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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 Wednesday 2 August 2000

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The Committee met at 10.00 a.m.

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PRESENT

The Hon. R. D. Dyer (Chairman)

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

LARISSA JASMIN BEHRENDT, Post Doctoral Fellow, Law Program, Research School of Social Sciences, Australian National University, Canberra, affirmed and examined:

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

Dr BEHRENDT: As an individual.

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

Dr BEHRENDT: Yes, I did.

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

Dr BEHRENDT: Yes, I am.

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

Dr BEHRENDT: I have a degree in law and a Bachelor of Jurisprudence which I earned from the University of New South Wales. I have a Masters Doctorate from Harvard Law School and I did my studies particularly on indigenous rights protection. I practised in the area of family law, native title and land claim work in New South Wales as a solicitor and I am currently a member of the ACT Bar. I have written extensively on Aboriginal legal issues and I am a member of the indigenous community.

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

Dr BEHRENDT: Yes, it is.

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

Dr BEHRENDT: I just want to pick up a few points of my submission and emphasise a couple of matters. I begin by actually saying that I do not see a Bill of Rights as a cure for the legal issues facing indigenous Australians but I think it is certainly a very important prong of a multifaceted approach and strategy for protecting indigenous rights. I also want to perhaps talk a little bit about how I came to this conclusion from my experiences.

Actually I was not a great proponent of a Bill of Rights and, having spent time studying in the United States, I became more convinced that an entrenched constitutional Bill of Rights had many disadvantages. I became very aware of how minority groups such as African Americans and native Americans had fared particularly badly under a Bill of Rights as it was entrenched in the United States Constitution. From my experience of living in the United States, I thought the way in which rights—such as the First Amendment right to free speech and the right to bear arms—could become quite entrenched in the people's day-to-day thought processes in a way that did not to suit the society I came from. I thought it was a particularly bad model.

However, having subsequently worked in Canada with the First Nations communities and having seen developments in Australia, I actually changed my opinion about a Bill of Rights per se, even though I maintain my criticisms of the constitutionally entrenched model. I would like to point out those two experiences. One of the reasons why I thought that a Bill of Rights was never going to be an important issue for indigenous Australians was that we have legislative protection of rights such as the Racial Discrimination Act which has offered quite good protection. I was actually assuming that we would never in my lifetime see it become acceptable for the community that I thought I lived in to think about repealing such Acts.

With the development of our native title rights regime and the discussions around the Native Title (New South Wales) Amendment Act—when it was actually suggested, and subsequently enacted, that parts of the Act would be repealed—I became particularly concerned about that and I re-thought my position about those provisions being enough, considering that members of the community lost very valuable rights at that point. The other occurrence that made me really re-assess that point was the case of *Kruger v The Commonwealth of Australia*, which was the 1997 stolen generation case.

As the Committee is probably familiar, members of the stolen generation and a parent who had lost a child under a Northern Territory ordinance brought a list of claims to the High Court setting out a variety of implied and expressed rights that they thought had been violated by a policy, including things like the right to religion and the implied right to freedom of movement. By a majority—though there was some dissent among members of the High Court—none of those rights was found to have existed in the plaintiffs. I think that, symbolically, the case shows how our Constitution leaves issues of rights to the Legislature. It really highlighted for me the fact that there are big holes that should be addressed and that in some ways our standards do not come up to the society that we perhaps think we have.

The second point I would like to make is that aside from the improved rights protection that would be contained in a Bill of Rights, I believe that a Bill of Rights could provide a couple of other very important functions outside of legal ones. I think it gives indigenous people a language with which to articulate grievances. I think that the stolen generation probably again offers a very good example of that. People feel that they have been deeply hurt by the policy that has been unfair and unjust but perhaps they do not have a language with which to express what has happened to them outside very emotive ways which indicate to sympathetic members of the public what has actually occurred. But when people can actually describe that in terms of rights' infringement such as impinging on the right of due process or rights to equality before the law, it becomes a much more powerful statement of what has actually been suffered by those individuals. I think it actually provides a very important communication language.

The second aspect of a Bill of Rights that I think is important outside the strict legal context is that I think it will increase public debate around is use and will encourage discourse and a great heightening of understanding. I think we saw this in relation to the Native Title Amendment Act when there was a suggestion of overriding the Racial Discrimination Act and people could directly identify that there is a particular right being infringed and that that perhaps did not sit well with their sense of community standards, which allowed a lot more discussion of that particular aspect of the legislation.

Further I would like to emphasise that I believe very strongly that a Bill of Rights should be in a legislative form that can be overridden and by the express intention of the Legislature. I think this will allow us the flexibility that we need to continue to define and develop rights to suit our standards. If the committee looks at rights that we have acknowledged as being part of our society for a period, such as the rights to free speech, we have developed within our society ways of tempering those rights. We believe that they should be tempted by the laws of defamation and racial vilification and I think it is desirable to keep the flexibility of process that will allow asked some type of dialogue to be able to define by our own standards what those rights should be.

When the Legislature seeks specifically to overturn those rights, I think this will also allow debate to occur in the public arena in a way that will raise a flag and invite the public to discuss whether or not they feel that that is an acceptable incursion upon those rights. I think that is a very important process. I think it also allows that dialogue to take place in the public arena rather than leaving it behind the closed doors of the judiciary.

The last point that I would like to emphasise and which I have made in my submission is a really important one and that is in regard to the protection of indigenous rights. I think it is important that there be some direction with the legislation in relation to the notion of equality and freedom from discrimination that those principles be judged by the notions of substantive equality, that is, by the outcomes and not just the formal processes. I feel particularly strongly about that. I think we have a history within our community of living under laws that are supposed to apply equally for all Australians but give disparate impact and results to our communities.

The Royal Commission into Aboriginal Deaths in Custody is probably the best example of an analysis of the way that seemingly neutral laws can impact disproportionately in our communities. I think it is very important from that perspective to have some aspirational comment that looks at those outcomes rather than just a mere formal application. I would really stress that as an important element.

CHAIR: Dr Behrendt, are you able to illustrate for the Committee how a Bill of Rights in other jurisdictions might have advanced the rights and the position in society of indigenous peoples, perhaps both in a negative and a positive sense?

Dr BEHRENDT: I think probably my own experience and experiences with which I have some familiarity relate to the situation in Canada. I will use that because I think it has probably been a more positive experience than has been the United States of America, where a Bill of Rights does not seem to have much relevance to native Americans. They certainly were not engaged in embracing the principles of a Bill of Rights in the way they saw their communities being affected, but I think that Canada is a very different example and perhaps much more akin to our own legal system anyway. There are common law areas in Canada. It is not all covered by treaty and they have similar native title developments in the common law where they have relied on Mabo. Canada is quite a similar jurisdiction to Australia so I think the differences between Canada and the United States are quite stark.

Canada had a very long process of a legislated Bill of Rights before it had an entrenched constitutional process. Canada's experience showed very importantly that having that kind of mechanism creates a very different culture within society in relation to what people understand their rights to be—even if the mechanism is in legislative form and open to being overturned by the Legislature—and the way that they discuss their rights. I think that that is quite an interesting difference between the Canadian public and the Australian public in general. I think that had enormous trickle-down rights for indigenous people. Bills of Rights are supposed to protect to vulnerable people within the community and indigenous people disproportionately fall within those parameters. I think having principles such as non-discrimination as part of the basic assumptions of the community has been quite important.

In Canada it was particularly successful in that by the time there was constitutional entrenchment of rights there was a specific right that you may be familiar with: section 35 (1) of the Constitution Act 1982 gives protection specifically to Aboriginal treaty rights. They are affirmed and recognised under the Constitution, so they have that protection. If we proposed that kind of protection here in Australia it would be enormously difficult to have people think that that would be something that we would find easy to live with. It would really polarise the community. But it was relatively uncontroversial in Canada because there was a very different emphasis and appreciation of rights.

CHAIR: You made it clear in your opening remarks that you are in favour of a statutory rather than an entrenched Bill of Rights. One of the judicial officers who has made a submission to this inquiry has categorised bills of rights. He calls the New Zealand model a bare statutory Bill of Rights and he categorises the British model as a fortified statutory Bill of Rights. He points out that the United Kingdom legislation is to be interpreted so far as possible in a way which is compatible with the European Convention on Human Rights. Do you have any particular preference as to a model of a statutory Bill of Rights that Australia should follow?

Dr BEHRENDT: Given the distinctive nature of our society and our very different issues, perhaps the best way to approach a Bill of Rights is to find a model that will take the best of the models that are around rather than modelling too distinctly on one. The New Zealand model is attractive because it seems minimalist and uncontroversial. It is easier to read that the English model. From my experience in the United States and Canada I think that Australians have a very different idea and we have very different developments of different rights. The racial vilification one here is something that has not occurred in other jurisdictions.

I think that people would accept that has been one of the standards that we embrace in our community. We have issues to do with indigenous people that are not being thought about in England. There are too many elements in our society that make the models of other jurisdictions not easy to fit in here. But in terms of the flexibility that they offer, a model that gives the legislature the ability to

overturn or not apply a provision by expressly stating in another piece of legislation that these decisions can be reviewed by the judiciary and the law nullified so that the legislature can come back again and pass it or change it, however it needs to, to make it fit in is probably the best model. It gives the flexibility that is desirable for our society.

CHAIR: In your initial remarks you referred to the Racial Discrimination Act. There are at least six or seven New South Wales and Federal statutes such as the Racial Discrimination Act of the Commonwealth and the New South Wales Anti-Discrimination Act 1977, all of which, as their titles would imply, set down certain rights in regard to non-discrimination. Not only are the courts in a position to interpret and in some cases enforce those statutes, there are in many cases advocacy bodies such as the Anti-Discrimination Board to facilitate the implementation of the provisions of those pieces of legislation. Why in your view is that a less than satisfactory approach when one compares those individual statutes with the possibility of an overall Bill of Rights?

Dr BEHRENDT: A Bill of Rights is desirable even though there are these other protections. Certainly indigenous people have been able to utilise them in certain circumstances and have been quite effective; I do not dispute that at all. The advantage of a Bill of Rights is that even though technically it would have the same value as other pieces of legislation I think that there is something much more aspiration all about a Bill of Rights that does psychologically elevate it above those different statutes. I also think that bringing it together in one document is an important exercise in terms of having something that people can embrace and refer to.

I do not think it hurts either if there is a danger of breaching the Anti-Discrimination Act that the legislature has to be specific about overriding those pieces of legislation as well as the legislation that contains the Bill of Rights. I do not think that there is any harm having two mechanisms to do that. So in terms of the way in which it would help improve the dialogue within the community and to help educate people about their rights those two functions are really important. A Bill of Rights would go much further than those other pieces of legislation.

CHAIR: A moment ago you used the word "aspirational" in terms of a possible Bill of Rights. Some of the witnesses who have appeared before this Committee have seen that as a problem in terms of uncertainty in the law; in other words that objectives in a Bill of Rights are often expressed in generalised or aspirational terms. Could you tell the Committee what your response is to criticism that a Bill of Rights containing such generalised provisions promotes uncertainty in the law, which many would see as undesirable?

Dr BEHRENDT: There are two aspects to that aspirational approach. There are certainly rights that you could not put in a Bill of Rights unless they were aspirational, such as the right to education. They would become incredibly problematic. In my submission I stuck specifically to the individual rights in the International Covenant on Civil and Political Rights because they are much easier to determine and defined than the more aspirational rights. But there are other ways of providing for aspirations within a Bill of Rights that would not necessarily mean that you had to articulate them as part of the rights that you would put in. For example, you could have a preamble that could list those very general aspirational rights that might be more difficult to list as protected by the Bill of Rights which would allow some interpretive mechanism if it was desired by judges to employ them but would then maintain it as part of the aspirational nature of the document.

