



***AUSTRALASIAN STUDY OF
PARLIAMENT GROUP
(Queensland Chapter)***

***A Bill of Rights for
Queensland***

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Dr REYNOLDS: It is my great pleasure as the Chair of the Australasian Study of Parliament Group, Queensland Chapter, to welcome you to this meeting tonight.

Before I introduce the speakers, I want to make a couple of announcements about the Chapter. The first is that the Annual Conference of the Chapter will take place at the Parliament of New South Wales in September. Damon Blake, our Treasurer, myself and a couple of other people from the executive are intending to go down. The reason for that, apart from anything else, is to secure the Annual Conference for the Australasian Study of Parliament Group for Queensland next year, in the year 2000. We are confident that we will secure the conference. We have been informally told of that, but it needs to be finalised at the conference itself. Our purpose in doing this is to put the Chapter in the forefront of the organisation but, more importantly, because we feel that the year 2000 will be a very important year for all sorts of people and all sorts of organisations in Australia and, indeed, perhaps in Australasia. We intend to make the theme of that conference: "Toward a New Parliament, a Comprehensive Committee System". So we will be addressing the life and heart of the legislatures in our Australasian Westminster system by reason of the committee system. We are looking forward to that. We intend to hold the conference probably in July of next year, because that coincides with the break in university semesters and also takes us well and truly out of the Olympic timetable, which the committee was quite interested in doing. We do not want to get across anybody's lines in the latter part of the year 2000. So that is something to think about, and something that we hope we will be able to engage in.

The other announcement that I want to make is that our last meeting for the year in November will be, I think, a very special and a very important meeting. We have invited Kathy Sullivan, the member for Moncrieff, to address us on 25 years as a woman in Federal Parliament. Ms Sullivan is unique in the sense that she has served in the Senate and in the House of Representatives for virtually equal time, and both in Government and in Opposition in both Houses. We had thought about having a committee like a panel of speakers, but I think not. I think we will probably have Ms Sullivan on her own, speaking for herself and of her experiences. I think this will be a very important meeting for the Chapter, because while we talked about and had meetings of women in Parliament and women in politics some years ago, this is a unique opportunity for a Queensland woman member who was a pioneer from this State and who has served a quarter of a century in the Federal Parliament in various capacities. She is a very articulate person and a very competent observer of the Federal political scene. So I commend that meeting to you. Details will go out in due course when we finalise that, but it will be in November of this year.

Having said that, may I warmly welcome all of you to this meeting of the Queensland Chapter of the Australasian Study of Parliament Group. We are very, very privileged to have a distinguished panel of speakers to address a topic which is of great importance, I believe, to this State and to the study of politics and the study of Parliament generally. I will not introduce each speaker individually, so let me do this in an omnibus way now.

Our first speaker who will speak to the paper and give us the theme of our address is Father Frank Brennan of the Society of Jesus. Father Brennan was a first-class honours graduate from the Law School of the University of Queensland. He comes from a distinguished legal family. His father was a former High Court Chief Justice—the third Chief Justice of the High Court from Queensland. Father Frank is well known in the community for his writings on Aboriginal rights, Aboriginal law, Aboriginal religion, Aboriginal spirituality and customs and also on civil liberties and matters of that nature. He will address us on his perspective on a Bill of Rights for Queensland and Australia.

To respond to that will be Gary Fenlon, MLA, the member for Greenslopes. Mr Fenlon is the chair of the relevant parliamentary committee—whose name I can never get in sequence, so I will not bother; he will tell you. Mr Fenlon and his committee recently rejected the notion of a Bill of Rights for Queensland but made other provision for that.

Our third speaker and second respondent to Father Brennan will be David Solomon, who needs absolutely no introduction from me and probably not to anybody who reads the Courier-Mail—if there be any in this audience who still do that! David is also, however, a distinguished author of books on the Parliament, the Federal Parliament, on the High Court and

on the notion of a republic. David is a former National Chair of the Australasian Study of Parliament Group.

So without further ado, I introduce our speakers to you seriatim. After each speaker has spoken, and after all our speakers have spoken, I will then resume the chair and take questions and comments from the floor. After that, we will break up and move across to the Strangers Bar for supper, where a cash bar as well will be operating. Father Brennan.

Father BRENNAN: Thank you very much for your welcome. It is a very pleasurable irony for me to be speaking in this Chamber, because having the name Frank Tenison Brennan, being named after one who was the Minister for Public Instruction in a Government here which agitated for the abolition of the Upper Chamber, it is very pleasant to be here a couple generations on to be reflecting perhaps on what might be the role of Upper Houses and, in the absence of Upper Houses, what might be done more readily to curb the action of Executive Government, particularly for the protection of human rights.

It is also a pleasure to share this evening's platform with Mr Fenlon and Mr Solomon, because I assume that it will become clear that I will come to occupy that traditional Jesuit position of the happy medium between the two. As I understand it, Mr Fenlon's committee has come out fairly firmly opposed to the idea of a Bill of Rights. And Mr Solomon, of course, was the chief architect of the EARC report, which proposed a fairly comprehensive Bill of Rights. I, of course, am on the record as being opposed to a Bill of Rights as comprehensive as Mr Solomon has proposed, but being somewhat in favour of at least some tentative steps towards a Bill of Rights. So it is with that background that I offer my comments this evening.

I will, of course, simply be drawing out some of the themes which are found in my book "Legislating Liberty", which was launched last year. I was very pleased that it was launched by Justice Tony Fitzgerald, because many of his thoughts in his report provided at least a starting point for many of my thoughts in this area; although, as he made clear in his speech in launching the book, we have a fairly firm difference of views in some of these things, and I think he would be in favour of a more robust Bill of Rights, or hopeful of it—perhaps more hopeful of it than I have been in what I have outlined in my reflections.

I came to write the book with what I have sometimes described as a bit of a reverse Pauline/Damascus experience in that before I went to the United States I was mildly attracted to the idea of a constitutional Bill of Rights for Australia. I returned from the United States not attracted to the idea of a constitutional Bill of Rights but thinking there was a need for something in statutory form, at least at a national level, and for some constitutional protection at least of the principle of non-discrimination, at least on the basis of race but probably also on grounds of gender and sexual orientation.

