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LEGAL, CONSTITUTIONAL AND
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COMMITTEE

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

Dear Madam

I write regarding the recent letter from Ms Karen Struthers MP, Chair, Legal, Constitutional and Administrative Review Committee, which contained a proof copy of the Transcript of Proceedings taken of the round table discussion on 28 November 2002. In addition, Ms Struthers indicated that the closing date for the receipt of further submissions to the committee's inquiry into the entrenchment of the Queensland Constitution has been extended to 31 January 2003. In relation to the transcript I wish to advise that I did not identify any errors of transcription that warranted correction. Furthermore, I have no objection to the transcript being published on the committee's website.

I would like to thank the members of the committee for making available the opportunity to meet with them at the round table discussion. I consider the occasion was very successful as it enabled participants to gain greater insights into the views of others who are also interested in ensuring the Queensland Constitution remains a relevant and necessary document.

As a result of participating in the discussion I would like to offer some further points in addition to those I made in my submission of 10 October 2002 concerning the committee's inquiry into the entrenchment of the Queensland Constitution.

The committee's August 2002 Consultation Paper proposed that "*only those provisions necessary to maintain the essential structure of the State's constitutional system should be referendum entrenched.*"¹ In consideration of this matter, on page 3 of the transcript of the round table discussion an important point was made about the "litmus test" for what should be entrenched in the Constitution. Relatedly, on page 6 of the transcript concern was expressed that the committee's proposed test may not be sufficient in Queensland given its unicameral nature and the consequent ability of the executive to readily dominate Parliament. It was also recognised that Queensland has a history of strong majority governments, which makes the "safeguard" of parliamentary entrenchment somewhat illusory. While one view suggested that no entrenchment of any

¹ Legal, Constitutional and Administrative Review Committee 2002, *The Queensland Constitution: Entrenchment*, Brisbane, p. 17

type should be adopted, the contrary view was expressed that given Queensland's unicameral status it is necessary for referendum entrenchment to be adopted, at least for the fundamental constitutional provisions and principles, so as to provide some type of control, or safeguard, against a future executive that may be acting out of order.

In further considering these issues since the round table discussion I have been giving thought to the need for the committee's proposed referendum entrenchment test to be widened so as to be more consistent with the concept of constitutionalism. In this regard the following statement is relevant:

*A constitution is often defined as the whole body of rules, written and unwritten, legal and extralegal, which describe a government and its operation. This is permissible and indeed a highly convenient usage. But there is a more restricted idea equally deserving of a name – the idea of a constitution as a contrivance which not only describes but confines government, at least in its every day activities. The argument for such confinement was stated by Alexander Hamilton in *The Federalist*: 'In framing a government which is to be administered by men over men, the greatest difficulty lies in this: you must first enable the government to control the governed; and in the next place oblige it to control itself. A dependence on the people is, no doubt, the primary control on government; but experience has taught mankind the necessity of auxiliary precautions.' To these auxiliary precautions we give the name constitutionalism.²*

Of the principles of constitutionalism it has also been observed: "*A people's constitution is the supreme law that legitimates, limits, and empowers the government, which, if democratic, is based on periodic and competitive election of representatives by virtually all the adult population. It articulates the structure of government, procedures for selection and replacement of government officials, and distribution and limitations of the powers of government.*"³

Thus, to be reflective of the principles of constitutionalism a constitution should ideally be concerned with two processes: it should establish the essential structure of a constitutional system; and, it should define and circumscribe power. For this reason the committee's proposed test should be broadened to also encompass the notion of the limitation of power. Accordingly, section 42 of the *Constitution of Queensland 2001*, which is proposed in Appendix A of the Consultation Paper to be parliamentary entrenched, should be referendum entrenched, particularly subsection (2) which provides for Cabinet to be collectively responsible to Parliament. Despite the reality of party discipline, Parliament remains an effective check on the power of the executive. Referendum entrenchment of this provision, rather than parliamentary entrenchment, would be important to ensure a future executive did not attempt to dilute the principle of responsible government which underpins Queensland's political system.

