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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 Monday 15 May 2000

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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
The Hon. Janelle Saffin

ANDREA DURBACH, Director, Public Interest Advocacy Centre, 146-8 York Street, Sydney, and

PATRICIA MARIE RANALD, Principal Policy Officer, Public Interest Advocacy Centre, 146-8 York Street, Sydney, affirmed and examined:

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

Ms DURBACH: Yes, I did.

Dr RANALD: Yes.

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

Ms DURBACH: Yes, I am.

Dr RANALD: Yes.

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

Ms DURBACH: I am a solicitor and my work over the last 15 years has been concerned with the assertion and interpretation of rights in both South Africa and Australia. My work at PIAC has concentrated mostly on working with rights, both as a litigator and in terms of policy work, particularly around questions of discrimination.

Dr RANALD: I have worked for many years in the area of human rights, broadly speaking, but particularly employment rights. My doctorate, which was recently completed, included work particularly on international covenants, United Nations covenants, which deal with human rights.

CHAIR: PIAC has a written submission. Do you wish that the submission be included as part of your sworn evidence?

Ms DURBACH: Yes, I do.

Dr RANALD: Yes.

CHAIR: If either of 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 would be willing to accede to such a request. Dr Ranald, I now invite you to make a brief opening submission to the Committee in support of PIAC's submission.

Dr RANALD: Thank you. I will start with a few brief words about PIAC. It is an independent and non-profit legal and policy centre. Its charter is to undertake strategic legal and policy interventions in public interest matters in order to foster a fair, just and democratic society and to empower citizens, consumers and communities. We are the only broadly based public interest legal centre in Australia. We work in the State jurisdiction and also at the national level. Our clients are primarily those with the least access to economic, social and legal resources and opportunities. We offer our services free or at minimal cost.

We are associated with the Public Interest Law Clearing House, which facilitates access to legal advice free of charge or at a reduced rate for people and organisations seeking legal assistance in matters of public interest. The members of the service include private law firms, barristers and accounting firms in New South Wales. Our strategic plan for the coming three years includes as one of its priority areas to ensure access to human rights for citizens in the context of increasing economic inequality, deregulation and the transfer of regulatory powers from the national to the international level. We see a legislated Bill of Rights for New South Wales as one means of assisting access to such rights. Our submission specifically addresses terms of reference (a) to (e) and (g) and (i).

I will briefly summarise the main points in our submission. In terms of the general need for a Bill of Rights, Australia is a signatory to the United Nations Declaration on Human Rights, which since 1948 has been regarded as a common standard of achievement for all peoples and all nations. The declaration contains basic human rights, civil and political rights and economic, social and cultural rights. There are two more detailed declarations which I am sure the Committee is familiar with: the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights. Successive Australian governments have supported all of these documents, particularly the last two, through a ratification process which has included parliamentary debate and consultation with State governments. Our governments have also adopted other conventions which are more specific, such as the convention on the rights of the child, which are relevant to a Bill of Rights.

This process indicates broad political support for the rights contained in these instruments. The ratification of the instruments also carries obligations to implement them. It is worth emphasising that although some have claimed that there are sufficient rights, both explicit and implied, in the Australian Constitution, the explicit rights in the Constitution are very few. They include such things as freedom of religion, trial by jury, compensation for acquisition of property and so on. But most of the rights in the United Nations conventions and covenants are not found in our Constitution. This is partly because our Constitution predated those documents and the debates which generated the need for those rights to be made explicit in the post-World War II period.

The other argument that arises is whether the common law provides enough protection for rights. The British common law tradition relies very much on the establishment of rights through case law rather than through legislation. However, case law does not provide a comprehensive or adequate coverage of all the rights in those UN instruments. Moreover, it relies on the commitment of individual judges to the rights in question, which can be variable. Protection of rights can also be reduced or qualified over time by developments in case law. A key issue for PIAC, dealing as it does with the most disadvantaged groups in our community, is that most of these remedies must often be pursued in the High Court, a procedure of such length, expense and uncertainty that it is beyond the reach of most citizens, especially those in the most vulnerable groups, whose rights are often most at risk.

The other major argument for a Bill of Rights in the context of a democracy is that it provides protection of rights for minorities, which can be neglected or overridden by legislation or administrative action. So it does give a voice to those who might not otherwise have a voice in the system. The other issue which we wish to address in the basic arguments for a Bill of Rights is that in the context of globalisation it is even more crucial to have both international and national protections for social, civil and economic rights. Here we are talking about the economic pressures particularly that exist on governments in the context of global competition for investment and the temptation to allow situations to develop in which economic rights, such as employment protections, health and safety protections or environmental protections, can be neglected in order to attract investment.

This is very obvious in situations like export processing zones, which not only exist in developing countries but, for instance, one was attempted to be developed in the mid-1980s in Darwin and had to be abandoned because of basic breaches of matters such as minimum wages and employment conditions. Those kinds of external economic pressures on government make it imperative that we have agreed international standards that all governments agree to implement, but it is imperative also that such international standards are actually implemented at the local and national levels.

The submission also documents the development of Bills of Rights, both constitutional and legislative, in a number of other industrialised countries. I will not go through the details of that; I will merely note that in several countries that have the same tradition of British common law that Australia has, notably New Zealand and the United Kingdom, there have been recently-legislated Bills of Rights, and that in Canada there is a constitutional Bill of Rights. From our point of view, it would be desirable in the long run for there to be a Bill of Rights at Federal Government level. At the moment, that does not seem to be a prospect, just as 20 years ago there was no Federal anti-discrimination legislation. We believe that legislation at the State level for a Bill of Rights is a possibility, and we believe that that not only could pave the way to providing immediate safeguards for the people of

New South Wales but could also act as a model for other States, and ultimately for change at the Federal level.

The submission then goes into more details on the international covenant on civil and political rights, listing the rights that are contained in that covenant and pointing out that many of those rights are observed in practice in Australia. However, we believe there are still gaps in both the protection of those rights and sometimes in the observance of them. So that their inclusion in a Bill of Rights would ensure that legislation and public policy would be consistent with Australia's international obligations and its citizens would have access to those rights.

We also argue that the basic economic, social and cultural rights should be included in a Bill of Rights. Like civil and political rights, economic, social and cultural rights reflect the human values of dignity and equality and are no less important. It is important to recognise that the covenant itself acknowledges that these rights are dependent on the ability of governments to develop policies and to finance programs to provide access to particular services, and that it obligates governments to take steps, individually and through international systems and co-operation, to the maximum of their available resources, to achieve these progressively. That means that that covenant does not give absolute access to the rights, or open-ended access in terms of government expenditure, but recognises that these things are subject to a government's capacity to actually deliver them.

With that qualification, we believe it is still important to have those rights in a Bill of Rights, because there is evidence in Australia that some people are not getting access to some basic rights and services, such as income support and so on. This is in the context of the growth of inequality and the persistence of poverty in Australia. So that while some aspects of inequality and poverty are increasing, there are some people in the community who are not actually eligible to access things like basic income support. We have given examples of newly-arrived migrants, of home workers working in unregulated conditions, and of indigenous people living in remote areas who often do not have access to basic services.

We believe that the inclusion of economic and social rights in a Bill of Rights would provide a clear framework for State legislation to address those issues and would provide redress for the most vulnerable, who at the moment do not have access to adequate conditions of work and, in some cases, housing and health services, in areas which are the responsibility of the State government. Such rights, we have pointed out, are included in the European Social Charter, which is binding on countries like the United Kingdom, and are included also in the Canadian and South African Bills of Rights. We make particular reference to the rights of indigenous people and have argued that indigenous people in New South Wales should be specifically consulted as to their views on inclusion in a Bill of Rights of issues that are specific to indigenous people, such as access to land rights and access to cultural rights. The indigenous people should be consulted as to their views on whether those matters should be included in a Bill of Rights.

In terms of individual responsibilities, we do not believe that these should be included, in the sense that the general thrust of a Bill of Rights is to enshrine universally-recognised human rights and to protect people from abuse of power by governments or other public bodies. This relates to the general principle of a government serving the people, rather than vice versa. As to the section on the circumstances in which Parliament might override basic rights, we have addressed that issue fairly narrowly. Committee members might want to ask questions about that section. Essentially, we have said that the basic civil and political rights should be overridden only in very unusual circumstances, such as in the event of war or natural disaster.

In terms of the extent and manner of enforcement, we believe that individuals should be able to have right of action in the courts, where they could seek appropriate remedy. Also, and probably more importantly, we believe that other legislation should be consistent with a Bill of Rights. Where a breach of a Bill of Rights occurs through the provisions or operation of legislation, then the courts must have power to address such breach on the application of an individual or interested party. We have said in our submission that the courts should have power to make a declaration of inconsistency and should be able to disallow or read down part or all of the legislation. There are various ways in which this can be done. It can also be referred back to Parliament for further debate and amendment. We are flexible on that question, but we believe that the courts at least should have the power to declare inconsistency.

We have also talked about the manner of enforcement through the Supreme Court, and we have argued that it should be a no-cost jurisdiction and that there should be standing for interested parties as well as the complainant. We can answer questions about that if the Committee wants further details. We believe that legislation should be construed in a manner compatible with international human rights instruments, given that Australia's ratification of these instruments is a public declaration of commitment to those principles. We believe there is some legal argument for this.

I will conclude by saying that the general context of global economic pressure and growing inequality means that the need for protection of basic human rights is becoming more urgent, and that that has been recognised by an increasing number of governments around the world. Australia remains one of the few industrialised countries without a Bill Rights. We believe the New South Wales Parliament has the opportunity to exercise leadership and pave the way for the protection of human rights, and we hope that it will do so.

CHAIR: At the commencement of the questioning period could I indicate that any question that is posed by any member of the Committee may be responded to by either or both of you as you may see fit. Could I ask whether you could provide any examples from the work of PIAC itself of inadequacies within the current protection of human rights in New South Wales?

Ms DURBACH: Our work in relation to human rights is very much limited by the availability of legislation through which those rights can be exercised. Therefore the rights are very much limited to implied rights or rights that exist in current legislation, which is primarily discrimination legislation based on sex, race and disability. So our work is very much confined to exercising rights within those defined contexts. I should also point out that many of the concerns that have become obvious to us from our work in that regard relate to the fact that those rights are couched very much in the negative; they are not asserted in the positive. Therefore one is defending rights and very often coming to them in an adversarial fashion. As a result, the exercise of protecting those rights can be costly and protracted.

That raises another concern for us. That is that very often people who are trying to assert those rights are those least able to do so economically and culturally, because often the rights cannot be asserted because people come from non-English speaking backgrounds or from indigenous communities that do not necessarily have the ability to articulate those rights. Therefore our work, regrettably, has been quite piecemeal and ad hoc. As Dr Ranald has said, we have had very limited opportunities to attempt to approach the rights of people constitutionally and it is also very costly. I would say that overall, whilst we have taken opportunities where rights exist for our clients, that work has been done in a very ad hoc and piecemeal fashion. We would argue that a Bill of Rights would allow a far more comprehensive approach to the assertion and declaration and protection of rights.

