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 25 July 2000

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The Committee met at 10.00 a.m.

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PRESENT

The Hon. R. D. Dyer (Chair)

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

BRET WILLIAM WALKER, Senior Vice President, New South Wales Bar Association, Floor 5, St James Hall, 169 Phillip Street, Sydney, affirmed and examined:

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

Mr WALKER: Yes.

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

Mr WALKER: Yes.

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

Mr WALKER: I was admitted to the bar in 1979. I took silk in 1993. Both as a junior and as silk I have argued, and I am presently engaged to argue, a number of constitutional and public law cases both for and against governments at different levels. As the senior vice president of the Bar Association I was deputed to write the submission to this Committee on the reference before it at the moment.

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

Mr WALKER: Yes.

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

Mr WALKER: The terms of reference before the Committee put squarely into question a number of matters which in my view pose extreme tensions between the values of democracy on the one hand and the rule of law on the other hand. It should not be supposed that those values are always pulling in the same direction. The fact that there is the relation between Parliament that legislates and the courts that create case law and interpret legislation is enough to demonstrate that the tension is a real one happening everyday as it were across Macquarie Street from one side to the other.

The terms of reference have excited from me—as can be seen from the written submission on behalf of the Bar Association which I wrote—a degree of concern about the notion of accepting in advance, without having specific particulars of its content, a Bill of Rights for this State. It seems to me that the language or rhetoric of rights has been much abused, so that there are things which are truly rights in a sense which can be functionally operative in a society like ours with courts and a Parliament, and there are things which are not truly rights in any philosophical or juridical sense but are rather aspirational goods which civilised societies want for as many of their members as possible. A right to be heard in a court of law is an example of the first kind. A right to nutrition is an example of the second kind.

I do not wish any of my comments to be understood as suggesting that the former kind of rights are more important than the latter kind of rights. The two examples I have chosen would indicate that it would be very foolish to take that position. Being fed is obviously much more important than being heard in a court of law. But it seems to me that the area of discourse which one enters when talking about a Bill of Rights being enacted in legislation necessarily involves applying the tools developed to deal with the first or real kind of rights to areas which we are presently at risk of including in the second kind of rights, that is the political aspirational ideals.

The first and most important matter that I would like to emphasise in my evidence is that the notion of saying "yea" or "nay" to a Bill of Rights in principle is misconceived unless it be accompanied by a highly specific notification in advance of what the content of the supposed rights would be. That is because in my view a legislature confronting the notion of a Bill of Rights cannot debate it, cannot decide whether it should be enacted or not, unless it can see more or less precisely the words which would embody the rights which would thereafter become justiciable.

That brings me to the second point in opening. It has been suggested in various quarters that justiciability should not be assumed in relation to a Bill of Rights. It seems to me that here democracy and the rule of law do pull together in exactly the same direction. No democracy should enact as law something which it is not prepared to have its courts enforce. In other words we can all sign up to what might be called pledges—and perhaps we should—but we should not enact as law matters which are put beyond the judges' power or duty to enforce.

For those reasons I would reject as an extremely retrograde step the notion of this Parliament—the oldest in the country—enacting law which in the same breath it prevents from being enforced as every other law is enforced. I think that there is, in fact, an air of oxymoron about having a law which is not enforceable. It is certainly an oxymoron—and I would insist that it is axiomatic—that a right is something which can be enforced at law. In that, of course, I am departing from the common language of rights which is used in political discourse. I do not mean to criticise that language. It is a use of a metaphor but, like all metaphors, it can mislead if it is pushed beyond its rhetorical use.

The third point I would make is this: If it be accepted that one rejects the notion of a Bill of Rights that has no enforceability, and accepts that as a form of law, whether it is constitutionally entrenched or merely legislatively in the ordinary way, that it will be enforceable and thus is likely to be enforced from time to time in a court, then it must be contemplated that there will be within the topics covered by the law a wholesale transfer of power from these chambers to the courts across the road. That now may not be a good thing according to one's preference for a particular body of persons—legislators on the one hand elected, judges on the other hand appointed. However, it seems to me that in a democracy devoted to the rule of law, which I take as the twin assumptions upon which we should all proceed, there really is no choice: it is the duty of the legislature to remain supreme in as many areas as are appropriate for that to be.

In my view it is unquestionable that when it comes to all matters of social aspiration for bettering the material and intellectual state of the citizens of New South Wales, that must remain within their hands of the legislature or, in our case, the quadrennial parliaments that we have, elected by the voters, and must not be transferred to judges; the simple reason being that democracy positively requires that as much power as possible for the people should be handled by the people's representatives—and judges are emphatically not in any sense the people's representatives.

That concludes what I want to say in opening except to make clear, as I think you will have observed from the way in which I set out our written submission, that the fact that we take such a hard line against some a priori acceptance of the Bill of Rights, that is, accepting the idea in advance of knowing what it would say, does not mean that we do not have detailed suggestions as to what should be in a Bill of Rights if there were to be such a device in New South Wales.

There are—and I would be happy to elaborate on this in answer to any questions you may have—a number of true rights recognised in Anglo-American jurisprudence and political science which many New South Welsh citizens would believe they presently enjoy which are not protected in a way which is either at all or easily enforceable in a court. They seem to me to be rights which we should put at the very top of the list notwithstanding they are both traditional and obvious.

Another thing I would say is this: The technical choice between what might be called an Interpretation Act approach to a Bill of Rights and a constitutional entrenchment of a Bill of Rights or on the other hand the New Zealand model of legislation which requires explicit implied repeal from time to time by subsequent legislation but otherwise prevails, is one which raises some very important matters concerned with the technique of traditional enforcement, and raises transcendentally important issues of the transparency and intelligibility of law not just for lawyers like myself who make their living in dealing with difficult matters of statutory and constitutional interpretation but makes it available to citizens. Those technical choices raise immediately extremely important issues about the accessibility of law in written form. I would be happy to develop that in answer to any questions as well.

CHAIR: The present Chief Justice of New South Wales, Justice Spigelman, addressed the Australian Plaintiff Lawyers Association earlier this year and said among other things:

> At the present time, for the vast majority of Australian lawyers, American constitutional Bill of Rights jurisprudence is virtually incomprehensible. Within a decade it is quite likely that in substantial areas of the law, British cases will be equally incomprehensible to Australian lawyers. Indeed, it is already the case that the common law in England is

> developing, on a pre-emptive basis, in the shadow of the jurisprudence of the European Court to an extent that limits the use of British cases as precedents for the development of Australian common law.
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> This is an important turning point for Australian lawyers. One of the great strengths of Australian law is that it has been able to draw on a vast body of experience from other common law jurisdictions. Now, both Canada and England, and to a lesser extent New Zealand, may progressively be removed as sources of influence and inspiration. Australian common law is threatened with a degree of intellectual isolation that many would find disturbing.

A recent witness before this Committee was the Hon. Malcolm McLelland, QC, former Chief Judge in Equity, who respectfully disagreed with His Honour's remarks. Speaking of the United States and its Bill of Rights, he said:

> There is an enormous amount of common law decisions, particularly in the State courts in the United States, from which Australia does and has for many years drawn ideas and inspiration. When I was at the Bar if you had a difficult proposition to argue you could always find a decision in an American State court to support you. There was no real difficulty because of the existence of constitutional law in the United States in finding common law decisions which were useful in illustrating points so far as Australian jurisprudence is concerned.

What is your view concerning the cautionary remarks that the Chief Justice expressed earlier in the year? Do you think that he is right, or are you more inclined to Mr McLelland's view?

Mr WALKER: I disagree with both of them, but very respectfully in each of their cases. I disagree with the Chief Justice, not in relation to his description of the historical drift apart of different parts of the common law world, by reference to and in connection with their constitutional underpinnings, including their human rights components. The historical trend he describes is clearly correct; it is palpable. I have been at the Bar only 20 years, and I can tell the Committee that even in that short time the tendency is both discernible and in the direction that the Chief Justice describes.

When I came to the Bar the citation of an English authority was not merely common but usual. It is no longer the case and there is, to my mind, a wholly good development of, as it were, ensuring that the last word on Australian common law is treated not only by the judges but by the advocates as being Australian cases. Any suggestion that that loses us some internationalising influence, or that that loses us some access to intellectual stores overseas, should be rejected, because one only has to look at the Australian case law to which I have referred—all of it, practically speaking, in the High Court—to realise that Australia has an extremely open system in terms of its intellectual influences in jurisprudence.

