LEGAL AFFAIRS AND COMMUNITY SAFETY COMMITTEE

Members present:

Mr ML Furner MP (Chair)
Mrs T Smith MP
Miss V M Barton MP
Mr JM Krause MP
Mr CG Whiting MP

Staff present:

Mr S Finnimore (Research Director)
Ms L Pretty (Principal Research Officer)

PUBLIC HEARING—INQUIRY INTO A POSSIBLE HUMAN RIGHTS ACT FOR QUEENSLAND

TRANSCRIPT OF PROCEEDINGS

MONDAY, 11 APRIL 2016

Brisbane

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Committee met at 8.48 am

CHAIR: I declare open this public hearing of the committee's inquiry into a possible human rights act for Queensland. Our committee is inquiring into whether it is appropriate and desirable to legislate for a human rights act in Queensland other than through a constitutionally entrenched model. The full terms of reference are available at the committee's web page and there are also copies available in this room. The inquiry was referred to the committee by the Legislative Assembly on 3 December 2015. The committee is to report by 30 June 2016.

My name is Mark Furner. I am the member for Ferny Grove and chair of the Legal Affairs and Community Safety Committee. With me today are four other members of the committee: Jon Krause, the deputy chair and member for Beaudesert; Miss Verity Barton, the member for Broadwater; and Mrs Tarnya Smith, the member for Mount Ommaney. There are two other members who are missing and unavailable today. I welcome Mr Chris Whiting, the member for Murrumba, who is standing in for Ms Joan Pease, the member for Lytton.

The committee's proceedings are proceedings of the Queensland parliament and are subject to the standing rules and orders of the parliament. These proceedings are being recorded by Hansard and are broadcast live on the parliamentary website. A transcript of the proceedings will be published on the committee's web page unless there is a good reason not to. I ask everyone present to please turn your mobiles off or to silent mode. Representatives of the media may attend and may record the hearing, subject to the media guidelines endorsed by the committee. These are available from the staff if required.

FINLAYSON, Hon. Christopher, Attorney-General, New Zealand Parliament, via teleconference

CHAIR: Hon. Christopher Finlayson, Attorney-General of New Zealand, I firstly welcome you. The committee very much appreciates the time you have been able to set aside today to speak to us. Could you please introduce yourself clearly for the benefit of Hansard when you first speak. I invite you to make an opening statement. The committee may then have some questions of you.

Mr Finlayson: My name is Christopher Finlayson. I am a List member of parliament in the New Zealand parliament and I hold the portfolios of Attorney-General and Minister for Treaty of Waitangi Negotiations, which means I am responsible for negotiating historic agreements with the various tribes or iwi of New Zealand. I am also minister in charge of the GCSB, the Government Communications Security Bureau, and the SIS, Security Intelligence Service. I am also the Associate Minister of Maori Development.

I am very pleased to provide a brief statement to you. I prepared a speech a year or so ago which I am very happy to email to you which could serve as my introductory comments, frankly. It deals with section 7 of our Bill of Rights Act, which imposes an obligation on the Attorney-General to bring to the attention of the House of Representatives any provision of a bill which may breach in some way a relevant provision of the New Zealand Bill of Rights Act. Rather than read out the statement, I will email that to the committee clerk, because it is a reasonably succinct summary of the way in which our system works. I would be very happy to answer any questions arising from that. Of course you do not have it now, so I will just briefly summarise it.

As I said, the Attorney-General is responsible for providing the section 7 report. In so doing, he or she is not acting as a minister of the Crown but is performing an independent law officer function. It is my task to provide those reports even on politically contentious issues, which may not necessarily please the minister with portfolio responsibility for the bill which is the subject of criticism. In my 7½ years experience as Attorney-General of New Zealand, I think the section 7 procedure has a number of very positive aspects to it. In the first instance, there have been situations where, for example, the Prime Minister has said to the Minister of Police and me, 'I do not want a section 7 on this bill. Would you two please go away and discuss the provisions of the bill so that it is Bill of Rights compliant?' We do not even get to the section 7 procedure because the threat of it acting as some sort of kind of legislative sword of Damocles means that ministers often engage with me even at a reasonably late stage of a bill's development to ensure that it is Bill of Rights compliant.

This morning I signed off on a report given to me by the Crown Law Office in relation to a bill relating to a treaty settlement with which I have been involved, and that bill is Bill of Rights compliant and I so certified this morning. The interesting thing is that, even before ministers get involved, officials have been discussing a number of aspects of the bill from very early in the bill's development to ensure that it is Bill of Rights compliant.

The point I want to emphasise is that the Bill of Rights procedure—the section 7 procedure, we call it—has a number of salutary effects. It brings to the attention of policymakers, ministers and drafters at a relatively early stage Bill of Rights issues. The second thing I would say is that there has been a slight change in the way in which the parliament deals with my section 7 reports. Often it is said that the Attorney-General provides these reports and they are all very interesting but they languish and no-one pays too much attention to them. What we have now in select committees is slightly increased attention being given to them so that officials from the Ministry of Justice can go down to the select committee and address any Bill of Rights concerns. This is something that you may care to explore with David Wilson, who is the Clerk of the House of Representatives, when you meet with him at 10 o'clock this morning your time.

The other point I would make is that ours is an incremental system. We do not really do things in a revolutionary way over here, but what I am seeing is that, in the 26 years since the Bill of Rights enactment, there is an increasing focus on Bill of Rights issues and the parliament is taking a greater interest in the section 7 reporting procedure. I guess that would suffice as a preliminary statement, and I am very happy to answer any questions.

CHAIR: Thank you, Attorney, for your submission in respect to section 7 of the Bill of Rights. In that submission you referred to a number of reports that have been produced as a result to make them compliant with section 7, and I note there are 10 reports for the freedom from discrimination. For the benefit of the committee I wonder whether you could provide some examples of what some of those reports were relevant to.

Mr Finlayson: One that I can immediately think of was a bill to amend a particular matter of Maori legislation, and one of the issues that arose concerned whether or not it was discriminatory to change the terms of a trust in circumstances where only natural children could succeed or be beneficiaries rather than adopted children. It gave rise to a great deal of discussion—I can send you the details if you would like—and a lot of debate within government. At the end of the day it was decided that it was not discriminatory, but it was one of those situations where I thought it would be useful, because it was a difficult line call, for me to go down to the House and address the issues that arose.

CHAIR: In your opening statement you referred to a number of ministers who, under the threat of failure pursuant to section 7, attempted to resolve or actually resolved the matter prior to it getting to you. I assume in your opinion it would be a good thing that they are cognisant of matters relevant to section 7, so therefore they are endeavouring to fix it before it comes to you in terms of doing a report.

Mr Finlayson: I think that is a very fair summary, Mr Chair. I think people actively engage in these issues at a reasonably early opportunity because the section 7 report procedure is there, and if there is a way of addressing various issues that is fine. Sometimes there is not, and let me give you another example of where there was a lot of discussion. Again I can send you the details because it is a very interesting one.

Under our Legislation Act we sometimes revise legislation and reprint it to make it more intelligible for the layperson. One such redrafting exercise involved the first comprehensive redraft of the Social Security Act 1964 in over 50 years. One of the issues that arose related to special benefits that were paid to blind people and in fact whether or not it was discriminatory to favour blind people as opposed to other people in the community with an impairment. After a lot of discussion it was decided that it was simply not possible to resolve the issue without taking a benefit away from blind people. Therefore, a section 7 report issued but it explained the circumstances. That is not to say there has not been a really good discussion going all the way to cabinet on the issue in question, but it was decided that it was impossible to resolve and therefore a section 7 would issue.

CHAIR: Your bill has been around for many years now. What is the expectation of your citizens in terms of the resolution of human rights breaches?

Mr Finlayson: I think the average citizen would hope and expect that the policymakers are trying to resolve these things before a bill is introduced, and they would also expect during the committee work that issues would be brought to the attention of the members of the committee and if there is a way in which the committee members can turn a noncompliant bill compliant, so much the better. The other thing is that, of course, select committee hearings allow opportunities for submissions to be made by, among other people, the New Zealand Law Society. I strongly endorse what an American judge

once said about the bar: it is the bar that makes the statutes. We derive a lot of benefit from submissions by organisations such as the Law Society. Having extensive select committee hearings also feeds into fashioning a bill.

Mr KRAUSE: Good morning, Attorney-General, and thank you for your time with us today; we really appreciate it. My understanding is that section 7 reports are only produced when a human rights or Bill of Rights issue is enlivened; is that the case?

Mr Finlayson: Yes. That is a very good question, sir, because on a couple of occasions—and it is referred to in the documentation I am going to send over to you—I have produced what is called a 'not a section 7' because I thought that if there was a line call, for example, on the Public Safety (Public Protection Orders) Bill, I provided a report to parliament saying why it did not appear to be inconsistent with the Bill of Rights Act because I knew that there would be a lot of debate on it and I thought that it would be useful to bring to the attention of parliament exactly what my thinking process had been. They are the exception rather than the rule. There is no provision in the legislation for it.

The other point I would make is that as a matter of course—take the report I signed off on today which said that the bill is Bill of Rights compliant—the Ministry of Justice's advice in this instance is posted on the website and is available for all to see, but sometimes I feel it is useful on very rare occasions to bring to the attention of parliament why I thought it was consistent.

