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PATHOLOGIES IN QUEENSLAND LAW-MAKING: REPAIRING POLITICAL CONSTITUTIONALISM

WILLIAM ISDALE AND DR GRAEME ORR*

Law-making in Queensland has suffered decades of ongoing pathologies. Such institutional infirmity is a product of a shallow political constitutionalism which trusts an all-mighty executive to dominate a unicameral legislature composed by winner-takes-all elections. The present essay charts recent examples of legislation trammeling due process and equality rights and interests in both criminal and public law. It concludes by exploring reform options to reinvigorate parliamentary oversight and deliberation via a proportionally elected upper or lower house.

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* William Isdale is a law student (University of Queensland), and visitor at Oxford Uehiro Centre of Practical Ethics (Oxford University). Dr Graeme Orr is a Professor of Law (University of Queensland) and author of *The Law of Politics*.

I INTRODUCTION

For decades Queensland has had the most executive-dominated government in Australia. Lacking the scrutiny of an upper house, absent judicial review under a Bill of Rights, and with a voting system that tends to deliver large parliamentary majorities, legislation is frequently railroaded by the Premier and Cabinet with little serious debate or reflection. A weak parliamentary committee system — sometimes overridden when inconvenient (for instance in 2009 in relation to the controversial sale of major government assets) — does little to ameliorate matters.¹ Strong party discipline stifles internal dissent, and a concentrated media with little appetite for balanced reflection on state issues compounds the problem. This ‘Queensland sickness’ manifests itself in poorly conceived laws,² in which the interests and rights of minority groups and voices are particularly susceptible to short-term political manipulation. The absence of effective oversight has also resulted in serious corruption on more than one occasion. Most obviously, corruption thrived under the premiership of Joh Bjelke-Petersen, leading to the Fitzgerald Inquiry.³

Despite the persistence of the Queensland sickness, no government to date has been willing to administer serious antidotes. The Commission of Inquiry Report into Possible Illegal Activities and Associated Police Misconduct (*‘Fitzgerald Report’*) provided a useful blueprint for reform,⁴ especially of administrative law and electoral boundaries,⁵ but its brief never extended to reforming the structure of parliament and legislative power, and its lessons have been forgotten with time. This tempts fate by vesting unrestrained power in the hands of a select few and expecting them to always use it wisely.

¹ *Infrastructure Investment (Asset Restructuring and Disposal) Bill 2009* (Qld). For discussion and further examples of legislation deemed “urgent” to avoid committee scrutiny, see Mary Westcott, ‘Scrutiny of Legislation in Queensland’ (2009), *Association of Clerks-at-the-Table*, <[http://www.anzacatt.org.au/prod/anzacatt/anzacatt.nsf/0/CC6675AF0FE9FB46CA25782200831C73/\\$file/Mary%20Westcott-Scrutiny%20of%20Legislation%20in%20Queensland.doc](http://www.anzacatt.org.au/prod/anzacatt/anzacatt.nsf/0/CC6675AF0FE9FB46CA25782200831C73/$file/Mary%20Westcott-Scrutiny%20of%20Legislation%20in%20Queensland.doc)>.

² We take this phrase from a talk by Stephen Keim SC, ‘The VLAD Act in Queensland: Unjust and Counterproductive’ (delivered at the University of Queensland Justice and the Law Society Breakfast, 25 October 2013).

³ See the symposium on ‘The Fitzgerald Report: Twenty Years On’ (2009) 18(3) *Griffith Law Review*, 531.

⁴ Tony Fitzgerald, *Commission of Inquiry Report into Possible Illegal Activities and Associated Police Misconduct* (1989).

⁵ On the latter, see Graeme Orr and Ron Levy, ‘Electoral Malapportionment: Partisanship, Rhetoric and Reform in the Shadow of the Agrarian Strongman’ (2010) 18(3) *Griffith Law Review* 638.

'Political constitutionalism' is the idea that power should be held to account through political processes and institutions rather than legal ones.⁶ The Queensland model trusts all to a shallow political constitutionalism: one that pretends that voting once every three years is a sufficient form of democratic accountability and which is dominated by two institutionally entrenched political parties.⁷ The problem, at root, however is not our politicians — it is the infirm institutional structure in which they operate. The Queensland malaise will continue to recur, under governments of whatever political stripe, until the underlying problem is addressed.

