REPORT OF PROCEEDINGS BEFORE

STANDING COMMITTEE ON LAW AND JUSTICE

INQUIRY INTO A NEW SOUTH WALES BILL OF RIGHTS

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At Sydney on Thursday 15 February 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. Hatzistergos

JULIE FRANCES DEBELJAK, Legal Academic, Monash University, P.O. Box 12, Monash University, Victoria, affirmed and examined:

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

Ms DEBELJAK: I have been briefed by the Australian Plaintiff Lawyers Association, New South Wales Branch, to give evidence before this Committee on behalf of the association in relation to bills of rights.

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

Ms DEBELJAK: Yes.

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

Ms DEBELJAK: Yes.

CHAIR: As you are aware the Australian Plaintiff Lawyers Association [APLA] has made a written submission. Is it your wish that the submission be included as part of your sworn evidence?

Ms DEBELJAK: Yes.

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

Ms DEBELJAK: Okay.

CHAIR: I invite you to make a brief opening oral submission if you wish to.

Ms DEBELJAK: I have two points to make before giving evidence. The first point I would like to bring to the attention of the Committee is that I recently spent three months in the United Kingdom overseeing the introduction of its Human Rights Act. The Human Rights Act in the United Kingdom is the domestic incorporation of the European Convention on Human Rights into the British law. One way in which New South Wales could actually incorporate a bill of rights would be by looking at an international document and incorporating it into domestic law. I have actually seen that in action in the past three months in the United Kingdom, which has a unique model compared to the models we are used to dealing with, that is, the United States model, the Canadian model and the New Zealand model. Although it is referred to in the submission, I believe I now have more to add to the debate in front of the Committee.

Secondly, I have had a chance to read over the submission of the Premier, Mr Carr, and the submission by the New South Wales Bar Association and I have critiqued those in my own mind. If the Committee would like to hear my critique on that, I am happy to give my perspective on those two submissions. Basically, both of them are quite heavily reliant on bills of rights from eras gone by. The more modern bills of rights, such as the Canadian, New Zealand and United Kingdom bills of rights, are not really emphasised in those submissions so they are lacking in that respect. That is all I have to say.

CHAIR: I draw your attention to a sentence on page 6 of your submission in which you say, "Our constitutional and parliamentary system of government has been distorted such that a bill of rights is necessary." What form of distortion are you referring to there?

Ms DEBELJAK: Basically, at Federation the question came up as to whether we needed a bill of rights. Rather than going along the United States route and adopting a formal bill of rights our founding fathers decided that responsible government was sufficient in order to protect our fundamental human rights. The distortion that I mentioned is in respect pretty much to responsible government. Historically, the idea was that the Executive would be answerable to the people via the

Legislature but with the growth of not only the bureaucratic State but strong party discipline and party politics, this has been somewhat distorted. It is arguable that it is now the Executive that actually dominates the Legislature as opposed to the Legislature actually dominating the Executive, so responsible government therefore breaks down.

Another aspect is because we now have such a massive bureaucratic State and each Minister has the run of such a massive portfolio, they are no longer seen as being ultimately responsible for everything that happens in their departments, so in that sense again responsible government is broken down. That being the basis upon which we thought our human rights and fundamental freedoms would be protected, I think it needs to be reviewed, given that there has been a distortion.

CHAIR: You say at page 8, "Human rights must be given legal status to isolate them from the vagaries of politics. The involvement of the independent, impartial judiciary in rights protection will foster apolitical solutions." I would be the first to agree with you that the judiciary is indeed impartial and independent. However, I have some problems with the reference to "apolitical solutions". I certainly agree that the process at which the decision is reached may well be—and no doubt is—apolitical, however, some witnesses who have appeared before this Committee have certainly said to us that in effect to require a judge to determine what are essentially political, social or economic questions rather than legal questions is in effect judicialising the political process or politicising the judicial process, if you like. Would you like to comment on that and how you see the judiciary interpreting a bill of rights as an apolitical solution?

Ms DEBELJAK: Perhaps I should clarify what I mean by the term "apolitical" there. I more so referred to the idea that they will be determined in a principled manner as opposed to a policy-oriented manner. Before government and Parliament expediency is often what is required in coming to decisions. If courts have a legal document, that is, a bill of rights by which they have to make decisions over somewhat political issues, they are guided by what is written within the four corners of the bill of rights document and their process of reasoning in coming to a decision should be based on a principled manner. It is fair to say that political issues will come before judges under a bill of rights, but I have two points to make on that.

Firstly, judges already have the run of many political, social and economic matters anyway, whether it be interpreting statutes, developing common law, reviewing administrative action; political and economic considerations arise there. Secondly, there is that much jurisprudence on rights issues to date that it is quite clear that there are actually principled ways in which courts look at these issues. When one looks at an individual right, such as the right to freedom of expression, there is a lot of principled jurisprudence to say what expression is and what different levels of expression deserve different levels of protection. Therefore, judges have a principled basis upon which to determine these questions. It is not purely politically motivated. Say, for example, someone's pleaded freedom of expression hinges on somebody else's fair trial, in weighing the balance between competing rights, they also have their own judicial techniques by which they can weigh up the balance in objective terms.

What is necessary in a democratic society? Things like the pressing and social needs of our society come into it. Judges can identify enduring community values and they know the pressing needs of society. They then have to decide whether or not these limits on rights are proportional, such as, is it reasonable and objective? They have to look at the problem they have to solve and the way they are trying to achieve it. Is that a rational way of achieving the problem, does it go too far or was there a less intrusive manner in which the problem could be looked at and in the end does the detrimental effect of limiting that right outweigh what is trying to be achieved? These are all tests that can be approached in a principled manner and the courts are accustomed to doing that in the past, regardless of a bill of rights. In that sense, yes, they may be faced with various political issues but they do have the ability to decide them in a principled manner.

CHAIR: On a related matter, you quote Justice McHugh of the High Court as saying, "Judicial lawmaking is surely not as undemocratic as legislative inaction which fails to meet the need for law reform". Do you think that His Honour may be encountering the difficulty of not appreciating the necessary difference between the separation of powers and the legitimate roles of the judiciary on the one hand and the Legislature on the other?

Ms DEBELJAK: I think the difficulty facing many judges in our system at the moment is that people are perceiving that they do not have access to the representative branches. People are not getting answers to their problems from their local member of Parliament because he or she does not have the time or it does not fall in with the party line to which that person is attached, so people are actually seeking answers from the courts. Whether that is right or wrong, these people are aggrieved and feel that their problems are not being addressed through the representative political process so they are actually going to the unrepresentative arm of government for a solution. In that sense judges are being put in a difficult position. They would probably much prefer to have some kind of guidance from the representative arms on the issues before them rather than having to delve into the common law and try to find solutions to these situations which are not necessarily capable of resolution.

CHAIR: You say at page 10, "The days of the myth of strict legalism are gone and society accepts that judges can and must make law through the process of interpreting legislation and applying the common law". I readily accept the truth of that if it relates to the detailed facts of the case coming before the judge. I would also accept it as applying to interpretation of the detailed provisions of the statute, for example, the Local Government Act. However, a difficulty that has been raised with the Committee and a criticism that has been made of bills of rights, particularly by the Hon. Malcolm McLelland, QC, former Chief Judge in Equity of this State, is that bills of rights typically and perhaps of necessity specify objectives in generalised or aspirational terms.

Examples are freedom of speech, freedom of assembly, and all of the rights to which one could refer in the International Covenant on Civil and Political Rights. Those critics would say that, by virtue of that generality or of the aspirational nature of a bill of rights, the problem of judges intruding into the political area is exacerbated by the fact that their discretion is so untrammelled by the detailed provisions that otherwise would appear in most statutes.

Ms DEBELJAK: My first response to that is that, because of the enduring nature of a bill of rights, if it is actually to be entrenched, one basically needs relatively broad-brush rights. The sorts of rights we are talking about are freedom of speech, right to life, freedom against torture, and the right to privacy. Surely those issues change over time. Therefore, from the word go, one needs to couch the provision in terms broad enough to accommodate unforeseen consequences. One example is the Toonan case in Australia. I am sure when the ICCPR was signed in 1966 the idea of right to privacy was not going to encompass homosexual relations. However, come 1991, community perceptions had changed so significantly that the concept of privacy was able to encompass the idea of consensual relationships in private.

In that sense, yes, one needs relatively broad-brush statements of rights in a bill of rights. However, I do not think the judges will then see themselves as being given an open hand on interpretation. The judges will be considering what the enduring values of the community are and they will be looking at the laws that are in place in different areas of the community, and interpreting those rights. The Toonan case is a classic example. This Tasmanian case was the first case that was taken against Australia before the Human Rights Committee under the optional protocol to the ICCPR. In that case, Tasmania was the only State that had laws against consensual homosexual activity in private for people of an adult age.

The judges in that case, when they were considering privacy, looked to all the other laws in other jurisdictions within Australia to see what the common, enduring moral attitudes were towards homosexual activities. They were then able to extrapolate from the idea of what privacy was. So, in that sense, the judges are not in free flow in going in to fill in these broad terms in whatever way they like; they are actually looking at the existing law and the existing practice within the Australian community.

The second point I would like to make on that issue is that if New South Wales adopts a bill of rights it is in a pretty lucky position. Most other countries with a Commonwealth tradition have had a bill of rights in some way, shape or form now for a between 30 years and one year. There is a lot of jurisprudence already in existence on the meaning of such terms, such that if our judges were to begin to interpret these concepts outrageously I am sure they would come under a lot of criticism.

