

18 April 2016
The Research Director
Legal Affairs and Community Safety Committee
Parliament House
Brisbane QLD 4000
Dear Research Director

Craig N Burgess
[REDACTED]
[REDACTED]

I thank you for the opportunity to make a submission to this inquiry. My view is that Queensland should enact a human rights act.

Introduction

The debate about a human rights act is not about whether human rights are important, that is generally agreed, it is more about whether we should protect them by law.

A human rights act would make it more difficult for parliament to make laws that are unjust, or offend basic values. The High Court has said that Parliament can still do so if it wants, but it must say so plainly that it is intending to infringe fundamental human rights.¹

As noted human rights lawyer Julian Burnside has written: “It is important to recognise that, unless a right is recognised by parliament and enforceable by the courts it is not a right at all, just a good idea”.²

The isolation of Australia on this issue

Australia is now one of the few countries that do not have a Bill of Rights. Many countries with similar traditions to Australia have enacted a Bill of Rights. The United States enacted a Bill of Rights in 1791, Canada has had a Charter of Rights and Freedoms since 1982, New Zealand since 1990, South Africa since 1997 and the UK since 1982.³

Victoria was the first Australian state to have enacted a Bill of Rights and it remains the only state at this point to do so.⁴ By following Victoria and the ACT, Queensland could exert pressure on other states to follow suit and eventually maybe the federal government.

¹ *Al-Kateb v Godwin* (2004) HCA 37 para 19 per Gleeson CJ.

² Julian Burnside, ‘We need a charter of rights’, *Sydney Morning Herald*, September 10, 2009.

³ George Williams, ‘The Case for an Australian Bill of Rights; Freedom in the War on Terror’, (UNSW Press, 2004).

⁴ The ACT enacted its own Bill of Rights in 2004, the *Human Rights Act 2004*(ACT)

What can a human rights act achieve?

It should be acknowledged that a human rights act is not a universal panacea and in countries without a commitment to the rule of law, it is readily conceded they are often nothing more than window dressing. Also, in such countries, any rights that are conferred are usually not justiciable.

Examples of such countries are often used by critics as an argument against the adoption of a human rights act or Bill of Rights but this is a false comparison because these countries do not have a reliable legal system with independent judges as those in the USA, Canada, UK, New Zealand and South Africa. In these countries the existence of a Bill of Rights provides real protections to individuals and minority groups.

As Justice Atkinson has said there is a compelling argument that the statutory protection of human rights capable of being enforced in the courts is not only consistent with the democratic society we value, but should in fact strengthen democracy through the different and complimentary roles played by the different arms of government.⁵

Protection of minority rights

While democracy has many virtues it is important that democratic systems provide for the rights of minorities. The whole point of human rights is that they serve to protect people from the 'tyranny of the majority' otherwise there is a danger that minority rights will be overridden upon the basis that the Government is legislating in accordance with the wishes of the majority of the people.

A good example was the unlamented mandatory sentencing laws (which had a particular effect on children) introduced into the Northern Territory 16 years ago during the premiership of Denis Burke. Burke claimed the laws were very popular with the majority of voters and argued a by-election shortly after the laws were introduced that returned a government member was a demonstration of their popularity.

⁵ Justice Roslyn Atkinson, 'A Charter of Rights and Responsibilities: Who decides'?(Speech delivered at a forum on Human Rights in Queensland, held in the Red Chamber, Queensland Parliament House, 10 February 2009).

In addressing this point Professor Hilary Charlesworth commented from a human rights perspective public policy cannot be driven by political popularity alone or on purely utilitarian grounds.⁶

“The very essence of the idea of human rights is to protect vulnerable groups from the will of the majority. Political majorities often act with short term vision and are willing to sacrifice the concerns of the minorities”.⁷

Presciently the former Chief Justice of Western Australia, David Malcolm wrote in a 1998 article supporting the need for the introduction of a Bill of Rights:

“It is sometimes said that Parliament is the great bastion of our liberties. However, a government wishing to be seen as doing something decisive when confronted with a problem that is inconveniencing many people or causing public pressure for a response can and will infringe fundamental rights and freedoms for all”.

