

REPORT OF PROCEEDINGS BEFORE

STANDING COMMITTEE ON LAW AND JUSTICE

INQUIRY INTO A NEW SOUTH WALES BILL OF RIGHTS

¾¾¾

At Sydney on Tuesday 30 January 2001

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The Committee met at 10.00 a.m.

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PRESENT

The Hon. R. D. Dyer (Chair)

The Hon. P. J. Breen

The Hon. J. F. Ryan

JOHN CECIL NICHOLSON, Senior Public Defender, New South Wales Public Defenders Office, 175 Liverpool Street, Sydney, sworn and examined:

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

Mr NICHOLSON: I appear today as the Senior Public Defender and, in a sense, I guess, as the advocate for those people who are accused of serious crimes.

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

Mr NICHOLSON: I did.

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

Mr NICHOLSON: I am.

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

Mr NICHOLSON: I have practised the law since 1977, particularly focusing on initially prosecution and defence and more recently defence of those accused of serious crime. It is in that capacity that I have had occasion to argue before the courts that what I would consider to be basic rights have not been observed.

CHAIR: As you are aware, the Committee has received a written submission from you. Is it your wish that that submission be included as part of your sworn evidence?

Mr NICHOLSON: Yes, I do so wish.

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

Mr NICHOLSON: I am indebted to you.

CHAIR: I now invite you to make a brief opening oral submission in support of your written submission before we ask questions.

Mr NICHOLSON: A bill of rights containing in simple language fundamental rights which the Government and agencies of the Government must respect in its dealings with persons resident in the State and visiting the State is strongly supported by the New South Wales Public Defenders. Our reasons for so supporting a bill of rights are these: It would contain in one location the rights recognised and respected by government. An Act containing a bill of rights would be an education tool for the Government and its agencies in its service delivery. An Act containing a bill of rights would also be an education tool for the citizens of the States, whereby they would become aware of the standard of behaviour expected by government and agencies in dealing with members of the public. A bill of rights would be a benchmark for others not associated with government in their dealing with members of the public.

A bill of rights would provide a clearly defined statement for the courts to apply in the event of a dispute. A bill of rights would fulfil a need which exists in curbing any government agency that presently is not paying sufficient regard to, or respect for, human rights. I have in mind in particular the testimony I read just recently of a witness outlining his experience in 1996 in respect of a New South Wales Government agency whose task is investigating crime. Having regard to the transcript of the evidence of the agency, it became apparent that he was required by subpoena at fairly short notice to attend that agency at 10.00 in the morning. He was released by that agency after 2 o'clock the following morning. He was not allowed out to buy his lunch at lunchtime. He was not under arrest. The tone of the agency in its questioning, as observed by me, was both bullying and threatening. I

thought to myself: This is not Germany in 1936; this is New South Wales, Sydney, in 1996. There is a need to balance the tensions which exist between proper and efficient investigation of crime on the one hand and basic respect for the fundamental rights of suspects and accomplices on the other. Efficiency in crime investigation is not the only measure of a democratic society.

Finally, and perhaps most importantly, a bill of rights gives the community confidence in the Parliament and parliamentarians because the bill of rights is Parliament's imprimatur upon certain fundamental values which the Parliament itself respects. Thus, when the pressure is on Parliament to act or to react to a situation, or where there is, for instance, a law and order option being conducted under the guise of an election campaign, the citizens of New South Wales would know that when Parliament looked at any proposed Act it would have regard to the fundamental values expressed in the bill of rights before such an Act is passed. Thus we would argue that a bill of rights is a means of restoring and maintaining the confidence of electors in the parliamentary, and hence the democratic, system of government.

CHAIR: Thank you very much indeed. I would like initially to thank you for appearing and I thank you and the Public Defenders sincerely for the time and attention you have devoted to the preparation of this submission.

Mr NICHOLSON: The Public Defenders are keen to participate in any committee hearing that may be of assistance to the Parliament. We see it as very much part of our function to assist where we can those of you in Parliament who so conscientiously look to the issues before the laws are framed.

CHAIR: It appears to me, from my reading of your submission, that you favour the Canadian model of a bill of rights?

Mr NICHOLSON: Yes, I do.

CHAIR: As you are well aware there are various models available, for example, the United States Constitution which, as you will be aware, is an entrenched Constitution. On the other hand, there is the Canadian model, the South African model and the New Zealand model. Of all those I suppose one could say that the New Zealand model is the least rigid. It is a bare statutory bill of rights. Could you tell the Committee why you have chosen to prefer the Canadian model and to recommend that to us?

Mr NICHOLSON: Yes. The starting point for our approach is this: The democratic system has input from the four branches of government, that is, the executive, the courts, the judiciary and the Parliament. As I apprehend the Canadian bill of rights, it recognises the value of the input of each of the branches. Firstly, when a person complains of a breach of rights the executive arm of government has an opportunity to argue that the right has not been breached or, in the Canadian system, if it has been breached such a breach is justifiable in a democratic society. So it has an input. The court itself has a discretion, particularly in criminal matters, because it determines whether the purported breach was such as to bring the administration of justice into disrepute.

Finally, in the Canadian model, there is the notwithstanding clause which is towards the end of the Canadian charter of rights and freedoms, which gives to Parliament—indeed in Canada the individual parliaments because it is a Federal bill of rights—the right to override for a five-year term the decision of a court and to persist with the law as it was. So that gives to Parliament the opportunity to evaluate again the need for the law or the need for the apparent abuse of the right, and if it takes the view that that need is paramount it can—initially for up to five years and then subsequently—renew the continuation of the law.

CHAIR: In the early part of your submission you refer to the indefinite detention of one individual only as a result of legislation enacted by the New South Wales Parliament. You refer to the matter of Mr Kable. As you correctly identify in the submission, that legislation was struck down by the High Court on the basis of its interpretation of the Federal Constitution which, as you will be aware, protects the separation of powers in chapter 3 of the Federal Constitution. Would it be possible to prevent legislation such as that by safeguards inserted within the New South Wales Constitution

Act 1902 without the need for a bill of rights by protecting the separation of powers along similar lines to the protection given in the Commonwealth Constitution?

Mr NICHOLSON: Yes, that may be so, but in a sense that is remedial. We would argue that the bill of rights is more than remedial; it is a declaration of what the Government represents and recognises. For the reasons I gave in my opening we would argue that remedial action is not what is really required.

CHAIR: In your submission you also stated "governments of every political persuasion are under constant pressure from their electors, the media and concerned and well-meaning citizens to take measures regarding crime and criminals regardless of the systemic impact that may result". Arguably there is a public interest in the criminal law not being too rigid in the sense that the criminal law may sometimes need modernising. I put it to you that conditions can change over time. I will put an instance to you for consideration, although you may disagree as to whether the abolition of this right was a good idea. In recent years the unsworn statement was abolished in this State.

Do you think that, arguably, there should be some flexibility on the part of the Legislature to respond to modern conditions? Before you respond, I put it to you that one of the main arguments in favour of the example I gave you, the unsworn statement from the dock, was that it protected ill-educated and unsophisticated defendants. Arguably that may be of less relevance now than it was early last century.

Mr NICHOLSON: We would see the unsworn statement as being part of the fundamental right of an accused person to a fair trial. We argue that there are some people who are so disadvantaged by the choice of giving sworn evidence or remain silent that the unsworn statement should be retained as part of the basic notion of the right to a fair trial. I have in mind, in particular, people who are intellectually impaired, people who are still ill educated, people of cultural persuasion whose culture is such that they are inclined to agree with any proposition that is put to them—that applies to, say, Pacific Islanders, some Aborigines, folk from New Guinea, and those sorts of people. We argue that there should be a basis for making an application for an unsworn statement for the judge to consider against the background of the right to a fair trial.

CHAIR: To that extent are you suggesting that a bill of rights, if enacted in New South Wales, ought to provide for such a right?

Mr NICHOLSON: A right to a fair trial, yes, and pursuant to that one can make an application for an unsworn statement.

CHAIR: You are not saying that the unsworn statement should be specifically referred to in a bill of rights?

Mr NICHOLSON: No.

CHAIR: You would see that is flowing from the right to a fair trial?

Mr NICHOLSON: There should be, as I adumbrated in one of the paragraphs of the submission. The fundamental rights should be contained in the bill of rights, it cannot prescribe every existing right. For instance, one of the rights that on reflection I saw I had not included, and wondered whether it could be included and what would result from it, is the right to work for an income or the right to seek work for an income, at least so far as an adult is concerned. Of course, I began to qualify that; what happens if a person goes for a job and does not get it? We all seem to recognise that there is a right to work, but whether that ought to be specifically spelt out I do not know.

The Hon. P. J. BREEN: You actually said a right to seek work, that is something quite different, is it not?

Mr NICHOLSON: Yes.

The Hon. P. J. BREEN: It would be very difficult to take away one's right to seek work. In a sense it is quite meaningless to include that in legislation.

Mr NICHOLSON: Yes, but to put it any other way creates huge difficulties. There would be some aspects of rights which, perhaps, cannot be prescribed. The ones that can be prescribed are set out and they include the right to a fair trial, the right to life, the right to property.

CHAIR: Continuing with my theme of the possible need to maintain flexibility so far as the criminal law is concerned, in paragraph 12 of your submission, you referred, among other matters, to "the right to be protected against self-incrimination and its associated right; the right to be presumed innocent until proven guilty." You would be aware that in recent times the New South Wales Legislature has legislated to permit DNA testing including testing current gaol inmates. Would you agree with me that the right to protection against self-incrimination, if expressed in generalised terms, would arguably prevent DNA testing?

Mr NICHOLSON: Yes, it could do, and it may be that that might be one of the instances in which there would be tension between the Executive, the Government and the judiciary. But, with the Canadian model, if the Government felt it expedient enough, the Government could override the courts, assuming for the moment that the courts said it was a breach of right. The courts have a discretion, too, as to whether it is justifiable in a democratic society. The intrusion into the person of DNA testing is not nearly the same as rectum searches. It may well be that a government would be successful in argument before a court on the Canadian model that such a legislative framework is needed.

CHAIR: So far as the Canadian model is concerned, how satisfactory do you think it is in practice taking an example such as DNA testing, if the Legislature takes the view that there is public support for DNA testing, and given that the Legislature is democratically elected and answerable to the people at succeeding elections, and given further that the judiciary is neither elected nor accountable in that way? Should the Legislature have to go to the potential difficulty of enacting legislation permitting DNA testing, having it potentially struck down by the courts, and then having to override a judicial decision in the manner you suggest? Do you think that that is satisfactory?

Mr NICHOLSON: If one accepts that there are some values which should be fundamental and if one accepts that the right to silence, or the right against self-incrimination, is such a value, we would argue that such a process is necessary. It is necessary for confidence in the court system and for confidence in the Parliament, because the people would see that it had been thoroughly aired and thoroughly debated. At the end of the day the will of the people would have triumphed. There tends to be a desire to have instant answers, and I accept that the Canadian system requires some time to get to an answer. In my submission that is useful, because it guarantees that all the pros and cons of the issues are aired.

CHAIR: Paragraph 13 of your submission states:

The Public Defenders position is that these rights must be securely entrenched.

I take it you are referring to the rights mentioned in paragraph 12. In using the word "entrenched" I take it you do not go beyond the Canadian model?

Mr NICHOLSON: No, I am not advocating the American situation. When I used the words "securely entrenched" perhaps that was a little loose. I meant entrenched in the sense that the Canadians would regard those as entrenched.

CHAIR: I understand. In paragraph 25 you stated:

Rights contained in any document labelled Bill of Rights should be readily identifiable rather than nebulous.

I put it to you, and some witnesses to the Committee have certainly advanced this argument with some force, that the language within the bill of rights is necessarily general and cannot be particular. If that is correct, do you think that that creates a difficulty in that standards and concepts change over time and that that generalised language creates its own dangers?

Mr NICHOLSON: The Americans have dealt with the problem in this way: that they regard the Constitution as a living document and they rely upon the modern interpretation of the courts as to the meaning of the document.

CHAIR: The United States courts may regard the Constitution as a living document, however could I put this to you: that the founding fathers in their wisdom found it necessary to include a provision protecting the right to bear arms. That is a highly controversial provision in the modern context. Is that not an illustration of how an entrenched and inflexible constitution such as the United States one is—and I realise you are not going to the extent of advocating such a model—as the centuries passed something that seemed a good idea at the time is perhaps a very bad idea now?

Mr NICHOLSON: My answer to that would be that with respect to those bodies, the United States Supreme Court and the Federal courts have not been alive to modern needs interpreting that particular section of the Constitution. But, yes, I agree with you. If the approach is not one that looks to modern times, you can get that sort of problem.