A third factor to keep in mind is that most bills of rights have some potential for override by the Parliament. That is so whether it is the section 33 provision in the Canadian Charter, which allows

for a notwithstanding clause. That sort of clause is politically difficult to invoke, I admit, but if push came to shove I am sure a Parliament would be willing to utilise that clause in the event that judges were to make some outrageous interpretation of the bill of rights. Other examples relate to the United Kingdom system, whereby the Parliament itself is not allowed to invalidate laws. All that the United Kingdom courts can do if they find a law incompatible with the convention rights is make a declaration on that incompatibility.

At that point in time the declaration of incompatibility goes back to the Parliament and to the government, and it is in the government's hands as to what it does with it. I think any government will have difficulty ignoring a declaration of incompatibility from the judiciary. However, at least the declaration opens up dialogue and gives the Parliament a second chance to see what it would like to do with the legislation and what it thinks of the words of the judge before re-enacting a provision, rather than having it wiped from the books completely.

CHAIR: Can I put to you another aspect of the generalised language commonly adopted in bills of rights, taking freedom of speech as an example. Freedom of speech is clearly not absolute in any society, including ours. It is cut down, for example, in our case, by the law of defamation and the law dealing with racial vilification, to give two examples. How satisfactory and how effective do you think it really is to provide, in aspirational terms, for freedom of speech to be enshrined as a right, when it is in fact so constrained by countervailing considerations such as I have referred to?

Ms DEBELJAK: The main restraints usually put on freedom of speech include things like damage to other people's reputations. I think that is a particularly fair limitation to place on someone's freedom of speech, because in a community one always has competing interests. My interest is to defame you, and your interest is not to be defamed. I do not think that is an unusually difficult or rigorous limitation to place on a bill of rights, given that we are individuals living in a community and that within a community we need to respect each others' rights to not actually be defamed.

In terms of racial vilification, one of the most enduring values that our community should have is the right to equality and non-discrimination. So there is a clear need to have limitation on freedom of speech in terms of racial vilification. It does not add anything to a community. It just divides a community. Bills of rights, at their core, should be about building a stronger community that respects individuals' make-ups and acknowledges that every human is equal. So, in respect of the two limitations you mentioned, I do not find problems with them.

The Hon. J. HATZISTERGOS: What about contempt of court? We in this country take a very hard line on to issues relating to contempt of court—much harder than, say, the United States of America, which guarantees freedom of speech and recognises the freedom of the media to report on judicial proceedings in particular in a manner that they feel is appropriate. Would your association like to see the culture that has developed in the United States as one which we should adopt here, or would you recognise that the current limitations in that regard operating in this country and in this State strike an appropriate balance, bearing in mind the interests of individuals and the interests of the community?

Ms DEBELJAK: Firstly, I think the United States is an example of a really outdated bill of rights and we should not maintain focus upon it. The United States bill of rights actually came from the colonial power wanting to dissociate itself from the colonialist power. In that respect, it was all about getting individual liberty and justice. So it was very much about the individual's rights vis-a-vis the government, and the government being an overpowering and overbearing government. So, in that sense, my freedom to speak about what is going on in court is very much entrenched in the United States psyche because of the historical circumstances that brought about the United States Bill of Rights.

The next wave of rights really came after World War II, and they started looking at things like dignity of the human being, participation of community, and mutuality. These were based on the idea that we all have individual rights inherent from our being human beings, however we live in a community and therefore there are certain other responsibilities that we owe to the community as individuals of that community, that we do not have unfettered rights. In that respect, I think the United States system is not necessarily the best system for us to take a lead from.

The second thing I would like to say about that is in relation to the idea of freedom of expression, that is, my right to comment on what is going on within a trial in a court without the threat of being held in contempt of court. The flip side of that is the right of the person in court to a fair trial. Under a bill of rights those two rights always have clashed, and always will clash. The courts have tools which they can utilise to resolve that clash. One of the main tools is to consider which of the two rights should win out. In a democratic society that puts liberty of the person quite high on its agenda, I think in most cases it will be the freedom of the person on trial to have a fair and just trial on the true facts before an impartial tribunal. I think that right is most likely to win out over the media's right to come in and sensationally report cases. Again, it will come down to individual cases and individual facts, but I cannot see that freedom of expression necessarily will impair the right to a fair trial, or will necessarily preclude our courts utilising contempt of court provisions.

CHAIR: If you regard the United States model as out of date—and I agree with you—could I ask you to comment on the Canadian model of a charter of rights and freedoms? Do you regard that as a model that you would hold up to the Committee as worthy of adoption?

Ms DEBELJAK: The Canadian model to date has withstood 20 years of jurisprudence. I think it is quite a strong model. There are two things that are particularly good about that as a model. Firstly, it outlines the rights that each individual in a society should have. In doing so, it really only identifies the fundamental rights. So it outlines the civil and political rights, the right to a free trial, the right to be free of degrading and inhumane treatment, access to impartial judges, et cetera. It also contains in section 1 a general limitation clause that recognises that we live in a community, that at times individual rights will clash and that at other times the collective good might clash with the individual right. Section 1 actually recognises that by providing:

> All the rights in the Charter are guaranteed subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.

The limitations that are to be put on the fundamental rights of individuals at least have to be justified on the basis of what is required in a free and democratic society. That is not saying that Parliament can never put limits on people's rights. All it is saying is: We think these rights are really important, these rights are here because the individuals are human, and if the Parliament chooses to somehow limit these rights it should justify those limitations on the basis of what is required in a free and democratic society. The courts have actually interpreted that term in quite an objective manner as well. In other words, in a free democratic society, will Parliament please show us that there is a pressing need in society for this limitation to occur. Throughout that jurisprudence, that angle of limitation has rarely been questioned by the judiciary. The judiciary defers to Parliament when Parliament can actually point to a legitimate objective or a legitimate pressing social need.

The Hon. J. HATZISTERGOS: Is that not a source of criticism that has been directed in some quarters against the Canadian model? Originally we had judicial determinations in Canada which seemed to be fairly broad in their application of the charter of rights. That led to some criticism in relation to the level of political activism. The court, according to some commentators, has taken a far more circumspect view of its role which has also led to criticism on behalf of people who advocate that the court should be much more adventurous in its protection of rights. I draw that to your attention only because one of the criticisms that has been drawn from time to time in relation to those sorts of instances is that they politicise the judiciary. It seems to me that, on one view, those criticisms, coming from different directions at different times in Canada, draw out the criticism that is sometimes levelled, that is, that those determinations politicise the judiciary. Is that a fair analysis?

Ms DEBELJAK: I have read a lot of literature which falls on each side of the fence, such as Michael Mandels who thinks that the charter has led to a total legalisation of politics. I do not think it is necessarily a fair summation of what is going on. Many of the commentators who were very anti the charter wrote in the very early days of the charter. Every new constitutional document will have teething problems. It is true that in the very early days of the charter there was quite a strict unanimity; the courts were not actually going to push the cases any further than they needed to go. Then in the late eighties there was a much greater dissent about the breadth of limitation clauses and the breadth of the actual rights. I do agree with that. However, in the nineties there has been a true levelling out—I do not know whether you would put it in terms of activism or whatever—of the disparity among the judges.

There was actually a study done by Morton, Knoff and Russell which looks individually at how judges are deciding cases and whether or not, for example, they are giving rights a broad interpretation or a narrow interpretation, and also whether they are actually more willing to agree to limitations on rights or whether they are not likely to agree to limitations being put on rights. Having looked at those sorts of factors over close to two decades for which the charter has been in place, they have not been able to identify a trend whereby the so-called liberal appointees have been very liberal or very conservative in their interpretations; likewise, whether the conservative appointed judges have been either liberal or conservative.

I think it is fair to say from the findings of that study that judges are not going to be necessarily voting along what are perceived to be party political lines, regardless of whichever party appoints them. You can never guarantee that they will actually decide the way in which you would think that the party would like them to decide, so in that sense I think the whole idea of politicisation of the judiciary has been blown out of proportion. In terms of legalising politics, politics has been legalised to an extent anyway: That is my first comment. Second, I come back to the idea that if a solution to pressing problems in society cannot be obtained from the representative political arms, it has to come from somewhere. At least if it is coming from the judiciary, it is based on principles and reasoned arguments rather than political expediency.

CHAIR: Can I give you an example of what I regard as a major problem or even a substantial abuse of democratic process in my view? You discussed in your submission a case decided in Canada in 1995. The case is known as *R. J. R. MacDonald Inc v Canada.* For the sake of the record, I point out that you indicate that the relevant legislation, the Canadian Tobacco Products Control Act, prohibits the advertising, promotion and sale of all tobacco products unless their packaging included prescribed unattributed health warnings and a list of toxic materials. Presumably the toxic materials are contained in tobacco.

You say that the tobacco company challenged this legislation in the Supreme Court of Canada which held unanimously that the legislation infringed the freedom of expression. Quite frankly, I regard that as an outrage. I say that because it is well known to any reasonable person that tobacco causes health problems. To deny that is like denying that the Holocaust occurred in Europe in the Second World War, yet here we have the court deciding unanimously in the way I have indicated. The court was split 5/4 on the issue of whether the means chosen by Parliament, the legislation, was or was not the least intrusive method available to achieve its objective. How can that be said to be anything other than judicial interference in the political process?

