

Standing Committee on Law and Justice

# **A NSW Bill of Rights**

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## Terms of Reference

*That the Standing Committee on Law and Justice undertake an Inquiry into and report on whether it is appropriate and in the public interest to enact a statutory New South Wales Bill of Rights and/or whether amendments should be made to the Interpretation Act 1987 to require courts to take into account rights contained in International Conventions, with particular reference to:*

- a) whether the rights declared in the International Covenant on Civil and Political Rights should be incorporated into domestic law by such a Bill of Rights;*
- b) whether economic, social and cultural rights, group rights and the rights of indigenous people should be included in a Bill of Rights;*
- c) whether individual responsibilities as distinct from rights should be included in a Bill of Rights;*
- d) the consequences for Australian common law of Bill of Rights in the United Kingdom, Canada and New Zealand;*
- e) in what circumstances Parliament might exercise its ultimate authority to override basic rights declared in a Bill of Rights and what procedures need to be put in place to ensure that any such overriding legislation complies with the Bill of Rights;*
- f) the circumstances, if any, in which a Bill of Rights should be binding on individuals as distinct from the Legislative, Executive and Judicial arms of Government and persons or bodies performing a public function or exercising a public power under legislation;*
- g) the extent and manner in which the rights declared in a Bill of Rights should be enforceable;*
- h) whether a Bill of Rights should be subject to any reasonable limits prescribed by law that are demonstrably justifiable in a free and democratic society;*
- i) whether there should be a legislative requirement on courts to construe legislation in a manner which is compatible with international human rights instruments; and*
- j) any other matter arising out of or incidental to these terms of reference.*

These terms of reference were referred to the Committee by the then Attorney General, the Hon Jeff Shaw QC MLC on 18 November 1999.

## Committee Membership

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**The Hon Ron Dyer MLC** Australian Labor Party Chair

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**The Hon John Ryan MLC** Liberal Party Deputy Chair

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**The Hon Peter Breen MLC** Reform the Legal System Member

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**The Hon John Hatzistergos MLC** Australian Labor Party Member

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**The Hon Janelle Saffin MLC** Australian Labor Party Member

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# Table of Contents

	Chair's Foreword	x
	Executive Summary	xi
	Summary of Recommendations	xv
<b>Chapter 1</b>	<b>Introduction</b>	<b>1</b>
	<b>Reference from the Attorney General</b>	<b>1</b>
	<b>Conduct of this Inquiry</b>	<b>2</b>
	<b>Structure of this Report</b>	<b>3</b>
<b>Chapter 2</b>	<b>Meaning and sources of Human Rights</b>	<b>5</b>
	<b>Introduction</b>	<b>5</b>
	<b>The Meaning of "Human Rights"</b>	<b>5</b>
	Definitions	5
	Limits on Human Rights	7
	Rights and Responsibilities	9
	<b>Major International Covenants</b>	<b>9</b>
	<b>Human Rights Protection in NSW</b>	<b>10</b>
	Protections under the Constitution	11
	Protection of Rights in Federal Legislation	12
	Protections of Rights in NSW Legislation	13
	Common Law protections	13
	International Remedies	14
	The Adequacy of Current Protections	15
<b>Chapter 3</b>	<b>History of Bills of Rights in Australia</b>	<b>16</b>
	<b>Introduction</b>	<b>16</b>
	<b>Federation to World War Two</b>	<b>16</b>
	Federation	16
	1944 Referendum	17
	<b>Post War to the 1980s</b>	<b>18</b>
	Queensland 1959 Proposal	18
	Federal Human Rights Bill 1973	18
	<b>Federal Bill of Rights Proposals in the 1980s</b>	<b>19</b>
	<b>Inquiry by the Victorian Legal and Constitutional Committee</b>	<b>20</b>

	<b>Queensland Inquiries</b>	<b>21</b>
	Electoral and Administrative Review Commission inquiry	21
	Queensland Parliamentary inquiry	22
	<b>ACT Proposal</b>	<b>23</b>
	<b>Current Pressures for a Bill of Rights</b>	<b>23</b>
<b>Chapter 4</b>	<b>Models of Bills of Rights</b>	<b>25</b>
	<b>Introduction</b>	<b>25</b>
	<b>The United States Bill of Rights</b>	<b>25</b>
	Rights Protected	26
	Views on the US Bill of Rights	26
	<b>Canadian Charter of Rights and Freedoms</b>	<b>29</b>
	Rights Protected	29
	Limits on Rights	30
	Views on the Charter	31
	<b>New Zealand Bill of Rights Act</b>	<b>32</b>
	Rights Protected	33
	Limitations on rights	33
	Views on the Bill	34
	<b>UK Human Rights Act</b>	<b>35</b>
	Rights Protected	35
	Limits on Rights	36
	Pre-enactment checks and balances	36
	Views on the Act	38
	<b>South African Bill of Rights</b>	<b>38</b>
	Rights Protected	38
	Views on the Bill	39
	<b>Bill of Rights in a Federation</b>	<b>40</b>
	<b>Statutory Bill of Rights Compared to Constitutional Entrenchment</b>	<b>40</b>
	<b>Override Provisions</b>	<b>44</b>
	<b>Limitation clauses</b>	<b>47</b>
	<b>A Bill Provides Enforceable Rights</b>	<b>48</b>
	<b>Conclusion</b>	<b>50</b>
<b>Chapter 5</b>	<b>Arguments in Favour of a NSW Bill of Rights</b>	<b>51</b>
	<b>Introduction</b>	<b>51</b>

	<b>Educative Value</b>	<b>52</b>
	Rights can be more easily accessible	52
	Development of a Human Rights Culture in Political Debate	53
	Development of a Human Rights Culture in the Bureaucracy	55
	<b>Inadequate protections in existing laws</b>	<b>56</b>
	Weakness of the Common Law	58
	Weaknesses of Statutory Protections	61
	<b>Inadequate Protection of Minorities under Existing Law</b>	<b>62</b>
	Economic, Social and Cultural Rights of Minorities	63
	Human Rights and People with Disabilities	64
	The Rights of Indigenous Peoples	66
	Gender Inequality	70
	<b>International isolation of domestic law</b>	<b>71</b>
	<b>Facilitation of Dialogue between the Judiciary and the Parliament</b>	<b>73</b>
	<b>Conclusion</b>	<b>77</b>
<b>Chapter 6</b>	<b>Arguments Against a NSW Bill of Rights</b>	<b>78</b>
	<b>Introduction</b>	<b>78</b>
	<b>A Bill undermines the roles of both Parliament and the Courts</b>	<b>79</b>
	Undermines Parliamentary Supremacy	80
	Judicial Policymaking: Legalising Political Decisions	81
	Politicisation of the Judiciary	83
	Democratic Process as Guardian of Human Rights	85
	<b>A Bill would create Uncertainty</b>	<b>87</b>
	Uncertainty is unavoidable in Bill of Rights	87
	The Costs of Uncertainty	88
	Uncertainty encourages speculative cases	90
	Rights can be given unpredictable interpretations	91
	<b>No consensus on which rights to include in a Bill</b>	<b>93</b>
	<b>A Bill Increases Litigation</b>	<b>96</b>
	Canadian and New Zealand Experience	97
	Creation of new areas of litigation	99
	Using Courts as a Political Forum	100
	<b>Lack of a Bill does not isolate domestic common law</b>	<b>101</b>
	<b>A Bill favours Rights instead of Responsibilities</b>	<b>104</b>
	<b>A Bill could lead to harmful intrusions into private organisations</b>	<b>105</b>
	<b>Conclusion</b>	<b>109</b>



<b>Chapter 7</b>	<b>The Committee's View</b>	<b>110</b>
<b>Chapter 8</b>	<b>Parliamentary Scrutiny and Protection of Rights</b>	<b>115</b>
	<b>Introduction</b>	<b>115</b>
	<b>Models of Scrutiny of Legislation in Australia</b>	<b>117</b>
	Senate Standing Committee for the Scrutiny of Bills	117
	Queensland Scrutiny of Legislation Committee	119
	Victorian Scrutiny of Acts and Regulations Committee	121
	NSW Regulation Review Committee	122
	<b>Arguments in Favour of a Scrutiny Committee</b>	<b>123</b>
	Raising Parliamentarians' awareness of responsibility for Human Rights	124
	Introducing Human Rights into Political Debate	124
	Flexibility and Encouragement of Dialogue	125
	Allows Overview of Repeated Problems in Legislation	126
	<b>Arguments Against a Parliamentary Scrutiny Committee</b>	<b>126</b>
	Scrutiny Committees can be ignored	127
	Scrutiny can bypass human rights standards	127
	Failure to Develop a Political Culture of Respect for Human Rights	128
	Time Pressure of Legislative Program	129
	<b>Recommendations for a NSW Scrutiny of Legislation Committee</b>	<b>129</b>
	Structure of committee	130
	Statutory Framework or Standing Orders	130
	Joint or Single House committee	132
	Joint or single function Committee	132
<b>Chapter 9</b>	<b>The Interpretation Act and International Human Rights Instruments</b>	<b>133</b>
<b>Appendix One</b>	<b>Submissions and Letters received</b>	<b>141</b>
<b>Appendix Two</b>	<b>Witnesses at Hearings; Committee visits to Canberra and Brisbane</b>	<b>147</b>
<b>Appendix Three</b>	<b>Minutes of the Proceedings</b>	<b>151</b>
<b>Appendix Four</b>	<b>Universal Declaration of Human Rights</b>	<b>155</b>
<b>Appendix Five</b>	<b>International Covenant on Civil and Political Rights</b>	<b>161</b>
<b>Appendix Six</b>	<b>International Covenant on Economic, Social and Cultural Rights</b>	<b>175</b>
<b>Appendix Seven</b>	<b>Extract of a Report from the Senate Standing Committee for Scrutiny of Bills</b>	<b>186</b>
<b>Appendix Eight</b>	<b>Queensland Scrutiny of Legislation Committee assessment of impact of its work</b>	<b>194</b>
<b>Appendix Nine</b>	<b>Dissenting Report</b>	<b>202</b>

## Chair's Foreword

The Standing Committee on Law and Justice inquiry into a statutory Bill of Rights for NSW deals with some of the most important issues within our political and legal system. The rights and liberties enjoyed by residents of New South Wales, the role of the judiciary and the extent of the powers of Parliament are crucial to our democratic system. This report provides the Committee's view on where the balance should lie, and seeks to present in simple terms the very complex arguments that lie behind the many positions on a Bill of Rights held by participants in this inquiry.

On behalf of the Committee, I would like to thank all those who made submissions, gave evidence or otherwise assisted the inquiry. The very high standard of many of the contributions is greatly appreciated by the Committee. It is not possible to fully do justice to the many sophisticated arguments presented to the Committee in the course of a long inquiry in this report. Those with an interest in the arguments discussed briefly in this report are referred to the Committee's website for this inquiry (via [www.parliament.nsw.gov.au](http://www.parliament.nsw.gov.au)) on which some of the more detailed submissions and the transcripts of all hearings appear.

I would like to thank the members of the Committee for their conscientious participation in a demanding inquiry. I am particularly appreciative of the constructive approach taken by the Hon Peter Breen MLC, who while dissenting from the main finding, has endorsed the Committee's other two recommendations and all but one chapter of this report.

I would also like to acknowledge the role of the Committee secretariat in this inquiry. Former Committee Director David Blunt and Senior Project Officer Steven Reynolds had primary responsibility for this inquiry, arranging public consultation, and researching the issues. Steven Reynolds worked diligently in drafting a clear and thorough report. Committee Director Tanya Bosch, provided supervision over the inquiry in the latter stages. Committee Officers Phillipa Gately and Christine Lloyd have provided essential administrative support. The result is a comprehensive report that fully explores the main issues.

The Committee has ultimately found that it is not in the public interest to enact a statutory Bill of Rights. Its finding is based upon the undesirability of handing over primary responsibility for the protection of human rights to an unelected judiciary who are not directly accountable to the community for the consequences of their decisions. The Committee believes an increased politicisation of the Judiciary, and particularly the judicial appointment process, is a likely and detrimental consequence of a Bill of Rights. The independence of the Judiciary and the supremacy of a democratically elected Parliament are the foundations of the current system. The Committee believes both could be undermined by a Bill of Rights.

The most important recommendation in this report concerns the establishment of a Scrutiny of Legislation committee. In the words of one of the witnesses to the inquiry, the Houses of Parliament themselves have a continuing duty and power to debate and decide upon important matters such as the kind of rights which should be enjoyed within NSW. The Committee believes a scrutiny committee can greatly assist Parliament in this regard. I commend the report to the House.

**Hon Ron Dyer MLC**  
**Committee Chair**

# Executive Summary

## **Inquiry Reference (Chapter One)**

The inquiry was referred to the Committee on 18 November 1999 by the Hon Jeff Shaw QC, MLC, the former Attorney General. It is the first parliamentary inquiry in NSW into a Bill of Rights. The Committee was asked to investigate whether it was in the public interest to enact a statutory Bill of Rights in NSW, with nine terms of reference dealing with specific aspects of a Bill. The Committee received 82 submissions and 59 letters, held 12 hearings and obtained briefings in Queensland and Canberra in the course of the inquiry.

## **History of Bills of Rights in Australia (Chapters Two and Three)**

Prior to Federation there was a debate in Australia as to whether to adopt a US-style Bill of Rights. Instead, Australia's Constitution was enacted without general rights protections. The drafters of the Constitution relied upon the democratic system and respect for the rule of law, underpinned by an independent judiciary, as the guardian of individual freedom rather than guarantees of rights in a written document. There is a long history of unsuccessful proposals for Bills of Rights at Federal and State levels. Parliamentary inquiries in Victoria in 1987 and Queensland in 1998 have also investigated the issue and concluded against introducing an enforceable Bill of Rights in their states.

Bills of Rights have become commonplace in most countries since the Second World War, with the impetus given to the development of human rights law by the Universal Declaration of Human Rights and subsequent conventions. Recent adoptions of Bills by New Zealand and, in 1998, the United Kingdom, have seen Australia as the last remaining common law country without a Bill.

The NSW Chief Justice has expressed concern as to the potential intellectual isolation of domestic law as a result of the increasing impact of human rights standards in the other countries with a shared legal heritage. During the inquiry the Committee received important contributions, both in favour and against a Bill of Rights, from serving and former members of the judiciary.

## **Models of Bills of Rights (Chapter Four)**

Bills of Rights differ significantly in their content from country to country. There are many models providing different powers to parliaments to override rights within the Bill, different limitation clauses and varying levels of enforceability. The most significant difference between models is, however, whether they are statutory or constitutionally entrenched. A statutory Bill, such as the New Zealand *Bill of Rights Act* or the UK *Human Rights Act*, can be amended or repealed like any other statute. This is not the case for constitutionally entrenched Bills, such as the US *Bill of Rights* or the Canadian *Charter of Rights and Freedoms*.

Those participants in the inquiry who supported a Bill of Rights differed in their preferred model of a Bill; likewise opponents of a Bill varied in the models used to illustrate their criticisms of a Bill. In its report, the Committee has sought to distinguish arguments about Bills of Rights generally from arguments which are only relevant to a particular model. The US Bill of Rights had few supporters among advocates for a Bill; arguments based upon it were excluded in the report unless they illustrated a point that could be argued for other models.

### **Advantages of a Bill (Chapter Five)**

Supporters of a Bill of Rights came from diverse backgrounds including members of the judiciary, legal professional associations, peak disability groups and indigenous groups. The most significant arguments advanced by these groups in favour of a NSW statutory Bill of Rights are:

- inadequate protections of human rights for the community, due to gaps in current legislation and the uncertainty of the common law
- inadequate protection of minorities in society in the absence of a Bill
- educative value of a Bill of Rights in political debates, thereby developing greater understanding of human rights within the community
- international isolation of the development of domestic law in the absence of a Bill of Rights, and
- A Bill of Rights can facilitate a constructive dialogue between the Judiciary and the Parliament.

### **Disadvantages of a Bill (Chapter Six)**

Those who opposed a Bill of Rights during the inquiry included members of the judiciary, legal professionals, religious bodies and some academics. The most important arguments raised by these opponents are:

- A Bill would increase the power of the courts at the expense of Parliament, undermining parliamentary supremacy and leading to a politicisation of the Judiciary
- A Bill would increase uncertainty in the law because rights are widely defined, requiring judicial interpretation to give them content
- There is no consensus as to which rights should be protected
- A Bill could lead to an increase in litigation and associated costs
- A Bill could be used to intrude upon the activities of private businesses and associations, and
- A focus on rights can lead to lack of acceptance of responsibilities.

### **The Committee's View (Chapter Seven)**

There are valid arguments both in favour of a Bill and against, and advocates of both positions generally share a concern to ensure the effective protection of human rights in this State. The Committee's finding, however, is that on balance it would not be in the public interest to introduce a

Bill of Rights, even in a statutory form. The Committee's view on this threshold issue makes findings on the other terms of reference hypothetical.

The Committee believes that some of the arguments put forward by advocates of a Bill of Rights have merit. During this inquiry there have been examples given where human rights of individuals or of minority groups have been neglected. The Committee agrees that the common law is not a sufficient protection of individual rights in the absence of legislative action. There is also a role for increased community education on human rights in NSW.

Despite these arguments in favour of a Bill of Rights, the Committee does not support the solution proposed. A statutory Bill could lead to some improvement in human rights protections in some instances. However the cost of this uncertain marginal improvement is a fundamental change in the relationship between representative democracy, through an elected Parliament, and the judicial system. The independence of the Judiciary and the supremacy of Parliament are the foundations of the current system; the Committee is particularly concerned at the change over time that a Bill would make to these respective roles. The Committee believes a Bill of Rights could undermine the legitimacy of both institutions.

The Committee considers that it is ultimately against the public interest for Parliament to hand over primary responsibility for the protection of human rights to an unelected Judiciary who are not directly accountable to the community for the consequences of their decisions. The Committee believes an increased politicisation of the Judiciary, and particularly the judicial appointment process, is an inevitable consequence of the introduction of a Bill of Rights.

The Judiciary is already subject to unprecedented, and frequently unwarranted, public criticism. This will only increase if a Bill of Rights increases the scope for judicial decision-making into an area of broadly defined rights. Much of the public pressure and criticism directed at elected representatives will then also be directed to the Judiciary. It is true that, not being elected, the Judiciary is better able to make unpopular decisions without making compromises to accommodate majority opinions. However in a democracy this public pressure will still seek an outlet, with greater scrutiny of individual judges and much greater public pressure regarding appointment of judges the most likely outcomes. Executive governments will, to a much greater extent than currently occurs, be likely to make appointments based upon judges' political views rather than their legal skills. Ultimately this tendency undermines the independence and quality of the Judiciary.

The Committee does not believe that the statutory nature of a Bill can address its concerns regarding the preservation of parliamentary supremacy. A Bill of Rights would become a fundamental piece of legislation, which future governments would find difficult to amend without being characterised as destroying human rights protections. A Bill of Rights creates expectations: to back away from these expectations defeats the purpose of bringing in the Bill.

Provision of a parliamentary override creates its own difficulties. Rather than facilitating a "dialogue" between Parliament and the Judiciary, the existence of an override sets up a potential conflict between these two arms of government. Neither do limitation clauses adequately address the scope of the potential range of decisions able to be made by the courts under a Bill.

Judges make decisions based upon the facts situations in individual circumstances of the cases before them. At times these decisions have policy implications, but the judicial role is not suited to making decisions on the allocation of limited resources among competing needs, as has been persuasively

argued by former and current members of the Judiciary during this inquiry. Judicial decision-making and political decision-making are different, and need to remain separate. The legitimacy of both institutions suffers when the roles converge. Parliament should not pass legislation, for instance, determining an individual prisoner's sentence. Neither should a court determine the program allocations of a government department.

Overseas the greatest use of Bill provisions has been in the area of criminal law. It would not be unfair to suggest that the area in which local courts currently receive the greatest public criticism, and, consequently, where there is the most significant tension with the other two arms of government, is in the area of criminal law. Involving the Judiciary in a greater range of rights-based issues in criminal law, and, by implication, reducing the power of the Parliament in this area, is quite likely to lead to a fall in public confidence in both politicians and judges and an increase in conflict between the institutions.

The major concern of the Committee is that a Bill of Rights disturbs the relationships between Parliament and the Courts. However it also believes that a Bill of Rights will create uncertainty in the law for an extended period. Arguably any change in legislation creates uncertainty. However the broad nature of rights under a Bill provides far more opportunity for areas of disputed meaning than more narrowly focussed legislation.

The Committee believes that one of the aspects of this uncertainty is that initially there would be a major increase in litigation of a speculative nature, particularly in the area of criminal law. The Committee has not heard sufficient empirical evidence of the Canadian and New Zealand experience to ascertain whether a Bill of Rights encourages a permanent litigious culture. It may equally be that, as some have suggested during this inquiry, alternatives to litigation could be found to resolve disputes.

The Committee believes it is difficult to arrive at a list of specific rights in a Bill. The Committee believes a dilemma is posed as to what criteria is used for inclusion of rights.

Inadequacies in the protection of human rights may exist in New South Wales but the Committee believes the Bill of Rights as a solution raises more problems than it resolves. It is preferable that Parliament become a more effective guardian of human rights rather than handing over this role. In the final two chapters the Committee explores two areas where Parliament's role in protecting human rights can be enhanced without undermining the current relationship between the Judiciary and the Parliament.

### **Parliamentary Enhancements of Rights Protection (Chapters Eight and Nine)**

The Committee recommends the establishment of a scrutiny of legislation committee in NSW, following examples set by the Senate, Queensland, Victoria and the ACT Parliaments. A committee such as this has the potential to apply a systematic approach to the review of legislation at the time it is introduced, so as to alert the Parliament to possible breaches of individual rights and liberties, and provide an opportunity for Ministers to argue why they consider such breaches to be required.

The Committee also recommends amendment of the NSW Interpretation Act 1987 so as to allow judges to consider international human rights instruments in trying to understand legislation where the meaning is ambiguous. Judges currently have this option in any case under common law statutory rules of interpretation. This amendment provides Parliamentary endorsement of the common law position.

## Summary of Recommendations

### Finding 1 **Page 114**

The Committee finds that it is not in the public interest for the NSW government to enact a statutory Bill of Rights.

### Recommendation 1 **Page 132**

The Committee recommends that the NSW Parliament establish a Scrutiny of Legislation Committee similar to the Senate Scrutiny of Bills Committee. This Committee membership should be separate from the current Joint Regulation Review Committee to ensure it can give sufficient attention to its task.

The Committee further recommends that, at least in its first term, the Committee be provided with a budget to contract an academic legal advisor or advisors to assist the Committee with expert advice when required, in addition to the secretariat support necessary for the committee to meet legislative deadlines.

### Recommendation 2 **Page 139**

The Committee recommends that the Attorney General amend s34 of the *Interpretation Act 1987* (NSW) to confirm the common law position that judges are able to consider international treaties and conventions, to which Australia is a party, when there is an ambiguity in a NSW statute.





# Chapter 1 Introduction

## Reference from the Attorney General

**1.1** On 18 November 1999 the then Attorney General, the Hon Jeffrey Shaw QC, wrote to the Chair of the Law and Justice Committee requesting the Committee to investigate the desirability of a statutory Bill of Rights for NSW. This request was partly in response to earlier representations made to the Attorney by the Hon Peter Breen MLC, of the Reform the Legal System Party.<sup>1</sup> In his letter to the Chair, the Attorney noted that, while this issue had been canvassed in other states, there had never been a NSW parliamentary inquiry into a Bill of Rights.

**1.2** The full terms of reference given by the Attorney were:

*That the Standing Committee on Law and Justice undertake an Inquiry into and report on whether it is appropriate and in the public interest to enact a statutory New South Wales Bill of Rights and/or whether amendments should be made to the Interpretation Act 1987 to require courts to take into account rights contained in International Conventions, with particular reference to:*

- k) whether the rights declared in the International Covenant on Civil and Political Rights should be incorporated into domestic law by such a Bill of Rights;*
- l) whether economic, social and cultural rights, group rights and the rights of indigenous people should be included in a Bill of Rights;*
- m) whether individual responsibilities as distinct from rights should be included in a Bill of Rights;*
- n) the consequences for Australian common law of Bill of Rights in the United Kingdom, Canada and New Zealand;*
- o) in what circumstances Parliament might exercise its ultimate authority to override basic rights declared in a Bill of Rights and what procedures need to be put in place to ensure that any such overriding legislation complies with the Bill of Rights;*
- p) the circumstances, if any, in which a Bill of Rights should be binding on individuals as distinct from the Legislative, Executive and Judicial arms of Government and persons or bodies performing a public function or exercising a public power under legislation;*
- q) the extent and manner in which the rights declared in a Bill of Rights should be enforceable;*
- r) whether a Bill of Rights should be subject to any reasonable limits prescribed by law that are demonstrably justifiable in a free and democratic society;*
- s) whether there should be a legislative requirement on courts to construe legislation in a manner which is compatible with international human rights instruments; and*

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<sup>1</sup> Mr Breen is also a member of the Law and Justice Committee.

t) any other matter arising out of or incidental to these terms of reference.

## Conduct of this Inquiry

- 1.3** The Committee placed advertisements in major newspapers on 4 December 1999 for written submissions. The Committee Chair also wrote directly to a number of organisations and individuals with a potential interest in a Bill of Rights advising them of the inquiry and inviting them to make submissions. These organisations included legal professional bodies, human rights experts, community groups, peak bodies and religious organisations. The Chair wrote to the Chief Justice of the Supreme Court, inviting either himself or any of his judicial colleagues to contribute submissions to the inquiry. The Chair also wrote to the Dean of every law school in New South Wales and the Deans of major law faculties in other States, seeking contributions from faculty members with relevant expertise.
- 1.4** On 24 November 1999, the day after the inquiry was announced in the Legislative Council, the Premier the Hon RJ Carr MP was reported as making public statements to the effect that he opposed a Bill of Rights for New South Wales.<sup>2</sup> The Premier later confirmed this view in a formal submission to the inquiry.<sup>3</sup> While this clearly indicated the “Government Response” to any recommendations which supported a Bill of Rights, the Committee nevertheless decided to pursue the terms of reference with an open mind and conduct a full inquiry, including consideration of the relative strengths and weaknesses of a NSW statutory Bill of Rights. However because of the Premier’s public statement, the Committee did not invite State government departments, other than The Cabinet Office, to contribute to the inquiry.
- 1.5** The Committee received 82 submissions. A list of the individuals and organisations that made submissions is reproduced as Appendix One. The Committee also received a number of letters about the Bill (many of them in identical or similar terms), the writers of which are also listed in Appendix One.
- 1.6** The Parliamentary Library Research Service prepared a briefing paper entitled *The Protection of Human Rights: a Review of Selected Jurisdictions*,<sup>4</sup> which examined developments in bills of rights in overseas countries. This was published in March 2000, and was sent out by the Committee secretariat as background information during the inquiry to interested parties.
- 1.7** The Committee held a total of 12 public hearings for the inquiry. Initial hearings were held on 10 April, 15 May, 5 June, 26 June, 18 July, 25 July, 31 July and 2 August 2000. The Committee then interrupted the inquiry because of two other references it had received that had deadlines for reporting prior to the end of 2000. The inquiry resumed in 2001

<sup>2</sup> “Carr kills off any hopes for Bill of Rights” *Sydney Morning Herald* 25/11/99 p9.

<sup>3</sup> Hon R J Carr MP, Premier *Submission* 3/04/00.

<sup>4</sup> G Griffith, Briefing Paper 3/2000, Parliamentary Library Research Service.

with hearings held on 30 January, 1 February, 15 February and 20 March 2001. A list of witnesses to the inquiry is reproduced as Appendix Two.

- 1.8** The Committee concluded its gathering of evidence with a visit to Canberra on 24 May 2001 for briefings with the Senate Standing Committee for the Scrutiny of Bills, and to Brisbane on 29 May 2001 for briefings with current and former members of the Queensland Scrutiny of Legislation Committee. The individuals the Committee met during these trips are also listed in Appendix Two. The information gained from these two site visits forms the basis of much of the material discussed in Chapter Eight of this report.
- 1.9** The Committee met on Wednesday 6 June 2001 to consider an outline of the final report and discuss possible recommendations. The Chair's draft report was circulated to Committee members during September 2001 for consideration at a deliberative meeting held on 28 September 2001. The Minutes of Proceedings for that meeting are reproduced as Appendix Three.

## **Structure of this Report**

- 1.10** The Report provides a context for the debate about a NSW statutory Bill of Rights, then examines the arguments for and against such a Bill in relation to the terms of reference for the inquiry. The Report concludes with a statement of the Committee's views on whether it is in the public interest to enact a NSW Bill of Rights.
- 1.11** Chapter Two examines the meaning and sources of "human rights", including the relevant international covenants. Moves to increased protection of human rights both in Australia and overseas are briefly discussed. Chapter Three examines the history of Bill of Rights initiatives in Australia since World War Two, both at Federal and State levels. Chapter Four discusses the models of Bills of Rights available in other common law countries, in particular the United Kingdom, Canada, New Zealand and the United States. The models are described with brief comment on their respective merits. The Chapter concludes with a discussion of the approaches to parliamentary override, limits clauses and enforceability contained in different models of Bills of Rights.
- 1.12** Chapter Five considers the arguments in favour of a statutory Bill of Rights presented to the Committee during the inquiry. Chapter Six presents the arguments against a statutory Bill of Rights. In both chapters, particular attention is given to issues raised in the terms of reference such as protection of indigenous peoples rights; the extent of rights which should be covered by a Bill of Rights; and the impact of human rights developments in other common law countries on local jurisprudence.
- 1.13** Chapter Seven outlines the Committee's views on the desirability of a NSW statutory Bill of Rights. A member of the Committee, the Hon Peter Breen MLC, has dissented from the conclusions of this Chapter although he supports the recommendations made in the subsequent Chapters. His dissenting report appears as Appendix Nine.
- 1.14** Chapter Eight examines parliamentary scrutiny as a means of enhancing respect for human rights by both the Parliament and the Executive. Recommendations are made as to a suitable model for a NSW scrutiny of legislation committee. The Report concludes with

Chapter Nine, which examines and makes recommendations on the term of reference (i) regarding amendment of the NSW *Interpretation Act 1987*.

## Chapter 2    **Meaning and sources of Human Rights**

### **Introduction**

- 2.1**        The Second World War saw “civilized” nations commit atrocities against their own and other populations on an unprecedented scale. One of the most significant responses to the abuses which occurred was the agreement among nations which came to be known as the Universal Declaration of Human Rights. Since the Declaration was made in 1948 there have been many new international covenants and treaties and the development of a body of international and domestic human rights law. “Bills of Rights” and “human rights” are closely related concepts, and in Australia they have become part of a linked debate. The most notable outcome of this local debate is a continuing lack of support for a Bill of Rights politically, arguably based upon a perceived opposition to implementation of “human rights” in the wider community. Chapter Three of this report examines local attempts to introduce a Bill of Rights.
- 2.2**        Part of the difficulty in the debate is the gulf between the understanding of human rights by advocates of a Bill of Rights and many, though not all, of those who oppose a Bill. The Committee has received a number of detailed submissions which, for instance, describe human rights as if they are in opposition to protections given under the common law. Other writers of submissions appeared not to be aware that rights “protected” under common law can be overridden by legislation by either State or Federal governments.<sup>5</sup> The Committee in this chapter seeks to explain the context of a Bill of Rights in terms of human rights and existing human rights protections, before outlining the recent history of Bills of Rights in Australia and overseas in following chapters.
- 2.3**        This chapter outlines some of the definitions of “human rights” presented during the inquiry, and examines the source of human rights. The major international covenants referred to in this report are explained. The Chapter also looks at existing human rights protections in New South Wales.

### **The Meaning of “Human Rights”**

#### **Definitions**

- 2.4**        The Committee recognises that the concept of human rights has cultural, moral, religious and social dimensions and a theoretical background that goes back at least as far as the writings of political philosophers such as John Locke in the 17<sup>th</sup> century.<sup>6</sup> In the rest of

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<sup>5</sup> Several submissions argue NSW already has a Bill of Rights, tracing this back to the 1689 *Bill of Rights* (UK) or even the *Magna Carta* of 1215. Although the *Imperial Acts Application Act* 1969 (NSW) imported the 1689 *Bill* and *Magna Carta* into NSW law, any rights within that Bill can be overridden by contrary legislation.

<sup>6</sup> For an introductory examination of many aspects of human rights see “Human Rights Explained” produced by the Human Rights and Equal Opportunity Commission, available at

this report the committee approaches human rights from a legal and political perspective, but it is important to briefly outline what is understood by the term “human rights”.

**2.5** Human rights are those rights that are universal across all nations. They are based upon the belief that each individual should be treated with the dignity and respect to which, as a human being, they are entitled. One way to define “human rights” then, is that they are part of what each person needs to be human. Human rights, defined in conventions and legislation, are an attempt to express how people’s humanity should be respected by those with power over them, particularly governments. The *United Nations Declaration on Human Rights* encapsulates this in its first two articles:

All human beings are born free and equal in dignity and rights. They are endowed with reason and conscience and should act towards one another in a spirit of brotherhood<sup>7</sup>.

Everyone is entitled to all the rights and freedoms set forth in this Declaration, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.<sup>8</sup>

**2.6** These rights are given expression in different forms in the various human rights declarations, treaties and covenants, (see next section). Thus there are :

- ‘civil and political rights’ – such as rights to life, liberty, free speech, movement, political thought and religious practice, a fair trial, privacy, to found a family and to vote;
- ‘economic, social and cultural rights’ – such as rights to adequate food and water, health care, education, a clean environment, to respect for cultural practices, and to welfare assistance;
- humanitarian rights – that is the rights of those who are involved in, or affected by, armed conflict, such as the treatment of prisoners of war, of the wounded or sick or shipwrecked, of civilians, and of women and children in particular;
- various categories of rights as defined by the nature of the holders – such as the rights of workers, women, children, minority groups, refugees, indigenous peoples, and people with a disability.

**2.7** In some of the evidence to this inquiry quoted in later chapters there is reference to “generations” in the development of human rights. “First Generation rights” are those from the immediate post war period, exemplified by the *Declaration* and the *International Covenant on Civil and Political Rights (ICCPR)*. These rights are particularly focussed on restraining the state from committing abuses on its citizens of the type witnessed during the 1930s and 40s. Typically, “First Generation” rights are expressed as individual civil and

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[http://www.hreoc.gov.au/hr\\_explained/what.html](http://www.hreoc.gov.au/hr_explained/what.html) Paras 2.4 to 2.7 are based upon part of this text.

<sup>7</sup> Article 1

<sup>8</sup> Article 2

political rights, and are those most familiar to Western democracies. “Second Generation rights” are economic, social and cultural rights, as exemplified by the *International Covenant of Economic Social and Cultural Rights (ICESCR)*. The rights are primarily concerned with matters such as housing, clothing, food, education and social security, which the individual or group requires to enjoy these rights fully. “Third Generation rights” in contrast derived from developing countries and those with Socialist governments, who saw the rights of “groups” as being overlooked by the traditional focus on individual liberties.<sup>9</sup> (These concepts are explained further below in relation to the major Covenants).

### **Limits on Human Rights**

**2.8** Human Rights, despite being universal, have limits. Rights such as the right to be free from torture or slavery, are generally considered to be absolute, but most other rights have been subject to qualification or limitation in some way. The most important limits on human rights are:

- The generality with which rights are expressed in conventions
- Limitation clauses within individual rights; and
- Limits caused by competing rights

**2.9** The generality of the expression of rights is a product of how they have developed and how they are agreed upon. The so-called “first generation” human rights were heavily influenced by liberal political philosophy with its emphasis on the individual and their rights against the state. The formulation of the rights owed much to both the Common Law in English-speaking countries and the Civil Law system applying in European countries. However human rights have come to encompass other influences, particularly with the so-called second and third generation rights. The concepts embodied in current human rights documents come from many different traditions, countries and cultures. Religious systems such as Christianity, Judaism and Islam have also influenced the concepts behind human rights, while more recent movements such as feminism, socialism and environmentalism have also influenced rights and conventions. Many of these influences have conflicting values and there is no agreed way to resolve these so as to identify a “human right” other than the process of negotiation which exists between countries in the development of conventions, declarations and treaties.

**2.10** Because human rights have different contexts in different cultures, yet are at the same time universal, they are of necessity written in very general language. This allows nations to interpret those rights within their own cultural context. As Justice Brennan of the High Court has said:

An attempt to define human rights and fundamental freedoms exhaustively is bound to fail, for the respective religious, cultural and political systems of the world would attribute differing contents to the notions of freedom and dignity

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<sup>9</sup> There is some debate as to the status of “Third Generation” rights in international law: see Department of Foreign Affairs and Trade *Human Rights Manual* 1998 (Commonwealth Government) pp13-14.

and would perceive at least some difference in the rights and freedoms that are conducive to their attainment.<sup>10</sup>

**2.11** The formulation of many rights also contain limitation clauses. This was explained by one witness to the inquiry:

For example, if we take article 19 and 19(3) of the International Covenant on Civil and Political Rights, we will see that the limitation on the right to free speech is cast in the following terms: it says that the right itself carries special duties and responsibilities. The covenant accepts that the right to free speech is not absolute. The covenant then says that the right may be limited where the limitation or restriction is provided by law and is necessary in a democratic society. It sets out the reasons or grounds on which the limitation will apply. The first ground is the rights and reputations of others. It goes on to list other grounds such as national security, public morals and public order.<sup>11</sup>

**2.12** An example such as this illustrates that most rights are not absolute. Another limitation on rights is that typically one right has to be balanced against another. An example of the balancing of the right to freedom of religion as against the right for women not to be discriminated against was explored in a Committee hearing in relation to the ordination of women priests:

I can answer it this way. The answer comes from the definition of the rights themselves. At this stage we have only the international covenants to work from. Article 18.1 of the International Covenant on Civil and Political Rights protects that religion in its current form so that the current teachings, practices, observance and worship of that religion are protected by a right of religion. What is protected is the freedom to exercise one's religious beliefs. We would then be seeing a conflict with a right for all people to be treated equally. The right to equality is not an absolute right. The balance would have to be struck between two sets of competing rights and the covenants make it very clear that one person's rights may well be limited by the enjoyment and exercise of another right. In some senses, even if churches were brought within the scheme of the bill of rights, it would be to protect the churches, to protect current forms of religious organisations so that they are the beneficiaries of the rights themselves. If there is a conflict between the nature of the enjoyment of a particular religious belief and the rights of another, then the process is finding where that balance is to be struck.<sup>12</sup>

**2.13** While most human rights are not absolute, at least in their expression in conventions and treaties, they can be described as interdependent and indivisible. Countries that have signed the *ICCPR* (see para 2.16) for instance, have agreed to protect all of the rights contained in that instrument. This goes back to human rights being those rights which

<sup>10</sup> *Gerhardy v Brown* (1985) 159 CLR 70 at 126.

<sup>11</sup> *Eastman Evidence* 18/7/00 p10-11.

<sup>12</sup> *Eastman Evidence* 18/7/00 p22 (The context of the discussion was whether a Bill of Rights which covered private as well as public authorities could be used to take legal action against heads of churches for failure to ordain women. The conclusion of both witnesses was that a similar situation would apply to that under current Anti-Discrimination legislation, where churches are given certain exemptions.



express how people's humanity should be respected: governments cannot pick and choose which aspects of being human they will respect.

### **Rights and Responsibilities**

- 2.14** A debate in the human rights area, and one which forms the term of reference (c) of this inquiry, is to what extent "responsibilities" should be included when human rights are expressed in conventions and in local legislation. Every right implies a responsibility on the member state to honour that right. When the 1948 *Declaration* was drafted the strongest concern was to protect individual rights against the state, after the recent experience of authoritarian governments before and during the War. Governments were given responsibilities to protect their citizens' rights. However there have been arguments in recent years that part of being a citizen involves accepting responsibilities, and that over-emphasis on rights creates an attitude of avoidance of individual responsibility<sup>13</sup>. This debate will be covered in later chapters. The Committee notes here that many international covenants do discuss responsibilities alongside rights, and that recently a Universal Declaration of Responsibilities has been drafted by an international non-government organisation.<sup>14</sup>

### **Major International Covenants**

- 2.15** While the meaning of human rights is the subject of some debate, the sources of current human rights law is generally accepted. The original source document for current human rights is the *United Nations Declaration of Human Rights*, adopted in 1948 by the majority of the international community in response to the abuses of human rights perpetrated before and during the Second World War. It expresses basic human rights in general terms as a common standard of achievement for all peoples and all nations. These rights include the prevention of slavery and torture, the right to be treated equally regardless of race or gender, the right to own property and the right to privacy. The *Declaration* appears as Appendix Four.
- 2.16** The covenant which has proved most influential in the development of human rights law has been the *International Covenant on Civil and Political Rights* (the *ICCPR*). This was adopted in 1966 to provide detailed explanation of the individual rights of the citizen in relation to the power of the state. Civil and political rights include the right to vote, the right to form trade unions, the right not to suffer cruel or unusual punishment and various protections to ensure a person is not subject to arbitrary arrest or detention without charge. Under Article 40 those states, such as Australia, which have ratified the *Convention* are given obligations to provide reports on progress in implementing the protection of these rights within their jurisdictions. The *ICCPR* appears as Appendix Five.
- 2.17** In the international community there was debate, led by developing nations, as to whether the individual rights protected by the *ICCPR* gave sufficient recognition to the problems

<sup>13</sup> See for example the argument on p3-4 Hon RJ Carr *Submission* 31/3/00.

<sup>14</sup> for more detail on these issues and the Declaration of Responsibilities see "Human Rights Explained" *op cit* fn 2.

faced in countries where inadequate food, housing and health resources were the primary consideration of its citizens. There was also a debate along ideological lines with Socialist countries arguing that rights such as those relating to employment or welfare were not properly encompassed in the *ICCPR*. The idea of broader rights to be enjoyed by groups and individuals, drawing from the economic, social and cultural rights discussed in the 1948 Declaration, then became enshrined in the *International Covenant on Economic, Social and Cultural Rights (ICESCR)*, also adopted in 1966. The *ICESCR* provides for the right to be free from hunger, the right to education, the right to social security, the right to physical and mental health and the right of groups to enjoy their own culture and participate in cultural life. As with the *ICCPR*, those countries, such as Australia, that have ratified the *ICESCR* have obligations to report on progress in implementing the Convention in their jurisdictions. However, while the *ICCPR* is prescriptive in the obligations imposed, the *ICESCR*'s obligations are aspirational in nature. The *ICESCR* appears as Appendix Six.

**2.18** There are many other international treaties and conventions to which Australia is a signatory<sup>15</sup>. Some of these are largely commercial or trade agreements whereas others concern social factors. Apart from the *Declaration* and the *ICCPR*, some of the conventions which have had an influence on the development of Australian law include:

- The *Convention on the Rights of the Child*
- The *International Convention on the Elimination of Racial Discrimination*
- The *Convention Relating to the Status of Refugees*
- *United Nations Draft Declaration on the rights of Indigenous Peoples*, and
- The *Convention on the Elimination of all forms of Discrimination Against Women*.