CHAIR: You refer to a more comprehensive assertion of protection of human rights. It has been said in the past that the common law of England is a myriad of single instances. Does it follow from that that a Bill of Rights, albeit a statutory Bill of Rights enacted in New South Wales, would lead to a myriad of single instances being litigated in courts? If I am correct in that, how appropriate is that to a scheme to protect human rights in a general sense, given that each case is litigated on its own facts and is arguably a single instance?

Dr RANALD: I do not think that the main way in which a legislative Bill of Rights would be implemented would be through individual litigation. One of the main functions of a Bill of Rights would be community education, that is, to make people more aware of and more familiar with the whole issue of human rights. Another major function would be for legislation to be more consistent with a Bill of Rights. So that having a legislative Bill of Rights would make it possible for legislation and for government practice to be more proactive in meeting people's rights, as well as giving people the right to complain. Although there would undoubtedly be litigation, I do not see that as the main way in which such legislation would necessarily have an impact. It would also impact on other legislation and have a community education function.

CHAIR: You may be aware that the Chief Justice of New South Wales, Mr Justice Spigelman, in a recent address to the Australian Plaintiff Lawyers Association discussed the likely impact of international human rights treaties on our law. He referred to British legislation, the Human

Rights Act 1998—which incorporated the European Convention on Human Rights—the Canadian Charter of Rights and Freedoms 1985 and the New Zealand Bill of Rights Act 1990. To summarise his comments, he expressed the view that, as the law developed in those jurisdictions, it would become increasingly incomprehensible to lawyers in New South Wales and in Australia. To what extent do you think that an effective remedy to the difficulty that Mr Justice Spigelman envisages would be furnished by making an appropriate amendment to the New South Wales Interpretation Act rather than introducing a Bill of Rights? It could provide that New South Wales courts must have regard to international covenants to which Australia is a party.

Ms DURBACH: Did he foresee the problem as being a jurisdictional difficulty?

Dr RANALD: Did he not refer to incompatibility rather than incomprehensibility?

The Hon. J. HATZISTERGOS: Justice Spigelman was trying to say that the common law that applies in England will cease to have much relevance if it is based upon interpretations that flow from legislative instruments protecting human rights in Britain that do not apply in Australia.

CHAIR: I will quote a short passage from His Honour's remarks to the plaintiff lawyers. He said:

> At the present time, for the vast majority of Australian lawyers, American Constitutional Bill of Rights jurisprudence is virtually incomprehensible. Within a decade it is quite likely that in substantial areas of the law, British cases will be equally incomprehensible to Australian lawyers. Indeed, it is already the case that the common law in England is developing, on a pre-emptive basis, in the shadow of the jurisprudence of the European Court to an extent that limits the use of British cases as precedents for the development of Australian common law.

His Honour believes that our law is getting out of kilter—to use an everyday expression—with that in jurisdictions where human rights legislation is incorporated in their constitutions or where countries, such as New Zealand, have a statutory Bill of Rights. Reverting to my previous question, do you think that one method of addressing His Honour's concerns would be to amend the Interpretation Act of New South Wales to make it obligatory for courts to have regard to international instruments to which Australia is a party?

Ms DURBACH: That is one possible method. However, the Act should suggest that courts refer to domestic environments and situations. I disagree with His Honour as I think American and European human rights jurisprudence has had a beneficial impact on the international interpretation of "human rights"—by which I mean the essential and fundamental principles of human rights. That jurisprudence has added value to the world's interpretation of human rights in different jurisdictions. However, there must be some reference to ensuring that those principles are interpreted by referring to local or domestic situations and circumstances. I am not sure whether that answers your question. If we consider ourselves to be members of the international community, promoting similar values and fundamental principles, we should apply those principles consistently by always referring to domestic environments. In so doing, the law will make sense and the community will feel able to adhere to it. A difficulty with adhering to court determinations arises when those determinations are far removed from people's experiences.

Dr RANALD: I think one can interpret His Honour's speech another way: it would be a bad thing if Australia were to fall behind or be out of kilter with interpretations of human rights in other countries and jurisdictions. That problem should be remedied by making the sort of change that we are discussing this morning.

CHAIR: Dr Ranald, in the latter part of your address, you referred to costs orders. Would a New South Wales Bill of Rights have any implications for legal aid funding? On page 10 of PIAC's submission, you argue against adverse costs orders for actions taken under a Bill of Rights. You argue against the normal rule that costs follow the event and say that there should be no order as to costs. What safeguards would be needed to prevent vexatious litigation, particularly litigation commenced by an individual not supported by responsible organisations such as yours?

Ms DURBACH: I will answer the question about legal aid first. I do not believe the introduction of the New South Wales Bill of Rights would have detrimental implications for legal aid funding. As occurs at present, every applicant would have to demonstrate compliance with certain

legal aid eligibility criteria. I do not see why those criteria should not apply to human rights litigation in the same way as they apply to any other litigation. As to the costs involved with a human rights regime, it would be a shame if costs were to be a barrier to asserting those rights and giving them substance. As we say in our submission, many of those who would wish to take up the opportunity presented by a Bill of Rights are often least able to participate in litigation. It would be a great shame it costs became a barrier to their doing so.

Having said that, I think there are ways of limiting costs. There are opportunities to institute pre-emptive costs arrangements so that, when parties first come before a court, the court can define who will be responsible for the costs. Perhaps the court might be able to limit the litigation in some way by making time limitations on the presentation of arguments. For example, it could suggest that the litigation be presented in a written form with a simple address to that written form. There are ways of limiting costs, but PIAC's position is strongly held. Our experience is that, although we would often like to pursue meritorious claims on behalf of our clients, we cannot do so—and cannot establish an important precedent—because costs are a barrier.

CHAIR: Page 7 of PIAC's submission refers to clothing outworkers and the exploitation that, regrettably, they sometimes experience. Could you explain specifically how you believe that a Bill of Rights could be used to protect their employment and working conditions? Why is it not sufficient to use current industrial relations and occupational health and safety legislation to protect those workers' conditions?

Dr RANALD: One answer lies in community education: a Bill Of Rights would state explicitly that everyone is entitled to certain minimum employment conditions and standards of treatment. It would say publicly that those rights are endorsed by Parliament, which would assist the general atmosphere and people's awareness of their rights. That general statement of those rights could then be supplemented by specific pieces of legislation. I note that in New South Wales in particular and in Australia generally the existence of minimal industrial relations and health and safety legislation has not prevented significant numbers of people from being employed in exploitative circumstances—in fact, those numbers have grown in recent times. I think that proves that we need a general community push, community education and some leadership from bodies such as Parliament in this area. Rights to decent, minimal conditions of employment, health and safety and fundamental human rights should not be violated. Those whose rights are being violated need to be aware of that fact, as do the people who are violating them.

CHAIR: How do you respond to the criticism that is sometimes made of a Bill of Rights—even a statutory Bill of Rights—that it politicises the judiciary in the sense that judges are required, under such legislation, to determine issues that are essentially political in character or that judges are obliged to decide social questions that are better left to the legislature?

Dr RANALD: It depends on the existing legislation; we have not gone into that level of detail in our submission we have concentrated on the principles. However, it is possible to have a legislative Bill of Rights that spells out the limits on what the courts and Parliament can do. For instance, it would be possible for the courts' examination of legislation to involve referring inconsistent legislation back to Parliament for further parliamentary debate. I do not think the courts would be given much additional power. At present, courts find implied rights in the Constitution, which is also a series of "political decisions". A legislative Bill of Rights would give Parliament the opportunity to be more specific about what rights should be included and about the role of the judiciary in enforcing those rights. I think that would allow Parliament more leeway in shaping that process than it has at present.

The Hon. J. F. RYAN: I have a question along the same lines. Is it not a fact that the identity of a judge is largely irrelevant in New South Wales and in Australia? It is not the subject of great public discussion. However, as soon as judges makes decisions along these lines, they could be characterised as "hawks", "doves", "conservatives", "liberals" and so on. It then becomes a big deal as to which judge is called upon to make a decision. It would not be a party political matter, but there would be some politicisation of the Bench. Personalities on the Bench would suddenly become far more important in relation to questions such as these than occurs in the current run of cases.

Dr RANALD: That is the case now when we do not have a legislative Bill of Rights. I do not necessarily agree with your characterisation, but, if you take that view, I would argue that that scenario is possible in the current circumstances when we do not have a legislative Bill of Rights.

The Hon. J. F. RYAN: In New South Wales the background of various judges, other than perhaps practitioners, is largely unknown.

CHAIR: Before you respond to the Hon. J. F. Ryan's point, let me illustrate what he possibly has in mind, although perhaps this is an extreme example. We all know that the United States has a constitutional Bill of Rights and that the judiciary committee of the United States Senate has to advise and consent to the appointment of Federal judges and Supreme Court judges. As part of the confirmation process judges are actually asked for their views on controversial matters such as abortion. Is there not a danger that the judiciary might become politicised—perhaps not to that extent but to an extent?

Dr RANALD: We are not arguing at all for the United States model. I repeat: With a legislative Bill of Rights the Parliament has the opportunity to designate what powers it wants to give to the courts and to keep what powers its wants to keep in Parliament. So it does not necessarily follow that the judiciary will automatically become more politicised.

The Hon. J. HATZISTERGOS: Following the answer that you have just given, how would you demarcate between what powers the Parliament should keep for itself and what powers it should give the judiciary?

Dr RANALD: As I said earlier, I think Parliament has a number of options. In the case of legislation they range from the courts actually being able to declare legislation invalid to the courts being able simply to refer legislation back to Parliament, which is the British model. If Parliament wants to keep more of the power at the parliamentary level, it can use that kind of model. I think that the courts have to have a review power but, as I said, the degree of that power can be determined by the legislation.

CHAIR: To what extent should there be an override power in the Legislature, if the Legislature believes that something is manifestly unallowable, improper or unviable in a public policy sense? Ought the Legislature to have a power to override a decision?

Dr RANALD: Again, we have not specifically addressed that override aspect in our submission. We have dealt only with states of emergency and so on. But I would argue that that override power has to be determined, if you like, by Parliament. I think it would be fairly unusual for Parliament to be able to override basic human rights. Again, it would be important that such a process be subject to open parliamentary debate. In other words, it would be a fairly unusual situation if the courts declared something inconsistent, it went back to Parliament and Parliament, after full public debate, decided that it was going to override that decision. It should be a very public process.

Ms DURBACH: I will just add to the Chairman's question about politicising the judiciary. I agree completely with what Dr Ranald is saying. Currently, because Australia is a healthy democracy, the judiciary is being forced more and more to become involved in determining rights between competing groups. Simply by involving itself in that process it does not necessarily mean that the judiciary is politicised. It is being asked simply to do its duty to determine rights according to precedent and according to the evidence before it. Within a courtroom often there are important safeguards which allow for the veracity of an issue to be tested, to garner evidence which is important to the ultimate determination of an issue, and for questions to be asked. It is also a public forum which can help to engender debate in the community. So I think it is no less incongruous for the courts to be involved in those sorts of issues than Parliament as we become a more healthy and complex democracy.