Here we examine recent Queensland laws in two spheres: criminal law and the law of politics. (Other domains could be chosen, eg industrial law and discrimination law, but in the interests of space we focus on two of the most salient and topical areas). The criminal laws address 'outlaw motorcycle gangs' (the application of which extend far beyond this group alone) and sex offenders. The political laws target the political speech of unions and the capacity of minor parties and independents to electioneer. We outline some general problems with these laws in relation to basic principles such as due process, freedom of association and political equality, and then discuss the defectiveness of Queensland's governance structures and some ideas for reform. We add our voice to the ongoing calls for the reintroduction of an upper house, or for a voting system that provides more diverse representation in the existing chamber. Our claim is not that such pathologies are completely absent elsewhere where executive power is not subject to sufficient checks.⁸ Anti-bikie laws of various sorts are in place in much of Australia.⁹ Rather it is that Queensland's one-dimensional political constitutionalism is both qualitatively different even amongst modern Westminster systems and a source of significant problems.

⁶ Graham Gee and Grégoire Webber, 'What is a Political Constitution?' (2010) 30 *Oxford Journal of Legal Studies* 273, 273.

⁷ cf Marco Goldini, 'Two Internal Critiques of Political Constitutionalism' (2012) 10 *International Journal of Constitutional Law* 926.

⁸ See, eg, Stuart Weir and David Beetham, *Political Power and Democratic Control in Britain: the Executive, Parliament and the Rule of Law in Britain* (Routledge, 1999), 359.

⁹ See Lynsey Blayden, 'Anti-Gang Laws in Australia', *New South Wales Parliamentary Library Issues Backgrounder*, No 5, December 2013, 3.

II EXAMPLES OF LEGISLATIVE EXCESS: CRIMINAL LAW

In the second half of 2013 a swathe of legislation was rushed through Parliament in response to two events: firstly, a motorcycle gang brawl on the Gold Coast followed by an attempted raid of a police station;¹⁰ secondly, the impending release of repeat sex-offender Robert Fardon from detention after the Supreme Court of Queensland found that he no longer represented a serious enough risk to continue to be detained under existing legislation.¹¹ Some of this legislation built on existing punitive measures enacted by previous administrations (our claim is not that the pathologies we describe are limited to one administration or governing party). The criminal association legislation remains on the books; the sexual-offender amendments, which permitted the Attorney-General in effect to appeal to himself to override the Supreme Court, were found unconstitutional by the Queensland Court of Appeal.¹² The passage of both sets of laws is troubling, but we focus here on the criminal association laws.

The key piece of legislation enacted in response to the perceived motorcycle gang threat was the *Vicious Lawless Association Disestablishment Act* (the 'VLAD Act').¹³ Notably, this Act mandates that a sentencing court add significant periods of incarceration on top of a base sentence where an offender is a 'participant' in an 'association' and commits a 'declared offence' as part of that association.¹⁴ The definitions provided by the legislation are broad and are not limited to outlawed motorcycle gangs; the definition of 'association' includes any group of three or more persons, 'whether associated formally or informally and whether the group is legal or illegal'.¹⁵ Nor is the term 'vicious' anything more than window dressing: people consorting for purposes as simple as buying a small amount of marijuana are even caught by these provisions.¹⁶ The list of 'declared offences' for the purposes of the Act can be extended by ministerial regulation.¹⁷ The onus of proof was also reversed for bail hearings involving people

¹⁰ ABC News, '18 Charged after Biker Gang Brawls on Gold Coast', *ABC News* (online), 28 September 2013 <<http://www.abc.net.au/news/2013-09-28/bikie-gang-brawl-gold-coast-arrests/4986714>>.

¹¹ *Attorney-General (Qld) v Fardon* [2013] QSC 264.

¹² *Attorney-General (Qld) v Lawrence* [2013] QCA 364.

¹³ 2013 (Qld).

¹⁴ *Ibid* ss 3–5.

¹⁵ *Ibid* s 3.

¹⁶ *Ibid* sch 1.

¹⁷ *Ibid* s 10.

accused of being participants in criminal organisations,¹⁸ a category established by the previous Labor government and also fillable by ministerial regulation.