Mr KRAUSE: I want to step back a little bit, and I hope you can assist the committee with this. What were the driving factors for the introduction of the New Zealand Bill of Rights 26-odd years ago? Was it because of perceived or actual breaches of human rights, or was there some other debate going on in the country at the time?

Mr Finlayson: No. Looking back now, I think there was a desire on the part of the 1984-1990 Labour government to inject a bit more rigour into this kind of analysis. I always remember a senior civil servant saying to me that the thought that there was some kind of road to Damascus type experience—when previously noncompliant backwoodsmen would be passing noncompliant Bill of Rights legislation and then suddenly they became legislators who were aware of the Bill of Rights implications of a particular matter—is simply unfair on the legislators and policymakers of years gone by. I think this kind of analysis was always done and questions asked about whether or not common law standards were being upheld or how particular provisions fit in with our international obligations, but I guess the introduction of the Bill of Rights, which is not entrenched, has provided additional rigour to the kinds of analyses that I have been talking about.

Mr KRAUSE: On another matter, some information has been provided to us by our committee secretariat and one of the indications I had was that the Bill of Rights in New Zealand does not provide the ability for action to be taken against public bodies based on the Bill of Rights but, again based on our briefing, that the courts in New Zealand had found a way to give rights to people based on the Bill of Rights. Is that the case? If it is the case, has there been a situation where monetary damages have been awarded in those matters?

Mr Finlayson: I cannot think of any situation like that against a public body. I can send you the reference, but there has been only one case that I am aware of, concerning prisoners' voting rights. The right of prisoners of a certain category to vote in a general election was taken away from them, and one prisoner commenced a proceeding for a declaration and the court was prepared to grant one. That is the only thing I can really think of.

Mr KRAUSE: What was the outcome of that declaration?

Mr Finlayson: The case is under appeal so I had better be careful in the comments I make. The judge was prepared to make a declaration, but the interesting issue that arises is that my section 7 report could be said to be an extension of a parliamentary proceeding in terms of our Parliamentary Privilege Act, and whether or not it could be said the judge was interfering with a proceeding of parliament is an interesting question, an aspect of which may come up on appeal.

Mr WHITING: Thank you, Mr Attorney-General, for your participation today. Clearly your act does introduce extra steps for parliamentarians and parliament to step through in preparing legislation. Is that viewed as onerous within parliament, or does it have the support of parliament?

Mr Finlayson: I do not think it is regarded as onerous. As I say, in a less formal, less rigorous way it has been done from time immemorial when drafting legislation. The next steps that have been introduced in the last couple of years—to ensure that section 7 reports are brought to the attention of the select committee dealing with a particular matter and that justice ministry officials can go down and speak to it—I do not think are regarded as onerous at all but, if you like, an inevitable and natural development in Bill of Rights scrutiny within the legislature.

Miss BARTON: Good morning, Attorney, and thank you for your time. Mr Attorney, I have had a chance to have a look at your speech to Transparency International from last year. I think that is the speech you referred to in your opening remarks. I am just curious about how the Bill of Rights with respect to section 7 vests power in the parliament as opposed to the judiciary when it comes to invalidating laws and also how that works with your position in the cabinet in a Westminster parliament. Obviously there was a reason for deciding that the Attorney, because of the office that they hold, should be the person who makes these decisions with respect to section 7, but I just wonder how that works in operation with respect to cabinet solidarity in a Westminster system.

Mr Finlayson: There are a number of very important questions there. No, the speech I was referring to—the Transparency International speech was one of them—is a speech I made for the New Zealand Centre of Human Rights Law, Policy and Practice a year or two back, so I will get that over to you. It covers a lot of similar material.

Why the Attorney-General? Because the Attorney-General holds two functions in our system. I meet with attorneys-general from Australia, Canada, the United States, England and Wales on a regular basis, and the Attorney-General's role in New Zealand is very closely aligned to the English Attorney, whereas George Brandis is both Attorney-General and, I suppose, also Minister for Justice and has a lot of homeland security responsibilities. The Attorney-General here is both a minister of the Crown, in that I am responsible for the Crown Law Office, who are the Crown's lawyers, and Parliamentary Counsel Office, which is the drafting office, but I am also an independent law officer. It is me as the independent law officer who writes the reports, and it is said it is because I have to undertake that role independently, regardless of any criticism there may be from some of my colleagues in cabinet. It is always well respected by them that that is my function and that if there is a section 7 report then that is the way it has to be. People do not try and nobble me in some way.

There has been some talk in some jurisdictions—and there has been some debate here—about whether the person who provides such a report should be counsel assisting parliament, but our system seems to work reasonably well. You may care to check what the practice is in Britain, because I do not think it is Jeremy Wright who provides these reports. The only other point I would make is that there have been occasional mumblings by judges in various speeches to the great and good about striking down legislation, but that power is not there.

Miss BARTON: With respect to your last comment and the fact that power is vested in the parliament through an individual office holder, if you were considering a Bill of Rights now in 2016 do you think you would be inclined to continue to vest power in an individual office holder, or with the Westminster tradition would you be more inclined to perhaps be more observant of the separation of powers and not have a member of the executive consider these propositions?

Mr Finlayson: I think any attorney-general in our system worth his or her salt will bring to the task an individual independent responsibility and will continue to do that and will not be worried about being nobbled by one's colleagues. Our system works reasonably well. It is not for me to give advice to your parliament, but you may care to look at the New Zealand model and I think the British model to see which one you would prefer if you go down this path.

Miss BARTON: Thank you, and please do not think it was a reflection on you or your office.

Mr Finlayson: No, but from time to time in the last 26 years we have had a few rather contentious debates about whether in fact an attorney-general was nobbled in relation to electoral finance legislation and foreshore and seabed legislation for reasons which I express in what I am about to send you.

Mrs SMITH: Good morning, Attorney-General. In 1991 Queensland introduced the Anti-Discrimination Act and a whole range of acts that are there for individual rights. Is the bill in New Zealand—the current bill we are talking about—in place of or as well as other various acts, given it was introduced around the same time that Queensland brought in our legislation of anti-discrimination?

Mr Finlayson: We still have our Race Relations Act and a Human Rights Act, but I suppose the point you make is a very valid one: do you, as the Greeks would say, pile Ossa on Pelion or the other way around? You can have all this legislation piling up and what does it do actually practically to enhance the freedoms of Queenslanders or New Zealanders? But that is a matter of political decision for you.

Mrs SMITH: You said that so much better than I did, too. With regard to New Zealand citizens, does the court system then become bogged down with individual cases of people wanting to be frivolous or—

Mr Finlayson: That is an excellent question, because I am inclined to think that is the down side of the Bill of Rights. There has been the development of a Bill of Rights industry, especially lawyers on legal aid who will run arguments from time to time that are not complicated by any vestige of merit. That is one aspect of the Bill of Rights basically in the hands of the court, because the judges control their own courts. That perhaps has been a down side. I actually think the Bill of Rights has been a very positive development in terms of the matters I have referred to in increasing parliamentary scrutiny and ministers taking a good look at these issues in the early stage of policy development, but I do not like at all the way that courts are bogged down with frivolous and vexatious arguments run by people who are on legal aid.

CHAIR: Are there any penalties where someone brings a matter before the courts that is frivolous or vexatious, as far as you are aware?

Mr Finlayson: No. Judges would peremptorily dismiss them. In terms of costs against lawyers personally over here, there was a case. In fact, I remember going to the Privy Council on it—a case called Harley v McDonald. As part of the court's inherent jurisdiction the courts could fine a lawyer personally, but that would have to be a very extreme situation and in itself would give rise to no doubt unnecessary satellite litigation. I am not sure whether you have it in your state, but in some states of Australia there is a statutory basis for fining lawyers, isn't there?

CHAIR: There are some acts that impose a penalty on a matter of being vexatious or frivolous.

Mr Finlayson: Yes.

CHAIR: We do not have a Privy Council any longer, either.

Mr Finlayson: No. Funnily enough, we were the last to say goodbye to it, but we had a rather long tail and just a few weeks ago—in fact, I was hoping it would give me an opportunity to go back there one more time—someone petitioned the Privy Council for special leave over a sentence in 1968, but their lordships did not require to see any New Zealand lawyers and dismissed it.

Mr KRAUSE: In terms of creating a human rights dialogue, which is sometimes referred to as one of the benefits of this sort of system, is there a commission or any type of public body in New Zealand that facilitates that—creating a human rights dialogue or working out resolutions to people's human rights disputes under the Bill of Rights?

Mr Finlayson: There is a Human Rights Commission, one of whose tasks is to talk about these issues, and I know the chair of the Human Rights Commission will address anyone, from the Jewish community on Holocaust Memorial Day to law conferences, to talk about them and the commission can also entertain complaints. But I think this human rights dialogue is a lot more complex than that. For example, you have a copy of a speech I gave to Transparency International. I have one coming over to you from the Centre for Human Rights Law. It is a much richer dialogue, I would have thought, than simply the human rights leading it.

CHAIR: Thank you, Attorney-General, for your excellent knowledge and your delivery of what you have been doing in your country. We do appreciate your time and we look forward to receiving the rest of the material that you have indicated you are going to send to the committee.

Mr Finlayson: If you want anything further, please come back to me.

CHAIR: Thank you very much.

