REPORT OF PROCEEDINGS BEFORE

STANDING COMMITTEE ON LAW AND JUSTICE

INQUIRY INTO A NEW SOUTH WALES BILL OF RIGHTS

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At Sydney on Monday 31 July 2000

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The Committee met at 10.00 a.m.

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PRESENT

The Hon. R. D. Dyer (Chair)

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

JOHN FREDERICK STUART NORTH, President, Law Society of New South Wales, 170 Phillip Street, Sydney, and

MARK RICHARDSON, Chief Executive Officer, Law Society of New South Wales, 170 Phillip Street, Sydney, sworn and examined:

MICHAEL DAVID ANTRUM, Chair, Human Rights Committee, Law Society of New South Wales, 155 King Street, Sydney, affirmed and examined:

CHAIR: Mr North, in what capacity are you appearing before the Committee?

Mr NORTH: As President of the Law Society of New South Wales.

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

Mr NORTH: I did.

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

Mr NORTH: I am.

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

Mr NORTH: I have been a solicitor of the State since 1983. During that time I have been involved in both local and State Law Society matters. As a result, I have been instrumental in having our Human Rights Committee look at the introduction of a bill of rights. At the beginning of my period as President in January of this year, in fact at Parliament House, I made a speech in which I said that I was very interested in furthering an inquiry into whether or not New South Wales should have a bill of rights.

CHAIR: As you would be well aware, the Law Society has made a written submission to this inquiry. Is it your wish that that submission be included as part of your sworn evidence?

Mr NORTH: It is.

CHAIR: Mr Richardson, in what capacity are you appearing before the Committee?

Mr RICHARDSON: In the capacity as Chief Executive Officer [CEO] of the Law Society of New South Wales.

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

Mr RICHARDSON: I did.

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

Mr RICHARDSON: I am.

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

Mr RICHARDSON: I have been a solicitor for 14 years in New South Wales. I have served on numerous Law Reform Commission inquiries over the years, including inquiries that have touched upon human rights issues. I am now the CEO of the Law Society which, as the President has already advised, has examined the terms of reference of this inquiry and made a submission.

CHAIR: The Law Society has made a written submission. Is it your wish that that be included as part of your sworn evidence?

Mr RICHARDSON: It is.

CHAIR: Mr Antrum, in what capacity are you appearing before the Committee?

Mr ANTRUM: I am a councillor at the Law Society of New South Wales and I am also the Chair of the Law Society's Human Rights Committee.

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

Mr ANTRUM: I did.

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

Mr ANTRUM: I am.

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

Mr ANTRUM: I have been a solicitor since 1993 in this State and I am Chair of the Human Rights Committee. I have been an expert consultant to the Australian Law Reform Commission and Human Rights and Equal Opportunity Commission. I have particular expertise in the area of children's law and compliance to international conventions in that respect.

CHAIR: Is it your wish that the Law Society's written submission be included as part of your sworn evidence?

Mr ANTRUM: It is.

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

Mr NORTH: Mr Chairman, you will see that the submission we have made to this Parliamentary Committee is endorsed as being on behalf of the committee only. Since this submission was sent it has been presented to the council of the Law Society of New South Wales and the council has endorsed it in principle. The Law Society made this submission in general terms addressing the issues raised by the Parliamentary Committee. We are very pleased that this important issue has been referred to a Parliamentary Committee and that it is being looked at seriously by the Parliament. As I referred briefly in my answer to a question you asked at the beginning of these proceedings, this issue is not only important to the Law Society, it is important to me personally. I have involved myself in this matter and have been fortunate to have the great support of the Law Society.

This is an important issue and one that should not be put aside for a number of reasons. At the moment this country is fast becoming alone in the common law or civilised world in that we do not have a bill of rights. Whilst we applaud the New South Wales Government for taking this initiative, Committee members will note from our submission and, no doubt, from their own knowledge, that previous submissions up to as much as 100 years ago at Federal level have all fallen on deaf years and have failed. Of course, we would like this to be an Australian initiative. It cannot be at this stage, but we believe that New South Wales, as the largest Sate and one of the most important, should take the lead in this area. If New South Wales does take the lead in this area, then hopefully the other States and, in due course, the Commonwealth will follow.

I do not propose to go through the submission at this stage as I know that each of you has read it. However, I wish to highlight a couple of matters in the submission. I alluded briefly to the fact that it is important for New South Wales, which has the largest population, to take the initiative and to

lead developments in Australia. As you will see from our submission, a number of matters are raised in the Bill of Rights question that concern State and Territory governments rather than just the Commonwealth. That is particularly so in the area of criminal trials. We believe that human rights enactments in New South Wales will pass on benefits to the community in this State and enhance this State's standing in the international community.

At the moment we would say that our whole system is characterised by a large amount of legislation and regulation that then says "What is left over are your rights". Our whole system at the moment is negative rather than positive. With respect, Mr Chair, we need a Bill of Rights in this country so that people can understand what their rights are and then look to our legislative bodies to enact legislation that is in conformity with those rights. At the moment we tend to say that our rights are what are left over after legislation and regulation have finished. This is a very important philosophical point and raised against it are the arguments that no doubt have been put to the Committee by other parties such as: Will this introduce an explosion of litigation; will this affect the supremacy of Parliament and so forth?

You will see from our submission that we believe a properly and carefully drafted Bill of Rights, which is based on the enormous amount of information that we have gathered since 1948 when these matters first started to be looked at on an international basis and uses information that we can glean from other jurisdictions such as Britain, Canada, New Zealand, South Africa and even America, would not only reflect 50 years of experience but also deliver outcomes that are suitable in a modern world. We have not put our submission on the basis that we should jump blindly into a Bill of Rights; we have put our submission on the basis that we should look to other jurisdictions and learn from how they are working—or learn more from how they are not working in some respects—so that the document that we finally deliver takes these matters into account.

It may interest Committee members to know that some people have said that it does not matter that Australia—and indeed New South Wales—is now going it alone in developing our own legal principles that have no relevance to all the other countries that I have mentioned. We believe that should not be dismissed tritely as it is very important that Australia not be ostracised from the rest of the common law world—and we are in danger of that happening. From my experience—which includes recent travel—people in other countries such as America, and indeed Great Britain, are more fully aware of their legal rights and human rights situation than people in New South Wales. One of the great problems with the current common law-based and legislative-based situation in New South Wales is that people find it too complex and do not understand it. We think that a well-drafted Bill of Rights will give Australians a full and proper awareness of their rights. Furthermore, it will mean that the people responsible for making legislation will need to consider carefully the full flow-on effects of each piece of legislation. If that takes place, that legislation will be far better and less open to attack than current legislation.

A real problem for any State wishing to introduce a Bill of Rights is the question of whether people would take the view that lawyers rather than properly elected representatives of the people were making the law. We believe that a great deal of the present court litigation would no longer be necessary. People are not fully cognisant of their rights, which are encompassed by Federal and State legislation, regulation and common law, and must often adopt a scattergun approach to try to find out whether they have any of those rights. We believe that if each legislature, subject to a Bill of Rights, tells its drafters to look at the situation carefully and then, as in England, it is examined at the second reading stage, the legislation we get will be even better than the legislation we have today.

That leads to the question of whether a Bill of Rights, which we believe in, is at all possible in a State such as New South Wales. That is one of the reasons why this inquiry has been established. We have not tried to set out all of the things that should be in a Bill of Rights. What is in a Bill of Rights is extremely important and requires a great deal of input, with the proviso that we also learn from other jurisdictions. We have also said that we believe the only way a Bill of Rights could operate in New South Wales is based upon the British model. There are a number of reasons for that view. We have a similar—although not the same—parliamentary system and a similar common law heritage. Under the British system, the supremacy of Parliament is retained. We believe that unless this is part of at least the starting point for a Bill of Rights, this inquiry and further steps will fall by the wayside—as did all the Federal attempts.

We have looked carefully at some of the other jurisdictions, including the British situation. Mark Richardson, Shaughn Morgan and I were fortunate to hear a speech by the British Prime Minister, Tony Blair, to the American Bar Association on 17 July at the Royal Albert Hall in London. Mr Blair was late and the band played on, but thousands of American lawyers were present—it was quite a spectacle. Mr Blair made not a long but a particularly well-received speech during which he said:

> But from 2 October this year, the European Convention on Human Rights, which we ratified in 1951 the first state to do so, will become part of our domestic law. The fathers of the American Constitution would have found something very familiar in the fundamental rights and freedoms set out in the Convention which is no surprise, since English common law lawyers played a major role in drafting it.
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> The Act will transform judicial decision-making in four ways.
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> First, by transforming our society from one of negative rights, where freedom is merely what is left over after the restrictions imposed by common law and Statute, to one based on positive rights, which these restrictions must not unreasonably reduce.
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> Second, by giving the courts strong interpretive powers to construe legislation, so far as possible, compatibly with the Convention.
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> Third, by giving the higher courts a radical new power to declare statutory provisions incompatible with the Convention, but not to strike them down. Parliament will maintain its exclusive sovereignty to pass legislation to remove any incompatibility.
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> And fourth, by encouraging the courts to develop more principled reasoning to look more to the substance of rights, and Parliament's intention, not the literal wording of legislation.
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> Our Human Rights Act will usher in a new partnership between the judiciary, the executive and Parliament to ensure that a culture of respect for basic human rights will permeate the whole of our institutions and society.

I think this is important and I believe that the Prime Minister of Great Britain has addressed some of those issues—albeit before it has come in, because it does not come in until 2 October—but he has made the really important point, and I hope we have expressed it clearly in our submission, that it is fundamental to the success of the State as a continuing democracy that we turn around that negative, that we actually have human rights and not a negative bunch of what is left over after the sort of common law and legislation and statutes are finished with prescribing how we behave. Thank you.

CHAIR: Thank you very much. In commencing the questioning period I indicate that any question by the Committee may be responded to by one or more of you as you see fit.