Ms DEBELJAK: The way in which the Canadian courts have gone forward with interpreting their charter is through that strong limitation clause which is in section 1 whereby they are willing to give quite a broad reading to the content of the rights because they know that in particular circumstances the rights can be limited by section 1, Limitations Justified, if that is required in a free and democratic society. To actually say that the corporation's freedom of expression was infringed was not the be-all and end-all of that case. They looked at the idea of speech and said, well, this is speech. I think they have done that to make sure that they do not too narrowly define the idea of speech because, in the future, who knows what cases will come before them in which they will need to actually agree that, yes, this is speech, to avoid unduly restricting in the concept of speech.

If you read on through the submission, I go on to discuss the ways in which the Supreme Court considered the limitation. They all agreed, yes, it is an impingement on freedom of speech; however, is this limitation justified? The majority in that case I think got the decision wrong. The minority in that case, I think, got the decision right. It was a 5/4 split and this will occur; it occurs all the time. Wrong decisions are made by the High Court in this country regularly and that is why they actually overturn their own previous jurisprudence.

CHAIR: There was a majority and there was a minority. They were split regarding and the methodology adopted by the Legislature. In essence, what I am putting to you is: Why should there be any impediment on a Legislature which is legislating to put messages on cigarette packets, if the Legislature believes it is acting in the public health interest? Why should freedom of speech considerations cut down such a legislative initiative?

Ms DEBELJAK: Although the charter requires us to ensure that any limitations put on freedom of speech are actually objective, the majority in that decision decided that because there was not enough evidence to actually link the advertising with consumption and the Parliament could not point to a definite link between the two. If Parliament cannot do that, how can Parliament say that it is objective? How can Parliament say that it is reasonable? The other factor that they had in mind was proportionality. Given that you could not necessarily make the link between the consumption and the advertising, is it disproportionate to say that you cannot have any form of advertising? There was probably a less restrictive manner in which to control the inducement process of people to smoking rather than a blanket ban.

It was not so much that that the courts were saying to the government that it cannot regulate in this area. They were more so saying that if the government went too far with its blanket ban and did not have enough evidence upon which to link the inducements to the actual advertisements, then something less should have been done. The minority in that decision actually held back and said that if the Parliament had to have 100 per cent foolproof scientific evidence of everything before it actually legislated, that would be impossible; that governments are there to also take a social lead, if you like, on particular topics, and requiring a scientific evidence would severely hamper a government's decision.

In that sense, the court's minority were happier to have the limitation on advertising without the 100 per cent foolproof scientific evidence. I think that, essentially, the case came down to factual evidence as opposed to there being a complete split by the courts as to what the tests or methodology should be. I emphasise that the majority did not say that the Parliament could not ever put any restrictions on tobacco advertising. It was just that the restrictions that had been put on were blanket and there was no objective basis for them.

CHAIR: Can I put another problem to you in connection with the Canadian Charter of Rights and Freedoms? In discussing group rights at page 25 of your submission, you say that the Canadian the Supreme Court has interpreted references to "person" or "everyone" in the charter to include corporations so that corporations benefit from charter rights. I disclose to you that this Committee has received a detailed written submission from Associate Professor Paul Latimer from Monash University who argues very strongly—and if he is available, we intend to call him as a witness—that the charter effectively has destroyed—I do not think that puts it too highly—corporate regulation in Canada by importing all sorts of rights and freedoms that cut across the authority of the regulatory authorities in Canada and their ability to control corporate criminality. What would you have to say to those criticisms—that the charter in fact vitiates the authority of the regulatory authorities to administer corporate law in Canada?

Ms DEBELJAK: I would just make one further point in relation to the tobacco case. In Canada, they have a section 33 override. If the Parliament really thought that that decision was so outrageous, it could have put it to the political test and actually passed the law notwithstanding what the court said. If there was no political backlash, people would be happy with that.

The Hon. P. J. BREEN: But the problem is, with respect, that you do not actually approve of that override in your submission. It seems to the Committee, or to me, that you are advocating a kind of judicial activism at the expense of the power of the Legislature that this Committee is trying to address.

Ms DEBELJAK: Okay. In terms of having override clauses, I think you will find that there is a pure theoretical argument to say that they actually undermine the whole purpose of the Human Rights Act or a bill of rights. In all international documents that exist, there is no override clause. What happens in practice, though, is that because we are all obsessed on parliamentary sovereignty, the idea of having an override clause—or of the idea of only having a declaration of incompatibility in the UK document, or the New Zealand bill of rights actually not allowing the courts to invalidate pieces of legislation—is actually to preserve the ideal of parliamentary sovereignty. From a purely purist perspective, override clauses are wrong. How can anyone in one breath be saying that we need a bill of rights because these are fundamental and enduring human rights and in another breath take them away?

The Hon. P. J. BREEN: Is not the answer to that that you recognise that parliamentary sovereignty is such a fundamental principle and such an important doctrine in the Westminster system of government that it actually is more important than individual or fundamental rights?

Ms DEBELJAK: No, I do not. A balance can be struck.

The Hon. P. J. BREEN: Is that not the theory of the overriding clause?

Ms DEBELJAK: For any government to allow an override in the face of a judicial decision based on reasoned and objective criteria would be taking a pretty massive political gamble or for a government to feel that strongly that it wished to override would kick in the whole democratic process. That is, the judges say one thing, the parliament says it will override and the next election the people will out. If the people do not like the fact that the government went against the judiciary, the government will be voted out. If the government thinks that the judiciary made an outrageous decision and the people support what the parliament said, that is a lesson for the judiciary in relation to the enduring values of the community.

CHAIR: Would you agree that an override clause essentially provokes a political crisis? I do not want to overemphasise it. If not a crisis, would you agree that it provokes a confrontation between two independent arms of government, namely, the judiciary and the Legislature?

Ms DEBELJAK: It can be looked at more positively than a confrontation. It can be looked at as a dialogue. The override clause in Canada has rarely been used. Perhaps a better model to focus on if there is a problem with an override clause is the idea of a declaration of incompatibility. It is much less confrontational than an override clause in terms of the relationship between the judiciary and the Legislature.

The Hon. P. J. BREEN: Surely that declaration of incompatibility recognises parliamentary sovereignty as being so important that the idea of individual rights or judicial activism having priority over the parliament is not even considered as worth mentioning in the legislation?

Ms DEBELJAK: I have two points on that. It is political expediency to have an override clause or a declaration of incompatibility. The people of Britain would never, ever have agreed from zero rights—

CHAIR: Do you say that the people of Britain had zero rights?

Ms DEBELJAK: They had no entrenched domestic rights. Even today they do not have them. The Labour Party in the United Kingdom would never have gotten through a bill of rights were it able to override parliamentary sovereignty. In that sense it is politically expedient for it to allow for a declaration of incompatibility. It is bastardising to a certain extent the idea of rights, but that is politically what it could achieve in the climate it is operating in at the moment.

The Hon. J. HATZISTERGOS: Would you say that again? Did you say that it would be political expediency to put the bill through or the charter of rights in Britain?

Ms DEBELJAK: In both Britain and, I would suggest, Canada, for any political party to get a document through, full party support and full Opposition support were needed. It would be almost impossible for them to have the representatives agreeing to have their power removed. It is a political reality. What parliament is going to put forward a document that actually said to the people, "We are happy to give up some of our powers"? At that point I am saying it is politically expedient in terms of allowing for an override clause and for parliamentary sovereignty. In terms of human rights theory and jurisprudence it is, in fact, a bastardisation of what human rights are about because human rights are enduring. They should not be allowed to be overridden by a parliament. That is the whole concept. It is a pragmatic solution to a political question.

CHAIR: You were diverted by questions from my colleagues. I ask you to return to the question of business regulation in Canada. You have not responded to my question in that regard. I put it to you that one of your colleagues at Monash University has made a written submission to this Committee drawing attention to the fact that by virtue of the interpretation placed by the courts on the

Canadian charter on the meaning, for example, of the word "person", that the rights that apply to individuals also apply to corporations. In the view of Associate Professor Latimer the courts have, in effect, neutered the capacity of the business regulation authorities in Canada to regulate malpractice in business.

Ms DEBELJAK: Basically that all comes down to definitions. Who are you going to give rights to? Who do you expect responsibilities from? Any bill of rights can define them expressly for themselves. In the Canadian context it was not defined whether or not corporations should be given rights or responsibilities. If you looked at the United Kingdom Human Rights Act, it has a wide definition of "public authorities". Public authorities owe obligations under the Human Rights Act. Public authorities in that situation include private bodies that perform any public function. To that degree, a number of corporations will be caught under the Human Rights Act.

The second point in terms of public authorities is that the courts are considered a public authority. In terms of the courts making decisions in relation to the parties before them, the courts have the duty to uphold convention rights. In that sense, when two individual parties are before the courts, if one party is trying to do something to another party or is wanting an interpretation of the law that is incompatible with rights, the court has a duty to ensure that does not occur. There will be an indirect effect on private actors to make sure that they are not exploiting existing laws against other private actors. To an extent there is what is termed a horizontal effect to the Human Rights Act. It is not just about citizen against State, it is also to an extent citizen versus citizen.

The next thing I would like to say in relation to, in particular, the United Kingdom bill is again about the idea of a declaration of incompatibility. If for some reason there is something problematic with the law that enables a corporation to do something, all the courts can do is make a declaration of incompatibility that opens up a dialogue between the court on a principled, reasoned basis with the parliament that may have made a decision on political or expedient terms. Then they can always remedy the situation.