WEINBERG, Justice Mark, Judge, Court of Appeal, Supreme Court of Victoria, via teleconference

CHAIR: Good morning, Justice. Thank you for making yourself available to give evidence via teleconference today. With me in the room is the deputy chair, Mr Jon Krause, the member for Beaudesert; Miss Verity Barton, the member for Broadwater; Mrs Tarnya Smith, the member for Mount Ommaney; and Mr Chris Whiting, the member for Murrumba.

Justice Weinberg: Good morning, everybody.

CHAIR: Once again thank you for making yourself available. I do understand you have some tight time frames, so we will hopefully get everything resolved and questions asked by 10 o'clock. I will hand over to you to make an opening statement.

Justice Weinberg: Thank you very much. I understand that what prompted this invitation to speak to the committee was a speech that I delivered at the Bar Association of Queensland's annual conference in February of this year. I was asked to speak about human rights and the criminal law. In particular, I focused on the question of whether human rights are best protected by the enactment of bills of rights but always in the context of the criminal law. The paper that I wrote, which I think might have been provided to your committee—

CHAIR: That is correct.

Justice Weinberg: That paper focuses narrowly upon certain provisions of the Victorian Charter of Human Rights and Responsibilities Act—the key provisions dealing with the right of an accused to a fair trial—rather than considering the act in its totality.

The second point I would make is that the paper focuses largely upon matters of a technical nature—drafting matters. I do not take a particular position as to the philosophy or otherwise of enacting legislation of this kind. I know that Queensland is presently considering the introduction of something like the Victorian charter, and my concern is to ensure that at least the legislators are aware of some of the drafting problems that we have encountered in Victoria.

With that modest introduction, I will state my position. In Victoria when I was appointed to the court in 2008 I had assumed that the charter would open up a vast array of court challenges—that we would be swamped by people seeking to invoke the charter arising out of criminal cases, in particular. It has been a great surprise to me that that has not happened. It happened in other jurisdictions where equivalent provisions were introduced but in Victoria not at all. I was puzzled about that and so I considered why that was so.

Ultimately I concluded that there were two main problems. One was the drafting of the charter itself. The provision for legal enforcement is all but incomprehensible, as I think most people would agree. Secondly, the interpretive provision, which was supposed to be the provision that had all the teeth behind it, has caused a good deal of difficulty. I think you would have followed from my paper some of the mess that the courts have got themselves into. Even now, even though the High Court has spoken on the point, we do not know what the High Court's decision in Momcilovic actually says. As a note of caution, by all means consider and look at the Victorian experience, and the experience in Canada, New Zealand, England and so forth, but do not copy slavishly the key Victorian provisions because they have caused nothing but grief.

CHAIR: You certainly make that point in your conclusion about it being less effective in facilitating legal challenges. Has that led to people's expectations being diminished as a result of the lack of effectiveness of this legislation in Victoria?

Justice Weinberg: We are talking about effectiveness at two levels. As I indicate—and I am not really in a position to comment on this—the charter is said to be effective at the level of the Public Service, administrative decision-makers and so forth who now have to focus when coming to a decision on whether their decision is charter compliant. If you ask yourself the question, 'Has the charter been effective in a litigation sense, in a court sense?' the short answer I think has to be that it has not done very much at all. It has not been invoked very often and it has not been invoked successfully very often at least in relation to the key criminal law provisions.

As to lowering of expectations, I think you would appreciate that the introduction of the charter was very controversial in Victoria. Some people thought it was long overdue. Some people thought it was the beginning of the end. I think neither position is true. It is just that there has been far less of an impact within the court system than people might have anticipated.

CHAIR: Part of the bill requires that a statement of compatibility be tabled in parliament. Justice, would you know offhand how many of those statements have been issued at all?

Justice Weinberg: I would not know what the numbers are, but I imagine these are done for every piece of legislation. Every piece of legislation that could conceivably affect the rights contained in the charter would have a statement of compatibility. That is a precondition, as I understand it, of the Victorian statute. Again, that may or may not be valuable. Just because the legislature says, 'We have looked at it and we think it is charter compliant,' does not necessarily mean that a court would agree with that proposition but it tends to focus the mind. I do not see that as a particularly difficult hurdle to overcome and probably a useful thing to do. If you are going to enact controversial legislation which impinges seriously on rights then it is a good thing, it seems to me, for legislators to appreciate that there is a balancing exercise involved and to ask whether the new statute goes too far.

CHAIR: Has the Supreme Court, to your knowledge, issued any declarations of inconsistency of interpretation?

Justice Weinberg: Only one.

CHAIR: What was that matter?

Justice Weinberg: I think that was in the Momcilovic case itself.

CHAIR: The one you refer to in the paper to the Queensland bar.

Justice Weinberg: Yes.

Mr KRAUSE: Good morning, Justice Weinberg, and thank you for your time.

Justice Weinberg: Good morning, Mr Krause.

Mr KRAUSE: I want to touch on your comment about there being, to paraphrase, no great flood of challenges in Victoria in the courts after the charter was introduced. You mentioned that in other jurisdictions the situation was different and that there were significant challenges.

Justice Weinberg: Yes.

Mr KRAUSE: Can you enlighten the committee about some of those?

Justice Weinberg: You have to bear in mind that the Victorian charter is a very modest document. It does not allow a court, for example, to strike down legislation on the basis that it is non-charter compliant. There is a real issue as to the extent to which, if at all, it operates to allow a judge or a court to exclude evidence which is obtained in breach of the charter. The Canadian position is quite different. After the Canadians introduced their bill of rights, which is now in their constitution, effectively, there was a spate of cases, for example, on undue delay. A number of trials had to be abandoned because they had not been brought on within what was regarded as an acceptable or reasonable period. I have forgotten the exact number, but it was a very large number of cases that could not proceed in those circumstances. That is a tangible example of just how the charter could operate if somebody thought to give it those sorts of teeth. In England the enactment of the Human Rights Act in 1998 led to a lot of cases involving, for example, prisoners who were unhappy about their treatment bringing proceedings in the courts. Nothing of the kind has occurred in Victoria. As I think I indicate in the paper, we have had a total of about 75 cases in which the charter gets a mention but there would not be more than a dozen or so in which it gets significant treatment, and that is after a period of the best part of eight years now.

Mr KRAUSE: Would it be fair to say that the charter has not really hindered the application of the criminal law as it relates to the process of criminal trials?

Justice Weinberg: No, absolutely not. The criminal law functions as well or as badly as it ever used to. Delays are still a problem in Victoria, although we are doing our best to reduce the period of time between charging and trials. No, it has had no impact on that. It has had very little impact in other areas where you would think it might have—for example, bail—and the reasons I think are self-evident. So far as the rights of the accused are concerned, these are sufficiently protected, it seems to me, by the principles of interpretation that we apply to statutes. We apply the maxim effectively that we read statutes down when they are ambiguous and could either be read as cutting into fundamental rights. If they are not ambiguous then we give effect to them but we make the usual comments about them from time to time. Sometimes that has an impact and sometimes it does not. So far as the protection of the community is concerned, I do not believe it has caused any people who ought to have been convicted to escape on what you might call a technicality. The Americans with their Bill of Rights will get a lot of cases where evidence has to be excluded because of a breach of the law. No-one contemplated going down that path here and I would assume that the Queensland parliament would not go down that path in Queensland.

Mr KRAUSE: You spoke about the enforcement provisions in the charter being hard to interpret and the interpretive provisions also being very difficult and subject to a High Court decision. Could you elaborate on that again because I did not quite catch what you said?

Justice Weinberg: Yes, certainly. It is very complicated and I am sorry that is so, but you can blame the High Court for that I think, with great respect. The case of Momcilovic is the first case on the Victorian charter that went to the High Court. There had been a debate about how this interpretive regime would operate. The debate centred around whether the section of our charter, section 7, which is the balancing section, was to be taken into account at the initial stage when you are interpreting the relevant provision or whether you interpret the provision first and only then at a later stage went to the balancing provision, and that could produce different results depending on the order in which the two matters were considered. Even now, after the matter has been to the High Court, there is no clear answer to that question. Our court has said—that is, the Court of Appeal—that you have regard to the balancing provision as part of the interpretation exercise. The High Court may or may not have agreed with that; we do not know because there is no majority judgement on the point. The law has been left in a state of confusion on that.

The Victorian parliament recognises that and it is in the process, as the paper says, of reviewing those provisions of the charter that have not worked properly. One would think they will be drafting provisions which make it unambiguously clear how the interpretive provision should work. The first go was a very sad one. Part of it stemmed from the problem that the English courts in relation to the Human Rights Act had come up with an interpretive approach which is fundamentally at odds with traditional notions of parliamentary sovereignty. Basically what the English said was that if the particular statute in England is not human rights compliant the court will rewrite the statute: they will make it human rights compliant. That is a very controversial, if not revolutionary, approach to statutory interpretation and, again, I would have thought you would not want to go down that path of allowing the courts to rewrite legislation which is not ambiguous.

CHAIR: No.

Justice Weinberg: The whole area of interpretation has become very messy, and I would have thought with some very careful drafting you could produce a provision which is clear and easy to follow—as it should be when you are dealing with a charter of rights. It ought not to be the Income Tax Assessment Act. It ought to be a set of provisions that ordinary, intelligent, laypeople can read and understand. Any time you enact legislation of this kind, if you are not particularly careful with your drafting you will produce unintended consequences, and that has unfortunately been the case in some respects here.