Even fairly straightforward rights that we have spent a long time defining such as the right to free speech—we have had many years of trying to determine the tensions between other rights and that particular right—give rise to expectations within people's minds that regardless of how within the legal system you might define a particular right, the community in general when they are seeking to improve their society will, in an aspirational way, seek to push those rights forward. Perhaps native title is an example of that. The courts had defined it very narrowly but indigenous people have a very different idea in their mind about what the right actually means. I do not think that you can get away from the aspirational nature of rights anyway. The dialogue about what they mean is really important in society. Perhaps the difference between the way the judiciary or the legislature interprets them and what people think is an important dialogue for us to be having.

CHAIR: The right to free speech has been cited as an example by some critics of a Bill of Rights of the difficulties that arise in specifying a right in general or aspirational terms. As you will be

well aware, the right of free speech is not absolute. It is cut down or qualified by countervailing considerations such as the law of defamation, the law relating to racial or other forms of vilification of minorities, and the law relating to criminal conspiracy as another example. What do you say to those critics in terms of the balancing that undoubtedly occurs as between a generalised statement of a right and the clearly necessary countervailing considerations such as I have mentioned?

Dr BEHRENDT: That is why it is undesirable to have the rights entrenched. It is very desirable to have these rights recognised as being important but to have the mechanisms in place whereby we can continue to define those rights through the very processes that we have already developed. The advantage of the legislative model is that it gives the flexibility to continue those arguments as to how we balance these rights against other rights that might compete or conflict with them. I would take it as a very strong argument against an entrenched Bill of Rights but perhaps one that does not limit the usefulness of the legislative model. If you did not have a Bill of Rights you would still be having those same tensions taking place outside in society when we tried to balance these rights against each other. The judiciary and the legislature undertake that process every day. By having it in a legislative context you elevate its importance to the society and engage more people in the debate as to how that balance takes place.

CHAIR: In your submission you say that you would recommend to the Committee that it should consider treating the contents of the International Government on Civil and Political Rights as core rights and the substance of the other main convention, the International Covenant on Economic, Social and Cultural Rights, as rights to be considered in the interpretation of those core rights. How do you see that working in practice?

Dr BEHRENDT: It goes back to the point I was making. The ICCPR has rights in it that are clearly recognised as being individual rights and in a legislative Bill of Rights in a pragmatic sense they are much easier to include and discuss and attempt to go through a process of defining. Many of the rights included in the International Covenant on Economic, Social and Cultural Rights have more of a community base to them. They are more amorphous. They are good aspirational rights but it would be quite difficult, at least as far as I can see, to legislate them into effective rights that people could then have remedies to.

However, as a country we have signed on to both of those conventions. Both then form part of the things that as a society we have said that we aspire to. It is probably workable to then have, if there are articulated rights in a Bill of Rights, those individual rights that we have also engaged in more. You will see in litigation that people have actually raised that they have the right to freedom of movement, the right to free speech, and the right to political association more than these rights to education and services. I think that is a good way of balancing those two different types of rights, to have one that becomes those core rights that people can have remedies to and to have the others perhaps mentioned in the context such as in a preamble in which they could merely re-emphasise the values that we had to give some guidance to how other rights should be implemented.

CHAIR: During this inquiry we have gained the impression that there is a good general understanding of what a Bill of Rights involves in the legal profession and in sections of academia. However, in general society outside that is certainly not so much the case. This Committee is just completing an inquiry into crime prevention through social support. During that inquiry we visited various country centres in New South Wales including Dubbo. Among other things we met with representatives of the Aboriginal community. I well recall that during the meeting at Dubbo the concern that was expressed to us by some of the Aboriginal people present was that in their perception the convention on the rights of the child undermines parental authority. Can you advise us of any strategies regarding the indigenous community or other communities outside specialised communities such as the legal profession and academia where a general awareness of human rights would possibly be raised?

Dr BEHRENDT: The issue that you highlight is one of the things that perhaps we can remedy to some extent by having a legislative Bill of Rights that would promote dialogue within the broader community and take some of the debates that occur in academia and in the legal circles a bit further. Hopefully there would be some trickle-down effect to help people become better acquainted with what rights they have. I think bodies like ATSIC, the Human Rights and Equal Opportunity

Commission and various State boards have a really important role to play in assisting indigenous communities to become aware of those rights.

In the first report of the Social Justice Commission Mick Dodson wrote substantially about educating Aboriginal people about their rights as an important function of the Human Rights and Equal Opportunity Commission. He developed some strategies, which may be helpful to look at. I also think that one of the reasons why these rights become amorphous is that we have not seen any example of them being implemented. Once that happens I think people will take them a lot more seriously. Native title is probably a good example of that. There is a general lack of awareness within the community and the indigenous community about what is and is not in the Constitution.

I remember visiting Redfern Public School and talking to kindergarten students and students to year 6 not long after the Mabo case. They all knew about the Mabo case and about native title and what it meant. When these rights actually become more of a reality people will get a better sense of what they entail. While they remain amorphous and they are contained in things like international documents and they are not clearly part of our legal system, people will not have a sense of what is contained within them, especially as there is also debate within academia and legal circles about those issues.

CHAIR: A body calling itself Australian Lawyers for Human Rights recently gave evidence to this Committee. It expressed the view that a Bill of Rights should apply to both public and private bodies. It argued that the most satisfactory resolution of the issue would be to do away with the distinction between public and private power altogether. I told the representatives that I had little difficulty with that so far as it might relate to the question of private bodies exercising public power. There has been an increasing trend towards the privatisation of public functions, as you are aware. However, I also told them that I have great deal of difficulty with the more sweeping application of the view that there should be an entire abolition of the distinction. Do you have any view regarding the application of this principle to private bodies?

Dr BEHRENDT: I agree that, with the changing nature of the delivery of government services, there is a privatisation of many public utilities and services. Corporations themselves are changing as more members of the community are becoming shareholders. They are also becoming more democratic. There are issues raised there. But the public-private distinction becomes incredibly difficult in relation to drawing a strict line. Destroying that line is probably not the best option. Perhaps a more cautious approach might be the better way to proceed on this quite difficult issue. I think that a Bill of Rights that applied to public bodies, or even to private bodies that provided public services—public bodies that tendered to deliver public services that found themselves bound by this statutory Bill of Rights—would probably be the best way to start.

I hope that, as a Bill of Rights becomes part of our legal landscape in relation to those public bodies, it would raise an awareness of how other bodies and corporations might be infringing on those rights. It might give people a sense of heightened scrutiny of those issues. A Bill of Rights would make them aware of their rights in relation to those issues. We would want to ensure that perhaps a private prison was bound by a Bill of Rights if it was delivering those services. I think that would be something that would in some ways make a legislative Bill of Rights ineffective if it could not get into those basic areas where human rights are quite vulnerable. I think a line should be drawn between public and private bodies. Those are the sorts of things that you should consider when you think about where that line should be drawn.

CHAIR: I ask you to comment on an often expressed criticism of a Bill of Rights on a generalised basis, that a Bill of Rights involves the judicialising of essentially a political function. In other words, that judicial officers, under a Bill of Rights, essentially can often be required to determine what is, in essence, a political, social or economic question.

Dr BEHRENDT: Having lived in the United States I have seen that phenomena quite a bit. There is a stark contrast. Even teaching first-year law students I have been surprised to find how many do not know the current members of their Supreme Court. Even members of the general public in the United States would be aware of some of the members of their Supreme Court. It would be a particularly problematic issue if a Bill of Rights was entrenched in the Constitution because the courts then become the last arbiter of how that should be interpreted. Implementing a bill of rights

legislatively that allowed most of the discussion to take place by the elected arm of government would be one way of decreasing the amount of onus that is put on the court.

However, I think it is also a bit simplistic to say that we do not now have a politicised judiciary when judges are political appointments. Many members of the courts have been appointed because their political views have been in sync with the government at the time. I think particularly from an indigenous perspective appointments that have been made to the High Court have been very political in nature and perhaps have been based solely on the areas of indigenous rights. It is quite naive to think that the political nature of judicial appointments does not already exist. I think a Bill of Rights would put the emphasis back on the Legislature which, under the Constitution, has been given the role of determining those rights.

The Hon. J. HATZISTERGOS: Following on what you said, are you suggesting the judiciary is appointed with an agenda?

Dr BEHRENDT: People have clearly been appointed to the High Court on the basis of a political agenda.

The Hon. J. HATZISTERGOS: What is your view on a Bill of Rights? You seem to vacillate in your submission between an entrenched Bill of Rights and a legislative Bill of Rights in relation to the best form of protection for native title and the interests of indigenous people. Which one are you actually supporting?

Dr BEHRENDT: I think that a legislative Bill of Rights is the best way to offer that protection. At the end of the day what is likely to happen with that sort of legislative Bill of Rights? I hope that it will change the nature of the society that we live in and make us more tolerant of those rights. You could then get a situation where maybe one or a few of those rights could be entrenched in the Constitution.

The Hon. J. HATZISTERGOS: In the article of which you have given us a copy entitled "Righting Australia" you talk about various experiences. You indicated that the problem with a legislative Bill of Rights is that it leaves it up to the whim of the Legislature if it subsequently wants to change it. You indicated that you were against the American experience.

Dr BEHRENDT: I thought that the Canadian experience was good.

The Hon. J. HATZISTERGOS: You said that, when you came here and observed the changes to the Native Title Act, you then became an advocate of a Bill of Rights because you thought that was a way of protecting indigenous rights. You said in your article:

> The best way to do this is with a specific constitutional protection like the one provided in the Canadian Constitution Act 1985.

Dr BEHRENDT: That is a specific constitutional entrenchment. I think that would be most desirable, but I think that I have already indicated that I think it would be politically unachievable in this day and age. Aspirationally I would like to see a Bill of Rights that engaged public debate in the way that I have mentioned—in the way in which I think a legislative Bill of Rights can do—that in some ways replicates what happened in Canada where you get as a whole a community that is much more aware and educated about rights protection that may eventually lead to that sort of constitutional protection.

The Hon. J. HATZISTERGOS: Let me understand your submission as I am still a little puzzled at the moment. You did not like the United States experience. You thought that Canada had something to offer. You came back to this country and you felt that, in light of what happened to the Native Title Amendment Act, your perspective of a Bill of Rights had changed. Because of that single instance you now favour some form of a Bill of Rights in Australia?

Dr BEHRENDT: I was not saying that that was a single instance. I think it was really a point of culmination. I always thought that the Racial Discrimination Act was inadequate protection of indigenous rights. I think we saw that in many instances. The thing that really shocked me was the fact that I thought I lived in a country where the principle of non-discrimination was given and that

nobody would ever think of repealing the Racial Discrimination Act. That is what made me question that.

The Hon. J. HATZISTERGOS: That is a political issue. We are talking about a legal framework.

Dr BEHRENDT: It is a rights issue.

The Hon. J. HATZISTERGOS: What is stopping you from having a legislative Bill of Rights which is subsequently overridden by legislation? You have a legislative Bill of Rights that protects native title and then you have the Native Title Amendment Act which states that, notwithstanding anything in the legislative Bill of Rights, the Act is to prevail. What protection does that provide?

Dr BEHRENDT: I tried to stress in my introduction that I think this is a really important process. When that happens, as it happened with the Native Title Amendment Act, it is an issue that becomes part of the public debate. That is really important, even if it might not at the end of the day have led to those rights being protected. Ideally, of course, that is what you would want. I still think the process of alerting other members of the public to the fact that you are overturning a specific right because you have to go over the Bill of Rights really raises the awareness of the public as to what happens. The public debates that go on are really important. It is actually really difficult with these sorts of issues to untie the political issues from the legal issues. I think they are very intertwined. I make one other point that I think is important. I am not just talking about native title; I am talking about many other rights.

