed as a political and human rights issue.

The Hon. J. HATZISTERGOS: Some people.

Mr WILLIAMS: Some people. I agree. I talk more broadly about the media because, you are right, there have been individuals who certainly have been aware of it, but it has not captured media attention until very recently.

My concern is that we should be looking to draft a model that actually ensures that these issues come to attention at the time they are debated within Parliament, not some time after that where you have the issue of overrides and things like that by outside bodies. There ought to be scrutiny up-front.

What I am trying to do, therefore, is to suggest a model that brings scrutiny back to the Parliament and back to the community with an independent role for the courts in certain situations.

I would like a bill of rights which would be subject to ongoing review through parliamentary committees as well as periodic review every five years or so and a bill of rights which would focus media attention upon community interests and would help to develop a culture of liberty within the community and parliaments themselves, which would seek to involve people, give people a sense of this is their bill of rights through their ability to make submissions to parliamentary committees and other devices and, indeed, give them a chance to see that their rights are actually defined within the system in a way that will give them some greater structural reform and, hopefully, avoid, or at least ameliorate, some of the examples I started off talking about. That is all I have to say.

CHAIR: Mr Justice Spigelman, the Chief Justice of New South Wales, made a speech some months ago to the Plaintiff Lawyers Association. He expressed concern, and I am summarising his remarks, that unless there were a bill of rights enacted in New South Wales we would run the risk of our law getting out of kilter with the law in comparable jurisdictions. He had in mind, in particular, jurisdictions, such as the United Kingdom, Canada and New Zealand, all of which, as you know, now have bills of rights and which pay due regard to international covenants to which

they are subject. How much weight do you place on that concern that the Chief Justice has expressed?

Mr WILLIAMS: It is certainly a concern for the legal system in that if we want a legal system which is appropriately informed by developments in other like countries, then, indeed, the fact that we do not have a similar structure to those other countries will naturally quarantine us from those developments. It is not healthy for a legal system for that to happen.

Legal systems best develop, and indeed ours has been this way for many, many years, by reference to developments in comparable systems, where we learn, adapt and, indeed, adopt many of those things. But I do not see that as the most important reason why you would go down this path.

I think Chief Justice Spigelman's comments raise two issues. The first is relating to the legal system itself and why is it that every one of these other systems have recognised the worth of going down a particular path and we have not. I think it clearly shows, indeed, given that, at least up until recent years, our system followed the same track as theirs, that somehow we have got out of kilter with theirs. We have not recognised the wisdom of following a particular path, whereas they have.

The second is a bit of what I call a warping of the legal system as a result. Judges in Australia have had a tendency, particularly over the last decade, to, if you like, themselves develop particular protections of rights within the legal system. While that might be applauded for its particular sympathy for human rights, I think it presents great dangers. I think parliaments like this Parliament are facing a question: is the agenda to be controlled by the courts or the Parliament? Because even though we do not have a bill of rights, a variety of courts within the system are now directly incorporating international norms within human rights and legal developments; they are discovering implied rights in statutes; they are discovering implied rights in the Constitution.

If the parliaments do not act themselves to determine through communities what are the appropriate rights, they find courts have done it for them, and that is certainly a second-best solution, and it is not appropriate that courts deal without the community consultation. I think parliaments ought to. I think that is the sort of argument that Chief Justice Spigelman's criticisms lead to.

CHAIR: Could I ask you a more general question? You will be aware that the political landscape in Australia is littered with, metaphorically speaking, corpses of proposed bills of rights. There have, for example, been parliamentary inquiries in Queensland and Victoria.

The Hon. J. HATZISTERGOS: And the Northern Territory.

CHAIR: And the Northern Territory, none of which have led to actual enactment of a bill of rights. Also, historically, at a Federal level there has been an attempt to put some aspects of rights into the Federal Constitution by referendum. I know you are not here as a political scientist; you are here as an academic lawyer.

Why has it, in your view, been so difficult to enact a bill of rights anywhere in Australia?

Mr WILLIAMS: I think the two most relevant for us to look at would be the Queensland example and the Federal example. I will start with the Federal referendum in 1988. I think the greatest weakness in that referendum was a lack of leadership at the Federal level.

The referendum itself was almost abandoned to the wolves, if you like, and became an intensely partisan issue. The rights that were sought to be entrenched in that referendum were absolutely minimal and would not have amounted to a bill of rights. They were simply doing things such as extending existing Federal guarantees relating to religion to the States and in one or two other areas, but what we saw was a referendum that was rushed, we saw a referendum which did not receive sufficient political support in the actual campaign. It was also a referendum where there had been no sense of community involvement.

It was almost as if this proposal was thrust upon the people and they are suddenly asked to vote for it without engaging in some process prior to it. There was also a sense that the Government at that point was simply pushing it forward because it felt it had to have a referendum in 1988. You put all those factors together and it failed. It was dismal. In fact, the results for the rights proposal were the lowest of any referendum ever in Australia dealing with the Federal Constitution.

The lessons I think you draw from 1988 are several. I think it shows very strongly the need to have a more gradual path; it shows the need not to go by the route of constitutional change to seek to entrench these things in stone but, indeed, it shows the need to have a legislative response whereby the community has a feeling that they are involved both at the drafting process and also at the process of developing the meaning of the rights over a period of time.

We have also got the Queensland example. You have the EARC report from 1993, which, as you can see, is a very thick volume which went into these issues in great detail. It is a very detailed report, but that report suffers, I think, from the fact that it set the bar too high. That particular report tried to set out all of the rights you might possibly imagine were human rights and develop a bill of rights which went far beyond, I think, what you might regard as a bill setting out the core rights, the rights that have a strong resonance in the community. There are rights in there which are very speculative; there are rights in there which people would very strongly agree and disagree with.

I think the lesson from that is that we should be looking at a bill of rights which might have only 10 rights, it might have five. I am not sure of the number, but it would have only those rights which, indeed, are strongly regarded as being appropriate rights at a first stage to put in such a bill. This tried to do everything at the first draft. It also, I think, gave too much power to the courts.

That model did not provide an override for the Parliament. That model was more about a court-centred model rather than a Parliament and community-centred model. I think, indeed, the model I am proposing is different from any of the other

proposals you are putting in that it seeks to be far more modest and far more pragmatic. It is purely legislative.

I would only argue we should put those rights into the first stage which we can achieve broad agreement upon across the political spectrum. I think if we do that it is quite different from anything that is proposed and, at the same time, if we cannot do that, then, indeed, it is of great concern that we cannot even get to that first base, if you like, to start somewhere very easy.

CHAIR: I realise this is substantially a political rather than a legal question as well. Are you aware whether there was any substantial outcry in particular in New Zealand on the one hand and the United Kingdom on the other when their bills of rights were enacted?

Mr WILLIAMS: There certainly was not an outcry. In both countries it is a very similar climate to what we see in Australia today. Take the United Kingdom example. There was a great feeling in the United Kingdom that European conventions were having an overly large influence upon domestic developments within the criminal process, within other human rights-related processes.

There was a strong feeling, indeed, that international developments were dominating how things were done in the United Kingdom. When the Blair Government was elected there, their response to that particular criticism and concern within the community was to say, "Well, what we should do is develop our own statement."

That statement does incorporate the European developments but puts them within a domestic context, and it is clear as a result that the European rights which are incorporated, and there are some which are derogated from, are done so as a result of the sovereignty of their own domestic Parliament.

New Zealand was a similar example, where in New Zealand there was a concern that it had become adrift from developments in other countries, such as Canada, such as developments at an international level, and that particular model was again sought to be a domestic response to what was seen as overriding human rights concerns that had not been adequately addressed within the domestic parliamentary context.

CHAIR: You made some passing reference a moment or two ago about a bill of rights for New South Wales incorporating some core rights. Without necessarily being definitive, can you indicate to the Committee what core rights you have in mind?

Mr WILLIAMS: Yes, I can. The place I would start would be to look at some of the existing legislation within New South Wales. I think one of the most important things about a bill of rights is that it would consolidate within one document what might be seen as those core rights, and I think that would assist and facilitate the very important educative role of a bill of rights within the community and give people a sense that there is a document they can turn to.

I would turn to the anti-discrimination statutes, for example. I would turn to what are some of the other important statutes in New South Wales. I would add to that basic protections for freedom of association. That is something that Australians take for granted - their right to join or, indeed, not to join a trade union or a political party or any other organisation they might feel is important.

I would add to that a freedom of speech. It has been one of the rights which has been most severely impacted upon in recent years when you looked at Albert Langer and you looked at the banning of satirical songs about the political process. And I would also add to that any other rights which this Committee might have put before it by the community that seemed to have a very strong acceptance within the community.

One useful way of doing this would be to look at some of the lists developed in Queensland, at the international level and have a check list. I think if you went through that you would be surprised how much of those rights, indeed, are simply taken for granted and simply accepted as so obvious that people ought to have them or have simply assumed that they do have them, but they are the types of things that could be included.

CHAIR: You have adverted to this in your preliminary remarks. Could I ask you, though, to indicate to the Committee what your response is to the well-known and often-articulated criticism that a bill of rights transfers decisions on major policy issues from the Legislature to the judiciary?

Mr WILLIAMS: This seems from the Premier's reported comments to be one of his main concerns, that a bill of rights becomes a judicial plaything almost and, indeed, it becomes a source of lawyers' fees and things like that. I think that a lot of those criticisms are extremely valid, very valid, for certain bills of rights models.

In particular, if you looked at the United States, when certain issues arise people immediately rush to the courts more quickly than they do to their members of Parliament, and that is not a desirable thing.

I think, to respond to this concern, the appropriate thing to do is to draft a bill of rights in a way that avoids that. Other countries have sought to do that. The United Kingdom does not grant courts the ability to invalidate legislation. Indeed, their courts can simply give a declaration of incompatibility, which then puts it back within the political process. That would be one approach.

The New Zealand approach simply says that their rights are used as interpretative tools; they are not used as invalidating tools. I think my bottom line is that even though I think courts ought to have an ability to strike certain things down, the way to avoid them becoming creatures of the judiciary is to make sure the Parliament has an override ability, as has been done in Canada, to say that ultimately sovereignty resides with this Parliament, the courts have an immediate role in interpreting and applying the rights within the appropriate context but there is no doubt which body has the final say, and that should be the Parliament.

The Hon. J. HATZISTERGOS: But it still brings them into the position of having to determine a political issue rather than a legal issue.

Mr WILLIAMS: Yes, you are right about that.

The Hon. J. HATZISTERGOS: That is one of the criticisms in the submissions that we have had from some of the judges, that they do not wish to be embroiled in the politics as opposed to legalism.

Mr WILLIAMS: Well, there are two responses. The first is that you can limit that by drafting rights appropriately. If the Parliament has a greater say in what the ambit of these rights are, there will be a lesser say for courts. It has been a very strong criticism in Canada, where courts are called upon to determine what is equality. That is a principle question; it is not a legal question. But if you tell courts, "We are not going to define what equality is, you are," then, indeed, you are devolving that responsibility. I do not think that should happen.