Mr NORTH: Thank you.

CHAIR: The last witness to appear before this Committee, as recently as last week, was Mr Bret Walker, SC, on behalf of the New South Wales Bar Association. The very last question I asked Mr Walker related to the apparent difference between the approach of the Bar Association and the Law Society of New South Wales to the question of whether this State should have a Bill of Rights or not. I told Mr Walker that he could take the fifth amendment under the United States Constitution if he chose, and I make the same offer to you. However, it is true to say that the Bar Association's submission, while not saying to this Committee do not have a Bill of Rights, certainly issues some very grave warnings, to put it at its lowest. I invited Mr Walker to explain why the Law Society would be so different in its opinion and I asked him whether solicitors were inherently more radical or whether there is some other reason for the difference. Before you respond, I want to quote to you what Mr Walker said:

> . . . the Bar carries many more scars of litigation and is more aware of the evil of litigation than is any other group in society, which even includes the society that represents litigators, by which I mean the solicitors. Obviously, litigation is not the only or even the main activity of solicitors. It is the Bar's main activity. The more you do it, the less enamoured you are of it as a tool of social advancement. The analogy that I use frequently and would use again in this context, is that, like surgery, it is a very good thing when it is needed but that it is regarded as a sign of insanity voluntarily to submit to it without need.

Having put that to you, could I ask you to indicate to the Committee as best you are able why in your view the body representing solicitors, namely the Law Society, and that representing barristers, the Bar Association, had apparently widely differing views in regard to this matter?

Mr NORTH: Unfortunately, Mr Chair, we did not see the Bar's submission. I do not know whether or not they saw ours. We were not hiding our submission from them and from your question I would have assumed that Mr Walker, in answering it, appeared to be cognisant of what was in ours. Implicit in what Mr Walker has said to the Committee is that he believes that all a Bill of Rights will do is increase the incidence of litigation. That seems to be implicit in what he is saying. It may be true to say that within the ranks of barristers, of whom there are about 1,800, there are those who might tend to be seen as being more Conservative than those within the ranks of the 15,500 solicitors I represent. Of course, on a subject as important as this within the ranks of lawyers there will be differences. We believe the incidence of litigation in this State is already pretty high anyway, and one of the ways to try to get some rationalisation and some sense, after a bedding down period, would be to have a well-drafted Bill of Rights. I think the difference might be, and I am saying this without having read any of the Bar's submission, is that they may well have been unable to get a consensus from their 1,800 members and they are therefore raising matters rather than putting something as positively as we are have put it.

Mr RICHARDSON: The President has referred to the fact that the submission was not available to us, and I received it for the first time at 10 o'clock this morning.

CHAIR: Before you proceed further, could I indicate that where bodies, as the Law Society has done, put submissions to the Committee in electronic form, they are on our web site. I have just been advised that apparently the Bar did not do that. I regret that. That may furnish some explanation as to why you have not seen it.

Mr RICHARDSON: Yes. I could make two points about this. The first is by way of a question. That is this. I wonder whether this submission by the Bar Association was endorsed by its council. If it has not been endorsed by the council there is a difference between it and the one Mr North is putting to you, because he can say that his submission has been endorsed by the council of the Law Society of New South Wales and, as such, represents the views of the 15,000 or so solicitors in this State. I do not know the answer to that question, but I think there is a point to be made in that regard. The second thing I would say is, having looked at the submission for the first time in the last few minutes, the answer to the question whether it is appropriate to have a Bill of Rights is expressed in these terms on page 2, paragraph 6 of the submission dated 13 April 2000. The answer is:

> Only if the likely public benefits of doing so outweigh the arguably harmful increase in litigation and judicial review of executive and parliamentary action which would ensue. The devil is in the detail—everything depends on the precise content of the proposed texts.

I think that answer given by the Bar Association to the question asked by your inquiry is interesting, because it is saying: we will reserve our position until we see the bill; we want to see the precise terms of the Bill of Rights before committing ourselves one way or the other. That is a point that the President of the Law Society has referred to already this morning in evidence when he said to you that there should be a properly crafted and well-drafted Bill of Rights. Possibly the difference between the two associations is not as great as you might imagine. They are my two observations.

Mr ANTRUM: I simply repeat Mr North's submission that Mr Walker starts from the premise that a Bill of Rights would increase litigation. Of course, that is not the society's view. I think Mr Walker, with respect, also makes a further error in characterising members of the Bar Association as the main litigators in this State. Every single day in Local Courts around New South Wales solicitors largely are at the front line of the fundamental rights that are called into question, and it is your ordinary citizens in Cobar, in Narrabri and in Campbelltown that are essentially facing that front line of human rights. That is the litigation, perhaps, that many members of the Bar do not see, and that is litigation we would suggest stands, if anything, to be minimised through a clear enunciation through a Bill of Rights. I am absolutely certain that a Bill of Rights would make the jobs of the Local Court magistrates a little easier and certainly would clarify the submissions that members of the Law Society make every day in local courts.

CHAIR: I have put to some previous witnesses a passage from remarks made by the present Chief Justice of New South Wales, Justice Spigelman, when he was speaking to the Australian Plaintiff Lawyers Association. I know the Law Society is aware of what I am putting to you, because there is a short extract from what the Chief Justice said at page 14 of the Law Society's submission. In essence, the Chief Justice was issuing a warning that given that jurisdictions that Australia would

normally compare itself with in a legal sense, such as the United Kingdom, Canada and New Zealand, all now have a Bill of Rights, in his Honour's view increasingly those other jurisdictions would be progressively removed as sources of influence and inspiration on Australian law. I put that passage to Mr Walker last week and Mr Walker, in essence, told the Committee that he has been at the Bar for some 20 years, which is how long I have been in the Legislature, and he told me and the Committee that when he first went to the Bar it was very common indeed for British cases to be cited in argument in the courts. He told us that that is really no longer the case, that to an increasing extent Australian cases are cited. In summary, he tended to suggest that the problem that the Chief Justice adverts to is not really a serious problem at all. Another witness, a former Chief Judge in Equity, now the Hon. Malcolm McLelland, QC, also differed from the view expressed by the Chief Justice. Could I ask the Law Society what its view is regarding the remarks made by the Chief Justice?

Mr NORTH: We agree with the remarks made by the Chief Justice. The comment made by Mr Walker may well be true—it is about the same sort of time I have been practising—and British authorities are not used as often, because they dropped in their use primarily following the abolition of appeals to the Privy Council, but British authorities are still very much looked at. The problem here is one of putting your head in the sand. If you do not give the Chief Justice's words some real weight, we will have more and more of these very unpalatable cases of mandatory sentences and other matters being raised by organisation such as the United Nations, condemning Australia for having legislation and practices that are anathema to an otherwise civilised society. You will find that if we do not keep an eye on the course of these cases in other countries we will be internationally ostracised for the stance we take.

CHAIR: In your preliminary observations to the Committee some reference was made, more than once, to a well-drafted or well-drawn Bill of Rights. When Mr McLelland appeared before the Committee he was opposing the Bill of Rights and one of the grounds for his opposition was that a bill of rights would result in an unacceptable degree of uncertainty in the law. Another ground was that the stated values are rarely, if ever, absolute. Taking freedom of speech as an example, he said that there has to be established the relationship between freedom of speech and potentially competing values or interests. Some examples were the protection of personal privacy, commercial or personal reputation, the prohibition of criminal conspiracy and discrimination against or vilification of particular community groups. He said also that the stated values in the Bill of Rights are almost invariably couched in general and vague language, and that the values stated in the Bill of Rights are rarely if ever exhaustive. Essentially they were his grounds, briefly stated, for opposing a bill of rights on the basis of what he describes as uncertainty in the law. Could you address yourself to that criticism?

Mr NORTH: Yes. Once again there is some truth in comments of this nature, but the problem is that if you look at the situation as it stands, we have rights under the existing common law system that are totally incomprehensible to the large majority of the population. At least if you have a positive Bill of Rights carefully drafted, even though of course it must, as you see in our submission, have some reservations—freedom of speech and the others you have set out are right—you will not have the total ignorance that exists amongst the wide population in this country. You are replacing something that is totally nebulous at the moment that depends upon the whim of different legislation and different common law judges with a positive document about which people can be taught from kindergarten through to high school the fundamental basis of their rights. People will have far more certainty, but it is true to say that it would have to be a very carefully drafted document. It is true to say also that it could not just be open slather—that is recognised in our submission and, indeed, by all the other areas we have looked throughout the world.

Mr ANTRUM: One of the reasons the drafting needs to be careful is not only for legislative certainty and being able to have the proper degree of clarification and interpretation of it, but also, in my view, and I am sure for many of our members, that it should not just be a reflective document but an inspirational document—as Mr North referred to the ability of schoolchildren, for example, to learn a little of our law. You need only look at the United States of America and its Declaration of Independence and Constitution for the degree of awareness and understanding by young people in the United States of America about their cornerstone foundation documents. It exceeds Australian schoolchildren by a factor of probably 15 to 1, or greater. I believe this is an opportunity for the community to improve respect for the rule of law and a bill of rights is a great document in which to do that.

CHAIR: At page 8 of the Law Society's submission reference is made to seven different statutes, some Commonwealth and some New South Wales, dealing in one form or another with aspects of human rights. Referring to New South Wales statutes, the Anti-Discrimination Act 1977 as an example, when Mr Walker appeared before the Committee last week he expressed the view to us that that is an example of a highly successful enactment which, as you are aware, bans discrimination on various grounds and has supporting machinery to give effect to its provisions. In the Law Society's view, why is that an insufficient approach to giving effect to human rights? With privacy and personal information the rights of people with disabilities and so on not only are there statutory provisions but mechanisms are set in place with an objective of giving effect to advancing the rights of those groups in society. Why does the Law Society argue that you need to go beyond that and have a bill of rights?