If anything, when one puts side by side speeches in the House of Lords, judgments in the United States Supreme Court, judgments in the Supreme Court of Canada, and judgments in the High Court of Australia on the same topic, and compares them for their breadth of reference internationally, there is no doubt that for the last 30 or 40 years, but particularly in the last 15 years, the Australian High Court, followed only second by the Supreme Court of Canada, is more international and wider in its breadth of reference outside the country in which they are sitting of all those courts. I would be surprised if there were people who read judgments of those courts—as I do for my practice—who would disagree with that anecdotal impression.

No doubt, that is the effect of us not being metropolitans, but of us being provincials in a global sense. Canada and Australia are not at the centre of worlds, in the same way that are England and Wales on the one hand and the United States of America on the other hand. They are the metropolitans, we are the provincials. It has been an observation for over 2,000 years that provincials often know more about different parts of the world than metropolitans, not least because they have an interest in what happens at the centre of the world that is not mirrored by an interest of the centre of the world in what is happening at its fringes. None of that is meant to be cultural or intellectual cringe. The great thing about the intellectual life of the law is that, even when it was only print media, but particularly now that it is electronic media, everyone all over the world can share in everything else at the same pace.

For those reasons I profoundly disagree with the Chief Justice that we are at the cusp of losing some access to the intellectual riches of other countries' jurisprudence. It is simply not correct. With great respect to His Honour, he as counsel—and he was a most eminent counsel—demonstrated by his own practice and by his breadth of reference when he was on his feet in the High Court, that there was no poverty of reference, no poverty of resource, and no incapacity to use American cases. I do not believe for one moment that the different constitutional underpinnings, or the human rights components of those, of the countries that the Chief Justice referred to, is going to deprive us of the truly useful material—all of it comparative law, even the English stuff—which we have been able to use for the last 100 or more years in this State and which we, I am sure, will continue to use.

Interestingly, there has been more reference to European human rights decisions and to European trade law decisions in the past 10 years in Australia than there would have been in the 90 years before that. That comes at a time when those systems are even more obviously different from ours in terms of the mega law or meta law that governs those systems. It is not the case that a difference in system prevents a transfer of intellectual resource. What it does, of course, is require greater learning at the Bar and on the bench in order to ensure that there are not false or misleading analogies presented. That, of course, leads into something to which I have referred earlier, and could elaborate on later. That leads into the huge danger that a human rights jurisprudence, borrowed, as it were, from overseas, could render an important part of the law accessible in effect only to people like myself and not available to readers of the newspaper who earn their livings in other ways.

It seems to me that the layering of reference—a matter I would like to explain later, if I may –to which human rights jurisprudence borrowed from overseas will lead is profoundly anti-democratic, is profoundly disempowering for people who wish to understand the law, and will render the practice of constitutional and public law in this country even more the secret preserve of an intellectual elite at the bench and the Bar, and that could be a terrible shame in my view because this is the stuff of politics, not law.

The Hon. J. HATZISTERGOS: Could I interpose a question so that I may understand fully what you are putting? Are you saying that the use of human rights jurisprudence internationally is now being used to shape Australian common law, and that that is an appropriate thing? Is that what you are putting?

Mr WALKER: No. Human rights jurisprudence internationally is certainly a matter of international exchange: that is, all the courts I referred to, plus others—the European Human Rights Court is the obvious other example—refer to each other. The German Constitutional Court does it, and the French courts do it to a certain extent. They do refer, as a matter of comparative law, in cases where there are, as it were, policy choices available in terms of the text of the law they are interpreting, to how other similar bodies in other societies have made similar decisions. The classic case recently, I think, is in the House of Lords, where the terrible question of damages for the birth of a healthy child came up, where they used comparative law by reference to the jurisprudence of other countries. It is not necessarily always human rights jurisprudence. Sometimes it is merely difficult social choice jurisprudence.

The difficulty with that style of argument and with that style of judging is that it makes the body of doctrine to which our courts would refer a body of doctrine that one has to be a professional scholar to be on top of. It seems to me that a huge value of law in a country like ours, which has these twin requirements of democracy and rule of law, is that people can first find out what the law is without needing to pay my fees and, second, have some prospect of understanding it if they understand English. That is not possible if, on top of our already relatively complicated relation between constitution, legislation and case law in our own system, you also put on top of that treaties, and you also put on top of that travaux preparitoire of treaties, and you put on top of that the interpretations of those texts by other international courts and tribunals. I think you count about six or seven layers. And, like any palimpsest, the more layers there are the more confused is the message on the top level, and the more distorted are the messages in the intervening levels.

In my view, one should prize more the transparency of, as it were, single-text law over the sophistication and intellectual fascination of multi-text law. I do not know whether that answers the question. But it is true that human rights jurisprudence from all over the world is expressly adverted to by most serious tribunals, including common law tribunals, trying to decide human rights and related issues. But the cost is of great intellectual complication.

The Hon. J. HATZISTERGOS: I remember the Mabo case. An article in a recent Australian Law Journal stated that the High Court had looked at Australian common law in the context of international treaties.

Mr WALKER: Mabo, notwithstanding its notoriety, was a relatively straightforward case in relation to whatever might be called the human right aspects of it. At the end of the day it was a case about property and the common law and so-called Aboriginal land rights, by which I mean doctrines developed in the sixteenth, seventeenth and eighteenth centuries both in Europe and in England. That was relatively straightforward compared to the kind of problems that a lot of the prisoners' rights, accuseds' rights and children's rights issues could raise over the next 20 or 30 years.

The Hon. J. HATZISTERGOS: Some statements were made by a couple of judges that referred to human rights law as shaping Australian common law.

Mr WALKER: There is no question about it. If it is convenient I could address that matter immediately.

CHAIR: Before you do I will put to you specifically some matters arising out of High Court decisions regarding international human rights law. In Mabo, Mr Justice Brennan, as he then was, 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.

The High Court, in *Dietrich v The Queen*, invoked principles of the international human rights law to identify a common law right to a fair trial. Some recent witnesses appeared before this Committee from a body calling itself Australian Lawyers for Human Rights. I asked them why they said that that was not enough, that is, that the High Court is taking into account international conventions bearing on questions of human rights. Their response to me was that that was nothing more than an influence, to use their expression. They said:

> It still leaves the court and us in the hands of the common law where the rule in Dietrich is open to review.

I am just expanding on what the Hon. J. Hatzistergos was putting to you. I invite you to say where you think the High Court is leading us. Is it arguably doing enough in the human rights area?

Mr WALKER: Yes, it is, in relation to decreeing the method which is legitimate to be followed. What content that will reveal over the years requires a crystal ball. We know of some content already. I will try to confine my comments to what we know already rather than looking into a crystal ball. This picks up also on the matter that you raised that the Hon. Malcolm McLelland noted. My disagreement with him is less fundamental than my disagreement with the Chief Justice. My only disagreement with Mr McLelland is this: It is no longer the case that one makes much headway in any court, certainly in the High Court or the Court of Appeal, by trawling the American digests for State decisions that favour an argument when you are on a wing and prayer to win. That no longer cuts any ice, if it ever really did.

But it is true, as he said, that Australian courts and practitioners, particularly in the public law and constitutional law areas which raise human rights issues, have used American decisions for a long time, not necessarily as precedents to be followed but just as often as death's-head examples to be avoided—not in any condescending way but in pointing out difficulties which the Americans have anticipated or have reached decades before we have. In the High Court references to three sources of values, in particular, and intellectual influences have characterised its approach from the earliest times, although there is definitely a recrudescence over the last 20 years.

From the earliest times under the influence of those early members of the High Court who had been, if you will forgive the sexist reference, the founding fathers of our Federation, in particular Justices Barton and Isaacs and Chief Justice Griffith, there was a great deal of reference to American constitutional law because of the similarities and differences between our Constitution, the Federal Constitution and their Constitution and the explicit way in which there were borrowings. There was not, of course, a great emphasis on what we now call human rights, although there was a great emphasis on that human right which requires strict observance of the legal division of legislative power, which was one of the themes of the early post-Federation High Court.

