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Legal, Constitutional and Administrative Review Committee
Parliament House, George St
BRISBANE QLD 4000

Re: **Submission to the Committees Inquiry in relation to Reform of the Queensland Constitution**

Dear Chair and Honourable Members,

I am writing in response to the Committee's Issues Paper "The Queensland Constitution: Specific Content Issues", released April 2002, and have a number of items of constructive feedback which I hope to contribute.

I am writing in a personal capacity, and do not represent any organisation. I am an academic with an interest in Queensland politics, and have just submitted a Doctoral thesis with a focus on Queensland electoral behaviour.

I am grateful that the Committee has gone to the effort of providing such a comprehensive issues paper to direct the thoughts of those providing submissions. I believe the entire constitutional reform process is outstanding, and that a similar process (without Republican vs Monarchist overtones) would be extremely useful at a federal level.

In the submission which follows, I will endeavour to address the numbered issues raised in the Committee's Issues Paper.

1. Should a statement of executive powers be included in the Constitution?

In my view, any codified constitution must contain, as a minimum:

(a) a statement in relation to executive powers and institutions;
(b) a statement in relation to judicial powers and institutions;
(c) a statement in relation to legislative powers and institutions;
(d) statements in relation to the manner in which these powers and institutions interact.

As a result, I hold a clear view that a statement in relation to executive power ought to be contained within the Constitution. Having said this, the real challenge lies in determining the depth of detail which should be contained within the Constitution. On one hand, a Constitution could contain a broad, almost ideological statement. Clause 30(1) of the QCRC Constitution Bill is such a provision. On the other hand, a Constitution could theoretically endeavour to contain painstaking detail about executive arrangements, running to several volumes. I suggest that the answer lies between these extremes.

I submit that the following Executive institutions should be mentioned in the Constitution: the Queen, the Governor, the Lieutenant Governor if such an office exists, the Executive Council, the Premier, the Cabinet, the Public Service, and holders of statutory office.

However simply listing the institutions would be inadequate. In relation to their powers, I submit that three points must be made:

(a) what these institutions can do;
(b) statements regarding what these institutions cannot do; and
(c) the fact that some executive offices are typically (or, indeed, inevitably) held by persons who also hold legislative office.

I have no expertise in legislative drafting, but a general provision might look like the following:

> *The executive powers in Queensland are formally vested in the office of the Governor, as the Sovereign's representative, advised by the Executive Council. Such powers are exercised by the Cabinet, led by the Premier, drawn from and accountable to the Legislative Assembly. The Cabinet is assisted in this role by the Queensland Public Service and the holders of various statutory offices.*
>
> *Executive powers extend to the administration and implementation of the laws passed by the Legislature and assented to in accordance with this Constitution.*

2. If a statement of executive power is included in the Constitution, should the statement include reference to the constitutional conventions which regulate its exercise? How should those conventions be incorporated?

The current process of consolidating and critically assessing Queensland's constitution is a remarkable and ambitious task. Because the horizons of the project are so broad, there may be a tendency to see matters in "all or nothing" terms. I submit that the issue of political/constitutional conventions will not yield readily to such an approach. My view is that a case-by-case basis, onerous though it be, is the only way to approach codification of conventions.

Constitutional and political conventions are, in the final analysis, based around that most rare political element – trust. Parties have not yet codified conventions for many reasons, but one of those is simply that, by and large, mutual self-interest prevents parties from transgressing beyond convention, and enables them to trust one another to "stick to the rules." Pairing conventions in parliamentary chambers are a fairly graphic example of such trust in action. Codification would remove the need – and therefore the basis -- for such trust. While this point may seem esoteric, I feel it would be a pity for this to be lost.

Constitutional conventions are much like common law, in that it is up to the incumbent decision-maker to make decisions based on the situation before them,

guided by the body of precedent which exists. Speakers' procedural rulings have much the same status. Both common law and speakers' rulings are strong despite – or perhaps because of – their lack of codification. Yet elements of each are occasionally codified – common law into statute law, speakers' rulings into standing orders. I submit that the same standard – a case by case assessment should apply for conventions.