These loose definitions create a kind of hyperbolic new criminal conspiracy offence, with obvious risks for the freedom of association. Besides being open to abuse, the *VLAD Act* requires terms of imprisonment that are extreme. If the legislation is engaged, a court *must* impose a further sentence of 15 years imprisonment served wholly in a corrective services facility, or 25 years if the person is an ‘office bearer’ of the relevant association.¹⁹ An offence that may have resulted in a fine or good behaviour bond could now result in 15 or 25 years in prison. Judges are unable to mete out a sentence that is appropriate and just having taken all of the circumstances into account. The Government has sought to justify the sentencing regime by accusing the courts of not meeting community expectations.²⁰

Yet the best evidence available — from the *Tasmanian Jury Sentencing Study* — paints a more positive picture.²¹ Jurors, who were informed of the facts of a case and had read the decision justifying the sentence, reported high levels of satisfaction with judicial sentencing — 90 per cent considered the sentence ‘appropriate’.²² When asked to indicate what an appropriate sentence would have been, 52 per cent selected a more lenient sentence than the judge.²³ Additionally, 83 per cent agreed that judges were ‘in touch with public opinion’.²⁴

The folly of mandatory sentencing is not merely in its stripping of proportionality and judicial discretion. It also is evident in the economics of imprisonment. According to Productivity Commission data, the daily cost of incarceration in Queensland is \$318.50 per prisoner.²⁵ Working from the shorter additional mandatory period of imprisonment required by the *VLAD Act* (15 years, instead of 25), each person sentenced under the new laws will cost taxpayers at least an additional \$1.7 million. Supposing

¹⁸ *Bail Act 1980* (Qld) s 16(3A).

¹⁹ *Ibid* s 7.

²⁰ Michael McKenna, ‘Judges Living in Ivory Towers: Newman’, *The Australian* (Sydney), 25 October 2013, 4.

²¹ Kate Warner et al, ‘Public Judgement on Sentencing: Final Results from the Tasmanian Jury Sentencing Study’ (2011) 407 *Trends and Issues in Crime and Criminal Justice* (Australian Institute of Criminology, February 2011).

²² *Ibid* 3.

²³ *Ibid*.

²⁴ *Ibid* 5.

²⁵ Australian Government – Productivity Commission, *Report on Government Services 2013: Part C (Justice), Chapter 8: Corrective Services*, 24. Queensland Department of Community Safety *2012-13 Annual Report*, at 20, puts the figure at \$190, but this does not include the costs of capital works.

Queenslanders cared only about fighting crime, it seems doubtful that this would be the most cost-effective way to do it. Criminological research indicates that certainty of punishment is a greater deterrent for the commission of crime than the quantum of imprisonment. In the words of Associate Professor Lana Friesen, ‘increases in the probability of punishment have a larger and more significant impact than increases in the severity of punishment.’²⁶ Accordingly, limited resources would be better spent on improving policing than requiring additional lengthy periods of imprisonment.

Two other aspects of the “war on bikies” (as the press dubbed it) are seriously concerning. First is the way in which the VLAD legislation was passed by Parliament. Second is the way in which motorcycle gang associates will be incarcerated. With respect to the VLAD legislation’s enactment, the Government ensured that there was no committee discussion of the legislation or consultation outside of government. The explanatory notes to the Bill state that ‘wider consultation has not been possible because of the need to respond urgently to the significant public threat these associations pose in Queensland.’²⁷ The Queensland Parliament’s committee system was recommended by the Fitzgerald Report as a means to partially overcome the weak scrutiny capacities of Queensland’s unicameral parliament.²⁸ The willingness to override deliberation on such serious legislation is regrettable but not unique.

Second, it is now policy for all correctional centres in Queensland to incarcerate convicted participants in criminal organisations at Woodford Correctional Centre’s ‘Restricted Management Unit’. The relevant policy document requires that these prisoners be held in solitary confinement for 22 hours a day, mandates the wearing of ‘the CMG prisoner uniform’ (a pink jumpsuit) and states that there will be ‘[n]o TVs in cells’ and ‘[n]o access to gymnasium facilities/oval’, amongst other restrictions.²⁹ Serious misconduct merits punishment, but holding individuals in such conditions for extended periods of time may be counterproductive, and the health implications (principally on mental health) of such cruel treatment have been highlighted by Justice Applegarth.³⁰

²⁶ Lana Friesen, ‘Certainty of Punishment Versus Severity of Punishment: an Experimental Investigation’ (2012) 79 *Southern Economic Journal* 399, 400.