There has been a return to the citation of American authority and, as an advocate, I can tell you that there is certainly a compulsion to have learned the American law and to be ready to debate it in any argument of any moment raising constitutional or public law issues in the High Court. An example which this Committee will probably appreciate is that when I argued *Egan v Willis* in the High Court a great deal of time was devoted to drawing attention to, and I have to say pointing out differences from, the United States Supreme Court case law, which you will find referred to in the High Court's decision on the matter. So there have always been references to American jurisprudence as a source of values in relation to Federal problems—which this country has, as the United States has—and also the problem of individual liberty as opposed to government control.

The second source of values is what is sometimes called, probably misleadingly, common law values, but really they derive from the very English concern with individual liberty of which John Locke is the most obvious champion. That, of course, is one of the reasons why American jurisprudence in this area and Australian jurisprudence have a real cousin relationship because the Americans are, of course, the greatest—or were at the end of the eighteenth century the greatest—practitioners of practical Lockean thought than anybody else, including the English. There is no question that so-called common law liberties—a misleading expression but one which is used—such as the expectation that, unless positive law controls your conduct it is not controlled, the expectation that unless clear words criminalise an act it cannot be criminalised, and the expectation that personal liberty may not be interfered with except by positive law, be it judicial order or otherwise, are matters which it seems to me run through at least 150 years of Australian case law.

I was researching habeas corpus the other day for a case. The Supreme Court of this State in the 1870s in relation to the obvious problem then perceived politically of Chinese immigration was dealing with these matters in terms which it correctly traced back to Magna Carta, which is one of the constitutional statutes still effective in this State under the Imperial Acts Application Act and pursuant to the three major habeas corpus statutes of the seventeenth and early nineteenth centuries, which are also constitutional statutes still in force in this State under the Imperial Acts Application Act. They are human rights statutes. The judges spoke in very old terms of things which are evergreen and do not need, with great respect, the international covenant of personal and political rights.

The third system of values, which is called in aid by Australian courts without the need for any Bill of Rights, is what is now called international human rights or universal rights, to adopt some of the language that one finds from the various protocols and covenants, principally including those which have come about since the end of the Second World War. There is no doubt that they are—not least because Australia has often as a sovereign nation in the exercise of a prerogative acceded to those treaties and signed up to those covenants—available to courts and are referred to. As you said, Mr Chairman, in *Dietrich* it is specifically referred to. Arguing *Dietrich*, one uses those references to the international covenants. But the notion that one gets some benefit for an accused person without representation by direct enforcement of an international covenant is quite impossible technically because it involves the expenditure of public money.

It is the expenditure of public money which brings one into the area where I disagree most with those who say that a mere influence is not good enough. If a mere influence and the three systems I have referred to—American constitutional public law thinking, so-called common law rights and then the more recent international human rights—are to be something more than mere influences in a system which is flexible and adapts from year to year, then they will be compulsory standards. If they are compulsory standards, that has only one meaning if you take the *Dietrich* case, and that is legal representation for an accused person. It means that there is a system outside Australia made by people outside Australia who were not elected by Australians, which system—which is bypassing Parliament and going straight to a court of unelected judges—will spend public money. That, in my view, is profoundly anti-democratic.

This Committee, of all committees, hardly needs to be reminded that the United States of America was independent of the United Kingdom partly because it did not like its money being spent by people whom it did not elect. It seems to me that if you have an international covenant which is to have direct enforceability by compulsive force and not the mere influence that proponents of a Bill of Rights deprecate, you must be saying that you want the words of other people, unelected by Australians, unelected by the electors of New South Wales, to dictate how New South Wales consolidated revenue is spent. I certainly do not want that. It seems to me that the Parliament should not want that. It seems to me that it is the antithesis of a free people to give up that right to the judges.

CHAIR: One of the matters that the Committee is required to inquire into, as you will be aware, is whether it is appropriate and in the public interest to amend the Interpretation Act 1987 to require courts to take into account rights contained in international conventions. When Mr McLelland was asked about that matter, he argued against amending the Interpretation Act to require New South Wales courts to take into account international conventions. He argued that that would be a move away from allowing judges to interpret the intention of Parliament in passing legislation and that it would make it harder for non-lawyers to understand legislation. He said:

> 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. It is important that people do understand Acts of Parliament

> when they read them and that is one of the motivating elements in the movement towards the use of clear English in Acts of Parliament.

Before you respond, in the submission of the Bar Association, in answer to the question whether it is appropriate to amend the Interpretation Act in this way, you say:

> Only if the precise way in which the content of those treaties will affect New South Wales law and New South Wales citizens has been examined in advance. The content of treaties, particularly multilateral human-rights protocols, has not been subjected to democratic scrutiny and choice by the electors of New South Wales.

I agree with that. I made a speech last year when I drew attention to the minimal input that States and Territories had in the treaty-making process. Is the Bar as much opposed to an Interpretation Act amendment as it is to a Bill of Rights?

Mr WALKER: We are certainly much more relaxed about an Interpretation Act approach than we are to a constitutionally entrenched Bill of Rights, which would be beyond the competence of a session of Parliament to change—that is the first thing—because an Interpretation Act approach can be amended by a simple bill and a constitutionally entrenched Bill of Rights could not be. The second thing is that we emphatically agree with Mr McLelland about the complicating influence of layers of laws to which you must refer in order to understand what you can and cannot do and what you can and cannot get.

The next thing is that with any reference in an Interpretation Act to treaties you would need to make a decision whether you are going to refer to particular treaties in the form they take at a particular time or whether you are going to refer generically to all treaties which from time to time, including in the future, maybe acceded to by Australia. It seems to me that the latter approach could be called colloquially the pig in the poke approach; that New South Wales would simply in advance legislate that anything that the Commonwealth executive—and I stress that—decides to accede to by way of the treaty will have some form of overriding effect on New South Wales' law, including the common law in New South Wales. That seems to me to be an available choice for the sovereign Parliament of New South Wales but a surprising one politically, given that if an elector asked you: What have you let us in for, you would not be able to say. It seems to me that legislation in the dark is legislation which should be rejected at the outset without wasting your valuable time and debate.

The next thing I want to emphasise is that treaties, whether you have selected them and therefore know what is in them or whether you simply refer to all treaties, whatever is in them, the sources of law in the question you have asked me become, in that fashion, part of the law of New South Wales by choice of the Commonwealth executive; it is not by choice of the Commonwealth Parliament. There is no element of democracy except insofar as one may posit theoretically that there could be a vote of no confidence in the lower House, that is the House of Representatives, because there was disapproval in that Chamber of a particular treaty being acceded to by the executive. That is of course theoretically possible but it is fantastic to suppose in practice and it is for that reason that I say there is not even an indirect democratic element in the accession to treaties in this country.

In my view that is a grievous failing of our Federal Constitution. We are democratically in advance of most of the rest of the world in so many things but we kept the king's and queen's prerogative to make treaties notwithstanding we had in our Constitution the capacity, Trojan horse style, of giving the Commonwealth legislative power by means of accession to treaties. For those reasons we should be very wary in New South Wales of giving up even more when the people of Australia do not have any democratic control over treaties. The notion that we should, as it were, give special privileged hearing to documents which the Australian people have never passed upon seems to me to be perverse. Treaties deserve less privileged hearing than do home-made laws.

The Anti-Discrimination Act of this State, which is a relatively early Act of that kind, deserves a lot more credit and honour because it is a democratic law then worked out by our courts and amended by this Parliament in light of experience, responsive to what people wanted, than do treaties, which have resulted from international committees, very often attended by people whose regimes, that is the regimes which sent them to those committees, that belong to the blackest and worst in history. It seems to me that the sentimental attachment to an international covenant because it is an international covenant has to be exploded in the name of democracy, which is essentially a local matter, that is, people in control of their own destiny by choosing their own representatives, who make their own laws.

I hope that as an individual elector, the electors in New South Wales will be as enlightened and as globally minded as any population in the world, but I do not think that should be done by the particularly technical approach of an Interpretation Act amendment to incorporate treaties. The next thing I would say is that technically as an advocate, my opinion for you is this about an Interpretation Act amendment. It holds out this prospect and this is why I so strongly agree with Mr McLelland's view. When I come to argue a matter or, worse still, advise so as to avoid argument—there I need predictability—I will have to have on my desk and balance up the following sources of law on any particular problem of this kind. I will first need my understanding of the common law. I will need a knowledge of the New South Wales statutes that happen to be paramount over that common law, as statutes are paramount over common law. Of course we know that is not straightforward because judges have devised interpretive cannons that everyone accepts that a statute should not be interpreted as overthrowing a common-law right, such as the right to liberty or property, for example, except by clear words.