The Hon. J. HATZISTERGOS: That is the one that you focus on. But let us get back to the issue at hand. I do not know whether you were present for much of the debate, but there was a huge debate about the Native Title Amendment Act overriding the Racial Discrimination Act, which focused on the right sorts of issues. How would that be different to the sort of debate that you envisage would take place with a legislative Bill of Rights?

Dr BEHRENDT: I do not think that it would be any different. The point I am trying to make is that I think those kinds of debates are really important. Even if at the end of the day the right is overturned and as indigenous people we think that is really bad, the fact that we have a society now that debates those issues, that brings those issues out and has discussions about whether this is a good thing or not is a really important part of our democratic process. I think that making those debates become more important, even if at the end of the day the right gets lost, is a really important part of developing a general understanding of indigenous rights protections.

I think that that debate had an enormous impact on people who perhaps did not think much about indigenous rights before then, who perhaps thought, "I don't mind if Aborigines have rights, as long as it does not infringe on me." When you put it in that term, that the Racial Discrimination Act is being overturned, people got really interested or really concerned about it because they saw a fundamental right that they believed was being overturned in a very specific instance. I think that a Bill of Rights would do exactly the same thing. I do not think that the outcome necessarily would be any different—I am not naive about that—but I think the debates are really important.

The Hon. J. HATZISTERGOS: You conceded that the debate may not necessarily be any different. What is to be achieved by having a legislative Bill of Rights, in that context that there is going to be a debate, it is going to be exactly the same and, to use your words, the outcome may not necessarily be different? What are we achieving?

Dr BEHRENDT: I think that the heightened awareness and the way that these things become debated are really important. I do not think you can really minimise the way in which you actually develop those consciousnesses in the community. Even if at that particular time it might not have meant that the native title rights was necessarily protected, I do not have any doubt that the fact that people begin to engage in the debate makes them much more aware of indigenous rights in future, and that can only be a good thing. I think it was a profound instance of where the debate becomes something that gives the rights much more support within the community, even if at the end of the day they are not protected.

CHAIR: Am I correct in believing that you attach considerable importance to the aspirational or symbolic aspect of a Bill of Rights?

Dr BEHRENDT: I think the educational aspect of it and the language it provides are all-important. As I said at the beginning, I do not think a Bill of Rights is going to be the answer to any of these problems. I think we need a multifaceted approach, with a broad range of other legal things to happen. But I do think that they are things that can be achieved by a Bill of Rights, and those dialogues, awarenesses and educational aspects are part of it.

The Hon. J. HATZISTERGOS: Let me move on to the form of the Bill of Rights that you envisage. Correct me if I am wrong. You envisage incorporating into domestic law provisions of international covenants as yardsticks by which our legislation is to be measured in terms of its human rights impact. Is that correct?

Dr BEHRENDT: The thing about the International Covenant on Civil and Political Rights that I recommended you look at—and I do not think that we need to import the international understanding of those rights into the domestic situation; I think that is probably undesirable. However, I think what that gives you as a starting point is recognised rights that we have signed onto as a country; we have said that they are important. I think they have become part of the rhetoric of rights that people continually use. There are instances of rights in that covenant where we, as Australians, have tried to tease out what we think those things mean, and I think it is a better starting point because of the individual nature of those rights than the other covenants that would be much more difficult to legislate.

The Hon. J. HATZISTERGOS: I want to focus on how you would bring it into force here. Would you incorporate those rights in the international covenants into a statutory Bill of Rights, in the broad form that they are expressed, and then leave it to the judiciary to determine whether a particular statute infringes those broad principles? Is that what you are envisaging? I do not want to put words into your mouth.

Dr BEHRENDT: At the risk of sounding fairly vague about this, I think we need to keep the flexibility that we have had in defining these rights for our own context, which we have had as they have been defined by the judiciary before. However, I think it is actually possible to define the rights a bit more specifically so that they perhaps reflect better our stance—for example, a right to free speech tempered by considerations of defamation and racial vilification. I think that is much more defined than simply the right to free speech, which gives you the ambit of how it is being used in the United States.

I think the advantage of the legislative process is that you could actually amend that when it became quite clear that there was some change in the way society has developed—for example, technological changes through use of the Internet; issues that might arise that would change the nature of the right to allow you to go back and say that. You could do that because, as the elected arm of government, you would have a sense of what the electorate had wanted and what people were saying when there had been some decision in the courts or some development that they were not happy with. I think it is really desirable to keep that flexibility. I do not think that it would be difficult to define the rights a bit more, to keep in line with those developments that we have already had and those recognitions and lines we have drawn already.

The Hon. J. HATZISTERGOS: Would not a better approach be to have statutes which deal with perceived rights and address the issues specifically, such as the Racial Discrimination Act, the Sex Discrimination Act, the Anti-Discrimination Act, and so on, which deal directly with the subject matter at heart and in a fair bit of detail, rather than having these broad statements, even refined as you suggest for domestic considerations?

Dr BEHRENDT: I do not see that there is any reason why a Bill of Rights could not define the statement that those rights in relation to how they have been more specifically defined in other areas, say with reference to those particular Acts so that you can incorporate them. I think that there is something important about the aspirational nature of the overall document of a Bill of Rights. As I said before, of course legally it has no different status than any other piece of legislation, however I

think it has a much more important aspirational purpose. Putting them together does give them a heightened status, and I think that is desirable. I do not think there is any harm in bringing those quite useful pieces of legislation together into one piece, even if it is by reference to the nuance nature of those pieces of legislation.

The Hon. P. J. BREEN: You referred to the case of *Kruger v. The Commonwealth*, and you said that one of the implied and express rights argued in favour of the plaintiff was held to exist in the Constitution.

Dr BEHRENDT: No. Some of them were not held to have been applied in that case.

The Hon. P. J. BREEN: I think that case also raised the issue of the 1967 referendum and whether the Aboriginal people were protected in the way that they thought as a result of that referendum. Is that correct?

Dr BEHRENDT: I think the issue was raised, as it was raised in the case of Hindmarsh, whether the racist power gave that ability to only legislate beneficially. Again, I think Gaudron was the one who gave the most attention to that. But the question was still, as in Hindmarsh, left fairly open, unanswered.

The Hon. P. J. BREEN: At this stage we do not really know whether the Commonwealth can legislate to reduce or diminish Aboriginal rights, and the question of whether that benefit provision exists is left in the air. Is that still the law?

Dr BEHRENDT: I guess that would be the status of the law, yes.

The Hon. P. J. BREEN: One advantage of a Bill of Rights would be to articulate those rights that apply specifically to Aboriginal people and would clarify the question of whether the New South Wales Government could pass a law which reduced or extinguished rights rather than benefited rights. Do you agree generally with that statement?

Dr BEHRENDT: To an extent. Given, unfortunately, that most likely it is the case that the Federal Government could, having a legislative Bill of Rights would not prevent them from overriding those rights if they chose to override the legislative framework that they have put in place. I do not think it would diminish those powers.

The Hon. P. J. BREEN: There is now the power for State governments to pass laws with respect to Aboriginal people. I think that follows the Wik decision. Do you see any potential problem, in New South Wales for example, that the government might pass a law that diminishes or extinguishes the rights of Aboriginal people?

Dr BEHRENDT: I think it is quite probable that that could happen. I would also like to emphasise the fact that, even though this power has been given back to State governments under the Wik legislation for Aboriginal people, there are many other ways in which State governments legislate which have an enormous and profound effect on indigenous communities that would also need to be perhaps considered as raising indigenous rights, even if that power were not there. I think that a legislative Bill of Rights that could hold some rights against which these pieces of legislation would have to be measured would be a positive step.

The Hon. P. J. BREEN: As a result of the Fitzgerald inquiry, the Queensland Government introduced a proposal for a Bill of Rights, which was circulated. It never became law, but it included a provision for the protection of Aboriginal rights. I will read that provision to you and ask you to comment on it. If you do not feel you are able to comment on it now, I am sure the Committee would be happy to take something from you in writing. Clause 41 of the Queensland draft bill provides:

> Aboriginal People and Torres Strait Islanders have the following collective and individual rights—
>
> (a) the right to revive, maintain and develop their ethnic and cultural characteristics and identities, including—
>
> (i) their religion and spiritual development;
>
> (ii) their language and educational institutions;

(iii) their relationship with indigenous lands and natural resources;

(b) the right to manage their own affairs to the greatest possible extent while enjoying all the rights that other Australian citizens have in the political, economic, social and cultural life of Queensland;

(c) the right to obtain reasonable financial and technical assistance from government to pursue their political, economic, social and cultural development in a spirit of co-existence with other Australian citizens and in conditions of freedom and dignity.

Do you see a provision of such as that in a Bill of Rights as enhancing the value of indigenous rights and improving the knowledge and understanding in the community generally about the specific and individual characteristics that apply to indigenous rights?

Dr BEHRENDT: I think that the recognition of those kinds of cultural rights, economic rights and self-determination would be incredibly desirable for indigenous people. I think it would be a very brave move for you to put it into a Bill of Rights. I think it would be incredibly controversial and would probably politicise the Bill of Rights a lot more, but I think from an indigenous rights perspective it would be incredibly desirable. I think it would go some way towards recognising articles 1 and 27 of the International Covenant on Civil and Political Rights. Therefore I think such a provision would be incredibly desirable.

I would also like to add that I think there are other provisions there that would be equally useful to indigenous people. For example, the right to due process and equality before law in relation to criminal justice matters would also be profoundly beneficial and would perhaps ensure that the New South Wales Parliament did not go in the direction of certain other States and Territories.

The Hon. P. J. BREEN: If a provision such as the one I read were too controversial and politicised the argument in an undesirable way, would you have in mind any other provision that might be introduced or included in the Bill of Rights which would not be so controversial but would have some educative value or indeed enable indigenous people to assert in the courts some particular rights?

Dr BEHRENDT: As you know, I aspirationally think specific protections are a good idea, as I mentioned in my article. I think pragmatically, though, if we are looking for solutions that can be achievable and that will have an impact on indigenous people, there are perhaps less controversial ways of doing that, such as the right to non-discrimination and equality before the law.

The Hon. P. J. BREEN: Without specifically mentioning indigenous people?

Dr BEHRENDT: Being aware of how much freedom of movement is a really important right to indigenous people. It was actually mentioned in the stolen generations case and for indigenous people like my father and grandmother who lived under the Reserves Regulations Act and the Aborigines Protection Board, the right to freedom of movement is something that they feel has been breached quite often and fundamentally. However, it might not be the first thing that people think of in relation to an indigenous right. One way to actually ensure better protection of rights that on the face seem to be neutral and to be rights for everyone is to ensure that there are interpretive provisions, such as substantive equality being the interpretive tool, ensuring that legislation applies equally and fairly and that outcomes are considered.

The Hon. P. J. BREEN: What about a broad one-line statement such as the rights particular to Aboriginal people shall be protected and other citizens shall respect and regard those rights. Is something like that out of the question?

Dr BEHRENDT: I do not think it is out of the question; I think it is a great idea. I really encourage you to go that path if that it is what you would like to achieve. The Canadian example is an interesting way in which that has become an entrenched right but one that is very workable in that it is an entrenched constitutional right to respect Aboriginal and treaty rights very broadly. The Canadian Government has recognised that that includes the right to self-government but it has allowed in its interpretation of the Act instances in which the Legislature is allowed to override that if it is balanced against the general public good. When there is that flexibility for interpretation one can do a better job of balancing those interests.