Mr RICHARDSON: There is nothing inappropriate per se in that approach, but you need to look at the history that led to parliaments enacting legislation like that in Australia. You mentioned privacy and personal information; if you look at the history and development of legislation in that area you will find that for many years, in fact going back 20 years, there have been attempts by people in the community to litigate matters in the courts on the basis of a "right to privacy". As no doubt Committee members would be aware, common law does not recognise any right to privacy. Accordingly, over the years the courts were confronted with wide-ranging arguments and difficult issues being marshalled by proponents of such a right to try to establish its existence in common law.

It was as a result of the failure of the common law system to recognise the right to privacy that it became necessary for State and Commonwealth governments to enact the kind of legislation to which you have referred. I feel sure, although I am not an expert on it, a similar argument could be made out for anti-discrimination laws, sexual harassment laws and the like in this country. I guess at the end of the day what a bill of rights does is give to the Parliament an opportunity to lay down a series of fundamental rules by way of a charter that will provide guidance not only to the community but also to the Parliament and to the judiciary in the development of our future legal system.

CHAIR: At page 9 the Law Society submission states:

> All legislative human rights protective measures in Australia are contained in ordinary Acts of Parliament and are therefore subject to amendment or repeal at any time.

I put to you that a statutory Bill of Rights on the New Zealand or United Kingdom model also would be subject to subsequent amendment by Parliament although, admittedly in the case of the United Kingdom model, that legislation is to be interpreted so far as possible in a way which is compatible with rights under the European Convention of Human Rights. Short of an entrenched Bill of Rights based on the United States of America or Canadian models, you have the same problem, parliamentary supremacy is preserved and the Bill of Rights can be amended from time to time.

Mr NORTH: Yes. Undoubtedly you are correct, but one would expect, and you would know this far better than me having spent 20 years in Parliament, that it might be one thing to change a couple of clauses in a discrimination Act or privacy Act, but it would be a fairly major undertaking for a government to put forward comprehensive changes to something as important as a bill of rights Act. Of course, it could be done and our suggestion, in our submission, is that the Parliament does retain supremacy in the role of being the one that can make the legislation. We are not putting to you that it should be lawyers who override Parliament in this regard, but we do not resile from that and I think you are right. However, I believe it would be far more difficult to do than it would be to change any of these pieces of legislation that come from both the Federal and State spheres. From 20 years of looking after clients in both the country and the city, I can say that they have absolutely no idea of their rights under the present situation and that is one of the grave dangers of continuing with the present situation and one we think can be fixed by a properly drafted Bill of Rights.

CHAIR: What does the Law Society say to the often expressed criticism of a bill of rights that it transfers to the judiciary, who are after all unelected and unaccountable in a democratic sense, a political function of deciding what are essentially economic and social questions rather than legal questions?

Mr NORTH: We believe the major effect of having the Bill of Rights will be that the legislation that is enacted in any event will have already been scrutinised not only by the parliamentary draughtsmen or the Local Court people who make the regulations but also by the

Parliament itself before it is enacted. One of the benefits of judicial scrutiny, according to our submission, will be that they will not be looking to overturn it in terms of the black letter of the law but will be scrutinising it along the lines of whether or not it is compatible with the Bill of Rights Act. I suppose it is fair to say when you bring in something new like this there may well be a bit of an uplift in judicial review, but when they actually become workable and are bedded down, we would hope you would have a country that not only enjoyed better legislation but less interference by way of litigation because your rights, which are not known at the moment, would be clarified and known. I think that is an essential element of the whole argument.

Mr RICHARDSON: Another point that could be made on this topic is that if you take the British example, which, as the president has already advised, is not yet enacted, the supremacy of the Parliament in the British model is affirmed and the role of the courts is to evaluate the issues and proceedings before it having regard to the United Kingdom Bill of Rights. In other words, it is more an interpretive role and they will be using the Bill of Rights as a guide to the decisions they make. It may be the case that the reason the United Kingdom has gone down this path is that without it they are subject to review in Geneva and other places under treaties—the European Convention and other conventions, proceedings over which they have little control or indeed much influence.

It has been the case for many years in the United Kingdom that important decisions have been made in Europe that affect basic rights of people, particularly those involved in criminal trials and other matters. It may be the case that the response of the United Kingdom Parliament has been encouraged by those developments over the past 20 years and that the United Kingdom Parliament, and particularly the United Kingdom Government, has decided that, rather than allow the administration of justice in the same country to be subject to review by others in other places, it would be preferable for the United Kingdom Parliament to make its own statement as to the rules that will apply, and thus bring the disputes that currently take place in Europe into its own court system and allow its own judiciary, which is very similar to ours, to apply the rules to the issues that come before it.

That may be an approach that seems remote to Australia at the moment, but it may not be remote for much longer. In fact, I think the President and I are aware of some publicity being given in the United Kingdom at the moment to a case being brought by a group in Australia under the International Covenant in relation to mandatory sentencing laws, which we understand is a case being argued by Cherie Booth, the wife of the Prime Minister of the United Kingdom. So it may be remote to our thinking now, but it may not be so remote in the future.

CHAIR: If I might follow up the matter of whether the judiciary is politicised under a Bill of Rights. I note that at page 10 is this response to a question that the Committee asks as to whether economic, social and cultural rights, group rights and the rights of indigenous people should be included in a Bill of Rights:

> There is a need to include economic and social rights such as the right to work or the right not to be poor, as well as community and cultural rights such as those relating to indigenous peoples in any Bill of Rights.

Would I not be correct in thinking that the difficulty of the judiciary being required to decide essentially political, economic and social questions would come into very sharp focus if such rights were to be in a Bill of Rights, as distinct from rights under the International Covenant on Civil and Political Rights, such as the right of free speech, freedom of assembly and such traditional rights?

Mr ANTRUM: In many cases a Bill of Rights does no more than encapsulate what is already existing law. I think it is perhaps, with respect, a stretch to suggest that the judiciary would become any more politicised by a Bill of Rights than it is already—which is not to suggest that the judiciary is overly politicised. Every single day the various tiers of the judiciary decide rights relating to monetary compensation, social rights, rights within family law and deal with cultural rights under native title legislation. The bundle of rights that the courts now review already stray into those spheres. The Bill of Rights may create or define some new rights, but I do not think those rights would in any way stray into areas that the magistracy and judiciary are already dealing with.

I think that the Bill of Rights—and, again, I do not want this to become a sort of violin speech—presents the State of New South Wales the opportunity to actually affirm what it is that the community upholds as its values. Why are we frightened to enshrine those things which the

community regards as fundamental rights? If we have to continue with the piecemeal and ad hoc legislative framework that we have at the moment, I think that is unsatisfactory for a first-world country like Australia and for a sovereign body like New South Wales which says on every possible occasion that we are a people committed to human rights and the protection of our own. Why, then, are we frightened to articulate what that is? I do not think that is beyond us.

CHAIR: Could I put this to you? Supposing an economic right were upheld in a particular piece of litigation, and that had resource implications so far as the government of the day is concerned. It might be Aboriginal people at Toomelah, to take that as an example, who might not have had, in the past at least, adequate sewerage or even running water. Could I put it to you that, realistically, only a government can determine budget priorities. On the basis of my political experience, I would feel entitled to say that politics is basically about carving up the cake between the competing priorities; that there is never enough funding available in any given year to satisfy all demands that might be made on a government.

That is true across government, and it is true within portfolios that I have held in the past. One can never go to the budget committee of Cabinet and say that the 30 things that one wants funded are to be funded in any given year. The Cabinet committee is likely to say, "We will be able to fund six of them at a maximum." I am trying to come to grips with how this works. If a judge is entitled to make a finding in regard to an economic or a social right, how is it to be funded?

Mr RICHARDSON: The issue is: What is the nature of the finding they can make? It depends on the model followed, but if one adopts the United Kingdom approach, which is the one that the President of the Law Society is pressing upon the Committee, then the ability of a court in the United Kingdom, once that legislation comes into effect, to make the type of economic decision to which you referred is very limited.

There are two things to be said about this. The first is that the United Kingdom Parliament itself can enact legislation in such a way as to put it beyond the reach of the court to apply human rights enactments to it. The Parliament has the ability to do that. That is one of the weapons that it can use to maintain its supremacy over the legal system in that country. That is point one. Point two: Where it does not do that, and a piece of legislation is enacted, yes, it is open to individuals to challenge it; yes, potentially, they could go to the court and say that a particular piece of legislation offends against—expressed in your terms, Mr Chair—the right to work.

But the courts, when hearing such a dispute, do not have the ability to strike down the legislation. They have only the ability to say in their view that that particular rule, that is, the right to work, is infringed by this or that provision contained in that particular piece of legislation. One would then assume that the matter would come back to the United Kingdom Parliament for consideration. It may be that, on the second occasion the United Kingdom Parliament considers this, it would enact legislation in terms that puts it beyond any possible interpretation by the courts under the human rights bill.

Mr NORTH: Or, on a humanitarian aspect, it may help the government to divide up its cake, because the government might say, "We have a ruling, and maybe we do have to spend $30 million on sewerage for the Aboriginal people, or not." But I think I should make the point in this regard that already courts quite often, under the existing structure, are making pronouncements that affect tax, cigarette franchises and cross-vesting that have huge implications for the government in any event. In that regard, it is not a major change but, under the proposal that the Law Society has put to the Committee, the government does retain the ultimate power. We would say the beneficial effect of this is that these changes by the courts are not coming to the government in an ad hoc way and unexpectedly, such as the cross-vesting legislation came out of nowhere, as did the cigarette franchise legislation, and then suddenly the government finds itself with a multibillion dollar hole in its budget.

CHAIR: Could it be that, via the High Court and its decisions in cases such as Mabo, *Minister for Immigration and Ethnic Affairs v Teoh*, and Dietrich's case, the High Court is already importing Australian international convention obligations into our common law here in Australia?