The discussion paper particularly referred to the convention that the Governor act in accordance with the advice from his or her Ministers, with the possible exception of the exercise of reserve powers. Under ordinary circumstances, codification of this convention is patently unnecessary. It has a rich body of precedent which can be traced back as far as the Magna Carta. Constitutional arrangements, however, should be built to handle extraordinary, and not just ordinary, circumstances. Under extraordinary circumstances, the Governor's choice is to (a) obey the Ministry's advice; or (b) utilise reserve powers. The difficulty for codification is that it is impossible to foresee "extraordinary circumstances" and thus to fashion a constitutional provision to accommodate them. It may be, in fact, that relying on convention is a safer option.

Despite all of this, I gather (impressionistically) that there are still widespread calls for codification. As a result, I suggest a compromise provision along the following lines:

> *The Governor shall note the convention that the Governor acts in accordance with the advice of the Ministry and Executive Council, and shall consider this convention in its contemporary state, before taking any action without the advice of the Ministry.*

Such a provision gives constitutional legitimacy to the convention whilst leaving it intact as a convention rather than a statute. This represents an effective compromise between the two positions on this issue.

3. Should the right of the Governor to be kept fully informed and to request information about matters relevant to the performance of the Governor's functions be recommended in the Constitution?

Initially, this appears to be a fairly innocuous and harmless suggestion. However on further reflection a number of issues emerge.

The first of these relates to the provision proposed for issue 2 above. If the convention that the Governor must act in accordance with the advice of the Ministry is codified then the practical usefulness of this provision is diminished. If the Governor is simply to obey the Ministry, it is irrelevant whether he/she is informed or not. To make the point flippantly, an ignorant rubber stamp is just as effective as an informed one, if a rubber stamp is all that is required. It may be argued that even under such circumstances, the Governor needs access to information to inform his/her use of the reserve powers. However under the circumstances, any such attempt to obtain information would simply signal to the government that the governor was contemplating the use of the reserve powers - seldom welcome news

for the incumbent government. As a result, I submit that if the convention of acting in accordance with the Ministry is codified, then the convention that the Governor is kept fully informed should not be codified, but left as convention.

The second issue relates to the potential for disagreement between the Governor and the Government in relation to an information request made in accordance with the proposed constitutional provision.

If the Governor made a request under this provision, an implicit element of the request would be that the governor considered the information to be "relevant to the performance of the Governor's function." It would be open to the Government, upon receiving such a request, to determine that the requested information was not relevant to the performance of the Governor's function and, on that basis, to decline the request. Under such circumstances, a dispute resolution mechanism must be in place. At present, there are no institutions capable of performing such a function. I submit that, if Constitutional recognition of the right of the Governor to be kept fully informed and to request information about matters relevant to the performance of the Governor's function, is undertaken, a dispute resolution mechanism should be implemented.

4. Should the Governor have power to apply to the Queensland Court of Appeal for a Declaration concerning possible illegal or corrupt activities by a member of the Ministry?

I concur with the objective of this measure, but am unconvinced by the means proposed. The objective is to provide appropriate guidance for the Governor in the event that the Governor must dismiss a government which is acting illegally where the nature of that illegality is sufficiently important to justify withdrawing the Premier's commission. In order to do so the Governor must have a source of information beyond the media or "general knowledge."

Implicit in this issue is that the Governor feels the need to act before a prosecution can be brought (because if a prosecution were underway or complete, the facts would be subject to determination by the court in which the prosecution was brought). If the prosecution has not been brought, there are grave dangers associated with the Governor asking a Court for a determination of facts: this would amount to bringing an immature case before the Court. The Court may not be able to provide an assessment of the facts because, at that time, investigators may not have uncovered them.

There is another option which may address the need for the Governor to be informed, and to act before the conclusion of a prosecution. The constitution could provide that the Governor General should, on a confidential basis, be privy to the brief of evidence supplied to the Director of Public Prosecutions in relation to an alleged offence by a Minister or the Ministry. The Governor could then make his or her own determination, possibly on the advice of an appropriate legal practitioner, as to whether the prosecution brief was sufficiently strong to support the suspension or withdrawal of a commission. If the Governor determined that suspension of the government's commission was appropriate, a caretaker administration could be appointed until the next election, or until the proceedings against the Minister or

Ministry are concluded. Actual withdrawal of a commission would then only occur if a conviction was recorded.

This process would allow the Governor to act as a safeguard against governments acting in a criminal manner, without risking the prospects of the eventual prosecution.

