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The Queensland Constitution: Specific Content Issues

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LEGAL, CONSTITUTIONAL AND
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COMMITTEE

Issues 1 & 2: A statement of executive power

A statement that the executive power of Queensland is vested in the Sovereign and extends to the administration of the Constitution and the laws of Queensland coupled with s.7(2)-(5) of the *Australia Acts* will give the public a better understanding of the constitutional framework and the distribution of powers. However, I think the words 'execution and maintenance' is preferable to the word 'administration' for they are well understood as used in the Commonwealth Constitution.

The only convention that is material with respect to executive powers is that the Governor should act on the advice of the relevant minister. In this regard, it is important to keep in mind that the 'reserve powers' are not 'executive powers' but are *sui generis* constitutional powers that may be exercised independently of advice.

Issues 3 & 4: The Governor's role

The proposal to empower the Governor to apply to the Queensland Court of Appeal for a declaration concerning possible illegal or corrupt activities by a member of the ministry is ill-informed, ill-defined and risky. I give the following reasons.

- (a) Westminster constitutional convention militates against the dismissal of the Premier on grounds of illegal conduct except in the very extreme cases. The Governor should act only if the normal processes of law cannot be used to resolve the matter and the potential harm to the constitution or the public interest is clear, present and substantial. The proposed power is not confined to such situations. The Governor will come under constant pressure to exercise this power in relation to decisions made by ministers.
- (b) In the normal course, many decisions and actions of ministers are subjected to judicial review on grounds of illegality upon the application of aggrieved citizens. Potentially, all such instances could trigger the Governor's power to refer ministerial actions to the Court of Appeal.
- (c) Illegality can take different forms. Illegal actions may amount to criminal conduct or a civil wrong or constitute void or voidable actions. The applicable procedural and evidentiary standards differ depending on the type of illegality that is alleged. If this proposed provision is to be implemented, the due process evidentiary issues need to be addressed.

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- (d) The power to refer instances of 'corrupt activities' to the Court of Appeal raises further serious questions. The expression 'corrupt activities' has an extremely fluid meaning. There are various forms of corruption, some of which may amount to illegality and some which may not. There are actions that would be considered corrupt in the moral or political sense but in not in the formal legal sense. If the Court of Appeal gives its opinions on the latter forms of corruption, the Court will surely venture beyond its traditional province of competence and into the arena of political and moral discourse.
- (e) In the absence of an extant concrete dispute, a question of illegality or corruption will be a hypothetical issue. Common law juristic tradition discourages the rendering of advisory opinions. (See *Re Judiciary Act*).

Issues 5 & 6: Appointment of ministers

The proposal to write in the rule that the Governor should act on the advice of the Premier in appointing and dismissing ministers is an attempt to codify the convention that already exists. However, there is a tension, if not a conflict, between this provision and the provision to empower the Governor to seek the advice of the Court of Appeal on questions of illegality or corruption on the part of ministers. The latter provision seeks to give the Governor a distinct source of advice on whether a minister should be dismissed. The Premier may disregard the Court's opinion in advising the Governor against removing a minister. This tension needs to be eliminated if the proposal to empower the Governor to refer illegal ministerial acts for curial determination is implemented.

The proposal to allow persons to be appointed as ministers subject to their gaining membership of the Legislative Assembly within 3 months runs counter to Westminster principles but has value. However, it should be noted that this process will involve by-elections and hence will impose a cost on the public purse.

Issues 7 & 8: The Premier

The recommendation in QCRC R6.6 that the Governor 'appoints as Premier the Member of the Legislative Assembly who, in the Governor's opinion, is most likely to command the support of a majority in the Legislative Assembly' is a restatement of the central convention of Westminster parliamentary democracy.

However, the specification of the grounds of dismissal in QCRC R 6.6 is, in my view, seriously misconceived for the following, among other reasons:

1. The loss of confidence of the Legislative Assembly does require the termination of the Premier's commission. However, it is misleading to state that this action is a dismissal. The term dismissal is appropriately applied when the Premier is dismissed for acting contrary to law or convention. The convention is that the premier who loses confidence of parliament offers the Governor the resignation of himself and of his ministry with the advice that the Governor:
 - a. Invite another member to form a government or;

- b. Dissolve Legislative Assembly so that a general election is held and appoint the Premier as the Caretaker Premier until the new government is formed after the elections.
2. The proposal as currently presented will not promote public understanding of the working of the Constitution and may introduce dangerous uncertainties.
3. I am of the view that there are only three clear situations warranting the dismissal of a Premier. That is when:
 - a. The Premier refuses to tender the resignation of the government when a confidence motion (however framed) is lost, or
 - b. The Premier refuses to resign when the government has failed to secure supply for the ordinary annual services of government, or
 - c. The Premier or the government is engaging in a gross violation of the law in a situation where timely judicial intervention to prevent irreparable harm to the constitutional order is not possible.

Issue 23: Summoning of Parliament

The answer to this issue, in my view, is in the affirmative. I am unable to see any reason for delaying the summoning of Parliament beyond 30 days of the date appointed for returning the writ.

Issue 45: Magistrates

Magistrates' functions are primarily judicial and Magistrates' Courts are courts in the strict sense. Although their jurisdiction is limited in monetary and punitive terms, they are an integral part of the machinery of justice. Magistrates play a critical role in ensuring due process in criminal procedure and hence bear heavy responsibility for protecting basic civil liberties. Magistrates' Courts may be invested with federal jurisdiction and as emphasised in *Kable v DPP*, they thus form a part of a unified hierarchy of courts within the Australian Constitution.

Hence I am strongly of the view that Queensland Magistrates should be provided the same level of security of tenure accorded to other judges. They must be removed only by an address of the Legislative Assembly made on grounds of proved misbehaviour or incapacity.

Issue 47: Acting District Court and Supreme Court Judges

The practice of appointing acting judges has stood the test of time in England and in other Commonwealth jurisdictions with no significant impairment of judicial independence. The proposal is to be commended particularly, if the consent of the Chief Justice is required for appointment of acting judges. The efficiency gains, in my view, outweigh the dangers.

Issue 48: Compulsory retirement

I am of the view that compulsory retirement of judges of the Supreme Court and the District Court at the age of 70 should be retained. The alternative is appointment for life with Parliament having the power to remove a judge on grounds of incapacitation through ageing.

Issue 49: Removal of a judge

The issue here is whether only specific allegations should be referred to the tribunal appointed to investigate misconduct. I believe that should be the case. Adequate notice of allegations is a *sine qua non* of natural justice. A departure from this principle can only undermine the independence and integrity of judicial office.

A. W. M. S. / C
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