Mr ANTRUM: Yes, Mr Chair. I think that is clear, particularly in cases like Teoh. But the interesting outcome from Teoh is that, while we have been developing—and certainly Justice Kirby

would support this view—an implied Bill of Rights, which I think it is an international development which, no matter what we do here—and I refer now back to the Chief Justice's view in relation to intellectual isolation in a common law country—that we are going to be drawn into that in any event, perhaps more for trade reasons than any other reason—the interesting thing about those decisions is that that is looking to human rights instruments and looking to international conventions, because we have in this country such a hotchpotch for guidance and for clarification.

Teoh is the classic example of saying that where there is confusion, where there are some grey areas, then Australia may look to international conventions to clarify those matters. What we suggest in our submission, and what so many advocacy groups that represent vulnerable people are suggesting, is that there is an urgent need for that clarification domestically. We should be able to do now what time will to inevitably, which is to import the provisions of international conventions into domestic law.

CHAIR: The Law Society, in dealing with a question that the Committee put to it, considered the matter of the increasing trend over recent years of privatisation of government functions and the growth of large corporations and other private organisations, and says that the practical implication of this would be to apply the Bill of Rights to both public and private power. The Australian Lawyers for Human Rights has submitted to the Committee that the most satisfactory way in which to resolve this issue is to do away with the distinction between public and private power altogether. Speaking for myself, I have little difficulty with that as a concept if it is dealing with private bodies, whether corporations or otherwise, exercising what formerly would have been public functions. However, I have a great deal more difficulty with it if it means the entire abolition of the distinction.

I put to the Australian Lawyers for Human Rights two examples of situations that might conceivably arise under litigation. They are quite startling when one thinks of the implications. One would be if litigation were mounted against the Catholic Church or the Anglican Church in the diocese of Sydney regarding the question of ordination of women priests. Another example I gave was compulsory student membership of student unions. That could conceivably be challenged under human rights law that abolished a distinction between public and private rights. What would you have to say to that? Do you think I am right in worrying that there could be quite far-reaching and even radical and startling consequences?

Mr NORTH: I will let Mark Richardson answer that because it is something we discussed, but we put the proviso in a submission that there would need to be get-out clauses in terms of certain, I think we referred to it as matters of national security and other matters that do not fit within the ambit of it.

Mr RICHARDSON: Mr Chairman, your example about the church, no matter what church it is in the central business district, is an interesting example because the New South Wales Parliament has enacted legislation over the years which has included special protective provisions in relation to religious groups. In fact, the Anti-Discrimination Act is one of those. That is an example of the Parliament indicating to the judiciary what its view is about important social questions of this kind. The issue that concerns you in raising that example is whether you wish to maintain control, through this Parliament, over decisions that might be made through the court system or whether you wish to allow those decisions to be arrived at through more informal mechanisms such as occurring in cases like Teoh, Dietrich and others where, in effect, the High Court is looking at overseas treaties and conventions and drawing out from those conventions principles which it then seeks to apply in some way.

If it can justifiably do it under a common law principle, it will but if not, it might will apply those principles in some other way to the resolution of disputes between citizens in this country. The issue is whether you want the more informal processes to continue, in which case the decisions made by courts in New South Wales will be indirectly affected by international conventions, or whether you prefer the alternative approach of seizing control of the issue to enact your own rules through the Parliament and thus give the guidance that the courts are really looking for in terms of the kinds of rights that this community expects to be applied to the decisions that come before it.

CHAIR: Another route that the Parliament could take in the promotion of a bill of rights in a statutory sense would be to amend the Interpretation Act of this State to perhaps require the courts to take into consideration Australia's obligations under treaties to which it is a party. When that was put to Mr McLelland, to take an example, his response was that he would have no objection to courts being entitled to go to such an international instrument as an aid to interpretation, however, he would certainly be firmly against being required to take that into account. What would your attitude be to that as a means of promoting a bill of rights as an alternative to a statutory bill of rights, that is, amending the Interpretation Act?

Mr NORTH: In this respect we agree with the Hon. Malcolm McLelland that the Interpretation Act should not be amended. One of the reasons that we are advocating a bill of rights is that we believe the people of this State do not understand the current system in any measure. One of the reasons we are advocating the United Kingdom approach is that it will invite a much greater understanding of the whole issue if one actually has a bill of rights rather than amending an Interpretation Act because we think that will have no effect on clarifying people's rights and no positive effect on teaching people in this country about the bill of rights.

Mr RICHARDSON: Another point is that invoking an international treaty and saying it can be applied in the courts means by definition that all provisions in that treaty are capable of being applied in a domestic court. There may be very good reason why the New South Wales Parliament will want to look at some of the individual rules within those treaties and ask itself whether those particular rules should be applied in New South Wales and, if so, in what way they should be applied. That is important because we have a constitution in this country and the Australian Constitution contains some basic and fundamental rights which it may be necessary for whoever drafts a bill of rights in New South Wales to look at closely when considering the importation of a provision in an international convention dealing with the same subject matter, such as the right to vote, religious expression votes and the right to trial by jury.

It is not appropriate for there to be a blind acceptance of some international treaty as applying to domestic law, but rather the Parliament's role is to look at the international treaty and say which of the rights should be applied in New South Wales and to then enunciate them. There may be rights in an international treaty that this Parliament does not want to see contained in a bill of rights. For example, for very sound reasons you may well not want to have a right to life. Maybe that is something you do not wish to have in your bill of rights. The role of this Parliament is to make that decision and to say, "No, we will not include that but we will include the others." I would prefer a more thoughtful approach than one that merely says that you can look at the international obligations insofar as they are relevant, because that really just passes the buck.

CHAIR: The right to vote is a very clear example, in my view, of the difficulties that arise if that were to be included in a bill of rights. When one articulates a right to vote there are various qualifications, such as the age at which it is exerciseable and whether prisoners can vote. I put it to you that is a clear example of the difficulties of just specifying a right in simplistic terms in a human rights document.

Mr ANTRUM: The same difficulties are faced by the drafters of international conventions. In fact, their difficulties are greater than ours in that they are not dealing with just one community but hundreds of communities around the world. The most popular convention is the convention on the rights of the child, but most conventions make a number of statements that raise certain difficulties. However, it is a drafting exercise and subject to the standards or proper laws of the Parliament at the time, those qualifications and caveats can be built into a bill of rights without diminishing or diluting the impact of making a bald statement like, "Everyone shall have the right to vote." There is nothing to prevent Parliament from adding certain get-out clauses, as referred to earlier, which allow the Parliament to retain supremacy in terms of doing its job, after being elected by the community.

CHAIR: Dealing with the question of certainty of the law, when Mr McLelland appeared before the Committee he said that in his view it is desirable for the law to be capable of being clearly explained to a client in a solicitor's office and that if there is a bald or brief statement of a right in a human rights enactment, in whatever form, in essence there is a derogation from that capacity to clearly explain to a client in that context what the provisions of the law are. Can you comment on that criticism?

Mr NORTH: I think here he has got the effect of what we are going to try to achieve mixed up. If you have a bill of rights, hopefully once it is in place you already have legislation and regulation at local levels that have been carefully looked at and therefore conform with the bill of rights, and the legislation is far less open to interpretation than legislation that existed before the bill of rights. Therefore, as a lawyer, rather than having another layer of things to explain to a client, you can actually say that the legislation is very well reasoned, thought out and is compatible with the bill of rights. Our present system requires that we have to try to explain an ad hoc arrangement that is negative in that one cannot do certain things. It will be far more positive and far better for a solicitor or barrister to be able to explain things to a client if we have a well-drafted bill of rights.

Mr RICHARDSON: Going back to your earlier question which, as I interpreted it, is directed at whether the rights are absolute, you asked how one applies the right to vote. Does it mean one cannot have age limits or one cannot exclude prisoners from voting? That is a very interesting proposition but I do not think the Law Society would ever see these rights as being absolute. If you take the right to life, there will always be arguments both ways as to how that right should apply in a particular case. There will be those who argue that the right to live means that a pregnancy should not be terminated and others will argue on similar grounds that it should be.

The bill of rights focuses the issue and brings it back to something that a court can look at and can determine, whereas at the moment within the Australian context it does not have that framework to guide it in reaching a resolution of the dispute. Accordingly, when lawyers argue cases in courts in Australian jurisdictions at the moment they seize upon all sorts of possible arguments to try to advance the cause of the woman who is seeking to terminate the pregnancy or the other group that is seeking to prevent that occurring under any circumstances. Accordingly, litigation perhaps under the current situation is more protracted than it needs to be.

The bill of rights will focus the issue. Courts will interpret that ruling, that there should be a right to live and they would do so over the years and as time goes by, as with common law, we will come to a better understanding of what that rule means, but I do not think anyone would believe that it is absolute and if it were to be interpreted as an absolute provision, it would create all sorts of difficulties.

CHAIR: That brings into sharp focus, though, criticisms made by Mr McLelland and probably Mr Walker on behalf of the Bar Association that to the extent that you require a judicial officer to weigh competing interests under a bill of rights statement, whatever it might happen to deal with, you are in effect judicialising an essentially political function.

Mr RICHARDSON: You are establishing what the community expects by way of a fundamental standard that you would ask your judiciary to apply to the facts before it. You mentioned the right to vote. That is a rule enshrined within the charter and you would look to your judiciary to uphold that rule in the circumstances of the case before it. Really you are giving it a framework and guidance, and in creating that system, you are ruling out a whole lot of possible arguments that might occupy the court's time that arise at the moment simply because we do not have any fundamental statement which we can bring our arguments back to, so we try to find anything. If we can persuade the judge that we are right, we get a result.