Already there is some sophistication to that apparently simple inquiry. Then in this country I go to Commonwealth legislation to see whether there is Commonwealth legislation with an inconsistency that will mean it is paramount under section 109 of the Constitution. That is not straightforward, as anybody who reads section 109 cases will understand. Then I go to the Commonwealth Constitution to see if there is something there that is paramount over Commonwealth legislation because not all Commonwealth legislation is consistent with the Commonwealth Constitution and the common what constitution is the supreme law in this country, including New South Wales.

I have already got to four and four intellectual exercises. I then have to go to the Interpretation Act 1987 in this State and the Acts Interpretation Act of the Commonwealth to see whether I have misunderstood by applying ordinary English any of the words in any of the positive enactments that I have just referred to. That is a relatively straightforward exercise because interpretation Acts at the moment, if you will forgive me, make very dull, boring reading. They are technical and they tell you how you interpret various expressions. Interestingly, because interpretation Acts sit there to effect legislation that comes after them, they have always—and in my view must always—have a provision that says "unless the contrary intention appears, such and such will be the understanding of this expression or this approach in a statute".

Even for the Interpretation Act you have not a straightforward template to apply to another law; you have another intellectual exercise to ask: Is the contrary to be found expressed? You will not be surprised to learn that when the contrary is found to have been expressed, it is never said in plain words. There is no red flag that shows that the Interpretation Act does not apply. You have to do that by implication. If we added in the Interpretation Act an incorporation by reference to either specified treaties or treaties holus-bolus, then we have added on my count at least another half a dozen—and who knows how many more there will be—texts to be referred to.

Let us assume for convenience that we only have to go to English language texts because the English language has equal status with the French or whatever other language the treaties are in so at least we are spared linguistic problems. As you know we have at least three styles in Australia, maybe four, and then another set of styles—and by styles I mean language, the use of words to convey ideas—that must all be married together. We have the New South Wales' legislative style, we have judges styles, we have the Commonwealth legislative style, which is different in New South Wales, we have the Commonwealth Constitution, which is different again. I am just talking about styles, not content. We then have the difference styles of the international covenants, which are manifestly, as every reader of them knows, not written the same way as our statutes are written.

In my view that presents an extremely formidable task for somebody whose full-time, well-paid job is to think about such matters, to advise upon them, and to appear in cases arguing them. It reduces predictability to a degree that is unacceptable in my view in a civilised society devoted to the rule of law, because the rule of law should not involve contests in courts except in a tiny minority of cases. For all those reasons it seems to me that the Interpretation Act approach, though obviously less dangerous than the entrenched rights approach, is an approach which would reward people in the small cast of advocates, such as myself, but only in the least important way. That is, it would give us yet more work to do but without any redeeming social virtue.

CHAIR: One of the judicial officers who made a written submission to the Committee identified four different models of bills of rights. The New Zealand model he calls a bare statutory Bill of Rights; the British model a fortified statutory Bill of Rights; the Canadian model a constitutional Bill of

Rights with an opt-out clause for the Parliament; and of course the American model, the constitutional Bill of Rights, which is perhaps too well-known or too notorious to need any elaboration. However, I notice in responding to the question the consequences for Australian common law bills of rights in the United Kingdom, Canada and New Zealand, the Bar's submission states among other things: "It is the American experience which can probably teach us most, both to encourage emulation and to counsel avoidance." I am not impressed by constitutionally entrenched bills of rights, however, could you tell the Committee what is meant by that?

Mr WALKER: Yes. You will have gathered, Mr Chairman, neither am I. As a preamble one can say this: The most grandiloquent expressions of civil rights are to be the found in the Constitution of regimes mercifully either now gone, such as the USSR, or regimes which are transforming, the PRC. It is not the case that they are some talisman to a better future for the citizens of a country to have such rights written down, entrenched or otherwise. The next thing is that in New South Wales, by a combination of democratic responsiveness, benign neglect if I can put it that way—in other words government does not feel the need to interfere in most aspects of life—we enjoy practical liberties of a kind which are no less than any other country on earth and are greater than most countries on earth.

The those reasons one would expect that if you are going to be talking about entrenchment and the good lessons, that is the lessons that might be emulated from United States, you might ask what might be added in practical terms that would assist. The Committee will notice from the way I addressed this question in the written submission that the main influence that is a benevolent influence of the United States' experience is to have taken some of the rights supposedly dearest to Englishmen, as they called them in the eighteenth century, and made them for the first time entrenched against parliamentary vote and not just against executive pretence. They were important and debates at the time at the end of the eighteenth century in the United States revealed that they, first, thought of them as ancestral English rights; second, wished to be freer against the executive than Englishmen were; and, third, understood that meant the ability to withstand majoritarian tyranny, in other words, the dark side of democracy, by, fourth, the rule of law.

Therefore, it seems to me that there is a set of apparently desiccated rights—that is, they will never have people marching in the streets for them, but they are fundamental in constitutional terms and bolster the enjoyment of ordinary life by ordinary people in ways that they mercifully never have to think about in this country—which should be considered for entrenchment in our Constitution Act, regardless of whether we have anything recognisable as a human rights Bill of Rights. I have in mind, in no particular order, habeas corpus, that is, that no court can be prevented by a law from examining the lawfulness of a person's detention or custody. For example, we know that President Lincoln's worst act was to suspend habeas corpus unlawfully, and the suspension of habeas corpus, even in times of war, is something which should be approached with extreme doubts.

We should seriously think about entrenching habeas corpus because the history of parliaments in this country suggests that there would be a willingness in certain cases to legislate to prevent courts from examining the lawfulness of detention. The second thing is that New South Wales lacks what the United States and the Commonwealth of Australia have, which is a constitutional guarantee against property being taken without compensation, other than by criminal forfeiture or taxation. That seems to be something which might be thought could or should be entrenched for New South Wales as it is for the Commonwealth of Australia. We have in this State now a far more civilised and acceptable set of ordinary laws, legislation, requiring compensation for takings by government than have existed at any time in our past. But they seem to be ad hoc and rather difficult to put together as a scheme, and perhaps we should consider a general one there.

The Americans, on both habeas corpus and on government takings—expropriation—have a very good jurisprudence from which we can learn a great deal. There are other matters which are technically illegal which therefore bolster the rule of law without which this useful tension with democracy will not operate. I have mentioned that in the written submission but I do not have to go into it in detail. They include things like legal representation, but I picked that one deliberately because it raises the critical issue of whether the judges or the Parliament are in control of the budget. As someone who strongly believes in the huge historical advances in the 17th century in England, from which we are the beneficiaries, I want Parliament to be in charge of the budget emphatically, not the judges.

As you know, in Victoria they have taken an entirely different approach from the approach in this State in relation to control of the money to be spent on legal representation. That is something which it seems to me we are free to experiment with by legislation in this country. God forbid that the

experiment should stop or the improvement cease because there is an entrenched provision in the Constitution. Entrenchment is inflexibility unless you give to judges a margin of movement in interpreting entrenched provisions, which is, in my view again, profoundly antidemocratic.

The Hon. J. HATZISTERGOS: What would you say about the contention that has been put before this Committee that the failure to have a Bill of Rights in New South Wales and, indeed, in Australia results in people who are aggrieved in terms of their human rights going off to international tribunals to argue their cases and thereby bringing international embarrassment to the governments of this country? Do you think that is a consequence of not having a Bill of Rights domestically?

Mr WALKER: No. I think that would be a consequence of any system whereby Australia had acceded to protocols and covenants to any degree materially wider than domestic law provided for its citizens in any event. In other words, so long as there is more scope for grievance to be aired in an international tribunal than there is at home, then there will always be—and for perfectly good reason—not only a temptation but a practical compulsion for people to go overseas to get what they cannot get here. That does not trouble me at all. It seems to me to be a more or less amusing consequence—amusing if you disapprove of the Executive in this regard, as I do—of the Executive deciding amidst champagne and commemorative fountain pens to sign up to treaties whose consequences it may not have thought about and whose consequences it has not informed the domestic population about.