The Hon. J. HATZISTERGOS: You keep using the word "dialogue". I am not sure that is an appropriate term and whether there is, in fact, any dialogue at all. A number of factors may determine whether or not parliament or a government wants to apply resources to revisit an issue once there has been a declaration of incompatibility or a declaration of invalidity, depending on what course is taken. It is very simplistic to suggest that a decision takes place and all of a sudden everyone will get together and have a chitchat about what should happen. In reality, it would not happen. There is no dialogue.

Ms DEBELJAK: Dialogue is basically the tab word that the Labour Government in the United Kingdom has used to bring in human rights.

The Hon. J. HATZISTERGOS: It is a buzzword.

CHAIR: Mr Hatzistergos is putting to you that we are dealing with independent arms of government—the Legislature and the judiciary. No matter what the Blair government in Britain might have said about it, is it in truth justifiable to talk about such interaction as may occur as a result of a bill of rights as a dialogue?

Ms DEBELJAK: Let me put one thing back to the Committee. What occurs now? What occurs when parliament passes a statute? That is dialogue that is putting into words on paper to the community and the judiciary what the law is. When the judges interpret that statute, that is dialogue. The judges come back to the community and to the parliament and say, "We think that the words you have used in the statute as well as in your second reading speech explain that term." In response to the question you put before about money to revisit issues, I will say two things. Firstly, it is a political risk. The courts may say, "What you have done encroaches upon human rights." It is a political risk whether or not the government then decides that it had better do something about this because it does not respect the rights of the citizens that it is meant to represent. The second factor is: What is more important? Is it more important to balance the budget lines or is it more important that the citizens, which government is there to represent, do not have their rights infringed?

The Hon. P. J. BREEN: It depends on who you ask the question to. The Hon. M. R. Egan would say it is more important to balance the budget.

CHAIR: As a former Minister in various portfolios I have had to engage in very bruising annual encounters to seek funds for various identified enhancements. The various departments I controlled at one time would put up about 30 options. I would refine that down to six, because one could never expect more than six to be funded. A court in an individual case, relying on a particular facts situation, may determine that something ought to be addressed. Given the realities that the budget in a given year is finite, do you not see that as interference with both the Executive and the legislative arms?

Ms DEBELJAK: Firstly, that occurs already today with or without a bill of rights. In administrative law decisions often cases are made out before the court that will require additional funding. They might require reallocation or increased funding. There may be a problem about the quality of a service. For example, a pension was calculated differently between men and women because men are primarily breadwinners and women are not. That would breach the idea of equality, which, I think, we would all agree was fundamentally unfair. The court says that to the parliament. All that requires from the parliament is for it to make sure that it is being fair to all people. That does not mean that parliament then has to up everyone's pension to be the equivalent of the male pension. What it can do is say, "We have the finite resource of $100,000. Rather than give $70,000 of that to men and $30,000 to women, we can do it 50-50." The terms of judgment rarely would require additional expenditure from the government.

The second factor I would like to put in this respect is that the judiciary is well aware in most cases of its role. It knows it is not there to spend the dollars of government. It has mechanisms, such as justiciability. Is this is the sort of issue that should be before the court or is it purely political? Also, it has other mechanisms, such as deference. How much of this decision is balancing on social fact evidence we might not have before us? How much of this decision is based on expenditure? In that situation the judiciary can either choose to defer to the judgment of government, which it does regularly—for example: Is there a pressing social need for this law? The government and the parliament are the ones who are meant to represent the people. If they think so, then there probably is. Rarely would a government disagree with that.

Secondly, I cannot see why if we do get a bill of rights in New South Wales or Australia generally that we cannot alter to some extent the procedures before the courts. Someone from a particular department would be in front of the court explaining the reasoning behind the decision—that is, "We have finite resources. This is the basis upon which we decide to exclude these people from the resource. It is not discriminatory. It does not offend anyone's rights." What is the problem with that?

CHAIR: It may be a problem if the member of the Executive, the public servant, is appearing before a court. At the moment the public servant would be appearing before a parliamentary committee or a Cabinet committee. The dynamics would be changed.

Ms DEBELJAK: The whole idea of a bill of rights is to change the dynamics. People have lost faith in what goes on in the back rooms of parliament or in the Executive.

The Hon. P. J. BREEN: With respect, people have lost faith with what happens in the courts.

Ms DEBELJAK: I would argue that one of the reasons why people have lost faith in the courts, if you want to speak about things like implied rights or the Dietrich decision—which allows for funding for people who have no legal representation but need to in the interests of a fair trial—those sorts of decisions have come about because our common law is in need of reform. Our common law does not sufficiently protect our fundamental rights, as was thought it might in days gone by. The judges are there fishing, trying to find solutions to the problems before them in court. Their primary duty is to reach a just and fair decision on the arguments before them. At times the law is found wanting, to actually reduce to words what our fundamental rights and freedoms are. It might help judges to make a more confined decision. It might help us to have more faith in the legitimate role that the judges have.

CHAIR: Could I come back to an issue you raised a short time ago. At the bottom of page 39 of your submission you say:

> A bill of rights should be binding on certain non-State actors. A bill of rights must place binding obligations on private providers of essential public services and private actors with enormous economic/political power whether they are individuals, corporations or institutions.

I do not have so much difficulty with that part of the comment that relates to providers who are private entities and who are carrying out what were formerly public functions. I understand what is being said there. When you refer, though, to "private actors with enormous economic/political power whether they are individuals, corporations or institutions" would you see, for example, universities and churches as coming within that?

Ms DEBELJAK: They could. In the United Kingdom with the Human Rights Act the churches ended up fighting and lobbying to be excluded under the Human Rights Act specifically. There are arguments for; there are arguments against. In terms of my submission the concern really is about multinational corporations and multinational individuals who have a whole lot of money, a whole lot of economic, a whole lot of social and a whole lot of political power. There has not been a bill of rights that I know of that has sufficiently taken account of that problem in our society today.

The Hon. P. J. BREEN: Is it not only a problem in the Canadian Bill of Rights and the American Bill of Rights because no other bill of rights to my knowledge gives corporations that kind of power? That is the problem, is it not?

Ms DEBELJAK: All bills of rights potentially give corporations that power. It depends on how the judges interpret the idea of "people". Who are "people"? Who are "human beings"?

The Hon. P. J. BREEN: Is it not true that they are the only two jurisdictions where the judges have said that corporations are people and have equated one to the other?

Ms DEBELJAK: I have a feeling that also under the European convention corporations are also included. I cannot be 100 per cent sure about that. On that point, if corporations are people under the Human Rights Act, what is there to stop unions from being classed as "people"? You will see in my submission that in Canada it has not occurred. That has nothing to do with doctrine; it can occur. You can hand over to corporations the rights that people have. Why not give the opposing analogue, unions, also the power? In terms of defining who should and should not be given rights, I think personally that any bill of rights should be a lot more express about who has rights and who has obligations. If you are concerned about the corporations getting their hands on bills of rights and exploiting them against the masses, ensure that there is a definition there saying that people equals corporations, people equals other institutions, including unions. In terms of wanting to place obligations on corporations or people that wield a lot of political power, you can actually define that into your model.

The Hon. P. J. BREEN: But obligations under a bill of rights apply only to government.

Ms DEBELJAK: No, they do not.

The Hon. P. J. BREEN: Can you give me an example?

Ms DEBELJAK: In the United Kingdom example the obligations under the Human Rights Act apply to courts. That is not government.

The Hon. P. J. BREEN: As part of government.

Ms DEBELJAK: Well, the Parliament is not included, so there is a difference there. Secondly, they apply to public actors that have some kind of private function.

The Hon. P. J. BREEN: Representing the government.

Ms DEBELJAK: Not any more, they are not. With a privatised utility how can you say that those people are representing the government?

The Hon. P. J. BREEN: Well, acting as agents of the Crown. That is the only circumstance in which they are bound by the United Kingdom Human Rights Act, when they are acting as agents of the Crown.

Ms DEBELJAK: I would not necessarily say they are agents of the Crown once they are privatised. It may be that that is a semantic matter. My point is you can decide who you want to be covered by a bill of rights—the horizontal effect of a bill of rights. It can be more than just citizen against the government. It is not just the government in this day and age that encroaches on our rights. It can be our employers that encroach on our rights. It can be our retailers that encroach on our rights.

The Hon. P. J. BREEN: Yes, but that should not be included in a bill of rights, surely? A bill of rights is a document that relates to rights as they apply between governments and citizens.

Ms DEBELJAK: Well, call it something different. If you are looking at seriously protecting the rights and freedoms of individuals you may need to be a bit more creative about who you think should be subject to this particular document.

The Hon. J. HATZISTERGOS: We are living now in a world where one hears the term "globalisation" mentioned whereby transnational corporations are increasingly shaping the lives of ordinary citizens in a variety of ways—finance provision, computer technology, output media. Various decisions are being made that, in effect, government is finding it very difficult to be able to respond to. We have heard recently statements made in this country about the need to free up the banking system in order to allow corporations to compete nationally. How does a bill of rights bring sovereignty back to a country to be able to resist those sorts of pressures, which are international in nature?