On the other hand, we have already got things like anti-discrimination laws in this State. It is not as if people are suggesting that they have worked in such a way that judges have become so politicised that that does not work. I am suggesting we should put like protections together in a bill which are drafted so carefully that, indeed, the Parliament's will is quite clear as to what the ambit should be. There will always be ambiguities; there will always be shades of grey; there will be a role for the courts to play in that.

My second response is that, to some extent, courts becoming involved in political matters is inevitable, but it is already happening.

The Hon. J. HATZISTERGOS: The more closely you define the particular right the more ambit there is for criticism that what is being engaged in is, in fact, not a protection of rights because the flexibility is not there to interpret it in a way that others might regard as consistent with the principles of human rights.

Mr WILLIAMS: That is true, and there is a balance here between, on the one hand, defining things so exhaustively, as you say, you almost define them out of existence and, on the other hand, leaving them so broad that Parliament does not give appropriate direction to a court. I think the middle course is, as you find in some jurisdictions, where rights are generally stated but with a clause which also says there are reasonable limits as to these rights.

The Hon. J. HATZISTERGOS: That brings the courts right into play. That is determining what is reasonable. That is what has happened in Canada. The courts are forever juggling with this concept. Originally, as I recall it, what was occurring in Canada was that the courts were being very careful not to override Parliament in terms of interpretation, and that led to community backlash. They were not protecting rights. Some people have tried to go the other way now. It just goes back to the point I am making. You are embroiling the courts in a political fight.

Mr WILLIAMS: And I agree to the extent that I said to some extent that is inevitable. I think, however, a lot can be learnt from the Canadian context and, as I

said, you remove those rights which are so general, like equality, that indeed the majority of cases under the charter deal with those types of rights, and the Canadian Supreme Court hears an amazing number of cases dealing with what is equality.

The other thing, of course, is that in Canada it is a constitutional entrenchment, it is not legislation, and that heightens the politicisation to a far higher degree. To some extent, you will have judges involved in what are thought to be political controversies, but, as I have said, that is inevitable, anyway.

The question is: do they decide it by reference to the system we have or do we give them a better structure where, indeed, instead of them implying rights we are actually giving them parliamentary determined rights?

When you look to the Hindmarsh case, you look to the fact that there are various challenges now being proposed to mandatory sentencing in the Northern Territory, you look to the fact Albert Langer went to court, these will end up in courts one way or the other.

My suggestion is that we should give the courts directions from parliaments as to at least how they should start and a framework within which to operate with a possible override, and that actually manages the inevitable politicisation in a way that I think gives them a much more appropriate basis to develop a rights jurisprudence than what is already happening.

The Hon. J. HATZISTERGOS: The other argument against you would be to leave it to parliaments to determine those rights on a case-by-case approach.

Mr WILLIAMS: Well, you could, but parliaments do not do that very well.

The Hon. J. HATZISTERGOS: The courts staying out of it reading in implied rights and all this sort of thing.

Mr WILLIAMS: The difficulty is that if you could say, "Well, the courts are not going to deal with this any more," that might be an option, but it is impossible. You look at various judges who are saying simply in interpreting ordinary statutes, "We will use the international covenants on human rights as an interpretative tool." You can legislate that out of existence possibly.

Then there are judges who are saying there are implied rights not only in the New South Wales Constitution but the Federal Constitution. There is nothing you can do about that; that is inevitable. But, institutionally, parliaments are not the best body to provide a backstop to their own actions, if you like.

It is very important to recognise, as our own Constitution does, that majorities do not always make just laws. There is a role for a circuit breaker in the courts in carefully defined circumstances. And you look at mandatory sentencing. The debate in the Northern Territory did not deal with the human rights concerns in the way it ought to have done.

The Hon. J. HATZISTERGOS: I think there are other reasons for that. You have an immature Parliament with a small electoral base and the particular characteristics of the Northern Territory electorate, without saying too much, but it is not only that fact; there are other reasons for it.

Mr WILLIAMS: There may be, but even if you take away the suggestion of immaturity, the fact is that parliaments are not prescient about how their Acts will actually operate in the community. If you look at the Albert Langer statute, nobody thought when that was passed that it would end up putting a political activist in gaol for 10 weeks for a political crime. There was nothing the Parliament could do about that.

The Hon. J. HATZISTERGOS: I see values in bills of rights in countries where there is a particular problem, for example, in South Africa, where there was a minority that was going to hand over power to a black majority and they needed, in order to get some reconciliation, to assure the white community that their rights would be respected. I think, similarly, in the Northern Ireland situation where they were talking about having self-government, there was a need there to protect the rights of the two separate communities.

In Canada, similarly, you had the Anglophone and the Francophone communities, and I think that was an impetus, to some extent, for their bills of rights, but I just wonder in Australia and New South Wales whether we have the same sort of impetus.

Mr WILLIAMS: Well, it comes down to the question: do you think our human rights record is magnificent? Personally, I do not. I think if you judge our human rights record from the perspective of people who generally do have well-protected rights from the perspective of people in the community and people in the middle classes and people like that, yes, absolutely, but what is too often forgotten is the fact that indeed human rights of many of the smaller groups in this country have been very badly abrogated on many occasions.

Whether it is indigenous peoples, whether it is Communists at the height of the Cold War, whether it is agitators like Albert Langer, whether it is certain people in the bush, the fact is that their human rights are not well protected today. Something ought to be done. I think those people would say too, "Well, it is fine if you are in that majority that is well protected at the moment, but what about us?"

We are like some of the groups in other countries you are referring to where we do not have the political power to indeed achieve certain things. We want a structure that actually respects our position within the community.

The Hon. J. HATZISTERGOS: Accepting what you are saying there, that is why I am trouble with your solution, because your solution seems to say, "Well, there are problems with the Legislature and, therefore, it needs to have some form of backstop," but the solution that you are putting forward is a legislative solution.

You are putting up another piece of legislation. For example, we have an Act here that protects the right to vote in New South Wales, but you want another Act that is going to protect the right to vote alongside which that Act is going to be judged.

Do not forget that that law that you are going to put up, the Interpretation Act or whatever it is, that is going to assert the rights is just as vulnerable to amendment as the principal law which sets up the right to vote, so I am not sure what you are achieving by setting up another legislative instrument alongside the other legislative instrument which has no greater protection, amendment or transgression.

Mr WILLIAMS: If you look at it legally you have a very strong argument. If, indeed, this was simply a matter of playing one law off another, then, you would not do it for that reason.

The Hon. J. HATZISTERGOS: Let me put it to you another way. If there were some legislative attempt to change the Parliamentary Elections and Electorates Act, to take away the right to vote, the outcry out there in the community would be enormous.

Mr WILLIAMS: But you do not see laws which take away the right to vote.

The Hon. J. HATZISTERGOS: What you are trying to do is that you are trying to form a basic bill of rights which sets forward rights which no-one would dispute to some extent, and I am saying, what is wrong with the protections that are already there for those? We have got anti-discrimination laws here at the Federal level and the State level to protect those people.

Mr WILLIAMS: But no freedom of speech, for example.

The Hon. J. HATZISTERGOS: Just take freedom of speech for a moment. There are so many probables with freedom of speech. You have defamation laws. What happens if someone puts on the Internet instructions as to how to construct a bomb?

The Hon. JANELLE SAFFIN: They do.

The Hon. J. HATZISTERGOS: And they do. Are we going to allow that sort of freedom of speech or freedom of speech which encourages racial vilification? There are all sorts of difficulties when you are trying to define those sorts of things like freedom of speech.

The Hon. JANELLE SAFFIN: Can I just make a comment there? There is actually a case before the court at the moment where a person who has taken a defamation action has actually invoked section 42 of the Fair Trading Act to try to curb an independent journalist's free speech, which I find quite extraordinary. If there was a bill of rights guaranteeing freedom of speech, then that could actually be invoked as well. It is just before the court now.

Mr WILLIAMS: You raise some fundamental concerns about a bill of rights, all of which have some strength. What I try to do is respond to them by putting to you a particular model which I think meets those concerns in the best way.

The Hon. J. HATZISTERGOS: Do you have a bill that you have drafted or something?

Mr WILLIAMS: No, I do not have a bill. I have deliberately refrained from doing one, not because it could not be done but, indeed, what I have tried to do in my writings in this book and elsewhere is simply to put forward a process to lead to a bill.

I do not see my role as even suggesting what the rights should be so much as saying, "Here is a way of actually structuring it." I think there is a community and parliamentary approach that really should be taken to that.

Taking your example of the right to vote, I think there is a lot of merit in collecting together things like the right to vote in a statute which has a heightened visibility within the community and, indeed, can be a focal point for debate and consideration and awareness of these issues.

I think if certain rights are spread out over the legislation broadly, the community is just not aware of what they are. Something is needed that can be given to schools, that can have some resonance within the community so that they can actually see what they have got in one document, and I think that it is important not to underestimate the value of actually doing that.

The Queensland committee in 1998 recognised that by having their little booklet *Queenslanders' Basic Rights*. They were trying to collect these things together. Unfortunately, that book does nothing more than illustrate what the gaps are because there are so few rights in Queensland that are given the basic protection. This book illustrates the need to actually not only collect them together but actually to cover the gaps.

The second issue was: if you do have these two statutes, what happens and, indeed, why not just leave it in anti-discrimination acts and things like that? I think that by putting it in a bill of rights it changes the political landscape irrevocably. What it does is that it gives the community a direct linkage to their rights in the parliamentary context which is dissipated by having it spread out or indeed not having the rights in legislation at all.

Even though you correctly say I am suggesting an override and all these other things and indeed Parliament can make the changes, the fact is that the political landscape is changed as a result because people have a focal point for debate and interest and that focal point becomes incredibly important for community groups and other groups.

One of the very important Canadian developments as a result of certain rights being put in their charter is that communities have become much more involved in the process. They have a point of interest. They have an entry point. The level of

alienation has dissipated in some areas quite markedly because they can actually have a sense that indeed "Here are our rights, here is our input into the political process".

If parliaments seek to deal with their rights in a certain way, even though it can be done, as you and I would both agree, and you correctly say, the fact is that politically it makes an enormous difference. My argument is that parliaments should be doing this, not courts, because I think it is the change in the political debate and the community culture which is all important, not the fact that rights are simply put on a piece of paper.

The Hon. J. HATZISTERGOS: Take the right to vote for a moment. That is at the moment in legislation and it is preserved by legislation, but it could be changed. If you set up in a bill of rights the right to vote, I imagine that is what the bill would say, that everyone has got the right to vote.

Mr WILLIAMS: Not necessarily. You correctly raised also the fact with freedom of speech that there are very real limitations which ought to be put on that, and, personally, I think freedom of speech should be seen as compatible with anti-vilification laws, for example. One way to do it would be to specifically mention that in the legislation or at the time of enacting a bill of rights to put override clauses in any pieces of legislation that you wish to ensure would not be affected by a bill of rights.