This is a country which rejected what might be called anodyne, if not very good, poetry in a supposed preamble to our Federal Constitution, which set out very largely ideals against which no-one would vote, because they are just so self-evidently right. Yet we know that great pains were taken in a way that was almost embarrassing to contemplate to render it non-justiciable. But anecdotally one suspects that the Australian people not voting against those values nonetheless voted against adding more words that might be grist to a lawyer's mill. It seems to me that while ever the Executive continues to sign up to protocols which have things like the Human Rights Committee attached to them, not by way of enforcement but, as you correctly say, by way of international shaming devices, then we the population and they the government have to accept that consequence. The notion that for that reason you would import all of those words, those texts, into our municipal law to render them directly enforceable in our courts is such an overreaction to the irksome reality of the readers of the *New York Times* thinking Australia is no good as not to bear thinking about.

The Hon. J. HATZISTERGOS: I put it to you that even if we had a Bill of Rights domestically, that would not necessarily obviate the rush of people going overseas to get an international perspective on our laws—

Mr WALKER: Absolutely not.

The Hon. J. HATZISTERGOS: —because there is a political pressure and dimension which is added to by the international condemnation which domestic law could not provide.

Mr WALKER: You cannot get *Le Monde*, The *Times*, and the *New York Times* interested in what has happened in the New South Wales Supreme Court but you can get them interested in the United Nations Human Rights Committee. Furthermore, as it were, the more obviously our law operates in a Bill of Rights from the texts of international documents, the more obviously it highlights those parts it has chosen not to incorporate. At that point, it seems to me, you erect a whole new set of grievances from people who can bring their grievance only under the rejected part of the international covenant. Then there is a whole new one: What kind of country is Australia in that it will sign up to a treaty completely as a treaty but when it comes to reflecting it in local law will only go for the bits it can deal with comfortably?

It seems to me that that again highlights that we are putting the cart before the horse if we say that because we signed up to these treaties we should be doing something in our domestic law. The more obvious and politically respectful approach—that is, politically respectful of the people—is to ask: Should we have signed up to these treaties? If we have, of course we cannot get out of them now, but at least we should not compound the problem by treating them as some inherently respectable source on legal laws. They are not, and they have no democratic legitimacy of any kind.

The Hon. J. HATZISTERGOS: What is your response to the following point which was made by Justice Abella of the Ontario Court of Appeal in an address to the Australian Institute of Judicial Administration in October 1998? She said:

> Insofar as the sifting of legal choices is the sifting of policy values, judges, in interpreting law, do consider and always have considered, in addition to logic and precedent, the values or policy implications their legal conclusions represent. All the [Canadian Charter of Rights and Freedoms] did was to allow public policy to come out of the judicial closet and participate more openly in the policy partnership which courts and legislatures have, in reality, been parties to for centuries.

Mr WALKER: I profoundly disagree. With great respect to Justice Abella, I think that is an irresponsible way of failing to recognise the critical importance of avoiding what I will call childish realism. Let me explain that. Of course it is true that judges are human beings, and it is true that judges take into account systems of values ranking from their first version of the Bible when they were a child through to their reading in philosophy on the weekends while they are a judge and everything in between, including leader articles in newspapers. But it would be childish to think that because their intellectual make-up includes all of those influences that is what is a directly mediating factor in producing the outcome in a particular case.

The language which common law judges have adopted has been adopted not as window dressing but as a way of reflecting juristic technique, that there are some things that cannot be allowed to be reflected in the outcome of a case. They will include, for example, a judge's religious upbringing, et cetera. To deny that there are influences in those very rare cases where there are open choices of a policy kind, as Justice Abella was talking about, to deny that there are intellectual or personal influences would be very silly. There clearly are, but to use the language of "coming out of the closet" as if there has been some concealment which was illegitimate or some matter to be ashamed of in the past is a completely inappropriate matter; she should not have done it. It suggests that she disapproves of the notion that judges must not tread beyond certain limits in the way in which they decide cases. Judges are not elected. To talk, as she does, blithely of a partnership between judges and legislatures is, in my view, politically naive and democratically wrong.

The Hon. J. HATZISTERGOS: What do you think the implications would be in terms of the judiciary having to interpret a broad-based set of values in a Bill of Rights? In particular, do you believe that they would be more agenda driven?

Mr WALKER: Yes.

The Hon. J. HATZISTERGOS: What implications would that have for the state of the judiciary and the State?

Mr WALKER: The first aspect to be borne in mind is that it will not affect Local Court magistrates, District Court judges or most judges of the Supreme Court, the Land and Environment Court, the Industrial Relations Commission and the Compensation Court. I think I have named all of them. It will not affect them at all except in extremely rare cases where they will know that what they are really doing is writing part of the appeal book; the case will not stop with them. Therefore, it will affect the relatively very small number of judges who are members of or who sit on the Court of Appeal or the Court of Criminal Appeal. The Court of Criminal Appeal has the widest range of possible judges to be affected.

But principally I have to stress that it will affect the High Court, because the notion that there will be some reticence practised by the High Court if there is a New South Wales Bill of Rights, of letting the Court of Appeal remain the final court for the Bill of Rights, is something that I have no faith in at all. The High Court is the apex of the New South Wales judicature because it is the apex of the Australian judicature. We are a Federal nation, and that is the end of it. If there was a Bill of Rights in New South Wales and New South Wales alone, then the importance of home-grown human rights jurisprudence, compared with English, Canadian or American human rights jurisprudence is so obvious that the notion that the High Court should stay out of it should be rejected. So it means that there will be an influence on a judiciary which comprises the High Court, the Court of Appeal and those judges who sit largely as members of the common law division of the Supreme Court and Court of Appeal judges in the Court of Criminal Appeal.

The first effect it will have on them is for all the reasons I have already pointed out this morning. It will increase their work, that is their intellectual work, very considerably. The second is that it will add to uncertainty, and I say as to uncertainty that it is in every way an undesirable quality in the law. The third thing it will do is to unquestionably, depending upon the content of the provisions in a Bill of Rights, require judges to make decisions about matters to which legal technique is more or less irrelevant. I have

in mind what might be called, and has been called by some philosophers, allocative justice—an expression that is not very useful because it uses the word "justice"—but it means what is fair as between people when handing out the resources, mostly financial, that society has to hand out. That is not the province of judges, that is the province of elected representatives, that is members of the Executive directly responsible since 1855 in this State to the elected representatives.

The notion that we would throw out the longest history in this country of responsible government for allocative justice by giving it in very large measure to the judges, the notion that we would even think about removing any democratic element of the distribution of the resources of this State and give them to the judges stagger me. Some people have said that is melodramatic because judges do not engage in budgetary sessions. My answer to that is, yes, that is the problem. They cannot; they do not have the wherewithal; they do not have the skill; they do not have the training; but above all else they do not have the democratic legitimacy. And you have every reason to expect that the judiciary in this State, if they are given a Bill of Rights, will try very hard to maintain traditional judicial reticence over policy values.

But as your question brings to the fore, they will not be able to avoid—they will have to, because they have been commanded to—deciding matters that will include allocative questions. As soon as it involves allocative questions over and above the simple question "Should this defendant pay those damages to the plaintiff?" Then, it seems to me, there are very deep and dangerous issues raised that go to the heart of democracy. I, for one, think that the chief difficulty of the project that other of your witnesses have talked about is that far too little faith is given to the people and their representatives in Parliament, and far too much faith is given to the very narrowly selected group of people who are on the bench. When I say they are narrowly selected, I do not mean to suggest that they should be more widely selected, far from it. I think the selection should remain narrow, that is to people who have befitted themselves by experience, training, learning and temperament to be judges, that is of law, and deciders of fact, not parliamentarians.

The Hon. P. J. BREEN: One of the problems as a legislator is that a number of bills come to the Parliament that, from time to time, clearly breach what any reasonable person would say are internationally recognised principles, perhaps even fundamental justice. The Parliament in Victoria, for example, has the Scrutiny of Bills Committee. I looked for the reference a moment ago, but I was not able to find it, but in its first year of operation, 1996, something like 38 bills were identified as breaching these fundamental principles. If a statutory Bill of Rights were in place, not a constitutional bill, which is the ambit of this Committee's work, do you agree that it would assist to identify at an early stage, if it contained an appropriate provision, that a particular bill contravened principles either in a Bill of Rights or against some other benchmark? Do you think that would assist to help people identify more closely with the work of the Parliament, and recognise that the law-making power has to be in the Parliament as opposed to the judges?

