REPORT OF PROCEEDINGS BEFORE

STANDING COMMITTEE ON LAW AND JUSTICE

INQUIRY INTO A NEW SOUTH WALES BILL OF RIGHTS

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At Sydney on Tuesday 20 March 2001

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The Committee met at 10.00 a.m.

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PRESENT

The Hon. R. D. Dyer (Chair)

The Hon. P. J. Breen
The Hon. J. Hatzistergos
The Hon. J. F. Ryan

DAVID WILLIAM KINLEY, Professor of Law and Director of the Castan Centre for Human Rights Law, Monash University, Clayton, Melbourne, affirmed and examined:

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

Professor KINLEY: I did.

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

Professor KINLEY: I am.

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

Professor KINLEY: I am a law professor who has studied and written in this area.

CHAIR: You have made a written submission to the Committee. Is it your wish that that submission be included as part of your sworn evidence?

Professor KINLEY: It is my wish.

CHAIR: If you should consider at any stage during your evidence that in the public interest certain evidence or documents you may wish to present should be heard or seen only by the Committee, the Committee will be willing to accede to your request. I now invite you to make a brief oral opening statement in support of your written submission.

Professor KINLEY: I would like to say that I have prepared a brief opening statement reflecting my submission, which was based pretty much on the scrutiny of legislation issue. However, reflecting on the breadth of your terms of reference, I am more than happy to seek to address any questions you have on any of your terms of reference. However, my opening address is really focused on the scrutiny of legislation issue. I would like to do three broad things: Firstly and most briefly is to declare my interest in this area. I began focusing on this issue in 1986 as a doctoral student and, indeed, my doctorate became based on pre-legislative scrutiny and was subsequently published. I think you may be aware of the book. It really focused on how an alternative or perhaps a parallel human rights compliance mechanism could be put into place alongside, or alternative to, a typical bill of rights.

The book and the PhD lay pretty dormant until a few years ago when the "Bringing them home" report from the Blair Government picked it up and, indeed, it has now become a joint committee in the United Kingdom Parliament on human rights. I can speak about what I know of the existence and workings of that committee. I might just say as well—and I think this is very relevant—the reason I am in Australia has a lot to do with the scrutiny of bills because my research took me to Professor Leslie Zines, who was a visiting fellow at Cambridge at the time. I asked him about this body called the scrutiny of bills committee and the regulations and ordinances committee in the Senate. He encouraged me to come and visit and then encouraged me to take a job. That was my enduring interest for the first couple of years that I was in Australia.

The interest has waxed and waned over the last 10 years, principally because it has not been a big issue within my life and within others until most recently. Finally on this issue of declaring my interest, I am pursuing a research project with Professor Brian Horrigan from the Australian National University on this issue, in particular, with respect to how bureaucrats as well as the Executive and Parliament, may be appraised more securely of the human rights implications of their work, policy-making and such. That project will be undertaken in conjunction with Professor David Feldman, the legal adviser to the United Kingdom joint human rights committee.

Secondly, I want to reiterate the opportunities and/or needs for scrutiny of legislation. I am only going to briefly refer to these and I am more than happy to pick up issues as you wish in discussion. First and foremost, the International Covenant on Civil and Political Rights [ICCPR]

under Article 2 (1) obliges us to ensure to all within our jurisdiction human rights compliance and human rights protection; that means to me much more—and indeed may be even primarily Parliament and the Executive much more than the judiciary through a bill of rights.

I see our commitment as being unfulfilled without greater parliamentary input into the scrutiny and protection of human rights. Secondly, under this general heading there is a signed structural institutional base within Australia, and New South Wales in particular, because in all nine jurisdictions there exists scrutiny of bills or scrutiny of regulations or scrutiny of legislation committees. Indeed, their existence here was in stark contrast to their non-existence in United Kingdom but the United Kingdom has leapt ahead somewhat. In all these committees, as this Committee knows, there is at least a common statement that there should be recognition of the rights and liberties or freedoms in scrutinising the legislation before that committee. Some of them go no further than that but the opportunity, even as it stands at the moment, is enormous for any legal adviser or any committee to open that statement up to include all the ICCPR, economic, social and cultural rights and indeed all the treaty rights that we have signed up to, but that is not what happens. Other issues are generally focused on by the scrutiny committees. The one exception is Queensland, which I will talk about later, if you wish.

Thirdly, and this has been an issue that will always override the existence of a strong structural or institutional basis, that is, the issue of political motivation. Without that there will be no such committee. It is interesting that there is a confluence of apparent political motivation at the moment. This committee and the fact that I am sitting here is emblematic of that, but the other is the two recent bills that have been introduced into Federal Parliament by Dr Theophanous and the Democrats. I have skimmed through them—I am sure you are aware of them—and I have some brief comments. I cannot say I know them back-to-front but we could talk about them. I understand it to be the case that the Federal Labor Party is pursuing scrutiny of legislation at a policy plank. I do not think it has reached anything other than Labor Party discussions but perhaps members of the Labor Party here can inform me. However, I understand that to be the case.

I think there is an inevitable and continued osmosis between the Australian scrutiny of bills and scrutiny of regulations committees, and the United Kingdom one. The United Kingdom one is only just up and running but unquestionably there will be a focus on both sides and an osmosis sharing of experience and jurisprudence between the two, so that is another opportunity. Of all committees to be saying this in front of I need hardly say this to you but with the United Kingdom passing its Human Rights Act it joins New Zealand, Canada and Ireland in having such a Human Rights Act but, interestingly, it also joins all three of those countries in having a substantial scrutiny of legislation apparatus. They are different in each country but they are significant.

Finally on this point of opportunity and need, I would like to say that I do not believe that it is necessary to have a human rights Act in order to have scrutiny of legislation. That may seem somewhat obvious to this Committee but some people believe that they would have to be brought together. I think it can operate either parallel to a bill of rights or a human rights Act or it could operate just as well, maybe even being more conspicuous if it were on its own. I am sure that the Committee is aware of these things but I would like to put them on the table as much to allow me to focus on them as on the questions. I believe there are four broad beneficial objects of a pre-legislative scrutiny scheme. Firstly, and most glibly, the very existence of such a scheme will better ensure our international human rights compliance.

Secondly, and this largely feeds to the first mentioned objective, it will inevitably increase a wider understanding and debate on human rights. It will do so in particular in Parliament. One of the great potential benefits of having a scrutiny of legislation committee focused on human rights is that it will allow the stirrers, the opposition, further ammunition, putatively objective human rights and nothing to do with party politics, to be used as ammunition to attack, scrutinise, qualify government or indeed any other legislation or policy. Therefore, that will create debate. It also creates—and this is extraordinarily important—a debate, more closed, between the Executive and Parliament in the corridors, in letters or emails. It will also create a debate between the bureaucrats and the ministerial heads where the bureaucrats perhaps a more aware of what the scrutiny of bills or scrutiny of legislation committee will say about human rights and, therefore, advise the Minister that perhaps going down that road is not the right way to go. It creates debate in all these areas to do with

Parliament but, of course, it will also help create debate in the wider community because it will be reported that Parliament is focusing on human rights compliance legislation.

Thirdly, clearly a scrutiny of legislation apparatus will help to spread the constitutional responsibility for human rights observance. A bill of rights on its own has a tendency, although I do not believe like some people that it goes so far as to give to the judiciary manifestly increased powers, but it does have a tendency to present rights as more of a judicial issue rather than a parliamentary or Executive issue. To me, it is absolutely crucial that should not be the case in reality as well as a perception, and the scrutiny committee can redress that balance somewhat. It will allow Parliament still to have a substantial hold on human rights observance.

Fortunately, I think one of the benefits and one of the niceties about a scrutiny of legislation committee on human rights issues is that its sanction is somewhat malleable. Now, some people see that as a bad thing because, therefore, you are not producing any line in the sand. I say it is malleable because I would not advocate that there be a power within the scrutiny of legislation committee to stop legislation mid-draft in its pre-legislative form because the Committee discerns there to be some contrary human rights provision. That cannot be the responsibility of a committee. It has to ultimately be the Parliament that decides that, armed with the evidence and information from the Committee.

So, really, it can exert its control by overt political pressure, implicit political pressure. And the more that it is sought to be used by parliamentarians, or by Ministers or not by Ministers, the more it will pull. It is like a self-tightening knot: if you really want to use it, the more you pull on it the more it will become harder and sanction-like. But, a government or a particular committee that is not interested in doing it can stand back. It is somewhat of a moving sanction. I think that can be a great benefit rather than a problem. That is all I have by way of introduction.

CHAIR: Professor Kinley, I realise that your academic work has concentrated on pre-legislative scrutiny. However, before we come to that—which is the Committee's main interest in hearing from you—could I ask you whether you have any particular or general views regarding the forms in which bills of rights should appear, that is, entrenched or statutory?

Professor KINLEY: I think, reflecting on the constitutional history of Australia, I would not be happy with a constitutionally entrenched bill of rights. I think that by far the greatest benefit of a bill of rights comes in its educative, and therefore somewhat willingly given, raising of the consciousness of human rights, rather than in its sanctioning of them. The greater, the more powerful the sanction, the more people will focus on that rather than on one's hopes of raising awareness and consciousness of human rights. To put it in a constitutionally entrenched way is to give it the ultimate sanction. If you put it in an ordinary bill—which, I agree, can therefore be overridden—you would achieve 90 per cent of what you would get from a constitutional entrenchment, but adding that extra 10 per cent would create so much fervour and contest that it would not be worth it.

Beyond that, I believe that the essence of a bill of rights should be focused on how the organs of government operate, rather than on individuals. In a way, we do not need to have a bill of rights that focuses on individuals and ensuring compliance, because ordinary legislation already does that to a large extent; and, if it does not, we can include more Acts. Sex discrimination Acts or a whole raft of discrimination Acts apply of course to both the government and public bodies as well as to private organisations. So it is already there. It would seem to add an additional layer—and an unnecessary layer—to put it in a bill of rights.

However, the British example—which I am sure the Committee would be aware of—indirectly imposes obligations on an individual by saying that all organs of government are bound, including the judiciary. That means that the judiciary, when hearing civil actions between two private parties, must impose on that judicial power and judicial action a bill of rights that stands behind it, thereby including the individuals. That is yet to be fully exposed in practice, though an enormous amount of literature has been written about it.

Another aspect to a bill of rights would be that it should be basically interpretive. It should be an instruction to the judiciary that it should interpret a bill of rights to the best of its ability in compliance with the Human Rights Act. I think there is a need for some non obstanto clause, an ability for Parliament to override should it wish. There are a variety of models requiring Ministers to

make some sort of declaration of compliance. I do not think that is a bad thing at all. It may be somewhat glibly done, but occasionally there will not be non-compliance and that will be exposed, and that would be a good thing. One could include in legislation a reference to a scrutiny of bills committee. I know it is not normally done like that, that they are usually set up by resolution or through the internal procedures within a Parliament, but it could be referred to. I think there is room for pursuing a Human Rights Commission role within a bill of rights—another external input. All of these, apart from the judicial interpretation clause, broaden the scope of the bill of rights, broaden its ability to be able to educate, and get away from the single focus of "It's going to be a court-run thing," which I think is dangerous.

CHAIR: Before I come to the pre-legislative scrutiny aspect I should mention that one of the Committee's terms of reference requires us to consider whether it is desirable to amend the Interpretation Act here in New South Wales to either require or alternatively permit courts to construe legislation in terms of, for example, the International Covenant on Civil and Political Rights. Do you have any views that you would wish to express regarding that as a way of importing human rights considerations into the administration of our law?

Professor KINLEY: I think that that is a way of so importing, and quite clearly it is happening in the State courts as well as the Federal Court. Already, it is open to New South Wales courts to so interpret legislation. I suppose it really depends—and maybe this is a problem—on the willingness of the particular court or the particular judge, and that in itself may not be a desirable thing. I cannot see how we could ever tie judges down more, even if an even more express provision were put into the Interpretation Act. But that is clearly the way that things will go. Mr Justice Kirby has foreshadowed that, and no doubt he will pursue it. It is not altogether a bad way to pursue it because, in a way, that is what the focus of a Human Rights Act or a bill of rights Act will be: to give this express authority to the judiciary.

The Hon. J. HATZISTERGOS: Is there not a difference between actually having regard to an instrument like the International Covenant on Civil and Political Rights for the purposes of resolving ambiguities, and actually implementing it in terms of making a definitive statement that something offends the ICCPR? At the moment, it seems to me that what the High Court has said—and Justice Kirby in particular has said—is that if there is an ambiguity, as one method of resolving the ambiguity one can have regard to the rhetoric and values espoused in these instruments for the purpose of resolving the Act. That is the a different thing from saying, "I am going to apply the provisions of the ICCPR."

Professor KINLEY: To override?

The Hon. J. HATZISTERGOS: To override, or to read down, what otherwise may be the clear intent of the statute.

Professor KINLEY: The models that exist within the common law world are never absolutely clear on the ability of the courts to strike down. There is one exception to that, but an old exception, and that of course is the Supreme Court of the United States. But, if it is an ordinary piece of legislation, they are never able to give to the judiciary full power to be able to strike down a piece of legislation that is contrary or, in the way that you have articulated, to apply the ICCPR or any other convention on human rights. A far greater area of function for the judiciary has been in its interpretive role. What is the ambiguity? Where is the lacuna? To what extent does this Act have some intention to implement the Convention on the Elimination of Discrimination against Women, or whatever?

If it did have a scintilla of such an intention, that might be enough for the judiciary to say, "Therefore we want to read this somewhat open-ended provision to conform to that." So ambiguity, lacuna-filling and implementing the objects of the Act are extraordinarily broad considerations. But I accept that one can go beyond that to say that, even where it is starkly opposed and it is impossible to read it in a way to conform with human rights conventions, one is faced as a legislature with deciding whether one wants to give the judiciary the power to annul or rule inconsistent, and therefore determine a provision inoperative, or whether one simply decides one has to back away at that point and say, "That effectively is Parliament speaking."