The Hon. J. HATZISTERGOS: A lot of this seems to me to get back to the question of what rights you wish to protect. I have not really heard much in what you have said today—in either your submission or your oral exposition—about what should be the content of a Bill of Rights. This matter is fraught with difficulties. Sometimes something that may be a right for one person may have a negative impact on some other person. For example, freedom of speech may conflict with the laws

of defamation and so on. How far do you see the content of a Bill of Rights going? That is a prelude to me asking a question about whether or not the courts will be politicised as a result of any role they play in enforcing a Bill of Rights. So what should be the content of a Bill of Rights as you see it?

Dr RANALD: We believe that, broadly speaking, they should be based on the international covenants which we outlined in our submissions. Whether each right is included would have to be considered through a process of public debate, through the Parliament and so on. You mentioned freedom of speech. A number of rights have been defined in various Bills of Rights, not in an absolute sense. Freedom of speech is a basic right, but there are also limitations in the sense that legislation exists, for instance, in relation to racial vilification and so on. The right to freedom of speech can be defined in such a way that it does not give people absolute rights to harm other people.

The Hon. J. HATZISTERGOS: Pausing there for a moment, the United Nations Declaration of Human Rights 1948 lists a series of broad-ranging rights. Let me go through some of them: the right to vote, the right to life, the liberty and security of a person, freedom of thought, the right to leisure, the right to join trade unions, et cetera. Are those the sorts of rights that you believe should be put into a constitution or into an interpretation clause? If so, how can you possibly avoid the courts being dragged into political controversy? The rights are so broad-ranging and wide that it is inevitable that the courts will have to play some role in relation to policy. For example, if you have a right to vote that you are going to protect, it raises all sorts of issues. Will people under 18 have the right to vote? Will non-citizens have the right to vote? Are these issues not better resolved by the Parliament?

Dr RANALD: I was trying to answer that matter earlier in response to your first question. We said in our submission that the two key documents are the United Nations Covenant on Civil and Political Rights, which is more specific than the United Nations declaration, and the Covenant on Economic, Social and Cultural Rights. I was trying to say in answer to your previous question that we believe that those rights can be made more specific in a legislative Bill of Rights, if the Parliament wishes to do so. Exactly which rights are included can also be determined by Parliament. So we are not using as a model the example that you have just given; we are using more specific covenants. We are also saying that some discretion could be used by the Parliament. It is a process of community debate as to how those rights are specified and defined.

The Hon. J. HATZISTERGOS: So you do not believe that aspirations should necessarily be in a Bill of Rights. Is that what you are saying?

Ms DURBACH: As a document that embodies the values of a society I think that aspirations have an important role to play. I think the example you raised is exactly the kind of situation that we would want to move away from. We do not see a Bill of Rights as involving a plethora of rights simply because they are in a United Nations declaration. Bills of Rights come out of and are fashioned by a nation's experience. I can talk a little bit about the South African experience. That country has a far-reaching Bill of Rights because it had to address an enormous power imbalance and huge inequities. Australia's experience would shape a Bill of Rights that would be dramatically different from the South African experience.

The Hon. J. HATZISTERGOS: I agree with you so far as that is concerned. But when we look at the Australian situation we see that we are a reasonably mature society. When we consider legislation, for example, the Parliamentary Electorates and Elections Act, which deals with voting rights, why can we not consider that question at the time we are passing legislation? Why do we need to reference it to some other document?

Ms DURBACH: If we are a mature society—and I agree that we are—we need to demonstrate that to our citizens and internationally. If we want to stand up as a country that has a tradition of asserting its rights and being proud to do so, to have a document that embodies those rights that we parade to our citizens and to the world is an important sign of how mature we are as a democracy.

CHAIR: Focusing on the right of free speech, I want to quote to you one sentence written in 1987 by Mr Nick O'Neill in an article entitled "A Never Ending Story: A History of Human Rights in Australia in Human Rights: An Australian Debate." Mr O'Neill said:

> The right to free speech, for example, is that which is left after censorship laws, defamation, criminal libel, blasphemy, radio and television program standards have been taken into account when common law is applied.

The relevance of me quoting that statement is this: If there is, for example, an aspirational statement in a constitutional or statutory Bill of Rights prescribing a right of free speech, is there not an illustration, via that quote, of how difficult it is to give effect to that right, given that there are reasonable limits to it?

Ms DURBACH: I think there is a benefit to that. The point that you just made when referring to Mr O'Neill's comment is that with every right there is a limitation of that right. In a sense, we need to expect that. We need to direct society that it cannot just have this culture of entitlement; that every right is just an open-ended right; that every right carries with it certain limitations. That is the message that we would want citizens to understand. To take your point, that shows how the exercise of one right by an individual may infringe the right of another. It goes to questions of resource allocation. So I think we would want some limitation on those rights. Courts are there to ensure that rights are exercised responsibly, not just open-endedly.

The Hon. J. HATZISTERGOS: To follow on what the Chairman just said, if we are trying to give definitions to Bills of Rights and we are passing on that interpretive phase to the courts, is that not just a misguided attempt to try to give judicial sanctity to some political decision?

Dr RANALD: Obviously we disagree with that statement. If that were the case it would be unlikely that, for instance, the United Kingdom, New Zealand or Canada would have Bills of Rights. I think that it is possible to have Bills of Rights that do not simply give people unlimited and open-slather access to rights but that define rights in a way that respects the exercise of those rights in relation to other people's rights, as in the examples we have discussed. Again I would emphasise the importance of community education and awareness of lawmakers and Parliament about these basic rights.

The Hon. J. HATZISTERGOS: If we look at one of the examples you have just given, that is Canada, my understanding is that the Canadian courts have been very careful in interpreting their Bill of Rights so that it does not infringe the role of Parliament, bearing in mind that Canada's Bill of Rights gives somewhat extensive powers to the court. As a consequence, those who would be seen in the human rights debate as being pro Bill of Rights have criticised the courts for not being adventurous enough. In other words, the cautiousness of the courts has been unnecessary in the circumstances.

With regard to Britain, is it not the case there that that country has had to go down this road because of the impact of the European Union and the difficulties that if Britain did not do something locally and domestically to address its situation, the Europeans would? I am not sure that those two examples are very compelling ones by which to judge what we should be doing. I do not know about the situation in New Zealand. However, I know that in New Zealand some of the consequences that that country has had have been unintended and have caused some New Zealanders to stop and take a breath. For example, one's right to be able to receive damages in the event that one breaches the Bill of Rights—which I think the courts have just found to be permissible—has somehow managed to cause some people to express concern. Do we really need it here? Can we not address it in our mature democracy through other means—for example, a scrutiny of bills committee? Have you considered such an option?

Dr RANALD: I guess one of the points we are making relates to the value of a public commitment by Parliament to certain values and rights. I think a scrutiny of bills committee is a very poor substitute, because it would not have the same value in terms of a public commitment. It would also not necessarily have the same public exposure as debate in Parliament. With regard to the United Kingdom, I think it is worth saying that the United Kingdom has been a member of the European Union since its inception in the 1950s, and in fact has subscribed to all of the human rights aspirations of the European Union, except for the period of the Thatcher Government, which was a very ideological government and which was in power for a very long time.

It was during that period that the United Kingdom Government had some difficulty with the European human rights and social rights legislation, and it is with the change of government that it has

signed up to the fundamental charter on social and economic rights and has now passed legislation which is consistent with the European Convention on Human Rights. I could say that you have to take those sorts of factors into account as well. As a member of the European Union, I think that in Britain most people, and certainly the current government, clearly support the European Conventions. I think that there was a political hiatus for a long period under the Thatcher Government, but I do not see the British tradition as being very much different from the European tradition in the sense of commitment to human rights.

The Hon. J. F. RYAN: Is that not almost a political statement in itself? You have basically said that for a long period there was a government which had, apparently, some level of public support and a particular political persuasion, which a Bill of Rights effectively would have countermanded. Is not a Bill of Rights simply an attempt to have a second bite of the cherry on decisions that have already been made by the public through the Parliament?

Dr RANALD: I am saying that a government was elected which had very large majority public support, and part of its platform was to pass legislation on the European Convention and to sign up to the social and political rights part of the European Union regulation.

The Hon. P. J. BREEN: Is it not also the case, however, that the British were traipsing off to the European court in Strasbourg, almost on a daily basis, and creating an international embarrassment? Is that not what was really happening?

Dr RANALD: People were making allegations and complaints that the European Convention was being violated, yes.

Ms DURBACH: They were doing so because there was a deficiency in the British law.

The Hon. J. HATZISTERGOS: Although, there was an opening in European law which allowed them to use that, causing some embarrassment to the British Government. I think there was a perception that they needed to do something locally and domestically which was more palatable than having judges from all over Europe determining whether or not Britain was or was not breaching fundamental principles of human rights.

Ms DURBACH: But I think it also came very much from the populous, from the British people, who were saying, "We do not like what is happening in our country. We don't like the fact that we have to go to Europe to get rights which, we would imagine should be available to us in Britain. And why aren't they? We are way behind the European tradition at this moment, and we need to address that."

The Hon. J. HATZISTERGOS: I had not heard that statement flourishing around. However, it may be that you are right.

Ms DURBACH: There are some documented reports. Some very well-established academic institutions in England undertook research which demonstrated exactly that. That was the basis on which the Government was approached to consider implementing domestic law.

The Hon. J. HATZISTERGOS: Having the choice between going to Strasbourg and the current British legislation, I am not sure that the British legislation is necessarily a satisfactory alternative to what was the case previously. Putting that matter aside for a moment, I would like to ask further questions with regard to the extent of the Bill of Rights. I thought I understood your submission to suggest that not only should public rights be included in this document but private sector rights should also be included—that is, the rights of individuals in the private sector.

Ms DURBACH: The private sector exercising government functions.

The Hon. J. HATZISTERGOS: Not necessarily government functions. Many licensing boards make decisions that may affect people's livelihoods.

Dr RANALD: Our submission is silent on that point; we have not made a specific point about it.

The Hon. P. J. BREEN: In fact, the submission is not silent on that point. At page 10 you say that there should be wide standing provisions for organisations with a sufficient interest in the operation of provisions of the legislation, in addition to individuals directly affected.

Dr RANALD: That refers to people making complaints, not to those who are complained against.

The Hon. J. HATZISTERGOS: You do not see any role for the Bill of Rights in terms of being able to challenge decisions made by, for example, employers or licensing authorities which may be outside of legislation, or decisions that may be affected by, say, codes of conduct and general administrative law?

Dr RANALD: Our submission does not specifically address that point. In our submission we have confined ourselves to the fact that the Bill of Rights should mainly apply to actions of government or bodies that are acting on behalf of government in carrying out public functions.

The Hon. J. HATZISTERGOS: You know that in the United States the Bill of Right applies to all aspects of life?

Dr RANALD: Yes, but we are not using the United States as a model.