The Hon. P. J. BREEN: May I interrupt there. Just on that question of the right to bear arms, is it not the case that the United States Supreme Court has consistently held that that provision in the US Constitution is not the right of the individuals to bear arms but that the provision reads if there be the need for a militia the people shall have the right to keep and bear arms, and the reason arms are available in America is not because of the Bill of Rights but because of the attitude of Americans to guns and the State gun laws?

Mr NICHOLSON: I am prepared to bow to your superior knowledge on that. I do not come here as a constitutional expert.

The Hon. P. J. BREEN: In the same context, the American Bill of Rights provides for the equality of all people but there was a time when the American Negroes were not regarded as people but as property. Therefore, the laws about slavery were not seen as being contradictory to the Constitution. If subsequently a court reviews that provision without actually changing the bill and interprets property rights as not including slaves, is that really inconsistent with modern jurisprudence where courts can often do a 180 degree turn on particular issues?

Mr NICHOLSON: That's right. I understand when the Soviet Union was in existence it had a wonderful Bill of Rights, at least as a document, but the interpretation given to that Bill of Rights by the courts left much to be desired. So it is a case of the approach courts are going to take to a Bill of Rights. The Canadians had their Bill of Rights in 1960 but because it was merely a piece of Federal legislation the approach of the courts to that bill was nothing like the approach of the courts to the Charter of Rights and Freedom.

CHAIR: Taking the Constitution of the Soviet Union, which from memory I think was enacted in 1936, as an example, do you think that is an illustration of the fact that of itself a Bill of Rights does not necessarily mean very much? It is very much a matter of the sort of society that exists, whether the democratic norms are respected, whether the rule of law is given effect, and so on?

Mr NICHOLSON: And, as I said in my opening, the attitude of Parliament, whether it is recognised that the items that are declared fundamental rights are really those rights that are recognised and respected by Parliament. Is Parliament giving a lead? In the Soviet Union, particularly in the Stalinist times, Parliament did not recognise and respect those rights at all.

CHAIR: They did not have much choice, did they? They might end up in a gulag.

Mr NICHOLSON: Yes.

CHAIR: So that seems to illustrate that the sort of society one lives in seems to be more important than what formal constitutional documents might exist.

Mr NICHOLSON: No. What it means is when a Bill of Rights is made in a society such as ours, as was experienced in Canada, it becomes a fillip to the recognition of those rights by government and government agencies.

CHAIR: Could I return for a moment to a matter I was putting to you a moment ago. As you say in your submissions, the rights contained in a Bill of Rights should be readily identified rather than nebulous. A previous witness before this Committee last year, Mr Malcolm McLelland, QC, a former Chief Judge in Equity in this State, argued very heavily on that point, namely, that bills of rights of necessity have to express rights in generalised terms. He went on to argue from that that the judiciary is given a wide scope to interpret at any given time in history what those generalised words mean, and that that arguably may amount to a politicisation of the judiciary or, to put it another way, the judiciary largely exercising what would generally be considered to be political functions. What do you have to say to that?

Mr NICHOLSON: That nobody who was appointed to the High Court of Australia, the Court of Appeal in New South Wales and, in some cases, the Supreme Court would be unaware that their decisions even now may have political consequences. *Mabo* is a good example. In the absence of a declared Bill of Rights by Parliament, you will have a court-based Bill of Rights emerge here and there such as *Dietrich*, which is a good example, and it would seem to us it is better to codify or at least to collect together the major fundamental rights for the edification of Parliament, the judiciary and the people.

CHAIR: May I give you an example of what I would regard as perhaps unavoidably generalised language. In paragraph 30 of your submission you advocate certain fundamental rights that in your view a Bill of Rights should contain. One of them is the right to trial without unreasonable delay. Can I put it to you that if there were such a provision in a Bill of Rights in precisely those terms—and perhaps one could not be more precise than that—that would come down to the courts of the day interpreting what an unreasonable delay is. The legislature may take the view that an unreasonable delay might be beyond nine months or 12 months; the judiciary may say that not coming on for trial within three months is an unreasonable delay. Is there not a transference of power in a situation like that where the courts would determine as a matter of fact what that provision means in practical terms with perhaps massive resource consequences?

Mr NICHOLSON: The right to a trial without unreasonable delay I think already exists in those terms. I would have to look at *Jago* again to see whether it is that or it is a right to a fair trial, and a fair trial is no longer fair because of the delay.

The Hon. P. J. BREEN: Can you just say what *Jago* is?

Mr NICHOLSON: *Jago* was a decision of the High Court some years ago. I think the argument was that he wanted to argue that his trial had been unreasonably delayed, and the High Court, if memory serves me correctly, ruled against him. There have been decisions of the New South Wales Supreme Court that have set the parameters of unreasonable delay, but our argument is that very often accused people do not know or are unaware of the right and very often counsel perhaps do not pay sufficient regard to the right because it is not enshrined in a Bill of Rights.

CHAIR: Could I give you another example of a generalised provision. The very first item that you advocate is the right to life. I think I would be correct in saying that in our contemporary society here in New South Wales that is a highly controversial matter—what that means, when life begins and the circumstances in which it ends.

Mr NICHOLSON: In the case of encapsulating notions such as the right to life and the right to property in a Bill of Rights, it may well be that one would see an increase, at least initially, in litigation in those areas. If memory serves me correctly, I think that was the case in Canada, particularly in respect of discrimination issues, but after a while, particularly after the courts had settled what was meant by those terms, the litigation would die and our understanding of the parameters of the right to life would be understood.

CHAIR: Well, Mr Nicholson, supposing there was a provision in a New South Wales Bill of Rights saying just that—the right to life. I think I could presume quite safely there would be a very early case mounted before the courts by, say, the Right to Life Association regarding abortion; possibly by the same body regarding euthanasia. Is that not a very clear example of a transfer to the

judiciary of what essentially is a highly controversial political issue which arguably the legislature, the elected representatives of the people, should deal with?

Mr NICHOLSON: The issue of abortion has been addressed by Parliaments in this country.

The Hon. J. F. RYAN: Not this one.

Mr NICHOLSON: Perhaps not this one but I think South Australia is what I had in mind.

The Hon. J. F. RYAN: I think the only Parliament in the land that has done it.

Mr NICHOLSON: The question of whether that legislation offended this principle would seem to me to be a very important one that would be looked at by a court. It is *Wade v Roe* in America. The position may change from time to time, but the American society has not collapsed because of the intervention of the court in issues that we would think Parliament and indeed the public would be assisted by knowing the courts views.

CHAIR: Society certainly has not collapsed in the United States but *Roe v Wade* would be a clear example of the judiciary taking a decision in a highly controversial area of public policy rather than the United States Congress.

Mr NICHOLSON: One of my problems is that I am not a constitutional expert, but I understand it has nudged back up a little bit since *Roe v Wade*, that there have been decisions that have eaten at the edges.

CHAIR: In effect I am asking you whether you are comfortable with the judiciary rather than the Legislature making decisions in regard to such issues about which, understandably, all sorts of views, often very passionate views, are held in society.

Mr NICHOLSON: One has to remember that while the judiciary is unelected, it is still accountable, perhaps not to an electorate but to the Government and, indeed, to the people generally. The judiciary decides cases on evidence that is placed before it and the people who are making the decisions, by and large, are very learned men. We would argue that given those factors both the Parliament and the people benefit from the input of the judiciary in the debate, but that it should be seen as part of an ongoing debate in which the various arms of government are continuing to have the input.

CHAIR: I do not differ from you in that the judiciary is accountable in the sense that reasons are given for decisions. However, if the populace at large does not like a decision, it cannot be argued that judges are removable as politicians arguably are at the succeeding election. Do you see what I mean?

Mr NICHOLSON: Yes, but there is a system within the judiciary of appeal and intervention.

CHAIR: But judges are not democratically accountable in the same way.

Mr NICHOLSON: No, not in the same way. That does not mean that they have not got a very substantial role to play and a role to play in the body politic of the State.

CHAIR: I want to ask you about one remaining matter. You will be aware, of course, that Australia is a signatory to international treaties bearing on human rights emanating from the United Nations, such as the International Covenant of Civil and Political Rights. To what extent do you think the courts should be either obliged or alternatively entitled on a voluntary basis to have regard to the provisions of such treaties when hearing cases, possibly by an appropriate amendment being made to the Interpretation Act?

Mr NICHOLSON: We would support as the minimum that they should be required to have some regard to those treaties where we are signatories. In the absence of a bill of rights, we would

urge that they should be obliged to have more than regard, they should regard themselves as bound by it.

CHAIR: You go as far as to say that the courts should be bound by those treaties?

Mr NICHOLSON: Yes. Having said that globally, of course I have not perused all of the treaties to which we are signatories, so I do not quite know. I am assuming that they contain notions such as I have referred to in my paragraph 30. I want to qualify my answer by saying that is on presumption.

The Hon. J. F. RYAN: Mr Nicholson, you would be familiar with the expression, "If it ain't broke it shouldn't be fixed". I ask the next question in that context. You have argued in your submission that a bill of rights should contain rights such as the right against self-incrimination, the right to trial by jury and the right to due process. Do you believe that these rights are being infringed in New South Wales at present? If so, could you provide examples?

Mr NICHOLSON: I thought I did in my opening remarks when I made reference to an agency. I would be happy to name the agency more specifically.

The Hon. P. J. BREEN: With respect, that was back in 1996.

Mr NICHOLSON: It is only four years ago. That is a term of a government.

The Hon. P. J. BREEN: If there have not been any instances since then, it is not a serious problem.

Mr NICHOLSON: I do not know how this crew works because I do not come across them very often. But I do know and I suspect that there is a tension between the investigation of crime on the one hand and fundamental values that we hold on the other. It is my view that the rights of the accomplices, as it turns out in the end, were trampled on by this criminal investigation body.

The Hon. J. F. RYAN: Some might argue that by having a bill of rights which protects individuals in that regard an even greater number of people who have committed serious criminal offences will escape justice because their trials and the criminal justice process will become even more bogged down in process rather than, as some people have said, to get to the truth. My colleague made reference earlier to the inclusion in your rights of the right to trial without unreasonable delay. It could be argued that accused will wind up being discharged from the courts on a technical ground and people will say, "What is the point when the world knows that he or she was guilty?" I know that is a tension which already exists in our legal system, but some people might say that one of the arguments against a bill of rights is that more likely than not one of the outcomes will be that an increasing number of people will escape the consequences of wrongdoing on technical grounds.

Mr NICHOLSON: The competing question is whether people should be brought to trial, whether there should be a statute of limitations on some crimes other than murder, as exist elsewhere. In other words, what is recognised is that there is an unfairness to an accused person in bringing him to trial years after an event, which is said to be a criminal event. That brings you back to the fundamental values in your society. Do we have values which say that at the end of the day it is unfair to a person to bring him to trial for an offence that occurred 20 or more years ago? That debate is raging around to Kalajzich now. I do not purport to have an answer to it, but it seems to me that it is something that ought to be looked at—whether 50 years or closer to 60 years after the event a man should be brought to trial to answer issues for which he could have been tried years and years ago. It is a question of degree, a question of tension and a question of the underlying values in our society.

The Hon. J. F. RYAN: How do you answer the question that people will obviously ask about whether or not we have a bill of rights, given that even having a bill of rights will not be a perfect solution? What crisis is occurring in our legal system that requires us to have a bill of rights, given that you have indicated there are likely to be significant resource issues involved?

Mr NICHOLSON: At the present time in the District Court in civil trials in particular and in criminal trials of less than two or three days duration no transcript is available. The practitioners tell

me that their clients are not guaranteed a fair trial against that background. The Chief Judge of the District Court, as I understand it, is not completely happy but the resources are not available for him. He has judges with repetitive strain injury [RSI] from writing. But, more importantly, appeals are being held complaining about findings of fact by judges where the judges have not got the evidence in written form before them. One cannot say that that is a fair trial. That is a crisis, but because of the way in which the court system works we soldier on.

The Hon. P. J. BREEN: Why does not someone appeal that question?

Mr NICHOLSON: In one sense it is, but it is appealed on a case-by-case basis that his honour made errors in a finding of fact.

The Hon. P. J. BREEN: Can practitioners not appeal the general question that it is not a fair trial because no transcript is available?

Mr NICHOLSON: It would be a bold barrister who would do so because it is taking the major issue where he may succeed on the minor one. He can establish the findings of fact, but the other one is more difficult for him to argue. For instance, I once argued in the Court of Criminal Appeal that somebody was suffering cruel and unusual punishment. The Chief Justice chided me and said, "Why go for the big one when you can simply say the sentence was manifestly excessive?" I learned my lesson.

