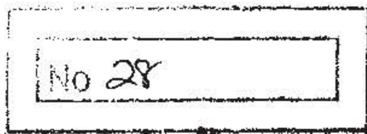
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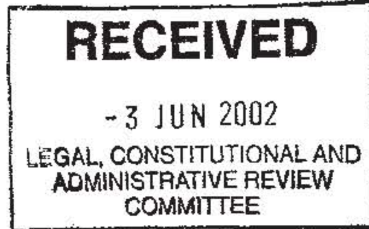
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LEGAL, CONSTITUTIONAL AND ADMINISTRATIVE REVIEW COMMITTEE

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May 2002

Chair and Members
Legal Constitutional and Administrative Review Committee
Parliament House
Brisbane Q 4000

Submission on your 49 Questions: 'The Queensland Constitution: Specific Content Issues'

Honourable Members,

May I start by suggesting, with the greatest respect, that 49 issues, as diverse as these issues are, in one Issues Paper, to be answered in 6 weeks, is too many issues, and too short a time! I have commented in this submission on Issues 1 to 32. I will try to make some comments on the remaining issues before you come to consider them, but I am already behind schedule in my more routine, but less important, work so we shall see.

Although the *Constitution of Queensland 2001* has not yet quite commenced, I refer to it below, as 'the new *Constitution*', as if it has. I refer to the *Constitution Act 1867* as *CA 1867*.

Issues 1- 9: the Governor and the Executive Government

I have dealt with these issues in a different order from that in your Issues Paper, as my answers to some depend on others that appeared later in the IP and I think my submission 'flows' better in the order below.

Issue 1 – Executive Power

I agree with the Queensland Constitutional Review Commission (QCRC) that a statement as to the vesting of executive power should be included in the Constitution of Queensland, but I quite disagree with their recommendation that it should (like section 61 of the Commonwealth Constitution) maintain the pretence that the Queen (or the Governor) has something to do with the day-to-day exercise of executive power. As I have said before (and the words were quoted with apparent approval by the QCRC), a Constitution ought to be something that can be put on a poster in a school room and be understood by the children. It ought, therefore, to tell the truth about our system of government, not recite ancient myths.

Inadequacy of the *Constitution of Queensland 2001*, Chapter 3

Although the rest of the newly-consolidated *Constitution* conveys its meaning pretty clearly, the overall effect of Chapter 3 is about as clear as mud. In saying this, I do not mean to imply

any criticism of your Committee, its staff and others who worked on the drafting – I know that this was simply a consolidation exercise and the defects reflect the fact that the rules about the exercise of executive power have been assumed rather than explained in all of the *previous* documents. But it is now time to consider these defects and to address them.

Parts 3 and 4 provide that there must be a Cabinet and an Executive Council respectively – but there is no explanation at all of the relationship between them, if any! The Cabinet, the *Constitution* explains in s 42, consists of Ministers and is collectively responsible to the Parliament, but, for all that it reveals, the Executive Council *could* consist of completely different people. Section 23 says that Chapter 3, Part 3 contains provisions about the appointment of MLAs as Ministers, but the provisions in that Part do not require Ministers to be members of the House at all, though *acting* Ministers must be. And then section 51 refers to the powers of the 'Executive Government' of the State, without saying how that relates to the entities already mentioned – whether this 'Executive Government' is the Governor, the Cabinet, the Ministers, the Executive Council or some mixture of some or all of them! So it certainly needs to be explained more clearly and consistently.

Why We Should Not Copy S 61 of the Commonwealth Constitution

However (as already noted) I urge that you do not follow the recommendation of the QCRC and the example of the Commonwealth Constitution, and write something that purports to vest executive power in someone who does not, in reality, exercise it. Jeremy Bentham declared that the season of fiction was over in *A Fragment on Government* in 1776, and yet in 2002 our Commonwealth Constitution still states a solemn fiction (ie, a lie!) about the exercise of executive power. Let us not copy that!

After the recent republic referendum, commentators have pointed out, first, that the existing section 61 of the Commonwealth Constitution caused confusion, and, secondly, that the proposed amendment of it 'would have been the oddest definition of the executive in any parliamentary constitution in the world' (Prof Alan Ward, 'Trapped in a Constitution: The Australian Republic Debate' AJPS Vol 35, p 118).

As to the existing section 61, the Constitutional Centenary Foundation pointed out, in *RoundTable*, March 2001, that the 1999 referendum questions had been highly technical and difficult to evaluate without knowledge of the status quo. They did not of course suggest this as the main reason for the 'No' vote, but they did remark that voters had difficulty in understanding the questions which 'assume[d] technical knowledge from the outset'. They claimed that the republic question 'proposed changes to a part of the Constitution that was somewhat cryptic at the time of federation and has become more so since'. That is, if the key section referring to executive power – section 61 – was misleading, how could the voters be expected to understand arguments about quite technical alterations to the sections about that power?

As to the amendment proposed in 1999, see Prof Ward's comment quoted above. All the proponents of change emphasised that they were asking us to vote for a *non-executive* President, rather than an executive president as in the United States – and yet the proposed replacement for section 61 (renumbered as 59) solemnly, and quite ludicrously, declared that executive power was to be *vested in the President*! As Professor Ward noted, this oddity was completely unnecessary, as 'every parliamentary country with a modern constitution, and

there are a great many, has committed the rules of parliamentary government to law very successfully'.

I submit that the State of Queensland should set an example to other Australian jurisdictions, and show that a Constitution *can* say what it means. This should be done regardless of whether we may become a republic in 5 years, or 50 years, or never. If doing it makes it easier to draft a republican Constitution one day, well and good, but even if we are to remain a constitutional monarchy for the next generation or two we should draft ourselves a Constitution that describes constitutional monarchy *accurately*. As Joseph Carruthers said in the debates about section 61 in 1897 (*Convention Debates*, Adelaide, p 913), if we are framing a written Constitution 'it is better to let that Constitution clearly express what it is intended to effect; do not let us have to back it up by quoting whole pages of Dicey'.

