Submission No. 55

11 October, 1998

Chair and Members
Legislative Constitutional and Administrative Review Committee
Parliament House
Brisbane Q 4001

Second Submission on Interim Report on Consolidation of the Queensland Constitution

Not at all confidential - authorise publication as you please!

Honourable members,

1. What Is To Be Done? continued

Since finishing my first submission, I have thought further about the alternative ways of coping with the entrenched sections in the existing Constitution Acts. On reflection, it seems to me that the best way to quickly achieve a consolidation which is both *in plain English* and *beyond legal challenge* is to follow my option 4 - that is, to leave the entrenched sections of the 1857 and 1890 Acts intact, **but also** include a "parallel" restatement of them in modern drafting style in the 1998 Act. [You may find an EARC file which includes a letter where I made a similar suggestion in 1993 - it was ignored!] The new Act would still include:

- a section somewhat like your suggested s 73, declaring that it is not Parliament's intention to amend any of the entrenched sections, and that Parliament accepts that if any one of them is inconsistent with the original section then the original one prevails; and

- a footnote to each "restatement" section explaining that it *is* a restatement of a section of an Act that cannot be amended without referendum - and that in the unlikely chance that the restatement was not accurate, that the original version would represent the true law.

This would have a number of other benefits:

- The 1998 Act could simply be a new Act, rather than a terribly complex amendment of the 1857 Act. It could include a Schedule (not to be reprinted in the first reprint) which repealed the 1896 and 1922 Acts and the non-entrenched sections of the 1857 Act, and the other repeals included in your current draft.

- The restated sections could be modernised somewhat more thoroughly than you have dared to in the interim draft, because there would be no claim that the original entrenched sections were being repealed. Another Bill, to be approved by referendum, would be needed *at some time* to repeal the original entrenched sections and replace the three entrenching sections with a new one in the 1998 Act (now entrenching the new versions of the entrenched sections). That later Bill would be shorter and simpler if the entrenched sections, where possible, had already been reworded into the appropriately modern form.

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• If other Bills amending the main CA (such as Mr Wellington's CIR Bill, or any attempt to extend the term of the House) are passed by the House, the Bill referred to above would need to be put to the House and the people fairly quickly - but otherwise, perhaps this stage could be left until after the 1999 referendum on the republic. If that is passed, some substantial changes to the entrenched provisions are going to be necessary; then all of the issues relating to entrenched sections, the Queen and the Governor could be put to the vote together. And whether the people eventually voted yes or no, the State would have *most* of the sections of constitutional significance consolidated into one readable (and valid) Act.

2. Comments on the Detailed Drafting - the Proposed Constitution Act 1988

In the comments that follow, I will assume that you have used the method that I have suggested above. Therefore when I make suggestions about the sections that restate the existing entrenched sections, please read them against the background assumption that the original section will still be on the statute book, in parallel with the restatement, until a referendum is held to complete the consolidation.

I also assume that this exercise can still properly called a "consolidation of the Constitution" if the new CA includes some matters that are not currently spelled out in any of the various Constitution (something) Acts, as long as they are in fact doctrines of constitutional law that currently have force in Queensland. I note that the Committee's draft itself includes provisions taken from other Acts such as the Acts Interpretation Act and Supreme Court Act. Several of my suggestions below will involve the inclusion of further provisions which are currently dealt with in other Acts. [I refer the Committee to its reference, in footnote 21, page 9 of Part I of the interim report, to the "informative definitions of what might be considered 'constitutional'" in EARC's *Issues Paper No 21* (pars 3.1-3.11). Since I wrote most of that Issues Paper, and in particular every word of those paragraphs, perhaps I can claim some authority on this matter!]

Of course my first suggestion for this Act is that it need not be the product of a complicated reprint of the CA 1857, but should simply be presented to Parliament as the Constitution Bill 1998. In what follows I will refer to the *section* numbers of what you show as the Reprint, but if you adopt my suggestion they would be very close to the clause numbers of a redrawn Bill.

Section 4: As it is, and in its original form as CA s 2, this section tells a legislative lie. The Parliament (the Sovereign with the advice and consent of the Legislative Assembly) does *not* have power to make laws in all cases whatsoever. It should say "..., subject to the Constitution of the Commonwealth of Australia, to section 53 of the Constitution Act 1857 and to sections 3 and 4 of the Constitution Act 1934,..." The New South Wales Parliament inserted similar words into its Constitution Act in 1902. The section as amended would not be inconsistent in its actual effect with the (still) entrenched CA s 2, as it would simply state the existing constitutional position.