**2.19** Two points need to be made in relation to these international agreements. Firstly, regardless of whether NSW has a Bill of Rights these international agreements have and will continue to have an influence on NSW through their impact on both Federal and State legislation and through their impact on the common law (see below). Secondly, a local Bill of Rights does not need to adopt the terms of some or all of these conventions. The *Declaration* and these conventions form what is often termed as "the International Bill of Rights".<sup>16</sup> These international instruments are the core of human rights law that can be adapted or expressed in terms relevant to local conditions in a Bill of Rights.<sup>17</sup>

## Human Rights Protection in NSW

<sup>15</sup> The text of most of these conventions can be viewed through the United Nations High Commissioner on Human Rights website at <http://www.unhchr.ch/>

<sup>16</sup> For example: Department of Foreign Affairs and Trade *op cit* p13 refers to the *Declaration*, the *ICCPR* and the *ICESCR* as the International Bill of Rights.

<sup>17</sup> This point was made in submissions and evidence by many supporters of a Bill of Rights: for example the Public Interest Advocacy Centre (Durbach *Evidence* 15/5/00 p8), and Australian Lawyers for Human Rights (*Submission* 30/3/00 p14-15).

**2.20** When the Queensland Legal Constitutional and Administrative Committee considered a Bill of Rights one of the outcomes of its inquiry was a study it commissioned into the rights protected under existing Queensland law.<sup>18</sup> In this inquiry the committee found the submissions from Australian Lawyers for Human Rights<sup>19</sup> and the Law Society of New South Wales particularly helpful because they began with an examination of the “rights” currently protected in New South Wales.<sup>20</sup> These cover the following areas:

- Protections under the Constitution
- Protections in Federal legislation
- Protections in NSW legislation
- Common Law protections, and
- International remedies.

### **Protections under the Constitution**

**2.21** The Commonwealth Constitution contains several rights, mainly expressed as prohibitions on Federal or State powers. These are limited and ad hoc rather than forming a coherent collection of specific rights. However these rights cannot be overruled by any statute passed by any Parliament in Australia. Section 116, prohibiting the Commonwealth from making laws with respect to the establishment of, or prohibition on the exercise of religion, is perhaps the best known.<sup>21</sup> Other rights include:

- Under s 51(xxxi) the Commonwealth may only compulsorily acquire property if it does so on just terms (ie with compensation)<sup>22</sup>
- Section 80 provides the right to trial by jury for federal indictable offences
- Section 117 protects residents from one state from special disability or discrimination based upon residence, in other states, and

<sup>18</sup> *Queenslanders Basic Rights*, November 1998.

<sup>19</sup> In outlining the existing protections ALHR provided a critique of the adequacy of these protections; the debate as to their adequacy is discussed in Chapter Five.

<sup>20</sup> *Submission 30/3/00* p7-14 (ALHR); *Submission 15/5/00* p7-9 (Law Society). There is also a detailed discussion of existing rights in p14-26 of Williams, *A Bill of Rights for Australia* (UNSW Press) 2000.

<sup>21</sup> A submission to this inquiry from former Member Stephen Mutch (*Submission 17/01/01*) discusses some of the cases on this section.

<sup>22</sup> In a submission to this inquiry the Australian Property Institute, the professional association for property experts and valuers, points out that there is no corresponding right to compensation in the NSW Constitution, and hence no right against the NSW government.

- The separation of powers contained in Chapter Three of the Constitution, which establishes the High Court, also provides some protection from inappropriate use of executive power.<sup>23</sup>

**2.22** A further protection is provided by s109 of the Constitution which renders State legislation invalid where it is inconsistent with Federal legislation. The width of the Federal anti-discrimination statutes (see below) means that there is significant scope for Federal legislation to protect human rights against action by States and territories.<sup>24</sup> However s109 can also be used by a Federal government to override State legislation which protects rights.

**2.23** The High Court in recent years has also found “implied rights” in the Constitution. For example, using sections 7 and 24, the High Court found an implied right to freedom of political communications, overturning limits placed upon political advertising on radio and television during an election campaign<sup>25</sup>. This implied right was also developed in relation to defamation of politicians in the *Theophanous* case.<sup>26</sup>

### **Protection of Rights in Federal Legislation**

**2.24** Some significant rights are given to particular groups in NSW under either Federal or State legislation. The basis for much of this is the anti-discrimination statutes, most of which date from the mid 1970s to the early 80s. Federal governments have passed legislation protecting different categories of persons from discrimination which draw upon principles from the *ICCPR* and covenants addressing discrimination issues. This legislation includes the *Sex Discrimination Act 1984*, the *Disability Discrimination Act 1992* and the *Racial Discrimination Act 1975*. Under the *Human Rights and Equal Opportunity Commission Act 1986* the Human Rights and Equal Opportunity Commission (HREOC) was established to oversee the protection of these rights. The Commission was given investigatory and reporting powers but, following the case of *Brandy v Human Rights and Equal Opportunity Commission*,<sup>27</sup> HREOC is not able to provide enforceable legal remedies. Included in schedule 2 of the 1986 Act is the *ICCPR*, as breaches of human rights by Commonwealth agencies are defined by that instrument.

**2.25** There are other Federal statutes which provide direct or indirect protection of what are commonly regarded as human rights. These include:

<sup>23</sup> For example, legislation aimed at increasing one individual’s term of imprisonment, was considered to an executive encroachment on judicial power – see *Kable’s Case* (1995) 189 CLR 5.

<sup>24</sup> see Williams *A Bill of Rights for Australia* UNSW Press 2000 p24.

<sup>25</sup> See *Australian Capital Television Pty Ltd v Commonwealth* (1992) 177 CLR p106, discussed in Law Society *Submission 15/5/00* p7 and Williams *op cit* pp18-19.

<sup>26</sup> *Theophanous v Herald & Weekly Times Ltd* (1994) 182 CLR p104.

<sup>27</sup> (1995) 183 CLR 245.

- The *Privacy Act 1988* (Cth), which guarantees the rights to privacy contained in article 17 of the ICCPR
- The *Freedom of Information Act 1982* (Cth) which gives limited rights to obtain personal information held by Federal agencies
- The *Evidence Act 1995* (Cth) which gives judges a discretion to exclude improperly or illegally obtained evidence
- The *Family Law Act 1975* (Cth) which has incorporated principles from the Convention on the Rights of the Child.

### **Protections of Rights in NSW Legislation**

#### **2.26**

The protections given under NSW statutes follow the same pattern of protecting rights based upon principles established in international instruments for a limited number of categories of groups or individuals. The key act is the *Anti-Discrimination Act 1977*, with an Anti Discrimination Board to oversee its implementation. The *Disability Services Act 1993* sets out a range of non-enforceable principles relating to the treatment of people with disabilities. Privacy and related protections are also included to a limited extent in the *Privacy and Personal Information Protection Act 1998* (NSW) and the *Freedom of Information Act 1989* (NSW) although these only address rights against State government agencies<sup>28</sup>. The *Evidence Act 1995* (NSW) also gives similar protections in court proceedings to those in the Commonwealth Act.

### **Common Law protections**

#### **2.27**

The common law over the centuries since *Magna Carta*, and particularly since the *Bill of Rights Act 1689* (UK) has developed a series of protections of individual liberties and due process. These are primarily “left over” rights – the Federal and NSW Parliaments are at all times free to pass legislation which abrogates these rights, and only those common law protections which are not limited by statute remain in force. Despite this, common law rights have had a major and continuing impact on criminal law and related areas. They include the right against self incrimination, the right (under tort law) to sue for false imprisonment, and the immunity from search without a warrant. Other important protections include the presumption of the onus of proof being on the prosecution to prove a criminal offence; and the requirement that the standard of proof in criminal cases is that of proven beyond reasonable doubt. Each of these rights can be, and sometimes are, overruled by statute, and their application is also largely dependent upon the discretion of individual judges. The writ of *habeas corpus*, however, by which an individual can seek redress for false imprisonment, is still very much able to be used in the protection of human rights.

<sup>28</sup> In a submission to the inquiry, Privacy NSW (the Office of the NSW Privacy Commissioner) provides a summary of the gaps in current privacy protection in NSW, particularly in relation to collection of information by the private sector – *Submission 11/4/00*.

**2.28** Aside from the “traditional” common law rights there is the potential for further protections via rules of statutory interpretation. Under common law rules of statutory interpretation, judges can use international human rights instruments to assist them in interpreting statutes or the common law. Justice Kirby of the High Court has explained this approach:

In judging whether a right is fundamental, regard might be had to any relevant constitutional or statutory provisions and to the common law.... It is also helpful, in considering fundamental rights, to take cognisance of international statements of such rights, appearing in instruments to which Australia is a party, particularly where breach of such rights give rise to procedures of individual complaint.

These provisions reflect notions with which Australian law is generally compatible. To the fullest extent possible, save where statute or established common law authority is clearly inconsistent with such rights, the common law in Australia, when it is being developed or re-expressed, should be formulated in a way that is compatible with such international and universal jurisprudence.<sup>29</sup>

**2.29** As well as interpretation, judges can also use international law to develop new rights in the common law.<sup>30</sup> A very important case in this regard was *Minister for Immigration and Ethnic Affairs v Teoh*.<sup>31</sup> In this case the High Court ruled that, as the Commonwealth had ratified the *Convention on the Rights of the Child*, the decision-maker had to give consideration to the rights in that *Convention* when considering how to protect the applicants interests, even though the *Convention* had not been implemented by domestic legislation. Another example of the influence of international human rights on domestic common law is the found in the *Dietrich* case,<sup>32</sup> where it was deemed that a litigant who was unable to obtain legal representation had been denied the common law right to fair trial.

### **International Remedies**

**2.30** Under certain circumstances, an individual may seek an international remedy from one of the three main international committees that receive complaints. These committees are the Human Rights Committee, established under the ICCPR; the Committee on the Convention for the Elimination of All Forms of Racial Discrimination; and the Torture Committee established under the *Convention against Torture*. Any findings by a committee that human rights are violated, and any recommendations to address this, are not binding on Federal or State governments, although action is sometimes taken to avoid adverse international opinion. An example where a successful complaint to the Human Rights Committee resulted in remedial action by the Federal government was a complaint in the 1990s against provisions in the criminal law in Tasmania, which made certain types of homosexual activity by consenting adults an indictable offence. Following an adverse

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<sup>29</sup> (1995) 183 CLR 273.

<sup>30</sup> see Brennan J in *Mabo & Others v Queensland (No.2)* (1992) 175 CLR 1 at 42.

<sup>31</sup> (1995) 183 CLR 273.

<sup>32</sup> *Dietrich v The Queen* (1992) 177 CLR 292.

finding by the Human Rights Committee, the Federal government passed the *Human Rights (Sexual Conduct) Act 1994 (Cth)*, which overrode the Tasmanian law.

### **The Adequacy of Current Protections**

- 2.31** The description of current protections of human rights above is provided as a context for the debate on the need for a Bill of Rights, discussed in Chapters Five and Six; it is not intended in this Chapter to argue that human rights are or are not adequately protected under existing laws. Those who support a Bill of Rights believe these current protections in New South Wales are ad hoc, narrowly focussed and inadequate. They see a Bill of Rights as necessary to provide a comprehensive framework for the protection of rights.
- 2.32** Those who oppose a Bill of Rights believe the essential protections necessary to prevent human rights abuses already exist, in current laws, and, more importantly, through the institutions of responsible and democratic government and an independent judiciary. They argue that it is the current constitutional structure which has prevented (or limited) human rights abuses, and that a Bill of Rights would undermine the stability of the structure.

## Chapter 3 History of Bills of Rights in Australia

### Introduction

**3.1** The United States introduced the Bill of Rights into its Constitution in 1789. Most jurisdictions in Australia have considered introducing a Bill of Rights in Australia since the Second World War, and partial moves to a Bill of Rights have been put twice to national voters. Despite this Australia is one of the few countries in the world that has not adopted a Bill of Rights as part of its constitutional structure.<sup>33</sup> This Chapter surveys the major inquiries and attempts to introduce a Bill of Rights in Australia, and finishes with a discussion of current local pressures on governments to introduce a Bill.

### Federation to World War Two

#### Federation

**3.2** There was a debate in Australia prior to Federation as to whether to adopt a US style Bill of Rights for Australia. When Australia's Constitution was enacted in 1901 it contained some sections, such as s116, which were influenced by the American Constitution. However the "founding fathers" deliberately chose not to adopt a defined Bill of Rights.<sup>34</sup> Overall the British approach was adopted over the American. This approach gave Parliament the ultimate responsibility for making laws without the checks and balances of the United States system. Individual freedom was guarded by the democratic system and by respect for the rule of law, underpinned by an independent judiciary, rather than by guarantees of rights in a written document.

**3.3** While a belief in the supremacy of Parliament and the rule of law strongly influenced the decision not to adopt a Bill of Rights, experts such as Professor Williams have pointed out there was also a less high minded reason.<sup>35</sup> A constitutionally entrenched Bill of Rights would have caused major problems for newly created Federal and state governments at the time in their treatment of minorities. A Bill of Rights at the turn of the century would have caused major problems for the validity of the White Australia policy in immigration and the prevailing treatment of Aboriginal persons at the time. Professor Williams states that s51 (xxvi) of the Constitution, the so-called "race power", has been used in the *Hindmarsh Island*

<sup>33</sup> See Griffith G *The Protection of Human Rights: a review of selected jurisdictions*, NSW Parliamentary Library Research Service Briefing Paper No 3/2000. Afghanistan, Brunei, Myanmar (Burma) and Bhutan were among the only other countries that Griffith could find without a current Bill of Rights.

<sup>34</sup> See Constitutional Commission, *Individual and Democratic Rights: Report to the Advisory Committee to the Constitutional Commission* Commonwealth of Australia 1987 p1-3, also Breen P *Advance Australia Fair* Cape Byron Press 2000 p39-40.

<sup>35</sup> See *A Bill of Rights for Australia* UNSW Press 2000 p7-9, tendered as part of Professor William's submission to the inquiry, also Constitutional Commission *op cit* p2.



case<sup>36</sup> to argue that the Commonwealth government has the power to pass laws that discriminate against Australians on the basis of their race.<sup>37</sup> He notes that one of the framers of the Constitution, Andrew Inglis Clark, proposed a clause taken from the United States Bill of Rights which would have prevented discrimination on the basis of race. This anti discrimination clause was rejected at the 1898 Constitutional convention in favour of the current section 117.<sup>38</sup> In the debate over Inglis's clause one delegate to the Convention, a State Premier, successfully argued:

It is no use for us to shut our eyes to the fact that there is a great feeling all over Australia against the introduction of coloured persons. It goes without saying that we do not like to talk about it, but still it is so. I do not want this clause to pass in a shape which would undo what is about to be done in most of the colonies, and what has already been done in Western Australia [legislation preventing Asian and Africans from gaining miner's rights on gold fields], in regard to that class of persons.<sup>39</sup>

**3.4** Edmund Barton, Australia's first Prime Minister, stated in 1898 that the power under s51 (xxvi) was necessary "to regulate the affairs of the people of coloured or inferior races who are in the Commonwealth".<sup>40</sup> This was a reference to mining, factory and immigration laws at the time which discriminated against Chinese and other non-Anglo immigrant workers.

**3.5** Section 51 (xxvi) was also drafted to support the policies then being pursued by state governments in relation to Aboriginal peoples. The section stated that the Commonwealth Parliament should have no power to make laws for Aboriginal persons, leaving this to state governments.<sup>41</sup> Section 127 excluded Aboriginal people from being counted in the Commonwealth census. Changes were only made to s51(xxvi) and s127 (the latter being removed) in the 1967 referendum.

### 1944 Referendum

**3.6** Australia's constitutional arrangements remained relatively stable from Federation through the ensuing decades. The first significant move toward a Bill of Rights came from the Labor Attorney General, Dr Herbert Evatt, in 1944, following an earlier Constitutional

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<sup>36</sup> *Kartinyeri v Commonwealth (Hindmarsh Island case)* (1998) 152 ALR p540

<sup>37</sup> See Williams, *A Bill of Rights for Australia* UNSW Press 2000 p7. It should be noted the judges in the *Hindmarsh Island* case did not make a definitive finding on this issue.

<sup>38</sup> This merely prevents discrimination between states based upon residency.

<sup>39</sup> Sir John Forrest, from the *Official Record of the Debates of the Australasian Federal Convention* (1986), Legal Books, quoted in Williams *op cit* p37.

<sup>40</sup> Williams *op cit* p7.

<sup>41</sup> This provision allows states the power to exclude Aboriginal people from voting.

convention.<sup>42</sup> As part of a post war reconstruction plan the Federal government sought to gain increased powers from the States over the regulation of employment and production, in return providing guarantees of free speech and freedom of religion. These guarantees and the increase in Federal powers required amendments to the Constitution. The 1944 referendum proposing these changes was defeated with a 53.3% “no” vote. The Prime Minister John Curtin attributed the result to concerns about continuing the exercise of wartime powers by the Federal government into peacetime.<sup>43</sup>

## Post War to the 1980s

- 3.7** After World War Two there was little in the way of moves towards a Bill of Rights until the 1980s. This was despite Australia playing an active role in the drafting of the 1948 *United Nations Declaration of Human Rights* and being an active participant in the establishment of subsequent conventions.

### Queensland 1959 Proposal

- 3.8** The only significant post War initiative for a Bill of Rights prior to the 1980s came from the Queensland Country Party/Liberal Coalition, with the Constitution (Declaration of Rights) Bill introduced into the Queensland Parliament by then Premier Nicklin. This Bill sought to protect basic civil liberties and the independence of the judiciary, but was abandoned due to opposition to it from the Labor Opposition.<sup>44</sup>

### Federal Human Rights Bill 1973

- 3.9** The 1970s were a period of significant law reform. One of the most important developments was the introduction into most jurisdictions of anti-discrimination laws that incorporated many human rights principles into local law. The Federal Labor government under Gough Whitlam initiated the most radical move towards a Bill of Rights in Australia to date when Federal Attorney General Lionel Murphy introduced a *Human Rights Bill* into Federal Parliament in 1973. This bill was largely based upon the *International Covenant on Civil and Political Rights*. If enacted, this Bill would have overridden inconsistent State legislation and Commonwealth legislation if it were contrary to the Act. This Bill was never progressed due to opposition from State governments,<sup>45</sup> and in 1975 the incoming Coalition government did not revive the concept.

<sup>42</sup> See Williams *op cit* p27-28, Electoral and Administrative Review Commission, (EARC) *Report on Review of the Preservation and enhancement of Individuals' Rights and Freedoms*, Queensland, August 1993 p48, Breen P *Advance Australia Fair* Cape Byron Press 2000 p40-41.

<sup>43</sup> Breen *op cit* p41.

<sup>44</sup> See EARC *op cit* p48, Breen P *op cit* p46.

<sup>45</sup> Williams *op cit* p30, Breen *Ibid* p43, EARC *op cit* p49.

## Federal Bill of Rights Proposals in the 1980s

- 3.10** When the Hawke Labor government took office in 1983 the discarded Murphy Bill was reworked by Attorney General Gareth Evans and circulated on a confidential basis to Premiers as part of an initial consultation process. The issue became controversial when the Queensland Premier Sir Joh Bjelke-Petersen made the Bill public during the 1984 Federal election campaign, accusing the Federal government of acting secretly to impose a Bill of Rights.<sup>46</sup> Although the Federal Labor government was re-elected the Bill was withdrawn for further redrafting.
- 3.11** The new Attorney General Lionel Bowen brought to Parliament a revised Bill as part of a human rights package in 1985. The Bill was to be an ordinary Act of Parliament, breaches of which would be investigated by the Human Rights and Equal Opportunity Commission. Prior to the introduction of the Australian Bill of Rights Bill, the Senate Standing Committee on Constitutional and Legal Affairs investigated the desirability of a Bill of Rights in general terms. The ensuing report, published in November 1985, stated that there was no prospect that a constitutionally entrenched Bill would pass a referendum, and that even if it did the preference of committee members was for human rights to be protected through ordinary legislation.<sup>47</sup> Following this, Bowen's Bill passed through the House of Representatives but lapsed when withdrawn after long debate in the Senate.
- 3.12** In December 1985 the Federal Government established a Constitutional Commission to investigate and report on a revision of the Australian Constitution. One of the Commission's advisory committees, the Advisory Committee on Individual and Democratic Rights, was asked to inquire into whether and in what form rights should be guaranteed in the Constitution. After a two year inquiry, with consultations in every state and over 500 submissions, the Committee concluded in 1987 that rather than enacting a Bill of Rights it would be preferable to limit the legislative powers given to governments in specific sections of the Constitution<sup>48</sup>. However, the Final Report of the Constitutional Commission, released in July 1988, rejected this recommendation from its advisory committee. Instead, it recommended inserting a Bill of Rights into Chapter VIA of the Constitution (to be entitled "Rights and Freedoms").<sup>49</sup>
- 3.13** The Federal Government did not fully adopt this proposal. Instead, prior to the release of the Commission's Final Report, the government drafted referendum proposals based upon an earlier interim report of the Commission. These more limited proposals sought to amend the Constitution to extend to the States the protections already given to individuals against Federal government action: guarantees of trial by jury in serious criminal cases; exercise of religious freedom and the acquisition of property on just terms. The

<sup>46</sup> EARC *op cit* p49. The Commission Report suggest this was the start of the perception that a Bill of rights was a "thinly veiled attack on the parliamentary system of government by those on the left of the political spectrum".

<sup>47</sup> Senate Standing Committee on Constitutional and Legal Affairs, *A Bill of Rights for Australia?* AGPS Canberra November 1985), quoted in LCARC p12,*op cit* fn 25.

<sup>48</sup> Constitutional Commission *op cit*, Chapter Five.

<sup>49</sup> LCARC *op cit* p12, Williams *op cit* p31.

referendum amendments also sought to recognise local government in the Constitution and provide for fair and democratic parliamentary elections throughout Australia which guaranteed one vote, one value.<sup>50</sup> Although this 1988 referendum was not in any way proposing a comprehensive Bill of Rights, it was characterised as such in public debates by opponents. All the proposals were rejected in every state, with only 33.7% support nationally.<sup>51</sup>

- 3.14** Since 1988 there has been little attempt by federal governments to revive interest in a Bill of Rights,<sup>52</sup> and the focus of activity has shifted to state governments.

### **Inquiry by the Victorian Legal and Constitutional Committee**

- 3.15** In 1985 the Legal and Constitutional Committee, a joint house committee of the Victorian Parliament, was given terms of reference to investigate and report on the desirability of introducing legislation to define and protect human rights in Victoria. It completed its inquiry in 1987. In its final report the Committee expressed considerable concern about the difficulties in formulating and defining human rights,<sup>53</sup> yet equally acknowledged that the common law and the system of responsible government left gaps in which individual freedoms and human rights went unprotected.<sup>54</sup> The Committee considered various options for improved rights protection, but concluded against those that supported a Bill of Rights enforced by judicial review:

The Committee believes that it is beyond all argument that Parliament historically has been the final arbiter of questions of human rights. Perhaps more importantly, the Committee further acknowledges the persuasiveness of the argument that issues of such fundamental importance to society as those relating to basic human rights should be resolved by elected and electorally accountable representatives of the people, rather than by unelected officials, however worthy and respected those officials may be.<sup>55</sup>

- 3.16** The Committee took the approach that the best guarantee of individual freedoms was to strengthen the focus of Parliament on its role as the protector of individual rights. To this end the Committee made two major recommendations: firstly for the Victorian Parliament to enact a Declaration of Rights and Freedoms, to be inserted into the Constitution; and

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<sup>50</sup> There was also a proposal for four year terms for Federal governments.

<sup>51</sup> EARC *op cit* p50.

<sup>52</sup> There was some discussion of a Bill of Rights at the Constitutional Convention held in Canberra in February 1998 (see Breen p56-58) but proposals made by delegates were not taken up by major parties.

<sup>53</sup> Legal and Constitutional Committee *Report on the Desirability or Otherwise of Legislation Defining and Protecting Human Rights* Parliament of Victoria, April 1987, especially p8-18.

<sup>54</sup> *Ibid* Chapter Five.

<sup>55</sup> *Ibid* p94.

secondly to establish a Parliamentary committee to scrutinize all bills according to the criteria set out in the Declaration.

- 3.17** The Declaration listed 13 rights and freedoms, including the right to life, the right to privacy; the right to marry; the right against arbitrary arrest, the right to vote and the freedom of peaceful assembly. However the most important provision of the Declaration was, arguably the statement in it that “This declaration does not create any right of action”. As explained by the Chairing Member of the Committee:

Unlike a Bill of Rights, this Declaration would not be enforceable through the courts. It would not present an opportunity for endless litigation, or constitute a challenge to the authority of the democratically elected Parliament. On the contrary, the Declaration would act as a beacon to Parliament in terms of the rights and freedoms which it should seek to protect, and would remind the Parliament of its responsibilities in this regard.<sup>56</sup>

- 3.18** The Declaration was introduced into the Assembly as a Bill in 1988 but subsequently lapsed. The proposal for a scrutiny of bills committee was later adopted in a revised form with different terms of reference. (This is discussed in Chapter Eight of this report.)

## Queensland Inquiries

### Electoral and Administrative Review Commission inquiry

- 3.19** The Fitzgerald Report into police corruption in Queensland, released in 1989, expressed concern that Queensland had fallen behind other states in relation to the protection of individual liberties.<sup>57</sup> A number of inquiries were instigated by a public body called the Electoral and Administrative Review Commission.<sup>58</sup> One of the Commission’s references was to investigate whether to recommend a Bill of Rights for Queensland. The Commission undertook a wide ranging public inquiry from June 1992 to August 1993 and produced a report which recommended in favour of a Bill of Rights. The Commission proposed that the Bill operate as ordinary legislation for five years, after which it should be put to a referendum for entrenchment in the Queensland Constitution. Once the Act was entrenched in the Constitution, the Commission argued there should be no power of parliamentary override to the provisions of the Bill.
- 3.20** The Commission’s Report represents the most detailed support for a state-based Bill of Rights prepared by a public body in Australia. It provides a detailed draft Bill of Rights, based upon consideration of arguments for and against the inclusion of each individual right. The Commission proposed that only civil and political rights be enforceable,

<sup>56</sup> *Ibid*, Chairing Member’s Summary.

<sup>57</sup> EARC *op cit* p1.

<sup>58</sup> The Commission was established by statute to investigate different aspects of the public administration of Queensland referred to in the Fitzgerald Report.

although the economic, social and cultural rights stated should also be respected by the Queensland government and the community generally.

### Queensland Parliamentary inquiry

- 3.21** The incoming Goss Labor government did not take up the recommendation for the Bill. The Commission's report was also the only one of its 22 reports not to be reviewed by the Parliamentary Committee established for this purpose. To remedy this omission a new parliamentary committee, the Legal, Constitutional and Administrative Review Committee (LCARC), undertook to inquire into the Commission's proposal in late 1995. This review was completed in November 1998, and included a visit to Canada, during which the Committee held 25 meetings with key political and legal figures to discuss the practical impact of the Canadian Bill of Rights (the *Charter of Rights and Freedoms*).
- 3.22** The LCARC produced two final reports to complete its inquiry. The first was a specially commissioned booklet, *Queenslanders' Basic Rights*<sup>59</sup> which identified and explained the protections enjoyed by Queenslanders under existing law. This was distributed by the Committee with the intention that it be used as an educational tool in the community. The Committee also produced a main report, *The preservation and enhancement of individuals' rights and freedoms in Queensland: Should Queensland adopt a bill of rights?*<sup>60</sup> This report recommended against the adoption of the Commission's 1993 Bill of Rights, or any other model of a Bill of Rights. The main reasons given for its finding were:

An enforceable Queensland Bill of Rights would most likely result in a significant and inappropriate transfer of power from the Parliament (the Queensland legislative body elected by the people) to an unelected judiciary. In the case of a constitutionally entrenched bill of rights, it would be the judiciary, not the Parliament, that ultimately decides the validity of legislation and governmental action. Judicial decisions that impose significant costs to society or that do not meet with general community acceptance would be extremely difficult to modify or reverse. New Zealand's experience with a statutory bill of rights also shows that a bill of rights need not be constitutional in form to effect a significant transfer of power.

As a result of this shift, the judiciary will potentially find itself in a position where it is making far more controversial decisions of a policy nature; decisions affecting the entire community as to competing social and economic objectives. The judiciary may not be fully equipped to make many of these decisions. There is also a real likelihood that the judiciary will, as a result, become politicised. Another potential effect is that the existing high level of public confidence in the judiciary might be undermined if the public perceive that judges are making more "political" decisions.<sup>61</sup>

<sup>59</sup> Queensland Parliament, 11 November 1998.

<sup>60</sup> Queensland Parliament, Report No 12, November 1998.

<sup>61</sup> *Ibid* p iv.

- 3.23** The report also concluded that, based on the experience in other jurisdictions, a Bill of Rights could lead to an increase in litigation and benefit those best able to enforce their rights rather than those most in need of their rights being protected. The Committee was also concerned that, to be effective, a Bill of Rights would need to cover the private sector carrying out public functions, and that this created extremely difficult definitional issues. Following this parliamentary committee report, the 1993 Commission's proposal did not proceed any further.<sup>62</sup>

## ACT Proposal

- 3.24** The Australian Capital Territory government in 1994 came close to passing a Bill of Rights.<sup>63</sup> Shortly after the publication of the Queensland Electoral and Administrative Review Commission Bill of Rights proposal the ACT Attorney General produced a draft bill which, after public consultation, was tabled in the ACT Assembly. However in early 1995 the government changed and the Bill was left to lapse, and it has not been revived since.

## Current Pressures for a Bill of Rights

- 3.25** The Law and Justice Committee is not aware of any current major inquiries into a Bill of Rights in other Australian jurisdictions. Significant calls for a Bill of Rights in recent times have come from members of the judiciary, although, equally, other members of the judiciary have publicly opposed a Bill. During this inquiry the Committee received a submission which provided a helpful summary of recent comments, made in judgements, speeches and other public statements, by senior members of Australian courts on this issue.<sup>64</sup> The Committee has also received several submissions from current or former members of the judiciary, some supporting and some opposing a NSW Bill of Rights.

- 3.26** A major change overseas which has been the subject of much local interest is the *Human Rights Act 1998* (UK), which is discussed in more detail in the next chapter. The impact of this Bill is that British jurisprudence is likely from now on to be increasingly influenced by human rights standards expressed in the Act. This issue prompted one of the more prominently recently reported statements impliedly<sup>65</sup> supporting a Bill of Rights. The Chief Justice of the NSW Supreme Court, Justice Spigelman, in an address to the Australian Plaintiff Lawyers Association dinner, said

The incorporation by the *Human Rights Act 1998* of the European Convention into English law gives rise to a radically different approach to the influence of international human rights instruments on the development of the common law.

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<sup>62</sup> Note however Chapter Eight of this report, where the Queensland *Legislative Standards Act 1992* (QLD) is discussed, in relation to the principles in s4.

<sup>63</sup> See Breen *op cit* p50 –51.

<sup>64</sup> Ellson *Submission 26/4/00*.

<sup>65</sup> The Chief Justice did not specifically call for a Bill of Rights as a solution to the problem he identified.

It is in this respect, more than any other, that Australian common law and that of England will progressively diverge....

...one of the great strengths of Australian common 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, will progressively be removed as sources of influence and inspiration.

This is a transition of great significance for Australian lawyers. At the present time, for the vast majority of us, American Bill of Rights jurisprudence is virtually incomprehensible. Within a decade it is quite likely that in substantial areas of the law, British and Canadian cases will be equally incomprehensible to Australian lawyers. The Australian common law tradition is threatened with a degree of intellectual isolation that many would find disturbing.<sup>66</sup>

**3.27** The next chapter examines some of these overseas developments as a context for considering the advantages and disadvantages for a NSW statutory bill of rights.

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<sup>66</sup> Spigelman CJ, Speech to National conference of the Australian Plaintiff Lawyers Association, 22 October 1999 (available via [www.lawlink.nsw.gov.au](http://www.lawlink.nsw.gov.au)).



## Chapter 4 Models of Bills of Rights

### Introduction

- 4.1** Australia is one of a minority of countries that does not have a Bill of Rights.<sup>67</sup> The advantage of this situation is that it provides an ample opportunity to consider the models adopted in different jurisdictions to protect human rights. The terms of reference for this inquiry refer specifically to a “statutory” bill rather than a model which is constitutionally entrenched. However to understand many of the arguments for and against a NSW Bill of Rights it is important to be aware of the various alternative models. Many of the arguments have been developed from observation of how these Bills have worked in practice.
- 4.2** In this chapter the focus is on models operating in common law jurisdictions most similar to New South Wales. The oldest is the United States, a constitutionally entrenched model. A more recent constitutionally entrenched bill examined is the Canadian *Charter of Rights and Freedoms*. Two of the most recent bills are both statutory: the UK *Human Rights Act 1998*, and the New Zealand *Bill of Rights Act 1990*. A brief discussion of the South African *Bill of Rights* incorporated in its 1996 Constitution is also included because of its relevance to the term of reference in this inquiry relating to social, economic and cultural rights. These five models were the only ones discussed at any length in submissions and evidence to this inquiry.
- 4.3** This chapter presents some brief arguments as to the relative merits of the models. However these are mainly presented so as to distinguish arguments about Bill of Rights generally from arguments which are only relevant to a particular model. The chapter concludes with a discussion of issues the various models of parliamentary override, limits clauses and enforceability of rights, all terms of reference for this inquiry.

### The United States Bill of Rights

- 4.4** The arguably best known constitutional Bill is the United States Bill of Rights. It began as ten amendments made in 1791 to the 1789 US Constitution. Later amendments were made during and immediately after the Civil War in the years 1865, 1868 and 1870. The key features of the US Bill of Rights, other than its longevity, are:
- It is constitutionally entrenched, subject to interpretation but not alteration
  - Congress is given no override powers to pass contrary legislation
  - Its rights are expressed in absolute terms
  - The rights protected are primarily individual civil and political rights

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<sup>67</sup> For a more detailed consideration of international comparisons see Griffith G *The Protection of Human Rights: a review of selected jurisdictions*, NSW Parliamentary Library Research Service Briefing Paper No 3/2000.

- As a result of judicial interpretation, its rights are protected against action by State governments.

### **Rights Protected**

**4.5** The rights in the Bill of Rights are expressed in negative terms, that is restrictions on the power of governments rather than positive rights to be exercised – “Congress shall make no law...”<sup>68</sup> The Fourteenth Amendment, preventing the deprivation of a person’s life, liberty or property “without due process of law” or the denial to any person within its jurisdiction of the equal protection of the law has proved particularly influential, as will be discussed below. Other rights protected (by preventing Congress passing contrary laws) include:

- Freedom of speech, including freedom of the press and the right of peaceful assembly
- Freedom of religion, including the prohibition of Congress establishing a state religion
- The right to compensation for the acquisition of private property
- The prevention of cruel or unusual punishment
- The right to obtain legal representation in criminal proceedings
- The right to a trial by jury without unreasonable delay in criminal proceedings
- Protection against unreasonable search and seizure.

**4.6** The rights in the Bill have not been altered since 1870. The development of constitutional law has therefore been in the hands of the US Supreme Court. Over the last 50 years a very complex jurisprudence has been developed by an increasingly activist Court.<sup>69</sup>

### **Views on the US Bill of Rights**

**4.7** Most witnesses and writers of submissions to this inquiry saw the United States Bill of Rights as an inappropriate model for a modern Bill of Rights. Bill of Rights advocates saw the US Bill as the source of many of the negative stereotypes of the impact of a Bill of Rights. One of the major critics of the US Bill in Australian debates has been Father Frank Brennan, a constitutional lawyer who spent an extended period in the US studying its legal system. He went to the US as a supporter of a constitutional Bill of Rights but returned as

<sup>68</sup> First Amendment

<sup>69</sup> Griffith *op cit* p10, Brennan *Submission* 29/3/00.

an opponent (although he supports a statutory Bill of Rights for Australia)<sup>70</sup>. His major criticism is that the Fourteenth Amendment, the “due process” clause (*see para 4.5*), has been so widely interpreted that it has made constitutional law in the US unpredictable and incoherent:

What surprised me when I got to the United States was to find that the most fertile ground for litigation, in terms of the constitutional Bill of Rights, was not with those rights which are specified in the first 10 amendments but rather with the fairly generic clauses to do with due process and equal protection. If you are like me, you would have to admit that no matter how many US Supreme Court decisions you have read on due process and equal protection it is almost impossible to give a coherent jurisprudence as to what is covered by due process and equal protection.

Basically any new social issue which gives rise to political conflict can somehow be put through a template of due process and equal protection. So if you are speaking about so-called rights to privacy, you will have reference to the idea of due process. Or if you think that there might be a new and emerging area of discrimination, then you invoke the mantra of equal protection. This means in the United States that any new political controversy is assumed in the end to be resolvable by the judiciary and, once it has been constitutionalised, the judiciary has the final say. So whereas here in Australia it will be more like a ping-pong game, where it can go between the judges and the Parliament, once the judiciary in the United States intervene to constitutionalise the issue as something of due process or equal protection, that is it – game, set and match.<sup>71</sup>

#### 4.8

Fr Brennan provides examples of the incoherence of US jurisprudence where the Supreme Court has ruled that it is constitutionally valid for a State to retain laws making a homosexual act a criminal offence, yet another State was prevented from discriminating against gays in the allocation of resources because it offended the due process provision. This contrasts with the relatively simple way the Australian Federal government was able to legislate to override a Tasmanian law which was condemned by the Human Rights Committee for making certain sexual acts criminal.<sup>72</sup> A witness to this inquiry argued:

There are more than a hundred different decisions in the United States Supreme Court invalidating State legislation of that kind [trading activities and labour regulation], on the basis of that due process clause. So it is very difficult for traditional lawyers to understand how that could happen. Another example, also relating to the due process clause, is how it is that the due process clause can justify courts invalidating State legislation, dealing for example with contraception, or with abortion for that matter. These difficulties are not confined to Australian

<sup>70</sup> See “A Bill of Rights for Queensland” Australasian Study of Parliament Group 12/7/99 p2-3, in Brennan *Submission* 29/3/00.

<sup>71</sup> *Ibid* p3.

<sup>72</sup> The *Human Rights (Sexual Conduct) Act* 1994 (Cth) was introduced as a response to the finding by the United Nations Human Rights Committee, in *Toonen v Australia* (Communication 488/1992), 18/3/94), that s122 (a) and (c) and s123 of the Tasmanian Criminal Code were in breach of art 17 of the ICCPR.

and English lawyers. As I said earlier, there are many American lawyers who simply regard that as completely unjustifiable interpretation of the Constitution<sup>73</sup>.

**4.9** A related argument is that the rights in the US Constitution have, as a result of judicial interpretation, been used for opposite purposes to that which the drafters would have originally intended. The example most frequently cited to the Committee was the First Amendment guarantees for religion. It is argued that this has been used by opponents of organised religion to prevent prayer in schools and other expressions of religious belief on the grounds that this would constitute the establishment of a state religion:

Now of course, at the moment, whilst we might have similar provisions in our own Federal constitution, it has never reached the state of what has happened in America with the First Amendment and I guess most of you would be aware of the concerns that they would have that there is not tax sponsored education, prayer in schools, bussing, no allowance of Bible studies or whatever in an education system and, of course, certainly no scripture. All of those areas are seen as a result of the First Amendment clauses.<sup>74</sup>

**4.10** Some witnesses argued these outcomes were the result of the absolute nature of the rights expressed and their lack of a limitation clause.<sup>75</sup> Writing of this, Griffith suggests that some of the guarantees of rights have been judicially interpreted as being subject to justifiable limitations. However, the absence of a provision guiding the courts in balancing various rights or the extent to which they be qualified in the public interest has restricted judicial flexibility.<sup>76</sup> Others argue the problems are symptomatic of the rigidity of the US Constitution, with the right to bear arms being an example of what was appropriate in a post-colonial society being particularly harmful in a modern context.<sup>77</sup>

**4.11** While the United States Bill of Rights has had few supporters in this inquiry there has been one advantage raised by several witnesses. The rights granted are widely known and understood, in contrast to Australia:

If we generate a sense that people have a symbolic attachment to certain rights, one of the really important things the United States has achieved, despite its other problems in these areas, is there is a real sense in the community of "I do have certain entitlements as part of the political process. I, as an individual, do have an ability and almost a responsibility to speak and be interested in political matters, and I have a right to a jury trial and things like that." We lack a lot of that, and I think we are weaker for it.<sup>78</sup>

<sup>73</sup> McLelland *Evidence* 26/6/00 p7.

<sup>74</sup> Clifford *Evidence* 5/6/00 p8.

<sup>75</sup> Eastman *Evidence* 18/7/00 p10.

<sup>76</sup> Griffith *op cit* p10.

<sup>77</sup> eg Hon RJ Carr *Submission* 31/3/00 p2, Debeljak *Evidence* 15/2/01 p4.

<sup>78</sup> Williams *Evidence* 10/4/00 p41.

## Canadian Charter of Rights and Freedoms

**4.12** Canada is a political system with many similarities to Australia: it is a Federal system with provinces having very distinct identities; it has a written Constitution and an English common law heritage; and, it has an indigenous population which suffers great relative disadvantage. Canada has followed a two stage process in arriving at its current *Charter of Rights and Freedoms*. Initially it adopted a statutory bill, the *Bill of Rights* 1960. The very cautious judicial attitude to interpretation of the Act led the reformist Prime Minister Pierre Trudeau during the late 1970s to champion a constitutional bill.<sup>79</sup> It was strongly opposed by Premiers of the provinces because of fear it would undermine their powers. When a compromise was reached on a legislative override provision (see below) the *Constitution Act* 1982 (renamed from the *British North America Act* 1867) was amended by the insertion of Part 1 of the Act as the *Canadian Charter of Rights and Freedoms*.

**4.13** Professor Williams has highlighted the way in which public participation was encouraged in the drafting of the *Charter*.<sup>80</sup> The draft of the *Charter* was scrutinised by a joint parliamentary committee, the proceedings of which were nationally televised. The committee received submissions from over 1000 individuals and 300 organisations, held 60 days of hearings and made 65 substantial amendments as a result of the consultations. Six years later a survey found 90% of English Canadians and 70% of French Canadians had heard of the *Charter*.<sup>81</sup>

### Rights Protected

**4.14** The Canadian *Charter* is a useful modern example of a constitutionally entrenched Bill of Rights in a common law country. Unlike the US Bill it expresses rights in positive terms and is based upon modern human rights instruments, particularly the *ICCPR* and the *European Charter of Human Rights*. It protects civil and political rights such as freedom of conscience, equality and protection from discrimination, the right against self incrimination; the right to trial without unreasonable delay and the right to be secure against unreasonable search or seizure. However it has some unusual rights resulting from Canada's multicultural society and its bi-lingual population makeup. Section 27 requires that the *Charter* be interpreted "in a manner consistent with the preservation and enhancement of the multicultural heritage of Canadians". Sections 16-23 protect the equal rights and privileges of both English and French as the official languages and details the application of some of the implications of these rights in court proceedings, education and other matters. Section 35 recognises the existing treaty rights of Aboriginal peoples in Canada, defined as the Inuit, Indian and Metis peoples.