I am not advocating at all that we follow the United Kingdom model, but the UK deals with the situation by allowing the judiciary to make a declaration of an inconsistency between a particular piece of legislation and the Human Rights Act, and, metaphorically speaking, deliberately throw that back to the Parliament say, "Do something about this." In fact, the judiciary throws it back to the Executive and to Parliament because, as committee members may or may not know, under the Human Rights Act in the United Kingdom the Executive, through the Minister, under a secondary piece of legislation, can make a remedial order amending the legislative provision. That becomes like a Henry VIII clause: that becomes the law. But it is the Executive that has done that. Or, of course, Parliament can pass an Act to do that. So, although the declaration by the judiciary is powerful, it is not then saying that the piece of legislation does not operate henceforth. All it has done is declare an inconsistency and left it to the Executive to decide whether to reverse the declaration or annul the piece of legislation.

The Hon. J. HATZISTERGOS: Your paper and your comments seem to focus on the ICCPR as a method of assessing human rights transgressions.

Professor KINLEY: Yes.

The Hon. J. HATZISTERGOS: I would like to put two things to you. Firstly, is it not the case that the document itself is the product of a compromise by the signatory nations, and therefore it is necessary that the statements within it be expressed in somewhat broad or vague language, reflecting, as I said, the history of the document? Secondly, bearing in mind the fact that this jurisdiction, New South Wales, is not a signatory to the document—even though, by its very existence, the document is binding on Australia and its various constituent parts—is it appropriate that a legislature that has had no part in the framing of the document or the decision to adopt it should adopt as part of its law this document, which, as I said, is itself necessarily composed of broad-sweeping statements to reflect compromises achieved elsewhere?

Professor KINLEY: I think the easiest way to address that—and I do not know whether it is an easy answer—is by dealing with your second point first. There is absolutely no reason, provided it is within your constitutional powers, that the New South Wales Parliament cannot implement such legislation. You could adopt the directive principles within the Indian Constitution.

The Hon. J. HATZISTERGOS: We could do that, but should we?

Professor KINLEY: I do not think there is any problem in the fact that you have not had input. You can adopt whatever you want. You can adopt the ICCPR and remove or amend privacy provisions. It is just a set of accepted international human rights principles, even though they are controversial. That then leads to your second point—which, of course, is a very fair one—that this is a compromise. I am not so fussed that it is a political compromise, beaten out within the crucible of international relations, focusing on the result. The result is ambiguity—such things as freedom of association, or freedom of speech, and it may be limited, where it is necessary in a democratic society and by law, to protecting public morals, et cetera. Who decides what are our public morals, or what are the public health principles necessary in a democratic society? In my view, parliamentarians will. They do that all the time. You do it all the time in passing legislation. You make those judgments, and you make them according to what you think is fair and just, individually, or according to what you hear in your electorate, or what you see in the press, or what you hear the community say.

That is why I think that it is to be focused on more as an educative document, one that raises debate and is not itself definitive, because there is no definition of freedom of speech that is clear, unambiguous and forever to be applied in all situations at all times. But it can be debated. That is a good thing—it is a jolly good thing. And the fact that it puts it down in 25 or 30 articles is a neat packaging way for people to focus on these particular rights. I do not think it is necessarily a problem, but in itself it is somewhat ambiguous and somewhat open-ended.

I thought you were going to ask this, but it is an opportunity for me to add this. I therefore do not see a particular problem with including other human rights, that is, economic, social and cultural rights, and the convention for the rights of the child, for the reason that it raises a debate, rather than trying to create a line in the sand that is definitive. I know that the economic, social and cultural rights, as raised in your terms of reference, is a particularly major problem for the Western countries. Not so

for Asian countries, interestingly. I do a lot of work in Asian countries at the moment, and, if anything, they are primary rights, economic, social and cultural, civil and political, as we know with China. We will just keep those quiet; what we are focusing on is the economic wellbeing of the nation. I am not saying that that in itself is necessarily the economic wellbeing of the nation, but they see it as flowing on to the individuals.

There is some debate within Europe about the need to include in constitutional and ordinary legislative protections of human rights the economic, social and cultural ones as well. Maybe from a lawyer's perspective they are even more ambiguous, especially when they are all prefaced by—as the international covenant on economic, social and cultural rights is—that you shall seek to meet these rights, that is, the right to health and education, to the best of your ability or available resources, within a reasonable time, by a step-by-step process. My goodness, what an open-ended way to project a set of human rights. That does not happen with the ICCPR. I do not see a problem with this ambiguity. I think you can bring in all these other even more ambiguous rights as part of the discussion.

CHAIR: May I refer to be question of pre-legislative scrutiny. In your published article entitled "Parliamentary Scrutiny of Human Rights: A Duty Neglected?", published by Oxford University press in 1999, you first of all review the models in Canada and New Zealand, which appear to be based in the bureaucracy. At page 166 you make a comment that both the New Zealand bill of rights scheme and the Canadian model lack independence since they entrust the task of the scrutiny of government legislation to the government. Would you like to briefly refer to the models in those two countries and develop that criticism?

Professor KINLEY: If you were to define one single practical object of the scrutiny of the legislation system it would be to instill in the executive—that is, the bureaucrats and Ministers who are creating the policy that becomes draft legislation—a need or desire to comply with international human rights obligations. The question is: How do you do that? That is the most important point at which you should have leverage, but how do you get there?

If you simply entrust it, as the New Zealanders and Canadians have, almost wholly to the executive itself—and, in the New Zealand example, the Attorney General, to tick off—then it simply beggars belief that political exigencies would not come into his or her mind as they tick off on particular pieces of legislation, particularly ones that are controversial. If, however, they know that if they tick off on this, it nevertheless will still go to a parliamentary committee which will not be wholly in control of the government, but it will be a committee that will scrutinise that decision, then it may be perhaps less open to persuasion on the political needs for ticking off on a piece of legislation.

I think there is an issue of perception. It does not look good if you are saying: You are your own a watchdog; you are the self-regulatory form here. I think it has to be broadened into the Parliament with the potential for Opposition, in the form of the Opposition parties, to bring to bear arguments to the contrary. When I say that it lacks independence, I mean obviously independence from the executive. And I think it does somewhat qualify the power of any scrutiny.

CHAIR: In another published article in Public Law Review in December 1999 entitled "Human Rights Scrutiny and Parliament: Westminster Set to Leap Ahead" you refer to the Joint committee on Human Rights to be set up by the UK Parliament. That is to be set up, as you mentioned, in connection with the Human Rights Act, which was to come into force on 2 October 2000.

Professor KINLEY: Yes.

CHAIR: You describe the then proposed committee as being "an extraordinarily eclectic beast: part standing committee, part select committee and part royal commission". Would you like to make any comments to the Committee about the model the UK Parliament has chosen to adopt?

Professor KINLEY: I would. In fact, this is always a problem in putting yourself into print. They did not follow that particular model. As you may or may not be aware, they have established the

joint committee, and its terms of reference are much more circumscribed than they were foreshadowed at that time. I think I was doing them justice at that time.

First of all, although the three issues in the terms of reference are very short, one of them is so extraordinarily broad: They are to consider and report on matters relating to human rights in the United Kingdom, excluding consideration of individual cases. So potentially they still could operate as a royal commission. Therefore they have got very much the self-instigating authority; they do not actually have to have things referred to them. They will pursue anything. They can be rather like a human rights commission, as well as be a scrutiny of bills commission, that core thing that we are looking at. The other two things they are responsible for are looking at these remedial orders that Ministers can put up. We can almost put that to one side for the moment. Eclecticism is not there on the face of it now, but the potential for it to operate in a very broad-ranging manner is still very much the case.

When I was doing research on this originally for the book, one of the great problems that one was faced with was the issue of scrutiny of legislation to be taken seriously. I mean that much more than simply setting it up and the people who staff the Committee and the members of the Committee to come along to the meetings and discuss fervently the issues, but to actually seek to make a real difference, to use the authority that the Committee is given, and to use it intelligently and with as much leverage as possible. In my view the most important dimension of that seriousness would come in the fact of whom you appoint as the legal adviser. Talking to the legal advisers of the Committees in Australia, but particularly the Senate ones, both of whom were my colleagues at ANU, they would be the first to admit that they were not human rights lawyers, they were not constitutional lawyers. So they focused on things that would not have been focused on by a human rights lawyer. Therefore that chance within the Senate committees, which has a broad mandate rather like the one of the UK, went begging because they did not get in there and use it.

The United Kingdom has appointed one of the United Kingdom's most eminent professors of human rights law, David Feldman, and he is now the full-time legal adviser to the Committee. But it has only been up and running for a few months, and it has had one or two bills before it. But the very fact that David Feldman has been appointed—and he has full-time honours and he really does know the various models that have been thought of and looked at in the preparation of this Committee—is a statement of intent, I hope. So I think that the Committee is going to do interesting and forward-thinking things.

The Hon. J. F. RYAN: Has the horse somewhat bolted in the United Kingdom? I noticed an article in *The Guardian* not long ago about Lord Woolf complaining that the number of people in prison is increasing, and asking that politicians do not do the law and order routine any more. I noticed the response from the Home Secretary was: The problem with judges is that they have not used the regime of mandatory sentencing we have given them. Apparently, they have recently ramped up the law and order agenda quite significantly since Mr Blair came to office.

If you were to use that as a rough yardstick of a nation's commitment to human rights, the significant increase in the prison population and the significant changes to the laws, almost introducing mandatory sentencing, even having the regime on human rights that Britain has, to what extent does that have an impact? For the New South Wales Parliament, we consider that probably one of the most important and significant human rights issues is law and order, custody and the interaction of the criminal justice system. It does not appear to have an enormous impact in Great Britain; they are still madly legislating on a very harsh regime of law and order, albeit even under a Labor Government.

Professor KINLEY: Firstly, I do not believe that the Human Rights Act is a panacea. Having said that, you cannot say that the Human Rights Act, having only been in existence since 2 October of last year, can be measured in those six months by the number of people in prison in the United Kingdom. I am not saying that even in six years or 60 years that will be significantly different, but at the moment it is unfair to judge it.

I say that because, unquestionably, the legislation that will be challenged most of all— and, indeed, the one substantive act that this Committee has already looked that—will be criminal legislation, that is, legislation to do with fair trial in its broadest sense, including, of course, criminal

legislation. That is the jurisprudence of the European Court of Human Rights. Eighty per cent of the jurisprudence of the European Court of Human Rights comes back to classic civil liberty rights, and particularly the legally oriented ones, fair trial, and access to law and justice. That is what is going to happen in the UK. It is a typical country within that European lot that has a sufficiently sophisticated legal system for that to be focused on.

The Hon. J. F. RYAN: Why do you think that it has not had any impact on that? One would imagine that if it had had an impact, there would at least have been a stabilising of the number of people going to gaol. Most of the laws relate to depriving bail, the onus of bail, and even towards mandatory sentencing, which traditionally has been considered to be entirely inconsistent with the human rights regime. The United States has had a bill of rights, and that country imprisons seven times more people than Australia does. The United States also has the death penalty. Is it the case that, to some extent, the Parliament is looking at some of the minutiae and somehow or other some fairly big issues are escaping past this detailed scrutiny of bills?

Professor KINLEY: You cannot say that the Human Rights Act or a scrutiny of bills will necessarily stop that. One is not saying that they are. And the fact that they are absent will not necessarily stop it. It is much more to do with the culture, and the attitude of the community and of parliamentarians. It is a double-edged sword. Focusing on a bill of rights or a scrutiny of bills committee in its minutiae, it is necessary to understand what it is before one puts it in place. Yet, by so doing, one seems to invest in it a great deal of importance because everyone is focusing on it. Whereas, in reality it will have a much more implicit underlying effect rather than the king hit of suddenly we do not have mandatory sentencing, and suddenly we do not have all these people in gaol who are put in their under spurious causes or for spurious reasons.

It will be a much more level effect, something that we will see over a period of may be 10, 15 or 20 years rather than immediately. Having said that, your example of the USA is one in which you have had the death penalty for 200 years. That is a long enough time, you would think, to say: Is this not an indication that a bill of rights is not any good? I would answer that by saying that it is the political culture. It is not a question of a bill of rights; it is a political culture.

The Hon. J. F. RYAN: A bill of rights is supposed to impact on the political culture, is it not?

Professor KINLEY: Yes.

The Hon. J. F. RYAN: Then what happened?

Professor KINLEY: You cannot expect a bill of rights to be the most important part in determining a political culture. Political culture is determined by all sorts of other things and the Human Rights Act is part of that. I am not sure whether I want it to occur or not, but if it occurred within New South Wales I would like to think there would be a greater emphasis or focus on, or understanding of, human rights obligations. A bill of rights might be one way in which you can raise that community awareness.

CHAIR: In the published article, the first one I mentioned earlier, you refer to the current terms of reference of the Commonwealth Senate's Standing committee on the Scrutiny of Bills, and also the terms of reference of the Standing committee on Regulations and Ordinances. The terms of reference require those committees to report whether any clauses of bills introduced into the Senate, "trespass unduly on personal rights and liberties". You make the comment, "In relation to neither committee is any elaboration on the stark instructions provided." Would you like to comment to the Committee on whether it is your view that those terms of reference are unduly brief or unnecessarily generalised perhaps?

Professor KINLEY: I think by changing them you would not necessarily achieve the object. The object will be the intent to pursue scrutiny of bills or regulations for compliance with human rights. I think that is more in the attitude that the Committee takes because the breadth of those words—indeed, the words that are in the terms of reference for the United Kingdom joint committee are very similar—contain the potential for both our Senate committees and the United Kingdom

committee to pursue these human rights obligations with as much vigour and as much reference to knowledgeable international standards as possible. It is there for both.

