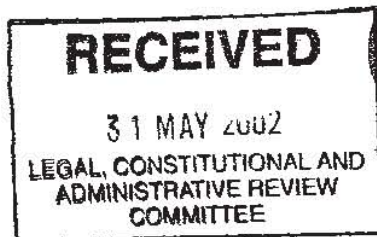


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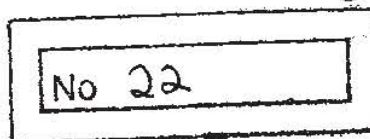
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O MBUDSMAN

Parliamentary Commissioner for
Administrative Investigations

31 May 2002



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

Dear Kerry

RE: Issues of Constitutional Reform

Thank you for your letter dated 18 April 2002 inviting me to make a submission on issues raised in Chapter 13 of the Committee's Issues Paper titled "The Queensland Constitution: Specific Content Issues".

Issues 33, 34 and 35

33. Is there a need for special recognition of certain statutory office holders in the Constitution? Are existing statutory provisions sufficient and/or appropriate to make the independent status of the offices clear?
34. If special recognition of certain statutory office holders is to be made in the Constitution, is the QCRC's list of statutory office holders appropriate? Should other office holders be added to, or removed from, this list? (See appendix B in this regard.)
35. If special recognition of certain statutory office holders is to be made in the Constitution, is clause 58 of the QCRC's Constitution appropriate? If not, how should the clause be amended?

I support the QCRC's proposal for special constitutional recognition, and protection of the independence, of certain statutory office holders. I consider that such recognition and protection should be extended to those statutory office holders who, in discharging their statutory functions, are ordinarily required to investigate, or make rulings or recommendations about, decisions and conduct of the executive government, including disputes between citizens and the executive government. The important functions which those statutory office-holders discharge for the benefit of the Queensland public warrant an appropriate level of protection from any pressure from within the executive branch of government that could inhibit the independent performance of their duties of office. The rationale for such protection is comparable to that which warrants guarantees of protection for the independence of the judiciary, members of which are also required to rule on disputes between citizens and the executive government.



The Victorian examples given on p.57 of the QCRC's report are a timely reminder that executive government cannot always be relied on not to interfere with these statutory positions.

There may be an additional ground for constitutional recognition and protection of those statutory office holders who are officers of the Parliament (for example, the Ombudsman, the Information Commissioner and the Auditor-General), namely, that Parliament has seen fit to provide that they must perform their statutory duties independently of Ministerial control or direction.

I consider that the QCRC's recommended clause 58 is generally appropriate. However, there is also a valid case for affording an additional measure of constitutional protection for those office holders by inserting a clause requiring that they be adequately funded to perform their statutory duties. This may be of greater significance in a unicameral legislature. I recommend an additional subsection to clause 58 to provide to the following effect:

(4) Sufficient funds shall be allocated from the Consolidated Fund of the State of Queensland to the statutory office holders mentioned in subsection (3) to enable them to efficiently and effectively perform their statutory functions.

In similar vein, I also recommend another long-established protection of independence for holders of judicial and statutory offices:

(5) The salary and entitlements, and the conditions of service, of the statutory office holders mentioned in subsection (3) must not be varied to their disadvantage after their appointment.

Section 62(2) of the Ombudsman Act already provides this protection in respect of the Ombudsman.

Issues 36, 37, 38 and 39

- 36. Is there a need for the Constitution to include a removal procedure for certain statutory office holders such as the QCRC proposes? Are existing provisions regarding removal of the identified statutory office holders sufficient, or might they be sufficient with certain amendments?**
- 37. If special provision is to be made in the Constitution for removal of the identified statutory office holders along the lines recommended by the QCRC, does the process contained in clause 59 of the QCRC's Constitution of Queensland 2000 require amendment in any way?**
- 38. If special provision is to be made in the Constitution for *removal* of the identified statutory office holders along the lines recommended by the QCRC, should special provision also be made for their *appointment*? (As the table in Appendix B reveals, there is currently no consistent procedure by which the identified office holders are appointed. Arguably, the independence of such officers would be enhanced by a procedure which required multi-party support for their appointment, such as occurs in the case of the Crime and Misconduct Commission.)**

39. If special provision is to be made in the Constitution for removal of the identified statutory office holders along the lines recommended by the QCRC, is there a need for complementary provisions providing for life tenure, or terms beyond which tenure cannot be extended? (See Appendix B regarding existing limits on tenure.)

I consider that the existing provisions for removal from office of the Ombudsman are appropriate and afford adequate protection. However, I also consider that the rationale I have referred to above affords justification for extending to all of the statutory office holders specified by the QCRC, removal procedures comparable to those considered appropriate for the judiciary.

I think that the QCRC's proposed clause 59 is adequate. The processes of the proposed tribunal would have to comply with the common law requirements of procedural fairness, since the proposed legislation gives no indication that procedural fairness is intended to be excluded.