The Hon. J. HATZISTERGOS: Really, the only way you can do that is to have a clause in there that allows for reasonable transgressions.

Mr WILLIAMS: That is one way of doing it, but I think having a parliamentary committee which is continually involved in these things and actually in looking at statutes recognises the need to put an override clause up-front if necessary, you can pass what you want in that event.

The Hon. J. HATZISTERGOS: Rather than have this sort of system that you are talking about - and you have not discussed this so far - would there not be merit in having a bill of rights committee, as I think some State parliaments do, which can examine legislation for infringements of human rights and report to the Parliament at the time the legislation is being passed?

The Hon. JANELLE SAFFIN: We could at least have a scrutiny of bills committee, which we do not have but Queensland does.

The Hon. J. HATZISTERGOS: Queensland does. I think Victoria does.

CHAIR: The Senate does.

The Hon. J. HATZISTERGOS: The Senate does.

Mr WILLIAMS: I think it is a very good idea. It might even be seen as a first stage in the absence of anything else, that indeed a special committee, or a committee with an enhanced jurisdiction, has a list of rights which it determines, perhaps at another inquiry or as a result of this, and it scrutinises all legislation against that in

order to determine whether those rights are breached. That does happen in other States and at the Federal level.

The difficulty with most of those other regimes is that they do not adequately define what the rights are that the committee is looking at. The Federal Scrutiny of Bills Committee, for example, simply looks at whether bills infringe upon fundamental rights and freedoms, or words to that effect. It is meaningless.

If this Parliament was to adequately define the core rights and set up a committee process, I would very broadly support that. I think the Parliament ought to go further because I think, indeed, it is necessary for people in the community and other places that indeed the courts do have a role in this, although it would be carefully limited, but as a first step I think doing the committee approach you suggest would be a very good way forward.

CHAIR: If I could ask you a couple of other questions before I pass over to my colleagues, one criticism that is sometimes made of a bill of rights for a society such as ours is that it is said, and truly said, that in oppressive regimes, such as the Soviet Union at the height of Stalinism there was a bill of rights. And there is one in the People's Republic of China now. People who raise that point say that our rights in a society such as ours really rest on the goodwill of our systems and our democratic traditions and our reliance on the common law of England. What do you have to say to that?

Mr WILLIAMS: It is true that in some jurisdictions bills of rights are not worth the paper they are written on. My view is that bills of rights are important because of their ability to reshape the political process and, indeed, to reshape the community's approach to certain issues.

I think, properly respected, they have the ability to increase respect of tolerance and difference within the community, but this also comes back to my suggestion that, indeed, if we had a bill of rights it should be Parliament-focused because I think, ultimately, that is what we should be most concerned about.

We should be concerned about educating parliamentarians and, through them, the community, and using the media also through to the community. I think, if we did that, there is the opportunity for a bill of rights to make a very important impact upon the political process in this country and also to really improve the level of political debate and scrutiny of some of these issues.

When you do look at when human rights concerns are raised in this country there is a very ad hoc approach to them in the sense that there is no structured response. In the Federal Parliament we do see the private members' bills responding and responding to a Territory issue. That, to me, suggests that we need a more structured and carefully considered approach and that by involving the community and parliaments that might make a difference, where, indeed, those other bills do not, but it would not go so far as you see in other countries, where, indeed, the difference is made within the court system rather than within the political process itself.

CHAIR: Can I just explore for a moment the reference you have just made to a more structured approach? I think you would agree that in New Zealand there is, for want of a better term, a moderate bill of rights and court decisions are brought down quite frequently, particularly in the criminal law area, relying upon provisions of that bill of rights.

What would you say to the argument that the courts, of their very nature, bring down decisions on particular facts brought before them in litigation that occurs and that the decisions that are made by the courts essentially are piecemeal in nature and do not take into account all the issues that might reasonably be taken into account to determine a particular policy question?

Mr WILLIAMS: You are right, and, again, that is why I would say that Parliament must have the ultimate say, because courts are not the best institutions for finally determining the value or level of certain rights within the community.

On the other hand, it is the courts' ability to deal with the specifics that in certain circumstances means they ought to have a say. In some cases, you can only fully appreciate the particular rights violation as a result of a court looking at a particular effect of a law on a particular person.

Sometimes things are only apparent in the specifics rather than the general. That is why I think you need to create a dialogue between courts, parliaments and the community in order to fully involve the different institutional strengths of each and, in doing so, hopefully you strengthen the political and legal system as a whole.

The Hon. J. HATZISTERGOS: You concede that there will still be a role, an enhanced role, for the courts?

Mr WILLIAMS: I do concede that, yes, and I do also think that it is appropriate that it should be that because, as I say, I think the courts can bring particular strengths to this process, but I think it should be allowed within carefully defined limits and only in circumstances where the Parliament has the final say.

There are different models this Committee could look at. My suggestion is that the courts should be able to strike down legislation but then Parliament could re-enact it if it wanted to. The other thing, of course, you could look at is simply to allow the courts to declare something to be incompatible, to have no legal effect whatsoever. That is the UK approach, where it raises it against a political issue.

The third approach is the New Zealand one. It is just like an enhanced Acts (Interpretation) Act. Again, the courts cannot strike anything down but at the leeways of choice they can respect rights rather than abrogate them.

I think courts need to be involved in some way ultimately in a bill of rights. If you were to move beyond what your question was earlier directed at, that is simply an enhanced parliamentary committee role.

The Hon. J. HATZISTERGOS: Looking at it from the point of view of an enhanced role for the courts in a bill of rights, you accept that that would only be able

to be exercised on a case-by-case approach depending on litigation coming before it, and there is no avenue for the courts to express openly at an early stage what their views are about rights unless they are confronted with a specific fact situation. If that is the case, do you accept that that creates a problem in terms of rights being unpredictable?

Mr WILLIAMS: No, I do not accept it creates a problem so much as actually the opportunity to again strengthen the system. I think you do need the courts involved, because in some circumstances we ought to look at things on a case-by-case approach.

It comes down, again, to the issue that general laws do not always do justice by all people and, indeed, there is a role where courts will look at particular fact situations and ask whether a law operates in a particularly discriminatory way in a certain situation that the Parliament could not have predicted.

A court may then reach a decision based upon that particular case and the Parliament may say, "Well, that is inappropriate," and then they can decide to override it in that particular case if they want to, but the courts offer a different view or a different lens on a similar problem. I actually think that ultimately would strengthen the system rather than weaken it.

CHAIR: Can I just focus on the override for a moment? Mr Hatzistergos was asking you about that some considerable time ago. To what extent do you think it is a reasonable criticism that the exercise of the override really puts the Legislature in the hot seat? They are seen as the bad guys who are overriding a court outside that people in society might say is better disposed to people's rights or less influenced by political considerations.

Mr WILLIAMS: It depends very much on the issue. The Legislature will not always be in the hot seat, as you have put it. There will be some issues where, indeed, the community is so strong that this is the way it ought to be that despite a court decision indeed it is likely that the Legislature will have tremendous support in achieving a certain result.

In other circumstances, you are right, the Legislature may pass a bill without putting an override in. The court strikes it down or interprets it in a way that is not desirable. That does put the Parliament in a hot seat, and my argument is, well, that is the way it should be in such a situation where an independent arbiter has said, "In this particular facts situation it raises grave concerns."

If the Parliament wishes to come back and specifically override that in the general scenario, then the Parliament should have an overwhelming political justification for that and the onus would be upon parliamentarians to make absolutely clear why it is a good thing to do and, in doing so, would have to meet the understandable community opposition to such a development.

But that is what we are lacking at the moment, that level of scrutiny and heightened focus on these issues. I think we ought to be having that and we ought to be having it within the parliamentary context. Too often, bills pass through Parliament

without appropriate debate in the community or in the Parliament itself. Hopefully, this is one way of actually fostering a better and wider debate.

The Hon. J. HATZISTERGOS: I was concerned about the matter that you raised about having a structured approach to human rights issues. If I may say so, with some respect, I was a little bit confused in what you had to say about that because some of the rights that you actually talked about did not seem to me to be rights at all but seemed to be more aspirations.

I particularly raise the one that you mentioned about the right to communications services in the country. If you are going to put something like that in a bill of rights document, which is clearly a policy aspiration, how can you compel a government to ensure that it has these levels of services?

Now what happens is that if a community does not have those services it becomes a political issue, there is political pressure exerted through the ballot box and the service is either provided or not provided. Do you intend to put something like that within a bill of rights?

Mr WILLIAMS: No, I would not put it in.

The Hon. J. HATZISTERGOS: I thought that was one of the things that you said.

Mr WILLIAMS: You are right. I did raise that earlier. Indeed, what I raised was what you might describe as a variety of concerns. I am really trying to put to you a process and a model without actually so much suggesting what I think ought to be the rights in it, but that is something which has been suggested quite widely by other people.

Other countries do have such protections in their bills of rights, some of the African countries. Indeed, the South African Constitution has guarantees of access to water and other basic services.

My own view is that it would be extremely difficult to put something like that in one of these bills because of the point you raise, that there are resource and other policy issues, and indeed a bill of rights is better structured to what you might call negative rights saying you do have the ability to do something and if a government interferes in that in some way, indeed there may be something wrong with the law rather than putting an onus on governments to actually provide education or other services. But I think it can be raised in this context.

It may well be that a bill of rights - and, indeed, other countries do do it this way - is not simply a list of the legally enforceable rights but does contain aspirations, and they are carefully drafted as such. They are not enforceable in any way, but, indeed, they are a list of what might be regarded as basic community aspirations that the Parliament ought to work to in the fullness of time without giving the courts any role in that whatsoever.

The Hon. JANELLE SAFFIN: Could you just comment on that because we have ratified, like Australia, the International Covenant on Economic and Social and Cultural Rights? Are they aspirations or are they obligations, because they cover the things that John was talking about?

Mr WILLIAMS: They do.

The Hon. JANELLE SAFFIN: People in the bush actually do see those things as rights. I followed very closely all the bush talks on just those particular issues.

Mr WILLIAMS: Yes, and that is why I raised it, because, indeed, they do see them as rights. If you ask people there, they say, "Well, for us, a very basic human right is access to some of these services."

The Hon. JANELLE SAFFIN: To health care.

Mr WILLIAMS: To health care, to education.

The Hon. JANELLE SAFFIN: We are just about to educate Burma about health care and human rights.

Mr WILLIAMS: But, at the same time, I recognise the legal difficulties. They are of a different order, if you like, to some of the other things we might talk about. We do not want courts saying, indeed, that certain money must be allocated. The courts have no role in actually doing budgetary allocations, but you could put certain things, if it was thought appropriate, in such a bill in an aspirational format.

As I said, other models do do this. Again, it provides the focal point for these types of debates. That is also how they are structured in the international documents. The civil and political rights are put as obligations upon Australia, which, of course, we are not honouring in large at the moment, at least in terms of we are obligated to put these structures into place.