It is not that necessary to articulate what those rights are. There is reference to "rights and freedoms" and in the United Kingdom to "human rights". How is the legal adviser or the Committee to determine to define human rights? One way would be to go through all the human rights that Australia or the United Kingdom have signed up to and that would produce an enormous body of jurisprudence. If they want to they can go in there and create it themselves. It may be that the Queensland model, which you know of—which actually has a mini bill of rights articulating 10 rights, or whatever it is—makes them focus on those alone perhaps to the detriment or exclusion of others. I do not think it is a problem to have it as brief as it is. It is a question of having the wherewithal and the will to expand that potential. Those are not in existence at the moment.

CHAIR: One matter in regard to the Senate formulation that troubles me to some extent is the use of the word "unduly" in the formulation, "trespass unduly on personal rights and liberties". That seems to inject a subjective element. Presumably one can trespass on personal rights and liberties so long as the trespass is not "unduly".

Professor KINLEY: I could not agree with you more, but that is inevitable. If that were not there it would be read in by the Committee and/or the judiciary. That is why you have the "necessary and in a democratic society" limitation; that is why you have limitation on freedom of speech or anything else, in order to protect public morals. It is inevitable and if it were not there it would be read in. If you were to just say, "trespass on the rights and freedoms," well, trespassing on someone's privacy in order to get information about their involvement in a multiple murder is clearly something that we do want to do, and that is because we have laws that allow us to do it. I think the word "unduly" is perhaps one that you do not have to be unduly concerned with!

The Hon. J. HATZISTERGOS: What is the benefit of having a committee that exclusively looks at transgressions of human rights, as opposed to a committee which has a broader focus? I raise that in this context, and that is that we do have a Subordinate Legislation committee. Is it appropriate that that committee have a broader agenda, as opposed to setting up an exclusive human rights committee to look at legislation?

Secondly, we have committees in New South Wales, particularly Legislative Council committees, general purpose standing committees, that have really taken on an agenda of their own. They will look at anything that takes their fancy—although I must state that, notwithstanding the interest in this topic, none of them so far, to my knowledge, have looked at human rights transgressions. If and when an issue arises that attracts someone's attention, would there be value in leaving that issue to such general purpose standing committees rather than setting up a different structure with a different staff and a different range of people?

Professor KINLEY: The pragmatic reply to that is to say that if you can only get up a committee to look at this by adding or expanding the existing terms of reference of an existing committee—if that is the only way you are going to get it—do it that way. That is not necessarily to say that that would be inferior to a specifically created committee, because presumably they could have exactly the same terms of reference and just inject them into broad terms of reference as opposed to merely being the only terms of reference of the new committee. But it has to be said, obviously, that that committee will have those other issues to look at. Indeed, it will have built up a busy schedule looking at those other issues and then suddenly have to look at this enormously complex human rights issue.

It seems to me, just in terms of the sharing of the workload, that it would be better to create a separate committee. What is more, if you are kicking this thing off and saying, "We are taking this issue of scrutiny for human rights compliance seriously," and if—as you both referred to and I fully accept—you have to deal with the inherent ambiguity of what these human rights standards are compared to a piece of legislation which is much more defined, then have a committee specifically assigned to that task with a specific legal adviser or an expert in that area.

The Hon. J. HATZISTERGOS: Should that committee have exclusive jurisdiction to look at these issues? That is, so that no other committee can examine those issues?

Professor KINLEY: I think not. I do not know why another committee cannot raise it. It would be great if these sorts of things were raised in other committees. Also, I know this is a very specific point, but your existing committee deals only with regulations and not with bills. You would want to expand it into bills as well. If you were going to do that, you might as well create a specific committee. Although, you could be creating, I suppose, a generalist scrutiny of bills committee into which you would put this human rights issue.

The Hon. J. F. RYAN: One of the advantages of the way in which the Regulation Review committee is able to work is that the Executive is able to initiate its regulation, carry out a certain level of scrutiny beforehand through a regulation impact statement and its own consultation, then make the regulation while the Committee is able to follow up looking at it and knock it out within 15 sitting days of it coming to attention, being gazetted or whatever. I suppose one of the difficulties of a scrutiny of bills is that you will get numerous Ministers complaining that it is bad enough as it is that they have to take the bill through the process of consultation, get it through Cabinet and, having got it through Cabinet, have it introduced into Parliament—in New South Wales there are two houses of Parliament, one in which the Government has a level of comfort and the other in which just about anything goes on any day. Then you add to that another committee. Is there any neat way of speeding up that process because I suspect the biggest blockage of resistance will be a group of public servants and Ministers saying that, compared with the current level of scrutiny, this is going to make formulating laws akin to constipation?

Professor KINLEY: This was the biggest single issue when I was researching in the United Kingdom and Australia: How do you manage to keep the process moving? It is difficult enough, especially with a huge list of legislation that you are seeking to get through. Interestingly, when looking at it in the United Kingdom, I had learnt from the Australian experience because the Scrutiny of Bills committee at the Senate level does precisely this, it produces an alert digest, as I am sure you are aware, every week or every other week to say, "We have these bills. We have looked at them and these are the sorts of problems that we envisage."

I have to say against myself, as it were, that because they do not look at human rights issues they deal much more with a type of checklist and it is a quite defined checklist—you know, Henry VIII type clauses. I accept that it would be an enormous task if you were to say to them, "Start scrutinising for compliance with all the human rights that Australia is obliged to honour." But the jurisprudence, the procedure, will build up. There will be a groove into which the Committee and the legal adviser will eventually slot, but there will be some teething problems I have no doubt.

You are asking essentially that as soon as a bill is created it is tabled before the Committee and the Committee is duty bound to produce a report or an indication as the end point to Parliament by the second reading stage—possibly, exceptionally, by the third reading stage, although that would be a bit late. You really want it by the second reading because you want it to be an element of debate. That length of time could be very short. You would have procedures, presumably, to expedite particular bills for particular reasons. The Minister sponsoring the bill has to stand up and say, "I want to expedite this bill because there is rioting in the streets" or whatever it may be. You have to accept that there will have to be some exceptions.

The other thing is that, although I say that that is the end point, you may actually get a lot of these issues resolved in the intercommunication with the departmental officials or with the Minister. The committee may—and I know that the Scrutiny of Bills committee does this—shoot off a letter to say, "Did you realise that in fact this is effectively a Henry VIII clause?" or whatever it is.

The Hon. J. F. RYAN: They would say, "Of course we did".

Professor KINLEY: Or, "No, we did not but now that we know we are not going to do anything about it." I understand that that is a way in which they can resolve some of these issues. In fact, it may be relatively exceptional that a controversial report will be made to Parliament that will then be used by Parliament and become part of the debate. It will be much more sorted out in the corridors and in letters privately. I think that is a great thing. I do not consider that is a bad thing at all.

The Hon. J. F. RYAN: I suspect that the biggest problem will be the logistical problem. None of the theoretical issues will be a problem.

Professor KINLEY: It will be interesting to see what they do.

The Hon. J. F. RYAN: I do not know whether anyone has done a study of the life of the average bill and the New South Wales Parliament. But, by and large, I must say from being in opposition what tends to happen is that we arrive here at the beginning of the week having absolutely no idea what the Government's agenda is, by the end of the first week we find out and by the end of the second sitting week you know. The bills are through by the following week in the upper House and there is live debate. There is a capacity for the guillotine and all that sort of thing in the lower House that seems to be used with impunity.

Professor KINLEY: You have the upper House. If you make the Committee a joint committee you could focus on the upper House and it buys you more time. You can focus on that. I guess that that is what is going to happen in the United Kingdom, that they will focus on the House of Lords. That is where the controversy will find its greatest airing.

The Hon. J. HATZISTERGOS: We have seen in recent debates, particularly those relating to mandatory sentencing, Aboriginal affairs and matters of that sort of nature, an increasing tendency to go to international bodies to scrutinise legislation that is in operation in Australia. Part of that process is just to get an outcome that conflicts with our international rights obligations, but also, it appears to me, to give an international dimension to a problem with a view to achieving a domestic remedy. That was achieved with some success in respect of the mandatory sentencing issue in the Northern Territory—perhaps not to the extent that it ought to have been, but it certainly provoked a response from the Federal Government.

Nothing you have said seems to me to be able to offer some remedy to that particular type of problem. You will still get groups that will exhaust whatever remedies are available here—lobby politicians, put it through a scrutiny of bills committee—but will end up going to the United Nations or to one of these international bodies that we belong to, seeking some form of relief and internationalising the issue. Is not what you are proposing just adding an additional layer to all of the other things that the Hon. J. F. Ryan has spelled out—the Cabinet process, the upper House process, the select committee process and the internationalisation of these issues?

Professor KINLEY: No.

The Hon. J. HATZISTERGOS: Now we are going to have another committee.

Professor KINLEY: No, I do not think it will add to it.

The Hon. J. HATZISTERGOS: It might be tremendous, but where does it stop?

Professor KINLEY: I believe this is what Parliament should be doing. Parliament should not be in the process of passing legislation that even gets within a stone's throw of infringing human rights without justification. If it does pass legislation, it should do so openly with scrutiny and debate.

That, to me, is the essence of it. If we are not doing it at the moment because legislation is incurring the wrath of international bodies, then let us get our own house in order. This is one way to do it. I do not think it is an additional layer. I think it is focusing on what Parliament should be focusing on, perhaps above all else—passing legislation that is fair and just.

The Hon. J. HATZISTERGOS: Perhaps I have not made myself clear. What will it achieve over and above everything else we have? What has it achieved over and above everything else that we have? I am not saying that bodies should not go off to the UN and make such complaints as they feel justified in making, but these committees have been in operation in a lot of different places. Do you have a checklist of their achievements that you would like to give this Committee so that we can see what they have done that every other check and balance in the system has not achieved?

Professor KINLEY: They have not existed in other places in anywhere near the sorts of levels that we are talking about with the UK, and the potential exists within the Australian system but has just not been used. They do not exist anywhere else. The Canadian models and the New Zealand models, as I say, are internal of government.

The Hon. J. HATZISTERGOS: How long has the Senate committee been operating?

Professor KINLEY: The Senate had two, one since 1932 and the other since 1980.

The Hon. J. HATZISTERGOS: What are the latter's achievements?

Professor KINLEY: Certainly in human rights, next to nothing.

The Hon. P. J. BREEN: It is not a human rights forum, is it?

Professor KINLEY: Indeed they have not used the potential, and that is my whole point. They have the potential but they have not used it.

The Hon. J. HATZISTERGOS: Queensland?

Professor KINLEY: I think that was 1995.

CHAIR: It was 1992.

Professor KINLEY: Then it was 1992.

The Hon. J. HATZISTERGOS: What are its big achievements? I would have thought it is a disaster.

Professor KINLEY: I do not know: You will have to ask them.

The Hon. J. HATZISTERGOS: I will.

Professor KINLEY: I mean, it has been the most ambitious but it has not achieved the sorts of results that we would want.

The Hon. J. HATZISTERGOS: Victoria, has it achieved anything?

Professor KINLEY: Victoria has had a very chequered history. It has been a political animal perhaps more than any other but it, too, is very, very limited. It has the typical unduly rights and freedoms. My whole point is not that these do not exist: My point is that they have never been pursued. I think that we are now going to see for the first time—although I am loath to say it because it is the United Kingdom and I would have loved it to have been Australia—in fact we are going to see it happen in the UK because of the impetus that has been created by the Human Rights Act there. Actually just to pick up a point—I hope I am not misinterpreting you—but I think it is absolutely essential that we have the international forum. That is the whole point of it. We want everything to be internalised as much as possible. That is the purpose of international law.

The Hon. J. HATZISTERGOS: I am not suggesting otherwise.

Professor KINLEY: Okay.

The Hon. J. HATZISTERGOS: I am just trying to find out from you what the Committees that you are proposing are going to achieve, over and above all that has been mentioned.

CHAIR: Is not the answer to that, Professor Kinley, better legislation, one would hope?

Professor KINLEY: Better government.

The Hon. J. HATZISTERGOS: I was wondering whether that has been demonstrated in any example so far.

Professor KINLEY: Let me put it this way. It is the reverse. When I did this study in the UK, 29 of the transgressions by the United Kingdom had been found by the European Court of Human Rights. There were 29 transgressions, 29 failures of upholding or infringing human rights by the United Kingdom.

The Hon. P. J. BREEN: In what period did those 29 transgressions occur? Was it a couple of years?

Professor KINLEY: No. It was up to 1992. I think it was. I can actually give you the exact date. That was from when we signed up which was 1966, I think, up until 1992, so slightly less than 30 years. It was about 25 years. I will check that up for you and get back to you.

The Hon. P. J. BREEN: I do not mean to interrupt your answer. Can I just make the observation that 29 transgressions is the number that has been identified in Victoria as being applicable in just one year. In the Victorian Parliament, there have been 29 transgressions of international human rights principles.

Professor KINLEY: Who has identified that?

The Hon. P. J. BREEN: The Scrutiny of Bills committee in Victoria.

Professor KINLEY: I was not aware of that.

The Hon. P. J. BREEN: To my mind, that is one reason why we should be looking at this issue because that can then be debated in the Parliament in the context of legislation. But anyway, I am sorry to have interrupted.

Professor KINLEY: I would agree with you. In fact, these 29 transgressions were transgressions of the UK Government but in fact 22 of them were legislative, which begged the question—that was the reason why I got into it in the first place—how come we are passing legislation in the United Kingdom that is transgressing, given that we are obliged not to?

The Hon. J. HATZISTERGOS: I am sorry, who did you say identified those transgressions?

Professor KINLEY: They are on the record of the European Court of Human Rights but they are now out of date because that was in 1992 and we are up to about 40. The Italians have overtaken the British, actually, but the British were the worst at that stage. But 22 of those were legislative and one asks: What is the problem here? Indeed, some of the studies show an absolute studied opposition to any internal or external review of a piece of legislation being identified as being contrary to the European Court of Human Rights or the European Convention on Human Rights. They still say, "Oh well, it doesn't matter. We are still going to go ahead with this"—to do with refugees, in particular. That will definitely not happen with this. If it does, the scrutiny of bills committee will require, or the human rights Act will require, the Government to make a statement to that effect and therefore justify itself.