**4.15** Section 15 is particularly important because it is so widely expressed:

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<sup>79</sup> Griffith *op cit* p25.

<sup>80</sup> Williams *A Bill of Rights for Australia* UNSW Press 2000 p42, incorporated as part of his submission to this inquiry.

<sup>81</sup> This contrasts with the frequently cited lack of awareness of many Australians of the existence of the Constitution – eg Constitutional Commission *Individual and Democratic Rights: Report of the Advisory Committee to the Constitutional Commission* 1987 p xi.

Every individual is equal before and under that law and has the right to the equal protection of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.

- 4.16** However, unlike the “due process” clause in the US Bill of Rights the Canadian courts have generally avoided giving this section its widest meaning, instead looking for substantive equality in legislation.<sup>82</sup>

### **Limits on Rights**

- 4.17** The Canadian *Charter* is particularly important for the way it attempts to define the limits of rights and the balance between judicial review and parliamentary supremacy. A key provision is section 33, which reads:

Parliament or the legislature of a province may expressly declare in an Act of Parliament or of the legislature, as the case may be, that the Act or a provision thereof shall operate notwithstanding a provision included in Section 2 [the “fundamental freedoms” of religion, free thought, free press, peaceful assembly and freedom of association] or Section 7 to 15 of the Charter [the other civil and political rights derived from the ICCPR]

(2) An Act or a provision of an Act in respect of which a declaration made under this section is in effect shall have such operation as it would have but for the provision of this Charter referred to in the declaration.

- 4.18** The “notwithstanding” clause will be discussed in later chapters in regard to terms of reference (e) and (h) of this inquiry. This provision is an attempt to give back Parliament some of the powers taken away by constitutional entrenchment. Parliament is able to pass legislation which specifically declares that it is overriding section 2, or s7-15 of the Constitution.<sup>83</sup> A court is able to review legislation and declare it invalid for breach of *Charter* rights, but in response Parliament can then pass an override clause to give effect to the legislation. In practice this override has been rarely used after the first few years because of the political cost of invoking it.<sup>84</sup>

- 4.19** Section 1 of the *Charter* is another limitation on the rights given. It states:

The Canadian Charter of Rights and Freedoms guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.

- 4.20** The limitation clause has been the subject of considerable judicial discussion in Canada, which has resulted in judicial tests of what constitutes “reasonable limits”. Legislation must:

<sup>82</sup> MC Hurley, *Charter Equality Rights: Interpretation of Section 15 in Supreme Court of Canada Decisions*, Canadian Parliamentary Library September 1999, quoted in Griffith *op cit* p27.

<sup>83</sup> Under s33(3) the override only has a lifespan of five years, although under s33(4) the Parliament can legislate to extend the lifespan by a further five years.

<sup>84</sup> Griffith *op cit* p29.

- pursue an important objective which is pressing and substantial and consistent with democratic values
- be rationally connected with the objective
- be designed so as to satisfy judicial tests of proportionality, so that the right is breached as little as is reasonably possible
- not use means where the burdens imposed outweigh the beneficial effects the objective is intended to serve.<sup>85</sup>

**4.21** Under other legislation, the *Statute Law (Canadian Charter of rights and Freedoms) Amendment Act 1985*, the Federal Minister for Justice is given the obligation to scrutinise legislation for compliance with the *Charter*; effectively “signing off” on the legislation before it reaches Parliament.

### Views on the Charter

**4.22** There is a vast literature on the impact of the *Charter*, some hostile<sup>86</sup> some very positive.<sup>87</sup> Perhaps the only point of agreement is that the *Charter*, unlike its statutory predecessor, *has* had a significant impact. Those who believe the *Charter* has had a negative impact cite factors such as:

- The politicisation of the judiciary
- The major impact on government expenditure as a result of *Charter* decisions in the courts
- The contest created between the executive and the judiciary created by the wording of the *Charter*
- The *Charter* has been of most value to criminal lawyers in finding new means for clients to evade convictions
- The *Charter* has lead to an explosion in litigation.

<sup>85</sup> See *R v Chaulk* [1990] 3SCR 1303, *Dagenais v Canadian Broadcasting Corporation* [1994] 3 SCR 927, JL Hiebert, “Why must a Bill of Rights be a contest of political and judicial wills? The Canadian alternative” (March 1999) 10 *Public Law Review* 22 at 24.

<sup>86</sup> For instance “Canada as Post-Modern Kritarchy” Yves-Marie Morissette *ALJ* Vol 72 No4 April 1998 at 294-302, “A Constitutional Bill of Rights – the Canadian Experience” T Ison *Modern Law Review* vol 60 no4 July 1997 p499-512.

<sup>87</sup> For instance RJ Sharpe “the impact of a Bill of Rights on the role of the judiciary: A Canadian perspective” in P Alston *Promoting Human rights Through Bills of Rights : Comparative Perspectives* Oxford University Press 1999, JHiebert *op cit* p22-35.

- 4.23** Supporters of the *Charter* differ in their perception of events. For instance cases taken under the *Charter* have forced the Canadian government to substantially increase funding to the criminal justice system so as to reduce court delays. Supporters of the *Charter* argue this is a beneficial impact, whereas opponents argue this is part of the process by which the judiciary is making decisions on the allocation of resources which should rightfully be made by elected representatives.<sup>88</sup>
- 4.24** Several submissions to this inquiry were enthusiastic about the *Charter* model. The NSW Office of the Public Defenders in a submission to this inquiry strongly supported the Canadian *Charter* as striking the right balance in protection of rights of the accused.<sup>89</sup> Justice Stein of the NSW Supreme Court, in his submission, quoted with approval a member of the Canadian judiciary who argued that the *Charter* simply bought public policy decisions “out of the judicial closet”.<sup>90</sup>
- 4.25** An unusual feature of the Canadian *Charter* is that corporations are able to take advantage of the rights as well as individuals. During this inquiry Associate Professor Latimer of the Department of Business Law and Taxation, Monash University, argued that this has made the task of corporate regulation in Canadian jurisdictions problematic.<sup>91</sup> A particularly striking case in which the Bill was used by a corporation was the case of *MacDonald Inc v Canada*.<sup>92</sup> In this case a tobacco company successfully challenged Canadian legislation which prohibited the advertising and sale of tobacco products without prescribed health warnings. The tobacco company’s challenge was successful because the Supreme Court of Canada found that the legislation infringed the right to freedom of expression under the *Charter*.

## New Zealand Bill of Rights Act

- 4.26** The New Zealand *Bill of Rights Act* 1990 was primarily an initiative of former Prime Minister and constitutional law expert Sir Geoffrey Palmer, who first proposed the Bill in 1979.<sup>93</sup> From an entrenched model based upon the Canadian *Charter* originally proposed in 1985, the final Bill took the form of an ordinary statute when passed in 1990.

<sup>88</sup> Examples of these type of cases are discussed in Constitutional Unit, London University “*The impact of the Human Rights Act: Lessons from Canada and New Zealand*” (UK) May 1999, pp31-33.

<sup>89</sup> *Submission* 13/4/00 p7.

<sup>90</sup> *Submission* 5/5/00 p4. This will be discussed in more detail in Chapter Five.

<sup>91</sup> Latimer *Submission* 1/02/01.

<sup>92</sup> (1995) 3 SCR 199, see Australian Plaintiff Lawyers Association *Submission* pp44-47. The Association used the case to illustrate the importance of defining who has rights under a Bill, as well as what those rights are.

<sup>93</sup> See Legal Constitutional and Administrative Review Committee, *The preservation and enhancement of individuals’ rights and freedoms in Queensland: Should Queensland adopt a bill of rights* Report No 12 November 1998 p15.



## Rights Protected

**4.27** The rights protected under the Bill are primarily civil and political: there are no economic and social rights included. The rights are divided into 3 categories:

- Rights associated with the “life and security of the person” – right not to be deprived of life, right against torture or cruel treatment, the right to refuse to undergo medical treatment
- Democratic and civil rights – electoral rights, freedom from discrimination, religious and language rights
- Search, arrest and detention rights

## Limitations on rights

**4.28** The key provisions of the Bill are those which dictate how these rights are to be interpreted. Of the models of Bills presented in this chapter it provides, at least in its wording, the least protection for the rights declared. The New Zealand Bill contains no statement by which it overrides inconsistent legislation and makes no reference to Maori rights under the Treaty of Waitangi.<sup>94</sup> Section 6 requires that, in interpreting other statutes, a court is to favour a meaning consistent with the *Bill* to any other meaning. However this is to be read with Section 4, which has the effect of saying that Courts can neither invalidate secondary legislation or make declarations that legislation is incompatible with the *Bill*:

No court shall, in relation to any enactment (whether passed before or after the commencement of this Bill of Rights), -

- (a) hold any provision of the enactment to be impliedly repealed or revoked, or to be in any way invalid or ineffective; or
- (b) decline to apply any provision of the enactment -.

By reason only that the provision is inconsistent with any provision of this Bill of Rights

**4.29** Section 5 also introduces a limitations clause which provides an opportunity for expansive interpretation of rights, but this is made subject to section 4:

Subject to Section 4 of this Bill of Rights, the rights and freedoms contained in this Bill of Rights may be subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.

**4.30** Finally, Section 7 provides for pre enactment scrutiny by requiring the Attorney General to alert the Parliament to any provision of a *Bill* “that appears to be inconsistent” with the *Bill of Rights Act*. A recent report suggested that this section has had one of the most important

<sup>94</sup> See Griffith *op cit* p21.

impacts of the Bill in that now government legislation is now vetted by the Attorney General for human rights compliance.<sup>95</sup>

### Views on the Bill

- 4.31** Unlike the Canadian *Charter*, part of the debate about the New Zealand *Bill* is whether it has had a significant impact. What is termed the “section 4-5-6 puzzle” has created the most difficulty for courts because it does not provide a clear sequence or methodology with which to approach situations occurring under a Bill of Rights.<sup>96</sup> Participants in the current inquiry, with some exceptions, were generally unenthusiastic about the New Zealand model because of its lack of legal effect as a result of the interpretation sections.<sup>97</sup> Opponents of the *Bill* elsewhere, however, have argued that judicial interpretation has effectively turned “Clark Kent” (the original weak statutory Bill of Rights) into “Superman”.<sup>98</sup>
- 4.32** There is some consensus that the Bill has had its greatest impact on criminal law, with one observer describing the Bill of Rights as having “enormous consequences for the day to day operations of the police and criminal courts in New Zealand”.<sup>99</sup> Research into the impact of the New Zealand Bill puts the percentage of cases brought under the Bill which fall into the area of criminal law to be 90%.<sup>100</sup> As with the experience of the Canadian *Charter*, the successful use of the *Bill* by criminal defendants can be argued either as an advantage or disadvantage.
- 4.33** The New Zealand model is of direct relevance to this inquiry both because it is a *statutory* Bill of Rights and because there has been a decade of experience and analysis with which its impact can be judged. In the later chapters of this report reference will be made to New Zealand experiences for this reason, even though the Committee recognises that some aspects of the New Zealand model, particularly the interpretation section, would be unlikely to be adopted locally.

<sup>95</sup> Constitution Unit, London University, *The Impact of the Human Rights Act: Lessons from Canada and New Zealand* (UK) May 1999 p29-31. The paper argues the impact on the development of legislation by government agencies of the Canadian Charter is even more profound, with the perceived need to “Charter proof” new legislative initiatives.

<sup>96</sup> See Griffith, *op cit* p23-24, quoting M Taggart “Tugging on Superman’s cape: lessons from experience with the New Zealand Bill of Rights Act 1990” (Summer 1998) *Public Law* 266 at 276.

<sup>97</sup> A common description is it provides an “emasculated version of judicial review” – Law Society of New South Wales *Submission* 15/05/00 p18.

<sup>98</sup> J Allan, “Turning Clark Kent into Superman: The New Zealand Bill of Rights Act 1990” *Otago Law Review* Vol 9 No4 (2000) p613 –632.

<sup>99</sup> Taggart, *op cit* at 276, quoted in Griffith *op cit* p24.

<sup>100</sup> Constitution Unit, London University, *op cit* p20.

## UK Human Rights Act

**4.34** The United Kingdom has become the latest common law country to adopt a Bill of Rights with the coming into effect last year of the *Human Rights Act* 1998. The UK legal system is one of the original sources of human rights through the development of protections expressed in the common law. The *Bill of Rights* 1689 is one of the seminal constitutional documents in the English speaking world, with its delineation of the boundaries between the elected parliament and the sovereign. Despite this heritage, the pressure for a formal Bill of Rights has come comparatively recently as a result of the engagement with Europe through the continuing development of the European Union.

**4.35** The move to the current situation began in 1966 when the UK government accepted the compulsory jurisdiction of the European Court of Human Rights, established to enforce the *European Convention on Human Rights and Fundamental Freedoms* (the *ECHR*)<sup>101</sup>. This acceptance of jurisdiction included granting the right of individuals in the UK to petition the European Court. During the 1980s and early 1990s this resulted in a series of highly embarrassing adverse findings by the European Court that various decisions by English courts, often based on established case law precedents, were in breach of human rights standards as expressed in the *ECHR*. That this string of cases had an impact on the move to a local bill of rights was indicated by the UK Lord Chancellor in the second reading speech on the *Human Rights Act*:

Our legal system has been unable to protect people in the 50 cases in which the European Court has found a violation by the United Kingdom. That is more than any other country except Italy. The trend has been upwards. Over half the violations have been found since 1990.<sup>102</sup>

**4.36** In 1996 the Blair Labour Government produced a White Paper entitled *Rights Brought Home*. The title indicates how the *Human Rights Act* was promoted as a way of allowing British judges to develop human rights jurisprudence in UK courts, instead of being developed by European judges in internationally embarrassing decisions. The resulting Act was introduced into Parliament in November 1997 and came into effect on 2 October 2000.

### Rights Protected

**4.37** The main purpose of the Act is to incorporate into domestic British law the major rights and freedoms of the *ECHR*. Section 1 incorporates the major articles of the *Convention*, which are then included as a Schedule to the Act. The *Convention* rights are the classic civil and political rights such as the right to life, the prohibition against torture and slavery, the right to a fair trial and the right to vote. Economic, social and cultural rights are not covered – for instance the right to education is expressed as a civil liberty, in negative terms: “no person shall be denied the right to education”. Because the substantive rights

<sup>101</sup> This Convention drew upon the civil and political rights protected in the 1948 United Nations Declaration of Universal Human Rights. For a discussion of its content see Griffith *op cit* p14.

<sup>102</sup> HL Deb Vol 582 c 1228, 3 November 1997, quoted in *Ibid* p15.

appear as a schedule, the main part of the Act is concerned with the machinery of how the rights are to operate.

### **Limits on Rights**

**4.38** Unlike countries such as Australia and Canada, the United Kingdom does not have a written constitution. Accordingly, the *Human Rights Act* is a statute, able to be repealed by any future UK government. However, it has the status of a fundamental constitutional document by virtue of section 3, which reads:

So far as it is possible to do so, primary legislation and subordinate legislation must be read and given effect in a way which is compatible with the Convention [ECHR] rights

**4.39** Section 3(2) preserves the validity of primary legislation which is incompatible with the Convention rights in the Act, but allows a court to declare invalid subordinate legislation (such as regulations) in most cases. Section 4 permits a higher court to make a declaration that legislation is incompatible with the *Convention* rights. This then initiates a “dialogue” between the judiciary, Parliament and Executive government. The declaration of invalidity allows a Minister, under Section 10, to seek parliamentary approval for a remedial order to amend the legislation to make it compatible.

**4.40** The declaration of incompatibility can, however, be ignored by Executive government if it so chooses. While it would be potentially politically embarrassing for a government not to amend the legislation, section 3(2) makes it clear the legislation remains valid. In fact the most potent checks against legislation breaching *Convention* rights are probably in the initial stages of legislation prior to enactment.

### **Pre-enactment checks and balances**

**4.41** A notable feature of the *Act* is the two checks placed into the legislative process to ensure compliance or identify non-compliance. Firstly, Section 19 of the *Human Rights Act* provides that:

A Minister of the Crown in charge of a Bill in either House of Parliament must, before Second Reading of the Bill-

- (a) make a statement to the effect that in his view the provisions of the Bill are compatible with the Convention rights (“a statement of compatibility”); or
- (b) make a statement to the effect that although he is unable to make a statement of compatibility the government nevertheless wishes the House to proceed with the Bill

**4.42** This provision has the effect of requiring agencies to undertake a review in relation to the *Convention* rights when preparing legislation and regulations. Considerable embarrassment would be caused to a Minister who makes a statement of compatibility in Parliament regarding legislation that is later found to be in error by a court, even if the legislation remains in effect. Ministers may introduce legislation explicitly incompatible with the

Convention rights, but the Act forces the Minister to explain to the House why the rights have been ignored.

- 4.43** The second check against incompatible legislation is the establishment of a Joint Committee on Human Rights. Interestingly, the Committee is based upon an Australian committee,<sup>103</sup> the Senate Scrutiny of Bills Committee (examined in detail in Chapter Eight). The committee was established by Parliamentary standing orders rather than being a part of the Act. Arguably, it has been used by the Blair government as a way of avoiding the establishment of an independent human rights commission.<sup>104</sup> Despite this, the committee has the potential to have a powerful role. Professor Kinley argued the UK committee could have a greater impact on the preparation of legislation than either the Canadian or New Zealand scrutiny systems:

If you were to define one single practical object of the scrutiny of the legislation system it would be to instil in the executive—that is, the bureaucrats and Ministers who are creating the policy that becomes draft legislation—a need or desire to comply with international human rights obligations. The question is: How do you do that? That is the most important point at which you should have leverage, but how do you get there?

If you simply entrust it, as the New Zealanders and Canadians have, almost wholly to the executive itself—and, in the New Zealand example, the Attorney General, to tick off—then it simply beggars belief that political exigencies would not come into his or her mind as they tick off on particular pieces of legislation, particularly ones that are controversial. If, however, they know that if they tick off on this, it nevertheless will still go to a parliamentary committee which will not be wholly in control of the government, but it will be a committee that will scrutinise that decision, then it may be perhaps less open to persuasion on the political needs for ticking off on a piece of legislation.<sup>105</sup>

- 4.44** The Joint Committee on Human Rights has as one of its terms of reference, the power to consider and report on matters relating to human rights in the United Kingdom, excluding consideration of individual cases.<sup>106</sup> This very broad power allows the committee to instigate any inquiry it wishes to undertake. It is also empowered to consider remedial orders proposed by Ministers whose legislation has been found to be incompatible with *ECHR* rights.

<sup>103</sup> See D Kinley, “Human rights scrutiny in parliament: Westminster set to leap ahead” 10 *Public Law Review* 252 December 1999, P Tudor, “Why re-invent the wheel when the Australian Scrutiny Model works”, Speech to International conference on Regulation Review 2001 (proceedings to be published by NSW Regulation Review Committee).

<sup>104</sup> See Kinley *Evidence* 20/3/01 p20.

<sup>105</sup> *Evidence* 20/3/01 p6.

<sup>106</sup> See <http://www.parliament.uk/commons/selcom/hrhome.htm#ref>

### Views on the Act

**4.45** At the time of writing this report the *Human Rights Act* has not been in effect for sufficient time for any real assessment of its impact to be made. During this inquiry the Act generated a great deal of interest from most witnesses whatever their standpoint. Many of those who support a Bill suggest the *Human Rights Act* is the best model available of a statutory Bill of Rights.<sup>107</sup> Time will tell, but the Act is certainly a major contributor to debates within Australian jurisdictions and will continue to be so in the years ahead.

### South African Bill of Rights

**4.46** In 1996 the South African Bill of Rights was adopted as part of the new, post-Apartheid Constitution. The drafters of the Bill were faced with three major difficulties:

- A previous background of active denial of civil and political liberties, particularly to those from specific racial groups
- The existence of a significant white minority group with economic power but suddenly reduced political power, and
- The existence of widespread economic and social disadvantage.

**4.47** The Constitution is drafted to protect minority rights from being eroded by the exercise of political power. The *Bill of Rights* is constitutionally entrenched, and Parliament is given no power to override its provisions by legislation.<sup>108</sup> The *Bill of Rights* can only be amended by a two thirds majority vote in the National Assembly, in addition to approval from at least six of the nine provincial parliaments.<sup>109</sup> Detailed arrangements are described for the declaration of a state of emergency, including the extent to which some rights cannot be abrogated.<sup>110</sup>

### Rights Protected

**4.48** The significant feature of the Bill for its relevance to the terms of reference (b) of this inquiry is, however, the wide coverage of rights given. As well as the civil and political rights common to most other Bills, the South African Constitution also provides enforceable social and economic rights. These include:

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<sup>107</sup> However, one supporter, Professor Williams, was critical of the unclear and complicated drafting of the Act because it worked against the aim of having widespread community understanding of the contents of a Bill of Rights – *Evidence* 10/4/00 p40.

<sup>108</sup> Section 1 (c) 1996 Constitution.

<sup>109</sup> Section 74 (2).

<sup>110</sup> Section 37.

- The right to a healthy environment
- The right of access to health care, food, water and social security
- The right of access to adequate housing
- The right to an education.

**4.49** Some of these rights are unqualified, such as the right to a healthy environment; while others such as housing, health care, food, water and social security are explained with a subsection stating:

“the State must take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of this right”.<sup>111</sup>

**4.50** Education is treated in two ways. “Basic education” is an unqualified right under Section 29. However the right to “further education” in the same section is qualified by a similar phrase to those applying to housing and health.

### **Views on the Bill**

**4.51** The South African Bill of Rights is clearly too early in its existence to gauge its impact on human rights in that country. An example of how the economic, social and cultural rights have been interpreted by its judiciary, was however, provided by one witness to the inquiry:

A recent decision<sup>112</sup> is dealing exactly with that issue, the right to health. A case came before the South African Constitutional Court of a man in his 40s who was suffering heart disease but who had chronic renal failure. One hospital could provide him the requisite dialysis but the hospital was very short of resources and had to have guidelines in place to determine who would have access to that type of treatment. It was a publicly funded service. If this man were able to afford private services he would have had access to the dialysis machine. He took proceedings under section 27 of the South African Constitution, which guarantees everybody a right to access to health care services and it also provides that no-one may be refused emergency medical treatment. He argued that the refusal by the hospital to accord him priority in terms of access to the kidney dialysis machine was a breach of his right under section 27 of the South African Constitution.

The South African Constitutional Court had to deal with that case. It dismissed his application and the way in which the court approached the issue I think is interesting but also instructive in terms of how these issues could be dealt with in New South Wales. The judges of the South African Constitutional Court showed clear deference to the executive in terms of managing budgets and resources. The court did not say that money should be spent in a particular area or for a particular individual. It looked at that difficult task of attempting to balance rights and

<sup>111</sup> Sections 26 (housing) and 27 (health care, food, water and social security).

<sup>112</sup> *Soobramoney* (1998) 1 SAR at 765.

competing interests and if one looks at the judgment it did so in a very sensitive and sensible way in trying to deal with these competing rights and issues.<sup>113</sup>

- 4.52** The South African *Bill of Rights* is not immediately useful as a model for local purposes because of the very different historical and social experience of that country. However, as was argued by some witnesses, it is instructive because it shows how a bill protecting human rights can be tailored to local conditions.<sup>114</sup> It also demonstrates the width of rights which can be potentially covered by a Bill of Rights.

## Bill of Rights in a Federation

- 4.53** Occasionally it has been argued that it is inappropriate for one Australian State to proceed with a Bill of Rights in the absence of a Federal Bill.<sup>115</sup> This was not raised as an issue of substance during the inquiry. In the Federal systems that have a Bill of Rights there are precedents for a State “going it alone” in the absence of a Federal document. Professor Williams stated:

It is actually common in countries that are federations to have bills of rights at both levels. That is the way it normally works. Simply because a federation involves a division of powers between the different levels, it is not as if any one level has a monopoly on issues that might raise human rights concerns. At the same time, it is important to recognise that Federal levels often do not have the power, or indeed do not have the political responsibility, to interfere in State matters by legislating in such a way as to have their bill of rights applying at the State level.<sup>116</sup>

- 4.54** Griffith provides examples in Canada where provinces, such as Saskatchewan, enacted Bills of Rights prior to the Federal government.<sup>117</sup> In the United States most States had bills of rights before the Federal Bill of Rights was introduced. There are clearly precedents for a state having a Bill before a Federal government. As Griffith points out, there are no current examples because Australia is currently the only Federation without a Bill of Rights.

## Statutory Bill of Rights Compared to Constitutional Entrenchment

- 4.55** This chapter has outlined the most important models which would be considered should any future NSW government consider a bill of rights. There are many points of difference between the various models. These include:

- The nature of the rights protected

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<sup>113</sup> Eastman *Evidence* 18/7/00 p22-23.

<sup>114</sup> eg Durbach *Evidence* 15/5/00 p8.

<sup>115</sup> eg Brennan *Submission* 9/5/00 p1.

<sup>116</sup> Williams *Evidence* 10/4/00 p23.

<sup>117</sup> *Ibid* p4.



- The limits placed on the extent of those rights
- The balance struck between parliamentary supremacy and judicial review, especially with regard to override clauses
- The scrutiny process which occurs immediately before or after the tabling of a bill
- The broadness of the approach to interpretation taken by the judiciary, and
- The enforceability of the rights protected.

**4.56** Most of these differences will be explored in the separate sections in this chapter. However one issue for the purposes of this report was determined prior to the start of the inquiry. The terms of reference from the Attorney requested that the Law and Justice Committee investigate a *statutory* Bill of Rights. This precludes active consideration by the Committee of constitutionally entrenched Bills of Rights, such as the United States, Canadian and South African models, except in so far as they reveal general advantages or disadvantages of bills of rights.

**4.57** In choosing a statutory model as the preferred model for investigation there is a decision made about where to place the balance between parliamentary supremacy and the power of judicial review. A government in New Zealand or the UK can pass through Parliament legislation which amends their Bill of Rights in the event of a persistent, problematic judicial interpretation of a provision, such as, arguably, the interpretation given by the US Supreme Court to the Fourteenth Amendment (see above in this Chapter). Those who support constitutional entrenchment, on the other hand, argue that a statutory bill allows a future government to amend a bill so as to do away with rights for an unpopular minority, such as refugees or illegal aliens.

**4.58** Most submissions to the inquiry took the terms of reference as given and did not canvass the debate between statutory and constitutionally entrenched models.<sup>118</sup> However a few submissions argued strongly that a statutory bill provided insufficient protection. The then Senior Public Defender, Mr John Nicholson SC argued:

The level of entrenchment for any Bill of Rights must be predicated upon a clear understanding of what that Bill of Rights is expected to achieve. If it is expected to secure permanent protection against government encroachment of an individual's rights and liberties then the level of entrenchment needs to be great. If it is expected to be no more than a sign post saying it is desirable to have regard to the individual's rights and liberties then its entrenchment may be shallow.<sup>119</sup>

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<sup>118</sup> The submission from the Law Society of New South Wales is a good example of applying the terms of reference to all the major models listed in this Chapter to compare the strengths and weaknesses of the various models – *Submission 15/5/00*.

<sup>119</sup> *Submission 18/4/00* p3.

**4.59** Australian Lawyers for Human Rights argued similarly for constitutional entrenchment<sup>120</sup>. They suggest that a Bill of Rights could be inserted into the NSW *Constitution Act 1902* (NSW) by a normal statute. In this way a statutory bill could be given “constitutional” status; the drawback being, however, that the bill could just as easily be amended or removed from the *Constitution*. For that reason Australian Lawyers for Human Rights argue for double entrenchment in the NSW *Constitution*, which under s7A and s7B would have the effect of alteration only after a successful State referendum.

**4.60** Some supporters of a statutory Bill of Rights are not necessarily opposed to later entrenchment. The Canadian *Charter* shows how a statutory bill of rights can be later upgraded to an entrenched Bill. The International Commission of Jurists, NSW Chapter, for instance, argued in their submission:

...the preference is that a Bill of Rights, containing significant enforceable rights as are contained in the ICCPR, should be entrenched. However it is recognised that this is essentially a question of political will requiring extensive consultation. This should not prevent the taking of steps to put into place a legislative scheme that provides some security against easy amendment by future governments. For example it could provide that the legislation can only be amended by a vote of 2/3s of the members of both houses of parliament sitting together.<sup>121</sup>

**4.61** Other participants in the inquiry have moved from one time supporters of constitutionally entrenched Bills of Rights to preferring a statutory Bill. Two witnesses to this inquiry, constitutional lawyer Father Frank Brennan,<sup>122</sup> and Dr Larissa Behrendt,<sup>123</sup> an academic from the Australian National University, both changed their previous support for entrenchment after first hand experience of some of the difficulties and inflexibility of the US Bill of Rights.

**4.62** Writers of submissions to the inquiry have championed particular models of Bills of Rights, with most models other than the US Bill having some advocates. An interesting summary of the various models was put to the Committee by Professor Williams of the University of New South Wales in support of a Bill of Rights:

**The Hon. J. HATZISTERGOS:** So in terms of a bill of rights which you would regard as a model bill of rights that we should use in Australia, really, you cannot point to any example of the existing ones?

**Mr WILLIAMS:** Well, I think we can do better than all of those. My perspective is that I think each of them has strengths or weaknesses but each country is different. I think in this particular country we have some interests that are different from those of the United Kingdom. It has the European Community, which makes it different from Canada, with its proximity to the United States, and

<sup>120</sup> *Submission 30/3/00 p19.*

<sup>121</sup> *Submission /4/00 p11.*

<sup>122</sup> *Submission 9/05/00*, see also his book *Legislating Liberty* (University of Queensland, 1998).

<sup>123</sup> *Evidence 2/08/00 p1.*

New Zealand, with a far higher determination to follow international standards. We will do it differently from each of those. That does not mean they are weak necessarily. It is just that I think we look to those, take the strengths from each and draft something that is particularly appropriate for New South Wales rather than simply trying to add in what they have already done.<sup>124</sup>

**4.63** Professor Williams explained the model of a Bill of Rights he believed was likely to gain community acceptance. This is based upon three assumptions as to the type of Bill enacted:

- That it is minimalist
- That it is gradual
- That it is parliament-centred rather than court-centred.

**4.64** In describing his approach as “minimalist”, Professor Williams suggests that only those few rights on which there is widespread community support should initially be included in a Bill. He suggests consolidating existing anti-discrimination legislation and taking other commonly accepted “rights” such as freedom of speech, freedom of association and the right to vote. He believes rights which affect the criminal law should be protected (such as are contained in the *ICCPR*), but their inclusion could be deferred in an initial Bill to ensure maximum support.<sup>125</sup> He does not support economic, cultural and social rights being included (such as are contained in the *ICESCR*) because of the difficulty of formulating these to avoid intruding into the role of governments in determining resource and policy issues.<sup>126</sup>

**4.65** Professor Williams’ model of a Bill of Rights is an evolving document: he describes it in his recent publication on the issue as “A Gradual Path Forward”.<sup>127</sup> As community understanding develops through the educative role of a Bill, additional rights will be added:

I also think that, whatever rights are put in, such a bill should not be set in stone but, indeed, we should think of this as the beginning point where the community and parliaments and courts can work together to better develop protection for human rights over a longer period of time. It must also be a cost-effective system, and it should be a gradual, careful and pragmatic model that seeks to have minimal change at the beginning and perhaps working for greater change over time depending on the community’s reaction to these things.<sup>128</sup>

<sup>124</sup> *Evidence* 10/4/00 p48.

<sup>125</sup> *Evidence* 10/4/00 p5.

<sup>126</sup> *Ibid* p21

<sup>127</sup> Williams *op cit* : (title of Chapter Five)

<sup>128</sup> *Evidence* 10/4/00 p4.

**4.66** Professor Williams sees the statutory nature of the Bill as allowing this flexibility. He describes his model as “community-centred” and “parliament centred” rather than court centred, and sees this as integral to the educative role of a Bill:

The first [aim] is a very basic one. It is simply to improve respect and tolerance for human rights within Australia, to develop a culture of liberty and also to actually underpin that by greater awareness for human rights in parliaments, the community and courts.

Within that general aim I think it is very important to retain ultimate sovereignty in the Parliament itself. I do not suggest that courts be given the final say on these issues, but the Parliament ultimately should be able to decide these within a democratic framework.

I also think that, whatever rights are put in, such a bill should not be set in stone but, indeed, we should think of this as the beginning point where the community and parliaments and courts can work together to better develop protection for human rights over a longer period of time<sup>29</sup>.

## Override Provisions

**4.67** Professor Williams argument for a “Parliament centred” statutory Bill of Rights raises the issue of the power of parliamentary override in the various models. Parliamentary supremacy is implicit in any statutory Bill of Rights. If the Bill is an ordinary statute, Parliament can amend or repeal the Bill or specific provisions at any time. Professor Williams sees this implicit power of override as the great strength of a statutory Bill of Rights, which he calls a “a parliament centred” Bill as opposed to a “court-centred” entrenched model:

Parliament must have the ultimate say, because courts are not the best institutions for finally determining the value or level of certain rights within the community.

On the other hand, it is the courts' ability to deal with the specifics that in certain circumstances means they ought to have a say. In some cases, you can only fully appreciate the particular rights violation as a result of a court looking at a particular effect of a law on a particular person.

Sometimes things are only apparent in the specifics rather than the general. That is why I think you need to create a dialogue between courts, parliaments and the community in order to fully involve the different institutional strengths of each and, in doing so, hopefully you strengthen the political and legal system as a whole.<sup>130</sup>

**4.68** In practice it could be difficult for a Parliament to amend or repeal rights protected under a Bill of Rights, particularly if it was only an individual instance of legislation which was incompatible with the Bill. The discussion during this inquiry therefore focussed on the advantages of override mechanisms *within* Bills. An override clause allows Parliaments to

<sup>129</sup> *Ibid* p4.

<sup>130</sup> *Evidence* 10/4/00 p19.

pass incompatible legislation. By allowing Parliaments to pass legislation which overrides rights protected within a Bill of Rights, two advantages occur over the situation where there is no Bill of Rights. Firstly, Parliaments need to *consider* human rights even if they choose to override the rights protected in a Bill. Secondly, courts can provide guidance to Parliament as to compliance of legislation with the Bill without this being seen as a challenge, as it is acknowledged that Parliament has the power of override.

**4.69** Clearly an override clause can have disadvantages; much depends on how narrowly the override is expressed. The British model was praised by those participants in this inquiry who saw it as facilitating a dialogue between arms of government. Under the *Human Rights Act*, when a court makes a finding that a statute is incompatible with the *European Convention on Human Rights*, the statute is then referred back to Minister and to Parliament. The opportunity is provided to remedy the incompatibility, although because of section 3(2) the legislation can remain effective despite the declaration of incompatibility by the court. In the pre-legislative stage Ministers are required to make a statement that either the Bill is compatible with the Act or that it is incompatible and the Minister is wishing to override the Act. The Law Society of NSW, in its submission, argued that this system minimises the tension between the protection of fundamental rights and maintenance of the legislative supremacy of parliament.<sup>131</sup> The Public Interest Advocacy Centre (PIAC) did not commit to any particular version of an override clause. Instead they argued that a Bill of Rights could be written to reflect whatever balance between parliamentary supremacy and judicial review was considered appropriate for local conditions.<sup>132</sup>

**4.70** Not all advocates of a Bill of Rights support an override clause as the means of determining the balance between judicial and parliamentary power. Some argue that a parliamentary override, also known as a “notwithstanding” clause, risks undermining the purpose of the Bill:

The Canadian experience with the “notwithstanding” clause has shown that the notwithstanding clause is of limited practical significance because, politically, it has proved unattractive to invoke the clause and this has deterred the Provinces from doing so. McKenna<sup>133</sup> observes:

The inclusion of a parliamentary override clause may make an entrenched Bill of Rights more palatable...but its effectiveness is questionable. For example, in Canada and New Zealand, override clauses have rarely been used and their insertion sits at odds with the anti-majoritarian purpose of an entrenched Bill of Rights – namely that human rights should be beyond the reach of parliamentary majorities seeking to intrude upon rights for political expedience.

A notwithstanding clause can present a dangerous threat. McKenna points out that “override clauses may be invoked by Parliament at the very moment protection of human rights is most under threat”. A notwithstanding clause

<sup>131</sup> *Submission 15/5/00 p15.*

<sup>132</sup> *Evidence 15/5/00 p7.*

<sup>133</sup> *In The Need for a New Preamble to the Australian Constitution and/or a Bill of Rights*, Research Paper 12, Department of Parliamentary Library (Cth) 1996-1997).

would also undermine the symbolic significance of the government's commitment to human rights.<sup>134</sup>

**4.71** The case against override clauses was put most strongly by Ms Debeljak, representing Australian Plaintiff Lawyers' Association:

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

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

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

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

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

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

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

**Ms DEBELJAK:** It can be looked at more positively than a confrontation. It can be looked at as a dialogue. The override clause in Canada has rarely been used.

<sup>134</sup> Australian Lawyers for Human Rights *Submission 30/3/00 p22-23.*

Perhaps a better model to focus on if there is a problem with an override clause is the idea of a declaration of incompatibility. It is much less confrontational than an override clause in terms of the relationship between the judiciary and the Legislature.

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

**Ms DEBELJAK:** I have two points on that. It is political expediency to have an override clause or a declaration of incompatibility. The people of Britain would never, ever have agreed from zero rights.... They had no entrenched domestic rights. Even today they do not have them. The Labour Party in the United Kingdom would never have gotten through a bill of rights were it able to override parliamentary sovereignty. In that sense it is politically expedient for it to allow for a declaration of incompatibility. It is bastardising to a certain extent the idea of rights, but that is politically what it could achieve in the climate it is operating in at the moment.<sup>135</sup>

## Limitation clauses

**4.72** Limitation clauses are important, particularly in constitutionally entrenched systems, because they allow the judiciary to qualify rights according to limits on what is acceptable to democratic system. The Canadian example: "subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society" is a useful example, and one which has been copied in the New Zealand Bill. Other Bills, such as the South African Bill, apply different limits clauses to different rights protected (see above). In New Zealand the courts have developed rules of interpretation regarding the limitation clause (see above).

**4.73** Advocates of a Bill argue limits clauses can avoid the inflexibility of the United States model:

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

<sup>135</sup> Evidence 15/2/01 p7-8.

their conduct in accordance with the Bill of Rights, of what they are required to do.<sup>136</sup>

**4.74** Ms Eastman of Australian Lawyers for Human Rights argued that limitations clauses should ensure certainty in their meaning so as to be workable. She also argued there must be a clear and good reason why human rights should be limited:

... The overriding test would be: Is the limitation necessary, and is it proportional to achieve the reasons why the right needs to be limited in the first place?<sup>137</sup>

## **A Bill Provides Enforceable Rights**

**4.75** There are differences in opinion as to the way in which Bills of Rights should be enforced and the nature of remedies available. The terms of reference (g) for this inquiry refer to the “extent and manner in which the rights declared in a Bill of Rights should be enforceable” and it was in this context that these differences arose during the inquiry. Professor Williams, for instance, saw declarations of incompatibility of legislation, as is intended with the UK *Human Rights Act*, as the main remedy.<sup>138</sup> Other witnesses supported enforceable damages and other remedies as being necessary. Despite different emphases, those who supported a Bill during this inquiry generally argued that one of its advantages was that it would provide enforceable rights where they were lacking at present. Even in a submission generally opposing a Bill, the NSW Bar Association argued strongly that any rights given under a Bill should be enforceable if given at all:

This is because nothing but harm will come from the form or appearance of legislation being lent to unenforceable admonitions of a high-minded kind. The harm lies in the clear message that New South Wales does not trust its people or its courts to treat such important matters appropriately. The harm lies in the implicit message that lip service is all that such supposedly universal values require from New South Wales as a polity. In short, unless such legislation has teeth, it should not be allowed to speak. The only teeth which can be civilly turned on the government are those used by the courts.<sup>139</sup>

**4.76** The most detailed argument regarding remedies was provided by Australian Lawyers For Human Rights in their initial submission.<sup>140</sup> They identified three possible approaches to enforcement of Bill of Rights:

- An interpretative approach: followed by the UK and New Zealand models, where no remedy is provided to the individual but a declaration of

<sup>136</sup> *Evidence* 18/7/00 p10.

<sup>137</sup> *Evidence* 18/7/00 p11.

<sup>138</sup> This is because of his emphasis on the educational value of a Bill (see Chapter Five) and the need for it to be “parliament-centred” rather than “court-centred”.

<sup>139</sup> *Submission* 14/4/00 p10.

<sup>140</sup> *Submission* 30/3/00 p40-53.



incompatibility is made, with the onus on Parliament to either rectify or explain the discrepancy

- A “watchdog” approach where a body with a similar role to Australia’s Human Rights and Equal Opportunity Commission is given monitoring, educational, conciliatory and prosecutorial functions in regard to the Bill
- A complaints based approach, by which individuals need to bring actions in courts or tribunals to obtain enforceable remedies, much in the way the Canadian *Charter* operates.

**4.77** Australian Lawyers For Human Rights argued that the interpretative approach simply represents the existing situation in Australia: there are already common law principles which presume that laws should be read in a way consistent with international human rights obligations (see Chapter Nine).<sup>141</sup> They argue this has not proved to be effective in protecting human rights, and a preferable approach is to have a Bill which allows individual complaints to be run while also having a watchdog body to address systematic issues and promote non-adversarial solutions to breaches. There is a concern that allowing individual complaints leads to remedies which only benefit the individual plaintiff. Australian Lawyers for Human Rights argue this can be addressed by widening the rules of standing in NSW Courts to allow special interest groups or associations to appear on behalf of groups. This theme was also raised by the Public Interest Advocacy Centre, as one of the advantages of a Bill:

...that there may be organisations which would want to institute proceedings asserting a right when an individual cannot do that. The example would be—again, taking a disability example—if an individual who suffers some sort of discrimination or a breach of his or her rights cannot take up the issue because that person's disability precludes them from doing so, then an organisation that is fluent with those kinds of interests should have standing to take up that right on behalf of the individual. It may not even necessarily be on behalf of that individual but in its own right.

For example, it may be an organisation such as People with Disabilities which acts on behalf of individuals with disabilities across the State. That organisation might see that, in terms of its sector, this is an important right that it would want determined so it would be able to intervene. In abortion cases, as in the Canadian experience, organisations often take cases on behalf of women who feel that they do not want to be seen in public arguing something that might cross their cultural background in some way so there is some sort of shield for those women who do not want to necessarily be the person asserting the right, but the organisation that can demonstrate a sufficient interest in an issue does so on their behalf.<sup>142</sup>

**4.78** The Disability Council of NSW argued that Canada has had success in providing a systematic administrative response to the transport and education needs of people with

<sup>141</sup> *Ibid* p47.