The Hon. J. F. RYAN: It is well known that the Premier of New South Wales is not supportive of the introduction of a bill of rights, particularly with New South Wales going it alone. I am not sure that I would succeed in changing his mind, were I inclined to do so, because of an inability of getting transcripts in the District Court of New South Wales. Would you agree that perhaps we need to have more major reasons than that?

Mr NICHOLSON: You asked me whether there was a crisis in justice and my answer is that just in my limited experience there it is. We would argue that the bill of rights is an affirmation by the Parliament that in a sense, putting it down to simple terms, there ought to be resources sufficient to guarantee the quality of justice in the District Court of New South Wales. I would have thought that the confidence in the administration of justice is an important political issue in those circumstances, particularly where it is not the judges who are at fault.

The Hon. J. F. RYAN: You have argued for the inclusion of the "notwithstanding" clause, which apparently follows a Canadian concept. At the beginning of your written submission you made rather strong comments about mandatory sentencing and how that is inclined to be discussed at the moment. If a bill of rights contains a "notwithstanding" clause, is it not likely that would be the very means whereby one of the strongest reasons you put forward for having a bill of rights would be easily overridden by the Legislature acting on what it believes to be the will of the population to introduce some form of mandatory sentencing? That will be the exact means by which it comes about.

Mr NICHOLSON: My argument would be this: If it was held by a court that mandatory sentencing was an affront to one or more of the rights contained in a bill of rights there would be immense pressure on the Legislature to consider carefully whether it should pursue the bill of rights. For instance, if in the Parliament as it is presently constituted the lower House said "Yes, we want to override", one would imagine that the upper House would be much more cautious.

The Hon. J. F. RYAN: Sometimes the Government and the Opposition vote together on matters that seem to have broad support. I do not think that would have much difficulty getting through at all. New South Wales already has what the Premier describes as mandatory sentencing for certain forms of murder and drug trafficking. I think that was agreed to by both the Government and the Opposition at the time.

Mr NICHOLSON: And, indeed, for certain drink-driving offences there is not so much mandatory sentencing as a mandatory result, that is, licence suspended. The difference is that those cases apply to a limited number of people. I think, in all, 19 prisoners are serving life imprisonment and of those probably only two or three have been impacted by the mandatory provision as such. What

is afoot in Western Australia and in the Northern Territory is a law that has much wider application—and, it would seem on occasions, a very, very unfair application.

The Hon. J. F. RYAN: I do not disagree with you, but what protection will a bill of rights afford if it can be overridden by the very statute that introduces it? I have no doubt that the politician who introduces mandatory sentencing in New South Wales in any form will admit openly that it does not adhere to any of the normal bills of rights that exist, even one that we might suggest for New South Wales, and they would gleefully include the clause, "Notwithstanding ...", right from the outset, even before a court made a decision. But of what value would a bill of rights be if it contains an enormous loophole whereby it allows a mob to very quickly overcome the majority, which is what a bill of rights is supposed to be about?

Mr NICHOLSON: I have not done research recently, but I did the research some years ago on the Canadian situation. My memory is that in Canada no Parliament of its 10 Parliaments has overridden a decision of the Supreme Court or Canada's respective courts up until 1990, and that is only eight years of application of the charter. I have not in more recent times looked at that but the point I make is that when the court speaks this way and enunciates arguments, it may be that Parliament would ride roughshod over that; but if it did, it would be confident that it has the support of the people, in which case it may be appropriate.

The Hon. J. F. RYAN: But is not the point of a bill of rights that it is supposed to support minorities? One of the chief arguments being brought to this Committee in support of a bill of rights is that sometimes for some individuals in society the will of the people can be attributed to the will of the mob against people who seem to be unpopular or who are in a minority. For example, one of the rights you listed in paragraph 30 of your suggestions for a bill of rights does not include recognition of people who are indigenous, recognition of discrimination against people on the basis of gender, and recognition of people who have disabilities. They are the people who have been most strongly making representations to this Committee of the need for a bill of rights to protect them. Because doing things for those categories of people is seen to in fact be difficult and unpopular, that is the only way of making sure that Parliaments do not ride roughshod over them.

Mr NICHOLSON: In paragraphs 34 and 35, I make reference to the situation of indigenous people. I think they ought to be recognised. True it is that I have made a general list. I do not pretend for one minute that it is a complete list and I have sought to submit to the Committee from the perspective of a criminal defence lawyer.

The Hon. J. F. RYAN: Yes.

Mr NICHOLSON: But I would be sympathetic to any recognition of a right in respect of discrimination against people who have either a physical or intellectual handicap—those sorts of things. My list is not a closed list.

The Hon. J. F. RYAN: I simply make the point that there will be different views in the community about what should be on that list.

Mr NICHOLSON: Indeed, there will be.

The Hon. J. F. RYAN: And about what is a priority. I do not mean it as a criticism but, for example, the second last item probably gets closest to some of the ones that are put to this Committee and deal with things such as people who are disadvantaged minorities and who ought not be discriminated against on the basis of race, colour, religion or sexual preference. But as I said, I think that 50 per cent of the community would add "gender" to that list immediately and, perhaps, "people with disabilities".

But then that brings us to the very point that people argue—that it is exactly the province of the Parliament to make decisions about resource distribution. Many of the court cases that are litigated are not likely to be ones that relate to the more obvious rights, such as the right to a fair trial or the right to be considered innocent until proven guilty and so on. They are more likely to fill up the courts up with loads of cases where the complaint is about the government of the day's distribution of resources and cases of people seeking general access to public schools on the basis of disabilities.

Those matters are more likely to be the vast bulk of the litigation before the courts. Do you not see that as a weakness of New South Wales imposing upon itself a bill of rights?

Mr NICHOLSON: Any bill of rights, any statement of what is regarded as underlying values, will have a price tag attached to it. The question for you, the parliamentarians, is the whether or not the price tag is too big. But from our perspective, the price tag is well worth it. For instance, taking the last example, we would say that handicapped people should have access to public schools for a number of reasons. When I say "we", the Senior Public Defender says that.

The Hon. J. F. RYAN: I do not think anybody objects to the idea of people with disabilities having access to public schools. I think the question becomes more difficult when it becomes an individual person with a particular disability seeking to have access to one specific school above all others when the government of the day might argue that provision has been made for that person within the whole system, but not necessarily at a specific school. They are the types of things that are going to be brought to the courts and perhaps have more time spent on them than would a discussion about Kable, who appears to have had good protection under the law already without a bill of rights. It will be those smaller things that will take up most time.

Mr NICHOLSON: With respect, I appeared for Kable. With respect, he did not: he spent an additional time in prison after his sentence was served.

The Hon. J. F. RYAN: But the Parliament was not successful in being able to enforce that law, was it?

Mr NICHOLSON: No, no. At the end of the day, he did. But had there been a bill of rights in New South Wales protecting him, I could have argued initially from the bill of rights and saved everybody a lot of time and anguish.

The Hon. J. F. RYAN: The only other thing I was going to ask you about your list was that it does not include the question of conscientious objection. There are a number of occasions when members of the State Parliament have been asked to consider issues of conscientious objection particularly in relation to industrial relations laws and so on. Do you see that as being an appropriate item for a bill of rights?

Mr NICHOLSON: It is a much more difficult question for me and to be perfectly frank I have not considered all the ramifications. If it were in a bill of rights, I would wonder whether it would be a defence to some criminal offences. I have not pursued it. My mind is going at a hundred miles an hour so I would reserve my position on that. I really cannot assist the Committee one way or the other.

The Hon. J. F. RYAN: The other thing is just a matter of clarification. The third point in your list includes the right to personal liberty unless denied by due process of the law. Do you mean by that a right against imprisonment, or do you mean personal liberty in a more general sense?

Mr NICHOLSON: I mean false imprisonment. The example I gave you was of the man who was not allowed out for lunch. Essentially, he had his liberty taken from 10 in the morning until two the next morning against a background of no right of that committee so to do. The world did not collapse but we would say that he should not be detained by investigation agencies—police or others—unless there is an approach to the courts. Indeed, the Parliament seems to think so because it requires police to get permission every four hours from a magistrate to keep somebody for questioning. This fellow was kept much longer than that and in bizarre hours without any reference to a magistrate.

The Hon. J. F. RYAN: I guess what you mean by personal liberty is freedom of movement.

Mr NICHOLSON: Freedom to come and go.

The Hon. J. F. RYAN: My final question is that on page 8 of your submission you state that concerns about a bill of rights transferring political power from an elected Parliament to unelected judges have some validity, and that the rights in a bill need to be clear and explicit. Then on page 9

you list a series of rights which frequently appear in overseas bills of rights documents. How can the drafters of a New South Wales bill avoid the problems being experienced by overseas jurisdictions where rights such as due process have been litigated for purposes much wider than was originally intended?

Mr NICHOLSON: It would be a matter for the parliamentary draftsman, but one could imagine that a definition or a deeming section either at the beginning or at the end or in the preamble that could set the parameters of what the Parliament considered to be due process.

The Hon. P. J. BREEN: I am interested in your approach from a practical point of view on how a bill of rights in New South Wales, if we had one, might operate. You said in response to a question from Hon. J. F. Ryan that if a bill of rights had been in place when Kable was argued, it could have saved everybody a lot of time and trouble by arguing from the bill of rights. Can you indicate what provision in a bill of rights you might have been referring to?

Mr NICHOLSON: I would imagine the rights to personal liberty unless denied by due process of law would have been one of them because, if I understood it correctly, the legislation in respect of Kable was nothing more than—and I say this with respect to the Parliament—a bill of attainder.

The Hon. P. J. BREEN: But Justice McHugh of the High Court said in the course of the Kable judgment that it is possible for the New South Wales Parliament to pass our law keeping a particular person in gaol but that the Parliament just needs to go about it the right way and not get confused about legislative powers as opposed to judicial powers. I think Justice McHugh said that the Parliament cannot leave it to the Supreme Court to make the decision but has to make a decision itself. To my mind it means that members of Parliament can introduce legislation specifically to keep a particular person in gaol. In fact, the issue was canvassed recently in respect of another matter concerning a person whose name escapes me.

CHAIR: Crump and Baker.

Mr NICHOLSON: Crump was another one of my clients. As I understood it, the Opposition was concerned that he got a determinant sentence in circumstances where the Opposition felt that that was truly lenient treatment by Justice McInerney. I do not know what I can say in respect of that, other than that we would have looked very closely at any legislation which was passed to see whether in fact a constitutional challenge could have been mounted against it.

The Hon. P. J. BREEN: But the point I wanted to make is that there are circumstances in which the Parliament sees it as appropriate to make laws that might infringe due process rights in particular circumstances, such as Kable and Baker and Crump—cases in which the political will is there to make the law. There ought to be power in the Parliament—and, indeed, the power is in the Parliament, even if a bill of rights were in place—to simply override the bill of rights.

Mr NICHOLSON: That is right.

The Hon. P. J. BREEN: So in that sense, a bill of rights, according to Hon. J. F. Ryan's argument, does not actually add anything to the law that we have already.

Mr NICHOLSON: Other than that the bill of rights sets the hierarchy and says that the Parliament is supreme, the court will give an opinion and a ruling. If in the light of that ruling on the legislation it should not have gaoled Mr Crump, hypothetically, and the Parliament decides that it takes a different view, the Parliament can override it for at least five years and then review it again in five years time on the model that we propose.

The Hon. J. F. RYAN: Would it not be possible for the Canadian Parliament to anticipate that a court might rule against a specific law by including the notwithstanding clause in the initial legislation, or is that something that has to be done after a court ruling?

Mr NICHOLSON: Yes. That is something that occurs after a court ruling.

The Hon. J. F. RYAN: Knowing the circumstances involved in the Kable case, I have no doubt that Parliament would have willingly included such a clause in that legislation.

Mr NICHOLSON: No doubt the ingenuity of the parliamentarians and the draftsmen would come to grips with the problem but because of the way in which the Canadian Constitution is framed, the notwithstanding clause, by virtue of its terms, applies only after a court has ruled.

The Hon. P. J. BREEN: There are other models, though, where the Attorney General must actually make a statement in respect of every law that is introduced into Parliament that it either does or does not infringe the provisions of the bill of rights.

Mr NICHOLSON: Again, my expertise is very limited here but I would imagine that there would be some committee or review system whereby the Parliament would be assured that the legislation had been checked against the bill of rights to see that it either did or did not comply with it.