The Hon. J. HATZISTERGOS: I am aware of that. However, you do not see that as an area that you want to make any comment about, is that the situation?

Ms DURBACH: I think we stand by what we have said. I am trying to find the provision in our submission.

The Hon. J. HATZISTERGOS: Should a Bill of Rights include matters that are economic, social and cultural? For example, should matters such as adequate health care, food, water and social security be included in a Bill of Rights?

Dr RANALD: We have said that we believe that those rights are important and that such rights could be included in a legislative Bill of Rights. In my introduction and in the submission we have also noted that those rights should not be absolute, that they are circumscribed to some extent by the capacity of governments to deliver those sorts of services. Again, in a legislative Bill of Rights one could frame those rights in a way that made clear that the rights were not absolute. However, we do believe that there are people in Australia who are currently denied those rights at the moment and that it is important to include those rights in a Bill of Rights.

The Hon. J. HATZISTERGOS: I notice that you put a qualification on those rights. Do you not concede, by the nature of that qualification, that those sorts of rights are inherently political in nature and that they would best be resolved by the Legislature rather than by the courts ultimately, notwithstanding what sort of limits you might put on them?

Ms DURBACH: Are you talking about social and economic rights?

The Hon. J. HATZISTERGOS: Yes.

Ms DURBACH: Do you mean they are political because they raise questions of resource allocation?

The Hon. J. HATZISTERGOS: They raise not only questions of resource allocation but also questions of priorities. One government may regard the provision of resources in a particular social or economic area as a major priority, while others may say that that is not a priority. Therefore, they are political. It seems to me that if the courts are allowed to interpret those sorts of situations, you are inherently getting into an area of policy and controversy in which it is not desirable that the courts, because of the nature of them, be involved. Also, the courts are unelected bodies which are not responsive to public opinion. As well, of course, policies and priorities change with time according to

need. Again, the courts do not have the capacity—nor should they—to be able to respond to circumstances such as those.

Ms DURBACH: Our argument would be that it is important that there is a minimum floor of rights available, including social and economic rights, that are enshrined in a Bill of Rights and that the courts are able to affirm as to how they are implemented. We would say that the Legislature should have the power to make legislation which reflects those rights, and in doing so they would obviously have to take into account balancing need and resources. So that while the minimum right is enshrined in the bill, government will always have the power to legislate to reflect that right and to implement it. It is not the courts necessarily determining how that right will be implemented, but that power reverts to Parliament.

The Hon. J. HATZISTERGOS: Are you able to give some examples of the way you would see it operating?

Ms DURBACH: Possibly a ridiculous one to demonstrate the point relates to the fact that in indigenous communities the right to electrical power or water is not an open-ended right. A court would then assert that that right is there, and that it is made available. The Legislature is then asked to enact legislation to reflect that right, so it puts in place the infrastructure that allows people access to power or water.

The Hon. J. HATZISTERGOS: What happens if the Legislature does not? What rights do the courts have to force the Parliament to provide power to someone? I simply want to know what you are asking the courts to do. I can understand a Bill of Rights saying that anyone has the right to have access to power, but where do we go from there? What are the courts supposed to do—decide that this person can have more power than that person; this person will pay a cheaper price than that person or this person can have it between these hours and those hours? I know they are difficult issues to think about, but it seems to me that you must work out what you are asking the Parliament, the Executive Government and the courts to do?

Dr RANALD: I do not think there is any suggestion that we would be asking the courts to determine the price of power. In this case what we are talking about is access to very basic services that in Australia some Aboriginal communities still do not have. I think that is a public scandal in the twenty-first century. What we are saying is the Parliament should be capable of declaring that there is a very basic right to basic services and that if those services are not supplied a court should be able to say that they should be supplied. We are not suggesting that the court should say at what price or any of the other detail you talked about. Other legislation covers that.

The Hon. J. HATZISTERGOS: Or at what cost.

Dr RANALD: Again, no. It seems to me that if a civilised community cannot supply electricity services to a group in the twenty-first century there is something wrong with that community.

The Hon. J. HATZISTERGOS: I agree with that as a political statement.

The Hon. P. J. BREEN: But it is not a matter for the courts.

The Hon. J. HATZISTERGOS: I am asking whether that is a matter for the courts or for the Parliament and its Executive through the budget process. If the courts are going to force the Government to supply a need to a particular community that you feel it is scandalously not supplying, obviously that will have an impact somewhere else in the budget. It is all very well for the courts to turn around and say, "you should spend money on this".

Ms DURBACH: We have huge confidence in the Government's ability to balance those sorts of questions. We are not advocating that that be taken away. We are saying that the courts are there simply to assert and confirm the rights. Government is there to ensure, to the best of its ability, that those rights are implemented and to some degree realised.

The Hon. P. J. BREEN: The problem that my colleague the Hon. J. Hatzistergos has, and that many people have, with the Bill of Rights is giving too much power to the courts. This is a great fear that everyone has. My understanding of that—and I would ask for your comment about this—is that if you had a provision in a Bill of Rights that said indigenous people should have right of access to water and that became the subject of a judicial determination the judge would say, "Yes, it is true. This is what the law says. The community should have access"—and I emphasise the word "access"—"but it is a matter for the Parliament to determine when and how the service is actually provided." The court does not have any power to order an authority to connect power to the local indigenous community. Is that your understanding?

Ms DURBACH: That is absolutely right. That happens at the moment in relation to discrimination legislation. The Human Rights Commission, and now the Federal Court, make a determination in relation to a disability complaint and say to the parties, "Go away and work out between you what is viable to ensure that my determination can be implemented." I can use an example of the Public Interest Advocacy Centre recently where we represented a little girl with spina bifida who was denied access to school because the school asserted that it would have to put in place structures which would be enormously costly to the school.

The commission found that this little girl was incurring discrimination based on her disability. It confirmed that her right was being breached. It then said to the parties, "It is not for us as the commission to determine how you remedy that situation. You need to go away and balance up the cost to either party and come back to us and tell us how you have resolved it. That is your domain; it is not the domain of the commission." The commission is simply there to assert that the right exists and that it has been breached. We would envisage that healthy interaction between the courts and Parliament, not one usurping the other's role.

The Hon. J. F. RYAN: I have been thinking about that case. Is that not a good instance of where the problem is not so much wanting someone to stop doing something, because bills of rights are often more effective in preventing someone who plans to do something or is doing something to stop it and make it illegal for them to continue? It is much more difficult to make somebody do something that is not been done at all. Is not a better model, rather than a Bill of Rights, that very sensible legislation we have in New South Wales, such as the Anti-Discrimination Act which essentially draws people's attention to things and then sends them off to solve these problems?

Particularly at a State level, the decisions made by State instrumentalities tend not to be very grand; they tend to be about service provision. Similarly, the Disability Services Act also provides the means whereby those sorts of things are resolved. Is that not a better model for a State Legislature or a State jurisdiction to adopt, rather than the Bill of Rights model, because that appears to get things done more effectively than a Bill of Rights? Is that not likely to be more effective and more efficient?

Dr RANALD: For all the reasons we have already said, I do not think that is the case because anti-discrimination legislation and specific pieces of legislation only cover those particular issues. As we said, we see part of the value of a Bill of Rights as a community education function about what rights people have—positive rights as well as negative rights—an education process for the Legislature and the Parliament, and a kind of proactive process to ensure that other legislation which is passed is consistent with those rights in the community.

The Hon. J. F. RYAN: That is not the difficulty in New South Wales. Let us just imagine that one day electricity is privatised and access to power is one of the rights in the Bill of Rights, what would a judgment do in that case? Private instrumentalities are not bound by that, because these things tend to have a greater impact on the public sector, rather than the private sector. What would a Bill of Rights achieve?

Dr RANALD: In all cases when basic utilities have been privatised there is a public regulatory framework under which those utilities operate. In that sense I think the regulatory framework would have to include that the private suppliers do actually provide access to everyone in the community. So in that sense I think that difficulty could be overcome.

The Hon. P. J. BREEN: Can I ask a question about page 10 of the submission, that question raised before about standing? My understanding of a Bill of Rights is that it applies and protects the

rights of individuals. If we were to extend that right to other organisations, or perhaps even corporations, would that not defeat the purpose of the bill? Should it not be limited to the rights of individuals?

Ms DURBACH: I think what that part of our submission goes to is that there may be organisations which would want to institute proceedings asserting a right when an individual cannot do that. The example would be—again, taking a disability example—if an individual who suffers some sort of discrimination or a breach of his or her rights cannot take up the issue because that person's disability precludes them from doing so, then an organisation that is fluent with those kinds of interests should have standing to take up that right on behalf of the individual. It may not even necessarily be on behalf of that individual but in its own right.

For example, it may be an organisation such as People with Disabilities which acts on behalf of individuals with disabilities across the State. That organisation might see that, in terms of its sector, this is an important right that it would want determined so it would be able to intervene. In abortion cases, as in the Canadian experience, organisations often take cases on behalf of women who feel that they do not want to be seen in public arguing something that might cross their cultural background in some way so there is some sort of shield for those women who do not want to necessarily be the person asserting the right, but the organisation that can demonstrate a sufficient interest in an issue does so on their behalf.

Dr RANALD: We do not mention corporations in our submission, and there is no intention that corporations should have such rights.

The Hon. P. J. BREEN: So it is more like the concept of a next friend, is it?

Ms DURBACH: Yes, exactly.

The Hon. P. J. BREEN: Since Professor George Williams appeared before the Committee there has been some controversy about the question of the right to legal equality. I know that your submission does not address individual rights as such, but that seems to be an important issue. For example, in the HomeFund case which PIAC is running, there is an authority, an opinion, which says that that HomeFund legislation failed to treat HomeFund borrowers equally before the law; they were treated separately depending on their economic circumstances.

If we were to have a Bill of Rights that provided for the right to legal equality, legislation such as that could still be enacted under the kind of bill that I certainly have in mind, but the Parliament would need to make it clear that the legislation did in fact contravene that provision for legal equality in the Bill of Rights. Do you have any view about whether or not a provision that included the right to legal equality would result in a proliferation of litigation and cause too many people to be running off to the courts, which again is the fear that the Parliament has? Do you have a view about that?

Ms DURBACH: When one looks at the experience of countries where there are Bills of Rights or charters the experience is that there has not been a proliferation; it has not opened up the flood gates because the usual constraints always apply in relation to running litigation. It is expensive, protracted and high profile. Those constraints will always come into play, irrespective of whether there is a Bill of Rights. There will not be this huge flood gate and people will, if they can, resort far more to settling disputes other than in the courts because they are expensive and difficult to access.

The Hon. P. J. BREEN: If there was a benchmark that said that this is a particular right that the Government's respects and recognises as being part of the rights that citizens have, do you think that would reduce the incidence of litigation?

Ms DURBACH: That is a very important point. As our submission says, I think that in the journey of a Bill of Rights the more society becomes aware of the rights and values that it is supposed to adhere to, hopefully the greater conduct will reflect those rights and values, and so diminish the need for people to resort to litigation to assert those rights, because communities, big and small, and society as a whole will endeavour to put those values and principles in place in ways which diminish the need to assert them through the courts.

