Look to past policies, not present, to gauge charter’s need

If the latest effort to enact a charter of rights for Australia fails, it will be in large part because the debate has focused on the wrong type of question. People have weighed in on whether Australia should do more to protect the rights of asylum seekers, terrorism suspects, same-sex couples wishing to marry, and so on. They have, in other words, looked at the case for or against a charter through the lens of current controversies about rights.

But this is a recipe for failure for the proponents of a charter. The problem is that when advocates for a charter point to a problematic present-day policy (let’s say, the treatment of asylum seekers), they are choosing to fight a battle on two fronts.

Their opponents on one front are all those who think that the policy is just fine. Chances are that this is a majority of voters, or close to it. If most Australians wanted more rights for asylum seekers, the government in power would have already made it happen.

On another front, they face opposition from people who accept that policy change is needed but believe that a charter is the wrong way to effect it, because it increases the power of unelected judges. Fighting on both of these fronts at the same time, the proponents of a charter are bound to be outnumbered.

In addition to being bad politics for charter proponents, a focus on current rights controversies is the wrong way in principle to approach the question of whether Australia needs a charter.

The premise of a charter is that popular majorities and their elected representatives can sometimes commit grave injustices, which some kind of judicial oversight can be useful in preventing.

When an entire society commits an injustice, it is not usually out of malevolence. To consider whether your institutions currently protect rights well enough. There could be a serious present injustice without you even recognising it. You must also look at your history.

Think about the stolen generations. At the time, most Australians thought removing Aboriginal children from their families was the right thing to do; that’s why it happened. Only later did they recognise that it was an appalling wrong to Aboriginal people that should never have happened.

The general point is this: to decide whether Australia needs a charter, it is not enough just to consider whether your institutions currently protect rights well enough. There could be a serious present injustice without you even recognising it. You must also look at your history.

For what it’s worth, historical assessment was a key part of the push for a charter of rights in Canada. By the 1970s, a consensus emerged that a variety of laws adopted earlier in the century had been appallingly unjust. Even worse, many of these laws had been popular at the time. We had our version of the White Australia policy. Other laws authorised the internment of Japanese-Canadians during World War II, sought to suppress the Jehovah’s Witnesses movement, or gave the government the power to “correct” inaccurate news reports.

The Canadian courts struck down some of the problematic laws using constitutional rules that had no obvious connection with individual rights. But other laws were upheld.

Later, Canadians drew two lessons from this. First, the courts could be of some use in defending rights. Second, they were hamstrung by the absence of a catalogue of legal rights.

It is for Australians to decide whether you have similar reasons to regret popular political decisions of the past. Assuming that you do, it is also relevant to consider whether the courts could have made a positive difference if there had been some mechanism for them to check those decisions against a charter of rights.

By contrast, it is not helpful to dwell on whether present-day policies — say, on same-sex marriage, or on the Northern Territory intervention, or on asylum seekers — strike the right balance between rights and other social interests.

Australians disagree about those issues, just as your country’s policies differ from my country’s. The future will judge our respective responses, just as today we are all in a better position to judge our past.

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