So might I, at the outset, give some account about that Damascus experience to say why I am opposed to a fully fledged constitutional Bill of Rights à la the American style, but then go on to point out why I think the existing status quo is unacceptable and, in fact, is no longer a status quo? In fact, even those who want a status quo in Australia should be in favour of some change. If you think that sounds Jesuitical, then I will try to explain it in further detail when I come to that.

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 then 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 decides to

intervene and to constitutionalise the issue as something of due process or equal protection, that is it—game, set and match.

Now, that might be thought to bring some clarity, but let me just give two examples from the book which highlight the great ambivalence that exists as a result of that. The first is on the still vexed issue in that society, as here, on the question of gay rights. In 1986—as recently as that—the US Supreme Court, in a case *Bowers v. Hardwick*, said that it was still constitutional for the State of Georgia to have on the criminal statute books a criminal sanction against homosexual acts—even those committed in private and even those with consent.

Now, while I was there in 1995, the landmark decision of that term, *Romer v. Evans*, was to deal with the question as to whether or not non-discrimination laws set down in Colorado could be struck down because of a referendum which was carried in the form of a citizen-initiated referendum in order to ensure that State resources for non-discrimination were directed to other areas of discrimination rather than that of gay rights.

In the end, the US Supreme Court decided that that referendum was unconstitutional and struck it down. But the majority of the court managed to do that without reviewing the decision in *Bowers v. Hardwick*. In fact, in the course of the argument, counsel was asked whether or not the court was being invited to overrule *Bowers v. Hardwick*, and counsel said, "Oh no, that is the last thing we want you to do." So you end up with a jurisprudence in the United States at the moment where it is still on the books that it is constitutional for a State to have a law rendering homosexual acts in private and with consent a criminal act, whereas at the same time it is unconstitutional to have a provision which allows a State to strike down any local measures which are aimed at non-discrimination within the civil jurisdiction. It is simply incoherent.

Then, if you look at the reasoning and some of the emotion of the minority judges, you find that with an issue such as that, which has not yet found a moral unanimity within the community, there can be much judicial hostility not only towards the Executive or towards the Parliament but amongst the judiciary themselves. Consider these remarks by Justice Scalia in his dissent—

"When the court takes side in the culture war, it tends to be with the knights rather than the villains and, more specifically, with the Templars, reflecting the views and values of the lawyer class from which the court's members are drawn. How that class feels about homosexuality will be evident to anyone who wishes to interview job applicants at virtually any of the nation's law schools. The interviewer may refuse to offer a job because the applicant is a Republican, because he is an adulterer, because he went to the wrong prep school or belongs to the wrong country club, because he eats snails, because he is a womaniser, because she wears real animal fur, or even because he hates the Chicago Cubs. But if the interviewer should wish not to be an associate or partner of an applicant because he disproves of the applicant's homosexuality, then he will have violated the pledge which the Association of American Law Schools requires all its member schools to exact from job interviewers: assurance of the employer's willingness to hire homosexuals. This law school view of what prejudices must be stamped out may be contrasted with the more plebeian attitudes that apparently still prevail in the United States Congress."

I think you will agree—whatever your view on homosexual law reform—that that sort of utterance from the highest court in the land is not really very helpful in resolving the issue.

Now, the irony is that because Australia was a signatory to the first optional protocol of the International Covenant on Civil and Political Rights—Tasmania having retained a provision similar to the Georgian provision—it was possible for homosexual rights advocates in Australia—admittedly using a slightly cumbersome procedure—to bring political pressure to bear whereby the criminal sanction was abolished in Tasmania. Whereas in the United States, even with its fully-fledged jurisprudence of equal protection and due process, that still remains on the statute books in Georgia. So that sort of American jurisprudence does not necessarily provide the answers.

Let me take another stark example which arose after my return from there. Having been involved in the euthanasia debate here in Australia, it was very interesting to contrast the approaches taken in Australia and the United States. You will recall that, here in Australia, the issue was whether or not the Commonwealth Parliament would pass a law to overrule the

Northern Territory legislation which basically permitted physician-assisted suicide. Now, that led to a Senate inquiry, which received thousands of submissions; where yes, it had to be conceded that there was an acute difference of moral opinion in the community. In the end, the Senate voted—I think by 38 votes to 34; but then, by the time it got to the final vote, by 38 to 33—permitting the passage of the Commonwealth legislation to strike down the Northern Territory law. Meanwhile, what happened in the United States was that those who were agitating for euthanasia law reform—as they would call it—mounted constitutional challenges in two cases, and they lost in the Supreme Court nine-nil.

Now, I am one who actually thinks that the present law on euthanasia is the right law for reasons of social policy. But we are not here to discuss that in any great length tonight, although I am happy to address it in questions. But my point in terms of political and legal process is this: I would dare to suggest that those who are in favour of euthanasia law reform, as they would see it, would be more heartened by a political process which gives results of a vote—a close vote: 38 to 34—after a Senate process which hears from a plurality of viewpoints rather than a nine-nil Supreme Court decision which goes against them, basically on the basis of the judges saying, "We are not yet ready to put that through the template of due process and equal protection." You see, if you constitutionalise such politically vexatious issues, basically you leave it to the judges in their sole discretion as to when they will choose to constitutionalise the question. And then, when they choose to constitutionalise the question then, of course, it is for them, putting it through that template, to find a resolution.

I must say that, in reading the judgments in the euthanasia-type decisions, I do not find the templates of due process and equal protection any more enlightening in terms of clarifying what the moral arguments should be or what the social policy is or finding the balance between individual rights, on the one hand, and public interest or the common good on the other. Perhaps just to highlight that, if I could take a quote from one of the euthanasia judgments by one of the more small-l liberal judges now on that court, Justice Souter. This is the reasoning he gave as to why he did not want to constitutionalise the issue. He said, basically, that it should be left to State legislatures rather than it being seen as a matter of equal protection or due process, which would then preclude the States from having the discretion through their legislatures. He said—

"Not only do they have more flexible mechanisms for fact finding than the judiciary, but their mechanisms include the power to experiment, moving forward and pulling back as facts emerge within their own jurisdictions. There is, indeed, good reason to suppose that in the absence of a judgment for respondents here, just such experimentation will be attempted in some of the States."

