

FEATURES

Hefty Bill to pay when wrongs become Rights

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20

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At first blush, the concept of a Bill of Rights has all the attractions of motherhood.

How could a document which codifies the responsibilities of the State to its citizens be anything but good?

But the more we are confronted by what supporters of a Bill of Rights want to achieve from one, the more the cause for alarm.

It should come as no surprise that such documents are generally pushed by those who come from the Left of politics - or by lawyers from all shades of ideology. Both seek to gain through such a move what they have been unable to attain through the political process.

The push for a Bill of Rights in Australia has a long history. It was purposefully omitted by our founding fathers who drew up the Federal Constitution. It was rejected by a Federal Parliament inquiry in 1929 and then again in 1959.

Referendums in 1942 and again in 1988 on making the States adhere to three human rights issues commonly embraced by a Bill of Rights were expressly rejected by the Australian public.

In fact, one of the prime supporters of WAs push towards a human rights Bill, former Supreme Court chief justice David Malcolm, noted in a speech on the matter back in 1998 that the most recent referendum attracted only 30 per cent support.

"This was the lowest Yes vote in any Commonwealth referendum to date," Mr Malcolm said.

He also pointed out that an Australian Bill of Rights Bill had been debated over two years in the Federal Parliament before being withdrawn by the Hawke government in 1986.

Which is not to say that a good ideas time doesnt arrive at some stage. But it does seem that every time this good idea is put before the Australian public it gets booted out.

It is no surprise that Attorney-General Jim McGinty is now running hard on a WA human rights Bill. Mr McGinty showed his priorities when he made gay law reform the first issue on his agenda on attaining government in 2001.

This latest attempt to impose on Australians what they have so stoutly rejected in the past should be seen as part of wider struggle between our political and judicial arms of government.

There has been a concerted and growing effort over the past decade for the courts to covet the powers of Parliament with our highest court falling captive to ideologically driven judicial activism. Lawyers have become a potent lobby to achieve something through the courts that was never intended in our system of government.

While this has been driven by a lack of confidence in the political process, there is little evidence that the people want to transfer their sympathies to judges. In fact, there is plenty of evidence that the courts do not reflect the will of the people in many instances.

A ready manifestation of this is the reliance on mandatory sentencing for certain crimes, made necessary by the refusal of many judges to interpret the criminal laws as the democratically elected parliaments wished. The more the parliaments have sought to achieve the type of sentencing the public demands, the more the courts have resisted.

Our democratic system was designed to create a tension between the courts and the parliaments. But this tension was always predicated on the superiority of the Parliament, something that now seems lost on the growing list of activist judges and their supporters in the legal fraternity.

If you want a precursor of what might occur in the courts when interpreting a Bill of Rights, just have a look at what happened to personal injury law in Australia.

Personal injury litigation became a cross between a lawyers picnic and a plaintiffs smorgasbord as dripping wet judges created multi-millionaires from people who sprained their ankles in a shire councils park. All rights, no responsibility.

Anyone who has had the misfortune to appear in any of the Human Rights and Equal Opportunities tribunals will know that the law becomes a shifting sand of ideological interpretation skewed to the interests of minority groups.

Mr Malcolm concedes that one of the arguments against a Bill of Rights is that it will confer too much power on the courts.

"When legislation such as the proposed Australian Bill of Rights gives very wide powers to courts to decide issues which may involve questions of social policy, the fear is expressed that results may differ according to the social or political philosophy of the judges that decide each case," the former chief justice said back in 1998.

"In these circumstances it is argued uncertainty and injustice may be introduced into the law. This seems to be the most fundamental argument against constitutional entrenchment of a Bill of Rights."

And it is the one that the supporters of WAs controversial new legislation most need to overcome.

Those driving the bus will also need to convince the people that the existing system is broken. That in itself will be a huge challenge. If they cant do that, they will at least have to show that a new system will be able to achieve what they want, rather than changes to the existing one.

In some ways the political process deserves this challenge because it has for so long been disconnected from the needs of the people.

This should be an opportunity for the Parliament to reassert its proper role, rather than hand over sections of its responsibilities to the undemocratic courts.

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