No 15

CHAMBERS OF THE CHIEF JUSTICE
SUPREME COURT
BRISBANE

Your Ref:
Our Ref: 1:192



28 May 2002

Ms Kerryn Newton
The Research Director
Legal, Constitutional and Administrative
Review Committee
Parliament House
George Street
BRISBANE Q 4000

Dear Ms Newton,

I respond to your invitation for submissions in relation to the "Specific Content Issues" paper published in April this year in relation to the Queensland Constitution. The views expressed in this letter follow my consultation with the Judges of the Supreme Court, and may be taken generally to reflect a collegiate view.

**Issue: Appointment of Lieutenant Governor**

Section 4 of the paper raises the question whether a Lieutenant Governor should be appointed. This is of significance to the court only because of the present system under which the Chief Justice or the next senior and available Judge acts in the Governor's absence. While that may in theory be argued to infringe the separation of powers, in practical terms it has not given rise to difficulty and would not be likely to do so. While there might, for example, be a question as to the appropriateness of the Chief Justice signing a minute of appointment of a Judge of this court while acting as Governor, such a possibility would obviously be rare and readily avoided. Hence, no doubt, the view of the Queensland Constitutional Review Commission that the present system is "completely satisfactorily". A possibly more practical consideration could arise were the Governor unable to carry out his or her duties for a protracted period. In that event, the Chief Justice would assume that role with an acting Chief Justice appointed for the Supreme Court. It may be that a Lieutenant Governor could at such a time be appointed to cover the case if, say, the Governor's absence were expected to exceed three months. But history suggests that such a complication would be only a remote possibility and not such as to warrant particular consideration.

**Issue: Whether the Constitution should make reference to the principle of an impartial and independent judiciary**

There would be no particular difficulty were the Constitution to recognize this principle, perhaps by incorporation, in relation to the Supreme Court, in s 57 of the *Constitution of Queensland* 2001. Should such independence be preserved by entrenching some of the core provisions contained in chapter 4 of the Constitution of Queensland, relating to the courts? Provisions which should be entrenched are: s 57 only as it requires the existence of the Supreme Court of Queensland (as opposed to the District Court); s 58(1) which confers jurisdiction; s 60(1) as to

the holding of office indefinitely during good behaviour; s 61(1)(2) which provides for removal from office by the Governor in Council on address of the Legislative Assembly; and s 62, which provides for Judges' salary – provisions to that effect have been recognized as proper in common law jurisdictions since the Act of Settlement.

**Issue: Should further consideration be given, and if so by what form of review, to the process for an extent of consultation prior to judicial appointments?**
There is a need for transparency in the process of appointment. A provision could be enacted requiring in all cases the Attorney-General to consult with the Chief Justice and the Presidents of the Bar Association of Queensland and the Queensland Law Society before any judicial appointment were made. If the appointment were to the District Court or the Court of Appeal, the Chief Judge and the President respectively should additionally be consulted. This is what already occurs, but there would be value in giving the process legislative force. There is no need for further review of the matter.

**Issue: Should further consideration be given to, and if so by what form of review, the mechanisms for investigating complaints against the judiciary?**
There have from time to time been suggestions that there should be some form of body to receive and investigate complaints by those who feel themselves aggrieved by judicial conduct. The New South Wales experience suggests that the vast majority of complaints concern the result of a court case, and that may be tested on appeal. The experience in this jurisdiction is that other complaints in relation to judicial conduct are a rarity, and adequately dealt with as at present by the head of jurisdiction. One very real concern attending the creation of a commission such as that which operates in New South Wales is the absorption of resources, both in terms of the personnel required to constitute the commission or tribunal, and the Judge time likely to be taken in responding to complaints. The New South Wales experience indicates that the vast preponderance of complaints lack substance. There is a real risk that a certain small group of disaffected litigants which takes up a disproportionate amount of court time would equally absorb a disproportionate amount of out of court time were such a system to be created. At present, as mentioned, complaints may be made to the head of jurisdiction, and the system works satisfactorily. There is no need for change. It may be added that were such a commission or tribunal nevertheless to be established, the mechanism should not be entrenched, because it would be untried, and may or may not prove effective.

**Issue: Should further consideration be given, and if so by what form of review, to the constitutional recognition and protection of the independence of magistrates?**
Given the substantial jurisdiction of the Magistrates Court, it would be appropriate to consider formal recognition of the independence of the Magistracy. Appropriate review could be carried out by a panel consisting of former Supreme Court Judges and retired Magistrates.

**Issue: Whether there should be provision to enable appointment of acting Judges: if so whether the consent of the Chief Justice or Chief Judge should be required; and whether any other safeguards are required to ensure that the independence of the judiciary is not eroded by such appointments.**
The issues paper correctly flags the concerns about independence which attend the appointment of acting Judges. The reality is that the need for acting appointments does from

time to time arise. Such appointments should be strictly confined to situations of temporary need and made only for fixed short-term periods. Courts should be stocked with an adequate complement of permanent Judges. I concur with the view that it would be entirely inappropriate that Judges be permitted to act on a part-time basis. Any acting appointment should be subject to the consent of the Chief Justice or Chief Judge, as the case may be. Finally, there is no real need to have provisions dealing with such appointments included within the Constitution. There is no reason why they should not be retained in the *Supreme Court of Queensland Act* 1991.

**Issue: Compulsory retirement**
The factors mentioned in the Issues Paper supporting the retention of a compulsory retiring age are compelling. The present compulsory retirement age of 70 years should be retained for Supreme and District Court Judges.

**Issue: Whether a tribunal established to inquire into a Judge's conduct should have before it specific allegations, and if so, whether its jurisdiction should be thus confined; and whether it is appropriate to state particulars in terms of "full particulars of the grounds on which it is proposed to remove the Judge."**
While there is some concern that a reference to full particulars of grounds might be suggestive of a conclusion in itself, a Judge in the circumstance where a tribunal is to enquire must be given full particulars of the matters of enquiry. While the tribunal's enquiry likewise must be confined to those matters, it could be appropriate that it be given power to request further references, should evidence warranting such a course emerge during the enquiry.

Yours sincerely

Paul de Jersey

The Hon P de Jersey AC
**Chief Justice**

ADDENDUM TO SUBMISSION 15

CHAMBERS OF THE CHIEF JUSTICE
SUPREME COURT
BRISBANE



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11 June 2002

Ms Kerryn Newton
The Research Director
Legal, Constitutional and Administrative
Review Committee
Parliament House
George Street
BRISBANE Q 4000

Dear Ms Newton

I refer to my letter of 28 May 2002, of three pages, in which I set out views concerning the "Specific Content Issues" paper as to the Queensland Constitution. I wish to add an observation in relation to the issue: "Should further consideration be given, and if so by what form of review, to the process for an extent of consultation prior to judicial appointments?" My previous letter mentioned that if the appointment were to the District Court or the Court of Appeal, the Chief Judge and the President respectively should additionally be consulted. Carrying this through logically, if the appointment is to the Trial Division of the Supreme Court, it would follow that the Senior Judge Administrator should be consulted in respect of that appointment, as, in relation to the other division of the court – the Court of Appeal, the President would be consulted.

Yours sincerely

Paul de Jersey

The Hon P de Jersey AC
**Chief Justice**

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