The Hon. P. J. BREEN: The point that the Hon. J. F. Ryan made is that even if it did not comply, if the Government was hell-bent on introducing the legislation anyway it would not be a deterrent. The Government would simply say that, notwithstanding that the provision or legislation does not comply with the bill of rights, it is the will of the Government that the legislation be approved by Parliament.

The Hon. J. F. RYAN: Some would regard it as a badge of honour.

The Hon. P. J. BREEN: That is right. In the view of some, to introduce legislation contrary to the bill of rights would give them some added credibility and electoral support.

Mr NICHOLSON: It may well be that in a free and democratic society that approach ought to be subject to the scrutiny of the courts. One of the problems as I understand it—again, I would want to do research before I said it as strongly as it could be said—was that the German courts were weak in the 1930s in scrutinising much of what the German government of the day was doing. It may be that if the courts had been stronger and had been given the opportunity some of those Acts of the Parliament would have been second-thought. There would have been people in the Parliament speaking out against some of those Acts.

The Hon. P. J. BREEN: One of the important reasons for having a statement in legislation that something does or does not comply with the bill of rights is that at least debate is had upfront in Parliament. In the view of some people who have given evidence before this Committee, that in itself is an important reason to have a bill of rights. If the debate is had and lost in Parliament, at least it has been had and it is not left to the resources of a litigant down the track to have the same argument in court. In the same vein it ought to, theoretically anyway, reduce the number of court cases.

Mr NICHOLSON: Ultimately, I think it will. Initially, as with most laws, there will be a series of court cases testing the parameters of the law and then I think things will subside.

The Hon. P. J. BREEN: In the same context I was interested in your reference to the Dietrich case which was decided by the High Court. I think in that particular case the High Court said that without legal aid Dietrich could not have a proper trial. The case was not dismissed but I believe it did not come to a hearing. Could you explain that a little more?

Mr NICHOLSON: Dietrich was a Victorian who applied for legal aid. The legal aid body in Victoria, as I understand it, assessed the merit of his defence and said that it felt that he had no merit and they would not give him legal aid for the defence. He then went to court undefended. I cannot quite remember the process, but I think it was adjourned, then appealed and ultimately ended up in the High Court where it was held that he would not get a fair trial. He did not have a right to representation, but what he did have was a right to a fair trial. The issues in that trial were sufficiently complicated for him to require the services of counsel, or a legal representative at least, to achieve a fair trial. The stay was given until such time as he was afforded legal representation.

The Hon. P. J. BREEN: Did he ever go to trial?

Mr NICHOLSON: I think he did and I think he was found guilty.

The Hon. P. J. BREEN: The point about that case was that in the view of the High Court one is entitled to legal representation in the complex circumstances that existed in that case. Yet, as I understand it, whenever that case is argued, for one reason or another it has not created a general right to legal representation. Even today, in complex cases, people still go to trial without legal representation.

Mr NICHOLSON: Some do, yes.

The Hon. P. J. BREEN: That raises a problem. If we had a bill of rights in place that included the right to legal representation is there not a significant problem with regard to resources, so far as the Government is concerned? A bill of rights would impose financial strains on the Government that it would otherwise not have to deal with.

Mr NICHOLSON: The question is partly that, but the other part of the question is: In a democratic society with certain fundamental values is it not appropriate for resources to be made available to people, particularly those charged with complicated matters, so that they can defend themselves? You might recall that the American system of justice has the Miranda warning which says to them in part, "You are entitled to legal representation". The American system of justice works—not well, but it works. The English system of justice now has a caution in terms I cannot quickly remember but to the effect that, "a failure to answer may disadvantage your defence at a later time." As a result of that caution you will note that in every interview situation a duty solicitor is made available. It is a question really of the underlying values of the community as to whether they are going to make those resources available.

The Hon. P. J. BREEN: Let me paraphrase a question that you were asked by the Chairman: Are you comfortable with the judiciary taking the initiative rather than leaving it to the elected representatives to make decisions about controversial issues. The Chairman asked you that question in the context of an answer you had given previously about the case of *Roe v Wade*. It is a fact that the New South Wales Government, for example, has not embarked laws upon controversial issues such as abortion and voluntary euthanasia. If a bill of rights were in place that included the right to life do you think that that would provoke action by the judiciary that the Legislature has otherwise decided not to become involved with?

Mr NICHOLSON: Could I answer it this way, in the present state of affairs the initiative is open to the court to take, assuming a litigant comes along. Even now if someone were to file a civil prosecution against Nitschke, the court would have to determine the issue. The court is daily determining the issue of whether rights have been infringed in respect of the questioning or arrest for questioning of accused people. Without the aid of Parliament and without perhaps even the knowledge of Parliament, day by day the court is taking the initiative in these things and a body of law has been built up. We would argue that it is appropriate for Parliament to take the initiative and include a right to life in declaring the bill of rights, in terms where it has a notwithstanding provision, so that it can continue to take part in the debate.

The Hon. P. J. BREEN: I do not want to be too cynical about this but there is a sense in which the Government uses the courts as another branch of government in order not to make certain laws, even though a majority of people might like to see them. For example, I understand that 70 per cent of people support voluntary euthanasia. I also understand that a similar proportion support the death penalty. If Parliament chooses not to make laws in respect of those issues, is that not indeed an aspect of government? It is government by not acting, but if the provision, such as the right to life, were included in a bill of rights would that not provoke a whole host of litigation and result in the Government becoming involved in issues that it does not want to know about; that it wants to leave to the courts? Is that not one serious disadvantage of a bill of rights?

Mr NICHOLSON: The answer is more grey than black and white. For the Government to step into a bill of rights does not mean that the Government is taking part in outlawing euthanasia or outlawing abortion. All it is doing is saying that the law is that people have a right to life. Whether a person has a right to terminate his life is another issue again, and the courts may well need to decide that in the light of such an issue.

The Hon. P. J. BREEN: Do you think that one of the reasons Australia seems to be at the forefront of the voluntary euthanasia debate is the very fact that we are the only common law country that does not have a bill of rights which includes the right to life and that all other common law countries have that included in their bill of rights and, therefore, that is why there is no debate in those countries about voluntary euthanasia?

Mr NICHOLSON: There certainly was in America with the doctor from Oregon who was nicknamed "Dr Death". I forget his name.

The Hon. P. J. BREEN: Dr Kavorkian.

Mr NICHOLSON: Yes. There was a debate certainly raging for some time in America. Consequently the same debate, as I recall it, was raging in Canada because whatever goes in America is of interest in Canada. I cannot speak of other places because I have not been there, but it is hard to imagine that it is not a matter of some concern in places like Holland, and therefore England and France, to have a bill of rights. England now has one, but only recently.

The Hon. P. J. BREEN: You expressed an opinion about Kable in relation to the bill of rights, if we had one. Would you express a similar opinion about the right to life in a bill of rights, if we had one—as to whether it applied to capital punishment, voluntary euthanasia and abortion.

Mr NICHOLSON: The right to life in my argument does not preclude the State—God help us—from imposing the death penalty. It does not preclude the right of a person to terminate his or her own life. The issue of abortion is much more difficult because the right to life may well depend upon when the court determines the life of the human being begins. That is a debate I do not seek to get into.

The Hon. J. F. RYAN: If you have eliminated the fact that it does not impose any restriction on euthanasia, and has nothing to do with euthanasia, that it may or may not have something to do with abortion, what do you mean by the statement "the right to life" because to some extent the laws

Mr NICHOLSON: Malnourishment may be something that would be included in the right to life.

The Hon. J. F. RYAN: But those things are already against the law. What is not against the law now that would not be covered by your definition of right to life?

Mr NICHOLSON: Simply because laws already exist does not mean the right should not be enunciated. The laws enforce the right.

The Hon. J. F. RYAN: But is that all you mean by a right to life, that people should not take someone's life illegally, given that you said it does not include the government reintroducing the death penalty? About the only thing that is left is individuals taking somebody else's life unlawfully, I think. Is there something else that the right to life could mean?

Mr NICHOLSON: It certainly is an issue on the abortion front. It may be an issue on the nursing home front, where people are not capable of making a determination about whether they want to end their own lives, but it is done for them. It may apply there.

The Hon. P. J. BREEN: I think you answered the question about the right to life in a bill of rights would impact on capital punishment. You said that the Parliament would still be free to pass laws, God forbid, about capital punishment. You also said that the Parliament would be free to pass laws about abortion even though right to life was in the bill of rights, and that the courts may make a particular interpretation about that. The last aspect of the question is, do you think that the right to life in a bill of rights would impact on laws about voluntary euthanasia?

Mr NICHOLSON: In my opinion?

The Hon. P. J. BREEN: Yes, in your opinion.

Mr NICHOLSON: I do not think it does, but there may be others who hold a different view.

The Hon. P. J. BREEN: So in each of those cases you would say, in your opinion, the bill of rights would not impact on the power of the Parliament to pass laws on those three issues?

Mr NICHOLSON: That is correct.

(The witness withdrew)

PETER REX GROGAN, President, New South Wales Branch of the International Commission of Jurists, 86 Goulburn Street Sydney,

SIGRID HIGGINS, Member, New South Wales branch of the International Commission of Jurists, Wentworth Chambers, 180 Phillip Street Sydney, and

KEITH DOUGLAS SUTER, Vice-President, New South Wales Branch of the International Commission of Jurists, GPO Box 4878, Sydney, sworn and examined:

CHAIR: Judge Grogan, what is your occupation?

Mr GROGAN: I am an Acting Judge of the New South Wales District Court, and I am the President of the New South Wales Branch of the International Commission of Jurists.

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

Mr GROGAN: As President of the New South Wales Branch of the Australian section of the International Commission of Jurists.

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

Mr GROGAN: I did.

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

Mr GROGAN: I am.

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

Mr GROGAN: I have been a barrister since 1961. From 1956 I have been involved with the International Commission of Jurists. I became the honorary Assistant Secretary-General in 1956. Edward St John was the Secretary-General then and Sir Owen Dixon was the President. In 1961 Sir Owen Dixon became the patron, Mr St John became the President and I became the honorary Secretary-General. From that time I have been on the Council of the International Commission of Jurists. I have travelled to various conferences. I have been interested in human rights affairs in New South Wales, Australia and overseas, but particularly with respect to Tibet, Malaysia and some other countries. I have been in close touch with justice for a number of years.

When I became a judge in 1989 it became more difficult to be as active in some ways, except in respect of certain activities. However, I have kept a great deal of interest in relation to Tibet and so on. Apart from that, I have been involved in various matters and activities in associations which, in one way or another, have involved a concern for individuals. In my experience as a barrister and judge I have encountered issues that have, in one way or another, involved questions of human rights. My professional practice has been, as it were, something done in conjunction with my interest in human rights.

CHAIR: The Committee, as you are aware, has received a written submission from the International Commission of Jurists. Is it your wish that the included as part of your sworn evidence?

Mr GROGAN: That is so. Might I draw attention at this stage to two typographic errors that might be corrected. At page 3, line 4, there is reference to enactment of the Canadian Bill of Rights, it states, in 1980. In fact, it was in 1982 that the Constitution Act was passed by the United Kingdom Parliament. The other typographical error is on page 8, in paragraph 2.2. In the third-last line is a

reference to rights contained in the "International Covenant on Economic, Social and Cultural Rights". That should be the International Covenant on Civil and Political Rights [ICCPR].

CHAIR: We have made those corrections. Ms Higgins, what is your occupation?

Ms HIGGINS: I am a barrister.

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

Ms HIGGINS: As a member of the New South Wales Branch of the International Commission of Jurists. Also, I am the Assistant Secretary-General of the national body of the International Commission of Jurists.

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

Ms HIGGINS: I did.

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

Ms HIGGINS: I am.

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

Ms HIGGINS: I have practised as a barrister for three years now. Prior to that I practised as a solicitor in prosecutions. I have also spent three years as Executive Secretary of the International Commission of Jurists in Geneva. During that time I organised and was a member of a fact finding mission to the United States of America, where it we examined the practices and procedures of death penalty sentencing in the United States and how those practices and procedures complied with the international obligations of the United States under the ICCPR and also the conventions.

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

Mrs HIGGINS: Yes, it is.

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

Dr SUTER: I am a writer and broadcaster, but I am appearing as Vice-President of the New South Wales branch of the International Commission of Jurists.

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

Dr SUTER: Yes, I did.

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

Dr SUTER: Yes, I am.