It is a pity his advice was not heeded by the Newman government when in it could have been spared the embarrassment of its introduction of the unworkable VLAD laws that are now the subject of review.⁸ We can only hope the present government reflects on Justice Malcolm’s advice when drawing up new laws relating to outlaw motorcycle gangs.

Reasonable limits upon human rights

It is however, also important to balance the power of courts and parliament in dealing with human rights. To ensure that the protection of rights is not reposed only in the courts there should be important safeguards within any human rights act enacted in Queensland.

A general limitation clause found in s 7 of the *Charter of Human Rights and Responsibilities Act 2006* (Vic) and s 28 of the *Human Rights Act 2004* (ACT) would seem appropriate.

Section 7(2) of the Victorian Charter is modelled upon similar provisions contained within various statutes from other jurisdictions that are intended to protect human rights. It reads as follows:

7. Human rights-what they are and when they may be limited

⁶ Hilary Charlesworth, ‘The UN and Mandatory Sentencing’, *Australian Children’s Rights News*(No 25) (2000)

⁷ Ibid.

⁸ Alan Wilson SC, ‘Review of the *Criminal Organisation Act 2009*’ Department of Justice and Attorney-General, 15 December 2015.

...

(2) A human right may be subject under law only to such reasonable limits as can be demonstrably justified in a free and democratic society based on human dignity, equality and freedom, and taking into account all relevant factors including –

(a) the nature of the right; and

(b) the importance of the purpose of the limitation; and

(c) the nature and extent of the limitation; and

(d) the relationship between the limitation and its purpose; and

(e) any less restrictive means reasonably able to achieve the purpose that the limitation seeks to achieve.

The installation of such a clause in any proposed Queensland human rights act may nullify criticisms that the legislation would result in a “lawyer’s picnic”.

According to a number of interested parties, since its enactment, the Victorian Charter has not only ensured more equitable outcomes for many Victorians whose rights have been violated it has also debunked many of the myths supported by opponents of human rights legislation.⁹

Which additional rights should the human rights act protect?

The Committee, I assume, will have the Victorian and ACT Charters and their particulars before them. Therefore, I shall not reiterate them but instead briefly highlight ways in which I submit a Queensland human rights act could improve on the existing legislation by special provisions relating to Queensland’s Indigenous peoples.

Despite the Commonwealth’s power to legislate with respect to Aboriginal issues, many issues affecting the rights of Aboriginal people are legitimately the subject of State based legislation and administration. For example, native title, while recognised and protected under federal legislation is generally administered over State Crown lands and waters.

In my submission the relevance of the proposed Queensland human rights act would be enhanced by the inclusion of the following additional rights.

⁹ Castan Centre for Human Rights Law, submission to the Scrutiny of Acts and Regulations Committee of the Victorian Parliament Inquiry into the *Charter of Human Rights and Responsibilities Act 2006*, 12 July 2011.

- (a) The right to self-determination;
- (b) The right of Indigenous people to maintain and strengthen their distinctive spiritual relationship with their traditionally owned or occupied lands, territories, waters and coastal seas and other resources and to uphold their responsibilities to future generations;
- (c) The right to non-discrimination on the basis of race;
- (d) The right to access adequate standards of education;
- (e) The right to access adequate housing; and
- (f) The right to an adequate standard of living, including access to adequate food and sufficient, safe, accessible and affordable water.

The recent joint management between the Yorta Yorta peoples and the State of Victoria highlights the progress that can be made in this regard.¹⁰

Yours faithfully,

Craig N. Burgess

¹⁰Arnold Bloch Leibler submission to the Scrutiny of Acts and Regulations Committee of the Victorian Parliament Inquiry into the *Charter of Human Rights and Responsibilities Act 2006*, 12 July 2011. ABL have represented Yorta Yorta more than 20 years.