<sup>142</sup> Durbach *Evidence* 15/5/00 p14

disabilities because of the existence of the *Charter*.<sup>143</sup> This has been achieved without the need for complaints to be run through the courts. However the knowledge that enforceable remedies were available if administrative reforms were not made provided an important impetus for governmental action.

## **Conclusion**

**4.79** Bills of Rights differ significantly from country to country. There are many different models which New South Wales is able to draw upon should a Bill be introduced. The next three chapters examine the arguments for and against a NSW Bill of Rights, and discuss the Committee's conclusion.

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<sup>143</sup> Kayess *Evidence* 15/5/00 p28-29

## Chapter 5 Arguments in Favour of a NSW Bill of Rights

### Introduction

- 5.1** The Committee received 52 submissions in support of a NSW Bill of Rights. In the course of hearings 24 witnesses spoke in support of a local Bill. While legal academics featured prominently in hearings and provided much assistance to the Committee, supporters of a NSW Bill came from diverse backgrounds. They included human rights advocates, peak disability groups, members of the judiciary, legal professional associations and indigenous groups.
- 5.2** It is not possible in this chapter to do justice to the many sophisticated arguments presented to the Committee in the course of its long inquiry. Those with an interest in the arguments summarised in this chapter and the next are referred to the Committee's website for this inquiry (via [www.parliament.nsw.gov.au](http://www.parliament.nsw.gov.au)), on which appear some of the more detailed submissions received, and the transcripts of all hearings.
- 5.3** While many arguments can be advanced for a Bill of Rights, the Committee believes the most important arguments relevant to a NSW statutory Bill are:
- The educative value of a Bill of Rights in political debates, thereby developing greater understanding of human rights within the community
  - The inadequate protections of human rights for the community, due to gaps in current legislation and the uncertainty of the common law
  - The inadequate protection of minorities in society in the absence of a Bill
  - The international isolation of the development of domestic law in the absence of a Bill of Rights
  - A Bill of Rights can facilitate a constructive dialogue between the Judiciary and the Parliament
- 5.4** The terms of reference for this inquiry ask the Committee to “report on whether it is appropriate and in the public interest to enact a statutory NSW Bill of Rights”. Following this, the Committee is asked to report on 9 specific aspects of a statutory Bill. In Chapter Seven the Committee concludes that in its view it is not in the public interest to implement a Bill in New South Wales. This conclusion makes findings on most of the subsequent specific terms of reference hypothetical: for example, there is little value in expressing a view on how a Bill should be enforced (term of reference (g)) if a statutory Bill has not been supported. For this reason the Committee has chosen to incorporate much of the evidence on terms of reference (a) to (i) in this chapter. Many of the arguments for and against a Bill are relevant to specific terms of reference, and the connection is made throughout this and the following chapter.

## Educative Value

### Rights can be more easily accessible

**5.5** Bills of Rights, whatever their form, serve an important educative function. A Bill of Rights expresses the major rights of a community in a written form in one document. This simplifies the process for the general community wishing to understand the rights to which they are entitled. The Queensland parliamentary committee which examined a Bill of Rights (see Chapter Three) produced a booklet, entitled *Queenslanders' Basic Rights*, which outlined the sources of law which protect rights in Queensland. This included the Federal and Queensland constitutions, Federal and Queensland legislation and regulations, the common law and international human rights law. The booklet stated:

These different sources make it difficult for people to know the range and limits of their rights under the law. This handbook has been prepared ...to help people in Queensland to understand: (1) what their basic rights are and where those rights are found; (2) how to find more information about their rights and enforcing their rights; and (3) how they might go about expanding their rights<sup>144</sup>.

**5.6** Finding "rights" within a complex legal system, then distributing material to promote understanding of those rights, becomes a different proposition under a Bill of Rights. The leading proponent of the educative value of a Bill during this inquiry was Professor George Williams, a constitutional lawyer at the University of New South Wales. Professor Williams has been active in stimulating debate on a local Bill of Rights. He argued that a Bill of Rights consolidates in one document what are seen as the "core rights" for a society, and by doing so provides the general community with a document they can turn to:

I think if certain rights are spread out over the legislation broadly, the community is just not aware of what they are. Something is needed that can be given to schools, that can have some resonance within the community so that they can actually see what they have got in one document, and I think that it is important not to underestimate the value of actually doing that<sup>145</sup>.

**5.7** Professor Williams highlights the US as an example where rights are clearly understood throughout the community because of a Bill of Rights:

If we generate a sense that people have a symbolic attachment to certain rights, one of the really important things the United States has achieved, despite its other problems in these areas, is there is a real sense in the community of "I do have certain entitlements as part of the political process. I, as an individual, do have an ability and almost a responsibility to speak and be interested in political matters, and I have a right to a jury trial and things like that."

We lack a lot of that, and I think we are weaker for it. It is why, again, we are always turning to outside our borders to determine these things. We should

<sup>144</sup> Queensland Legal Constitutional and Administrative Committee, *Queenslanders Basic Rights* p1.

<sup>145</sup> Williams *Evidence* 10/4/00 p16.

develop a sense in the community that the community does have a role in the political process and the people are entitled to certain things.<sup>146</sup>

- 5.8** The Chair of the Law Society's Human Rights Committee, Michael Antrum, also saw a Bill of Rights as not only educational but potentially inspirational, leading to greater understanding of law generally:

One of the reasons the drafting needs to be careful is not only for legislative certainty and being able to have the proper degree of clarification and interpretation of it, but also, in my view, and I am sure for many of our members, that it should not just be a reflective document but an inspirational document—as Mr North referred to the ability of schoolchildren, for example, to learn a little of our law. You need only look at the United States of America and its Declaration of Independence and Constitution for the degree of awareness and understanding by young people in the United States of America about their cornerstone foundation documents. It exceeds Australian schoolchildren by a factor of probably 15 to 1, or greater. I believe this is an opportunity for the community to improve respect for the rule of law and a bill of rights is a great document in which to do that.<sup>147</sup>

- 5.9** Dr Larissa Behrendt of the Australian National University used the example of the *Mabo* decision to illustrate how difficult concepts of human rights can become understood:

I remember visiting Redfern Public School and talking to kindergarten students and students to year 6 not long after the *Mabo* case. They all knew about the *Mabo* case and about native title and what it meant. When these rights actually become more of a reality people will get a better sense of what they entail. While they remain amorphous and they are contained in things like international documents and they are not clearly part of our legal system, people will not have a sense of what is contained within them, especially as there is also debate within academia and legal circles about those issues.<sup>148</sup>

### **Development of a Human Rights Culture in Political Debate**

- 5.10** In his book *A Bill of Rights for Australia*<sup>149</sup> Professor Williams refers to the Canadian *Charter* as an example of how rights can become widely known in the broader community. A survey conducted in 1988, only six years after the *Charter* came into effect, found that 90% of English speaking and 70% of French speaking Canadians had heard of the *Charter*, with a substantial majority describing the *Charter* as good for Canada<sup>150</sup>. Professor Williams attributes this in part to the public participation process used in drafting the *Charter*, and

<sup>146</sup> *Ibid* p41.

<sup>147</sup> Antrum *Evidence* 31/7/00 p6.

<sup>148</sup> *Evidence* 2/8/00 p6.

<sup>149</sup> UNSW Press (2000); this book was tendered by Professor Williams as part of his submission.

<sup>150</sup> *Ibid* p42.

argues that likewise the community in New South Wales could and should be drawn into a process of identifying rights to be protected within a Bill:

A necessary condition of an effective rights regime is popular support and understanding. As Sir Gerard Brennan, a former Chief Justice of the High Court, has argued: "It is clear that the Australian judiciary could not perform a role under a Bill of Rights unless the Australian people consciously casts that role on them"...What is also required is the opportunity for popular participation in a process that offers to improve those rights, so that Australians gain a sense that they have a stake in the freedoms that are recognised. This process should involve reform of the parliamentary committee system and the enactment of a statutory Bill of Rights.<sup>151</sup>

**5.11** Professor Williams further argues that part of this educative value of a Bill of Rights would be to provide a framework for debates over issues, and to highlight encroachment by government on individual rights:

**The Hon. JANELLE SAFFIN:** There seems to be a reluctance in the political process - I am speaking generally - to get involved in debates about human rights. Currently there is the issue about the DNA testing in New South Wales, and when there was some debate about civil liberties it was in the negative sense. It was covered in the media almost in a negative sense instead of in the sense of "Now, hold on. We really are reversing the onus of proof here by mass testing. What we are saying is that every man is a rapist and have this test to prove you are not." I have not been in the community, but it is an issue where there did not seem to be a balanced debate.

**Mr WILLIAMS:** There was not a debate on that issue.

**The Hon. JANELLE SAFFIN:** There was no debate.

**Mr WILLIAMS:** Too often, the media talks to the civil libertarian groups and they say it is a bad thing, and that is the way it works, but there is no sense of what standards we are applying here. If we had an entrenched bill which said we have standards of a presumption of innocence and a range of other things, people might say, "Well, the Parliament has legislated for this. Is this really appropriate?" The Government could say, "Well, yes, it is for these reasons." This may be an overriding right which we understood in that way.

**The Hon. JANELLE SAFFIN:** But we reverse that onus in so many areas, do we not?

**Mr WILLIAMS:** And people do not know about it. It is done all the time. My point is that maybe there are good reasons in some circumstances, but surely it should not be happening unnoticed?<sup>152</sup>

**5.12** Professor Williams sees the educative value of a Bill as having the effect of improving tolerance in the community and strengthening the protection of human rights. He argues

<sup>151</sup> *Ibid* p44.

<sup>152</sup> *Ibid* p31.

that a broad based community understanding of human rights would make it less likely that legislation such as mandatory sentencing would be put forward by governments.

- 5.13** John Nicholson QC, the then Senior Public Defender, agreed, and saw the educative value of a Bill as providing a check against encroachment of the rights of those involved in the criminal justice system:

A bill of rights containing in simple language fundamental rights which the Government and agencies of the Government must respect in its dealings with persons resident in the State and visiting the State is strongly supported by the New South Wales Public Defenders. Our reasons for so supporting a bill of rights are these: It would contain in one location the rights recognised and respected by government. An Act containing a bill of rights would be an education tool for the Government and its agencies in its service delivery. An Act containing a bill of rights would also be an education tool for the citizens of the States, whereby they would become aware of the standard of behaviour expected by government and agencies in dealing with members of the public. A bill of rights would be a benchmark for others not associated with government in their dealing with members of the public.<sup>153</sup>

### **Development of a Human Rights Culture in the Bureaucracy**

- 5.14** Participants in this inquiry frequently referred to the way in which a Bill could promote an informed discussion of human rights in public debates. Aside from the public side of this debate, however, an important by-product of a Bill of Rights is the way a human rights culture would be likely to develop within the bureaucracy. Under most Bills of Rights overseas, legislation and regulation generally need to comply with provisions in the Bill. Public servants developing new policies or drafting statutes to give effect to political initiatives are required to measure up these proposals against the standards set out in the Bill. In time, human rights considerations can become as important a consideration as budgetary impacts of new proposals.
- 5.15** The experience in Canada and New Zealand has been that the level of understanding of human rights within government departments has been substantially upgraded. In a study entitled *The Impact of the Human Rights Act: Lessons from Canada and New Zealand*,<sup>154</sup> UK academic researchers found that the bureaucracies of both countries had undertaken reviews of all existing legislation and regulations for compliance with relevant human rights standards.<sup>155</sup> In Canada, representatives from the Justice Department with expertise in the *Charter* are a regular part of any initial policy team working on a new proposal. The UK researchers concluded that the Canadian Ministry of Justice has come to rival Treasury as

<sup>153</sup> *Evidence 30/1/01 p1.*

<sup>154</sup> Constitution Unit, School of Public Policy, University College, London, May 1999 (London, UK).

<sup>155</sup> However both countries experienced difficulties with this exercise; in New Zealand the "Consistency 2000" review process was terminated by Cabinet because of the extent of the potential changes that could be required – *Ibid* p19.

the most influential agency of government.<sup>156</sup> A study of senior Canadian officials in 1992 concluded that the *Charter* had permanently changed the way in which policy proposals reached Cabinet, with the development of a culture of resolving human rights issues prior to proposals becoming legislation.<sup>157</sup> In New Zealand the impact has been less systematic: a Cabinet Office Manual provides guidelines for all agencies but the major review arises at the legislative drafting stage, at which point the Attorney General must sign off on compliance with the *Bill of Rights*.<sup>158</sup>

## Inadequate protections in existing laws

**5.16** Chapter Two of this report contained a brief summary of the protections given under existing legislation and the common law to human rights in New South Wales. The most consistently put argument from advocates for a Bill of Rights was that current laws provided inadequate protection against human rights abuses. Some highlighted the inadequate protections overall, while others highlighted the inadequate protections given to minorities such as indigenous peoples or the disabled.

**5.17** To put a practical context to the debate, the Committee frequently asked witnesses to provide examples where human rights were claimed to be threatened or denied. Some of the examples provided by witnesses of individual instances include:

- The overriding of the *Racial Discrimination Act* 1975 (Cth) in 1998 by Federal Government amendments to the *Native Title Act* 1993 (Cth) to give effect to pastoral leases on native title land (the *Wik* Bill) (indigenous issues are discussed in a separate section below)
- The jailing of political activist Albert Langer in 1996 for advocating, contrary to a provision in the *Electoral Act* 1918 (Cth), that voters put major parties equal last when voting in an election
- The passage of legislation by a NSW government which extended the sentence of an individual prisoner, Gregory Kable, after the completion of the sentence given at his trial<sup>159</sup>
- The successful defamation action by One Nation Party leader Pauline Hanson which prevented the playing on radio of a song satirising the leader's political views

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<sup>156</sup> *Ibid* p26.

<sup>157</sup> *Ibid* p25.

<sup>158</sup> *Ibid* p27-28.

<sup>159</sup> This legislation was ultimately found to be unconstitutional in the High Court in part because it offended against the implied separation of powers provided for by Chapter III of the Federal *Constitution*.



- The removal of the right of an accused to make an unsworn statement in NSW criminal trials; and
- The prevention of religious groups from distributing literature within a certain radius of Olympic sites during the Sydney Olympics.<sup>160</sup>

**5.18** The Committee has also received several submissions in which the individuals provide detailed documentation of what they argue are abuses of their human rights by various authorities, including courts and tribunals. (The Committee is specifically precluded in its standing orders from investigating individual matters, so is not able to express any view on these examples).

**5.19** Many examples were also given of systemic problems, whereby significant groups in the population were denied basic rights:

- The lack of adequate access to water supplies and other infrastructure by remote rural communities
- The passage of mandatory sentencing legislation in Western Australia and the Northern Territory which remove judicial discretion to take into account the circumstances of the individual offender when sentencing
- The lack of simple remedies available to members of the “stolen generation”
- The lack of access by disabled persons to basic services such as transport and appropriate housing (discussed in more detail below)
- Inadequate legal aid funding leading to lack of legal representation of the poor and disadvantaged.

**5.20** Finally, other examples were provided of gaps in human rights protections which affected the whole community:

- The lack of effective privacy laws
- The lack of laws to ensure adequate compensation for acquisition of private property by the State government
- The encroachment of legislation affecting longstanding common law rights within the criminal justice system.

**5.21** The examples given can be debated. Some are outside the ability of a NSW Bill of Rights to remedy in the absence of a Federal Bill. What is perhaps more useful than listing the abuses which are claimed to occur is the analysis of *why* these and other examples have the potential to arise.

<sup>160</sup> See Clifford (representing NSW Council of Churches) *Evidence* 5/6/00 p25-26.

- 5.22** There were several different explanations why current laws provide inadequate protection. Some argued that the protections under the common law were too vulnerable to being overridden by legislation. Others argued that while some legislation, such as anti-discrimination laws, provided protection to specific groups there was inadequate protection to the wider populace. The view was also put that disadvantaged groups with little electoral power had been largely ignored by legislators and decision makers, and that existing laws gave them no opportunity to remedy this situation.

### **Weakness of the Common Law**

- 5.23** Many common law rights relevant to personal liberty and due process have their counterparts in international conventions such as the *ICCPR*. These include the common law rights against self incrimination; rights not to be detained without charge; the presumption of innocence; rights against search without a warrant; and, rules as to the onus of proof. Some common law protections go beyond *ICCPR* rights, such as the common law right to trial by jury in serious criminal cases and the need to prove a criminal offence beyond reasonable doubt. The weakness of the common law, however, is that these protections can be very easily removed by legislation. Advocates of a Bill argue the only effect of common law rights is residual, covering the gaps not addressed by legislation. For instance, popular concern about young people and violent crime may lead to the passage of legislation that gives police the right to search young people without a warrant, or that allows young people to be removed from public areas at night without charges being laid. Another example is where investigative agencies are established with statutory powers which reverse the onus of proof, with the argument that this is necessary to obtain evidence.
- 5.24** The Law Society of New South Wales argued that, under our current system, “rights” are only what is left after governments have taken away many freedoms:

At the moment we would say that our whole system is characterised by a large amount of legislation and regulation that then says "What is left over are your rights". Our whole system at the moment is negative rather than positive. With respect, Mr Chair, we need a Bill of Rights in this country so that people can understand what their rights are and then look to our legislative bodies to enact legislation that is in conformity with those rights. At the moment we tend to say that our rights are what are left over after legislation and regulation have finished.<sup>161</sup>

- 5.25** Senior Public Defender John Nicholson QC gave an example of an investigatory body contravening several common law rights in the process of an investigation.<sup>162</sup>

A bill of rights would provide a clearly defined statement for the courts to apply in the event of a dispute. A bill of rights would fulfil a need which exists in curbing any government agency that presently is not paying sufficient regard to, or respect for, human rights. I have in mind in particular the testimony I read just recently of a witness outlining his experience in 1996 in respect of a New South Wales

<sup>161</sup> North *Evidence* 31/7/00 p3.

<sup>162</sup> It was not clear whether the agency was acting within its statutory powers in the example given.

Government agency whose task is investigating crime. Having regard to the transcript of the evidence of the agency, it became apparent that he was required by subpoena at fairly short notice to attend that agency at 10.00 in the morning. He was released by that agency after 2 o'clock the following morning. He was not allowed out to buy his lunch at lunchtime. He was not under arrest.

The tone of the agency in its questioning, as observed by me, was both bullying and threatening. I thought to myself: This is not Germany in 1936; this is New South Wales, Sydney, in 1996. There is a need to balance the tensions which exist between proper and efficient investigation of crime on the one hand and basic respect for the fundamental rights of suspects and accomplices on the other. Efficiency in crime investigation is not the only measure of a democratic society.<sup>163</sup>

- 5.26** There is also an argument that many of the protections within the common law are insufficient to meet modern conditions. Advocates of a Bill of Rights point to the many decisions in the European Court of Human Rights during the 1980s and 90s where decisions in the UK courts based on common law principles were found to be in breach of the *European Charter of Human Rights*.<sup>164</sup> An example of how the common law becomes “ossified” was explained by Privacy NSW:

Privacy has not developed as a branch of common law, mainly as a result of the High Court’s decision in the case of *Victoria Park Racing & Recreation Grounds Co Ltd v Taylor (1937) 58 CLR 479*. This case has provided a barrier to the common law developing responses to many of the technological developments that have progressively undermined privacy. It must be remembered that this case was decided before the advent of electronic relational databases, the Internet, micro-cameras, listening devices, tracking devices, DNA identification and retina scans. It was therefore decided in an age before the fragile nature of the right to privacy was fully realised.<sup>165</sup>

- 5.27** One of the strongest criticisms made of the ability of the common law, the so-called “judge made law”, to protect human rights came from a serving judge of the NSW Court of Appeal, NSW Supreme Court, the Hon Justice Paul Stein.<sup>166</sup> He supported those who argue that the common law can be slow to adapt. He highlighted the rights of women as one area where legislation has had to lead the way to remedy deficiencies in the common law. The common law failed to develop in areas such as the right to enter the professions, women’s right to control over property in marriage and the existence of an offence of sexual assault in marriage.

- 5.28** Justice Stein also argues that while the common law has protected some rights in an ad hoc manner, it has also acted to deny other rights:

<sup>163</sup> *Evidence* 31/7/00 p1.

<sup>164</sup> Australian Plaintiff Lawyers’ Association *Submission* p127.

<sup>165</sup> *Submission* 11/4/00 p2-3.

<sup>166</sup> *Submission* 5/5/00 p1-2.

However, the common law has acted as a denier of rights, as well as a protector. While on the one hand, the courts have sought to protect the privilege against self-incrimination, on the other hand, cases have denied any right of privacy, *Victoria Park Racing and Recreational Grounds Club Co Ltd v Taylor* (1937) 58 CLR 479; any right of public meeting for political purposes, *Duncan v Jones* [1936] 1 KB 218; any right of protest, apart from petitioning parliament, *Campbell v Samuels* (1980) 23 SASR 389; any fundamental guarantee of religious freedom and expression, *Grace Bible Church v Reedman* (1984) 36 SASR 376.<sup>167</sup>

**5.29** As with some other witnesses to the inquiry, Justice Stein also notes that the common law does not provide positive “rights”:

On occasions judges have refused to develop the common law interstitially, eg *Dugan v Mirror Newspapers* (1978) 142 CLR 583. The fact is that the common law does not create or support human rights in a positive fashion but rather operates negatively. For example, the law of trespass may be used to stop agents of the state coming onto a person’s land without a search warrant. An action for false imprisonment arises if a person is unlawfully detained by police. These are in the nature of negative rights, which need to be availed of to be upheld. But even remedies of these types may be overridden by statute.<sup>168</sup>

**5.30** Another judge, Judge Grogan of the NSW District Court, highlighted a further weakness of the common law in that it is opportunistic, needing specific cases to be run for a right to be established:

The common law just cannot deal with every conceivable situation that affects a person’s human rights, freedom of speech and other matters. It has to endeavour to deal with the issues that arise case by case and resolve those issues in a particular case. It is the knowledge and the fact of universal standards that apply. You can read a document, you can go to school. It may be only four pages or so, “These are our rights”. The Universal Declaration of Human Rights is not hard to read. It is educative, but if it is enforceable it seems to me that we have done the work that might otherwise take the common law—which is scattered and so on across Australia—years to do. There are also small rights which are very important to an individual which may never see the light of day, and accordingly, never be determined by a court. It seems to me that those rights are worth protecting just as much as big rights which may be determined by the High Court in a particular way.<sup>169</sup>

**5.31** A final weakness of the common law suggested to the Committee is that the development of rights protection is in the hands of individual judges, and particularly influenced by the composition of the higher courts:

Common law rights stand in a precarious position given the uncertainties associated with the development of the common law. History shows that the

<sup>167</sup> *Ibid* p2.

<sup>168</sup> *Ibid* p2.

<sup>169</sup> *Evidence* 30/1/01 p32. This point was also raised by the Disability Council of NSW, *Submission*, 29/3/00, p10.

availability, scope and application of rights can vary according to changes in the composition of a court. Moreover, in articulating rights, judges tread an uncertain path, sometimes leaving the judiciary open to charges that the democratic system is being usurped by an “unelected and unaccountable” judiciary. Rights “discovered” by the judiciary also have little symbolic or educative effect since their existence is not known prospectively and they are not publicised widely.<sup>170</sup>

### Weaknesses of Statutory Protections

**5.32** Advocates of a Bill of Rights generally acknowledged that existing statutes provided some protection of human rights, with Commonwealth and NSW anti-discrimination legislation most regularly mentioned. However it was argued by several witnesses that these statutes were often not given enforceable remedies, and that rights given could easily be taken away:

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

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

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

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

In terms of the actual substance of the laws as opposed to institutions, again that can be changed. Limitations can be placed on rights quite readily. For example, with the problem that we had with the infertility laws of Victoria of late, the Federal Government could quite easily have put a provision in its legislation preventing single women getting IVF treatment and put in an exception under its Sex Discrimination Act to ensure that that was not against the Sex Discrimination

<sup>170</sup> Australian Lawyers for Human Rights, *Submission 30/3/00* p13.

Act. So in that sense there is always the ability for Parliament to limit the rights that it has given and those limitations will never be subject to judicial review.<sup>171</sup>

- 5.33** The argument that statutes protecting rights can be changed and so do not provide adequate safeguards is equally an argument that can be made against a *statutory* Bill of Rights. This is the reason why some advocates preferred a constitutionally entrenched Bill. However others argue that statutory Bills acquire the status of “fundamental legislation” so that it becomes politically very difficult to amend such statutes, even if it remains possible.
- 5.34** A frequently put argument for the weakness of statutory protections during the inquiry was the “gaps” in current protections and the unwillingness of governments to address those needs. This was particularly argued in relation to minorities, which has been treated here as a major argument in itself (below).

### **Inadequate Protection of Minorities under Existing Law**

- 5.35** The term of reference (b) of this inquiry included consideration of whether “economic, social and cultural rights, group rights and the rights of indigenous people should be included in a Bill of Rights”. While economic, social and cultural rights can be enjoyed by the whole population, they can be of particular benefit to disadvantaged groups. One of the principal arguments in favour of a Bill of Rights is that is that the reliance upon responsible government to protect rights means that “unpopular” minorities can have their rights ignored. If a group is small in number or not concentrated in a voting bloc it is not able to influence government through the democratic process; these minorities are dependent upon the goodwill or concern of elected representatives to advance their case. As explained by Ms Debeljak of Monash University (representing the Australian Plaintiff Lawyers Association):

I think what must be kept in mind is that the main reason why we need documents to protect fundamental human rights and freedoms is that they are there to protect unpopular minorities. In terms of unpopular minorities, who is out there to protect them? When I am thinking about limitations being placed on statutes such as the Anti-discrimination Act, there may be multiparty agreement in terms of some general areas of discrimination that should not be allowed, but then what happens when an unpopular minority comes forth and needs the protection of anti-discrimination laws?<sup>172</sup>

- 5.36** Professor Williams presented a similar argument:

Well, it comes down to the question: do you think our human rights record is magnificent? Personally, I do not. I think if you judge our human rights record from the perspective of people who generally do have well-protected rights from the perspective of people in the community and people in the middle classes and people like that, yes, absolutely, but what is too often forgotten is the fact that indeed human rights of many of the smaller groups in this country have been very badly abrogated on many occasions.

<sup>171</sup> Debeljak *Evidence* 15/2/01 p14.

<sup>172</sup> *Evidence* 15/02/01 p15.

Whether it is indigenous peoples, whether it is Communists at the height of the Cold War, whether it is agitators like Albert Langer, whether it is certain people in the bush, the fact is that their human rights are not well protected today. Something ought to be done. I think those people would say too, "Well, it is fine if you are in that majority that is well protected at the moment, but what about us? We are like some of the groups in other countries you are referring to where we do not have the political power to indeed achieve certain things. We want a structure that actually respects our position within the community".<sup>173</sup>

- 5.37** When considering the protection of the rights of minorities most witnesses addressed these in the context of "group rights" (see Chapter Two). Economic, social and cultural rights of the type found in the *International Convention on Economic, Social and Cultural Rights* (the *ICESCR*) were particularly emphasized, although as one witness pointed out the *International Convention on Civil and Political Rights* also contains some group rights, such as the right to self determination in Article 1 and cultural rights in Article 27.<sup>174</sup>

### **Economic, Social and Cultural Rights of Minorities**

- 5.38** Uniting Care of NSW ACT (formerly the Uniting Church Board of Social Responsibility) saw economic, social and cultural rights for minorities, of the type covered by the *ICESCR*, as the area most neglected by existing protections:

In NSW, anti-discrimination legislation provides some protection for such groups where the violation of their human rights is related to discrimination. However, that is clearly not enough, as the *Toomelah Report* and statistics on Aboriginal health, education and unemployment make clear. Twelve years after the *Toomelah Report*, many of the problems it documented, both the specific problems at Toomelah and the underlying problems of government administration and coordination, persist. Similarly, in spite of the bureaucratic activity in response to the reports of the Royal Commission into Aboriginal Deaths in Custody, there are more Aboriginal people in custody in NSW (and elsewhere) than ever before, prisoners continue to die in custody, and many economic, social and cultural issues highlighted in those report have not been effectively dealt with.

In recent years, it has become clear that the rights of workers to associate, to organise and to strike are under threat. The BSR commends the NSW government for its recent initiatives to protect and enhance the rights of outworkers in the garment industry. However, those initiatives have only emerged after a concerted campaign by community and church groups and the unions, in solidarity with the workers themselves. ...Other areas where not all citizens enjoy the standard of living one would expect in an Australia that respects human rights are housing, education, health, employment, physical services such as water and sewerage, income levels, child protection and juvenile justice.<sup>175</sup>

<sup>173</sup> *Evidence* 10/4/00 p14.

<sup>174</sup> Nettheim *Evidence* 2/08/00 p28.

<sup>175</sup> *Submission* 21/3/00 p7.

**5.39** Uniting Care notes that although Australia has ratified the *ICESCR*, the Convention's provisions have not been entrenched in domestic law, and receive ad hoc legislative protection at the discretion of various federal and state governments. In its submission Uniting Care further argues that this inadequate legislative protection puts the judiciary in a difficult position when interpretations based upon Australia's international undertakings are made:

The failure to clearly incorporate the ICESCR into domestic law means that when the High Court or other courts attempt to take account of such rights, their decisions come under attack and arouse hostility and division that are themselves inimical to human rights. As there is little effective education on citizenship and human rights, most Australians have little idea of the meaning or implications of ESC rights or how the concept of ESC rights is integral to their citizenship.<sup>176</sup>

**5.40** Mr David Wiseman, an Australian academic currently working for the Centre for Equality Rights in Accommodation in Canada, prepared a detailed submission to the inquiry exploring the ways in which economic, social and cultural rights were protected in Bills of Rights overseas. Mr Wiseman argues that protection of economic, social and cultural rights includes the ability to enforce these rights. He argues this ability to enforce economic, social and cultural rights is not present in NSW:

This obligation to provide effective remedies is significant for the present inquiry because, at present, NSW is failing to adequately comply with this obligation. Economic and social rights are not presently guaranteed or protected by any legislation in NSW. While there is some degree of protection against discrimination in the economic and social sphere, this protection is far from comprehensive and has been made less effective by continuing declines in legal aid funding.<sup>177</sup>

### **Human Rights and People with Disabilities**

**5.41** Australia is a signatory to the *United Nations Declaration on the Rights of Disabled Persons*<sup>178</sup> and the *Declaration on the Rights of Mentally Retarded Persons*.<sup>179</sup> Aside from these declarations, the major conventions, such as the *ICCPR* and the *ICESCR*, require governments to ensure all citizens enjoy equal rights and opportunities. The Disability Council of NSW, the peak advisory body to the NSW Government on disability issues, has argued that existing legislation aimed at protecting the rights of people with a disability fail to fully meet Australia's international obligations. Examples of weaknesses in the legislation are said to include:

- The *Disability Discrimination Act 1992 (Cth)* and the *Disability Services Act 1993 (NSW)* operate more as funding mechanisms rather than addressing planning

<sup>176</sup> *Ibid* p12.

<sup>177</sup> *Wiseman Submission /3/00* p8-9.

<sup>178</sup> For text of this declaration see [www.unn.edu/humanrts/mstree/tldrmp.htm](http://www.unn.edu/humanrts/mstree/tldrmp.htm)

<sup>179</sup> See [www.unn.edu/humanrts/mstree/tldrmp.htm](http://www.unn.edu/humanrts/mstree/tldrmp.htm)



needs, with the exclusion of sections of the disability community whose needs cannot be met or whose disability is not captured by those laws

- The *Community Services (Complaints, Reviews and Monitoring) Act 1993* (NSW) limits the Community Services Commission<sup>180</sup> to making recommendations (a) within the resources appropriated by Parliament and (b) not inconsistent with government policy that stipulates how resources should be allocated
- The Human Rights and Equal Opportunity Commission has no power to enforce determinations made under the *Disability Discrimination Act*, resulting in people with a disability having to appeal to the Federal Court for a legally enforceable ruling.<sup>181</sup>

**5.42** The Council provided a list of specific examples in which people with a disability have failed to receive adequate protection of their human rights:

- Women with disabilities experience abuse and violence at significantly higher rates than their non-disabled counterparts
- People with disabilities in institutions often live in inappropriate conditions, with reported incidences of abuse, malnutrition and deaths
- People with psychiatric disabilities were subjected to experimental forms of treatment resulting in death (The Chelmsford inquiry)
- People with disabilities have unmet needs in relation to supported accommodation and respite care
- Women with disabilities escaping violence are denied access to women's refuges.

**5.43** In evidence, representatives of the Council did not agree that political representatives could be relied upon to remedy these and other gaps in protections:

**The Hon. J. HATZISTERGOS:** Is the answer to that question that there should be activity at a political level to ensure that that matter is redressed, rather than leaving it up to the good grace of judges to be able to interpret it? After all, those judges are not elected. They are not responsive to the policy concerns that are raised, whereas theoretically members of Parliament are. If you do not like them you chuck them out.

**Ms KAYESS:** Theoretically, yes.

**The Hon. J. HATZISTERGOS:** In practice they are. If they do not respond they are not re-elected.

<sup>180</sup> A body established under the Act whose role includes to monitor and review community services, conduct inquiries into matters affecting consumers and service providers.

<sup>181</sup> Disability Council of NSW *Submission 29/3/00* p4-5.

**Ms KAYESS:** Representativeness in this culture is not necessarily a notion that, if people do not respond to certain elements, they do not get elected. It is a silly notion. In relation to the disability issue, I completely reject it.

**Mr FOLINO:** If a child with a disability does not get into a school of his or her choice, it is not going to be a vote loser; it is not going to be a thing that tips a party into opposition.

**Ms KAYESS:** If a person living in an institution does not receive enough nutritional care, to the point where he or she dies an early death, that is not an issue that is going to raise any great voting backlash, and it has not created any voting backlash.

**Mr FOLINO:** Melinda Jones, if you have the opportunity to speak to her, uses a really good example of a child with a disability who is actually killed by a parent because the mother could not cope, but she does not go to gaol.

**The Hon. J. A. SAFFIN:** Does the case go to court?

**Mr FOLINO:** No, it does not. However, the mother who kills a child without a disability ends up going to gaol.

**The Hon. J. HATZISTERGOS:** I think we are talking about two different things. You are talking about an individual problem. Leaving that aside—

**Ms KAYESS:** No. It is the manifestation of a systemic problem. They are not individual problems. It is objectifying the situation.

**The Hon. JANELLE SAFFIN:** Is denial of access to transport individual or systemic?

**Ms KAYESS:** It is systemic. Denial of access to be able to go to the local school is a systemic problem. It has nothing to do with the individual.<sup>182</sup>

## The Rights of Indigenous Peoples

- 5.44** The advancement of the rights of indigenous peoples is sometimes a controversial issue in international human rights debates. Many indigenous groups consider the *ICCPR*, with its focus on individual rights, provides insufficient protection for their needs, and that at a minimum the rights given under the *ICESCR* are necessary.<sup>183</sup> The *United Nations Draft Declaration on the Rights of Indigenous Peoples*,<sup>184</sup> which has yet to reach the status of formal declaration, stresses not only the fundamental right to equality for the world's Indigenous peoples (article 1), but also the special protection required if they are to be able to practise their culture (articles 4, 6, 8, 9, & 12 - 14), including their particular association with land

<sup>182</sup> *Evidence* 15/5/00 p28.

<sup>183</sup> NSW Aboriginal Land Council *Submission* 11/7/00 p2, although NSW ATSIIC was less critical *Submission* 2/06/00 p1.

<sup>184</sup> See [www.unhchr.ch/](http://www.unhchr.ch/)

(articles 10 & 25) and to exercise their right to self-determination in political, economic and social terms (article 3). The *Convention on the Elimination of all forms of Racial Discrimination*<sup>185</sup> is also important in debates as to the protection of the rights of indigenous peoples. The *Racial Discrimination Act 1975* (Cth) enacted much of this convention locally, but was overridden by Federal legislation during the 1997-98 *Wik* debate (see below).

- 5.45** The terms of reference for this inquiry included, as term (b) the question as to whether the rights of indigenous peoples should be specifically protected in a statutory Bill of Rights. The Committee sought the views of a number of indigenous organisations on this issue, and also received frequent comment on this from other individuals and organisations. Generally those who supported a Bill of Rights also supported the need for such a Bill to specifically protect the rights of indigenous peoples, while others argued that a more general provision, such as that preventing racial discrimination, would be of great benefit to indigenous peoples. Bill of Rights advocates were in agreement that existing laws did not adequately protect the rights of Aboriginal and Torres Strait Islander peoples.
- 5.46** Chapter Three discussed arguments that the Australian Constitution was originally framed so as to treat Aboriginal persons as non-citizens. Professor Williams is concerned that there appears to be some support, deriving from the *Hindmarsh Island* case,<sup>186</sup> for the proposition that the power given to the Federal government to pass laws on the topic of “the people of any race for whom it is deemed necessary to make special laws” includes the power to make laws which affect a particular race adversely. As a result of the final decision of the case it remains unresolved whether the Federal government has the power to pass a law to discriminate against indigenous people.<sup>187</sup> Professor Williams also argues that on the basis of *Kruger v Commonwealth*<sup>188</sup> there is no power in the Constitution to prevent the forcible removal of indigenous children from their families and communities.
- 5.47** Professor Garth Nettheim, founder of the Aboriginal Law Centre at the University of New South Wales<sup>189</sup> argued that the *Hindmarsh Island* case was very uncertain in regard to the “races” power.<sup>190</sup> However he expressed considerable concern at the way the rights of indigenous peoples had been treated during debate on the *Native Title Amendment Act 1998* (Cth) (The *Wik* legislation):

**The Hon. P. J. BREEN:** As a result particularly of the *Wik* decision, the New South Wales Government now has the power to make laws in respect of indigenous rights in a way that perhaps it did not before. It occurs to me that that is an environment in which we could find ourselves confronted with laws which breach fundamental principles, particularly in relation to indigenous people. Do you see that as a risk in New South Wales?

<sup>185</sup> see [www.unhcr.ch/](http://www.unhcr.ch/)

<sup>186</sup> (1998) 152 ALR p540.

<sup>187</sup> See Williams *op cit* p8-9.

<sup>188</sup> (1997) 190 CLR 1.

<sup>189</sup> Now known as the Indigenous Law Centre.

<sup>190</sup> *Evidence* 2/8/00 p30.

**Professor NETTHEIM:** I think it is a risk. I was concerned about the amendments that went through. Amendments to the 1997 legislation were introduced in the Senate, some of which the Government accepted. Ultimately, the deal between Senator Harradine and the Prime Minister allowed the Native Title Amendment Bill 1998 to go through the Parliament. Nonetheless, it left some significant violations of rights under international human rights standards, certainly in terms of the property rights of indigenous peoples. The debate itself I think at the time generated more heat than light. ...

Possibly some of the discussion over the last week or so, emerging from the consideration by the Committee on the Elimination of Racial Discrimination of those amendments, introduced to Australians who had read some of those accounts in the newspapers an awareness that there could be some problems. My understanding is that the Government was trying from 1996 through to 1998 to introduce as much certainty as it could for non-indigenous interests. But it did so at quite significant encroachment on native title rights and interests, which might otherwise have applied under the Mabo decision in the 1993 Act.

**The Hon. P. J. BREEN:** Could it also be said in that context that, at least with the original native title legislation, the indigenous people were consulted, whereas with the Wik amendments they were not? Is that the case?

**Professor NETTHEIM:** There was some consultation with the Wik amendments, but not at the level at which there had been in 1993. Eventually, those people representing Aboriginal organisations in 1993 accepted some of the negative aspects of the 1993 bill in return for some of the positive aspects in that bill and outside that bill, one of which was the establishment of the Indigenous Land Corporation and the Land Purchase Fund. There was not that element of acceptance by principal organisations involved in the 1998 amendments.

Generally speaking, one could say that Aboriginal people and Torres Strait Islanders were entirely opposed to the more draconian pieces of the legislation. Some elements were supported. In fact, provisions in the Native Title Amendment Act 1998 authorising indigenous land use agreements were initiated by indigenous peoples' organisations in conjunction with industry and various other bodies and were supported by them. But the bill, as a whole, was not. That was one of the criticisms made by the Committee on the Elimination of Racial Discrimination.<sup>191</sup>

**5.48** Dr Larissa Behrendt, a research fellow from the Australian National University, stated that the *Wik* legislation changed her view as to the needs of indigenous peoples in Australia for a Bill of Rights:

One of the reasons why I thought that a Bill of Rights was never going to be an important issue for indigenous Australians was that we have legislative protection of rights such as the Racial Discrimination Act which has offered quite good protection. I was actually assuming that we would never in my lifetime see it become acceptable for the community that I thought I lived in to think about repealing such Acts.

<sup>191</sup> Evidence 2/08/00 p24-25.

With the development of our native title rights regime and the discussions around the Native Title (New South Wales) Amendment Act—when it was actually suggested, and subsequently enacted, that parts of the Act would be repealed—I became particularly concerned about that and I re-thought my position about those provisions being enough, considering that members of the community lost very valuable rights at that point. The other occurrence that made me really re-assess that point was the case of *Kruger v The Commonwealth of Australia*, which was the 1997 stolen generation case.