²⁷ Explanatory Notes, Vicious Lawless Association Disestablishment Bill 2013 (Qld), 3.

²⁸ Fitzgerald, above n 4, 124.

²⁹ *Callanan v Attendee Z* [2013] QSC 342 [27].

³⁰ *Ibid* [35]–[37], drawing on Sharon Shalev, *A Sourcebook on Solitary Confinement* (LSE: Mannheim Centre for Criminology, 2008).

The ostensible focus on bikie gangs — absent the public outrage over a visible incident of violence — is inexplicable. According to Assistant Professor Terry Goldsworthy, police data released in May 2013 from the Gold Coast showed that over a 12-month period outlaw motorcycle gangs were responsible for about 0.9 per cent of overall crime.³¹ The data reveals that the most common offences involving motorcycle gangs were not serious but consisted of ‘breach of bail, unlicensed or disqualified driving, and low-level possession of dangerous drugs.’³² But to search for evidence-based rationales for such laws is to miss the point. Legislation like the *VLAD Act* is not meant to address a social problem so much as to generate political perceptions. Whilst the targeting of minorities defined by ethnicity or sexuality has become unacceptable, governments remain tempted to define public enemies by manipulating criminal law and public impressions. This is a populist manoeuvre, in which the law is used to construct a moral panic and simultaneously to address it.³³ Whilst the concept of “moral panic” began life in the 1970s as a sociological critique of media tropes and campaigns, it can equally apply to governmental exploitation of the “politics of fear”, and disproportionate responses to it.³⁴

III EXAMPLES OF LEGISLATIVE EXCESS: THE LAW OF POLITICS

Aside from feigned public enemies, governments of course have real political enemies. The attraction, to incumbents, of tweaking the rules of the political “game” to their benefit is well understood. In the regulation of political finance, for instance, politicians seek advantages over their immediate challengers whilst the parties seek ongoing financial security.³⁵ These motivations typically outweigh any incentives to pass laws restricting political finances — laws that theoretically have popular appeal — because political processes have limited saliency to a cynical electorate.

³¹ Terry Goldsworthy, ‘A Phony War: Bokies Aren’t the Only Problem on Queensland’s Glitter Strip’ (17 October 2013) *The Conversation* <<http://theconversation.com/a-phony-war-bokies-arent-the-only-problem-on-queenslands-glitter-strip-19231>>. The data is available in Australian Government, ‘Queensland Police Service Crime Statistics – Recorded Offences for the Gold Coast’ (31 May 2013) <<http://data.gov.au/dataset/ba546289-1aed-4c46-9ad0-356d9e22c64a>>.

³² Goldsworthy, *Ibid.*

³³ Kenneth Thompson, *Moral Panics* (Routledge, 1998).

³⁴ Frank Furedi, *Politics of Fear: Beyond Left and Right* (Continuum Books, 2005). It has been a feature of responses to motorcycle gangs: Arthur Veno and Julie van den Eynde, ‘Moral Panic Neutralization Project: A Media Based Intervention’ (2007) 17 *Journal of Community and Applied Social Psychology* 490, 491-4.

³⁵ Zim Nwokora, ‘The Distinctive Politics of Campaign Finance Reform’ (2012) *Party Politics* 1, 15.

The Newman administration was elected in 2012 having pledged no forced redundancies in the public service. It thus faced little opposition from public sector unions, and private sector unions even campaigned against the previous Labor government for renegeing on guarantees against privatisation. However in government, the Liberal-National Party embarked on significant forced redundancies in the public service and scoping privatisation measures of its own. With only a handful of Opposition MPs, the union movement became a focal point for dissent.

One government response to this union dissent was to legislate constraints on the freedom of political speech and association of state registered industrial associations. Such bodies are now required to ballot all their members before they can commit more than \$10 000 to any 'political purpose'.³⁶ Such purposes are broadly defined. They include not just a donation to a party or the mounting of an election campaign, but any advertising about a 'political matter' at any time; 'political' simply means anything that could reasonably be associated with a 'political cause or belief' (so that even industrial dispute advocacy may be caught, at least where policy decisions by public agencies are involved).³⁷

The gist of such hurdles is to restrict the power of union executives to make decisions, in ways that apply to no other body in civil society: not political parties, not corporations, not general associations and certainly not governments who spend hundreds of millions on promoting government policy without even parliamentary approval.³⁸ That unions engage in political campaigning is no secret to their members or the wider public. As the High Court recognised, as long ago as the 1950s, unions are inherently political entities.³⁹ It is not clear why special laws are required to limit their autonomy and not other groups or entities. Queensland law already mandated democratic structures and financial accountability within industrial organisations. Although it does not lack institutional clout through its ties to the Labor Party, unionism is a minority feature of the modern Australian workforce and the interests of organised labour are correspondingly vulnerable to legislative restriction. Unions are seeking a High Court

³⁶ *Industrial Relations Act 1999* (Qld) pt 12 div 1B.