The Hon. P. J. BREEN: Do you think that if we had a bill of rights PIAC would have more litigation or less?

Ms DURBACH: I think less. I absolutely think less and I would hope less. I think conduct will be shaped by those values and I would hope that it would minimise the need for litigation. I really do believe that. I think we all do as an organisation see that as one of the great values of a Bill of Rights.

The Hon. J. HATZISTERGOS: That has not necessarily been the experience overseas, and it has certainly not been the experience with legislation which might be akin to a Bill of Rights. For example, since the Human Rights and Equal Opportunities Commission was set up it has got a fair bulk load of work with people queueing to get in. The same goes for anti-discrimination and so on.

Ms DURBACH: I think that is largely because those rights are couched in the negative. A kind of complaint culture starts emerging with those sorts of rights when they are couched in that fashion. I know a little about the Canadian experience. Certainly, they have not demonstrated that there has been a huge rush to the courts around the Bill of Rights. Initially, that might be the case when people are testing the water but I think it will start to settle down.

The Hon. J. HATZISTERGOS: I think it is also added to by these sorts of provisions that exist in relation to costs. For example, you suggest that if you lose a case you do not have to pay anything. That is certainly a green light for anyone who wants to complain to be able to take proceedings at minimum risk to themselves.

Ms DURBACH: I would add a rider that if the proceedings are vexatious or frivolous a costs order would be appropriate. In a sense that sends out a very good message to the community to not waste the time or resources of the court by bringing cases which are vexatious.

(Ms Durbach withdrew)

The Hon. J. HATZISTERGOS: One of the criticisms levelled against the system you envisage as protecting human rights is that it is focused essentially on litigation. The interpretation and exposition of breaches of human rights and respect for human rights comes through cases which are precipitated by complaints and which demonstrate breaches. Alternatively, when framing laws the Legislature should have the capacity to do so in a way which is consistent with human rights and to respond to public criticism in relation to that. The Legislature has chosen various ways of being able to do that and by taking that second approach it could become proactive in respecting human rights rather than reactive to court-based decisions. That could achieve a better respect for human rights rather than the other method, which is a legislative instrument interpreted by the courts.

Dr RANALD: What we are proposing has aspects of both scenarios you outlined. To have a Bill of Rights provides an educative function in the community and the Parliament. To have a Bill of Rights which requires other legislation to be consistent with it picks up the second aspect of what you described; that is, that legislation in general should be consistent with those principles. That is a proactive approach to human rights. In our view the recourse to the courts, of course, would exist in the courts would have the right to review that legislation, but if Parliament wished that process could refer the legislation back to Parliament so that we do not see it as giving unwarranted power to the courts over Parliament. Parliament could still play a role in that review process.

The Hon. J. HATZISTERGOS: Bearing in mind that not every Bill of Rights would meet every circumstance, would you favour a clause in a Bill of Rights that provides reasonableness on the part of a government; for example, in Canada if there is a reasonable infringement of human rights, the courts could declare it reasonable and therefore not override it? Or would you favour an interpretive Bill of Rights as exists in New Zealand, whereby laws are sought to be interpreted in a manner consistent with a Bill of Rights?

Dr RANALD: In a legislative Bill of Rights that sort of thing is up to the Parliament to determine.

The Hon. J. HATZISTERGOS: What is your view?

Dr RANALD: I have already indicated that the qualifications of how the rights are implemented could well be built in and determined by circumstances in Australia, New South Wales, and so on.

The Hon. J. HATZISTERGOS: Have you drawn up a Bill of Rights?

Dr RANALD: No, we have not.

The Hon. J. HATZISTERGOS: Is there a model from anywhere in the world that you favour?

Dr RANALD: Not a particular model. We have made the point that it is possible to have a Bill of Rights in legal and political systems which are similar to Australia's. The United Kingdom and New Zealand have a legislative Bill of Rights. We are not saying that they should be the exact models, but we could use principles from those and adjust them to the Australian situation.

The Hon. J. HATZISTERGOS: Do you believe that the Bill of Rights should apply to local government?

Dr RANALD: In principle, yes.

The Hon. J. HATZISTERGOS: What role, if any, do you see for legislation which might permit a court to take into account a plan of action which may exist on the part of some agency to address a human rights situation? For example, in the disabilities area there is a capacity for organisations or agencies to develop plans of action committing themselves to infrastructure changes, or whatever, over a period. So if there is an infringement of a particular right the Human Rights and Equal Opportunities Commission can look at that plan of action in the purview of determining whether there has been a breach and whether it has been reasonable.

Dr RANALD: All those issues would need to be taken into account. It is that form of flexibility and interaction between a court finding that there has been a breach of rights and the actual implementation through Parliament or the Executive Government; that is the kind of flexibility we spoke about before.

CHAIR: I take you back to a discussion that occurred earlier about the period of the Thatcher Government in Britain when various people were going to the European Court of Human Rights to assert their rights. Arguably that was an embarrassment for the British domestic authorities. Do you think that we are approaching or encountering a similar situation in Australia? For instance, homosexual law in Tasmania and the undoubted scandal of fresh water not been available to some Aboriginal communities are cases in point. Could it be said that we may be at the doorstep of a similar situation in Australia? If Australian people rush off to international bodies, is that indicative of the need for a Bill of Rights?

Dr RANALD: As we said in our submission, it is important that there are international standards which people can refer to in the absence of local standards. That is what the United Nations conventions are about. It is preferable to have our own domestic implementation of rights and conventions which can take account of the particular situation in Australia. That is what we are arguing.

The Hon. J. HATZISTERGOS: But you will not stop the internationalisation of issues by having a domestic law?

Dr RANALD: No, and I am not arguing that it should stop. In our submission we argued that we need both the international standards and national implementation of them. The other point I make is that in ratifying these conventions, in most cases governments are supposed to implement legislation to give them effect; that is the design of the United Nations structure. It is intended to produce international minimum standards which are then implemented through domestic legislation in each country. I see that as the normal relationship between the two levels.

The Hon. P. J. BREEN: If the British experience were to be followed, there would be a reduction. Presumably, if we had a local Bill of Rights there would be a reduction in the number of people going to Geneva, where the human rights committee is based. I understand that currently there are 19 matters from Australia that are outstanding. Do you think there would be a reduction if there were a local decision maker or umpire?

Dr RANALD: I certainly think that with the expense, time, and all the rest involved in going to Geneva people would much rather have a local remedy, yes.

CHAIR: Why is it not satisfactory to deal with perceived problems in a given area by legislation specific to that area? There are two Commonwealth and three New South Wales statutes which deal with people with a disability and tribunals are set up to give effect to their rights. What is the overriding argument upon which you rely for a Bill of Rights? Is it the educative argument, is that an important reason to have a generalised Bill of Rights rather than strike at particular problems in society via legislation?

Dr RANALD: The educative argument is very important for the community and Parliament and also for ensuring that other legislation is consistent with human rights. There is no contradiction between having a basic right in a Bill of Rights which is not detailed, and having comprehensive legislation in the area—for instance disability—which spells out in detail some issues in relation to discrimination in disability. I see those as complementary but at the moment we have such legislation in only a very few anti-discrimination areas which deal mainly with gender, ethnicity, race and disability. The areas which could be covered by a Bill of Rights are more numerous and there are many areas which remain uncovered.

The Hon. J. F. RYAN: Such as?

Dr RANALD: In our submission we have listed the areas covered by the convention on civil and political rights and the convention on economic and social rights. We are not seeking to mount a detailed argument that all those rights should be covered because we have not gone into it at that level of detail. Certainly a number of areas of civil and political rights and of social and economic rights are not covered at the moment by any legislation. That is quite clear.

(Dr Ranald withdrew)

(Luncheon adjournment)

ROSEMARY JANE KAYESS, Member, Disability Council of New South Wales, 323 Castlereagh Street, Sydney, and

BEN FOLINO, Policy Officer, Disability Council of New South Wales, 323 Castlereagh Street, Sydney, affirmed and examined:

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

Ms KAYESS: Yes, I did.

Mr FOLINO: Yes, I did.

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

Ms KAYESS: Yes, I am.

Mr FOLINO: Yes, I am.

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

Ms KAYESS: As a member of the Disability Council of New South Wales.

Mr FOLINO: As Policy Officer of the Disability Council of New South Wales.

CHAIR: The Disability Council of New South Wales has made a submission to the Committee in connection with this reference. I take it that you wish the submission to be included as part of your sworn evidence?

Ms KAYESS: Yes, I do.

Mr FOLINO: Yes.

CHAIR: If either of you should consider at any stage during our 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 would be willing to accede to such a request. I invite either or both of you to make a brief oral submission by way of preliminary statement.

Ms KAYESS: Essentially, I will just reaffirm the council position that has been put forward in the submission and couch it within the general principles in terms of our beliefs. The council believes that there is great potential for a Bill of Rights and or amendments to the Interpretation Act on two basic principles. The first is the educative factor that could be enhanced in terms of the rights of people with disabilities. People with disabilities have had significant difficulty in establishing the notion of rights, and to have that supported within bureaucratic or legal frameworks. There is also the symbolic value as up until now the notion of rights has not been something that could be alluded to in statutory law but as a general principle or notion of rights. So there could be a piece of paper which states the rights that people with disabilities should have afforded to them as a general principle of law.

CHAIR: Mr Folino, would you like to make a statement?

Mr FOLINO: Not at this time.

CHAIR: I will start questioning by drawing attention to a matter that you referred to in your preliminary remarks in passing. That is, although the Disability Council's submission does advocate a Bill of Rights for New South Wales, also contained within the submission is advocacy for an amendment to the Interpretation Act to enable courts to take into account rights contained in international conventions and to allow for the development of human rights law in New South Wales.

If you had been present at our hearing this morning you would have learned that many difficulties and doubts can be raised regarding a Bill of Rights. Could something useful be done by amending the Interpretation Act to require legal effect to be given within New South Wales to international covenants and conventions to which Australia is a party?

Ms KAYESS: You must recognise that the two declarations are not part of that international law framework but they provide written and agreed substance to the notion of rights for people with disabilities. As I said before, in the area of policy and also in the area of interpretive law it has been very difficult to pin down the notions of rights for people with disabilities because they are not set within a statutory framework. We allude to general principles of rights that are accorded to all citizens but in Australia we do not have any established statutory rights and the rights for people with disabilities in terms of looking for a framework have been the international declarations on the rights of disabled persons and the declaration of rights for people with mental retardation.

There is also the International Covenant on Economic, Social and Cultural Rights. It would be useful to adopt an agreed framework on the notion of rights for people with disabilities. They are established declarations. They have been used and accepted as the central principles for the rights of people with disabilities over the last 15 to 20 years within a policy framework and it would be both educative and also symbolic to have them as a more established set of rights that could be addressed.

