Richard E and Lesley McGarvie

Submission No 36

10 May 2000

Mr Gary Fenlon MLA
Chair
Legal Constitutional and Administrative
Review Committee
Legislative Assembly of Queensland
Parliament House
George Street
Brisbane Qld 4000

Dear Mr Fenlon,

Review of the Queensland Constitutional Review
Commission's Recommendation for Four Year Parliamentary Terms

Thank you for your letter of 13 April 2000 inviting me to make a submission to the inquiry of your Committee in reviewing the Report of the Constitutional Review Commission and enclosing your Committee's Background Paper of April 2000 on Four Year Parliamentary Terms. I note that your Committee is proceeding to review that Report and report on it to Parliament in two stages, and that the initial review of stage 1 will be on recommendation 5.2 that the maximum term of the Legislative Assembly be extended to four years. I also note that the Committee has not yet reached any conclusions or come to any recommendation on this issue.

I am glad to respond to your invitation. I ask you to take into account that I am not intimately familiar with Queensland's Constitution. My knowledge of it comes mainly from reading the Report of the Constitutional Review Commission and the Background Paper. If I have overlooked some provision peculiar to Queensland I ask you to make due allowance.

In its Report the Constitutional Review Commission proposed a number of constitutional changes and updates and recommended a carefully integrated Constitution including a number of new safeguards designed to ensure continuance of the democratic operation of the constitutional system. It is not necessary at this time to express any view on the comprehensiveness and effectiveness of the safeguards in the recommended integrated Constitution. It is sufficient to look at the safeguards which would exist if recommendation 5.2 were introduced alone.

The democratic operation of the constitutional systems of the Commonwealth and States results from the combined effect of office-holders being bound in some respects by the law of the constitution and influenced in other respects by the binding conventions, incentives and penalties of the operational, organisational part of the constitutional system, to exercise their powers in the way that makes the system operate as a representative democracy. In considering constitutional change one must first be convinced that the changed constitution will effectively make legal changes which are the object of the amendment. The object here is that Parliament have a maximum term of four years and, with some exceptions, a minimum term of three years. Then it is necessary to be satisfied that the changed constitution will operate in a way that produces binding conventions, incentives and penalties sufficient to ensure that the constitutional system operates in a democratic way. This is explained in my book published last September, *Democracy: choosing Australia's republic,* Melbourne University Press, 1999, pp. 7,12, 46-8, 53-63, 76-81.

If recommendation 5.2 were introduced alone in its present form it would leave the Queensland constitutional system seriously deficient in the safeguards of the democratic operation of the system. It would substantially curtail the vital safeguard of the Governor's reserve authority to exercise a reserve power when that is absolutely necessary to ensure the effective operation of our system of parliamentary democracy and its safeguards of democracy. That is the fail-safe mechanism that enables an exceptional and intractable constitutional malfunction to be referred as a last resort to the Parliament or people for resolution. It authorises the Governor in a situation of absolute necessity to act independently of ministerial advice and exercise the reserve powers of appointing or dismissing a Government or dissolving or declining advice to dissolve Parliament, in such a way as brings the constitutional malfunction before Parliament or the electorate. (*Democracy*, pp. 145-153) The curtailment of the fail-safe mechanism of the reserve authority would result from the Governor being deprived for the first three years of the reserve power to dissolve Parliament for an election and thus bring the issue of a malfunction before the electorate.

I give some examples of the way this deficiency would be likely to lead over time to deficiencies in the democratic operation of the Queensland constitutional system. The ultimate guarantor of democracy is reference to the electorate. If there is restriction of the Governor's capacity to refer a constitutional malfunction to the electorate when it becomes absolutely necessary in order to continue the effective operation of the democratic system and its safeguards of democracy, it follows that the democratic quality of the system suffers.