The Hon. P. J. BREEN: You said earlier that the courts define native title narrowly but that indigenous people have a very different idea about what is meant by native title. Could you indicate to the Committee the understanding of native title by indigenous people?

Dr BEHRENDT: I shall give two examples. I came to that conclusion because the Mabo judgment clearly shows very defined areas in which native title applies but when the Mabo judgment was handed down, most indigenous people thought they would be able to claim their land back when that clearly was not going to be the case. As native title has now been defined a bit more, many indigenous people think that the issue of land is inherently tied up with the issue of sovereignty and that the two are linked intimately. I think the court has been very clear that the two are not related or that it is not going to deal with them as though they are related. That is what I was trying to imply by saying that people take these rights aspirationally, regardless of how the courts define them. They pin their hopes on that rhetoric.

The Hon. P. J. BREEN: In evidence you suggested that people have a better understanding of native title rights as a result of the legislation, as is the case with the Racial Discrimination Act. The legislation was in place before many people actually focused their minds on the issues. In your view would a Bill of Rights have a similar effect? We have already noted that although there might be some ignorance in the community about what a Bill of Rights is, the implementation of the legislation itself would have some kind of cataclysmic effect in the sense that people would focus their attention on it and say, "What is this all about?"

Dr BEHRENDT: I would hope that that would be the case and I think that is also why there needs to be a flexible approach taken with the legislative model. As people become aware that the legislation is there, they can see that it has relevance to what they are doing in their own lives and those debates would expand. It is crucial to allow that heightened debate but to allow mechanisms with which to accommodate the outcomes and discussions that would hopefully result from the passing of such legislation.

The Hon. J. HATZISTERGOS: You recall I asked you a question about the nature of the public debate that might occur if there was a provision in the native title legislation that conflicted with another Act, such as the Racial Discrimination Act, and I contrasted that to a similar situation that might occur in the event of the Native Title Act conflicting with a statutory Bill of Rights. Would you not concede that perhaps one difference in the nature of public debate would be that in the first situation the debate would be much more focused, involving a more concrete context for the debate to occur, where the various interest groups knew the impact whereas in the second situation, that is, where there is a conflict with a statutory Bill of Rights, the debate would be much more theoretical and would raise more general principles of rights?

Dr BEHRENDT: I think it would depend on the circumstances of the debate and the context in which it was raised. I do actually agree with you that there would be certain differences in the nature of that debate. Another interesting difference about those two debates is that many Australians do not really think that the Racial Discrimination Act applies to them but that they are rights that apply to minority groups and Aborigines whereas a Bill of Rights is something that applies to all Australians and they may feel they have a vested interest in the outcome of the debates around how those rights are interpreted, even if indigenous plaintiffs give rise to those debates. I think you might get a much more inclusive debate around a Bill of Rights, even if it is an indigenous issue, because the public would see themselves as having a stake in the debate.

(The witness withdrew)

(Short adjournment)

ROBERT GARTH NETTHEIM, Honorary Visiting Professor, Faculty of Law, University of New South Wales, 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?

Professor NETTHEIM: I did.

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

Professor NETTHEIM: I am.

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

Professor NETTHEIM: I have been addressing issues of human rights, including indigenous peoples' rights, for about the past 30 years, possibly longer because I first did some work in relation to apartheid in South Africa, but certainly since 1970-71 I have been working on human rights issues generally, constitutional issues and issues affecting the rights of indigenous peoples, particularly in this country.

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

Professor NETTHEIM: It is.

CHAIR: If you should consider at any stage during your evidence that in the public interest certain evidence or documents you may wish to present should be seen or heard only by the Committee, the Committee would be willing to accede to your request. Would you like now to make a brief opening statement before we ask you any questions?

Professor NETTHEIM: I will. I begin by congratulating the Committee on conducting this inquiry. I think it is a very interesting idea and one to be encouraged for consideration of some sort of Bill of Rights under whatever name at State level. In recent times, of course, most of the attention has been focused on the desirability or otherwise of having some sort of Bill of Rights, preferably a constitutional Bill of Rights at the national level. However, these attempts over the years have failed. I am familiar with the initial attempt in 1973 by the then Federal Attorney-General, Lionel Murphy. There was a further proposal in 1983 and then the report of the Constitutional Commission, which led to four fairly modest proposals being put to a referendum in 1988. All of these attempts have gone down, so the auspices are not good.

I think there is a lot of wariness about a Bill of Rights at the national level and possibly also at State and Territory level in this country. One needs to take that into account and proceed fairly cautiously. So my proposals are fairly modest, which is to suggest that it might be desirable to start with a provision in the interpretation legislation of this State to endorse in fact what judges already do—that is, to state that they may make reference to international standards in instruments ratified by Australia in interpreting legislation—and to couple with that a statutory Bill of Rights, under whatever name, which does not necessarily spell the last word and is not necessarily judicially enforceable but leaves the ultimate word with Parliament. It would concentrate initially on a fairly limited classification of rights.

I think it would be wise to build on the international standards that Australia has ratified, particularly the International Covenant on Civil and Political Rights. As my submission states, the International Covenant on Civil and Political Rights has some legislative recognition and incorporation within Australian law. It is one of the instruments that is attached to legislation of the Human Rights and Equal Opportunity Commission. The Australian Law Reform Commission is required to tailor its recommendations in light of the International Covenant on Civil and Political Rights. In addition, the International Covenant on Civil and Political Rights corresponds very closely with the traditions and values of the Australian legal system, so I think it would be wise to start there.

Since Australia ratified the first Optional Protocol to that covenant it has been possible for Australians to bring communications to the Human Rights Committee established under that covenant. However, before such a provision is admissible, domestic remedies must be exhausted. There has not been a flood of applications or communications from Australia to that committee, but it could happen. At least two applications have been determined in a way that is adverse to Australia. Therefore, I think it makes a lot of sense to have domestic legislation within this country—preferably at a national level but certainly at a State level, as well or alternatively—that provides some sort of point at which a person who claims that his or her rights have been infringed by governmental action can seek a remedy and seek to ventilate those issues before the matter is taken to Geneva.

Likewise the proposal for a provision in the Interpretation Act will build on the practice of the courts. The Court of Appeal in this State as well as the High Court of Australia have in recent years accepted that it is perfectly legitimate for the courts in interpreting ambiguous legislation, and also in developing the common law, to take account of international human rights instruments ratified by Australia. This has already been done and it would be useful to clarify that that is a legitimate point of reference for interpreting legislation by inserting an appropriate provision in the Interpretation Act.

I would add such provisions as the possibility of bills going before this Parliament having a certification by the Attorney General that it appears to him or her that the Act is not in contravention of the International Covenant on Civil and Political Rights, or whatever other instruments are included. There should be provision for ongoing review by a parliamentary scrutiny committee and I suggest that it might be useful to have what some other submissions refer to as a watchdog role, vested possibly in bodies such as the ombudsman, the Anti-discrimination Board and the privacy organisation in this State. We have precedents for bodies with experience in this area and it may be possible to have some sort of education and conciliation roles vested in such bodies.

I would hesitate at this stage to have a provision that is judicially enforceable in the sense of spelling the total and permanent invalidity of any measure that fails to comply with such instruments that are referred to. I propose instead that, if there is a court determination that a measure—an Act of Parliament or an executive action—appears to be in conflict with the international human rights standards referred to, the Parliament should have a period of about three months in which to re-enact that provision if it is a provision of an Act of Parliament, and, if so, the Parliament would then have the last word. This would address the concerns of some people that the Bill of Rights would necessarily involve the transfer of ultimate political power from Parliament to the courts. The ultimate political power would remain with Parliament, but Parliament would consciously know that there was some sort of determination that there had been non-compliance with human rights standards before proceeding with the ultimate overriding legislation.

I was asked specifically about indigenous peoples' rights. If the International Covenant on Civil and Political Rights were given some sort of force, there are provisions in that covenant that are of direct concern to indigenous peoples. For example, article 1, which includes the right of self-determination, is of potential significance to indigenous peoples in this country. Article 2 contains the general provision that the rights shall be enjoyed without discrimination on the basis of race and other considerations such as gender. Article 27 is also of potential significance to indigenous peoples in Australia. These provisions have been interpreted by the Human Rights Committee in the context of individual communications to that committee and also in general comments issued for the guidance of States parties to that covenant from time to time. So there is some jurisprudence about the interpretation of those provisions.

In addition, it would be possible to include in the legislation, in separate legislation or in the constitution—as has happened in Canada—general recognition of Aboriginal rights and to set up a process to define those rights over a period of time. This was done in Canada in 1982. Section 35 of the Canadian constitution says "existing aboriginal and treaty rights are hereby recognised and affirmed". It set up a process for determining what those aboriginal rights—the treaty rights are fairly self-evident—were over a period of time. That occurred through a process of First Ministers' Conferences, which proceeded through the 1980s. They did not achieve a final resolution of the matter, but certainly the work of those First Ministers Conferences finally achieved some sort of recognition by governments in the terms of the Charlottetown Accord, which, together with a whole range of other issues, was put to the people of Canada in a referendum to change the constitution.

For various reasons—particularly involving the status of Quebec—those referendum proposals did not succeed but a consensus was certainly achieved as to what the right of aboriginal peoples in Canada to self-government within Canada might mean. I have the terms of that Charlottetown Accord with me if the Committee would like me to make a copy available. I propose not to entrench any sort of Bill of Rights provision in the constitution at this stage. I think the Canadian experience is relevant in this sense. In 1960 when I was living in Canada there was introduced by the Progressive Conservative Government under the leadership of the Hon. John Diefenbaker a statutory Bill of Rights—a Bill of Rights Act, which was an ordinary Act of Parliament.

That operated as an ordinary Act of Parliament for something like 22 years before the National Parliament under the leadership then of the Prime Minister, Pierre Elliott Trudeau, finally succeeded in getting various amendments to the Canadian Constitution, then called the British North-America Act of 1867. The legacy of that is that a generation of Canadians had the experience of addressing Bill of Rights issues which were not entrenched in the Constitution. A generation of students were taught about that. A generation of judges learned about them. A generation of Canadians learned about them, in the non-threatening context of a statutory Bill of Rights. That experience helped in the actual framing of the rights that were ultimately included in the Constitution.

So, I would strongly recommend that instead of trying to entrench those rights in the Constitution, although to a large measure the New South Wales Constitution is not entrenched, it might be better to keep them as separate legislation, that is if this Committee recommends legislation along these lines, over a period of, say, five years or longer and allow some sort of experience with the use of it, with the adequacy of language, with the adequacy of processes, and then have it reviewed at a period, maybe successive periods, before giving it higher status with some sort of entrenchment within the Constitution.

CHAIR: Thank you. Professor Nettheim, you have said in your written submission, and you have said to us just now, that you would not favour at this stage an entrenched constitutional Bill of Rights. You have gone on to refer to the Canadian experience. Some people who have commented on a Bill of Rights, such as Father Frank Brennan, for example, are trenchant opponents of a constitutionally entrenched Bill of Rights however they are equally supporters of a statutory Bill of Rights. Could I ask you, in your incremental approach on the Canadian model, are you specifying that for essentially pragmatic reasons or do you have any particular preference as between a statutory Bill of Rights and a constitutionally entrenched Bill of Rights?

Professor NETTHEIM: Two sets of reasons, I think. One is a sense of politics within Australia. A lot of people in Australia are very wary about the idea of a Bill of Rights, and I know one or two of the submissions put before this Committee expressed the reasons for caution, and I think they have to be respected. To get any sort of support for the idea of having a Bill of Rights it is better to proceed with a statutory Bill of Rights, which leaves the ultimate sovereign powers with the New South Wales Parliament within the context of Federation.