³⁷ *Ibid* ss 553D-E.

³⁸ *Combet v Commonwealth* (2005) 224 CLR 494.

³⁹ *Williams v Hursey* (1949) 103 CLR 30.

ruling that the restrictions breach the implied freedom of political communication under the Commonwealth Constitution.⁴⁰

The restrictions ostensibly borrow from a British idea. Except there the law applies equally, to empower shareholders as well as union members, and only requires that members approve the principle of maintaining a general political fund each decade, not a ballot before each specific campaign.⁴¹ As drafted, the provisions would have required a 50 per cent turnout, until employer groups objected that they rarely received response rates above 15 per cent from member surveys. The Bill otherwise was developed without consultation with unions, because it was designed as a shackle on speech. The cost of each ballot adds unreasonably to the campaign it authorises, and the weeks of delay introduced form an inflexibility that applies to only one set of speakers. The partiality of the law was emphasised when the local government (employers) association lobbied for and won a bespoke exception.⁴²

The final example we wish to highlight is the campaign finance amendments contained in the Electoral Reform Amendment Bill 2013 (Qld). The Bill undoes a scheme hastily enacted in the dying days of the previous Labor administration. That scheme inflated payments to political parties to defray their electioneering expenses (a boondoggle to the Labor Party which was facing electoral massacre). But it did so in a way that was even handed as between all parties, and in return for caps on their campaign expenditures and donations. The Newman Government is legislating to remove those caps and return to a laissez-faire approach that is consistent with liberal philosophy but also advantageous to an incumbent government (as big donations follow power).⁴³

It offers post-election public funding, per vote, but only to parties and candidates receiving over 10 per cent of the vote. That threshold is 2.5 times the standard in the rest of Australia. It discriminates against the minor parties, currently The Greens, the Katter Australia Party, and the Palmer United Party. Independent candidates who achieve that threshold earn funding at only half the rate of parties — perversely, since

⁴⁰ Transcript of Proceedings, *Queensland Police Union of Employees v Queensland* [2013] HCATrans 256 (24 October 2013).

⁴¹ See *Trade Union and Labour Relations (Consolidation) Act 1992* (UK) Ch VI and *Companies Act 2006* (UK) Pt 14.

⁴² *Industrial Relations Act 1999* (Qld) s 553C.

⁴³ Iain McMenamin, *If Money Talks, What Does it Say? Corruption and Business Financing of Politics* (Oxford University Press, 2013).

independent campaigns lack the economies of scale of the major parties. In addition, a second stream of public funding, only open to registered parties which win seats in parliament, is to be made available. This funding will be paid annually, at an amount set ministerially. Although labelled a “policy development” payment, parties can use it for whatever purposes they like. The government claimed that its intention was to save money by not funding smaller political parties. Besides breaching the principle of political equality, that rationale is contradicted by the fact that the reforms will boost and extend the public subsidy of the two major parties.

The proposed party funding regime is redolent of a cartel approach, benefiting the incumbent party whilst buying off the other major party (here, Labor) and discriminating against smaller rivals. The relevant parliamentary committee considered the Bill (of 50 pages, dealing with voter ID as well as political finance) in just over two hours, in a hearing which also dealt with five other unrelated bills. To its credit even the Government majority on the committee suggested the 10 per cent threshold was too high.⁴⁴

IV ELECTORAL SOLUTIONS TO THE PROBLEM OF CONCENTRATED POWER

Over the past few decades the Queensland Parliament has proved to be defective as a check on executive power. Under the Westminster model inherited from Britain, the Premier and Cabinet, responsible for the day-to-day running of the public affairs of the state, are answerable to parliament. Parliament is in theory the supreme governing institution, and as well as possessing law-making power it serves an important oversight role: it scrutinises the government through debate, questioning, and specialised committees that deliberate on portfolios and proposed legislation. In Queensland however, parliament regularly fails to undertake such oversight in any meaningful way. This is partly a result of Queensland’s electoral system, which delivers large majorities to governments with alarming frequency. This, combined with strong party discipline and the lack of an upper house, enables the executive to avoid scrutiny of legislation (not to mention executive action) at will. Legislation drafted by a handful of senior ministers can be expeditiously rammed through a compliant parliament.