The Hon. J. F. RYAN: You said earlier that if there was a bill of rights it is likely that there would be less litigation, not more—a different view to the Bar Association—in that people would be more aware of their rights and therefore the distinctions would be clearer. You also recommended that the international covenant of civil and political rights should also be incorporated into the domestic law and that is an important statement. In my view the statements in that covenant are not likely to limit litigation but are likely to escalate it. For example, the statement that everyone should have the right to recognition everywhere as a person before the law, if stated in those terms, is not a statement that is likely to reduce litigation. Everyone will wish to make the point to the court that their case is special and contravenes that standard, something that they do not normally do now.

Similarly, this morning we talked about the right to privacy. This statement with regard to privacy states that no-one shall be subjected to arbitrary or unlawful interference with his privacy, family, home, correspondence, unlawful attacks on his honour and reputation; everyone has the right

to protection of law against such interference and attacks. Those kinds of things, stated in those terms and even with some qualifications, are likely to lead to more litigation not less because all sorts of groups and individuals would want to try it on. It seems to me that a far more efficient way to go about, for example, privacy would be to set legislation that set standards and sets up the tribunal to look at situations that might be infringed. Similarly with sexual harassment cases that are taken up with the Anti-Discrimination Board and so on. Those sorts of models that we already have in New South Wales appear to be more efficient in terms of reducing litigation than to have this sort of statement that strikes me as likely to enhance litigation, not reduce it.

Mr NORTH: I will let Mr Richardson answer this, but at the outset I should clarify something. There could well be a bedding-down period following any bill of rights. To blandly state that we do not think there will be any increase in litigation at all for a short period may not be totally one that we, as an organisation, should give to you. But we really believe that if we have a bill of rights rather than the ad hoc groups dealing with different aspects of human rights eventually we will have far more efficient and well-drafted legislation that is far less likely to be open to judicial review.

Mr RICHARDSON: There is no answer to what you say, because you picked some particular rights that are very widely expressed.

The Hon. J. F. RYAN: I put to you that most of the stuff in this covenant is pretty widely expressed.

Mr RICHARDSON: There are pretty widely expressed, yes. One answer to your question is this, it is up to the New South Wales Parliament to put these rights in terms with which everyone is comfortable, terms that are suitable to the community in New South Wales. This is the point I was making to the Chair earlier. I do not think it would be appropriate for the New South Wales Parliament simply to pick up some international covenant and say that it will apply in New South Wales in its current terms. You have to think through each of these clauses and assess whether they are appropriate. That is really what the Bar Association, in the end, is saying in its submission: the devil is in the detail. The role of the New South Wales Parliament, should there be a bill of rights ultimately in this State, is to evaluate each of these provisions and decide which of them is appropriate for application in New South Wales.

The second thing is that the courts, ultimately, will decide what these things mean. The fact that a provision says, and these are my words not the words in the covenant because I do not have it before me, that everyone has a right of access to the law, or something along those lines, does not mean to say that the New South Wales Parliament cannot have rules on standing to bring proceedings before the court or, indeed, that the Supreme Court cannot have rules dealing with such matters. It does not mean that at all. What it means, though, is that if anyone were to challenge the rules in relation to standing, bringing actions before a court, it would have some framework within which to do that and ultimately it would be for the courts to decide whether a particular statute or a particular court ruled breached the provision, and that is a matter of interpretation. These things are not absolute.

The Hon. J. F. RYAN: So what becomes the right? The statute that qualifies the right or the wider statement in the bill of rights?

Mr RICHARDSON: The statute creates the right and the provisions within the statute will be measured against the charter, that is the bill of rights.

The Hon. J. F. RYAN: What is the point of having a broad a bill of rights?

Mr RICHARDSON: Because there is nothing at the moment against which you can measure it.

Mr ANTRUM: If I could just add to that. As you would be well aware, under the rules of interpretation anyway, anything that has greater detail will be used as a primary source and then you move backwards to a statement of more broad principle. Again there is nothing to prevent the Parliament from providing more detail through specific legislation on any of the broad principles and, in any event, the principles contained in the ICCPR under the Convention on the Rights of the Child, the United Nations Declaration of Human Rights, those conventions are drawn generally with a view

that sovereign parliaments and others will create rules to support those. In this State we already have principles and legislation that is a right for everyone to appear before the courts to have their case put. There is nothing to prevent any person from doing that. They may have to appear with the tutor, they may have to seek leave, but they can still get their day in court. That particular provision would not be of any great difficulty. We should not be concerned that again we affirm what we regard as the rights.

The Hon. J. F. RYAN: What is so special about the United Nations Covenant on Civil and Political Rights or any others given that in a pluralistic society like Australia there are so many countervailing values that it is difficult to know exactly without a democratic vote what the community believes at any one time. Even drawing on something like this, it is reasonably solid on slavery, but it does not include, for example, something that is certainly taken for granted in Australia and that is that there is no death penalty. It is that every human being has an inherent right to life and that right shall be protected by law, and no-one shall be arbitrarily deprived of his life. In Australia no-one is deprived of his life by the State. What makes that a better judgment than what we have come up with ourselves?

Mr ANTRUM: There is nothing to suggest that the International Convention is a better document or instrument than what we could come up with ourselves and, in fact, most United Nations instruments, if not all that I am aware of, are described as minimum standards by which, again, States build upon. That is a very good example you made in relation to the death penalty, the prohibition against the death penalty is expressed in some other instrument to which Australia is a party, but putting that to one side I make the point again that this Parliament can look at these sorts of documents and its own bill of rights and use those as foundations, never forgetting that, at least in my opinion which I think is shared by my colleagues, we have a great opportunity to create an inspirational document and to improve respect for the rule of law.

The Hon. J. F. RYAN: The decision in Victoria, for example, at the end of last week with regard to artificial insemination would make an interesting comparison with the statement in Article 23: the family is the natural and fundamental unit of society and is entitled to protection by society and the State. Someone might use that as an argument about what occurred in Victoria. You made a recommendation that we ought to use it and I want to know whether you would qualify that in anyway.

Mr RICHARDSON: The qualification is the one that we raised with the Chair when he asked us some questions earlier, and that is that it is for the New South Wales Parliament to go through each of these and decide which ones are appropriate and if they are appropriate what their terms should be. We are very strongly of the view that a blind acceptance of an international convention into New South Wales law is not a particularly astute thing to do. It may well be that, for example, the right to vote will have to be rephrased entirely differently. You mentioned the death penalty. You may well have the fundamental rule that nobody will be deprived of his or her life. That may well be what you do.

The Hon. J. F. RYAN: When the Chair asked you a question about why the Law Society might have a different perspective from Bar Association on whether we should have a bill of rights you said that by and large solicitors deal with people on more fundamental issues than perhaps people at the Bar and therefore you have a greater recognition of how a bill of rights might help people, and you named a number of suburbs in Sydney such as Campbelltown. A court like Campbelltown normally deals with traffic fines, apprehended violence orders, petty crime, persons remanded and things of that nature, under what sort of circumstances would you deal with the issues that are part of the International Covenant on Civil and Political Rights, such as the prohibition of torture or inhuman treatment, the prohibition on slavery, the prohibition from arbitrary arrest and detention, other than what already appears the New South Wales, people deprived of liberty to be treated with humanity, freedom of movement, freedom to choose a residence, limitations placed on expulsion of aliens, equality of persons before courts and tribunals, the prohibition on retroactive criminal legislation and so on. They do not sound like the sorts of things that are likely to be discussed with someone at the court door at Campbelltown, do they?

Mr ANTRUM: I would take the contrary view and say absolutely they would be the sorts of things that we would be dealing with. I practised in Wee Waa and Narrabri for 2½ years, and particularly prior to the royal commission torture, arbitrary arrest, unlawful arrest, and detention

without proper procedure were fairly common. The difficulty that one has in making submissions is that at that stage I had nothing to refer to. I might look to international conventions, I might try to construe an argument on part of existing legislation, but it can sometimes be extremely difficult. On many occasions I have seen solicitors refer to international conventions when they are talking about arbitrary as rest, for example, or unlawful imprisonment. That simply is not good enough because we are not quite sure how they apply in domestic law.

It is also the case that these submissions are not made regularly because you simply go shopping to find out what is the best opportunity, and that encourages an enormous waste of time because it requires the court and others to consider a whole number of submissions that are made in desperation. You know it is wrong and you know it smells, but you find whatever sword you can to attack it. The Bill of Rights is a clarifying instrument. When we talk about the increase in litigation, there are two types of increases. You can look at the number of new matters or you can look at the amount of time that a particular litigated matter takes. I would submit that during the bedding-down process there probably will be a greater number of matters but the actual time taken in determination would probably be reduced.

The Hon. J. F. RYAN: In terms of arbitrary arrest or those sorts of things, are not our existing laws that relate to bail or the Evidence Act and so on adequate to deal with them?

Mr ANTRUM: They are, but that particular example has improved because of the detention after arrest legislation, which is a recent innovation of this Parliament and a good one. But it is indicative of the way in which human rights in this State are protected. It is a piecemeal, gradual, incremental development when there are, I would suggest, matters of fundamental interest to the community and matters they would regard as fundamental human rights that are not protected.

The Hon. J. F. RYAN: One of the other problems that has been put to the Committee from time to time about having an entrenched bill of rights, which you are recommending, is that sometimes, over time, the understanding of the meaning of the words can alter to the point that they mean precisely the opposite of what was intended by the people who originally enacted them. Perhaps the best example are provisions in the United States Constitution that separate church and State. There is little doubt that the original Founding Fathers of the American colonies were religious people who did not envisage a situation where the only people in the United States who seem to have rights with regard to religion are those who have no religion at all. It has been used to drive religious influences from private venues, such as shopping centres, which would appear to be entirely the opposite of the original intention.

It could probably be argued that the right to bear arms, for example, is similarly abused. It is no longer relevant in the twenty-first century when people are living in close proximity to each other and they do not have the sorts of pressures that people might have had when they came off the *Mayflower*. Do you have any ideas how you might address that issue? If we entrench a bill of rights, how do we maintain sufficient flexibility to keep it relevant and ensure that it continues to express the cultural and political mores of contemporary society?