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

Dr SUTER: My bachelors degree is in international law and international politics, particularly specialising in the international protection of human rights. My first doctorate is in the international law of nuclear warfare, being a study of international humanitarian law. I also had 20 years in various positions of President nationally and at State levels of the United Nations Association of Australia. I spent some years chairing the International Humanitarian Law Committee of the Australian Red Cross, New South Wales. I was also one of the earliest members at Amnesty

International in London. More recently I was employed by the Board of Studies in New South Wales to be a writer for the new legal studies Higher School Certificate syllabus, looking particularly at international law and human rights and inserting that into the legal studies syllabus. Last year I was one of the co-authors of the Macmillan legal studies textbooks which go along with that course, which I am pleased to say has been a best seller.

CHAIR: Dr Suter, is it your wish that the ICJ's written submission be included as part of your sworn evidence?

Dr SUTER: Yes, it is.

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

Mr GROGAN: Before Ms Higgins speaks briefly to the submission, I should say that we are here in the hope that we may be able to assist if there are matters that the Committee would like to address to any of us. We are here to assist in that sense. There are some matters which may well have been put to you. We do not wish to repeat matters that have been put to you, but there is one matter that we wanted to put to you. I say in an introductory sense that one of the issues that frequently arises is the comparison between what we say is a good situation in Australia and an adverse situation in other countries where there purports to be a bill of rights in the constitution. Prima facie, that is a good argument but the comparison is invariably made with countries which have no developed jurisprudence and no independent judiciary.

So the fact that some totalitarian countries for example have a fine looking bill of rights in their constitution does not mean that there is any means to enforce them or any, as it were, established jurisprudence or recognition that comes when we have an independent judiciary as we have in Australia. The very emphasis, though, that is placed in that sort of argument upon the importance of the independent judiciary that we have highlights the reason why a bill of rights in our view could be effective in Australia. It is because we have an independent judiciary that a bill of rights would work here and the rights guaranteed would be enforced. They would be enforced, in our view, with the efficiency with which courts dispose of issues and deal with issues today.

There may be other arguments of course. People might have different views about how efficient that is. However, we want to emphasise that when we talk, for example, about the International Covenant on Civil and Political Rights—which Sigrid will be referring to later in her introduction and which I dealt with in the submission—we are not talking about something that is so remote and fanciful that Australian lawyers are not concerned with it. The New South Wales Government has legislated an Evidence Act which, no doubt, was intended to be a uniform Evidence Act. The Commonwealth has done it. New South Wales did it. It is my understanding that that was probably on an understanding that other States would follow it. As it turned out, other States did not follow it. That, of course, can happen in a federation.

But the fact is that the Commonwealth Evidence Act and the New South Wales Evidence Act have provisions in them which require courts to have regard to the International Covenant on Civil and Political Rights. Section 138 of the Evidence Act deals with the court's discretion. This is something which has occurred on various occasions before me in the exercise of criminal jurisdiction, but it deals with the court's discretion to exclude improperly or illegally obtained evidence. I should say that section 138 of the Act states:

- (1) Evidence that was obtained:
 - (a) improperly or in contravention of an Australian law, or
 - (b) in consequence of an impropriety or of a contravention of an Australian law
- is not to be admitted unless ...

Then the court is given a discretion about the admissibility of it. Under section 138(3) of the Evidence Act, the court is obliged to take into account:

- (f) whether the impropriety or contravention was contrary to or inconsistent with a right of a person recognised by the International Covenant on Civil and Political Rights ...

I have been present in court armed with a copy of that covenant and other documents relating to international covenants and conventions, and submissions have been made to the court about that international covenant and also the recognised standard and norms of international law or covenants. So the Parliament in this State has legislated to require the courts to have regard to that covenant. It is not something which is available only as it were in print for practical purposes overseas; it is something that we are required under the Evidence Act, when that issue arises, to have regard to in deciding whether evidence should be admitted in particular cases. The Commonwealth, as I have said, also has the same provision. That International Covenant on Civil and Political Rights is set out in schedule 2 of the Human Rights and Equal Opportunity Commission Act 1986. It is a document that is readily available and that may be frequently referred to.

In relation to the relevance of the provisions, it is fair to say that this Committee might be aware of developing attitudes and approaches put forward by members of the High Court either in decided cases or by people such as Sir Anthony Mason in relation to the recognition of a bill of rights and his, as I understand it, new and firm attitude that a bill of rights would be appropriate in Australia. It may be that he had in mind the sort of bill that was drafted by the Constitutional Commission and published in 1988. That is one of various alternatives. A number are referred to in the submission but that is one which, no doubt, this Committee would wish to consider. It is discussed at some length in a book by Mr Justice Wilcox entitled *An Australian Charter of Rights*, which was published in 1993 with a foreword by the Right Hon. Sir Ninian Stephen.

In his discussion about the Australian scene, Justice Wilcox refers to the history of the Constitutional Commission, amongst other events in Australia. He does, in fact, suggest some minor amendments to it. But the book itself, in its appendices, contains the draft bill of the Constitutional Commission for an Australian Charter of Rights and Freedoms. In appendix D are some variations to the Constitutional Commission draft suggested by the author. I think we would say that that is probably sufficient for the purposes of this Committee. We think that the draft document of the Constitutional Commission is a very useful document.

The Hon. P. J. BREEN: Are you able to say whether that is a constitutional bill or statutory bill?

Mr GROGAN: It is a constitutional bill. It was intended to be an entrenched constitutional bill. So it would require that constitutional process, which was part of a review of constitutional amendment. That, of course, is not a State Act, although it would bind the States. The Constitutional Commission considered the problems that arise because of some of the entrenched Commonwealth provisions. There are precious few of them, but some of them do not give any protection against State Acts, laws or conduct.

The Hon. P. J. BREEN: I think it needs to be said, though, that this Committee is looking only at the question of a statutory bill of rights.

Mr GROGAN: Yes, that is so.

The Hon. P. J. BREEN: The terms of reference specifically say "a statutory bill of rights".

Mr GROGAN: Yes, that is right. Whether that is entrenched in a particular way or not is open for this Committee to consider. In our view it ought to be entrenched and there are various ways it can be done in New South Wales. The only other matter I wish to emphasise at this stage is of importance to lawyers in Australia, and no doubt members of Parliament and others; that is, the awareness amongst the judiciary of the availability of international precedents and norms to take into consideration. In the 1992 High Court decision in *Mabo's* case, Justice Brennan, with whom Chief Justice Mason and Justice McHugh agreed, said:

The opening up of international remedies to individuals pursuant to Australia's accession to the Optional Protocol to the International Covenant on Civil and Political Rights ... brings to bear on the common law the powerful influence of the covenant and the international standards it imports. The common law does not necessarily conform with international law, but international law is a legitimate and important influence on the development of the common law, especially when international law declares the existence of universal human rights.

That is part of the background to the submission we have prepared. Mrs Higgins could speak briefly to that submission, if that is convenient.

CHAIR: I invite you to speak briefly now, Mrs Higgins.

Mrs HIGGINS: This morning Judge Grogan hinted to us that he had appeared before a committee.

Mr GROGAN: No, I wrote to the *Sydney Morning Herald* in 1956 advocating a national bill of rights.

CHAIR: And you are still trying.

Mr GROGAN: That is right, yes.

Mrs HIGGINS: The International Commission of Jurists [ICJ] is one of the oldest human rights organisations. It was founded in 1952 and has worked very heavily, as has the Australian Government, in international standard setting. We first had the universal declaration and the principles of that declaration were transferred into the International Covenant on Civil and Political Rights and also the International Covenant on Economic Social and Cultural Rights. The treaties to which Australia has become a signatory of course access out minimum standards of human rights; they are what Australia, as part of international community, have determined to be minimum guarantee is for protecting human rights. Also, they have been seen as being norms, which develop within a society a culture of fundamental rights and freedoms.

The biggest task for the International Commission of Jurists, once the international standards have been set, is to have domestic implementation of them. Domestic implementation is not only legislative as required under the covenant, but also is to try to develop a culture of particular values and norms. One of the first things that we regret is that Australia does not have a bill of rights. Australia having signed the optional protocol to the International Covenant on Civil and Political Rights has meant that Australians often seek international solutions for what they see as infringement of their basic rights as contained in the covenant. We think it is regrettable that there is the need for them to do so.

Of course, at the same time a large international jurisprudence of human rights has developed. Also Canada, New Zealand and the United Kingdom have introduced a Bill of Rights and there has been ample commentary about the development of Australia's jurisprudence without a bill of rights; indeed our common law will alter to some extent because we have not incorporated it and do not have the same rights domestically incorporated into our legislation. The fact that the Federal Government has not introduced a bill of rights does not stop this State from doing so. New South Wales is the most populous State and the State in which most litigation occurs. For New South Wales to put in mechanism that recognises and protects the fundamental rights contained in the covenants would provide a model for other States and Territories and encourage them to follow.

I will now address the Committee's terms of reference. First, whether the rights declared in the International Covenant on Civil and Political Rights should be incorporated into domestic law by such a bill of rights. We submit they should be, and there is ample precedent for that in other jurisdictions such as Canada, New Zealand and the United Kingdom. There is ample evidence of the common law not really providing written guarantees of freedom as contained in the international instruments.

On page 6 of our submission we set out the positive effects of having a bill of rights. It would certainly provide more certainty and consistency in application and interpretation. The main issues are that a bill of rights incorporating the fundamental rights and freedoms contained in the International Covenant on Civil and Political Rights will provide an easily accessible and tangible statement of the

fundamental values of our democracy. That would provide guidance for legislative, executive and judicial action, including any person undertaking a public duty. It would provide the basis for a wider educative role in having a more informed public. It would provide a permanent and effective check on oppressive action by future governments, whether it be intentional or unintentional.

More importantly it would provide a proper framework within which to consider issues rather than respond to sometimes uninformed public pressure. It would provide individual fundamental rights which, although not absolute, should not be overridden by Parliament or the Executive unless there is a really pressing social interest which requires it. It would enhance the development of our common law in line with developments in other common law jurisdictions and provide a mechanism whereby the Executive and judiciary are able to balance the infringement of rights against the necessities of a democratic society. That could be done within the Australian and New South Wales context.

It would provide a local mechanism to protect fundamental freedoms and ensure that New South Wales complies with current international obligations, including treaties to which Australia is a party. The real issue for the International Commission of Jurists is whether any legislation in the form of a bill of rights should have rights that are enforceable and are entrenched in the Constitution. The New Zealand and United Kingdom legislation do not provide for the rights to be enforceable. However, they do affirm those rights and also place obligations on the Executive and other public officials to adhere to the affirmed rights.

The argument for an enforceable right is that there have been great abuses of rights, but a remedy is available through damages or other ways. Even if it is not enforceable it clearly has a strong educative effect. The New Zealand legislation has been in operation since the early 1990s and it certainly has had a strong educative effect. Criticism of that legislation was initially that it was a Clayton's bill of rights. It has not gone away, it is used and it has been quite effective. However, we support an enforceable bill of rights.

The Hon. P. J. BREEN: You seem to be saying that the Bill of Rights should be entrenched in the Constitution.

Mrs HIGGINS: Yes, we have used those words.

The Hon. P. J. BREEN: But that is not contained in your written submission. You mentioned entrenching in other ways, but not into the Constitution

CHAIR: Before you respond, Mrs Higgins, paragraph 1.1 of your submission indicates that fundamental rights should be protected against legislative intervention. I assume that is advocating some form of entrenchment?

Mrs HIGGINS: That is correct.

The Hon. P. J. BREEN: Page 11, paragraphs 5.1 and 5.2, under which the entrenchment question is dealt, you suggest other means such as a two-thirds majority of both Houses of Parliament. You do not suggest there or anywhere else putting it in the Constitution.

Mrs HIGGINS: On page 7, paragraph 1.10 raises whether it should be entrenched in the Constitution. Our preferred position is that it should be entrenched in the Constitution. We strongly urge that if it is not entrenched in the Constitution it should be entrenched in some other way. One suggestion is mentioned on page 11, as you pointed out.

Mr GROGAN: Paragraph 5.1 states:

As mentioned above, the preference is that a *Bill of Rights*, containing significant enforceable rights as are contained in the ICCPR, should be entrenched. However it is recognised that this is essentially a question of political will requiring extensive consultation. This should not prevent the taking of steps to put into place a legislative scheme that provides some security against easy amendment by future governments.

The Hon. P. J. BREEN: When you use the word "entrenchment" you mean in the Constitution?

Mr GROGAN: Yes, that is so.

