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STANDING COMMITTEE ON LAW AND JUSTICE

INQUIRY INTO A NSW BILL OF RIGHTS

PUBLIC HEARING NO 4

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At Sydney on Monday, 26 June 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. J. F. Ryan
The Hon. J. Haztistergos
The Hon. P. Breen

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CHAIR: Thank you very much for attending to give evidence, it is very much appreciated.

MALCOLM HERBERT McLELLAND, 37 Mahratta Avenue, Wahroonga, New South Wales, private citizen, sworn and examined:

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

Mr McLELLAND: I did.

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

Mr McLELLAND: I am.

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

Mr McLELLAND: Yes, Mr Chairman. I was a Judge of the Supreme Court of New South Wales for 18 years from 1979 to 1997 and for the last three years of that period I held the office of Chief Judge in Equity.

Before my appointment to the court I practised as a barrister for 15 years, including five years as a Queens Counsel. My practise at the Bar frequently took me into the fields of constitutional and public law and I have maintained an interest in those and related subjects.

Retirement has given me the leisure to read and reflect more deeply on various public law related issues, including the question of a Bill of Rights.

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

Mr McLELLAND: I am content that it should be. There are three minor textual corrections that I would like to make, if I can mention those now?

CHAIR: Yes.

Mr McLELLAND: On page 4, line 9, delete the portion in brackets "(op cit @ 299)". On page 5, towards the bottom the heading, "WHAT IS A LEGAL 'RIGHT'?" the immediately following paragraph, should be numbered 9. On the sixth line of paragraph 9 the final "the" should be preceded by the word "be".

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

Mr McLELLAND: Thank you.

CHAIR: Could I now invite you to make an opening submission, if you choose, just putting forward and expounding, if I might put it that way, the submission you have made before we ask you any questions?

Mr McLELLAND: Thank you, Mr Chairman. There is a maxim attributed to Hippocrates and still applied by the medical profession as a principle of treatment '*First do no harm*' and that also serves as a useful caution for legislators and law reformers.

The main concern of my submission is to draw attention to some harmful effects to be expected from the enactment of a Bill of Rights in New South Wales, important aspects of which have I think received insufficient attention in the literature on the subject.

I do not want to waste the Committee's time by repeating the details of the submission which I hope speaks clearly enough for itself but there are a few matters which it might be useful to mention at this stage.

As appears from paragraph 1, the submission relates to the enactment of a Bill of Rights in which the enacted rights are intended to have what I have called controlling legal force.

There are of course various possible levels of controlling legal force which a Bill of Rights could be given and not all of my objections apply to all of the possibilities. For example, in the case of a Bill of Rights which did not operate to invalidate other legislation the objection in paragraph 1(b) would be of less weight and the objection in paragraph 1(d) would not apply at all.

I understand that the Committee takes the view that its terms of reference in their reference to a statutory New South Wales Bill of Rights does not include the possibility of a statutory Bill of Rights which is entrenched, and what is under contemplation is an ordinary statute enacting a Bill of Rights. That is a limitation which I had not appreciated when I prepared my submission so that you will find here and there a submission in my document which attacks in effect entrenched or constitutionalised Bills of Rights and in view of the attitude of the Committee to its terms of reference then they of course will be of no present relevance.

Each of the objections in paragraphs 1(a) and 1(c) of the submission, and to varying degrees paragraph 1(b), however would apply to any proposal whatever form it might take whereby the interpretation of the Bill of Rights became a justiciable issue; it is the intervention of the courts into this process that gives rise in my view to the major problems.

Paragraph 1(a) is founded in part on the proposition that most Bill of Rights provisions would be unacceptably vague and uncertain.

It is quite ironic that under both the United States and Canadian Constitutions, each of which contains undoubtedly vague and uncertain provisions, uncertainty or vagueness in a law has been held to be a ground of its invalidity; in the United States as being inconsistent with due process under the 14th Amendment and the 5th Amendment and in Canada as being inconsistent with the principles of fundamental justice which are dealt within Article 7 of the Canadian Charter.

It would make for an interesting paradox if the courts of those countries could pass judgement on the validity of their own Bills of Rights by the same standards.

In paragraph 7 I make the point that one consequence of the degree of legal uncertainty to be expected from a Bill of Rights is an explosion in the complexity, duration and cost of litigation and I give there some figures in relation to Charter-related litigation in Canada up to 1988. I also refer to the likelihood of a blow-out in court delays.

Since preparing the submission I have come across some further Canadian figures which are quoted in Frank Brennan's Book called *Legislating Liberty, a Bill of Rights for Australia?* which was published by the University of Queensland Press in 1998, at page 28. He says that enquiries by him reveal that immediately before the Charter was adopted in Canada the average time that a judgement was reserved in the Supreme Court of Canada was four months. In 1986 after the Charter had been in operation for four years the average time which a judgement was reserved in that court was ten months.

He also reports that in the two years 1980 and 1981 there were only two judgements of the Supreme Court of Canada which were reserved for more than 12 months but in 1985 and 1986 there were 33 judgements of that court that had been reserved longer than 12 months. Now that is some evidence of the impact on court delays and the consequent inefficiency of the court system as a product, certainly of the Canadian Charter.

That circumstance if of course relevant to the point I make in paragraph 8 of the submission as to the likelihood of impairment of the function of the High Court of Australia under the influence of litigation generated by a Bill of Rights.

It is no solution to that problem to say, 'Oh well, appoint some more judges to hear more cases and divide the court up'. In any important case in the highest court, the highest appellate court in the country, it is only satisfactory if all the available judges participate; you cannot have separate divisions of the court.

In paragraph 10 of the submission the point is made that the identification and balancing of competing societal values and interests in the formulation of laws to give effect to them is the proper role of Parliaments and not courts. In addition to the matters that I mention there in support of that proposition are these further considerations.

Firstly, courts are simply not equipped to ascertain facts or conduct any necessary research or investigation into many matters which would be relevant to the balancing process between societal values.

The courts are reliant on the parties before them to provide any necessary evidence which in relation to what might be called constitutional facts or value type facts may well be contentious, require verification and be unavailable to the parties for reasons of cost or accessibility or other reasons.

On the other hand, Parliament is well-equipped, both its the composition of persons elected by and in close touch with the community, and also by the use of its committees and research staff, to inform itself of these kinds of matters.

Furthermore, courts operate under time constraints which would in many cases preclude such wide-ranging inquiries.

Secondly, there is not the same opportunity for community participation and debate in relation to issues before a court as there would be in relation to issues before a Parliament.

On questions of balancing community values, participation and debate by the people through their elected representative is a procedure more likely to foster the habits and culture of sound democratic government than having a situation where Parliament either was quarantined from such matters, or if not quarantined controlled in a substantial degree, by a non-representative court.

Thirdly, if I could illustrate the point by what you may regard as an extreme case. Consider the prospect of introducing into the New South Wales Constitution a justiciable statutory provision which said something like: 'Every law and executive act in New South Wales must be just and reasonable'. Who could quarrel with that as a statement of value but who could possibly contemplate giving the courts the power to veto legislation or executive action or to criticise legislation or executive action on such a broad criterion, introducing such indefinite and subjective values?

The reasons why I suggest no-one would reasonably contemplate such a situation are essentially the same as those that I have advanced in my submission.

The difference between a provision like that and provisions which one would expect to find in a Bill of Rights is, I suggest, one of degree only.

Next, my objections are directed only to what I have called "values treated as rights". On a different plane altogether, are rights necessary to the preservation of the desired structure of government, for example, the right to vote in parliamentary elections.

In Canada the right to vote, the limits to the duration of parliament, and requirements as to parliamentary elections, are included in the Charter as what they call "democratic rights". Analogous rights are found in section 12 of the New Zealand Bill of Rights.