The Hon. JANELLE SAFFIN: The ICCPR also has the exemption, does it not, for matters of public order and things like that?

Mr WILLIAMS: Yes. It has got the limit, in any event.

The Hon. JANELLE SAFFIN: Freedom of speech and free assembly, et cetera, that you were talking about?

Mr WILLIAMS: That is right, it has got it. What we are obligated in Australia to do as a result of that particular convention is to legislate at the different levels to entrench rights subject to those types of limitations.

On the other hand, for the economic, social and cultural rights you were referring to, there is not the same obligation. We are obligated to legislate and progressively move towards the realisation of these things, so, indeed, you could reflect that, if you so wanted, in such a bill.

Of course, the difficulty of putting aspirations in at all is that you need to draft them very carefully and put them in very careful wording and make sure there are not unrealistic or inappropriate expectations, but if the Committee thought that was appropriate, you can look to places like South Africa, India and other countries, which have actually got separate sections where they set them out, and here they actually put in plain English that the community realistically has certain aspirations and Parliament will, for example, legislate to provide adequate education, health, et cetera, services. That could be done. The question would be whether you thought it was appropriate in such a bill as this.

The Hon. JANELLE SAFFIN: They have a very active judiciary in India.

Mr WILLIAMS: Very active. But, again, even with these, there is a clear distinction maintained. Courts do not get involved in these things if there is a clear direction because they are undermining their own legitimacy if they start interpreting aspirations as rights where a bill clearly says they are nothing more than aspiration. They are equivalent to a preamble.

It is the same argument you could have with the preamble that Australians voted on last year. There was a section there that was going to say, "This preamble cannot be used by courts in any context." You could do exactly the same thing with certain things if you wanted to put them in for their symbolic or political value but realised that the courts have no role in certain areas.

The Hon. JANELLE SAFFIN: Could I ask one other question? Have you got examples of Federal systems where the states have enacted bills of rights? We are referring to the UK and we are referring to South Africa. I suppose South Africa is a federation to some degree because of the provinces.

Mr WILLIAMS: Yes, that is right.

The Hon. JANELLE SAFFIN: But, in particular, Germany, Switzerland and some other places like the United States where the States have bills of rights.

Mr WILLIAMS: Yes, there are. It is actually common in countries that are federations to have bills of rights at both levels. That is the way it normally works. Simply because a federation involves a division of powers between the different levels, it is not as if any one level has a monopoly on issues that might raise human rights concerns.

At the same time, it is important to recognise that Federal levels often do not have the power, or indeed do not have the political responsibility, to interfere in State matters by legislating in such a way as to have their bill of rights applying at the State level.

There are two systems I am aware of where States have got in first. In Canada that was achieved in Saskatchewan, and this paper by the Parliamentary Research Service sets out examples of this. Saskatchewan legislated before the Federal level.

Then, before the Canadian Charter of Rights, I know that Alberta and Quebec both had separate bills of rights before the constitutional Bill of Rights was brought in.

In the United States most States had bills of rights before the Federal Bill of Rights came in. People seem to think these issues are Federal, but, indeed, in most cases, in those countries they start at the State level.

(Short Adjournment)

The Hon. J. HATZISTERGOS: You indicated earlier that you thought it was important that when we set out to protect rights we define exactly the extent to which we protect them, and that probably raises the question if you protect them so specifically of whether you are protecting anything at all.

On the other hand, if you leave it broad, you get to the position where those rights could be misinterpreted. For example, in the United States, I think the due process laws have been used to strike down laws in relation to minimum working hours, wage standards and things like that, which they were clearly not intended to protect. You have not actually given us any parameters as to how specifically you would define those rights if you were going to define them.

Mr WILLIAMS: No, you are right, and due process is another one of those rights I would certainly say should not be in a document such as this. I think we should be aiming for rights which, when we put them in what you might call plain English, contain some clear understanding as to what types of things they would cover, but you cannot win a debate in suggesting, indeed, you could ever define these things to cover all possibilities.

But neither should you try to cover all possibilities, because the value of something like this is that you recognise the importance of certain values within the law and within the political process that, indeed, should take precedence over other future unpredictable events.

If you want some parameters, I would suggest that the Committee could approach it this way. The Committee should first seek to work out or derive those rights which it sees as being core rights, using the criteria that they are things that would have broad support within the community or might have worked well within the legislative process already.

I turn to things like anti-discrimination or I would also turn to things like freedom of speech, because even though you can give me a host of examples which, frankly, I would agree with in freedom of speech which are good examples where it ought to be abrogated or, indeed, there is a stronger countervailing interest, I have no doubt that as a general principle people would say, of course, they already have an entitlement to freedom of speech.

The ways of dealing with that second-order question of what do we do about the countervailing principles are two. Firstly, you put in the reasonable limits clause, which indicates it is not absolute, and you then use the override appropriately, either in existing legislation to insert an override for this legislation which the Parliament

clearly believes should be maintained or in future cases where there is legislation in which the Parliament also believes there is an overriding community interest.

If there is a concern that that could not be done in time, you could do as has been done in Canada. You could introduce a right where it does not actually come into force for three years, and in that three-year process this Committee, or other committees, actually looks at existing legislation to determine where an override should be used or not used.

Indeed, for every future piece of legislation where the Committee determines whether it be used or not used you have a general right, but in specific instances the Parliament has the role of actually determining whether legislation should be allowed through or not, and if the Parliament does use the override, you would have what I am trying to promote, that is, an appropriate political debate about domestic standards rather than people simply raising what are the international standards.

The Hon. J. HATZISTERGOS: You have not spoken at all so far about the extent to which any bill of rights should apply. You have indicated, I think fairly clearly, that you believe it should apply, for example, in interpretations legislation. Is there any reason that you could articulate as to why, for example, a statement of rights should or should not apply in relation to private sector conduct?

Mr WILLIAMS: Well, firstly, in the interpretation of legislation, I do say it should be used in that context, and one of the main reasons is that international rights are already used. The High Court has developed principles which have now been in place throughout the 1990s under which, where there is any ambiguity, courts are instructed to use the international human rights covenants to determine that ambiguity.

The court also says it should be used in the common law. So it is already being done. My suggestion is that should be used not just for international instruments but let us draft our own so courts can use that instead. Sorry, what was the second half of the question?

The Hon. J. HATZISTERGOS: Should principles of rights also be able to be applied in a private sector context?

Mr WILLIAMS: No, I do not think so, at least not initially. I recognise fully that there are sometimes difficult boundaries to be drawn, and I would say, for example, it should apply to individuals in their public capacities. For example, it might impact upon certain judges, members of Parliament and other people, for example, in a freedom of speech context or otherwise, but I do not think that the bill of rights I am proposing should be seen as having a private sector impact, at least initially.

Maybe people will change their mind, but I do not think it should now. The reason is, again, because what I am suggesting is a model which would hopefully heighten political debate, not actually be a series of litigation actions within the private community, which I think will do far less to encourage the sort of debate that I am proposing than, indeed, using this as a political focus within the Parliament itself.

The Hon. J. HATZISTERGOS: There are certain instances, however, in the community where there is private sector regulation of particular industries.

Mr WILLIAMS: Yes.

The Hon. J. HATZISTERGOS: Those regulatory bodies could, for example, discriminate against individuals or deny them their human rights. Are those sorts of organisations to be left immune from the principles of rights which you would have public sector regulatory bodies apply?

Mr WILLIAMS: Not necessarily. All I am saying is that I think in the bill of rights itself we should not be applying that to those sectors. There could well be complementary legislation, and, indeed, that may be a very good thing, but I think you lessen the impact of what is seen as a public document with a public governmental impact by introducing some of the concerns you do.

I think that if there is a concern that indeed these other issues should be dealt with in the private sector, you do what other countries have done, Canada and New Zealand and also the United Kingdom, which have complementary private sector legislation targeting specific industries which also deals with the regime targeted to that industry, rather than seeking to regulate all private conduct under a bill of rights.

The Hon. J. HATZISTERGOS: Then you could have other conflicts of rights. For example, take advertising. Some group wants to advertise its particular cause. The Advertising Council refuses to accept it because it regards it as inappropriate for some reason or another. The Government steps in to try to regulate it. It is accused of interfering with the right of free association and media rights, free speech.

Mr WILLIAMS: There are many. I will give you another one. What about private prisons in Victoria? Why should not they be subject to exactly the same regulations?

The Hon. JANELLE SAFFIN: They claim commercial in confidence.

Mr WILLIAMS: They do, and you have claims of in confidence and things like that, all of those types of issues which are very thorny. All I say is that it is about time we started to debate these issues. Let us start with something which does apply to the government sector. It may well be that over time that is sought to be broadened out within a bill of rights and by complementary legislation.

I do not dispute that. Indeed, some of the standards that we are talking about, for example, the right to privacy, are in far greater danger within corporations than in terms of government, I think. I think the model that I am proposing will indeed lead to a greater awareness within these other sectors, but it is a pragmatic beginning. I think it would not be achievable to try to bring in these other interests, but, indeed, the boundaries should be defined, in so far as they can be.

Canada does exactly the same thing. Section 32 of its charter says "This only applies to the Legislature and the Executive". There are difficult cases on where that stands, but I think that is a better way initially rather than seeking to bring in these other things.

The Hon. J. HATZISTERGOS: Finally, how would you respond to the suggestion that if you do have a bill of rights of the kind you are suggesting, the Legislature could become when it is passing legislation less focused on rights issues than it is, say, at the moment because it takes the view that these rights will be protected by the courts in its interpretation of that legislation and, therefore, the way legislation is drafted, I suppose, is not as sensitive to the individual circumstances as it might otherwise be?

Mr WILLIAMS: There is already a tendency for that to happen in this country, and I think it is a bad thing that that would happen. For example, when the Native Title Amendment Bill was being passed the Prime Minister, John Howard, said, "Well, if there is a difficulty, I will fund an action by indigenous groups to test this in the court and let the court work it out."

The Hon. J. HATZISTERGOS: Exactly.

Mr WILLIAMS: And it is entirely inappropriate that that should happen.

The Hon. J. HATZISTERGOS: That is what I am saying.

Mr WILLIAMS: Exactly. I am agreeing that you do have a legitimate concern there, but that is one of the reasons why I actually favour the courts being given the ability to actually invalidate legislation because of the consequences - you might call them embarrassing, inconvenient, or a range of other things.

If the Government is really keen on getting a policy through, to leave it to the courts is quite a substantial risk in this type of circumstance. It is one that maybe the Prime Minister is willing to take at that time for his own political reasons but one that would be very unlikely to be taken in other contexts and, indeed, the better legislative response would be to use the override if there is real concern.

The Hon. J. HATZISTERGOS: In the example you have just given, there was an offer to fund the litigation, but in many, many cases there is no offer to fund the litigation and the individual is then left to his own private resources or to the resources of others in order to be able to assert whatever position he takes in relation to breaches of human rights.