He went on to say—

"One must bear in mind that the nature of the right claimed, if recognised as one constitutionally required, would differ in no essential way from other constitutional rights guaranteed by enumeration or derived from some more definite textual source than due process. An unenumerated right should not, therefore, be recognised with the effect of displacing the legislative ordering of things without the assurance that its recognition would prove as durable as the recognition of those other rights differently derived."

And in concluding, he said—

"The experimentation that should be out of the question in constitutional adjudication displacing legislative judgments is entirely proper as well as highly desirable when the legislative power addresses an emerging issue like assisted suicide. The court should, accordingly, stay its hand to allow reasonable legislative consideration. While I do not decide for all time that respondents' claims should not be recognised, I acknowledge the legislative institutional competence as the better one to deal with that claim at this time."

What I am suggesting, as an Australian lawyer coming to that sort of jurisprudence, is that I find it highly unsatisfying, namely, judges within their absolute discretion saying, "We are charged with this constitutional function, but for the moment we have decided to stay our hand. Maybe at some stage in the future we will decide to intervene and we will decide to recognise that there is here a constitutional right." I think that reeks too much of unelected judges being able to be a law unto themselves. And I think what is more essential is to permit those sorts of

experimentations within the political processes with elected politicians in a fully fledged way, much as even the American judiciary would desire it to be.

So that is to say that, basically, I return opposed to a constitutional Bill of Rights which contains generic terms such as "due process" and "equal protection". Because, as I found in the United States, whether it be on issues like abortion, euthanasia or gay rights, there is no satisfying and coherent jurisprudence to be found in that constitutionalising sort of operation.

Then the next step in my reasoning in relation to the United States was that if ever there is a particular right which you find articulated in the US Bill of Rights on which you would think the jurisprudence to be completely coherent, it would be on freedom of speech. But with things like the availability of the Internet and the need to try to govern what is available on video and on cable television, even there you find that the American jurisprudence is fairly incoherent. So to expect Australian judges, without the generations of training that the American judges have had, to develop a coherent jurisprudence about those matters and to give answers more satisfying than found by our Parliaments, I think is a very big ask. So it is for that reason briefly that I returned home opposed to a constitutional Bill of Rights.

Let me then come at it from the other angle. If there is to be, for example, a move towards a statutory Bill of Rights, what sort of things should be contained in such a Bill? And here, as David Solomon would know, I have taken issue with the approach that was taken by EARC here in Queensland.

My basic concern here was that if we were going to have developments towards a coherent Bill of Rights jurisprudence developing with a statutory Bill of Rights, particularly at a State base in Australia, it was essential that those rights be rights in the hard sense, that is, rights enforceable in court; rights whereby judges would be entitled to restrict the action of Parliament and of Executive Government. I think that once you fudge the notion of rights beyond those things which can be insisted upon by citizens going to court in order to put some hamper upon the activity either of the Parliament or the Executive, then basically you start to engage in an incoherent exercise where you basically forfeit the value of articulating things as rights.

So where I would particularly join issue with EARC's approach is where EARC attempted to go beyond the idea of enforceable rights to what I would regard as a politically correct shopping list of extensive rights of what you might call the elite interest groups of society. This culminated in the idea that there would be non-enforceable rights but, for example, there would be a clause in the proposed Bill of Rights regarding the unenforceable rights saying, "The Parliament urges the Queensland community generally to observe these rights and encourages persons to assert the rights in ways that do not involve the legal process or proceedings." My point is a simple one. It is: if the Parliament is not prepared to arm the citizen with recourse to the courts to implement those rights and to have them upheld, then don't call them rights. I do not think anything is to be served by a notion in legislation of a distinction between enforceable rights and unenforceable rights.

Furthermore, I think that once you get beyond a hard core of enforceable rights to rights, for example, such as "A person has the right to promote ecologically sustainable development in the interests of current and future generations", I think you are starting to get into the domain of wish lists, which is not very helpful in getting something which is coherent for a fetter on the exercise of State power. And a further addition: "A person has the right to object to development that is not ecologically sustainable and to expect that Government will accept and act on a reasonable objection." My point would simply be: if you are going to have an entitlement to expect that Government will act reasonably to any objections you make, why should that simply occur in relation, for example, to matters of ecology? Why not, for example, in relation to making facilities available to those who are disabled, or concern that you might have about the State educational system or things of that sort?

Also, I suggest that the EARC Bill was too broad in a number of its rights; for example, the right to obtain and disseminate information. So what that brings me to is to say that I think that what is necessary in order to move incrementally forward is to move towards a statutory Bill of Rights in Australia with clearly articulated rights which are enforceable in the courts by citizens, where those citizens are able to bring a fetter to bear, not just on Executive Government but even on a popularly elected Parliament. Now, how can that feasibly happen within the Australian

Federal system? What I have suggested—and once again, this is in contradistinction to EARC's approach—is that it is difficult in this domain for one State to go it alone; because basically, I think it would be very unlikely that the High Court of Australia, with its present procedures, would give special leave to appeal in relation to cases relating to the interpretation of a comprehensive State Bill of Rights if there was only one State which had triumphed with such a Bill of Rights. So I think that, in terms of a general coherence of the development of the law in Australia, it is necessary, if possible, to work at the national level.

My next suggestion is that I think there is the opportunity at the national level to create some political imperative for change, and it comes on two levels. The first is: Australia is presently signatory to a number of international conventions and instruments which obligate Australia to respond to complaints which are made by citizens to international tribunals once the citizen has exhausted all domestic remedies. Now, the main ones of those relate to the International Covenant on Civil and Political Rights. To my mind, in terms of national sovereignty and self-determination, it makes far more sense to ensure, in the legislative process, that there be a check made to ensure that any proposed legislation already complies with the International Covenant on Civil and Political Rights, rather than allowing legislation to be passed which contravenes such a covenant, thereby then permitting Executive action which goes against the covenant, thereby ultimately allowing a citizen to have recourse to an international tribunal in order to cause embarrassment to Australia for failing to discharge its international obligations.