Mr ANTRUM: In our submission we looked at a flexible situation. Again we made the statement—and it is one that we truly believe in, particularly in a democratic society—that Parliament retains its supremacy. It is an ignorant view of history to suggest that the community will not change. Perhaps we can improve on the statements that we make. Perhaps we can tighten them so that in another 200 years we have moved from one minimum standard to a new minimum standard. As Mr North indicated earlier, we would like to see, I suppose, difficulty in being able to change such a fundamental document. That difficulty is likely to be more political than anything else. If you start to tinker around with documents of this nature, there probably would be some opposition. That may be a sufficient break. We certainly do not advocate that it is written in stone.

Mr NORTH: That is right, Mr Ryan. At page 15 we state:

> The Committee supports the British model for incorporation of a Bill of Rights into NSW where the Bill is introduced by way of an Act of Parliament. The protection of rights while upholding the supremacy of Parliament is paramount to the acceptance of a Bill of Rights in this State.

Above that we discuss the question of entrenchment. I think you are right. Obviously, one of the great problems in America is that they are doing things some hundreds of years after the event. After much discussion we have put this sort of proposal to you because we think it allows the Parliament to recognise the changing situation and, therefore, to make changes in due course.

The Hon. J. F. RYAN: Mr North, you have been arguing for a bill of rights in the media. I do not know whether you or our staff supplied extracts of these newspaper articles for the Committee's reference. They refer to some comments you have made in the *Sydney Morning Herald* and other places. You have said generally that one of the reasons we might usefully have a bill of rights is to protect contemporary society from going down what I think you call the Singaporean path of government and infiltrating itself into everyday life. The *Sydney Morning Herald* quotes you as saying:

> We are increasingly regulated by lifestyle laws. One of the things we pride ourselves on as Australians is being a little bit carefree, but everything we do, from driving a motor vehicle to drinking in the streets, is more restricted.
>
> With a bill of rights, effectively people would have a say. Government laws brought in as a kneejerk reaction to some perceived social ill would have to take into account basic human rights.

Later, in response to that quote, a *Sydney Morning Herald* editorial stated:

> Like it or not, Australia committed itself long ago to that particular aspect of the "Singaporean path"—urban concentration. The result naturally has been an increase in laws aimed at keeping the peace between neighbours and regulating things such as traffic. If such laws come to be seen in practice as oppressive or unfair, the better remedy is political, by way of repeal or amendment, to make them fairer. A bill of rights is a clumsy and unpredictable response, more likely to lead to complexity and unfairness. To those who can afford it, it will provide opportunities for their lawyers to ensure the client avoids the effect of a law which can be claimed to be oppressive.

That seems to me to be an elegant response to the issues raised both here and in the media. Would you like to respond further to that response?

Mr NORTH: Thank you for the opportunity to say to the Parliamentary inquiry that those comments touched a great chord with people who continually rang and wrote to me, particularly people who had come back to Australia after a period overseas. Most people who rang me were from New South Wales. They said that they were finding life increasingly regulated and difficult. One of the great attributes of a bill of rights is that we will be able to identify for the normal people who live in this society why laws and regulations are going to be enacted. If we have a bill of rights, each of the people who enact laws—whether the laws be at a local, State or Federal level, if eventually we get a Federal bill of rights—will be forced to look at the consequences of these regulated Acts. If the Acts tend to not comply with what people see as their fundamental rights, then we will probably get a better society.

I fully understand why the Parliament and others are increasingly forced to bring in legislation to correct perceived ills. But what we say will occur with a bill of rights is that Parliament will not bring in some new legislation the next day after some cataclysmic event. That legislation will necessarily be looked at carefully and enacted properly and people will know that they have very good, well-considered rules and regulations. I do not pretend to say that I was in any way misquoted, but I do take issue with the editorial saying that a bill of rights is a clumsy way to address this problem. We say the problem has occurred because of increased urbanisation and pressure on a daily basis on members of Parliament to fight perceived ills. If your draftsmen produce legislation that is well-considered and well-reasoned and look at the long-term consequences, that will go a long way down the track.

A short example is that parliamentarians, quite rightly, are worried about deaths and injuries on our roads. Over the last number of years they have ratcheted up all of the penalties so that in some areas for some matters people will never have a licence again. There has been no corresponding drop in the road toll. Those are the sorts of things where you should sit back and look at people's fundamental right to work, to have a job. Rather than continually making penalties more onerous, look at proper alternatives.

The Hon. J. F. RYAN: How does a bill of rights stop that?

Mr NORTH: If in response to the Staysafe committee or somebody-else's assessment that there has been an increase in the road toll this month you triple driving penalties, people will ask about the outcome of that decision? Does that mean that people in areas where there is inadequate public transport—who show on a daily basis that increasingly they are becoming outcasts in society—have no right to work or cannot get their kids to school? Those types of things would be the upshot of that sort of legislation. We will say "Hang on, that is not really achieving what we want to achieve. Let us think about it in the whole social context."

The Hon. J. F. RYAN: Is that not best achieved by having a parliamentary committee similar to the regulation review committee which has a capacity to scrutinise bills?

Mr RICHARDSON: That is precisely one of the key reasons why you would have a bill of rights. It is not directed solely at the court system. It is directed as much at the Parliament. It is a guide for the New South Wales Parliament. One would assume if we had a bill of rights that every regulation or enactment of legislation that went through this House would be subject to an impact test, as the President has just referred to.

The Hon. J. F. RYAN: Following on and bringing my questioning to a conclusion, in New Zealand and Canada the bill and charter have been used frequently to overturn drink-driving and random breath testing convictions. What do you say to the argument that a bill of rights will provide a great deal more opportunity for those charged with criminal offences to raise additional defences to avoid charges? If this happened in New South Wales is it likely to increase public dissatisfaction with the legal system and increase pressure on politicians to support further law and order type legislation?

Mr ANTRUM: I question the accuracy of that particular statement. I am not sure what the evidence for that is.

The Hon. J. F. RYAN: I think a case in Canada resulted in thousands of drink-driving convictions not being able to be proceeded with.

Mr NORTH: To back up what you are saying, Mr Ryan, there was talk in England about speed camera offences. It looked as if many hundreds of thousands of speed camera offences that had been issued might be reversed. Under our submission and under the supremacy of Parliament these things are not going to be badly affected by a bill of rights. If you found yourself in an unfortunate position—as every now and again Parliament does with a High Court decision in the current climate—which badly affected your revenue or something could not be fixed up because the monetary implications were disastrous for the Government, you have the power. You do not lose it under this proposal.

Mr ANTRUM: It does come back to the interpretation question again. A broader or general principle will apply as long as there is not a contrary and more express provision. In this State we have a fairly accepted and laid down procedure to be followed for the taking of breath analysis. That procedure would always apply above a general principle that might touch on the same subject.

The Hon. J. F. RYAN: The concern is not whether it is a drink-driving offence. The concern is that you would argue that we need a bill of rights to ensure that people have more liberty. In real politics it may have the opposite aspect. If it is used, as you say it might be, to protect people's liberty, it will cause the sort of public outcry that happens from time to time when judges use their discretion. That will put pressure on politicians to introduce things such as guideline statements which were not conceivable until a judge's decision. It would be fair to say that because of revisions of the Bail Act more people are serving their remand in custody than was ever the case. I think about 100 women are in Mulawa Correctional Centre now. Until reviews of the Bail Act over the past 10 years there would have been about half that number. Having a bill of rights that is utilised as you suggest might have exactly the opposite impact to the slow, steady, cautious and piecemeal approach that we now take to protect the rights and liberty of people in New South Wales.

Mr ANTRUM: I think your concerns are shared by many of the human rights groups and, no doubt, the Australian Lawyers for Human Rights probably touched on that as well. We have not presented in our submission what we think the bill of rights would look like, because it would be presumptuous to do so. It comes back to careful drafting and allowing Parliament to have a revision

role and to have the opportunity to correct deficiencies, as it does in all new legislation. Very little legislation or new instruments actually hit the deck completely error free. We will have to be prepared for that. Let us be realistic about it. There will be aspects that perhaps need to be amended. That is the nature of legislative development and, again, not beyond this community to correct those deficiencies should they occur. If we do our homework, allow proper consultation and ensure that there is sufficient time to road-test these principles, it would still be a great leap forward.

Mr RICHARDSON: One further point. Mr Ryan used the word "liberties". I do not know that a Bill of Rights is just about liberties; it is also about defining people's obligations. The idea that a Bill of Rights would make us all freer is not one that the Law Society accepts necessarily. A Bill of Rights would provide an opportunity to articulate our responsibilities and obligations as citizens.

CHAIR: Does your submission not argue against doing that?

Mr RICHARDSON: No, it does not. One assumes that the right to vote is an onerous obligation. The Law Society faces that issue every year. We do not have compulsory voting for members of the Law Society Council but members must vote for at least seven candidates who stand for office. The number of complaints we receive from members about having to vote for seven candidates when they know only four is not to be minimised. It is a serious issue within the legal profession. It is an obligation: if members do not vote for seven candidates their vote is invalid. There are obligations in the Bill of Rights as well as liberalising things.

The Hon. J. F. RYAN: On page 11 of your submission, you recommend:

> The Committee believes a Bill of Rights should focus on rights of the individual. Individual responsibilities should remain the domain of the legislators and to be interpreted by the courts.

The run-up to that statement seems to address the question of whether individual responsibilities as distinct from rights should be included in the Bill of Rights. That section of your submission seems to argue against what you have just said.

Mr RICHARDSON: Which page are you referring to?

The Hon. J. F. RYAN: Pages 10 and 11.

The Hon. P. J. BREEN: To clarify, Mr Chairman, one term of reference is whether the Committee should consider separately the question of responsibilities. I do not think it follows that because we have rights there are no responsibilities attached to the question of whether we have rights.