So How Should We State the Rules?

I urge therefore that the Constitution should 'tell it like it is'. The fundamental rules about executive power should be stated *accurately*. The three fundamental rules are as follows.

1. That the Queen appoints the Governor (on advice – see Issue 9, below). This is already stated by the combination of s 7 of the *Australia Act 1986* and s 29 of the *Constitution*, but perhaps it could be spelled out more clearly.

2. That the Governor appoints, and, when necessary, dismisses Ministers, in accordance with the principles of responsible government, and that these Ministers head the executive departments of the State and constitute the Executive Council, or Cabinet. (See discussion about the extent to which the principles of responsible government should be expressly stated under Issues 2, 7 and 9 below.) That is, the power that is vested in the Governor should be described accurately, ***not*** as executive power but as ***an appointing and dismissing power*** **over** the executive branch – a power and indeed a responsibility to ensure that the conventions of responsible government are followed. The pretence that all executive power is exercised by the Governor is long gone; there are plenty of Acts that directly place the responsibility for a class of decisions in a Minister, a Chief Executive Officer or other public servant (and case law that says that once this is done the donee of a power or discretion should not too readily act under 'dictation' from above – see, eg, *Nashua Australia Pty Ltd v Channon* (1981) 36 ALR 215). I submit that the constitutional formulation of executive power should match the reality expressed in the drafting of ordinary statutes. It follows that the next thing to say is...

3. That executive power is vested (not in the Governor but) in the Executive Council and is exercised by the Council, by individual Ministers or by officers of the Public Service or other public agencies, as specified by law and subject to law. Although I doubt whether we really need the parallel institutions of Cabinet and Executive Council, I am aware there is an argument that the need for the more formal documents to be presented to the Governor in Council ensures that they are prepared with the utmost care. I am not sure that I find this a compelling reason for the dual structure, but it does have some weight, so I will assume that the dual structure will continue. If it is to continue, it is clearly appropriate that executive power should be formally vested in *the Council*.

I therefore suggest that the sections currently in Chapter 3 Part 3 (the Cabinet), dealing with administrative arrangements and acting Ministers, ought to be placed in the Part on the Executive Council. The sections referring to the Executive Council ought to make it clear

that the 'persons' who are appointed to the Council are the Ministers of State and that they only remain as members of the Council as long as they are Ministers. The conventional understanding that those appointed to the Council remain members of it for life is made nonsense by the other convention that they are not summoned to meetings once they have ceased to be Ministers – let us have done with such nonsense! It should also be made clear that, although the Governor presides over meetings of the Council, he or she is not a 'voting member' of the Council. As to the Governor's role in putting the decisions of the Council into formal effect, I suggest that 'Governor in Council' should be defined as the Governor acting ***on*** the advice of the Executive Council rather than 'with' that advice, as in the new section 27.

As to the Cabinet, I am not sure that an express reference to the fact that the Ministers also meet and deliberate at greater length in another body, quaintly named after a small room, is necessary – perhaps it could be briefly adverted to for the sake of transparency, either in a section that declares that it is included for more complete information or a 'Note' after the appropriate section.

Issue 6 – Ministers to be MLAs

This is such a fundamental assumption of our system that it ought to be in writing. It is also a desirable principle in my opinion, though I probably do not need to justify that proposition to a committee of MLAs! (See my remarks about one-person rule versus 'rule by committee of Parliament' below, under Issue 5.)

As to whether a 3-month leeway should be provided, I feel that this is something of a 'chicken-soup' issue – that is, the answer to whether it ought to be included in the Constitution is much the same as the answer to question whether grandma, seriously ill, should be given some chicken soup: 'it possibly won't do much good, but it can't do any harm'. Uniformity of rules between Commonwealth and State would lessen confusion, so it may be a good idea to adopt the suggestion.

Issue 2 – Constitutional Conventions

You ask whether the statement of executive power should include reference to the constitutional conventions which regulate its exercise. My answer above, if implemented, would partly answer this question. The fact that the Ministers, departments, etc, really *exercise* executive power rather than merely acting as 'advisers' to the Personage in whom power is supposedly vested, would be stated openly. That in itself would be a statement of one of the major principles which is currently left mysterious.

As to the conventions under which the Governor appoints and dismisses Ministers, dissolves Parliament and so on, I suggest below under Issues 7 and 9 that the *basic* rules should be spelled out. These explicit rules would explain most of the content of the general statement suggested above, that the Governor appoints and dismisses Ministers 'in accordance with the principles of responsible government'.

However, the minor details of the conventions relating to responsible government are debateable and possibly still evolving. Some of the situations that have arisen in other States recently – eg, where no party holds a majority, should the Governor act on public statements of independent members and commission a government as soon as the stance of a majority of

members is clear, or should s/he wait until Parliament sits? – depend very much on the details of the particular case, and it is probably best to leave some discretion in the hands of the Governor. I suggest that the Parliament should not try to fully codify these details, but instead they should simply be adverted to ('incorporated by reference', as you might put it) in the Constitution by use of the phrase 'in accordance with the principles of responsible government'.

This does mean that my suggested 'poster on the school-room wall' Constitution will not tell the children *everything* about the rules for our government, but it will tell them most of the principal rules, will not tell them lies, and it will signal that there are some details that require further study. It might even encourage them to study some of the fascinating history of our system of government, whence have come the conventions. It also means that Parliament, its committees and advisors will not waste the next 25 years trying to come up with a statement of every detail of the conventions that everyone can agree to! I think that the parts for which I have suggested codification below should be matters on which all members can agree.