So along the lines of your own Legislative Standards Act here in Queensland, I would propose a course of action whereby the Federal Senate had a committee for rights and freedoms whereby there could be scrutiny of all proposed legislation to ensure compliance with the basic rights set out in the International Covenant on Civil and Political Rights, and any citizen would have the right to go to that committee and put a submission as to how the legislation contravened. I think that, over time, that—in our Federal politicians at least—could start to breed a mentality about rights which transcends party politics and where, ultimately, you could then move towards a statutory Bill of Rights which faithfully implements the International Covenant on Civil and Political Rights.

That is a very incremental approach, but I think it is necessary because of the proven failure in some instances of Australia to honour its obligations in relation to these things. We had, of course, the recent instance of the asylum seekers at Port Hedland, who were able to establish, before the international tribunal, that they were subject to arbitrary detention and that laws which limited their damages to \$1 a day were to be struck down. Australia's response to that has been quite shameful, namely, for the Government simply to say, "That is just the opinion of an international tribunal." Basically, we have been caught falling short.

At this very moment, we have a Senate inquiry which has had to be set up because of the way our immigration and refugee laws are structured. We had the shameful case of a Chinese woman, over eight months' pregnant, being forcibly removed back to China for a forcible abortion. That, at least on one argument, is a clear contravention of the Convention Against Torture, to which Australia is a signatory, whereby Australian officials are not permitted to engage in any activity which is degrading or inhuman treatment. Now, for Australian officials, under Executive warrant, to be in a position to allow a woman to be removed for a forcible abortion at eight months—for that sort of forcible State-authorised interference with her bodily integrity—that sort of thing, of course, is clearly inhuman treatment. I think it is necessary that our legal structures be in place to ensure protection of those people, even though they may be a despised minority group who happen to be inhabiting our shores, if only for a short time.

I will conclude by saying that though I am opposed to a constitutional Bill of Rights, what I have argued strongly in the book—I hope strongly enough—is the need for a constitutional protection nationally of non-discrimination, particularly on the grounds of race. I think that here the whole Wik debate, to which we were all subject, is a salutary lesson. Much fudging went on in 1993 with the negotiations between Paul Keating and the Aboriginal leaders as to the interrelationship between the Native Title Act and the Racial Discrimination Act. Basically, what happened was that a deal was done whereby the Racial Discrimination Act was to be displaced by a later Commonwealth Act, namely, the Native Title Act. That then led to very muddy politics five years later, when the Howard Government wanted to do exactly the same thing. The

Aboriginal leadership then, belatedly, tried to insist on a constitutional recognition of the principle of non-discrimination.

So what we have had now on both sides of the political chamber nationally is legislation which permits an interference with the operation of the Commonwealth Racial Discrimination Act in what is said to be the national interest, namely, giving certainty to others who want to develop land while, at the same time, the Howard Government's 1997 white paper on foreign policy says this about the principle of unqualified commitment to racial equality and to eliminating racial discrimination—

"This is a non-negotiable tenet of our own national cohesion reflected in our racial diversity, and it must remain a guiding principle of our international behaviour. The rejection of racial discrimination is not only a moral issue, it is fundamental to our acceptance by, and engagement with, the region where our vital security and economic interests lie. Racial discrimination is not only morally repugnant, it repudiates Australia's best interests."

If that is the case, I would ask: why not put it in the Constitution? Thank you.

Mr FENLON: I will be very provocative, I suppose, to start with and suggest that there have been two events that have worked to enhance individual rights and freedoms in Queensland in recent times. The first one has already been mentioned by Father Brennan, that is, the introduction of the Legislative Standards Act. That is a device which has, indeed, brought the issue of rights—individual rights and freedoms—into the domain of the legislature itself in a very substantial way.

The other action, with which I am very proud to be associated, is the advent of this little booklet which my committee produced: "Queenslanders' Basic Rights". I say that because of one particular event at least. It was when my niece came to my house and said, "Look what we are studying at university." This is a concise and extensive, well-prepared document which covers the range of rights and freedoms that we do have in Queensland, how to go about enforcing those rights and how to go about enhancing those rights. That is something that we have never seen before. So I say with some confidence that those two devices in recent times have acted in that way in bringing the issue of individual rights and freedoms well into the community, on the one hand, via that booklet, and into the legislature, particularly via the Legislative Standards Act.

The issue of responding to a Bill of Rights is certainly a vexed one, because I find it a very elusive target. We have to ask: how big is it; how comprehensive is it; how much should be implemented at once, that is, in terms of incrementalism as opposed to perhaps a comprehensive single fell swoop, as David Solomon might advocate; how general should it be; how advisory, as opposed to how prescriptive, should it be? Certainly, we have seen for some time in public debate all manner of permutations and combinations of Bills of Rights.

What I think we have to start with is a very more fundamental question which I certainly look for in terms of the previous debate and, in particular, in relation to the previous excursions into this field on behalf of EARC. That is the question: what is the disease? What is the disease we are setting out to cure in terms of deficiencies and individual rights and freedoms in this State and in this nation? If we can get some way to answering that question, we can certainly progress towards how to go about answering that. I think the better question to start with beyond "what is the disease?"—which is a more positive question—is the question which my committee really posed in terms of its report, that is: what do we need to do to enhance individual rights and freedoms for our citizens? That is the fundamental question. And what is the most appropriate, expedient, realistic and relevant way to do that?

