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REPORT OF PROCEEDINGS BEFORE

STANDING COMMITTEE ON LAW AND JUSTICE

INQUIRY INTO A NEW SOUTH WALES BILL OF RIGHTS

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At Sydney on Tuesday 18 July 2000

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The Committee met at 10.00 a.m.

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PRESENT

The Hon. R. D. Dyer (Chair)

The Hon. J. Hatzistergos
The Hon. J. F. Ryan

KATHERINE LOUISE EASTMAN, Barrister, 180 Phillip Street, Sydney, sworn and examined, and

SIMON JAMES RICE, Judicial Member of the Administrative Decisions Tribunal, Level 15, 111 Elizabeth Street, Sydney, affirmed and examined:

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

Ms EASTMAN: As the President of the Australian Lawyers for Human Rights.

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

Ms EASTMAN: Yes.

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

Ms EASTMAN: Yes.

CHAIR: The Australian Lawyers for Human Rights have made a submission. Is it your wish that that submission be included as part of your sworn evidence?

Ms EASTMAN: Yes.

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

Mr RICE: As Treasurer of the Australian Lawyers for Human Rights Inc.

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

Mr RICE: I did.

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

Mr RICE: I am.

CHAIR: I take it that you are also happy to have the written submission of Australian Lawyers for Human Rights included as part of your sworn evidence?

Mr RICE: I am.

CHAIR: If either of you should consider at any stage during your evidence that, in the public interest, certain evidence or documents you may wish to present should be heard or seen only by the Committee, the Committee will be willing to accede to your request. I now invite each of your in turn, if you wish, to make a short oral statement to the Committee before we ask any questions.

Ms EASTMAN: At the outset, Australian Lawyers for Human Rights thanks the Committee for the opportunity to appear and to give evidence. We consider this to be a very important inquiry. First, a little about Australian Lawyers for Human Rights. We are a network of Australian lawyers who are active in furthering the awareness and promoting advocacy of human rights in Australia. We do this through training, publications and advocacy. We aim to promote the practice of human rights law in Australia and in doing so to work with Australian and international human rights organisations to achieve this aim.

We have set out in some detail in our submissions the issues that we have identified as the important issues arising out of the terms of inquiry. Given the nature of the inquiry, it was beyond the scope of our submission to address each and every term in the detail that it perhaps requires. But you will see that the focus of our submission is on the implementation and enforcement of a bill of rights in New South Wales. Australian Lawyers for Human Rights believes that an appropriately drafted and implemented bill of rights would be an important tool by which individuals in New South Wales may seek redress and vindication when their rights have been violated. It would be a means of access to justice that, traditionally, disadvantaged groups have, to date, had very little access to.

We also see that the purpose of a bill of rights for New South Wales is to educate. A bill of rights will have an important educative and symbolic effect and, again, it will empower traditionally disadvantaged groups and, we believe, create a more rights-based culture within New South Wales. We also consider that a bill of rights will develop community and governmental awareness and understanding of all people's rights; and in doing so there will necessarily be more care taken in ensuring their protection. Finally, it will bring New South Wales into line with most modern western liberal democracies that have a bill of rights, and a bill of rights as part of their political, legal and social arrangements.

As I have indicated, our submission focuses on the mechanics and the procedures concerning a bill of rights rather than entering into the debate of the substance or content of a bill of rights. We consider that unless the bill of rights provides effective remedies for individuals it will have minimal impact. The question of remedies is a critical question, and the question of remedies must be addressed in the existing protection for human rights that exist in New South Wales, but also take into account and, of course, work with the current legal and political arrangements.

In dealing with the issue of remedies, Australian Lawyers for Human Rights has the view that human rights protections that currently exist in New South Wales are limited. They are incomplete when measured against existing international human rights standards, and in many instances there are rights that Australians are entitled to ask for protection, but there is no remedy existing in Australian law or New South Wales law. In this respect we say that starting on the question of remedies, international human rights law is a very useful starting point in examining the question of a bill of rights for New South Wales.

But we say in relation to international human rights that it is a starting point. It is not enough simply to replicate the terms of the International Covenant on Civil and Political Rights, but that instrument must be appropriately adapted for New South Wales. It must, therefore, take into account the particular social, cultural, and political context of New South Wales. In looking at the question of remedies, we also think it is important to take into account the nature in which rights will work. Of course there must be limitations: no right is an absolute right. Our submission also deals with the extent to which there should be limitations on any current human rights. In terms of the mechanisms for implementation, our submission addresses the competing views of what is an appropriate way in which to implement a bill of rights.

Our view is that a bill of rights should not only be entrenched constitutionally but we refer to double entrenchment by which we mean that there must be a mechanism in place if a bill of rights is ever to be amended. In our view constitutional entrenchment of a bill of rights has a very important effect. The next issue is the application of a bill of rights. Australian Lawyers for Human Rights considers that an appropriate scope for the application of New South Wales bill of rights is not only to focus on the public arena and State responsibility, but to look more broadly; to accept that the true and proper implementation of human rights is, at times, horizontal. Therefore it should not be limited to the public sphere, but it should have an impact where appropriate on certain private entities.

In this respect our submission deals with the issue and makes the conclusion that the New South Wales bill of rights should not recognise a distinction between a public and private power and, consequently, could apply to both the public and private entities and individuals where appropriate. The key to remedies, of course, is the mechanisms established to enforce those remedies. In this respect our submission deals with the various approaches to enforcement through a bill of rights. Our view is that two newly taken interpretive principle is not sufficient. In this sense the New South Wales bill of rights must extend beyond mere decoration of principle.

While we say that a legislative principle, or interpretive principle, must be part of the mechanisms on which a New South Wales bill of rights operates, it must go further than the mere interpretive principle. It must contain appropriate enforcement mechanisms that can properly guarantee and protect the rights it proclaims. In this sense we advocate a mixed approach, that there should be a watchdog in the form of an ombudsman or a commission structure that currently exists in New South Wales, such as the Anti-Discrimination Board. But there also should be a mechanism for dealing with complaints about human rights breaches. Again, we can look to existing New South Wales structures to assist us in how a complaints-based approach to human rights issues could be dealt with.

Finally, there is, of course, the courts, which play an important role in enforcing human rights. Access to the courts is an important part of access to justice and the enforcement of human rights. On the issue of access, our submission deals with standing. Our view is that there should be a wide approach

to standing. Our submission deals with a suggested model based on section 38 of the South African Constitution. Finally, we say that if a bill of rights is to be effective in guaranteeing remedies, it should be a bill of rights that enables a court or a tribunal or the watchdog to cater for a wide range of remedies, be they negative or positive, but also remedies that will deal with systemic violation of human rights. They are the comments I wish to make. Mr Rice may have some comments as well.

Mr RICE: I would like to make two further points to take the position of Australian Lawyers for Human Rights a little further. The first is that Australian Lawyers for Human Rights sees this inquiry as being a very important public endeavour regardless of its outcome. The availability generally of the debate around a bill of rights, electronic access to submissions and transcripts and the opportunity for the public to express its views, is a matter of great public importance and New South Wales is showing leadership in airing the issues around a bill of rights regardless of the outcome. We place considerable store on the very fact that the democracy in New South Wales is mature enough to be able to address this issue and look at competing views from all parties.

The second point is to emphasise the approach taken in our submission and the perspective from which we would like to approach your questions this morning. Our submission is about implementation and process. We specifically do not address the question of what the rights content of a bill of rights should be. That is addressed by a number of people with particular and usually very well-informed views about rights contents. We focus on implementation and process because regardless of the rights, as has been said, they amount to nothing unless implementation is appropriate and process is apt.

The point we want to make about that—and I trust the Committee will hear this current running through all we have to say this morning—is that in our view implementation and process for a bill of rights is manageable. Our submission is that balance is achievable and that implementation and process can be an approach to a bill of rights that makes it workable in a liberal, democratic society. For example, we do not advocate for courts as the first recourse. We recognise their importance, but quite explicitly move away from what might be the North American model in which courts are the first recourse and to an extent tend to characterise people's views of the workability of a bill of rights. We emphasise in our submission other more manageable, less expensive, less divisive approaches to balancing the issues in a bill of rights. The overall tenor of our submission is that a bill of rights is a process that can be implemented sensibly, taking into account a range of competing interests.

CHAIR: I would like to express the Committee's gratitude for the thoroughness with which this submission has been prepared. We are very grateful for that. I would first like to put to you a quote from someone I do not often quote, the late Sir Robert Menzies, former Prime Minister of Australia—I note that you have quoted him yourself in your submission—in which he said in part, "In short, responsible government in a democracy is regarded by us all as the ultimate guarantee of justice and individual rights." Why is that an insufficient statement of what is needed to protect individual rights?

Mr RICE: He said it a long time ago. I will ask Ms Eastman to elaborate but our understanding of the extent of accountability of responsible government and responsible government's own perception of what is able to be achieved has advanced significantly on an international sphere.

Ms EASTMAN: I agree with Mr Rice's comments. Our submission does not suggest that that is not a proper approach because democracy is, in a sense, the foundation for any effective human rights system. It is the elaboration and articulation of the rights that are now important and in that sense time has moved on since the words of our late Prime Minister and the international community has also developed international and universal standards that work with democratic structures.

CHAIR: I turn now to another matter. Part 3.1 of your submission refers to express protection of particular human rights. You there deal with various items of anti-discrimination legislation, both Federal and State, and various statutes dealing with disability, privacy and personal information protection. Why do you have the view that statutes such as those are an insufficient response to the protection of a bill of rights, contrasting those ordinary statutes with a dedicated statute, to use that expression, protecting human rights?

Ms EASTMAN: These statutes are critical to the protection of freedom from discrimination and equality within Australian law, but that is the right that these statutes focus on; of course, with the exception of the specific laws dealing with privacy, but discrimination law is not law that deals with human rights protection generally. The protection is focused on discrimination and in that sense it is a limited protection.

