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SUPREME COURT OF QUEENSLAND

Gold Coast District Law Association Annual General Meeting
Friday, 19 June 2009 at 12.15 pm
"An Australian Bill of Rights"

The Hon Paul de Jersey AC
Chief Justice of Queensland

I am very pleased to be with you again. This is an annual event to which I look forward with great pleasure. I make use of the opportunity to compliment the Association on its work, in securing a degree of cohesion in the Gold Coast profession; I use the occasion to compliment you practitioners on your industrious application; and I have sometimes raised matters of particular relevance to practice in this region of the State. And now, as they say, something completely different ...

Ted Skuse invited me, nay asked me, to speak for a short while today on a subject of broad general interest, and that is, whether Australia should adopt a charter or bill of rights. I responded that I had to this point refrained from expressing my own position, but he suggested some may find it of interest. I believe I may do that without intruding into the realm of executive government. This is after all a large issue of general public interest, and significantly, the driver for those who promote or oppose a bill of rights, is in general not party-political.

My other hesitation in taking on this topic arose from the circumstance that probably everything which can be said on the topic has been said already. Nevertheless I will endeavour to articulate the reasons why I do not personally favour our adopting a bill of rights, in whatever form.

I have four principal reasons for not personally favouring a bill of rights.

The first is that a bill of rights would likely bring questions of high social and economic policy before the courts. The courts are not well-equipped to resolve such issues. Judges are not economists. They are not social scientists.

Second, the expression of the rights usually embodied in such instruments is necessarily rather general. Having judges interpret what they connote vests vast power in judges, and power which surpasses the normal judicial charter of delivering justice according to law, where that law is essentially concrete, black-letter law.

Third, there are, at present, adequate protections available under the common law, statute and the Constitution. Recall such statutory features as anti-discrimination and equal opportunity legislation, indeed the Criminal Code itself. Recall the evolving capacity of the common law, which rose to support native title through *Mabo v The Commonwealth*. Recall the presumptions which guide courts in construing legislation impinging on human rights, such as the presumption that the Parliament does not intend to invade fundamental rights, freedoms and immunities, or to restrict access to courts, or to exclude a right to claim self-incrimination, and so on. Recall the constitutional implications, as to freedom of political communication, and procedural fairness in the exercise of judicial power.

Fourth, it is questionable whether the necessary generality of a bill of rights is in the end helpful. Generality may lead to inconsistent and unpredictable applications. I offer examples drawn from the United States Bill of Rights. The fifth amendment, which forbids any State to "deprive any person of life, liberty or property without due process of law", has been interpreted to govern laws prohibiting abortion. The second amendment, which prevents Congress from making laws "abridging the freedom of speech or of the press", was held to justify the Supreme Court's determination of the question whether a student could be lawfully prevented from wearing braided long hair. It is unlikely the drafters envisaged recourse to the amendments to resolve disputes like those. By contrast, there is a host of legislation in Australia outlawing discrimination: as examples, the *Age Discrimination Act* 2004, the *Human Rights and Equal Opportunity Commission Act* 1986, the *Racial Discrimination Act* 1975, the *Sex Discrimination Act* 1984, and the *Disability Discrimination Act* 1992. It is the practical machinery set in place by those Acts which helps avoid discrimination and remedy its occurrence.

In my judicial role, in particular, I am concerned that a bill of rights would involve courts in matters of potential political controversy, and thereby subvert the courts' reputation for dispassionate determination; it would involve judges in determinations they are not well-equipped to make; and it would possibly diminish confidence in the courts, because of the transformation in their role from the strictly constitutional, the delivery of justice according to law, to small "p" political, with the determination of questions based on social policy, where the determination of what is best for the community is left to judges rather than parliaments.

Sir Gerard Brennan has pointed to the impact all of this would have on the judiciary: after all, "the very object of a bill of rights is to create a new role for the judiciary – by exercise of a new jurisdiction, the courts are to protect human rights and fundamental freedom." He added: "Over time, the function and significance of the third branch of Government will be substantially changed and the relationship between the courts and the political branches of Government will be altered." Before the Australian people made an informed decision they wanted a Bill of Rights, they would need to appreciate the likely shift in dynamics among the three branches of Government.

I am afraid it is not a shift I would welcome. Of course I appreciate the contrary arguments: the prime need to protect minority groups; that courts have a demonstrated capacity to confront difficult issues and do so well; that the present protections simply do not go far enough; and that there is no reason why we should not be keeping step with other nations.

But in the end I am driven by the importance of not blurring the judicial function. I believe the public has a clear expectation of its courts, and that is enshrined in the judicial charter of delivering justice according to law, not according to some idiosyncratic notion of justice, but according to law, where that law is relatively clearly ascertainable. The hallmarks of good judicial performance are predictability, certainty. Ideally, one should be able to determine in the solicitor's office what the result will be, given this particular factual scenario. Once the facts are determined, uncertainty of outcome is

simply incompatible with what the public expects in the discharge of the judicial function. By involving courts in the determination of matters of social and economic policy, in a matrix of high generality, would dramatically change what judges do and what may be expected of them.

In *Mistretta v United States*, in 1989, the Supreme Court of the United States referred to courts' "reputation for impartiality and non-partisanship", warning that that reputation "may not be borrowed by the political branches to cloak their work in the neutral colours of judicial action". I believe the public confidence in the judicial process, essential to its legitimacy, and so often and rightly said to be a fragile commodity, could be seriously harmed by the transformation in role which the involvement of judges in this work would entail.

Of course, judges will discharge this new role if it is committed to them, as judges do in the United Kingdom, Canada, Victoria and the ACT among a number of other places. But I would have serious reservation about whether that added commitment would, in the end, prove justified in the public interest.

For a conclusion, I cannot, with respect, improve on something published in yesterday's Australian newspaper, under the hand of the Hon John Hatzistergos, New South Wales Attorney-General, where he said:

> "Australia is a mature democracy with one of the most respected and incorruptible judiciaries in the world. Our judicial officers are almost entirely outside and above the world of politics, allowing them to retain their independence and impartiality and to be rewarded for their professionalism rather than party alignment. They justifiably want to preserve this. We have had the benefit of seeing the damage and politicization that a bill or charter of rights has effected on the judiciary in other Western democracies, and we should have the wisdom and determination to avoid this for our own country."