Issues 5 (and aspects of 7, 8 and 9) – References to the Premier

Your formulations of Issues 5, 7 and 8 ask whether there should be certain references to the Premier in the Constitution. You refer with some apparent sympathy to submissions that found something odd in the fact that, until recently, there were virtually no references to the existence of Premier and Cabinet in the Constitution. I submit that this does not matter greatly. The point of referring to particular persons or bodies in a Constitution is generally to give them power or to impose specific limits on their power. As to the Cabinet, I have suggested above that it is best to officially vest executive power in the more formal body, the Executive Council, and simply explain that the Ministers also meet and deliberate at greater length in a body called by the quaint name of Cabinet.

As to the Premier, I submit that we should be wary about including provisions which give any powers solely to one Minister rather than to the general body of Ministers. I know that human nature is such that most of us tend to look for One Great Leader to represent our collective interests and take decisions off our hands, and I know that the famous Triumvirates of history usually fought among themselves until one came out on top – but I suggest that the Constitution of a democracy should not absolutely rule out the *possibility* of collective leadership, even though it may seem a pretty unlikely eventuality. And even if it is probable that our Ministries will always have an identifiable First Minister, we can draft a Constitution that will work perfectly well without express reference to such a person. That Minister should not be able to make significant decisions unchecked by the rest of the Ministers.

Indeed, the whole beauty of the system of responsible government is that, unlike the American system, it does not enshrine one-man-or-woman rule in law. The Americans rebelled against the one-man rule of King George, and substituted the one-man executive authority of a President. In the next 60 years the English quietly and subtly developed instead the notion, which we have inherited, that executive power is exercised by a 'committee of Parliament' – see Walter Bagehot, *The English Constitution*, Chapter 1 (page 66 in the Fontana ed with intro. by Crossman). It is a much better system (as even that most passionate of American republicans-with-a-small-r, William Everdell, agrees[1]); let us not subvert it. The parties' PR machines may try to turn our Premiers and Prime Ministers into copies of the

[1] See page 307 of his *The End of Kings: A History of Republics and Republicans*, U Chicago P, 1983 and 2000.

American President; I urge that our Constitutions should ***not*** do so! The Constitution should not state that the Governor or Queen should take advice on ***anything*** solely from the Premier – not the appointment of Ministers, nor dissolutions and election dates (see Issue 7 below), nor the appointment of a Governor (see Issue 9 below). [The references to the Premier in the new *Constitution* are relatively innocuous, in that they only give him (or, one day, her) power to assign particular responsibilities to people, whose actual appointments are made by the Executive Council.]

A section such as is suggested in Issue 5 would imply that the Governor must dismiss Ministers on the advice of a Premier even if it is possible that the Premier has lost the support of his party. If the Constitution had so provided in November 1987, Sir Walter Campbell may not have been able to take the wise decision not to fully accept Sir Joh's advice to replace some Ministers until it had become clear whether the Party supported Sir Joh or not. It follows that my response to Issue 5 is 'No'.

On the issue of the formation and change of Ministries, the 'advice' that the Governor should follow is the opinion of the majority in the Assembly. That may be *communicated* most appropriately to the Governor by one person – a leader of a party – and it may be that when an election has produced a confusing result the Governor may have to follow the European practice of asking persons in sequence whether they can 'form a government', but all that *matters*, and all that needs to be stated in the Constitution, is that those who are eventually sworn in should be those who seem, collectively, to have the confidence of the majority of MLAs –see below for further discussion.

Issue 7 (and 8): The Key Convention – The Need for the Government to Have the Support of a Majority

It follows from the section above that I do not advise that you adopt the suggestion in Issue 7(a) in *quite* the form referred to there. If the key principle of responsible government is to be stated, I submit that it should be in terms that the Governor should appoint as *Ministers* those who, *collectively*, have (or appear to the Governor, on the evidence available to him or her, to have) the support of the majority of the Assembly. There is certainly an argument for spelling this out in the Constitution – it would leave my suggested phrase 'according to the conventions of responsible government' much less of a mystery to the schoolchild or new citizen – but I can see two difficulties.

First, I suggest that if some phrase such as 'support' is used, it should be made clear that this does not mean that the majority must support the government in everything that it wants to do. If a 'minority government' can muster 'support' in the minimal sense that a majority is prepared to tolerate this Ministry and pass its Appropriation Bills, this is support enough, according to the conventions as generally understood.

Secondly, I have no problem with the provision as suggested in Issue 7(a), if modified as I suggest, if it clearly applies only to the first appointment of a Ministry after an election, or to routine re-shuffles of the Ministry. I suggest, however, that a provision as suggested in 7(b) would be undesirable, and indeed the idea in 7(a) would become undesirable as well, if it implies that the occupancy of office should *always* change, *immediately*, if there has been a mid-term change in allegiance of the majority in the Assembly. It is generally agreed that the Queen or a vice-regal representative has two options in the situation in which a Prime Minister or Premier has lost the support of the majority – to offer a commission to the person

who now seems to have majority support, if there is such a person, or, if the current Prime Minster/Premier requests it, to dissolve the lower House. The latter is a perfectly respectable option under our traditions. (Note that this implies no approval of Sir John Kerr's action in 1975. He dismissed a PM *who possessed majority support* and appointed a minority PM purely so as to get the advice to dissolve – an act, in my opinion, of misfeasance in public office!).

There are some circumstances where a change of government without confirmation by election is appropriate (eg, the Commonwealth Parliament in the early stages of the war in 1941) but it is easy to imagine circumstances where it is better to test whether the shift of allegiance in the Parliament actually reflects a shift in preferences of the voters or whether it merely reflects pressures in the corridors of Parliament. It would be next to impossible to codify these situations; clearly the right decision depends on a mix of factors such as how recent the last election was, whether the switch of allegiance seems to involve improper influence, and what opinion polls may reveal about what the electors think of the switch of allegiance, of the parties in general, and of the possibility of having the routines of life disrupted by an election. All in all, I suggest this is an area where it is best to leave a discretion (a 'reserve power') in the hands of the Governor.