More to the point, at this juncture in our history it is a question of: how do we go about that to ensure that the citizens themselves are involved? At a time when we are debating our Constitutions, at a time when we are debating whether or not we are a republic, it is a very important point to reflect upon, because we have in our history a single common denominator, I believe, in terms of the way in which our fundamental legislative instruments have been presented to us as citizens. They have all come from the top down. They have all emerged here in Australia from England, from the top down essentially, in the sense that we have not in Australia had any major historical events which have been present in other countries and which have, through revolution or other social upheaval, created the major instruments in terms of

Constitutions and Bills of Rights. So I think it is very inappropriate for anyone, at this point in our history, to advocate more of the same. This is the time in Australia's history to really turn that on its head and, if we are going to bring about change, to bring it from the people up. So in this sense it has been the view of my committee to very deliberately take an emphasis upon building and constructing our individual rights and freedoms and, as we have actually said in our report, from the bottom up—from the people up. I suppose that does coincide to some degree with Father Brennan's suggestion of a more incrementalist approach to the construction of our individual rights and freedoms.

Our committee also undertook a fairly similar road and conversion to that of Father Brennan in terms of looking at international experience. A particular international experience which affected my committee's consideration of this matter was the Canadian experience. That, indeed, was a jurisdiction in which we had a modern society with a Westminster history embarking on the implementation, within our modern times, of a Bill of Rights.

If I could just take you very quickly through some of the main points that the committee saw as appropriate reasoning for the rejection of a Bill of Rights—I suppose that that Bill of Rights, whilst it is difficult to come up with any classical definition of a 20th century Bill of Rights, is perhaps what we have referred to as the EARC model, a generalised model—a shopping list, as it were, which is posed at a fairly general level and which, it is assumed, has scope, ultimately, for judicial interpretation and for that prospect of that judicial interpretation to override parliamentary sovereignty.

The reasoning that the committee adopted is basically as follows: that firstly, an enforceable Bill of Rights would most likely result in a significant and inappropriate transfer of power from the Parliament, that is, the Queensland legislative body elected by the people, to an unelected judiciary. In this sense, we really have to acknowledge and gauge just how far that goes in terms of changing the fundamental underpinnings of our Westminster system of government—this representative democracy—in the sense that it would constitute a fundamental shift of power and we would have a different system. So I would prefer that those advocates of a Bill of Rights also say in the same breath, "Let's have a different system of government in this country. Let's be very up front with that."

The New Zealand experience with a statutory Bill of Rights also shows that a Bill of Rights need not be, in fact, constitutional in form to effect a significant transfer of such 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.

The next point is the potential consequences of an enforceable Bill of Rights, that is, litigation-generated court time, utilised challenges to legislation and administration, the impact on existing areas of the law, etc. It is impossible to estimate these. The next point that we argued was that the experience in other jurisdictions, particularly Canada, as I mentioned, also demonstrates that a Bill of Rights, rather than preserving and enhancing the rights of the people most in need of further rights protection, might in fact have the opposite effect and benefit those least in need. Prohibitive legal costs associated with enforcing one's rights under a Bill of Rights, whether constitutional or statutory, might effectively see the utility of a Bill of Rights being restricted to wealthy and corporate citizens. That has indeed been the experience in Canada, where we find people such as major tobacco companies pursuing various rights to advertise and sell their product. That is not exactly the intention, I hope, of the civil libertarians who might have advocated that approach.

Further, the committee argued that a Bill of Rights is limited in its effective coverage given a diminishing public sector and an increasingly powerful private sector. Yet to try to expand the operation of a Bill of Rights to appropriately cover newly privatised entities—entities with which the Government has contracted—and powerful corporate entities is an extremely difficult task given the complex definitional issues which arise.

Finally, the committee argued that there are no readily identifiable solutions to other issues that would arise, such as: what rights should be included in a Bill of Rights; which of those

rights should be enforceable; how a balance can be struck between specific and general terminology used in defining those rights; how to overcome the effect of codifying and freezing the enunciated rights; and the effect that the Bill of Rights would have on existing common law provisions. Indeed, the committee was very influenced by the Canadian model, but certainly saw immediate practical difficulties in implementing those rights within this State.

Just to wrap up, I would like to take up a couple of the issues raised by Father Brennan, particularly, first of all, the States pursuing a Bill of Rights as opposed to those Bills of Rights being considered at a national level. I think the committee acknowledged some practical difficulty and, indeed, perhaps a logistical difficulty in individual States moving out on this limb, where perhaps a more national federally based approach might be more appropriate.

In conclusion tonight, I would like to affirm the position taken by the committee and indicate that it is not perhaps as far from the position advocated by Father Brennan as we might have thought, in that we see individual rights and freedoms as something to be constructed and built. The debate is not over. We made that very clear when we launched our booklet on individual rights and freedoms. In fact, we had Justice Fitzgerald here to launch that publication. That was a surprise to some, since he also, in the same breath, in launching it, advocated a Bill of Rights. So how and when those rights might be enunciated in the future in our legislature—perhaps in our Constitutions—is something for future debate. But one thing that I think we have to guarantee—we have to ensure—is that, as we move forward step by step, we must do so with great care and we must do so with the very direct involvement of the citizens of this State. Thank you.

Mr SOLOMON: You would think, wouldn't you, that EARC was advocating a revolution in having a Bill of Rights. As of 1 January next year, we will be about the only civilised country in the world that does not have one. In October last year, the mother of Parliaments—the one we all think is terrific in Westminster—decided to make the European Bill of Rights part of its domestic law, so that it was enforceable within the United Kingdom by United Kingdom citizens as though it was part of the local law. That comes into effect on 1 January next year. I wonder if the roof will fall in.

Mr Fenlon mentioned that Tony Fitzgerald launched the publication last year of "Queenslander's Basic Rights"—a little booklet about which I wrote something at the time. I did not actually say that I thought they should be prosecuted under the Trade Practices Act, but it really needs a lawyer to look at this carefully and see that the number of rights that we actually have which cannot be removed by the Parliament is very small.

Justice Fitzgerald made some very interesting remarks when he launched that booklet, and I thought it might be useful if I told you what he thought about the situation rather than what I thought. He considered, for example, that it would have been helpful if the committee had added an argument about whether we should or should not have a Bill of Rights in Queensland. He said—

"There is absolutely no reason for this State to maintain a redneck reputation or why it cannot give a lead to the rest of Australia in the constitutional entrenchment of individual rights."