I am not denying that they can still do that, but they are going to have to justify why it is that they are asking Parliament to pass legislation in that way. Unfortunately this is not something that—certainly not at the moment—can be statistically proved. It is more an issue of its being part of the debate and ensuring that there will be a better discussion and a better appreciation of what human rights are and what their standards are in any particular country. That, to me, is the most important part, and that is why it is part of good government, not that there will be a king-hit answer that will make all the difference.

The Hon. J. F. RYAN: Oddly enough, a letter from the Chief Minister of the Northern Territory landed on my desk yesterday, the effect of which was to tell every politician whom he could tell that we are fed up with overseas courts or any sort of external influence on what we do. It is a very

powerful political argument. I might not necessarily agree with it; it is not one that appeals to me, but I accept that in Australia's current political climate it actually enhances incompatible legislation. To some extent it is a badge of honour to some people that their laws do not comply. If there is a building up of a head of steam, by setting up some further opportunities of external scrutiny even at the very beginning of legislation, are we not in fact setting up opportunities to fan that flame?

Professor KINLEY: Just so that I am clear about this—in the sense that issues are raised about the potential of this piece of legislation being contrary, yet the legislation is passed—that being a matter of public record, people will then pick up—later down the track, say, in five years time—the concerns of a parliamentary committee as an indication of why they can go further into the international community. Is that really what you are saying?

The Hon. J. F. RYAN: No. It helps to have passed the very legislation that is not wanted. The fact that there is a report of a parliamentary committee saying that the legislation does not accord with the standards of human rights conventions will actually help legislation to pass—

Professor KINLEY: Why is that?

The Hon. J. F. RYAN:—in a bizarre way because there is an actual enthusiasm. It is not something that I share, but there is actually, I detect, a feeling that it is something to be commended; that Australia is setting new standards in violating human rights.

Professor KINLEY: Well God forbid. If that is the case, then this Committee and a human rights Act will not save it. It is far more endemic and problematic so this sort of issue will be irrelevant if that is the sort of attitude we are dealing with.

The Hon. J. F. RYAN: A theory behind how the Prime Minister reacted to the mandatory sentencing problem that confronted the Federal Parliament a while ago was that he decided to deal with it softly, softly rather than in a much more forceful manner because he feared the electoral backlash of doing otherwise. In fact, behind mandatory sentencing there was a feeling in a couple of States that this was Australia's right to do that. The fact that there was a group of well-paid, champagne-sipping lawyers in France who were concerned about it was of no matter to the poor burghers of the Northern Territory and Perth who are having their houses ransacked. I detect that there is a political feeling that the more we draw attention to these matters there is in fact an enthusiasm to pass that type of legislation.

Professor KINLEY: I am sure that you have your finger on the community pulse better than I. I would like to think that the issue is more one of "We will pass what we want to pass", irrespective, rather than "We will pass it because we know it is contrary". But I accept your point that ultimately the outcome is pretty much the same because the legislation is passed. If that is the sort of reaction, that will always be the case and a human rights Act will certainly not change that, although it will create another dimension to the debate. That is clearly what has happened in the UK. One of the interesting things, as I am sure you know, is the enormous—not re-education—continuing education of the judiciary and magistrates in the UK. It has been an absolutely enormous indication of what this Human Rights Act means. There are now books on commercial law and human rights. It has pervaded. That may be a lot of talk, but even if 1per cent of that talk gets through, I think that is a raising of the standards.

The Hon. J. F. RYAN: It is difficult to know what judicial officers think, but I must say that they do seem to be the heaviest consumers of material related to human rights.

Professor KINLEY: Yes.

The Hon. P. J. BREEN: Can I again make an observation about the Scrutiny of Bills committee in Victoria. Last night I happened to be reading information about pre-trial disclosure. I was looking at the debates from the Victorian Parliament about the issue in Victoria. It struck me that the whole focus of the debate was actually on the report of the Scrutiny of Bills committee on that issue. The Scrutiny of Bills committee had made some observations about fair trials and the extent to which the proposed legislation might have breached the principles about a fair trial. Each of the people contributing to the debate not only made reference to what the Scrutiny of Bills committee had

said, but had actually used the arguments that were canvassed in the Scrutiny of Bills committee to then advance the legislation.

Professor KINLEY: Yes.

The Hon. P. J. BREEN: Is this kind of practical effect that you could expect it to have? Is this generally what happens?

Professor KINLEY: I would like to think so, yes. That is how the scrutiny of bills reports are used within the Senate though seldom, or relatively seldom, because the issues that they are reporting on are generally not as dramatic as are human rights because they do not, as I said, use the potential to comment on human rights compatibility. But if they did, unquestionably that would rise the ire of some people. Some people would see the words "human rights" and would say, "We will get stuck into this", or some people would say, "Jolly good thing. We are going to pursue that." I would think that is precisely the sort of way it would be used. If it is used as political leverage, that is fine. That is what Parliament is all about.

The Hon. P. J. BREEN: The other thing that struck me about the debate is that using the human rights principles as the basis of the argument actually created something of a level playing field among all the people. There was not the usual acrimony and breast-beating that often goes on about the issues of a fair trial and law and order and that sort of stuff. The human rights elements kind of toned down the debate and everyone seemed to be arguing about the same things, which does not always happen in our Parliament.

Professor KINLEY: One would like to think, as you would well know, that the words "human rights" would be something that everyone would want to be behind, even though they might have their own different interpretation of what human rights are. But that is not the case, of course. Some politicians see human rights as itself a bad thing but that is the object. You would like people to be talking about—debating and arguing but still talking about—the protection of human rights rather than, "Let's lock 'em all up", or whatever.

CHAIR: Professor Kinley, I was referring earlier to the fairly generalised criterion against which the Senate committee for the Scrutiny of Bills considers proposed legislation. In Queensland, on the other hand, there is what you have described earlier this morning and also in the footnotes of one of your published articles—namely, a mini bill of rights. For example, I state for the record that section 4 of the Legislative Standards Act 1992 includes four examples of considering whether the legislation: is consistent with principles of natural justice; allows the delegation of legislative power only in appropriate cases and to appropriate persons; provides appropriate protection against self-incrimination; and has sufficient regard to Aboriginal tradition and Island custom. Would you regard that as a preferable course to adopt and to have such a mini bill of rights rather than to adopt the Senate approach which is considering the matter against one fairly generalised statement?

Professor KINLEY: You are pushing me on this issue, and that is fair.

CHAIR: Yes. We have to determine—

Professor KINLEY: I am happy to be pushed.

CHAIR: —if we go along the course of recommending pre-legislative scrutiny, I would like to know whether you have a preference for the Senate methodology or perhaps the Queensland mini bill of rights methodology.

Professor KINLEY: I wish I could be clear, and therefore more helpful to you, but I think that there is a danger in articulating. For instance, nobody around this table would have any difficulty in identifying other pressing human rights issues in addition to that list of four. Yet inevitably one will focus on that list of four if that is what the terms of reference are, even if it then has a catch-all "any other human rights issue that the Committee wishes to focus on ". That might be the compromise, but you will nevertheless focus on the four. It is a typical lawyers' statutory interpretation. You will focus on the four that are expressly mentioned.

CHAIR: We have not been to Queensland yet to speak to the Queensland Parliament's committee. My impression is that the four examples I gave are but part of a list of perhaps 12.

Professor KINLEY: Yes, I think that is right, there is a list of 12. But even then, everyone around this table could look at that list and ask: Where are children's rights?"

The Hon. J. HATZISTERGOS: But if you say "have sufficient regard to the rights and liberties of individuals and the institution of Parliament. These include..."

Professor KINLEY: Yes, so therefore it is—

The Hon. J. HATZISTERGOS: These are just four examples.

CHAIR: I have a sense that you may be saying to us that the Senate methodology is safer, less restrictive.

Professor KINLEY: Yes. But, then again, you can hide behind that. I am not implying that the Senate is hiding. But because it has been so general they have been able to skip over it and they have not pursued some things. I am really debating this with myself as well is with you. Maybe if the Senate had included a mini Bill of rights then it would have focused on them much more and therefore would have had more scrutiny of reports that raised the issue specifically of a human rights transgression or potential human rights transgression of a bill. These will be products of political compromise and debate. It may be that if you are wishing to put forward terms of reference you therefore invite Parliament to nominate what it considers are its human rights issues and then put that list together, categorise them and come up with 6,7, 10 or 12 issues that seem to be most important at the moment. Of course, there will be a provision to look at any others as well, but it might be a way to make the Committee focus on what the Parliament thinks are the pressing issues, and maybe that is not a bad thing. But I would not want to think that you would not look at others as they arose and that you could not predict five years before. A good lawyer can see that.

The Hon. P. J. BREEN: Earlier there was a suggestion from Professor George Williams that if we were to have a Bill of rights—there is no reason why this suggestion could not apply to a scrutiny of bills Act—we should have only those eight or 10 provisions that everybody agrees on and not have anything controversial such as social and cultural rights. The idea did not appeal to me much at the time but it seems to be similar to what you are suggesting now: that if you narrow it down to what is perhaps common or acceptable then at least the heads of the principles are in the legislation and it is not so easy to avoid them.

Professor KINLEY: That is true. You would still be able to include, for instance, economic, social and cultural if you say "any other right the Committee wishes to pursue". Of course, if you raise them and articulate them, as you read the terms of reference you could not but think you have to look at the bill for its compliance on the issue of self-incrimination.

CHAIR: Another aspect of what I am putting to you—it may be more a matter for us than for you—however, the former Attorney General gave a reference to the Committee to consider the terms of reference that we are all familiar with. If we were to recommend pre-legislative scrutiny in terms of a parliamentary committee for the scrutiny of bills and we were to, for example, recommend that such a committee would have terms of reference along the lines of the Senate model, the Premier, who is known to be hostile to a Bill of rights, taking the view that it takes the matter outside Parliament, might be less than supportive if we were to recommend such a model and have a generalised term of reference along the Senate lines. He may ask, "What you talking about?" Might it not assist someone holding those views to have a mini Bill of rights along the lines of the Queensland model to set out with some certainty the criteria against which a parliamentary committee would consider legislation? Do you think what I am putting to you makes any sense? I know that it might be a political question.

Professor KINLEY: The nature of the Committee and the nature of the legal adviser and clerks will be the final determining factor within the context in which they all operate. If they are in a context in which they are able to pursue the human rights that they want—and that we are agreeing would be possible under either of the models, the one with the mini Bill of rights or the Senate, just a

glib statement—then working backwards you could do whatever is necessary to win it politically. If it is necessary because politically it is considered "you have to articulate these" or "I do not want any articulation, we will just put it down like this and the Committee can sort it out"—maybe I am to simplistic—just take whatever it is because the ultimate will be the context and the calibre of individuals involved in the Committee and the legal adviser. They will be able to do as much under either model, depending on their will.

CHAIR: Both the Senate Standing committee on Regulations and Ordinances and the Senate committee for the Scrutiny of Bills are, as their names imply, single-house models. That may well have occurred for historical reasons. The Senate regulations and ordinances committee, as you are aware, has existed for a very long time. I have the impression that you would favour a joint-house model. In New South Wales we have a joint-house model for the Regulation Review committee. Would you like to express a preference to the Committee as between the single-house and joint-house model?

Professor KINLEY: I would. You are correct in your feel. I do think it is essential that it is joint. That gives ownership to both Houses, which I think is important, and therefore Parliament in its totality is involved. It increases the pool of talent. That is obvious. I have absolutely no doubt that the talent sitting around this table would be fine, but you could increase it if you wished by including those from the lower House.

The Hon. J. HATZISTERGOS: You could decrease it, too.

Professor KINLEY: I do not have a view on that either way. As Mr Ryan point out, there is the issue of timing. If you have a joint committee, it does not matter where the bill is introduced, you will always have a member from either House involved in the scrutiny, and that helps. Otherwise, if there is the occasional bill introduced—it happens hardly at all—in the Council and it is only a Council committee, the point you would be focusing at would be the Legislative Assembly, and it is a Council committee.

The Hon. P. J. BREEN: We will also get attacked by the other House if we do not do what it wants us to do.

Professor KINLEY: Unquestionably the answer is yes. Is there any restriction in technical terms? It is not any more arduous or difficult to set up a joint committee?

CHAIR: No.

The Hon. J. F. RYAN: Only that the Government has to agree and there would be a fight over who owns the Committee. That is where the chairman lives and who gets the parking space.

Professor KINLEY: This probably comes from the fact that they have not been controversial about the human rights issues but as you may well know the two Senate committees pride themselves on their bipartisanship, irrespective of who is in government and therefore who is the chair.

The Hon. J. HATZISTERGOS: So do ours, generally.

Professor KINLEY: That is a good thing, and one would hope that that would extend even to controversial issues such as human rights.

CHAIR: I accept that the Senate committees do operate on a bipartisan basis. However, it seems to me to be a fairly obvious thing to say that in a bicameral legislature it is not unreasonable, where a committee is considering either regulations and ordinances or alternatively bills, for a committee performing that function to reflect the bicameral nature of the legislature.

Professor KINLEY: I agree.

The Hon. P. J. BREEN: I have a question about numbers. I notice that the Victorian committee has nine members. Do you have any view about the numbers? It seems like a lot to me.

Professor KINLEY: Yes, for a relatively small legislature.

The Hon. J. F. RYAN: Is it a joint committee?

Professor KINLEY: It is a joint committee; that is one reason. The UK one has 12. It is a bigger jurisdiction, of course—six from either. Certain people will always do the majority of the work and the quorum will always be whatever it is. I do not see a particular problem. It may be considered a wee bit unwieldy but for the start of a committee that may be seen as something of a flagship or be touted and presented as a big issue perhaps it would be attractive to have a lot of people on. I do not have any particular view about numbers.