Mr RICHARDSON: We say that: page 11 of our submission says that a Bill of Rights "will impose responsibilities on people". I do not think we are cavilling at that, are we?

Mr ANTRUM: No. I had some part in drafting that response. It comes back to the concern that seems to be engulfing much of the human rights debate in Australia at the moment: any consideration or elaboration of rights somehow excludes a consideration of responsibilities. That is why we get expressions of concern that we should change the name of the Human Rights Commission to the "human rights and responsibilities commission". It is my submission, and that of many of my colleagues, that a proper understanding of rights includes responsibilities. Obligations are created by rights. The enjoyment and protection of rights absolutely involves the enjoyment and protection of responsibilities as well.

The Hon. P. J. BREEN: When the Hon. J. F. Ryan was asking questions it occurred to me that the guidelines for judges might be compared to a Bill of Rights for politicians in that the Bill of Rights could serve to set boundaries against which it would be inappropriate to make laws. Is that a fair description of a Bill of Rights?

Mr ANTRUM: In my view a Bill of Rights acts as a regulatory impact statement, if you like. It provides legislators with an opportunity to reflect their proposal against a background. That is done already in relation to the environment. Sometimes it is tested against the political reality and

sometimes it is tested against other legislative provisions. This would provide a facility for legislators to test their proposal or their bill against what the Bill of Rights says.

We have had instances within the law and order debate of clear breaches of human rights laws and our human rights obligations. For example, the mandatory sentencing legislation in the Northern Territory. If the Northern Territory had had a Bill of Rights I suggest that it might have had more difficulty in squeezing that legislation out of Parliament. I do not suggest that a Bill of Rights provides a brake on legislators because they have a mandate to put up any proposal they like. However, a Bill of Rights would provide a mirror for them to see whether their human rights provisions were being breached.

The Hon. P. J. BREEN: In Victoria there is a Scrutiny of Bills Committee, which I think was introduced in 1996. In its first year of operation it identified about 38 laws that had been passed by the Victorian Parliament that breached fundamental principles of human rights. Judging from my experience in this Parliament, we have a similar problem: we frequently pass laws that contravene the basic principles of human rights. If there were either a scrutiny of bills committee or a Bill of Rights, those laws would be identified as breaching fundamental principles—whether or not they then proceeded to be enacted is of course another question, and it is the Parliament's prerogative to do that.

However, not having the debate seems to me to be one of the disadvantages of the present situation. For example, this Parliament has passed I think 22 laws on which the Government and the Opposition voted together. Only the crossbenchers expressed opposition to those bills. To my mind, that highlights the fact that, in a political situation where the major parties represent the overwhelming majority of citizens, minority groups do not have their interests identified or protected. Do you believe protecting minority groups is an important aspect of a Bill of Rights?

Mr ANTRUM: Yes, I certainly believe so. You make a good reference to the Scrutiny of Bills Committee in Victoria. The difficulty with that committee is that it reports largely to a fairly small, educated group of people. People like me would receive the deliberations of that committee. I think a Bill of Rights would provide input for the entire community to test the impact of legislation. I believe a well-drafted, clear, concise, plain English bill would allow our young people and others to have a much better understanding of the human rights framework. I think that would provide greater accountability for Parliament and perhaps lead to greater care regarding such proposals.

The Hon. P. J. BREEN: Mr North, Mr Richardson and Mr Morgan reported earlier on proceedings at the Royal Albert Hall in London. I was interested to hear the remarks of Tony Blair on that occasion. In that context, you mentioned the different attitudes of children in America who know about rights and freedoms. Because of the complexity of our laws in this country and the fact that there is no overriding principle in place in the legal system, we cannot direct our children to any particular benchmark. Nevertheless, our children identify with other values—for example, fairness and the environment. By their nature, children need to identify in some way with those fundamental values. Although there is a deficiency here because there is no Bill of Rights, it seems to me that that gap is filled by other values such as those that I have identified. Do you think that is an argument against a Bill of Rights?

Mr NORTH: No, I do not think so. The difference is very marked regarding what children in the United States, for instance, know about their heritage, their background and the constitution. We need to fill that void. On Saturday night I attended a local Law Society function in Taree that was attended by the Chief Justice of the High Court of Australia, Murray Gleeson. He talked about the constitution and the Centenary of Federation and said that it was absolutely amazing how little even the audience to whom he was speaking—which comprised solicitors from the local area—knew about the way that we started as a country and the way in which we treat issues. He spoke provocatively and said that we should encourage more interest. We think a Bill of Rights will do that, and do it from the beginning—from kindergarten upwards. That would help us to live in the world community in a far more peaceful and progressive manner.

The Hon. P. J. BREEN: The proposed English bill or rather the United Kingdom Human Rights Act contain an unusual provision in that it refers back to Parliament any issue that the judges might determine as being in contravention of the bill. There is some question about whether that raises the issue of separation of powers. Bret Walker, in particular, was horrified by that provision when he

addressed it the other day. I think it is a positive provision that would enable the judiciary and the legislators to work in collaboration—I think you identified that point in your evidence. Can you explain further from your experience in the United Kingdom how they expect that provision to work in practice?

Mr RICHARDSON: I do not see it as a separation of powers issue. I am inclined to your view: it is a helpful provision. The United Kingdom Act allows the Parliament to say that a particular enactment is beyond review under the Human Rights Act. It can do that: it can pass legislation dealing with drink driving, for example, and say that sections 15 to 20 cannot be reviewed by the courts under the Human Rights Act. If it does that, there can be no review. That is the first point.

When Parliament does not say that, it is open for a person to challenge provisions before a court as contravening an article in the Human Rights Act. The United Kingdom has simply said that, when a court is of the view that a challenge is appropriate and there has been a breach of one of the articles in the Human Rights Act, it can be so declared. However, the provision cannot be struck down; it returns to the Parliament. That is a way of maintaining the supremacy of the Parliament. It gets around the problem of Parliament's handing over to the judiciary its entitlement or its responsibility to make certain kinds of decisions.

The Hon. P. J. BREEN: What does it do with the litigant—the person who has made the application? Is he or she sent away?

Mr RICHARDSON: The litigant seeks the order. One assumes that the proceedings, when they occur—there have not been any yet—will be directed to the question of whether the order will be made. The order is simply that this particular provision contravenes an article of the Human Rights Act. There no remedy beyond that—no compensation, no deeming a provision to be unlawful or anything like that. It is simply an order, which then comes back to Parliament.

The Hon. P. J. BREEN: So the person who has made the application does not get any specific relief for his or her problem.

Mr RICHARDSON: No, not necessarily.

The Hon. P. J. BREEN: Is that the intention of the legislation?

Mr RICHARDSON: I do not know, but I expect so. The material that led to the enactment of the Human Rights Act in the United Kingdom Parliament caused the Parliament, through its committees and debates, to be very concerned about the question of Parliament's handing over its supreme position in the legal system to the judiciary. I think it is a direct response to that concern.

The Hon. P. J. BREEN: The Chairman mentioned earlier the cases of Mabo, Teoh and Dietrich as examples of the courts already using international instruments to make decisions in Australia. The problem with those decisions is that judges are now avoiding like the plague the possibility of acting on them. For example, when someone raises a Dietrich issue the judges find some other way of dealing with the problem so that they do not have to go down the Dietrich track. Is that correct?

Mr RICHARDSON: I cannot comment on the Teoh case, but I can comment on Mabo and Dietrich. The ultimate decision in Dietrich does not depend on any international convention. In Dietrich, the High Court had an authority before it in the case of McGuinness, which was a 1979 case. It raised the question of whether an indigent accused had a right to counsel and in McGuinness the court ruled that he had. Along comes Dietrich many years later, and in the submissions made to the court in Dietrich there was plenty of reference to international convention but ultimately the decision in Dietrich arises out of an interpretation of what is meant by fair trial in common law. So, the decision does not hang on an international convention at all.

The same point probably could be made about Mabo. I will not go through that argument, but I think you know what I am getting at. Ultimately the Mabo principle is a common law principle not an international Law principle. The point about having a Human Rights Act has much to do with Parliament declaring what are going to be the basic rules they are to apply within a community. If you

do not do that, as we said before, you run the risk through an indirect mechanism of international courts and tribunals making those decisions for you. I think that is a very important distinction you need to bear in mind.

The Hon. P. J. BREEN: The point I wanted to make though is our judges seem to be reluctant to follow even decisions of the High Court that support international human rights instruments. If you were to try to run a Dietrich type argument in the Local Court or District Court, the judge would find some way of dealing with it and ending your argument without even bothering to refer to international instruments. Whereas, if we had in place a Bill of Rights which somehow gave you the right of access to judgment, however it is expressed, it could be a benchmark that the litigant could rely on.

Mr RICHARDSON: Mabo, once passed, is a decision that resulted in legislation of all sorts. Dietrich will be not much different. Already the reaction to Dietrich from the judiciary is: we need guidance from Parliament. Under what circumstances does an indigenous accused have a right to counsel? Who is paying? Do we decide that or does the Legal Aid Commission decide that? In Victoria and South Australia statutory provisions have been brought in by Parliament to give the judiciary in those jurisdictions some understanding of what the Dietrich decision means in those jurisdictions. Your point is that if you had a Bill of Rights to underpin the Dietrich type of decision it may not be necessary to do that. It is a good point and you are probably right, but the Dietrich decision left the judiciary in a very difficult position.

If you make a Dietrich application, the proper interpretation of the Dietrich principle is that you release the accused. The accused has not got legal aid, the accused has not got private means of funding his or her defence, therefore you release the accused as a person unable to have a fair trial. That is what it means ultimately. Judges are not likely to reach that conclusion without some sort of guidance from Parliament through statutory law in other ways. Your point is well made, the Human Rights Act could help.

The Hon. P. J. BREEN: Currently there are about 19 cases from Australia before the human rights committee in Geneva and a good number of those are from New South Wales. Is there likely to be any pressure, political pressure or otherwise, to introduce a Bill of Rights as a consequence of adverse decisions against Australia in Geneva?