Ms DEBELJAK: Globalisation is an international factor and I think it needs to be addressed at both the national and international levels. At the international level there is plenty going on in terms of trying to instil a sense of obligation on multinational corporations. I personally do not think we are that far away from a situation where there will be actual obligations, direct legal obligations, international law obligations on multinational corporations. In terms of retaining sovereignty there will be certain elements of a bill of rights that you could potentially utilise to ensure that your government does not give away your economic sovereignty.

The Hon. J. HATZISTERGOS: If they do not like it they will go somewhere else.

Ms DEBELJAK: That is why I say it is also an international problem.

The Hon. J. HATZISTERGOS: We have the ACCC that puts all sorts of obligations on corporate entities. If they do not like them they threaten that they are going to leave. To me this whole concept of what you are saying that you can impose some sort of reasonable discipline on these organisations to make them responsible is great in theory but I am not sure that a bill of rights will achieve anything. That is the question I put to you: how is a bill of rights going to impose some discipline in this situation? The answer seems to be that it cannot.

Ms DEBELJAK: Something has got to start somewhere, is my response. Of course you need an international response to international problems.

(Short adjournment)

The Hon. J. HATZISTERGOS: I want to ask you a question on the issue of corporations that you may or may not be aware of. In 1991 the people of Ontario elected the New Democratic Party into office, which is the equivalent of the Labor Party. Its plank for that election for a period of about 25 years was that there should a government monopoly over motor vehicle third party insurance—as had been the case for many years in a number of other provinces of Canada, particularly Saskatchewan, Manitoba, British Columbia and also Quebec. That party was elected to Parliament and formed a government. It had championed this policy for some 25 years. What happened, however, is

that in 1992 it became very, very clear to the government that it could not pursue that policy agenda because the insurance companies were going to challenge it and the advice was that they would be successful under both the Charter of Rights and the North American Free Trade Agreement.

Do you believe that this was an appropriate area where corporations should be able to use a charter of rights to support their economic interests ahead of the policy of a party endorsed by the people at an election; a policy which had a history of some 25 years in that particular case?

Ms DEBELJAK: I think in that situation—again, I am not sure if I need to limit myself to the charter in my response. In respect of my first point I will limit myself to the charter. I am not sure on which basis the insurance companies were going to claim that it was invalid, but on whichever basis it was the judges still have the ability to say, "Fine. A particular right that you have got has been infringed. However, we are happy with this limitation being put on your rights because in a free and democratic society it is much better that we have no-fault motor vehicle insurance." There is always that stop gap within the Canadian model. Under section 1 limitations are allowed on the basis of a free and democratic society. I am not sure upon what basis they had their advice.

The Hon. J. HATZISTERGOS: It could have been that the case was fought and they were ultimately unsuccessful. The very fact of the charter, however, meant that in that particular case the government was not prepared to take the political and economic costs of pursuing that policy and coping with the challenges that the charter provided. Is that an appropriate outcome?

Ms DEBELJAK: I think that is fair. When you introduce a charter of rights or a bill of rights into the political landscape, it becomes one of many political factors that have to be taken into account in making political decisions. The only difference between that factor and lots of other factors is the idea that at least it is a factor that makes sure we are serious about maintaining the rights of our individual citizens, the citizens that we are here to represent.

I think it takes a certain amount of political maturity for any government or any parliament to say, "Okay, we agree that there are certain boundaries that should not be crossed in terms of our legislative capacity." Once they are agreed upon, I cannot see why a government cannot say to itself, "Fine, we know that we cannot cross this boundary. If we do, that is one of the risks that we face in the next election and that is one of the many factors we have to take into account when we are actually deciding whether or not to pass this bill."

It seems to me that charters of rights and bills of rights are not there just to stop Parliament for the sake of it; they are there to stop Parliament from encroaching on freedoms and rights that over hundreds of years have come to be accepted by everyone as being fundamental to each individual person's autonomy and ability to live peacefully in the community.

The Hon. J. HATZISTERGOS: But what we are talking about in that particular case is the economic interests of insurance companies, vis-a-vis the rights of ordinary citizens, to be able to enjoy the products of a State monopolies insurance corporation. One of the aspects that I wanted you to address your mind to was whether that would be an appropriate area to place limits on the government's capacity to legislate, that is, the economic interests of private corporations.

Ms DEBELJAK: I hark back to my first point again. In that situation, fine, there might be some economic freedom in the insurance companies that they want to pursue, but under a bill of rights there will be limitations on their rights. Those limitations on their rights have to take into account other people's individual rights as well as the collective good, the collective good being defined by the actual things that are necessary in a free and democratic society. So it may be necessary for the Parliament in that particular situation to encroach on the insurer's rights to ensure that other values in our society are maintained.

Secondly, a solution to this sort of problem again will boil down to whom you give rights to and whom you impose obligations on. There are no rules here. You do not have to confer rights on corporations. You can actually define in express, clear words in your bill of rights that these are to apply only to natural persons, as opposed to legal persons. If, however, you are happy to hand over rights to corporations, there is nothing to stop you also imposing obligations. Even still, each

individual who has rights also has obligations. My right to something is my obligation also to ensure that that something is protected for somebody else.

CHAIR: May I a come back to a matter we were discussing a little while ago, that is, whether a bill of rights should be binding on certain non-State actors. In response to a question I was asking at the time, I understood you to say that in your view such a provision should probably apply to, for example, universities and churches. Am I correct?

Ms DEBELJAK: No. I do not agree. In thinking of non-State actors, I have not necessarily turned my mind to the idea of universities and churches. I know that in the United Kingdom churches are not covered, nor are universities. I know also that in Canada the universities and churches are not covered.

The Hon. P. J. BREEN: Do you mean they are not bound by the legislation?

Ms DEBELJAK: They are not bound by the legislation. In my opinion, when we are thinking of non-State actors we need to think about the sorts of things that a bill of rights is aimed at achieving, and then see who can actually impact on the achievement of those goals, that is, the guarantee of those rights. For instance, obviously private companies that are running public utilities should be covered, because how can we have a right to live if we cannot have access to water? In terms of education, that can come within the scope of Parliament and government in terms of media provision. In that sense, you have non-State actors that wield a fair amount of power. Perhaps it is suitable to be able to somehow pull them in to some of the obligations that are contained under a bill of rights.

CHAIR: You would be aware that there are a number of Federal statutes and New South Wales statutes that deal with human rights in various ways. For example, there is the Racial Discrimination Act of the Commonwealth and there is the Anti-discrimination Act of New South Wales. Under both of those statutes, and others that I could name, there is a structure set up, which one might describe as an advocacy body, to which complaints can be made. Those complaints can be conciliated or upheld, and sanctions can sometimes be applied if there are breaches.

Why would you say that that is an insufficient response to human rights? Could it not arguably be said to be the case that a more particular and more flexible response might be to legislate in those particular areas, whether it be sex discrimination, racial discrimination or whatever, rather than have an overriding bill of rights seeking to cover the field in all respects?

Ms DEBELJAK: I think the difficulty with statutory-based human rights measures is that they are purely statutory-based. They are still subject to the political whim of the day. For example, HREOC, which is the Federal body, the Human Rights and Equal Opportunity Commission, has had its funding slashed by the Government. So there is an appearance of there being a commission that is out there to protect their human rights, but in effect it has been emasculated to an extent because they have not been given funding.

Another example that occurred to HREOC is in relation to the Aboriginal and Torres Strait Islander Social Justice Commissioner. When Mick Dodson's commission appointment was up, no-one was reappointed for years. So what happened with the indigenous portfolio of HREOC in that time was pretty much nothing. I do not know why they were not reappointed, but at least the perception is that it occurred to ensure that things were not progressing there.

In terms of the actual substance of the laws as opposed to institutions, again that can be changed. Limitations can be placed on rights quite readily. For example, with the problem that we had with the infertility laws of Victoria of late, the Federal Government could quite easily have put a provision in its legislation preventing single women getting IVF treatment and put in an exception under its Sex Discrimination Act to ensure that that was not against the Sex Discrimination Act. So in that sense there is always the ability for Parliament to limit the rights that it has given and those limitations will never be subject to judicial review.

CHAIR: I understand what you are saying. However, I think I would be entitled to say that here in New South Wales the Anti-discrimination Act 1977 has bipartisan or even multipartisan

support. I suppose the grounds were fairly restricted initially, but they have been expanded to other areas subsequently. Would that not be an example of a very successful model?

Ms DEBELJAK: I think what must be kept in mind is that the main reason why we need documents to protect fundamental human rights and freedoms is that they are there to protect unpopular minorities. In terms of unpopular minorities, who is out there to protect them? When I am thinking about limitations being placed on statutes such as the Anti-discrimination Act, there may be multiparty agreement in terms of some general areas of discrimination that should not be allowed, but then what happens when an unpopular minority comes forth and needs the protection of antidiscrimination laws?

CHAIR: Aboriginals might possibly be an unpopular minority. There was a case before the Antidiscrimination Tribunal recently in which a prominent radio announcer, Alan Jones, was complained against because he made remarks concerning someone who had sought access to accommodation at a real estate agency. He uttered words to the effect of, "If you go along to an estate agent wearing a sandshoe on one foot and a sardine can on the other and you smell like a skunk…" Various very unpleasant things were alleged to have been said. That complaint was upheld. That might be one example of an unpopular minority. Perhaps the homosexual community might be another example of an unpopular minority. Is it said that such a model, the Equal Opportunity Tribunal, and the structure that exists under that antidiscrimination legislation is anything other than successful and does intervene on behalf of unpopular minorities?