As the Committee is probably familiar, members of the stolen generation and a parent who had lost a child under a Northern Territory ordinance brought a list of claims to the High Court setting out a variety of implied and expressed rights that they thought had been violated by a policy, including things like the right to religion and the implied right to freedom of movement. By a majority—though there was some dissent among members of the High Court—none of those rights was found to have existed in the plaintiffs. I think that, symbolically, the case shows how our Constitution leaves issues of rights to the Legislature. It really highlighted for me the fact that there are big holes that should be addressed and that in some ways our standards do not come up to the society that we perhaps think we have.<sup>192</sup>

**5.49** Dr Behrendt also believed that any right to equality or freedom from discrimination in a Bill of Rights should provide the opportunity to ensure equality of outcomes:

...I feel particularly strongly about that. I think we have a history within our community of living under laws that are supposed to apply equally for all Australians but give disparate impact and results to our communities. The Royal Commission into Aboriginal Deaths in Custody is probably the best example of an analysis of the way that seemingly neutral laws can impact disproportionately in our communities. I think it is very important from that perspective to have some aspirational comment that looks at those outcomes rather than just a mere formal application.<sup>193</sup>

**5.50** The NSW Aboriginal Land Council and the NSW branch of the Aboriginal and Torres Strait Islander Commission both gave strong support for a Bill on the basis that it would advance and protect the interests of the people they represent. Mr Rodney Towney, chairperson of the New South Wales Land Council, raised the prospect of a future NSW State government introducing a form of mandatory sentencing, with dire repercussions for the indigenous community:

That such a proposal [a proposal from the NSW Shadow Attorney –General to impose minimum jail sentences for repeat offenders] can come from a State whose Government was the first to offer an apology following the "Bringing them home" report, which has robustly embraced reconciliation, is a frightening reawakening to the reality that Aboriginal people in New South Wales will forever be in a precarious position until fundamental human rights are enacted by government. The bill of rights in New South Wales will not correct 200 years of disadvantage. It will not of itself prevent Aboriginal people suffering the detriment

<sup>192</sup> *Evidence 2/08/00 pp1-2.*

<sup>193</sup> *Evidence 2/08/00 p2.*

of ill-conceived policies and practices. But a bill of rights at a very minimum would provide the benchmark of standards of government policies and it would provide a much-needed mechanism to ensure the proposals of mandatory sentencing, assimilation and other abhorrent policies are never enacted in New South Wales. In the absence of adequate protection from the Federal Government, it lies to the State and Territories to uphold and enact those rights.<sup>194</sup>

**5.51** The NSW ATSI Commission Mr Desmond Williams raised a number of examples where the rights of indigenous people in NSW might have been treated differently under a Bill of Rights. The examples included:

- the lack of access by some NSW Aboriginal communities to clean water, functioning sewerage systems or adequate primary medical care
- the lack of debate about human rights to clean water during the passage of the *Native Vegetation Conservation Act*
- the lack of consideration of the cultural rights of indigenous peoples to fish as a human rights issue when the *Fisheries Management Act* amendments were considered
- the lack of control of Aboriginal people in NSW over their sacred sites; and
- the lack of implementation of Aboriginal customary law and the lack of indigenous community based justice systems as part of the NSW criminal justice system.<sup>195</sup>

### **Gender Inequality**

**5.52** In population terms women are not a minority in New South Wales, but Ms Debeljak, representing Australian Plaintiff Lawyers Association, argued that in other respects they were a minority and one which would benefit from a Bill of Rights:

They are an economic minority, they are a political minority and they are a social minority. We need to expand our vision of what a minority is to be able to understand the issues underlying a bill of rights. Women are consistently underpaid for the work they do; women are consistently denied access to services that they might need; women are consistently given less security in job tenure than men through structural discrimination. A bill of rights can aid that. There will be a freestanding clause in a bill of rights that says that discrimination in practice or in law should not be allowed to happen, and in that sense it will actually aid New South Wales.<sup>196</sup>

**5.53** Several international conventions address the rights of women aside from those given by virtue of the general rights in the *ICCPR* and the *ICESCR*. The *Convention on the Elimination*

<sup>194</sup> *Evidence 1/02/01 p3.*

<sup>195</sup> *Evidence 1/02/01 p11.*

<sup>196</sup> *Evidence 15/2/01 p15.*

of all forms of *Discrimination Against Women*<sup>197</sup> is particularly important as it forms the basis of the *Sex Discrimination Act 1984* (Cth).

- 5.54** Two organisations representing women's interests, the Women's Electoral Lobby and Women into Politics, gave evidence during the inquiry. While acknowledging that progress had been made in advancing the interests of women over the last 100 years, they saw this progress as too slow and too piecemeal, and argued that a Bill of Rights could accelerate gender equality:

I think we come back to what we said originally. At the moment what we have is a hodgepodge of legislation that covers different activities. Some of it is federal and some of it is state. We have affirmative action, we have EEO, CEDAW. We have a whole bunch of stuff but there are still gaps. There is no teeth in any of the legislation—large employers, political parties. It does not apply to political parties. There is a whole bunch of exemptions. If we are to lobby on all the different fronts how much energy and effort is that going to take? Properly drafted legislation should not need amending that quickly. It will certainly last our lifetime.<sup>198</sup>

- 5.55** Representatives of both organisations argued that the under-representation of women in parliaments meant the protection of women's rights by statute was largely in the hands of men, and that a Bill of Rights could act to ensure accountability:

**Ms BIELSKI:** I put it to you that 50 per cent are presently unrepresented. Therefore, we have to pressure and lobby you because we have no other source to get change. I should not say "no other source", but we do not have what is called critical mass in the Parliament. Farmers are represented in the Parliament, business is represented and lawyers are represented. There are people there from all sorts of occupations that can bring matters of concern to their profession, their organisation, their way of life to the Parliament. I think women in this Parliament have only demonstrated their interest in women's issues over the abortion debate some years ago.

**CHAIR:** I put this to you in regard to judges. Judges are overwhelmingly still male, Anglo-Celtic, private school educated. As that is the case, how do you argue that you are likely to get a better deal from the judiciary, given that they are less representative of Australian society than are politicians?

**Ms BARBER:** Because the bill of rights will direct them that way. At the moment, under common law, what they are doing is building on the previous cases that were heard, and on the different pieces of legislation. This is changing.<sup>199</sup>

## International isolation of domestic law

<sup>197</sup> see [www.unhchr.ch](http://www.unhchr.ch)

<sup>198</sup> Barber *Evidence* 1/02/01 p23.

<sup>199</sup> *Evidence* 1/02/01 p24.

**5.56** Term of reference (d) for this inquiry referred to “the consequences for Australian common law Bills of Rights in the United Kingdom, Canada and New Zealand”. This related primarily to recent comments by the Chief Justice of NSW, Justice Spigelman, quoted in Chapter Three of this report to the effect that local common law risked intellectual isolation in the years ahead. His argument was that the introduction of a Bill of Rights in the UK would have a profound impact on the future development of the common law in that country, as it has done in Canada (and increasingly New Zealand). In the absence of a local Bill of Rights, much of the overseas cases which have proved so helpful to the development of local law would be incomprehensible in the future.

**5.57** Understandably, as it was a term of reference, this international isolation argument was discussed in a number of submissions, both supporting the argument, as discussed here, or rejecting the argument, as discussed in the next chapter. The NSW Branch of the International Commission of Jurists quoted another Chief Justice (of Western Australia) raising similar concerns to the NSW Chief Justice:

The consequences on Australian common law, without a Bill of Rights, ...has been highlighted by the President of the Western Australian Branch of the ASICJ, the Hon Justice Malcolm, when he stated:

Australia, without a Bill of Rights, is now outside the mainstream of legal development in English speaking countries, particularly those most comparable in the political and legal systems.<sup>200</sup>

**5.58** The ICJ went on to argue:

People in France, Germany the Netherlands and Italy have remedies in their own courts in case of a breach of the European Convention on Human rights and many other countries give similar protections. Australia has drawn upon and continues to extensively draw on the common law of the United Kingdom, Canada and New Zealand. These countries now each have a Bill of Rights, which has and will continue to have a considerable impact on the development of their jurisprudence. If Australia, including the states and territories, omit to enact a Bill of rights then our ability to draw upon the jurisprudence of these countries will become increasingly limited, notwithstanding our foundational values and aspirations remain the same.<sup>201</sup>

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<sup>200</sup> *Submission 31/3/00 p10.*

<sup>201</sup> *Submission 31/3/00 p11.*



**5.59** The President of the Law Society of New South Wales, Mr John North, when he gave evidence, was even stronger:

... The problem here is one of putting your head in the sand. If you do not give the Chief Justice's words some real weight, we will have more and more of these very unpalatable cases of mandatory sentences and other matters being raised by organisation such as the United Nations, condemning Australia for having legislation and practices that are anathema to an otherwise civilised society. You will find that if we do not keep an eye on the course of these cases in other countries we will be internationally ostracised for the stance we take.<sup>202</sup>

**5.60** Justice RN Madgwick of the Federal Court argued that New South Wales should lead the way in overcoming Australia's lag in response to trends in international human rights, or else face more rapid and less appropriate legal developments at a later stage:

Familiarity with a statutory bill of human rights will make surer and easier a transition to constitutional entrenchment. Sooner or later, we will in Australia do something. The world movement to greater respect for human rights is not only directed against the most brutal abusers of them. That movement is unstoppable. The world will not let Australia forever be the backwater that we now are in terms of giving legal expression to human rights. NSW has the legislative capacity to act and to lead. It is the birthplace of Australian democracy. It is fitting that it should lead the development of human rights in Australia. The NSW Parliament can ensure that what it does suits NSW. The alternative is to do nothing, to suffer some people to be avoidably trampled, until eventually the Commonwealth Parliament, or another activist High Court, acts, and then be subject to a scheme that may suit NSW less.<sup>203</sup>

## **Facilitation of Dialogue between the Judiciary and the Parliament**

**5.61** Debates over a Bill of Rights frequently involve a debate about the appropriate balance between the Judiciary and the Parliament. Arguments revolve around whether human rights are best protected by parliamentary representatives or the judiciary. Members of Parliament are democratically elected but bound to various interests, including party discipline. Members of the Judiciary are able to make judgements free from political constraints but are not directly accountable to the community for the outcomes of those decisions. Many advocates of a Bill of Rights believe in parliamentary supremacy, particularly those such as Professor Williams and Father Frank Brennan who strongly favour statutory Bills of Rights over constitutionally entrenched Bills. Other advocates are less convinced of the potential of Parliament to protect human rights and seek a model of a Bill which can effectively strengthen the power of the Judiciary, such as the Australian Plaintiff Lawyers Association, Australian Lawyers for Human Rights and the Disability Council of NSW.

<sup>202</sup> *Evidence* 31/7/00 p6.

<sup>203</sup> *Submission* 19/5/00 p10.

- 5.62** These differences emerged primarily when participants in the inquiry commented upon the terms of reference (e) and (h). Term (e) refers to “in what circumstances Parliament might exercise its ultimate authority to override basic rights declared in a Bill of Rights and what procedures need to be put into place to ensure that any such overriding legislation complies with a Bill of Rights”. Term (h) refers to “whether a Bill of Rights should be subject to any reasonable limits prescribed by law that are demonstrably justifiable in a free and democratic society”. Arguably term (e) is about Parliament giving itself a power, in a Bill, to retain its supremacy; whereas term (h) is about a “reasonable limits” clause by which the judiciary is given an interpretative power. (The specific issues of parliamentary override and limitations clauses are discussed in Chapter Four).
- 5.63** Despite differences in emphasis, advocates for a Bill of Rights generally all agreed that a Bill would change the nature of the relationship between the Judiciary and the Parliament for the better. While it is difficult to encapsulate the different arguments presented, a summary of the overall view is that a Bill of Rights would allow a more constructive dialogue or interaction between the Judiciary and Parliament than currently occurs. There was particular enthusiasm for the way in which the UK *Human Rights Act* has formalised this dialogue<sup>204</sup>:

The next thing I would like to say in relation to, in particular, the United Kingdom bill is again about the idea of a declaration of incompatibility. If for some reason there is something problematic with the law that enables a corporation to do something, all the courts can do is make a declaration of incompatibility that opens up a dialogue between the court on a principled, reasoned basis with the parliament that may have made a decision on political or expedient terms. Then they can always remedy the situation.<sup>205</sup>

- 5.64** Ms Debeljak, for Australian Plaintiff Lawyers Association, argued that the “dialogue” envisaged under the UK Act would not in any way threaten the separation of powers:

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

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

<sup>204</sup> There were more mixed views as to the Canadian and New Zealand experience. No one presented an argument that the United States was an appropriate model.

<sup>205</sup> Debeljak *Evidence* 15/2/01 p9. Ms Debeljak was speaking in relation to a different issue, the definition of corporations under the Canadian Charter, but her answer illustrates the type of dialogue referred to in this section.

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

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

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

Thirdly, the Parliament has actually said that it will take any declaration of incompatibility seriously. The Parliament is confident that the judges are not going to abuse their role under the Human Rights Act. In all second-reading speeches, and in all public relations media in relation to the Human Rights Act, the Parliament and the government have said they will take declarations of incompatibility seriously and will look to the bases on which they have been made, because the Parliament and the government are intent on respecting the rights of their citizens.<sup>206</sup>

**5.65** Those who oppose a Bill of Rights frequently cite the politicisation of the Judiciary as one of its undesirable side effects. However some advocates of a Bill argue that instead, the political role of the Judiciary is made transparent and given formal definition. Judges, they argue, have always taken on a limited policymaking role: all a Bill of Rights does is to take public policymaking "out of the closet".<sup>207</sup> The advantage of a Bill is that it can be used to give the Courts and Parliament a means of dialogue over particular statutes instead of the current situation where no formal dialogue exists.

**5.66** One presentation of the argument regarding the politicisation of the Judiciary came from Justice Stein of the NSW Court of Appeal, in support of a Bill. He said:

Such a label [politicisation of the judiciary] is misconceived. Charters or Bills of Rights have not, for example, politicised the courts of New Zealand or Canada. There is a good reason why this is so. Courts have always been reviewers and interpreters of the rules by which society operates, that is through legislation. Nothing about the institutional arrangements of courts changes with the introduction of Charters of Rights.

<sup>206</sup> *Evidence* 15/02/01 p20.

<sup>207</sup> The term was used by Justice Rosalie Abella in a speech "Human Rights and the Judicial Role", presented at the Ninth Australian Institute of Judicial Administration Oration in Judicial Administration, 23 October 1998 p16-17.

It's a funny thing about the politicisation argument. It is an argument rarely used where courts prevent rights. However when courts interpret rights expansively, critics say they are 'politicised'.<sup>208</sup>

**5.67** Justice Stein quotes a Canadian judge, Justice Abella to argue that the *Charter* has provided for a more open and transparent role for the judiciary than previously occurred:

In so far 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 *Charter* 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.<sup>209</sup>

**5.68** Other advocates have argued that the Judiciary under a Bill of Rights are given an extended role to that which they already play, in the protection of rights of minorities:

...there is the belief that there should be an institution in society which can independently and fairly, and without fear of consequences, safeguard against what Lord Scarman called the 'modern menace of unbridled majority power'. Human rights essentially concern the protection of minority rights from arbitrary erosion or violation by the majority. The Legislature, which relies on majority support, cannot be expected routinely to risk political self-destruction by promulgating minority causes; on the other hand, the courts, who do not rely on any constituency, risk nothing in protecting them. What body can better attenuate the impact of majoritarian expectations when they may unfairly circumscribe minority ones, than a body which does not depend for its survival on popularity with the majority?

...While [judges] may not be accountable to public opinion, they are nonetheless accountable to the public interest for independent decision-making based on discernible principles rooted in integrity. Interpreting justice involves a complex balancing of legal principle and public interest. Performing the task properly may mean controversy and criticism. But better to court controversy than to court irrelevance, and better to court criticism than to court injustice.<sup>210</sup>

**5.69** Professor Williams is less enthusiastic about the benefits of judges deciding upon the public interest and protecting the rights of minorities without there also being input from elected representatives through the Parliament, hence his preference for a statutory Bill over the "court centred" Canadian Charter model. Despite this, he warns that without a Bill judges will adopt this role of protection of the rights of minorities anyway, without receiving any guidance from the Legislature:

Judges in Australia have had a tendency, particularly over the last decade, to, if you like, themselves develop particular protections of rights within the legal system. While that might be applauded for its particular sympathy for human rights, I

<sup>208</sup> *Submission 5/5/00 p3.*

<sup>209</sup> *Cited in Submission 5/5/00 p4.*

<sup>210</sup> *Justice Arabella op cit, quoted in Stein Submission 5/5/00 p4.*

think it presents great dangers. I think parliaments like this Parliament are facing a question: is the agenda to be controlled by the courts or the Parliament? Because even though we do not have a bill of rights, a variety of courts within the system are now directly incorporating international norms within human rights and legal developments; they are discovering implied rights in statutes; they are discovering implied rights in the Constitution.

If the parliaments do not act themselves to determine through communities what are the appropriate rights, they find courts have done it for them, and that is certainly a second-best solution, and it is not appropriate that courts deal without the community consultation. I think parliaments ought to. I think that is the sort of argument that Chief Justice Spigelman's criticisms lead to.<sup>211</sup>

- 5.70** The use of override clauses was probably the main area of disagreement among those who believed a Bill of Rights would open up a constructive dialogue between arms of government- this was discussed in Chapter Four in relation to the different models of Bills of Rights.

## **Conclusion**

- 5.71** There are many arguments in support of a Bill of Rights. Not all advocates agree on all these arguments, with the source of disagreement revolving around the model of a Bill of Rights more than its content. Behind this preference for different models often lie differing views as to where the balance between the powers of Parliament and the courts should lie. This is also a key issue for those who oppose a Bill of Rights, discussed in Chapter Six.

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<sup>211</sup> *Evidence 10/4/00 p8.*

## Chapter 6 Arguments Against a NSW Bill of Rights

### Introduction

**6.1** The Committee received 28 submissions and 59 letters opposing a NSW Bill of Rights. In the course of hearings five witnesses gave evidence opposing a domestic Bill. As with supporters of a NSW Bill, opponents came from diverse backgrounds. They included members of the judiciary, legal professionals, religious bodies and some academics. As noted in Chapter Three, there have also been major parliamentary inquiries in Victoria and Queensland which have examined the issue and concluded against an enforceable Bill for their respective States.

**6.2** The most important arguments against a NSW statutory Bill are based around the change in relationships between the Parliament, the Executive and the Judiciary which would be likely to result. The major arguments presented to this Committee are:

- A Bill would increase the power of the Courts at the expense of Parliament, undermining parliamentary supremacy and leading to a politicisation of the Judiciary.
- A bill would increase uncertainty in the law because rights are widely defined, requiring judicial interpretation to give them content
- There is no consensus as to which rights should be protected
- Australian courts will not be isolated from overseas developments in the absence of a local Bill
- A Bill could lead to an increase in litigation and associated costs
- A Bill of Rights could be used to intrude upon the activities of private businesses and associations
- A focus on rights can lead to lack of acceptance of responsibilities.

**6.3** Although the Committee in the next chapter makes a finding against a Bill, it does not necessarily agree with all the arguments presented here. As with arguments in support of a Bill in the previous chapter, the arguments are those of participants in the inquiry rather than of the Committee. Also, the Committee notes that some of the arguments in submissions and evidence against a Bill of Rights were primarily based upon difficulties with the US Bill of Rights. As discussed earlier, any NSW Bill would be much more likely to follow more recent models such as the Canadian, New Zealand or UK Bills than the older, more problematic US model. For that reason arguments based upon the US Bill have been excluded here unless they illustrate a point which could equally be argued for other forms of a Bill.

## **A Bill undermines the roles of both Parliament and the Courts**

**6.4** A Bill of Rights brings about a significant change in the relationship between the three arms of government. The extent of that change, arguably, depends upon the model of a Bill chosen. The change will be influenced by whether the Bill is constitutionally entrenched or statutory; the extent to which override powers are given to Parliament; and the wording of limitation clauses regarding the rights protected within the Bill. The most consistently advanced argument of those who oppose a Bill of Rights is that its introduction, even in the statutory form proposed by the terms of this inquiry, will undermine the existing balance of power between the Parliament and the Courts. This in turn affects governance, with the Executive dealing with increased uncertainty as to its authority to act as a result of the tension between Parliament and Judiciary.

**6.5** The rationale of a Bill of Rights is to protect human rights. Advocates of a Bill argue the rights of minorities are often neglected under parliamentary democracy. Political parties seek to gain majority support in order to govern, with the Executive dominating Parliament rather than being accountable to it. As a counterbalance to “majoritarian” parliamentary rule, a Bill of Rights, it is argued, provides basic guarantees of rights which can be enforceable through the Courts. Opponents of a Bill argue that to protect human rights in this way is undesirable on several, interrelated, grounds:

- It undermines the supremacy of an elected Parliament in favour of an unelected Judiciary
- Decisions can be made by judges with resource allocation implications; these policy decisions are best made by elected representatives rather than unelected judges. Previously political decisions become legal decisions.
- The increased power of the Courts under a Bill politicises the Judiciary and the appointment process of judicial officers, undermining the respect for the rule of law in the wider community, and
- The best protection of human rights ultimately is respect for these rights by Parliament and the wider community which elects Parliament; this is undermined if the responsibility for protection is given primarily to the Courts. The reduced power of Parliament makes the work of the Executive more difficult, undermining public confidence in the ability of the political process to deliver outcomes.

## **Undermines Parliamentary Supremacy<sup>212</sup>**

- 6.6** Many of these arguments are closely connected. Essentially they are based on a belief that a Bill undermines Parliamentary supremacy, and that this is undesirable. A currently serving judge, Justice KR Handley QC of the NSW Court of Appeal, encapsulates the argument in favour of parliamentary supremacy in the conclusion to his submission to the inquiry:

Giving a court the power to declare and enforce human rights in terms of the international conventions would give unelected judges a blank cheque to decide what, in many cases, are really political questions. Their decisions could have an unexpected impact on the State's budget in ways that would be outside the control of the government. Australia is essentially a free and democratic society which does not need this type of legislation. All these questions should remain the responsibility of the elected government, and be subject to the restraints and constraints of the democratic process.<sup>213</sup>

- 6.7** A recently retired Chief Judge in Equity of the NSW Supreme Court, the Hon Malcolm McLelland QC, also outlined the importance of parliamentary supremacy in his submission:

The identification and accommodation of competing societal values and interests in the development and formulation of legislation relating to particular subjects is basic to the function of Parliament as an elected representative legislature, and intrinsic to the political process. A Bill of Rights, by transforming social or political questions into legal questions, would require courts to exercise a similar function in cases coming before them and empower them (if the Bill of Rights were entrenched) to retrospectively invalidate Acts of Parliament on social or political grounds. This would both derogate from the proper role and status of Parliament and be harmful to the legal and judicial systems and to the administration of justice. Members of Parliament are elected by, and are supposed to represent, the people. Judges are neither elected nor supposed to represent anyone.<sup>214</sup>

- 6.8** The current head of the Executive in NSW, the Premier the Hon RJ Carr MP, put a similar perspective in his submission:

If a bill of rights were enacted, it would then be up to a court to decide whether freedom of speech should be limited in relation to pornography, tobacco advertising, solicitation for prostitution and the publication of instructions on how to make bombs. These are issues which need to be considered in the context of community views. They are issues which should be decided by an elected Parliament whose Members are ultimately responsible to the people for the

<sup>212</sup> Throughout this report "Parliamentary Supremacy" has been used instead of "Parliamentary Sovereignty". Though the two terms are approximates, "supremacy" is considered to be a more readily understood term.

<sup>213</sup> *Submission 31/3/00 p4.*

<sup>214</sup> *Submission 29/3/00 p6.*



decisions they make. They are not decisions which should be made by judges, who are not directly accountable to the people.<sup>215</sup>

**6.9** The NSW Bar Association, in its submission, provided the most detailed advocacy for the importance of maintaining the appropriate roles for Parliament, Executive and the Courts. One of the arguments presented was that while an initial Bill could be said to be an act of Parliamentary power, expressing the will of the people as to which rights to protect, the danger was that this eroded the supremacy of *future* Parliaments:

...it may obviously be said that it is a vote for proclaiming the values and expressions of today as those which should govern tomorrow, without extending to tomorrow's legislators the same scope of discretion, balance and choice as today's legislators enjoy concerning the very same subject matter. This is to repeat, in a particular respect, the tyranny of all constitutional founding generations over their posterity. An alternative approach, which places Parliamentary power above that of the courts, is to allow each session of legislators their full democratic power to reflect (or not) as they see fit the will of their electors, when it comes to manifesting a concern for so-called universal values or prized citizens' rights and immunities against government.<sup>216</sup>

### **Judicial Policymaking: Legalising Political Decisions**

**6.10** Those who are concerned to ensure a Bill of Rights does not undermine parliamentary supremacy are concerned that a Bill may give the courts a role which is better suited to Parliament. They argue that widely expressed rights require judicial interpretation to give content to those rights, yet in the process decisions are made which have policy implications, in particular regarding the way resources are allocated. Resources available to any government are finite and decisions between competing priorities are best made on a political basis by Parliament rather than made as an ad hoc legal decision based upon the specific circumstances of the matter being decided. Most proponents of this argument acknowledge that judicial decisions at present do include those with policy implications; however they argue a Bill of Rights will actively encourage an expansion of this role. They argue that the evidence from the United States and Canada, and even from New Zealand, supports this view (see below in "Increase in Litigation" section).

**6.11** Mr McLelland argued in evidence that there has been an "extraordinary exaggeration" in public discussion as to the extent that judges make policy under current conditions.<sup>217</sup> He stated that judges are currently under substantial restraints in their law-making role, particularly the duty to state reasons for the resolution of the dispute between parties. The judge has to state the general proposition of law which governs the particular facts, based upon existing precedents and taking into account the common law tradition in which they operate. In contrast, the judicial process is not suited to determining wide ranging aspects of policy for several reasons:

<sup>215</sup> *Submission* 31/3/00 p1.

<sup>216</sup> *Submission* 14/4/00 p13.

<sup>217</sup> *Evidence* 26/6/00 p24.

**Firstly**, courts are simply not equipped to ascertain facts or conduct any necessary research or investigation into many matters which would be relevant to the balancing process between societal values.

The courts are reliant on the parties before them to provide any necessary evidence which in relation to what might be called constitutional facts or value type facts may well be contentious, require verification and be unavailable to the parties for reasons of cost or accessibility or other reasons.

On the other hand, Parliament is well-equipped, both its the composition of persons elected by and in close touch with the community, and also by the use of its committees and research staff, to inform itself of these kinds of matters.

Furthermore, courts operate under time constraints which would in many cases preclude such wide-ranging inquiries.

**Secondly**, there is not the same opportunity for community participation and debate in relation to issues before a court as there would be in relation to issues before a Parliament.

On questions of balancing community values, participation and debate by the people through their elected representative is a procedure more likely to foster the habits and culture of sound democratic government than having a situation where Parliament either was quarantined from such matters, or if not quarantined controlled in a substantial degree, by a non-representative court.<sup>218</sup>

## 6.12

Mr Bret Walker SC, representing the Bar Association, argued that a very clear implication of the introduction of a NSW Bill of Rights would be that judges would be required to make decisions of what he termed “allocative justice” – deciding a fair allocation of resources between people in society. He repudiated this in the strongest terms:

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

<sup>218</sup> Evidence 26/6/00 p3-4.

plaintiff?" Then, it seems to me, there are very deep and dangerous issues raised that go to the heart of democracy.<sup>219</sup>

### **Politicisation of the Judiciary**

**6.13** If judges take the opportunity provided by a Bill to make decisions with policy implications, opponents of a Bill argue that this will inevitably lead to a politicisation of the judiciary. If judges decisions are seen to be "political", attention is focussed on the values of individual judges which influence those decisions. If decisions are then interpreted as reflecting judges' values rather than legal reasoning, the respect for the rule of law, it is argued, will decline in the general community.

**6.14** Mr McLelland expressed concern that under a Bill of Rights judges would increasingly be asked to make political decisions to the detriment of judicial independence. He cites the United States experience where:

A large part of the American public appears to regard as the single most important question in assessing the suitability of a proposed appointee to the Supreme Court, his or her personal views on abortion.<sup>220</sup>

**6.15** He also quotes a Canadian observation that concerns are now expressed about judicial appointment which were previously only heard in the electoral process.<sup>221</sup> Mr McLelland concludes that increasing politicisation of the judiciary would weaken the administration of justice:

Any increasing tendency for judicial decisions to be, or to be perceived to be, determined by judges' views on social policy, would result in a corresponding increase in pressure to select as judges those whose views on policy questions reflect the views of the selectors. Selection of judges on political grounds would stimulate even more political decision-making and so on. In this way, both judicial independence and the quality of the judiciary would suffer. To the extent that social or political attitudes tend to be considered as appropriate criteria of suitability for appointment to the bench, the likelihood is that the traditional qualities of intellectual competence, independence of mind, integrity, legal knowledge and ability, courtesy and a sense of fairness will tend to be displaced in importance. If this were to happen to any substantial degree, the present high reputation of Australian courts, both within Australia and internationally, would suffer, as would public confidence in the administration of justice.<sup>222</sup>

**6.16** In evidence Mr Walker was referred to an argument by a Canadian judge (presented in Chapter Five) that a Bill of Rights simply makes the policymaking role of judges more transparent, taking policymaking "out of the judicial closet". Mr Walker responded:

<sup>219</sup> *Evidence 25/7/00 p13.*

<sup>220</sup> *Submission 29/3/00 p6.*

<sup>221</sup> *Submission 29/3/00 p6.*

<sup>222</sup> *Submission 29/3/00 p6.*

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<sup>223</sup>

**6.17** During the inquiry the committee was sent a paper by Mr Justice Brian Sully of the NSW Supreme Court which he wrote after a period based in Canada in 1994.<sup>224</sup> In it he argues that the Canadian experience is that the judiciary has come under increasingly virulent criticism for exercising the role of adjudication on rights issues given to it under the *Charter*. This criticism is already present in Australia, and Justice Sully therefore argues that introduction of a Bill of Rights would be likely to accelerate this trend and further threaten the independence of the judiciary.

**6.18** The Queensland parliamentary committee which examined a Bill of Rights proposal undertook a study tour to Canada as part of its inquiry. In its final report, the committee raised serious concerns based upon discussions with Canadian authorities:

Detractors of the *Canadian Charter* have noted that one of the *Charter's* consequences has been that Canadian judges have found themselves making decisions which belong in that realm of "policy" which properly belongs with the legislature. In particular, concerns have been raised in Canada about the judiciary's ability and resources to decide questions concerning rights...

There have also been allegations that Canadian judges when placed in the position of adjudicating *Charter* matters have not sufficiently divorced their personal values from community values and that their values are not those of society in general....Experience in Canada has also shown that by judges making "policy"

<sup>223</sup> *Evidence* 25/7/00 p12.

<sup>224</sup> "Judicial Independence under a Charter of Rights: Australian Snapshot – Canadian Camera", 1 *Macquarie Law Review* 1994.

decisions, there is significant repercussions for society. ... Judicial appointments therefore might become a highly political issue, threatening the independence of the judiciary. The perception that judges are political appointees as opposed to impartial adjudicators can, in turn, impair public confidence in the judiciary. Thereby, the high regard in which the community holds the judiciary can be undermined.<sup>225</sup>

**6.19** The Canadian *Charter* is a constitutionally entrenched Bill. The Committee notes that the levels of concern about politicisation of the judiciary expressed in relation to New Zealand's statutory *Bill* have been of a lesser degree, although the same issues have been raised.<sup>226</sup> The UK *Human Rights Act* has provision for courts to refer back legislation to Parliament found to be incompatible with the *Act* which has led some to suggest this provides the opportunity for dialogue between Parliament and the Judiciary (see Chapter Five). Mr Walker, representing the Bar Association, expressed grave concerns when this argument was put to him in evidence:

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.

...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.<sup>227</sup>

### **Democratic Process as Guardian of Human Rights**

**6.20** Those who are unenthusiastic about the effectiveness of a Bill of Rights point to examples such as the Peoples Republic of China and the former Soviet Union as states where a Bill of Rights has co-existed with human rights abuses on a massive scale. They argue that the best protection of human rights ultimately is respect for these rights by Parliament and the wider community which elects Parliament; this is undermined if the responsibility for protection is given primarily to the Courts. The reduced power of Parliament also makes

<sup>225</sup> *Op cit* p35-36.

<sup>226</sup> *Ibid* p40.

<sup>227</sup> *Evidence* 25/7/00 p15.

the work of the Executive more difficult, undermining public confidence in the ability of the political process to deliver outcomes.

**6.21** The head of the Executive in NSW, the Premier the Hon RJ Carr, expressed this argument in his submission to the inquiry:

Some of the most abusive and oppressive regimes have had extensive bills of rights. In reality, it is not a “bill of rights” which protects rights. Nor can the courts alone adequately protect rights. The protection of rights lies in the good sense, tolerance and fairness of the community. If we have this, then rights will be respected by individuals and governments, because this is expected behaviour and breaches will be considered unacceptable. A bill of rights will only have the effect of turning community values into legal battlefields, eventually undermining the strength of those values.<sup>228</sup>

A bill of rights is an admission of the failure of parliaments, governments and the people to behave in a reasonable and respectful manner. I do not believe we have failed.<sup>229</sup>

**6.22** Another submission to the inquiry<sup>230</sup> quoted former Prime Minister Sir Robert Menzies expressing a similar argument:

Should a Minister do something which is thought to violate fundamental human freedoms he can promptly be brought to account in Parliament. If his government supports him, the government may be attacked, and if necessary, defeated. And if that...leads to a new General Election, the people will express their judgement at the polling booths. In short, responsible government in a democracy is regarded by us as the ultimate guarantee of justice and individual rights.<sup>231</sup>

**6.23** In evidence Mr McLelland was asked how effective Parliament is as a guardian of human rights, in light of examples of continuing gaps in protections:

Well, I am quite sure that there are injustices flowing from our laws in our community, of one kind or another, and in many cases they are injustices flowing from lack of parliamentary attention to the cause of them, but recognising that, I vehemently maintain that the cure is not to have these wide ranging value statements enacted as laws. The cure is, when such injustices are identified then to pass a law dealing with it specifically.

That is of course what has happened in relation to discrimination on the subject of the various anti-discrimination Acts both in the Commonwealth and the State

<sup>228</sup> *Submission 31/3/00 p2.*

<sup>229</sup> *Ibid p5.*

<sup>230</sup> Australian Lawyers for Human Rights *Submission 30/3/00 p8.* The authors of the submission argued that both the nature of government and rights protection had developed since that quote was made so as to make it less relevant: *Evidence 18/7/00 p3.*

<sup>231</sup> *Central Power in the Australian Commonwealth* (London: Cassell, 1967) at 54, cited in H Charlesworth, “The Australian Reluctance about Rights” (1993) 31 *Osgoode Hall Law Journal* 195 at 198.

field. Bear in mind also that there is no way by way of Bills of Rights or anything else, to make a perfect society. There are practical limits to what can be achieved by laws. ...once injustices that can be in practical terms cured by passing a law are identified, then it is the duty of the relevant parliament to pass that law.

When I say we cannot have a completely ideal society, a number of the instances that you have cited, I suspect, would require for their remediation the expenditure of considerable public funds. The inadequacy of resources to do all the things that a government might want to do is notorious, and unfortunately there is no cure for that. One of the main responsibilities of governments and parliaments is to allocate resources among all the conflicting demands that community values and particular policies produce.<sup>232</sup>

**6.24** Mr Walker, representing the Bar Association, also argued that parliamentary democracy, while not perfect, was the ultimate source of protection of human rights:

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.<sup>233</sup>

## **A Bill would create Uncertainty**

**6.25** As discussed in Chapter Two, human rights are universal and need to be expressed in broad terms so as not to limit their effect as circumstances and cultural conditions change. As discussed in Chapter Five, supporters of a Bill argue that limitation clauses attaching to specific rights can prevent rights becoming too broad or absolute in their reach. However opponents of a Bill argue that a major impact of a Bill of Rights is to create uncertainty in the law. Limitation clauses only add another layer of uncertainty; the fundamental problem remains that rights in a Bill have to be expressed widely, and that this makes the future meaning and application of the rights very uncertain. As with most arguments against a Bill, the issue of rights being too wide or general can also be linked to concerns that it provides the courts with increased power at the expense of other arms of government. Rights expressed in broad, general terms depend upon the judiciary to give practical content to those rights.

### **Uncertainty is unavoidable in Bill of Rights**

**6.26** Opponents of Bills of Rights disagree with advocates who argue that uncertainty can be avoided by precise wording of rights. Justice Handley of the NSW Court of Appeal, in his submission to the inquiry, argued:

<sup>232</sup> *Evidence 26/6/00 p22.*

<sup>233</sup> *Evidence 25/7/00 p18.*

Statements of human rights in international conventions, such as the *Universal Declaration of Human Rights*, have largely been drawn from the common law. However these common law “rights” were in truth areas of liberty where interference by the State in the affairs of citizens was only authorised if appropriate legislation had been passed by Parliament. These “rights” were vague and were really political statements frequently invoked in political controversies where they meant what the speakers wanted them to mean. Making these liberties enforceable legal rights changes their character. Their vagueness enables courts to make of them largely what they will. In the hands of courts they become vehicles for the beliefs and aspirations of non-elected judges, subject of course to appeal, but insulated and isolated from the realities and the checks and balances of the democratic political process.<sup>234</sup>

**6.27** Mr McLelland argued in his submission that the broad, vague wording of rights arose because these rights are an attempt to encapsulate competing individual and societal interests and values:

The stated values are almost invariably couched in general and vague language, involving indeterminacy in meaning and subjectivity in application. Most value-type “rights” are inherently vague. But in addition the process of formulation of a statement of such “rights” by a committee or deliberative assembly, where different interests are represented, frequently compels the adoption of expressions which are deliberately ambiguous, imprecise or open to subjective interpretation, merely to obtain the requisite level of assent, each differing interest group assenting on the basis of its own interpretation. Often, the more certain and specific the formulation of a “right” the less likely it is to command general assent, so that the “rights” which are more likely to survive the formulative process are those which are indefinite or obscure rather than precise or clear. The attempt to transpose general and indeterminate values into enforceable rules of law would invite those whose responsibility it is to ascertain and apply the law (ie individual judges) to give specific content to such a value in a concrete case by applying their own social, political or ideological inclinations.<sup>235</sup>

**6.28** In evidence Mr McLelland made the comment that it was ironic that under the Canadian *Charter* and the US Bill of Rights vagueness or uncertainty were grounds for invalidating legislation:

It would make for an interesting paradox if the courts of those countries could pass judgement on the validity of their own Bills of Rights by the same standards.<sup>236</sup>

### **The Costs of Uncertainty**

<sup>234</sup> *Submission 31/3/00 p1.*

<sup>235</sup> *Submission 29/3/00 p2.*

<sup>236</sup> *Evidence 26/6/00 p3.*



**6.29** The most detailed examination of the costs and adverse impacts of uncertainty on the legal system was provided by Mr McLelland in his submission.<sup>237</sup> He argues that uncertainty in the law is the single most significant contributing factor to cost, delay and unpredictability in the legal system. Increasing legal uncertainty is said to:

- Increase the difficulty and expense of obtaining legal advice
- Reduces the reliability of legal advice
- Reduces the predictability of the outcome of litigation, and
- Increases the likelihood, volume, complexity and length of litigation.

**6.30** While noting that it is impossible to remove all uncertainty from the law, he argues a Bill of Rights will add greatly to uncertainty:

The degree of legal uncertainty which would result from a Bill of Rights would be much greater than that to which the Australian community, and governments responsible for funding courts and legal aid, have so far grown accustomed. The range of subjects within the reach of a Bill of Rights would be extensive, the scope of potential arguments which it would open up would be broad, and the public interest in the question of the validity of legislation, and the influence of interest groups attracted to the particular issue, would tend to create an imperative that validity arguments based on human rights be appealed as far as possible. It would be difficult to confine representation in a case involving a Bill of Rights to the parties to the original dispute: there would be applications by interest groups, together with governments, to intervene and present submissions to the court at each stage of proceedings. In short, there would be an explosion in the complexity, duration and cost of any litigation attracting a Bill of Rights argument.<sup>238</sup>

**6.31** Mr McLelland also argues that certainty would be delayed in many cases until finally tested in the High Court, and perhaps not even then:

Legislation against which a Bill of Rights challenge might conceivably be mounted could never be treated as certain law unless and until such a challenge was actually made, and determined, and appealed as far as the High Court. Such a challenge might be made in, and determined by, a lower court and not reach the High Court, in which case the uncertainty would remain until, in some future case the same question did reach the High Court. Even a High Court decision would not remove the uncertainty, since the High Court is not bound by its own decisions and on a later occasion, with a differently constituted bench ... a different result might be reached.<sup>239</sup>

<sup>237</sup> *Submission 29/3/00 pp2-5.*

<sup>238</sup> *Submission 29/3/00 p4.*

<sup>239</sup> *Ibid p3.*

**6.32** He argues that considerable financial resources may be required to ensure the legal system meets the increased demands placed upon it by the complexity and unpredictability caused by a Bill of Rights. This includes the need to appoint more judges to deal with an increased workload driven by Bill of Rights litigation.

### **Uncertainty encourages speculative cases**

**6.33** Mr McLelland argues that one of the worst outcomes of uncertainty in the law is that it encourages speculative litigation:

Uncertainty in the law invites speculative arguments, either on the “might as well give it a run” principle, or as a tactical manoeuvre. The practical effects are that:

- cases go to trial which would otherwise never have reached that stage;
- issues are raised and litigated which ultimately turn out to have no significance; and
- appeals are instituted and pursued which would otherwise not have been brought<sup>240</sup>

**6.34** Even though many of these speculative cases may not succeed, Mr McLelland argues they add to the costs of the legal system and to delays, and on occasions lead to “idiosyncratic decisions” with unanticipated consequences. He argues that the Canadian experience gives many examples of the problems caused by speculative litigation. Mr McLelland further argues that in Australian civil law over the last 25 years, there are many examples where new laws giving courts wide discretionary power have led to a huge increase in the volume, complexity and length of proceedings.<sup>241</sup>

**6.35** An expansion in the number of cases litigated is a major result of speculative litigation; this is discussed in the section on increased litigation, below. However a specific example of speculative litigation caused by the drafting of a Bill was identified by Associate Professor Paul Latimer, of the Department of Business Law and Taxation at Monash University.<sup>242</sup> From time spent studying the issue in Canada he concluded that the *Charter* has made the task of corporate regulation increasingly difficult for Canadian governments. Corporations have been interpreted by the Canadian courts as included in the definition of “person” or “everyone” for the purposes of protections in the *Charter*. This has enabled corporations to obstruct business regulators from exercising their powers of search and seizure by invoking s8 of the *Charter*<sup>243</sup>. It has also allowed corporations to use provisions such as

<sup>240</sup> *Submission 29/3/00 p3.*

<sup>241</sup> *Ibid p3-4.*

<sup>242</sup> *Submission 1/2/01, Evidence 20/3/01.*

<sup>243</sup> “Everyone has the right to be secure against unreasonable search or seizure.”

s24(1)<sup>244</sup> and s(7)<sup>245</sup> for technical and procedural defences such as trial fairness and the exclusion of evidence. While many of these uses of the *Charter* have eventually proved unsuccessful, Associate Professor Latimer argues that the extended litigation by business has proved very costly and hampered the effectiveness of corporate regulators. He fears for the potential confusion caused by a similar Bill in NSW:

The introduction of a bill of rights provides many possibilities for challenge to business regulation. ASIC and the ACCC, and indeed the tax departments, Federal and State, have lengthy experience of litigation—people taking technical points, and challenges to jurisdiction. It is my submission that the introduction of a bill of rights will provide yet another layer of what I have called skirmishing, or a lawyers' picnic perhaps, but certainly a layer of complications to business regulation, whether corporate, trade practices, tax or any other business regulation. The Canadian experience is that the Trudeau Charter, which was aimed at individuals, in effect has been taken over and enforced by big business and its connections, hence showing the risks to be considered when it comes to drafting a possible bill of rights for New South Wales.<sup>246</sup>

- 6.36** As Associate Professor Latimer pointed out, the specific problem of the definition of corporations can be addressed in a NSW Bill by specifically excluding them from the protections given under the Bill, or by defining words in a Bill such as “person” or “anyone”. However the example demonstrates how a Bill of Rights can result in an increase in speculative cases in a manner which may not be in the overall public interest. One consequence is that greater power is given to the courts to give content to broadly expressed rights.

### **Rights can be given unpredictable interpretations**

- 6.37** Several participants in the inquiry provided examples from overseas experience as illustrations of the uncertainty caused by unpredictable interpretations given by courts to provisions of Bills of Rights. Justice Handley provided two examples where interpretations were given to statements of human rights that “could have no conceivable relationship to the purpose of the original authors”.<sup>247</sup> The first is *Roe v Wade*.<sup>248</sup> The Fourteenth Amendment of the US Bill of Rights, which states that “no state shall deprive any person of life, liberty or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws”, was interpreted as providing the right of a

<sup>244</sup> “Anyone whose rights and freedoms, as guaranteed by this Charter, have been infringed or denied may apply to a court of competent jurisdiction to obtain such remedy as the court considers appropriate and just in the circumstances”.