⁴⁴ Queensland Parliament – Legal Affairs and Community Safety Committee, *Electoral Reform Amendment Bill 2014* (Report No 56, February 2014) 11.

Queensland has an extreme form of majoritarian democracy. Its electoral system frequently results in governments with parliamentary representation far above the level of support they receive from the electorate. In 2001, for instance, the Labor Party secured 74 per cent of parliamentary seats with 49 per cent of the primary vote. In 2004 Labor took 71 per cent of the seats with 47 per cent of the vote. In a reversal of fortunes, the Liberal National Party won 88 per cent of the seats with just 50 per cent of the primary vote at the most recent election in 2012. As Professor Aroney notes, the systematic tendency of Queensland's voting system is to favour the two major parties.⁴⁵ Additionally, '[a]t each election, one party tends to secure a dominant position in the legislature and minor parties struggle for any representation at all.'⁴⁶ Long periods of governance with rump oppositions result in limited scrutiny. Backbenchers of the governing party are unlikely to criticise their leaders, since it would rule out promotion and sours their relationships with colleagues. Committees are invariably dominated by government MPs and can be bypassed — as they were in the cases examined here — or made impotent in other ways, for instance by limiting the time given for a committee to report, when the government chooses.⁴⁷

As Prasser, Nethercote and Aroney argue, '[f]or many decades, Queensland has provided one of the most obvious and pure examples of elective dictatorship.'⁴⁸ A dictatorship can, in theory, be benevolent — but unfortunately history has tended to confirm Lord Acton's observation that power corrupts. The 18th century British philosopher and Member of Parliament John Stuart Mill noted that absolute power has an evil effect upon the mind of the holder, through 'the consciousness of having only themselves to consult'.

He concluded:

It is important that no set of persons should, in great affairs, be able, even temporarily, to make their own *sic volo* [wants] prevail without asking else for his consent. A majority in a single assembly, when it has assumed a permanent

⁴⁵ Nicholas Aroney, 'Bicameralism and Representations of Democracy' in Nicholas Aroney, Scott Prasser and JR Nethercote (eds), *Restraining Elective Dictatorship: The Upper House Solution?* (University of Western Australia Press, 2008) 34.

⁴⁶ *Ibid.*

⁴⁷ Amanda Honeyman, 'An evaluation of the Queensland Parliamentary Committee System: from Fitzgerald to recent reforms' (2013) *The Australia and New Zealand Association of Clerks-at-the-Table* <[http://www.anzacatt.org.au/prod/anzacatt/anzacatt.nsf/0/09CD95435AF152A2CA257C2800091777/\\$file/29785492.pdf](http://www.anzacatt.org.au/prod/anzacatt/anzacatt.nsf/0/09CD95435AF152A2CA257C2800091777/$file/29785492.pdf)> 20-21.

⁴⁸ Scott Prasser, JR Nethercote and Nicholas Aroney, 'Upper Houses and the Problem of Elective Dictatorship' in Aroney, Prasser and Nethercote (eds), above n 45, 6.

character – when composed of the same persons habitually acting together, and always assured of victory in their own House – easily becomes despotic and overweening, if released from the necessity of considering whether its acts will be concurred in by another constituted authority.⁴⁹

Observations of these kinds have persuaded politicians in most democratic countries of the need to provide checks and balances on power. Often, it has persuaded them of the need to have two chambers in parliament — the consent of both being necessary for the passage of legislation. Unique amongst Australian state parliaments, Queensland lacks an upper house of review. The unelected Queensland Legislative Council — stacked with Labor party loyalists — voted itself out of existence on 3 November 1921.⁵⁰ It was viewed by Labor politicians as a recalcitrant body of those from the propertied classes, inimical to their legislative agenda. The abolition of this chamber, instead of its reform, has left a dubious legacy.