Ms DEBELJAK: The unpopular minorities that are identified today do get protection under these statutes. There are two points. With statutes that are set down in such defined terms, what occurs when the next unpopular minority comes along? They will not be protected by that statute, and there will not be the political will to extend the laws to cover that unpopular minority.

The Hon. J. HATZISTERGOS: How can you say that? We are looking at a bill of rights for New South Wales; we are not looking at it in the abstract for any other community. Could you point to any other instances in which the parliamentary system in New South Wales has shown itself to be immature and unable to respond to those forms of challenges? If you are arguing for a bill of rights in the Northern Territory where there is a different cultural experience it may be that you would say that a bill of rights is appropriate, as it was for example, in South Africa, bearing in mind its problems. Zimbabwe got its independence and so on. However, we are talking about a reasonably mature, functioning democracy. I am not saying it is perfect but it has shown a capacity to be able to deal with the sorts of challenges that have arisen. Can you point to anything in the cultural experience of this State that has shown that this State is incapable of responding to those sorts of challenges and, if so, how a bill of rights would advance that situation?

Ms DEBELJAK: Being from Victoria I cannot speak authoritatively on the ins and outs of the New South Wales Government and the legislation passed or not passed here. One thing I can say in response, however, is that I have actually worked quite extensively with indigenous communities and the people I have worked with came from throughout Australia. I do not think the problems that indigenous communities are facing are relevant to every State but New South Wales. On that front there are plenty of situations that can be remedied under a bill of rights, even the position of women.

The Hon. J. HATZISTERGOS: They are not a minority.

Ms DEBELJAK: They are an economic minority, they are a political minority and they are a social minority. We need to expand our vision of what a minority is to be able to understand the issues underlying a bill of rights. Women are consistently underpaid for the work they do; women are consistently denied access to services that they might need; women are consistently given less security in job tenure than men through structural discrimination. A bill of rights can aid that. There will be a freestanding clause in a bill of rights that says that discrimination in practice or in law should not be allowed to happen, and in that sense it will actually aid New South Wales.

The Hon. J. HATZISTERGOS: That is assuming that the decisions go the way you would expect them to.

Ms DEBELJAK: It is also assuming that Parliament can make decisions that will go the right way as well. At least there is that stopgap.

The Hon. J. HATZISTERGOS: Assuming court decisions do not go that way. In any event, you recognise that there are principles of proportionality and other implications, balancing respective interests and so on. Assuming they do not go the way you expect, what happens then? Does the minority come back to the Parliament and say, "You fix this up for us", or does it rest with the court's decision?

Ms DEBELJAK: I think we can be pretty confident that upon objective and reasoned decisions based on precedent, not only from within this country but international tribunals and overseas experiences, such decisions would more than likely go the way towards equality. There is at least 50 years of jurisprudence in these areas which support equality in law and in fact. More particularly, our High Court in its own constitutional jurisprudence is familiar with looking at discrimination based on law and fact and is capable of making decisions upon that basis.

The Hon. J. HATZISTERGOS: Is that the experience you found elsewhere. For example, I thought some trade union rights were not recognised by the Canadian Supreme Court under its charter of rights. There were certainly instances in relation to the French speaking community of Quebec in which rights were not recognised notwithstanding that they were a minority under the charter of rights in Canada.

Ms DEBELJAK: It is very dangerous to refer to the outcome of a decision alone.

The Hon. J. HATZISTERGOS: Do you go back to the Parliament and say, "Let us have another go"?

Ms DEBELJAK: I have a few things to say in relation to that.

CHAIR: Before you do, I indicate that recently we had Aboriginal groups and women's groups giving evidence. For example, we had the Aboriginal and Torres Strait Islander Commission [ATSIC], New South Wales Aboriginal Land Council, the Women's Electoral Lobby and another umbrella group called Women into Politics. The Hon. J. Hatzistergos in particular put to them what would happen if they went to the courts under a bill of rights and were disappointed and all of them said, "We will come back to the Parliament. We will have a bit each way."

Ms DEBELJAK: That is the process; that is democracy. If you have a democracy that also has a bill of rights, it gives people multiple forums in which to pursue their goals. What is wrong with that? We are a democracy. It is about people trying to translate their beliefs and their idea of a fair go and justice to the representative arms. I see no problem with their ideas being aired in a variety of forums and actually getting the ideas out there.

The Hon. P. J. BREEN: But if it results in a proliferation of litigation, then the bill of rights will find itself up against a difficult obstacle, namely, objections from politicians and the public at large because the public does not want to see a proliferation of litigation.

Ms DEBELJAK: There is absolutely no evidence at all and I can refer you to Mr Carr's submission and the New South Wales Bar Association's submission, which are both totally without substance in relation to the claim that there will be a litigation explosion via a bill of rights. Studies in the Canadian system have shown that there has not been a litigation explosion. All that has happened is that cases that would already come to the courts on a particular basis anyway may have included one more cause of action or an additional defence. The floodgates have not opened in response to a charter of rights. I was in the United Kingdom for the first three months of its bill of rights and I went to maybe three or four cases and a Human Rights Act issue was one of the issues in the cases that were already before the courts.

Scotland was the test ground for the British Government and the Human Rights Act has been in force there for just over year and it has been mainly looking at the procedural rights of criminals to date, and again in these situations it is one of a many-pronged defence for these people so it does not necessarily lead to a litigation explosion. If it were to actually increase litigation, is that a problem? If

it is about us as individuals ensuring that our fundamental rights are being honoured by the people we elect to government, is that necessarily a problem? Any society can expect some kind of increase in litigation in the short term but the long-term advantage of that is a much more just, fair and equitable society. In terms of having my discussion on equality converted to a discussion about trade unions, it is very difficult. My comments in relation to equality do not necessarily apply to trade unions so I am not quite sure how to answer that. I have actually forgotten the point being made.

The Hon. J. HATZISTERGOS: I asked what happens in a situation where you do not get the outcome that you aspire to achieve from the courts. You then go back to the Legislature and say, "Fix it up". How would you be able to do that, bearing in mind your rationalisation, that is, the capacity of the Legislature to override should not exist?

Ms DEBELJAK: I think you are putting too much on what you perceive as being my point of view in terms of the override clause. I say in theory an override clause or a notwithstanding clause or a declaration of incompatibility is bastardisation of the pure idea of human rights.

The Hon. J. HATZISTERGOS: But is it your submission that there should not be one?

Ms DEBELJAK: No. It is APLA's submission that at the very least we should have a statutory bill of rights; at the very most we should have a somewhat entrenched bill of rights. In terms of the separation of powers and the sovereignty of Parliament there are issues in relation to who gets the last word. One way of ensuring that Parliament has the last word, if this is the politically expedient outcome, would be to have either an override clause or to adopt a model such as in the United Kingdom where there is a declaration of incompatibility. Under either model, where you do not get your response in Parliament or in the courts, that is the system of democracy we have decided we want to have so you would pursue your political angles.

The Hon. J. HATZISTERGOS: That assumes that the political angle is available and sometimes it is not.

Ms DEBELJAK: Precisely.

The Hon. J. HATZISTERGOS: You are also making the assumption that generally speaking all the decisions that are taken out of the court's interpretation and bills of rights tend to be fatal as compared to the sorts of legislative outcomes one might get out of the Parliament. Some of the rights that have been upheld in Canada are astonishing. There was the case in Canada in which a person was acquitted of murder on the ground of insanity and it was held it was a breach of that person's right for him to be arrested after the acquittal. How do you rationalise a decision such as that?

Ms DEBELJAK: I think it is particularly unfair just to focus on the outcomes of decisions. If you actually read the reasoning of the judgments behind those decisions there is a rational reason for them. At least judges have to actually put down in writing and publicise their reasons for decisions. If they happen to be the wrong ones, another court will override them or potentially when the issue comes before the court again it will be reviewed. In terms of accountability of decision making, there is a lot more accountability of decision making with judges than with other arms of our government.

Secondly, I think you will find in my submission that I have not been frightened to admit that some wrong decisions have been made; RJR McDonald and the tobacco companies and also decisions in relation to trade unions. Not everyone gets things right the first time but we can learn from those mistakes, firstly, by ensuring that we draft the bill of rights, if we have one, in ways that avoid those decisions and, secondly, having a bit of faith that our judiciary will actually see those judgments and the holes in them and make a better decision than what was originally made.

The Hon. J. HATZISTERGOS: Have you prepared a bill of rights that you would commend to the Committee?

Ms DEBELJAK: If the concern of the community and of the Government is about maintaining some form of parliamentary sovereignty, if they cannot get past the idea that democracy equals parliamentary sovereignty I would probably look at the model in the United Kingdom. If they

can get past the idea that democracy equals parliamentary sovereignty and thus accept that democracy equals the majority tempered by the needs of the minority and tempered by the rights of individuals, I think the Canadian model works quite well.

CHAIR: In giving that response you do not mention the New Zealand legislation. Do you regard that as too pallid to even consider?

Ms DEBELJAK: We basically have the New Zealand model in Australia at the moment anyway. Under statutory interpretation of rules courts are able to take into account our international obligations whenever there is an ambiguity in statute. Courts can also focus on international human rights law in developing the common law, so I do not see that the New Zealand model goes much further than what we already have. I do believe that for a nation or a State that is nervous about implementing a bill of rights a statutory model could be a good first step, so that people realise that judges are not going to totally undermined the legitimacy of the Parliament or of the Executive, and so that people can realise that the limitations and the balancings at the end of the day will work on objective and reasonable bases.