Rights like that can be expressed with relative precision, and are unobjectionable. In my view they should properly be dealt with in New South Wales in the *Constitution Act*, and entrenched, and the same thing I think would apply to many matters dealt with which safeguard the integrity and democratic elements of the electoral process, which are found in the *Parliamentary Electorates and Elections Act.*

May I mention an additional consideration which is not mentioned in my submissions, which by the way I do not put forward as an exhaustive statement of all possible objections to a Bill of Rights, but this one may be worth adding.

To reduce societal values to texts which are petrified in legislation is to risk creating an artificial rigidity in respect of which one of two things might happen. Firstly, by reason of drafting deficiencies, or unexpected court interpretations, there may be perpetuated a meaning or application which was not intended or anticipated when the Bill of Rights was enacted, and which for one reason or another is contrary to the public interest. This can apply whether the Bill of Rights is entrenched, or simply ordinary legislation.

One example is in the United States, where in the period 1890 to 1937 there occurred what has been called the laissez faire period of the interpretation of the due process clause in Amendment 14, under a doctrine called "Substantive Due Process" - which is an oxymoron indeed - involving the large scale invalidation of laws regulating trading and labour conditions, including much of President Roosevelt's early New Deal legislation at the height of the depression.

Ultimately there was a threat by President Roosevelt, on his re-election in 1936, to add seven additional judges to the nine comprising the Supreme Court. A sudden change in approach occurred when one majority judge switched sides so as to convert the invalidating five to four majority into a four to five minority, referred to at the time as "A switch in time saves nine".

The second thing that could happen is that social or cultural changes, or changing conditions and circumstances, or fresh perceptions, may render a provision in the Bill of Rights obsolete or out of kilter with contemporary needs. The example that most people quote is the provision in the Second Amendment of the United States Bill of Rights preserving the right of people to keep and bear arms.

But there are others in the original United States Bill of Rights which are equally obsolete, but still remain there. For example, in Amendment Five, "No person shall be held to answer for a capital or otherwise infamous crime unless on a presentment or indictment of a grand jury". Now the grand jury is an institution which was introduced in the 12th century in England, superseded in the 19th century by what has become the modern committal proceeding. It never came into operation, except in a very attenuated form for four years, in New South Wales. And yet the Americans are stuck with the grand jury procedure.

In Amendment Six, "In all criminal prosecutions the accused shall enjoy the right to be confronted with the witnesses against him". I just do not know what happens in the United States when you have situations where, for example, young children give evidence about sexual assaults. Here, of course, we have procedures for video evidence to be given to protect the witnesses. I just do not know how the Americans handle that situation in light of what is in Amendment Six of their Bill of Rights.

The final example I give is in Amendment Seven, which says "In suits at common law, when the value in controversy shall exceed $20, the right of trial by jury shall be preserved, and no fact tried by a jury shall be otherwise re-examined in any court of the United States than according to the rules of the common law". Now something like that is repeated in most of the State constitutions in the United States, and of course we are all familiar with the astounding verdicts that juries bring in, and the inefficiencies and other deleterious consequences that flow from that.

We know that in common law actions in Australia juries are slowly disappearing, in the interests of efficiency and saving of time and costs, and the desirability is becoming increasingly to be recognised that in civil actions at least the tribunal should give reasons for its decision. Yet that cannot happen under those provisions in the United States Bill of Rights.

I said that these defects apply to an ordinary statutory Bill of Rights as they certainly do to an entrenched Bill of Rights, because any Bill of Rights would be very difficult to amend, for two reasons.

Firstly, when they have been there for a while and there have been court decisions on them, vested interests have been created, and expectations created, on that basis, which would create very substantial opposition to any amendment being made, even by ordinary legislation.

Secondly, there exists an emotional bias against change of what people regard as important legislative provisions, and it seems to me that it would be quite difficult for parliament to legislate to alter the Bill of Rights, even in ordinary legislation, once it had been enacted and it had been there for a while, and produced results which gave expectations to particular groups in the community.

Mr Chairman, I think that is all I need to say in introduction.

CHAIR: Thank you very much indeed. In asking my first question I would like you to bear with me while I quote to you two paragraphs of what the Chief Justice of New South Wales, Mr Justice Spigelman, had to say early this year when he was addressing the Australian Plaintiff Lawyers Association. His Honour was referring to the impact of international human rights treaties on Australian law, and he made some specific reference to the United Kingdom *Human Rights Act 1998* as well. This is the quote:

"We have ahead of us a transition of great significance for Australian lawyers. 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.

This is an important turning point for Australian lawyers. One of the great strengths of Australian common law is that it has been able to draw on a vast body of experience from other common law jurisdictions. Now, both Canada and England, and to a lesser extent New Zealand, may progressively be removed as sources of influence and inspiration. Australian common law is threatened with a degree of intellectual isolation that many would find disturbing."

I must hasten to add that his Honour did not really suggest any immediate solutions. Not only did he not only produce any solutions, he did not advocate statutory or any other form of Bill of Rights.

However, the Chief Justice did seek to address the problem, and I was wondering whether you could make any comment. Do you share his concern that in the light of Bills of Rights in various forms existing in comparable jurisdictions in many

ways, that is the United States, Canada and New Zealand - do you share his Honour's concerns?

Mr McLELLAND: No, I do not share his Honour's concerns. Could I make these comments about that point of view? Firstly, some United States Bill of Rights jurisprudence is incomprehensible to many American lawyers as well. One only has to read some of the dissenting opinions, the vigorous dissenting opinions, in some of the leading American constitutional cases, to realise that.

But from the point of view of the outsider, incomprehensibility I think occurs on two levels. The first is that most common law lawyers, Australian lawyers perhaps, if they compare the constitutional text in the United States Bill of Rights with a result reached, find it impossible to work out how one gets from one to the other.

Perhaps the primary example of that is the due process provision in Amendment 14 (and in Amendment 5), and I assume the Committee knows what that says: "Nor shall any State deprive any person of life, liberty or property without due process of law". A very simple statement, and one would think that "due process" means proper procedure.

However, that is not how it has gone, and I have already referred to the wholesale invalidation of trading activities and labour regulation Acts of various States in the period 1890 to 1937, which proceeded on a massive scale. There are more than a hundred different decision in the United States Supreme Court invalidating State legislation of that kind, on the basis of that due process clause. So it is very difficult for traditional lawyers to understand how that could happen.

Another example, also relating to the due process clause, is how it is that the due process clause can justify courts invalidating State legislation, dealing for example with contraception, or with abortion for that matter. These difficulties are not confined to Australian and English lawyers. As I said earlier, there are many American lawyers who simply regard that as completely unjustifiable interpretation of the Constitution.

But then the second level of incomprehensibility arises when you try and work out the process of reasoning by which these results have occurred to find the underlying rationale. It is a frustrating process. You come across criteria such as "undue burden", "compelling State interest", "legitimate State interest", regulation going "too far", all concepts of an airy-fairy abstract kind used by judges to justify reaching a particular result in a particular case to invalidate a law which is contrary to what they regard as proper ideological principles.

The actual decisions, and there are periodic shifts in emphasis and in direction, really lead to the conclusion that it is a result of judicial idiosyncrasy combined with the need to apply practical limitations on absolutely expressed rights without any constitutional guidance.

So in those respects I believe the Chief Justice was correct in saying that to many people American Constitutional jurisprudence in many respects, not all, is incomprehensible. That is the first point.

The second point is that the concept of Bill of Rights cross-fertilisation within common law countries runs into the problem that when one examines them the Bills of Rights in comparable countries are all different. They differ in their structure and legal status, but they also differ very significantly in their substantive content, and the process of trying to form some global Bill of Rights jurisprudence that one can pluck out of the world's law and apply to ones own Bill of Rights simply is impossible in that situation.