Mr WHITING: I have listened to your comments regarding the remedial provisions lacking in the Victorian legislation. You also discussed the UK bill where there have been a lot of proceedings in courts by prisoners seeking to protect their rights but certainly not so in Victoria. From what I understand, in this area of prisoner rights, powers of arrest and legislative provisions regarding sentencing, it seems from what you have said here that there is a range of protections that are left to be discovered through the courts. Is that a good way of clarifying that?

Justice Weinberg: I think that is entirely right. I had expected there would be much litigation arising out of, for example, challenges to sentencing legislation. We were contemplating introducing something called baseline sentencing in Victoria, which is now no longer the case. I think it has been frozen. It is a bit similar to mandatory minimum sentencing but not quite. That seemed to me to be a ripe area for challenge by someone on the basis that it involved entirely disproportionate sentencing and so forth. One could easily see how sections of the charter could be invoked in that area, but that whole doctrine of baseline sentencing has now been disappeared. It has been held by our court that the legislation was so badly drafted that it was incomprehensible and therefore the government is looking at withdrawing it and repealing it. It is a drafting exercise which has to be carried out with great care. I suppose that was the message I was intending to convey to the Bar Association and to your committee.

Mr WHITING: Thank you.

Miss BARTON: Good morning, Your Honour. Are you happy for me to call you 'Judge'?

Justice Weinberg: You can call me 'Judge'. You can call me whatever you like, Miss Barton.

Miss BARTON: I just have two questions with respect to your speech to the Bar Association.

Justice Weinberg: Yes.

Miss BARTON: Just following on from where you reference Professor Clapham, in light of some of the concerns that you have around the efficacy of the charter and in light of Professor Clapham's comments, in your experience is it judges or society who should perhaps necessarily choose what is best for society?

Justice Weinberg: Wow! That is a killer question, isn't it? I guess the answer is: in the broad, obviously parliament should make these sorts of judgements. I am very much a traditionalist in terms of my approach to the extent to which judges have a role in promoting social good. My concern is at the micro rather than the macro level. I want to ensure that the matters that are entrusted to us—and the primary one, as far as I am concerned, in this context is the right to a fair trial—are dealt with by people who have the experience and expertise to deal with those sorts of questions.

I have no difficulty with legislators setting up the parameters, for example, of sentencing—the broad parameters. I get very concerned when legislators want to circumscribe judicial discretion to the point that we are constrained to do injustice—that has been one of my concerns about mandatory sentencing for a long time—or with parliament telling us, for example, that we cannot, or should not, grant bail in a particular situation where there are unusual and compelling circumstances that warrant it.

So the answer is yes and no. I do not want to be involved in social justice at the wider level. I am just a citizen. I vote like everybody else. I have my own views about what is just in society and what is not. But at the micro level, in terms of things that come before my court, I believe that I should have the final say on whether or not a particular procedure will lead to a fair trial. If it will not lead to a fair trial, I will not allow it to happen in my court and that is where I stand.

I understand that parliament can do what it wishes to do, but at the same time there are limits on what parliament can do, as you would be well aware. Even a state parliament is subject to the federal Constitution. If the state passes a law that unduly impinges upon judicial independence—because we are chapter III courts, effectively—then that legislation would be struck down by the High Court, as has happened a few times, and we would strike it down as well.

Miss BARTON: Thank you.

Justice Weinberg: That is a roundabout way of answering your question, I am sorry, but it was a very difficult question.

Miss BARTON: No, that is fine. Thank you. Just following on from that, obviously your speech had a particular focus on a right to a fair trial as opposed to a broader consideration of the charter.

Justice Weinberg: Yes. I am not going to deal with questions of privacy or family law matters of that kind—a whole range of other provisions that I have no experience with or no particular worthwhile views about. I focus on the key provisions in the charter that deal with the right to a fair trial.

Miss BARTON: I just wondered whether you thought that the freedoms and liberties that are intended to be enshrined in the charter of rights, and also a general view about a right to a fair trial and an understanding of what that is, were protected before the charter was introduced and whether there are additional liberties that have been enshrined because of it.

Justice Weinberg: I think the short answer is that the common law has gone a fair way towards protecting those rights through its approach to the interpretation of statutes. There comes a point, of course, where the parliament passes a law which is not ambiguous and not uncertain. Assuming that law is valid—in other words, assuming it gets past the Kable test in chapter III terms—then the courts will do what the state parliament, or federal parliament as the case may be, tells them to do.

We have a particular responsibility—a constitutional responsibility, it seems to me—to stand between the state and the individual and to ensure the individual gets a fair trial. Hypothetically assume that the parliament decided that it would be a good thing if the accused had to prove his innocence beyond reasonable doubt and had passed a law to that effect. I do not think there would be any doubt at all that that would be unconstitutional and invalid and in breach of chapter III. I might be wrong, but you do not need a charter to protect that particular right because the Constitution itself has embedded within it that kind of protection. Similarly, you get a statute that can be read in several ways. Common law would say that you read the statute in the way that is most protective of individual rights and liberties.

At the margins, yes, the charter has had an effect. It would have a greater effect if one knew how to enforce the provisions—it did not have sections 38 and 39 in the language in which they are drafted, which nobody can understand. But I would not like to see a statute enacted that was a black-and-white statute that said, 'If there is a breach of the charter in any respect, for example, the evidence obtained in breach will be excluded.' I think that goes too far. That is the American exclusionary doctrine, which has caused so much trouble in that country.

Miss BARTON: I think it is the fruit of the stolen tree analogy, Judge.

Justice Weinberg: The fruit of the poison tree, not the stolen tree.

Miss BARTON: I knew what I meant; I just did not say it properly.

Justice Weinberg: No, I think I know what you mean. It goes too far. You do not have a uniform evidence act in Queensland, but under the provisions of the Evidence Act—section 138—we have reached a kind of compromise which says, 'If the accused can show that evidence has been unlawfully obtained'—and the onus rests on the accused to establish that—'then prima facie the evidence will not be admitted.' But it is a matter of discretion, a balancing exercise. I always think a balancing exercise is far better, because it is flexible and it allows the individual facts to be taken into account, than a black-and-white rule.

I think you should trust your judges a little more, if I may say so with great respect, than some legislators are prepared to do. We have had, at least at the higher levels of the court, 30 to 40 years of experience working in these areas. Generally, we certainly do our best to get it right and we do get very much concerned about legislation that is drafted in very prescriptive terms and allows us so little room for the exercise of discretion. The community has its protections. If a judge gets it wrong, there is an appeal available, so I just think a little bit of greater trust in the judiciary might not be amiss.

Miss BARTON: When you talked about prescriptive language, that triggered another question. You referred to opaque language being a problem in terms of interpretation.

Justice Weinberg: Yes.

Miss BARTON: I just wondered how that has really hindered the ability of courts to have appropriate discretion and whether too much time is spent considering what the charter means as opposed to considering the rights.

Justice Weinberg: Again, thank you for that very difficult question.

Miss BARTON: Sorry, it is not intentional.

Justice Weinberg: I would say this: have a look at the volume of statute law that now governs almost every aspect of our lives, including in particular, from my point of view, the operation of the trial system and the criminal justice system. When I started dealing in criminal law 45 years ago, we had a Crimes Act which ran for about 150 pages and that was about it. We now have, I would say, between 5,000 and 6,000 pages of legislation dealing just with criminal law and sentencing in my state. We have reached the point where the sheer volume of the material as well as the complexity of the drafting—and here I would have to say that the states do a far better job than does the federal government. Its statutes are drafted in a manner that is more incomprehensible quite often, and the states are generally better. Even so, drafting is the key part to the whole exercise. Parliament has to ensure that its statutes pass a readability test—that people can understand them applying ordinary common sense to the way in which statutes are drafted. All too often we are getting provisions, particularly in the criminal law, which changes about every six months, that are virtually impossible.

Just out of interest, have a look at the debate and the judgement of our court on the introduction of baseline sentencing, which, for the first time I think in any jurisdiction in the world, struck down a state statute because it was incomprehensible. I do not think that has ever happened anywhere before. This was a statute that was introduced that required the court to go through a mathematical exercise to work out what baseline sentencing amounted to and what baseline sentence was appropriate, but the courts were not given the necessary material to enable them to carry out that exercise. In other words, it just could not be done. The Court of Appeal in Victoria, for the first time I think anywhere in the world, said, 'This statute is bad, because it is meaningless and incomprehensible and unworkable.' If we are reaching that stage then things are pretty sad, it seems to me.

Miss BARTON: Thank you.

Mr KRAUSE: Putting aside the charter provisions—I take on board all of your comments about the common law having developed interpretative principles in relation to a fair trial and so forth—do you think there is any situation that could possibly arise in the future that the common law is not capable of dealing with or that these interpretative provisions are not capable of dealing with?

Justice Weinberg: Yes. One cannot anticipate what is going to happen. I think there is ultimately, as I say, a protection in the Constitution. When Kable was first decided by the High Court—some years ago now—we thought it was a one-off decision that would never be seen again. It is an unusual fact situation and we just thought it was an aberration. As you would be aware, because I think Queensland has had several statutes struck down by the High Court—I may be wrong; I may be conflating it with South Australia. You have had your bikie association legislation and so forth reviewed by the court. Some of it has been upheld; I think some of it was struck down.