CHAIR: One of our terms of reference requires us to consider whether there should be a legislative requirement on courts to construe legislation in a manner that is compatible with international human rights instruments. In commenting on that particular matter you say at page 56 of your submission that it is a difficult issue. I quote:

> The dilemma is that once we have a domestic Bill of Rights, should we still impose a legislative requirement on the courts to construe legislation in a way that is compatible with international human rights instruments?

I understand what you are saying when you say that if there were to be a bill of rights there is a difficulty. But supposing there were no bill of rights and the Committee were to recommend, for the sake of argument, an amendment to our Interpretation Act here in New South Wales that either required or permitted courts to consider the provisions of international covenants to which Australia is a party, such as the International Covenant on Civil and Political Rights or the International Covenant on Social, Economic and Cultural Rights. What would you say to such a step?

Ms DEBELJAK: I would have to say different things, according to whether it is just an interpretive obligation or whether the obligation is within a bill of rights. I take the first circumstance first. Having a provision in an interpretation statue to interpret things according to international law, and international human rights law specifically, I think is commendable and recommendable. We have these obligations under international law anyway, and the only reason that we do not have to abide by them is because the world is not yet mature enough to actually want true enforcement mechanisms at the international law level. The point is that we have these international obligations.

CHAIR: The High Court seems to be moving in the direction of taking those obligations into account in any event.

Ms DEBELJAK: Yes, and it has in fact done so. So, having a statutory obligation imposed on New South Wales courts to that effect I think is no different from where the common law is going anyway. At that level, just an obligation insofar as possible to construe domestic laws compatibly with international rights law is a recommended position. In terms of whether you are going to have some form of entrenched bill of rights, the position becomes a bit more complicated. Would you like to hear me on that?

CHAIR: Not really, because this Committee is not in effect inquiring into an entrenched bill of rights. So that probably is not a matter that would be particularly useful at the moment. Could I return to models. It has probably become clear to you that the Committee is not particularly enamoured of either the United States model or the Canadian model. Could we hear a little bit more from you about the United Kingdom and New Zealand models as they might apply here in New South Wales?

Ms DEBELJAK: Do you wish me to come from a particular angle, such as parliamentary sovereignty?

CHAIR: Why, in your view, is the United Kingdom model superior to the New Zealand model?

Ms DEBELJAK: The UK model is superior, I suppose, on two levels. I am going to introduce again my language of dialogue, my buzz word. Under the United Kingdom model, if the court actually makes a declaration of incompatibility, that then gives the Parliament and the government something solid to work from. They have the reasoned decision of the judges as well as their own political agenda, and they can then work around the judgments and the agenda to achieve the correct result.

In New Zealand there is no such capability to make a declaration of incompatibility. What happens there is that the court might interpret a statue in a way that the legislature does not agree with. If that happens, the New Zealand government is probably in a greater bind than the United Kingdom government. In the United Kingdom, once a declaration of incompatibility is made, there is a fast-track procedure. The responsible Minister can make a change to the legislation by executive order if the Minister considers there are compelling reasons to do so. In that way, if the agenda of Parliament is too busy to enable it to deal with the issue in a day, a week or two weeks time, the Minister can deal with the issue in an attempt to remedy the incompatibility. The Minister has 120 days to get that change approved by Parliament.

Under the New Zealand model, if the courts make an interpretation of statue that the Parliament is not happy with, the only thing to do is to legislate to override that interpretation, that is, expressly state in law what the interpretation should be, rather than relying on the judge's interpretation. In that situation, the perverse interpretation does not necessarily come before the Parliament, because it is not receiving any formal notice of an incompatibility. Further, the legislative timetable will not actually allow for that piece of legislation to be pushed through. So that is the first reason why I think the United Kingdom model is superior to the New Zealand model.

Secondly, it has got to do with the breadth of the rights. In the New Zealand model there is not as great an interpretive obligation on the courts. If there is an ambiguity in a statue, the courts are obliged to interpret the law compatibly with international treaties, conventions and human rights law. In the United Kingdom model one does not need an ambiguity. All legislation, all law, so far as possible, should be interpreted compatibly with convention rights. In that situation, any government or any Parliament that is serious about respecting rights I think should go for the United Kingdom model.

The Hon. P. J. BREEN: The Human Rights Act in the United Kingdom, I think you said, was one of a number of issues in any particular case. I think you used the words "one of a many-pronged defence". When the Bar Association made its submission to this Committee, Brett Walker SC, in his view, suggested that the Bar's view was that this was just another layer of legislation that the courts would have to deal with, and in that sense it would complicate pleadings, it would draw out cases and make them longer, and that even if it did not result in more cases it would make individual cases more complex. He suggested also that the idea that in the United Kingdom the court should make a declaration of incompatibility and refer the case back to the Parliament, in his view—and in the Bar Association's view, presumably—in effect flies in the face of the whole principle of separation of powers and the parliamentary system of government. Do you have a view about that?

Ms DEBELJAK: I will deal with the complexity issue firstly and then the separation of powers secondly. In terms of complexity, there are two issues. In the first instance, I do not understand why people are shy of complexity, when the outcome of that complexity is to actually ensure that individuals' rights and fundamentals are guaranteed. We do not shy away from complexity in other areas of life. Why should we shy away from complexity when the result of the complexity is something as fundamental as guaranteeing to individuals that the State will not encroach on their rights?

The Hon. J. HATZISTERGOS: It may not give that guarantee. We have been through this debate. When the interpretation of rights is looked at by the courts there is no guarantee, as you put it, that the outcome will be the protection of their rights. It may not be.

Ms DEBELJAK: The rights will be guaranteed to the extent that there is a principled, reasoned and objective view of what individual rights should be, as opposed to having them subject to

the whims of political desire and/or political need. So, in that respect, the rights, as interpreted by the courts, are guaranteed. There is an apolitical impartial body interpreting individuals' rights. Secondly, on the complexity point, in the United Kingdom I was with a human rights barristers chamber. So I was with 35 of the leading human rights barristers in the United Kingdom. Not one of those shied away from the fact that there was a Human Rights Act.

Again, that is a law to protect people's rights. In the United Kingdom they have to deal with not only the domestic law but European community law and decisions of the European Court of Human Rights. Then they have the Human Rights Act to deal with. They are not jumping up and down and feeling overwhelmed by this complexity, because at the end of the day this is what the constitutional system is dictating, and it is what democracy requires. So they do not shy away from the idea that it is a complex issue.

Secondly, in relation to the separation of powers, allowing judges to make a declaration of incompatibility, or allowing judges to put forward their reasons and arguments that a law encroaches on rights, does not threaten the separation of powers. As I said before, there is already dialogue between the three arms of government. Common law is part of the dialogue. Statutory interpretation is part of the dialogue. I cannot see how the fact that judges are able to declare to the Parliament that a certain law goes too far, supported by reasoned and principled views, would somehow all of a sudden threaten the separation of powers.

The Hon. P. J. BREEN: Are there any cases that you are aware of where a declaration of incompatibility has been made?

Ms DEBELJAK: Not yet. I have interviewed judges, representatives of the government and members of the Parliament in the United Kingdom, and, from the judges' perspective, they are not keen to adopt any kind of confrontational stance.

The Hon. P. J. BREEN: Or dialogue.

Ms DEBELJAK: Dialogue is a different thing. They are not keen to get into confrontation, so they are not going to make declarations in circumstances in which those declarations are not strictly needed. When they are needed, yes, they will make those declarations, so that there will be dialogue between the courts and the Parliament. Secondly, the government is now subject to section 19, which means it has to make a statement of compatibility of legislation. Every bill that comes before the Parliament has to have a statement of compatibility. So the government is taking its obligation seriously. Each department is getting full training. With every bill that is going through there is a process whereby checks are made to see whether that legislation would encroach on rights. If it does, the decision must be made, "Do we really want to do that?"

Thirdly, the Parliament has actually said that it will take any declaration of incompatibility seriously. The Parliament is confident that the judges are not going to abuse their role under the Human Rights Act. In all second-reading speeches, and in all public relations media in relation to the Human Rights Act, the Parliament and the government have said they will take declarations of incompatibility seriously and will look to the bases on which they have been made, because the Parliament and the government are intent on respecting the rights of their citizens.

The Hon. P. J. BREEN: It is not clear to me, from reading the legislation, whether the Parliament will change the law in order to address the facts of a case in respect of which there is a declaration of incompatibility. Or is it the intention that the Parliament will simply resolve the declaration in such a way that the court can then reconsider those facts in the light of the Parliament's resolution?

Ms DEBELJAK: They can make retrospective orders. In the schedule to the Act, there is a provision stating that the response to a declaration of incompatibility can be made retrospectively, so in that situation the court would then reconsider that particular fact situation. If the government did not want to make a retrospective order and it was only prospective, the government still has prerogative powers to grant some kind of compensation to the individual whose rights were encroached upon at the time. So at that point, it becomes a political decision whether the executive will do that retrospectively or whether the executive will do it prospectively and, if they do it

prospectively, whether they will actually compensate the poor individual who ended up losing out under the old law.

The Hon. P. J. BREEN: Would that be done by the Executive Government by way of regulation?