He said—

"It is difficult for members of the general public to comprehend the need to entrench individual and minority rights. The community is easily persuaded by the usual platitudes concerning the desirability of leaving unfettered power with elected politicians, that is, those who are chosen by the dominant majority to represent their interests. They are also swayed by the ubiquitous fear of freedom argument that is effectively founded on the premise that since some of these will abuse their rights and fail to carry out their co-relative responsibilities, guaranteed rights present too great a risk for the law-abiding ordered society."

After referring to the EARC's recommendation, he said—

"There is validity in some of the arguments against the Bill of Rights, but in my opinion the debate frequently starts at the wrong point and encompasses the wrong perspective. If there is to be a serious discussion on the need of a Bill of Rights, the issue

should be looked at from the viewpoint of minorities and individuals who are at the bottom of the social order. The veil of obscurity with which politicians and lawyers, including, of course, the judiciary disguise the fundamental issues must be pierced. We have no requirement of justice in our society. Our politicians are not required to act in the public interest or to enact just laws"—

they do not take an oath to do so, for example—

"and courts are not required to dispense justice but to enforce the law. We hide such fundamental truths by sometimes describing the legal system as the justice system and by references to the rule of law and justice according to law as though law necessarily has some intrinsic relationship to the qualities of fairness and justice. It does not. With few exceptions, our Parliaments are free to enact, and our courts are required to enforce, unfair and unjust laws in the same manner as laws which are fair and just. There continue to be significant inequalities and injustices entrenched in our system."

That was all a quote from Justice Fitzgerald, apart from those few words that I added.

One of the arguments against the Bill of Rights is that it transfers powers from elected politicians to an appointed judiciary. A Bill of Rights, as Justice Fitzgerald said, does not alter the distribution of power between politicians and judges but between politicians and the people. As I have written elsewhere, most people would prefer judges to enforce their rights rather than politicians. It is true that they do not elect the judges, but in every opinion poll that has ever been held in Australia, they certainly put them on a far higher rating of trustworthiness than they do politicians. The argument that a Bill of Rights would be overseen and enforced by the courts is an argument in its favour, not an argument against it. There are public opinion polls which show that an overwhelming number of people actually want to have a Bill of Rights; they want to be protected essentially against the politicians. Most Bills of Rights are concerned with preventing the Parliament from taking away what may or may not be common law rights that people have. The Parliament can only be prevented from removing people's rights by a constitutional or, perhaps in some circumstances, a legislative Bill of Rights.

It is true that in Queensland, for example, there is legislation which requires the Parliament to consider whether, when it enacts legislation, it does intrude upon certain fundamental rights. It does not, however, stop the Parliament from doing so. A committee of the Parliament merely has to tell the Parliament that that is what it is doing. It can say, "Okay, so that is what we want to do", and does so if the Government wants it to do so. The only way of stopping Parliaments from intruding on the rights that people have—the intrinsic rights that people have under the common law—is to include those rights in a Constitution. I am pleased to say that Father Brennan is not entirely against Bills of Rights these days. When EARC was first considering the proposal, and before he went to the United States, I think his general feeling was that there should not be Bills of Rights at all.

Father BRENNAN: No.

Mr SOLOMON: Anyway, we will wait for that. I am pleased to see that he now favours at least some legislative and possibly some constitutional rights—some limited constitutional rights. It may well be that EARC, in its proposals for a Bill of Rights, complicated the matter by not simply specifying those rights that it considered the most important rights—the rights that should be enforceable in the courts. That perhaps was a question of strategy and tactics. However, EARC did make the point that only the most basic rights should be enforceable in the courts. It suggested that, because there was a need for the people and for the courts to become accustomed to the enforcement of those courts, for a period of about five years they should be legislative only; that is, that the Parliament should be able to override them if it considered them necessary, and that only at the end of that period should there be an attempt to include them in the Constitution in such a way, and by a vote of the people, that they would become unamendable by the Parliament itself.

The process of winning a Bill of Rights in Australia, I am afraid to say, I believe will have to be done through the States rather than through the Commonwealth. The reason for this is that the only way the Commonwealth can proceed is by picking up international covenants. The only power that the Commonwealth has under the Constitution at the moment is the external affairs power. It can only pick a Bill of Rights off the international shelf; it cannot change it to meet

Australia's needs. State Parliaments are not limited in that way. They can choose which rights they want to apply in their own States. And the Commonwealth, perhaps, after seeing the way in which States implement Bills of Rights, may then be able to approach the people—perhaps when the next referendum for the republic comes around, or the one after that—to include a limited Bill of Rights in proposed changes to the Constitution. I do believe that there are difficulties in simply taking international Bills of Rights and using the external affairs power. I think there is a degree of impropriety in the Commonwealth using its external affairs power in this way.

At the same time, I must say, of course, that the Racial Discrimination Act would never have been passed had it not been for the Commonwealth's ability to access the external affairs power. And for the reasons that Father Brennan expressed, without that power the Mabo decision by the High Court would not have lasted for more than a couple of years. There would be no—or very limited—land rights had it not been for the fact that the Racial Discrimination Act prevented the States in particular from immediately overriding the High Court's decision.

So there are advantages in picking up some rights from international sources, but the most legitimate way for the Commonwealth to enhance human rights is to decide and to put to the people, in a constitutional referendum, the rights that it believes should be included in the Constitution. I am afraid that that debate will take quite some time. My feeling is that the best way to approach it is for the States to begin implementing State Bills of Rights first, so that the people can become accustomed to having rights and to exercising them.

As I said at the beginning, we will be just about the last civilised country in the world not to have a Bill of Rights, and I think that is a great shame. Thank you.

Dr REYNOLDS: Thank you, David, Gary and Frank—three quite different viewpoints. Damon has the roving microphone. I think we might allow about 20 minutes at least for questions and comments. If you have a question or comment and you wish to direct it to one person, that is good. If you have a scatter gun comment, give it to all three, but perhaps you can tell us which speaker you want to kick it off first. Can we have some questions and comments then?