Kable represents a line beyond which no parliament can go—no federal parliament, no state parliament—so there is an ultimate protection there. Some people would say that it is not an adequate protection, but I would like to think that, in every case where parliament passes laws that affect rights,

whether you have a provision that requires you to make a compliant statement and so forth or not, responsible legislators and people on committees such as yours would give very careful consideration to whether the particular statute goes too far. I know that politics enters into all of this and I know that some legislation meets the approval of the tabloids and so forth which, in my view at least, goes too far, but a balanced set of provisions where careful thought has been given to how far parliament ought to go will invariably produce the right result.

We see people debate the federal anti-terrorism legislation and so forth. Some people say that it goes too far. Some people say that it is entirely reasonable. There are limits within it and there are protections built into it. It does seem to me that there are some checks and balances within the existing system without necessarily being reliant upon a bill of rights, but I am not going to say that a bill of rights could not provide a useful additional protection in unforeseen circumstances.

CHAIR: Thank you so much for your time and assistance this morning.

Justice Weinberg: It is a great pleasure. Can I just make it clear that these views are my views and I am not speaking on behalf of the court, obviously, or my colleagues, many of whom will have views quite different from mine.

CHAIR: That is fine. Have a lovely day, and thanks again. Thank you.

Justice Weinberg: Thank you so much.

WILSON, Mr David, Clerk of the House of Representatives, Parliament of New Zealand, via teleconference

CHAIR: Good morning, David. We will run through some procedural matters and then we will have you provide a bit of an opening statement. We will then hand over to the committee for questions.

My name is Mark Furner, the chair of Legal Affairs and Community Safety Committee. Also with me is Mr Jon Krause, the deputy chair and member for Beaudesert; Miss Verity Barton, the member for Broadwater; Mrs Tarnya Smith, the member for Mount Ommaney; and Mr Chris Whiting, the member for Murrumba. Thank you for making yourself available. Would you like to make an opening statement?

Mr Wilson: Good morning everybody. Thank you for the opportunity to speak to you this morning on your inquiry. I had a look at the terms of reference and put together a few notes that I will speak to this morning. I am happy to answer your questions as we go along.

In terms of legislating for human rights in New Zealand there are two key statutes. There is the Bill of Rights Act, which sets out some fundamental rights and also provides the ability for our Attorney-General to report to parliament where a proposed piece of legislation infringes upon any of those rights. The second one is the Human Rights Act, which is primarily an anti-discrimination piece of legislation that also provides the ability for the Human Rights Commission to make declarations of inconsistency with that act. Those are two ordinary pieces of legislation in New Zealand. They are not entrenched in any way. In fact, in New Zealand the only piece of legislation with any kind of special protection or entrenchment is some provisions of our Electoral Act, which provides for three-year terms of parliament.

There are a number of places in New Zealand where there are requirements for consideration of human rights in the legislative process. The first is provisions in the cabinet manual for officials who are working on legislation for ministers. It requires that in their consultation and work on policy they take into account both the Bill of Rights Act and the Human Rights Act and then ultimately be in a position to report on compliance with those acts for any legislation that they work on. Those requirements are in the cabinet manual and are accepted as part of our constitutional framework. It does not have the force of law, but it is a pretty well accepted constitutional convention in New Zealand.

In terms of the legislative process itself, probably the most significant requirement is that in the Bill of Rights Act, as I mentioned before, the Attorney-General has the ability to report to the House on any piece of legislation where it appears that legislation is inconsistent with any of the rights and freedoms in the Bill of Rights Act. The Attorney-General does that as an independent law officer although he is as well a minister and a member of cabinet. The cabinet manual makes it clear that when he is making those judgements on inconsistency he does that as an independent law officer rather than as a member of cabinet.

The Attorney-General can make those reports to the House, and does so reasonable frequently. Once that is done it forms part of the debate on the first reading of the bill, before it is referred to a select committee. When the bill goes to the select committee, so does the report on the Bill of Rights Act. That is a new requirement. The select committee is required to report not only on the bill and any amendments it recommends to it but also on the findings of the Attorney-General.

The idea of that was really to ensure that select committees give some consideration to bill of rights and human rights issues and make sure they address them when they report to the House. One weakness of that approach, though, is that, although the bill as introduced has that vetting for bill of rights purposes, any amendments made by the select committee subsequently do not. It is possible that amendments that are inconsistent with those rights and freedoms are recommended and that is not necessarily picked up. That has been criticised both by the legal commentators and by the courts from time to time.

There is no ability in New Zealand for the courts to strike down a law. The closest to that is that the Human Rights Commission, that I mentioned before, is able to find that a piece of legislation is inconsistent or a provision in legislation is inconsistent with the Human Rights Act. In that case a minister is then required to present that finding to the House and also explain to the House what he or she will do to address the inconsistency.

The High Court has also determined that it has the right to declare that legislation is inconsistent with the Bills of Rights Act but that declaration does not affect the validity of legislation. The High Court did that for the first time quite recently in the case of Taylor v the Attorney-General, which covered the removal of the right to vote for all sentenced prisoners. The court found that that was inconsistent with the Bill of Rights Act. As I say, it did not have any ongoing affect in terms of the validity of the legislation.

The final thing I thought I would mention before I take any questions is that the adoption of human rights legislation in New Zealand, which explicitly applies to the House of Representatives as well as to agents in the executive, has led to some change in parliamentary procedures. One of them is the bill of rights vetting, which I have mentioned. Another one is that the House adopted quite a wide range of natural justice measures for select committees to ensure it was complying with the rights to natural justice and due process that are set out in the Bill of Rights Act.

It continues to think about these things as time goes on. One area around discrimination that the House has been looking at recently involves access for disabled people to parliamentary proceedings. There are a variety of initiatives going on in that area at the moment. It is something that the House bears in mind during its procedures and particularly its select committee procedures, because they are the ones where it is more likely to interact with members of the public and to potentially make findings that might be adverse to those people as well.

Those are the key points I wanted to raise. I would be happy to answer any questions you have or explain more fully any of the things I mentioned to you fairly quickly.

CHAIR: Thank you, Mr Wilson. I understand there are 13 select committees; is that correct?

Mr Wilson: That is right, yes.

CHAIR: So the Attorney-General would hand down a report on a particular bill before the House after its first reading. That report would then go to the relevant select committee and if that select committee—using this committee as an example, the Legal Affairs and Community Safety Committee deals with the portfolios of Attorney-General and Justice and Police, Fire, Emergency Services and Corrective Services—found a concern, consistent with some of the matters you expressed about dealing with prisoners' rights, it would be its task to examine the report from the Attorney-General under your model and then make recommendations back to the House for the further reading of that bill. What is the process in terms of the recommendations the committee makes being further scrutinised by the Attorney-General or otherwise?

Mr Wilson: You have summed up the process correctly. That is what happens at the moment. The committee would normally report the bill and its findings on the Attorney-General's report at the same time. Those two things do not have to go to the same committee, but in practice they always do. The amendments to the bill and any comments and findings in terms of the Attorney-General's findings would be debated at the same time in the House as part of consideration of the bill. If there were any further amendments to make to the bill as a result of that—assuming that the select committee had not made those or had not recommended them—that would be done in the Committee of the whole House stage, which follows the second reading of the bill.

There is a further ability for the House to react to and make amendments. What it lacks is any further analysis of any of the proposed amendments by the Attorney-General. It is not something that he is required to do or does do.

CHAIR: Do you believe that the model you have is effective? Would it not be the case that a committee would be better tasked with examining human rights overall rather than particular select committees having that task?

Mr Wilson: That issue has been raised a few times. I know that is a model that exists in quite a few jurisdictions. For quite some time we really have had a focus on every select committee, every subject committee, of which there are the 13 that you mentioned, taking responsibility for all matters within their portfolio, including human rights and bill of rights as it affects whatever their subject area is. That seems to be reasonably effective.

There have also been practical considerations in terms of the difficulties in creating a 14th committee and finding sufficient time for members to serve on that because, as you would appreciate, people are reasonably busy as it is. I think for pragmatic reasons and reasons of consistency with the model of select committees we have, the idea of a specialist human rights committee has not been pursued any further. What we have focused on instead is strengthening the scrutiny that select committees might do of rights issues. That is one of the reasons the Attorney-General's reports now go to committees.

Mr KRAUSE: Thank you for your contribution this morning. I wanted to ask about the case you spoke about concerning prisoners' voting rights. I was led to believe, based on some briefings we have had, that the Bill of Rights Act was not actionable by people in New Zealand—that is, they could not take court action based on it. I understand that you are with the parliament and not involved in the judicial system, but are you able to give any information about how it came to be that the court took on that matter, heard it and made that declaration?

Mr Wilson: I think your first statement has always been taken to be the case. There really was not an ability to challenge legislation before the courts. The case is an interesting one because Mr Taylor, who is one of the parties to it, is currently a serving prisoner. He has taken quite a lot of human rights cases focused on prisoners in particular.

In this case I really think the High Court took a fairly active role in itself and it decided that this was something it was competent to determine. It was the first time it had made that declaration of inconsistency with the Bill of Rights Act. I think it probably was a fortuitous alignment of views between Mr Taylor, who wanted to take the case, and the High Court that believed it did have jurisdiction, while recognising that it does not have the ability to overturn the law.

Mr KRAUSE: That is understood. I presume there would have been a section 7 report made in relation to this law, or was there not?

