Bar Association of Queensland

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Ms. Karen Struthers MP
Chair
Legal, Constitutional and Administrative Review Committee
Queensland Parliament
Parliament House
Alice Street
BRISBANE Q 4000

Dear Ms Struthers

RE: THE QUEENSLAND CONSTITUTION - ENTRENCHMENT

Thank you for including the Bar Association of Queensland on your committee's list of consultees in respect of the important subject of the entrenchment of provisions in the Queensland Constitution.

The proposals for entrenchment as contained in your committee's report No. 36 "Queensland Constitution: Specific Content Issues" and the "Proposals for Comment" Discussion Paper, each released in August 2002, were considered by the Executive of the Association following the receipt of a report to the Council by Mr John Logan RFD, SC and Mr Dominic Katter, respectively convener and member of the Council's Administrative Law Committee.

The enactment of the Constitution of Queensland Act 2001, which materially commenced on Queensland Day this year, served the very desirable end of consolidating into the one document a range of measures, or at least a ready reference to the same, concerning the governance of our State which were hitherto scattered through a number of pieces of legislation. That consolidation has also served to make patent a noticeable feature of Queensland's constitutional framework namely, the absence of any double entrenchment of provisions concerning the judicial branch of government. In contrast to provisions found or referred to in Chapter 2 concerning the Parliament and Chapter 3 concerning the Governor and the Executive Government of the State, none of the provisions of Chapter 4 concerning the Judiciary are entrenched at all.

The advice tendered by the Judicial Committee of the Privy Council in *McCawley v. The King*[1] established that no special sanctity attended the Constitution Act 1867 (Qld), the provisions of which might readily be amended by the passage of other legislation by the Queensland Parliament of the day. Cases decided since then[2] have established that it is possible for a State parliament to entrench provisions in a way that binds successor parliaments.

Over the course of the twentieth century, Queensland parliaments chose doubly to entrench, including via the inclusion of a referendum requirement, provisions governing the Parliament and the office of Governor. The absence of any such entrenchment concerning the Judiciary lends an asymmetrical quality to our system of government that is highlighted, but not addressed, by the Constitution Act 2001. Especially that is so given the referendum entrenched, unicameral nature

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1 (1920) 28 CLR 106

2 Notably Attorney-General (NSW) -v- Trethowan (1932) 47 CLR 97 (Judicial Committee)and Clayton -v- Heffron (1960) 105 CLR 214 (High Court).

of the Queensland Parliament. That feature has led, inexorably, to dominance by the Executive over Parliament and, with that, the potential for the dominance of the Judiciary by the Executive. Writing extrajudicially in 1989, the Honourable Mr Justice McPherson CBE, put the matter thus:

> *A tendency for the legislature to assert its dominance over the judiciary, and for the executive to dominate the legislature, may have its origins in the bungling of Queensland's Constitution at Separation ... Its apotheosis was the decision in McCawley's Case and The Supreme Court Act of 1921, followed a year later by the abolition of the Legislative Council. In fashioning an instrument of power for their use the politicians of that era lacked the wisdom to foresee, or perhaps to care, that control of it would one day pass to their opponents. Those who now regret the ambit of Executive authority in Queensland can be in no doubt who were responsible for creating it ...* [3]

History instructs the prospect that events such as those which led up to the Supreme Court Act of 1921 or which led to up to the Fitzgerald Inquiry might again occur is not a remote one, however unlikely it may presently seem. His Honour's remarks, in the Association's respectful opinion, have an enduring relevance.

The existence of a superior court of general jurisdiction, the members of which unquestionably enjoy secure tenure and salary during good behaviour and capacity, is fundamental to our system of government. When express provision for the same was made in the Act of Settlement 1701 (UK) the cataclysmic struggles of the preceding century that had caused so much suffering and loss of life in England, Scotland and Ireland were very fresh memories. An independent judiciary was seen as one of the ways of guaranteeing the rule of law and equal justice under law as between Crown and subject and subject and subject. Our system of government was established on this premise. An understanding of the historical basis for that premise underscores just how

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[3] B H McPherson: Supreme Court of Queensland (1989), Butterworths Pty Ltd, Sydney, p.399.

serious an omission from an instrument of government is the absence of entrenched protection for the Judiciary.

For these reasons, the Association supports the proposal that ss.57 and 58 of the Constitution of Queensland Act should be "referendum entrenched", insofar as they relate to the Supreme Court. The Association agrees, subject to the comments below concerning tenure, that such entrenchment is not warranted in respect of the District Court. The basis of that agreement is that specified in committee proposal 15 namely, that it would unnecessarily restrict the capacity of future governments to modify the court system.

