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LEGAL, CONSTITUTIONAL AND ADMINISTRATIVE REVIEW COMMITTEE

THE UNIVERSITY OF NEW SOUTH WALES

FACULTY OF LAW

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20 May 2002

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

Dear Research Director

Submission to Inquiry on Issues of Constitutional Reform

Thank you for the invitation to make a submission. I make the comments below in regard to the questions raised in the Issues Paper of April 2002. I would be willing to comment further on these or other matters if it were of assistance to the Committee.

It is a basic principle of a democracy that people have access to information about how the system of government works. This information should be in an accessible form that enables citizens to understand their system of government without needing to be a constitutional lawyer.

The most appropriate place to find such information is in the constitution of the nation or the state. A constitution ought to clearly and accurately describe how government works. It ought to be used in schools and at the community level. Queenslanders have the right to expect that their Constitution will be readily accessible by them.

This principle of accessibility means that it would be appropriate for the Queensland Constitution to incorporate clear statements of the basic constitutional principles, conventions and practices that are necessary for the operation of government. Without such information, Queenslanders may get a false or misleading picture from the Constitution of how their government actually works. For example, the failure to incorporate such material means that any person

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reading the federal Constitution would gain the impression that Australia is governed by the Queen, whose actions are carried out in Australia by her representative the Governor General. The federal Constitution mentions neither the Prime Minister nor the Cabinet, and is the poorer for it.

Spelling out basic constitutional principles, conventions and practices does not mean that the Constitution should be an overly lengthy document. Such material should be spelt out in clear, precise and accessible language that is not so prescriptive or exhaustive as to prevent further constitutional development.

Issues 1 and 2

The Constitution of Queensland ought to provide a statement of executive power and also reference to the fact that executive power is exercised by the Governor, as the Queen's representative, on the advice of the Premier or his or her ministers. The Constitution ought also to make mention of the reserve powers of the Governor. Codification of the reserved powers is long overdue in Australia and is necessary in order to make the exercise of such powers more transparent and accountable.

Issue 3

This would be a sensible addition to the Constitution.

Issue 4

I do not believe that the Queensland Court of Appeal would be an appropriate body to make a declaration concerning possible illegal or corrupt activities by a member of the Executive. A decision as to such matters by a court may well require a lengthy judicial process. Any such a decision may also be more appropriately made in some cases on essentially political criteria or according to community standards or values. There does need to be appropriate processes for exposing illegal or corrupt activities. However, I do not believe a court would be the appropriate body for this. There may be a role for an ombudsman or for some other body, such as a specially convened advisory council to the Governor assembled for the purpose of providing appropriate legal and other advice.

Issue 5

Yes.

Issue 6

An essential feature of the system of responsible government operating federally and in the states means that ministers must be members of the Legislative Assembly. It would be a departure from that principle if ministers could be appointed from outside of the Assembly. The Assembly provides a significant accountability mechanism for the actions of the Executive. It is appropriate, however, that a three month period be allowed, as in section 64 of the federal Constitution, for a minister to gain a seat in the Legislative Assembly.

Issue 7

Yes. Such a provision would reflect the current convention and reserve power.

Issue 8

It is commonly accepted that a reserved power also exists to dismiss a Premier for illegality or unconstitutional action. This occurred with the sacking of the government of Jack Lang in New South Wales in 1932. It would be appropriate to retain this additional ground for the dismissal of a Premier for use in extreme circumstances. A provision could state that a Premier can be dismissed only on this ground or the ground of a lack of confidence in the Premier by the Legislative Assembly.

A majority of votes in the Assembly should be sufficient for the dismissal of government. A decision to abstain from a no confidence motion should not enable the motion to be defeated. If an absolute majority were necessary, it would leave open the possibility that a Premier may well have lost the confidence of a majority of the voting members of the Assembly, yet could remain in power.

Issue 9

It may be appropriate to refer to other general principles in a preamble to the Constitution. For example, a preamble might refer to the establishment of a Queensland Constitution within a system of representative and responsible government.

Issues 10 to 13

I do not believe it appropriate that the Chief Justice of Queensland is able to assume the functions of the Governor of Queensland. In the event of a constitutional crisis that might be necessary to resolve in courts, the position of the Chief Justice, and potentially the judiciary in general, could be compromised. It would not be acceptable at a federal level for the Chief Justice of the High Court to assume the role of Governor General. It should not be seen as acceptable at the State level either.

Queensland should take the opportunity to more firmly entrench the separation of powers in its Constitution as part of this review process. The separation of powers offers important protections to the community, including appropriate checks and balances in the exercise of executive, legislative and judicial power. The mixing of those powers and functions, as in this case, threatens to compromise aspects of that protection. On the other hand, there is nothing to prevent a retired judge undertaking such a role.