Section 6: As EARC noted, the words "for the time being" in the existing s 40A may have unintended consequences, and could cause difficulties of interpretation, particularly when the latest edition of Erskine May is some years old and the Speaker's and Clerk's staff are not sure whether it is current on a particular point. However, as the Committee notes, the matter of the definition of the privileges of the House is currently under consideration by the Members' Ethics and Parliamentary Privileges Committee - so I agree with the Committee that the words

are best left in the redrafted version for the moment. I also endorse the Committee's decision that, while the details can go in the Parliament of Queensland Bill, the basic provision as to powers and privileges belongs in the Constitution Act.

As to the words "to the extent they are not inconsistent with this Act",
• they are of doubtful effect in a Constitution Act which has been declared by the Privy Council to be "flexible" (*McCawley v R* [1920] AC 691) [though I have always believed that the High Court's doctrine expressed in *Cooper v Commr of Income Tax (Qld)* (1907) 4 CLR 1304 and *In Re McCawley* (1918) 24 CLR 345 - that a State Constitution Act has to be complied with until it is expressly amended - makes better sense, and may one day be re-adopted by the High Court];
• in any case, the words may have made sense in s 40A when detailed provisions as to the powers and privileges of Parliament followed in the same Act, but now that the detailed provisions are to be removed to a Parliament of Queensland Act they have no point and may as well be removed.

As to the words "defined by Act to the extent they are not inconsistent with... another Act", this is legislative absurdity. Of course if two Acts make inconsistent provisions one will have to be invalidated by the other according to the ordinary principles of statutory interpretation, but having these words in a section of the Constitution provides no help. Which is to be taken as the first-mentioned Act and which is to be taken as "another" Act?

Section 7: Since the eligibility to be elected and to vote are dealt with elsewhere in the CA and other legislation (eligibility to vote *should* be mentioned in the CA - see below), this section says essentially nothing!

Sections 8-10: These, in my opinion, are in an illogical order. The number of members came first in the LAA and the EARC draft, and it reads better if it stays that way.

Additional section - right to vote: In my opinion the definition of who has the right to vote is a constitutional matter. In fact, I believe that a provision guaranteeing the right to vote to all adult citizens living in Queensland, and strictly limiting the disqualifications that Parliament can prescribe, *ought* to be *entrenched* in the Constitution. But since this is a consolidation exercise, perhaps I cannot expect you to go that far. However, by analogy with sections 6 and 15, I suggest that the basic entitlement to enrolment , and to vote if enrolled, ought to be in the CA, with a reference to the Parliament's power to prescribe exceptions. I suggest that this belongs after s 11, before the Part 2 heading.

Another additional section - pay for members and Ministers: By similar reasoning to that above, I suggest that the fact - of great constitutional importance - that members and Ministers are to be paid a salary should be mentioned in the CA, even though the details may be left to the Parliamentary Members' Salaries Act. This could fit between s 17 and the Division 2 heading.

Sections 23-27: The attempt to redraft provisions relating to the Governor in modern style while retaining the entrenched sections of the CA more or less as they are has caused some repetition and illogical ordering here. I suggest that sub-s 26(3) and s 27 belong in s 23 - they can be footnoted as restatements of CA 11A(3) and 11B and those would remain the sections with *real* force. I suggest that, logically, sub-s 26(1) belongs between 25(1) and 25(2), and the words should be re-ordered to read "The Governor is the Sovereign's representative in Queensland" - again a footnote would remind readers that the real source of this rule is CA 1867

s 11A, which is entrenched. If it is felt necessary to restate CA 1867 sub-s 11A(2), whose effect would be clear from the footnotes already mentioned, it should be a fourth sub-section of s 25 or a separate section.

Section 32: I suppose, if this is a consolidation exercise, this must stay here - but in this day and age the Governor does not just grant a pardon without a judicial reconsideration of a case. I suggest that the power to grant pardons, commutations and reprieves *really* belongs in the Criminal Code, where the modern conditions upon its exercise would also be spelled out.