5. Should the Constitution provide that the Governor shall act on the advice of the Premier in appointing and dismissing Ministers?

I submit that the Constitution should *not* include this provision. I am fully in support of the convention that the Governor shall appoint and dismiss Ministers on the advice of the Premier. However, I am not in support of the codification of this convention.

The reason for my view is that a constitutional requirement is absolute, and cannot be lawfully deviated from; whereas a convention can be ignored if the circumstances require.

Fairly recent Queensland history offers an example where a Governor refused to abide by a Premier's direction to dismiss Ministers, and was widely applauded for his decision. The example occurred in 1987, during the final days of the Bjelke-Petersen Premiership. The Premier approached the Governor, His Excellency Sir Walter Campbell, seeking to resign his own commission and that of his entire Ministry, with the intention of then seeking a new commission to form a new Ministry. Mr Campbell indicated in a letter (to the Premier) of 25 November 1987 that:

> *I did not consider your suggestion to resign as Premier and to seek a further commission to form a new administration was the appropriate course for the achievement of a restructuring of the Ministerial portfolios.*

The Premier subsequently requested the Governor to dismiss five Ministers, and the Governor still advised a more moderate response, declining to abide by the Premier's direction and instead suggesting:

> *... that you should request each Minister whom you did not wish to continue as a Minister to resign his commission.*

Eventually, once the Premier had discussed the proposed restructure with his Cabinet, he returned to the Governor to request the dismissal of three Ministers. At this stage the Governor consented, dismissed the three Ministers, and appointed two new Ministers.

Had the Constitution included provisions requiring the Governor to abide by the Premier's instructions, he would have been forced to implement the Premier's first option rather than asking the Premier to reflect and reconsider his decision.

While I do not support the codification of this convention, I share the QCRC's view that the current provisions are archaic, and completely contradictory with political

reality. Clearly those provisions cannot remain in the Queensland Constitution. Instead, I support a similar form of words to those I have proposed in relation to Issue 2 above:

> *The Governor shall note the convention the Ministers are appointed and dismissed on the advice of the Premier. If the Governor declines the Premier's request to appoint or dismiss a Minister, the Governor shall, by message within seven days of so declining, inform the Legislative Assembly of the reasons for declining the Premier's request.*

I have suggested, in this case, that the Governor should inform the Legislative Assembly if he or she chooses not to abide by this convention. This seems appropriate given that Cabinet is drawn from the Legislature, and is answerable through Parliamentary processes to the Legislature. Such a requirement may also provide a brake on the potential for a Governor to capriciously decline to abide by the convention.

6. **Should the Constitution provide that Ministers must be members of the Legislative Assembly? If so, should they be allowed a period of three months (or some other period) from their appointment as a Minister to be elected to Parliament?**

I submit that the basic principle at stake here – that the Cabinet should be drawn from the executive – is fundamental to Westminster democracy, including its Queensland variant. I cannot imagine support for a more American-style administration consisting of non-elected Ministers.

However there may be circumstances where it is appropriate to appoint Ministers who have not yet been appointed as Legislative Assembly members. At a federal level, Michael Lavarch was appointed Attorney-General following the 1993 general election, despite the fact that the election for his seat had been delayed by the death of a candidate. Lavarch subsequently won his seat in the House of Representatives and continued as a Minister.

The alternative would have been for the Prime Minister to ask the Governor General to commission someone else as Attorney-General for a period of a few weeks, or to leave the post vacant. On balance, it seems sensible to allow for Ministers to be appointed provided they become Members of the Legislative Assembly within some period after their appointment.

However I consider the Queensland constitution can improve on the Federal one in two ways.

First, the three-month window of grace could be improved. At present, in the Federal constitution, it is a flat three months. If the Parliament sits during this period, the Parliament would have no chance to question the Minister concerned, during question time, because the Minister concerned would be unable to sit in the Parliament. This is clearly unacceptable given the principles of parliamentary accountability. As a result, I suggest that the requirement be that the Minister

become a Member of the Legislative Assembly within three months, or before the next sitting day of the Legislative Assembly, whichever comes first.