There is one specific illustration of that I can cite to the Committee. Article 7 of the Canadian Charter says:

"Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice."

Now that in sentiment and concept is very similar to the due process clause that I read out earlier from the United States' Constitution and no doubt the United States due process clause was the inspiration for Article 7 of the Canadian clause.

When the Canadian Supreme Court came to interpret that, the argument was of course well look at the law that has grown up around the due process clause in the United States. The judgement of the Supreme Court of Canada in respect to that argument was, (this is the view of Mr Justice Lamer who delivered the judgement of the court):

"We would in my view do our own Constitution a disservice to simply allow the American debate to define the issue for us all the while ignoring the truly fundamental structural differences between the two Constitutions."

I would make the point that various Bills of Rights around the world are all different and one reason why they are different is that in nearly all cases they are the product of some highly significant historical event.

The English Bill of Rights 1689 was the result of the English Revolution. The Statement of the Rights to Life, Liberty and the pursuit of happiness" in the American Declaration of Independence of course was the consequence of the American Revolution. The French Declaration of the Rights of Man and of the Citizen (1789) was a consequence of the French Revolution.

The American Bill of Rights adopted in 1791 strangely enough had been rejected, the concept of a Bill of Rights had been rejected by the Constitutional convention which drew up the United States Constitution in 1787, rejected on grounds quite similar to the sorts of objections that are raised these days to Bills of Rights.

CHAIR: Pardon me, some of the American States though prior to America becoming a Federation did have their own Bills of Rights.

Mr McLELLAND: Indeed, and those Bills of Rights in the American States are products of the Revolution but the subsequent introduction of the Bill of Rights in 1791, after the Constitution had been ratified, was the product of misgivings in the ratification processes in the various States to erecting a Federal Government with very large powers without any apparent limits on those powers and it was really the distrust in the States of a new governmental entity that was responsible for the American Bill of Rights.

The Canadian Charter of 1982 was the result of the historical event of a combination of repatriation of the Canadian Constitution plus the separatist tendency in Quebec, and politically the idea was that it was very important so far as Quebec was concerned to put up what was regarded as a unified vision of citizenship in Canada; all Canadians would be in the same position in relation to the Canadian State.

When British colonies gained independence post-War, masses of them, in nearly all cases Bills of Rights were drafted with the express object of protecting minorities in the various countries. The first I think was Nigeria where there were two very powerful groups and similarly in Kenya and many of the African countries and that is the way it happened. The Indian Bill of Rights was a home-grown affair and I have not examined the historical reasons for the inclusion of an elaborate Bill of Rights in the Indian Constitution, quite conceivably it was because of the Hindu/Moslem problem and the need to try and unify that country.

In Europe itself Bills of Rights in many cases were the product of post-War efforts to avoid any prospect of the rise of the sort of fascism that had developed in Germany which was very strong in the memory of these newly formed, new constituted European States at the time, and so on.

Those different historical circumstances produced different kinds of Bills of Rights, that is one of the reasons why they are all different but the fact is that they are all different. I would take the view that the public interest in Australia would be better served by avoiding the confusion, the difficulty, the time and expense involved in Australian courts and lawyers trying to understand these various different provisions and instead trying to be consistent with their own national culture and traditions.

The other point that the Chief Justice I think made, that this tends to isolate Australia so far as development of the common law is concerned, I think is not a serious difficulty.

So far as cross-fertilisation producing developments in the common law is concerned it is necessary to remember that we have six States and two Territories as well as the Federal courts all producing common law and providing a very useful laboratory for experimentation in development of the common law all of which ultimately, in due course, gets dealt with by the High Court. There is no lack of precedents to test and to examine in producing the common law of Australia.

Finally, quite apart from the Bill of Rights litigation in the United States and I suppose that is the best example because the Bill of Rights has been in force there for so long, there is an enormous amount of common law decisions, particularly in the State courts in the United States, from which Australia does and has for many years drawn ideas and inspiration.

When I was at the Bar if you had a difficult proposition to argue you could always find a decision in an American State court to support you. There was no real difficulty because of the existence of Constitutional law in the United States in finding common law decisions which were useful in illustrating points so far as Australian jurisprudence is concerned.

I think that is the way I would deal with your question, Mr Chairman.

CHAIR: I think it is fair to say that your submission makes a number of references of a critical character regarding the practical experience in Canada following their introduction of the Canadian Charter of Rights and Freedoms.

One of the judicial officers who has chosen to make written submissions to this Committee has categorised the various Bills of Rights into four models: one is what he describes as the bare statutory Bill of Rights, in other words the New Zealand model; then he moves onto what he describes as the fortified statutory Bill of Rights or the British model, that is that all UK legislation is to be interpreted: "so far as is possible in a way which is compatible with" convention rights, that is the European convention on human rights; then there is what he describes as the constitutional bill of rights with an opt out clause for the Parliament, that is the Canadian model. The opt out is achieved by the making of an express declaration, that an Act or a particular legislative provision, operates notwithstanding the terms of the Charter.

Finally there is the constitutionally entrenched model, the American model, which is perhaps too well known or perhaps you would say too notorious to need further exposition.

You clearly would be very unhappy with either the Canadian or the United States models. Would it be correct to say that you are less unhappy but still opposed to a statutory Bill of Rights on either the New Zealand or the slightly stronger UK models?

Mr McLELLAND: Yes, that is probably a more or less accurate statement, but may I add this to it. It is perhaps a little too easy to think "Well, the American model has all these objections, so let's forget about that", and to perhaps underestimate the effect of such things as the New Zealand and the United Kingdom, and I might also say the Canadian model.

What seems to me to produce difficulties so far as courts are concerned - and for this purpose that is the focus that I would like to rely on - is that even though parliament may override, and parliament may simply offer rules of interpretation, once the courts, for whatever reasons, including those, get into the area of determination of values and balancing them, and balancing values against the public interest, in other words, interpreting the Bill of Rights - which they must do; even if all they have go to do is to use the Bill of Rights to interpret legislation, they have still got to find out what the Bill of Rights means in a particular situation - once the courts have that function in any of the situations which you have postulated in this division, then some or all of the problems that I have identified are going to occur.

Let us take for example the British situation, where the courts are given the function not of invalidating primary legislation, that is, parliamentary legislation, but of declaring that it is inconsistent with the European Convention. That is going to provide a forum for interest groups or individuals who have a beef which they cannot obtain satisfaction for at a political level, to approach the court system, not with a view to doing anything else but procuring a declaration from the court that a particular statutory provision or executive action, or whatever, or judicial decision, is inconsistent with the European Convention.

Now once that avenue is open it will be utilised; utilised, I would suspect, a great deal and in great volume, and although the courts cannot invalidate legislation, the power to say that this legislation is in breach of the Human Rights Convention is a wonderful victory for the person who is pressing that point of view.

So in fulfilling that function, which is a function which is unrelated to the court's primary function of resolving disputes between the parties before it, the courts are going to have to go into this evaluation process and interpret the European Convention. I would suggest that is going to give rise to all sorts of problems with courts in delays, expense, etcetera, that I have identified in the submission.

The reasons why the United Kingdom has gone down that path are fairly clear. It all stems from their adherence in 1966 to an agreement to the compulsory jurisdiction of the European Court of Human Rights, and the right of individual petition by citizens of the United Kingdom to that court. Having done that, the British then found, as we all know, that people were actually exercising that right, and a lot of findings against Britain were made by the European Court of Human Rights.

That was humiliating to the British; it was expensive and inconvenient for individual citizens in Britain who wanted to pursue these claims to a breach of the European Convention, and for British officials, all of whom had to go to Strasbourg to deal with these things, and they wanted to avoid that inconvenience.