Mrs HIGGINS: We also recognise that there needs to be wider community consultation in order for that to happen, and also acceptance. I refer to the issue of economic, social and cultural rights, group rights and whether the rights of indigenous people should be included in a bill of rights. The rights that are contained in the International Convention on Economic Social and Cultural Rights are clearly of equal importance to ensuring fundamental rights and freedoms. They are each mentioned in the universal declaration and there is some interrelationship between the two. Our preferred position is that these should be included in a bill of rights, but it may indeed be a question of timing or of what particular rights are included.

CHAIR: We will have an extensive questioning period. Do you wish to add anything?

Mrs HIGGINS: As far as the indigenous rights are concerned, Article 27 of the International Covenant on Civil and Political Rights already has in it a protection for minorities—religious and ethnic minorities. So, there is again some sort of overlap between the ICCPR and the International Convention on Economic, Social and Cultural Rights. The issue of whether individual responsibility as distinct from rights should be included in the Bill of Rights, we have said this is something that is not something familiar to us here in Australia but we have also pointed out the preamble in the International Covenant on Civil and Political Rights. It does make mention about responsibilities in there as well. So, there is a recognition that individual rights do also carry individual responsibilities. The rights that are contained in both the international instruments, as I have said, are values, norms, minimum norms that I think anybody who was just asked if he or she agreed with those particular norms would agree with, but the actual application of those sometimes becomes difficult.

It may be easier if I just go to the conclusions very quickly, where we say that we, the New South Wales branch, support a Bill of Rights in New South Wales and we support it with extensive consultation within the community. We support a Bill of Rights that contains rights that are enforceable and which is entrenched in the Constitution. We recommend that at a minimum enforceable rights should be those contained in the ICCPR and the appropriate rights contained in the International Covenant on Economic, Social and Cultural Rights. It recommends that the remaining rights contained in the ICESCR should also be imported into the Bill of Rights without those rights initially being enforceable and enabling legislation to have educative effect with a view, where appropriate, to subsequent enforceability. We urge that consideration be given to the Canadian model, however we would also support a model based on the United Kingdom legislation.

The thing that we feel should be given effect to almost immediately is mechanism within the parliamentary system as such for vetting legislation to ensure that it does comply with these obligations in the international instruments, and some sort of reporting mechanism back to Parliament as to how they comply or whether they do not comply. That is something that we feel could be done immediately, it would be educative and is certainly a way of developing a culture of the human rights norm within Australia.

CHAIR: Thank you very much. Could I indicate in commencing the questioning period that any question I pose or my colleagues do may be responded to by one or more of you as you choose. That does not mean it is compulsory for everyone to respond to every question. It is a matter of your choice who responds to any particular question. Could I start with the very last point Ms Higgins made regarding a parliamentary standing committee which possibly could be called the Scrutiny of Bills Committee on the Senate model, to give that example. I think I would be correct in saying that at the very least it would overcome one of the most commonly made criticisms of a Bill of Rights, that there is a transference of power or a political function from the legislature to the judiciary. I know you are not resiling from your advocacy of a Bill of Rights, but do you think at the very least that would be a useful mechanism, to use the parliamentary context to advance human rights?

Mrs HIGGINS: Yes, it would be something that could be implemented immediately. It would be useful to really develop the debate about human rights norms at the parliamentary and public level, and that should continue even it is transferred to the judiciary.

CHAIR: I note that in paragraph 1.4 the submission makes the point that there is no question that there is a longstanding and strong commitment to the rule of law in Australia. I am sure we would all agree with that. You go on to say, though, that it is essential that we enhance our law through the incorporation of a Bill of Rights. It sets out what is accepted in forming our fundamental freedoms and human rights. Some reference has been made this morning to the Bill of Rights that was enacted in the Soviet Union, I think in 1936. The People's Republic of China has a Bill of Rights now that I would argue is more honoured in the breach than in the observance. Why do you attach such importance to a Bill of Rights within the Australian context given that we are all on common ground I believe that there is a great deal of respect in Australia to the rule of law and our common law system?

Mrs HIGGINS: I guess because the rule of law does not always equate to protecting human rights. That was also part of the development of the ICJ itself, in that it was always felt that the rule of law was sufficient to protect human rights and there were ample examples of countries that had a rule of law but they did not protect human rights. I guess the human rights have to be part of the law and therefore it just expands the rule of law. It sounds a bit circular, I am sorry about that, but it is a body of principles that should be part of our jurisprudence and be part of our rule of law.

CHAIR: You think it goes beyond a mere educative function?

Mrs HIGGINS: I think that is right, yes, but for it to work you have to have the system so that you can educate at the same time as you actually co-operate.

Dr SUTER: Can I also add a couple of comments. One is in regard to the Soviet Union and the People's Republic of China. In a sense the use of a Bill of Rights there was simply window-dressing without any appropriate culture to go behind it. So, when Stalin introduced it nobody ever expected to use the system, because people knew it was an authoritarian system. So, in a sense therefore, law has not only got to be a positive, it has also got to be normative. It has not only to say things in black and white, it also has to add to the changing nature of the culture of society. In the way, for example, some of us were discussing the labelling of Sigrid Higgins, who is Ms, and she is actually Mrs. What we have had is a culture change. Through the use of legislation we have changed people's perception that we now use Ms and it has become so automatic that the Mrs of this world feel themselves now being neglected. It is an interesting example of how something that is positive, legal and law in black and white becomes normative over a period of time. So, if you have a Bill of Rights it is not only something that is in black and white, it also adds to the creation of a culture of human rights, and one sees that particularly in the United States.

The second issue, which takes on from what Sigrid was saying, is the debate we have had within the International Commission of Jurists. It is not just the rule of law; increasingly it has to be the rule of just law. In other words, even a Chilean dictator could introduce his own law but we are not necessarily going to suggest that is the law we should adhere to. There has to be a set of criteria against which to measure any law, and that is the value of a human rights culture, and in particular the creation of a Bill of Rights.

CHAIR: I am sorry I fell into error in referring to Ms Higgins.

Mrs HIGGINS: I am not offended.

Mr GROGAN: In further answer to your question, Mr Chairman, I think it is fair to say that experience shows that even where you think the garden is perfectly neat and tidy, for example, in the United Kingdom, there are errors and in all sorts of ways the common law is inadequate to protect human rights as we understand them. One of the reasons for that is that courts, which develop the common law, only decide cases that come to them in the course of deciding cases. There are many things, for example, at the government level or maybe acts of police officers or other people, and some of them are dealt with no doubt in complaints to the Ombudsman and in various other ways, but we have had to supplement where we thought we were complacent in, perhaps, 1930, 1940, 1950 and 1960, and so on. But you only have to look across Australia, and I suppose we can say what about mandatory sentencing and so on, and that may be a difficult one and it may be the sort of thing that people feel, why cannot the Government do that or other provisions, but the fact is wherever we look there are areas, no doubt even in New South Wales, and we write lots of letters to Ministers and other people where there seems to be a breach, and we have to include in the criminal law provisions about

how long may a person be detained, and so on. It is a very acute development that is going on and there are numerous legislative changes.

It seems to us that if there are universal human rights, a good starting point would be certainly along the lines of the Constitutional Commission in 1988 and the International Covenant on Civil and Political Rights and the Universal Declaration of Human Rights. We have had enough experience to know that in various ways that are hard to articulate we fall short of what should happen and we cannot be sure that in this State or in other areas of Australia what ought to happen is in fact happening, even with the best will in the world of those in charge. We do not want to underestimate that if New South Wales were to take a step forward, that that role as an example to other States would, we hope, be significant but if Australia took the initiative I think that would be a real sign, a light to other countries in this region. We are going through this sort of development as we celebrate 100 years of Federation. Looking to the future, the educational function and the question of being an example, being a country that is prepared to do that and look after its citizens in that way is very important.

At the moment we are falling behind neighbours like New Zealand and we are behind the United Kingdom even though we might think what they have done is not as far as we might like to go, but at least it is a step forward. The United Kingdom has committed itself to the European Convention on Human Rights and to the court and to the commission there, so that is also having an effect. So, the jurisprudence of England is going further away from the Australian jurisprudence because of those developments. So, the example, the educative role and the fact that we can see no reason why it should not happen, and frankly we do not see any real difficulty if there was proper leadership any real difficulty in it happening. I must admit, of course, the political scene in Australia where both parties may be combative—we recognise that sort of difficulty—but we do not abandon the view that this is really an initiative that should come not only from New South Wales but from the Commonwealth. The citizens in Australia are entitled to a universal recognition of human rights.

CHAIR: A previous witness before the Committee in this inquiry was Mr Malcolm McClellan QC, a former Chief Judge in Equity of this State. One of the points he made was that, of necessity, statements in a bill of rights are expressed in generalised terms. He argued that that would inevitably involve a transference of power from the Legislature to the judiciary or, putting it another way, the judicialising of essentially political functions. For example, the previous witness this morning, Mr Nicholson, advocated various rights that in his view ought to be included in a bill of rights. In the legal area, for example, he included the right to natural justice and due process of law and the right to a trial without unreasonable delay. Focusing on the second one, what would be an unreasonable delay? Is that something the judiciary should determine or, given its resource implications, something the Legislature should deal with? I ask you to respond as you wish to this argument that a bill of rights inevitably specifies matters in general terms and arguably transfers power to the judiciary about what happens in a given case.

Mr GROGAN: In a sense, the common law only expresses itself in general terms. For example, under common law a person must be brought before a justice of the peace without unreasonable delay or promptly or without delay. These formulae have been used and developed by the common law and that is as far as it goes. The Evidence Act statute has now introduced various provisions, and even there, ultimately, several questions arise. One issue is if it does not happen the consequences may not mean, for example, that evidence is inadmissible. The Evidence Act that this State has introduced does introduce some provisions that go significantly further than the common law provisions. The common law only speaks in general terms where it is endeavouring to lay down a rule. It does not state, for example, that an offender must go before a justice of peace within four hours. In practice, in court cases there are inquiries about who was available, what were the mechanics, how far away was a justice of the peace and so on. We might hear days of evidence about whether a phone call should have been made or a justice of the peace could have been brought and so on.

Mrs HIGGINS: The provisions of a bill of rights are a body of principles and they are generally as stated. To take your example, the court's role is to use those principles and apply them to the circumstances before it. To use the example of no delays in court, that is happening already in the court system. The judiciary is very aware of its responsibilities in this regard and, indeed, is seeking to

ensure that matters proceed as quickly as possible. I would have thought that is something the Legislature would not wish to prescribe in a very detailed way.

CHAIR: I will give you a more difficult example. You refer in paragraph 2.2 of your submission to the rights presently contained in the International Covenant of Economic, Social and Cultural Rights. References are made there to an adequate standard of living, continuous improvement of living conditions, the right to just and favourable conditions at work and the right to the highest attainable standard of health, to education and so on. Taking the right to the highest attainable standard of health as an example, that certainly is highly generalised. I think that I would be entitled to say that the standard in regard to such a formulation might well differ markedly between Australia and Bangladesh.

Dr SUTER: That was recognised back in 1966 when the two separate covenants were created. When the 1948 Universal Declaration of Human Rights was created, some of those economic, social and cultural rights were included in the second part of the document because they grew out of the welfare state which had grown up in the western world from the 1890s. When it came to moving from the declaration's statement of principles to a treaty, the United Nations decided, partly just on ability, to separate the civil and political rights from the economic and social rights because one was more a statement of aspirations rather than something which could be challenged in a court of law.

The matter being raised here under question two of the terms of reference is what should be done about the economic, social and cultural rights. It is for the Committee to know that there is now increasing interest in the political sphere in seeing what can be done about making those rights much more of substance within the western political tradition. There are talks now about the issue of the right to employment. It is interesting to note, by the way, that the right to employment is contained within the United Nations charter at the insistence of the Australian delegation. When that was written in 1945 the Australian delegation said that the right to employment should be recognised as a human right and is therefore found in article 55 of the UN Charter.

It is interesting to note this gradual movement, a progression if you like, from the 1890s of the German welfare state towards a situation whereby people might in due course be able to challenge whether or not their rights are being violated. That is why we are saying in a sense that we are erring on the side of caution. We are saying that we do not think they can be given the same sort of status, but it may be something towards which one has to work. That is setting the trend of the debate that is going on in Australia and overseas.

CHAIR: When I gave my example of health conditions in Australia as compared with Bangladesh I suggested there was a massive dichotomy. For example, some years ago Mr Justice Einfeld found appalling conditions on his visit to Toomelah in New South Wales. I am seeking to put to you that if there were a formulation within a bill of rights in New South Wales of some economic or social rights, arguably Aboriginal people in that instance could rely on that. It would then be argued that the rights of the government of the day to decide how much of budgetary resources is devoted to a particular social problem could possibly be superseded by consideration given by a court in a particular piece of litigation brought before it. Some people would say that is improper, that only the government can decide how the cake is carved up each year.