CHAIR: I think that our Regulation Review committee has nine members.

The Hon. J. HATZISTERGOS: Seven.

CHAIR: It has seven. That is quite sensible size for a parliamentary committee, I would have thought.

Professor KINLEY: You have seven or six?

CHAIR: This is a one-house committee, and we have five members, which is rather small.

The Hon. P. J. BREEN: You said that the UK Human Rights Act allows judges to make a declaration of inconsistency and in effect throw the question back to the Parliament. I have been trying to establish for some time what happens to the issue so far as the litigants are concerned. Does the litigant wait in limbo until it goes back to the Parliament or is it resolved in the negative?

Professor KINLEY: My understanding—I stand to be corrected—is that the resolution of the dispute is as the law stood. There is no retrospectivity, as it were. The declaration is merely a declaration; it is not in itself grounds for the person who has suffered because of the transgressing legislation to obtain remedy. It is therefore prospective. If the Minister decides to introduce a remedial order then that remedial order remedies the legislation henceforth rather than retrospectively. I presume there would be the possibility for Parliament to pass legislation that would have retrospective effect, and there is nothing to stop the UK Parliament from doing that. It would have to expressly say but it would go against all the usual cannons of interpretation. But my understanding is that the norm and the expectation is that it is prospective. So the litigant is the person on the white charger for everyone after. He does not gain but he has the satisfaction that everyone in the future will gain.

The Hon. P. J. BREEN: It is a Pyrrhic victory.

Professor KINLEY: Yes. I do have information on the joint committee here. It does have a web site. You probably already know that but I am more than happy to give you what I have here.

The Hon. P. J. BREEN: You said that the essence of a Bill of rights should be focused on the organs of government rather than individuals. Is it not the case that a Bill of rights is really a bill of individual rights? I know that the American Bill of rights does blind corporations but that is kind of inconsistent with my understanding of the general nature of a Bill of rights: that it does apply to individuals, and perhaps more importantly that it only binds government. So a private agreement would not be covered by a Bill of rights. In the sense that a Bill of rights does only blind government, is it not true to say that a Bill of rights focuses on the organs of government by its very nature?

Professor KINLEY: Obviously, I did not make myself clear. Clearly, it is about the rights of the individual and protection of the rights of the individual; protection against transgression by the organs of government, not by other individuals; therefore, not the horizontal but the vertical. I apologise if I did not make myself clear. I agree with the way you have presented it.

The Hon. P. J. BREEN: Do you also agree that it is inconsistent with the nature of a bill of rights for it to bind corporations and to bind contracts that relate to individuals and not the Government?

Professor KINLEY: I would not say that it was inconsistent because that would seem to assume that there is an agreed consistent view of what a bill of rights is. A bill of rights can apply to individuals. It can expressly say that it does. It is just that that has not been the norm; they have been seen as documents that bind the State and its organs of government in its relations with its individuals. However, as I said, indirectly individual transgressions are covered by the Human Rights Act in the United Kingdom by virtue of the fact that they bind the judiciary as well as Parliament as well as the Minister for Education, as well as the Bureau of Student Grants or whatever. There is an indirect application to individual rights in the United Kingdom as we speak.

The Hon. P. J. BREEN: We have had evidence from Brett Walker that that is such a radical departure from the traditional way that a bill of rights would operate that he sees it as being manifestly inappropriate to have it in Australia. Do you have any view about that?

Professor KINLEY: Unquestionably it was controversial. People could not quite believe, when this issue was raised and was debated by Lord Irvine in the House of Lords in the United Kingdom—and it was made clear in debate not only by all the other contributors to the debate but much more importantly by Lord Irvine himself, the Lord Chancellor, that that is how this section was to be interpreted. From that moment on it became probably the primary focus of intellectual debate on the Human Rights Act, precisely because, as Brett says, it is a radical departure.

It is much more difficult for me to say, therefore, that it would be wholly inappropriate. I am not saying that Britain and New South Wales are the same but if it can apply in the United Kingdom it is not as if we are so utterly different that it could not apply to us. I think perhaps his view would be tied up in all sorts of other concerns that he has, although I should not speak for him. However, other people who would be against such a horizontal application may be against a bill of rights more generally applied to New South Wales or to an Australian jurisdiction and that was just another dimension to their objection.

The Hon. P. J. BREEN: You indicated that we have nine jurisdictions in Australia where we have scrutiny of bills committees operating. I take it you were including the New South Wales Regulation Review committee in that number, were you?

Professor KINLEY: Yes.

The Hon. P. J. BREEN: Is this the only State or Territory where there is a Regulation Review committee?

Professor KINLEY: No. In fact, I think all cover secondary legislation. The exceptions are those that also cover primary, either in a separate committee or the same committee does primary and secondary legislation. In fact, the definitive document is the one I referred to in footnote 12 of my public law review article. It covers all of the nine jurisdictions committees.

The Hon. P. J. BREEN: Do you recall offhand if there is a scrutiny of bills committee anywhere else besides Victoria, Queensland and federally?

Professor KINLEY: No, I think the Australian Capital Territory covers both.

The Hon. P. J. BREEN: Anyway, we can look it up.

Professor KINLEY: I am sorry, I am a little rusty on that.

CHAIR: On that point of the structure of such scrutiny committees, given that New South Wales presently has a Regulation Review committee, do you have any views or do you wish to express any preference, given that that is the status quo now? If we were to set up a scrutiny of bills mechanism, would it be better, in your view, to have a dedicated committee dealing with that task or, given that we have a current structure with an expertise in reviewing regulations and other subordinate legislation against defined criteria, could it arguably be satisfactory to expand their terms of reference to deal with bills as well?

Professor KINLEY: I will go back to my earlier reply. I think the ideal would be to have a separate committee, particularly if this was to be something of a flagship for human rights compliance—and that sends the right message—but also because it will be a tough task, certainly at the beginning. However, I do not think that it would be impossible or inappropriate to have it as an additional terms of reference injected into the existing terms of reference of the existing committee.

Indeed, when I was doing research on this for the United Kingdom I saw that as the politically acceptable and practical way to go forward rather than raising the spectre of having an additional committee and getting the ire of politicians or others saying, "We do not want that. The last thing we need is another damn committee." Therefore, the answer would be somewhat political; whatever you could wear, but I think that in the end—certainly if it did its job properly—the Committee that already exists that had this included in its terms of reference will realise the overwhelming demands of it and, hopefully, it would be hived off to a specialist committee.

CHAIR: In the ordinary course there are fewer bills coming forward at any one time than regulations or ordinances. I was mulling over in my own mind whether it might be a satisfactory structure to have one committee doing both, although I can see what you are saying that a dedicated committee, particularly initially, might be the way to go.

Professor KINLEY: Yes. It will be the political will. I did not envisage it happening in the United Kingdom and it only happened as a consequence of the Human Rights Act coming in and, therefore, the whole debate was raised an extra notch or two.

The Hon. P. J. BREEN: Why did that happened? What precipitated that? It seems to me quite odd that the Human Rights Act should throw up a scrutiny of bills committee. My reaction would have been that the Human Rights Act would cover the field.

Professor KINLEY: I think there are two levels to this, although I will not pretend to know the full ins and outs of this, but I did follow it is far as I could from here. They thought it was a good idea because it would better ensure human rights compliance; it would have this constitutional evening-out and would keep within Parliament an authority for human rights compliance and, indeed, raise knowledge of human rights within Parliament, not just give it, as would appear to be the case, the sort of tabloid headline case that it all goes to the judiciary and Parliament is somehow denuded of this human rights responsibility.

The other reason that may be very telling is that unquestionably there was a focus on the concomitant creation of a human rights commission in United Kingdom, which was not something, as I understand it, the Blair Government supported—an independent human rights commission not unlike our own hierarch. To deflect concern for the establishment of such a thing, the establishment of a relatively powerful and potentially broad-ranging joint committee within Parliament was established and thus far it seems to have been successful in the sense that it has deflected fervent cries for a human rights commission to be established. It may still be established further down the track, but not the moment.

(The witness withdrew)

(Luncheon adjournment)

PAUL STEPHEN LATIMER, Associate Professor of Law and Deputy Head, Department of Business Law and Taxation, Monash University, Melbourne, affirmed and examined:

CHAIR: Professor Latimer, in what capacity are you appearing before the Committee?

Professor LATIMER: As a private citizen.

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

Professor LATIMER: Yes, I did.

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

Professor LATIMER: Yes.

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

Professor LATIMER: I have a Master of Laws degree from the University of Sydney. I have been an academic for about 20 years. My current position is Associate Professor of Law in the Department of Business Law and Taxation, Monash University, specialising in business law and securities regulation.

CHAIR: You have made a written submission to the Committee. Is it your wish that that submission be included as part of your sworn evidence?

Professor LATIMER: Yes.

CHAIR: If you should consider at any stage during your evidence that in the public interest certain evidence or documents you may wish to present should be heard or seen only by the Committee, the Committee will be willing to accede to your request.

Professor LATIMER: Thank you.

CHAIR: I now invite you, if you wish, to make a brief oral opening statement in support of your written submission.

Professor LATIMER: I approach this not as a human rights lawyer but as a legal academic in the area of business law and securities regulation. Business law and securities regulation includes corporate regulation, such as the work of the Australian Securities and Investments Commission [ASIC] for example. The business law side includes trade practices, consumer law, competition law and the work of the Australian Competition and Consumer Commission [ACCC].

I have read the terms of reference. The purpose of my submission is to discuss the interface of business and securities regulation with a bill of rights, especially with reference to the experience overseas. From my study of the Canadian situation—the overseas jurisdiction that I know best—it seems that the Canadian Charter of Rights has added another level of litigation and of complication in the area of business and corporate regulation. The Canadian Charter of Rights was one of the legacies of the Trudeau regime of the early 1980s. I am sure it was intended to focus on human rights. The language really focuses on human rights in many situations. But the Canadian experience over the past 20-odd years is that business has found itself a plaintiff or a person under the Canadian Charter of Rights.

So, whereas the Trudeau Charter of Rights focused on the rights of individuals, in fact it is wide enough to give rights to corporations and their connections. I have borrowed the word "connections" from the racetrack because I could not think of any other words to refer generally to companies, company staff, company advisers, their bankers, their accountants and their lawyers. Rather than specifying the many other people who are associated, I thought I would use one word. So

in that sense I use the word "connections", because I know that is the term used with reference to racehorses.

The Canadian experience is that companies and their connections are major litigants under the Canadian Charter of Rights. The purpose of my submission, therefore, is to draw the attention of the Committee to the risks that can follow on if a bill of rights is not properly defined. My submission uses the expression "carve-out". Carve-out is the current language for exemptions or exceptions. Really, I am raising for the Committee's consideration whether carve-out could be included for business regulation involving corporate citizens, their personnel and their connections.

I move on to where I come from. I come from the side of business regulation, the ACCC and ASIC. In respect of business regulation in this country, the ASIC Act sets out as its purposes, in section 1 (2) (a), improving the financial system, in section 1 (2) (b) the enhancement of investor confidence, and in section 1 (2) (c) uniformity of corporate law throughout Australia. Those provisions of the ASIC Act mirror the international standard. The international standard comes from the international body of securities commissions called the International Organisation of Securities Commissions [IOSCO]. It has more than 100 members representing commissions around the world. I mention IOSCO because the IOSCO objectives—to which Australia has acceded—refer also to investor confidence, fair markets, efficient markets and transparent markets. So I am talking about business regulation with reference to ASIC and the corporate world. I turn to the ACCC and the trade practices world. The Trade Practices Act talks about promotion of competition, fair trading and consumer protection. Those are the aims under which our business operates and the legislative purposes of legislation at the Commonwealth level.

The introduction of a bill of rights provides many possibilities for challenge to business regulation. ASIC and the ACCC, and indeed the tax departments, Federal and State, have lengthy experience of litigation—people taking technical points, and challenges to jurisdiction. It is my submission that the introduction of a bill of rights will provide yet another layer of what I have called skirmishing, or a lawyers' picnic perhaps, but certainly a layer of complications to business regulation, whether corporate, trade practices, tax or any other business regulation. The Canadian experience is that the Trudeau Charter, which was aimed at individuals, in effect has been taken over and enforced by big business and its connections, hence showing the risks to be considered when it comes to drafting a possible bill of rights for New South Wales.

There is a lot of academic literature that is pro a bill of rights. You have heard from my two Monash colleagues, who are more specialised in the bill of rights area than I am. But I would point out that there is academic literature critical of a bill of rights on the basis that it could be heavy-handed. It is like saying, "We will legislate to ensure that everybody in this country has a telephone." Is that the way to ensure that everybody has a telephone—to say, "You will have a telephone"—or do we leave it to those who want a telephone to go out and buy one? Under our competitive system today, one has seemingly endless choices of telephone suppliers. Is a bill of rights to be imposed from above, or are the rights to be on an as-needs basis? I can table at this stage the academic literature cited in my submission that is critical, or I can refer to it by name.

CHAIR: Whichever you choose.

Professor LATIMER: There is one article that I will leave with the Committee secretariat. It is written by Professor Jim Allan of New Zealand. I will read the name of it onto the record because I believe it is self-explanatory. It is called "Why business learns to love bills of rights". Would you like me to refer to a couple of things that Professor Allan says?

CHAIR: Yes, please.

Professor LATIMER: Professor Allan points out that business learns to love a bill of rights. That contradicts what we would expect. We would assume business would be opposed to a bill of rights, but, as Professor Allan discusses in his paper, research shows that business in the United States and Canada sees the costs of bill of rights litigation as just another cost of doing business—that there is no problem, that business is set up for administration and for legal issues, and therefore it is business that becomes the main litigant in bill of rights issues, not the citizen because the citizen cannot afford it. Therefore, business sees the cost of a bill of rights as no problem.