The reintroduction of an upper house is one means to dilute the executive's stranglehold over parliament and restore greater levels of accountability. As Prasser, Nethercote and Aroney write, '[b]icameralism, properly designed, materially enhances the qualities of a parliament in several ways. A thoughtfully constructed bicameral parliament is one where capacity for representation is amplified, opportunity for debate and deliberation is broadened, scope for examination of legislation is increased, and avenues for scrutiny, investigation in all its forms and review augmented.'⁵¹ An upper house need not involve a larger number of politicians. As Stone suggests, governmental arrangements could be improved simply by reducing the Assembly's size from 89 to 47 members and creating an upper house of 42 members.⁵² An upper house elected through proportional representation — as the Commonwealth Senate is — would not be a mere echo chamber, but an additional forum giving voice to a wider range of views and institutionalising a process of negotiated rather than railroaded legislation.

If the reintroduction of an upper house proves infeasible, there is a more creative solution, a different voting system for the Legislative Assembly. For instance, New

⁴⁹ John Stuart Mill, *On Liberty and Other Essays* (Oxford University Press, 1991) 385.

⁵⁰ For a history, see BH McPherson, 'A Constitutional History of the Parliament of Queensland' in Aroney, Prasser and Nethercote (eds), above n 45, 229.

⁵¹ Prasser, Nethercote and Aroney, above n 48, 4.

⁵² Bruce Stone, 'State Legislative Councils – Designing for Accountability' in Aroney, Prasser and Nethercote (eds), above n 45, 179.

Zealand's parliament has been unicameral since 1950 but provides better scrutiny as a result of its multi-member proportional ('MMP') method of election. MMP is a hybrid between the constituency system employed currently in most English-speaking countries and a European style party-list system. It ensures that parliamentary representation matches popular support. The result is a mix of members representing local interests with a parliamentary composition that reflects the varied dispositions of voters. It empowers the parliament by destabilising the two-party lock on power and, like the bicameral option, reduces the chances of legislation being passed by a government representing a minority of voters.

V CONCLUSION

Without either reform to empower parliamentary and responsible government in Queensland, citizens and civic groups will continue to turn to the courts to imply rights and protections in the form of limitations on parliamentary law-making power. (As motorcycle groups, Mr Fardon and the unions have in the examples discussed here.) That is, they seek to build up a legal constitutionalism to fill in for deficits in political constitutionalism. Such a response is strategically understandable, but systemically undesirable.⁵³ Except in extreme cases, courts lack a democratic basis for resolving contested values and do not have the inclusive process or empirical means to balance social interests.⁵⁴ Further, overuse of the courts as "red lights", to block legislative or administrative action, can enshrine a conservative, limited government view that elevates liberty over other social values.⁵⁵ In any event, the absence of an explicit Bill of Rights at either the state or national level means that the prospects of successfully challenging poorly conceived laws are limited.

The best way to avoid bad laws — like the *VLAD Act* and the legislation governing political campaigns — is to ensure that they are not made in the first place. But it is possible to reform law-making machinery to improve electoral democracy and with it our political constitutionalism. Winner-takes-all electoral laws within a unicameral

⁵³ See, eg, Adam Tomkins, 'The Role of the Courts in the Political Constitution' (2010) 60 *University of Toronto Law Journal* 1.

⁵⁴ Richard Bellamy, *Political Constitutionalism: A Defence of the Constitutionality of Democracy* (Cambridge University Press, 2007).

⁵⁵ Adam Tomkins, 'In Defence of the Political Constitution' (2002) 22 *Oxford Journal of Legal Studies* 157, 158.

parliament have proven to be insufficient as a means of restraining overbearing and populist government in Queensland. Preventing elective dictatorship means fixing the underlying problem — a weak parliament. An upper house or more diverse representation in the existing chamber will not be a panacea.⁵⁶ As Jeremy Waldron observes, a political culture has to be molded;⁵⁷ institutional reforms do not, in themselves, guarantee better outcomes. They can however tilt the scales by improving public deliberation and inhibiting the passage of laws that lack evidence or public-spirited rationales.

⁵⁶ Andrew Geddis and Caroline Morris, "'All is Changed, Changed Utterly'? The Causes and Consequences of New Zealand's Adoption of MMP' (2004) 32 *Federal Law Review* 451.

⁵⁷ Jeremy Waldron, 'Parliamentary Recklessness: Why We Need to Legislate More Carefully' (Maxim Institute, 2008 John Graham Lecture) 43–4.

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