A provision as suggested by part (b) of this question would seem to remove the option of dissolution on the advice of the PM/Premier who has just lost a vote. I suggest therefore that it should be reworded to say that where, mid-term, the Ministry has lost the support of the majority the Governor must ***either*** dismiss the Ministry ***or*** dissolve the Assembly, and that it should leave the choice to his or her understanding of the principles of responsible government. You may note that in the previous sentence I used the phrase 'the Ministry has lost the support of the majority'; I don't feel that we need to spell out, in the style of a Constitution of a newly-independent nation, how this loss of support may be manifested. It can be either of the mechanisms suggested in the question – a resolution calling for dismissal or a no-confidence motion – or by one of the quaint traditional devices such as a motion that the first line on an Appropriation Bill be reduced by one dollar. As to Issue 8(b), I am sure a Governor expressly charged with applying the 'conventions of responsible government' and with working out, on the best evidence, who has the support of the majority, would disregard a no-confidence motion passed by less than an absolute majority, so I suggest that there is no need to spell that point out.

If you accept the above proposal about issue 7(b), the section about loss of confidence would no longer be drafted so as to contain any implication that it was exhaustively stating the grounds for dismissal of a Premier, so I would answer Issue 8(a) in the negative. The general reference to appointment and dismissal under the principles of responsible government recommended above would clearly leave the Governor sufficient power to deal with a Premier who tries to hang on after losing the leadership of his/her party. I discuss the question of whether the Governor can be expected to punish illegality below (Issue 4).

Issue 9 – Other Principles

The power to dissolve Parliament

The issue of whether the Governor should automatically accept the advice of a Premier to dissolve Parliament is raised by the above discussion. The view is held fairly widely

(especially by Premiers and Prime Ministers) that the decision as to dissolutions and election dates is the Premier's or Prime Minster's alone. This is problematic in two ways.

One problem has already been discussed above – the problem of what is to happen when the Premier has lost a confidence vote and seeks a dissolution rather than resigning. As I noted above, there are sound reasons to suggest that ultimately the Governor should have a discretionary power to refuse a request for dissolution here.

Secondly, when a government's majority is not under serious challenge, the notion that the Premier can choose the election date all by him/herself, without consulting the rest of the Cabinet or party, has two unfortunate – even undemocratic – effects. It gives the governing party an unfair advantage over the Opposition. This can only be remedied by fixed parliamentary terms, which is not within the scope of your current review. More relevantly to the current discussion of executive power, it gives the Premier an unjustifiable power over possible dissent or revolt within the Cabinet or party – Hood Phillips has claimed that the combination of variable terms and the Prime Minister's (presumed) power to dissolve the House at whim gives the PM a power over his own backbench which is 'the greatest blot on the English Constitution' (*Reform of the Constitution*, 1970). Furthermore, Geoffrey Marshall has argued cogently that the presumption that there *is* such a power is historically unjustified and that, whatever doubtful justification in precedent there may be for the supposed convention, there is no justification in principle. (*Constitutional Conventions*, 1984, Ch III.)

To cover both of the above situations, I suggest that there should be a section about dissolution in the Constitution that provides that in the last, say, ten or twelve months of the term, the Governor acts on the advice of the Executive Council (ie, *not* on the personal whim of the Premier) as to dissolution, but until that part of the term s/he has a discretion whether to dissolve or not, to be exercised with due regard to the conventions of responsible government. I have detected a shift in opinion among other constitutional academics in the last few years towards what Marshall calls the 'automatic' theory, but my proposal would pretty clearly state the theory of dissolution as it was understood in at least the earlier years of the twentieth century, and as I believe it should still be understood. Actually, my personal preference would be for the Governor to have the power to ignore a request for a dissolution until about the last four months of the term – almost a *de facto* fixed-term Parliament. I recognise that that would clearly be a change from anyone's understanding of the existing conventions, but I put the idea forward for your consideration.

Selection of a Governor

The specific issue that the Issues Paper raises under this heading is whether there should be a section that spells out that advice to the Queen re the appointment (and termination thereof) of a Governor is to be given by the Premier. Of course, this is already stated in the Australia Act 1986, s 7. (It refers to the tendering of advice on 'the exercise of the power and functions of her Majesty in relation to the State', but the appointment and dismissal of the Governor are Her Majesty's *only* functions.) Consistent with my general observations above about not encouraging one-person rule, I suggest (assuming that *election* of the Governor is not within the scope of this review) that the Constitution should provide that the ***decision*** as to appointment or termination should be made by the Executive Council; the practice of a Premier or Prime Minister keeping the decision as his private little secret (as we witnessed in the federal sphere last year) is not something to admire or encourage.

This would not be inconsistent with s 7 of the *Australia Act 1986* – the decision would still be 'tendered to' Her Majesty by the Premier. That Act displays no concern with how the decision is made – the purpose of the section is merely to provide that the Premier may tender the advice directly to the Palace rather than having, as before, to communicate it through the British government. In fact it even leaves the way open for the Constitution to provide for the choice of the Governor by popular election. If you think that this issue is within the scope of your current review, I urge you to go further and recommend election of the Governor but, if not, I urge that you should consider this possibility at a later stage. [I add just one point here for your consideration, now or later. Those who fear that popular election of a Governor may give us a sports star or pop singer as Governor may think that popular election is inconsistent with my suggestions, above, that some real discretions or 'reserve powers' should be left in the Governor's hands. I simply point to the last Irish Presidential election. One of the candidates was a pop singer. The people of Ireland elected a Professor of Law. 'nuff said!]

Issue 4 – Declarations of illegality?