That leaves the situation that those who have access to funds can assert their human rights. Those people who do not, do not. It leaves the courts in the situation of responding only to certain numbers of cases that might involve breaches.

The Hon. JANELLE SAFFIN: That is no different from many access-to-justice issues, though.

The Hon. J. HATZISTERGOS: That is so, but at least the alternative is that when there is an alleged infringement of human rights at the moment the Parliament should be focused on dealing with those at the legislative stage rather than the interpretation stage.

Mr WILLIAMS: It should be, but it is not. That is the problem. If Parliament was doing this well --

The Hon. J. HATZISTERGOS: That is why I favour a scrutiny of bills committee.

The Hon. JANELLE SAFFIN: We do not do anything.

The Hon. J. HATZISTERGOS: We do not do anything at the moment. But if we were more focused on it and we had a scrutiny of bills committee, say, that looked at those sorts of issues, that would be a far more economical way of allowing individuals to be able to bring to the attention of members of Parliament breaches of human rights or infringements of human rights rather than passing laws which may become, as time goes on, poorly drafted and leaving it to the courts to interpret with only those people who have access to the funds being able to assert them.

The Hon. JANELLE SAFFIN: It would be a good start.

Mr WILLIAMS: It would be a good start. As I said before, I would be very supportive of that. My difficulty with that being an end point is that it only gets you so far. In particular, I think one of the most important values of the bill of rights is its ability to raise community awareness of these issues.

I have some doubt as to how far a scrutiny of bills mandate would take you on that. From appearing and doing a lot of work with scrutiny of bills committees, even where these issues are raised, in general because it is not a piece of legislation that is seen as having a particular status within the community, it is too easy for the committee deliberations to be completely unnoticed. They do not provide the focal point that a piece of legislation which is given to schools and other places does have. I agree that it is a good first step. I just do not see us getting as far as we need to.

The Hon. JANELLE SAFFIN: It does not initiate legislation, either, in areas where there is want, but it could recommend.

The Hon. J. HATZISTERGOS: But neither does a court.

The Hon. JANELLE SAFFIN: Yes, but it could recommend.

Mr WILLIAMS: I would strongly favour some role for the courts in this. There are many examples where parliaments have not been as prescient as they might have been. There is a role for an umpire, an independent arbiter, to at least re-raise the issue at a political level.

The Hon. J. HATZISTERGOS: Would you be able to comment on the extent to which the judicial systems in those countries which do have bills of rights

regimes have become more politicised? We do notice, for example, in the United States - I know that is not the example that you wish to follow - that every time there is a Supreme Court nominee there are these horrific profiles on their inclinations towards protecting human rights.

The Hon. JANELLE SAFFIN: Abortion.

The Hon. J. HATZISTERGOS: Or not protecting human rights, and where do they lie, for example, on the question of the right to life or other issues, freedom of speech and so on, State rights. We do have that now, to some extent, in Australia with the High Court.

Mr WILLIAMS: Well, if you want, a capital C Conservative for the last High Court Justice.

The Hon. J. HATZISTERGOS: I know. We would have that because we have these questions of State rights and the right to federalism and their views as to whether the courts should be adventurous or not, but not to the same extent as in the United States.

It seems to me that a bill of rights provides more avenues for that sort of focus to exist when there is an appointment in the nature of the judiciary. I would be particularly interested to know whether you know of what is happening in Britain with its charter of rights and, where there is the power simply to make declarations of infringements without actually striking down the law, whether that is leading to more politicisation of the judiciary.

CHAIR: Their legislation is of very recent origin.

Mr WILLIAMS: It is very recent. I will mention that because there are a few things that I can mention about that. I might actually start by referring to your earlier point, and that was about funding and things like that, because that is a real concern, but of course it is a real concern in the current system as well.

I think if there was a bill of rights, then it would be appropriate to look at access-to-justice issues, but, then, it is already appropriate to look at those anyway. I think also that the advantage of having courts doing these things is that even though there are very real issues about what cases can be taken, the fact is that there are a number of public institutions and people in the profession who are willing to do these matters for free.

This Parliament supports the Public Interest Advocacy Centre, which has a mandate for running exactly these actions. It selects them on the basis of, "Even though you have no money, we recognise there is a public interest which needs to be vindicated." People like myself do a number of these actions, representing people for free because it is the public interest. It is not satisfactory.

What I am suggesting is that even when you do not have money, there are institutions and people within society who will recognise that, and even where there is not adequate government funding, these matters are still litigated.

As to your politicisation issue, I make the point strongly that it really does depend on the model, firstly, and if you look to the US, we do not want the US model for exactly the point you are raising. It politicises the judiciary to such an extent that it is almost more important who your judges are than who your politicians are in dealing with matters of public policy, and that is entirely inappropriate.

Canada also has some problems along these lines arising from the fact that they have equality and rights drafted so widely that matters of public policy are devolved onto the courts.

As to the United Kingdom, the United Kingdom has taken this path because it has already happened in the United Kingdom. Judges are already becoming politicised, as our judges already are as well. In the United Kingdom judges are already interpreting and applying European human rights standards in English law. This particular bill has been introduced simply to give them a domestic basis for doing what they already do.

I think there will be more cases in the United Kingdom. I think it is inevitable that that will be the case but as to whether they are more politicised, I do not think so. Their role actually will not change so much as what they will actually do is do it on a far better platform. Instead of plucking down these principles from outside the system, they will be doing it on the basis of a mandate given to them by the Parliament in very limited circumstances.

I think they are actually much more likely to stick within their role, if you like, than they were previously when they were making the rules up as they went. Our judges have been doing the same thing. The agenda has been left to the courts, implied rights, a range of things.

Our judges are becoming very politicised as a result of native title and other developments. I think what we should be doing is giving them a carefully limited and defined platform for doing what they already do and, again, making them do it on our own standards, not international ones.

The Hon. J. HATZISTERGOS: I want to ask you a question about whose rights we are actually protecting. So far we seem to have focused on individual rights, but are corporate rights able to be protected, particularly economic rights in relation to dealings with government through legislation under any proposed bill of rights and, if not, why not?

Mr WILLIAMS: I would not put those in, not at this stage, and neither has Canada, actually. Canada excludes corporations from the majority of its rights. The United States Supreme Court has excluded corporations from most of its own rights as a result of interpretation.

The reason I would exclude them is on the principal basis that we should be drafting a bill which defines the link between people and the community and Parliament and the courts and establishing a dialogue. It is true that corporations have

certain legitimate interests in that, but my focus is upon heightening and improving the political process.

I think you can justify a voter-parliamentarian-court axis rather than seeking to also limit and define all the economic rights within the community. It is a political, not on economic, instrument.

The Hon. J. HATZISTERGOS: So small business people, for example?

Mr WILLIAMS: As individuals, there may be certain things in there which are relevant. Maybe there are association rights, for example, which assist them in certain ways. But I do not think a bill of rights, at least initially, should be drafted in a way that actually gives benefit to big business, for example. It should be giving individuals their place within the system.

The Hon. P. BREEN: The US bill of rights, I think, protects corporations to the extent of free speech, does it not?

Mr WILLIAMS: It does. That has been a recent interpretation. You can simply include them or exclude them by saying that certain people have the ability to vindicate rights under this instrument, and you can simply say that those people do not include corporations. It is an easy thing to exclude. The difficulty with the US system is that it does not say either way, so there are some, but not other, circumstances.

The Hon. J. HATZISTERGOS: The New Zealand Court of Appeal I think has allowed breaches of human rights, if I am correct, to give rights to actions for damages.

Mr WILLIAMS: Yes, they have.

The Hon. J. HATZISTERGOS: Do you think that that is appropriate?

Mr WILLIAMS: I would not do it at this stage, no, and the New Zealand model is flawed in some respects. One of the most important respects is that the Parliament did not explicitly say one way or the other whether damages would be available.

The Hon. J. HATZISTERGOS: I know, but the court decided that they were.

Mr WILLIAMS: Well, they were because Parliament did not tell them. That is a clear example of bad drafting. The Parliament's intention was clear. The Parliament did not want damages to be available but did not put that in. I, frankly, do not know why, but there is an easy way to avoid that. Just make it clear and put it in there, and that is what should be done.

New Zealand is also flawed, and this Parliamentary Library paper refers to it - the four-five-six puzzle, where they have three sections which are very unclear as to how they work - basically because it was fudged. My suggestion if you have a bill of

rights is to set it out in plain English. The expectation should be clear. Do not leave it to the courts to make up their mind as to what should happen. They will follow clear directions, and they should be put in at the first stage.

The Hon. J. HATZISTERGOS: If you had to scour round the world and find a bill of rights which meets the criteria that you have advocated here today, which one would you pick?

Mr WILLIAMS: The closest would be the United Kingdom model. That does focus upon parliamentary involvement. It is the result of concerns within the United Kingdom system of a lot of ad hoc rights abuses which were not being dealt with in an appropriate manner. It gives some power to the courts, but only as to declarations of incompatibility, which then means the issue is put directly back in the Parliament. All indications are that the courts will have a limited but important role, but a role that will not overshadow the fact that sovereignty lies ultimately with the Parliament itself.

The Hon. P. BREEN: You said earlier that that bill has not come into force yet?

Mr WILLIAMS: Not all of this, no. I think actually it has the date in this Parliamentary Library paper. I think it is 2 October of this year. I think they are being very sensible in that they are having a long lead time. They are setting up a parliamentary committee which will look at these issues.

They are revising their laws to look at consistency. They will look at whether they will need to put overrides and things like that in their legislation, and there is a very high level of community consultation involved in just what are the overriding interests that, say, will trump freedom of speech, and there is a strong sense that this is really a deepening of democracy in that country.

The Hon. JANELLE SAFFIN: I have got a question about property rights. Have you got examples of bills of rights that include the right to own property or any right sort of pursuant to property? Do you know of any examples where they are in a bill or in an Act or entrenched in a constitution and any recent decisions about property where the right to property has taken away, say, the right to acquisition on just terms or it has eroded people's communal right to property?

Mr WILLIAMS: Property is one of the really thorny areas of human rights. They are very, very difficult issues, and the United States raises them most clearly. The decision in the famous Dred Scott case in the middle of the last century in the United States was that the property right to own a slave overrode the right to freedom.

That particular area of property rights continued in the United States until the mid-1930s, when property rights gave rise to a host of freedom of contract issues which overrode individual liberties to work reasonable hours and things like that.

I think looking at the experience of other countries with property rights you would have to define it extremely narrowly. The only area of property right I would actually recognise is to replicate what is in the Federal Constitution, and that simply is

that if your property is compulsorily acquired you have a right to just compensation. I think that is something people would broadly agree on. I would not define it any broader than that, because it does raise other issues which I do not think can be adequately dealt with. It is one of those areas like equality that should not be there except as to the compensation arm.