A situation in which it might become absolutely necessary to operate the fail-safe mechanism could come into existence if a Government persisted in acting or encouraging action in clear and grave breach of the law, and neither legal nor political action would be rapid or reliable enough to protect the integrity of the system. There have been occasions in which Governments in Australia have persistently breached the law: Queensland Constitutional Review Commission, *Report on the Possible Reform of and Changes to The Acts and Laws that relates to the Queensland Constitution*, Brisbane, February 2000, pp. 51-3; *Democracy*, pp. 152-3, 185-6. Recent events in Zimbabwe provide a stark example. Organised groups of political supporters of the Government in breach of the law entered farms to scare off or evict the owners, occupiers and their workers in order to obtain the land. The High Court issued injunctions ordering the intruders to leave the land and ordering the police to evict from the land intruders who remained. The intruders refused to leave the farms and the police refused to evict them. The head of the Government, Mr Mugabe, refused to support the owners, occupiers and workers who are regarded as associated politically with the Opposition against the Government, refused to uphold

the court orders or to direct the police to enforce the law and court orders. He encouraged his followers to break the law and defy the Court. Owners, occupiers and workers have been killed and injured. See the *Australian*, 17 February 2000, p. 8, *Weekend Australian*, 8-9 April p. 16, *Australian* 10 April, p.8; 12 April, p. 10; 14 April, p. 9; 17 April, p.9; 19 April, p.8; 20 April, p. 10.

In Queensland at present the Governor has reserve authority to dismiss a Government persisting in acting or encouraging action in clear and grave breach of the law and to bring about an election in which the people have the opportunity of deciding to elect a Government which will comply with and uphold the law.

Recommendation 5.2 is:

> That the maximum term of the Legislative Assembly be extended to four years subject to a provision that a dissolution may not be granted during the first three years unless (a) a vote of no confidence is carried or a vote of confidence fails to be carried, or (b) an appropriation bill is defeated or fails to pass. The provisions should be referendum entrenched.

The Background Paper comments that, 'the Queensland Governor would not have any reserve power of dissolution of the Legislative Assembly during the fixed three year term. This would not prevent however, the dismissal of a Government for proven illegality since the substitute Government will either possess the confidence of the Assembly or else be defeated and an early election will be triggered' (p. 4). I question the correctness of that comment.

A Government which persistently engages in or encourages clear and grave breaches of the law almost invariably does so because it regards itself as fulfilling an obligation to do what is politically correct according to its own partisan political philosophy or imperatives, and treats that obligation as superior to the obligation to comply with the law and constitutional propriety. Compare *Democracy*, pp. 111-2. If recommendation 5.2 became part of the Constitution, during the first three years of a Parliament a Government with majority support in the Legislative Assembly could engage in such conduct and fairly easily avoid being forced by dissolution to face the electorate. The Governor would be impotent to take the steps that under the present constitution would be expected to bring the clear and grave illegality to an end. Assume the illegal conduct occurred six months into the life of the Parliament. The Governor could dismiss the Premier and Government perpetrating or encouraging the illegality but could not appoint another Premier and Government able to govern or able until the expiration of two and a half years to advise and bring about an election. The Governor would know that a Government prepared to achieve its political objectives through grave illegality would be likely to be prepared to exert on the Governor the pressures of frustration in order to force its own reappointment. It would be well within its power, with its control of the majority in the Legislative Assembly, to frustrate the Governor. It could avoid an election and retain its majority so long as it avoided a vote of no confidence being carried, ensured that every vote of confidence was carried, and ensured that every appropriation bill passed. The Governor, whose primary obligation to the community is to appoint from the Parliament a Government fitting the notion of the elected Government, and able to govern, would be unable to do so unless the Government dismissed for illegality were reappointed. No other Government could obtain the support of the majority of the Legislative Assembly and without that support could not pass any Act of Parliament. Compare *Democracy,* pp. 48-50, 59. The constitutional system would be drifting with no effective Government and no effective Government other than the Government involved in illegality could

be obtained for two and a half years. Although the power to dismiss a Government for persisting clear and grave illegality would exist during the first three years, the absence of effective power to install an effective Government in its place through dissolution and election would greatly discourage a Governor from making any use of reserve authority even in a case of the gravest, clearest and most blatant illegality. There would be no realistic option but to leave the offending Government in office.

Other situations arise where a Governor has no real option but to take the course that avoids the risk of producing ineffective government. When a Premier with a majority in a Parliament with no minimum term advises an election, however early, the Governor has no real option but to act on the advice. If the advice were refused, the Premier could resign, and the Governor could not obtain a majority Government able to govern, and would have to dissolve for an election. To avoid the risk of frustrating the system of government, the Governor has no real option but to accept the initial advice.