CHAIR: Part 4.1 of your submission deals with certain developments in the common law, partly as a result of the influence of international human rights law. For example, you refer to the fact that in the early 1990s the High Court was increasingly receptive to the idea that international law, and more specifically international human rights law, could influence the development of common law. You refer to the High Court's decision in Mabo in which Mr Justice Brennan said, "International law is a legitimate and important influence on the development of common law especially when international law declares the existence of universal human rights." You also refer to the case of *Dietrich v The Queen* in which the High Court invoked principles of the international human rights law to identify a common law right to a fair trial. I put those matters to you because you appear to concede yourself that in appropriate cases common law is increasingly recognising, at least at the level of the High Court, the influence or obligations of governments under international conventions. Why do you say that is not enough?

Mr RICE: With respect, Mr Chairman, you used the word yourself that the highest we have been able to put it or anyone can put it is that it is a question of influence. The doctrine around international law and its relationship with common law, which I will ask Ms Eastman to elaborate on, is very clear that the common law is not subject to international law and the most of the High Court has been able to do is to have regard to international law developments and norms to develop the common law. It is still leaves the court and us in the hands of the common law where the rule in Dietrich is open to review just as the expansive common law approach taken in the matter of *Theophanous v Herald and Weekly Times* has since been reviewed by the court. The common law predominates in its relationship with international law and we remain in the uncertain hands of the common law. Ms Eastman can better explain the limited role of international law.

Ms EASTMAN: The difficulty can be seen if we perhaps use an example. Privacy and the right to non-arbitrary interference with a person's home, family and correspondence is recognised as a fundamental right in international law—it is Article 17 of the covenant—but there is no common law guarantee for privacy. An individual whose privacy has been breached cannot approach a court and commence proceedings arguing that his or her privacy has been breached and judges in the United Kingdom—and those cases have been followed here in the case I referred to as *Malone v The Commissioner of Police*—have made it very clear that the common law does not recognise a right to privacy. Although the right exists in international law, it has not translated into a common law protection.

So there are gaps in the common law, and international law will only attach to express common law recognition of a particular right. It is the development of rights that exist and that are recognised in the common law where international law is very helpful. But in areas such as privacy the absence of any common law protection means that very limited use can be made of international instruments dealing with such a right. That is one example of the gaps in using international law as part of developing and influencing the common law.

Mr RICE: What we and many other advocates see the bill of rights doing is formally introducing into our jurisprudence the legal provisions for the operations of society, those international law norms which at worst are not reflected at all in the common law, or at best might influence the development of common law in those matters that get to the High Court. It is a question of formally recognising the existence internationally of those standards and importing them.

CHAIR: One of the most articulate critics of a Bill of Rights who has appeared before this Committee to date is the Hon. Malcolm McLelland, QC, a former Chief Judge in Equity. In his submission one of the arguments he raised against a Bill of Rights was what he termed uncertainty. He put that under three heads. The first was that the stated values in a Bill of Rights are rarely, if ever, absolute. He instanced in that regard freedom of speech and competing values and interests, such as the protection of personal privacy, the prohibition of criminal conspiracy, the regulation on advertising that might be injurious to children or relating to dangerous goods or substances. Other grounds that he relied on are that, in his view, the stated values in a Bill of Rights are almost invariably couched in general and vague language, and that the values stated in a Bill of Rights are rarely, if ever, exhaustive. Could you comment for the Committee on what your view is regarding Mr McLelland's argument that a Bill of Rights is necessarily uncertain in content and necessarily vague?

Ms EASTMAN: Often, the difficulty is that when you start with a blank sheet you say, "How are we going to draft this Bill of Rights? What will we have regard to?" Generally, a Bill of Rights is historically derived from revolutions. We think of America and France as examples. Such bills of rights are political statements; they are not documents that have been through a drafting process, as we

understand it, by modern drafting techniques. So, when we look to political statements from America and the US being the process of a revolution, of course we should expect mere statement of intent, and very little detail about the content of the rights.

Then we look to international law as a source and are also faced with conventions that are expressed in vague and perhaps uncertain terms. They are also part of the histories of the way in which international law operates. International law is formed through a process of consensus and agreement. It is often the case that one word has been the subject of ongoing negotiation for days between many States. So, what we find in a convention will represent that process of negotiation.

We should not look at those instruments as being the end of the process of defining human rights, but the beginning. So I think we can say that we would agree that if we looked at bills of rights that represent political statements following revolutions, or bills of rights that merely seek to implement international law, of course we will find vague and uncertain language. So the challenge in implementing bills of rights domestically is to translate that language to make it appropriate and adapted for its local political, legal and social contexts. The problems of vague and general language, we think, can be dealt with by effective and careful drafting. It may be that the document will be a little longer than the political statements that we see. You will be familiar with the amendments to the American Constitution and Bill of Rights. If we take each of those clauses, it is a very short document.

The Hon. J. HATZISTERGOS: If I could interpose. Would it be any different if you were negotiating the content of a Bill of Rights, say, in the New South Wales or Australian context? I will give an example. I recall that last year there was some discussion about the proposed preamble to the Australian Constitution which, in order to be developed into a proposition that could be put to the people, had to be teased out. There was argument about the wording. Its effect was also neutered by a statement saying that it was not to be used in the interpretation of anything, and the people still rejected it. How to you think the proposed Bill of Rights will be able to be developed along the lines that you have suggested, bearing in mind that experience? Is not the Australian public being no different from say the United Nations or anyone else who is working out an international covenant in trying to develop compromises between the various interest groups?

Ms EASTMAN: That is certainly the case. But the compromise occurs locally, rather than on an international level, where the interests of States represent a wide range of histories, cultures, traditions, and understanding of legal process. So what we do is translate those broader concepts, and the values will remain the same. But we are looking at how to implement these rights and make them work in practice, to make them effective in New South Wales. So, yes, of course the process of compromise will occur within New South Wales, but that is, in some senses, the very purpose of implementing international law into a local system: you make it relevantly adapted for the local conditions. So you take into account the local argument, not just say that we begin and end with the international argument.

The Hon. J. HATZISTERGOS: That is easier said than done though, isn't it?

Mr RICE: I think we are in a fundamentally different decision-making environment which distinguishes, fairly readily, the international context, where there is competition at worst, if you like, amongst competing sovereign nation States, each of which is entitled to assert predominance of its view. here, we are speaking about, to put it simply, legislation of the government of the day, where clearly there needs to be appropriate negotiation, and compromise and accommodation of views, there is a decision-making process where authority vests in a body to make a statement as to what the law—in this case a Bill of Rights—would be. On the same basis, it is distinguishable from the Commonwealth preamble, which required a referendum and therefore more than a consensus on a substantial weight of Australian voters' opinions to endorse it. It would be different in the legislative processes of New South Wales surrounding a Bill of Rights, even taking account of the constitutional entrenchment that we seek.

I make the point by saying that it is on this score analogous to a lot of legislation that the government implements which has within it values, which has within it certain positions that the government wishes to take as a matter of public policy. The Anti-Discrimination Act is the clearest example, but aspects of the Corporations Law regarding conduct generally of say creditors, is only another example of where the government legislates for behaviour, often in general terms, and then mechanisms are put in place to ensure that the values expressed by the government of the day to regulate a certain area of conduct are given effect to. Those mechanisms are not necessarily the courts either. So that a Bill of Rights in that sense is not remarkable as far as a piece of legislation goes.

The Hon. J. HATZISTERGOS: What you are saying is that that we should have a Bill of Rights that is defined, which should have definitions in it to indicate how those values will be addressed in a more specific way. This Committee has had evidence from Professor Williams of the Australian National University. Professor Williams is a person who supports the concept of a Bill of Rights, and he certainly articulated that position before this Committee. However, he acknowledges the controversy and he says that the way to resolve it is basically to leave out all the controversy, and get down to the few things that are not controversial, that you have a very limited Bill of Rights, and that is what you run on.

It seems to me that what you are articulating is the reverse of that. You will have a very complex bill, which will be very defined and broad reaching. It will affect the private sector, the government sector and a number of other sections of the community. Part of the problem with that is that you will have to get some form of consensus between all those various interest groups. The reason that I raise the question of the United Nations is that those statements are broadly defined because they are a compromise between the various nation States that go to make up the United Nations. But, similarly, if you are to have a very broad-ranging Bill of Rights applying to New South Wales, affecting the conduct of not only government but the private sector and individual members of the community, one must get a consensus involving all those people, at least to the extent of making the Bill of Rights broadly acceptable to the public of the State. How would you achieve that when you would be very specific about what you want to do? How are you going to meet everybody's wishes? We are talking about values, some of which are competing.

Ms EASTMAN: I think there are two issues in that. The first is the issue of what is the substance, what rights will be included in the Bill of Rights. That necessarily, like bees to the honey pot, invites debate, discussion and controversy. It is inherent in any discussion on rights. The aspect upon which we have tried to focus in our submission is the other aspect that we think is the critical aspect, that is, how do you implement the Bill of Rights in giving effect to remedies? Generally, that is not a particularly controversial or difficult area. How do you ensure that the values that underpin the rights that are in the Bill of Rights are effective in terms of access to mechanisms either through courts, tribunals or other sorts of complaints bodies?

In that aspect, it is not difficult to draft mechanisms defining ways to resolve human rights disputes, be they between private individuals, be they between private individuals and organisations, or be they between private individuals and the State. We think that the process of drafting a Bill of Rights, in terms of setting up a mechanism for enforceable remedies, is no different from the process that Parliaments are engaged in throughout Australia whenever they set up any sort of dispute resolution process. So that is not an area that we see necessarily attracting controversy.

Mr RICE: If I could elaborate on that point. The second reading speeches in relation to the introduction of the Anti-Discrimination Act leave one in no doubt that it was an enormously controversial piece of legislation, strongly opposed by many sectors, and surprising sources, within the community. The introduction, similarly, of consumer claims protection legislation in the 1970s and of privacy legislation, with a host of measures in New South Wales, faced opposition—healthy opposition, opposition that was debated in Parliament. This is where I say the decision-making process is different. In relation to the Anti-Discrimination Act and other pieces of legislation—and I do not attach this comment to any one government—they resulted from a government taking a leadership role, of showing vision and saying, "We have been through the process, we have been through the parliamentary debates, we understand the conflicting views, we have taken account of those as we think we should, and here is the legislation."