Secondly, I think there is a lot to be said for developing a Bill of Rights or some sort of recognition of rights at State levels in a progressive way so we have time with particular mechanisms. So many choices are available about how you define those rights, how you articulate them, what sort of mechanisms you have for protecting those rights or for reviewing them. I have seen some of the submissions put before this Committee and there are a lot of possibilities. If the Committee decides, if Parliament goes ahead with a Bill of Rights, it would be well to have something that allows us to learn by experience so that however human rights are to be protected within the State we have experience in seeing whether these definitions of rights would give rise to any unforeseen and unfortunate consequences. Then they could be tailored at a later stage to avoid the possibility. We could look at how processes are working and perhaps improve on those. So, I think for political and pragmatic reasons I would suggest caution and proceed along this track. Not only on the basis of the Canadian experience, because in recent times we have had non-constitutional bills of rights or human rights legislation introduced in countries by New Zealand and now, of course, the United Kingdom. I think they are proceeding along the same track. I think that makes a lot of sense.

CHAIR: Some people would say, though, that an entrenched Bill of Rights would never make a great deal of practical sense. They would rely essentially on the United States experience.

They would say that at the time the United States Constitution was put in place the founders and drafters of that Constitution could not have had in contemplation events that occurred in subsequent centuries. They would rely as a prominent example upon the right to bear arms. Do you think it is a legitimate criticism that no matter how carefully thought out a provision may be at a given period in time, that no-one can really confidently predict future events and circumstances in society and, to that extent, the flexibility offered by a statutory Bill of Rights is perhaps very much to be preferred to a constitutionally entrenched document?

Professor NETTHEIM: I would agree with that.

CHAIR: You referred to a possible amendment to the Interpretation Act of this State.

Professor NETTHEIM: Yes.

CHAIR: I put that to, among other witnesses, the Hon. Malcolm McLelland, QC, former Chief Judge in Equity of the State. He appeared to have no difficulty with the provision of that statute that entitled the judicial officers to go to international instruments.

Professor NETTHEIM: Yes.

CHAIR: However, to say the very least he had considerable difficulty—in fact, he was opposed—to any requirement that judges should be obliged to have regard to the provisions of an international instrument. He pointed out that judges are entitled as a matter of course these days to use extraneous materials, however his problem related to the requirement that they should have regard to any particular instrument, including international covenants to which Australia is a party. Could you comment for the Committee on what you have in mind in regard to such an amendment to the Interpretation Act?

Professor NETTHEIM: I have used the language in my very brief submission—I apologise it is so brief—to require courts to take into account human rights standards. That is simply in interpreting legislation and does not necessarily require that they give greater weight to the human rights standards over other considerations that are also relevant to inquire into, because courts are also able to take into account second reading speeches of the Minister and parliamentary debates. I thought there was no difficulty about having a requirement for judges to take into account human rights standards in international instruments. That is not problematic.

We could change the word "require" to "permit", and if judges were permitted to take into account human rights standards in instruments ratified by Australia, that would possibly dampen the concern some people might feel about that and may well match the occasion. There is not a great deal of difference between requiring and permitting. It judges were permitted to take these matters into account, I think lawyers increasingly might tend to raise these issues and the courts would take that into account in interpreting the legislation, but I think the court would ultimately make its decision on a range of considerations, which would include the instruments. So, although I have suggested an amendment to require courts to take into account human rights standards, I would not be particularly grief stricken if the ultimate decision was taken to amend the Act simply to permit judges to take those matters into account.

CHAIR: You say in your written submission that in relation to the provisions of the International Covenant on Civil and Political Rights you would favour associating both sets of rights within the one document.

Professor NETTHEIM: Yes.

CHAIR: That is, referring to the rights I had just referred to and the others contained in the International Covenant on Economic, Social and Cultural Rights.

Professor NETTHEIM: Yes.

CHAIR: However, you go on to say:

It might be safer to commence with the less controversial step of confining attention to the rights under the Covenant on Civil and Political Rights.

As you are aware, Dr Larissa Behrendt has been here as a witness earlier this morning. Her approach was to recommend to the Committee that it ought to consider treating the contents of the Covenant on Civil and Political Rights as core rights and the substance of the rights under the other convention as rights to be considered in the interpretation of those core rights. Do you think that is a viable methodology?

Professor NETTHEIM: It is an interesting methodology. My ultimate preference would be to have both sets of rights as equally significant. There was a big debate on this in the 1993 world Conference on Human Rights in Vienna. This was preceded by preparatory committee—prepcom—meetings in three regions of the world including, in our region, Bangkok. If you go back to the Universal Declaration of Human Rights, that was the original document that set out to give some sort of meaning and interpretation to what the United Nations Charter meant in its several references to human rights.

That single document, in which Australia had a major role in the drafting, included civil, political, economic and cultural rights, all within the one document. This was not an enforceable document in terms of the limited extent to which there is enforcement of the actual treaties and covenants, but it was the core document. The Commission on Human Rights that had done the drafting then set to work, after the declaration had been accepted by the General Assembly, to draft a covenant on human rights. That took some time. They produced the declaration in fairly short time. By 1948 it was accepted by the General Assembly. It took until 1966 until we had the two covenants agreed to.

There are various reasons why we ended up with two covenants rather than one. They related partly to politics and also to different considerations coming out from the different regions of the world. The western European countries tended to take the view that the civil and political rights were the important ones from their point of view. They had achieved greater recognition within the political and constitutional tradition of countries like France, Britain, the United States, Australia and so on whereas, it tended to be the old Eastern Bloc countries and the Third World that tended to place greater stress on economic, social and cultural rights and said "when we are able to feed and shelter our people we can turn to the comparative luxury of recognising people's civil and political rights". They prioritised economic rights in particular, and social rights, and said that civil and political rights should happen way down the track. That was one of the factors that led to the separation of the two sets of rights.

Another factor was that while western countries had experience of the civil and political rights being recognised by law to the extent of being justiciable and enforceable by courts, we had less experience with justiciable economic, social and cultural rights. Ultimately, it was partly for these political reasons, but also because there was a feeling that the civil and political rights should be immediately in force in relation to the State parties whereas the economic, social and cultural rights were things that could be implemented only as States reached a certain level of affluence so that they could afford to provide four weeks annual leave without pay, maternity assistance, education assistance for all, et cetera. Once in, there is a bit of a cross-over because some of the civil and political rights are quite expensive. For example, the cost of running an independent judicial system or the cost of running elections is quite expensive. Some of the economic, social and cultural rights are relatively inexpensive. These were the reasons we ended up with two sets of documents. If you look at article 2 of each of the two covenants you will find different approaches to implementation.

The rights under the International Covenant on Civil and Political Rights are meant to be immediately applicable, in force and operable whereas the rights under the International Covenant on Economic, Social and Cultural Rights are subject to what is called progressive implementation. States are obliged to take steps when resources permit. The tendency has been, because we have had two covenants, for the West in particular to give much greater strength and force to civil and political rights and not to take economic, social and cultural rights seriously. This has certainly changed and the thinking at the Vienna Conference where some of these issues cropped up again was that both covenants and both sets of rights should be regarded as interdependent and indivisible.

My preference would be to relate any legislation in New South Wales to both covenants. But, once again, because of the tradition, because of the history and because of political concerns, given the choice I would rather go with the civil and political rights at this stage and accept that the economic, social and cultural rights might be incorporated in some way at some later stage and that is the only basis on which I make a distinction.

CHAIR: Another matter you stated in your submission is that it would probably be wise to avoid any substantial recognition of group rights at the outset beyond those that are already acknowledged in the International Covenant on Civil and Political Rights such as the freedom of association and the freedom of religion, to give two examples. Can you tell the Committee why you are of that view? Is that a matter of tactics that you think it would be a venturesome and radical step to include group rights at the outset?

Professor NETTHEIM: I think so, yes—subject to what I have to say about indigenous peoples' rights. There are certain group rights recognised within the International Covenant on Civil and Political Rights. For example, Article 1 is the right to self-determination of peoples and to the extent that that is given recognition, that is certainly a collective right. The rights that I talk about, such as the right to freedom of association or the right to freedom of religion, are rights which are regarded as rights of the individual but they presuppose the group. They presuppose the other members of the religion and they presuppose the other members of the association or the trade union, or whatever it is, so that is a little different.

There are certain rights which Article 27 of the covenant recognises as group rights and those are the rights of members of minorities to their culture, et cetera. That is another group right which I think is sufficiently accepted to deserve recognition but I would not choose to go beyond that at this stage, particularly if we are just developing legislation for the State of New South Wales on a trial basis to see how it works out. It might be something that could be incorporated later if there appeared to be a need to do so. Yes, I think the Committee could pick up the group rights, or the individual rights which make reference to the group, which are already in the International Covenant on Civil and Political Rights but at this stage, once again because of my rather cautious approach, I would not go beyond that. But I might make an exception in terms of the rights of indigenous peoples.

CHAIR: One of the particular criticisms made of a Bill of Rights by Mr McLelland in particular was that uncertainty in the law, as he said it, is a substantial evil. In his view, a Bill of Rights essentially specifies aspirational objectives and, of necessity, it expresses those objectives in fairly general terms. Taking freedom of speech as an example, he pointed out that that has to be cut down by laws dealing with racial or other forms of vilification, the law of defamation, the law of criminal conspiracy and so on. What do you have to say in response to that quite frequently expressed criticism—that is, a bill of Rights is essentially expressed in general terms and takes away from, to put it in Mr McLelland's terms, the capacity of a lawyer to explain the law in a satisfactory and complete fashion within a solicitor's office without having to determine it before a judicial officer?

Professor NETTHEIM: I agree with what he has said—that most of the rights as formulated in Bills of Rights, human rights treaties or whatever, cannot be absolute. Sometimes you will get rights in national Constitutions—for example, the First Amendment to the United States Constitution which appears to be expressed in absolute terms. There have been some judges of the US Supreme Court who have taken an absolutist view on freedom of speech. Certainly, the majority view that has prevailed over the years has been that freedom of speech in the United States Constitution is not an absolute right. It is legitimately subject to certain incursions in relation to defamation and various other matters. If you have a look at the language in the Covenant on Civil and Political Rights, you will see that they expand the fairly broad language of the Universal Declaration of Human Rights and qualify it. If you have a look at Article 19 of the covenant, subsection 2 states:

> Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds ...

But it then goes on to state in subsection 3:

> The exercise of the rights provided for in paragraph 2 of this article carries with it special duties and responsibilities. It may therefore be subject to certain restrictions, but these shall only be such as are provided by law and are necessary:

(a) For respect of the rights or reputation of others;

(b) For the protection of national security or of public order ... or of public health or morals.

So the formulations which you get in the International Covenant on Civil and Political Rights accommodate in broad terms the sort of categories of opposing interests and rights and says that it is legitimate for a State to pass laws to restrict the right of freedom of expression provided that it does so by law and provided that the restriction is necessary for these particular countervailing interests.

There has been quite a body of jurisprudence built on that. I do not think we can attempt to define those rights in broad terms. If the Bill of Rights simply replicated or simply referred to the International Covenant on Civil and Political Rights, then one might look, as the Honourable Malcolm McLelland suggested, for greater articulation or greater specification of what that is. I think it would be open for the New South Wales Parliament, either in a Bill of Rights or in a series of specific Acts, to deal with and spell out, consistently with the covenant and its jurisprudence, what the details of freedom of expression are in the State of New South Wales.

CHAIR: Can I ask you for your response to the fairly frequently expressed criticism that a Bill of Rights essentially involves the judicialising of the essentially political, social and economic functions or, to put it another way, involves the politicisation of the judiciary?