Second, the Discussion Paper slightly misinterprets the Commonwealth Constitution. The Discussion Paper states:

> *An alternative approach is that adopted by the final paragraph of s 64 of the Commonwealth Constitution which allows any person to be appointed a Minister of State provided he or she is elected to Parliament within three months of appointment. [p.7]*

This is not quite so. The second paragraph of s.64 reads as follows:

> *After the first general election no Minister of State shall hold office for a longer period than three months unless he is or becomes a senator or member of the House of Representatives.*

The result of this is, in fact, that a Minister need never be elected to the Parliament, so long as they leave their Ministerial position before the three months expire. Theoretically, it would be possible to cycle non-elected Ministers through the Cabinet indefinitely, provide that each Minister's commission was terminated after two months and twenty-eight days. At present, I suspect it would be difficult to secure agreement from the Governor General to this abuse of process, but if (as suggested by the discussion paper) the Governor was compelled to follow the advice of the Premier, a similar provision has the potential for disaster.

As a result, the Queensland Constitution can improve on the Commonwealth Constitution by *requiring* a Minister to be elected to the Legislative Assembly within three months of their Commission, or before the first day of sitting of the Legislative Assembly, whichever comes first, and perhaps by providing that it is a contempt of the Parliament for a Minister to accept a commission and then fail to become elected.

7 Should a provision be included in the Constitution stating that the Governor:

(a) may appoint as Premier the member of the Legislative Assembly who, in the Governor's opinion, is most likely to command the support of a majority of the Legislative Assembly; and/or

(b) must dismiss the Premier when the Legislative Assembly passes (i) a resolution requiring his or her appointment to be revoked, or (ii) a vote of no confidence against the Premier?

I submit that these are excellent suggestions, and that this convention would be well codified. I have two minor suggestions, relating to sub-issue (b).

My understanding is that it is normal for the Parliament to transmit messages to the Governor, and vice versa, via the Speaker. I suggest that the Governor's duty should

occur "when the Speaker advises the Governor, by message, that the Legislative Assembly has passed [a vote of no confidence]" rather than "when the Legislative Assembly passes ..."

The second small issue is that (although I may be in a small minority for thinking so) I consider most Premiers to be people of honour, who would resign if they lost the confidence of the Assembly. I think they should be given the chance to do so. Thus, I submit that the provision should require that, upon receiving a message from the Speaker in relation to a successful vote of no confidence, the Governor should allow the Premier an opportunity to resign, and if the Premier fails to resign, the Governor should dismiss the Premier.

8. **If either such a provision as outlined in issue 7(b) is included:**
   - **(a) should it expressly state that such a resolution is not the only ground for dismissing a Premier?**
   - **(b) Should it require an absolute majority of the members of the Legislative Assembly to pass the resolution or vote, that is, a majority of the number of seats in the Assembly?**

I submit that, for a decision of this gravity, it is only fair to require an absolute majority. A hypothetical suggestion may show why:

Consider Premier A, whose party occupies 50 of the 89 seats in the Assembly. By some calamity, 22 government members miss the Division for a vote of no confidence, and the motion is passed 39-28. The Constitution states that the Governor must now dismiss Premier A. Yet Premier A would also still be the person, in the Governor's opinion, most likely to command the confidence of the (full) Assembly, and would be immediately reappointed.

I realise this example is unlikely, and far-fetched, but it is a logical (rather than practical) possibility which can easily be accounted for by requiring an absolute majority.

9. **Should any other constitutional principles, conventions and practices be included in the Constitution?**

Yes. I believe the Constitution would benefit from the inclusion of a section outlining, in general, the conventions of Caretaker government, which occurs either once Parliament has been Prorogued, or under any circumstance where the Governor commissions a Caretaker Premier and Administration. I submit that such a section should make the following points:

(a) That the purpose of Caretaker administration is to continue the necessary machinery of government until a full administration may be commissioned;
(b) That a Caretaker administration should not make major policy decisions that are likely to commit an incoming government;
(c) That a Caretaker administration should not make major appointments;
(d) That a Caretaker administration should not enter into major contracts or undertakings;

(e) That a Caretaker administration may take the actions outlined in (b), (c) and (d) if there is agreement between the Government and Opposition that it should do so; and
(f) That the Caretaker Ministers should make every effort not to utilise the machinery of government, including the Public Service, to assist the performance of the Government or Minister in any election which is underway during the period of Caretaker administration.

