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Liberals aim to wedge Labor on bill of rights
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The ALP is divided on a charter that many think is unnecessary, and which unites the Opposition

THE dynamics of wedge politics eventually cut both ways. On Thursday George Brandis SC, plans to get some of his own back.

Labor, led by the lately fluorescent Paul Keating, used the republic to try to divide the Liberal Party, knowing that many in its more moderate wing favoured a split with the Crown. Indeed Malcolm Turnbull, the head of the Australian Republican Movement at the failed 1999 referendum, was the unwitting motif for Keating's more malevolent drivers: to bust the Liberal Party wide open. Turnbull was Keating's creation.

The parallel beckoning question today under the Rudd Government is the proposed adoption of a bill or charter of rights. This proposal offers up the same political territory for the Liberals that the republic posed for Keating. The issue has the potential to cleave Labor.

So on Thursday, shadow attorney-general Brandis will steal a divisive march on Kevin Rudd. In an address to the James Cook University law school in Townsville, Brandis will bring down the Coalition's final and considered position on a bill of rights. It will oppose.

The effect of this will be to automatically align the Liberal and National parties with leading Labor intellectuals, Bob Carr and former Labor staffer and now NSW Chief Justice James Spigelman, along with NSW Labor Attorney-General John Hatzistergos and many others within the ALP. Brandis, one of the Coalition's sharpest minds, knows what he's doing politically but he also knows why he's doing it constitutionally, as demonstrated by the first draft of his James Cook speech.

Brandis notes: ``Five days after last year's change of government, on November 29, 2007, the new Attorney-General Robert McClelland expressed his Government's support for the enactment of a statutory bill of rights.

``It is interesting that the Government has elected not to pursue a constitutionally entrenched bill of rights such as that in the US. I suspect the Government's reluctance to go down this path has more to do with the political reality of achieving constitutional change in Australia, rather than sound and considered constitutional policy on behalf of the federal Government.''

Brandis's challenge to Rudd is extant: ``What proponents of a bill or charter of rights in Australia have, to date, failed to establish, is why Australia needs a bill of rights? Given that our legal system, one way or another, already provides the full range of human rights, what is it about our current arrangements that requires us to restate those rights?

``In the view of the Opposition there is no case for the enactment of a bill or charter of rights in the absence of any demonstrated need for one. That view is not, as I have said, a partisan one.''

Brandis's primary argument is this: ``By enactment of a bill of rights which makes those rights as justiciable, the parliament is transferring the responsibility to define and give meaning to those abstract rights to un-elected judges, who are not best suited to exercising that discretion.''

Brandis cites Spigelman: ``Speaking extra-judicially, NSW Chief Justice Spigelman describes the `rights compliant' provision in the UK Human Rights Act as `a substantial change in the relationship between parliament and the judiciary'.

``He identifies a conundrum, whereby `the intention of parliament expressed in Section 3 of the Human Rights Act is applied to override the intention of parliament at the time that the other legislation, including subsequent legislation, is enacted. In substance, it constitutionalises the Human Rights Act.'''

Brandis continues: ``Parliaments are the proper institutions under our system to decide what rights should be further developed or qualified by competing interests.''

This is Carr's point as well. Responding to the recommendations of a parliamentary inquiry into a bill of rights for NSW, Carr said: ``Parliaments are elected to make laws. In doing so, they make judgments about how the rights and interests of the public should be balanced. Views will differ in any given case about whether the judgment is correct. However, if the decision in unacceptable, the community can make its views known at regular elections. This is our political tradition. A bill of rights would pose a fundamental shift in that tradition.''

Brandis also highlights the dangers of omission in any charter or bill of rights. ``Rights by their very nature are qualifications on power,'' he asserts. ``If we are to enumerate those abstract rights which we value today as the most popular or favourable, then what of the rights that exist but are omitted?

``If we are to reduce abstract ideas down to a series of short lines on the statute books, then we limit their meaning.''

Brandis also highlights the inevitable inconsistencies between state and federal rights charters, notably and presently the Victorian Charter and the ACT's Human Rights Act. The Victorian Charter states: ``Every person has a right to life and has the right not to be arbitrarily deprived of life.'' Whereas, the ACT Act states: ``Everyone has the right to life. In particular, no one may be deprived of life.'' The ACT Act goes on to qualify that statement by saying that: ``This section applies to a person from the time of birth.''

``What are judges to make from this inconsistent language?'' asks Brandis. ``Does an unborn baby fall within the definition of every person under the Victorian Charter? Does the ACT's Act, by expressly making the right contingent upon being born, deprive that soon-to-be-born child a right to life?''

Brandis also deals with the cultural argument; that other Western nations have bills of rights, why not Australia? ``The simplest rejoinder,'' he says, ``is that Australia does not have a bill of rights because it has never felt the need of one. That fact alone demonstrates the strength of our protection of rights and liberties, not its weakness.''

And this, surely the clincher: ``Where the public culture is inhospitable to the rights of the individual, no amount of grandiose language will change it, and bills of rights become meaningless constitutional baubles, as the Nazi bill of rights (which guaranteed ``the dignified existence of all people''), the Soviet constitution, and the bill of rights of modern Zimbabwe, chillingly attest.''

The Rudd Government dedicated $2.8 million in the past budget to ``undertake an Australia-wide inquiry to determine how best to recognise and protect human rights and responsibilities''.

Brandis and the Opposition have just determined that if the vehicle for these ambitions was a charter or bill of rights, then that ambition is dead.