Secondly, a bill of rights always has the government at the other end. It is always a government which is stepping on the right to free speech; it is government that is stepping on whatever the bill of rights is enshrining. The Jim Allan thesis is that business is experienced in dealings with government. Therefore this is just using their existing experience in government dealings, government liaison, and bureaucracy generally. The second point is that business sees a bill of rights as no problem, but just another cost of doing business. And again, the citizen is the person who is at a major disadvantage in how to trigger the system. That is probably the main issue: that business can live with, can adapt to, and can indeed take over the rights given in a bill of rights, as is the Canadian experience.

I would like to table the papers that I included in my submission as one of the footnotes, and that is footnote number one. This gives me a chance to speak to my footnote number one, which is on page 2. We got as far as the third paragraph. I remind the Committee of the extensive literature, with grave reservations of the alleged benefits of a bill of rights, focusing on the dangers of judicial activism—who appoints judges, where do they come from, how representative are they—from a largely unaccountable judiciary.

I can also tender for the Committee the Allan and Cullen paper from the University of Queensland Law Journal called “The Sirens are Calling”. My colleague Professor Jim Allan is quite active in the area. The third one there is “Turning Clark Kent into Superman”. I think he is referring to turning a very modest bill of rights into a powerhouse. A bill of rights looks as if it is focusing on the individual, but it is the Superman side that takes over; turning Clark Kent into Superman. The fourth one I am tendering is the unpublished paper which is a longer version of this submission.

They are pretty much the aims of business regulation. I am now at the middle of page 2, about to start on the Canadian material. I will leave it to the Committee to move through that.

CHAIR: You quoted a passage on page 2, in which you refer to extensive academic literature expressing grave reservations regarding the alleged benefits of a bill of rights. Could we regard you as an opponent of bills of rights in principle, leaving aside the corporate regulation aspect?

Professor LATIMER: It is not like an academic to sit on the fence here, but I can see both sides of the fence here. My focus is the corporate regulation side, and I am a definite opponent when it comes to corporate regulation. Regarding individual rights, I can see both sides to that. I guess my query is: If it ain't broke, don't fix it. That is very much an issue. It is often said that politicians like to be remembered by the monument they build. We have a room of politicians here, and I guess it is in somebody's interests to say that this person was the founder of the bill rights 50 years ago. I am not sure that Mr Trudeau would be happy with his name being attached to the bill rights today and the way that it has been focused in the business area.

CHAIR: Regarding the phrase "If it ain't broke, don't fix it", it has often occurred to me that it depends from where one stands whether one considers it to be broken or not. Do you follow what I mean?

Professor LATIMER: Yes.

CHAIR: In this bill of rights area, some people consider that there is a need for one and some do not, and they do not really agree with each other as to whether there is something broken to be fixed.

Professor LATIMER: It is the issue of overkill. We might say that the right to free speech is not guaranteed. But do we have any evidence that free speech is a problem? Do we have any evidence that people cannot speak freely? You are actually taking me away from the area that I am here to speak about. But as a citizen and an academic lawyer, I would say that my own work has not shown me that we have a problem, except in the corporate area.

CHAIR: Turning to the corporate area, I take it your views are substantially formulated as a result of your experience and/or knowledge of the position in Canada. Am I correct in believing that?

Professor LATIMER: Yes. I spent a sabbatical in Canada late last year, and I learnt from a time at Laval University in Montreal that in the area of business regulation this is the dominant subject: the Charter of Rights and the way that it impacts on the whole area of corporate regulation.

The reason I say that it impacts is because of the language of the Canadian Charter, which uses the word "anyone". It is open to the Committee, if you were to move in this direction, to define who it is that is going to have rights. The Canadian section 24 provides that anyone whose rights have been infringed may apply to the court. The Canadian jurisprudence is that the word "anyone" is interpreted to mean "any person". The lawyers in the room will know that under interpretation legislation around the common law world, the word "person" includes a corporation, a corporate person.

I have three or four of the issues from Canada on the word "anyone". The Canadians say that "anyone" includes any person, which includes any corporation. So whenever the bill of rights is referred to, it includes a corporation if relevant.

My second point from Canada telling us that "any person" includes "any company" is that with official Canadian bilingualism, the French version of the Canadian Charter uses the word "une personne", and any French dictionary says "une personne" includes "person" and "a company". So this official bilingualism of Canada's law is confirming the second reason: that "person" includes "company".

The Hon. P. J. BREEN: In New South Wales we might not have that problem, because in New South Wales the word "person" means "subject of the Queen".

Professor LATIMER: I think "person" in interpretation law says "person, natural or corporate", does it not, or along those lines?

The Hon. P. J. BREEN: I would be guided by the Chair.

CHAIR: I would agree with what the witness has said.

Professor LATIMER: That is the basic legal interpretation: that "person" includes "natural person" or "corporate person".

The Hon. P. J. BREEN: Do we have any instances here of corporations claiming rights under the Commonwealth Constitution?

Professor LATIMER: I am not aware of any. Again, this morning's witness Professor Kinley could have answered that question better than I can. As I have said, in the Canadian experience there is no reason why "person" does not include all persons. For example, all persons are taxpayers. That might be part of the answer to your question. All persons, natural and corporate, are taxpayers under the Taxation Act.

CHAIR: However, you are arguing, I take it, that if we were so minded to recommend a bill of rights here in New South Wales, it should be so expressed as to define a person as being a natural person and not a corporation?

Professor LATIMER: Yes. I noticed that the meaning of "person" was touched upon by an earlier witness. Again, I think it is an important point of definition.

May I finish my four Canadian lessons? The first was interpretation legislation; the second was Canada's bilingual French Charter; and the third reason why "person" includes "company" is that the Canadians say that it would be inconsistent to read their Charter as saying that one section includes "natural person" and another section includes "corporate person". They have said that, as a matter of interpretation "person" will be uniform throughout the whole Charter. The fourth reason that the Canadians include companies is that they say that in many situations it would be beneficial for shareholders to give a company standing under the Charter.

The Charter, for example, talks about freedom of expression. That is seen to be a newspaper section, to say that the *Sydney Morning Herald*—if there was any law limiting its freedom of expression—would have standing under the Canadian equivalent of section 2(b). That would therefore benefit proprietorship and the shareholders of the corporate newspaper. In short, what I am saying about the word "anyone" is that I am not sure whether Mr Trudeau and his generation would have realised where it would lead. The committee might consider how it can be refined to include humans and the protection of human rights.

If I could go further: that section in the Canadian Charter, which gives rights to anyone, has therefore led to all kinds of legal skirmishing—that is the word I would use—technical defences and procedural defences. For example, you will recall the National Companies and Securities Commission [NCSC] from the 1980s was our first attempt at national corporate regulation. The then NCSC was the first attempt and it was very much establishing its credibility. Our experience in the 1980s was that the NCSC had to almost fight to establish every one of its powers under its legislation—the right to call witnesses, the right to hold hearings, the right to require evidence. My suggestion is that a bill of rights in New South Wales would reopen these claims to the jurisdiction of the regulator.

Can I give the Committee some further examples of the Canadian experience? Other witnesses may have mentioned that the Canadian Charter uses the word "anyone" in many situations, but that has sections that their jurisprudence now tells us can be enforced by corporations. Section 2(a) deals with freedom of religion. I will give you an example of freedom of religion. I do not know if you are aware of the Sunday trading case. Now, when Trudeau wrote "freedom of religion" I think he was intending human rights, conscience, belief in religion. The Canadian experience under section 2(a) is that freedom of religion was taken on by a large retailer in what is called the Big M Drug Mart Case against Sunday closing laws.

The Sunday closing laws the judge traced back to about the year 600, saying that Sunday is the Sabbath and thou shalt not work on a Sunday. Big M Drug Mart said, "This is compelling us to follow Sunday observance and to close our shop on a Sunday". The case was upheld by the Canadian court as another example of something that it is amazing to think about. Freedom of religion and a retailer challenging and succeeding in having the Sunday trading laws overturned on the basis of infringing their corporate decision, their wish to trade on a Sunday.

The Hon. J. F. RYAN: That is right, is it not? What other reason would there be for closing on Sunday?

Professor LATIMER: What other reason for closing on Sunday?

The Hon. J. F. RYAN: What reason would you have other than a religious reason?

Professor LATIMER: Well, Big M Drug Mart is saying they are closing on a Sunday because State laws require, State laws dictate.

The Hon. J. F. RYAN: Why would State laws dictate? Because of religious reasons!

Professor LATIMER: Correct, and they are saying, "This is affecting our decision. We are saying that we do not observe." In a corporate sense they are saying that they are not interested in the religious side.

The Hon. J. F. RYAN: Well, it sounds right, does it not? It sounds logical? I am a religious person, but as it so happens there is no doubt that prior to that decision that company was being forced to observe Sunday for reasons which were entirely religious.

Professor LATIMER: I am saying the same thing here. This company is saying that they are being forced to close on a Sunday because of religious reasons. They are saying that that is affecting their freedom of conscience, their freedom of religion.

The Hon. J. F. RYAN: It does.

Professor LATIMER: But we are talking about human rights here. We are talking about a big retailer. Does it have freedom of religion? I find it incomprehensible.

The Hon. J. HATZISTERGOS: Well it does have, in relation to all the employees, the staff and all the other people who are affected by that decision.

Professor LATIMER: That is because it is reading "anyone" to include a corporate "anyone". Indirectly it is talking about the human beings that make up the corporation.

The Hon. J. F. RYAN: As it happens we do not have Sunday trading by a vote of Parliament. That was considered to be an advance.

Professor LATIMER: I think that is probably the case in most States, but up until this Charter challenge in Canada apparently there was Sunday closing.

The Hon. J. F. RYAN: It deregulates business, does it not? It gives business the opportunity to trade in a deregulated fashion.

Professor LATIMER: Are you saying that you would support a bill of rights giving freedom of religion to corporations, effectively?

The Hon. J. F. RYAN: What you appear to be arguing, although saying that you disagree with it, is that a bill of rights has actually given business more trading opportunities.

Professor LATIMER: It has in that case. That seems to me to be so far away from a bill of rights focusing on human beings.

CHAIR: You are seeking to draw a distinction between a corporation as a legal entity and a natural person, are you not?

Professor LATIMER: I find it hard to comprehend how the corporation can have freedom of religion. I see religion as a personal thing.

The Hon. J. HATZISTERGOS: Look at it in reverse. What the organisation in that case was being required to do under the law as it existed was observe a religious obligation.

The Hon. J. F. RYAN: To make all its staff observe Sunday as a non-work day.

Professor LATIMER: I am not sure whether the corporation was concerned about its staff's religious beliefs. I think the corporation wanted to trade on Sundays. The religious aspect was a kind of convenient reason, if you like. Again, that is my line, that this is a bill of rights being used for a purpose which I think was not intended..

The Hon. J. F. RYAN: There is probably no doubt that better examples than that have been given to the Committee.

Professor LATIMER: Yes.

CHAIR: May I put something to you that you raised in your oral remarks earlier. You said words to the effect that it would be inappropriate in your view to legislate to require everyone to have a telephone. I agree it would be inappropriate. However, is that a fair comparison with what one might characterise as a standard bill of rights provision, such as, shall we say, freedom of speech, freedom of religion or freedom of assembly, to give three examples? They are, one would think, incidents of a free person whereas whether one has a telephone or not is perhaps a matter of choice and comfort and no more.

Professor LATIMER: Yes. I use the telephone example on the basis that this is being imposed from above. Somebody says it is good for everyone to have a phone, and thou shalt have a telephone—every person in Australia. Some people would say, "We don't want one". My comment was the way you do it is for those who want the telephone to go out and buy one. Now, you are saying that to legislate for a telephone is not legislating for freedom of speech.

The Hon. P. J. BREEN: Would a better analogy not be the right to a telephone. That is really what human rights law is all about. You do not really have to exercise your right but you do have that right.

Professor LATIMER: Yes, the right to speech—the right to a telephone. Other witnesses could speak better about this than I can, but I understand that we have very little in the way of legislated rights—free speech, assembly, religion. Under the Constitution there is freedom of religion.

The Hon. J. HATZISTERGOS: Actually, there is not.

The Hon. P. J. BREEN: Well, that is debatable.

The Hon. J. HATZISTERGOS: There is no right of freedom of religion under the Constitution.

Professor LATIMER: Again, that is not really my area. As I understand it human rights in this country are a mixture of inherited common law decisions with legislative provisions in some cases. My first example was legislating for a telephone and my fall-back, if you like, would be that if we need it we do it on an as needs basis. For example, if there is a problem with freedom of speech, let it make itself known and then deal with it if and whether it becomes known as a problem.

The Hon. J. HATZISTERGOS: That is something that can be raised in opposition to a bill of rights per se. It is not something specific.

Professor LATIMER: That is probably the direction I am going in. It seems to me that if there is a problem with freedom of speech, we do something about it. Are we aware that there is a problem at this stage? I do not think we are.

CHAIR: Could I bring you back to your central thesis, which I understand to be that you do not consider it to be appropriate to give bill of rights guarantees to corporations. Taking freedom from unreasonable search or seizure, section 8 of the Canadian Charter of Rights and Freedoms as an example, is there anything wrong with such a guarantee being extended to corporations, to businesses?

Professor LATIMER: Section 8 is certainly one of the corporation sections. Section 8 opens with, "Everyone has the right to be secure." The danger there is that it can create technicalities. The Canadian experience is that unless the proper procedure by the ASIC equivalent or the ACCC equivalent or the ATO equivalent has been absolutely spot-on to the letter of the law, there will be a Charter challenge under section 8 which will slow down the whole process for another year while that section is debated. The right to assert unreasonable search and seizure is definitely open to a corporation. The issue there is that it appears there is a distinction between search and seizure in the penal sense,between the criminal law and regulatory offences. Even that creates problems. Do you say that the ASIC is criminal law or is it regulatory? Is the Trade Practices Act penal? One can go to gaol under the Trade Practices Act, but I think it is seen as regulatory. I could see a whole chapter of litigation opening in this country to work out: is unreasonable search and seizure focusing on, say, indictable offences or regulatory offences? This distinction is very blurry.