Ms Vlada Kassabian: Firstly, I would like to say something to David. As Australia is the only country in the world without a Bill of Rights, do we have the right to be so—a minority in the world? Secondly, I would just like to say that the problem with the expressions of Bills of Rights so far as expressed is that, for every single argument for a Bill of Rights, there is a counter-argument not to have a Bill of Rights in Australia. I think people fear the unintended consequences, rather than what they assume are the inherent rights of people. That is where we keep getting bogged down. Which way is the world going to be stacked? And how would a Bill of Rights in this form address the two conflicting parallels?

Mr SOLOMON: The answer about the right to life is that it depends on how you phrase the right. One of the points I was trying to make was that we do not have to pick up what other people have said. You can phrase it as you prefer. If you want to prevent euthanasia, you say so. If you want to prevent abortion, you say so. The problem with the United States' Bill of Rights—and I guess one of the arguments against Bills of Rights generally is that they tend to be written for their own time, and that is one of the arguments against constitutional Bills of Rights; that they are not necessarily adaptable as society changes.

If I remember correctly, the due process and equal protection amendment in the United States was passed around about the time of, or immediately after, the Civil War. It was not intended for the sort of use being made of it—or attempting to be made of it—by people in the United States now, as is fairly clear from its wording. And the generally expressed right to life means different things to different people. I guess that, being the last cab off the rank, we can phrase a Bill of Rights with the jurisprudence of the whole world behind us. We know how words are interpreted under the American system. We know how words are interpreted in New Zealand and in Canada. We will know shortly how they are interpreted by the House of Lords. And it is for us to debate and decide on what rights we want to protect.

Father BRENNAN: To follow on from that, it is to further buttress the point that if you want to maintain the status quo, given the changes that have gone on internationally, there is a need for change in Australia. Take, for example, the approach John Howard took as Leader of the Opposition to constitutional reform in 1998. I quote him in my book. He says—

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"The Constitution was never intended to be a document spelling out chapter and verse of individual human rights, etc. The Australian founding fathers carefully considered and deliberately rejected the American Bill of Rights model. I have long held a strong personal view that the common law approach to basic human freedoms is the most effective one."

The problem now is: what is the common law and how does it develop? Because now, not only in the United States but also in Canada, New Zealand and now in Great Britain, any new political controversy which is relating to rights which turns up in the courts will be resolved by the courts there looking at their own Bill of Rights instrument. So then, how does the Australian common law develop? Now, for the first time, it can only develop by the Australian judges just doing their own thing without checking in with other judges who have had to develop the common law to deal with the same situation.

So those who would say that they are opposed to judges having more power have to concede that if they do not have a Bill of Rights, there are then no guideposts to be given to Australian judges in the future and there is no other common law jurisdiction with which they can touch base. So the risk we run is that, in future, as Australian judges develop the common law, unassisted by a Bill of Rights giving them bright-light solutions to follow and unassisted by judges in other jurisdictions, what will the politicians say? "There go those damned judges again, just doing their own thing." If the damned judges are not to go doing their own thing in terms of new controversies with the shaping of the common law, it is essential that they be given bright-light solutions in terms of these fundamental rights.

I will just add one other point. In terms of what you raised about euthanasia and then the questions about abortion, I must say that I have always seen that as one benefit of going the Federal road, where you implement something like the International Covenant on Civil and Political Rights. Why? Because such an international covenant does not deal with such issues precisely because there was never any moral unanimity within the community of nations about such questions. So at a Commonwealth level, you can rightly say, "Look, we can have a basic Bill of Rights without reopening questions such as abortion law reform, euthanasia, etc." If you are going to do it at the State level, then you have to buy into each of those issues, as well. For those who want to, fine. But it may simply mean that any proposed Bill of Rights is killed off.

Mr FENLON: Can I just give a very quick illustration in relation to the point about a Bill of Rights being contemporary and keeping up with changes, which I think underlies the question? That is in relation to a conference we held here at the Parliament last week in relation to MP3. Does anyone know what MP3 is? I see a couple of nods. A lot of people do not, I am sure. MP3 is a new technology which consists of a solid commuter chip which allows people to download music from the Internet and to have free access to music. What has happened with MP3 is that it has upset the entire law of copyright. We had a professor of law from Harvard here last week to talk about this.

The other implication of this is that it may have to be tested, in the United States, in relation to the principle of freedom of speech. So you ask the question: is that something that is appropriate to be dealt with by the legislatures of the day with sound principles and reasoning on the basis of their people, or are we talking about something that is very archaic as a principle and that we are leaving it to the judges to say that this is the appropriate way to deal with MP3 in 1999?

Mr Neil Flanagan: I have two questions. The first is for David Solomon. I am probably taking a slightly more lateral approach to the issue. I am just thinking that if we actually abolished the States, do you think that could entrench rights or give us any better protection than what you are proposing—or what we have discussed, anyway—given that the States have often been the cause of the abuse of the rights of individual people? My second question is to Father Brennan: how do you see that committee system addressing the party political approach—given that often it is the case that the two major parties gang up together to quash some sort of rights—as to where the major issues are?

Mr SOLOMON: A long time ago, I might have applauded the lateral thinking. But abolishing the States is not going to happen. It requires every State to agree to it—the people in every State agreeing to it—and I cannot see that happening. I do not think that would help,

either. While the individual States have been guilty from time to time of affecting individual rights and freedoms, so has the Commonwealth.

Mr Neil Flanagan: If it was entrenched in a sort of Commonwealth Bill of Rights, might that be a better basis?

Mr SOLOMON: Most of the rights currently contained in the Commonwealth Constitution apply only to Commonwealth laws. For example, the provision in the Constitution forbidding the Commonwealth to make a law establishing a religion applies only to the Commonwealth. The provision in the Constitution preventing the Commonwealth from taking people's property without just terms—those provisions do not apply to the States. Any Bill of Rights would have to. For example, any Bill under the external affairs power would apply to the States. And any otherwise constitutionally entrenched Bill of Rights, one would hope, would also apply right throughout the country and not just under Commonwealth laws.