Mr WALKER: No, I do not, but I agree with all the premises of your question and with part of its conclusion. First, the notion of having some semiformal, that is some overt, mechanism for scrutiny of legislation against the norms of so-called human rights, universal values or common fairness and decency seems to me self-evidently good. The notion, whether figuratively or literally, of legislators having at their desks a little booklet of checklists of human values to measure appeals against is one that could only be good, so long as it does not become mechanistic. But that is also the reason why I disagree in relation to having a legislative Bill of Rights to assist in that task. The first question is: in the legislature where, subject to party discipline, the individual conscience of a member is engaged on matters such as whether a bill passes muster against notions of decency and justice, why would it assist to have an expression of opinion of one historical parliament by a majority as to some of those rights or values?

In other words, it would not be given any extra status morally or intellectually by having been the result of a majority vote of both Houses at some stage in the past. Second, there is no shortage, as we all know, of intellectual resources written down about these values. One can get books, Brownlee for example, and many American books that contain—and contain only—the text of various human rights expressions. So you do not need to add another one to that for the sake of having it branded New South Wales. Third, it seems to me the reference I hope individual members would make to notions of decency and transcendent human value in measuring the merit of a particular bill in this Parliament could and should never be constrained by reference to something this Parliament has, itself, enacted.

In other words, you should never see your legislation as somehow bounded in terms of the scrutiny to which it will be exposed by reference to what you yourselves, or your predecessors have in a

previous Parliament, decided might be relevant. You should bring the eyes, which are opened, to the particular circumstances at the particular time to the task of scrutinising the bill. For those reasons a legislative Bill of Rights does not seem to me to add to your armoury of parliamentary scrutiny. I would hope that both in Caucus and in the Chamber you would all feel free to say, "But clause 7, for example, seems to fly directly in the face of clause X of the ICCPR, and we really should not be doing that."

The Hon. P. J. BREEN: The reality is, and you have had direct experience of this I believe, the Parliamentary Electorates and Elections Act, which was passed at the end of last year, contained a provision that contravened a basic principle of the International Covenant. I drew that to the attention of the Parliament, but it really fell on deaf ears. That is the problem: As the society and as the Parliament that represents that society, we do not have a benchmark or we do not have the kind of values that people generally recognise. It seems to me, at any rate, that the uncertainty in the law that you spoke about and that you said is an undesirable quality in the law, would be assisted; in other words, some of that uncertainty would be clarified if there were a general benchmark that people recognised and people understood, that was in plain terms, did not have recourse to overseas law or any other layers of law that you speak about, but that was generally recognised and accepted as a fundamental principle that the legislators ought to use when making laws.

Mr WALKER: I have always supposed, and *Hansard* tends to support this, that parliamentarians already apply yardsticks. I have always supposed, and I hope it will always remain true, that the yardsticks are not the same. That is, I do not want people as parliamentarians who, as it were, have exactly the same set of values and emphasis when it comes to considering the making of law. For those reasons it seems to me whether the language is plain, whether it is entirely local, any legislation will not serve your desired end of providing a yardstick that will quell controversy. It will simply provide another piece of law to be compared with during debate in stages of the bill after enactment of the Act that the Parliament decides to enact. It means if you have declared general principles as a piece of legislation, but it is not paramount because it is not entrenched, then with the best will in the world you cannot avoid questions of implied repeal, or whether a specific law is paramount over a general law.

It seems to me that the purpose that you suggest such a device would serve would be defeated by a piece of legislation, and could be wholly satisfied simply by making sure that there is drawn to the attention of the Parliament from time to time other people's views, including international covenant's views on the various matters of transcendent value. There is no shortage of awareness in this Parliament of international covenants. I am not quite sure that it would be correct to say that things fall on deaf ears simply because in a particular law it is decided by Parliament, by the majority upon which democracy operates, that in this case that particular law should be expressed in a particular way notwithstanding arguments about principles from elsewhere. That seems to me to be a classic case of parliamentary democracy at work.

The Hon. P. J. BREEN: It does assume, though, that the major parties in the Parliament represent different views in the political spectrum. If you have a situation, as I would suggest is increasingly the case with major parties representing the same part of the electorate, the same middle ground of politics if you like, it is more likely that fundamental principles might be overrun in the haste to please this middle ground, this so-called silent majority.

Mr WALKER: Up until last weekend even the Liberal Party had factions. I know that has been changed. It is all gone now. As I understand it, all the major parties are now so big and they have such long political traditions that different strands of thought are represented within them. I am quite sure that demographically you cannot describe the voting support of any of the major parties as composed homogeneously and differently. In other words, there is no such thing as a Labor voter or a Liberal voter stereotypically that enables you to say of any particular person by reference to their upbringing, occupation, wealth, or place of residence that they are or are not a Labor or Liberal voter. That comes from the size of this population and the nature of our politics. No doubt it also comes because, as you say, the middle ground tends to be the most densely populated political ground, but that is why it is the middle ground.

The Hon. P. J. BREEN: I would like to ask a question about the English Bill of Rights, not a 1689 bill but the Human Rights Act, which takes effect this year. I know it has not been in place long enough for there to be any reasonable assessment of how it might work, but the theory behind it, as I understand it, is that the judges, in making a decision about the particular set of facts, if they decide that those particular set of facts somehow put the issue that they are deciding outside the many intended in the Bill of Rights, then they are not in a position where they can actually make a decision that override the Bill

of Rights. They must, as I understand it, refer the issue back to the Parliament and the Parliament must then make the decision about those facts. That is the first part of the question.

The second part of the question is, if that were the case in Australia, that we had a similar kind of Bill of Rights where the judges were not in a position to make decisions contrary to a Bill of Rights but must refer it back to the Parliament, would that not have the effect of these issues of public importance being debated in the Parliament upfront, in front of the full scrutiny of the press and often before bills are even finalised in the Parliament? Would that not be a more desirable situation than the one we have at the moment where we pass a law, someone argues about the principles down the track and at some stage, generally several years away, a judge in some court makes a decision about those facts? Do you not think that the theory behind the English Human Rights Act, in terms of access to justice, will have a much better effect for the people of Britain and in similar circumstances will also benefit the people of Australia?

Mr WALKER: No, I do not. I think that if it turned out that the English experiment operated in the way you have paraphrased—and we do not know how it is going to work—it will be appalling. The notion that you remove difficulties by giving to the courts a power to say to the legislature "Do it again, and do it better" is, to my mind, politically a very frightening one. It will add a whole new category of politically charged decision to the decision making of judges at a level where it already is political. There is nothing wrong with judges' decisions being political, in the sense that, yes, they make the common law and, yes, they construe legislation; that is inherently and properly political.

But there becomes another level of political charge to that decision if there were a system by which the judges can say, "I have the text in front of me, I have the text of other, as it were, meta-law in front of me—not the Constitution but, say, a Bill of Rights or whatever, and I regard there as being a disjunction or dissonance between the two. Notwithstanding that they are each, either directly or indirectly, the will of the people's representatives, I am going to deny it force of law and send it back with an indication of why it is not effective", which, of course, will be a hint to Parliament as to the directions in which Parliament should move in order to meet the scrutiny of the court.

Emphatically, like Mr McLelland, it seems to me that the function of the courts outside common law, which is properly made by them but in a very special and incremental way, must be to apply the intention of the legislature only and nothing else—and that is very hard in some cases. If you do any more than that, you are giving them a power of policy making which they will be forced to exercise. It seems to me that we must never move away from the tradition of positive law-making, which is that a text in the vernacular which people can understand emerges from the law-making organ which can then be read. You do not cross Macquarie Street, then to ask the Court of Appeal, "Does this work?"

We all know that from time to time, but very rarely, the court says something which surprises the government who sponsored the law which the court has just construed. They are noteworthy when it happens, but that is because they are exceptions which prove the rule. The great thing about the traditional relation between Parliament and court is that when that happens Parliament can fix it up if Parliament wants to. It seems to me that that at least is democratic and transparent. It is not democratic if some judge over the road can say, "Your program, whatever that is, requires X. Your enactment does not quite get to X, it is only seven-eighths of X. I am going to hold things and send it back, because I think you should move in this direction more solidly for example." I, for one, think that if you did that, then you should immediately start thinking about electing judges. It seems to me that at that point you have transformed our society in a way which is wholly undesirable.