The suggestion that the Governor should be able to ask the Supreme Court for a declaration that a Minister has engaged in illegal or corrupt activities is tied to the notion that the Governor is 'the ultimate guardian of a State's Constitution and its laws'. But, with respect to the QCRC, this quite overstates the Governor's role. The Governor is indeed ***the guardian of the principles of responsible government*** – his or her role is to ensure that only those persons who have the support of the majority in the Assembly exercise executive power. But s/he cannot be the 'guardian of the Constitution and the laws' in all respects. Other aspects of that job are performed by the Supreme Court, who declare whether laws are valid or invalid and exercise the power of judicial review over officers of the government, and by the people who enforce our laws – the Police and the Crime and Misconduct Commission (CMC). It is quite unrealistic to expect that the Governor can exercise some sort of policing function over the Ministers. As guardian of the principles of responsible government, the Governor *may* in extreme and notorious cases have the function of dissolving the Parliament and sending the government to 'trial by the people', (at some risk to his/her continuation in office if the government is returned) but it is a different matter to say that s/he should take on the role that has recently been given, after considerable deliberation, to the CMC.

The judiciary has been traditionally wary of being asked to give declarations that conduct is illegal or corrupt conduct, for good reasons. If the police or other enforcement bodies have proof of such conduct, conviction after a criminal trial is the best way to establish it. I submit that it would do far more good to keep taking steps to ensure the independence of institutions like the Police and the CMC than to rope the Governor in to supplement their job.

Issue 3 – Right of Governor to be kept informed

This recommendation from the QCRC was, to a degree, supplementary to the suggestion that the Governor should be able to ascertain whether the Premier or Ministers were corrupt or engaging in illegal activities – and therefore this becomes something of a 'chicken soup' issue if the response to Issue 4 is 'No'. However, as your Issues paper remarks, this recommendation does reflect an existing convention. To that extent it would certainly not hurt to include it in the Constitution, though I doubt whether it would produce any great benefit.

Would these proposals make the Governor's decisions judicially reviewable?

At places in both the QCRC Report and your Issues paper the issue is raised, faintly, of whether the complete or partial codification of the Governor's powers would make the exercise of those powers subject to judicial review, and whether this would be desirable. You will note that in the suggestions I have made above I have used subjective phrases such as 'those who appear to the Governor... to have majority support' and 'according to the Governor's understanding of the principles...' In my opinion, this would ensure that the Governor's decisions would not be likely to be overturned by the courts, at least as long as there was some arguable basis for the decision – cf *Adegbenro v Akintola* [1963] AC 614 where the Privy Council seems to have agreed with the lower courts that a decision of the Governor was reviewable but also held that it was *correct*. It may be likely that the courts would make it clear, in principle, that they held themselves ready to hold a Governor's decisions reviewable on grounds of '*Wednesbury* unreasonableness', where the decision was one that no reasonable Governor could make. I think that would be quite a desirable principle, but since the fine details of the conventions are debateable it would be surprising to find the courts too ready to overturn a Governor's decision.

Amending the Constitution – would a referendum be needed to implement the above proposals?

Section 53 of the *CA 1867* provides that a law that provides for 'the abolition of or alteration in the office of Governor' must be approved by a majority of the electors at a referendum. Its effect (where effective at all) is quite draconian – a purported Act enacted in disregard of the section is not just invalid *to the extent* that it amends an entrenched provision, as a sensible drafter would have provided, but is 'of no effect as an Act'.

There is, as I think you are all well aware, some dispute as to whether a 'manner and form' provision like s 53 is effective to protect matters other than those relating to the 'constitution, powers or procedure of the Parliament'. If the only source of the Parliament's power to bind future Parliaments is section 6 of the *Australia Act 1986*, then laws dealing with *the executive side* of *the Governor's power* can be passed in total disregard of any restrictions like s 53. Indeed the Parliament passed such a law in 1996, when a section of the *Public Service Act* purported to repeal s 14(1) of the *CA 1867* and to delete the reference to s 14 in s 53. The government of the time quoted its legal advisers (some of them the same ones, I gather, as the ones who had advised on the inclusion and drafting of s 53 in the first place!) as saying that the repeals were valid. If that is indeed true, Parliament has the power to make any laws altering the role of the Governor as long as his part in 'the constitution of the legislature' is preserved.

In my opinion, however, a manner and form provision in a State Constitution can invalidate later contrary laws even if they do not relate to the constitution, etc of the Parliament. I won't recite the full reasons – I know the Committee wants to consider this in detail at a later stage – but section 106 of the Commonwealth Constitution figures large among them. That has two implications. First, the *Public Service Act 1996* is wholly invalid, and the Parliament ought to retrospectively re-enact it minus the section that purported to amend the *CA 1867*. Secondly, we would need to consider whether any of the proposals above, and anything else that you decide to recommend about the Governor and executive power, amount to an 'alteration in the

office of Governor'. As most of the specific recommendations that I have made above are just spelling out more clearly what the Governor actually does – and has done for the last 100 years – there is a case for saying that they would not be altering the office; compare the argument, accepted by Muir J as probably correct, in *Skyring v Electoral Commission of Qld* (17 May 2001) about the *Constitution (Office of Governor) Act 1987*. However, if it was desired to put some of these ideas into effect by an ordinary Act it would be necessary to consider this in more detail.

In any case, it is clearly desirable that we have a referendum to approve the final consolidation of the Constitution at a not too-distant time. Not only is it untidy to have the entrenched provisions sitting around in the old Constitution Acts (though now conveniently displayed in Attachments 1-3), but it is high time that s 2 of the CA 1867 was amended to refer to this polity as a *State*, rather than a colony, and to declare that the power to make laws for its peace welfare and good government is subject to the Constitution *and* to the Commonwealth Constitution. The latter qualification was added to the New South Wales *Constitution Act* almost immediately after federation, in 1902. Since it is true, whether or not it is stated in our State Constitution, it seems almost like an act of constitutional truculence not to admit it openly in the *Constitution* and to persist with an unqualified statement of 'power over anything at all'. And to have an apparently unqualified power to make laws with respect to peace, welfare and good government when there is a manner and form provision, at least partly valid, in section 53, just looks like careless drafting. I look forward to the Committee embarking on the next stage of constitutional review, when, as you have foreshadowed, you will consider what should be entrenched.

