

Submission to Legal Affairs and Community Safety Committee
A Human Rights Act for Queensland

This is a joint submission made by members of the Public Law Research Group in the School of Law and Justice, University of Southern Queensland. We write in support of the proposal for a human rights act for Queensland. Many of the arguments to support the proposal already appear in the circulated document *A Human Rights Act for Queensland: A Discussion Paper*, prepared by Allens and the Human Rights Law Centre, so our comments here can be brief. In particular, we agree with the Discussion Paper's views as to the importance of an express human rights instrument in terms of developing a culture that embraces and respects human rights for all, and the valuable educative role of such a document, as well as an expression of who we are as Queenslanders, and what we value.

Australia is considered to be the only Western nation without an express human rights instrument. Obviously, comparable nations such as the United States, Canada and New Zealand have such an instrument, as does the United Kingdom, connected with its membership of the European Union. Australia was one of the first signatories to the *International Covenant on Civil and Political Rights*. The Australian *Constitution* contains a small number of scattered human rights throughout the document. They have been interpreted very narrowly. Our founding fathers were in the thrall of principles of parliamentary sovereignty, though it is difficult to apply that notion in a country with a written *Constitution* and judicial review, such as Australia, and the High Court has recognised it is not applicable in Australia (*Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520, 564: 'The *Constitution* displaced, or rendered inapplicable, the English common law doctrine of the general competence and unqualified supremacy of the legislature' (Brennan CJ Dawson Toohey Gaudron McHugh Gummow and Kirby JJ)).

Two sub-national jurisdictions in Australia, Victoria and the ACT, have enacted human rights instruments. The High Court has clarified the constitutional validity of such instruments (*Momcilovic v The Queen* (2011) 245 CLR 1). The absence of an upper house in Queensland and the move to four year terms perhaps sharpens the argument for express rights protection even further, given that elsewhere, an upper house can provide a brake on legislative overreach. Further, the separation of powers is not as strong here as it might be.

Despite the *Legislative Standards Act 1992* (Qld), which sought to address human rights protection in a limited way, clearly the Queensland Parliament in various sittings has passed laws that are highly invasive of human rights. One of the most egregious examples was the suite of legislation passed by the Parliament late at night in October 2013 with minimal consultation and with great urgency, to deal with a supposed community safety issue associated with particular groups, in particular some motorcycle groups. (Hereafter, 'the

VLAD legislation'). We should clarify, if relevant, that none of us is a member of any motorcycle club.

However, many legal scholars have grave concerns with the VLAD legislation from a human rights point of view. In particular, the threat of arbitrary sentencing practices, because the legislation left courts with no discretion other than to impose minimum 15 or 25 year jail terms for what could be, in relative terms, quite minor offences. Further, the legislation simply declared 26 organisations to be criminal organisations, with no apparent consultation, natural justice for those affected, or published reason. This was in sharp contrast with the *Criminal Organisation Act 2009* (Qld) which, though it may have been the subject of other criticism, properly (in our view) left the court with a discretion as to whether or not to make such an order. Further, the VLAD legislation criminalises mere acts of association, something which is on one view abhorrent in a society that values fundamental human rights like freedom of association. The VLAD legislation also contains reverse onus provisions and provided for compulsory questioning, again elements which fly in the face of ancient, fundamental human rights freedoms like due process, fair trial, open courts, the right to know and respond to specific allegations (including natural justice), the presumption of innocence and the right to silence.

Clearly, a test of society's commitment to human rights and civil liberties is whether we apply them to everyone. Importantly, human rights are not just for the people we like, or of whose conduct we approve. It is when we are faced with serious threats to public safety that our commitment to cherished human rights, and the rule of law, not men (or women), fought for over many centuries in the United Kingdom, is shown.

Visionary politicians elsewhere, such as James Madison and other founding fathers in America, and Pierre Trudeau in Canada, have recognised the importance of protecting fundamental human rights from the inevitable pressures on the legislature and executive to pass laws which trample upon such rights. We ask the current Queensland Parliament to do the same.

We support a human rights model that is broadly similar to those currently operating in another state and another territory in Australia. Specifically, we support a model which would require a court to interpret Queensland statutes, if possible, in a manner consistent with human rights enshrined in a new Queensland bill. This would be an improvement on the current protection of the *Legislative Standards Act 1992* (Qld) and common law principles of interpretation, including the principle of legality. The human rights to be enshrined in the Queensland human rights act would, like the models in Victoria and the ACT, be drawn from human rights instruments, such as the *International Covenant on Civil and Political Rights*, *Canadian Charter of Rights and Freedoms*, and *European Convention on Human Rights*. Some of us also support consideration of the inclusion of freedoms contained in the *International Covenant on Economic, Social and Cultural Rights*, including the right to education enshrined in the *Human Rights Act 2004* (ACT).

In an ideal world, we would welcome a power for the Queensland courts to strike out as unconstitutional a law that was inconsistent with the contents of the human rights act. Obviously, this is what occurs in places such as the United States. A law inconsistent with human rights enshrined in the Australian *Constitution* is similarly constitutionally invalid here. We recognise that this is beyond what the current Victorian and ACT models deliver. Accordingly, we would recommend a power for the Queensland courts to strike down such laws as invalid, but if this is not on the legislative agenda, we would support courts being given the power to make a declaration of incompatibility, and require the legislature to respond.

Given the importance of human rights protection, and the apparent opposition of some political parties to the notion of statutory protection of rights, we would recommend that the new human rights legislation contain a double entrenchment provision, making its future repeal or amendment more difficult.

In addition, we support the inclusion of provisions governing the application of human rights in Queensland similar to those in Part 3 of the Victorian *Charter of Human Rights and Responsibilities Act 2006* (Vic). In our opinion, such provisions would strengthen human rights protections by requiring legislative scrutiny, statutory interpretation and compatible conduct by public authorities. The provisions would also encourage 'dialogue' between the different arms of government.

We would also support individuals who are aggrieved by a breach of their human rights being able to seek financial compensation for such breach in the courts, in addition to other remedies. We agree that the human rights legislation should bind, at the minimum, the legislature, executive and judiciary in Queensland. A human rights act would inform everyday Queenslanders, as well as inform and remind those with power to make and shape the law, of their legal rights and responsibilities, creating a culture of respect and understanding for human rights.

We thank you for the opportunity to provide input as to this possible exciting development in Queensland's governance. Please contact us if you require any further information from us:

[REDACTED]

Regards Anthony

Professor Anthony Gray, Associate Professor Pauline Collins, Dr Nicky Jones, Dr Jeremy Patrick

USQ School of Law and Justice

Public Law Research Group