Mr Wilson: Yes, there was one made in relation to the bill that triggered this issue. One of the problems in that case was that the legislation was passed before Attorney-General reports are automatically referred to select committees. Although there was one and the committee could have picked it up and considered it, it did not do that. It did not in its report on the bill really go into the reasons for supporting the bill or that kind of balancing act between the guaranteed rights and freedoms and the public interest benefits in favour of restricting prisoners' voting rights. Some of the High Court's commentary was about the deficiency not of the consideration but an inability to understand the reasons for legislating.

Mr KRAUSE: Did the section 7 report acknowledge or state that there was a deficiency in terms of the Bill of Rights?

Mr Wilson: Yes, it did.

Mr KRAUSE: In a general sense, I suppose it is possible, now that that decision has been made by the High Court, to look at these things.

Mr Wilson: Yes, that is right.

Mr KRAUSE: Do you think it is possible that there could be a difference between the section 7 determination and a later view from the High Court about particular legislation?

Mr Wilson: I think it is possible that there could be. From memory, the decision in the Taylor case acknowledges that there was a section 7 report but it does not dissect it in any way. That report has been found previously by the High Court to be a parliamentary proceeding, although the requirement for it is in the statute. Courts have shied away from dissecting it in detail because they consider that to be parliament's role. I think it is possible that there could be a difference between them. In this case there was not. The Attorney-General found there was an inconsistency and the High Court thought the resulting act was inconsistent as well.

Mr KRAUSE: I have not read all of the Bill of Rights, but does it incorporate general anti-discrimination provisions as well? In Queensland we have a number of anti-discrimination provisions and at the Commonwealth level, too. Does the Bill of Rights deal with those issues?

Mr Wilson: The Bill of Rights in New Zealand sets out some fundamental rights. One of those is the right not to be discriminated against and in the grounds for unlawful discrimination set out in the Human Rights Act. The Bill of Rights Act cross-references the Human Rights Act, and that is where you will see the grounds under which you cannot discriminate against people.

Mr KRAUSE: A lot of our anti-discrimination law is contained in specific pieces of legislation which to some extent are actionable in the courts in Queensland and in Australia. I make the comparison by way of a statement that the Bill of Rights is not actionable in New Zealand on a prima facie basis but anti-discrimination law here in Queensland is. It is an interesting comparison. Thank you for your time.

Mr WHITING: Mr Wilson, thank you for your time today. Thank you also for outlining how the section 7 reports on matters dealing with human rights go to select committees instead of creating a specific 14th select committee to deal with those matters. One of the things I would like to hear about is your observations on how committees deal with these reports. Do they have sufficient time or expertise to consider these reports in regard to their human rights compatibility?

Mr Wilson: In terms of sufficient time, I think they certainly do. Almost all bills that are referred to select committees—and virtually every bill is—are sent to the committees for six months. Within that time, as well as doing other work at the same time, there is a reasonable possibility to deal with complicated legislation and rights issues that are associated with it. I am not sure that committees have found to date that there has been too much of a constraint on their time to be able to do it.

The issue of expertise may or may not reside in the committee. I think that is probably one of the stronger arguments in favour of human rights committees. You are likely to have a group of members who develop experience and expertise in the area. Some of our members will have that; others will not. We also provide specialist advice to committees. My own staff provide the first line of advice including advice from our legal staff if they want that, but there is a budget available for them to get a specialist human rights adviser or any other kind of adviser they would like. I do not think they have done so yet. The decision that members are being asked to make, although it has important implications, does not necessarily have to be a complicated legal decision. They are weighing certain public policy issues against the bill of rights against the public interest, and I think our members are pretty well equipped to do that.

Mr WHITING: Thank you.

Miss BARTON: Good afternoon, Mr Wilson. Thank you for making yourself available. I have a question with respect to the power to make section 7 declarations vest with the office of the Attorney-General as opposed to the individual. Based on your experience of working in a Westminster parliament and your appreciation of the Westminster system, is that the most effective avenue? Is the office of the Attorney, given that the Attorney-General sits within the cabinet and is a member of the executive, the most effective place to vest power?

Mr Wilson: It is a good question. The New Zealand system, not just in this area but in a variety of areas, often gets looked at quite critically in terms of the number of things that the executive is involved in in supporting the legislature. The other obvious one would be that in the consideration of legislation committees are assisted by government officials as well as parliamentary staff. In this instance I am not sure that there was ever a variety of different options considered apart from the Attorney-General. It has been a practice now since 1990 and it tends to work well. One of the things that helps is that the advice to the Attorney-General, who is the one who has to make the determination about whether there is inconsistency or not, is published so it is possible for anybody to see that advice. There are times when the Attorney-General might object to the advice. There are other times when he has accepted it. I suppose that provides a bit of discipline and opens it to some public scrutiny as well.

Miss BARTON: I am not sure of your background but I am making an assumption, given your role in the parliament, that you possibly have some legal training.

Mr Wilson: No, I do not.

Miss BARTON: In light of Taylor v Attorney-General, we spoke with the Attorney this morning and I understand there is still a question about whether or not it was an appropriate declaration to be made because it is a proceeding of the parliament. I wondered about the administrative law principles when a member of the executive and a member of the parliament are making the declaration. I appreciate that you might not be in a position to answer that question, but is that something that has been considered because there may be no effective opportunity for judicial review or consideration of whether or not there has been procedural fairness and the like?

Mr Wilson: You are certainly right. I think there would not be an opportunity for judicial review. One of the Attorney-General's reports in this area, I have to say, has been held to be solely a proceeding of parliament. To my knowledge there has not been any question of whether the office of the Attorney-General is the appropriate body to make that decision. I am not sure if that has ever arisen.

The other point was about the decision that the High Court made. We did look at that quite carefully, because ultimately it does involve a law passed by the parliament and there is a question as to what extent the court did consider or question the proceedings of the House. To a large degree it focused its attention on the outcome of those proceedings which was the piece of legislation, the finished act. There are places where it is does set up (inaudible) which were probably more on the margins, but I am not sure whether a strong case has been made that the High Court does not have the ability to look at a statute once it is passed (inaudible).

CHAIR: Mr Wilson, we are having broken language from the connection on your end. Is there any possibility of seeing whether there are any issues with the telecommunications?

Mr Wilson: I will have a look. I am using—

CHAIR: That is better.

Mr Wilson: I have just moved my mouthpiece a little closer to my mouth. That might have fixed it.

CHAIR: Please proceed, Miss Barton.

Miss BARTON: I am finished, thank you, Mr Chair.

CHAIR: Mr Wilson, thank you for your time this afternoon. We appreciate your input, involvement and experience in regard to what you have provided to the committee today.

Mr Wilson: You are most welcome. It was a pleasure to talk to you. If there is anything you think of later, your staff are welcome to get in touch with any questions, or if there is any documentation that you need I am happy to provide it.

CHAIR: We appreciate that. The committee will now adjourn for 30 minutes and reconvene at 11.15 to hear from the Department of Justice and Attorney-General regarding its inquiry into the Penalties and Sentencing (Queensland Sentencing Advisory Council) Amendment Bill 2015. After that briefing and a break we will return to the topic of human rights and hear from Professor Andrew Geddis at 12.30.

Proceedings suspended from 10.26 am to 12.30 pm

CHAIR: The committee is now reconvened to continue its hearing as part of its inquiry into a possible human rights act for Queensland. Our committee, the Legal Affairs and Community Safety Committee, is inquiring into whether it is appropriate and desirable to legislate for a human rights act in Queensland other than through a constitutionally entrenched model. The full terms of reference are available at the committee's web page and there are also copies available in this room.

My name is Mark Furner. I am chair of the committee and also the member for Ferny Grove. With me is Mr Jon Krause, the deputy chair and member for Beaudesert; Miss Verity Barton, the member for Broadwater; Mrs Tarnya Smith, the member for Mount Ommaney; and Mr Chris Whiting, the member for Murrumba. Two members of the committee are unavailable today and Chris is here filling the space for one of them, the member for Lytton, Ms Joan Pease.

The committee's proceedings are proceedings of the Queensland parliament and are subject to the standing rules and orders of the parliament. These proceedings are being recorded by Hansard and broadcast live on the parliamentary website. A transcript of these proceedings will be placed on the committee's web page as it becomes available.

GEDDIS, Professor Andrew, University of Otago, New Zealand, via videoconference

CHAIR: I welcome Professor Geddis from the University of Otago, New Zealand. Professor, thank you for putting aside the time to appear before the committee today and for your submission. I invite you to make an opening statement and then we will lead into questions after that. Thank you.

Prof. Geddis: Just as an initial statement, given the result of the Rugby match between our respective places over the weekend, I was thinking of refusing to testify.

CHAIR: We were not going to go there!

Prof. Geddis: But I put that aside and—

Miss BARTON: It was a great game to watch.

Prof. Geddis: It was a great game, yes, just not a great result. Anyway, congratulations.

CHAIR: Thank you.

Prof. Geddis: Thank you also for inviting me to spend some time with you today. I have provided a rather lengthy written submission, which I do not plan to speak to in any great detail. It is there for you to peruse at your leisure—or perhaps, more realistically, for the research folk of your committee to peruse as they see fit. What I plan to do today is to speak for a few moments, making some key points, and then answer any questions that you may have. I am also not going to presume to tell you whether you should adopt a written statutory model bill of rights. That, obviously, is a matter for the Queensland people to decide in a Queensland manner. What I intend to do instead is discuss how a similar model has worked in New Zealand since its adoption in 1990. Given that New Zealand is a similar legal, cultural and political place to Queensland, it may be of some use for you in deciding what to do but, as I say, in the end it is going to be your call what you need to do.