Mr RICHARDSON: Absolutely. That is the point I made before. It might seem remote now but it will not be remote in the future. If you cannot get a local remedy you will get an international remedy. We are not talking about remedies being sought only by people seeking to preserve their liberty or freedom. You may find the business community becomes very interested in this. After all, privacy laws are very important to the business community, because it is well known that countries that do not have sensible and statutory provisions and other rights dealing with privacy may not be so welcome in the global trading community. It is a well-known fact.

The Hon. P. J. BREEN: Is it true that Australia has the worst privacy rights in the world?

Mr RICHARDSON: I cannot comment on that, but certainly steps are being taken quickly at the Federal level. The Federal Government has seized on this issue and is taking steps to rectify the problem. Whether it is a response to that, I do not know. Certainly there is a lot of movement on privacy.

The Hon. P. J. BREEN: Is there a problem with standing for corporations if they went to Geneva? I think they have to be individuals, is that correct?

Mr RICHARDSON: No, but there are many ways in which you can skin a cat.

The Hon. P. J. BREEN: You have to skin a cat as an individual, not as a corporation, is that right?

Mr RICHARDSON: That is possibly right but if the will is there to mount some international challenge against something in Australia that the business community or the other communities find undesirable, they will do it.

The Hon. P. J. BREEN: Finally, the question of what kind of rights would be in a Bill of Rights is not one that we have addressed, and obviously it is difficult to do that in advance. But, we have had the benefit of some advice from other witnesses about due process rights, for example, and about the right to vote and various other rights that would be relatively uncontroversial. For example, the right to life is controversial. Professor Williams said that the right to equality is controversial, which surprised me, the right to legal equality. He said that would cause more litigation than you could poke a stick at. Assuming there are a number of rights everyone can agree on would the society be in a position to make a submission to the Committee about those rights it sees as necessary in a basic bill?

Mr RICHARDSON: Certainly we would be in a position to do that if you wanted us to do that, but we would feel our resources were better used if we did that after you had made a decision whether in principle it was a good idea. For years people have been arguing about whether we should have a Bill of Rights. The Law Council drafted a Bill of Rights some four years ago, a complete bill. Mr Walker, who was the president of the Law Council, made reference to that. It drafted a bill but it got nowhere. One does not like to see one's resources wasted.

The Hon. P. J. BREEN: I have to say that bill was unconstitutional.

Mr RICHARDSON: It may well have been but the point I am making is we would be very happy to put our resources into something we thought was going to be meaningful.

CHAIR: Mr Walker's submission on behalf of the Bar was rather curious to the extent that it warned us what dangerous territory we were about to embark upon then proceeded to tell us what we should have in the bill.

Mr RICHARDSON: He would have been on the executive of the Law Council of Australia when the document to which I refer was drafted.

The Hon. P. J. BREEN: If I were, for example, to send you a copy of the rights that he suggested ought to go into a Bill of Rights and perhaps ask for your comment on those and for you to elaborate on them, would that be appropriate?

Mr RICHARDSON: That would be appropriate.

The Hon. P. J. BREEN: Would you be happy to do that?

Mr RICHARDSON: Yes.

The Hon. P. J. BREEN: If I could ask the Committee or one of the members to send a letter to the Law Society. Other than that, I have no more questions.

CHAIR: Could I ask a couple of additional questions. Before this inquiry commenced I wrote letters to quite a substantial number of people I thought might have an interest in making a submission. One of them was Sir Anthony Mason, the former Chief Justice of the High Court of Australia. He chose not to make a submission, however, he did say in a letter to me that he favoured a Bill of Rights on the New Zealand model. One of the judicial officers who has made a submission to this Committee describes the New Zealand Bill of Rights as a bare statutory Bill of Rights and describes the British model, that is the Human Rights Act of 1998, as a fortified statutory Bill of Rights. Could I ask you to say briefly why you have chosen the United Kingdom model rather than the New Zealand model?

Mr RICHARDSON: It is not so much the content of the bill itself. It is not the clauses in the bill that create rights and responsibilities that impressed us in the UK model. It is the fact that it put Parliament at the pinnacle of the process. It was that aspect of it that excited our interest initially. Then, when we looked at it further and looked at the European convention and looked at the International Covenant on Civil and Political Rights, we had similar thoughts to Mr Ryan's. The UK convention has so much more clearly expressed rights and responsibilities in it than the International Covenant on Civil and Political Rights. That became a second reason for supporting the UK Bill of

Rights concept, because it is based on a better international treaty than might otherwise be the case. They were primarily the two reasons. We are not saying the UK Bill of Rights and what it contains is appropriate for New South Wales, because ultimately that is a decision Parliament would have to make, but it is a better starting point that the International Covenant on Civil and Political Rights.

Mr ANTRUM: I think it also goes a greater distance. They made the decision that they were going to affirm human rights in that country and they did so. The New Zealand one was more procedural than substantive.

CHAIR: I think you would agree with me that in recent years there have been examples of legislation enacted in State and Territory legislatures that could be characterised as both a breach of human rights and an interference in the role of the judiciary. Mandatory sentencing in the Northern Territory and, to a lesser extent, Western Australia may fall within that, as might the Kable legislation in the State, which was subsequently struck down, as you would be aware, by the High Court. If there were ultimately not to be a Bill of Rights, do you think that these breaches of due process, if they could be described that way, could be remedied by another means, that is by entrenching the separation of powers doctrine in the State Constitution Act, much along the lines as, shall we say, the Chapter 3 provisions in the Australian Constitution? Do you think that would be a way that matter could be dealt with?

Mr ANTRUM: If I could just say that it would be one way of doing it but I do not think it would have the uniformity that a Bill of Rights would probably allow for. I think that to do it via the back door or the side door is not as honest as a Bill of Rights and is not as useful as a Bill of Rights. The affirmation of these rights sends a signal. It performs a public education role and it allows the community to state very clearly what it expects and what it is entitled to.

Mr RICHARDSON: But for an international convention what is it about mandatory sentencing that is unlawful?

CHAIR: I would not necessarily say it is unlawful, but I would say it is an undue interference with the discretion of the judiciary to impose a sentence according to the facts of the particular case.

Mr RICHARDSON: In other words, by creating a clearer separation you would argue that the judicial officer, when sentencing an accused in circumstances where the sentence is mandated by Parliament, could say that in his or her view the application of the mandatory sentence to the facts is not appropriate because it interferes with his or her judicial discretion and thus move to another sentence?

CHAIR: Clearly judicial discretion in sentencing is not absolute in that Parliament can prescribe a maximum penalty and perhaps a minimum penalty in some cases. However, it could be argued that the Northern Territory legislation, to take that example, deprives the judiciary of the opportunity to consider a matter before it on its merits and to impose a sentence that reflects the particular circumstances of the case, and arguably an amendment to the Constitution Act 1902 of the State entrenching the separation of powers might have some effect by way of ameliorating that perceived interference with the discretion of the judiciary in sentencing matters.

Mr NORTH: It could perhaps do that but it does not face the fundamental issue of whether or not you want these basic rights set out clearly so that people understand them and the whole system is transparent. Chapter 3 of the Constitution does not really create rights, it gives some sort of right to due process, whereas if you have a Bill of Rights you are spelling out something positive. That is what we would say.

Mr ANTRUM: The affirmation of the doctrine of separation of powers would be one thing, but it is not going to be a complete answer because the courts can still determine matters only on those issues that are recognised at law. There would still be aspects of rights which are not yet enunciated and, therefore, the separation of powers will not assist.

CHAIR: That is so, but on the mandatory sentencing matter, if there were to be an entrenchment of the separation of powers doctrine, at least one would believe it follows that in the face of a challenge such legislation could be declared to be invalid.

Mr ANTRUM: I agree. I was the former Director of the National Children's and Youth Law Centre and I have always said that there were good constitutional grounds, and I am not a constitutional lawyer, to mount such a challenge and, indeed, raise an issue that mandatory sentencing brings the judiciary into disrepute. However, I think that exists already. The difficulty is the will, the resources of course and again a huge ignorance from the Legislature down to the young people being incarcerated as a result of that legislation about what human rights means in this country.

CHAIR: The Legal Constitutional and Administrative Review Committee of the Queensland Parliament in the past has examined the possibility of a bill of rights for Queensland. After an inquiry it recommended against such a bill of rights. One of the grounds it raised against having a bill of rights was that it would most likely benefit those with most access to legal advice or activist public interest groups rather than those who might be in most need of human rights, that is, individuals. Do you have any comment?

Mr NORTH: I read that reasoning with some incredulity. It is hardly a sound reason for rejection of a bill of rights that some sections of the community may benefit from it therefore you reject it so that no-one gets the benefit of it. But we must go back to how it was drafted, what is contained therein and what mechanisms are proposed, which we have not really discussed because it is presumptive. We have to get to first base first: what is included in it and how it is drafted. However, I would have thought it was tortured reasoning to say, "All right, a couple of people might want to use it, oh well, it doesn't easily benefit everyone, therefore, we're going to throw out." At least it benefits somebody. We would have thought the Parliament could address how you have access to a properly drafted bill of rights.

Mr RICHARDSON: It is also very difficult if you are going to use a piece of legislation to enforce rights. Mr Chairman, you would remember the debate about the Trade Practices Act 1974. When that legislation was introduced the Commonwealth Parliament was of the view that consumers would be the first to use it to protect their rights against misleading and deceptive conduct of corporations. As you know, the first to use it were corporations litigating against other corporations who were engaged in activities they thought were anti-competitive. So, it is very hard to predict who will use these rights. That is why we say you should not ignore the possibility that such legislation might be of great interest to the business community of New South Wales as much as to individuals and others in this State, particularly on things like the right to privacy and others.

(The witnesses withdrew)

(The Committee adjourned at 12. 34 p.m.)