Spec 43.1

No 23

LEGISLATIVE ASSEMBLY OFFICES

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LEGAL, CONSTITUTIONAL AND ADMINISTRATIVE REVIEW COMMITTEE

27 February 2003

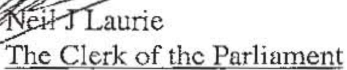
Ms Sarah Lim
A/Research Director
Legal, Constitutional and Administrative Review Committee
Parliament House
George Street
BRISBANE QLD 4000

Dear Sarah

I refer to the Chairman's letter requesting submissions on the committee's inquiry into entrenchment of the Queensland Constitution.

Please find attached a submission for the committee's consideration. Please pass on my apologies to the committee for its lateness.

Yours sincerely



Neil J Laurie
The Clerk of the Parliament

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LCARC PROPOSALS FOR COMMENT
THE QUEENSLAND CONSTITUTION: ENTRENCHMENT

Consequences of entrenchment

I think that it is important to emphasise that entrenchment does have practical consequences.

The recent Western Australian case *Marquet v. Attorney-General of Western Australia* [2002] WASCA 277 demonstrates the position. Section 13 of the *Electoral Distribution Act 1947* provides that it is not lawful to present to the Governor for Assent any Bill to amend the Act, unless the second and third reading of the Bill have passed with the concurrence of an absolute majority of the whole number of members for the time being of each House.

The *Electoral Distribution Repeal Bill 2001* (the repeal Bill) sought to repeal the *Electoral Distribution Act 1947.* The repeal Bill passed the second and third reading stages in the Legislative Assembly by the necessary absolute majority. The repeal Bill passed the second and third reading stages in the Legislative Council by a simple majority, not the required absolute majority.

The *Electoral Amendment Bill 2001* (the amendment Bill) passed the second and third reading stages in the Legislative Assembly by an absolute majority. The amendment Bill passed the second and third reading stages in the Legislative Council by a simple majority.

The effect of the two Acts would have been to reconstitute the method of electoral divisions in the State and thereby change the way in which seats in the Legislative Council were allocated between electoral divisions.

The question that arose was whether it was lawful for the Clerk of the Parliaments (also the Clerk of the Legislative Council), charged by Standing Orders to present Bills to the Governor for Assent, to present these two Bills for Assent, given that only a simple majority had been obtained in the Legislative Council. The Clerk sought a declaration from the court asking whether it was lawful for him to present the Bills for Assent.

A majority of the court answered the questions in the negative.

Issues that arose in the argument before the court included:

- Justiciability - essentially whether the court had jurisdiction in the matter or should exercise that jurisdiction. The majority found that the court had the jurisdiction and should exercise the power.
- Whether either Bill was a Bill to amend the 1947 Act. The majority had little difficulty in looking at the effect or substance of the repeal and re-enactment of the provision, rather than the form in which it took place.
- Whether s.2 of the *Australia Act 1986*, was a new and full conferral of plenary legislative power that would give the current Parliament power to amend the 1947 Act without complying with the manner and form provisions. This argument was also

rejected, with the majority of the court holding that s.2 of the *Australia Act 1986*, was of the same effect as the proviso in s.5 of the *Colonial Laws Validity Act*.

- Whether the 1947 Act was an Act or the relevant provisions were provisions to which a special manner and form provision could apply. That is, whether the matter concerned "the constitution, powers and procedures" of Parliament. The majority found that provisions which regulate the number of members of a House of Parliament, the division of the electors of the State for voting and the basis of division were matters to which manner and form requirements could apply.

For the LCARC, considering the issue of further entrenchment in Queensland, the important points to take from the decision include:

- It is arguable that entrenched provisions may not always need to be "doubly entrenched" to be effective. The court will look to the effect of the legislative activity.
- Whether a matter concerns "the constitution, powers and procedures" of Parliament is likely to be interpreted widely.
- Despite clear words in the entrenching provision, it is always possible for legislation to be passed in a manner contrary to the manner and form/entrenching provisions. Depending on the construction of the particular entrenching provisions (such as "it shall not be lawful to ..."), in such instances by default and in the absence of any other provisions it may fall to constitutional officers such as the Clerk of the Parliament who is required to present the Bill(s) for Assent or the Governor who is to give Assent to take cognisance of the possible unlawfulness of the relevant entrenchment procedure. In other words, essentially non-partisan persons are drawn into the matter and either be obliged to seek declaratory relief from the courts or take it upon themselves to proceed regardless. I note that in Queensland it is the practice for the Attorney-General to certify to the Governor that a Bill is in order for Assent, but that there is no legislative ground for this practice. Perhaps formalising the Attorney-General's certificate should be considered.
- Issues of justiciability should be made clear in any entrenchment exercise, preferably acknowledging or even setting a framework for any judicial review.

The reasons for entrenchment generally

Before considering the basis for entrenchment and what particular provisions should be entrenched, I think it necessary to consider the reasons for entrenchment.

As the committee's issues paper points out, the purpose or effect of entrenchment is to displace the "normal" plenary power of a Parliament. It enables Parliaments to bind their successors, so that later Parliaments must follow special procedures to enable the exercise of their plenary power to legislate for the "peace, welfare and good government" of the community. Because the "normal" exercise of plenary power assumes that the Parliament is acting in the pursuit of "good government", it follows that any break on that plenary power can only be justified in order to prevent "bad government". Idealistically, it assumes that a particular entrenchment is to prevent, hinder or make unlikely "bad government".