The Hon. P. J. BREEN: There is a problem in the legal system as it is perceived by the community. For example, the number of unrepresented litigants in the major courts is quite surprising; I think it is over 30 per cent in some courts. One of the reasons people give for not obtaining representation is that they are not happy with the lawyers and the way the lawyers operate in the system. Similarly, people express views about judges—and you have expressed them yourself—in a way that suggests that judges, because of their particular training and background, make decisions in a certain way, about which people, rightly or wrongly, say, "That is not the kind of justice that I want. I will run my own case or do it my way." Unfortunately some people even say, "I don't care if I lose, as long as I get a decision."

If the legal system has all these layers of the law—and you have enumerated them very accurately—why cannot all those different kinds of laws be put into a computer in such a way that they are quickly and easily accessible, so that we get a decision about the law that is not expensive. Computer

technology is not difficult, I understand; in fact, there may already be computers that have the law stored in such a way that it is accessible and that the decision by the computer, if you like, tends to match the decision of the judges. In fact, I think Mallesons is a firm that has a computer that does that, and I think there is a firm in Melbourne also that has one.

If the law were to be simplified in that way, and if we then had this fundamental document, a Bill of Rights or an Interpretation Act or whatever it is, which says, "These are the principles which we need to protect"—and we could list the ones that you mentioned: habeas corpus, compensation on just terms, and so on—even if there were only, say, 10 principles which were fundamental principles, would not those developments mean that we had a system that was more accessible to the ordinary person, that was less expensive, and did not require the intellectual rigour that you have spoken so eloquently about?

Mr WALKER: The short answer is that any project, whether it be electronic or any other way, which makes available the text of the law to people who are not lawyers is a good thing. The longer answer, I am afraid, is almost entirely negative to your question, in this sense. Facetiously I can say that if Mallesons really do have a computer that does what you say, I confidently expect that there will be very few of us who can compete with them in any area of law within a very short time. I can add facetiously that I do not intend to get another job. I do not think that there is any computer anywhere in the world that has even begun to make inroads on the problem of what I have called the palimpsest of law in a Federal common law country with international tendencies, and that is this country.

To my knowledge, it has never been undertaken in any of the computer databanks to which I have access. Although, you could have someone—they would have to be a legal scholar—sit down and link every section of a positive enactment to any other section of any other positive enactment or case law which throws light on the meaning of the first, whether by inconsistency, by a paramountcy provision or by a narrow reading. Unless you can do that, the project falters at the first hurdle. No doubt it would be a noble aim for everybody to be able to know that section X of such and such a law has been not only thought about by these 753 judgments in the last 23 years but also what the best or only view is of what those 753 judgments add up to, and then also to know that it is subject to a reading down under the Commonwealth Acts Interpretation Act in deference to a particular provision of the Commonwealth Constitution.

The Hon. P. J. BREEN: But is that not what judges do anyway?

Mr WALKER: Yes, but they do it ad hoc. That is, labour is brought to bear only when it is necessary for a particular case. To do it, as I understand you are asking me, in advance as a comprehensive project designed to render all of this available to people is, as I say, a noble aim, but I fear it is pure ideal because the money involved in that project would be far greater than any law publisher or any government has ever shown itself likely to expend. Furthermore, I doubt whether it is entirely a project which would be worth a great expenditure, because most laws very rarely get argued about, ever. The huge majority of the law that comes from this Parliament is never argued about; it simply has its effect without there ever being a court case. It is only in court cases that the level of sophistication that I have talked about is something to be avoided—that is, one should not multiply it —comes to the fore. For those reasons, I doubt whether anyone ever will actually try to produce such an electronic program. If they did, at a price that was acceptable to the people, I would be the first to sign up to it.

The Hon. P. J. BREEN: If that development did occur, do you think that would be an argument in favour of having a benchmark document such as a Bill of Rights setting out fundamental principles?

Mr WALKER: It is to be understood that I am now, as it were, off in the realms of fantasy. However, if I could fantasise a system where layers of law-making and the hierarchy by which they affected each other could be rapidly, without pain and without argument, investigated so as to produce a uniquely correct answer every time, for my part I would be very interested in having one of those layers being a layer which enshrined values that I hold dear, such as no-one being deprived of their liberty without process of law, or Bob Hawke's "no child lives in poverty". Obviously, if one could legislate against poverty, one would.

The Hon. P. J. BREEN: If it were to be restricted to basic principles that might be, for example, in the International Covenant on Civil and Political Rights [ICCPR], and if that document were at the top of the heap, would that be a better legal system than the one we have at the moment?

Mr WALKER: No. I do not share the sentimental attachment with the ICCPR of many of your interlocutors; I think it is a highly suspect document. Much of it is, without doubt, simply one of the many expressions of universal values that those in the English tradition, such as ourselves, hold dear and operate it automatically. It is none the better for being a re-expression of those things. It is a latecomer to a field which was occupied hundreds of years beforehand by other philosophers and political scientists, judges and parliamentarians.

But there are provisions in the ICCPR which are, in my view, unthinkable as matters which would be for determination by judges against parliaments, that is, regardless of what a parliament thinks. I do not understand why people think that the ICCPR is the answer to everyone's prayer in this field. Maybe it is because of its title. It is a title that carries enormous sentimental force. It is international; it is a covenant, which somehow sounds better than an agreement; it is civil and political, so it is things dear to us socially; and they are called rights. But I do not think it bears analysis. If this Committee, for example, drew the short straw to go line by line through the ICCPR with a view to a project of incorporating it into our domestic law, I would be astonished if it all passed muster as law which could be here and now put into a New South Wales statute; let the devil take the hindmost in terms of litigating it. I think you would be doing the people of New South Wales a great disservice and you would be placing upon the judges an intolerable burden were you to do that. I also think you would be depriving yourselves of power that I want you to have.

The Hon. P. J. BREEN: Evidence taken by this Committee from at least one other group suggests that a Bill of Rights would result in less litigation and not more. I take it you do not agree with that?

Mr WALKER: No. The whole of my evidence could be described as a diatribe against self-interest.

The Hon. J. F. RYAN: You have said in your submission that controversial matters of social or political priorities are not the proper function of the courts. Are there not some advantages in having a judiciary that is able to decide controversial issues on the basis of reasoned argument, free from the pressures of interest groups and media influence, for example, issues such as abortion or Mabo? Could it not be said that the courts are rarely described as politicised when decisions are made which prevent rights, and that the criticism of the courts as politicised is generally only raised when courts interpret rights expansively?

Mr WALKER: Courts at the level we are talking about which are either intermediate or ultimate appellate courts are inherently political when they enter into fields such as relations with Aborigines and whether it should be a crime to abort a foetus. That is the experience in every country where courts have been permitted to decide those issues. It is absolutely correct that the fact that courts can bring politically disinterested techniques to bear on controversial issues is a good thing. Neither my written submission nor my evidence should be taken to suggest that courts should not deal with matters which are politically controversial. They should in a system which is both democratic and subject to the rule of law be the ultimate arbiter, subject to Parliament and a referendum, on all sorts of controversial issues. They have to draw lines in a sense that they have to say whether a particular case is on one side or another of a line drawn by the law.

I do not have any difficulty with courts diving into politically controversial issues but the techniques they adopt have to be the techniques of deciding a particular case that is in actual dispute between government and citizen, or citizen and citizen, including corporations in that, without essaying some generalist comprehensive dealing with a topic for all-time for all people which is what the Parliament does. I do not agree that courts are not subject to political vilification. It seems to me that in this country, particularly at the Federal level, there has been a departure from former reticence by legislators and members of the Executive in terms of criticising the outcome and sometimes purporting to criticise the method of judicial adjudication in a way which has contributed to political attacks on judges. Whether that is a good or a bad thing depends upon views about which everyone will differ in relation to the robustness of political debate, I suppose.

I do not, however, understand how adding an array of tasks such as under a Bill of Rights to what the judges already have to do will either bring to bear a superior set of skills from those possessed by parliamentarians to deal with those matters, or will produce better social outcomes for individuals. It seems to me that the citizens of New South Wales are manifestly not at present subject to deprivations which can be identified in ways which go without remedy here or across the road in the courts. If they

were then I would have a very different approach but empirically it is not the case that the citizens at the moment palpably need more protection by the judges against the Executive, for example, or against each other than Parliament presently provides them. The Anti-Discrimination Act is a paradyne that our human rights law should the engaged in. It is engaged in by an ordinary statute adjusted according to experience of its operation. It has been a powerful weapon for the improvement of minority rights—using that word in its correct sense.