² Wormuth, F D 1949, *The Origins of Modern Constitutionalism*, Harper & Brothers, Publishers New York, chapter 1. Source: www.constitution.org/cmt/wormuth/wormuth.htm

³ Patrick, J 1997, *Teaching about Democratic Constitutionalism*. Source: www.ed.gov/databases/ERIC_Digests/ed410177.html

Similarly, consideration should be given to extending referendum entrenchment status to recommendation 16 of Appendix B and section 19 of the *Constitution of Queensland 2001* because these relate to Parliament's ability to meet and thereby publicly scrutinise the activities of the executive with full immunity. I agree with the view expressed at the round table discussion that referendum entrenchment status should be also accorded to the number (or possibly proportion) of ministers and parliamentary secretaries to ensure constraint of the domination of the executive over the Parliament. Finally, I consider that recommendation 10 of Appendix B relating to the appointment of the lieutenant-governor should be referendum entrenched to be consistent with the committee's proposal for section 29 of the *Constitution of Queensland 2001* (Appendix A) regarding the appointment of the Governor. If, as the Consultation Paper states, the appointment of the Governor is essential to the effective functioning of executive government,⁴ the appointment of a lieutenant-governor should be similarly recognised by being referendum entrenched. Based on the principles of constitutionalism it may be possible that other provisions should also be referendum entrenched. I offer this point for the committee's consideration.

Thus, to better reflect the principles of constitutionalism the committee's proposed referendum entrenchment test should be concerned with not only the essential structure of the State's constitutional system but also with the limitation of power. As mentioned earlier, this is particularly important in Queensland given the ability of the executive, through the mechanism of party discipline, to dominate the sole house of Parliament.

Before closing I would like to offer two further comments for the committee's consideration. Firstly, section 8 of the *Constitution of Queensland 2001* provides for the law-making power of the Parliament. The provision translates the referendum entrenched provision of the *Constitution Act 1867* which empowers the Parliament to make laws for the peace, welfare and good government of the State.⁵ I understand it has been judicially held that, contrary to what might be first thought, the words "peace, welfare and good government" are not words of limitation and therefore, laws that are otherwise are not subject to review by the courts.⁶ This situation would appear to be at odds with the principles of constitutionalism which emphasise the need for checks and balances to prevent the abuse of power. To clarify any ambiguity a provision could be inserted in the *Constitution of Queensland 2001*, under section 8, whereby Parliament formally commits itself to ensuring the enactment of laws for the peace, welfare and good government of the State. This may provide an additional safeguard against the actions of a future executive that is using its ability to dominate Queensland's unicameral Parliament to enact laws not in the State's best interests. Any such provision would need to be referendum entrenched.

⁴ Legal, Constitutional and Administrative Review Committee 2002, *The Queensland Constitution: Entrenchment*, Brisbane, p. 35

⁵ *Constitution Act 1867*, section 2

⁶ Hanks, P 1996, *Constitutional Law in Australia*, 2nd Edn, Butterworths, Sydney, pp. 18, 129 – 132; Lumb, R D 1991, *The Constitutions of the Australian States*, 5th Edn, University of Queensland Press, St Lucia, pp. 84 – 86

Secondly, I am inclined to concur with the views expressed at the round table discussion that a full constitutional convention as proposed in the Consultation Paper⁷ is probably not necessary or desirable given the level of consultation that has occurred over the past few years. Nevertheless, I consider it important that to ensure popular support for the process of constitutional change and reform it will still be necessary for the community to be widely engaged otherwise there will likely be a lack of interest in the process and this would be damaging to its chances of success at a referendum.

Thank you for the opportunity to make this further submission to the committee's inquiry. I trust the comments I have offered will assist it in its deliberations.

Yours faithfully



Don Willis

⁷ Legal, Constitutional and Administrative Review Committee 2002, *The Queensland Constitution: Entrenchment*, Brisbane, p. 30