Of course determinates of "good" or "bad" government and what is likely to cause each is highly subjective. For example, some contend that unicameralism is superior from of Parliamentary democracy, worthy of entrenchment, whilst others believe the same of bicameralism. Queensland has entrenched unicameralism, whilst other Australian jurisdictions have entrenched bicameralism. Queensland has entrenched three year terms, whilst other Australian jurisdictions have entrenched four year terms.

I am a parliamentary supremacist by nature. That is, I believe that in our system of government, Parliament is and should remain supreme. This is the main reason why I am not generally supportive of Bills of Rights. In my view, Bills of Rights tend to reduce the power of Parliament to make laws it determines to be for the peace, welfare and good government and increase the power of the courts in making that determination. In my view entrenchment – as an exception or break upon parliamentary supremacy – can only be justified if the purpose is to entrench or safeguard the system of Parliamentary government.

The basis for entrenchment of particular provisions

Referendum entrenchment

The committee's basis for selection of referendum entrenchment is dependant upon identifying *provisions necessary to maintain the essential structure of the State's constitutional system.* The committee then provides three general descriptions of provisions that will fall within its criteria.

The committee states that referendum entrenchment of these provisions "prevents substantial changes from being made arbitrarily by a particular government, which might undermine the democratic foundations of the system of government".

I refer to my comments at the round table discussion (pp.5-6), that referendum entrenchment is the ultimate safeguard and that provisions should be selected that are worthy of that safeguard. More particularly, provisions should be selected where other lesser forms of entrenchment, such as parliamentary entrenchment relying on an absolute majority, cannot be relied upon as a worthy level of safeguard for the particular provision. In saying this I refer to my comments above: entrenchment is to safeguard against "bad" government, not "good" government and to ensure the maintenance of our system of Parliamentary government.

I am not certain as to whether the test or basis of selection that I am trying to express is similar to or the same as that which has been articulated by the committee. In any event, I submit that there are a number of provisions worthy of consideration for referendum entrenchment omitted by the committee and I detail those provisions below.

Provision	*Reason for referendum entrenchment*
Appendix B Report No 36 Recommendation 4 – The Governor's right to request information	This is a provision essentially enshrining the Governor's right to request information. This is obviously a safeguard provision. Proposed Parliamentary entrenchment offers no safeguard.

Appendix A Sections 23 and 24 Ministers and Parliamentary Secretaries Appendix B Recommendation 18 – Number of Parliamentary Secretaries	I would argue that the provisions that set the number of Ministers and Parliamentary Secretaries is worthy of entrenchment because they are provisions that, in the committee's words: *Maintain a balance of power between these arms of government as appropriate for a system of representative and responsible government.* Even in a party dominated system of Parliamentary democracy, proper independent scrutiny by Parliament is unlikely to be achieved if too high a proportion of members are Ministers or Parliamentary Secretaries (effectively junior Ministers). To enshrine that the number of Ministers or Parliamentary Secretaries cannot in total exceed, for example, 30% of the number of members in the Legislative Assembly would, I submit, not be unreasonable and indicate a "maximum" level. This would mean that if it is deemed necessary to increase the executive in the future, then a counterbalance increase in numbers will be required.
Appendix B Recommendation 28 – Judicial independence	If such a provision is desirable at all, then it should be referendum entrenched. Surely judicial independence is necessary to maintain the essential structure of the State's constitutional system.
Appendix B Recommendation 29 – Acting judges	Arguably acting judges are an anathema to judicial independence and I query this provision in light of recommendation 28.

Parliamentary entrenchment

Parliamentary entrenchment based upon an absolute majority is, in a unicameral system operating under an electorate system with preferential or optional preferential voting system, almost never likely to be a safeguard. This is because the likelihood of governments having substantial majorities is highly likely, although not impossible (as demonstrated in 1996 and 1998). The point is that Parliamentary entrenchment is really a point of difference from other provisions in other Acts, not a safeguard. Parliamentary entrenchment based on a two-third majority is a much more likely safeguard and would almost always require bipartisan support. I am <u>not</u> advocating a higher form of Parliamentary entrenchment, merely pointing out that as a safeguard to a future "bad" government it is illusory.

Other matters

Reconstituted legislature

I subscribe to the view that if a Bill is approved by the people at a referendum with entrenched provisions, then despite what matters are contained within the Act (that is, despite whether they would be regarded as "manner and form" provisions), I think it likely that a future court would find the entrenchment to have legal effect. When selecting provisions for entrenchment, I believe it is a safer course for the committee to assume this state of affairs and not assume that any particular provision, because of its nature, will not be legally entrenched.

Role of LCARC or successor

In reference to Committee proposals 3 and 4, I assume that proposal 3 is to be entrenched, but I query whether it is necessary to further spell out what the committee must do in respect of the constitutional proposal beyond simply "report". Should there not be a requirement for them to inquire, consult etc.

I trust that the above matters are of assistance to the committee.

Neil Laurie LLB LLM (Hons) MBA