Dr SUTER: With respect, that is what has happened with the Mabo decision on land rights. If you read the debates that occurred in the 1980s, one group said, "We will work through the political process and try to introduce uniform land rights." That initiative ground to a halt in Western Australia, which meant that people said, "If we cannot work through the political process we will work through the legal process." Hence, the Mabo case. In a sense, we already have examples of people saying if the political process is not moving fast enough we need to do it through the legal system. The issue you raise is not unprecedented.

Mrs HIGGINS: The right to housing does not mean that everyone has a right to a house. There has been quite a bit of development in that jurisprudence. What it does indicate is that there must be available to individuals or groups the opportunity to obtain a house. It is not a question of the State or government providing a house for everybody.

CHAIR: The Hon. P. J. Breen earlier elicited that you are arguing for some form of entrenched bill of rights. It seems to me your first preference is for the Canadian model and your second preference is the British model.

Mrs HIGGINS: Yes.

CHAIR: I have the impression that you are not terribly enamoured about the New Zealand model.

Mrs HIGGINS: My understanding is that there are some differences between the two, but there is a great difference between the New Zealand model and the—

CHAIR: A judicial officer who made a submission to this Committee described the New Zealand model as a bare statutory bill of rights and the Canadian model as a fortified statutory bill of rights, that is, there is a degree of entrenchment but it is subject to parliamentary override. You seem to be arguing for some form of entrenchment but, presumably, you do not go the whole hog of the United States of America model.

Mr GROGAN: The United States model is affected by its history. It was the introduction, as it were, at that time of certain amendments—some of which are probably inappropriate now—which were interpreted through the nineteenth century in a particular and very limited way. For example, slavery could still exist although all men were created equal. Slavery was not abolished until further amendments were made after the Civil War. We find the Canadian model and the Constitutional Commission recommendations in 1988 much more helpful than the American precedent, except that the American precedent does show in one sense an interesting jurisprudence which is helpful in understanding, for example, due process and other terms. It has developed out of a particular history. Of course, being bound as it were by its own precedents and also by the nature of the political appointment structure of the court, there are difficulties in using the American model as the preferred model.

The Canadian bill of rights is much more apt and appropriate to our situation. The trouble with the New Zealand bill is that it has the provision that no court can hold any provision of an enactment, whether passed before or after, to be implied, repealed or revoked, et cetera, by the bill of rights. In other words, the bill of rights has no effect on any other legislation prior or post, which means there is no real enforcement of the rights in the charter.

CHAIR: One of the problems I have with an entrenched bill of rights is along the lines you have indicated regarding the history of the United States Constitution and its inflexibility. Father Frank Brennan—who has not yet appeared as a witness before the Committee but who, however, has made a submission to us—is an advocate of the bill of rights but, I think I am entitled to say, is an ardent opponent of an entrenched bill of rights, largely based on his United States experience. Are we entitled to be wary of an entrenched bill of rights given that times change. Something may seem appropriate at a given point in history—as it did in the history of the United States, whether it was slavery or the right to bear arms. Is that a warning to us that we ought to have a bill that can be flexibly adapted to contemporary conditions?

Mr GROGAN: In one sense, at the State level it is easier to have it entrenched in a particular way that would not necessarily raise the problems that would occur with the amendment of the Australian Constitution. So the questions are different, although obviously the same question can be asked in relation to an Australian bill of rights. It may be, of course, that the Constitutional Commission was looking at lots of things. Perhaps we ought to change the Australian method of amendment of the Australian Constitution because it virtually requires the support of the major parties or a groundswell of public opinion. That makes it difficult for amendment purposes. Assuming an amendment was made to the Australian Constitution along the lines of the Constitutional Commission of 1988, we feel that we are getting a much better model, for example, than the US amendments to its Constitution.

We believe that we have nothing to fear by that, bearing in mind of course that just as with legislation—when one looks at the provisions of legislation as well as the provisions of the common law there is a very wide discretion in terms of whether evidence is improperly obtained and ought to

be inadmissible or not admitted—the Evidence Act itself says that that a court may reject anything which it thinks may be unduly unfair to a person charged with an offence. Nothing can be broader than that. "Unfair prejudice"—what is unfair prejudice? But that can be interpreted, and the courts do so.

CHAIR: My final question for this stage is that I note in your submission you appeared to be arguing in paragraph 7.2 that in your view it is essential that public bodies such as the Human Rights Commission be given funding and power to bring actions and seek remedies. Do I take it from that that if there were to be a bill of rights, you would regard it as insufficient for it to be in the hands of the ordinary courts to interpret the bill of rights; that you, for some reason which I am asking you to elucidate, feel that there needs to be what I might term an advocacy body to bring actions on behalf of people who might be aggrieved in terms of provisions of a bill of rights?

Mr GROGAN: I would ask Mrs Higgins to speak to that. I think that what we have in mind is that there would be a number of areas—for example, sexual discrimination in the workplace and so on—where what may be in issue does not normally fall or is not justiciable in the normal way so that it does not appear before a court as an issue between A and B unless it involves an assault that has caused grievous injury. But there may be a breach of the law that requires someone—whether it is the Ombudsman the or ICAC, as the case may be—to determine questions so that people, in relation to issues, are entitled to have right done but not through the normal legal processes. I think that is the sort of area that we had in mind but perhaps Mrs Higgins can elaborate.

Mrs HIGGINS: Given that in many situations it is the disadvantaged whose rights are infringed, a body such as a public body or an advocacy body would not only have an educative function but also the function of assisting people to be able to have their rights enforced.

CHAIR: Is that is not a further derogation, though, of the status or jurisdiction of the Legislature in such a case, not only to the courts but to an administrative or advocacy body?

Mrs HIGGINS: No. If, indeed, the rights are affirmed and are enforceable rights, it is no different to any other body—the Human Rights and Equal Opportunity Commission and those sorts of bodies—which would have similar types of functions.

The Hon. J. F. RYAN: I do not wish to ask an extensive number of questions but you might remember that during the earlier part of the questioning by the Hon. R. D. Dyer there was some discussion about the experiences of Russia and China with bills of rights. I think you made the point that bills of rights work better in cultures where the rule of law is respected. There would be some who would say that the United States of America is a good example of where there has been a well-established culture of belief in human rights and a longstanding culture of an entrenched bill of rights. Yet, notwithstanding all that, there appear to be some gross violations of human rights which most Australians would regard as astonishing. For example, most States in America have, and practise regularly, the death penalty and the police forces regularly turn water cannon on the citizens. I do not think a police service in Australia even possesses one.

Mr GROGAN: They did at the Games, I think, did they not?

The Hon. J. F. RYAN: I am not sure that we actually used water cannon.

Mr GROGAN: No, we did not use them.

The Hon. J. F. RYAN: We do not have elected judges. The standard of our prison conditions is probably better. Although there is discussion about mandatory sentencing in various jurisdictions in Australia, only two very small jurisdictions have it and then it is fairly marginal. In California, which I think is the most populous of the American States, they have had mandatory sentencing entrenched by citizen-initiated referendums, which is something infinitely stronger than anything that has been contemplated in Australia. It could be argued that within a network of various tribunals and the common law and so on, Australia already has something that is far more efficient in protecting human rights than anything that has been developed in America with its entrenchment.

Yet some people would argue that the bill of rights in America has successfully extended the life of the abortion debate. They argue about stuff that we do not even bother to consider such as the prayer in schools and flag burning. It has been argued that it has entrenched the wide availability of guns and the agony that that has caused in United States, and yet in Australia we have successfully resolved things such as the Kable legislation. We have affirmed a limited right of free speech where it has been necessary. Even American elections which were thought to be the benchmark of democracy in America have shown through an examination of the ballot in Florida that some people have a better way of voting than do others simply because the state does not provide voting machines that can invalidate their most treasured right, the right of everybody in America to vote. Some might say that we have got it better in Australia and to simply go down the bill of rights way might ultimately in 200 or 300 years time, as discovered in America, prove to be a disaster.

Dr SUTER: Yes. I think there are several issues there and one is that a bill of rights is important but it is not sufficient. Obviously a bill of rights can only contribute to the development of a wider political culture. Second I think that some Americans might actually disagree with your assessment. I agree with it, but I think that some Americans would say that they happen to enjoy their political culture and that Australians have got it wrong. You will always have variations in people's political culture.

The Hon. J. F. RYAN: It is a bit hard to argue that Americans do not have a very substantial network of mandatory sentencing law.

Dr SUTER: Sure, with which I disagree, but obviously a large number of Americans think that that is fine. They also argue strongly about the structure of law and order which also brings to my mind the debate we had in this State over the children's parental responsibility legislation. I attribute that to the Chair who was, I gather, working behind the scenes to tone down some of the then Opposition's support for that. That was an example of how a conservative government decided to run on the law and order issue, and we now have a piece of legislation which is very difficult to implement.

As you may know, the children's agencies refuse to get involved in it which requires the Government to be involved in separate activities. It runs what I call the blue light taxi service. A kid on the street at night who has no money can just go to a police station and they have to drive the kid home. If the kid's parents are not home, they cannot keep the kid in a police car overnight and they cannot keep the kid in a prison overnight because the kid would be with adults. These are the issues that arose during a political campaign and that is, if you like, part of a political culture that we have here in New South Wales.

What we are arguing obviously is that the bill of rights or a more generalised human rights culture might perhaps lead to more sensible approaches. I happen to think that Australia has a better political culture than has the United States but a bill of rights is not going to solve all of our problems. We are not arguing that that is going to do that but what it will do, if it is supported with appropriate community education—which also includes meaning when you say to people, "You have got rights" that you say, "But you have also got a right to respect the rights of others"—that you can then create a better political culture. A lot of comments were made about the Soviet Union. Let me give the Committee a sequel to what happened in the Soviet Union.

Although there was the Stalin Constitution with a bill of rights, it is worth bearing in mind that in 1975 the Helsinki Conference finished, if you like, World War II. Thirty years after the commencement of World War II we had a conference in Helsinki involving the allies and we finalised the boundaries of Western Europe. There were three baskets of agreements. The third one was related to human rights. The argument that was made at the time was that the Soviets were not going to obey those things but the Soviets nonetheless agreed to it because they wanted to get the first two baskets which related to the legal and political framework for postwar Europe. That happened in 1975. Those Helsinki agreements had to be publicised by the Soviet Government.

The Soviet Government had to contribute to the creation of a human rights culture within Eastern Europe. This was then taken up by groups such as the Solidarity movement. I met some of the Solidarity people on a trip to Poland in 1987 and they were actually talking about the Helsinki agreement. What was sought, therefore, was an agreement about which some people said that it was

purely public relations [PR] and that the Soviets were not going to implement it. But it became a rallying cry for non-governmental organisations behind the Iron Curtain which then contributed to the change that has gone on within the Soviet Union. It made the job of Mikhail Gorbachev—a colleague of mine in the Club of Rome—easier for the introducing of glasnost and perestroika. The problem was, of course, that once one starts to unravel the Soviet Union, one cannot stop it. It just fell apart.

But what was interesting was the creation of a human rights culture. What we are saying is that the bill of rights, with appropriate educational follow-up and leadership from politicians, would in fact contribute to a healthier society. I agree that New South Wales is a lot better to live in than is downtown Florida or somewhere like that, but it seems to me that we should always be looking for areas of improvement.

CHAIR: So you are saying that the 1936 Stalin Constitution was not necessarily a dead letter and that even though it took some decades, it was worthwhile?

Dr SUTER: It is interesting that it was the Helsinki agreement that the Soviet Government had to publicise and that was then taken up as a rallying cry by the peace groups behind the Iron Curtain.

Mr GROGAN: We are not here to defend that the American way of life. There were a couple of matters that were raised that could require comment but the fact is that in relation to the bill of rights it was a country that still had slavery and it was very diverse. At the time of the adoption of the human rights provisions, it had not developed the west coast. Judge-by-judge analysis of what is going on in a country in which judges were appointed, and still are, to the Supreme Court for life and where any matter, as it were, that has a constitutional question may ultimately finish up there I think has raised problems.

I think that we are a much younger country in a sense, as is Canada, and I do not think that what has happened in America is understood by us. It is just the politics of the country has meant that there is injustice to Negroes who are there. The education system is unsatisfactory. I would have thought that health and welfare are totally inadequate in a sense, looking at the whole community. But that is an outsider looking in and being critical, I suppose.

