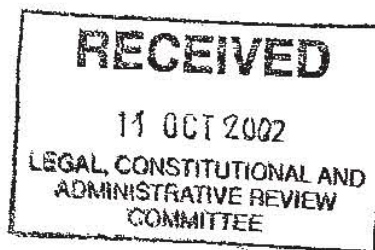


No 11

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10 October 2002

The Research Director
Legal, Constitutional and Administrative Review Committee
Parliament House, George Street
BRISBANE QLD 4000

Dear Madam

I write in relation to the Legal, Constitutional and Administrative Review Committee's August 2002 Consultation Paper entitled "The Queensland Constitution: Entrenchment". I wish to provide the following comments in relation to the paper's propositions.

Page 9 of Consultation Paper – comment on section 2.2.1

The paper notes that the legal arguments regarding entrenchment are complex and suggests there is some doubt as to the extent to which Parliaments can legally entrench provisions of a State constitution. It states that the only clearly established basis upon which a Parliament can bind its successors is found in section 6 of the *Australia Act (UK) 1986* and section 6 of the *Australia Act (Cth) 1986*. The paper further states, "*The Australia Acts empower Parliament to make 'manner and form' provisions which prevent laws 'respecting the constitution, powers or procedure of the Parliament' from amending or repealing entrenched provisions without observing special additional procedures. However, a law which amends or repeals the Constitution is not necessarily a law respecting the constitution, powers or procedure of the Parliament. Thus, some of the principal features of most constitutions, for example, provisions relating to the executive and judicial branches of government, do not fulfil the necessary test.*"

Interestingly, Lumb appears to have taken the opposite view and has suggested, "... *there is Australian authority in favour of the proposition that state parliaments may impose manner and form requirements in relation to matters not within the meaning of the phrase 'constitution, powers or procedure of the legislature'.*" (Lumb, R 1991, *The Constitutions of the Australian States*, 5th Edition, UQP, Brisbane, p. 129; also p. 132) Lumb elucidated this comment by citing from the case of *Victoria v Commonwealth* (1975) 134 CLR 81. Nevertheless, Lumb concluded that the power of a State Parliament to introduce rigidity into its constitution is limited by the following condition: "... *it cannot make legislation unrepealable or impose a manner and form provision which is in effect a limitation of substance designed to inhibit the power of a State legislature to repeal the legislation.*" (Lumb, R 1991, *The Constitutions of the Australian States*, 5th Edition, UQP, Brisbane, p. 131) I offer these points for the committee's consideration.

Page 12 of Consultation Paper – comment on section 2.3

In addition to the legal arguments concerning entrenchment the paper notes that there are policy arguments both for and against the notion of a Parliament being able to introduce rigidity into the State constitution. The paper states, “... *the question the committee is concerned with is whether the Constitution should be a controlled document, amenable only by special procedures, or an Act which the Parliament of the day is able to amend by ordinary statute.*” Legal arguments aside, my view is that given its basic nature the Queensland Constitution should not be able to be changed simply by ordinary legislative processes. The purpose of a constitution is to specify, and to provide certainty concerning, the essential ground rules for the governance of a society. Because of its fundamental importance a constitution should not be open to being arbitrarily changed according to political whim. For this reason a constitution should only be able to be changed in accordance with special procedures, and preferably with as much community involvement as practicable. This approach is particularly relevant for Queensland given its unicameral status, which makes it especially important for safeguards protecting the integrity of the Constitution, ideally approved by the electorate, to be in place.

Page 14 of Consultation Paper – comment on section 3

The paper notes various constitutional provisions that were doubly entrenched without seeking the consent of the electorate at a referendum. Two of these are closely connected: three year terms and Queensland’s unicameral parliament. Interestingly, in 1890, soon after the decision was made for members of parliament to be remunerated, it was decided that the parliamentary term should be reduced from five to three years to ensure greater accountability of the members to the electorate (Sawer, M (ed) 2001, *Elections Full, Free & Fair*, Federation Press, Sydney, pp. 24, 36). When Queensland’s Legislative Council was abolished in 1922, it was justified on the basis that three year parliamentary terms would ensure that the government of the day, which ends up controlling the remaining House of Parliament, did not abuse its public trust (Fitzgerald, R 1984, *From 1915 to the Early 1980s – A History of Queensland*, UQP, Brisbane, p. 27). Then, in 1934, these matters were constitutionally entrenched to ensure, as stated by the Premier of the time, that control of the constitution remained in “the hands of the people” so that no move could be made to extend the length of parliamentary terms or to reestablish the Legislative Council without the approval of the people in a referendum (QCRC Report 2000, pp. 68 – 69). I offer these points for the committee’s consideration.

Page 17 of Consultation Paper – comment on Committee Proposal 1

The committee proposes that provisions necessary to “*maintain the essential structure of the State’s constitutional system*” should be referendum entrenched. Appendices A and B of the paper outline the committee’s proposals with respect to both referendum and parliamentary entrenchment.