There are sound reasons for the behaviours outlined in the Caretaker conventions. Essentially, the conventions emerge on the basis of good will by the Government, recognising that (since an election has been called or a full Commission withdrawn) they currently lack the democratic basis for decision-making. Yet the conventions also realise that the business of government cannot simply be suspended for the duration of an election: teachers, police, judges, public servants, and so on must continue to perform their functions. The caretaker conventions represent an excellent, and time-tested compromise.

The Caretaker conventions are widely supported, and are complied with as a matter of course, but it is not unusual during elections to see the opposition accusing the incumbent government of acting outside the conventions. It is particularly difficult to determine what are "major policy decisions," "major appointments", and "major contracts." Codification of these conventions is unlikely to completely eliminate these arguments, but it would at least provide a constitutional basis for the relevant parties to argue their cases.

10. Are there difficulties with the current arrangement whereby the Chief Justice automatically becomes the Administrator in the governor's absence?

I submit that there are no such difficulties. The potential difficulty discussed in the discussion paper – that the Chief Justice could be acting as Administrator during a crisis adjudicated upon by the Supreme Court – is no different to any other court case which may potentially involve a conflict of interest for the Chief Justice. I have no doubt that a Chief Justice under such circumstances would stand aside from the consideration of such a matter. If the circumstance was such that the Chief Justice effectively became a litigant before their own court, then it would seem appropriate either for the full bench of the Supreme Court to sit in judgment, or for the High Court to do so. Such a process would seem more appropriate to the vague possibility of some potential crisis.

As a result, I do not consider that the office of Lieutenant Governor should be filled, or retained.

11. If there are difficulties with the Chief Justice automatically becoming the Administrator in the Governor's absence, how might these difficulties be overcome?

As noted above, I do not consider that any such difficulties arise.

12. Should a Lieutenant Governor for the state be appointed? What qualifications might be appropriate for appointment to the position of Lieutenant Governor?

As noted above, I do not support the retention of this office. However, if such an office were to be retained, then I consider the qualifications should be as follows:

- if the Governor is a female, the Lieutenant Governor should be male, and vice versa.
- the Governor and Lieutenant Governor should not both represent the same profession (in other words, no twin lawyers please)
- if the Governor is from Brisbane, the Lieutenant Governor should be from Regional Queensland, and vice versa; and
- every effort should be made to ensure that suitable Indigenous Australians are appointed to one or both of these offices on a regular basis.

13. If there are no difficulties with the Chief Justice automatically becoming the Administrator in the Governor's absence, should the provisions regarding the appointment of a Lieutenant Governor be retained?

As noted above, I do not support the retention of this office.

14. Should there be a mandatory requirement that members of the Queensland Legislative Assembly swear or affirm allegiance to the Crown? Should members have the option of swearing or affirming allegiance to the Crown, or only to the people of Queensland?

I commence my response to this issue by stating that I am an avowed Monarchist, raised to feel a deep and personal commitment and loyalty to Her Majesty the Queen, and to the Monarchy as a whole. Long may She reign.

However I recognise that I am part of a rapidly diminishing group of people sharing this view of the Crown. It would make me personally delighted if all Members were to swear to the Queen – but *only* if this reflected genuine loyalty to the Queen. If, on the other hand, Members are forced to swear an oath in which they do not believe, then such an oath cheapens the Parliament, cheapens Her Majesty, and cheapens the Members forced so to swear. As a result, I submit that those members who wish to swear or affirm their loyalty to the Crown should be able to do so – and those who wish to swear an oath which does not refer to the Crown should also be able to do so.

15. Should the Referendums Act 1997 provide for indicative plebiscites prior to a referendum to enable citizens to be involved in the formulation of a referendum question?

The underlying question for this issue really seems to be "How can the constitution ensure that there are sufficient opportunities for people to participate in the resolution of great issues of the day, particularly those requiring a referendum?"

One way to do this might be an indicative referendum. However there are other, and better ways. The example given in the discussion paper is an excellent place to

begin. The referendum question put in 1999 regarding a republic was unusual, in that it was not simply prepared by the Parliament, but followed an extensive process of community consultation, capped by the Convention held in early 1998. In my view, the real concern felt by many, and particularly by many "no" voters, was that the question was put prematurely, as a compromise, and did not reflect the outcomes of the detailed consultation process.

As a result, my view is that there is nothing wrong with simple yes/no referenda, so long as they are built upon, and reflect, extensive community consultation. I am concerned that an indicative plebiscite may simply become an alternative to the "hard yakka" of undertaking extensive public consultations.