Issues 10-13 – Lieutenant-Governor, Deputy Governor, Acting Governor

First, let me remark that I believe that there is an unnecessary proliferation of terminology here. According to the terminology used in respect of many other jobs and offices, someone who stands in for the usual occupant of a position, performing all of the usual occupant's functions for some period, is 'acting' whether or not the permanent occupant is away for a short or long term, or has left it and not yet been properly replaced. In most organisations, a 'deputy' X is someone who occupies a subordinate role to X much of the time and acts as X when X is on leave or the position as X is vacant . For example, your own Committee has a Deputy Chair who I believe (forgive me if I'm wrong, Miss Simpson!) has no special role except when the Chair is absent, but then acts as Chair.

The current provisions (s 40, new *Constitution*) provide that a person can be appointed as 'Deputy' Governor for the exercise of just some of the Governor's functions. One the other hand, other provisions such as s 22 of the new *Constitution* provide more simply that a function can be exercised by 'the Governor or a person authorised by the Governor', without designating that person a Deputy Governor. I suggest that wherever it is appropriate that a function can be exercised by the Governor or a delegate, the Constitution and other Acts should say so in that language. Then the provisions as to 'Deputy' Governor and 'Acting' Governor could be collapsed into a simpler section about the filling of the role (the *whole* of the role) for a period by an *Acting* Governor, and your question as to whether a Lieutenant-Governor should be appointed can become a question as to whether there should be a permanent *Deputy* Governor, in a sense in which 'deputy' is widely used, or whether there

should just be, as now, some prioritised list of office-holders who stand in line to become Acting Governor when needed.

As to the specific questions raised in the Issues Paper, there are two objections, at least in theory, to the traditional practice of the Chief Justice taking over as 'Administrator' – henceforth to be called 'Acting Governor'. The first is based on the separation of powers. Even though the State Constitutions do not embody a full separation of powers, the Judges are supposed to be separated from and independent of the executive (see Issue 44). If you adopt my recommendations above it will now be clear that the Governor is not one of the executive branch but merely has a 'guardian', appointing and dismissing, power over the executive. That would somewhat lessen the first objection to the CJ filling the position.

However, the second objection is more of a worry and would become more so if you adopt anything like my submissions above, about partial codification and 'incorporation by reference' of the constitutional conventions. Some things that a CJ might do as Acting Governor are uncontroversial – eg, the giving of royal assent to Acts (indeed, it is quite appropriate that the head of the judicial branch should signify that branch's acceptance of and submission to a new law). But what if there is a political crisis – eg, a no-confidence vote following which the Premier seeks a dissolution and the Leader of the Opposition says she is now entitled to become Premier? There would be some danger of, first, a CJ having to make a politically-charged decision between these options, and, secondly (especially if the conventions are codified or "incorporated by reference"), of other judges possibly being asked to review that decision.

All in all, I suggest that it would be better to create a position of Deputy Governor (ie. to re-create the position of Lieutenant-Governor under a more modern name). As no qualifications are spelled out for becoming Governor, it would seem odd to list formal qualifications for the Deputy, but it would be appropriate that the Deputy would be a retired Supreme Court Justice or Governor, or a retired or current Professor of Politics or Constitutional Law – someone who should know the conventions of responsible government in some detail. If appropriate, that person could do some of the delegated tasks referred to above even while the Governor was on duty, but failing that the sole duty of the D-G would be to act as Governor when the Governor took leave or unexpectedly became incapable of carrying out his/her duties (the "falling under a bus" scenario) – and to keep the Premier's office informed of his/her whereabouts in case a quick call to duty became necessary! I would not expect that the creation of this position should impose any financial burden on the State – it should be unpaid except for periods when the Deputy Governor was called upon to act as Governor.

Draft Substitute for Chapter 3

Once I have finished this submission, I will draft a new version of Chapter 3 of the Constitution, reflecting my submissions above, for your perusal. If I do not have time to attach it to this submission I will forward it, with your leave, within a week or two.

Issues not relating to the Governor

Issue 14 – Members' Oath or Affirmation

I suggest that honourable members should stop worrying about the republic issue here, and focus on the *point* of requiring a new member to take an oath or affirmation. All of those who get elected to Parliament, and all citizens, *already* owe allegiance to Her Majesty, though many of us might now interpret this as a metaphor for allegiance to the constitutional system of government. I have been amazed for a long time at how often we are expected to re-affirm this allegiance – in my own career, at least twice on joining the Commonwealth Public Service and once on being admitted as a barrister. Yet on admission to the bar I was not asked to make any promise about the carrying-out of my mixed duties to clients, to the Court, to the law and to the public. This would have been more relevant.

If I were to be elected to Parliament, there would be little point in asking me to swear or affirm my allegiance to her Majesty (however interpreted by myself) yet again. But on taking up the role of elected representative of a section of the people, there would be a lot of point in getting me to make a solemn promise to do my job diligently and honestly. As you have probably inferred by now, I therefore agree with your Committee's majority recommendation No 1 in your earlier Report on this issue (Report No 31), now embodied in the oath or affirmation in Schedule 1 of the Constitution as the second of the two promises. With respect to Mr Lee, I would not recommend the addition of an oath of allegiance to "the people". Not only would it possibly upset the monarchists among is, but it *also* misses the point. Everybody *already* owes allegiance to the nation and its system of government, whether we see that as embodied by her Majesty or the people. On taking on a new and very important task, it is *the task* to which we should pledge ourselves.