The Hon. J. HATZISTERGOS: I have no problems with those sorts of legislative instruments that result from the process of consultation and reflect human rights values. But there is a big difference between anti-discrimination legislation and a Bill of Rights. I think you referred in your paper to the fact that you want something that will entrench all sorts of broad-ranging conduct, not necessarily as defined as is the case with some of the Acts of Parliament to which you have referred. That is a very big difference. You must remember also that Acts only bind the State until those Acts are changed. They do not bind future governments that might want to propose amendments, and they do not bind future Parliaments. From your submission, you want to do the opposite: you want to bind future governments and future Parliaments unless there is a proposal otherwise.

Mr RICE: The examples we have just given are in response to the point made by the Chairman. We were meeting Mr William's argument to demonstrate that it is possible. You do not need to resile from the difficulty of a Bill of Rights being comprehensive and workable by adopting an almost

ineffectual, minimalist approach and listing a few aspirations. I do not want to be rude about it, but that is just not courageous. You do not even have to be courageous to do more than that. The examples are there for governments to cope with conflicting interests and, nevertheless, embody them in legislation which is workable. So what we just said is really in answer to Mr William's point about avoiding the difficulty and doing something small. It is difficult, but it can be done. It is done constantly. Interests can be addressed in a workable document. Then we get to your other point. If that is done we have other questions about constitutionality, entrenchment and so on. But all we were addressing was the fact that this document is a piece of legislation which can encompass a range of interests and it can be workable.

CHAIR: I return for a moment to some further criticisms made of the Bill of Rights by Mr McLelland when he appeared before the Committee. I put it to him that a possible means of promoting human rights in New South Wales would be to amend the Interpretation Act 1987 to require New South Wales courts to take into account international conventions. His response to us was that that would be a move away from allowing judges to interpret the intention of Parliament and it would also make it harder for non-lawyers to understand legislation. He said in part:

> The more you have to go to other material, such as international covenants and so on, the less likely it is that the ordinary reader of the legislation could understand what it means.

Could I have your comment on what Mr McLelland was saying in regard to international conventions being brought, so to speak, into interpretation law?

Ms EASTMAN: There are two parts to that. The first relates to the practical aspects of access to legislation and to ensuring that the public are aware of and understand the contents of legislation. Given Mr Rice's expertise, I will ask him to comment on that. But the other aspect is: What does it mean if judges have to have regard to international conventions? Again, I think there are two parts to that issue. First, what international conventions will you ask a judge to have regard to? I think members of the Committee will be familiar with the High Court's judgment in the Teoh case and Justice McHugh's strong dissenting judgment and his concern that, as Australia was a party several years ago to 900 international conventions, that could place an onerous load on the person who had to have regard to a wide range of conventions.

So the first issue would be to make it clear what international human rights conventions a judge would have to have regard to. These are simply and easily found through a variety of resources, but perhaps most simply through the Internet. There is a standard list of core human rights treaties. There are some to which Australia is a party and others to which Australia is not a party in relation to creating binding obligations. The first thing would be to make it very clear what instruments are covered. The second thing relates to the difficulties for the judges interpreting, and whether that would bring them into conflict with other interpretive rules, such as taking into account the objects and purposes of legislation and the Parliament's intention. Do we say that there is absolutely no conflict at all? You would have to ask: What regard are you having to the international convention and for what purpose?

The international convention, or the relevant human right, has to be relevant to the dispute that is before the judge. The international covenant will then merely prescribe a minimum standard of treatment that an individual is entitled to. Say, for example, there was an issue of privacy. The international law guarantees that a person's home, correspondence or family will not be subjected to an arbitrary interference of privacy. So a judge in that case would have regard to what an arbitrary interference of privacy means. He or she would acknowledge that the right to privacy may not be an absolute right, but he or she could have regard to the international covenant and then the writings and decisions on that right to form a view of what "arbitrary" might be in a given case. The international committees have said that "arbitrary" means unreasonable. Reasonableness is fundamental to the operation of a common law tort system.

Common law judges are experts on the standards of reasonableness in a reasonable man. That is a clear example of where international law can assist a judge in formulating a relevant standard and enable him or her to perhaps bring a slightly different perspective to existing standards in relation to understanding the nature of that law. I think Justice Kirby makes a good point in an article that he has written in a collection of papers edited by Philip Alston called "Towards a Bill of Rights". He says: "Don't see this issue of interpretation as the judge's responsibility alone." In fact, it is incumbent upon lawyers and those appearing before judges to work with and to assist judges in understanding these standards.

So if the interpretive principle is to work effectively, and there is not to be an onerous load, as perhaps some judges may fear, there is a responsibility on the lawyers appearing before the judges to ensure that they properly inform the judges of the relevant standards and that they bring before the court the relevant material. This material, which exists in international law, is not difficult or complex material. It is relatively simple. It is the sort of material that most lawyers should be readily able to equip themselves with in any given case. Those are my thoughts on the concerns raised by previous witnesses before this inquiry. The other aspect is the practical aspect of access to this information.

Mr RICE: On the interpretive approach, I would be surprised if previous witnesses, concerned about the judge's interpretive role being limited in any way, were to say that the judge's interpretive role was one that he and he alone brought to the proceedings and that it was his interpretation alone. Judges use interpretive tools. At the very least all that is being said today is that another set of interpretive tools is available to assist. Far from limiting a judge's power, these tools would simply broaden his scope. In relation to accessibility and understanding, yet another instrument is being brought into this sphere. Understanding law is notoriously complex and nobody pretends otherwise. However, the Committee would be aware that, in the last 10 to 15 years, there has been a substantial movement towards making comprehension of law as accessible as possible. There has been a drafting of all statutes in plain language; a footnoting of statutes; and the provision of explanatory memoranda.

There is a clear relevance now in the courts—and therefore to people generally in relation to law—of second reading speeches, policy statements and other documents. All our moves are towards ensuring that whatever has to be understood is more readily understood. Public education campaigns are extensive. The simple, modern, mechanism of a hypertext link allows legislation to be read in context, where a word in one piece of legislation, given a definition in another, is easily referred to. It is not at all novel that legislation is seen as interrelated or complex. Again I cannot believe that previous submissions would have suggested that law has been read simply before and so it should be read simply in the future. Law has been complex before. It has been made more accessible now through the commitment of the Government, public campaigns and modern technology, all of which would make the importation of another consideration into the reading of an Act all the more manageable. The Interpretation Act and the idea of an Interpretation Act has been fundamental to understanding legislation for well over a century. To bring in another instrument is unremarkable.

CHAIR: The final criticism of the Bill of Rights made by Mr McLelland that I would like to put to you this morning is that, in his view, a Bill of Rights fundamentally changes the role of a judge which, as he understands it, is primarily to resolve a dispute between two parties. He argued that, essentially, a Bill of Rights obliges a judge to balance up values, to make public policy virtually and that, in his view, that is quite inappropriate for a member of the unelected judiciary. Could you comment on that?

Mr RICE: To the extent that a Bill of Rights has to be spoken about in the context of litigation, as we said at the outset, we think it is mistaken to see a Bill of Rights as necessarily being a litigious document, or issues about a Bill of Rights being discussed in the context of litigation. The Bill of Rights is, at the very least, a symbolic document that assists people in the way in which they go about their ordinary daily business. At worst, it will be a document that articulates rights for which people can seek remedies, but not necessarily in the courts. So I think we are concerned to make it clear that getting dragged into discussions about the workability of a Bill of Rights by using the court context can be misleading. That said, if we are concerned with the way judges deal with a Bill of Rights, judges are implementing matters of public policy, having regard to public policy, and having regard to implementing values constantly in their judicial work. Every time they give effect to legislative requirements they are giving effect to public policy as reflected in legislative requirements.

I referred before to the creditors and to Corporations Law, the way in which a judge will have to balance the interests of various parties in a corporate lining up, and the way a judge will have to balance the interests of various parties in bankruptcy proceedings and in land and environment proceedings. Courts are constantly being called on to reflect values embodied in legislation and to weigh competing interests. It is not remarkable; it is exactly the business of the courts. It is as surprising to hear somebody characterise the courts as being neutral arbiters of private disputes between individuals as it would be to hear a judge still saying that he has absolutely no law-making role. It is no longer accepted that the courts do not take part in the daily development of life around values.

CHAIR: I turn to another matter. Speaking for myself I would have considerable respect for and confidence in the ability of the judiciary to interpret a Bill of Rights. However, I must say frankly that I have—and I say this softly or in a cautious way—grave reservations about what you describe as your

watchdog approach, which is set out in paragraph 2.3 of your submission. You say that you advocate a body, perhaps similar to the Human Rights and Equal Opportunities Commission which, in your words "would have monitoring, supervisory, promotional and educative functions". Now I would have thought that that was far removed from an independent judiciary. You also say that it would have prosecutorial, conciliatory and enforcement functions. Are you not really talking there about an advocacy body that will promote and enforce a Bill of Rights?

Mr RICE: Our intention there was to draw the Committee's attention to the long-standing existence and acceptance of exactly those bodies already around what legislative human rights protections exist. What we have described there is an apt description of the role taken by the Anti-Discrimination Board in New South Wales, the Federal Human Rights and Equal Opportunity Commission and other bodies in other States. It reinforces the point we made about courts not being the only forum within which rights should be enforced. For over 20 years this State has recognised the usefulness of a body that has a conciliatory and early intervention role. Most importantly—and this I think is to the credit of New South Wales governments that have done the same thing over many years—it recognises that early intervention, education and prevention are better than cure. As I said, I do not think, with respect, that what we have described in our submission is anything other than a description of mechanisms that are already in place. What we are suggesting would be as apt for a Bill of Rights as they would be for other pieces of legislation, such as the Anti-Discrimination Act.

CHAIR: Dealing with such legislation, at page 10 of your submission you refer in passing to the Commonwealth Sex Discrimination Act 1984, which lists protected grounds such as sex, marital status and pregnancy. You say that it prohibits discrimination only in fields such as employment, education, accommodation and the provision of goods and services. You go on to say that this Act, like other anti-discrimination legislation, contains a number of critical exemptions, including religious, charitable and voluntary bodies. Some people might say that that is a virtue: it makes the legislation more acceptable and more flexible than would otherwise be the case.