Section 36: The inclusion of the exception at the beginning of par (1)(a) is very clumsy and in fact ungrammatical. If the exception is to stay at the front it should say "except when the Governor is administering..", but in fact the original wording of COGA s 10 conveys the meaning quite clearly. I also wonder why the Governor cannot appoint a Deputy Governor, but must automatically be replaced by an Acting Governor, when administering the Commonwealth - but as you keep reminding the reader, this is (mainly) a consolidation so perhaps we must leave these technicalities alone. [I have visions of a protocol manual lurking somewhere, with about 100 pages on the differences between a Lieutenant Governor, a Deputy Governor and an Acting Governor. Do we *really* need three different terms?]

Section 38: The report notes (Part II - Page 17) that the committee considered inserting an express requirement that a Minister must be a Member of the Legislative Assembly, "but chose not in light of the consolidatory nature of the current exercise". I submit that the rule that a Minister must be an MLA can be properly seen as part of the Constitution of the State - though it is a convention rather than an expressly stated rule of law, it is a very "solidified" convention. Therefore an express statement of the rule would be perfectly appropriate even in a consolidation exercise.

I am not sure why the committee described as "unfortunate" the fact that the convention in Queensland probably does not allow for a Ministerial appointment before election to Parliament. The 3-month rule has only been rarely invoked in the Commonwealth Parliament (only once, I think, since the first general election) and other States (Tasmania, at least) get along without it perfectly well. I see no need to copy the 3-month rule from s 64, Commonwealth Constitution.

Section 43, and explanatory note on Part II - Page 19

Your explanatory note says that you considered making it explicit that *Executive Council consists of Ministers appointed...*, but you rejected that in light of the consolidatory nature of the exercise. Again I suggest that if the exercise is to consolidate provisions of the actual working constitution rather than just the things called Constitution (something) Act, this would in fact be entirely appropriate.

The explanatory note also remarks that you did not endorse the inclusion of EARC's cl 23 - "The function of Executive Council is to exercise the executive power of the State" - lest it "inadvertently" vest the executive power of the State in the Executive Council. In reality, of course, that is just where it *is* vested. As it stands, the consolidated Constitution says nothing about where executive power is vested. It is left to be implied from things like the traditional function of the Governor, the name "Executive Council", and the reference in s 47 to the "Executive Government" of the State. I suggest that something rather like EARC's cl 23 needs to be included - though perhaps it could be drafted with some sort of a nod to the Governor's

entirely theoretical position as the head of the executive government. Perhaps we could distinguish between "is vested in" and "is exercised by", as is done in s 61 of the Commonwealth Constitution. Clearly no power except the power to appoint the Governor is now vested in Her Majesty, so the Sovereign can be left out. The section could say something like:

> The executive power of Queensland is vested in the Governor and is exercised by the Executive Council, Ministers, and other public officers as provided for by law.

Section 52: It seems odd to me to say that "there must be a Supreme Court of Queensland *and a District Court of Queensland*" at a time when a merger of the two courts is under consideration by other agencies in the State. Certainly there *must* be a Supreme Court, and certainly the tenure of other judges who are likely to hear disputes between citizen and State should be guaranteed - I agree with EARC and yourselves that this is one area where the Bill should go beyond a mere consolidation - but perhaps the express references to the District Court could be omitted and "judge" in ss 55-57 could be defined as including any judge whose function includes presiding over a trial by jury or who has the power to impose sentences of more than two years imprisonment. Then any consolidation of the District into the Supreme Court will not require an amendment to the new Constitution Act.

Chapter 5, Part 1, before s 58: As the Committee notes at Part II-Page 25, the principle of parliamentary control of finance has two parts. In the current CA 1867 the principle of no *taxation* without Parliamentary authorisation is not mentioned at all, and the principle of no *spending* without such authorisation is only indirectly adverted to in ss 35 and 39. You propose - quite properly, in my view - to make the latter requirement explicit in the new s 59(1). I suggest that a complete consolidation exercise should also restate Art 4 of the Bill of Rights in modern language - that the executive government has no power to impose taxation (as opposed to fees for services - see *A-G v Wilts United Dairies Ltd* (1922) 37 TLR 884) unless authorised by Act. [I note that you propose to restate art 9 of the Bill of Rights as cl 8 of the Parliament of Queensland Bill. I agree that this is entirely proper, and suggest that other provisions of the Bill of Rights which have continuing constitutional force should be stated in Queensland law where Queenslanders can readily find them.]

Sections 59 and 60: I make a logical point here: these sections are in the wrong order - the first charge comes before any amount paid out under parliamentary appropriation. (Compare Commonwealth Constitution, ss 82 and 83.)