The Hon. J. HATZISTERGOS: Someone tried to run the argument, did they not, that the protection of acquisition of property on just terms applies to criminal asset confiscation of convicted drug smugglers?

Mr WILLIAMS: People run anything. There is a host of cases at the moment. There has been a variety of cases, and they have lost, but people want their day in court and, in the end, the court is not only useful to uphold rights but to actually vindicate a particular position Parliament may have taken, because in cases like that the courts clearly say, "Well, no, this is the clear intention of these things." If the courts did get it wrong, well, that is where your override comes in. That is a good example. It is not as though the community is likely to cause any grave concern should Parliament wish to re-establish that.

The Hon. J. HATZISTERGOS: That one occurred at the Federal level.

Mr WILLIAMS: The Federal level, that is right.

The Hon. J. HATZISTERGOS: And it related to asset confiscation laws. I do not know if you are aware, but under the Proceeds of Crime Act - I think it is section 48 or something - there is a right where a person has been convicted of a serious narcotics offence to basically confiscate all their property, and there need be no relationship between the criminal offence for which they have been convicted and the property that has been confiscated. There is simply a presumption set up, and it is all criminally tainted unless you prove otherwise. That is how it occurs. It was in that context that it was sought to be organised.

The Hon. JANELLE SAFFIN: But it was rejected.

The Hon. J. HATZISTERGOS: Yes, it was rejected through some tortured argument.

The Hon. JANELLE SAFFIN: But there still has to be something.

The Hon. J. HATZISTERGOS: You can just imagine the outcry that would occur if that sort of a law was struck down.

Mr WILLIAMS: Absolutely, and that is why I say to you, well, if the courts get it wrong, the Parliament comes back, it is a political issue, and it just changes it. To my mind, that is entirely appropriate if you have strong community concern for a particular issue. The court just raises the bar. You have to have a good justification, and that seems to be a clear example where the community would think there is a good justification, but that is the way to deal with it - to have that dialogue between the different arms of government.

The other thing I would just mention about property is that the reason I would leave it at property and just compensation is that that does adequately cover your individual and group rights, so if it is native title or whatever, you can cover that with property. People get just compensation, but that is it. I would not do it any broader than that.

The Hon. P. BREEN: What about equality? Some people, such as Belinda Jones from the University of New South Wales, would say that the lack of equality is the most serious defect in our legal system and to not address it or leave it out seems to me to leave a big hole in some people's eyes. If it were to be included how would you include it? Would you limit it to, say, everyone shall be equal before the law?

Mr WILLIAMS: I would say: what do we mean by equality? The reason I would not put in equality is not because I do not, as we all fervently do, agree with it. It is because it is too vague as currently defined. If we want to say that equality means the right to certain things and be quite specific about it, then that is fine. To think of an example, equality might simply mean freedom from discrimination on the basis of sex. It might mean a host of other things. But let us define specifically what we mean rather than having a very vague conception which just leaves the policy issue for the courts, not the Parliament. We should specifically put it out, if you like.

The Hon. P. BREEN: Do you think the expression "everyone shall be equal before the law" is too vague?

Mr WILLIAMS: It is pretty vague, yes. I think this comes into the issue as to the extent to which you wish to define the court's role itself within a bill of rights. To me, I am not quite sure what that means. I can think of examples of contexts in which it might operate, but the difficulty with that is that you are almost saying "let the courts work that out", and something like that could work out in a very unexpected way.

It is a bit like due process, I suppose. Courts have a history of using guarantees like that in ways that go far beyond their original drafting. My preference would be if there is a real desire to use this as a tool to achieve substantive and formal equality in different contexts, state the context in which you are trying to achieve it and state with some degree of precision exactly what the court should do in that way.

One way might be, if you wanted to get to the criminal context, to talk about rights of trial by jury in certain circumstances and things like that. You could talk about freedom from self-incrimination. All of those sorts of things are what are normally covered by an equal hearing and equality, but be precise about it. The advantage in a legislative bill of rights is that if it does not work, you amend it. If something else ought to be there, add it to the list. If you have periodic review, things can be added as time goes on.

The Hon. P. BREEN: This whole question of what rights should be included is always going to be, ultimately, the stumbling block. If you were to suggest five or 10 particular rights that ought to be included and if you were to express to the Committee how you thought they ought to be framed, would you have a view about that? Would you think that is a desirable thing to do?

Mr WILLIAMS: To actually do five or 10?

The Hon. P. BREEN: Yes.

Mr WILLIAMS: Yes, I do. My emphasis is on the process more than the rights individually almost in that I think the weakness we should be addressing is alienation within the system, impoverished political debate, a lack of domestic standards, things like that, but my emphasis is upon actually setting up a working system and then adding to it as the need arises. It should not be comprehensive.

That is where the Queensland report actually lost out. It tried to do far too much. So I would start with freedom from racial discrimination, freedom to vote, freedom of expression, freedom of association, things like that, which I think if you asked people on the street, they would say, "Sure, of course," and then you can always come up with examples where it should not operate, but that is where the ongoing process will achieve an appropriate balance.

The Hon. P. BREEN: Just on the question of the freedom to vote for the moment, my colleague John Hatzistergos said that the Parliamentary Electorates and Elections Act protected the right to vote.

The Hon. J. HATZISTERGOS: To an extent.

The Hon. P. BREEN: What he did not mention was that it also diminishes the right to stand for election because you have to have a certain number of members in your party and you have to pay certain fees. I wondered whether you had a view whether the right to stand for election ought to be included alongside the right to vote if you had a bill of rights.

CHAIR: Are you going to declare an interest in this matter?

The Hon. P. BREEN: I am an Independent at this stage.

Mr WILLIAMS: It is one of those things. I think we ought to be seeking to protect people's ability to work and have a role within the political process, and I think that the right to vote and the ability to stand for parliament both would be seen as fundamental rights.

As to where the balance lies, I have far less to say to you about that, because I do not know where the appropriate balance lies, but I would have no difficulty in suggesting that, indeed, the right to vote and stand for parliament might be something that could be considered.

The Hon. J. HATZISTERGOS: You see, the problem with things like that is you have to then define it, like, who is going to be in and who is going to be out. For example, you are going to have to put an age qualification on it. In some countries I think you are not able to vote until you are 21. In Australia it is 18.

The Hon. JANELLE SAFFIN: In some countries you are not allowed to stand until you are 25.

The Hon. J. HATZISTERGOS: In some countries, and in fact even in this country for about the first 30 years of its existence, women did not have the right to vote. Aborigines did not until 1967.

Mr WILLIAMS: 1962 at the Commonwealth level.

The Hon. JANELLE SAFFIN: The right to stand for parliament came later than the right to vote for a lot of women. The right to stand did not come automatically with the right to vote.

The Hon. J. HATZISTERGOS: Some people, such as prisoners, are still excluded under the current law.

Mr WILLIAMS: The Federal Government last year introduced a policy, and sought to get it through the Senate but failed, to remove the voting rights of all prisoners. One of the great problems with that debate was that there was not one. Whether or not it was a good thing, surely we should have been debating whether it was a good thing. But it just slipped by the Scrutiny of Bills Committee. Nobody knew what happened there.

It got a bit of debate in the Senate, but there were not the numbers to pass it. But nobody knows about these things. In the end we should have been debating whether it is appropriate or not. There are limitations and limitations, but simply we should be promoting a process which actually has an informed community debate about what is good and what is bad rather than having a parliamentary process which is largely unknown and a sense that people have no place in the Parliament. I think this is a way of involving them.

The Hon. J. HATZISTERGOS: Can I just go back to a question I asked you before about the private sector? When we were talking about equality in particular and the need for everyone to have equal opportunity to obtain work, we are increasingly moving, I think in this State and in the other States and probably at a national level, to a system which is encouraging tendering, for example.

I have noticed this with cleaning contracts and in other areas, for example, where individuals who might be small business people set up corporate entities simply to facilitate their being able to work with the Government in government sort of work. It seems to me that if you exclude from a bill of rights corporate entities, at least smaller corporate entities, which are, in effect, as I said, just facilitating agencies, then, in effect, you are, for no good reason, denying a sector of the community access to a form of redress which is available to individuals.

The Hon. JANELLE SAFFIN: Before you answer, could I ask you, John, what right are you seeking to protect there? Is it an economic right?

The Hon. J. HATZISTERGOS: It is an economic right, for example, to be able to have your tender, or whatever it is, dealt with on an equal footing with

anybody else. If, for example, a group of Indians in the community - I am just giving that as an example - decided to tender for a particular job and it was found that they were discriminated against on the basis of their ethnic background, an individual in an employment situation would be protected but a corporate body would not.

The Hon. JANELLE SAFFIN: But should we not change just our basic law to cover that?

The Hon. J. HATZISTERGOS: It depends how you look at it. I am using the example of whether a bill of rights should or should not apply to a corporate entity.

Mr WILLIAMS: I think in large part we escape this problem by saying a bill of rights, at least at the stage I am proposing, is not an economic document. It is not seeking to deal with tendering practice; it is dealing with public community rights that are particularly linked to the electoral or other community processes.

The sort of injustice you are talking about is quite possible to arise, and the appropriate way to deal with it is to say, "Here we have a focal point," which is a bill of rights, which is a community document, rather than a business document, and we have complementary legislation that will deal with these other things.

If, indeed, there is something in there and there is an obvious need for it to be extended, legislate to that effect, but do not clutter up the bill of rights, which should be a symbolic, simple document with a range of other things which go beyond what people can relate to as their individual concerns. Personally, I think that is the better way of dealing with it. If, over a period of time, people change their mind, then change the document. But I am just suggesting a minimalist version initially.

The Hon. J. HATZISTERGOS: That is the reason why you would only confine the bill of rights in the way you have suggested as opposed to broadening it to this fairly analogous sort of situation, I would have thought.

Mr WILLIAMS: As soon as you extend the rights to the corporate form you raise a range of issues and dramatically change the nature of the document. That is the experience in other countries where, if corporations are allowed to vindicate or take advantage of the rights under a bill of rights, it tends to be them who indeed dominate the document. That is a natural consequence of resources and things like that.

You shift attention from where it should be to attention such as, "Well, does this big corporation really have this interest?" I think that would be an undesirable consequence. We should be focusing in different areas.

The Hon. JANELLE SAFFIN: That happened with unfair dismissals legislation at the Federal level. It came to be dominated by huge payouts to chief executives who utilised it.

Mr WILLIAMS: It is inevitable that it will happen. It happens at the Federal level all the time with implied freedoms. You could include corporations. My suggestion is that, indeed, there are great dangers in doing so, but they are dangers to

do with warping of the direction in which it might go, but I recognise that other countries have included corporations, so there is legitimate debate over which way to go.

The Hon. P. BREEN: What other countries have included corporations?

Mr WILLIAMS: Well, it is more the countries that have not excluded them, I suppose, like the United States, of course. Corporations can take advantage, though. The interpretation of those rights is naturally given more constrained protection.

