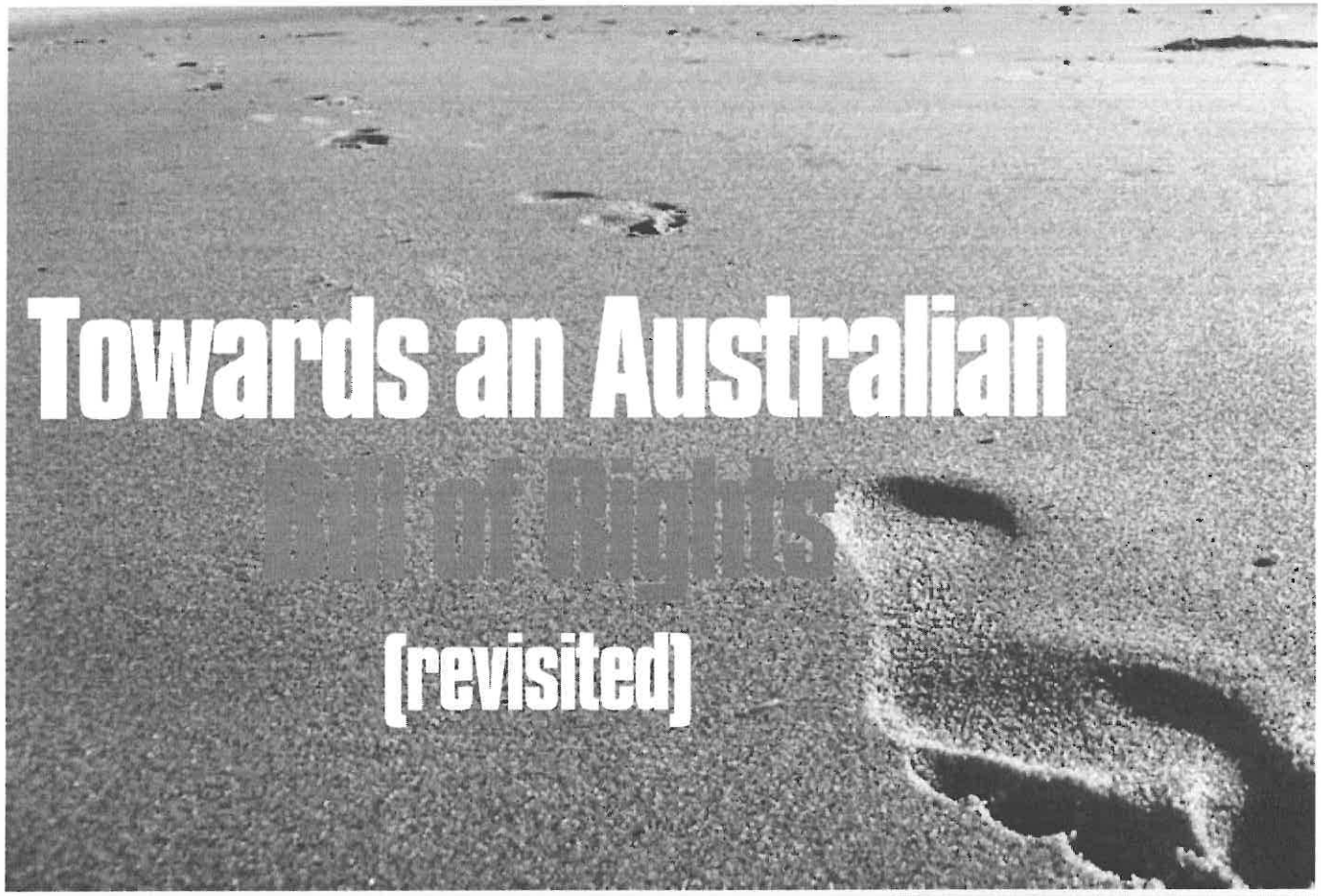
In June last year, Proctor visited the debate on an Australian Bill of Rights by inviting former federal Attorney-General Professor Michale Lavarch (in favour) and University of Queensland Garrick Professor of Law Professor James Allen (against) to argue their respective cases. The debate gathers pace in the broader community, and continues this year in Proctor, with human rights lawyer and former chair of Amnesty International (Australia) Russell Thirgood, *left*, taking the positive case against Queensland Chief Justice Paul de Jersey, *right*, arguing the negative.



Towards an Australian Bill of Rights [revisited]

AGAINST

This is an edited version of an address by Queensland Chief Justice Paul de Jersey to the annual general meeting of the Gold Coast District Law Association at Southport on June 19, 2009.

I have five principal reasons for not personally favouring a bill or charter of rights, as broadly mooted. The first is that a bill or charter 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 or charter 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.

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By Russell Thirgood

FOR

Much has been written and said about the virtues and dangers of a Human Rights Bill. At the heart of the argument against a Bill of Rights is the contention that such a document strikes at the very core of democracy in that it transfers power away from the majority. The fact, of course, is that there is no such thing as a "perfect" democracy.