Section 62: It can be argued that ss 30 and 40 of the 1867 Act do not need to be restated at all as their effect is wholly subsumed in the general grant of legislative power, and they were only included in the Order-in-Council of 1859 because they represented a change from the previous practice, whereby the Governor had been acting, so to speak, as a land agent for the "Home" government. Further, to repeat them in 1988 appears to ignore the *Mabo* decision and the existence of the Commonwealth's Native Title Act, to which the State's powers are subject. If the section is, nevertheless, to be retained, can't we, in 1998, find a better expression for "unalienated" Crown land than "waste lands of the Crown"? However, my strong first recommendation is that the section simply be omitted.

Section 63: Though I advocate the use of plain English and generally admire OQPC's modern drafting style, there are times when the Office produces something which goes beyond plainness to an odd kind of terseness - and this is an example. The two sub-sections of s 63 really belong in one sentence, as they are in s 54 of the 1867 Act. Sub-s 64(1) really "fits" in the same section

as well. The original drafters of s 54 (not too long ago!) had all of these 3 provisions in the same *sub*-section, after all, and I suggest that their judgment of what ideas fitted together were not too bad - though the expression may be verbose and in need of a "trim".

Section 68: More extreme terseness here! In English, we say "If A, then B" in one sentence, not "The next sentence is true if A." and then, as a separate sentence, "B." This section actually says "The next three sentences are true if A or B or C. D. E. F." I suggest that statutory language ought to stick to the structure of ordinary language (which is also reflected in formal logic). It would be easy enough to rewrite the old s 55(4) in plainer language, but still to hold it together as one sub-section (ie, one sentence) that says "If A or B or C, then D and E and F".

Section 71: If you adopt my suggestion as to the general form of the consolidation, of course this section will not appear in the Bill and new Act. However, something similar to your s 73 will still have a place.

Repeals: When some of the old Acts are to be replaced by the new Constitution Act, some by the Parliament of Queensland Act, and some have some provisions replaced by one Act and other provisions by the other, it seems illogical to have all of the repeals in the Constitution Amendment Bill (No 2). I have had some experience trying to help people track legislative provisions through amendments and consolidations, and I can tell you that it is much easier to find what Act repealed what section if the repealing provision is in the same Act as the new provisions.

[I suppose someone on the Committee or its staff has noticed by now, but in case nobody has, and in case you have people complaining that the footnotes on p 47 of the draft No 2 Bill make no sense, I note that to understand which repealed Acts each of the two footnotes is supposed to apply to, readers should turn back to the corresponding page of the Reprint where the footnotes do make sense. I presume that someone has managed to force the word-processing system to use only two footnote numbers repeatedly on p 47 of the Reprint, but the system developed a mind of its own on the same page of the draft of the No 2 Bill.]

3. Comments on the Detailed Drafting - the Proposed Parliament of Queensland Bill

Clause 9: I note that the provisions of art 9 of the Bill of Rights 1688 are repeated in cl 8. I suggest that it is unnecessary caution (and antiquarianism) to say, in cl 9, that it applies for the purposes of art 9 of the Bill of Rights as well as "this Act". Now that cl 8 is to restate the immunity of Parliament (the Assembly) in a local law, sub-cll (1) and (2) of cl 9 can be deleted.

The Contempt Provisions (cll 37-45)

I suppose I should confess here that my remarks on these provisions are conditioned by my strong belief that Parliament should *not* act as prosecutor and judge in its own cause. Instead, contempts should be prosecuted, by someone on behalf of Parliament, in an ordinary court of law (with appropriate powers in the House or the Speaker to restrain people who are committing disturbances within Parliament, of course.) This attitude will influence my remarks below where your proposals appear to go beyond a mere consolidation, and to weaken the position of those charged with contempt.