Professor NETTHEIM: I think you could say that. That is a criticism that has been made with some justification of the experience in the United States. I do not think the Committee needs to follow that experience. I think you can avoid that by having a range of mechanisms which do not necessarily—and only in the last resort, possibly—require resort to the courts and then, on my proposal, you would not even give the judges the final word. What I would suggest is something like certification by the Attorney General as to bills coming before Parliament not being inconsistent with the terms of the Bill of Rights; consideration by a parliamentary scrutiny committee, and we are accustomed to scrutiny committees operating particularly in regard to delegated legislation; and a watchdog body, however that might be devised.

I know that some other submissions to this Committee have spoken about watchdog bodies. These are bodies which can be involved in keeping an eye on the general flow of what is happening in the State in regard to the subject matter of the Bill of Rights, engage in community education and then, when there is conduct which appears to be in breach of the Bill of Rights, try to resolve that through some sort of conciliation mechanism. Ultimately, if you are going to have a Bill of Rights, it is important to have a role for the judiciary to make at least a determination of the declaration—perhaps that a particular piece of legislation or delegated legislation or a particular administrative act is inconsistent with such-and-such a provision of the Bill of Rights. Then again I would not, on my proposal, let that be the last word on the matter. It might simply be a determination that there appears to be a violation. I would give the Parliament the ultimate power to re-enact legislation to avoid that.

CHAIR: The final matter that I would like to put to you is that recently a group of lawyers calling themselves Australian Lawyers for Human Rights made a submission to the Committee and gave evidence in support of their submission. One of the matters that was put to the Committee is that in their view, there ought to be an abolition of the distinction between public and private power altogether so far as a Bill of Rights is concerned. I told them that I do not have very much difficulty if that relates to the question of private bodies, corporations and others exercising what would once have been public functions which increasingly happens under the privatisation process. However, I would have substantial difficulty going beyond that. Do you have any view regarding what they were putting to the Committee?

Professor NETTHEIM: I did have the opportunity of reading their submission: I was able to take it off the Internet. I found it to be a very interesting submission—extremely detailed and very sensible. I think they are right about the distinction between public and private. At this stage my own inclination is to tailor a Bill of Rights, or whatever the legislation is called for New South Wales, to the exercise of functions by government departments and agencies or functions that are authorised by legislation. So when you have a private body and possibly a former public body which has been privatised, or any body which has been exercising particular powers under the authority of legislation, then I would confine the distinction to that. Then definition for future development or future

consideration by this or some other Committee five years down the track could be done when reconsideration is required, if there is to be some subsequent review of the initial period of operation of such legislation.

The Hon. J. F. RYAN: I have just a simple question. In your submission, you have made frequent reference to the International Covenant on Civil and Political Rights.

Professor NETTHEIM: Yes.

The Hon. J. F. RYAN: You suggested that the Committee should give it some sort of legislative recognition in New South Wales. A couple of questions arise with regard to that covenant. One of them is that the covenant does not guarantee elimination of the use of the death penalty and there was a later resolution of it which made that aim desirable.

Professor NETTHEIM: That was the Second Optional Protocol.

The Hon. J. F. RYAN: I think that some people might question that as being an adequate defence of civil and political rights, given that it does not defend them. The second issue that might arise from that is one that has only become an issue or public talking point in the last few days as a result of the decision made by the Federal Court on Victorian law. It concerns Article 23 which states:

> 1. The family is the natural and fundamental group unit of society and is entitled to protection by society and the State.
>
> 2. The right of men and women of marriageable age to marry and to found a family shall be recognized.

It might well be that that article is interpreted in some interesting ways in terms of the current debate.

The question that I am putting to you is that sometimes statements of civil and political rights tend to have the difficulty that the intent expressed—in this case it was in 1966—may not be the same as an intent that is considered to be acceptable even 40 years later. The problems that have happened with the American Declaration of Human Rights of course have been commented on frequently in this Committee. Do you think we need to do something to that covenant to make it particularly applicable to New South Wales, given that we live in a society that has not necessarily exactly the same values that were expressed in 1966?

Professor NETTHEIM: What I would suggest would be that any legislation for New South Wales might have attached to it as an appendix or an annex the text of the convention together with the First and Second Optional Protocols. The First Optional Protocol is simply a procedural one which is the right of communication but Australia has ratified both protocols, including the Second Optional Protocol which is about the death penalty. That is a substantive rather than a procedural protocol. But I think there are deficiencies in the International Covenant on Civil and Political Rights. Unlike the Universal Declaration of Human Rights, it does not protect the right to property. That was deleted in the ultimate covenant for various reasons, probably because many of the governments at the time were keen to introduce programs of land reform in their particular circumstances. So it did not find a place in that covenant, whereas the International Convention on the Elimination of All Forms of Racial Discrimination, which was approved in the previous year, does include the right to own property alone or an association with others and the right to inherit property, based very much on the Universal Declaration of Human Rights.

So I would think that if you are going to introduce legislation in New South Wales you would probably want to guarantee the right to property. We have plenty of legislation which does that, particularly the lands acquisition legislation. So I would propose building on relating any legislation in the State to the International Covenant on Civil and Political Rights and certainly the second optional protocol but I am not necessarily confining it to that. It is useful to work in association, partly because Australia is a party to that treaty. By relating our legislation to that, which also goes to the question of the suggested amendment to the Interpretation Act, you can pick up the interpretation of that covenant over the years. The interpretation of that covenant also links in with the interpretation of similar language in the European Convention on Human Rights and elsewhere. So you have a whole worldwide body of jurisprudence that you can tap into when you do this.

It is also useful because if we can provide domestic remedies for alleged breaches of that covenant at State level then we can settle any questions within this State without somebody having to troop off to Geneva with a communication. But I do not think the substantive form of the legislation should necessarily be confined to the International Covenant on Civil and Political Rights and the second optional protocol. I think you could add provisions about property. You could set out in more detail the understanding for this State of some of the rights which are thought to need a little more articulation than is provided in the international covenant but expressing the general principle that these rights, the substantive sections of the Bill of Rights legislation or whatever it is called, are meant to be in accordance with the covenant.

The Hon. J. HATZISTERGOS: I am not aware in your submission that you have raised the context of why we need a Bill of Rights in New South Wales. You have advocated the form that it might take and how we may better respect human rights in New South Wales but where do you see the motivating force or the necessity for us to have one here in this State? Someone might argue that this is a relatively mature society, that we are democratic, that we take human rights into account in formulating legislative instruments. Where do you see the motivating force and the need for one?

Professor NETTHEIM: I see the motivating force generally in that I think most of us would take the view that Australia and New South Wales in particular are fairly free and fair societies. Certainly this was a view taken in Britain when the United Kingdom became a party to the European Convention on Human Rights. To the amazement and dismay of a number of people in the United Kingdom they began to learn after a period that there were significant departures in British law and practice from the standards of the European Convention on Human Rights. The Parliament and the Government then proceeded to redress some of them. We have not had the same level of scrutiny outside the country of human rights issues in Australia except in the Toonen case, which related to Tasmanian laws. That was the first case that went on as a communication to the Human Rights Committee under the International Covenant on Civil and Political Rights. Eventually the national Parliament passed legislation to override that.

Then there was a second case that concerned the detention of Cambodian boat people, I think. There was an adverse determination once again by the Human Rights Committee on that. I think that there was no legislation to patch that. But the issue is quite interesting because we have had this year consideration of Australia's record on human rights under, so far, two and a third one coming up, three human rights instruments which Australia has ratified. The first of those was the International Convention on the Elimination of Forms of Racial Discrimination. They have been concerned about certain aspects of Australian law in recent times, including mandatory sentencing in the Northern Territory and Western Australia and including amendments to the Native Title Act in 1998. Similar concerns have been expressed in just the last few days by the Human Rights Committee in considering Australia's overdue periodic reports under the International Covenant on Civil and Political Rights.

Later this month Australia's periodic report under the International Covenant on Economic, Social and Cultural Rights comes before the committee established under it. It might find no problem but Australia's compliance with the standards which we regard as our standards, which we helped to draft and formulate, and which we have generally thought with which we were in substantial compliance, we are beginning to find that in a number of respects we are not, that there are gaps, that there are acts, procedures and practices that infringe this. I would prefer to see these matters attended to and resolved within Australia, and at State level within the State, rather than to have people who complain, however reasonably well founded the base for complaining, in communication with an international committee having to raise the issues internationally.

The Hon. J. HATZISTERGOS: But having a Bill of Rights may not necessarily stop that, would do not agree?

Professor NETTHEIM: It may not ultimately stop it but these committees will not take on communications unless there has been exhaustion of domestic remedies. Up to now we do not have remedies which are specifically tailored to these sorts of sets of rights, and I think it would be very useful to do so.

The Hon. J. HATZISTERGOS: One of the things that trooping off to Geneva and these other venues allows is an international politicised debate, putting the spotlight and a lot more pressure on governments in relation to their activities than anything the domestic scene can provide.

Professor NETTHEIM: I think that ultimately it is useful if there is a failure at the government level, which is why Australia approved those processes.

The Hon. J. HATZISTERGOS: To focus on what Australia does and does not to, you keep saying that Australia has ratified this convention or that convention. In essence, as I think you would agree, ratification by Australia of any treaty is a ratification by the Executive Government. There is no process in Australia at the moment which requires any treaty which is signed on behalf of the Australian Government to be ratified by the legislature, as it exists, for example, in United States. Therefore, in circumstances particularly where treaties are signed on behalf of the national government by a country, is it fair to have a State legislature bound by the text of those conventions which in many cases reflect broad-based compromises and in which the State itself has had no role in drafting or commenting on in relation to any of the provisions?

Professor NETTHEIM: The situation you depicted is probably true of about five or six years ago but there has been a lot of movement since that time. There is now a standing committee of the Commonwealth Parliament which looks at treaties. You will see from time to time in the national newspapers and the quality broadsheets advertisements by the committee that it is looking at the following instruments which Australia is proposing to ratify and inviting submissions. There is now also the Treaties Council, I think it is, where the Federal Government and the governments of the States and Territories discuss proposals to ratify treaties. So I think the situation has changed quite considerably, because of the concerns which you have mentioned.

The Hon. J. HATZISTERGOS: It does not do it to treaties that have already been ratified, and some of them are fairly broad.

Professor NETTHEIM: Sure.

CHAIR: The Australian Treaties Council, according to my knowledge, has met on only one occasion. The Prime Minister is not particularly enamoured of it, I am told. Last year I addressed a conference in Canberra about treaty procedures as they relate to, and one would hope involve, the States and Territories. It appeared to me that some of the provisions are more honoured in the breach than in the observance as far as State consultation is concerned.

Professor NETTHEIM: I would agree with the general gist of what you are putting to me, that it is very important for the national Parliament to be involved and very important for the States and Territories to be involved in decisions whether to ratify treaties, whether they relate to human rights, postal services or whatever.

The Hon. J. HATZISTERGOS: Until such circumstances arise as make that possible, that is ratification by national or State legislatures, why is it in appropriate for, say, a State legislature to have its laws interpreted in the light of international treaties and covenants in which it has very little input?

Professor NETTHEIM: And politically I think you are correct in terms of international law. The answer arises under the Vienna Convention on the Law of Treaties and also the terms of particular covenants. The International Covenant on Civil and Political Rights provides that the obligation taken on by the national government representing the state applies to all portions on the state, unless there is a federal clause in the convention. Then the national government is under an obligation to ensure that rights are protected throughout the internal divisions, whatever they may be. Article 50 says that the provisions of the present covenant shall extend to all parts of federal states without any limitations exceptions. So that is the general principle under this particular convention. It is also a general rule for the interpretation of treaties under the Vienna Convention on the Law of Treaties. So once the state which has the international sovereignty agrees to become a party to the treaty it is an obligation on the state whatever its internal constitutional arrangements. That is why I agree with your general proposition that in the federal system the States and Territories should be involved, as should the public, as should the national Parliament in a decision to ratify.