I submit that a far better way of involving people in the great issues of the day would be through a more extensive system of parliamentary committees. I am, for instance, very happy indeed to have the opportunity to address this paper to the Committee. By writing, I am able to participate in the governing process in a much more extensive way than an indicative plebiscite could ever allow. Thank you.

I see two ways to alter Queensland's system of parliamentary committees to address this issue. The first would be to follow the federal line, and have a more extensive set of policy-focussed references and legislation committees, each corresponding to a number of Ministerial portfolios, and responsible for the conduct of Estimates for those portfolios. This would be my preferred option, as it would allow the people of Queensland to participate in many different issues, not just those slated for possible resolution by referendum. They allow more in-depth consultation, and are much cheaper per issue than an indicative plebiscite.

A second option might be to appoint a "referendums committee." Rather than holding an indicative plebiscite, let this Committee undertake widespread consultations, and let this Committee report back to Parliament on the appropriate form of a question. It may even be possible to combine the best features of such a committee and indicative plebiscites, by allowing the Referendums Committee to report to Parliament that three options should be listed on the referendum ballot paper, and determined by a preferential vote.

But please, Honourable Members, do not allow an indicative plebiscite to become a substitute for detailed consultation.

16. If provision for indicative plebiscites is not introduced, are there any alternative mechanisms by which the QCRC's concerns might be addressed?

Please refer to my response immediately above.

17. If provision for indicative plebiscites were to be introduced:

(a) should there be any restrictions on the subject matter of an indicative plebiscite, for example, constitutional issues only?

It appears to me that the notion of an indicative plebiscite is premised upon widespread public and community interest. In my view, constitutional issues are

among the least likely issues to raise public concern to the level where an indicative plebiscite is likely to be useful. The question of a republic, perhaps the issue of an upper house, and maybe the issue of four year terms of office, might be big enough constitutional issues to arouse public interest. For the important minutiae of constitutional issues, I maintain my view that a parliamentary committee inquiry, such as this inquiry, is most appropriate.

As a result, if indicative plebiscites are to be held, their potential scope must be wider than simply constitutional issues. If we are to adopt such plebiscites at all, I can see no reason to prevent them from covering any matter subject to the jurisdiction of the Queensland government.

(b) should voting at indicative plebiscites be compulsory or should this be decided on an ad hoc basis by the Legislative Assembly?

I can see no justification for compelling people to vote in an indicative plebiscite. A low voter turnout (or response) for such a plebiscite would, in itself, be an outcome which provided an important message: that the issue did not engage a vast number of people. It would irredeemably skew the results of any indicative poll if large numbers of responses came from those who had no opinion regarding an issue, had taken no steps for form a view, but who voted out of compulsion. Such votes do not reflect an opinion; rather, they reflect compliance.

On the other hand, voting in a referendum following an indicative plebiscite should remain compulsory, as a "yes" result would change laws with an implication for all.

(c) should the results of an indicative plebiscite be binding, that is, should the government be required to put the most popular question to the people at referendum?

I submit that indicative plebiscites should *not* be binding – just indicative. The political reality if that the outcome of an indicative plebiscite would have an impact on government decision-making, and that the strength of the outcome would affect the pressure on the government. For instance, plebiscite proposal with a 55% majority based on 30% voter turnout would have much less authority than a plebiscite proposal with 75% support from an 85% turnout.

If plebiscite results were to be binding, then I submit that, in order to be binding, an absolute majority of all electors enrolled to vote should have to be achieved.

(d) should there be provision to enable indicative plebiscites to be held by post?

I submit that plebiscites should not be held by post. Postal plebiscites are expensive (as shown in the table on p.14 of the Discussion Paper), easier to manipulate corruptly (one person may obtain and cast many votes), and are likely to result in a lower turnout then elections held in a network of polling places.

However, if indicative plebiscites are to be held, they seem to me to offer an ideal opportunity for Electoral Commission Queensland to experiment with different

forms of voting, particularly electronic voting. The US Presidential Election in 2000 showed how dangerous it can be to experiment with electoral technologies during elections for public office; but a plebiscite could be a proving ground for computerised, touch-screen, or perhaps optically-read ballots.