The first point that I would start with is that the primary focus of our Bill of Rights Act is on the executive branch as well as anyone else who is exercising a public function, power or duty. This focus is simply because of what the Bill of Rights Act is. It is an act of the New Zealand parliament, which means that actions by the executive branch, or other person who is exercising a public function, power or duty, who are in breach of the Bill of Rights Act are, for that reason alone, unlawful. They are in breach of an act of the New Zealand parliament, which just make them unlawful.

Consequently, by its mere existence the Bill of Rights Act imposes a disciplinary effect on the executive branch of government and others who are exercising public functions, powers or duties. It does so by giving the concept of individual rights and freedoms—those that are specifically recognised in the legislation—a positive legal foundation. You know that they are part of the law, because the act says they are. Then it imposes some genuine constraints on how those who are exercising public power may act to limit those rights. If they do so in ways that cannot be justified—there are insufficiently good reasons for imposing their rights limit—then their actions are unlawful and consequences may follow.

The Bill of Rights Act model has two flow-on effects that are worth emphasising. First of all, it inevitably leads to greater scope for judicial action. The courts become more involved in matters of public policy and the exercise of governmental functions than previously. That is the result of adopting such a model. However, the model still permits the executive, or other person exercising the public function, power or duty, to act in ways that limit rights, even in ways that a court may consider to be unjustified, as long as parliament positively authorises such limits.

I turn to consider how each of these points have then played out in New Zealand. First of all, there is the question of judicial activism or judicial restraint under our Bill of Rights Act. Bills of rights are only effective—they only have teeth—if there is some consequence for their breach. Otherwise they are just not worth the paper they are written on. Some of these consequences, or teeth, may be political or reputational in nature, as I will discuss when we look at the Bill of Rights Act and its impact on New Zealand's parliament. Simply being seen to be in breach of the Bill of Rights Act may be considered embarrassing or shameful and some political actors will seek to avoid doing so. However, political or reputational costs may not be enough to properly safeguard rights. There may not be enough to deter breaches of a Bill of Rights Act. Also, such costs may not help an individual who has been the subject of a rights-acting breach.

Some New Zealand courts have developed a range of remedies for breaches of the Bill of Rights Act, but—and this is a crucial point, I think—the courts at the same time have limited how and when such remedies will be used. The range of remedies stretch from the ordinary administrative law remedies that apply in all public law cases. For someone who exercises the public power and breaches the Bill of Rights Act, they have acted unlawfully and the courts may respond using the same sort of remedies that they would for any other unlawful act. For declarations that an unlawful act has taken place, injunctions—all of those sorts of remedies—are available in the Bill of Rights Act context.

There are, however, a range of specific remedies that apply to the Bill of Rights Act alone. Two of these remedies apply for breaches of the criminal law protections. The first is a so-called stay of proceedings. If there is a breach of the right to a fair trial or the right to a trial without undue delay, a court may choose to stay a prosecution, which is, in essence, the same as an acquittal. However, at the same time as this remedy has been created, the New Zealand Supreme Court has emphasised that it is a last-resort remedy that is to be applied only if there is significant fault on the state's part. Not any old delay in a trial or any restriction of the right will give rise to the remedy; it is the last thing for the courts to do only if all other remedies fail.

Equally, the courts have developed a remedy of exclusion of evidence. If evidence is collected in breach of the right against unreasonable search and seizure, it can be excluded from trial. The evidence is just thrown out. However, once again, the courts have developed a balancing test whereby the breach of the right is set alongside a range of other remedies before the decision is made on whether to exclude the evidence. New Zealand's parliament has chosen to uphold this approach by corresponding it in our Evidence Act 2005. In other words, the parliament has said, 'What the courts are doing here is fine by us. We will put it in our legislation to make it part of the law.'

The other remedy that has been developed in this area is damages for breaches of the Bill of Rights Act. If a person's rights under the Bill of Rights Act are limited in an unjustifiable fashion, the courts may award damages for that fact alone. It is a special, stand-alone public law remedy that applies only to breaches of the Bill of Rights Act. However, once again, our Supreme Court has emphasised that damages are not available as of right. There are a discretionary remedy. They are given only if there is no other remedy that will be available. They should be given only if necessary to vindicate a rights breach and that they should be modest in amount.

For a concrete example, the Supreme Court said that a prisoner who had been subject to two years and three months of very harsh treatment in breach of his rights under the Bill of Rights Act, including being left in solitary confinement, stripped naked as punishment, been forced to use a bucket for a toilet et cetera, should be given a total of NZ$35,000 and damages to vindicate that rights breach. That is the sort of upper end of damages that have been given under our Bill of Rights.

Another form of remedy that the courts can give is interpretation of competing statutes. As will be discussed further, parliament can legislate in ways that limit the Bill of Rights Act. Section 4 of our Bill of Rights Act makes that crystal clear. Parliament can even do so in ways that the courts may consider to be unjustifiable. If parliament wants to do that, it can do that. If parliament does so then the courts must apply the legislation as written. Any other statute takes priority over our Bill of Rights.

The question that arises, however, is: what does any given parliamentary enactment mean in any given situation? What do the words parliament has written actually require? Under section 6 of our Bill of Rights Act courts are told, where they can do so, to read other statutes in a way that is consistent with our Bill of Rights. That instruction gives the courts a role in trying to harmonise our statute books with the idea that all people have certain rights that should not be unjustifiably limited.

Once again, however, our Supreme Court has warned that this section 6 interpretative power cannot be abused by rewriting or remaking a statute. If parliament's intention is clear then the courts must do as parliament has written. Section 6 does not operate as a licence for the courts to operate as a kind of upper house that reworks statutes to produce what they see as being a rights-desirable

outcome. That is just not appropriate for New Zealand courts to do and New Zealand courts just do not do it. Under the Bill of Rights Act, courts can interpret only what parliament has said but cannot speak in parliament's place.

That said, the last remedy, which is an emerging one—it certainly still has not been put in place in New Zealand—are declarations of inconsistency if the fact that parliament's enactment, if clear, must be applied leads to the following possibility: a public actor may do something to a person and that person then complains to the court that their rights have been unjustifiably limited. The public actor, however, points to a piece of legislation and says, 'Look, the statutory provision lets me do this to the person.' The court looks at what was done to the person by the public actor and says, 'Yes, what was done is an unreasonable breach of their rights.' However, the court then looks at the legislation and says, 'The only way this legislation can be read is to authorise the rights breach.' That is what parliament intended to have happen. In such a case, the court cannot rewrite the legislation; nor can the court grant any other remedy to the person, because if parliament has said that the act was lawful then it is lawful.

However, last year a New Zealand court decided that it could still issue a so-called declaration of inconsistency—a formal message that the enactment, whilst still legally valid and still applies as law, is bad law because of its rights consequence. The practical effect of such a declaration is still unclear. It does not invalidate the law in question. That remains the law. It is up to parliament to respond to the declaration in any way it wants to, including by just ignoring it completely. I should note that the case that issued the declaration is currently on appeal. That Court of Appeal may undo it entirely anyway. However, it does lead to the third point that I want to discuss in brief which is the Bill of Rights Act and parliamentary supremacy.

Under our Bill of Rights Act, parliament remains able to make any law it wants to. Section 4 of our legislation makes that clear. If parliament wants to enact a law or if it has enacted a law in the past that imposes limits on rights, it can even do so in ways that a court or other outside observer may think is unjustified. If such a law is enacted in a clear and unambiguous way then, as discussed, the courts must apply it in that manner, irrespective of any rights consequence.

Our parliament remains completely sovereign in its law-making powers. However, back in 1990 when the Bill of Rights Act was first put in place, it was felt to be a good thing for parliament to at least be aware of the possible rights consequences of its legislation. Under our Bill of Rights Act all government legislation is vetted for Bill of Rights Act issues before cabinet makes the decision to put it into the House. Vetting simply means that government lawyers look at it and consider if there are any Bill of Rights Act implications to it. As a result of that vetting process, it is undoubted that some policy measures that previously were favoured get abandoned and the legislation does not include them. That is because governments, so I understand, are not made up of evil monsters. Governments do not just want to limit people's rights willy-nilly, so if governments can find another way to achieve a policy objective that does not have rights consequences they will try to do it.

However, if government really wants to put legislation into the House that has within it provisions that they have been told are inconsistent with the Bill of Rights Act, the government is completely free to do so. The government may simply disagree with the advice that is given. It may look at the issue and say, 'You're telling us that this is an unreasonable limit on rights, but we disagree. We think it's perfectly reasonable,' and government can decide that; or the government may consider the policy as simply so important that it has to be fought for and put in place irrespective of any rights consequences; or the government may simply figure that the legislation will be so popular with the voters that they are going to do it and to hell with rights. In such cases, the Attorney-General must issue a so-called section 7 notice. That is a formal bit of paper given to the House of Representatives telling the House that this bill it is going to consider contains provisions within it that limit rights and it gives the reasoning as to why that rights limit is considered unreasonable. It is then up to parliament what to do about that section 7 notice. It can do whatever it wants.