And finally, there was a feeling in Britain, as I understand it, that they did not have all that much confidence in a lot of the judges on the bench in the European Court of Human Rights at that time, and they wanted to get English judges to make decisions about the proper interpretation of the European Human Rights Convention, and try in that way to inject some British jurisprudence into European human rights jurisprudence. All those factors are operating, and that I think is at least a partial explanation of why the British set up this system.

But it came - it will come - because of course it has not commenced yet and we do not know what the experience is going to be, but I suspect it will come at a fairly high price in relation to the operation of the court system in Britain.

CHAIR: In your oral opening remarks, and also in your written paper, you have expressed concern regarding the possible impact on the High Court of too many cases ending up there and overloading the judiciary. I am just wondering in terms of a New South Wales Bill of Rights, if such were ultimately to be enacted, whether litigation would in fact get to the High Court. Do you think they would encourage the hearing of matters at that level, given that at that stage presumably New South Wales would be the only State to have a Bill of Rights? Would it be more a case perhaps of the court of appeal here in New South Wales having the problem of being overloaded?

Mr McLELLAND: I do not think the High Court would be able to resist it. There are two temptations, I suppose, for ultimate appellate courts. One is, as I think one of the Canadian judges that I quote in my papers says, it is a great temptation to try and cure all ills that the court becomes aware of in the course of litigation, and the other temptation is that courts, like any other institution, I suppose, have a tendency to try and enlarge their own powers.

I suspect that at least some judges of the High Court would welcome with open arms the opportunity to make a contribution to this area of law, even if it just came from New South Wales. But whether that be so or not, if that is wrong and if the High Court in effect washed their hands of New South Wales Bills of Right jurisprudence, the same problem is going to occur in the court of appeal.

But I think the most likely situation is the High Court will regard even just a New South Wales Bill of Rights, if it for example were based on an international covenant as is contemplated in the terms of reference, as having such an international significance that they would regard it as quite proper for them to assume control of it.

CHAIR: You just referred to the international covenant on civil and political rights; would your objections to a statutory Bill of Rights in New South Wales extend to an amendment of the Interpretation Act of this State that would require due deference, to use a general expression, to be given to the provisions of international human rights instruments to which Australia is a party?

Mr McLELLAND: That raises an important question, I think, Mr Chairman. Traditionally courts have to interpret legislation, and interpretation of legislation is traditionally, again, finding out what is the meaning that was intended by the legislature as is revealed by the words they have used in the context of the Act and the surrounding circumstances. There are various provisions of the New South Wales Interpretation Act which expand and define the matters which the court can have regard to, to try and find out the intention of the legislature in that sense.

When one comes to the question of interpreting legislation to accord with a Bill of Rights, I think it is necessary to draw a line between using the provisions of an international instrument or Bill of Rights, however you may define it, to try and discover the intention of parliament when the legislation was enacted on the one hand, or on the other hand using the international instrument, or whatever, to impose a meaning on the legislation which was not intended by the parliament, but which nevertheless gives greater effect to the international instrument.

Now in the latter of those two processes you are departing from the traditional role of the courts interpreting legislation, and getting close to a border between interpretation on the one hand and prescription on the other. This is particularly significant in the United Kingdom provision, which has a very strong interpretation provision which says, in section 3 of the *Human Rights Act*, "So far as it is possible to do so, primary legislation and subordinate legislation must be read and given effect in a way which is compatible with Convention Rights".

That formulation departs from the question of intention of the parliament.

In using the phrase "so far as it is possible" one raises the possibility of whether, assuming words have an ordinary and natural meaning in legislation but given that meaning they do not accord with some provision of international convention, whether that means the courts have to somehow stretch the meaning or add unexpressed qualifications or in effect depart from the legislative intention in order to accommodate consistency with the European Convention.

That problem of how you apply the British interpretation provision there has been the subject of some academic discussion in a journal called *Public Law* in the last couple of years and those articles point out some real difficulties in applying what is said in the British section.

Similar difficulties have been raised in relation to the New Zealand interpretation provision which is not expressed in such strong terms but says in section 6:

"Wherever an enactment can be given a meaning that is consistent with the rights and freedoms contained in this Bill of Rights that meaning shall be preferred to any other meaning."

The question is does that mean any other meaning even though it is clear from the context that that other meaning was not the meaning intended by Parliament?

Again there are questions being raised in New Zealand, does that mean that one is simply authorised to depart from the legislative intention and in effect substitute the criteria of the Bill of Rights? The answer to that has not yet been given in New Zealand as far as I know but what has been canvassed are such propositions as stretching the word "meaning" to mean any possible interpretation even though it is far fetched or adding qualifications which were never intended and certainly not expressed.

So in answer to your question that sort of problem arises and I see no difficulty in an interpretation provision which says in effect, in interpreting legislation the courts may take account of international covenants to which Australia is a party or whatever so long as they are not required to give effect to them and so long as it is clear that although they can take account of such things, nevertheless what they are looking for is the legislative intention, that is the intention of the Parliament that passed the bill. That latter situation is more or less what now obtains at common law. Of course courts can look at international instruments, they do not have to apply them but they can look at them.

Just in this connection there is a fairly salutary provision in the *New South Wales Interpretation Act* which is worth noting, it is section 34(3). Section 34 deals with the use of what is called extrinsic material in the interpretation of Acts and statutory rules. After saying what can be looked at, sub-section 3 says:

"In determining whether consideration should be given to any material, or in considering the weight to be given to any material regard shall be had in addition to any other relevant matters to:

this is the important one:

(a) the desirability of persons being able to rely on the ordinary meaning conveyed by the text of the provision, (taking into account its context in the Act or statutory rule and the purpose or object underlying the Act or a statutory rule and in the case of a statutory rule the purpose or object underlying the Act under which the rule is made), and

(b) the need to avoid prolonging legal or other proceedings without compensating advantage."

In other words, there is a strong value recognised in that provision for people being able to read an Act of Parliament and see that it fairly clearly in its ordinary and

natural meaning means something and to know 'Well, that is what it says and that is how it defines the rights and obligations which affect me as a citizen.'

The more you have to go to other material such as international covenants and so on, the less likely it is that the ordinary reader of the legislation could understand what it means. It is important that people do understand Acts of Parliament when they read them and that is one of the motivating elements in the movement towards the use of clear English in Acts of Parliament, which is an important Constitutional value in itself.

CHAIR: At the beginning of your paper two of the principal reasons you enunciate in opposition to a Bill of Rights are the proper role and relationship of Parliament and the courts and also you refer to the creation of uncertainty in the law.

I mentioned to you in informal conversation before the hearing commenced that one possible initiative that could be taken, other than creating a statutory Bill of Rights would be if the legislature itself were to have a scrutiny of bills committee along the lines of the Commonwealth Senate model.

Would you agree with me if that were to happen human rights would be kept within the realm of the legislature and although a certain amount of legal uncertainty undoubtedly is created every time a statute is enacted in a sense such a Committee would be watchful to explore and avoid, one would hope, the types of ambiguities that might otherwise occur regarding questions of legal rights.

Could you just make a general comment for the benefit of the Committee whether you think that that might be a mechanism that would resolve the types of difficulties you see with a Bill of Rights?

Mr McLELLAND: None of the criticisms that I have made would affect a proposal of that kind. My personal view is that such a committee would be able to perform a very useful function because, as you say, it would be within the parliamentary process which is the proper forum to investigate these matters. It would be a busy committee I think, but Members of Parliament are used to being busy. But as a concept I would certainly think it would be a worthwhile step to take.

(Short adjournment)

Mr McLELLAND: Could I just add one matter to the question you asked me about the *Interpretation Act*. I made reference to the New Zealand provision, it may help the Committee if I give you a reference to a discussion paper about the New Zealand experience which at the end deals with the interpretation provision and its possibilities. It is by a man called Michael Taggart, a Professor at Law at the University of Auckland, it is called *Tugging on Superman's Cape, Lessons from experience with the New Zealand Bill of Rights Act 1990*; it is published in 1998 Public Law, starting at page 266.