<sup>245</sup> “Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.”

<sup>246</sup> *Evidence* 20/3/01 p22.

<sup>247</sup> *Submission* 31/3/00 p2.

<sup>248</sup> [410 US 113]

women to terminate a pregnancy, the right varying depending upon the stage of the pregnancy.

**6.38** Justice Handley's second example was *Osman v United Kingdom*<sup>249</sup>, decided under article 6 of the *European Convention of Human Rights* (now incorporated into the UK *Human Rights Act*, but not at the time of the case). Article 6 provides that every individual has the right to a hearing by a tribunal in the determination of "his" civil rights and obligations. In the UK there had been a clearly decided precedent that there was no right of action against the police for negligent policing. The plaintiff's case was based upon negligent policing causing the murder of her husband and the wounding of her son, and on this basis failed in the UK courts. The European Court, however found that under article 6 the applicant had a right to have a determination on the merits of the case. In effect article 6 was used to overturn the UK immunity given to police from negligence actions. Justice Handley's argument is that:

Whether one approves or disapproves the actual results of these cases is irrelevant to my submission. My point is that one can only wonder at the practical content given by courts to legal statements of human rights which could have no conceivable relationship to the purpose of the original authors.<sup>250</sup>

**6.39** Another illustration of the types of problems which can arise from the broad meaning of rights arose from the evidence of a supporter of a Bill, Ms Julie Debeljak representing Australian Plaintiff Lawyers Association.<sup>251</sup> In this example, a tobacco company was able to use the right to freedom of expression given under s2 of the Canadian *Charter* to prevent legislation banning tobacco advertising:

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

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

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<sup>249</sup> *ECHR* 28 October 1998.

<sup>250</sup> *Submission* 31/3/00 p2.

<sup>251</sup> *Evidence* 15/02/00 p6. Ms Debeljak argued that the decision was an error and was of the type likely to be overturned, and was using the example to illustrate the importance of defining who was able to exercise rights under a Bill.

available to achieve its objective. How can that be said to be anything other than judicial interference in the political process?

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

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

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

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

It was not so much that that the courts were saying to the government that it cannot regulate in this area. They were more so saying that if the government went too far with its blanket ban and did not have enough evidence upon which to link the inducements to the actual advertisements, then something less should have been done.<sup>252</sup>

## No consensus on which rights to include in a Bill

<sup>252</sup> Evidence 15/02/01 p6-7.

**6.40** Several of the terms of reference for this inquiry concerned the content of a Bill of Rights, particularly whether specific conventions should be incorporated into a domestic Bill. Many opponents of a Bill argued that the specific rights protected was a crucial issue: they feared either that rights which they considered important may not be protected, or that that it would be impossible to find consensus in the community generally on what rights should be in. Some argued that the inclusion of social, economic and cultural rights would lead to courts usurping the role of governments in allocating resources (see above section on judicial policymaking). Several participants argued that there was likely to be strong, potentially divisive disagreement as to the validity of those rights finally chosen.

**6.41** A supporter of a Bill, Professor Williams, warned of the dangers of attempting to protect too many rights or define them exhaustively:

I would only argue we should put those rights into the first stage which we can achieve broad agreement upon across the political spectrum. I think if we do that it is quite different from anything that is proposed and, at the same time, if we cannot do that, then, indeed, it is of great concern that we cannot even get to that first base, if you like, to start somewhere very easy.<sup>253</sup>

...

**The Hon. P. BREEN:** This whole question of what rights should be included is always going to be, ultimately, the stumbling block. If you were to suggest five or 10 particular rights that ought to be included and if you were to express to the Committee how you thought they ought to be framed, would you have a view about that? Would you think that is a desirable thing to do?

**Mr WILLIAMS:** To actually do five or 10?

**The Hon. P. BREEN:** Yes.

**Mr WILLIAMS:** Yes, I do. My emphasis is on the process more than the rights individually almost in that I think the weakness we should be addressing is alienation within the system, impoverished political debate, a lack of domestic standards, things like that, but my emphasis is upon actually setting up a working system and then adding to it as the need arises. It should not be comprehensive.

That is where the Queensland report [the EARC report] actually lost out. It tried to do far too much. So I would start with freedom from racial discrimination, freedom to vote, freedom of expression, freedom of association, things like that, which I think if you asked people on the street, they would say, "Sure, of course," and then you can always come up with examples where it should not operate, but that is where the ongoing process will achieve an appropriate balance.<sup>254</sup>

**6.42** Professor Williams argued for the exclusion of rights with a history of very wide interpretation by judges, such as the right to due process or the right to equality. He also argued against the inclusion of rights where there are strong, possibly irreconcilable, differences, with the right to life being a key example. The NSW Council of Churches

<sup>253</sup> *Evidence 10/4/00 p9-10.*

<sup>254</sup> *Evidence 10/4/00 p34-35.*

disagreed with Professor William's proposal. In evidence the Reverend Ross Clifford, Principal of Morling Theological College, argued that human rights should be based on moral rather than pragmatic considerations, and this should be reflected in the content of any Bill:

The paper I was given by Mr Williams is an ideal of how to proceed where human rights is purely a pragmatic issue - and let's not get into the areas of controversy like right to life, and right of equality - we must leave those aside and find the things that five million New South Wales people will agree on.

That has no relationship with the language of the church. It might be the language of State and government, but it is not the language of compromise of the church. If you want to have a bill of rights that expresses our language then it has to be a bill of rights that is more than pragmatic, and more than useful for the State. It must have a higher base in principle than that, and that of course is the foundation of all decent human rights and bill of rights in the image of God.

It must include things like right to life, it must include things like right to equality. If it doesn't include that, as I say, why bother? If it is only a statutory piece of legislation, as you said, if this can be turned over, that can be turned over. Does the bill of rights live on the whim of the government? Or is it a statement that is owned by the churches and the people, that is beyond the whim of the government. If this is serious business, let's do it seriously.<sup>255</sup>

**6.43** Mr McLelland also raised the problem in his submission that the values, expressed as rights, in a Bill of Rights are rarely exhaustive.<sup>256</sup> Many human rights are limited by the need to respect other human rights, with the right to freedom of speech, for instance, being qualified by other rights such as the right to privacy. The difficulty with a proposal such as that advocated by Professor Williams, Mr McLelland argues, is that the values protected as rights in the Bill are likely to prevail over other values which have not been included:

One thing that expressing values as rights does is to allow rights to trump public interest considerations and to allow the selected rights which are expressed to trump unexpressed values which may well be equally as important but for one reason or another have not found their way into the Bill of Rights. Once you put something in statutory form there it is and it has got the force of statute and therefore under our system it prevails.<sup>257</sup>

**6.44** A major theme of the submission from the NSW Bar Association was that it was impossible to fully comment on the ultimate public interest in implementing a local Bill of Rights unless the content and expression of the rights within the Bill was known.<sup>258</sup> Only if

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<sup>255</sup> *Evidence* 5/6/00 p43.

<sup>256</sup> *Submission* 29/3/00 p2.

<sup>257</sup> McLelland *Evidence* 26/6/00 p19-20.

<sup>258</sup> *Submission* 14/4/00.

rights stated were based upon existing or precisely defined new rights the problems of excessive litigation and wide judicial interpretative powers could be avoided:

Case-law and other jurisprudence interpreting and applying rights and immunities such as those we already have are a priceless heritage of distilled thought about such values. In cases where the Committee believes the traditional conception of a right or immunity should be preserved, then so far as possible traditional language should be used to ensure that a shift in meaning is not introduced by what was intended to be a mere change of linguistic style.

Conversely, if the Committee considered a new right or immunity, or a material change in a familiar right or immunity, should be introduced in a New South Wales Bill of Rights ..., then words should be chosen which are sufficiently different from those which have been construed in previous judgements or works of scholarship, so as to bring about the desired reform.<sup>259</sup>

**6.45** In this context, Bret Walker SC, representing the Association, was less than enthusiastic about adoption of terms of the *International Covenant on Civil and Political Rights* into a local Bill. The Association's submission had raised a concern about article 10 of the *ICCPR* ("all persons deprived of their liberty shall be treated with humanity and respect for the inherent dignity of the human person") as an example of vague language open to being given very variable content by courts.<sup>260</sup> In evidence Mr Walker stated:

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.<sup>261</sup>

## A Bill Increases Litigation

**6.46** Many participants in this inquiry characterised the introduction of a Bill of Rights as a source of a significant increase in litigation, to the detriment of the public interest. Arguments as to why this should be so varied. Some argued that the wide nature of the way "rights" are expressed invites litigation to clarify the meaning and content of those rights (see above). Others argued that a Bill provides an alternative avenue to pursue

<sup>259</sup> *Submission 14/4/00* p24-25.

<sup>260</sup> *Submission 14/4/00* p23.

<sup>261</sup> *Evidence 25/7/00* p17.



essentially political agendas. If a group or individual has not been able to persuade elected representatives in the Parliament of the virtue of their case over other competing interests a Bill of Rights provides an opportunity to take this cause to the courts. There is also an argument that Bill of Rights litigation can be used as a tactical approach, where for instance those accused of criminal offences raise technicalities as either a delay tactic or to provide new defences.

### Canadian and New Zealand Experience

- 6.47** Some supporters of a Bill agree that, at least initially, there will be an increase in litigation as gaps in human rights protections are rectified. Where opponents differ is in whether the increase in litigation is temporary and whether it is in the public interest. Evidence has been given during the inquiry that the Canadian *Charter* and the New Zealand *Bill* have resulted in significant increases in litigation based upon the Bill. A supporter of a statutory Bill, Father Frank Brennan has commented on the adverse impact of the (constitutionally entrenched) Canadian *Charter* on litigation in his book *Legislating Liberty*.<sup>262</sup> He states that immediately before the *Charter* was adopted the average time that a judgement was reserved in the Supreme Court of Canada was four months; in 1986 after four years of the *Charter* it was ten months. He also states that in the two years 1980 and 1981 there were only two Supreme Court judgements reserved longer than 12 months, but in 1985 and 1986 there were 33 judgements in that category.
- 6.48** The review of Canadian and New Zealand experience by the Constitution Unit of London University found the area of most significant increase in litigation was the criminal law.<sup>263</sup> Some of the notable findings of the study are:
- In New Zealand 90% of cases under the *Bill of Rights Act* are estimated to be in the area of criminal law
  - In Canada 74% of *Charter* cases were in the area of criminal law in the first four years of its operation, with a success rate of 31%. Challenges to breathalyser tests featured very prominently, making up 11% of all *Charter* cases
  - 25% of all appeals in the Canadian Supreme Court are still criminal law *Charter* cases
  - Challenges based upon procedural aspects such as detention, search or processing of applications had the highest chance of success in Canadian courts.
- 6.49** Several decided cases under the Bills in Canada and New Zealand have had major impacts on the criminal justice system. In *R v Therens*,<sup>264</sup> failure to be informed of the right to legal counsel prior to providing a breathalyser sample forced the Canadian Attorney General to discontinue most of the 19,000 breathalyser cases then pending. Thousands of pending

<sup>262</sup> University of Queensland Press 1998 p28.

<sup>263</sup> *The Impact of the Human Rights Act: Lessons from Canada and New Zealand* May 1999 p20-25.

<sup>264</sup> [1985] 1 SCR 613.

prosecutions for drink driving in New Zealand were discontinued following a decision of a similar type in *Ministry of Transport v Noort*.<sup>265</sup> In *R v Askov*,<sup>266</sup> the Canadian Supreme Court ruled that the applicant had not been given a trial within a reasonable time. The result of this case was that charges against 34,000 people in Ontario were dropped because their cases could not be held within reasonable time. An additional \$39 million was allocated to the Ministry of the Attorney General to reduce delays in the court system.<sup>267</sup>

**6.50** Speaking of the Canadian and New Zealand experience, the NSW Premier the Hon RJ Carr MP wrote in a submission to this inquiry:

A quick look at the law reports of Canada and New Zealand will show the extensive use of their respective bill of rights in litigation. It will also show that the primary use of a bill of rights is in relation to criminal appeals. In New Zealand, in the first seven years after the Bill of rights Act was enacted, it was invoked by the accused in literally thousands of criminal law cases, a large number of which were appealed to the Court of Appeal (the highest court in New Zealand). Some may argue this shows the system for prosecuting defendants was deficient, and indeed reforms were made. However, the fact is that the Bill of Rights continues to be routinely used as a ground for attempting to overturn the admissibility of evidence, including confessions, evidence obtained under search warrants and breath testing of drunk drivers. It gives lawyers a new source of technicalities to allow the guilty (including those who have confessed or were found with large quantities of drugs in their possession) to go free.<sup>268</sup>

<sup>265</sup> [1992] 3 NZLR 260.

<sup>266</sup> [1990 2 SCR 1199.

<sup>267</sup> Descriptions of the impact of the cases in this paragraph taken from Constitutional Unit report *op cit* p32.

<sup>268</sup> *Submission 31/3/00 p4.*

**6.51** Mr Carr cited several examples by which Bills of Rights were used for litigation of dubious value:

- A claim (unsuccessfully) made that the New Zealand *Bill* protected the right of the plaintiff to walk naked down his suburban street<sup>269</sup>
- A claim that a rise in rent for public housing breached the “right to life” in s8 of the New Zealand *Bill*<sup>270</sup>
- A claim in the Federal Court of Australia that a prisoner’s human rights under the *ICCPR* were being abused because there was not enough variety in the vegetarian meals he was offered at prison. (The claim was said to be rejected on the basis that the *ICCPR* is not directly enforceable in Australian law).

**6.52** Mr Carr further argues that, based on overseas experience, the result of the increase in litigation, whether successful or not, will lead to increased cost to the taxpayer and a congestion in the court system:

While the Courts are swamped with thousands of Bill of Rights cases, where will the ordinary person go for justice? The Courts will be made even more inaccessible and the cost of running the court system will increase. The main beneficiaries of a Bill of Rights are the lawyers who profit from the legal fees that it generates and the criminals who manage to escape imprisonment on the grounds of a technicality. The main losers are the taxpayers, and society in general through the reduction of community values to mere court room weapons.<sup>271</sup>

### **Creation of new areas of litigation**

**6.53** One argument put by the NSW Council of Churches was that a Bill of Rights has the potential to create specific new litigation “industries” where previously there were none. The First Amendment prohibits Congress from passing laws respecting the establishment of a religion or prohibiting the free exercise of a religion. The Council argues that this has been used against mainstream churches and created an area of litigation which does not exist in Australia:

...There is a genuine concern over the bill of rights industry in America, where its First Amendment with respect to Congress not passing a law respecting the establishment of religion or prohibiting the free exercise of one has turned America into a church state nightmare. Actually it is an industry of church-state issues that we do not have in this country and that actually comes basically from the First Amendment. So any question of a bill of rights that makes statements about the establishment of religion, or prohibiting the exercise of one, many fear will lead us into the American scene of the First Amendment industry.

<sup>269</sup> *R v Ceramalus*, unreported, 17 July 1996 per Thomas J.

<sup>270</sup> *Lawson v Housing NZ* [1997] 2 NZLR 474.

<sup>271</sup> *Submission 31/3/00* p5.

...

So there is a real fear I think amongst certainly churches that I would be part of in this State that any bill of rights will take us down that same path where certain groups will decide that it is not appropriate to have scripture in schools; it is not appropriate to have a chaplain in schools; it is not appropriate to have religious holidays; it is not appropriate to have government funding, and of course education is not divorced from State issues, and so I think that is one considerable area that any bill of rights would have to determine as to what extent Australia is going to be free from the First Amendment industry in America..<sup>272</sup>

- 6.54** Although the US Bill of Rights model would be unlikely to be used in an Australian context, the example illustrates the argument as to how a Bill can create an opportunity for litigation in an area where previously there was little activity. On this particular issue of church-state litigation, former Legislative Council member Stephen Mutch also expressed concern as to the potential impact of a Bill of Rights.<sup>273</sup> He argued that judicial interpretation of s116 of the Australian *Constitution* had already led to protections being given to religious cults to the detriment of the public interest, and under a Bill even greater latitude could be given.

### Using Courts as a Political Forum

- 6.55** A further argument related to an increase in litigation is that a Bill will be used by those who have failed to persuade elected representatives of the strength of their case as a means of pursuing essentially political causes. Public interest objectives are pursued through litigation rather than the political process. This proposition, described by one member of the committee as “the second bite of the cherry” approach,<sup>274</sup> was seen by several public interest groups during the inquiry as a positive rather than a negative. Surveying New Zealand and Canadian experience, UK researchers concluded:

After the initial “settling in” of the legislation, issues which fail to be solved in the political arena begin to come for adjudication before the courts, with interest groups changing their strategy to litigation as well as political lobbying and campaigning.<sup>275</sup>

- 6.56** Some supporters of a Bill of Rights argued that in time a Bill could lead to less litigation rather than more as agencies became more mindful of their responsibilities and improved their practices. Former judge the Hon Malcolm McLelland QC did not support this view:

**The Hon. P. BREEN:** ...indeed the Public Interest Advocacy Centre suggested to the Committee that in their view anyway there would be less court cases as a result of the Bill of Rights than more. Would you agree with that?

<sup>272</sup> Clifford *Evidence* 5/06/00 p23-24.

<sup>273</sup> *Submission* 17/01/01.

<sup>274</sup> Ryan *Evidence* 15/5/00 p10.

<sup>275</sup> *Op cit* p25.

**Mr McLELLAND:** No. I think that is a view which does not stand up to critical examination.

**The Hon. P. BREEN:** Do you say that because of your experience of the Canadian system which you have outlined earlier, and your reading of the Canadian system in operation?

**Mr McLELLAND:** I say in part that is the case but also deriving from my experience as a judge of the Supreme Court dealing with legislation which is expressed in broad value-laden terms and observing the effect that that has had on litigation in this State, and I refer to some of that legislation in my submission, but there is a lot more of it and I refer to particularly the Contracts Review Act and Trade Practices Act and the Fair Trading Act. Not that I say that the effect of all that legislation is ultimately bad, but whether it is good or bad one of its effects has been to expand enormously the number of cases, the length of them and the cost of them and the general volume of litigation to an extraordinary extent.

There are many statutes for examples empowering courts to do what appears to them to be just and equitable, that sort of vague statement sometimes is necessary to give a sufficiently wide discretionary power but there is no question that the effect of them is to increase litigation and the cost and duration of litigation.<sup>276</sup>

- 6.57** Speculating on the Bar Association's reasons for being a less than enthusiastic supporter of a NSW Bill of Rights, Mr Bret Walker suggested litigation was not necessarily the best way to advance many social causes:

...the Bar carries many more scars of litigation and is more aware of the evil of litigation than is any other group in society... 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.<sup>277</sup>

### **Lack of a Bill does not isolate domestic common law**

- 6.58** Few opponents of a Bill of Rights commented on the term of reference (d), the consequence for local common law of Bills of rights in the United Kingdom, Canada and New Zealand. However two that did, Mr Bret Walker SC for the Bar Association and former judge the Hon Malcolm McLelland QC, addressed this in considerable detail with two different approaches. Both respectfully disagreed with the comments by Chief Justice Spigelman on this issue (see Chapters Three).
- 6.59** Mr McLelland made several points to argue Australia did not risk intellectual isolation as a result of not having a Bill of Rights:

<sup>276</sup> *Evidence 26/6/00 p20-21.*

<sup>277</sup> *Evidence 25/7/00 p20.*

- The various Bills around the world are all different and nearly always the product of significant historical events, causing difficulties in making straight forward applications of international decisions to local contexts
- Australia has six States, two Territories and Federal courts which can share development and precedents in progressing the common law
- US cases, particularly of State courts, have always been used by counsel in Australian courts when needing to argue a difficult proposition, despite constitutional differences.
- Overseas jurisprudence is not always desirable to adapt locally, with cases on the US Fourteenth Amendment (the “due process” clause) being a clear example where even American lawyers find US jurisprudence incomprehensible.

**6.60** Mr McLelland wished to particularly emphasize the differences in jurisprudence between common law countries:

The concept of Bill of Rights cross-fertilisation within common law countries runs into the problem that when one examines them the Bills of Rights in comparable countries are all different. They differ in their structure and legal status, but they also differ very significantly in their substantive content, and the process of trying to form some global Bill of Rights jurisprudence that one can pluck out of the world’s law and apply to ones own Bill of Rights simply is impossible in that situation.<sup>278</sup>

**6.61** He provided a detailed examination of the historical context of various models of Bill of Rights and concluded:

Those different historical circumstances produced different kinds of Bills of Rights, that is one of the reasons why they are all different but the fact is that they are all different. I would take the view that the public interest in Australia would be better served by avoiding the confusion, the difficulty, the time and expense involved in Australian courts and lawyers trying to understand these various different provisions and instead trying to be consistent with their own national culture and traditions.<sup>279</sup>

**6.62** Mr McLelland did not agree that the absence of a Bill of Rights would prevent local lawyers from using overseas cases, because this had never been the case for US case law:

...quite apart from the Bill of Rights litigation in the United States and I suppose that is the best example because the Bill of Rights has been in force there for so long, 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.

<sup>278</sup> *Evidence 26/6/00 p7-8.*

<sup>279</sup> *Evidence 26/6/00 p9.*

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.<sup>280</sup>

- 6.63** Mr Bret Walker agreed with the comments of Chief Justice Spigelman to the extent that there had been a drift in overseas jurisdictions towards incorporation of human rights standards into the common law:

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.

<sup>281</sup>

- 6.64** However where Mr Walker disagreed with the Chief Justice was in his conclusion that this trend in overseas jurisdictions was disturbing or threatening to the development of local common law. Mr Walker gave a strong defence of the openness and international awareness of the higher courts in Australia, and argued that Australian courts would continue to make independent use of comparative law in the future:

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

<sup>280</sup> *Evidence* 26/6/00 p9.

<sup>281</sup> *Evidence* 25/7/00 p4.

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.<sup>282</sup>

## **A Bill favours Rights instead of Responsibilities**

**6.65** Term (c) of this inquiry referred to whether individual responsibilities as distinct from rights should be included in a Bill of Rights. As mentioned in Chapter Two, there is a debate in international circles as to the extent that responsibilities should co-exist when rights are expressed in treaties and conventions. The granting of a right to someone must of necessity involve a responsibility on another person or institution to honour that right. Not all opponents of a Bill of Rights saw this issue the same way: for instance the Bar Association submission agreed with many supporters of a Bill in saying that the two issues needed to be treated separately, that rights were not given in law on the basis of reciprocal responsibilities.<sup>283</sup>

**6.66** However there were several arguments made during this inquiry that one of the disadvantages of a Bill of Rights is that they encourage a culture where individual responsibility is discouraged in favour of claiming rights through litigation. This was strongly put by the NSW Premier the Hon RJ Carr MP:

A Bill of Rights will further engender a litigation culture. Already it seems that people are unable to accept responsibility for their own actions. If a person trips and falls today, instead of blaming himself or herself for carelessness, the person will be looking for someone to sue. If a person is burnt by coffee while juggling it and driving a car at the same time, instead of recognising that it is a really stupid

<sup>282</sup> *Evidence 26/6/00 p4.*

<sup>283</sup> *Submission 14/4/00 p4.*



thing to do, the person will sue because the coffee was too hot. How much more litigation will we be inviting by a bill of rights?<sup>284</sup>

**6.67** The NSW Council of Churches informed the Committee that this issue of responsibility was particularly important to many of its members.

**CHAIR:** I think it is fair to say that in the Council of Churches' submission approval is given to duty based law and suspicion is cast on rights based law. Would you agree that that is a fair presentation of an element of your submission?

**Reverend CLIFFORD:** Yes.

**CHAIR:** Could I put it to you that in New South Wales and in the Commonwealth of Australia there are many hundreds of statutes..., which impose all sorts of obligations on people who are residents of Australia or New South Wales, and not only impose obligations but impose penalties in default of those obligations being carried out, ... whether it is legislation dealing with safety in the workplace or driving safely on the roads, there are innumerable examples..., so am I not entitled to say that the law very adequately and extensively deals with the obligations of citizens and residents of the State?

**Reverend CLIFFORD:** I guess responsibly it also adequately deals with the rights of citizens of the State as it is now as well, so why pick out one aspect? It certainly has racial discrimination legislation; it is certainly under international covenants that have been ratified and municipal law that has taken place on the basis of those ratification's; it has also satisfactory protection of rights as well as duties, so why pick out one to highlight in a bill as against the other? What we are saying is, if you were going to do one, then why not do the other and make statements of duties as well as statements of rights? The Christian position I think, or those who hold this would say that the Christian position is more about serving and giving and my responsibility to my neighbour than who I am and my rights in the world. Now I would simply say I believe there are rights, being in the image of God, et cetera, but they would certainly see rights in a statement of duties and if there are duties in the law today, there are also rights in the law today, why elevate one? <sup>285</sup>

**6.68** During the inquiry the Committee received a significant volume of correspondence from individual citizens, often expressed in very similar words, concerned that responsibilities should be given more emphasis by governments rather than considering a Bill of Rights.

### **A Bill could lead to harmful intrusions into private organisations**

**6.69** Term (f) of this inquiry refers to the circumstances in which a Bill of Rights should be binding on individuals as distinct from binding the arms of government or bodies performing a public function. The argument is that to protect many rights effectively a Bill would need to be binding on the private and non-government sector, whether or not the

<sup>284</sup> *Submission 31/3/00 p2.*

<sup>285</sup> *Evidence 5/6/00 p29-30.*

organisations involved are acting on behalf of the government or their own private interests. The analogy used is current anti-discrimination legislation, which with certain exemptions, is binding on all sectors, not just government. To grant the right of privacy, for instance, yet only hold government and its agents accountable, would be to leave individuals with no remedy when abuses of privacy are made by a corporation pursuing a commercial interest. The downside of this, however, is the potential for increased litigation in areas previously outside the public arena.

**6.70** This was not raised as an objection by most participants who opposed a Bill, except for the concerns by the NSW Council of Churches that churches could be the subject of litigation under a Bill of Rights. The argument is included here because of some of the potential implications of this intrusion into private affairs as a logical consequence of providing comprehensive protection of rights. The following exchange between members of the Committee and representatives of Australian Lawyers for Human Rights explores some of the potential implications of doing away with the public/private divide:

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

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

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

**Mr RICE:** We do mean what we are saying.

**CHAIR:** That the exemption should be abolished?

**Mr RICE:** We acknowledge, I will not say the novelty but the challenging aspects of the issue. But, we do not resile from the startling position, that the conventional public-private divide—and I venture to say this would be accepted as the general position—is blurred and can no longer be sustained as a simple proposition. What were once public and government functions compared to what were private functions is no longer straightforward. If we accept that is the way the world has moved, then we have to rethink our approach to human rights-regulating behaviour. It seems necessary to address the issue, and we have addressed it by saying let us effectively cross the divide.

...

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

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

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

...

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

The beginning point should be that it does not matter whether you are doing it publicly or privately, you are breaching someone's human rights, you are treating someone less than a human being is entitled to be treated....

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

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

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

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

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

**6.71** Similar issues were also explored in evidence from a representative of the Australian Plaintiff Lawyers Association<sup>286</sup>, representatives of the Women's Electoral Lobby (regarding the potential for actions against clothing restrictions imposed on women by an conservative ethnic community)<sup>287</sup> and with Commissioners from the NSW Aboriginal and Torres Strait Islander Commission (regarding private corporations infringing rights of indigenous peoples).<sup>288</sup>

<sup>286</sup> Ms Debeljak noted that churches and universities in the UK had successfully sought exemptions from the new *Human Rights Act*: *Evidence* 15/2/01 p13-14.

<sup>287</sup> *Evidence* 1/2/01 p29-30.

<sup>288</sup> *Evidence* 1/2/01 p16-18.

**6.72** The dilemma which emerges is that a Bill of Rights which does not bind private or non-government sectors provides only partial protection of human rights in a modern society. Conversely, to extend the coverage of a Bill has very uncertain and potentially divisive outcomes. The Queensland parliamentary committee which examined a Bill of Rights (see Chapter Three) expressed considerable concern over this issue. Their report argued that extending a Bill to cover all individuals, corporations and legal entities “would have major implications for the functioning of society”, including a massive increase in litigation. Despite this, the Queensland committee agreed that the nature of “government” or the “state” had substantially changed since Bills of Rights were first introduced, so definitional problems remained even in a narrower Bill.<sup>289</sup>

## Conclusion

**6.73** As with those who support a Bill, those who oppose it differ in the arguments they emphasize and are influenced in their arguments by the experience of specific models of Bills in operation. In the next Chapter the Law and Justice Committee explains its view on the public interest of a NSW statutory Bill of Rights, based on its assessment of the arguments summarised in this and the preceding chapter.

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<sup>289</sup> *Op cit* p46-47. The Victorian parliamentary inquiry into a Bill (see Chapter Three) took the view that the traditional view of a Bill as only applying to government should be taken *op cit* p165-167.

## Chapter 7 The Committee's View

- 7.1** This inquiry has benefited from high quality contributions by many participants, not all of which have been able to be included in the preceding chapters. There are valid arguments both in favour of a Bill and against, and advocates of both positions generally share a concern to ensure the effective protection of human rights in this State.
- 7.2** The Committee is, however, charged with making a determination on the public interest of introducing a Bill in New South Wales. Its finding, explained in this chapter, is that on balance it would *not* be in the public interest to introduce a Bill of Rights, even in a statutory form. The Committee is particularly concerned at the change a Bill would make to the respective roles of the Judiciary and the Parliament. The Committee believes a Bill of Rights could undermine the legitimacy of both institutions, in return for a largely uncertain impact on the protection of human rights. The Committee's view on this threshold issue makes findings on the other terms of reference hypothetical.
- 7.3** The Committee believes that some of the arguments put forward by advocates of a Bill of Rights have merit. During this inquiry there have been examples given where human rights of individuals or of minority groups have been neglected. Some of the examples occurred in other jurisdictions, but there have also been failures by NSW governments to address individual and at times systemic problems. The Committee agrees that the common law is not a sufficient protection of individual rights in the absence of legislative action.
- 7.4** The Committee understands the concerns of witnesses such as Professor Williams that there is a need for community education on protection of human rights. The Committee in this inquiry has not attempted to undertake grass roots community consultation. However the perception gained from those submissions and correspondence contributed by members of the broader community is that there is a suspicion and distrust of "human rights" in many sections of the NSW population. To the extent that this is based upon lack of understanding of human rights, there is a role for increased community education and debate.
- 7.5** Despite these arguments in favour of a Bill of Rights, the Committee does not support the solution proposed. A statutory Bill could lead to some improvement in human rights protections in some instances. However the cost of this uncertain marginal improvement is a fundamental change in the relationship between representative democracy, through an elected Parliament, and the judicial system. The independence of the Judiciary and the supremacy of Parliament are the foundations of the current system; both begin to alter under a Bill of Rights. A Bill of Rights would increase the responsibility of the Judiciary to protect human rights, giving it a role that should primarily be the responsibility of Parliament.
- 7.6** Advocates of a minimalist statutory Bill, such as Professor Williams and Father Frank Brennan, argue that parliamentary supremacy can be maintained in a Bill by its statutory

nature and by preserving the power of parliamentary override.<sup>290</sup> However a number of participants in this inquiry believe that judges could undertake this task of human rights protection more effectively than its elected representatives have done to date.<sup>291</sup> Regardless of whether this is correct, the Committee believes it is ultimately against the public interest for Parliament to hand over such decisions to an unelected Judiciary who are not directly accountable to the community for the consequences of their decisions. The Committee believes an increased politicisation of the Judiciary is an inevitable consequence of the introduction of a Bill of Rights.

- 7.7** The Committee acknowledges that the notion of representative democracy is modified by influences such as party politics and the development of a complex bureaucracy. However it believes the contrast made by some witnesses of principled, reasoned decisions made by judges compared to politically expedient decisions made by parliamentarians underestimates the very different roles that the institutions of the Courts and Parliament undertake.<sup>292</sup>
- 7.8** The Judiciary is already subject to unprecedented, and frequently unwarranted, public criticism. This will only increase if a Bill of Rights increases the scope for judicial decision making into an area of broadly defined rights. Much of the public pressure and criticism directed at elected representatives will then also be directed to the Judiciary. It is true that, not being elected, the Judiciary is better able to make unpopular decisions without making compromises to accommodate majority opinions. However in a democracy this public pressure will still seek an outlet, with greater scrutiny of individual judges and much greater public pressure regarding appointment of judges the most likely outcomes. Executive governments will be increasingly likely to make appointments based upon judges' political views rather than their legal skills.<sup>293</sup> Ultimately this tendency undermines the independence and quality of the Judiciary.
- 7.9** The Committee does not believe that the statutory nature of a Bill can address its concerns regarding the preservation of parliamentary supremacy. A Bill of Rights would become a fundamental piece of legislation, which future governments would find difficult to amend without being characterised as destroying human rights protections. A Bill of Rights creates expectations: to back away from these expectations defeats the purpose of bringing in the Bill.
- 7.10** Provision of a parliamentary override creates its own difficulties. Rather than facilitating a "dialogue" between Parliament and the Judiciary, the existence of an override sets up a potential conflict between these two arms of government. A possible scenario is one in which legislation is judged by a court to be in breach of human rights as set out in a Bill of Rights, and subsequently Parliament indicates its intention to let the incompatibility stand, and exercise its power of override. This process highlights the conflict when it arises.

<sup>290</sup> Eg Williams *Evidence* 10/4/00 p6.

<sup>291</sup> See for example Debeljak *Evidence* 15/2/01 p7-8, Kayess *Evidence* 15/5/00 p28.

<sup>292</sup> eg Bielski *Evidence* 1/2/01 p23, Debeljak *Evidence* 15/2/01 p6.

<sup>293</sup> The Committee acknowledges this occurs at present, although it remains the exception rather than the rule.

While there have always been decisions by which courts have questioned the validity of legislative action, the Committee believes these differences should not be elevated to the prominence possible with an override provision.

- 7.11** The Committee does not believe limitation clauses effectively restrict the ambit of court decision-making. The interpretation of the limitation clause is a judicial decision, not that of the legislature. It is possible, indeed quite likely, that the Judiciary would take a cautious view and not intrude far into areas of policymaking, particularly allocation of resources. However this would still be an exercise of judicial discretion. If the evidence of this inquiry is a guide, the Judiciary would be urged strongly by many human rights advocates to go further into a role of allocating resources and policymaking. Two scenarios suggested to the committee were of a representative of a government department giving evidence in court as to the reasons for allocating resources to particular programs<sup>294</sup>, and of a court deciding that the Executive must provide electrical power and electricity to an indigenous community.<sup>295</sup> Both are examples where at present it is Parliament's role to hold the Executive accountable.
- 7.12** The Committee does not suggest that these examples would be supported by all advocates of a statutory Bill of Rights, or that they would not be qualified further by those witnesses who put them forward. But they show the potential blurring of the role of the Judiciary under a Bill of Rights. Judges make decisions based upon the facts situations in individual circumstances of the cases before them. At times these decisions have policy implications, and judges will consider wider factors in making these decisions. But the judicial role is not suited to making decisions on the allocation of limited resources among competing needs, as has been persuasively argued by former and current members of the Judiciary during this inquiry. Judicial decision-making and political decision-making are different, and need to remain separate. The legitimacy of both institutions suffers when the roles converge. Parliament should not pass legislation, for instance, determining an individual prisoners' sentence. Neither should a court determine the program allocations of a government department.
- 7.13** Overseas the greatest use of Bill provisions has been in the area of criminal law. It would not be unfair to suggest that the area in which local courts currently receive the greatest public criticism, and, consequently, where there is the most significant tension with the other two arms of government, is in the area of criminal law. Involving the Judiciary in a greater range of rights based issues surrounding the criminal law, and, by implication, reducing the power of the Parliament in this area, is quite likely to lead to a fall in public confidence in both politicians and judges and an increase in conflict between the institutions.
- 7.14** The major concern of the Committee is that a Bill of Rights disturbs the relationships between Parliament and the Courts. However it also believes that a Bill of Rights will create uncertainty in the law for an extended period. Arguably any change in legislation creates uncertainty. However the broad nature of rights under a Bill provides far more opportunity for areas of disputed meaning than more narrowly focussed legislation. The

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<sup>294</sup> Debeljak *Evidence* 15/2/01 p10.

<sup>295</sup> Ranald and Durbach *Evidence* 15/5/00 p11-12.



Committee believes the arguments by the Hon Malcolm McLelland in particular are persuasive as to the negative impact of a Bill on certainty in the law.

- 7.15** The Committee believes that one of the aspects of this uncertainty is that initially there would be a major increase in litigation of a speculative nature, particularly in the area of criminal law if New Zealand and Canada are any guide. The Committee has not heard sufficient empirical evidence of the Canadian and New Zealand experience to ascertain whether the uncertainty is a transitional stage only, or whether, as in the United States, it evolves into ongoing uncertainty. It may be that a Bill of Rights encourages a litigious culture. It may equally be that, as some have suggested during this inquiry, alternatives to litigation could be found to resolve disputes.
- 7.16** The Committee believes it is difficult to arrive at a list of specific rights in a Bill. Professor Williams suggested a minimalist position of selecting initially only a few, relatively uncontroversial rights with wide public acceptance. Most advocates who disagreed with Professor Williams' pragmatic approach shied away from actually identifying which rights should be protected. The Committee believes a difficult dilemma is posed as to what criteria is used for inclusion of rights. If the criteria is to include only those rights which have popular consensus it may weaken the argument that a Bill is needed to protect minorities. However if other criteria are used it increases the likelihood that rights important to some sections of the community will be excluded and others included which are opposed by significant sections of the community.
- 7.17** The Committee has received strong evidence arguing both sides of Justice Spigelman's proposition that domestic common law will suffer from isolation as a result of all other common law jurisdictions now having a Bill of Rights. The judicial and legal experts who put these views are much better placed to assess and predict the future development of jurisprudence than the members of this Committee. The Committee wishes to let the evidence on this issue in Chapters Five and Six speak for itself. However in Chapter Nine the Committee makes a recommendation regarding the use of international human rights instruments in domestic interpretation. It serves to highlight the use that can be made of international developments in human rights in domestic law.
- 7.18** Inadequacies in the protection of human rights may exist in New South Wales but the Committee believes the Bill of Rights as a solution raises more problems than it resolves. It is preferable that Parliament become a more effective guardian of human rights rather than handing this role over to an unelected Judiciary. In the next two chapters the Committee explores two areas where Parliament's role in protecting human rights can be enhanced. Neither of these involve undermining the current relationship between the Judiciary and the Parliament. The Committee believes Parliament should retain the ultimate responsibility for protection of human rights. Countries without a legislature which protects human rights, and without an independent Judiciary, will gain nothing from a Bill of Rights. The importance of the next chapter is well encapsulated in the following argument from the submission by the NSW Bar Association:

..An obvious consequence of a New South Wales Bill of Rights or an *Interpretation Act* human rights amendment is to transfer a realm of decision-making presently dominated by Parliament to the jurisdiction of the courts. There would be many who might favour being governed in these particulars by the unelected judges – impartial and learned- rather than by the elected Members of the Houses and in

particular by the Ministers who enjoy the confidence of the Lower House, all in the context of a party system. However, the Bar Association regards that jaundiced view of politicians as the worst possible reason to favour a New South Wales Bill of Rights or an *Interpretation Act* human rights amendment. The institution of representative and responsible parliamentary government cannot be saved, and will be harmed, by depriving its key feature, which is the Houses of Parliament themselves, of the continuing duty and power to debate and decide upon important matters such as the kind of rights and immunities in question before this Committee.<sup>296</sup>

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**Finding 1**

The Committee finds that it is not in the public interest for the NSW government to enact a statutory Bill of Rights.

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<sup>296</sup> *Submission 14/4/00 p14.*

## Chapter 8 Parliamentary Scrutiny and Protection of Rights

### Introduction

- 8.1** In the last chapter the Committee expressed concern as to the way in which a Bill of Rights could undermine the current relationship between the Legislature to the Judiciary. The Committee concluded that Parliament has a responsibility to protect human rights. This responsibility is not always exercised effectively. The NSW Parliament has at times been responsible for neglecting to address ongoing needs of disadvantaged groups and for passing legislation which breaches human rights standards. Legislation is prepared within bureaucracies without any measurement against human rights standards, and then passes through Parliament again without any, or at most ad hoc, discussion of such standards.
- 8.2** The Committee believes more can and should be done to be done to protect human rights by Parliament itself. If members of Parliament, as law-makers, become more familiar with the standards of human rights and apply these to their consideration of legislation, considerable gains could be achieved without a Bill of Rights. In this chapter the Committee examines the way some Parliaments in Australia have created structures to ensure legislation is considered in a context where human rights issues can be raised. The Committee believes progressing in this direction may have important benefits without any of the drawbacks of a statutory Bill of Rights.
- 8.3** Both supporters and opponents of a Bill of Rights generally agreed on the value of a parliamentary committee responsible for scrutiny of bills. For instance, Professor Williams, in his evidence supporting a Bill of Rights:

**The Hon. J. HATZISTERGOS:** ...- would there not be merit in having a bill of rights committee, as I think some State parliaments do, which can examine legislation for infringements of human rights and report to the Parliament at the time the legislation is being passed?

**The Hon. JANELLE SAFFIN:** We could at least have a scrutiny of bills committee, which we do not have but Queensland does.

...

**Mr WILLIAMS:** I think it is a very good idea. It might even be seen as a first stage in the absence of anything else, that indeed a special committee, or a committee with an enhanced jurisdiction, has a list of rights which it determines, perhaps at another inquiry or as a result of this, and it scrutinises all legislation against that in order to determine whether those rights are breached. That does happen in other States and at the Federal level.

...

If this Parliament was to adequately define the core rights and set up a committee process, I would very broadly support that. I think the Parliament ought to go further because I think, indeed, it is necessary for people in the community and

other places that indeed the courts do have a role in this, although it would be carefully limited, but as a first step I think doing the committee approach you suggest would be a very good way forward.<sup>297</sup>

- 8.4** A representative of the NSW Branch of the International Commission of Jurists was one of the many other supporters of a Bill of Rights who also supported a parliamentary scrutiny of legislation committee:

The thing that we feel should be given effect to almost immediately is mechanism within the parliamentary system as such for vetting legislation to ensure that it does comply with these obligations in the international instruments, and some sort of reporting mechanism back to Parliament as to how they comply or whether they do not comply. That is something that we feel could be done immediately, it would be educative and is certainly a way of developing a culture of the human rights norm within Australia.<sup>298</sup>

- 8.5** The Hon Malcolm McLelland, in opposing a Bill of Rights, nevertheless saw a parliamentary committee as having a legitimate role:

**CHAIR:**...one possible initiative that could be taken, other than creating a statutory Bill of Rights would be if the legislature itself were to have a scrutiny of bills committee along the lines of the Commonwealth Senate model.