In practice, however, governments control a majority of the House. That is what makes them the government. The government has already decided to introduce the bill after being told that there are rights inconsistencies and it has decided to proceed anyway, so the government has a lot of political capital tied up in such legislation. In practice, of the 37 government bills that have attracted section 7 notices in New Zealand since 1990—that is more than 1½ a year—over 95 per cent have been enacted with the rights-inconsistent measure still in place because the government has already decided they want to do it, they know the consequence and they have the numbers. The point is that the New Zealand Bill of Rights Act has not hamstrung parliament's law-making powers. If parliament really wants to do something, irrespective of the Bill of Rights Act consequences, then it can and it regularly does do so. That is enough from me, so I would welcome any questions that you may have.

CHAIR: Thank you, Professor. I am mindful of the time. Unfortunately we have to wind up at one o'clock, so we will be short with our questions and I would appreciate if you can be prompt with your responses.

Prof. Geddis: Yes.

CHAIR: Based on your evidence about the remedy of damages—and you referred to a particular case of a prisoner who was sentenced for two years and three months, I think it was, and received a remedy of $35,000 in damages—can you expand as briefly as possible a little more on that particular case and, in doing so, indicate whether there are similar other cases that have delivered the same sort of damages outcome?

Prof. Geddis: Very briefly, the prison was running an unlawful behavioural management technique program whereby it is carrots and sticks: 'If you are a bad prisoner we do bad things to you; if you are a good prisoner you get benefits.' It was completely unlawful. It was also found to be in breach of various rights under the Bill of Rights Act because of the way in which the prisoner was being treated. It was treating him inhumanely. The prisoner went to the courts and said, 'I've had my rights breached. I'd like a remedy please.' The courts looked at it and said, 'We're not going to declare this to be an unlawful regime,' because everyone already admitted it was unlawful. The Crown said, 'Yes, we treated this guy lawfully,' so a declaration remedy would do him no use. The court said that the only thing it could do for this prisoner that will vindicate his rights—will actually recognise what has been done to him—is to give him money, for the state to pay him money to recognise the harm that has been done to his rights. That is what the Supreme Court ordered—$35,000 as payment because of the bad way the state treated him in breach of his rights.

However, there is then a follow-on. Parliament looked at this and parliament was horrified at the thought that prisoners might get comparatively large amounts of money given to them because of the way they were treated in prison. Parliament legislated to create a fund whereby any rights payments to prisoners first go into that fund and then victims of the prisoner have first call on the money. Parliament looked at what the courts had done and said, 'We're not entirely comfortable with the way in which the Bill of Rights Act is playing out here,' and parliament took its own action to not undo the court ruling but to modify it somewhat. There are two steps going on. First of all there is the court saying, 'We think we need to protect rights by giving damages,' and then there is parliament asking the societal-wide question: 'How comfortable are we with prisoners receiving these damages and maybe frittering them away before their victims have a chance to get hold of them?' Parliament then took that subsequent action to undo what it saw as a problem.

Mr KRAUSE: My question is also about the remedies that you spoke about and in particular that case you just spoke about. It is my understanding that when the Bill of Rights in New Zealand was first enacted it was enacted on the basis that the public would not have access to court remedies and compensation—that is, the Bill of Rights would not be actionable—but obviously that is not the case anymore. How has this come about? How have the parliament and the courts got to the situation where it is now actionable? Was there an amendment to the Bill of Rights or has it just been incremental? If you could elaborate on that that would be good.

Prof. Geddis: Sure. The Bill of Rights Act is actually completely silent as to what happens. The one thing it says you cannot do is strike legislation down. Section 4 says that you are not allowed to do that. It was then left up to the courts, in essence, to try to work out what this Bill of Rights Act does. One of the things the courts did—and this was pure judicial law making; I make no bones about it, because the courts did this off their own bat—was to say, 'If you've got this Bill of Rights that claims to guarantee and protect human rights, then it has to have teeth. It's got to have some consequences if those rights are breached. One of those consequences,' the court said, 'should be that if the only way to fix the rights breach is to give damages then we, the courts, take it on ourselves to make that remedy up,' and that is what the courts did. There is no getting around the fact that the damages remedy is pure judicial interpolation on top of the recent Bill of Rights Act. To defend the courts, all the courts were doing was saying, 'You guys, the parliament, said these rights really matter. If you really think they matter, you've got to expect something to happen if they're breached.'

The other thing you could say is that parliament is free to undo this. If parliament really does not like the idea of rights breaches giving rights to damages, you simply put a bit in the Bill of Rights Act to say that you are not allowed to give damages. Parliament has not chosen to do that. Instead, it has kind of gone around the back door through this prisoner compensation bill and said, 'Okay, you can give damages if you want, but if you give damages to prisoners we're going to make it really hard for them to get them because they'll go into this fund and their victims will get the damages instead.' There

is give and take here. Parliament creates the Bill of Rights Act. The courts react by saying, 'If you mean it, we're going to do this,' and then parliament responds by saying, 'We don't fully like what you're doing, so we'll do this instead.' That is kind of the interplay you see.

Mr WHITING: With regard to the public law remedies for breaches of the act, I note that proceedings would potentially be stayed if there was a significant delay to a trial. Do you think this has encouraged the courts to take action to avoid delay in going to trials?

Prof. Geddis: It has encouraged the prosecution to avoid delay wherever possible on the prosecution's part, because the remedy falls primarily on if there is a fault on the part of the prosecution bringing the case or some sort of prosecutorial error. If it is simply a matter that the courts are so overworked that they unavoidably have to keep putting things off and off and off, the Supreme Court has said that that is not enough to give rise to the remedy. In the case they said this in, there was something like a 4½-year delay between charges being filed and the court finally hearing the case, but the Supreme Court said that 4½-year delay was none of the prosecution's fault, that it was a whole lot of procedural matters that could not be avoided. You do not get the benefit of the remedy in that situation. The stay-of-proceedings remedy is aimed at the prosecution primarily.

Mr WHITING: I could certainly see that it would help perhaps encourage a higher level of prosecution to perhaps encourage those involved in the prosecution aspect to make sure they are doing everything they need to do.

Prof. Geddis: Yes, absolutely.

Miss BARTON: Professor Geddis, with respect specifically to administrative law and the access to judicial review, did you have any commentary around vesting the section 7 power in a member of the executive and that being a parliamentary process? I understand that Taylor v Attorney-General may be the subject of an appeal and whether or not the declaration actually has any real effective scope and what the outcome is going forward in terms of its tooth or consequence.

Prof. Geddis: If I might take that in two parts. The first issue is to do with the section 7 role of the Attorney-General which on occasion has raised questions because the problem is that the Attorney-General has to wear two hats. The Attorney-General puts on their hat as a minister of government and says, 'Yes, let's put this legislation into the House,' and then takes that off and puts on their hat as Attorney-General and says, 'This legislation is inconsistent with the Bill of Rights Act,' and questions as to the appropriateness of that have been raised. Our current Attorney-General, I have to say, is very good at doing this and there is not any question that they go soft on legislation. They really do look at it properly. I have no complaints about the partisan nature of this; it just seems strange that one person does two different things.

The courts have said that that section 7 process is completely outside their scope. They cannot look at all of the section 7 process. That is an internal working of parliament and only parliament can review that. The declaration of inconsistency is then a different matter where the courts have said, 'Irrespective of what the Attorney-General says to parliament, we the courts are speaking to a different audience. We speak to the people of New Zealand as a whole. If we look at a case and look at a piece of legislation and consider that the legislation imposes inconsistent limits on rights, we will tell the people of New Zealand that because the people of New Zealand deserve to know because it is then up to them to demand parliament do something about it or not.'

The High Court in Taylor believed that its role was significantly different to the Attorney-General because of the different audience for its message. Whether or not the declaration of inconsistency will have any practical effect is up in the air, because the Attorney-General has already told parliament this is inconsistent. Why should a High Court judge's view matter any different? But we have only had one of them. It was only issued a few months ago and it is still on appeal. That is an unwritten chapter that we still have to see.

Miss BARTON: Thank you.

Mrs SMITH: Professor, I asked the Attorney-General this question this morning and I would also be interested in your view. With regard to this particular piece of legislation, have you seen an increase, especially now that we are talking about the monetary compensation that is available or has now been handed down, of vexatious or frivolous claims by individuals that may see this as a way to make a few extra bucks?

Prof. Geddis: I see what you mean. I can say two things to that. I do not know is the short answer. I do not have any hard data. I cannot point to figures. People will try it on, but there are two aspects to the compensation that I would point out. First of all, it is discretionary. It is not like if you go into court and prove that you have had some minimal breach of your rights the court is then going to

pull out a chequebook and give you a cheque. The courts say, 'We only give this as a last resort because you really deserve it.' Secondly, to be honest, the amounts that are given in the usual rights breaches are just a few thousand dollars. It is just not worth it. It is not worth hiring a lawyer running a full judicial review case in order to get the few thousand dollars. If you are trying to make money out of it, it is just not going to work. People want it because it makes clear that the state has done them wrong. It is a tangible way of saying, 'Yes, we did wrong against you. We hurt your rights. Here's something that we can really say sorry with.' That, I think, is why most people run the argument.

CHAIR: Professor, unfortunately we have run out of time, but I thank you so much for your submission and also your appearance before the committee today on this matter. Thank you.

Prof. Geddis: Thank you.

CHAIR: I now declare closed the committee's public hearing on this inquiry into a possible human rights act in Queensland.

Committee adjourned at 1.01 pm