CHAIR: Thank you very much. The Committee will certainly obtain that reference and we will read it carefully.

The Hon. P. BREEN: Mr McLelland, I was interested in hearing your views about the British experience with regard to Strasbourg and the European Rights Court.

Is it the case that in Britain many of the judges were using European law anyway in British courts and in fact there is an author Murray Hunt who in fact listed the number of occasions when judges were referring to European law in British decisions and that created a greater impetus for incorporating European law than perhaps exists in Australia; there is less inclination in Australia I think to have recourse to international law than perhaps existed in Britain. Would that be your experience?

Mr McLELLAND: I do not know the answer to that question but I suspect that what you say is probably right, but I have not made a study of that to be able to answer it from my own reading.

The Hon. P. BREEN: If that were the case it would provide a greater impetus perhaps in Britain to incorporate the European convention and certainly a greater impetus than currently exists in Australia?

Mr McLELLAND: It could well, yes.

The Hon. P. BREEN: On the question of individual rights, I was interested to hear you say earlier that your objections to a Bill of Rights concentrated only on values treated as rights and that on a different plane, I think you said, is a right that forms the basis of government, such as democratic rights. Do I take it that there are some rights that you would like to see incorporated or entrenched in the system such as democratic rights, voting rights?

Mr McLELLAND: Yes, there are.

The Hon. P. BREEN: Are there any others besides voting rights?

Mr McLELLAND: Well, yes I think that the conduct of elections and the rules that govern them, the integrity of the electoral rolls, in other words the mechanical processes that produce a democratically elected Parliament, seem to me to be not only important as they undoubtedly are but capable of clear expression, thus avoiding the vagueness and uncertainty which I dislike, and the combination of their significant importance in the structure of Government plus their ability to be expressed clearly seem to me to lead to the conclusion that they should be clearly formulated and entrenched in the New South Wales Constitution.

The Hon. J. F. RYAN: Mr McLelland, I was only just thinking though that I recall being present at the Court of Disputed Returns when there was a lengthy debate as to what constituted a tick or a '1'; I don't about clear expression.

Mr McLELLAND: I suppose one has to say that it is impossible to avoid all conceivable uncertainty. I think probably in the future, not too long distant, we will be pulling handles on computers.

The Hon. P. BREEN: Certainly my experience in being a member of this parliament is that whilst parliaments are anxious to recognise the right to vote, they are not always so anxious to recognise the right to stand for election, and in my view often impose certain barriers to standing for election that I do not think were ever

contemplated by the international principles they are supposed to represent. Do you have a view about that?

Mr McLELLAND: It is not something that I have thought about, so I do not have a considered view about it. It seems to me that there is at least a prima facie case to permit any citizen to stand for election. Whether the prima facie case can be overwhelmed by other considerations I am just not sure, but that is one's instinctive reaction.

CHAIR: Could I just ask you, Mr McLelland, about the right to vote. As I understand it, what you are suggesting is that it may well be appropriate to provide for the right to vote, not by way of a Bill of Rights but in a statute dealing with that matter, which this parliament can entrench. However, are there not difficulties in that regard? When one contemplates the right to vote, issues occur such as, for example, at what age should one be given the right to vote? Is it eighteen, is it twenty-one, is it seventeen, or some other age?

Another example that could be given is ought prisoners, or certain classes of prisoners, be disentitled to exercise their right to vote. Compulsory voting would be another example. What would you have to say to that? I suppose in a way it is an illustration of a point made in your paper, that an aspirational objective really glosses over a number of individual circumstances.

Mr McLELLAND: It does, but when I say that I think it is appropriate that the right to vote be entrenched in the New South Wales Constitution, I do not mean a sentence saying "There should be a right to vote". It would have to be spelled out, and sorts of considerations like whether prisoners should share that right, is a matter which would have to be decided before the enactment of the right. In other words, these problems should be faced in advance and dealt with.

I think in Canada prisoners do have the right to vote; I think all citizens have the right to vote. Now whether that is a good thing or a bad thing I do not know, but whoever formulates this, and the legislature that considers it , will have to make that judgment.

I think there are strong reasons why prisoners should not have the right to stand for parliament, just reverting to Mr Breen's question, but there again that, and perhaps other considerations, need to be contemplated and dealt with. Really the only point I am making is that that sort of right can be expressed in specific terms. Just what those specific terms end up being would depend on the resolution of problems of the kind that you have just raised.

The Hon. P. BREEN: Do you have a view about the right such as the right to equality, whether any Bill of Rights ought to include that right?

Mr McLELLAND: Next to the due process clause, I think the equal protection of the laws clause in the 14th Amendment of the United States Constitution has caused more difficulty than any other. As a concept everyone agrees with equality, but equality and liberty cannot both be pursued in any absolute terms.

As soon as you legislate equality, you restrict liberty, because if people have liberty to do whatever they may want to do, within limits, then they have liberty to treat other people unequally. They have liberty, for example in their right to enter into contracts, to produce inequalities, and if it became an obligation of the government through its parliament to legislate so as to produce equality, it would necessarily have to impinge on other people's liberties.

The way that the question is often formulated is whether "equality" should mean formal equality, which is easy enough to achieve, subject to one matter which I will mention in a moment, that is the laws simply apply as they are expressed, and all people are affected by them in the same way. That has a simplicity and an appeal which does not lead to too many problems.

But then one has what has been called "substantive equality", but formal equality sometimes produces substantive inequality. If you have a law that applies to everybody in the same way, because of the circumstances affecting different people, or different groups of people, the ultimate effect is to produce inequalities.

It is that sort of consideration that leads to the problems about affirmative action, which the United States Supreme Court has been grappling with for about the last twenty years, and has not yet produced a satisfactory solution to. You may recall a case of *Bakke v University of California,* where the university said "So many places at this university are reserved for minority groups, particularly Blacks or Hispanics".

Bakke, who was in neither group, who was as far as I know a white Anglo-Saxon, said "This has not produced equality; my grades are better than the grades of people who you are proposing to allocate under this provision, and it is discriminatory against me to exclude me, who is better qualified, simply because you are reserving so many places for minority groups". The Supreme Court invalidated that particular provision, and said "you have got to admit Bakke; he has shown he is a better qualified person".

That was the first of the modern cases on the subject, and there have been all sorts of other permutations and combinations of that sort of thing, but not yet has there been any satisfactory resolution of that question, how it fits in with the equal protection of the laws provision.

As soon as you start trying to give effect to substantive equality, there is no limit to how deep down into the differences between people you are obliged to go, to find out whether ultimately they are going to be equally affected by a particular law, to other people who do not share those circumstances, or not. So it opens up a complex and difficult area of social enquiry, to try and preserve substantive equality.

The other argument that is often raised in relation to equality rights is that most of the things that parliaments do when making laws, is to draw distinctions between different kinds of people. People who earn more than $50,000 a year have to pay a higher rate of income tax. People who live in a particular area have to bear the burden of an expressway going past their front door. Everything that happens potentially has a different ultimate impact and effect on different kinds of people, in all sorts of ways, and by reason of all sorts of characteristics.

It is a concept which sounds good in principle, but it is extraordinarily difficult to find some overarching rationale which would solve problems of that kind.

The Hon. P. BREEN: I am not encouraged by the prospect of a Bill of Rights that you might formulate, including the right to equality, but I can see that it would include voting rights. Is there any other right, or group of rights, that you would consider important to entrench or to somehow create a benchmark for in the legal system?

Mr McLELLAND: As I have said, the rights that can be expressed in terms that are reasonably precise and able to be applied without too much uncertainty, I have no problem with. Another one, I think I may have adverted to in my submission, is the provision in the *International Covenant on Civil and Political Rights* prohibiting capital punishment. Well, that is clear and precise. I do not see any problem in introducing something like that into a Bill of Rights.