There is nothing fanciful in a Governor proceeding on the basis that during the first three years dismissal of a Government clearly involved in grave breaches of the law would be likely to worsen the constitutional position rather than, as now, resolve it. A Government dismissed for such serious illegality could well prefer to postpone for as long as possible the time when it would have to face the electorate, and seek to rebuild its image during the balance of the three years while the State drifted under a minority Government unable to govern except with the support on particular issues of the majority tainted by illegality.

There are other situations which could arise if the Legislative Assembly could amend the Constitution by an Act of the Parliament and recommendation 5.2 deprived the Governor of reserve authority to dissolve Parliament and bring about an election during the first three years. They amount to what Dr Evatt described as 'attempts to cheat the electors of the right to control the Legislature'. *Democracy*, pp. 151-2. A Government with a large majority in the Legislative Assembly could without ever having raised the issue in an election, cause Parliament to amend the Constitution to extend the life of that Parliament to fifteen years. Or it could change the electoral law so that only members of its party could be eligible as candidates for election to Parliament, which would have the effect of introducing a one-party system of government. Dr Evatt foresaw that attempts such as that to bypass the electorate and grab power would call for the Governor to use reserve authority to dissolve Parliament for an election before the bills for the changes became law. Referring those impending constitutional malfunctions to the electorate to give voters the opportunity of preventing the changes by electing a new Government would be an instance of acting to give the electorate the opportunity of retaining safeguards essential to the democratic operation of the system.

A Government could be prevented from such attempts to bypass the electorate and grab power, either by use of reserve authority or by referendum entrenchment of a provision requiring elections after a specified period and a provision specifying the eligibility of electors. Under the present Queensland Constitution the three year parliamentary term cannot be extended without the approval of the electorate by referendum (Background Paper p. 5). The Queensland Constitutional Review Commission recommended that a maximum four year term be referendum entrenched, Report, chapter 12 and ss. 15 and 84.

I have given some examples but the advantage of the reserve authority is that it is not limited to particular situations but authorises the Governor to exercise a reserve power and refer an exceptional constitutional malfunction to Parliament or people for resolution as a last resort in

any situation where that becomes absolutely necessary to ensure the effective operation of the constitutional system and its safeguards of democracy. It is available for situations when they arise which meet those criteria although the situation has not at present been encountered or thought of.

For the reasons, given, the inclusion in the Queensland Constitution of recommendation 5.2 in its present form would seriously reduce the effectiveness and utility and the safeguarding capacity of the vital protective device and fail-safe mechanism – the reserve authority. It would also substantially reduce the potential accountability of the Government to the electorate.

It is highly desirable that the reserve authority of the Governor continue to exist for the whole life of Parliament. In addition to what is proposed for recommendation 5.2 there should be a provision to a similar effect to the New South Wales provision under which the Governor expressly retains the power to dissolve the lower House, in accordance with established constitutional conventions' throughout the four-year parliamentary term (Background Paper, p. 3). That provision would no doubt be construed as retaining the reserve authority throughout the life of the Parliament but it is most ineptly expressed. The supposed constitutional conventions often said to apply in that area are spurious and non-existent and would be unworkable if they did exist. Instead of being bound by conventions in using the reserve authority the Governor exercises a discretion, although a very confined one. *Democracy,* pp. 157-62. The provision in the Queensland Constitution should have the effect of retaining the Governor's existing reserve authority to exercise reserve powers, throughout the four-year term. Because a provision such as that carries an undesirable risk of giving the courts jurisdiction to investigate and decide whether a purpoted exercise of a reserve power was justified by the reserve authority, it would be important to provide that that issue is not justiciable by the courts.

In making a constitutional change it is essential to take a realistic view of the future and have regard to the interests of future generations. A constitutional change made now is likely to last for a century or centuries. It can not be assumed that Governments will always be led by highly-principled leaders. The test of a good constitution is not how it will work in the usual situation when everyone is behaving well, but how it will work on the infrequent and exceptional occasions when people are acting badly. The existence of an effective reserve authority enabling the Governor to refer a constitutional malfunction to the people in the last resort, although virtually never used, provides a strong incentive for Governments to act with constitutional propriety. Because the reserve authority is virtually never used, a provision along the lines of that in New South Wales would seldom if ever actually operate but would maintain in existence the protective mechanism which in exceptional circumstances can be essential to the preservation of the democracy of the system. In an analogous situation, the fact that the fire control equipment of a building has seldom or never been used and it is hoped that it will never need to be used in future, is not a good reason for dispensing with the equipment.

Yours sincerely,

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