Ms EASTMAN: In the Sex Discrimination Act, as in any anti-discrimination legislation, it is important that the rights are not absolute: a balancing act must often be achieved. In that part of our submission we are addressing our concern that the Sex Discrimination Act does not have universal coverage under Commonwealth law. For example, the Sex Discrimination Act provides comprehensive protection only for women because it gives effect to the International Covenant on the Elimination of All Forms of Discrimination against Women. If the Commonwealth were merely to rely on the external affairs power, the law would protect only women; men would not be covered by Commonwealth sex discrimination laws.

The Commonwealth must rely on a cocktail of powers that it has available under section 51 to broaden its coverage. So the Act has patchy application in relation to men. We also see that, because of the way in which the legislation is drafted, there may be particular instances of discrimination that slip between the gaps. For example, the nature and the character of somebody's employment may mean that he or she is not covered by the Act's employment provisions. We are concerned that the absence of comprehensive laws to cover all situations may mean that, in certain cases, people may disappear between the gaps in terms of protection because of the way in which the legislation is framed.

CHAIR: I shall return to other matters in due course, but I now hand over to Mr Hatzistergos.

The Hon. J. HATZISTERGOS: I want to focus on your proposal that the Bill of Rights be constitutionally entrenched and that the only qualification should be a reasonable limits clause, which you indicate should be limited to the smallest degree possible. We have heard evidence from Mr McLelland that runs counter to that proposition on the basis that societal values change with time and that changing social or cultural politics, changing conditions and fresh perceptions may render the provision of a Bill of Rights inappropriate. Mr McLelland suggests that having these particular provisions entrenched in the sort of way that you have outlined, with a limited ability to depart from them, would in time render an instrument containing proposals that were not in line with modern-day conditions.

Mr McLelland referred to several examples in the United States Constitution. For example, the US Constitution contains a clause protecting the right of people to bear arms. You would also be aware of the clause that states that no person shall be held to answer for a capital or infamous crime unless there is presentation of an indictment to the grand jury—which is contrary to our system. There is also the right to trial by jury in United States where the amount in dispute exceeds $20. That is apparently still in the United States Constitution and in some state constitutions. There is also the right in criminal prosecutions

of accused persons to be confronted with witnesses against them. We might contrast that with the situation that exists in this country at present—particularly in sexual assault cases where victims are able to give evidence via video link and so forth. How do you get around changes in perceptions and cultural values if we have a Bill of Rights of the sort that you have articulated, particularly in light of the experience in the United States that I have outlined?

Mr RICE: I will answer generally before I ask Ms Eastman to go into more detail. I refer to an earlier discussion. The examples that Mr McLelland gave are nice examples of why there must be a debate about the precise content of a Bill of Rights. They are examples of the peculiar nature of the American Constitution and why it is not an example of the sort of Bill of Rights about which we are speaking. Few, if any, of Mr McLelland's examples are international human rights issues about which we are now speaking in 2000 about enshrining in the Constitution. Those examples do not help.

CHAIR: If I may interpose for a moment, a very articulate and well-known advocate of a statutory Bill of Rights is Father Frank Brennan, with whom you are no doubt familiar. However, he is equally a very stern and staunch opponent of an entrenched Bill of Rights based largely on his United States experience in the law. He would give as an example the right to freedom of religion, which he would say has had quite unintended consequences: the interpretation of that right today is light years away from what the Pilgrim Fathers might have intended when they first landed in the United States. I put it to you that there is genuine and sincere concern about the rigidities that would be imposed by an entrenched Bill of Rights.

The Hon. J. HATZISTERGOS: To follow on from the Chairman's comments, that is the matter to which my question was directed as opposed to content necessarily. The United States experience simply demonstrates how content that was decided 200 or so years ago may not be appropriate later, but you are stuck with it.

Ms EASTMAN: Both of those matters are the very reason why we have dealt with the issue of a limitation clause. A limitation clause is absent from the United States Bill of Rights. The rigidity in stating rights without appropriately drafted limitations on those particular rights is the reason why we have difficulty when looking with Australian eyes at the United States situation.

The Hon. J. HATZISTERGOS: But your proposed limitation clause goes to the smallest degree possible; that is what you say in your submission. Furthermore, it appears you are saying that changes in perceptions, attitudes and context should be handled by the courts as opposed to the legislature or the people.

Ms EASTMAN: Not at all.

The Hon. J. HATZISTERGOS: You say that the courts will reinterpret the rights to adjust them to modern-day circumstances.

Ms EASTMAN: The limitations and the way in which rights are limited in their nature and effect are perhaps the greatest challenges in any Bill of Rights. The absence of effectively and appropriately drafted limitation provisions attaches to the rights in the United States Bill of Rights and causes inflexibility and rigidity. You would be aware that the first amendment protects, on the one hand, freedom of religion and, on the other hand, freedom of speech. Those two rights are part of the one statement. That may be a driving issue and it certainly reflects views at the time. We believe a limitation clause should be narrowly drafted for this reason. Where rights are to be limited, the limitation should be proportional to the ends sought to be achieved by society as a whole or where those rights come into conflict with another person's right. Our submission in terms of why the limitation should be narrowly drafted is that there should be a clear understanding by those who come into contact with the Bill of Rights, and who must regulate their conduct in accordance with the Bill of Rights, of what they are required to do.

The limitation clause that we believe is workable is one that builds in certainty. First, the limitation must be provided by law so that there is no notion that the limitation or any restrictions on rights will arise on an ad hoc basis or from time to time. There must be a clear legislative statement of what the limitation will be. Secondly, the limitation must be necessary: there must be a clear and good reason why human rights should be limited. Thirdly—and this goes to the issue of why the limitation should be narrowly framed—it must be for a particular reason. For example, if we take article 19 and is 19(3) of the International Covenant on Civil and Political Rights, we will see that the limitation on the

right to free speech is cast in the following terms: it says that the right itself carries special duties and responsibilities. The covenant accepts that the right to free speech is not absolute.

The covenant then says that the right may be limited where the limitation or restriction is provided by law and is necessary in a democratic society. It sets out the reasons or grounds on which the limitation will apply. The first ground is the rights and reputations of others. It goes on to list other grounds such as national security, public morals and public order. When the limitation clause is drafted in a way that is tight and predictable it gives certainty to when rights will be limited and gives some guidance to the courts, or the watchdogs, in terms of how that balance should be struck.

Mr RICE: And to the legislature: it allows for continuing legislation in relation to defamation and so on. It creates a balance, which is the undercurrent of what we are saying. Like the international covenants, the limitation clause simply defines the point at which rights and responsibilities mesh.

Ms EASTMAN: It builds in flexibility. I will give an example under the European convention. In the United Kingdom in the 1950s there was a book known as the "Little Red Book", which was a sex education book. It was banned by the Government and the case went to the European Court arguing that that was a breach freedom of expression. The issue was morals and whether the morals and contemporary standards in the United Kingdom at the time could be taken into account. The European Court said yes, of course they could. Nobody looking at the "Little Red Book" today would bat an eyelid. Convention will allow contemporary standards to be taken into account, but there is certainty in terms of what areas will be designated for where limitations will arise. It builds in the very flexibility about which you are concerned.

The Hon. J. HATZISTERGOS: It is difficult to define the issue in the context of contemporary standards today. Perhaps we should go back in time and select an example from the United States Constitution, such as the right of a person who is held to answer for a capital or otherwise infamous crime to have an indictment presented to the grand jury. That is still in the United States Constitution. How would a limitation clause of the kind that you support and have articulated bring that sort of entrenched provision in the Constitution into a contemporary context?

Mr RICE: Speaking procedurally, a limitation clause would allow the legislature—

The Hon. J. HATZISTERGOS: To get rid of the grand jury.

Mr RICE: To qualify that right. A limitations clause in an Australian context would not bind people absolutely for all time: it would allow the Government of the day to legislate to bring that right into contemporary standards within a reasonable limitation.

The Hon. J. HATZISTERGOS: Let us get back to this example. There is a right in the United States to approach the grand jury, which I think emanates from United Kingdom law of the twelfth century. That right disappeared by and large from English law in the nineteenth century and it does not exist in Australia. You say that we could have had that sort of provision or a similar provision in the Constitution or we could have a limitations clause which could effectively abrogate that right in an entrenched Constitution.

Ms EASTMAN: "Abrogate" is the key word. The limitations do not abrogate; what they do is allow a measure of flexibility in the enjoyment of that right.

The Hon. J. HATZISTERGOS: So we limit it so that it has no effect.

Ms EASTMAN: No, because that would not be proportional. The overriding test would be: Is the limitation necessary, and is it proportional to achieve the reasons why the right needs to be limited in the first place?

CHAIR: You say "limited" to give it a contemporary relevance. Is that what you are saying?

Mr RICE: Yes. The dissenting judges in Dietrich's case expressed very strongly their concern that by giving effect in absolute terms to the common law right to a fair trial, the court was encroaching on the Executive's role relative to expenditure on legal aid. If we saw that right in the Constitution and people were concerned about the absolute implementation of that right to a fair trial, it may well be permissible for the government within the limitations clause to legislate to constrain or limit the

enjoyment of that right. The right is absolute about how it may be enjoyed may be limited within the limitations clause by a government which says, "Quite frankly, in this day and age, we cannot afford that. We cannot abrogate it and we cannot take away the right, but we can certainly constrain its enjoyment having regard to contemporary standards."

The Hon. J. HATZISTERGOS: Why would it be better for the Legislature to be able to amend such a provision to develop a new right that accords with contemporary standards?

Mr RICE: We have acknowledged that, too. The Constitution and an entrenched bill of rights can be amended if you wish to go down that path.

The Hon. J. HATZISTERGOS: Yes, but there is an emotional bias against change of the Constitution and that has been demonstrated time and time again.

Mr RICE: Precisely. The limitations clause allows that opportunity. Again, we are talking flexibility rather than locking governments into having to address, as you say, that emotional bias and go through the expense and time of a constitutional amendment. The flexibility of limitations clause allows you to ensure that a bill of rights lives, develops and responds to contemporary standards and to fundamental rights. The rights are always there. The way in which they are enjoyed has to reflect contemporary society, and the limitations clause will allow you to do that.