The Hon. P. BREEN: I think it is fair to say, though, with the US Bill of Rights that it was around before human rights came into existence as such. All the modern bills of rights have tended to protect human rights, and I would have thought that that alone is sufficient to exclude corporations. So far as I am aware, except in the US Bills of Rights, I do not think there is any standing for corporations in other bills of human rights.

Mr WILLIAMS: I am not sure what the position is in New Zealand, or the United Kingdom, for that matter. I have a feeling in both of those it is possible for corporations in limited circumstances to bring actions, but in both of those you are right, the focus is on human rights. The nature of these documents is to define where people stand within the community and as against the political process rather than seeking to be a battleground for corporate entities.

The Hon. P. BREEN: My understanding of the nature of a bill of rights is that it is a line in the sand between individuals, as indeed the Queensland report states. It is enhancement of individuals' rights and freedoms. It is a line in the sand between individuals, citizens, if you like, and government. That is the regime in which a bill of rights operates. It is a regulator between individuals and government.

Mr WILLIAMS: It is. The idea is, indeed, that parliaments have tremendous power over people's ordinary lives. Surely we should define in some way according to what parliaments can and cannot do in people's ordinary lives. But the point is also well taken that in certain circumstances people in their ordinary lives will use the corporate form in dealing with things that might be considered human rights and that there is a blurring there.

My suggestion simply is that that blurring is best dealt with initially by saying we stick to the human individual rights but that you look at complementary legislation or expansion over time.

The Hon. P. BREEN: You mentioned an expression earlier called negative rights as being the kind of basic rights that ought to be protected, if I understood you correctly. Would you include, even though it is commonly called an economic and social right, say, the right to a clean and safe environment as a negative right?

Mr WILLIAMS: Well, I would put that more in the aspirational context I think. You could define things in certain ways and protect particular environmental rights in a way that is negative by saying that governments or parliaments have a

limited power to interfere in our environment in specific circumstances, and a draft of that can probably be done.

You could say, for example, with the drafting, "This simply protects you against government interference which would undermine your ability to have a clean environment," and things like that. Of course, once you get into those areas you are raising a lot of resource and other issues. I am sure people have different views as to whether it should or should not go in.

As I am saying, I am more interested in the process, but you could certainly draft it in an appropriate way. It is better than equality in that equality has so many different conceptions. You can, in some circumstances, narrow down the environmental concerns to certain things.

The Hon. P. BREEN: One of the fundamental aspects of the Australian ethos, if there is such a thing, is that people are concerned about the environment. It is one of the issues that came up at the Constitutional Convention, and it was one of the aspirations in the preamble to the Constitution. I do not think it ever got a guernsey in the end.

Mr WILLIAMS: It did in the final version. The environment was there, yes.

The Hon. P. BREEN: But that kind of protection, if it could be used as a way of selling a bill of rights, I think would help the project.

Mr WILLIAMS: Again, I am not making the political judgments so much as saying, "Here is a framework. You can put in appropriate things." I think with that you have just got to be careful as to what extent that is more in the economic, social and cultural context because, in the end, we are aspiring to a certain type of environment or to what extent you can actually define it in such a way that people have some understanding that it gives them some protection from government but it does not actually require government to do certain things, which is beyond the way that such a bill could work.

The Hon. P. BREEN: In your model would you include anything to do with the environment or would you think that would be too difficult?

Mr WILLIAMS: I think initially I would not, and again it comes down to a very pragmatic position in that I am seeking to promote a model which is about the political process and people's standing within the political process as a response to things like what went wrong in the republic debate last year. Irrespective of the result, it was not much of a debate at all.

I think by including things like the environment you open up a whole new type of debate and you raise development versus other things which cannot be adequately dealt with in this sort of context and, indeed, you raise the danger of sinking the whole ship without actually protecting something.

The Hon. P. BREEN: You mentioned the British model as being the best of the existing models.

Mr WILLIAMS: Or the most appropriate for our circumstances, I think.

The Hon. P. BREEN: The British model is extremely difficult to read. I have to say that I have read it numerous times myself and it is so dense and expressed in such convoluted terms that it seems to me that whatever we develop would at least need to be expressed in plain English and certainly be a lot clearer than the British model.

Mr WILLIAMS: I agree. The British model is actually quite hard to understand. It is poorly drafted. If one of your objectives is to produce a bill which can be given to the community and they can understand it, it seems to me one of the most important objectives of all is awareness. So I think I would look at the mechanics of that bill, but you are right in saying that you want to redraft it quite significantly to actually give it a level of understanding more generally.

The Hon. P. BREEN: Do you foresee at any stage being in a position yourself where you would be willing to draft a bill?

Mr WILLIAMS: What I am doing at the moment is putting forward a process but I am quite open to assisting with drafts and things like that. My interest is that there is an open debate in the community and other representatives have a role in that debate, but I am quite happy to take part in actually doing the drafting once the object is known.

CHAIR: Could I throw into the ring that the Parliamentary Counsel in this State does have a commitment to the use of plain English?

Mr WILLIAMS: Yes, and at the Federal level as well. Australia is a world leader in parliamentary drafting. If we did it, we would do it a lot better than the UK model, which is very hard to understand.

The Hon. J. HATZISTERGOS: Can I ask you a question about local government? At a State level one of the key responsibilities is in terms of local government governance, where a lot of powers reside. How do you see a bill of rights interacting at the local government level?

Mr WILLIAMS: That is a good question. I must admit, it is not one I have thought deeply about, but you are right, it does raise very important issues, given the sort of power those governments actually deal with. I have not thought of it deeply, I think in part because I have really been focusing upon the political process as it exists at the State level, but exactly the same kind of concerns I have been raising also exist at the local government level.

You could either adopt an approach where local government has exactly the same rights as a State Parliament in that the State Parliament makes the rights and local governments must comply with them unless they wish to override them. Or, if it was thought that local governments ought to be kept further in check, you could simply say they must comply with them irrespective of their desires to do otherwise, but there might be an ouster clause in the sense that if they can get the permission of

the relevant Minister they might be given the ability to override a certain right in certain circumstances.

They must play a role in this, but as to how you do it depends upon your own view as to whether they should be checked in quite a strict way or they should have exactly the same freedom as the State Parliament itself.

The Hon. P. BREEN: Just two more questions. The question was raised about other bills of rights that exist around the world that are not necessarily supported by the government or the people, for example, the Chinese Bill of Rights. I think it is part of the Constitution in China but the most fundamental right is actually the right to support the party, not the individual. Is that how you understand it?

Mr WILLIAMS: There is a bill of rights in China. As I said earlier, these bills of rights only matter to the extent they foster a culture of liberty. Bills of rights can be used in entirely negative ways. Stalin had a bill of rights in 1936 at the height of the purges. They can be used as tools for negative consequences or simply ignored, or propaganda, or whatever.

That is why, again, I am trying really to take the focus away from courts and things in writing and to set up a process whereby people have a greater sense of involvement and to raise this as a political community issue. That is the way it should be.

If we generate a sense that people have a symbolic attachment to certain rights, one of the really important things the United States has achieved, despite its other problems in these areas, is there is a real sense in the community of "I do have certain entitlements as part of the political process. I, as an individual, do have an ability and almost a responsibility to speak and be interested in political matters, and I have a right to a jury trial and things like that."

We lack a lot of that, and I think we are weaker for it. It is why, again, we are always turning to outside our borders to determine these things. We should develop a sense in the community that the community does have a role in the political process and the people are entitled to certain things.

The Hon. P. BREEN: You said earlier in response to a question from John Hatzistergos that you concede there is an enhanced role for the courts in any bill of rights. Is it not the fact that if we had a bill of rights that allowed the courts to make a declaration of incompatibility and the question in that particular case then had to come back to the Parliament, that would actually be a decreased role for the courts?

Mr WILLIAMS: I made the concession in the sense it is enhanced and the courts would do more than they do now. But in terms of where the power resides, you are right, in that if Parliament actually enacted this, it would be a far clearer statement of really who has the agenda on these issues. That is quite a different perspective from this other question. But if you look at it from the perspective of who really has responsibility for the human rights of the community, a lot of people would say "the courts" these days.

With this sort of model I think people might start answering, "It is actually the Parliament. We should be talking to our members of Parliament about these issues rather than bringing actions all the time." That is why I would support it. But the courts would do more. They would be involved in more cases, I think. It should not be a significant increase given the limits on what they could do. But that is my qualification to the question.

The Hon. P. BREEN: But if they could not actually rule in a particular case, if they could refer it back to the Parliament, surely people would soon stop even bothering going to the courts?

Mr WILLIAMS: No, I do not think so.

The Hon. JANELLE SAFFIN: They do that at the Federal level with declarations.

The Hon. P. BREEN: Is what you are suggesting similar to declarations in the Federal arena?

Mr WILLIAMS: If it is incompatibility, it would simply be the court that says, "This law is incompatible with this right but we are still bound to enforce it. We have no choice. But we can simply say it is incompatible." In a sense, a voice of protest is almost what it is.

People would not stop bringing actions to the court. They would see the court as a really important intermediate step in bringing it back to the Parliament because if they lose in the Parliament or there is a law on the books for a long time which is operating in an unjust way, a very effective way to get media attention is to get a court declaration of incompatibility as a result of which the Parliament is almost honour bound to relook at it, and so the courts would be used in that way.

The Hon. P. BREEN: So there is no question of the court not ruling in that particular case? Is that what you are saying?

Mr WILLIAMS: They would rule in that sort of case, but all I am saying is that in that case it is clear the ultimate answer lies with Parliament, not the courts, but you have got to go through the courts to actually reraise is it as a parliamentary issue once it has already been passed as an Act.

The Hon. P. BREEN: The way the British system is intended to operate, as I understand it, is that the court will not actually rule on a particular case if the particular facts they have to deal with are incompatible with the bill of rights. My understanding is that they actually refer the case itself back to the Parliament and the Parliament has to decide on that case.

Mr WILLIAMS: Well, this is where the UK Bill of Rights is badly worded because in some circumstances they do do that, but the Bill of Rights Act also says that ultimately if a public authority has to do something one way, even if it does breach the Bill of Rights, then they must still do so, so it continues on, in a sense, and

if the Parliament says, "We are not going to do anything about it," then it stays on the books.

Ultimately, it is a parliamentary decision in the UK, and that is one of the reasons I favour the courts being able to actually find invalidity. The Parliament can re-enact, if it wants, with an override, but I think the courts should have a greater power as an independent arbiter in some circumstances.

The Hon. P. BREEN: So am I right in my understanding of how the UK system works, that the courts do not actually make a decision on particular facts?

Mr WILLIAMS: I thought they did, I must admit. It is one of those areas where we are both reading it from afar. It has not actually operated yet and it is a little bit ambiguous. I have not read the *Parliamentary Debates* fully to know what the intent was of that particular provision, but my understanding was that the courts actually deal with the matter. They reach a declaration of incompatibility, and give it back to the Parliament, but in the same process the matter continues. You would not stop a whole matter simply because one issue of incompatibility is raised.