Mandatory sentencing, three strikes and you are in and all that sort of thing and the death penalty seem to be very popular among the majority of the people, although voting is not compulsory. All of those matters we might have a separate view on. I do think that you cannot argue, as it were, from American history over 200 years to the recommendation that was made by our Constitutional Commission, which was headed by Sir Maurice Byers. The recommendation of the commission in 1988 recognised all that and the history. Hamer, Whitlam, Justice Toohey and others including Enid Campbell and Leslie Zines were on that commission.

They had regard to the Canadian model and I think it is fair to say—I certainly, personally, and I am not sure we had discussed this in terms of a particular model—there is a provision both in that Constitutional Commission draft bill of rights and also the Canadian Charter of Rights and Freedoms which says that the document guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society. That also raises a question as to what the courts may hold, but ultimately questions are still left to the court. The Kable legislation was resolved by the High Court.

The Hon. J. F. RYAN: Without the benefit of a bill of rights.

Mr GROGAN: Yes, but it would if there was a bill of rights. It would be interesting to see whether the Kable legislation necessarily falls foul of a bill of rights. It probably would. The fact that that was resolved without a bill of rights was by a High Court which is applying or seeking to apply what might be thought to be the norms of a civilised country according to international standards.

The Hon. J. F. RYAN: One of the driving forces behind perhaps one of the current threats to human rights in New South Wales and in Australia is people's perception as to how the law and legal institutions deal with the question of human rights. People say that frankly they are being too easy with criminals and letting too many people off so that what we need to do is override the courts and

make sure. It is not an anomaly that is being promoted by politicians. The common people of Australia do not regard legal processes as an appropriate place to resolve human rights issues. It seems that the more they attempt to do so, the more venomous the reaction against that, in fact the greater the threat ultimately occurs to human rights.

The Mabo judgment produced some enormous problems, to the extent where the Deputy Prime Minister was attacking the High Court. There is that danger, is there not, that as the legal system gets involved and if it is seen to be getting involved in a way which is not politically sensitive, in fact it ultimately brings about a reaction in the community that is more threatening to human life than the opposite.

Ms HIGGINS: Could I respond and give an example. I believe we are certainly much better than America now. I will give a very short example from my experience of going to America when we went on this fact-finding mission on practice and procedure of death penalty sentencing. What we really looked at were the procedures that were being adopted within various American States, to see whether they indeed complied with America's obligations under the International Covenant on Civil and Political Rights and the discrimination covenant. The thing that was overwhelming to all of us who went on that mission was first of all that within the American legal profession very few were even aware of the international covenant for political rights or of the protections that were in it. They never used them and had never seen them. There had been no education in respect of that at all. The other thing that was quite overwhelming was that, as you pointed out, the judiciary in many States are elected and they do indeed run election campaigns on the basis of—

The Hon. J. F. RYAN: Whether they will support the death penalty or not.

Ms HIGGINS: They are very much driven by public opinion. The thing that you do see, though, is that public opinion then also permeates who is indeed put through the process. The people who are put through the process are, without a doubt, statistically the uneducated, the poor and in many cases they are also African American.

The Hon. J. F. RYAN: Overwhelmingly?

Ms HIGGINS: America does not have a system of legal aid such as we have. We have a much better system, there is no question about that. Indeed, there are examples of people being put through the death penalty system—because it is a system they have to elect to put people through—where an African American will get some pro bono lawyer who happens to be a Ku Klux Klan member. There are examples of that. We do not have those sorts of problems. The other thing is that in some jurisdictions with elected judges, they have juries and the jury determines guilt. The jury also determines the issue of whether the person should be imprisoned for life or should be given the death penalty. In some jurisdictions the jury decision is only advisory and it can be turned over. Statistics show that there are more instances where the judge—this is an elected judge—will overturn a jury decision of life and impose death. I do not think we want a system like that.

The Hon. J. F. RYAN: The point I was making is that that is a country that has a bill of rights entrenched.

Ms HIGGINS: It is different from the values that have emanated from these jurisdictions. We are talking about enhancing our jurisprudence. We are not saying that Australia is worse.

The Hon. J. F. RYAN: I think you have given an adequate response. Very simply, one of the arguments that is often adduced against a bill of rights is that we do not want to be like the United States of America. I wanted you to have an opportunity to respond to that.

Mr GROGAN: The fact that you have a bill of rights which gives limited guarantees of protection does not mean that we are not going to have a mass of legislation. Parliament is not going to go out of business because we have a bill of rights. We are going to have considerations about whether we should have truth in justice, how many gaols we will build, the education system and everything else. These are essentially going to go but there is as it were a reserve or guarantee of certain protections which are basic and fundamental, we would say. The mass of legislation will still go on. In other words, there is no reason, I suppose in one sense, why some States could not have

three strikes and you are in—that might raise an issue—or why New South Wales should not go its own way, even with a bill of rights, national or State.

The Hon. P. J. BREEN: You said that the common law was inadequate to protect human rights. Is it not true that the common law is developing all the time in fact to accommodate human rights, as happened with the Mabo decision and such is likely to happen with the question of the right to legal equality? If we do not have a bill of rights the argument runs, and it has been put to this Committee, that the system we have at the moment is sufficient and that the common law is adequate in terms of its developments to protect human rights.

Mr GROGAN: It seems to me that the appropriate measuring rod is, for example, the International Covenant on Civil and Political Rights. Going back, for example, to the Constitutional Commission's draft which was produced in 1988, if one were to look at that and say, "Well, it may be that we are either there or very close to there". It seems to me that we should be ready now to adopt the bill of rights; that it is there and provides a standard that is going to be uniform throughout the country or in this case the State.

Indeed, I cannot see any provision in the Constitutional Commission's recommendation of 1988 which should trouble anyone who is concerned with human rights and their implementation. It crops up in particular ways. I suppose one could get various instances of where we think that the present system is inadequate, but the progression by the common law to meet the standards—true, it is affected by the fact that other countries are adopting bills of rights and therefore are developing jurisprudence which we will probably have regard to. We will follow them and so on, possibly—possibly in a State like New South Wales which has most of the litigation that may be.

The Hon. P. J. BREEN: Isn't it a fact that the real problem is that Parliament can override the common law? Is that not the real problem, not so much that the common law does not keep up to date?

Mr GROGAN: The common law just cannot deal with every conceivable situation that affects a person's human rights, freedom of speech and other matters. It has to endeavour to deal with the issues that arise case by case and resolve those issues in a particular case. It is the knowledge and the fact of universal standards that apply. You can read a document, you can go to school. It may be only four pages or so, "These are our rights". The universal Declaration of Human Rights is not hard to read. It is educative, but if it is enforceable it seems to me that we have done the work that might otherwise take the common law—which is scattered and so on across Australia—years to do. There are also small rights which are very important to an individual which may never see the light of day, and accordingly, never be determined by a court. It seems to me that those rights are worth protecting just as much as big rights which may be determined by the High Court in a particular way.

The development of the common law is gradual and I think there is no reason why we should not have regard to the experience of countries like Canada and the United Kingdom, and the European countries—what is available to them—and approach this task with confidence; that now is the time; we really are ready for it, if we were not ready for it before. It is a responsibility. There is no reason why we should just wait for judges to have the right issues to decide certain matters in that particular case.

Ms HIGGINS: Indeed, what you seek to avoid is the judicial determination and try to develop the culture among officials and people of a recognition of rights. It should not be enforced through the judicial process, it should be indeed an educative process where society embraces it.

Mr SUTER: If Parliament is worrying about losing its authority then obviously the common law is the best example of how it has done so. It seems to me that by having a bill of rights we would give Parliament an opportunity to get back into the driving seat of change, rather than leaving it to judges as they make decisions on an ad hoc basis. The other concern I have about this majesty of this common law argument is that now even the English have stopped using it, which is why they have introduced the bill of rights. We no longer get even the English saying, "Just rely on the common law" because the English now have their own bill of rights.

The Hon. P. J. BREEN: You are referring to the Human Rights Act?

Mr SUTER: Yes, which we have had in the United Kingdom now for two years.

The Hon. P. J. BREEN: But it has only just come into force.

Mr SUTER: Yes, that is right. It came in last October.

The Hon. P. J. BREEN: Is there any indication or evidence about what effect it has had?

Mr SUTER: Not at the moment. Our sister organisation "Justice" in a recent publication has been very tentative in its assessment. It is already giving rise to the fact that we now have a number of different courts. We have the European Court of Human Rights and the problems we will have with the devolution into England and Scotland, et cetera. There are all sorts of complications but, so far as I can tell from my most recent visit to England, no-one is saying that it was a bad move by the Blair Government. The general feeling is that if you are going to be part of Europe you now have to be part of this wider system for the protection of human rights. Britain, of course, is one of the authors of the European Convention on Human Rights 50 years ago.

The Hon. P. J. BREEN: One of the odd things about the Human Rights Act is that the judges, if they decide that a particular set of circumstances is inconsistent with the bill of rights, they have to refer the matter back to Parliament. Evidence before this Committee is to the effect that that is a serious incursion into the system to such an extent that it would be undesirable in Australia.

Mr SUTER: It will not be the judges striking down the legislation, but simply saying to the politicians, "We think you should revisit this"—which gives back to Parliament its own sovereignty.

The Hon. P. J. BREEN: The question is—and perhaps no-one knows the answer to this yet—if the judges in the United Kingdom decide that a particular set of circumstances is inconsistent with the Human Rights Act, do they make a decision contrary to the Act and rule in those particular circumstances or do they refer it back to Parliament?

Ms HIGGINS: I think they have to refer it back. Is it in respect of conduct? I thought it was in respect of legislative provisions.

The Hon. P. J. BREEN: I do not know the answer to that question.

Mr SUTER: We will have to wait and see how the legislation works out but for me it is interesting that even the English have decided to move away from this majesty of the common law argument.

The Hon. J. F. RYAN: I think to be fair they made the decision in Great Britain because they were concerned that those decisions were being determined by courts outside the United Kingdom and this gave them the opportunity to capture the decisions and keep them within the United Kingdom and enhance the capacity of Parliament to continue. It was not because of a significant

Dr SUTER: That is, possibly, a rather cynical argument. It may well be that organisations like our sister organisation will campaign for this precisely as a way of contributing to the development of the human rights culture within the United Kingdom.

Mr GROGAN: Of course, there is still access to the European commission. That has effects on cases such as the two young boys and the changes that England had to make in respect of that matter.

The Hon. P. J. BREEN: That is the Bolger case.

Mr GROGAN: Yes.

The Hon. P. J. BREEN: I think that will be the first decision under the Human Rights Act.

Mr GROGAN: Mr Chairman, in response to a question that you raised earlier, I must say that I do not see Parliament as in some way surrendering its control over the situation because of an entrenched bill of rights. It does not seem to me that the judiciary is looking forward, for example, to an assumption of power. It just Has to do its job when cases come before it. I think that the Legislature, which has the ability to reach people and to form and respond to public opinion, and has the ability to mould legislation and put forward amendments to constitutions when and if required, can and always will exercise leadership. I do not see the judiciary, except possibly if we go on without a bill of rights, having to develop its norms and principles, or endeavouring to do so, by keeping up with developing jurisprudence and so on. As I say, it only decides cases before it, although it may have some influence as a precedent. It is slow in one sense and is confined to the cases that arise before it.

CHAIR: What is the view of the International Commission of Jurists regarding the possibility of an amendment to the Interpretation Act either to require, or alternatively permit, an international instrument to be construed by courts in New South Wales?

Mr GROGAN: I do not think that we can speak for the International Commission of Jurists as a whole. The view of Mr Justice Kirby, who was our President before Justice Dowd became President, would be quite clear on that. He has advocated in his own decisions that he has regard to, and considered as very influential, the overseas provisions. Perhaps because we live in a State that shares, in one sense, a responsibility with other States, it is fair to say that we are a State that tends to lead, particularly in this area. I am not sure that we would necessarily think that New South Wales should go it alone. I think we need to consider what that would look like. It probably would not be a difficulty, but it may be that that could be done in consultation with the other States and the Commonwealth.

CHAIR: Even the Hon. Malcolm McClelland QC, who took a conservative view regarding a bill of rights, appeared to have no objection to courts being entitled—as distinct from being required—to consider international human rights instruments.

Mr GROGAN: I cannot think of any objection to the entitlement to have regard to such instruments. I would have thought that in one sense that may assist the situation. The courts are tending to have regard to them. The High Court does not hesitate to refer to other treaties, conventions and developments in other countries, perhaps with a greater freedom than trial judges like myself do.

(The witness withdrew)

(The Committee adjourned at 1.25 p.m.)