The Hon. J. F. RYAN: One of the arguments for a Bill of Rights is that it empowers groups of people who are never likely to gain majority political power. The sorts of people considered in that position might be people with intellectual disabilities or young children who have limited ability to understand and assert rights and are reliant upon outsiders to assert and protect rights on their behalf. Some would argue that it is preferable to frame protections for groups such as those in terms of duties imposed on those who care for them rather than human rights directed at the individual. Do you have any response to that?

Mr WALKER: They are excellent examples of how parliaments are the ideal ultimate source of protection. The courts do add a considerable amount. The common law, that is the duty of care and equity, that is judiciary duties, do have real operation day by day in relation to the looking after of people who are not able to look after themselves. We have guardians, trustees and carers, be they medical or educational, all of whom are subject to duties of the kind you have referred to, enforceable in the courts of law. But we also have a Parliament which provides by means of appropriate departments and agencies for assistance in kind, not merely the peculiarly blunt instrument of litigation and damages awards or trust accounting and the like. For those reasons it seems to me that a Bill of Rights would likely add nothing to the capacity of those groups to be considered by society and government and, if anything, would shift in emphasis to an adversarial dealing with matters which do not have to be adversarial.

I have not noticed in any of the State Parliaments in this country any obvious deficiency in their concern for regular review of what the Government does for people who are mentally disabled or who are vulnerable children. That is, Parliaments are interested in the matter because citizens are interested in the matters. There is a great deal of argument about what the laws should be and that argument includes assertions that certain laws either in the content or in their execution are deficient, but that is the nature of a parliamentary democracy: it is a constant project of improvement.

The Hon. J. F. RYAN: People who represent such groups say the Parliament is deficient in that because they can never get their issues over and above more populous matters. They would possibly argue that the provision of a freeway, for example, will always trump the legitimate human rights of a person with a disability to get about the city, for example, by the provision of ramps.

Mr WALKER: I think experience teaches to the contrary, that is, that government including its source of authority the Parliament, manifestly from what is on the legislative books and what is in budgets does manage both to build freeways and to have worked a social revolution in relation to disabled access in the past 20 years. I have to say that anybody who seriously maintained that there has been no advance in relation to sensitivity to the special needs of the disabled in the past 20 years is doing government, Parliament and non-governmental social agencies a grave injustice. There has been enormous advances. We have also had some motorways built.

The Hon. J. F. RYAN: Oddly enough I counted roughly 10 different rights you raised which you thought were of significance, some of which you said were prime candidates for being entrenched. They include: The right to peaceable assembly; habeas corpus; the right to judicial process; entrenching the concept that somebody is only convicted on the grounds of beyond reasonable doubt; various versions of trial by juries; immunity from search without a warrant; no retrospectivity for criminal sanction, that is no Parliament should ever impose retrospectively criminal sanctions; the right to appeal from all judicial decisions; a right against stated expropriation of private property; and the issue of privacy. I have attempted to give short titles to things that you have explained in a lot more detail. Nevertheless they all appear to be rather important matters which you have suggested are prime candidates. Some of them are entrenched. Is that almost the same as having a Bill of Rights?

Mr WALKER: Yes, it is. Mr Breen pointed out when we use the expression Bill of Rights you have got to remember 1688 and 1689 when some of those matters were talked about. The line is drawn, to return to where I started, at those provisions which are necessary to enable practical freedom to flourish in a system which will accommodate contending interests and which will keep in an appropriate balance the tension between democracy and the rule of law, that is, between the will of the majority and

the right of minorities to be left alone. Calling them constitutional rights, the catalogue you have read out I hope not accidentally, includes matters which try to strike a balance between the governors and the governed which try to regulate the way in which State force can be exerted on private individuals not because this is the only almost important area of life—indeed, I would argue manifestly it is not. The most important area of life is the intensely private sphere that mostly good governments do not try to do anything about—but those parts of life where we interact with organised society particularly the police, the courts, and the Executive generally, that is where we negatively define liberty. That is where we limit the power of others in the name of society to interfere with what we do.

I think those which are core rights really all partake of that nature. I do have an unashamedly eighteenth century American bias about such matters, namely, we invented this wonderful machine called government. We have to keep it in control because we do not wish to become a despot. The way you keep it in control is to limit its power. The way you limit its power is to provide citizens with certain immunities or to require government to satisfy certain requirements. So you cannot send someone to gaol because they look as if they did it; you have two have a trial and you have to have trialled with certain requirements.

I have to say I think it is very debatable whether all of those matters that I have raised as prime candidates should either the entrenched in anyway or should the entrenched in any particular form. I raise them because it seems to me that in a project of constitutional freedom they are the ones that need to be looked at. I do not wish to be misunderstood. I do not mean by that to suggest that a child's right to an education, to use political language, or an old person's right to appropriate nutrition and medical care card thereby less important social values. They are, however, it seems to me most inaptly called rights in any enforceable way and they are classically matters for Parliament to attend to some time to time by laws, not by entrenchment and enforcement by judges.

The Hon. P. J. BREEN: That list comes to 10 items. If we were to have a Bill of Rights in an ideal world, in my view of how the world goes round we ought to have, would you suggest that those 10 issues or rights would be a reasonable basis for such a bill?

Mr WALKER: They are inadequate as a prescription of what should be looked at and certainly inadequate as a proscription on what should not be looked at. They are probably a fairly decent start. They are, I think, uncontroversial as matters which ought to be looked at. Some of them are very controversial probably as matters that ought to be in a Bill of Rights although I think they are a pretty good start.

I think I may have left out, it goes without saying, that at the head of all of these should be what I will call the technically democratic rights—the right to vote, the right to stand—which are enacted, obviously enough, in this State. If we are going to be talking about entrenchment, if we are going to be talking about legislation that wears as a badge that it will trump everything else unless there is something very clear to the contrary, we should at least start with recognising the centrality of Parliament. The centrality of Parliament cannot be recognised without recognising the rights to vote and rights to be a candidate. They seem to me to be critical matters, without which they should be no start at all. One then moves on, I think, from attending to democracy first to then attending to the rule of law.

I do not think, for example—and I may be wrong—that I have put in that list what seems to be one of the enormous individual guarantees never thought of as an individual guarantee, and that is the Act of Settlement judicial tenure guarantee at the back of our Constitution Act. It is entrenched. It is a right. I believe it is an individual right; not an individual right of judges—perish the thought; the tenure is not for their benefit—but an individual right for us, giving enormous protection, because it means we have a judiciary that can then be fairly asked to do their duty in deciding between executive and citizen without being cowed by the executive. In other words, you can make the big ask without it being unreasonable. It seems to me that those are rights that first need to be ticked off. You need to be satisfied with those fundamental, structural rights, which sound as if they are institutional but are in fact guarantees of individual liberty, before you then move on to some of the more technical matters that I have listed. With that caveat, yes, I do think that the ones I have mentioned are worthy of prime attention.

CHAIR: Mr Walker, if I could conclude with one final question, and you may take the Fifth Amendment under the United States Constitution, if you wish. Next Monday the President and the Chief Executive Officer of the Law Society are coming here to give evidence before this Committee, and I understand they will be arguing for a Bill of Rights in some form. Can you explain why the Law Society

would be so different in its opinion? Are solicitors inherently more radical, perhaps, than barristers, or is there some other reason?

Mr WALKER: No. If I were to venture into stereotypes, I would say the contrary is the case. But that would be totally unfair. One thing that one cannot do is generalise about lawyers in matters of this kind. I think it is fair to say, as I suppose I would say in my position, that the Bar carries many more scars of litigation and is more aware of the evil of litigation than is any other group in society, which even includes the society that represents litigators, by which I mean the solicitors. Obviously, litigation is not the only or even the main activity of solicitors. It is the Bar's main activity. The more you do it, the less enamoured you are of it as a tool of social advancement. The analogy that I use frequently, and would use again in this context, is that, like surgery, it is a very good thing when it is needed but that it is regarded as a sign of insanity voluntarily to submit to it without need.

(**The witness withdrew**)

(**The Committee adjourned at 12.07 p.m.**)