Concerning appendix A, while I generally concur with what is proposed, I am of the view that sufficient grounds exist which warrant the committee giving consideration to altering

its proposition regarding section 71 of the *Constitution of Queensland 2001* (Requirements for a local government). While the committee proposes that the provision be parliamentary entrenched, I consider it would be more appropriate for referendum entrenchment status to be accorded to at least subsection (1): “*A local government is an elected body that is charged with the good rule and local government of a part of Queensland allocated to the body.*” Local government, which has often been described as the level of government closest to the people, is an essential element of the State’s constitutional system since it is responsible for providing a diverse range of services and programs on behalf of the State Government as well as undertaking many community service and economic development functions on its own initiative. As the paper also acknowledges, local government is recognised as an elected third tier of government and plays an important role in the structure of government in Australia (page 18). In order to perform their governance functions local governments are able to make local laws and impose taxes and charges on the citizens within their respective boundaries. Accordingly, local governments need to be accountable to their electors, and the ability of electors to be able to directly decide the fate of their respective local governments should be constitutionally specified and for this to be referendum entrenched, not just parliamentary entrenched. While it might be argued that such an approach could be inconsistent with the legal status of local governments as creatures of State Parliament, it is nevertheless consistent with the democratic rights and expectations of citizens to be able to choose their local representatives and to hold such representatives politically accountable.

Concerning appendix B, again I generally concur with what is proposed. However, I consider that there is justification for the committee to review its proposal regarding Recommendation 22 of Report No 36 (Fresh election of local councillors after dissolution). While the paper suggests that the flexibility of parliamentary entrenchment is preferable given that the relevant provision would not make it legally enforceable for a fresh election to be held “as soon as possible” (LCARC Report No 36, p. 46), I maintain that referendum entrenchment of the relevant provision would be more consistent with the democratic rights and expectations of citizens to choose their governmental representatives.

One final point should be made concerning local government. In 1999 local government terms were extended from three to four years. This was done without the matter first being put to a referendum to determine whether it had popular support. While it might be argued that there was no legal requirement to do so, putting it first to a referendum would have been preferable given the strong, long term political tradition in Queensland which holds the electorate, in the words of Dicey, to be the “true political sovereign of the state” (Funnell, W 2001, *Government by Fiat*, UNSW Ltd, Sydney, p. 2; also note LCARC Report No 31, p. 7 on this point). Therefore, I would like to suggest that consideration be given to the specification of local government terms being included in the Queensland Constitution, rather than in the *Local Government Act 1993*, and for this to be referendum entrenched. If this were done it would greatly enhance the vital role of democracy in local government.

Page 18 of Consultation Paper – comment on Committee Proposal 2

I support the committee's proposal that the Queensland Constitution should referendum entrench the provision requiring that there must be a system of local government in Queensland and that the system consists of a number of local governments. However, I also draw the committee's attention to my previous comments concerning the desirability of referendum entrenching the need for democratic processes to be observed in the election of local governments.

Page 21 of Consultation Paper – comment on Committee Proposals 3 and 4

I support the committee's proposals as outlined. My question, however, is whether it would be intended for the terms "referendum entrenchment" and "parliamentary entrenchment" to be constitutionally defined and, if so, whether such definitions would also be entrenched?

Page 22 of Consultation Paper – comment on Committee Proposal 5

While I note Lumb's view that the Queensland Constitution could provide for matters aside from those concerning the constitution, powers or procedure of the Parliament (refer previous comment), I support the committee's proposal that the Attorney-General should seek to obtain a High Court declaration on the matter as this would certainly assist to clarify any current ambiguity in this regard.

Pages 23 and 24 of Consultation Paper – comment on Committee Proposals 6, 7 and 8

I support the committee's proposals as outlined.

Page 25 of Consultation Paper – comment on Committee Proposal 9

While I support the committee's proposal, I note Lumb's view that State constitutions are also subject to *Statute of Westminster 1931* (UK) (Lumb, R 1991, *The Constitutions of the Australian States*, 5th Edition, UQP, Brisbane, pp. 132, 133). I offer this point for the committee's consideration.

Page 27 of Consultation Paper – comment on Committee Proposal 10

While I agree, in principle, with the committee's observation that formal mechanisms independent of Parliament for initiating constitutional reform are not absolutely necessary, I suspect that the consolidation of the Queensland Constitution into a single, more accessible and readable document will make it easier for citizens to become familiar with its contents, including any inadequacies it may have, and subsequently to lobby for change. This would be a positive outcome, one in fact that should be welcomed and encouraged by the Parliament.

Page 28 of Consultation Paper – comment on Committee Proposal 11

I support the committee's proposal as outlined.

Page 29 of Consultation Paper – comment on Committee Proposal 12

I support the committee's proposal as outlined.

Page 30 of Consultation Paper – comment on Committee Proposals 13 and 14

I support the committee's proposals as outlined. Of course, it goes without saying that it would be essential for any constitutional convention to be comprised of a wide cross section of the community to ensure broad support for, and ownership of, the resulting outcomes.

Thank you for the opportunity to present my views on these matters. I trust they will assist the committee in its deliberations.

Yours faithfully

A handwritten signature in black ink, appearing to read 'Don Willis', with a stylized flourish at the end.

Don Willis