A pure democracy is unattainable. We do not hold referendums on every matter of public policy ranging from the quantum of parking fines to whether or not our nation goes to war. Rather, we have a Platonic form of democracy where we elect a parliament and executive to enact laws and take action on our behalf for a certain period of time. The executive in turn appoints the third form of government, being the judiciary.

The judiciary is better equipped than the two other forms of government to dispense justice in an impartial manner, accordingly to law and the facts of a particular case. Judges are trained to make hard decisions and are appointed on the basis of their professional skill, personal integrity and wisdom. To ensure that the judiciary is independent from the day-to-day whims of party politics and media sound bites, we grant our judges tenure. Unlike MPs, judges do not have to seek re-employment every three or four years.

How can we learn from history so as to improve our form of government and particularly our shared humanity? The last three thousand years of human existence demonstrates time and time again that no person or state is incapable of evil and horrific violations of human rights.

'Mass murder century'

The century just gone was in some ways the "mass murder century". More than 50 million people were systematically killed by government order carried out by both soldiers and civilians. At the start of the century, Ottoman Turks slaughtered 1.5 million Armenians.

The mid-20th Century saw the Nazis exterminate at least six million Jews. And the century concluded with horror in Rwanda as the ruling Hutus proceeded to wipe-out the Tutsi minority.

These indescribable genocides were perpetrated against innocent minorities by the powerful majority. In a sense, they were an extreme expression of the unchecked will of the majority. How could it be that co-workers, neighbours and even friends could turn against each other in such a way?

Out of the ashes of Auschwitz came hope for a better world. Nations sought to restrain themselves so as to better the lives of their citizens and especially the most vulnerable of them. People of goodwill sought to put in place structures to ensure that human kind would not again descend into barbarity. Human rights instruments including the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights, the International Covenant on Economic, Social and Cultural Rights, the Convention against Torture and other treaties were created.

At the end of the 20th Century and the start of this century we have witnessed a further important advancement of human rights at the international level with the creation of the International Criminal Court. For the first time in history, the world has put in place an institution that can bring to justice the perpetrators of the most serious crimes against humanity.

Psychologists show that the world is filled with both good and evil, and that the barrier between the two is nebulous and permeable. Professor Philip Zimbardo's landmark study,

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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 or charter 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. This is my fifth ground of opposition.

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 on whether they wanted a bill of rights, they would need to appreciate the likely shift in dynamics among the three branches of Government.

Contrary arguments

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. 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.

'The Lucifer Effect – Understanding How Good People Turn Evil' explores the psychological dimensions and situational forces that lead ordinary people to do extraordinarily evil acts. It is a must-read for anyone striving to understand the cause of grave human rights abuses and ways in which they can be avoided.

In Professor Zimbardo's famous Stanford Prison experiment, ordinary American university students from good middle-class backgrounds were asked to assume the roles of prison guards and prisoners. Essentially, the experiment created an environment which led these otherwise normal students to perpetrate serious violations on their colleagues in a very short period of time. One group (the guards) was made more powerful than the other (prisoners) and their increasingly violent conduct towards the prisoners was encouraged by taking away systems of accountability.

Fortunately, our system of democracy is filled with checks and balances which quite rightly fetter the power of the majority and bring accountability to government. Judicial review of administrative decisions, freedom of information laws, anti-discrimination legislation and the Australian Human Rights Commission are all good examples of the way in which our institutions of government have improved. A Bill of Rights would be another reform of this tradition and would enable us to set out in one document all of the rights and freedoms that we as Australians believe are deserving of protection.

There are a number of models for a Bill of Rights (some of which are in operation) that we have the advantage of examining and potentially refining. We can adopt the strengths and avoid the weaknesses of those existing models to alleviate the concerns of those who are hesitant towards a Bill of Rights.

Level of discretion

The level of discretion afforded to the judiciary is ultimately a political decision for the people through parliament or referendum. As any practising lawyer knows, judges exercise discretion on a daily basis. Judicial discretion (as opposed to judicial activism) is not a novel, nor a controversial concept.

A few years ago I met a Chinese lady and her young daughter in the Baxter Detention Camp. The child had spent her entire life behind razor wire in the middle of the South Australian desert. Mandatory detention of "illegals", including children, was at that stage Australian government policy.

As I was talking to the mother I noticed the child drawing razor wire around each of the animals in her colouring-in book. This tragic example showed me that even in Australia there is a need for further checks and balances and for more restraint to be placed on politicians seeking political advantage by exciting majority opinion.

While Australia's democratic process has since overcome the policy of incarcerating children in the middle of the desert, there were many years when it was allowed to exist and lives were destroyed in the process. Our democracy has shown itself to have short-term "brain explosions" that have real and dire consequences on vulnerable people. We must continue to refine it and put in place systems and values that give minorities better protection.

A Bill of Rights will allow Australians to set up a framework which appeals to our better angels. It represents an opportunity for the citizens of a great nation to set out what we believe to be the fundamental rights of all of us. In that sense it would be a wonderful expression of our democracy.

Russell Thirgood, a partner at McCullough Roberston Lawyers, is chair of the QLS International Law and Relations Section. A noted human rights activist, he was chair of Amnesty International (Australia) from 2002 to 2006 and is currently a member of the Amnesty International Trust.