18. Should there be a statutory committee (a petitions committee) established and charged with responsibility for considering and reporting on petitions received by the Legislative Assembly? Alternatively, should this responsibility be conferred on an existing parliamentary committee and, if so, which one?

In response to issue 15 above, I have suggested that Queensland adopt a similar set of Parliamentary committees to those which exist in the Federal Parliament (and, as the discussion paper notes, in New Zealand). These committees would each focus on areas of policy, usually by portfolio. If such a system of committees existed, then the Legislative Assembly could refer petitions to their relevant committee.

This system would have a significant advantage over a general "petitions" committee because the petitions would be dealt with by officers who were familiar with the wider policy area, and who could therefore place the petition in its policy context. This increases the chances that the petition can be dealt with in a way which will satisfy the Parliament.

A petitions committee, in isolation, without any specific policy expertise relating to the areas of policy which the petition address, risks being little more than a mailbox.

19. If a petitions committee is established (or if this responsibility is conferred on an existing parliamentary committee), what should its jurisdiction be and what parts of its jurisdiction should be mandatory?

I submit that it is important that the lines of responsibility for a Parliamentary committee should remain clear. A parliamentary committee is a subordinate body of the legislature, and reports to Parliament on references *made by the Parliament*.

I therefore suggest that petitions should be tabled by the Clerk in accordance with standing orders, and that Members of the Legislative Assembly should then have an opportunity to move that a petition be referred to the petitions Committee for consideration and report by a certain date.

The jurisdiction of the committee would therefore be as Parliament provided in referring matters to the committee.

20. If a petitions committee is not established, should there be a review of the current standing and sessional orders regarding petitions? In what respect do the current orders require review?

I have no further submission in relation to this issue.

21. Should the objects clause to the chapter of the Parliament of Queensland Act 2001 (Qld) dealing with statutory committees of the Assembly be amended to

include the words "and extend democratic government"? Should this amendment be conditional on the establishment of a petitions committee?

22. Should the objects clause to the chapter of the Parliament of Queensland Act 2001 (Qld) dealing with statutory committees of the Assembly be amended to include the words "enhancing the transparency of public administration"?

I submit that these changes are entirely semantic in nature, and that the presence or absence of the suggested amendments will have no effect whatsoever on the good governance of Queensland.

23. Should the Constitution include a requirement that the Queensland Parliament meet within 30 days (or some other specified period) after the day appointed for the return of the writ for a general election?

I concur with the notion that a newly elected Parliament should be convened relatively soon after an election, both to confirm confidence in the Ministry, and also to allow the new government to commence its legislative program and submit to the mechanisms of parliamentary accountability which are executed in the chamber.

However, 30 days appears far too soon after the return of writs. In recent elections in Queensland and elsewhere in Australia, appeals to the Court of Disputed Returns have become more commonplace following elections. In Parliaments which may be evenly balanced, or hung, the outcomes of such appeals may well be significant. Queensland in 1995/96 and South Australia in 2002 are obvious examples. It may be that 30 days is too soon after an election to be relatively assured that the election outcome will be final.

Additionally, for a new government, taking office after a period in opposition, 30 days allows little time to make the transition to office, with the result that a constitutionally-required parliamentary sitting may end up being little more than a motion of confidence and an adjournment debate. A slightly longer period, allowing the new government to demonstrate the Assembly's confidence by initiating its legislative program, would be more meaningful.

I suggest that it would be appropriate for the "window" in this case to equal the "window" allowed for Minister who do not sit in Parliament – three months.

24/25/26. Waste Lands of the Crown

I have no submission in relation to these issues.

27. Should there be a statutory limit to the number of Parliamentary Secretaries? If so, at what level should this limit be set?

I support the explanation, provided in the discussion paper, of why the number of Parliamentary secretaries should be set at five. It makes excellent sense.

However I am puzzled as to why the Constitution needs to make provision for parliamentary secretaries at all? Surely these offices can be created (and, indeed, have been created) by normal statutes, and do not need the force of the Constitution?

Parliamentary secretaries are not of the executive, in the same way that Ministers are. They cannot be called on in Question Time, receive no extra salary, and are really just MLAs with extra duties. I can see no strong argument for including the office of parliamentary secretary in the Constitution.

28. Should there be any other amendments to the provisions in the Constitution regarding parliamentary secretaries?

As noted immediately above, I suggest that there should be no provisions in the Constitution regarding parliamentary secretaries.