CHAIR: I direct your attention to paragraph 2.1 where you deal with the matter of a statutory bill of rights. You appear to be quite critical of that as an initiative or a solution to the question of how one promotes human rights. You say that the disadvantage of a statutory bill of rights is that the New South Wales Parliament could amend or repeal the bill of rights at any time without recourse to any special procedures. You go on to state:

> This could lead to a lack of stability and undermine the enduring nature of the rights' protections it conferred.

Could I put it to you that one could well substitute for the word "stability" the word "rigidity". Some people might say that if you have an entrenched bill of rights, he have rigidity, and if you have a statutory bill of rights, you have flexibility. Could I ask you to comment on that?

Ms EASTMAN: You will have seen from our submission that we rely very heavily on international law and international human rights standards. The Universal Declaration of Human Rights, which came into being in 1948 and which is often called the blueprint for human rights, sets out values and standards. It would be very difficult to find anybody in the world who would say that the values and standards set out in that instrument no longer reflect the concerns of individual human beings in terms of leading their daily life with a sense of dignity and integrity of the person.

It comes down to the content of the bill of rights. If there is a clear statement of what should be in the bill of rights, it is unlikely that those values will change over time. Our concern about there being a statutory bill of rights is that it opens up the situation where those fundamental values reflecting current, existing norms in the universal declaration or the other instruments may be departed from. The bill of rights, if it is to implement the international law, must be true to that commitment and the most effective way that we think that should be done is through constitutional entrenchment rather than leaving the question open for there to be many amendments in the future that tinker with the rights or change the character of the rights that are to be implemented as they are found in international law.

Mr RICE: I would only add that I think a government would not go down that path unless it believed that what it was doing was addressing fundamental human rights. But it follows that if that is the belief and if they are the values that are being expressed, there would be no difficulty in seeing the need to ensure that those values are entrenched. It is inconsistent to believe that the values are fundamental human rights and reflect international norms and at the same time say that we have to leave it open for somebody to have a different view in a couple of years time.

The Hon. J. F. RYAN: Would you not take the view that if something was included in our Constitution which was called a bill of rights there would be a fair level of public attention at any time any government attempted to change that? You have said, using a literary quote, that it is no different from the dog Act.

Mr RICE: That is actually what an English law lord said.

The Hon. J. F. RYAN: I understand that but the reality of everyday politics is that there are some laws which have a certain status with the community and are very difficult to change even though a Parliament may change them. In fact there are some parts of the Constitution of New South Wales that one would think were entrenched but are not. For example, the very existence of the Legislative Assembly could be removed by an Act of this Parliament, as I understand it.

Mr RICE: I think that was somebody 's election platform, was it not?

The Hon. J. F. RYAN: No, this is the lower House I am referring to. I am not talking about the upper House, but the lower House.

Mr RICE: Oh, the lower House.

The Hon. J. F. RYAN: The lower House could be removed by an Act of this Parliament. Clearly that would generate a level of public excitement whereby I think it would be politically impossible for any government to attempt to do that.

Mr RICE: I think the point is that it is a judgment in advance of what is politically possible or impossible. As I said, if a move towards this is driven by a belief in the value that one is affecting fundamental human rights, then why not make it fundamental? Why leave it open and expose what is now perceived as being impossible to the risk of being possible? Governments have thick skins; governments have large majorities; governments have other agendas well beyond our comprehension currently or two years into the future, let alone 22 years into the future. To put it in lay terms, it just seems reckless.

The Hon. J. F. RYAN: If they are so valuable and so fundamental, would it not be incredibly difficult for any government to change them unless that government was able to demonstrate that it had a good reason to do so? If it was said that the government had a good reason and was able to get public support, why should it not be able to change it?

Mr RICE: It is only as difficult as having the numbers in the House and ultimately then being accountable to the electorate at some stage. That is as difficult as it is. That is not a barrier to governments achieving a great deal of which the public may not approve.

CHAIR: Returning to a statutory bill of rights for New South Wales, I feel entitled to point out that jurisdictions, such as New Zealand and the United Kingdom, with which in many respects—culturally, and as far as legal and parliamentary systems are concerned—we should feel quite comfortable comparing ourselves to have enacted statutory bills of rights. One of the usual officers who has made a submission to this Committee describes the New Zealand model as a bare statutory bill of rights and he describes the British model as a fortified statutory bill of rights. If Britain and New Zealand have gone down that path, why do you feel that it is inappropriate for New South Wales to do likewise? You say that you are arguing for what you describe as a doubly entrenched constitutional bill of rights.

Ms EASTMAN: We are saying that that is the best and most appropriate mechanism for entrenched rights. We are not abandoning the prospect that if that option was not available, a statutory bill of rights would also be inappropriate. We see a statutory bill of rights being second best.

Mr RICE: They are options and degrees of preference that, as I think we have said, would seem to follow from the values one attaches. But there is nothing invalid, wrong or inappropriate about a mere or bare statutory bill of rights. It just does not seem to reflect the importance one would attach to legislating for recognition of international human rights.

CHAIR: It may arguably be an ideal or convenient starting point to see how it works in practice.

Ms EASTMAN: Yes, and that is the Canadian experience. The Canadian experience is that it started with a statutory form of a bill of rights and then moved over time to constitutionally entrench those rights.

CHAIR: Yes.

Mr RICE: And that was a period of some 20 years.

CHAIR: Before I ask any other questions, I would like to clarify something that I put to you earlier regarding Mr McLelland's view of a requirement to take into account the provisions of international human rights instruments. He had no objection to a judicial officer being entitled to go to such an instrument to assist in the interpretation of a particular matter that was before him or her. However, what he did take exception to was being required to take that into account. Part of the Committee's terms of reference include consideration of whether it is appropriate and in the public interest to enact a statutory New South Wales bill of rights and/or whether amendments should be made to the Interpretation Act 1987 to require courts to take into account rights contained in international conventions. I take it you would have no qualms if the Interpretation Act were to provide that judges were to take into account the provisions of international conventions?

Mr RICE: With respect, I make a submission to the contrary. It is absolutely unremarkable that there be a requirement to take account of one thing when interpreting or looking at another. Courts are constantly being told that fundamentally they have to have regard to the Interpretation Act. A tribunal in the discharge of its duties has to have regard to the evidence Act. In fact, in the Interpretation of Evidence Act, one must have regard to the International Covenant on Civil and Political Rights. It is just unremarkable to be told to look at something else when deciding something unless, with respect, we are missing something. The objection could only be to being told that there is one more thing to add to the list but that would scarcely challenge a judge in the exercise of his judicial function, I would have thought.

CHAIR: There is an aspect of your submission that in my view could be described as being controversial, that is, you argue quite strongly that a bill of rights should apply to both public and private bodies. In fact I notice that at page 38 you state:

> ALHR submits that the most satisfactory resolution of the issue is to do away with the distinction between public and private power altogether.

That appears, unless I am mistaken, to go beyond the question of private bodies exercising public functions. I take on board what you say about government functions in recent years having been privatised. However it appears to me that you are actually advocating doing away with the distinction altogether. I put it to you that if that were to happen, some quite remarkable and controversial things might occur. I can give you a few examples. Someone might mount litigation or a complaint on the basis that he or she was claiming the abolition of compulsory student membership of student unions at universities; there might be an action against the Catholic Church anywhere or the Anglican Church in the diocese of Sydney on the basis that women were being discriminated against by not being allowed to enter the priesthood; perhaps banks could be proceeded against for closing what they claim are uneconomic branches in rural areas. Could I ask you to think about that and indicate whether you really mean what you are saying.

Mr RICE: We do mean what we are saying.

CHAIR: That the exemption should be abolished?

Mr RICE: We acknowledge, I will not say the novelty but the challenging aspects of the issue. But, we do not resile from the startling position, that the conventional public-private divide—and I venture to say this would be accepted as the general position—is blurred and can no longer be sustained as a simple proposition. What were once public and government functions compared to what were private functions is no longer straightforward. If we accept that is the way the world has moved, then we have to rethink our approach to human rights-regulating behaviour. It seems necessary to address the issue, and we have addressed it by saying let us effectively cross the divide. I think it is important that we emphasise a necessary starting point. The public-private divide is now a simplistic place to begin and we acknowledge that, perhaps controversially, we have gone down that path. I will ask Miss Eastman to perhaps meet some of your examples and illustrate how we think it is workable.

CHAIR: Before Miss Eastman does that, can I make my position clear. I understand what you say in regard to the privatisation of formerly public functions. For example, the water authority might be privatised and you would argue that is something that was formerly in the public sector and ought to be justiciable, to use that expression, under what you are advocating. However, I have a lot more difficulty, to say the very least, if the logical consequence of what you are advocating is that it would be justiciable whether the Anglican Church in Sydney is entitled to exclude women from ordination. Is that a matter that comes within the Bill of Rights?

Ms EASTMAN: If we look at what has occurred with the Anti-Discrimination Act, and we have discussed this earlier this morning, That Act applies to the public and private realms. The bulk of complaints about discrimination are not because the State or public entities are discriminating against individuals, although there are a substantial number of complaints: it is about the relationship between individuals, between an individual and his or her employer, a service provider, or an educator. So, translating human rights norms into a private sphere is, again, not uncommon and it has worked very well. Privacy is another area where there is a move to translate the human rights obligations of a freedom from arbitrary interference with the person's privacy into private obligations.

The examples you cite may well agitate action under a Bill of Rights but whether a not a Bill of Rights would result in the abolition of compulsory student union membership or whether it would result in the Anglican or the Catholic Church being taken to court on a discrimination issue, or whether it would result in the banks closing branches, would all depended on the particular circumstances of the particular case. It would also depend on the scope and the nature of the provisions in a Bill of Rights and the way in which the limitations provisions would operate. For example, the right to join a union or to refrain from joining a union may or may not be cast as an absolute right. The limitations that exist on that right may well allow accommodation for certain sorts of union membership at certain times. We try to strike a balance between those competing interests. In relation to action against the church, as with the current Anti-Discrimination Act there is an exemption. It may be that the community is not ready for private organisations in the form of churches to be covered by this type of instrument.