That just happens to be one of the very few of that international covenant that is clear, and does not involve the uncertainty and the vagueness to which I have referred.

The Hon. P. BREEN: We have heard evidence from other witnesses, including Professor George Williams, to the effect that there may only be eight or ten rights that are generally accepted, or that is, are non-controversial rights. If we were able to formulate a Bill of Rights that consisted of those non-controversial rights, and presumably they would be rights that came out of the *International Covenant on Civil and Political Rights*, would you see that as not creating too much disturbance in terms of how you see the system of the ideal Bill of Rights?

Mr McLELLAND: I suspect that Professor Williams' eight or ten non-controversial rights are rights which I regard as highly controversial. I assume one of them is freedom of speech and expression?

The Hon. P. BREEN: I would think so.

Mr McLELLAND: Another one might be the right to life?

The Hon. P. BREEN: No, he suggests that we do not include the right to life. But what about rights of freedom of speech and expression? What is your view about those rights?

Mr McLELLAND: I think that in paragraph 2(a) of my submission I have actually dealt with that. I say:
"Consider for example the relationship between 'freedom of speech' and potentially competing values or interests of the following kinds:

- the protection of personal privacy, confidential information (such as trade secrets or budget proposals or security arrangements), commercial or personal reputation (against malicious falsehoods), and the fairness of trials;

- the prohibition of criminal conspiracy, incitement to crime, extortion, blackmail, threats of violence, and discrimination against (or vilification of) particular community groups;

- the regulation of advertising (injurious to children, or of dangerous goods or substances), product labelling, professional advice and offers of financial securities."

All of which are other values which must limit, one would imagine, freedom of speech and expression, and I am sure there are others.

Now it so happens that in Australia the values of freedom of speech, and of the press, and of expression, and certain other values such as privacy and the right to a fair trial, are recognised by the common law as important values, and of course they conflict. One of the areas of conflict which has been studied is the conflict between the freedom of the press and the right of an accused person to a fair trial.

There is a paper which is referred to in footnote 2 of my submissions by someone called O'Callaghan, called *The United States Experience of Unfettered Speech and Unfair Trials: A Case Against an Australian Bill of Rights*, which was in the Australian Law Journal in 1998, which is an interesting comparison of how the High Court of Australia has sought to reconcile those competing values to reach an accommodation as a matter of common law, on the one hand, and how the United States Supreme Court have dealt with those two rights, both of which are recognised in the United States Bill of Rights, on the other.

In other words, both courts have had to try and balance and accommodate them and reach some ultimate view and the result has been that in the United States the right to freedom of the press and free speech has almost completely prevailed over the right to a fair trial so that in the United States it is very difficult to do anything about press reports in advance of a criminal trial, highly prejudicial to the accused person, simply on the basis that there is a right of freedom of the press and it should not have to defer to the right to a fair trial.

On the other hand, in Australia the opposite conclusion has been reached, that the freedom of the press, the right to free speech or the value of free speech, I should not call it a right, should defer to the value of ensuring a fair trial for an accused person and that is why Derryn Hinch went to gaol for a few months in Melbourne a few years ago for publicly broadcasting the previous criminal convictions of someone who was on trial for a particular offence.

That is just the way that different cultural and national traditions have dealt differently with the balancing of that particular duo of values and once you introduce freedom of speech or freedom of the press as a statutory right you transpose the value into a right, then you are in grave difficulties if there is another statutory right that is in direct conflict with it or even if there is not, if there is a community value that has not got itself into a statutory form in a Bill of Rights it is still a community value, but a statutory expressed value is going to trump the unexpressed value because it has the effect of a statute.

I would suspect that the eight or ten rights that you refer to, apart from the right to vote which I assume is one of them?

The Hon. P. BREEN: Yes.

Mr McLELLAND: Will all be of that kind and one thing that expressing values as rights does is to allow rights to trump public interest considerations and to allow the selected rights which are expressed to trump unexpressed values which may well be equally as important but for one reason or another have not found their way into the Bill of Rights.

Once you put something in statutory form there it is and it has got the force of statute and therefore under our system it prevails.

The Hon. P. BREEN: I have two further questions, Mr Chairman, if I may. Your submission refers to transforming values into rights and you have just explained very lucidly what you mean by that.

One of the other submissions that we have had was from the NSW Council of Churches who argued that human rights "themselves possess no intrinsic, ethical or moral content whatsoever" whereas in your submission you have said that human rights "are essentially broad statements of social values". There is this question whether human rights do represent social values, as you seem to suggest, or whether they do not have any intrinsic value at all, according to the NSW Council of Churches.

Mr McLELLAND: The expression "human rights" has a history. I think that expression was first used in the present context in the Charter of the United Nations but what it was intended to mean was rights which are inherently there simply because of the humanity of the individual to which they attach. In other words, they are inherent in humanity or a human person, that is why they are called human rights, and historically they are a continuation of the tradition which I think probably commenced with the idea of natural law and natural rights, it is the same sort of idea.

If one goes back into medieval times and works out what were regarded as natural rights then they usually have a fairly religious content but the tradition continued from medieval times through the enlightenment period when a lot of the religious content was eliminated in the 18th Century and they became the rights of man and so expressed in the French Declaration of the Rights of Man and the Citizen and encapsulated by Thomas Jefferson as including the right to life, liberty and the pursuit of happiness, all natural rights that anyone must possess simply because you are a person, except no doubt black slaves at the time.

But I think that the expression 'the rights of man' then went out of favour with the realisation that it could exclude women, as no doubt it was originally intended to do in some circumstances, and I think it was probably under the influence of that sort of consideration that natural rights having become the rights of man then became human rights but it seems to me it is all the same tradition. But once the expression human rights came into use through the United Nations Charter and subsequent international documents, it seems to have expanded from that original concept to include much more than rights that simply attach to someone because they are a human being and embrace all sorts of other rights which many people think are good values to espouse universally. I think that is how they come to have absorbed all these political rights and civil rights and economic and social and cultural rights, in other words the expression whose history is related to natural rights has now expanded into a much more wide field.

It is very difficult to define now what one means by a human right and it has become a kind of cant phrase which has an emotional appeal. It is very difficult to otherwise identify by some clear criteria.

The Hon. P. BREEN: Finally then the question of whether any of those rights, human rights as formulated in the international covenant, if they were incorporated into our legal system we have heard evidence that that would make the system less controversial, there would be less conflict which is contrary to what you foreshadow in your submission and indeed the Public Interest Advocacy Centre suggested to the Committee that in their view anyway there would be less court cases as a result of the bill of Rights than more. Would you agree with that?

Mr McLELLAND: No. I think that is a view which does not stand up to critical examination.

The Hon. P. BREEN: Do you say that because of your experience of the Canadian system which you have outlined earlier, and your reading of the Canadian system in operation?

Mr McLELLAND: I say in part that is the case but also deriving from my experience as a judge of the Supreme Court dealing with legislation which is expressed in broad value-laden terms and observing the effect that that has had on litigation in this State, and I refer to some of that legislation in my submission, but there is a lot more of it and I refer to particularly the Contracts Review Act and Trade Practices Act and the Fair Trading Act. Not that I say that the effect of all that legislation is ultimately bad, but whether it is good or bad one of its effects has been to expand enormously the number of cases, the length of them and the cost of them and the general volume of litigation to an extraordinary extent.

There are many statutes for examples empowering courts to do what appears to them to be just and equitable, that sort of vague statement sometimes is necessary to give a sufficiently wide discretionary power but there is no question that the effect of them is to increase litigation and the cost and duration of litigation.

So it is based on my own experience, extrapolating my experience in that sort of context from uncertainties that the courts have to somehow give effect to, plus the literature of experience in other places that I have referred to.