CHAIR: Would I be correct in thinking that you are saying that the existence of a bill of rights with constitutional guarantees gives business a further layer or additional platform upon which to mount challenges to appropriate business regulation?

Professor LATIMER: Yes, and I would compare the situation of ASIC in the 1990s and in 2000 with the NCSC in the 1980s. The NCSC had to fight for everything. It had to establish precedents at every turn—to hold a hearing, to summon a witness, to ask questions, which questions they could ask. It was dreadful. ASIC today operates in a whole different culture.

The Hon. J. HATZISTERGOS: That was without a bill of rights.

Professor LATIMER: That was corporate Australia challenging the Commission's rights under legislation to ask questions. I think the example of unreasonable search and seizure is important to consider. I just want to go back to some of these freedoms. If I can go back a few moments, I was discussing freedom of religion because I think these are even more graphically highlights the dangers. So, freedom of religion, freedom of expression, and as I mentioned before freedom of the press. I think other witnesses have referred to what they call freedom of corporate expression.

Earlier witnesses have discussed the tobacco advertising case in Canada; how the tobacco company was able to challenge cigarette labelling rules as infringing their rights to free speech. I think the chairman said that he found it—he did not use the word "grotesque" but it was a pretty strong word. I remember reading it in the transcript.

CHAIR: I have forgotten exactly what word I might have used, but I certainly did strongly disapprove of that precedent.

Professor LATIMER: That is the danger if we are talking about freedom of expression, freedom of corporate expression. Another example along the lines of that tobacco case was the Ford Motor Company case in Canada. I do not know if it has been mentioned before. The Ford Motor Company challenged French language laws in the Province of Quebec. Quebec is officially mono lingual. The Ford Motor Company wanted to advertise in English because some parts of Quebec have a large number of English speakers. Their right to commercial free speech was challenged by the State government.

Ford took that on under the charter, section 2(b), which related to infringing its freedom of expression, and it was successful. Again, I do not see that human rights have anything to do with corporate free speech. The way that this was overcome in fact was the use of what the Canadians call their "notwithstanding" clause, section 33, which relates to corporate free speech and which says that the Provincial Government or the provincial government can pass a law which contradicts the Charter if it is disclosed and agreed to by the State Parliament and it is made clear. So what happened in the province of Quebec was that the State laws were passed which confirmed that only the French language could be used for external advertising. So Ford won under the Charter and then lost under the notwithstanding clause. That is just another example of business in my view misusing what was intended as freedom of expression of human beings. A third area in the area of freedoms is freedom of association.

The Hon. J. HATZISTERGOS: I am sorry to interrupt, but why is it misusing it? I do not understand why you are saying that it was misusing it.

Professor LATIMER: I do not see that Ford International should be able to use to its benefit the Canadian Bill of rights that aims to protect, to advance and to further human rights; at least, I am sure that that was intended in early 1980s when it is as being drafted—human rights.

CHAIR: Perhaps there is a human right, though, residing in citizens in Quebec to receive information about motor vehicles in their own language.

Professor LATIMER: That is possibly looking at it from the other side.

CHAIR: Yes.

Professor LATIMER: But it was the charter of rights that gave Ford the standing to move this along.

The Hon. J. HATZISTERGOS: But why is it a misuse? Why should not a corporation have a right to make such an assertion—just hear me out—when it wants to communicate in the English language to a section of the population? It might be that by doing so it is precluding itself from getting its message across to the predominance of the population, but that is its commercial decision. It wants to take a commercial decision to communicate to a proportion of the population in the language that it

chooses, so why should some government step in and say, "You cannot do this." Why should not it be allowed the opportunity to be able to do that?

Professor LATIMER: What I would do is answer that by going back to your own terms of reference. I do not think your own terms of reference have any corporate flavour to them. They are not in front of me at the moment, but your terms of reference talk about human rights and the citizen. Perhaps it can be raised that if Parliament can legislate for anything within Parliament's jurisdiction, it could certainly legislate for a bill of rights to include corporations. I am not sure whether your terms of reference have this in mind, so this could be a definitional issue for this Committee.

The Hon. J. HATZISTERGOS: I am not sure but you seem to be focusing on the issue that bills of rights should be for individual rights and they should not be for corporate rights. I can understand what you are saying as far as you are concerned but what I am more interested in knowing is the philosophical basis for that distinction.

Professor LATIMER: I think the short answer to your question is your terms of reference which talk about human rights for citizens.

The Hon. J. HATZISTERGOS: Yes, but leave that aside for the moment. What is the philosophical basis for saying that bills of rights should not apply to corporate entities?

It **Professor LATIMER:** Okay. Well, this is the Canadian line. The Canadian line says that corporations' shareholders benefit by a corporation being able to use a bill of rights. That affects the shareholders. Perhaps, following your comment, corporations are not only BHPs. Corporations are, as you know, one-person companies, milk bars and so on. We have one-person companies. I guess what I am saying is that if this Committee wishes to recommend rights for corporations, I think you have the issue of the definition, perhaps, and stretching your terms of reference a bit. What you are saying is: Why should not the one-person milk bar have a right to free speech? I concede that is where you are coming from. I am probably thinking of it from the view of big business.

The Hon. J. HATZISTERGOS: I just do not know the basis for the distinction between an individual and a corporate entity when it comes to—

Professor LATIMER: I think it is probably size, power, knowledge, expertise and legal advice. I think a one-person milk bar is quite different to BHP.

The Hon. J. HATZISTERGOS: It may well be, but that may not be a basis for saying that BHP should not have these rights available for it to pursue, if it so chooses.

Professor LATIMER: At the end of the day, that is for this Committee to decide.

The Hon. J. HATZISTERGOS: In actual fact, it might have a benefit because, if it does pursue those rights, it establishes some precedent and maybe the one-person milk bar may be able to use it. I am not comfortable with the bill of rights at all, do not get me wrong. Just at the moment I do not see the basis for the distinction.

Professor LATIMER: Perhaps if we talk about corporate offenders rather than corporations.

The Hon. J. HATZISTERGOS: If you were to argue against a bill of rights per se, I can understand and accept that. But what you are doing is saying that there is a particular aspect of the corporate world which results in making it inappropriate to give corporations access to these rights. I am not sure that I understand so far what it is about the corporate world that makes it so distinctive.

CHAIR: Before you respond to the Hon. J. Hatzistergos' question or remark, am I correct in thinking that your attitude arises out of a perception of corporate regulation substantially in Australia and the extent to which you believe it will be vitiated or compromised if corporate entities are able to use this further resource or resort to a bill of rights over and above whatever defences they might presently have?

Professor LATIMER: I should probably clarify this and say that I am talking about corporate here in the sense of corporate offenders and I am thinking about the Australian Competition and Consumer Commission [ACCC] dealing with corporate offenders, the Australian Securities and Investments Commission [ASIC] dealing with corporate offenders under charges from the ACCC, competition laws and consumer laws. Those are the target of the Australian Taxation Office [ATO] and those are the target of ASIC for market manipulation, or whatever else that might be.

CHAIR: But they are not offenders by definition. They are offenders at the point at which they are found to have offended.

Professor LATIMER: "Those who are under investigation by" might be the way to define it

The Hon. J. HATZISTERGOS: But a moment ago you were talking about the Ford Motor Company in Quebec which was challenging the imposition of language laws. You would hardly regard the Ford Motor Company in that instance as a corporate offender, and yet you say that it should not be allowed to use these instruments to espouse its particular values or interest.

Professor LATIMER: There are two aspects to that.

The Hon. J. HATZISTERGOS: I just want to focus on that for the moment. It is one thing to say that some person is alleged to have committed some serious transgression of the law and that that person should not be advantaged in not meeting their culpability, but it is another thing when you are saying that they have a corporate interest which may actually also be a consumer interest and that they should not be allowed to articulate and ventilate that in whatever forum is available to anybody else.

Professor LATIMER: I think this is very helpful, actually. This is focusing the debate on two sides. We are looking at a bill of rights here in the case of the Ford Motor Company taking the offensive, if you like—the assertion of the right to free speech. The right to religion, and the other one to which I will come in a moment—a right to association or a freedom of association—that is on the assertion or the claim. The corporate offender line comes in where the bill of rights is being used as a defence and that was where the chairman referred earlier to life, liberty and security. I see life, liberty and security coming in on the defensive when they are under investigation, under litigation and under prosecution. At that stage the bill of rights is coming in as a defence for a corporation and that is where I am using the reference to a corporate offender.

I will go back to the offensive for a moment. I have three in the offensive side, namely, the claim to religion, the claim to expression and the claim to freedom of association. This is Canada section 2(d)—freedom of association. I see a tension between the rights to freedom of association, which we think of as meetings and political expression, that are interfaced with competition laws under the Trade Practices Act prohibiting association for an anti-competitive purpose. For example, two traders or two corporations may come together to fix prices. Do they claim that they have the right to association? Can they assert their rights under a bill or can they claim it as their defence if they are being prosecuted—that there defence is that they have a right to associate, to talk about prices and to divide the market. It just seems to me that it will add another year of litigation to work out the interface between freedom of association versus cartel laws—laws against anti-competitive practices.

CHAIR: Is the mischief that you identify in Canada in terms of corporations being able to avail themselves of rights declared by the Canadian Charter of Rights and Freedoms being manifested to your knowledge in any other jurisdiction with which we in Australia might compare ourselves, such as New Zealand or the United Kingdom?

Professor LATIMER: Look, I am sorry: I will have to pass on that one. I might ask the Committee what you have learned about other jurisdictions. I can only speak to Canada and the Canadians tell me that this is a new layer in business regulation. It is a lawyer's picnic in that sense and every commercial law firm now has a Charter section because it is part of doing business in Canada. Other jurisdictions I cannot comment on.

The Hon. P. J. BREEN: It is true, I think, that in North America corporations have access to the American Bill of rights and have certain freedoms, particularly I think the freedom of speech that

has been widely interpreted in America to include corporations which is being used for purposes that you would probably say are contrary to the interests of people promoting human rights. I think that is your problem, is it not—that corporate interests and the things that corporate interests represent are inconsistent with the principles underlying human rights. Is that what you are saying?

Professor LATIMER: That is all that I am saying, basically. I see a tension between human rights versus corporations and how to distinguish and define.

The Hon. P. J. BREEN: It seems to me also, if I can make this comment without being unduly provocative, that on page 8 of your submission you refer to the lessons from the Canadian Charter for Australian business regulation. You have said that the Australian Constitution was not designed for corporations, et cetera. You have said it was not designed as a people's Constitution, subject to a few exceptions. In the footnotes you have said that one exception to that is the freedom of interstate trade. That seems to me to be about as far removed from human rights as one can get. I have to say that I have never seen reference before to the idea that freedom of trade might be a scheme of human rights in the Australian Constitution.

Professor LATIMER: That is how desperate we are to find legislative statements. We are forced to use these. This was actually discussed by the Founding Fathers 100-and-a-bit more years ago as the right to carry on business. I guess what you are saying is "by a corporation" or "by a trader".

The Hon. P. J. BREEN: It just seems to me to be drawing an extraordinarily long bow to suggest that freedom of trade might be a human right under the Australian Constitution. I have never heard such a proposition.

Professor LATIMER: You do not like it?

The Hon. P. J. BREEN: It is just novel.

Professor LATIMER: I stand by that. Section 92 is well documented as one of the very few examples in the Constitution referring to freedoms of any sort. It is noted that the Commonwealth was put together to provide an Australian common market without tariffs between States and to provide a freedom of trade between States.

The Hon. P. J. BREEN: Yes, but not a human right. This is the whole point. You are constantly crossing the line between corporate interests and human rights. This is just another example. I mean, freedom of trade could not be a human right under any definition of human rights that I am aware of.

Professor LATIMER: Look, I suspect that in the 1890s it probably was the case. Corporations as we know them today almost did not exist. Lawyers here will know Salomon's case is a 1897 case and it recognised one or two person companies were a means of doing business. What I am saying is that when the Constitution was drafted, Salomon had not happened yet. Corporations were very unimportant in Australian business so section 51 (i) which refers to free trade would have really been free trade by traders, human beings.

The Hon. P. J. BREEN: It is an interesting idea. It is one that Inglis Clark would have had something to say about. It certainly was not amongst the human rights that he included in the original draft of the Constitution.

CHAIR: I know that we are not here to have debates between members of the Committee but I wonder whether I could throw this into the discussion. One of our terms of reference is whether economic, social and cultural rights should be included in a bill of rights. Given that freedom of trade could be described as an economic right, perhaps it is relevant for this matter to be discussed.

The Hon. P. J. BREEN: Yes. It is an interesting way to approach the whole question of a Bill of rights, from the point of view of corporate interests. It is something I had not applied my mind to. Your submission is very helpful to that extent.

Professor LATIMER: I am really here to raise the issue for the Committee of definitions and scope. Are there exemptions, and if so how do you define them? In some ways it sounds un-Australian to say that corporations do not have rights. But on the other hand corporations are legal persons and the whole Bill of rights debate focuses on human rights. Does a corporation have human rights? Maybe the connections have human rights, to go back to that word, the directors and the personnel. That might relate the comment of Mr Hatzistergos about freedom of religion in the Big M Drug Mart case, freedom of religion by the personnel. It is incomprehensible to say that a corporation has freedom of religion. I see the problem of definition and this Committee and your expert advisers have to work out definitions.

CHAIR: Would not a more proximate and relevant example regarding corporations and individuals who, shall we say, assist or carry out the functions of corporations be brought into sharper focus by unreasonable searches or seizure? Taking company directors or company secretaries for example, those people must be said to have rights. Would I not be correct in saying that?