Ms DEBELJAK: That is what I was saying. The fast track procedure is done by regulation but then those regulations have to be approved by both Houses of Parliament. Whether the Executive decides that all that is required is a change to a regulation or whether there is a need to change the primary legislation is dependent upon the fact situation.

The Hon. P. J. BREEN: From your discussion with judges, do you get any feeling that they might somehow resist these declarations of incompatibility?

Ms DEBELJAK: Definitely.

The Hon. P. J. BREEN: Would you suggest that that would be very rare?

Ms DEBELJAK: I would suggest that that would be—I do not want to say "very rare" because we do not know what is going to happen, but from my discussions with the judges, a declaration of incompatibility from the perspective of a judge it is a lose-lose situation. The judges have an individual in front of them who has a problem. They cannot actually change or invalidate the law so if they find an incompatibility in legislation, they have to say to the individual in front of them, "Look, I am sorry. This law infringes your rights but I cannot do anything about it, so go away." They do not actually get to distribute justice in the individual case, which is their primary obligation.

Second, the judges end up losing the run of the matter, if you like. If they cannot possibly take the words of Parliament and in some kind of sensible way make them compatible with individual rights, they have to hand the matter over to the government to deal with it. Knowing that the Parliament is a majoritarian body, as opposed to an apolitical body, in that respect again the judges cannot guarantee that the government will do anything about it. There is a very strong feeling among the judges with whom I spoke and among the commentators who have written in this area that the judges will do all they can, bar absolutely ridiculous interpretations in the law, to make sure that the laws are compatible. Even in Canada there have not been very many statutes that have been invalidated when one considers that it has been a 20-year period. I would suggest that it would be fewer in the UK than that.

The Hon. P. J. BREEN: I think you referred to section 19 of the Human Rights Act where the Attorney General has to say whether or not a particular bill complies with the Human Rights Act. Is there any indication of what effect that has had? Are there any statistics on that?

Ms DEBELJAK: There has been one instance. Under section 19, the relevant Minister for the legislation has to actually pass the section 19 statement. The section 19 statement has a number of brilliant flow-on effects. First it shows parliamentary intention: We are not intending to encroach on anyone's rights by actually passing the bill. So when the law actually gets before the courts on some kind of rights challenge, if it ever does, the courts are given the authority, if you like, from the Parliament to try their best to make sure that the legislation does in fact not impede rights.

There is a bill that has been passed or an amendment that has been passed to the Local Government Act talking essentially about whether or not in the Local Government Act there is a provision stating that in education, homosexual families could not be portrayed as being the norm, the usual, or a "proper family unit"—I think that is what the wording was. The Labour Government wanted to take that provision out because it thought that encroached on a variety of rights. The legislation passed the House of Commons but the House of Lords rejected it. When the bill came back to the House of Commons, they said, "Okay, it is one section of a 200-section bill", and they ended up writing a statement setting out that they could not vouch for the compatibility of that bill on the basis of the particular section which encroached upon human rights. There has been one example but when it goes to the judges, who knows what will happen? If the judges find that is compatible, then it goes back to the lower House again to try to convince the upper House that it is in fact compatible. If the judges find that it is incompatible, then again it goes back to the two Houses but this time at least the

House of Lords will have in front of it an apolitical, objective, reasoned decision on which to think when it chooses whether not to pass the law.

What has to be kept in mind with the UK system is that they still have the ability to appeal to the European Courts of Human Rights. That body has been a lot more effective in protecting the individual's rights than has our international tribunal, that is, the Human Rights Committee. It has been seen as a lot more legitimate because it is made up of a more homogenous region of the world compared to the Human Rights Committee. Second, there is a very strong political need or obligation among European communities and the countries of the European communities to actually abide by the decisions of Strasbourg. Were that case to go nowhere in the local courts and were it to go to the international courts, again there is another level of input from a judicial body that the UK Government, upper House and lower House would have to consider.

The Hon. P. J. BREEN: One of the matters that this Committee is considering is the question of a scrutiny of bills Act. I know that in Victoria, for example, they have such an Act. There is a book published by Allen and Unwin and written by Moira Rayner titled *Rooting Democracy*. In the 12 months preceding publication of that book, there were approximately 39 bills passed in the Victorian Parliament to which was attached a note stating that they failed to comply with the fundamental principles of human rights. That has not been very effective either as a beacon or as a torch in terms of illuminating what happened to the Victorian Parliament. Do you have any experience of that? Do you think that there is any benefit to this Parliament from introducing similar legislation?

Ms DEBELJAK: I think that the problem with a scrutiny of bills provision by itself, without any further sort of review of legislation, is precisely what you identified in Victoria. A Parliament with a large majority can pass whatever law it likes, regardless of whether there is some kind of statement attached to it, because there is no opposition. A scrutiny of bills Act in those terms which also has an external apolitical review process attached to it is a lot more effective. That way people just cannot sign off on bills and pass them without fear of there being some kind of accountability. I think it is probably fair to say that the massive swing against Labor in favour of Liberal during the last election—

The Hon. P. J. BREEN: You mean the massive swing against Liberal.

Ms DEBELJAK: Yes, the massive swing against Liberal—was based on behaviour like that—39 bills going through and we cannot do anything about it. On the face of it, it is being said that the bills probably will not pass human rights standards, but what can we do?

CHAIR: Suppose on the other hand, though, in a bicameral Parliament such as in New South Wales—I admit that there is a bicameral Parliament in Victoria—where in the upper House the Government clearly does not control the numbers in its own right, might there not be more protection in those situations if they were to be a scrutiny of bills Committee?

Ms DEBELJAK: In that situation, there would be more protection, I do agree; but at the end of the day, political compromises are made and political deals are done, so there is never any guarantee that it will not be a bipartisan issue. So at the end of the day, there are some instances in which, even if different parties rule in different Houses, legislation still could get through.

The Hon. P. J. BREEN: One example of that might be law and order issues which both of the major parties might support. They would go through without necessarily respecting the human rights principles involved. What about the situation that operates under the UK Human Rights Act where the notation is made that a particular piece of legislation or proposed legislation fails to comply in a certain area? Did you say that the statement was made by the Minister or by the Attorney General?

Ms DEBELJAK: It is made by the relevant Minister.

The Hon. P. J. BREEN: So it comes down to a decision of the Minister.

Ms DEBELJAK: Yes. Presumably they get advice, but that advice could be incorrect. It is in the New Zealand model where the Attorney General actually signs off with a similar statement but,

again, the law is very tricky. That is not to say that an Attorney General would necessarily give a correct answer as opposed to a relevant Minister.

The Hon. P. J. BREEN: Do you think that that would be some alternative to a scrutiny of bills Act—to have a system in place whereby the Attorney General actually nominates in respect of each piece of legislation that it does or does not comply with certain human rights principles?

Ms DEBELJAK: It has been my experience in recent years that Attorneys General are increasingly stepping away from their apolitical role. One example that I draw your attention to is defending the judiciary. The Attorneys General have actually said, "Look, we are sorry, but we can no longer be the defender of the judiciary because we have a political constituency that we need to consider as well." Given that Attorneys General are openly committing themselves to a more political role than to an apolitical role, I do not see how an Attorney General's signing off would necessarily be any better than that of a relevant Minister, given that the relevant Minister might be motivated more by political issues than by legal issues.

CHAIR: Ms Debeljak, during the course of questioning you responded to this point to some extent. You were invited or did in fact comment on Mr Carr's submission and the Bar Association's submission. Was there anything further you wish to say regarding either of those submissions—not in great detail, but any matter of great concern that that you might not have dealt with already?

Ms DEBELJAK: Maybe there are two or three more general matters. I do not think that either submission necessarily portrays the benefit of having a bill of rights. They only serve to actually ensure that our rights are actually protected, that is, they are meant to place limits on Parliament. Both of these submissions seem to be nervous about that but that is the very essence of a bill of rights—that certain things should be out of the hands of Parliament. We all agree that there are fundamental needs of each individual human being. Quite often unpopular minorities will actually receive the benefit of these documents so you cannot always expect everyone to be happy if you have a bill of rights.

The other point is that the decisions that are made under a bill of rights are based on objective, reasoned, principled bases. I am not sure that that comes through in some things spoken about in both submissions, nor through some of the questioning that has been put to me today. Another point about rights is the educative effect. Once you have a bill of rights and we all know what our rights are, that educates society. People become a lot happier and a lot more secure in the rights that they have. There has been a massive need for education in both the UK and Canada about those rights and I think that if people are more educated about rights and are more educated about the fact that the rights are not absolute—that there are limits that can be placed on them—a lot of people would actually be more comfortable with them.

One final point I wish to make about both submissions is that a lot of the criticisms from both papers occur already, that is, judges perhaps encroaching on social issues, or perhaps encroaching on economic issues, or perhaps encroaching on policy issues. These things happen already. It is part of the task of a judge—interpreting law and discovering the common law—that those issues may arise. They have the tools and the ability to deal with that, so I do not see why a situation under a bill of rights would necessarily be an extreme change.

CHAIR: Ms Debeljak, I am not sure whether you are aware of this, but the Australian Plaintiff Lawyers Association [APLA] submission, of which I think you are the author, is the longest, most detailed and most comprehensive submission that the Committee has received. We are very grateful to you and to APLA for the time and trouble that has been put into the submission, and certainly the Committee is very grateful to you personally for subjecting yourself to interrogatories for a period in excess of two hours.

(The witness withdrew)

The Committee adjourned at 12.17 p.m.