Mr RICE: I would interpose there are and say, so the limitation clause may well acknowledge that there is a proportional balancing to be done here and effectively exclude from the operation of what is otherwise a fundamental Bill of Rights this area of endeavour, just to comeback to the Hon. J. Hatzistergos' point.

Ms EASTMAN: In relation to banks closing branches, it is difficult to see how that may come within the rubric of a Bill of Rights. Is there a human right to have a local bank branch? What is the relevant right? These are all issues of concern and they are the sorts of issues that often attract litigation under a Bill of Rights, but they are also issues that can be dealt with through the process of investigation, education, conciliation and greater awareness of human rights issues. If we think of these issues as being issues to be determined solely by the court, perhaps we fail in properly implementing a Bill of Rights that provides a range of enforcement mechanisms and a range of options in relation to implementation. But we do not see these as being issues that should defeat the introduction of the Bill of Rights.

Mr RICE: Could I say, in relation to the more general proposition that your examples illustrate, if the concern is put in these terms: that a private individual would exclaim, "What do you mean I cannot run my business as I choose?" Or "I cannot treat my family as I choose" or "I cannot deal with people in my street as I choose? How dare you interfere with what is private to me, because a Bill of Rights should belong to the government but not to private individuals." We would say, well beyond the privatisation of government services but right into the private sphere, as you have asked, Mr Chairman, yes, human rights does have something to say about the way you behave when what you do transgresses fundamental human rights. You are not protected, simply by the fact you are doing it privately rather than publicly, from breaching what we are talking about, fundamental human rights, human dignity.

The beginning point should be that it does not matter whether you are doing it publicly or privately, you are breaching someone's human rights, you are treating someone less than a human being is entitled to be treated. If that is the starting point, then the public-private divide has not yet entered into it and it becomes a distinction that we bring from history into how we more easily or readily manage and regulate behaviour, rather than addressing the fundamental issue that human rights is about. So, I do not think we resile from saying we are concerned about human rights, breaches of human rights, whether they are public or private. We acknowledge the well-established understanding of spheres in which rights can be enforced recognises the public-private divide, which is blurred.

CHAIR: I feel entitled to say that the Anglican and Catholic churches might not exactly welcome being involved in litigation, considering their right to exclude women from ordination for the priesthood.

Mr RICE: No, but that is an opportunity to reiterate two important points. We agree with you, absolutely. As Miss Eastman has said, we may not be ready for that, and perhaps never will be. Perhaps churches will always have the benefit of the reasonable limits clause around their rights, and their sphere of activity may always be exempt. We are certainly not saying that as of tomorrow everything is open

slather. We acknowledge that, and that is the importance of managing and designing a Bill of Rights that is workable and acceptable.

The second point is—and with respect, Mr Chairman, I do not say that you meant to characterise it like this—the example you just gave immediately went to litigation as the form within which you want to critique the proposal. As we have said, again, proper management and implementation of a Bill of Rights would avoid litigation except as a last resort and have the opportunity for complaint investigation, conciliation, education and policy, so that even if the churches were dragged into this they may well find they were dragged into a forum where reasonably privately, confidentially and constructively there is a discussion about their conduct. We are a long way from invoking the American example of taking everything to court. That is vital to this Committee and the public at large accepting the workability of a Bill of Rights.

CHAIR: I would also feel entitled to say, though, if the Catholic Archbishop of Sydney, to take one example, were dragged before your watchdog body, he might well take exception to that, not only to appearing in court.

Mr RICE: He may well do, but chief executive officers of large corporations, directors-general of government departments, to give two examples, are almost daily required by bodies such as the Anti-Discrimination Board—rarely personally, usually by their authorised delegate or representative—to take part in a constructive discussion about conduct that is perceived to be problematic and around which a solution is developed. There is nothing by way of somebody's office that, at the moment, would preclude the Anti-Discrimination Board from inviting them to discuss an issue.

The Hon. J. F. RYAN: Is that not the very reason why the anti-discrimination legislation in New South Wales has been able to achieve that outcome? Because it is not entrenched, it is very flexible, and the problem with the Bill of Rights is that by the time you get something with which everybody will agree, because it has to be an ultimate standard that stands the test of time, and so on, you will wind up watering down the right by various mechanisms such as you have outlined? The right does not become nearly as strong as something that is brought about by legislative act, which everyone understands can be changed if it becomes too onerous?

Mr RICE: I think this is to acknowledge, as we said, a statutory Bill of Rights, a bare Bill of Rights is adequate. At least it is there. Just to stay within that perception of a Bill of Rights, the Anti-Discrimination Act is just that. We have taken the very success of the Anti-Discrimination Act and the mechanisms around it as a base standard that we do not believe a government would repeal or resile from—in fact, it only ever elaborates on it—as an example of how feasible a Bill of Rights and mechanisms around it could be.

The Hon. J. F. RYAN: I put it to you that you may not be able to achieve that. The Anti-Discrimination Act has been—by comparison with 1950s standards—a phenomenally invasive piece of legislation. Even churches have accepted they should not be exempt from some parts of that. If you ever intended to entrench those sorts of things into a Bill of Rights and allowed people to litigate them, we would still be discussing what the nature of those rights were and what the necessary qualification clauses were, whereas, because the anti-discrimination legislation was seen to be flexible, unentrenched and subject to political change if it was too onerous, it was able to achieve a great deal more than a Bill of Rights. That would not have been possible if we had chosen a Bill of Rights, statutory or entrenched, as a means of achieving that objective.

Mr RICE: It may depend on what you call it. We are not saying anything should be called a Bill of Rights. I would call the Anti-Discrimination Act, effectively, a Bill of Rights.

The Hon. J. F. RYAN: It is.

Mr RICE: So all we have done is call it something like an Anti-Discrimination Act. It has never gone backwards. It is entrenched by the very processes that some advocate for a bare Bill of Rights that is entrenched by public perception. It is a very good example of how a Bill of Rights by that name, although we can give it another name, is not a scary thing. As you say, it is non-1950s, a more current way of the Government managing our social relations. It has worked very well. Think of broadening the Anti-discrimination Act into other rights and spheres of endeavour using exactly the same mechanisms.

The Hon. J. F. RYAN: Does that not suggest that a robust democracy like New South Wales is likely to achieve all of those things without necessarily having an entrenched Bill of Rights but by using other mechanisms of that nature?

Mr RICE: Well, the Anti-Discrimination Act is now 24 years old. As we have alluded to in our submission—and I am sure you have heard other submissions at length—there are still very substantive areas of activity, endeavour and rights that are not reflected here. So, we are speaking about, just as it was suggested we could have done, broadening it. It has not happened yet, though.

The Hon. J. F. RYAN: Going back to the private-public divide, one reason that people would accept more readily the impact of a Bill of Rights in the public dimension is that every citizen in New South Wales is obliged to pay compulsory taxes and to be part of the public sector, whether they like it or not. As for private organisations, the best example I can give you is a church. The people who join those organisations do so voluntarily. They gain resources which are limited by some sort of arrangement with their adherence. There is to them a fundamental right to use those resources for means by which they feel best, and some of those means that they might feel best is not having them chewed up by having to go through tribunals and other forms of litigation or quasi-litigation. A corporation is at least a profit-making business which takes into consideration that part of making its profit includes that it might occasionally be engaged in litigation. That is part of the risk. However, many private organisations do not take that on as part of their risk and find in fact that need to be involved in that sort of potential litigation to be a huge strain on their limited financial resources, if nothing else.

Ms EASTMAN: In response to that, the very existence of a church and the very nature of the important role that churches play in society is because this is a country that recognises and tolerates a freedom of religion. We allow people to exercise their religious belief by choice—voluntarily, as you say. So in starting and looking at churches, they are the beneficiaries, as their people are, of the right to a freedom of religion. However, for example, if a person who uses a wheelchair is not able to enter a church and participate in the activities within that church that person is excluded from participating in religion. Having a mechanism for a person with a disability to be able to challenge a church and say, "I want to access the church. I want to be able to participate. I want to exercise my right of freedom of religion in the same way as everybody else who is able bodied" is an important right that we must respect.

If the churches are exempt from coming before a watchdog-type body or before a court further down the track to be challenged on why some people are excluded because of a particular characteristic and others are not, then that would undermine the very notion of protection and promotion of human rights. Of course there will be particular issues that will trouble churches and there may well need to be exemptions or limitations that enable churches to carry on their business without facing the threat of coming to court, but there will be other areas where the privilege of exercising freedom of religion also carries with that responsibility to ensure that that is a right that is accessible and open to everybody.

The Hon. J. F. RYAN: Are there any successful models of an abandonment of the private and public divide in any overseas version of a Bill of Rights?

Ms EASTMAN: It is becoming more and more frequent. The international courts and bodies that administer and deal with international instruments have all recognised that a strict division between the public and private divide is no longer sustainable, that effective remedies for human rights must include the State being involved in human rights implementation to the extent that it creates obligations and responsibilities on private organisations. So at an international level it is well recognised.

The Hon. J. F. RYAN: On page 47 of your submission you argue that history has shown that this type of approach is simply not effective enough with regard to the what you call an interpretive approach, which I think you later define as a court-based approach to human rights. In one case in Canada, *R v Askow*, a ruling that an applicant had not been given a fair trial because of unreasonable delay in bringing the matter to court resulted in the charges against 34,000 people being dropped, 50,000 criminal charges being withdrawn on the grounds that the trial could not be held within a reasonable time and $39 million in additional funds being allocated to reduce delays in the court system. Similar results were achieved in *R v Therens*: 19,000 breathalyser cases were affected. In *R v Singh* there was amnesty for 15,000 refugee claimants and $20 million increase in expenditure on the refugee board. Given those examples, how is it that a judge-based version of laws is not seen to be effective? That seems to be a fairly graphic illustration of how they are out.

Ms EASTMAN: The difficulty we have in answering is that we have not been able to find those decisions and to examine them to understand whether or not what was occurring in those matters was just in the application of an interpretive approach or whether it was individuals exercising the right that they have under Canadian law to approach a court. That is the difficulty we have.