Would you agree with me if that were to happen human rights would be kept within the realm of the legislature and although a certain amount of legal uncertainty undoubtedly is created every time a statute is enacted in a sense such a Committee would be watchful to explore and avoid, one would hope, the types of ambiguities that might otherwise occur regarding questions of legal rights. Could you just make a general comment for the benefit of the Committee whether you think that that might be a mechanism that would resolve the types of difficulties you see with a Bill of Rights?

**Mr McLELLAND:** None of the criticisms that I have made would affect a proposal of that kind. My personal view is that such a committee would be able to perform a very useful function because, as you say, it would be within the parliamentary process which is the proper forum to investigate these matters. It would be a busy committee I think, but Members of Parliament are used to being busy. But as a concept I would certainly think it would be a worthwhile step to take.<sup>299</sup>

- 8.6** Later in the inquiry the Committee had the benefit of receiving a submission and then oral evidence specifically on this issue from Professor David Kinley, the Director of the Castan

<sup>297</sup> *Evidence* 10/4/00 p17-18.

<sup>298</sup> *Higgins Evidence* 30/01/01 p23.

<sup>299</sup> *Evidence* 26/6/00 p14. For another example of a Bill of Rights opponent supporting a scrutiny committee see Bayne *Submission* 30/5/00 pp9-14.

Centre for Human Rights Law at Monash University, Melbourne.<sup>300</sup> Professor Kinley has studied and written on pre-legislative scrutiny, particularly by parliamentary committees, over a 15 year period. Subsequent to Professor Kinley's evidence, the Committee visited the Senate Standing Committee for the Scrutiny of Bills and the Queensland Scrutiny of Legislation Committee. During these visits the Committee spoke with current and former members of these committees and a former legal advisor to the Queensland Committee, Professor Bryan Horrigan, Director for the National Centre for Corporate Law and Policy Research, University of Canberra. The discussion which follows is therefore based upon both academic observations and the practical experience of Members working on such committees.

## Models of Scrutiny of Legislation in Australia

### Senate Standing Committee for the Scrutiny of Bills

**8.7** The Senate Standing Committee for the Scrutiny of Bills was established on 19 November 1981 under Senate standing orders. It was established following an inquiry of the Constitutional and Legal Affairs Committee in 1978.<sup>301</sup> Its purpose and terms of reference as set out in s(1a) of Senate Standing Order 24. This states:

At the commencement of each parliament, a Standing Committee for the Scrutiny of Bills shall be appointed to report, in respect of the clauses of bills introduced into the Senate, and in respect of Acts of the Parliament, whether such bills or Acts, by express words or otherwise:

- i. trespass unduly on personal rights and liberties;
- ii. make rights, liberties or obligations unduly dependent upon insufficiently defined administrative powers;
- iii. make rights, liberties or obligations unduly dependent upon non-reviewable decisions;
- iv. inappropriately delegate legislative powers; or
- v. insufficiently subject the exercise of legislative power to parliamentary scrutiny.

<sup>300</sup> It should be noted that Professor Kinley is a supporter of a Bill of Rights and his comments outlined in this chapter should not be taken as an argument that a parliamentary scrutiny committee is to be preferred to a Bill of Rights. Rather, his argument is that a scrutiny committee is valuable regardless of whether a Bill of Rights is in existence.

<sup>301</sup> For more detail on the history of the Committee see *The Work of the Committee during the 38<sup>th</sup> Parliament May 1996-August 1998* (esp Chapter One) (June 1999, Senate), *Report on the Operation of the Senate Standing Committee for the Scrutiny of Bills during the 36<sup>th</sup> Parliament* (October 1993, Senate) and *The Work of the Committee during the 37<sup>th</sup> Parliament* (June 1997, Senate).

- 8.8** The Committee consists of six Senators, three of whom are government and three non-government members. The current Chair is a non-government member. The Senate Committee has a single function, that of legislative review, with regulation review undertaken by the Senate Standing Committee on Regulations and Ordinances. The Senate Committee is staffed by a secretariat of three supported by an external legal advisor, a Professor at the ANU Law Faculty. This legal advisor is a key role, as will be seen from the description below of the process of the Committee's work.
- 8.9** The Committee generally produces two documents each sitting week, the Alert Digest and a Report. Both begin with the initial step following the tabling of a bill. The committee secretariat provides the bill to the legal advisor, together with its Explanatory Memorandum and the Minister's second reading speech, on the Friday of each sitting week. The legal advisor's role is to examine and report on each bill against the five principles set out in Standing Order 24. He then provides a written report to the Committee by the following Monday which draws the attention of the secretariat and Committee members to those clauses of the bill which appear to infringe principles (i) to (v).
- 8.10** On the basis of the legal advisor's report the secretariat then prepares a draft Alert Digest which is considered by the committee at its regular meeting on Wednesday morning of each sitting week. The Digest contains a brief outline of each of the bills introduced in the previous week and sets out any comments the Committee wishes to make by reference to one of the five principles. Once approved by the Committee, the Alert Digest is tabled in the Senate on Wednesday afternoon or the Thursday morning of each sitting week.
- 8.11** Where concerns are raised in the digest, correspondence is forwarded to the Minister responsible the day after the tabling of the Digest inviting the Minister to respond to the Committee's concerns. The Minister is asked to respond in sufficient time for the response to be circulated prior to the next weekly committee meeting.
- 8.12** A Report is produced when the Minister responds to a concern raised by the Committee. This Report contains the relevant extract from the Digest, the text of the Minister's response and any further comments the Committee may wish to make. As with the Digests, Reports are considered at the Committee's regular Wednesday meeting and are then presented to the Senate on the Wednesday afternoon or the Thursday morning of each sitting week.
- 8.13** Members of the Senate Committee advised that it was very unusual for a Minister not to respond to correspondence. Responses vary from agreement to amend the offending clauses to presentation of arguments as to why the intrusion on liberties is justified. The Committee does not make formal recommendations in its Report, but it may make statements such as "the Committee is not persuaded by the Minister's Response" or some other expression of continuing concern. An example of the interchange between the Committee and the Executive is shown in Appendix Seven.
- 8.14** The Senate Committee members believe that its Reports and Alert Digests are influential in Senate debates and noted that both publications are frequently referred to in Members' speeches on controversial Bills. In evidence David Kinley also noted that the new Joint

UK Committee on Human Rights (discussed in Chapter Four) gained much from an understanding of the Senate Committee.<sup>302</sup>

### Queensland Scrutiny of Legislation Committee

- 8.15** The Scrutiny of Legislation Committee was established on 15 September 1995 by s4 of the *Parliamentary Committees Act 1995* (Qld). However its origins can be traced back to the Fitzgerald inquiry into police corruption, and the concerns it raised about abuse of power by Executive government.<sup>303</sup> As well as recommending a strengthening of the parliamentary committee process to undertake genuine review,<sup>304</sup> the *Legislative Standards Act 1992* (Qld) was introduced to improve the then ad hoc standard of legislative drafting and provide guidelines for potential breaches of civil liberties in legislation.
- 8.16** The key provision for legislative scrutiny under the 1992 Act is s4. This section defines “fundamental legislative principles” which are to be adopted by each government agency and by the Queensland Parliamentary Counsel in its drafting. “Fundamental legislative principles” are “those principles relating to legislation that underlie a parliamentary democracy based on the rule of law, which requires sufficient regard to :
- Rights and liberties of individuals, and
  - The institution of Parliament”.<sup>305</sup>
- 8.17** Unlike the Senate standing orders, Section 3 then goes on to give eleven examples of whether legislation gives sufficient regard to the rights and liberties of individuals. These include whether the legislation:
- is consistent with principles of natural justice
  - does not reverse the onus of proof in criminal proceedings without adequate justification
  - provides appropriate protection against self-incrimination
  - has sufficient regard to Aboriginal tradition and Island custom
  - sufficiently defines administrative power upon which rights and obligations may be dependent.

<sup>302</sup> *Evidence 20/3/01 p8*, see also his article “Human Rights Scrutiny in Parliament: Westminster Set to Leap Ahead” *Public Law Review* Vol 10 Dec 1999 pp252-257.

<sup>303</sup> See *Report of a Commission of Inquiry pursuant to Orders in Council GE Fitzgerald July 1989 p125*, quoted in Queensland Scrutiny of Legislation Committee, *Annual Report 1995-96 p6*.

<sup>304</sup> Queensland has not had an upper house since 1922.

<sup>305</sup> Section (2) (a) and (b).

**8.18** This section is not meant to be exhaustive – it states “for example” prior to listing the principles.<sup>306</sup> Sections 4 and 5 then define the principles as to whether sufficient regard has been had to “the institution of Parliament” in legislation and in subordinate legislation. These sections are primarily aimed to ensure legislative power is appropriately delegated and subject to review.

**8.19** The Scrutiny of Legislation Committee’s terms of reference appear in s 22 of the *Parliamentary Committees Act 1995*. This states:

22 (1) The Scrutiny of Legislation Committee’s area of responsibility is to consider-

(a) the application of fundamental legislative principles to particular Bills and particular subordinate legislation; and

(b) the lawfulness of particular subordinate legislation;

by examining all Bills and subordinate legislation.

(2) The committee’s area of responsibility includes monitoring generally the operation of-

(a) the following provisions of the *Legislative Standards Act 1992* –

- section 4 (Meaning of “fundamental legislative principles”)
- part 4 (Explanatory Notes); and

(b) the following provisions of the *Statutory Instruments Act 1992*-

(six sections relating to the meaning of types of subordinate legislation and similar instruments are then listed)

**8.20** The Queensland Committee currently consists of seven members, of whom four, including the Chair, are government members and three are non-government. The Committee began its operation with a permanent secretariat (currently three staff) and a panel of legal advisors. These advisors consisted of a senior Professor of Law and Ethics and three other experts covering specialist areas in Corporate Law, Native Title and Criminal law. As with the Senate committee, the advisors received the Bills when tabled and were requested to identify any concerns in time for the Committee to consider a draft Bills Digest. However in recent years the Committee has reduced its use of external advisors and strengthened the legal expertise of its secretariat.<sup>307</sup> Bills are now very rarely referred out for external advice.

<sup>306</sup> The Law and Justice committee was advised by Professor Horrigan that the Queensland Committee has considered infringements of the right to privacy, an issue not covered by the eleven examples in s4(3).

<sup>307</sup> The current Research Director of the secretariat has had over 20 years experience working for the Queensland Crown Solicitor.



**8.21** The process of producing Bills Digests is similar to the Senate: very tight time frames, and the seeking of clarification from Ministers. As with the Senate, the Committee receives detailed responses from most Ministers which often result in amendments to legislation. The Committee in its annual reports seeks to report on the impact of its work. For the 1999/2000 year the Committee noted the following statistics:<sup>308</sup>

- The committee considered 90 out of 93, or 97%, of all Bills tabled during 1999/2000
- The committee found 36.8 % of these raised issues regarding individual rights and liberties<sup>309</sup> (with a greater number raising drafting issues)
- The committee noted that in 25 instances of which it was aware the relevant Minister made amendments in direct response to issues being raised in the Committee's Alert Digest, while other amendments to bills or regulations were made subsequent to issues being raised.

**8.22** Appendix Eight contains the Committee's most recent reporting on the impact of its work.

### **Victorian Scrutiny of Acts and Regulations Committee**

**8.23** The Scrutiny of Acts and Regulations Committee (the SARC) was created as an all-party Joint House Committee in November 1992 as part of an overhaul of the parliamentary committee system.<sup>310</sup> The establishment of the Committee had been recommended three times in the previous eight years by inquiries of the Legal and Constitutional Committee of the Victorian Parliament, including its inquiry into a Victorian Bill of Rights (see Chapter Three of this report).

**8.24** The terms of reference for the SARC were inserted as s4D of the *Parliamentary Committees Act 1968* (Victoria). This key section states:

The functions of the Scrutiny of Acts and Regulations Committee are -

(a) to consider any Bill introduced into a House of the Parliament and to report to the Parliament as to whether the Bill, by express words or otherwise -

- (i) trespasses unduly upon rights or freedoms; or
- (ii) makes rights, freedoms or obligations dependent upon insufficiently defined administrative powers; or

<sup>308</sup> Scrutiny of Legislation committee *Annual Report 1999/2000* p8-10.

<sup>309</sup> In its annual report the Committee provides a table breaking down the issues of concern into the individual categories raised in s4 of the "fundamental legislative principles".

<sup>310</sup> All information on this section taken from the Committee's website as at 6/7/01([www.parliament.vic.gov.au/sarc](http://www.parliament.vic.gov.au/sarc)) and the briefing paper prepared by Professor Horrigan, *Checklist Items for Establishing Parliamentary Scrutiny of Legislation 2001* (unpublished).

- (iii) makes rights, freedoms or obligations dependent upon non-reviewable administrative decisions; or
- (iia) unduly requires or authorises acts or practices that may have an adverse effect on personal privacy within the meaning of the Information Privacy Act 2000; or
- (iib) unduly requires or authorises acts or practices that may have an adverse effect on privacy of health information within the meaning of the Health Records Act 2000; or
- (iv) inappropriately delegates legislative power; or
- (v) insufficiently subjects the exercise of legislative power to parliamentary scrutiny.

**8.25** Sections (b) and (ba) give the Committee power to report on whether any Bill repeals or varies s85 of the *Constitution Act 1975* (Vic) and whether it raises an issue as to the jurisdiction of the Supreme Court; and section (c) gives the Committee the power to review regulations.

**8.26** The committee has membership from both Houses. Subcommittees of the main committee take on specific roles such as reviewing regulations, reviewing redundant legislation and conducting inquiries on specific references relevant to the committee's role.<sup>311</sup>

**8.27** The Alert Digest produced by the Committee incorporates the equivalent of both the Report and Alert Digests of the Senate. The process of the Committee's review is very similar to that of the Senate, except that the legal advice is provided by experts who are part of the secretariat rather than an external academic advisor. The Committee secretariat includes a Senior Legal Advisor and two legal advisors, one of whom serves the Regulation Review subcommittee, and two administrative positions.

**8.28** The Committee did not meet with the Victorian Committee, so in this Chapter it does not make any comment on its effectiveness. Likewise, the Committee notes but does not comment on the Standing Committee for Scrutiny of Bills and Subordinate Legislation of the Australian Capital Territory, established in 1992. Any arguments contained in the rest of this chapter derive from the Senate and Queensland models.

### **NSW Regulation Review Committee**

**8.29** A Regulation Review Committee with representatives from both houses was established by the NSW Parliament in 1987. The terms of reference for the Committee include consideration as to whether "the regulation trespasses unduly on personal rights and liberties". The Committee raises the Regulation Review Committee here because it has for a number of years highlighted the need for a scrutiny of legislation role to complement the

<sup>311</sup> For example in 1997 a subcommittee was established to review the Right to Silence in legislation. On the completion of an inquiry and report on the issues involved the subcommittee was then dissolved.

role it currently undertakes in reviewing delegated legislation. The Regulation Review Committee first recommended a Scrutiny of Bills Committee (based upon the Senate Model) in 1991.<sup>312</sup> As other states have established such committees the Regulation Review Committee has continued to argue for the need for a NSW committee in both speeches and reports to Parliament.<sup>313</sup>

## Arguments in Favour of a Scrutiny Committee

**8.30** In his submission to the inquiry Professor Kinley provided an explanation of the rationale for the establishment of parliamentary scrutiny committees:

The rationale of the proposal stems not only from the pragmatic recognition of the apparent Bill of rights impasse, but, more importantly, from the philosophical – that is democratic- justification of placing the greatest responsibility for the legal protection of human rights and civil liberties upon the elected legislators rather than the appointed judiciary....it is suggested, in serving to heighten awareness within executive and parliamentary offices of the scope and importance of the Covenant [the ICCPR], the scrutiny scheme would provide a means by which legislative violations of the Covenant might be anticipated rather than merely repaired or, worse, disregarded.<sup>314</sup>

**8.31** In his evidence to the Committee Professor Kinley outlined several specific arguments for a scrutiny committee. He argued that a parliamentary scrutiny of legislation committee can:

- raise Parliamentary awareness of its responsibility for human rights observance
- be used to develop a political culture where human rights protection is part of any debate over legislation
- be flexible and influence greater observance for human rights by persuasion rather than could be achieved by legislative force.

**8.32** Current or former members of scrutiny committees also suggested their committees:

- Allowed a constructive dialogue between Parliament, through the committee, and the Executive prior to the more adversarial process of the passage of a Bill
- Increased the understanding and awareness of committee members of the need to protect individual rights and liberties in legislation

<sup>312</sup> *Report in Relation to Regulations Report No 11, March 1991 p67.*

<sup>313</sup> A recent example is *Re-engineering Regulations in New south Wales for the 21<sup>st</sup> Century Part 1, Report No 9/52 June 2000, p24.*

<sup>314</sup> Kinley “Parliamentary Scrutiny of Human rights: A Duty Neglected?” p159-160 in *Promoting Human rights Through Bills of Rights: Comparative Perspectives* edited by P Alston, 1999 Oxford University Press, in Kinley *Submission 26/4/00.*

- Allowed an overview to be gained of any recurring problems in legislation, which the committee then highlighted by reporting on the problem area
- Alert digests had become a standard guide for all members when considering legislation
- Had become respected by both Governments and Oppositions for taking an objective, consensual approach to its work rather than being used to advance party interests.

### **Raising Parliamentarians' awareness of responsibility for Human Rights**

**8.33** In evidence Professor Kinley argued that a scrutiny committee helps spread the constitutional responsibility for human rights observance to the Parliament and the Executive rather than it be seen by parliamentarians as a judicial responsibility.<sup>315</sup> He believes this is entirely appropriate. The *ICCPR* under Article 2 (1) requires all signatories to ensure there is compliance with human rights within their jurisdiction. Professor Kinley said that this is a responsibility for Parliaments and the Executive. In the absence of formal scrutiny of legislation this duty is neglected by Parliament.

**8.34** Professor Kinley made the point that most Parliaments in Australia have adopted scrutiny committees for at least the review of regulations and, in the case of the Senate, Queensland and Victoria, for legislation. In all of these committees there is some common statement that there should be recognition of individual rights and liberties when exercising their scrutiny function. To exercise this function in regard to regulations but not legislation is clearly an incomplete acceptance of duties undertaken, as has been regularly argued by the NSW Regulation Review Committee.

### **Introducing Human Rights into Political Debate**

**8.35** A committee which considers legislation according to human rights standards can raise human rights protection as an issue upon which to argue the debate. By including this in the terms of the debate, human rights standards become an increasing part of the political culture and the political discourse, both within Parliament and the Executive and in the wider community, as explained by Professor Kinley:

it will inevitably increase a wider understanding and debate on human rights. It will do so in particular in Parliament. ...It also creates—and this is extraordinarily important—a debate, more closed, between the Executive and Parliament in the corridors, in letters or emails.

It will also create a debate between the bureaucrats and the ministerial heads where the bureaucrats perhaps are more aware of what the scrutiny of bills or scrutiny of legislation committee will say about human rights and, therefore, advise the Minister that perhaps going down that road is not the right way to go. It creates debate in all these areas to do with Parliament but, of course, it will also

<sup>315</sup> *Evidence 20/3/01 p1-2.*

help create debate in the wider community because it will be reported that Parliament is focusing on human rights compliance legislation.<sup>316</sup>

- 8.36** This was confirmed in discussions with the Senate and Queensland Committees, at least to the extent that the “Alert Digests” produced by the Committees were considered essential reading by most Members and were very frequently referred to in debates. Neither the Senate nor the Queensland Committee makes explicit reference to the *ICCPR* or other human rights standards in interpreting their scrutiny criteria, although the Senate Committee has done so on a number of bills concerned with criminal offences, controlled operations, and search powers in detention centres. The work of both Committees clearly contributes to political debate, even if experts such as Professor Kinley are critical of the extent of their use of human rights standards.

### **Flexibility and Encouragement of Dialogue**

- 8.37** Scrutiny committees can operate in an advisory role, providing implicit political pressure rather than powers such as delaying or halting legislation. Human rights are therefore advanced by debate and influence rather than by use of enforceable legal power. As with the previous point, the process of debate helps raise understanding of what is actually meant by human rights protection. As explained by Professor Kinley:

Fortunately, I think one of the benefits and one of the niceties about a scrutiny of legislation committee on human rights issues is that its sanction is somewhat malleable. Now, some people see that as a bad thing because, therefore, you are not producing any line in the sand. I say it is malleable because I would not advocate that there be a power within the scrutiny of legislation committee to stop legislation mid-draft in its pre-legislative form because the Committee discerns there to be some contrary human rights provision. That cannot be the responsibility of a committee. It has to ultimately be the Parliament that decides that, armed with the evidence and information from the Committee.

So, really, it can exert its control by overt political pressure, implicit political pressure. And the more that it is sought to be used by parliamentarians, or by Ministers or not by Ministers, the more it will pull. It is like a self-tightening knot: if you really want to use it, the more you pull on it the more it will become harder and sanction-like. But, a government or a particular committee that is not interested in doing it can stand back. It is somewhat of a moving sanction. I think that can be a great benefit rather than a problem.<sup>317</sup>

- 8.38** The process of seeking a response from a Minister when a scrutiny committee identifies a problem appears to work particularly effectively for both the Senate and Queensland Committees. It provides an opportunity for a Minister or Departmental officials to explain any reasoning they may have for contravening individual rights and liberties, then for the Committee either re-iterate or moderate its initial concerns. Members and former members of both committees said that Ministers generally always responded to requests for further information. It was very unusual for a Minister to take an adversarial approach to

<sup>316</sup> *Evidence 20/3/01 p2-3*

<sup>317</sup> *Kinley Evidence 20/3/01 p2-3.*

the identification of a potential breach. The Chair of the Senate Committee speculated that this was firstly because the Committee was known for its integrity and credibility; and secondly because its role was to advise rather than sit in judgement and make recommendations. Despite the advisory nature of the Committees, they are not ignored because no Department wants to be consistently identified as breaching individual rights and liberties in its legislation.

### **Allows Overview of Repeated Problems in Legislation**

**8.39** One benefit identified by members of both the Senate and Queensland Committees is that having a committee with a focus on legislative scrutiny allowed an overview of trends in legislation and legislative drafting. This goes beyond human rights issues but it is certainly relevant. For instance the Queensland Committee in the late 1990s saw a pattern of legislation which reversed the onus of proof and the principle against self incrimination. This was particularly the case for legislation concerned with the powers of investigatory agencies. The Committee began to highlight this repeatedly in its Alert Digests, even where agencies argued for the necessity of the provisions. By doing so the Committee sought to influence the bureaucracy and alert it to the trend. Similarly, the Queensland Committee identified a recurrence of use of Henry VIII clauses in the State's legislation. (Henry VIII clauses are where a provision in enabling legislation permits the delegated legislation to override either earlier acts or the enabling act itself).<sup>318</sup> As well as highlighting this in Alert Digests the Committee established its own inquiry specifically into Henry VIII clauses to give prominence to this issue.<sup>319</sup>

**8.40** In this role of identifying trends in legislation, a scrutiny committee can assist the work of the office of parliamentary counsel. While many of the contraventions of rights and liberties may be intentional rather than drafting errors, by liaising with parliamentary counsel a committee can ensure that those drafting legislation are also sensitised to the problem and can raise it with agency officials at the initial drafting stage. The Queensland Committee has at various times had regular meetings with the Office of Parliamentary Counsel to discuss recurring issues in legislation.

### **Arguments Against a Parliamentary Scrutiny Committee**

**8.41** A parliamentary scrutiny of legislation committee is not a panacea for failures in human rights protection. Those who support a parliamentary committee are quick to identify the shortcomings of such committees in practice. The weaknesses of scrutiny committees are:

- Executive government can choose to ignore the advice of the committee

<sup>318</sup> Such clauses are called "Henry VIII clauses" because of their undemocratic nature –see Senate Standing Committee for the Scrutiny of Bills *The Work of the Committee during the 38<sup>th</sup> Parliament May 1996 – August 1998* p61 June 1999.

<sup>319</sup> See the committee's report entitled *The Use of Henry VIII Clauses in Queensland* (28 January 1997), available via the committee's website at [www.parliament.qld.gov.au/Committees/](http://www.parliament.qld.gov.au/Committees/)

- The terms by which scrutiny can be made are often not clearly defined in terms of human rights standards, or not interpreted in light of human rights standards
- The development of a political culture of human rights debate may not eventuate
- The time pressures of the passage of legislation prevent adequate scrutiny at different stages in the parliamentary program.

### Scrutiny Committees can be ignored

**8.42** Supporters of parliamentary committees argue that one of its strengths is that it plays an advisory role, influencing and persuading rather than using enforceable powers. The converse of this is that Executive government can choose to ignore the advice given. The particular risk is when a government has large majorities in both houses:

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

**Ms DEBELJAK:** I think that the problem with a scrutiny of bills provision by itself, without any further sort of review of legislation, is precisely what you identified in Victoria. A Parliament with a large majority can pass whatever law it likes, regardless of whether there is some kind of statement attached to it, because there is no opposition. A scrutiny of bills Act in those terms which also has an external apolitical review process attached to it is a lot more effective. That way people just cannot sign off on bills and pass them without fear of there being some kind of accountability.<sup>320</sup>

**8.43** The Committee has not had the opportunity to examine the Victorian Committee in depth, so does not wish to draw any conclusions as to its impact. However for a scrutiny committee to work and have influence there is the need for good will from the Executive arm of government. To an extent the attitude taken by a government to a scrutiny committee may reflect the overall attitude taken by an Executive to Parliament's review role.

### Scrutiny can bypass human rights standards

**8.44** In his evidence Professor Williams was critical of the Senate Committee's terms of reference as "meaningless" because they do not adequately define the rights which

<sup>320</sup> Evidence 15/2/01 p22.

committees are looking at.<sup>321</sup> Members and staff of the Senate committee disagreed, arguing that the words of Senate Standing Order 24 (1) (a) allowed flexibility while focussing on the key issues which infringe upon human rights. Professor Kinley took an approach midway between the two views, suggesting that wide terms of reference gave great potential for human rights standards to be read into the scrutiny function, but that this potential had not been sufficiently exploited by any Australian committee to date:

My whole point is not that these [committees with the potential to oversight human rights] do not exist: My point is that they [human rights objectives] have never been pursued. I think that we are now going to see for the first time—although I am loath to say it because it is the United Kingdom and I would have loved it to have been Australia—in fact we are going to see it happen in the UK because of the impetus that has been created by the Human Rights Act there.<sup>322</sup>

### **Failure to Develop a Political Culture of Respect for Human Rights**

**8.45** “Human rights” has a different meaning for some sections of the community to the generally positive concept understood by others, as evidenced by some of the submissions and letters this committee received during the inquiry. Some sections of the community perceive human rights as a threat to political sovereignty and to values they hold dear. As put by a committee member to Professor Kinley:

**The Hon. J. F. RYAN:** ... a letter from the Chief Minister of the Northern Territory landed on my desk yesterday, the effect of which was to tell every politician whom he could tell that we are fed up with overseas courts or any sort of external influence on what we do. It is a very powerful political argument. I might not necessarily agree with it; it is not one that appeals to me, but I accept that in Australia's current political climate it actually enhances incompatible legislation. To some extent it is a badge of honour to some people that their laws do not comply. If there is a building up of a head of steam, by setting up some further opportunities of external scrutiny even at the very beginning of legislation, are we not in fact setting up opportunities to fan that flame?

**Professor KINLEY:** Just so that I am clear about this—in the sense that issues are raised about the potential of this piece of legislation being contrary, yet the legislation is passed—that being a matter of public record, people will then pick up—later down the track, say, in five years time—the concerns of a parliamentary committee as an indication of why they can go further into the international community. Is that really what you are saying?

**The Hon. J. F. RYAN:** No. It helps to have passed the very legislation that is not wanted. The fact that there is a report of a parliamentary committee saying that the legislation does not accord with the standards of human rights conventions will actually help legislation to pass—

<sup>321</sup> Evidence 10/4/00 p18.

<sup>322</sup> Evidence 20/3/01 p12. Professor Kinley identifies the choice of legal advisor as being the crucial determinant, that current committees have not used legal advisors with a specific human rights expertise – p7.



**Professor KINLEY:** Why is that?

**The Hon. J. F. RYAN:**—in a bizarre way because there is an actual enthusiasm. It is not something that I share, but there is actually, I detect, a feeling that it is something to be commended; that Australia is setting new standards in violating human rights.

**Professor KINLEY:** Well God forbid. If that is the case, then this Committee and a Human Rights Act will not save it. It is far more endemic and problematic so this sort of issue will be irrelevant if that is the sort of attitude we are dealing with.<sup>323</sup>

### **Time Pressure of Legislative Program**

- 8.46** Members and staff of the Senate and Queensland committees spoke of the very tight schedules their committees were forced to work to for their reports to be ready in time for parliamentary debate on legislation. A member of the Senate Committee expressed the view that the biggest weakness of the committee was that it lacked the time to make the full considered response necessary for some bills, particularly towards the end of parliamentary sessions, and that this risked some problematic legislation passing through undetected. There is a balance to this, however, because neither major party controlled the Senate there was a check on the volume and speed with which legislation was able to be passed by the Executive. The Queensland committee in 1999/2000 only failed to consider 2 bills because of urgency, out of 93 in total. However, in discussions with the Law and Justice Committee, a former Queensland Scrutiny Committee member suggested review of regulations was often given a lower priority during times of high workload.

### **Recommendations for a NSW Scrutiny of Legislation Committee**

- 8.47** The Committee acknowledges that the advice of scrutiny committees can be ignored by Executive government. However the Committee believes the current structure of the NSW Parliament, with no Government having held a majority in the Legislative Council for many years, is conducive to the development of a committee that can make a real contribution to improved law-making. A Committee could assist Members in both houses by bringing a systematic pre-legislative review process to bills, ensuring they do not unduly trespass on rights and liberties. This process exists for regulations, but not for legislation at present. While there may be ad hoc highlighting of concerns by individual members during debates on bills, much would be gained by making available to every member an Alert Digest or similar guide at the start of each sitting week. Parliament, through the Committee system, could make a genuine contribution to improving the protection of human rights in NSW while at the same time improving and assisting the focus of debates on legislation. For that reason the Law and Justice Committee supports the establishment of a NSW Scrutiny of Legislation committee.

<sup>323</sup> Evidence 20/3/01 p13-14.

### Structure of committee

**8.48** In considering what form such a committee should take the Law and Justice Committee was greatly assisted by the briefing provided by Professor Horrigan during the visit to Canberra. Professor Horrigan worked for the Queensland committee as one of its legal advisors for the initial three years of its operation, and based upon that experience and his observations of the Senate and Victorian committees, outlined the following criteria for an effective scrutiny committee:

- Truly bi-partisan committee membership and parliamentary support
- Integrated or separate parliamentary committees focusing on scrutiny, legality, constitutionality etc and not just scrutiny requirements
- Ongoing and institutionally respectful dialogue between the Committee and the Parliament (eg ministerial correspondence and parliamentary responses, respectful highlighting and referral of politically sensitive issues for Parliament's consideration)
- Focus upon legality, constitutionality, and policy requirements as well as drafting and scrutiny requirements in Committee reports
- Use of general and specialised legal advisers for scrutiny of legislation
- Adequate expertise, resources, and facilities within the Committee secretariat for Committee research as well as community input
- Availability of Committee reports publicly (on websites etc) and during parliamentary proceedings.

**8.49** The Law and Justice Committee believes these are all justifiable criteria. The use of academic legal advisors to assist a scrutiny committee need not be a major expense, going on the experience of both the Senate and Queensland Committee.<sup>324</sup> Some of the criteria are already a reflection of the way in which the NSW Joint Regulation Review Committee works – a legislative scrutiny committee just takes this to a new level.

### Statutory Framework or Standing Orders

**8.50** Professor Horrigan argued for a statutory framework in which the committee could operate, including detailed criteria as the basis for scrutiny, similar to Queensland's *Legislative Standards Act 1992*. He also argued for mandatory consideration of scrutiny

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<sup>324</sup> The Senate committee's budget for legal advice is very moderate, while the Queensland committee has progressively reduced its use of external legal advisors by employing committee secretariat staff from the Crown Solicitor's Office etc.

principles in explanatory memoranda produced by Departments proposing bills, and the capacity for courts to use committee reports as extrinsic material in statutory interpretation.

- 8.51** The Law and Justice Committee is attracted to the Queensland approach. The statutory basis for the scrutiny criteria gives the Committee's role a great deal of legitimacy; it also spells out in detail the criteria, to the extent that s4(1) is almost a mini-Bill of Rights. Despite this the Committee does not believe it could be successfully replicated in New South Wales. The *Legislative Standards Act* was one of the initiatives which emerged from the Fitzgerald Royal Commission as part of a thorough reformation of the relationships between different arms of government after the problems of the 1980s. In the very different situation in New South Wales in 2001 it is difficult to see any popular or government support for a similar Act.
- 8.52** The Committee supports the more flexible, less prescriptive approach of the Senate Committee. The Committee believes human rights standards, such as the *ICCPR*, would be a very useful tool in interpreting the content of rights and liberties but there would be also room to consider local issues which may not be explicitly considered in international instruments. In evidence Professor Kinley expounded some of the benefits of the more flexible approach:

**CHAIR:** ... Would you like to comment to the Committee on whether it is your view that those terms of reference [those of the Senate Committee] are unduly brief or unnecessarily generalised perhaps?

**Professor KINLEY:** I think by changing them you would not necessarily achieve the object. The object will be the intent to pursue scrutiny of bills or regulations for compliance with human rights. I think that is more in the attitude that the Committee takes because the breadth of those words—indeed, the words that are in the terms of reference for the United Kingdom joint committee are very similar—contain the potential for both our Senate committees and the United Kingdom committee to pursue these human rights obligations with as much vigour and as much reference to knowledgeable international standards as possible. It is there for both.

It is not that necessary to articulate what those rights are. There is reference to "rights and freedoms" and in the United Kingdom to "human rights". How is the legal adviser or the Committee to determine to define human rights? One way would be to go through all the human rights that Australia or the United Kingdom have signed up to and that would produce an enormous body of jurisprudence. If they want to they can go in there and create it themselves. It may be that the Queensland model, which you know of—which actually has a mini bill of rights articulating 10 rights, or whatever it is—makes them focus on those alone perhaps to the detriment or exclusion of others. I do not think it is a problem to have it as brief as it is. It is a question of having the wherewithal and the will to expand that potential. Those are not in existence at the moment.<sup>325</sup>

<sup>325</sup> Evidence 20/3/01 pp8-9.

### **Joint or Single House committee**

- 8.53** The Committee has considered whether to recommend the establishment of a scrutiny of legislation committee as a Legislative Council committee, which could be achieved through amending standing orders. However the Committee believes it is important that the protection of rights and liberties be the responsibility of the whole Parliament. The role of the proposed committee should be to advise all members of any potential problems in legislation, including human rights issues, before they came to debate and vote on a Bill, rather than only forming part of the Legislative Council's role as house of review. The approach taken for regulations at present, that of a joint house committee, seems appropriate.

### **Joint or single function Committee**

- 8.54** The Committee has also considered whether to combine the functions of the proposed scrutiny of legislation committee with the Joint Regulation Review Committee, as occurs with the Queensland Committee. Former members of the Queensland committee suggested the volume of work was such that, if members of a committee attempted to review both regulations and bills, it was likely that one of the two functions would suffer. Professor Kinley, from his review of scrutiny committees in Australia and overseas, also supports a single function committee.<sup>326</sup> The NSW Regulation Review Committee is already a very active busy committee with a full schedule. Rather than burden its members with an additional heavy workload there is a need for a new joint committee to be established for the scrutiny of legislation to be put before the House.

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### **Recommendation 1**

The Committee recommends that the NSW Parliament establish a Scrutiny of Legislation Committee similar to the Senate Scrutiny of Bills Committee. This Committee membership should be separate from the current Joint Regulation Review Committee to ensure it can give sufficient attention to its task.

The Committee further recommends that, at least in its first term, the Committee be provided with a budget to contract an academic legal advisor or advisors to assist the Committee with expert advice when required, in addition to the secretariat support necessary for the committee to meet legislative deadlines.

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<sup>326</sup> *Evidence 20/3/01 pp9, p19-20.*

## Chapter 9 The Interpretation Act and International Human Rights Instruments

- 9.1** Term of reference (i) for the current inquiry asked the Committee to consider whether “there should be a legislative requirement on courts to construe legislation in a manner which is compatible with international human rights instruments”. A finding on this is not dependent upon whether a Bill of Rights is adopted. Courts are currently able to use international instruments in statutory interpretation, on the basis of common law principles of statutory interpretation (see Chapter Two). The issue for the Committee is whether the NSW Parliament should provide guidance to the Courts on the *extent* of the use to be made of these instruments.
- 9.2** The *Interpretation Act* 1987 (NSW) sets out the principles to be followed in interpreting NSW statutes. Section 34, entitled “Use of extrinsic material in the interpretation of Acts and statutory rules”, states that in the interpretation of an Act, where the ordinary meaning of a provision is ambiguous or obscure, or if the ordinary meaning leads to a result that is “manifestly absurd or unreasonable”, material external to the Act itself may be used to assist in interpretation. The material which can be used for this purpose includes, at s34(2) (d):
- any treaty or other international agreement that is referred to *in the Act*.<sup>327</sup>
- 9.3** The Legislation does not enable international treaties or conventions not mentioned in the Act to be used to resolve ambiguities. For this judges need to rely upon common law rules of statutory interpretation.
- 9.4** Regarding the term of reference, there appears to be three approaches open to the Committee to recommend:
- No change from the current situation
  - Recommending that international human rights instruments *may* be used in the instance of ambiguity (regardless of whether they are mentioned in the Act being interpreted)
  - Recommending that international human rights instruments *must* be used in the instance of ambiguity
- 9.5** The Committee has not considered a recommendation that international human rights instruments be used in interpreting statutes whether there is ambiguity or not, as this would have the potential to lead to a defacto Bill of Rights, with all the concerns that the Committee has already raised in Chapter Seven.
- 9.6** The Committee has chosen to recommend that the use of human rights instruments be discretionary rather than mandatory, in cases where the meaning of the statute is unclear. This amendment enacts the common law position. The Committee believes this strikes a

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<sup>327</sup> (Italics added).

balance, sending a message from the Parliament that human rights are a part of local law while not encouraging interpretations of statutes at odds with the original intention of Parliament.

**9.7** Professor Nettheim of University of NSW stated a position held by many witnesses regarding the term of reference:

Likewise the proposal for a provision in the Interpretation Act will build on the practice of the courts. The Court of Appeal in this State as well as the High Court of Australia have in recent years accepted that it is perfectly legitimate for the courts in interpreting ambiguous legislation, and also in developing the common law, to take account of international human rights instruments ratified by Australia. This has already been done and it would be useful to clarify that that is a legitimate point of reference for interpreting legislation by inserting an appropriate provision in the Interpretation Act.<sup>328</sup>

**9.8** Few arguments were raised against an *Interpretation Act* amendment, except where use of human rights instruments was required rather than an option which judges could use. The Hon Malcolm McLelland raised two major concerns in his evidence about mandatory use of international human rights standards in judicial interpretation:

- It could move judicial interpretation away from the original intention of Parliament in passing legislation
- It would make it harder for ordinary, non-legally trained citizens to understand the law expressed in statutes, as an understanding of human rights would be required when reading ordinary legislation.

**9.9** Regarding the role of judicial interpretation, Mr McLelland said:

Traditionally courts have to interpret legislation, and interpretation of legislation is traditionally, again, finding out what is the meaning that was intended by the legislature as is revealed by the words they have used in the context of the Act and the surrounding circumstances. There are various provisions of the New South Wales Interpretation Act which expand and define the matters which the court can have regard to, to try and find out the intention of the legislature in that sense.

When one comes to the question of interpreting legislation to accord with a Bill of Rights, I think it is necessary to draw a line between using the provisions of an international instrument or Bill of Rights, however you may define it, to try and discover the intention of parliament when the legislation was enacted on the one hand, or on the other hand using the international instrument, or whatever, to impose a meaning on the legislation which was not intended by the parliament, but which nevertheless gives greater effect to the international instrument.

<sup>328</sup> Evidence 2/08/00 p14.

Now in the latter of those two processes you are departing from the traditional role of the courts interpreting legislation, and getting close to a border between interpretation on the one hand and prescription on the other.<sup>329</sup>

**9.10** He referred to New Zealand and UK provisions (which supported their Bills of Rights) and the difficulty this causes by allowing courts to construe provisions with a meaning other than that intended by Parliament. He also argued that it was important that laws be as clear in their meaning as possible:

Just in this connection there is a fairly salutary provision in the *New South Wales Interpretation Act* which is worth noting, it is section 34(3). ...After saying what can be looked at, sub-section 3 says:

“In determining whether consideration should be given to any material, or in considering the weight to be given to any material regard shall be had in addition to any other relevant matters to:

...

(a) the desirability of persons being able to rely on the ordinary meaning conveyed by the text of the provision, (taking into account its context in the Act or statutory rule and the purpose or object underlying the Act or a statutory rule and in the case of a statutory rule the purpose or object underlying the Act under which the rule is made), and

(b) the need to avoid prolonging legal or other proceedings without compensating advantage.”

In other words, there is a strong value recognised in that provision for people being able to read an Act of Parliament and see that it fairly clearly in its ordinary and natural meaning means something and to know ‘Well, that is what it says and that is how it defines the rights and obligations which affect me as a citizen.’<sup>330</sup>

**9.11** Mr Walker, representing the Bar Association, agreed with Mr McLelland’s concerns. He also argued that a requirement to use international instruments added a new layer of uncertainty and complexity to the process of legal argument and judicial interpretation. He explained that in advising on a legal matter, he initially examines four sources of law:

- The common law of NSW
- NSW statute law
- Commonwealth legislation, to determine any inconsistency of NSW legislation
- The Commonwealth Constitution, in particular the meaning of s109 regarding inconsistencies between State and Commonwealth legislation.

<sup>329</sup> *Evidence* 26/6/00 p13.

<sup>330</sup> *Evidence* 26/6/00 p14.