29. Where a bill assented to by the Governor contains an error or errors such that it is not the bill passed by the Legislative Assembly, should the Constitution include a provision which deems in any such case that the bill has been duly assented to in the form as passed by the Assembly

I submit that the Constitution should *not* include such a provision. This situation is one of those difficult situations where the practicalities of a working parliament conflict with the necessary symbolism which underpins our system of laws.

In my opinion, there is a vital symbolic importance in the notion that once a law has been assented to by the Governor, it is the law. Period. If it is later found that such a law has been assented to in error, then I submit the Parliament should pass an Amendment Act in the normal manner, to fix the problem. Such an Amendment Act could include a provision making the amendment retrospective to the date of commencement of the amended Act.

I would be very uncomfortable with the notion that laws could be passed, assented to, then later found not to be a law. The action of assent is extremely important, and should be protected, not reduced, by the constitution.

In terms of the practicalities of this situation, the discussion paper points out that these anomalies do not occur often. I think that, since this is the case, it is better to go through the somewhat onerous task of passing an Amendment Act, rather than eroding the perception of the finality of royal assent.

30. Should the Constitution retain the requirement for a recommendation by message from the Governor before the Legislative Assembly is able to originate or pass a vote, resolution or bill for the appropriation of an amount from, or an amount required to be paid to, the consolidated fund?

Given the executive's dominance in the legislature, this provision no longer seems to provide a brake on the legislature making private appropriations with which the executive does not agree. The legislature would not be able to pass an appropriation bill through a modern parliament without the support of the executive. As a result,

this provision is archaic and un-necessary, and should not be included in a modern Constitution.

31. If the requirement for a recommendation by a message from the Governor is to be retained, should there be some exception to that requirement? For example, should there be an exception where a bill or motion is introduced or moved by a minister that would appropriate money from the consolidated fund?

This question, in fact, highlights just how archaic the provision is. Virtually all bills which would appropriate money from the consolidated fund are introduced or moved by ministers. Guaranteeing supply of money from the consolidated fund is one of the basic requirements for an incipient Premier seeking a commission. If this exception was in place, virtually all such bills would be subject to the exception.

I suggest to the Honourable Members of the Committee that the best way forward is simply to eliminate the provision.

32-43. Various Issues

I have no submission in relation to these issues.

44. Should the Constitution make reference to the principle of an impartial and independent judiciary? If so, how should such a principle be incorporated into the Constitution?

I support a statement in relation to judicial office, in the same manner as the statement of executive office, discussed in issue 1 above. In my view, similar statements regarding the three arms of government and their interaction should be presented together, in the first few clauses of the constitution. Acknowledging again my lack of drafting expertise, a suitable clause may look similar to the following:

> *Judicial authority in Queensland is vested in such Magistrates and courts of law as the Parliament may provide, and in the High Court of Australia as the final court of appeal. The Judiciary shall discharge its duties in an impartial and independent manner, in order to ensure that justice is available to all Queenslanders, who shall appear as equals before the Courts.*

45. Should further consideration be given to:

- **(a) the process for, and extent of, consultation prior to judicial appointments;**
- **(b) mechanisms for investigating complaints against the judiciary; and/or**
- **(c) the constitutional recognition and protection of the independence of the magistrates?**

This is an excellent suggestion, and I wish to sincerely congratulate the Honourable Members of the committee for taking this approach. It would have been very easy to

seek to quickly make decisions on this issue, and it reflects great credit upon the Committee that it has decided to take a more thorough approach.

46. If the matters raised in issue 45 should be the subject of further consideration, who should conduct the relevant review?

I suggest that the current committee, the Legal, Constitutional and Administrative Review Committee, should be given the responsibility of undertaking an inquiry into these issues.

47 – 49 Judges

I have no submission in relation to these issues.

Conclusion

Again, my sincere thanks to the Parliament and the Honourable Members of the Committee for undertaking such an extensive consultation process. The discussion paper provided by the Committee was an excellent guide to the issues of relevance.

Should the Committee conduct hearings, and wish me to appear as a witness, I would be happy to do so. I would be unable to travel to Brisbane at my own expense, but would be happy to appear by teleconference or to undertake other arrangements convenient to you.

I look forwards to the Committee's report,

Anthony Marinac
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