CHAIR: The main reason I put to you the possibility of amending the Interpretation Act is that earlier this year the New South Wales Chief Justice, Justice Spigelman, spoke to the Australian Plaintiff Lawyers Association and, to summarise what the Chief Justice had to say, he referred to the fact that Australia is now out of step in that New Zealand, the United States, Canada and Britain, to take some examples, all have bills of rights. They all have developing jurisprudence. Cases are being decided from day to day and month to month and so forth with the result, in His Honour's view, that the law in New South Wales could become increasingly divergent from developments overseas. In his view British cases could ultimately be incomprehensible to Australian lawyers, which certainly would be a change from the present position. That is why I put to you the possibility of changing the Interpretation Act to build into our law a requirement that in some form due regard should be had to international instruments.

Ms KAYESS: I will not quote anybody but essentially we will be the only common law country without a statutory bill of rights. Apart from the jurisprudence aspect of it, from our point of view there is also the educative role that such a change would engender within the judicial system. It would make the rights of people with disabilities part of the educative framework of the legal and judicial system. People within the paralegal system and the legal system would have to be on top of the principles of the rights of people with disabilities and our international obligations. We see that educative process as being as important, if not more important, as the symbolic value of the concrete recognition of our international obligations.

CHAIR: Could I put to you what is possibly a fairly aggressive question and that is that there are three statutes within New South Wales dealing with matters relating to disability. You referred to them in the council submission, namely, the Guardianship Act 1987, the Disability Services Act 1993, the Community Services (Complaints, Reviews and Monitoring) Act 1993. There are also two Federal statutes, the Disability Services Act 1986 and the Disability Discrimination Act 1992. So there are five Commonwealth and State statutes all dealing in one way or another with the rights of people with disabilities. Furthermore, there are set up under those enactments, both State and Federal, structures that are established to seek to enforce the rights of people with disabilities. The question I would ask is: Why is that not enough? Is that not a good way of approaching the matter? Why do you think that the needs of people with disabilities would be better served by a Bill of Rights or some such mechanism?

Ms KAYESS: The principles behind the Disability Services Act, both at the Federal and New South Wales level, are loosely aligned to the principles enshrined within our international obligations in the first place. The principles and applications and the principles and objectives at a Federal level are only agreed principles within a narrow definition of sense of community. In other words, within the bureaucratic structure and within the disability sector, community is not recognised within those policy areas, whereas the international conventions are accepted more broadly in a policy

arena than are those two pieces of legislation, and both the principles and the application of principles are based on and draw from those two international declarations.

Mr FOLINO: Much of the existing legislation seems to be remedial in nature or tends to rely very much on an administrative policy, and is quite restrictive in what it can to. The Community Services Commission, for example, cannot recommend that funding be increased in order to provide additional support or an increase in services.

The Hon. J. HATZISTERGOS: Are you suggesting that a Bill of Rights should enable a court to do that?

Mr FOLINO: I am just highlighting some of the inadequacies of the present legislation in addressing the question of the full rights of people with disabilities, because in application there are restrictions in place. Also, there are issues about resources, and that is central to our laws as well.

CHAIR: What Mr Hatzistergos said, I would suggest, is relevant. If there were to be a statutory Bill of Rights in New South Wales, and if an agency were to be taken to court by a body acting in the interests of people with disabilities and relying on the provisions of the Bill of Rights, you are not suggesting, are you, that a court would be in any different position? It would still be a matter for the Executive and the legislative arms of government to fund any deficiency that might be found to be apparent.

Mr FOLINO: A court could say that there has been a breach of rights, if there were a Bill of Rights. At the moment, it cannot do that.

The Hon. J. HATZISTERGOS: What would be the advantage of a court doing that if there can be no practical application of such a finding? Do you suggest it would be just to highlight the anomaly?

Ms KAYESS: Highlighting the anomaly and providing a credible framework to address rights issues.

The Hon. J. HATZISTERGOS: That is what concerns me because I think you are suggesting that the court could make some sort of statement that would in effect politicise the issue; in other words, the court would be making a political statement as to what should or should not be provided in the interests of those with disabilities. I am not saying that someone should not do that, but that in itself draws politics into the court, as opposed to having politics reside where they should, that is, with the Parliament and the Executive. Do you understand what I am saying?

Ms KAYESS: Yes. But you are drawing a long bow. We have to come up with a quick analogy to get the framework straight.

The Hon. J. HATZISTERGOS: I am suggesting that by including such a proposal in a Bill of Rights you are trying to give some judicial sanctity to rights that are inherently fraught with political controversy.

Mr FOLINO: How do you know that?

The Hon. J. HATZISTERGOS: It is clear. If it is a question of resources, for example, then governments can make up their minds as to what the priorities should be and whether resources should be put in one area or in another area. You seem to be suggesting that the courts should be brought into that sort of controversy and say, "You should provide resources to people who are disabled, or you should provide water to some Aboriginal settlement that currently does not have water, or you should be providing electricity to a community that currently does not have it." Those are issues of controversy that require someone to balance the competing priorities. I do not see the courts giving some sort of judicial sanctity to those sorts of propositions. I do not see how that could help to achieve outcomes or how it would enable the courts to stay out of political controversy, if we accept that it is the court's function to interpret rights.

Ms KAYESS: Is it not about the identification of abuse of rights rather than advocating for an element of financial responsibility?

The Hon. J. HATZISTERGOS: It is not only a matter of identification; it is also a question of resources and reconciling the various priorities of government.

CHAIR: Is there any substantial difference between what obtains at the moment with, shall we say, the Federal Disability Discrimination Act [DDA] and the Human Rights and Equal Opportunity Commission [HREOC] perhaps upholding a complaint and identifying a need, with the attendant publicity that might flow from that? How is that different from, say, the Supreme Court of New South Wales, under a Bill of Rights, upholding a point in the litigation brought before it which identifies a need? Does it not come back to the government in both cases?

Ms KAYESS: Yes, it certainly does in terms of the DDA. I assume that it would be exactly the same situation if the principles were upheld through the Supreme Court. With the DDA, the recognition would be through the Federal Court, and that would be a recognition that would have to be addressed through an individual case. But it would be identifying the requirement for a matter to be addressed systemically.

The Hon. J. HATZISTERGOS: That is right, through a plan of action.

Ms KAYESS: As has been the situation with every public transport case that has been held over the TTA. It is recognition of a systemic need to adhere to rights or to provide services for people with disabilities.

CHAIR: At page 9 of the submission of the Disability Council is a short reference to what you describe as enhancing democratic government. You say:

> It has been argued that a Bill of Rights would entrench limits on government power by judicial review of governmental actions. This view is an extension of the ideal that governments are not the rulers but the servants of the people, whose rights cannot be transgressed.

How do you see it as more democratic that a judge might be involved, given that judges are not elected by anyone and are not accountable to anyone either?

Ms KAYESS: I suppose it comes back to the notion that the judiciary is to purely define the parameters of the rights and the enshrinement of those rights, rather than the political negotiation of resources and/or competing issues within the body politic.

CHAIR: Can you provide the Committee with any concrete examples of inadequacies that you have observed regarding current protection of human rights in this State as they apply to people with disabilities?

Mr FOLINO: We have listed quite a few on pages 7 and 8 of our submission. The council has had input to a lot of those issues either through some inquiry or through raising them at the government level, and the council has a legitimate function to do so. Rosemary and I want to talk about the current piece of research that we have done into the justice system which documented the extent to which people with disabilities rights have been breached.

Ms KAYESS: In fact, it will be launched in a couple of hours downstairs. The findings of that research demonstrate that there are many barriers to people with ability not just accessing the justice system but having their rights understood, and being able to participate within the justice system. The first is even an understanding of their rights as they stand now under our current legal framework, but secondly is the issue of the judicial system and the legal system having an understanding of the issues and the implications of rights for people with disabilities, quite apart from the barriers and problems that they face when trying to participate within our community.

The Hon. JANELLE SAFFIN: You referred to the findings of the research report that you are about to launch. Could you give me examples of persons with a disability who were denied access to the justice system and were not able to use any of the Acts in place to help them access the system? Then could you comment on how a Bill of Rights would assist such persons to access the justice

system? You might not want to answer that question now, but I would ask you to give some thought to that because I believe the answer could be really useful.

Mr FOLINO: In terms of juries?

Ms KAYESS: Jury service is a classic example. People with disabilities are excluded from jury service. People with disabilities can claim an exemption from participation in juries because of their disabilities. However, people with disabilities have found that even when they wanted to participate in juries they were excluded from doing so.

The Hon. J. HATZISTERGOS: Because of access problems?

Ms KAYESS: It is a combination of several factors. One is the access issue: access to the court, and access to information.

The Hon. JANELLE SAFFIN: If they need aids or something like that?

Ms KAYESS: Yes. The issues are several-fold. If I were to participate in a jury, I would not be able to take my sister along to take notes, sift through papers or otherwise assist me.

The Hon. JANELLE SAFFIN: You could, but they will not let you.

Ms KAYESS: They will not let me. The notion is that a jury consists of 12 people, and 12 people only. There are problems with physical access to the jury box, visual cues in respect of evidence for people who are visually impaired, as well as physical access to the building itself, and access to interpreters and hearing rooms.

The Hon. JANELLE SAFFIN: So the Commonwealth and State Acts are not able to help a person gain access. But what about the international covenants?

Ms KAYESS: If the international covenants were upheld, people with disabilities would have access to full participation in the legal system. The DDA has been used in respect of a jury case just recently. Unfortunately, one of the participants died last week, so that the chance of appeal is most probably fairly slim. But it was found that both people were discriminated against. One person was able to claim damages in respect of the refusal of a service, but the claim of the other person, who could not get from the footpath to go inside, and therefore have the service refused, was denied. So the person actually has to get into the building.

The Hon. JANELLE SAFFIN: The person has to be in a position where the service is to be provided.

Ms KAYESS: Yes.

Mr FOLINO: It requires amendment of the Interpretation Act to give someone access to cultural and political rights and to legitimise the fact that a person has such a right of participation.

CHAIR: In response to a question that I asked a short time ago, does the Disability Council rely on, among other things, the examples set out on pages 7 and 8 of your submission, which detail inadequacies in the current protection of human rights in New South Wales?

Ms KAYESS: They are some of the most glaring examples that have probably had the most administrative focus in terms of reviews and administrative attention. Those examples could apply for some time.

CHAIR: Do you agree that many, if not all, of the examples came to light as a result of reviews, studies, complaints and so on regarding various existing abuses or inadequacies?

Ms KAYESS: Particularly at the very end of the process. People have existed in horrific situations about which individuals and the disability sector have expressed concern. Many reviews have been held at the end of a fairly long process of identifying abuses.

CHAIR: Would your principal argument in support of a Bill of Rights in the disability context be that it has educative value? Do you place a great deal of stress on that role?

Ms KAYESS: I place a significant amount of stress on the educative role that a Bill of Rights could play. If the document that we are launching tonight demonstrates anything, it is that professional education and training is key. Lack of knowledge and lack of understanding of the issues confronting people with disabilities create the greatest barriers to their participating in society.