Mr RICE: There is a timing question, too. We do not know whether those cases arose under the current charter or under the previous Bill of Rights, which would make a significant difference in how you should look at them as being relevant to the discussion we are having.

The Hon. J. F. RYAN: I will be happy to confess that it is not a result of my particular learning. I understand that it is an article which the Committee has before it.

Mr RICE: If those cases were under the Canadian Bill of Rights, the results and explanations are attributable to a very different regime from anything we are discussing here.

The Hon. J. F. RYAN: You introduce a rather interesting concept of structural injunction on page 31 of your submission, where you explain that structural injunction is an extension of mandatory injunctions and have been used in the United States to desegregate schools and to reform prisons. The Committee would be interested to find out what you mean by structural injunctions and how they can be used.

Mr RICE: If I could respond by way of illustration, I identified my occupation as principally a judicial member of the Administrative Decisions Tribunal. I am not referring to any particular case but simply accumulated experience. I am sure the Committee would understand the exasperation with which one will hear a complaint, identify an institutional form of discrimination—the imposition of an unreasonable condition and so on—make a finding, ensure that that is redressed and then within weeks or months find another person with the same complaint in a related industry or circumstance and make the same decision and so on. The inability to identify a systemic phenomenon and address it as a systemic phenomenon is what we are discussing here, hence the reference to the school segregation situation in America, were a systemic issue was addressed on a systemic basis. If nothing else, to put it in crude and current terms, it is efficient.

The Hon. J. F. RYAN: Now that I understand what that is, I suppose that question the Committee would be inclined to ask you as: Is that getting dangerously close to having judges make laws?

Ms EASTMAN: I suppose the answer is no. It is saying that, rather than having 400 cases coming before the court where the issue will be the same in all cases and the options in terms of remedies will be the same in all cases, it enhances the efficiency of the court process and enhances access to justice for those who have to use the courts to force their rights. If one case and one instance which represents common issues across a sector—for example, schools or prisons—can help resolve those issues for all other cases, it can only assist access to justice and increase efficiency. But it is not a case where a judge would then be making some sort of legislative decree in relation to future action.

Mr RICE: Again, the powers that we are speaking of here are not remarkable. The representative complaints procedures in discrimination matters are a step towards that where it is possible for the tribunal to look at the representative nature and make orders accordingly. Procedurally, that is a difficult thing to achieve. It may well be that in implementing a Bill of Rights and anticipating a power such as we are speaking of here may be the preserve of a particular jurisdiction at a particular stage in the proceedings, to have regard to, as you have said, the seriousness of the step that is being taken. But again in ordinary commercial matters the interests of a whole range of creditors will be determined by a finding that an equity judge or a commercial judge might make in relation to a single application. This jurisdiction is not unfamiliar with broad-ranging determinations around a single issue which would bind a larger group of people.

The Hon. J. F. RYAN: I would agree with that, but is that not how case law works? Since case law works that way, what need is there for a court to define a series of principles which might be called a structural injunction?

Mr RICE: I think that is precisely one of the limitations that we generally recognise on the modern utility of case law, that it can be a repetitive, expensive and emotionally demanding—I mean expensive to the State, apart from the litigants—means of achieving change. That is why I characterised it before as efficient, if nothing else.

The Hon. J. F. RYAN: I wish to run by you a concern expressed by a previous witness, which we have discussed a little in part. However, because it is such a continuing theme, it is worthwhile getting a specific response from you. A concern expressed by a group such as the New South Wales Council of Churches was that in their view in the United States the first amendment protecting religious freedom has been used greatly to restrict the freedom of Christian groups. Examples have been given of the banning of prayer and scripture classes in schools, and it is this kind of experience in the United States which has made some people in our community somewhat worried about a Bill of Rights in that what appear to be commonsense arrangements in our community—I mean, for example, no-one questions the practice of stores and supermarkets displaying religious icons during Christmas—have become sources of litigation in the United States.

It is that kind of cultural problem that is bothering people in Australia about a Bill of Rights. In fact, some would argue that the only people who actually have rights in the United States with regard to religion are those who do not have any religion at all. And they have wound up with exactly the opposite. If you look at the words around the Bill of Rights and the statement about the Bill of Rights, they were clearly religious people so it is clearly unlikely that they intended it to have that outcome. What do you say about such concerns that are expressed by groups such as that?

Ms EASTMAN: What we would say is that the circumstance you have suggested would never happen here.

The Hon. J. F. RYAN: They are brave words.

Mr RICE: And could never happen.

Ms EASTMAN: I would say never happen. It may be that somebody might try a case and bring the issue before a court.

Mr RICE: Although we are recommending mechanisms that would make courts last resorts, so we are talking about dealing with this at a much earlier and more sensible stage.

CHAIR: Why is it less than legitimate to refer to the United States experience under a constitutionally entrenched Bill of Rights? Would it not be open to any reasonable person to suppose that if you had what you describe as a doubly entrenched constitutional Bill of Rights in New South Wales there would be an inbuilt rigidity that might lead to such inflexibility in the future that we cannot presently foresee that could replicate what has happened in the United States?

Mr RICE: With a limitations clause. In your description of the process it is important that that is remembered as a feature of a model replicating which differentiates substantially from the United States model.

CHAIR: But at page 24 of your submission you say that your body supports a reasonable limits clause in similar terms to the Canadian and New Zealand models but with the expressed qualification that when rights are limited pursuant to this clause they are limited to the smallest degree possible.

Ms EASTMAN: That comes back to our notion that any limitation on the right must be clear, predictable and certain so that everybody understands when the right will be limited and how it will operate. In terms of the issue raised about what seems to be a conflict between freedom of speech and the rights to exercise religion, I suppose I am so firm in saying that I do not think it would ever happen here for a number of reasons, with a footnote that is not to say that somebody might not try. One is that culturally Australia and America are very different in terms of the approach and understanding of the division between church and State. While both systems recognise that division, the issues are not so hard fought in Australia as they have been in America, and that is very much a consequence of its history.

Two is the way in which the First Amendment is framed in that it confuses and conflates both a right to freedom of speech and a right to exercise religion. In terms of dealing with rights, they are part of the same type of right, which creates some uncertainty. Three, there is no limitation clause such as there is in Article 19 (3) of the International Covenant on Civil and Political Rights that lends any flexibility to a limitation of free speech impairing the rights of others. For example, impairing the right to exercise and enjoy whatever religious beliefs. America has a culture where freedom of expression is considered to be

the paramount right. It dominates the way in which Americans think about government and it dominates the way in which Americans approach their participation in the political system.

Many other nations do not share that strong adherence to freedom of expression that we find in the United States. Those cultural differences between our two systems are one of the reasons why it would be unlikely that Australia would follow the path of America in banning nativity scenes at Christmas. It just could not happen. An appropriately drafted limitation clause to freedom of expression under a New South Wales bill of rights would allow that flexibility so that the right of freedom of expression would not be used to undermine, trample or deny the rights of another person. An appropriate balance would have to be struck and in doing so we think it is unlikely that we would follow the American path that freedom of speech would prevail.

The Hon. J. F. RYAN: Are there not, perhaps, aspects of the Australian culture—one that comes to mind is the apparent concern for what we call the "underdog"—not exercising exactly the same sort of distortion to a bill of rights in Australia that might have caused various distortions in the United States? In other words, the issues may not be the same but the outcome, although it might be in some other area, will nevertheless occur. There will be distortions.

Mr RICE: But, again, governed by or ameliorated by—and this is the Chairman's question about distinguishing the American experience, the limitation clause that we keep invoking, and it would be useful if we found another way of answering instead of saying limitations clause—a bill of rights that was designed to balance rights; where every time somebody said, "What about my right?" we would not be dealing with a document that said: Yes, we note that. And we note in your circumstance a competing right and we are obliged to balance them and find an accommodation.

Part of the education role behind the approach we recommend that would support a bill of rights would be to ensure people understood, had a much better understanding of our domestic approach to rights than they do from television of an American approach to rights where they would understand that here we actually attempt to accommodate and introduce a balance. It is a modern approach, not an eighteenth century, post-revolutionary approach to simply enforcing bald rights with each other.

The Hon. J. F. RYAN: One of the powerful aspects of the American Bill of Rights is simply that they are seen to be without limit and very easy to insert into almost any slogan. "Freedom of speech" is all the more powerful because it is able to be said in three words.

Mr RICE: So is the "right to bear arms" equally powerful, but more scary. It is that very simple strength that becomes simplistic very quickly. New South Wales in the year 2000 is able to cope with the necessary complexity to give what sounds simple real meaning instead of leaving what sounds simple to become simplistic and abused.

The Hon. J. F. RYAN: But if we then have a more complicated statement of our rights, is it likely that they are—

Mr RICE: Complex, not complicated.

The Hon. J. F. RYAN: But if we then have a more complex statement of our rights, they are not going to be nearly as accessible and therefore the document may not be as useful as it has been overseas.

Ms EASTMAN: No, we must disagree. The right of freedom of speech, freedom of expression will always be a right of freedom of expression. The key is the implementation of that right and the effectiveness of limitation. No-one would ever say that the right of freedom of expression was absolute, and it is not in the United States. But an understanding that all human beings, by virtue of being a human, are entitled to freely hold opinions and express their views is an important concept and, perhaps, a slogan that helps people understand their rights. The limitations are much more in the practical implementation in striking that balance. We would invite you to look at the International Covenant. The preamble of the International Covenant on Civil and Political Rights squarely says that individuals have rights, but they also have duties and responsibilities to other individuals, to the community and to the State.

The right to freedom of expression is expressed as carrying with it special responsibilities. There is always inherent in the notion of the right itself a balance. I think Gandhi was the person who said that duties are the essence of the right. Unless there is this notion of a sense of duty to the community and to

others there can be no rights. Rights will only work effectively if they work together in a recognition that one person does not stand with his or her rights alone, and that those rights might be exercised with others. The hard task is to find how we can effectively strike a balance and do so in a fair and appropriate way.

Mr RICE: That is the complexity I referred to, which is not complicated. It is simply an extra dimension beyond the bald statement, as you said Mr Ryan, of a slogan of a right. It is accepted absolutely internationally in instruments in jurisprudence that there comes with it the further dimension of the degree to which you can enjoy that right, and that is the balancing exercise. If we have a populous and we are looking ahead to people understanding there is a right and then there is the question of when and how and in what circumstances you can fully understand that right, which is very different from simply taking the United States statement of a right, and then you run with it and accommodate nobody else.