CHAIR: Not much time has elapsed at this point to allow a track record to be established in Britain.

Mr WILLIAMS: No, it just has not been there long enough, but all indications are good. It has very broad support in the community, Parliament and the legal profession, and there is almost a sigh of relief in the community and other places, "Finally, we have got something that means we can deal with these things in an appropriate way," rather than again having the European Community looking over their shoulder and almost being told what to do rather than working it out themselves.

The Hon. P. BREEN: In Britain, it became a source of great embarrassment to the Government that the judges were constantly using European law to override local law. I do not think there is that kind of head of steam in Australia.

Mr WILLIAMS: We have had it, though, if we look at the implied rights decisions, and you have had parliamentarians bitterly criticising the High Court. We have had attempts to change the focus of the High Court by appointing "capital C Conservatives".

The Hon. P. BREEN: With some success.

Mr WILLIAMS: With some success, that is true. We are in a period of abeyance at the moment where these things have gone off the boil, but it is only a matter of time. If the mandatory sentencing issue goes to the High Court, that may re-raise the issue. People will be saying, "What's the court doing in this?"

The court will be there almost because of the failure of the political system to work out the issue itself. We saw with the Kosovar refugees being returned. They have gone to the High Court. It is there. It is just the nature of the cases. It is a bit of a cyclical thing I think.

The Hon. JANELLE SAFFIN: Human rights activists in Australia refer to international instruments all the time because there is just such a dearth of legislation or political process to appeal to to get things done, and you have mentioned that.

Mr WILLIAMS: Well, as the barrister in the Hindmarsh Island case - I actually was junior in that to Chief Justice Spigelman - the two of us in doing that case had nothing on our books. The question there was: can the Federal Parliament pass racially discriminatory laws? In the end, we were just trying to make that proposition.

There is nothing in our system that gave us any purchase on that. We had to turn to the international conventions and other places and say, "Well, here are some outside suggestions as to what you should do," because there was nothing to turn to domestically.

The Hon. JANELLE SAFFIN: No domestic legislation.

Mr WILLIAMS: There are anti-discrimination Acts, but they do not help you in that context.

The Hon. JANELLE SAFFIN: They do not help you with the particular sorts of issues.

Mr WILLIAMS: I think we are actually much the poorer for it, personally. Before the Hindmarsh case I was a little bit lukewarm on bills of rights. That experience actually taught me that in the end these debates are really lacking some domestic purchase.

The Hon. JANELLE SAFFIN: There seems to be a reluctance in the political process - I am speaking generally - to get involved in debates about human rights. Currently there is the issue about the DNA testing in New South Wales, and when there was some debate about civil liberties it was in the negative sense.

It was covered in the media almost in a negative sense instead of in the sense of "Now, hold on. We really are reversing the onus of proof here by mass testing. What we are saying is that every man is a rapist and have this test to prove you are not." I have not been in the community, but it is an issue where there did not seem to be a balanced debate.

Mr WILLIAMS: There was not a debate on that issue.

The Hon. JANELLE SAFFIN: There was no debate.

Mr WILLIAMS: Too often, the media talks to the civil libertarian groups and they say it is a bad thing, and that is the way it works, but there is no sense of what standards we are applying here. If we had an entrenched bill which said we have standards of a presumption of innocence and a range of other things, people might say, "Well, the Parliament has legislated for this. Is this really appropriate?" The Government could say, "Well, yes, it is for these reasons." This may be an overriding right which we understood in that way.

The Hon. JANELLE SAFFIN: But we reverse that onus in so much areas, do we not?

Mr WILLIAMS: And people do not know about it. It is done all the time. My point is that maybe there are good reasons in some circumstances, but surely it should not be happening unnoticed?

The Hon. JANELLE SAFFIN: There is a committee at Federal level that actually has to look at each piece of legislation when they deal with such a thing as reversing the onus.

Mr WILLIAMS: The Scrutiny of Bills Committee.

The Hon. JANELLE SAFFIN: But they actually have to look at that particular issue, I understand.

Mr WILLIAMS: They do. They have about seven things. It is listed in this book. They have got the criteria in there.

The Hon. JANELLE SAFFIN: It is like our Regulation Review Committee here. We have criteria, and one of them is the sort of trespass on personal liberties, but not many people know about it.

Mr WILLIAMS: That is my point. Scrutiny of bills is a good place to start, but it does not get you as far as you need to go. It is good for the Parliament but not so good for community involvement. These things are just not known.

The Hon. P. BREEN: People like Moira Rayner in Victoria say that the scrutiny of bills mechanism in Victoria is kind of a beacon on the hill, but beyond that it does not actually do anything or does not have any authority, and people often do not listen to it. It will list a number of provisions as being contrary to fundamental principles.

Mr WILLIAMS: There are not even public submissions to most scrutiny of bills committees, so far as I am aware. If you do not have public submissions, what is the point, really? If you moved beyond that and had a committee which took public submissions, which was open to media reporting and all those sorts of things, that is what I would call a good start.

Simply giving a scrutiny of bills committee, which meets privately and does not even take public submissions, as an extra brief will not actually do anything because it already happens, but it makes no difference. That is what I would call the minimum committee start: public hearings, committee submissions, advertised, lead times, to look at these issues, rather than the secret approach we have at the moment.

The Hon. P. BREEN: Also with the existing models that we are looking at, I think the UK model included, all legislation has to have a statement by the Attorney General as to whether or not it complies with the bill of rights, or human rights.

Mr WILLIAMS: It does. In the UK model, the Attorney General must say, "This bill complies" or "This bill does not comply". I think it is a good thing that indeed again you involve scrutiny not only in the parliamentary process but scrutiny within the departmental context on policy making. It is another safeguard, if you like.

The weakness in the Canadian system is that they do not have a parliamentary committee as well. The UK system does. It has gone one step further. New Zealand does not have a parliamentary committee; it is just within the department.

I think the parliamentary committee is the most important part of it because it is too easy for attorneys to slide past the possibility of some sort of breach, whereas a parliamentary committee with a range of members from Opposition and Independents and other parties is much more likely to raise the issues and put the Government to test as to whether it is the right thing to do.

The Hon. JANELLE SAFFIN: The Regulation Review Committee here does have public hearings. It is not scrutiny of bills but it certainly has that practice of having public hearings.

The Hon. P. BREEN: Could I just ask you something that is not directly on point but I think was relevant in the Hindmarsh Island case? Is the perceived wisdom that the 1967 referendum actually diminished the power of Aboriginal people in terms of what happened in the Hindmarsh Island case?

Mr WILLIAMS: The 1967 referendum may turn out to be a very sad irony for indigenous peoples because it did give the Commonwealth power to pass laws for indigenous peoples but, at the same time, it extended the very clearly racist underpinnings of the power to them as well.

The racist power is there, to quote Barton, the first Prime Minister, "to let the Commonwealth regulate coloured or inferior peoples". That is his quote. To simply extend that to indigenous peoples is to extend the possibility of using it in similarly racist ways.

What we did with the power was not actually get rid of the racist underpinnings. We simply extended them to indigenous peoples. The High Court issue was whether, therefore, you could use the power in an adverse way for indigenous peoples. They did not answer that question. It is open. But some of the Commonwealth submissions were amazing on that case. You have them extracted in that book. The question was put to the Commonwealth Solicitor-General, "Does this mean the Commonwealth could enact Nazi race laws?" The answer to that question was, "Well, there is nothing in this power to stop it."

The Hon. P. BREEN: The High Court, in effect, affirmed that.

Mr WILLIAMS: The High Court did not answer it. It is an open question and, again, that just strikes me as unsatisfactory, that it even remains open, that we would put up with such a scenario within our legal system.

The Hon. P. BREEN: Can you draw an inference from leaving the question open?

Mr WILLIAMS: If you like at the orthodox interpretation, there is no doubt the orthodox interpretation is that it can be used to expressly discriminate against people on the basis of their race. It would take a high level of judicial creativity to avoid that conclusion. The High Court certainly was not prepared to do that in the Hindmarsh case.

The Hon. P. BREEN: So it seems from what you have said that Aboriginal people are worse off as a result of the 1967 referendum, even though it had 90 per cent support?

Mr WILLIAMS: Well, the question is: have indigenous peoples fared better by having their matters transferred to the Federal level, where it can be for or against, or at the State level, where it can be for or against, anyway? They would argue, I think, that even though the potential exists at the Federal level for it to act in a discriminatory way, there has been a lot of positive legislation as well.

The Hon. P. BREEN: Do you see any prospect in a State bill of rights including rights to protect Aboriginal people at any level?

Mr WILLIAMS: Yes, I think it is a very interesting issue as to whether you give particular rights for particular people. I think at the first stage my answer is we should not do that. Even though I personally believe there are particular interests for indigenous peoples who have quite separate interests to the rest of the community, and in particular some of their rights are more correctly fashioned as group or community rights than individual rights, I think that we should be focusing on an instrument that protects the community at large.

I think if it is appropriately drafted, it will, by its very nature, tend to help some of the poorest, most oppressed people in the community which, more often than not, are indigenous peoples, but I think, more than anything else, my pragmatic perspective is something which is seen to cover everyone rather than trying to put people out individually at this stage, but maybe in the longer term, or even the medium term, we should be looking to indigenous protection as well.

The Hon. J. HATZISTERGOS: Professor, you said earlier that if you had to choose any of the bills of rights around the world as sort of a model --

Mr WILLIAMS: Starting point is what I said. I would not choose any of them but I would look there first.

The Hon. J. HATZISTERGOS: You looked at Britain, and then, in answer to a question that Mr Breen put to you, you said it was actually poorly drafted. I do not know why you have chosen it, then.

Mr WILLIAMS: Simply for the model. If you look at what it does and how it works, that is what I have looked to, but I would redraft the language of it. I took your questions as simply being directed to if we had to look at how to do this in terms of

how such a system would work. I would choose that system, but I would just write it better.

The Hon. J. HATZISTERGOS: So in terms of a bill of rights which you would regard as a model bill of rights that we should use in Australia, really, you cannot point to any example of the existing ones?

Mr WILLIAMS: Well, I think we can do better than all of those. My perspective is that I think each of them has strengths or weaknesses but each country is different. I think in this particular country we have some interests that are different from those of the United Kingdom. It has the European Community, which makes it different from Canada, with its proximity to the United States, and New Zealand, with a far higher determination to follow international standards.

We will do it differently from each of those. That does not mean they are weak necessarily. It is just that I think we look to those, take the strengths from each and draft something that is particularly appropriate for New South Wales rather than simply trying to add in what they have already done.

CHAIR: Mr Williams, we have had you under questioning now for more than two hours, which perhaps is cruel and unusual punishment but thank you very much indeed for your patience in responding to our questions and for coming up here to address yourself to our terms of reference.

(The witness withdrew)

(The Committee adjourned at 12.20 p.m.)