The Hon. J. F. RYAN: Turning to your submission, you refer to legislation that has been useful in assisting people with disabilities to improve their human rights. However, you have not mentioned the New South Wales Anti-Discrimination Act. Is that omission intended?

Mr FOLINO: The Act was up for review and being amended at the time of writing the submission and I did not refer to it as there could have been significant changes.

Ms KAYESS: We had a brick on our desk that suggested that some ideas might be taken up as a result of a review that had been proceeding for a fairly long time.

Mr FOLINO: About eight years.

Ms KAYESS: First, we did not want to anticipate any changes that might come from the review; and, secondly, we had not read the sizeable document.

The Hon. J. F. RYAN: One difference with that sort of approach to securing human rights is that there is an element of informality with regard to the hearings.

Ms KAYESS: That is an assumption.

The Hon. J. F. RYAN: Such hearings are certainly more informal than Supreme Court hearings. Therefore, the hearings have the advantage of being a little more accessible in terms of cost. Even though they do not have the dramatic implications of creating binding legal precedents, some people would regard them as being more accessible. In view of those sorts of advantages, is that not a better way of securing human rights in New South Wales—the situation may be different at the national level—where most of the emphasis is on the provision of services? Might that not be a better approach?

Ms KAYESS: The conciliation process allows for private determination, which can lock people with disabilities into multiple issues in the case of complaints raised about the same matter time and time again until the matter goes to the tribunal and becomes a public determination. It then becomes part of the process of jurisprudence. That process is very tiring for the sector and for the individuals involved. An individual process is required and the onus is on people with disabilities continually to identify breaches and abuses of their rights.

The Hon. J. F. RYAN: On pages 4 and 5 of your submission, you refer to the Disability Discrimination Act and say that one of its limitations is that claims of discrimination are an individual responsibility where the onus is on the person to know his or her rights under the Act and to know how to access and enforce those rights. Would a Bill of Rights not have a similar difficulty? Would not the onus be on the individual, who might have to be involved in fairly significant—and perhaps expensive—litigation? Is that not a potential problem when approaching these sorts of issues from a Bill of Rights perspective?

Mr FOLINO: Advocacy would have to play a strong role.

Ms KAYESS: There would be an educative role in combination with the use of the Bill of Rights as a legal tool. It would also break the nexus of conciliation that necessitates people with disabilities making the same complaints over and over again. We need recognition of the systemic abuse of rights that allows for a broader acknowledgement of the issues facing all people with disabilities as opposed to the individual.

The Hon. J. F. RYAN: On page 6 of your submission, you make a statement that sounds profound but which, I must confess, I am not sure that I understand. You might be saying something important to the Committee, and I would like to have greater understanding of that statement. The submission says that the United Nations declarations marked an important shift in perspective and that individuals with a disability became the subject of action rather than its object. I am not sure whether I understand the difference. Could you elaborate on that statement?

Mr FOLINO: We are looking at what causes disability or impairment and pathologising about what disability is rather than looking at it in terms of a place in the world—which is objectifying where people's rights lie rather than simply looking at causes.

Ms KAYESS: What is the cause.

Mr FOLINO: People's disenfranchisement.

Ms KAYESS: Yes, and their marginalisation.

The Hon. J. F. RYAN: A Bill of Rights is often a useful tool for stopping something from happening, but it is not quite so useful in making something happen. Do you agree with that statement? In some of the examples you have provided you say that people with a disability living in boarding houses are overmedicated. If that were the subject of a hearing stemming from a complaint made under the Bill of Rights, it would be easy to stop medication being given inappropriately to people with disabilities. However, bringing an action to modify public transport for use by people with disabilities, for example, would require a Government decision to allocate resources.

Ms KAYESS: Yes, but there is an educative role. Any changes in, and the ongoing development of, existing public transport infrastructure would have to accommodate the principles of rights for people with disabilities.

The Hon. J. F. RYAN: A process that is not dissimilar to the Bill of Rights exists at the Commonwealth level with the Human Rights and Equal Opportunity Commission [HREOC]. People with disabilities have received some quite useful educative rulings through that body. Unlike a court, HREOC does not have the capacity to make law, but it has been quite useful in terms of education. Can you give some examples of how that process has been useful?

Ms KAYESS: The process has had an educative role to a degree but, unfortunately, it has not had the strength to take that educative role a bit further. After the initial thrust of the legislation, people began to realise that unjustifiable hardship—a case has just moved to the Federal Court—has left HREOC decisions as only decisions; they are not enforceable. I am doing a PhD regarding the DDA and I would like to say that some fantastic positives have come from that legislation. Perhaps I am not the right person to ask because I tend to focus on the negatives.

Administrative outs have watered down the strong educative role that the DDA could have played. That has affected the ability to have conciliation as a private issue. It goes to the use of unjustified hardship components, the unbalanced development of the use of standards and the process whereby industry and government have had much stronger input than the disability sector into the process. The potential was there but, because the legislation enshrined the notion not of rights but of making discrimination unlawful, it has not had the impact that it could have had.

The Hon. J. F. RYAN: In view of that, I must ask a further question. On page 11 of your submission you suggest that it might be a good idea to establish a HREOC-type body in New South Wales. Can you explain why that would be an advantage?

Ms KAYESS: It would enforce a different structure. HREOC controls a document or piece of legislation that gives several significant outs in terms of the notion of rights.

Mr FOLINO: I do not think you can have too much protection of people's rights. People's rights will always be undermined and unprotected, so why not fill in the missing piece of the jigsaw puzzle?

CHAIR: Do you achieve that by having layer upon layer?

Mr FOLINO: I do not think it is linear in that sense.

The Hon. J. F. RYAN: Some might say that an enormous amount of resources is expended on litigation that would be better used providing services, for example.

Ms KAYESS: The question is then whether services or an enablement of rights is the answer. Do people receive services because they are being excluded from participating in society in another way? Do we have a parallel transport system because the present system is not accessible to people with disabilities? Do people live in group homes because there are no mechanisms that allow children to attend local schools and there are not sufficient levels of support and child care for families with children with disabilities? You are making an assumption that service delivery is the primary goal and that the enablement of rights is not.

The Hon. J. F. RYAN: Might there not be some limitation with a Bill of Rights in that it is largely enforceable only against government agencies rather than private agencies? Given the declining size of government participation in the economy generally, do you think a Bill of Rights would be swamped to some extent by the fact that so much of the law would be more applicable to private agencies than to the Government?

Mr FOLINO: I do not know how to answer that.

The Hon. J. F. RYAN: How useful will a Bill of Rights be in an increasingly privatised world?

Ms KAYESS: It depends whether it is a fee-for-service privatised world or whether it is a funded privatised world. If it is a tendered-out privatised world, it will not necessarily change the framework dramatically. It will give you significant leverage.

The Hon. J. HATZISTERGOS: As I understand it, your proposal relates to amendments to the Interpretation Act?

CHAIR: No. It is put in the alternative. It is either that or a Bill of Rights. Is that not correct?

Ms KAYESS: A Bill of Rights first.

The Hon. JANELLE SAFFIN: My question relates to a specific case and how that changed the power of the HREOC. At page 5 of your submission you talk about the limitation of the DDA. You also say that if someone challenges a case and that case goes to the Federal Court, the Federal Court rarely upholds decisions made by the HREOC. Do you have any view about that? Why does the Federal Court rarely uphold any of those decisions?

Ms KAYESS: A very small number of cases have gone that far. There is nothing to indicate whether it was the case itself or whether it was the termination in the first place. The appeals are not big enough in number. There just have not been enough. At the moment I think they sit about even—appeal cases that have gone for and against respondents. It is very difficult to judge. The expense of the Federal Court will mean that fewer and fewer cases will go to the Federal Court. We will not use the Federal magistracy until it is established and functioning.

The Hon. JANELLE SAFFIN: Have you done a costing?

Ms KAYESS: Costings go with a decision, as we understand it. Generally, it is disbursements and the effort that a legal team puts into the case. That is a big issue for people with disabilities because nine times out of 10 the respondent is generally a large institution with significant resources. There have been clear examples of HREOC cases where large organisations take on large legal teams. They bring out the big guns and make it quite daunting for individuals with community legal centre backing to run these cases through to the Federal Court.

CHAIR: How would that be different under a Bill of Rights model?

Ms KAYESS: I suppose it would not be any different under a Bill of Rights model. But the notion and framework of rights are a lot stronger. The educative process within the legal and judicial system is a lot stronger. At the moment we are looking at a legal and a judicial system that really has not had to deal with or confront the issues facing people with disabilities who are trying to participate within society as a central part of their training. Incorporating the rights of people with disabilities within a Bill of Rights will ensure that would be enshrined within both tertiary and post-qualification training.

The Hon. JANELLE SAFFIN: Primarily that relates to access to services, does it not?

Ms KAYESS: No, it is not about access to services.

The Hon. JANELLE SAFFIN: The way in which the current Acts operate as opposed to a right being upheld?

Ms KAYESS: With the current Acts, yes, it is about access to services. One is about making discrimination unlawful and the rest is about administrative law and decisions that are made within government or government-funded bodies.

CHAIR: I turn to a more general aspect of this inquiry. I will not confine myself to people with disabilities. What would you say in response to the criticism that a Bill of Rights model involves the politicisation of the judiciary in the sense that judges are required to determine matters that are essentially political or social questions that really ought to rest with the Legislature and the executive arms of government? Do you think there is a danger that the judiciary will be politicised in that sense?

The Hon. JANELLE SAFFIN: Does it worry you?

Ms KAYESS: No it does not worry me. Framing an answer is what worries me at the moment.

Mr FOLINO: Does the evidence show that that is the case?

CHAIR: Let me give you an example.

Mr FOLINO: I am a little out of my league in answering this question. I might say no to that.

CHAIR: Let me give you an example. Admittedly the United States has a constitutionally entrenched Bill of Rights as opposed to a statutory Bill of Rights such as the one we are investigating today. The Supreme Court of the United States has become so politicised that the United States Senate has the duty to advise and consent to the appointment of any Federal judge, including a judge of the Supreme Court. A nominee for justice of the Supreme Court of the United States, for example, is questioned for many hours or even days about his political attitude and his attitude on contentious public issues. Abortion is the most prominent example. It certainly can become highly political. I am asking you to direct your mind to that. Do you think it is a good thing or a bad thing?

Mr FOLINO: I am not a legal expert.

Ms KAYESS: Law is not my field of expertise either. Appointments to the High Court in this country could be defined as highly political as well. I am sure that you could find arguments relating to just about every appointment for the last 25 years which involve contention on one side or the other and how political those appointments are. I am sure that, with varying degrees, that could be translated to most judicial appointments at a very senior level.

The Hon. J. HATZISTERGOS: You might have a Bill of Rights such as the one referred to by the Chairman, which has a broad range of rights, for example, the right to vote, the right to life, the liberty and security of a person, freedom of thought, freedom of expression and matters of that kind which are fairly broad categories. It would be inevitable when you came to apply those rights, that the court would be placed in a position of having to make a decision on social and economic

grounds rather than judicial grounds. In many of those cases it is a balancing of those rights with reasonableness in the circumstances or otherwise. Do you not think that that sort of approach lends greater scope to the politicisation of the judiciary than would otherwise have been the case if those functions were left to the Legislature to do that balancing out exercise?