As the Issues Paper points out, changing the members' oath might imply a need to reconsider the oaths or affirmations taken by other public officers and judges. I heartily recommend that this should indeed be done. Whether or not one believes in continuing the monarchy, it is an odd thing to go through life in changing roles, continually re-swearing allegiance to the Queen (as if the earlier oaths count for nothing!) while never being asked to give a solemn promise to do a specific job well. The emphasis should be on the latter.

A qualification: members with dual nationality

There is one issue, however, that can arise in a State Parliament, that needs consideration. Unlike the rules under the Commonwealth Constitution, nothing in the State's Constitution or laws disqualify a person with dual citizenship from being elected to the State Parliament. We would of course hope that no issue will ever arise which would cause a conflict in such members' minds between their dual allegiances, and if such an issue did arise that they would give priority to their allegiance to Australia -- but perhaps, to make the situation clear, there should be a provision that these members should swear or affirm some statement of priority, such as '...and, in case of conflict, putting my allegiance to the Queen and people of Australia ahead of my other allegiances'? Of course this might be implied in their honouring of an oath to do their job as members 'to the best of my abilities and according to law'. I imagine that this is an issue where the Committee might like to canvass the views of those members who have dual nationality.

Issues 15-22 – Indicative Plebiscites, Response to Petitions, and Objects of Committees

This cluster of issues, of course, arose because the QCRC rejected the idea of Citizen Initiated Referenda, but wanted to suggest some constructive ideas to improve the responsiveness of the legislature to public clamour for legislative action. Though they are indeed significant issues, they are not directly relevant to the consideration of the State's *Constitution*. I suggest, with respect, that you might like to consider them separately from this Constitution-focussed review, or see if you can 'flick' them to another Committee. (If the Standing Orders Committee were to become a broader-ranging Parliamentary Procedures Committee the matter of petitions would be a quite appropriate matter for its consideration.) In the meantime, I offer just a few thoughts.

Issues 15-17, Indicative Plebiscites: Of course, if a majority in Parliament can be persuaded that some issue ought to be put to the people by way of referendum or plebiscites where we, the people, are asked to indicate a chain of preferences instead of a Yes/No choice, the *Referendums Act* will need to be amended so as to make specific reference to that sort of ballot paper, and to provide rules for the counting of the vote and for determining an outcome. But unless or until a specific plebiscite is proposed, there is no urgent need to do the detailed drafting – it should be a brief-enough and easy-enough job when required.

Issues 18-20, Petitions: After reading the Issues Paper I did a little further research into the topics of the petitions that the Parliament received in 2001. Considering that, it seems to me that there is no need to make major changes in the handling of petitions.

Many of the petitions (as your Issues Paper pointed out itself) are really addressed to a particular Minister, seeking a non-legislative remedy. In view of this, it almost seems anomalous that they are presented to the legislative branch; I note that the right that is guaranteed in the US by the first amendment is "to petition ***the government'*** – not the legislature – 'for a redress of grievances'. However, I can see that tabling in the Parliament potentially serves a useful purpose in that there is some publicity attached, whereas a letter to a Department may end up lost in the filing system. It seems to me that the system whereby the Clerk then refers the petition to the relevant Minister is quite appropriate. I recommend one improvement however. At present a member of the public can check what petitions have been lodged via the list of tabled documents on the Table Office part of the QPH web site, but they are 'submerged' in the longer list. It would add greater transparency to the process if the Table Office could post a separate page on the web site listing *just* the petitions, with the Ministerial responses when received. I note that the government has foreshadowed a system for lodging petitions electronically, and I agree with the observation in the Issues Paper that further developments, such as the creation of a Petitions Committee, could await the development of this facility.

As to the petitions that are calling for the enactment of legislation, it seems to me that legislation can be initiated in so many other ways that the addition of a further committee is unnecessary. As the Issues Paper points out, one possible response of a member who tables a petition is to also table a private member's bill. If the issue generates general interest and sympathy the government may introduce a bill or refer the matter to the Law Reform Commission. And of course sometimes a petition is calling for legislative change which is quite contrary to the current government's policy – it is a good thing that such petitions can be

tabled, but it would be fairly pointless to suggest that there should be an automatic right to have a draft bill produced.

A Related General Issue – The Future of Legal and Constitutional Reform: This raises another issue that your Committee might like to put on to its longer-term agenda. The name of your own Committee implies that among other things you are the "Legal... Review Committee" and your statutory functions include "Legal reform, including recognition of Aboriginal tradition and Island custom under Queensland law and proposed national scheme legislation referred to the committee by the Legislative Assembly." Yet you devote most of your scarce time to matters of electoral, administrative and constitutional law, and the more technical matters of law reform are handled by the Queensland Law Reform Commission. Then of course, most legislation is drafted (and government legislation *must* be drafted) by the Office of Queensland Parliamentary Counsel, and once legislation is presented it is scrutinised by the Scrutiny of Legislation Committee. Rather than creating a Petitions Committee, to deal only in a reactive way with matters presented by petition, I suspect it would be more productive if Parliament explored ways of rationalising the links and interactions between these four bodies, to ensure that laws embodying government policy, technical law reforms, and ideas for law reform sponsored by government back-benchers, the Opposition or private members all got a fair share of attention. I would not attempt to suggest a model, but since related issues have been raised by the QCRC I suggest that it is something you might like to consider – one day, when you have time!

As to constitutional reform, I note that the QCRC recommended (R12.5) that 'it be open to the [LCAR] Committee to recommend that a Constitutional Convention be convened to take over the review of the Constitution, and... to also recommend that such a Convention by elected in whole or part'. I presume that the QCRC worded the recommendation in this way so as to avoid any inference that their other recommendations exhausted the field of constitutional reform – because of course the recommended course of action is already well and truly 'open to' you. For now, I simply recommend that you not forget recommendation 12.5 while the more urgent tasks are done, and further consider the possibility that regular constitutional review could become the task of regular Conventions, once the current items on the reform agenda have been dealt with.