Issue 14

Members of the Legislative Assembly should swear or affirm allegiance only to the people of Queensland. Although Australia, and Queensland, retains some residual links to the Crown of the United Kingdom, for all relevant legal purposes those links have now been severed by the Australia Acts of 1986 and by decisions

of the High Court. Swearing or affirming to the people of Queensland would reflect the democratic and accountable nature of Queensland government.

Issues 15 to 17

The proposal for indicative plebiscites prior to a referendum is a sensible one. Legislation should provide for indicative plebiscites as an optional means of determining community support for particular reform proposals. The proposal offers another means of gauging community support for different proposals. Although the cost of a plebiscite may be significant, it must be judged against the cost of holding an unsuccessful referendum caused by an inability to consult the community as to the final referendum proposal.

As an indicative plebiscite would not amount to an actual change to the Constitution, it is appropriate to provide for flexible and cost effective means of holding the plebiscite. While the plebiscite should ideally be compulsory for voters, it would be appropriate, for example, that the plebiscite be conducted by means such as post.

The system of responsible representative government in Queensland means that consultation with the people by this means is appropriate, but that it should not be binding. If it were binding, it might prevent a government from submitting a different proposal to a referendum than that that emerges from a plebiscite, such as because of new information coming to light or because of changing community attitudes as a result of some other factor.

Issues 18 to 20

It would be appropriate to establish a petitions committee as a more formal way of receiving submissions and matters of concern from the community. More ought to be done by measures of this type to provide formal avenues for community involvement in parliamentary and political processes.

Issues 21 and 22

I am aware of no reason for objection to either of the proposed amendments.

Issue 23

The Constitution should require that the Queensland Parliament meet within a specified period of a State election. Without such a provision, it may be possible for a government to remain in power by avoiding a no confidence motion. The election process should not be seen as complete until Parliament has met after the election to determine who will form government.

Issues 24 to 26

I am not aware of any constitutional reason why these provisions need to be retained. The general law making power of the Legislative Assembly is as wide as it can be in any event. If the Legislative Assembly has the power to pass laws over matters such as the wastelands of Crown, such a power would in any event

reside in its plenary and general law making power. Section 30 and 40 appear to be superfluous.

Issues 27 and 28

I would have no objection to a statutory limit on the number of parliamentary secretaries, so long as that limit was subject to ordinary amendment and was not entrenched. It does seem appropriate to set an upper limit, so long as it can be changed if a government has an appropriate reason to do so.

Issue 29 to 32

No comment.

Issues 33 to 39

Certain statutory office holders should have their positions recognised in the Queensland Constitution. It should be made clear that such office holders exercise certain independent powers necessary for Parliament or other office holders to be made accountable to people. The office holders whose positions might be recognised in this way might include the Auditor-General, Director of Public Prosecutions, Electoral Commissioner and the Ombudsman. The list should not be overly long and should not entrench such positions from the possibility of reform. It must also ensure that the office holders themselves are not beyond appropriate accountability.

The procedure for removal embodied in the proposed clause 59 appears to provide for an appropriate removal procedure. However, the difficulty in carrying out such a procedure reinforces the need to carefully limit the office holders who would have the benefit of such protection.

It is not appropriate that such office holders also be granted life tenure. While the period of appointment should be sufficiently long, such as seven years, so as to grant a high level of independence, these are not judicial officers and appointment for life does not seem appropriate.

If a new removal procedure is added, it will also seem appropriate to establish appropriate appointment procedures. That procedure should enable cross party discussion of the candidates, or difficulties may arise if overly partisan candidates are appointed to positions from which they cannot effectively be removed.

Issues 40 to 43

No comment.

Issue 44 to 49

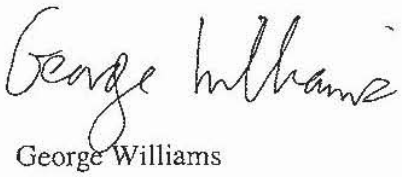
The impartiality and the independence of the judiciary is one of the most fundamental and important protections of the people of Queensland. As such, such principles ought to be entrenched in the Queensland Constitution. The separation of judicial power is inadequately recognised in the Queensland

Constitution. Changes should also include appropriate and transparent procedures for judicial appointments as well as for complaints to be made against judicial officers.

There should be provision for the appointment of acting judges. However, the appointment should be made subject to the consent of the Chief Justice or the appropriate chief judge. A retirement age should also be retained given that the appointment would otherwise be for a fixed life term.

Where a tribunal is given the power to investigate the conduct of a judge, that tribunal should only deal with specific allegations. This would not prevent further allegations being referred to the tribunal, but the tribunal ought not to undertake a roving inquiry into the conduct of a judge.

Yours sincerely



George Williams