Ms KAYESS: I cannot give a professional answer to that; I can only give a personal answer. I do not believe so. You are trying to ensure that you have a judicial system that represents a variety of elements within the community. You would expect your judiciary to be able to reflect on and to be able to understand the issues with which it is confronted relating to those various principles. I do not think that having a knowledge and an understanding of those principles necessarily politicises a person or his position.

The Hon. J. HATZISTERGOS: Having a knowledge of them may not, but applying them does.

Ms KAYESS: That would apply to anything.

The Hon. J. HATZISTERGOS: Let me give you an example.

Ms KAYESS: The same thing could be said about any judicial appointments in Western Australia or the Northern Territory.

The Hon. J. HATZISTERGOS: Put the right to vote in a Bill of Rights. That sounds pretty fundamental, does it not? Everyone should have the right to vote. But then you get other issues like people under the age of 18 being entitled to vote. Should the Parliament enact laws preventing people under the age of 18 from voting? Should the Parliament make laws preventing people who are convicted of serious criminal offences from voting? Should the Parliament make laws which prevent non-citizens of this country from voting, or qualifying the rights as to when people who become citizens should be entitled to vote?

These are difficult issues in this country. For a period women were not allowed to vote and Aboriginals were not entitled to vote. At that time that was seen as appropriate, but times change and we move on. So a simple right, such as the right to vote, which is pretty fundamental, has attached to it a series of limitations. Is it appropriate that those sorts of limitations be left to the courts to determine as opposed to the elected body that is responsive to the people, answerable to the people and able to adjust those rights to reflect contemporary standards? I did not mean to restrict you to that right; I raised it only as an example.

Mr FOLINO: It is a complex issue.

The Hon. J. HATZISTERGOS: It is. It raises difficult issues. One of the rights that was mentioned this morning was the right to equality. That is even broader right than the right to vote. Under the broad right of equality everyone should be equal. That is a broader statement than the right to vote.

CHAIR: The Hon. J. Hatzistergos is putting to you that it is all very well, in a sense, to specify some aspirational objective. However, it is much more complex and difficult when one considers beyond the surface appearance of what that statement is. For example, in your submission, there is reference to the right to free speech. You quote someone as saying:

> The right to free speech, for example, is that which is left after censorship laws, defamation, criminal libel, blasphemy, radio and television program standards have been taken into account when common law is applied.

Mr FOLINO: That is the problem with the common law.

CHAIR: You say it is a problem but are you suggesting that free speech means that all those things should be swept aside, even if it means vilifying a racial group, for example?

Ms KAYESS: It is a fundamental problem. You even lose out in relation to the construction of a complex myriad of laws when something is established that requires complexity in its application.

The Hon. J. HATZISTERGOS: That is exactly right. Is it not better to have that complex myriad of laws which at least address specific difficulties, rather than leaving it broadly up to the courts and, in the process, politicising the courts?

Ms KAYESS: Not necessarily when it leaves a whole section of the community, because of non-formal recognition of their rights, unable to participate.

The Hon. J. HATZISTERGOS: Is the answer to that question that there should be activity at a political level to ensure that that matter is redressed, rather than leaving it up to the good grace of judges to be able to interpret it? After all, those judges are not elected. They are not responsive to the policy concerns that are raised, whereas theoretically members of Parliament are. If you do not like them you chuck them out.

Ms KAYESS: Theoretically, yes.

The Hon. J. HATZISTERGOS: In practice they are. If they do not respond they are not re-elected.

Ms KAYESS: Representativeness in this culture is not necessarily a notion that, if people do not respond to certain elements, they do not get elected. It is a silly notion. In relation to the disability issue, I completely reject it.

Mr FOLINO: If a child with a disability does not to get into a school of his or her choice, it is not going to be a vote loser; it is not going to be a thing that tips a party into opposition.

Ms KAYESS: If a person living in an institution does not receive enough nutritional care, to the point where he or she dies an early death, that is not an issue that is going to raise any great voting backlash, and it has not created any voting backlash.

Mr FOLINO: Melinda Jones, if you have the opportunity to speak to her, uses a really good example of a child with a disability who is actually killed by a parent because the mother could not cope, but she does not go to gaol.

The Hon. J. A. SAFFIN: Does the case go to court?

Mr FOLINO: No, it does not. However, the mother who kills a child without a disability ends up going to gaol.

The Hon. J. HATZISTERGOS: I think we are talking about two different things. You are talking about an individual problem. Leaving that aside—

Ms KAYESS: No. It is the manifestation of a systemic problem. They are not individual problems. It is objectifying the situation.

The Hon. JANELLE SAFFIN: Is denial of access to transport individual or systemic?

Ms KAYESS: It is systemic. Denial of access to be able to go to the local school is a systemic problem. It has nothing to do with the individual.

The Hon. J. HATZISTERGOS: I do not know whether you are aware of the Canadian situation. Canada's Bill of Rights contains a clause that indicates that the courts can take into account the reasonableness of the relevant breach and whether it was appropriate. What happens when you get to that situation? The courts apply that clause and decide not to do anything about it because of the particular circumstances. Where do you go from there, in terms of protecting one's rights? I mention this because in Canada, as you may be aware, following the courts reluctance to get involved in that sort of political controversy there was criticism of the courts for not enforcing human rights.

Ms KAYESS: The Canadian system, which has constitutional attachment to the rights of people with disabilities, has been very successful in establishing a much more administrative approach rather than a judicial use. It is the fact that those frameworks are there and they can go to court that

they have had such a strong, educated approach. The Canadian system has a much stronger administrative, systemic response to abuses of the rights of people with disabilities, with regard to access to education and access to transport. As I said, it depends on the whether you put the emphasis on the symbolic principle, and develop administrative and systemic responses, or whether you put the emphasis on the court system.

CHAIR: You are arguing that we have both, are you not? There are always existing structures that exist: the Community Services Commission, HREOC, and so on?

Ms KAYESS: But at the moment they do not have a truly symbolic statute of rights to say that these are the rights of people with disabilities. The HREOC statute is about making discrimination unlawful and allowing anyone to demonstrate financial hardship, a claim against unlawful discrimination.

Mr FOLINO: Each of those laws has limitations; they have certain restrictions placed on them with regard to their administrative functions. They are not all-encompassing; they are not there to address all the systemic issues that people with disabilities experience on a day-to-day basis.

CHAIR: Is the Disability Council arguing that we should keep all existing structures and statutes and add a bill of rights with some guarantees in favour of people with disabilities, so that the courts can—?

Mr FOLINO: In our submission we argue that at least a discrimination clause be included in the Bill of Rights.

Ms KAYESS: And that there be recognition of people with disabilities as a distinct group.

Mr FOLINO: That might be an area that we need to debate further—that is, what groups are identified in terms of their rights.

CHAIR: Yes. One of the Committee's terms of reference directs its attention to whether group rights ought to be recognised. What do you say with regard to that?

Ms KAYESS: That has been quite significant. It has been very important in terms of the educative function of a Bill of Rights. It has also been very important in terms of the administrative responses that have happened in Canada, and it has been very important that clause 15 is within the Constitution and it recognises people with disabilities as a distinct group. In terms of their Equity in Employment Act, the frameworks then have to talk about identified groups within the Constitution. Therefore all their action plans about how they are going to provide access to employment for identified groups have to marry up with the groups that are identified within the Constitution.

The Hon. JANELLE SAFFIN: In your conclusion you say, "This submission has noted that common law cannot provide full protection of individual or group rights." You do not go on to say that that should be the case, but I think it is implied by that comment.

CHAIR: However, in that regard class actions are becoming more common, are they not?

Mr FOLINO: Not in the disability area.

Ms KAYESS: Class actions in terms of representative cases under the DDA are very problematic, because you have to be able to demonstrate a nominal comparator, in that it affects all people with disabilities in exactly the same way. That same sort of issue is not as stringent in terms of a class action, because you are not talking about the tight parameters of discrimination and how it is defined within the DDA, as opposed to an abuse of rights.

The Hon. JANELLE SAFFIN: On page 10 of your submission you cite the terms of reference to the inquiry, and you say in paragraph (b) that the Bill of Rights should include people with a disability, but you do not qualify that in any way.

Mr FOLINO: I took that portion on advice from Melinda Jones. I hope you are going to speak to Linda, because she is quite knowledgeable about this subject area—far more than I am. She is a human rights specialist.

Ms KAYESS: She teaches administrative law, but she edits the human rights defender.

CHAIR: The Committee takes evidence from people who approach us in response to an invitation to make a submission. The Disability Council sets out brief responses to some of the Committee's terms of reference. With regard to the extent and manner in which the rights declared in a Bill of Rights should be enforceable, you say:

> The council believes an agency with similar powers as the Federal Human Rights and Equal Opportunity Commission should be established to monitor and enforce human rights.

Are you there saying that if there were a Bill of Rights, a body other than a court should be set up to monitor and enforce the rights?

Mr FOLINO: I do not know how a court could monitor the rights, unless they are brought to its attention constantly. I think if you had an agency or organisation that was able to at least give people a way of bringing to their attention that breaches are occurring, that could be a mechanism for perhaps flowing on to the court system.

Ms KAYESS: There is no framework within Australia, either federally or at the State level, for the systemic recognition of abuses of rights, where people can say to the State, "These rights are being abused. Can these rights be monitored?" It is the principle of an individual complaint or an individual experience that can be brought either within the ADA or the DDA.

CHAIR: I agree with that. However, the point I seek to make is that under a Bill of Rights model in essence one would be dealing with single instances. Rather than a complaints-based model under an administrative structure, matters would be brought to the attention of the courts via a perceived breach of a Bill of Rights. So, as you are I think suggesting, there would not be a monitoring function; courts are not there to do that. Are you not arguing, at least in this respect, that there should be some upgraded HREOC?

The Hon. JANELLE SAFFIN: Do you want a HREOC with pre-Brandy case power?

CHAIR: No court is going to do what you are suggesting there, is it?

Ms KAYESS: We were not seeing it as a court function. We were seeing it as a human rights body as such. I suppose you could say pre-Brandy.

The Hon. J. F. RYAN: If you have a breach of human rights and the parties know that is similar to another case that has already been heard in the court, people go off and settle. Whereas, I suppose with an antidiscrimination model each individual must show the tribunal what his or her individual discrimination is. There is not quite the same level of using case law as a means of saying, "My case was just the same as someone else's case that has already been decided." To the best of my knowledge, most of the cases are kept confidential in any event.

Ms KAYESS: During the process of conciliation, generally they are, yes.

The Hon. J. F. RYAN: There is not quite the same level of comparison with that model, is there?

Ms KAYESS: No. Basically, there is not the strength of case.

(The witnesses withdrew)

(The Committee adjourned at 3.27 p.m.)