That agreement should not be interpreted as indicative of any support by the Association for the abolition of that court at the present time. Parliament has in the past felt moved, according to the temper of the times, to experiment with how best to deliver justice in the more minor cases to the community with the abolition of previously established District Courts and their subsequent re-establishment. The abolition of those courts was accompanied by the compulsory retirement of judges with retrospective effect. That was a most unfortunate chapter in the history of relations between the three branches of government in our State. For this reason, the Association supports the referendum entrenchment of s.63 of the Constitution of Queensland Act. The need to guarantee independence of the judiciary is so important that it also warrants the referendum entrenchment of ss. 60(1), 61(1) and 61(2) and 62 of that Act. A mechanism would be needed to ensure that such entrenchment could not be subverted by the modification of the definition of "judge" presently found in s.56 of the Constitution of Queensland Act. The aim, in the Association's opinion, should be to achieve an outcome whereby all provisions of Chapter 4 touching on the Supreme Court were referendum entrenched and those touching upon the tenure,

pay and allowances and removal of District Court judges were likewise entrenched, subject to the operation of s.63 (which should also be referendum entrenched).

The Association agrees that the tenure given to judges should be subject to an age 70 retirement based proviso.

The provision made in ss.61(3) to 61(10) for the report to the Parliament by a tribunal of superior court judges reflects a practice that has found favour with the Queensland Parliament in recent times. It represents something of a gloss on the Act of Settlement process, but has much to commend it, especially where there is a unicameral parliament. It is not though the only model that might be used. The Judicial Officers Act 1986 (NSW) with its provision for a judicial commission provides an Australian example of an alternative model. The Association agrees that it is more appropriate for the procedural provisions concerning the removal of a judge to be "parliamentary entrenched" so as to provide a measure of flexibility in the event that some impracticality is encountered in the future with the present tribunal system and so as to allow, for example, for the introduction if thought fit in the future of a "judicial commission" model.

The Association is in general agreement with the committee's proposals, set out in Appendix B to the Proposals for Comment Paper, concerning whether referendum or parliamentary entrenchment should be applied to provisions recommended in report No. 36 "Queensland Constitution: Specific Content Issues". That agreement is subject to the following comments and reservations:

- Recommendation 4 - The Governor's right to information. This recommendation makes

explicit that which is presently a convention. In its present form, though, the provision is an inexact replication of convention in that it does not contain the correlative that the Premier or, as the case may be, another minister, is obliged to provide the information requested by the Governor.

- Recommendation 10 - Lieutenant Governor. The Association considers that the people of Queensland have in the past been well served, and continue to be well served by the appointment of the Chief Justice, or next most senior available Supreme Court judge, in the absence of the Chief Justice, being appointed as Administrator of our State in the absence of the Governor. Queensland has had an unfortunate experience with the office of Lieutenant Governor. The appointment in 1920 of the Honourable William Lennon as Lieutenant Governor in the interval between the retirement of Major Sir Hamilton John Goold-Adams, G.C.M.G., C.B. as Governor and his replacement by the Rt. Hon. Lieutenant-Colonel Sir Matthew Nathan, G.C.M.G. as Governor facilitated the abolition of the Legislative Council, notwithstanding the then recent failure of a referendum proposal concerning that measure. The prospect of the repetition of such a situation is rendered highly remote by a continuation of the present arrangements.

- Recommendation 11 Oath or Affirmation of Allegiance to the Crown. The Association would dispute that a failure to take the oath (or affirmation) of allegiance has no legal effect. The effect of s.22 of the Constitution of Queensland Act is that a member is not lawfully entitled to sit or vote in Parliament until each of the oath (or affirmation) of allegiance and that of office has been taken. Further, it is popularly, but not legally, correct to describe the oath (or affirmation) of allegiance as one of allegiance to the

Crown. It is to then Sovereign and to his or her heirs and successors according to law. The latter would accommodate a lawful transition to a republic, were that ever to command sufficient popular support. In this sense, the oath is one that serves the useful purpose of requiring a member publicly to proclaim support for our present system of government and only lawful change of that system. If anything therefore, the absence of referendum entrenchment of this requirement makes it asymmetrical with the referendum entrenchment of our present system of government.

- Recommendation 28 - Judicial independence. The inclusion in the Constitution of a statement that "judges appointed under Queensland law are independent and subject only to the law which they must apply impartially" is, as a principle, a cardinal feature of our system of government. However, to include it in the Constitution on the basis that it is useful to make explicit a principle that is axiomatic, but then not to referendum entrench it on the basis of apprehended implications concerning the exercise of judicial power by those not enjoying security of tenure will reduce the importance of the principle. Especially, in circumstances where other conventions are given such entrenchment. The apprehension concerning implications may well be derived from the settled interpretation of Chapter III of the Commonwealth Constitution. There is much to commend that interpretation. The Association does not support the dilution of the independent exercise of State judicial power by persons who do not enjoy security of tenure and particularly by persons enjoying term appointments, save in those exceptional cases where it is necessary to appoint an acting judge. The existence of the apprehension concerning implications probably provides a reason not to include this statement at all, rather than just to entrench it in a parliamentary way and then to honour its spirit in the breach by

specific enactments that expressly provide to the contrary.

The Association would be pleased to elaborate on any of the foregoing submissions, should your committee so desire.

Yours sincerely
BAR ASSOCIATION OF QUEENSLAND

A.J. GLYNN SC
President