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Busting myths about the need for our own charter of rights

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A NEW orthodoxy is being promoted that Australia is in urgent need of a charter of rights. The argument has been mounted that, without a charter, human rights are vulnerable to abuse and Australia is in danger of falling out of step with other developed nations. This position is based on several myths that deserve interrogation.

The first is that human rights are inadequately protected under current arrangements. In fact, there are more important ways of safeguarding the rights of Australians than through a single human rights instrument. The most important of these are a system of checks and balances and the presence of strong institutions of governance.

Australia's legal and political structures — the separation of powers, democratic power sharing between the organs of government, the state and the commonwealth, and parliamentary accountability through bicameral systems — were all put in place over a hundred years ago at federation and have served the nation well since then.

The issues were debated at the constitutional convention and a deliberate decision was made to protect the rights of citizens through a robust institutional structure rather than through a bill of rights.

In all the subsequent referendums, the Australian people have rejected a bill of rights. The proponents of the charter of rights have recognised that attempts at constitutional amendment is hopeless and so they have changed their demands from a bill of rights to a statutory charter. But the weaknesses of a bill of rights are replicated in the charter proposals.

It is a myth that Australia's lack of a bill or charter sets it apart from other countries and makes it a pariah in the international community. Certainly Australia does not have a bill of rights like the one the Soviet Union had or Pakistan has, which enshrined the highest standards of human rights protection. They did not, however, prevent major human rights abuses from occurring.

Australia is also different from other countries with bills of rights, such as the US, France and South Africa. These nations all brought in rights instruments after long periods of civil war as a way of healing the deep rifts and restoring trust and the rule of law. We have been fortunately free of civil conflict and do not need to copy other countries who have.

Britain's Human Rights Act was also legislated in response to particular national circumstances. Following the growing influence of European human rights courts on British laws, the Government decided to create a Human Rights Act to give back power to interpret British laws to the British courts.

The British Lord Chancellor articulated this in a recent speech saying that without the act, "rather than seeking remedy in a British court, and heard by a British judge, the British people would have to look forward to joining the back of a very long queue of those waiting for justice in Strasbourg".

There is no comparable international court to which Australian laws are tied and therefore no need for a similar human rights instrument to keep Australian courts in control of our laws.

Another myth is that the enactment of a charter will lead to a range of social wrongs being righted through legal action. Litigation, in fact, is one of the least effective ways of combating social disadvantage.

Finally, a further myth is that a charter will be a simple educative tool that will help clarify the law and make Australians understand their legal rights. Unfortunately, what the charter will actually do is impose an additional layer of interpretation over all legislation.

In the leading British case on the interpretation of their Human Rights Act, Ghaidan v Godin-Mendoza, the House of Lords sets out this position: "Even if, construed according to the ordinary principles of interpretation, the meaning of the legislation admits of no doubt, (the Human Rights Act provisions) may nonetheless require the legislation to be given a different meaning ... (They) may require the court to depart from the intention of the parliament which enacted the legislation ... It is also apt to require a court to read in words which change the meaning of the legislation."

Under a charter, courts will interpret statutes in accordance with its terms, so it will become impossible for any member of the public to understand a law at face value. This will in fact distance Australians from the legal system further, and put an understanding of the laws that govern their lives out of their reach.

While keeping the public away from power, a charter will place greater authority in the hands of the judiciary. Judicial interpretation of legislation will be raised to a new level, and the power of elected parliaments to express their will through enacting legislation will be constrained. The judiciary is a specialised institution not suited to making political decisions, and does not have the democratic legitimacy to do so.

The separation of powers and the principle of parliamentary sovereignty have been fundamental to Australian democracy since federation, and any proposal that potentially threatens them deserves great scrutiny.

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