In terms of special provisions regarding appointment, I consider that s.59 of the *Ombudsman Act 2001* Qld affords an appropriate model. I also consider it appropriate for such provisions to appear in separate legislation prescribing in detail the functions and powers of particular statutory office holders, rather than in the *Constitution of Queensland Act*. This would allow for variations in the appointment procedure that may be appropriate for different offices.

Although life tenure is one of the traditional safeguards of judicial independence, current trends in public sector management view extended tenure as inimical to optimal performance management. It is hard to justify providing life tenure for any of the office holders specified in Appendix B of the Issues Paper. However, there is a delicate balance to be struck with regard to tenure. On the one hand, appointments for short terms, such as two years, renewable by the executive government, may be considered unsatisfactory, in that they may give rise to a public perception that the relevant statutory office holder has an incentive to perform his or her functions in a way that does not displease the executive government, so as not to prejudice prospects of being re-appointed. On the other hand, appointments for extended terms, while bolstering the independence of the statutory office holder, carry the risk that a government has reduced opportunity to replace an office holder who is performing poorly according to objective performance criteria.

A reasonable compromise for the specified office holders may be initial appointment for 5 to 7 years with the possibility of re-appointment for one further term but with a maximum period of service of 10 years in total. Section 61 of the *Ombudsman Act* already limits the total of an appointee's terms of appointment to 10 years.

Issues 40, 41, 42 and 43

40. Is there a need for parliamentary committee involvement in the budget of the identified statutory office holders beyond that which already exists?
41. If the QCRC's R7.3 is to be adopted, do the terms of clauses 86(1)(e), 97(c) and 114 of the QCRC's Parliament of Queensland Bill 2000 achieve the objective of the QCRC's recommendation? If not, how might they be improved?
42. To what extent can the above parliamentary committees make a meaningful determination of whether the office holders allocated to them have been given

sufficient resources? What other implications might be the result of expanding the jurisdiction of certain parliamentary committees in this regard?

43. Instead of a number of committees having responsibilities regarding the resourcing of statutory office holders, would it be preferable for a designated committee—for example, a statutory officers committee—to be conferred this role?

I have suggested above an alternative and stronger approach to the potential problem identified at the beginning of p.29 of the Committee's Issues Paper.

To support my suggested approach, I consider it important that the respective Parliamentary Committees (comprised of representatives from all major parties represented in the Parliament) which oversee each of the specified statutory office holders, should be involved in reporting to Parliament each year, before the passage of the annual Appropriation Acts, on whether the proposed budget legislation makes adequate provision to comply with the new cl.58(4) I have recommended above.

With respect to Issue No. 41, I do not think that the specified clauses of the QCRC's *Parliament of Queensland Bill 2000* are sufficiently clear to achieve the QCRC's recommendation. For example, the relevant parts of cl.86(1) are:

The committee's area of responsibility about administrative review reform includes considering legislation, or provisions of legislation, about—

...

- (e) *the capacity of ... the information commissioner and the [Ombudsman] to discharge their duties effectively.*

The more natural reading of this provision suggests that it requires the Committee to consider the provisions of enabling legislation concerned with the functions and powers of the relevant statutory office holders, or any other legislation which might impede those functions and powers. Therefore, the provision may not be interpreted as requiring the Committee to consider the financial provision made in an Appropriation Act, and its effect on the capacity, resource-wise, of the relevant statutory office holders to discharge their duties effectively. I consider that a more specific provision is required. Consistently with my recommendation above for a new cl.58(4) to be added to the QCRC's recommended *Constitution of Queensland Act*, I also recommend the insertion of complementary provisions in the QCRC's recommended *Parliament of Queensland Act*, which (by way of example in the case of cl.86) would provide:

(2) The committee's area of responsibility also includes making an annual report to Parliament, prior to consideration of the relevant annual Appropriation Act, as to whether the requirements of s.58(4) of the Constitution of Queensland Act are satisfied in respect of the following statutory office holders:

- (a)
- (b)
- (c)
- (d)

I am confident the relevant parliamentary committees will quickly become familiar with the nature of the operations of the statutory office holders they oversee, and the correlation between resource allocations and outputs/achievements. Therefore, it should not be an unduly onerous task for a committee to report on this question annually, after consultation with the individual statutory office holders, and with Treasury officers or other relevant government officers.

As the Committee is aware, section 88(3) of the Ombudsman Act already requires the Treasurer to consult with the Committee in developing the Ombudsman's proposed budget for each financial year. However, it would be desirable to specify the purpose of consultation and the Committee's role following consultation.

If my recommendation to insert a new cl.58(4) is not supported, I recommend that the legislation clearly specify an obligation for the Parliamentary Committees to consult with the relevant statutory office holders and report to Parliament on whether or not those office holders have been given sufficient resources to perform their statutory functions.

Thank you for the opportunity to raise these comments for consideration by the Committee.

Yours faithfully

A handwritten signature in black ink, appearing to read 'D J Bevan', written in a cursive style.

D J Bevan
Ombudsman and Information Commissioner