Professor LATIMER: Yes. But you have the tension there between the specific legislation that allows search, seizure, warrants, investigations and hearings and a Bill of rights. There are tensions between the two. How do you balance the right to be free from unreasonable search and seizure is not prohibited. It is just a matter of clarifying the process. So I would hope that if a Bill of rights does set out protections against unreasonable search and seizure that it is compatible with what specific legislation has to say. The moment there is a degree of inconsistency you get a whole range of appeals on your hands.

CHAIR: I am not necessarily being critical of this but when a new facility or structure is set up by a government—take the Ombudsman as an example—that can be resorted to buy the rich and powerful and by the poor and oppressed. It may initially be thought of as a remedy for the poor and the oppressed. However, the rich and powerful tend to use such a facility as much as anyone else.

Professor LATIMER: And equally freedom of information.

CHAIR: Yes, FOI would be another example.

Professor LATIMER: Politicians are the main litigants under FOI. The bigger end of town tends to make most use of these provisions—FOI and the Ombudsman.

CHAIR: Yes, the media would be another example of big corporations using FOI.

Professor LATIMER: Which goes back to my quoting my colleague in New Zealand on why business loves the Bill of rights: because it is business that has the expertise, the backup staff and the resources to test a Bill of rights to its limits, far more so than the weak and the oppressed.

The Hon. J. F. RYAN: But that is the case with the whole law, is it not?

Professor LATIMER: Yes, but I think your terms of reference relate to looking at a Bill of rights for human rights, individuals.

The Hon. J. F. RYAN: If you are saying that human rights are going to be more dependent on litigation than they are now, instead of people just voting, for example, clearly some aspects of human rights will be a bit more expensive. But I suppose some people would say that people with disabilities have been very successful in enhancing and expanding their human rights by being able to appear before the Human Rights and Equal Opportunity Commission and bringing cases before the Disability Services Commissioner here in New South Wales. So whilst it is open to classes of people, corporations and people that are funded such as peak groups, it could be argued that they are doing it on behalf of other people and therefore pushing some of the benefit around.

Professor LATIMER: So you are saying that corporate enforcement will benefit—

The Hon. J. F. RYAN: I am not saying anything; I am saying that there is an argument that will go that way and I am interested in your response to it.

Professor LATIMER: I just go back to the question of definition. If you are going to use the word "anyone" or "anybody" do you intend to include corporate anyone, big business anyone, or do you wish to focus it on what you have called the weak and the oppressed? Near the end of my submission on page 7 I refer to the due process of law, Canadian section 11. There is no doubt that the due process of law is open to corporate citizens as well under the Canadian Charter. Reading this as Australians, there is nothing unusual here—the right to be informed, to be tried within reasonable time, not to be a witness against yourself. I just mention this to draw attention to the fact that if New South Wales does draft such a section you have to make sure that it is compatible with due process of law provisions in other legislation. There is reference to the right to be informed without unreasonable delay. I would have to check the ASIC Act or the TPA. Do they refer to "without unreasonable delay" or do they say "immediately"? Do you see the way that playing with words can create the scope for deep-pocket challenges to a section 11?

The Hon. P. J. BREEN: So what you are suggesting is that due process on that interpretation is extended to, say, the jurisdiction of ASIC or the corporate regulator?

Professor LATIMER: No, I am saying that the corporate regulator already includes these provisions.

The Hon. P. J. BREEN: But not in the context of due process.

Professor LATIMER: It is at least by common law. The ASIC Act sets out details on hearings and witnesses. People cannot be called upon to incriminate themselves and so on.

The Hon. P. J. BREEN: Have the Canadian courts held that the due process provisions extend to corporations?

Professor LATIMER: Absolutely.

The Hon. P. J. BREEN: In the context of the corporate regulator?

Professor LATIMER: Absolutely, yes. That is the danger. If New South Wales is going to propose a section 11 you would have to make sure that it is compatible—indeed identical—with the equivalents in State legislation and I suggest also Commonwealth legislation. Otherwise you will have a gap which will therefore create a challenge.

The Hon. J. HATZISTERGOS: I do not understand. A lot of this corporate regulation stuff you are talking about is Federal law, is it not?

Professor LATIMER: I was going to leave this to my final comments, the problem with section 109 of the Constitution and inconsistency.

The Hon. J. HATZISTERGOS: We are talking about bills of rights for New South Wales here.

Professor LATIMER: I am pleased that this has come up. We live in a Commonwealth with substantial Commonwealth regulation. The areas I am talking about are corporations, trade practices and tax to a lesser extent—all Commonwealth. Let us say that ASIC was going to hold a national inquiry into something, with witnesses being called from every State. A New South Wales witness may say that under the Bill of rights he or she or it wants something determined first.

The Hon. J. HATZISTERGOS: That depends on the form the Bill of rights takes.

Professor LATIMER: The witness may say, for example, "I have not been given reasonable time."

The Hon. J. HATZISTERGOS: No.

Professor LATIMER: This is what it could lead on to.

The Hon. J. HATZISTERGOS: Assume the Bill of rights was a statutory Bill of rights and there was an Interpretation Act which said that every New South Wales statute had to be interpreted consistently with the Bill of rights provisions in the Interpretation Act. That would not cause you any concern, what it?

Professor LATIMER: You have answered that already, because if you are tying it down to every New South Wales statute that will be safe from Commonwealth regulation except in the case of corporate regulation as it stands at the moment. You are aware that the national scheme is under challenge of the moment. You are aware that ASIC operates through New South Wales application legislation. You are aware of the Bond case and Hughes and others from last year and the current referral of powers discussion, which I think is pretty well advanced. ASIC as it stands at present operates through New South Wales application legislation.

The Hon. J. HATZISTERGOS: Once the referrals all come through --

Professor LATIMER: That will be fixed.

The Hon. J. HATZISTERGOS: Does the regime that I have referred to cause you any concern as far as corporate regulation is concerned?

Professor LATIMER: So long as your Bill of rights is connected to New South Wales legislation.

The Hon. J. HATZISTERGOS: That is all it can be.

Professor LATIMER: I do not know whether the ACCC would be using, say, the New South Wales Evidence Act. I suspect that it might.

The Hon. J. HATZISTERGOS: No, there is a Federal Evidence Act.

Professor LATIMER: That is an area that I do not know about. But would there be dangers of a Commonwealth regulator being reliant upon a New South Wales statute as part of a national system? If so, the Bill of rights could provide a barrier or further hearings in New South Wales whereas every other State proceeds in a national hearing or national investigation. I would need to research further—you would be more aware than I am—which State legislation a national regulator may depend upon.

CHAIR: Would you be comforted or would your concerns be allayed to some extent if the Committee were not to recommend a statutory Bill of rights but were to go down the path of pre-legislative inquiry by a parliamentary committee into the form of any legislation that might be thought to offend against human rights principles? Do you think that would be a less rigid and more acceptable methodology?

Professor LATIMER: I do not want to go on record as somebody opposed to rights. Of course, we all support human rights. It is a matter of how to best set them out and support them. What I know about human rights is that they exist in statutes in some places and by common law, and I believe Australia is party to various international conventions. Whether the legislating from above is the way to go I am not convinced. I think it raises grave problems of definition, who the rights are for and how they will be set out.

CHAIR: I am really putting another matter to you. Rather than legislating from above, as you put it, via a Bill of rights, albeit a statutory Bill of rights for New South Wales, supposing there were, along the lines of the Senate model, a parliamentary committee for the scrutiny of bills and that committee had as its charter or remit considering the terms of any proposed law against certain criteria?

Professor LATIMER: This goes back to my comment a while ago, what I called "as needs". The issue of rights is addressed as needs. If freedom of expression is an issue it is addressed as needs, whether it be by specific legislation—what you are talking about is a process in advance, the scrutiny in advance?

CHAIR: Yes, in advance of the law being enacted into a statute.

Professor LATIMER: That would seem to me to be less heavy-handed, if that is the expression to use. It is certainly less like imposing from above and it is dealing with the issue as it arises. However, it does not create the monument that maybe the Parliament wishes to establish. I do understand that legislation is a monument: it is a statement. This would not have the same public profile.

CHAIR: I am not sure whether the Committee is here with a view to erecting monuments. We are here to inquire into the merits of our terms of reference.

The Hon. P. J. BREEN: I remember hearing that comment earlier, Mr Chairman, about politicians wanting to erect monuments. I was thinking then that politicians really are only interested in being re-elected, and publicity that way.

Professor LATIMER: Yes, but that happens through monuments. Academics say, "Which politician is remembered by the monument they did not build?" It is always the monument they built. I understand what you are saying in the sense of quality control from a human rights perspective. I do suspect that investigation in advance, especially in the light of overseas learning, might be a less "heavy-handed" way of approaching this topic, but I am not certain that Canada provides lessons for Australia. The experience is that it is so far removed from human rights that it is a major obstacle for business regulation and corporate regulation. Could I now move on to section 109 because I think that we are moving towards the end of the hearing?

CHAIR: Yes.

Professor LATIMER: I raise this as one for the Committee to consider further. I think some of the constitutional speakers could address it better than I can, but you are aware that section 109 of the Constitution provides that if there is an inconsistency between State law and Commonwealth law, the Commonwealth law will prevail. There is no Commonwealth bill of rights. There is a private member's bill drafted by the Democrats through Senator Meg Lees. It is only at the bill stage and I guess we do not know where that will go, but I do not see section 109 being a problem at the moment. However, I do think that a bill of rights in New South Wales—one State only—would put New South Wales in a position different to the other States. I would have thought in these days of one national economy and everything becoming more and more harmonised through various jurisdictions, that a bill of rights will put New South Wales into a stand-alone situation.

CHAIR: That maybe so, however, historically there are examples of State or provincial based bills of rights. That was certainly the case in the United States of America before its Federal Constitution came into effect. It was also true in certain provinces in Canada before the British North America Act, as it then was, was enacted. You may well be right in saying that it will be a stand-alone provision, however, there appears to be nothing in law preventing it from happening. You are saying, though, that it would be inconvenient in a Federation to do that?

Professor LATIMER: It makes New South Wales separate but I think the section 109 issue would come up if the Commonwealth went ahead in the same direction. You are quite right: Quebec has a bill of rights as well, so that is one example of a province existing side-by-side with the Federation. That is as much as I have to say, unless there are further questions. Basically, the theme again is the bill of rights, how best to approach it, how to define it, cost versus benefits and the unintended consequences in business and corporate regulation.

The Hon. J. HATZISTERGOS: On the section 109 issue, the Commonwealth at present is using its powers to give grants on various conditions and this sometimes creates disparity in a Federal system. I refer to the education area in particular, where grants are given to independent schools and those schools are given certain entitlements and rights which may not apply in a public school system. Is that necessarily a problem, having a State bill of rights alongside of a Federal one? Things could be actually harmonised, could they not?

Professor LATIMER: You mean a State could raise the issue that a Commonwealth grant was given to school X and not school Y?

The Hon. J. HATZISTERGOS: Yes.

Professor LATIMER: And that infringes on the rights to equality of opportunity for New South Wales schoolchildren?

The Hon. J. HATZISTERGOS: Whatever it is?

Professor LATIMER: Because it infringes on their rights to religion, for example, through a church school?

The Hon. J. HATZISTERGOS: All sorts of arguments can be raised.

Professor LATIMER: Yes, I know.

The Hon. J. HATZISTERGOS: What I am getting to is that certain areas of power are reserved to the States where one could argue that there are fairly strong cases for human rights, corporate rights, whatever you might call them. The next Federal Government has indicated—and I might say that I do not agree with this—that it will pursue some form of bill of rights.

The Hon. P. J. BREEN: They always say that but they never actually do it.

The Hon. J. HATZISTERGOS: It is part of their platform.

Professor LATIMER: I cannot speak on the education area from that perspective but I notice that we have not mentioned section one, which has been covered by other witnesses, about the way the Canadian situation provides for restrictions. For example, some of these laws have been challenged by corporations and some of the challenges have been unsuccessful on the basis of Canadian section one, which says the rights exist, including these corporate rights, subject only to such reasonable limits as can be democratically justified in a free and democratic society. The rights guaranteed can be restricted in the case of such reasonable limits prescribed in a free and democratic society, but what a can of worms is being opened here!

The Hon. J. HATZISTERGOS: I agree.

Professor LATIMER: Again, that is a danger for New South Wales. If you are going to have this fall back of justification to be challenged by corporations, you are introducing again scope for legal skirmishing. That is where I wanted to finish up: a bill of rights, perhaps unintended corporate consequences to be clarified by definition or, as the Chairman mentioned, other ways of approaching it, such as scrutiny at the drafting stage rather than the overall system.

CHAIR: Would this be a way of summarising your position, at least in part: that enforcement agencies in the corporate regulation area in Australia right now have powers that might be said to be unreasonable in rights-based terms, however, they are necessary for corporate regulation. Is that one way of encapsulating what you are saying today?

Professor LATIMER: I would not go that far because that could be paraphrased by saying that the Australian Competition and Consumer Commission is over the top and that it has rights that could not be substantiated. No, they do not. If you read the Australian Competition and Consumer Commission Act or the ASIC Act, they have the right to hold a hearing, the right to summons eyewitness, which is quite reasonable. No, I am not suggesting they have excessive rights but I am suggesting that one of these regulators, exercising their rights, could be challenged under a bill of rights. That is what defence lawyers are all about—challenging every word, challenging the letter of the law. I am not sure if the challenge would be successful, but I believe it would add another year to an investigation, another year to a process.

CHAIR: You argue very strongly for a carve-out, as you described it, of corporate entities from any bill of rights?

Professor LATIMER: Yes, subject to definition, the one-person milk bar, as mentioned before, raises the difficulty of how does one define this. Then the carve out of corporates, but what about company directors, their lawyers, accountants or bankers. Do we carve them out as well? I throw that back to the Committee. That is the sort of thing that you, as the experts, can give some thought to. It all comes back to definitions.

(The witness withdrew)

(The Committee adjourned at 3.25 p.m.)