The Hon. J. F. RYAN: Mr McLelland I would be interested in your response I suppose to questions which are part of our Inquiry but I suppose they are a little more philosophical rather than a discussion of the black letter of how a Bill of Rights might be interpreted.

One of the points often made by people who argue for a Bill of Rights is that rights in Australia are not adequately protected and essentially the Bill of Rights is intended to be a mechanism whereby some level of minimal access to human rights is achievable. Quite often the people who put forward that point of view usually have a fairly broad list of instances where they believe that human rights are not protected, even in a country as progressive as Australia, and the sorts of examples that they give, the imprisonment of Albert Langer for offences against the Commonwealth electoral

laws and I think he was imprisoned for failing to vote or refusing to vote, mandatory sentencing in the Northern Territory.

CHAIR: Pardon me. I think Langer was gaoled for advocating an informal vote.

The Hon. J. F. RYAN: Advocating an informal vote, that is right, and the capacity of the Commonwealth Parliament to pass racially discriminatory legislation and then perhaps more closer to home, since we are considering features of New South Wales, the provision of water supply in places like Toomalah(?) or the access of Aborigines to medical attention for eye disease or the right that people with disabilities might have to move around our community via access to adequate transport and to access various schools.

Some would say that they are good examples of where human rights even in our community are not protected. Do you believe that there is adequate protection for human rights in our community or do you have alternative ways in which those issues might be better addressed other than the Bill of Rights?

Mr McLELLAND: Well, I am quite sure that there are injustices flowing from our laws in our community, of one kind or another, and in many cases they are injustices flowing from lack of parliamentary attention to the cause of them, but recognising that, I vehemently maintain that the cure is not to have these wide ranging value statements enacted as laws. The cure is, when such injustices are identified then to pass a law dealing with it specifically.

That is of course what has happened in relation to discrimination on the subject of the various anti-discrimination Acts both in the Commonwealth and the State field. Bear in mind also that there is no way by way of Bills of Rights or anything else, to make a perfect society. There are practical limits to what can be achieved by laws.

I have not considered all the particular examples that you have quoted, but I suppose the critical point is, once injustices that can be in practical terms cured by passing a law are identified, then it is the duty of the relevant parliament to pass that law.

When I say we cannot have a completely ideal society, a number of the instances that you have cited, I suspect, would require for their remediation the expenditure of considerable public funds. The inadequacy of resources to do all the things that a government might want to do is notorious, and unfortunately there is no cure for that. One of the main responsibilities of governments and parliaments is to allocate resources among all the conflicting demands that community values and particular policies produce.

I think it is living in fantasy land to think that simply by enacting such things as these wide ranging values, one can by a stroke of the pen, cure these problems. It is just not possible in a practical world.

The Hon. J. F. RYAN: Perhaps I might focus then on mandatory sentencing, because I think that is a fair example of a place where that particular failing of human rights, in two States in this country, continues not as a result of any failure to get attention by the political system, but one might say it was a failure of the political

system, because what was seen to be popular, and the will of the people, was something that ultimately wound up offending a reasonable human rights value, which was that you should not be imprisoned for some trivial thing where you might even risk your life.

I think the purpose of the Bill of Rights is to have some sort of overriding and immutable description of values that is able to integrate with those difficult positions in which politicians find themselves, where what the community wants is not necessarily what all of us might believe.

Mr McLELLAND: I agree with what you are saying, but in response to it say this, that I have no doubt that there are instances one could think of where the existence of an enforceable and constitutional Bill of Rights could prevent injustice of that kind, and in many other cases. But you cannot have that without all the other effects which I have identified.

This is really a matter for the Committee to evaluate, as to whether to provide against the odd situation of the kind that you refer to, one should risk doing the damage that would eventuate from that particular solution to the problem. My own view is, it would not justify it.

Others may take different views, but it is really a matter of evaluation of risks and benefits, and the good things and the bad things. My own view is it is wrong in principle, for the reasons I have indicated, and it leads to practical consequences which are destructive in many respects.

The Hon. J. F. RYAN: Is it possible mandatory sentencing might in fact fall into the category - you talked about the right to vote, for example, being a reasonably simple and precise area whereby lawmakers might in fact entrench that right - does mandatory sentencing involve any complications that would make it difficult to simply state and entrench as a right, that is, a protection against a mandatory sentence?

Mr McLELLAND: Yes, I do not see any particular problem with doing that. It is capable of precise expression. What you would have to consider is whether it may not have unintended consequences. You would have to formulate it, "No court shall be bound to impose any sentence except that which it considers appropriate to the offence in the circumstances at the time". If you had a provision along those lines, then I do not see any structural reason why that could not be incorporated in the Bill of Rights without problems.

I think it illustrates one of the points I was making earlier, that where there are specific injustices of that kind, then they can be dealt with specifically, and should be. But that does not justify overriding general statements that are intended to deal with everything, all at once.

The Hon. J. F. RYAN: In your submission you make a fairly strong case that a Bill of Rights might create a level of uncertainty in the law, and you refer specifically to section 42 of the *Fair Trading Act* and the *Contracts Review Act 1980*, as representing "a dramatic shift from principle to the palm tree", if I may quote you.

It could be said that whilst some of these provisions have to some degree created some uncertainty in the law, could it not also be argued that they represent

developments which make the law more just? Similarly, a Bill of Rights may lead to increased uncertainty in the law, but might this not be a small price to pay for the end result, which is a greater protection of human rights?

Mr McLELLAND: Well as I said, it is a balancing and evaluating process. Just taking the *Contracts Review Act* as an example, it has produced a great deal of uncertainty and proliferation of litigation. It has also produced the ability to produce justice in many individual cases, where justice could not otherwise have been produced.

In that particular instance, on balance I think it is a worthwhile provision. In relation to that provision, that is the view that I would come to.

But I do not utilise that example as an example of a law that should never have been passed; I simply utilise it as an illustration of the fact that introducing uncertain laws has a down side, a substantial down side of that kind. Whether the down side is justified by the up side is a matter of assessment.

I must say, I cannot say the same for section 42 of the *Fair Trading Act*, which I think is a very unfortunate provision to enact in the first place. I do not think it added anything to justice, or the beneficial effect of the trade practice or fair trading law, in its application to civil proceedings between ordinary parties. It may be justifiable as giving rise to some criminal sanctions or other penal consequences, but so far as concerns interfering with the contractual relations between parties to commercial contracts, I think it has been a disaster, but that is another subject.

The Hon. J. F. RYAN: In a couple of places in your submission you argue that a Bill of Rights would have an impact of politicising the judiciary, and you put a very strong case with regard to the selection of judges in the United States to some extent almost on their view as to how they stand on cases like *Rowe v Wade*, and abortion. I would be interested to get your response to a point made by Justice Rosalie Abella of the Ontario Court of Appeal, which she made here in Australia, where she said:

"Insofar as the sifting of legal choices is the sifting of policy values, judges, in interpreting law, do consider and always have considered, in addition to logic and precedent, the values or policy implications their legal conclusions represent. All the *Canadian Charter of Rights and Freedoms* did was to allow public policy to come out of the judicial closet and participate more openly in the policy partnership which courts and legislatures have, in reality, been parties to for centuries."

I suppose what you are saying is that to a limited extent, judges already make political decisions; what a Bill of Rights might do is to provide some benchmark whereby they go about making those decisions?

Mr McLELLAND: So far as benchmarks are concerned, there would be very few people or judges who, presented with a provision of a traditional Bill of Rights as a proposition expressing value, would disagree with it, and most provisions in Bills of Rights would be expressions of values which judges and legislators, and anybody else, would share.