The Hon. J. F. RYAN: Just to a show you how complicated life can get, even for this Committee, on the one hand we had the submission from the New South Wales Council of Churches who gave a very strong submission against a bill of rights. By contrast the Council of Churches argued that if we were to have a bill of rights, if one were to be introduced, it should not be a minimalist document that would be a compromise of only those rights on which we could all agree. One of its representatives stated that the bill of rights needs to be more than pragmatic, more than useful to the State. It must have a higher base in principle than that and, of course, it is the foundation of all decent human rights. It must include things like a right to life. It includes things like a right to equity. What would be the impact of including things such as a right to life in a bill of rights, particularly considering issues such as abortion and euthanasia, and in what way would these sorts of conflicts and these issues be resolved significantly?

Ms EASTMAN: If you asked every person who came before this inquiry whether they valued a right to life I do not think you would find anybody who disagreed. In terms of what the fundamental rights are and the values that lie behind them, most people agree on those. The difficult issue is the implementation of the rights and where to strike a balance, where to draw the limitations. Often people who oppose bills of rights oppose them because they see the difficulty not in the statement of the right but how the right should be implemented and where the balance should be struck. They are difficult questions, but they are not questions that are foreign to the community.

These issues are debated constantly. Our submission is: Do not look only to the courts to resolve these issues, but build into place mechanisms that allow the community to participate in the broader education, awareness and understanding of the rights, that allow them to have early intervention measures, that allow there to be tribunals or bodies that allow rights to be discussed, for compromises to be reached; not only to see the enforcement of rights as having to be enforcement within a court or a strictly litigious system, but a broader understanding of rights so that the community can work with each other in finding where the balance can be struck.

Mr RICE: Can we exhort the Committee not to be deterred from looking closely at perhaps even the idea of a bill of rights simply because there will be people who will say, "What about our right getting in or our right will be left out?" The comfort that we say the Committee can find is in this, that in its implementation, in the procedure supporting a bill of rights that we hope we have brought to the attention of the Committee are mechanisms in a modern sense, in which we have learnt a great deal since the United States Bill of Rights that we are able to accommodate, balance, implement sensibly a long way from litigation with procedures that perhaps avoid the courts altogether and that take account of contemporary needs to balance rights. Whatever issues are confronted and with which people are confronted about which rights to include, a bill of rights can be given effect to through a sophisticated implementation processes.

CHAIR: You might think I am obsessed by this, but could I explain myself? I am not opposed to the ordination of women to the priesthood. However, I have a substantial difficulty with your submission regarding the public-private divide if it means to do away with the distinction between public and private power altogether. Quite sometime ago Mr Rice appeared to make reference to the chief executive of a private corporation when I expressed some horror at the idea of the Catholic Archbishop of Sydney being hauled before either a court or an administrative tribunal. I think the politics of doing that are hopeless. I know that you are not here to advise us regarding politics, but would you agree with me that taking the Catholic Church as an example, it has taught from time immemorial, and still teaches, that women cannot be ordained to the priesthood. The present Pope has said so in recent times. Do you

really think that the New South Wales Government or any administrative body or court acting under a bill of rights should justifiably intrude into or intervene in the doctrinal aspects of the Catholic Church?

Mr RICE: As a pragmatic matter, no, we do not. As Ms Eastman said earlier, we would acknowledge that in that area of activity and, perhaps, in others society is not ready for it and, perhaps, never would be. Perhaps that is where church and State do not meet. It is an example that shows us where an absolute conflation of the public and private spheres is not tenable, and we have no difficulty with that. There may well be other examples. I must say, I have no difficulty with the idea of the Archbishop having to attend court if the law is such that the policy of the church is called into question, just as I have been involved in proceedings where directors-general of government departments have similarly had to front up and account for the conduct of something that has occurred within the jurisdiction. But we have no difficulty conceding in relation to the church that that is precisely the area of endeavour that might be covered by the limitations clause. The public-private divide does not necessarily encroach. We simply want to make the point that the public-private divide is no longer tenable as a starting point for where human rights are identified and given effect to.

CHAIR: I am not so much concerned with the Archbishop of Sydney appearing as a court or tribunal from the point of view of his undoubted status. I am more concerned at the perceived intrusion into the affairs of the church.

Mr RICE: Yes, and that is where we would not go.

Ms EASTMAN: I can answer it this way. The answer comes from the definition of the rights themselves. At this stage we have only the international covenants to work from. Article 18.1 of the International Covenant on Civil and Political Rights protects that religion in its current form so that the current teachings, practices, observance and worship of that religion are protected by a right of religion. What is protected is the freedom to exercise one's religious beliefs. We would then be seeing a conflict with a right for all people to be treated equally. The right to equality is not an absolute right. The balance would have to be struck between two sets of competing rights and the covenants make it very clear that one person's rights may well be limited by the enjoyment and exercise of another right. In some senses, even if churches were brought within the scheme of the bill of rights, it would be to protect the churches, to protect current forms of religious organisations so that they are the beneficiaries of the rights themselves. If there is a conflict between the nature of the enjoyment of a particular religious belief and the rights of another, then the process is finding where that balance is to be struck.

CHAIR: Part of the terms of reference of the Committee requires it to inquire into whether economic, social and cultural rights, group rights and the rights of indigenous people should be included in a bill of rights. If economic and social rights were to be specified in the bill of rights, it is not difficult to think of a number of examples of problem areas within the State of New South Wales that might be arguably justiciable under a plank of a bill of rights dealing with social and economic rights. For example, in New South Wales according to my understanding there is a five-year waiting list for public housing and literacy rates are remarkably low in some areas and among some groups in society. Some people might argue that public hospitals are underfunded. Is it not at least possible that if there were to be economic and social rights within a bill of rights, that governments could have litigation taken against them arising out of some of the issues or problems I have given you by way of illustration?

Ms EASTMAN: Our view would be that all human rights are indivisible, interrelated and interdependent. We understand that you may well have heard that phrase before and we see it in the submissions, but the understanding is that the enjoyment of civil and political rights goes hand in hand with the enjoyment of economic, social and cultural rights. In terms of current protections for human rights, we are very good, particularly in New South Wales, at protecting economic, social and cultural rights in the employment field. A vast majority of rights that are characterised as economic and social rights are rights to just and fair working conditions, safe working conditions and fair remuneration. All of those rights we deal with quite easily in our current industrial and employment laws.

The more difficult rights are those that deal with broader sectoral interests such as education, health and housing and there are some real difficulties in litigating those types of rights. Some assistance may be gained from the challenges faced by the South African Constitutional Court and as members of the Committee will be aware, the South African Constitution contains economic, social and cultural rights. A recent decision is dealing exactly with that issue, the right to health. A case came before the South African Constitutional Court of a man in his 40s who was suffering heart disease but who had chronic renal failure. One hospital could provide him the requisite dialysis but the hospital was very short

of resources and had to have guidelines in place to determine who would have access to that type of treatment. It was a publicly funded service. If this man were able to afford private services he would have had access to the dialysis machine. He took proceedings under section 27 of the South African Constitution, which guarantees everybody a right to access to health care services and it also provides that no-one may be refused emergency medical treatment. He argued that the refusal by the hospital to accord him priority in terms of access to the kidney dialysis machine was a breach of his right under section 27 of the South African Constitution.

The South African Constitutional Court had to deal with that case. It dismissed his application and the way in which the court approached the issue I think is interesting but also instructive in terms of how these issues could be dealt with in New South Wales. The judges of the South African Constitutional Court showed clear deference to the executive in terms of managing budgets and resources. The court did not say that money should be spent in a particular area or for a particular individual. It looked at that difficult task of attempting to balance rights and competing interests and if one looks at the judgment it did so in a very sensitive and sensible way in trying to deal with these competing rights and issues. The case of Soobramoney is reported in 1998, Volume 1 of the South African reports at page 765.

We say that perhaps the courts are not the best places to have these issues determined and the inclusion of economic, social and cultural rights in the New South Wales bill of rights perhaps will focus attention on a broader range of enforcement mechanisms, particularly those that will involve education, consultation, conciliation and policy development. There may well be through processes of early intervention and conciliation a means of trying to accommodate the health-care interests of individuals and the obligations on the State generally to provide adequate health care.

CHAIR: In saying that courts are not really the best places to resolve disputes in regard to economic rights, to take that example, you would appear to be in agreement with a critique of bills of rights generally, that is, Mr McLelland, who would take the view that the courts are placed in a false position of determining essentially political, social and economic questions that are not, in his view, a matter for the courts. He takes the matter beyond that, though, and he would say that essentially the court would be determining a political issue if they were deliberating on matters arising from a guarantee of freedom of speech.

Is my understanding correct that you are saying that if there were to be anything in the nature of an economic right within a New South Wales bill of rights, that would be more properly or logically a matter for the watchdog, the administrative body, rather than for the courts to deal with in litigation?

Ms EASTMAN: I would say that the courts and the watchdog must work together and courts may not be the best places because the nature of litigation in this State is that litigating to achieve a remedy can take a long time. Mr Soobramoney was faced with a chronic situation in terms of his health-care and he needed fast and effective intervention. It may well be that those rights can be enforced by a dual mechanism, with access to the courts, but the most effective remedy—which is why I say that courts may not be the best places—may well be by a watchdog body taking an early intervention role and working with the relevant parties to effect an appropriate outcome in that case.

Mr RICE: To address Mr McLelland's point, in our earlier submissions we have already rejected a suggestion that the courts should not be involved in the exercise that a bill of rights would involve them in because they do that already when it comes to implementing public policy and weighing up values. With respect, that is perhaps a naive or dated view of the role that the courts play. It does not follow that because a bill of rights matter is not best dealt with by litigation there should not be a bill of rights. What does follow is that there needs to be alternative mechanisms and in fact every matter would begin with conciliation and there should always be the opportunity for litigation. It is a progressive process.

(The witnesses withdrew)

(The Committee adjourned at 12.25 p.m.)