The Hon. J. HATZISTERGOS: I understand the point you are making but what I am saying is not what the obligation of the national government is but what perhaps the obligation of the State should be. In the situation in which the State is not consulted or has very little input into the text or the fact that a treaty is going to be signed by a national government, why should it as the body that is responsible have legislation in force in its State which says that the legislation is to be interpreted by reference to these international documents? It does not have to do that if it does not want to. So what I am asking is why should it, bearing in mind that picture that I have painted? It is a different matter to say that the national government has to do it because it has signed the treaty and it therefore has to sponsor it. But why should a State do it?

Professor NETTHEIM: It is not obligatory on the State to do it at all; it would just be desirable.

The Hon. J. HATZISTERGOS: Let us come to the question desirability. Bret Walker, past president of the Bar Association, addressed this Committee. He said that if we incorporate a provision of the type that you are suggesting we should think of the practical ramifications of that. If he has a particular problem that he has to advise his client on he has to look at, in the Australian context, the relevant State and Federal legislation and, to the extent that that is refined, regulations or other statutory instruments. He then has to look at the Australian Constitution to see whether that correctly fits into the broad parameter that the Constitution sets out. He then has to look at the common law to see how that has been refined, by reference to previous cases and instruments. Now it is being suggested that, apart from all the other avenues that he would go to, such as parliamentary debates and so on, he now has to go to 800 or so treaties to work out what provisions and statutes there might have been. That is the process through which he, as a highly paid barrister, has to go. For the ordinary citizen it would be almost impossible to interpret. Would that not be a correct summation of the difficulties that one would face?

Professor NETTHEIM: Not under what I am proposing. I am proposing simply a reference to one international convention or one international treaty—the International Covenant on Civil and Political Rights.

The Hon. J. HATZISTERGOS: So we do not look at the others?

Professor NETTHEIM: We could look at both of the covenants. Additionally, we could look at the International Covenant on Economic, Social and Cultural Rights. But I am suggesting an amendment to the Interpretation Act, which would permit or possibly require judges in interpreting legislation to take into account the obligations under one or both of those covenants.

The Hon. J. HATZISTERGOS: What about other treaties to which Australia is a signatory?

Professor NETTHEIM: It has already been established that it is certainly permissible for judges to take into account, when relevant, other instruments which Australia has ratified.

The Hon. J. HATZISTERGOS: In the interpretation of New South Wales statutes?

Professor NETTHEIM: In the interpretation of any statutes.

The Hon. P. J. BREEN: I take it that that has been established in the High Court?

Professor NETTHEIM: It has been established certainly in the Court of Appeal in this State and subsequently in the High Court of Australia.

The Hon. J. HATZISTERGOS: In which cases?

Professor NETTHEIM: In a series of cases. I cannot remember offhand the reference to the New South Wales cases. There was an article in the University of New South Wales *Law Journal* by Justice Michael Kirby, when he was President of the Court of Appeal, which gave an account of New South Wales cases and also High Court cases at that time. That was several years ago. I can give you the reference if you wish it. But since then there have been a number of High Court cases which have

accepted the legitimacy of resolving questions of interpretation of legislation and also in developing the common law. It is legitimate—not compulsory—to refer to international treaties ratified by Australia. Mabo is one case and Dietrich is another. There have been a number.

CHAIR: Would it not be the case now that, under the Interpretation Act of New South Wales, a judge can have regard to all sorts of extraneous material, such as parliamentary speeches, academic papers and, one would think, international treaties?

Professor NETTHEIM: Yes. Presently, in interpreting legislation, a judge can have a look at any of those and certainly at any international treaties which happen to be relevant to the particular case. I am suggesting a specific provision in association with a Bill of Rights which refers particular attention to the international Covenant on Civil and Political Rights.

The Hon. P. J. BREEN: You mentioned that you lived in Canada in 1960 when a statutory Bill of Rights was introduced by a progressive, conservative Government and that the legacy of that was a generation of Canadians, I think you said, who learned about rights in a non-threatening environment. Would you see a statutory Bill of Rights having a similar effect in Australia?

Professor NETTHEIM: I think it is perfectly feasible, if it is drafted and designed with appropriate skill, care and caution.

The Hon. P. J. BREEN: Do you think generally that there is a lack of awareness in the community about rights?

Professor NETTHEIM: I think so. I think there is a lack of awareness in the Australian community. I do not think many people in this room, and certainly outside this room, would be aware that we are halfway through the International Decade on Human Rights Education. I have not noticed many observances of that in Australia since the decade began in 1995. It finishes in 2004. I think most people are not aware of what the international human rights system is about or what human rights are about. So I think a period of transition, or a period under which we operate with a fairly limited, fairly cautiously drafted statutory Bill of Rights, would give the opportunity to Australians to become accustomed to the idea of whether they want to move it along or notch it up a bit. They might be happy with it as it is, or they might want to abandon it altogether.

The Hon. P. J. BREEN: The previous witness, Dr Behrendt, suggested that, as a result of the native title legislation and debates around it, particularly focusing on the Racial Discrimination Act, it had an educative value in the community and that the kind of debate that followed the Wik amendments, for example, were instructive. I am left with the feeling after those debates that people are actually more confused about rights. Certainly in my experience people understand even less about what the indigenous rights of people might be in relation to land, the coexistence of native title and those sorts of questions. As a result particularly of the Wik decision, the New South Wales Government now has the power to make laws in respect of indigenous rights in a way that perhaps it did not before. It occurs to me that that is an environment in which we could find ourselves confronted with laws which breach fundamental principles, particularly in relation to indigenous people. Do you see that as a risk in New South Wales?

Professor NETTHEIM: I think it is a risk. I was concerned about the amendments that went through. Amendments to the 1997 legislation were introduced in the Senate, some of which the Government accepted. Ultimately, the deal between Senator Harradine and the Prime Minister allowed the Native Title Amendment Bill 1998 to go through the Parliament. Nonetheless, it left some significant violations of rights under international human rights standards, certainly in terms of the property rights of indigenous peoples. The debate itself I think at the time generated more heat than light. I think I might differ slightly from Dr Behrendt on that point of view.

Possibly some of the discussion over the last week or so, emerging from the consideration by the Committee on the Elimination of Racial Discrimination of those amendments, introduced to Australians who had read some of those accounts in the newspapers an awareness that there could be some problems. My understanding is that the Government was trying from 1996 through to 1998 to introduce as much certainty as it could for non-indigenous interests. But it did so at quite significant

encroachment on native title rights and interests, which might otherwise have applied under the Mabo decision in the 1993 Act.

The Hon. P. J. BREEN: Could it also be said in that context that, at least with the original native title legislation, the indigenous people were consulted, whereas with the Wik amendments they were not? Is that the case?

Professor NETTHEIM: There was some consultation with the Wik amendments, but not at the level at which there had been in 1993. Eventually, those people representing Aboriginal organisations in 1993 accepted some of the negative aspects of the 1993 bill in return for some of the positive aspects in that bill and outside that bill, one of which was the establishment of the Indigenous Land Corporation and the Land Purchase Fund. There was not that element of acceptance by principal organisations involved in the 1998 amendments.

Generally speaking, one could say that Aboriginal people and Torres Strait Islanders were entirely opposed to the more draconian pieces of the legislation. Some elements were supported. In fact, provisions in the Native Title Amendment Act 1998 authorising indigenous land use agreements were initiated by indigenous peoples' organisations in conjunction with industry and various other bodies and were supported by them. But the bill, as a whole, was not. That was one of the criticisms made by the Committee on the Elimination of Racial Discrimination.

The Hon. P. J. BREEN: What sort of legislation do you envisage that the State Government might pass as a result of the Wik legislation?

Professor NETTHEIM: It has already passed legislation validating intermediate period Acts and confirming the extinguishment of native title under past exclusive possession Acts. This was a process which was authorised by the amendments and I think all States and Territories have now exercised that power. Do you want me to say what they are?

The Hon. P. J. BREEN: I am wondering whether you fear any legislation in the State that might infringe upon native title rights or the rights of indigenous people?

Professor NETTHEIM: I think not. In 1993 section 43 of the Act authorised States and Territories to pass their own legislation and to do various things, in particular, to deal with the right to negotiate in regard to future developments on native title land and giving jurisdiction to State bodies. I think at that time New South Wales followed Queensland fairly closely in making provision for a State body to exercise those powers, but in neither State at that time were those State bodies actually activated to exercise those State powers. Now we have section 43A, which authorises States and Territories to set up alternative procedures, which are rather less than the right to negotiate under Commonwealth legislation in certain categories of land. New South Wales, on my understanding, is not proposing to exercise that sort of power. Queensland, of course, has. It is waiting certification from the Attorney General who, ultimately, is waiting to see what the Senate does. The Northern Territory and Western Australia were the other two States that have been going down that track. But, from my understanding, New South Wales is not going down that track.

The Hon. P. J. BREEN: You generally do not fear in New South Wales that, by going down that track, we might contravene basic rights of indigenous peoples?

Professor NETTHEIM: If New South Wales was going down that track we could contravene the basic rights of indigenous peoples.

The Hon. P. J. BREEN: It would be open to a future government to do that?

Professor NETTHEIM: Yes, provided what it did was consistent with the Commonwealth legislation. The Commonwealth legislation allows derogation of such rights which people currently have, even under the amended Act.

The Hon. P. J. BREEN: Would that legislation then have to be ratified by the Federal Attorney-General?

Professor NETTHEIM: If it was inconsistent with what was authorised by the Commonwealth Act, yes. It would certainly need to be certified by the Attorney-General if they claim to be authorised under section 43A. Even apart from native title I recall that, with the change of government, when the Greiner Government came into office, it pledged to abolish the Aboriginal Land Rights Act 1983 in this State. Fortunately, it did not proceed with that pledge. It shows the vulnerability of the land rights and native title rights of indigenous peoples.

The Hon. P. J. BREEN: A statutory Bill of Rights would act as a buffer in some way to protect the rights of indigenous peoples?

Professor NETTHEIM: It could. It might be possible to look for some protection of those rights either under the non-discrimination principles in Article 2 of the covenant, if you are cross-referring to the covenant, or under Article 27, which is the cultural rights provision. But it might be better to have specific provisions relating specifically to the rights of actual people in the State. This has been done in the Canadian Constitution. The Canadian Constitution has the charter of rights and freedoms, but it also has a group of separate provisions which deal with aboriginal and treaty rights.

The Hon. P. J. BREEN: I think you were present when Dr Behrendt was giving evidence and I read a provision from the draft Queensland bill. It was a general provision which referred to the collective and cultural rights of Aboriginal people.

Professor NETTHEIM: Yes.

The Hon. P. J. BREEN: Would you prefer to see a provision like that or would you prefer to think that it was more politically acceptable to have a provision which simply said, in general terms, that the rights of indigenous people need to be recognised and respected?

Professor NETTHEIM: I am conscious of the work that was done in the Northern Territory by the sessional committee on a statehood constitution. That sessional committee started work in about 1987 and worked for about 10 years. It produced a draft constitution on which it was hoped that the Northern Territory would be able to seek statehood. In 1998 the then Chief Minister of the Northern Territory held a convention which produced a constitution which deviated to some considerable extent from that draft. But the draft that was produced by that sessional committee also had specific provisions about indigenous peoples. It referred particularly to their territorial rights and, to some extent, to their right to be consulted, to be involved in decisions affecting their affairs and, of course, to their cultural rights.