I think that there has been an extraordinary exaggeration in public discussion of the extent to which judges are lawmakers of a kind which I think was probably being

referred to in that extract which you just quoted. Certainly the common law, which is the law developed by judges, contains values. It must; that is how it got formulated.

But there are very substantial restraints on what a judge can do in relation to the common law, which could be put in the category of law making. First of all, judges' core function is to resolve disputes between parties. They have a duty to state reasons for the decisions they reach. The consequence of that is that where the law applicable to the dispute is doubtful or uncertain, then their duty to state reasons for their decisions requires them to state what they regard the law to be, and that is how the common law gets developed.

In the great majority of cases the law is not in doubt or in dispute, but in the small minority of cases where it is, then judges have to adopt traditional methodology to resolve the doubt, and to state the general proposition of law which the judge regards as governing the particular facts.

The judge does that by looking at first of all the relevant precedents, and generalising from them by a process of inductive reasoning, generally, and if the facts of the incident case are sufficiently analogous to facts of other cases which have produced a consistent line of results, then it produces a general principle of the common law which is available to be applied, but to do with the novel or uncertain case there may be two or more different principles which can be arrived at by a process of induction.

The judge then has to decide which of them should apply to the instant case and normally that is a process which will involve consideration of accepted community interests and values, like freedom of speech and privacy and all the sorts of things that we all think are part of our culture and the terms of any legislation that may bear on it and so on, and arrive at a result so that if there are two conflicting lines of authority the judge will tend to apply that one which produces what to the judge seems to be the most just result in cases in that category.

Of course judges of courts other than the ultimate appellate court are bound by decisions of higher courts so that their discretion is limited to that degree. Judges of the highest courts, let's say the High Court of Australia, are bound first of all by the fact that there are seven of them so individual idiosyncrasies are filtered out to some degree.

Secondly, they are very much aware of the legal tradition which they are in. They are aware of the fact that the validity of the reasoning by which they reach a result is going to be subjected to analysis all over the country by academics and by other courts and judges and so on. They must be aware that they should not intrude into fields that ought to be reserved for legislatures. They have to realise that the ultimate authority of the courts rests on the confidence of the community generally, so that they cannot be seen to be producing results except by logically coherent means of reasoning and no doubt there are other aspects but all those considerations restrict to a very large degree what people refer to as judicial law making. It is referred to sometimes in the press as if judicial law making was somehow equivalent to legislative law making whereas it is an entirely different and much more restrictive process.

Another element in it of course is that when judges formulate a rule of law to apply to the case before them they are applying it retrospectively to the facts of that case and that again is a limiting function. They cannot be too adventurous because the

mere fact that a law is formulated which was not law when the facts occurred which they are dealing with is itself an injustice so they must be very careful to reduce as much as possible injustice of that kind.

So all those considerations are practical and theoretical restrictions on the way that judges can apply public policy and values.

To use an Americanism, it is a different ballgame altogether when one comes to balancing the sorts of values in a Bill of Rights, in effect it is open slather. I think it is wrong in principle to try and justify one by reference to the other as appears to have been done in that quotation which you read.

The Hon. J. HATZISTERGOS: Mr McLelland I was not here but I understand you indicated in some remarks that you did not oppose an *Interpretation Act* amendment which might allow the courts to consider the provisions of international covenants as an aide to interpretation as distinct from being binding upon the courts.

I was just interested whether you feel that there is any downside to such a proposal, that is if the *Interpretation Act* was amended in that way so as to allow courts to look at international covenants as an aide to interpretation?

Mr McLELLAND: I do not think it would require any amendment to the *Interpretation Act* to allow courts to do that, they can do that now. What I would object to is any requirement that courts conform with international covenants in interpreting legislation and the reason for that is that the primary purpose of interpretation is to discover the legislative intention which may or may not accord with some international covenant. But as simply a piece of material which they can if they think it appropriate take into account, I have no quarrel with, except for what I did mention before, the possibility that once the extrinsic materials which govern interpretation become too extensive then the citizen who tries to work out what his legal rights are by reading an Act of Parliament becomes unable to do so intelligently because he does not know what all these external things, like international covenants, what effect they may have on what a court ultimately says is the meaning of that expression. In other words, Acts of Parliament should be intelligible to people who read them without having to resort to a whole range of external, possibly conflicting material.

The Hon. J. HATZISTERGOS: The question I wanted to ask you is, in relation to the need for a Bill of Rights there are a number of countries and communities where Bills of Rights do exist to regulate their affairs and if I might say so a number of them seem to have arisen in circumstances of meeting particular interests and values of that community.

I am talking about countries which have particularly unique problems such as Canada with its Anglophile and Francophile communities; South Africa with its white and black population and even to some extent I think in Northern Ireland where there is a religious divide between the Catholics and the Protestants which has necessitated some rights to be incorporated into their governing law.

Would you accept the proposition generally that in all advanced democracies of which I think New South Wales might be considered to be one, there is even less need

for a Bill of Rights than in communities where it may have been imposed for the purposes of settling particular unique problems in the make-up of those communities?

Mr McLELLAND: I do agree with that and I agree with the proposition that when one examines the history one can see particular conditions of the kind that you have identified as very influential in the adoption of particular Bills of Rights. The only country in which that does not seem to be the case as far as I can see is New Zealand.

The New Zealand Bill of Rights seems to have been the brain child of William Palmer who was I think the Prime Minister that followed Robert Muldoon.

CHAIR: He was the Deputy Prime Minister.

The Hon. J. HATZISTERGOS: No, he was Prime Minister.

CHAIR: Was he? I apologise.

Mr McLELLAND: He seems to have been advised by a number of people who had graduated from American law schools; he was attracted to the Canadian Charter. The Government produced a White Paper suggesting a constitutional Bill of Rights for New Zealand, like the Canadian example, which simply did not get enough support from elite opinion to make it a goer. So as a kind of second best he then persuaded his party to support and introduce into Parliament the statutory Bill of Rights which ultimately was passed, but it was passed as a party political measure against opposition, not only opposition from the Opposition but opposition from within his own party.

So the New Zealand Bill of Rights hasn't got the same sort of history as the others have, it was a kind of gratuitous matter that was the brain child of Palmer. I think another strong influence on it was it fitted in with the philosophy of the then President of the New Zealand Court of Appeal, Sir Robin Cooke, who was strongly in favour of judicial activism in relation to legislation and I think a proponent of the idea that courts could invalidate legislation anyway on fundamental grounds, a view which has certainly been rejected in Australia, that is that if you have a legislative power to make laws for the peace, order, and good government of New Ssouth Wales then a court in extreme circumstances can say well this law just is not for the peace, order and good government of New South Wales.

So apart from New Zealand I think there are historical reasons for each of the other counties that have Bills.

The Hon. J. HATZISTERGOS: Just following on from that, you would be aware that in the last Federal election I think there was a referendum held in the Northern Territory to consider self-government which failed and it was considered to have failed for a number of reasons and that is because of the significant minority Aboriginal population which feared the consequences of allowing the immature Territory Parliament to govern the affairs of that particular community and was a significant part of the opposition to the referendum.

In a case such as that, I am not necessarily saying in that case, but in a case such as that is a Bill of Rights something that could resolve the tension that might exist between minorities and majorities?

Mr McLELLAND: Historically that has been the reason for the adoption of Bills of Rights, as I think I mentioned earlier, in places like Nigeria which was one of the first British colonies to become independent after the War, and many other African nations, and I think the Republic of South Africa and Canada and because of culturally different groups of people to try to instil a sense of national unity.

As to the Northern Territory, I do not know enough about the situation to really comment on whether it would work there, so I do not really think I can answer your question in its terms.

CHAIR: Mr McLelland, thank you very much indeed for your patience with us this morning and thank you for your earlier submission.

Mr McLELLAND: Thank you, Mr Chairman.

(The Committee adjourned at 12.35 p.m.)