Clause 37: On one reading of the existing CA (I would have thought the obvious and *only* reading, but I know there is another view), s 45 is a self-denying ordinance which limits the

power of the House to punish for contempt to the imposition of fines only, and s 52 provides for a prosecution by the Attorney-General when the House considers that a summary proceeding before itself is inappropriate. [I note here that these sections are derived from an Act of 1861, 25 Vic No 7, which was consolidated into the CA 1867 six years later as ss 41-53. Since s 51 (repealed in 1889) used to refer to prosecution for false or scandalous libels against a member, the reference to "other contempt" in s 52 must mean a contempt, other than false or scandalous libel, which is punishable by law.] Therefore sub-cl (2) may well be extending the Assembly's powers by suggesting that it can punish for all contempts, and indeed that it is not limited to punishment by fine. This is going *far beyond* consolidation. I urge the Committee to delete it from the draft. [Of course, even without sub-cl (2), sub-cl (1) will not ultimately limit the Assembly's power, in that the Assembly acting as legislature - ie, with the Governor - can always amend it by Act, but sub-cl (2) suggests that the apparent codification and limitation in sub-cl (1) is meaningless, and that the Assembly can find more draconian powers without the formality of passing an amending Act.]

Clause 41: The draft omits the words presently in CA s 48 which require that a warrant specify (in the words of the Act or in equivalent words) the nature of the contempt. As your notes explain (Part III-page 10) this may have led to a warrant under the section being subject to judicial review. *And a good thing too*, I say! - *R v Richards ex parte Fitzpatrick and Browne* (which holds that warrants for unspecified contempt are not reviewable) is one of the greatest blots on Australian jurisprudence. In 1861 the Queensland Parliament set a precedent worthy of study by other parliaments in the Westminster tradition by drafting rules for the punishment of contempt that are far more self-limiting than the rules in many other parliaments. You are suggesting (following EARC) that the new CA should go beyond mere consolidation in one significant respect - strengthening the independence of the judiciary. It would be deeply ironic if, in the same Bill, Parliament were to remove a significant area of interaction between Parliament and the people whom it represents from review by the independent judiciary.

Clause 44, sub-cl (1): I quite agree with the Committee that an express statement of the double jeopardy rule should be included in the Bill (sub-cl (1)) - but it should be noted that this is *not* mere consolidation.

Sub-cl(2): It follows from the paragraph about clause 37, above, that I do not necessarily agree with the Committee's assessment of what is the "better view" of the effect of the present s 52 (cf your Part III-Page 11). Admittedly, the reference to a contempt "which is punishable by law" *might* support that interpretation, but it might be that, by contrast with the repealed s 51, s 52 referred to the prosecution of *any* contempt other than a false or scandalous libel. Therefore I suggest that sub-cl (2) may not simply reproduce the effect of s 52. Unless the House is to rely on the proposed sub-s 37(2) (whose deletion I strongly recommend, above) it may even reduce the House's range of choice as to how to proceed against contempts, in that it allows the House to move for prosecution by the Attorney-General *only* when the contempt is also some other offence. I suggest that any changes to the words of s 52 should be left until the Members' Ethics and Parliamentary Privileges Committee has finished its review of Parliamentary Privilege. Until then, a separate clause should restate the present s 52 - although perhaps it could reinstate the original meaning of "other" by saying "other than a contempt constituted by the publishing of a false or scandalous libel of a member touching the member's conduct as a member".

Section 49: The use of "is taken to" in this section is the sort of fictional, "deeming", language that I understood was out of favour in these days of plain-English drafting. Sub-s (1) could simply say "A person to whom this section applies is authorised to publish parliamentary

documents." (Ie, without need of specific authorisation under s 47).

Section 60: Sub-s (4) would be easier to read with another comma after "accrued leave".

Section 61: I wonder if the list of senior officers in positions demanding political independence, who must resign to contest an election, should be broadened to include their deputies?

Section 117 (amendment of Parliamentary Members' Salaries Act by insertion of the present CAAA s 6 as s 12):

Section 6 of CAAA 1896 has some oddities of drafting which, it seems to me, have not been fully rectified in its translation to the PMS Act:

In par (2)(b), I presume what is meant is "notification of the appointment to the *office* to the Speaker", or, by parallel with sub-s (3), simply "notification of the appointment to the Assembly"?

In sub-s (7), I can work out what "vacated for that cause" means by reference back to sub-s (6), but it reads very oddly all the same. Perhaps "for that cause" could be omitted - the sub-section then reads quite easily and the meaning of "the time... since the happening of the cause" is still quite clear.

In sub-s (8), the commencing words "in addition" make it read, at first glance, as if it relates to the same matter as sub-ss (6) and (7) - members being dismissed from the assembly for cause. I suggest that the interaction between all the sub-sections would be made clearer if sub-s (6) and (7) became a separate section, and sub-s (8) became another separate section.

I would be happy to discuss these points and any other related matters with the Committee at a convenient time.

Respectfully,

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