I think it would be possible to develop, as occurred in Queensland and the Northern Territory, three or four proposals, which could I think adequately accommodate in broad brush terms the specific rights of indigenous peoples. Indigenous peoples' claims tend to be equality rights—that is, to have the same standard of services, the same level of rights as other people, which are described sometimes as equality rights and citizenship rights—and there are also the distinct indigenous rights, which relate mainly to issues of self-government and political participation, territorial rights and cultural rights, which might include some recognition of Aboriginal law, culture, and things like that.

As experience in several States and Territories indicates, you could have specific provisions dealing with those issues. Another alternative track would be to have simply a recognition of Aboriginal rights. However, I think if you are going to do that, you should follow something like what the Canadians did, that is, to have some sort of mechanism for specifying how you express those rights. One way in which this could be done, if New South Wales wanted to go down that track, would be to build on the experience which New South Wales has already had. On at least two occasions that I am aware of the New South Wales Parliament has invited the members of the New South Wales Aboriginal Land Council elected by Aboriginal people throughout the State, together with the New South Wales ATSIC commissioners, to sit in the Legislative Assembly in a special forum. It would be possible to formalise that forum so that you could, perhaps over a period of time, have meetings of that forum which, after consultation with constituents, could come up with formulations. The general membership in the New South Wales Parliament could meet and formulate appropriate language for recognising those rights.

The Hon. P. J. BREEN: You said earlier that you would hesitate at this stage to have a provision which is judicially enforceable. I think you said that if there is a court determination the matter should be referred back to the Parliament.

Professor NETTHEIM: Yes.

The Hon. P. J. BREEN: This appears to be the framework of the United Kingdom Human Rights Act—that is, the judiciary will not be making a decision contrary to the Act; they will be referring the question back to the Parliament. It seems to me—and it was referred to in evidence given by Brett Walker—that that will raise questions about separation of powers between the legislative and judicial branches of the government. Secondly, the provision in the United Kingdom Human Rights Act is so obscure and difficult to read that it seems to defeat the whole purpose of having a bill which is accessible and readable for the general community.

Professor NETTHEIM: What I would propose is that when a case comes before the New South Wales Supreme Court, you get a determination that legislation or executive action or other action within the scope of the Bill of Rights is in contravention of the Bill of Rights, but you do not immediately get a determination that it is therefore invalid; you get a determination which is a judicial determination. It will not become invalid if, within three months, the New South Wales Parliament re-enacts the legislation or authorises the specific matter. Whereas, if this does not happen, at the end of that three-month period you then have invalidity.

The Hon. P. J. BREEN: Do you mean invalidity in the legislation, or in the interpretation of the legislation?

Professor NETTHEIM: Either.

The Hon. P. J. BREEN: Do not think that that raises difficult questions in relation to what the judges do and what the politicians do?

Professor NETTHEIM: No. I think they would make a clear determination of the consistency of the particular Act of Parliament with the Bill of Rights. But the Bill of Rights does not have superior force of its own right. I take your point. You would have to tailor it separately, for primary legislation and subordinate legislation or executive action.

The Hon. J. HATZISTERGOS: What would happen if invalidity arose in the course of a criminal trial? Where does that leave the trial? It simply leaves the trial dangling for three months whilst the New South Wales legislature convenes. It is just unworkable, is it not?

The Hon. P. J. BREEN: The legislature might decide, "This is too hard. We will just go on with something else." What happens then? Is that not the problem?

Professor NETTHEIM: I take your point. I think you probably need to finetune the legislation so that you are dealing with specific issues in more detail than I have addressed here.

The Hon. P. J. BREEN: That would create a huge piece of legislation, would it not?

Professor NETTHEIM: What I am trying to suggest is that the Parliament should have the ultimate overriding power, to override a judicial determination, so that we do not have the loss of the sovereignty within the Australian Federation. To craft it to deal with particular issues needs a certain amount of finetuning—more than I have been able to address in this paper.

The Hon. P. J. BREEN: If a judge were to acquit an accused person based on a provision in the Bill of Rights, and within three months the Parliament is then to pass a law to say that that decision was incorrect, the accused then must either stand trial again or go to gaol?

Professor NETTHEIM: Not necessarily. If the person has been acquitted, the person is acquitted. We already have experience of that sort of thing, where a person may be acquitted of a charge and ultimately on some sort of stated case an appeal court says, "The judge below got it wrong". You cannot have another go at him for the same charge.

The Hon. P. J. BREEN: Parliament would say that the decision was wrong. In similar circumstances, an accused person would not go to trial, but nothing happens in relation to that particular case?

Professor NETTHEIM: Yes.

The Hon. J. HATZISTERGOS: What happens if the ultimate rights of the accused have not been determined but may be able to be determined once we know whether the evidence gets in? It simply leaves the trial dangling, for some decision to be made as to whether that legislation is to stand or not.

Professor NETTHEIM: Surely this could already happen, if a point of evidence is taken and it is thought to be against the Evidence Act. Then you might get some sort of interlocutory application to an appeal court.

The Hon. J. HATZISTERGOS: If a point of evidence arises during the trial, of course the judge will rule on it, either the evidence is in or it is out, and then that the trial simply proceeds.

The Hon. P. J. BREEN: Or it could go to the Court Of Appeal, as happened in the Marsden case.

The Hon. J. HATZISTERGOS: That could happen. However, what you are advocating is not that it goes on to appeal but that a determination is made that there is an invalidity in a particular procedural point, however, the legislature is going to have the power to override that invalidity by re-enacting the legislation within three months. What then happens to the course of a criminal trial whilst the question of whether this evidence is in or out is determined? It simply leaves the whole criminal trial dangling.

Professor NETTHEIM: In the light of this discussion, my inclination would be to simply say that you do not have this sort of judicial declaration during the course of an ongoing trial. The only matters that could occur during the course of an ongoing trial are those which can already occur through the standard judicial system.

The Hon. J. HATZISTERGOS: So the bill would not apply?

Professor NETTHEIM: That is right. It might apply to the ultimate determination, but it would not necessarily invalidate what has been done.

The Hon. J. HATZISTERGOS: Are we going to have longer court cases if we have a Bill of Rights?

Professor NETTHEIM: I do not know.

The Hon. J. HATZISTERGOS: What do you think?

Professor NETTHEIM: I do not think so. Occasionally, if a major issue were raised during the course of a trial on which there was some argument, yes, it would be longer. I think the circumstances in which this would happen would be relatively few.

The Hon. J. HATZISTERGOS: Are there going to be more cases?

Professor NETTHEIM: There could be more.

The Hon. J. HATZISTERGOS: The Hon. Malcolm McLelland told us that whenever we get pieces of legislation which involve decisions on the part of the judiciary which are fairly broad-based, that leads to a rush of additional cases. He gave examples such as section 52 of the Trade Practices Act, section 47 of the Fair Trading Act, which I think is in similar terms, and section 9 of the Contracts Review Act, which contain broad terms which have to be given some sort of contacts in terms of judicial discretion. The Hon. Malcolm McLelland indicated that his experience is that those

types of legislative instruments have led to a substantial increase in the workload of the judiciary as compared to what existed prior to their enactment. Can it be anticipated that a legislative Bill of Rights in the form you are advocating would have a similar impact?

Professor NETTHEIM: I think if you pass any legislation which gives people rights, people will assert those rights, so this will lead to some increase in workload. In terms of Mr McLelland's point about the broad brush language, I think he has something in that point, and that is why I would suggest that any legislation should relate to the International Covenant on Civil and Political Rights but should not just end by replicating that. You should have a more specific language tailored to the circumstances in New South Wales, spelling out in more detail the standards of the international covenant.

The Hon. J. HATZISTERGOS: What you are envisaging is still an exercise of judicial discretion within the context of the Bill of Rights as enacted by the New South Wales legislature?

Professor NETTHEIM: I am talking about our bill of rights which would give certain opportunities for people to raise issues, preferably not in the courts but outside the courts, through some sort of watchdog mechanism, but in the last resort to the courts, coupled with the interpretation provisions in the Interpretation Act, which would require or permit reference to the International Covenant on Civil and Political Rights.

The Hon. J. HATZISTERGOS: Does international experience that you are familiar with indicate that in countries that have bills of rights cases have become longer and more voluminous?

Professor NETTHEIM: I am not aware of any data on this. Maybe there has been some data collected; I am just not aware of it.

The Hon. J. HATZISTERGOS: What about anecdotal evidence from your experience in Canada?

Professor NETTHEIM: I have not been back to Canada for some years now. In fact, I am hoping to get back there quite soon.

The Hon. J. HATZISTERGOS: In any event, your anticipation is that there probably would be longer cases?

Professor NETTHEIM: In a case in which there were serious issues as to whether or not something was in violation of the standards of a Bill of Rights, yes, you would have a new issue to be addressed and this would inevitably take extra time.

The Hon. P. J. BREEN: We heard from representatives of the Law Society earlier in the week who suggested that although initially there would be a rush of extra cases and people asserting particular rights, once it settled down the situation might well pan out to be much the same as it is now. Would that be a reasonable view?

Professor NETTHEIM: I think that is right. It is also important to take into account not only the need for fairly specific legislation to develop the ICCPR for New South Wales conditions but also to do so in relation to the international jurisprudence. That could be gathered as a community educational and legal educational process to inform people about how this has been interpreted by the Human Rights Committee or by other entities so that we get a clear idea how to draft the language of a New South Wales bill in a way that ties in with that accumulated experience.

The Hon. J. HATZISTERGOS: Have you drafted a bill or sought to draft a bill?

Professor NETTHEIM: I have not.

The Hon. J. HATZISTERGOS: Do you know anyone who has drafted a bill that you approve of?

Professor NETTHEIM: Offhand, I do not. That could be an interesting exercise.

The Hon. J. HATZISTERGOS: It is curious that no-one has done it so far.

CHAIR: Mr Walker made some suggestions in his evidence last week as to what it ought to contain.

The Hon. J. HATZISTERGOS: But they were very broad based.

Professor NETTHEIM: It would be interesting to get the New South Wales Law Reform Commission involved, at least in a support capacity.

CHAIR: The first witness in this inquiry was Mr George Williams, an academic from the Australian National University. He argued on the basis of the Hindmarsh Island case that the Commonwealth does have the power under the Constitution to pass legislation that discriminates against the rights of indigenous peoples. Dr Behrendt made some reference to that this morning, possibly before you arrived.

Professor NETTHEIM: Yes.

CHAIR: If New South Wales were to introduce a bill of rights and it contained a principle of non-discrimination, which you appear to argue for near the bottom of page 2 of your submission—

Professor NETTHEIM: Yes.

CHAIR: Could that not lead quite possibly to an inconsistency with Federal legislation, with the result that the New South Wales legislation in that respect would be struck down?

Professor NETTHEIM: I do not think the Hindmarsh Island case was quite as clear as suggested on the power at the Commonwealth Parliament to pass legislation against the rights of indigenous peoples. Not all of the judges addressed that issue. It arose mainly in the context of what the majority of the court saw as the question of legislation amending a previous Act of Parliament and derogating it from rights created by Parliament. They took the standard view that it is a necessary power that a sovereign parliament must have the power to enact or repeal its own prior legislation.

At least two of the judges did not rule on the question of whether the power did allow general adverse discrimination outside that context. Therefore, if you had legislation that infringed on the rights of indigenous peoples which derived from common law as distinct from statute, I do not think the Hindmarsh Island case answers that question, but on the consequent question, whatever legislation the New South Wales Parliament enacts, whether or not it is a Bill of Rights, if the Federal Parliament has enacted or does enact an Act that is within its powers which is contrary to the New South Wales legislation, obviously under section 109 of the Constitution the New South Wales legislation has to yield.

(The witness withdrew)

(The Committee adjourned at 12.48 p.m.)