Father BRENNAN: As to your second question: how do we get past the party political influence in terms of such a committee - if you look at the way the Senate operates now with, say, something like the Scrutiny of Bills Committee, that Scrutiny of Bills Committee has got to a stage, after some years during which it has gradually developed, where Bills are scrutinised against certain legislative standards, and they are done in a fairly non-party political way. Routinely, any proposed Commonwealth Bill is immediately sent off to a competent legal academic to do the scrutiny as to whether or not it measures up according to those legislative standards. That report then goes to the committee, which is usually chaired by a member of the political party which is in Government.

But, for example, even when the Labor Left had control of the Migration portfolio and was doing some pretty mean and nasty things to asylum seekers, you did have a senator and a lawyer of the integrity of Barney Cooney, who chaired that committee, who basically said, "Here is the legal advice. This is where the legislation falls short. And as night follows day, so does the report of the Scrutiny of Bills Committee." I have no doubt that there would have been some backroom discussions and probably some unwelcome remarks made to someone like him. But I think that, over time, just as that developed with the Scrutiny of Bills Committee, equally you could develop something which would be an amalgam of that with the legal and constitutional committee—a committee for rights and freedoms—where it would be accepted that the job of that committee, for a true house of review, was to ensure that legislation complied with prescribed legislative standards in relation to rights and freedoms.

Now where, as proposed by me, any interference with those rights would not be adjudged as under the Canadian model by judges as to whether or not any interference was within reasonable limits as could be demonstrably justified in a free and democratic society, but where that would be the call of politicians, I am sure that there would be more room for party political influence. But nonetheless, with the prospect of submissions being put, argument before a committee and with the prospect of dissenting reports, I think that, over time, a political jurisprudence of rights could develop which could help to enhance the prospect of overcoming that problem. But you are right; it will still be a problem until you get to a stage of some constitutional entrenchment of key provisions. But at this stage, of course, you have no interest in the major political parties joining forces in order to sell to the Australian public the prospect of constitutionalising even the most basic of rights.

Mr Peter Breen: I am a member of the Upper House of the New South Wales Parliament. I also worked with David Solomon on the review of the enhancement of rights and freedoms in Queensland. On the question of the party political selling of a Bill of Rights, we do not have a legislative review committee in New South Wales, but we do have a very active crossbench. We now have 13 crossbench members, and there are 13 Liberal/National members and 17 Labor members. I am a member of the Standing Committee on Law and Justice in the New South Wales Parliament, and we actually have, as one of our agenda items, the preparation of a statutory Bill of Rights. We hope, as crossbench members, to be able to sell that to the Labor Government and to a good number of the members of the coalition.

So the question of interest to me, Father Brennan, is your disapproval of the provisions in the Queensland Bill of Rights—or draft Bill of Rights prepared by EARC—the wish list, as you call

them. I think your principal objection to them—what I gleaned from your book—is that they were not enforceable; therefore, why put them down as rights, and why muddy the water with them?

It seems to me that in relation to those issues, such as environmental rights and ecologically sustainable development, more and more those rights are becoming recognised in legislation. Indeed, the environmental law that has just gone through the Federal Parliament actually gave standing to people, I think for the first time, on the question of environmental rights. Would it not be possible that, if we included such rights—even though they may be a wish list—they would educate people and they would create some level of recognition that they are rights—indeed, recognised in some Bills of Rights in other parts of the world? Would you consider, if they were enforceable, including them in a Bill of Rights?

Father BRENNAN: If they were enforceable, yes, because then I think they could truly be called rights. I am simply making the similar point to what David made in relation to the Queensland document about your rights. You only put in a document called "your rights" what are your rights. You only put in a Bill of Rights things which are enforceable. If they are not enforceable, sure, put them in a little booklet like this, but do not go putting them in a Bill of Rights where you have two different sections: enforceable rights and unenforceable rights. If you go to a Bill of Rights, you expect to pick up a document where you find: these are my rights; these are enforceable; and if the State Government or the State Parliament has violated them, I am entitled to go off to court and enforce them. And if I cannot do that, call them what you like, but they are not rights.

Dr REYNOLDS: I am now going to call on Mr David Liddell, who is a member of our executive committee and a lawyer—since it seems to be a lawyers' night—to move the vote of thanks.

Mr LIDDELL: At a function such as this, I suppose due process dictates that a vote of thanks should be extended to the three of you on behalf of those present as an expression of our appreciation. Equal protection dictates that that appreciation should be equally distributed amongst the three of you. However, I have no hesitation, without the compulsion of such US-style constitutional imperatives, in extending to the three of you our sincere appreciation, both on behalf of the Queensland Chapter of the ASPG and those present, for your attendance here tonight.

So far as the equal protection element is concerned, I am sure that Mr Fenlon and Mr Solomon will not feel their rights too much impinged upon if I single out Father Brennan for a special thanks as our keynote speaker.

Father Brennan, you have treated us to an interesting and thought-provoking exposition of the pros and cons of a Bill of Rights, for which we thank you. Hopefully, it will set us on our own expedition to learn and understand more. I suppose that you would suggest that that expedition should start with the purchase of your book. So you might like to distribute the recommended retail selling price and its availability to those present. But for the moment, I ask all of you present to extend in the usual way your appreciation to the three gentlemen for an excellent night. Thank you.

Dr REYNOLDS: There was a party that I gave about two years ago where every second male seemed to be called David. That may seem to be one of the generational things, but thank you David, David, Gary and Frank.

I now invite you all to the Strangers Bar where, I am sure, Father Frank, David and Gary would be more than happy to be buttonholed—at least moderately—by people who did not have a chance to ask a formal question.

Our excellent secretary, Kerryn Newton, has asked me to remind you that, as you pass the desk there, there are a couple of booklets that pertain to this meeting which may catch your attention: "Queenslanders' Basic Rights" and "The Consolidation of the Queensland Constitution"—bedtime reading for you all! Thank you.