**9.12** Continuing in his description of the process of legal advice, he stated:

... 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.<sup>331</sup>

**9.13** Mr Walker also raised concerns that mandatory use of international instruments was undesirable because these would be elevated to a higher level than domestic legislation. This was undesirable because domestic legislation was the result of democratic

<sup>331</sup> *Evidence* 25/7/00 p9.



participation within NSW, whereas international conventions signed by the Federal government without consultation with NSW:

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.<sup>332</sup>

**9.14** Mr McLelland had fewer concerns if the use of international instruments was optional rather than mandatory:

I do not think it would require any amendment to the *Interpretation Act* to allow courts to do that, they can do that now. What I would object to is any requirement that courts conform with international covenants in interpreting legislation and the reason for that is that the primary purpose of interpretation is to discover the legislative intention which may or may not accord with some international covenant. But as simply a piece of material which they can if they

<sup>332</sup> Evidence 25/7/00 p8.

think it appropriate take into account, I have no quarrel with, except for what I did mention before, the possibility that once the extrinsic materials which govern interpretation become too extensive then the citizen who tries to work out what his legal rights are by reading an Act of Parliament becomes unable to do so intelligently because he does not know what all these external things, like international covenants, what effect they may have on what a court ultimately says is the meaning of that expression. In other words, Acts of Parliament should be intelligible to people who read them without having to resort to a whole range of external, possibly conflicting material.<sup>333</sup>

**9.15** Other witnesses did not believe the issues raised by Mr McLelland and Mr Walker were matters for serious concern. For example, Mr Rice, representing Australian Lawyers for Human Rights, suggested arguments as to the problems of comprehensibility and complexity of legislation were over stated:

On the interpretive approach, I would be surprised if previous witnesses, concerned about the judge's interpretive role being limited in any way, were to say that the judge's interpretive role was one that he and he alone brought to the proceedings and that it was his interpretation alone. Judges use interpretive tools. At the very least all that is being said today is that another set of interpretive tools is available to assist. Far from limiting a judge's power, these tools would simply broaden his scope.

In relation to accessibility and understanding, yet another instrument is being brought into this sphere. Understanding law is notoriously complex and nobody pretends otherwise. However, the Committee would be aware that, in the last 10 to 15 years, there has been a substantial movement towards making comprehension of law as accessible as possible. There has been a drafting of all statutes in plain language; a footnoting of statutes; and the provision of explanatory memoranda.

There is a clear relevance now in the courts—and therefore to people generally in relation to law—of second reading speeches, policy statements and other documents. All our moves are towards ensuring that whatever has to be understood is more readily understood. Public education campaigns are extensive. The simple, modern, mechanism of a hypertext link allows legislation to be read in context, where a word in one piece of legislation, given a definition in another, is easily referred to. It is not at all novel that legislation is seen as interrelated or complex. Again I cannot believe that previous submissions would have suggested that law has been read simply before and so it should be read simply in the future. Law has been complex before. It has been made more accessible now through the commitment of the Government, public campaigns and modern technology, all of which would make the importation of another consideration into the reading of an Act all the more manageable. The Interpretation Act and the idea of an Interpretation Act has been fundamental to understanding legislation for well over a century. To bring in another instrument is unremarkable.<sup>334</sup>

<sup>333</sup> *Evidence* 26/6/00 p26.

<sup>334</sup> *Evidence* 18/7/00 p7-8.

**9.16** Advocates of a Bill of Rights such as Professor Nettheim were generally not concerned whether the amendment to the Interpretation Act was mandatory or simply a restating of the common law position, although the stronger form was preferred:

I thought there was no difficulty about having a requirement for judges to take into account human rights standards in international instruments. That is not problematic. We could change the word "require" to "permit", and if judges were permitted to take into account human rights standards in instruments ratified by Australia, that would possibly dampen the concern some people might feel about that and may well match the occasion. There is not a great deal of difference between requiring and permitting. If judges were permitted to take these matters into account, I think lawyers increasingly might tend to raise these issues and the courts would take that into account in interpreting the legislation, but I think the court would ultimately make its decision on a range of considerations, which would include the instruments. So, although I have suggested an amendment to require courts to take into account human rights standards, I would not be particularly grief stricken if the ultimate decision was taken to amend the Act simply to permit judges to take those matters into account.<sup>335</sup>

**9.17** The Committee has come to the view that there are problems in requiring judges to use international treaties and conventions in interpretation, for some of the reasons outlined by Mr McLelland and Mr Walker. It is important that the true intention of Parliament be given effect in interpretation by the Courts. At times international human rights standards may assist as background clarification of this meaning, at other times these standards will be irrelevant. The Committee prefers to make the use of such instruments permissible rather than mandatory. While this only confirms the common law position, it is valuable as a signpost, indicating that the Parliament recognises that human rights instruments are amongst extrinsic materials which the courts may use to interpret NSW legislation.

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### **Recommendation 2**

The Committee recommends that the Attorney General amend s34 of the *Interpretation Act 1987* (NSW) to confirm the common law position that judges are able to consider international treaties and conventions, to which Australia is a party, when there is an ambiguity in a NSW statute.

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<sup>335</sup> Evidence 2/08/00 p16.

# **Appendix 1**

## **Submissions Received**

## Submissions Received

NO	AUTHOR
1	Mr Peter Hogan
2	D K Budd
3	Mr Stan Stanfield
4	Mr Donald Ross
5	Professor George Williams (The Australian National University, currently UNSW)
6	Dr Larissa Behrendt (The Australian National University)
7	Mr Robert Lovren
8	Mr John Dillon
9	Mr John McLaughlin
10	Humanist Society of Victoria Inc
11	Christian Science Committee on Publication
12	Uniting Church in Australia Board of Social Responsibility (now Uniting Care NSW-ACT)
13	Mr Rod Hordern
14	Professor Garth Nettheim (University of NSW)
15	Mr Mark Allas
16	Disability Council of NSW
17	Citizens for Democracy Inc
18	Public Interest Advocacy Centre
19	Progressive Labor Party
20	Mr Graham McGill
21	Australian Lawyers for Human Rights
22	Medical Consumers Association Inc
23	Legal Aid NSW
24	Australian Property Institute – NSW Division
25	Ms Eliana Freydel Miller
26	Mr Malcolm Brandon
27	Mr David Wiseman (University of Toronto)
28	New South Wales Young Lawyers Human Rights Committee
29	Youth Justice Coalition

30	Justice K R Handley QC (NSW Court of Appeal)
31	Committee for a Just Republic
32	Mr David Barr MP (Member for Manly)
33	Mr Ben Saul
34	Ethnic Communities' Council of NSW Inc
35	Hon Malcolm McLelland QC
36	Mr Kerry Corke (K M Corke and Associates)
37	Antichrist
38	Womens' Electoral Lobby/Women into Politics
39	Mr Wayne Knight
40	Mr Charles Pope
41	NSW Council of Churches
42	Mr and Mrs Laurel and Norman Harris
43	Mr Barry Hart
44	Hon Bob Carr MP, Premier
45	Mr Tom Hearne
46	Ms Gloria Hearne
47	The Greens (NSW)
48	The Bancroft Family
49	NSW Ombudsman
50	International Commission of Jurists (NSW Branch)
51	Atheist Foundation of Australia Inc
52	Mrs Marion Smith
53	Mr Gerhard Weissmann
54	Mr John Murray
55	Ms Julia Freebury
56	Privacy NSW
57	The NSW Bar Association
58	Australian Plaintiff Lawyers' Association Ltd
59	Braidwood Greens
60	Public Defenders Office
61	Ms K Ellson
62	Professor David Kinley (Monash University)

63	Mr Mark Nolan (The Australian University)
64	Justice Paul Stein (NSW Court of Appeal)
65	Religious Freedom Institute
66	Kingsford Legal Centre
67	Fr Frank Brennan SJ AO
68	The Law Society of NSW
69	Illawarra Legal Centre Inc
70	Mr Peter Bayne (Australian National University)
71	Justice Rodney Madgwick (Federal Court of Australia)
72	Mr Gordon Harris
73	Aboriginal and Torres Strait Islander Committee (NSW)
74	NSW Aboriginal Land Council
75	Australians for a Constitutional Democracy
76	Mr Laurence Hagerty
77	Mr Stephen Mutch
78	Justice Brian Sully (NSW Supreme Court)
79	Associate Professor Paul Latimer (Monash University)
80	Mr Keith Rex JP
81	Lindsay Johnson
82	Mr Adam Johnston

## Letters Received

No	Author
1	Mr and Mrs Argus
2	Q G Bosman
3	D J Parkin
4	Mr & Mrs E W & F E Blyth
5	Mr Keith Scott
6	Mr & Mrs W Sheaffe
7	Lorraine Thomas
8	Rhonda, Stephen and Nicole Palmer

9	Mrs Winifred Campbell
10	Ms Diana Shield
11	Dr M Sheldon
12	Mrs Dorothy Longfield
13	Mrs H M Webb
14	Miss L F Webb
15	Keith & Oriel McRae
16	Mrs V G Stokes
17	Mr Peter J Stapleton
18	W R Sinclair
19	Miss E C Keogh
20	D J & H M Parkin
21	M Knagge
22	Ms Diana Simpson
23	Mr Richard J R Lewis & Ms Marcia Lewis
24	Ms J E Fleming
25	Mrs S Jones
26	Ms Alice Simpfendorfer
27	The Hon Daryl Maguire MP
28	Ms Stephanie Hanckel
29	Mrs Marie Thorp; Miss Roz Thorp; Mrs Janet Gorkeny; Chris Truman
30	Mr Leonard Spiteri
31	Ms Carmeld Spiteri
32	Mr Anthony Spiteri
33	Mrs J Parker
34	Mrs Daphne Maslin
35	Ms Doreen Spalding
36	Rev D Gestner
37	Ms Dianne Richardson
38	Ms Bernadette Spiteri
39	Ms Mary Hale
40	Ms Rosalie Stacy
41	Mr Frank Stacy



42	Mrs G M Ingram
43	R W McLaren
44	Robert Doran
45	Ms M J Brown
46	Ms Elsie E McAlister
47	Mrs C Patt
48	Mr Darcy Maybon
49	Robyn Kirchner
50	Miss Muriel Henseleit
51	Charles Nightingale
52	J K & L A Muir
53	Mrs O R Watt
54	W Seaman
55	L & E Karas
56	Mrs D R Smith
57	Mr David Eric Patt
58	Mr Michael John Patt
59	A & T Miller

## **Appendix 2**

### **Witnesses at Hearings; Committee Visits to Canberra and Brisbane**

## Witnesses at Hearings

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10 April 2000	
<b>Mr G Williams</b>	Senior Lecturer in Law Australian National University
15 May 2000	
<b>Dr P Ranald</b>	Principal Policy Officer Public Interest Advocacy Centre
15 May 2000	
<b>Ms A Durbach</b>	Director Public Interest Advocacy Centre
15 May 2000	
<b>Professor R Kayess</b>	Member Disability Council of NSW
15 May 2000	
<b>Mr B Folio</b>	Policy Officer Disability Council of NSW
5 June 2000	
<b>Rev A Wansbrough</b>	Minister Uniting Care of NSW-ACT, Uniting Church of Australia
5 June 2000	
<b>Rev R Clifford</b>	Principal Morling Theological College
5 June 2000	
<b>Pastor W McGee</b>	Public Affairs Director NSW Council of Churches
16 June 2000	
<b>The Hon M McLelland QC</b>	
18 July 2000	
<b>Ms K Eastman</b>	President Australian Lawyers for Human Rights
18 July 2000	
<b>Mr S Rice</b>	Treasurer Australian Lawyers for Human Rights
25 July 2000	
<b>Mr B Walker</b>	NSW Bar Association
31 July 2000	
<b>Mr J North</b>	President, The Law Society of NSW

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31 July 2000

**Mr M Richardson** Chief Executive Officer  
The Law Society of NSW

31 July 2000

**Mr M Antrum** Chair, Human Rights Committee  
The Law Society of NSW

2 August 2000

**Dr L Behrendt** Post Doctoral Fellow, Law Program, Research School of Social Sciences  
The Australian National University

2 August 2000

**Professor G Nettheim** Emeritus Professor, Faculty of Law  
University of New South Wales

30 January 2001

**Mr J Nicholson SC** Senior Public Defender  
Public Defenders Office

30 January 2001

**Judge P Grogan** President  
International Commission of Jurists (NSW Branch)

30 January 2001

**Dr K Suter** Vice President  
International Commission of Jurists (NSW Branch)

30 January 2001

**Mrs S Higgins** Member  
International Commission of Jurists (NSW Branch)

1 February 2001

**Mr R Towney** Chairperson  
NSW Aboriginal Land Council

1 February 2001

**Ms R Jacobsen** Legal Officer  
NSW Aboriginal Land Council

1 February 2001

**Ms I Ferguson** Legal Officer  
NSW Aboriginal Land Council

1 February 2001

**Mr D Williams** Commissioner  
Aboriginal and Torres Strait Islander Commission

1 February 2001

**Ms C Williams** Commissioner  
Aboriginal and Torres Strait Islander Commission

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1 February 2001

**Ms A Barber** Member  
Womens Electoral Lobby

1 February 2001

**Ms J Bielski** Secretary  
Women Into Politics

15 February 2001

**Ms J Debeljak** Australian Plaintiff Lawyers Association

20 March 2001

**Professor David Kinley** Director, Castan Centre for Human Rights Law  
Monash University

20 March 2001

**Associate Professor P Latimer** Deputy Head, Department of Business Law and Taxation  
Monash University

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## Participants in Canberra Meetings

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24 May 2001

**Senator B Cooney** Chair  
**Senator A Murray** Member  
**Mr J Warmenhoven** Secretary  
**National Centre for Corporate Law and Policy Research,  
University of Canberra**  
**Professor B Horrigan** Director

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## Participants in Brisbane Meeting

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28 May 2001

**Queensland Scrutiny of Legislation Committee, Queensland Parliament**  
**Mr W Pitt** Chair  
**Ms B Barry** Member  
**Mrs R L Long** Member  
**Ms C Sullivan** Member  
**Mr C Garvie** Research Director  
**Ms A Sweet** Principal Research Officer  
**Ms L Lavarch** Former Chair  
**Ms L Cunningham** Former Member

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## **Appendix 3**

### **Minutes of the Proceedings**

Proceedings of the Committee

**Meeting No 52**

10.30am Friday 28 September 2001

Room 1108, Parliament House, Sydney

**1. MEMBERS PRESENT**

Mr Dyer (in the Chair)  
Mr Breen  
Mr Ryan  
Ms Saffin

Also in attendance: Director, Ms Tanya Bosch; Senior Project Officer, Mr Steven Reynolds.

**2 APOLOGIES**

Mr Hatzistergos

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**INQUIRY INTO A BILL OF RIGHTS FOR NSW**

The Chair submitted his draft Report on the Inquiry into a Bill of Rights for NSW, which having been circulated to Members of the Committee was accepted as being read.

The Committee considered the draft report.

Chapter One read and agreed to.

Chapter Two read.

Resolved, on the motion of Mr Breen, that paragraph 2.7 be amended to describe the commonly accepted understanding of "First", "Second" and "Third" generation rights.

Resolved, on the motion of Mr Breen, that the first sentence of paragraph 2.11 be omitted and replaced with "The formulation of many rights also contain limitation clauses".

Resolved, on the motion of Ms Saffin, that Chapter Two be amended as follows:

2.13: Remove "and the ICESCR (see para 2.17) convention" from the second sentence, and change the word "those" to "that".

2.14: Second sentence: remove "someone or something else", replace with "the member state".

2.14: Last sentence: remove “a United Nations agency”, replace with “an international non-government organisation”.

2.16 Fourth sentence: replace “which have signed” with “that have ratified”

2.17: Fifth sentence: replace “signatories such as Australia” with “those countries, such as Australia, that have ratified the ICESCR”.

2.17: After fifth sentence, add: “However, while the ICCPR is prescriptive in the obligations imposed, the ICESCR’s obligations are aspirational in nature.”

2.18: Third sentence, at the beginning add “Apart from the *Declaration* and the *ICCPR*”

2.19 After third sentence, add “The *Declaration* and these conventions form what is often termed as “the International Bill of Rights”. Last sentence remove “merely a starting point as a source of human rights”, replace with “the core of human rights law”.

2.22 After last sentence add: “However s109 can also be used by a Federal government to override State legislation which protects rights”.

2.24 Fifth sentence, after “but” remove “no enforceable legal remedies” and add, “following the case of *Brandy v Human Rights and Equal Opportunity Commission* [(1995) 183 CLR 245], HREOC is not able to provide enforceable legal remedies”.

2.27 After last sentence add “The writ of *habeas corpus*, however, by which an individual can seek redress for false imprisonment, is still very much able to be used in the protection of human rights.”

2.29 Third sentence, remove “applied the *Convention on the Rights of the Child* “, add “ruled that, as the Commonwealth had ratified the *Convention on the Rights of the Child*, the decision-maker had to give consideration to the rights in that *Convention* when considering how”.

2.30 First sentence, remove “It is open to an individual who has been denied protection of their rights under Australian law” replace with “Under certain circumstances, an individual may”.

Chapter Two, as amended, was agreed to.

Chapter Three read.

The Chair amended paragraph 3.25 to insert “Australian” after “in other”, and to delete the second and third sentences.

Resolved on the motion of Mr Breen that Chapter 3, footnote 10 be amended to cite the full title of his book, and footnote 13 be amended to *op cit*.

Chapter Three, as amended, agreed to.

Chapter Four read and agreed to.

Chapter Five read and agreed to.



Chapter Six read and agreed to.

Chapter Seven read.

Mr Ryan moved that Chapter Seven be agreed to.

Debate ensued and the Committee divided.

Ayes:

Mr Dyer

Mr Ryan

Ms Saffin

Noes:

Mr Breen

The question was resolved in the affirmative.

Chapter Eight read.

Resolved, on the motion of Mr Ryan, that the recommendation on page 19 be amended so that the first sentence reads "The Committee recommends that the NSW Parliament establish a Scrutiny of Legislation Committee similar to the Senate Scrutiny of Bills Committee"

Chapter Eight, as amended, was agreed to.

Chapter Nine read.

Resolved, on the motion of Mr Breen, that Recommendation 1 on page 7 of Chapter Nine be amended by adding "to which Australia is a party" after the word "conventions".

Chapter Nine, as amended, was agreed to.

Resolved on the motion of Mr Ryan, that the draft report (as amended) be the Report of the Committee and that the Chairman, Director and Senior Project Officer be permitted to correct stylistic, typographical and grammatical errors.

Resolved, on the motion of Mr Ryan that the report, together with the transcripts of evidence, submissions, documents and correspondence in relation to the inquiry, be tabled and made public.

## **5 ADJOURNMENT**

The committee adjourned at 11:40am *sine die*.

Tanya Bosch  
Director

## **Appendix 4**

# **Universal Declaration of Human Rights**

# **Universal Declaration on Human Rights**









## **Appendix 5**

# **International Covenant on Civil and Political Rights**































## **Appendix 6**

# **International Covenant on Economic, Social and Cultural Rights**

























## **Appendix 7**

### **Extract of a Report from Senate Standing Committee for Scrutiny of Bills**

## **Extract of Report from Senate Standing Committee for Scrutiny of Bills**















## **Appendix 8**

# **Queensland Scrutiny of Legislation Committee assessment of impact of its work**

















# **Appendix 9**

## **Dissenting Report**

# Dissenting Report

## Introduction

Broadly speaking, I support the recommendation of the Committee that the Attorney General amend the *Interpretation Act 1987* to confirm that judges may refer in certain circumstances to international human rights instruments, although I wonder about the value of such a provision in the absence of a Bill of Rights. What benchmark would the judges use to decide a question of human rights that was not part of domestic law, for example? Many treaty laws are subscribed to by the executive government with little or no scrutiny by the legislature. The Committee's other recommendation – to establish a Joint House Scrutiny of Legislation Committee – is more realistic and I support it unreservedly. At present, parliamentary debate on bills that may involve breaches of human rights law takes place without the benefit of any benchmark principles and informed scrutiny of legislation would lift the level of debate.

Unfortunately I am unable to agree with the primary finding of the Committee that the public interest will not be served by a statutory Bill of Rights. This finding is against the weight of evidence received by the Committee, as I hope to demonstrate. It is also inconsistent with the policy platforms of the Australian Labor Party, the Australian Democrats and the Greens and it ignores the proud human rights record of the Liberal Party of Australia. The first Bill of Rights introduced into an Australian parliament was the work of the Nicklin Country Party/Liberal Coalition in Queensland in 1959. I believe the Committee has failed to address one basic question in its deliberations: why is it that the New South Wales parliament, now one of the oldest in the democratic world, is the last (along with other Australian parliaments) to adopt a declaration of the rights of its citizens?

In this dissenting report I hope to expand on some of the positive aspects of a Bill of Rights and address the principal objections. I do so in the context of the devastation and destruction in Washington and New York, apparently the work of Afghanistan-based terrorists. As I write, the flags on the New South Wales Parliament building are at half-mast, a mark of respect to the victims of the United States tragedy. And the world holds its collective breath for the American response. Human rights were never more important in my opinion. Not surprisingly, the fanatical Afghanistan government sponsors appalling atrocities of its own against Afghani people – atrocities on a par with the worst acts of the terrorists it harbours – making Afghans the world's largest refugee group at around 3.6 million people.

## Points of Dissent to the Bill of Rights Report.

### 1. Access to justice

Some of the Afghani refugees find themselves on the high seas aboard the HMAS *Manoora*, a navy transport ship, waiting for the Australian legal system to decide their fate. At issue is a law of the Australian parliament, the *Migration Act*, as interpreted by ancient common law principles including prerogative rights and habeas corpus. The future of the refugees will be decided by judicial reasoning and the doctrine of precedent as directed by centuries of English heritage and tradition. To my mind, a statutory Bill of Rights that codifies the human rights of refugees would be a much more satisfactory benchmark for deciding what happens to these people.

I am not suggesting for one moment that the refugees would fare any better under a Bill of Rights regime than under the common law and statutory regimes that presently operate in Australia. Refugees worldwide are treated with the bare minimum of human dignity, despite the UN convention on refugees and the right to protection against unlawful detention in international instruments. But the legal process for dealing with people who are the victims of tyrannical governments is much more transparent if we engage human rights principles rather than allow the vagaries of the common law and the inconsistencies of statute law to dominate debate.

People ought to have access to justice and the fundamental requirement is the need to know where to find the law – the benchmark principles – and it follows that those principles ought to be comprehensible. I am aware of the argument that a Bill of Rights is just another layer of law, an argument put succinctly by the NSW Bar Association,<sup>336</sup> but I call this ‘the law is junk argument’ in which the Bill of Rights is reduced to one more piece of junk on the legal junk-pile. In fact, human rights law is a new body of law with an evolving jurisprudence of its own that produces a stronger and more relevant system of common law rules.

Even if the legal junk-pile argument were true, computer technology is such that the law should be readily accessible to ordinary people on the Internet with the Bill of Rights on top of the heap. A Bill of Rights is the human face of the law, reflecting the values that underpin our system of government and the justice system. In the past few days I have been frequently moved by the human stories of devastating loss and the soaring acts of courage and compassion that emerged from the rubble of New York. I saw none of this on the HMAS *Manoora*, its cargo of refugees dehumanised by the banning of television cameras and journalists. The people whose lives we are considering are as far removed as the legal principles that guide us in our deliberations.

## 2. **Protection of minorities**

One consequence of our failure to recognise basic values of human dignity in the legal system can be seen in the religious vilification that has emerged in the aftermath of the tragic events in the United States. Anti-Muslim threats and attacks have been reported across Australia, including vandalism directed at mosques, schools and Islamic businesses. Muslim women in particular are vulnerable targets of hooligans. We should not be surprised to learn that the common law offers few protections against religious vilification. The common law has always taken a narrow view of fundamental human rights, failing to outlaw slavery, failing to provide equal rights for women and failing to recognise the inherent historical inequality between employers and their employees.<sup>337</sup>

Statute law offers no more comfort than the common law for those New South Wales citizens who practise the Muslim faith, given that the New South Wales *Anti-Discrimination Act* does not prohibit religious vilification, although I note in passing that homosexual vilification is proscribed. The Australian Federation of Islamic Councils was compelled to issue a press release appealing ‘to the Australian people to act with rationality’. Politicians and the media were asked ‘not to inflame the already volatile situation’. A significant feature of a Bill of Rights

<sup>336</sup> The NSW Bar Association, *Written Submission* 14 April 2000 and *Oral Evidence* 25 July 2000.

<sup>337</sup> Justice Murray Wilcox, *An Australian Charter of Rights*, Law Book Company, 1993, as quoted in Justice Rod Madgwick, *Written Submission* 19 May 2000.

is the protection it affords to minority groups such as members of the Islamic community who have absolutely no connection with terrorism.

As the Australian Federation of Islamic Councils pointed out in its press release, 'the teachings of Islam do not condone the taking of innocent lives and the destruction of property'. Islam, Christianity and Judaism have shared origins and each religion is a tributary of the same river. Like the proponents of human rights principles, mainstream religions seek to promote justice, equality and the search for truth. Religious faiths and the human rights movement have a shared vision of the inherent dignity of the human person and the expression of this shared vision is the protection of basic human rights by the rule of law. After Israel, Australia is the most culturally diverse country on earth, and the need to recognise and respect people of different cultures and faiths is both immediate and pressing.

The fact is, statute law and the common law have both failed us in our multicultural experiment. Apart from laws preventing religious vilification, laws about racial discrimination are also thin on the ground. A feature of the Australian Constitution that ought to be confronted is the fingerprints of racial prejudice that appear throughout the document. When progress is made in the High Court in cases such as *Mabo* and *Wik*, the legislative response is to lurch backwards towards the security of our past. The *Native Title Act* and the *Wik* amendments clearly reduced the rights of indigenous people in spite of the provisions of the *Racial Discrimination Act*. In 1998 the High Court skirted around the issue in the *Hindmarsh Island* case, although few commentators now would question the power of the federal parliament to pass laws discriminating against a particular racial group.

### 3. **Hosing down the race issue**

One right that the Australian Constitution does preserve (although hardly a 'human' right) is the right of State governments to pass racist laws. I would like to see a benchmark principle in our legal system that says such laws are always inconsistent with the value we place on human dignity. A provision in a statutory Bill of Rights that prohibits racial discrimination could certainly be removed by subsequent statutory amendment. But at least the debate would take place before the event and in the parliament, rather than the situation we have at present: people being required to justify their existence simply on the basis that they happened to be born into a particular ethnic group. Without a benchmark statement in the legal system that racial discrimination is always wrong, the rule of law is constantly on the back foot.

I raise this issue because of an opinion expressed by the Premier in the context of the Bill of Rights inquiry,<sup>338</sup> in which he argues that an Australian Bill of Rights in 1901 'would most likely have enshrined the White Australia policy'. This is a perverse view of our constitutional origins and a rewriting of history of David Irving-like proportions. The reason we have no Bill of Rights is precisely because of our racist history. Australia's draft Constitution as prepared by Tasmania's Inglis Clark included about 12 citizens' rights. Most of these rights had to be removed from the draft Constitution because they contradicted our racist factory and immigration laws, not to mention laws discriminating against Aboriginal people. An accurate assessment of our history identifies racial discrimination as a significant aspect of our heritage.

<sup>338</sup> Hon R J Carr, 'The rights and wrongs of law', *Daily Telegraph*, 21 August 2001, quoting *Written Submission* 31 March 2000.

At the Melbourne constitutional convention in 1898, following the removal of the right to equal protection of the laws from Clark's draft constitution, delegates argued about a suitable substitution clause. People who were not British subjects were described as 'aliens' and 'barbarians'. Delegates agreed that 'there will be races within the nation that remain distinct; that do not blend with our people; that are by their existence and by their rapid increase inimical to the well-being of the whole community'.<sup>339</sup> The clause finally agreed on to replace the legal equality provision is today section 117 of the Australian Constitution, a provision so incomprehensible it has been largely ignored over the years, and serves no useful purpose in promoting human rights. The High Court has consistently held that there is no right to legal equality in the Australian Constitution.

To my mind, it is a tragedy beyond description that we have made such little progress in our democracy since colonial days. Failure on the part of parliament and the courts to recognise legal equality allows governments made up of the two major parties to build policy on the back of the poor and the disadvantaged. Frequently this policy emerges as racial discrimination and the current refugee crisis is but the latest example.<sup>340</sup> The way we deal with refugees now stands in stark contrast to the approach taken by the rest of the developed world. In our public policy we fail to recognise refugees as fellow travellers equal in dignity and human rights. Boat people are the modern equivalent of the Chinese in the goldfields, singled out for discrimination because of the fear they will take too much gold. For most of us, prejudice and discrimination can be traced to unreasonable concern about our economic security. This is fertile soil for growing the support needed to maintain a bipolar political system which is focused primarily on the fears of the middle class rather than the human rights of the poor.

#### 4. **Fairness as a cultural value**

During television coverage of the scenes of devastation from the Pentagon and the World Trade Centre, I was struck by a brave soul carrying a placard that read 'No revenge, no war.' It was a challenging message in the circumstances and said something about freedom of expression in the United States. Personal freedom has been an enduring value in America since Thomas Jefferson (1743-1826) wrote the original draft for the Declaration of Independence:

We hold these truths to be sacred and undeniable: that all men are created equal and independent, that from the equal creation they derive rights inherent and inalienable, among which are the preservation of life and liberty, and the pursuit of happiness.<sup>341</sup>

One consequence for the Americans of placing such a high value on personal freedom is that competitive individualism and equality of opportunity tend to be the values that underpin the United States Bill of Rights. The Americans also tolerate a highly politicised judiciary. Australians value fairness above personal freedom and we support equality of outcomes over equality of opportunity. Most of us down under were appalled when the United States Supreme Court decided 5 to 4 on party lines that George W Bush should be president in preference to Al Gore. Americans seemed to demand the right to vote but not the right to have their vote

<sup>339</sup> Australasian Constitutional Convention Debates, Melbourne, 3 March 1898.

<sup>340</sup> See Malcolm Fraser, 'Stumbling on a path of inhumanity', *Sydney Morning Herald*, 18 September 2001.

<sup>341</sup> *Dictionary of Quotations*, Oxford University Press, London, 1985.

counted. Australians would not want a Bill of Rights that delivered such a potentially unfair outcome, and the idea that judges should decide political questions is anathema – as the Premier also pointed out in his submission.

I disagree with the Premier, however, that a Bill of Rights ‘will further engender a litigation culture’. Several witnesses to the inquiry, including the Public Interest Advocacy Centre, gave evidence that a Bill of Rights will ultimately generate less litigation, not more. This opinion is based on a few assumptions. One is that a Bill of Rights is a statutory instrument that confirms parliamentary supremacy over the courts. Specific guidelines can be included in the Bill of Rights requiring judges to refer back to parliament any question of incompatibility between the objectives of the legislation and its application in particular circumstances. Another assumption is that the existing body of human rights law will be the principles underlying the Bill of Rights – we are not exactly sailing in uncharted waters. And I, for one, would not give corporations any legal standing under a human rights instrument, as this appears to be the main cause of the plethora of litigation resulting from the Canadian and American constitutional models.

Instead of a litigation culture, I would expect a statutory Bill of Rights to engender a culture of participatory democracy which we have not experienced in Australia. The current divide that exists between politicians and their constituents is attributable in part to the way our political and legal institutions exclude ordinary citizens. Democracy works best when decisions are made collectively. In other words, individual citizens need to feel involved in the democratic process. ‘Law must be made by individuals, with each individual having a political weight equal to that of any other person.’<sup>342</sup> In a secure society, individuals make decisions knowing those decisions are consistent with the principles that underpin the institutions of government. Without a statement of basic rights and freedoms in the legal system, however, it is not possible to say with any degree of certainty what principles are the driving force behind the democratic process.

Individual citizens are excluded from vast areas of decision-making because the major parties give lip service to most of the important social objectives, including prevention of crime, immigration, full employment, education, housing, health and so on. In a sense, this consensus undermines the democratic process. People do not feel empowered when they are unable to exercise their individual autonomy, which is the basis of all human rights law. As an individual, I am not inclined to recite constitutional principles or otherwise advance the cause of a political system which I know in my heart protects many interests, but not the one that reflects my core cultural value of fairness.

## 5. **Questions of certainty and allocation of resources**

The argument is frequently advanced that a Bill of Rights will create uncertainty in the law. My experience is the exact opposite. Human rights law today is well established in the common law world. If we were to follow George Williams’ suggestion<sup>343</sup> and include in a Bill of Rights only those rights and freedoms that are uncontroversial, the result would be greater certainty in the law, not less. I say this in the context of decisions of the High Court such as *Dietrich*, where the judges ruled that a person charged with a serious criminal offence will not receive a fair trial unless he or she has legal assistance. Although this is the common law as declared by the

<sup>342</sup> Brian Galligan and Charles Sampford, *Rethinking Human Rights*, Federation Press, Sydney, 1997.

<sup>343</sup> George Williams, *Written Submission* 28 February 2000 and *Oral Evidence* 10 April 2000.

highest court in the land, it can be overruled by legislation (Commonwealth or State) and must, in any event, be applied on a case by case basis by the courts in a legal system strapped for cash.

Examples were provided to the committee of cases under the New Zealand and Canadian Bill of Rights, where major changes were forced on the criminal justice system as a result of the new rights protection regime. In the Canadian case of *Askov*, for example, the Supreme Court ruled that the applicant had not been given a trial within a reasonable time, and following this decision, charges against 34,000 people in Ontario were dropped because their cases could not be dealt with expeditiously. This was presented to the committee as an example of an appalling consequence of a Bill of Rights since an additional US\$39 million had to be allocated to the justice system to reduce court delays. To my mind the case demonstrates the positive aspects of a Bill of Rights and I would argue that creating certainty in the justice system about the need to avoid delay is a good thing.

It is true on one level that judges should not be involved in questions about the allocation of resources. On the other hand, judges are part of the government and they need to speak out on behalf of those people who are the victims of injustice and oppression. Uncertainty in the law benefits the government, not citizens, and the more we are compelled to rely on the vagaries of the common law and the ambiguities of statute law, the easier it becomes for the government to divert resources away from the criminal justice system. In a perverse way, the law and order rhetoric feeds on itself when scarce resources force cost-cutting in the courts. I contend that a statutory Bill of Rights would protect the criminal justice system from the kind of neglect by government that leads to cases such as *Askov*.

Perhaps the most significant feature of a Bill of Rights is that it represents a line in the sand against all aspects of government. Any government literally gives away power when it hands over to the people a charter of basic rights and freedoms, because citizens exercising those rights and freedoms do so at the expense of the government. In other words, a Bill of Rights is enforceable against the government and represents the ultimate watchdog. As Geoffrey Robertson has pointed out, incorporation of the European Convention on Human Rights into British law under the UK *Human Rights Act* means the courts will be equipped 'with better principles and procedures for identifying and remedying abuses of power perpetrated against citizens by government departments'.<sup>344</sup>

It would be naive to suggest that protecting citizens in this way does not come at a cost to the government. Under an appropriate Bill of Rights model, however, courts would not be given any greater power to determine resource allocation. The opportunity would always be available for parliament to override or modify a court decision under a model such as the UK *Human Rights Act*. Besides, the impact of court decisions upon resource allocation is likely to be small if the rights and freedoms listed are limited to the more important forms of civil and political rights.

## 6. **The role of judges and politicians**

Something more needs to be said about the role of judges and politicians in our system of government and the argument that a Bill of Rights would politicise the judiciary. It is worth repeating that nobody wants to see a politicised judiciary in Australia. I do not believe a Bill of

<sup>344</sup> Geoffrey Robertson, *The Justice Game*, Chatto & Windus, London, 1998.

Rights such as the UK *Human Rights Act* will cause judges to make political determinations, because of the need to refer back to parliament any decision incompatible with the legislation. Judges in Australia receive trenchant criticism when they make decisions at odds with the perceived will of the parliament, as demonstrated by the response to the Federal Court decision (single judge) in the case of the refugees aboard the HMAS *Manoora*.

The Federal Court is not a forum for the bleeding hearts at the expense of taxpayers . . . one wonders how many more times we have got to put up with the charades of Mr Justice North, Mr Julian Burnside [counsel for the plaintiffs] and others.<sup>345</sup>

From a historical perspective, judges have always taken a stand against various forms of tyranny, even though they are not permitted to comment about cases outside the court.<sup>346</sup> After all, with the rise of parliamentary supremacy in the seventeenth and eighteenth centuries and a diminishing role for the monarch in the affairs of government, the judges came to be identified as protectors of the rights of the people. Judges in Australia, however, have not had the same opportunities to exercise power as their counterparts in the United States and Great Britain since the Australian Constitution has only two human rights of any significance: the right to freedom of religion and the right to trial by jury for certain Commonwealth criminal offences.

It is against this historical backdrop that we need to judge our judges 'who are a good whipping post because they cannot whip back'.<sup>347</sup> Following the *Mabo* and *Wik* decisions in the High Court, our top judges were variously described by politicians of the day as 'basket weavers' and 'a pack of historical dills'. The most strident critics of the judiciary are in fact politicians seeking to make political capital out of the law and order agenda, and one reason we do not have a Bill of Rights, I believe, is that the legal vacuum is easily filled with the empty rhetoric of politicians. If we had a Bill of Rights along the lines of the UK *Human Rights Act* that referred back to parliament any question of interpretation, public condemnation of any unexpected outcome of the legislation would fall where it belongs – in the political arena.

In 1997 I undertook private research of Australia's judges on their attitude to a statutory Bill of Rights. I mailed a survey to 454 judges across the country and received an effective response rate of 25 per cent to the following question: *If a legislative Bill of Rights were in place which provided for its enforcement in any court, would the legislation improve the delivery of justice in your court?* Of the 112 judges who answered the question, 71 per cent said a Bill of Rights would *not* assist the delivery of justice. Contrast this response of judges with that of the people in the Australian Rights survey<sup>348</sup> carried out at the Australian National University. Some 1500 citizens responded to the following question: *Generally speaking, are you for or against the idea of a bill of rights for Australia which provides these sorts of guarantees [freedom of speech, freedom from discrimination etc] or don't you have an opinion either way?* Results of the survey are as follows:

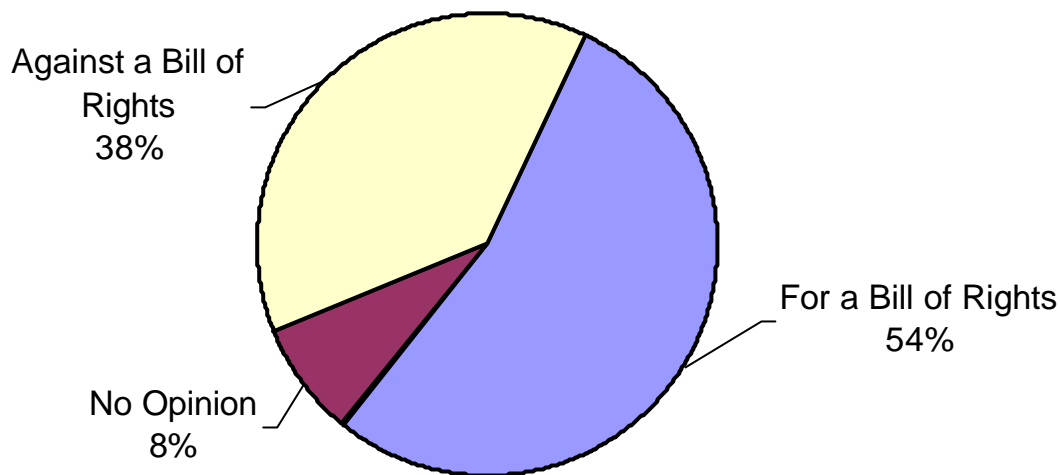
<sup>345</sup> Alan Jones, Talkback Radio 2UE, Sydney, 18 September 2001.

<sup>346</sup> See Nicholas Cowdery, *Getting Justice Wrong*, Allen & Unwin, Sydney, 2001.

<sup>347</sup> *Ibid.*

<sup>348</sup> Brian Galligan and Ian McAllister, *Citizens and Elite Attitudes Towards an Australian Bill of Rights*, in Galligan and Sampford, *op cit.*





The same survey asked 549 politicians (roughly half Labor and half Liberal/National Party) the same question and the results were quite different:

It is difficult not to draw the conclusion from these surveys that judges and politicians are out of step with the people. Here is evidence (if we needed it) that the three arms of government – legislative, judicial and executive – are acting in one way on the issue of a Bill of Rights while the people they are supposed to serve expect something quite different. The people have never been given the opportunity to have their say on the question of a Bill of Rights. One question in the Australian Rights survey asked respondents: *Are you in favour of holding a referendum to decide whether Australia should have a bill of rights?* Overwhelmingly, 88 per cent of the general population favoured a referendum.

Judges and politicians need to enter into formal dialogue about human rights if they are to reflect the will of the people. A statutory Bill of Rights along the lines of the UK *Human Rights Act* would provide an ideal forum for the proper consideration of human rights by our lawmakers. A declaration of incompatibility by a judge in a particular case, as the English legislation is expected to operate, will allow parliament to consider the law in the light of practical experience and reasoned argument. This can only serve to advance the human rights cause and promote plain language laws. Far from politicising the judiciary, this process would serve to inform citizens that it is their elected representatives in the parliament who are the

ultimate decision-makers. Under the UK legislation, judges are effectively barred from making decisions inconsistent with the intention of the legislation.

One important feature of our system of government is that it recognises the doctrine of separation of powers between politicians and judges. I know judges who will not visit parliament even for a social function for fear of compromising the doctrine. Recently the Premier attended the Chief Justice to raise concerns about sentences handed down to multiple offenders involved in serious sexual assaults. Questions were asked in some quarters about the doctrine of separation of powers but, more importantly, the meeting highlighted the need for reasoned dialogue between the different arms of government. Ideally, such a dialogue would be based on basic human rights principles as codified in a statutory Bill of Rights. Our democracy would be strengthened and the process of government opened up for greater scrutiny.

## Conclusion

Like most respondents to the Australian Rights survey, a large number of citizens and interest groups who made submissions to the parliamentary inquiry were in favour of a statutory Bill of Rights. Of the 80 submissions I had the opportunity to peruse, 21 were against the idea of a Bill of Rights, five were neutral and 54 were supportive. These submissions are listed in Attachment 1, which indicates the general level of support for a Bill of Rights and the strength of support. Further analysis indicates legal and political individuals and groups clearly in support of a statutory Bill of Rights. Overall, 68 per cent of submissions supported the idea of a Bill of Rights, suggesting the committee has made its decision without a thorough evaluation of the majority view.

Governments of both major parties have had the opportunity to put the question of a Bill of Rights to a plebiscite or referendum of the people, but other questions are always more pressing. Our democracy is the poorer for this lack of political will. Basic human rights ought to have first priority in a healthy democratic society since these are far more enduring values than the changing political fortunes of parliamentary representatives. This inquiry has added to the work of similar committees in other States and Territories, but the Bill of Rights cause will stall in Australia if political leaders fail to live up to the expectations of the people who elect them. A Bill of Rights is the people's statement of their basic entitlements and I hope I have demonstrated our strong desire to express an opinion at the polls on whether we want to remain out of step with the rest of the common law world on this important issue.

Today the newspapers are filled with talk of war and the precautions that need to be taken to protect life and property. People look at the sky as they have never done, wondering about interlopers in commercial aircraft. I am waiting for the hoary argument that a Bill of Rights will not assist us when the bombs begin to fall. We live in splendid isolation in Australia and bombs are unlikely, but we have always taken a compassionate and generous attitude to the surviving victims of war. Indeed, our nation is built on the backs of migrants and refugees from previous wars, and their descendants. It has always been the case that we function on a personal level almost in spite of our governments and the racist heritage they continue to promote in subtle and unsubtle ways.

As for the future, our human rights record and our poor relationship with the government will continue to mirror our colonial past until we acknowledge in our legal system the paramount importance of basic human rights principles.

Peter Breen MLC  
September 2001