Issues 21-22: Objects clause of *Parliament Act 2001*, Chapter 5: I agree with the observation in the Issues paper that the additional words proposed by the QCRC may do nothing to achieve the objective of 'reinforcing a constitutional commitment to FOI [or other] objectives'. However, I suggest that the objects section should be amended for another reason – it simply does not match up with the full scope of the Chapter! Section 78(1) declares that the main object is 'to enhance the accountability of public administration in Queensland', but the Chapter creates and gives powers to a range of Committees including your own, Members Ethics and Parliamentary Privileges, Public Accounts, Public Works, Scrutiny of Legislation and Standing Orders. These cover the *legislative* work of parliament as well as public administration, and promote other aims as well as accountability – see the 'areas of responsibility' listed in sub-s (2).

I suggest that an objects section that would better explain the point of having all these committees would be [brief form] 'to enhance the standards of legislation and public administration' or [longer form] 'to enhance the standards of legislation and the openness, accountability, integrity, and efficiency of public administration'.

Issue 23 – Summoning Parliament (*and* frequency of sittings of Parliament)

Yes, the inclusion of a provision that Parliament must meet within some time after the return of the writs for a general election is self-evidently a good idea. I would suggest a shorter period than 30 days – with the availability of modern air travel I would think that 7 or 10 days should be quite sufficient. In a climate when it is increasingly likely that independents will hold a balance of power (the last election in this State being a dramatic exception!), it is highly desirable that Parliament should meet as early as possible so that members' support or opposition to a government can be manifested on the floor of the House.

May I also raise a related matter here? The new *Constitution* provides, in s 19, that there must be at least 2 sittings per year, with not more than 6 months between sittings, which is an improvement on the previous requirement of one per year. However, it has become Parliament's practice in the last few years to have a group of sitting days in almost every month except January and, sometimes, December. Having proved that this frequency is possible, I suggest that you should improve the minimum standard imposed in the Constitution. It is not good enough in a democracy that the government should be able to 'hide' from parliamentary scrutiny for up to six months. I suggest that you ought to reduce the minimum period between sittings to ten weeks (or ten working weeks plus two weekends, allowing no more than ten 'clear' weeks between sittings). This should cover the longest Christmas recess you might want to take, and just about covers the typical break over an election period in recent years – though it *may* be prudent to specify that the 10 weeks rule does not apply on a dissolution of Parliament, where the rule in the above paragraph would apply instead.

Issues 24-26 – 'Waste Lands' of the 'Crown'

Issues 24-25: There is absolutely no point in retaining either s 30 or s 40. These sections are superfluous – they add nothing to the parliament's power that is not contained in the 'plenary and ample' power in s 2 of the *CA 1867* to make laws for the peace, order and good government of the State (therein misdescribed as the 'colony').

These sections continue a dim reflection of the historical situation at the time when the colonies were granted self-government. Prior to 1855 (1890 in the case of Western Australia), the UK government and Parliament had retained ultimate control over colonial land grants and the right to dispose of the revenue raised from sales. They may have exercised this control for what they saw as the benefit of the colonies – eg in 1842 an Act (*5 & 6 Vict c 36*) appropriated the proceeds of sale back to the public services of the respective colonies but dictated that one half was to be applied to assist migration from the UK to the colonies – but did not concede the colonial legislatures the right to control grants and the proceeds by their own laws.

It is in fact mainly this issue that is responsible for the odd form that the original *Constitution Acts* of New South Wales, Victoria and Western Australia took – each as a Schedule to an Imperial Act. Though the *Australian Constitutions Act No 2* (1850) had provided that at a certain time the Legislative Councils of the colonies could enact *their own* Constitutions with bicameral parliaments and responsible government, in these three colonies the Councils proposed Acts under which the new parliaments would take control of land grants and the proceeds, thus going beyond the power granted in the 1850 Act. When the New South Wales

and Victorian 'Constitutions' were sent to London for the Royal Assent in 1855, the Imperial authorities were happy enough to reverse their policy about the control of 'waste' lands and to give in to the colonists' demands, but as a matter of law they decided that the colonially-enacted Constitution Acts could not be assented to as such and that the passage of enabling Acts by the UK Parliament was necessary. They also enacted the *Australian Waste Lands Act 1855*, to commence at the same time as the new *New South Wales Constitution Act*, to expressly repeal the 1842 waste lands law in New South Wales, which then included Queensland.

The original 'Constitution' of Queensland was the Imperial Order in Council of 6th June 1859 which replicated much of the New South Wales Constitution Act, including the express power to make laws about land grants, though here the relevant sections were not saying anything new – the UK Parliament and government had renounced their power to control grants in Queensland 4 years earlier. When the Queensland Parliament consolidated the colony's constitutional provisions into the *CA 1867* this history was fairly recent, so presumably the drafters felt, out of an abundance of caution, that they had better include separate provisions about the Parliament's power over 'waste' lands. (And there *may* have been a *real* need to include the proviso to s 40, now repealed. This had been copied into the Order in Council from the *New South Wales Constitution Act 1855*, where it was inserted to protect the rights of persons who had made contracts for land grants under the old regime. In 1867 there may still have been some people who had pre-1855 rights, who needed protection. By 1988 it was clear that the proviso had long since ceased to have effect – see *Mabo v Queensland (No 1)* (1988) 63 ALJR 84, per Dawson J at 105.) For confirmation and a few more details of the above history see Lumb, *Constitutions of the Australian States*, Chs 1 and 2, and *Mabo No 1* per Dawson J at 104-5.

If it was not clear at the time that the power given by ss 30 and 40 was superfluous it was certainly made clear by the famous trilogy of cases, *R v Burah* (1878) 3 App Cas 889, *Hodge v R* (1883) 9 App Cas 117 and *Powell v Apollo Candle Co.* (1885) 10 App Cas 282, which stated repeatedly that the powers of colonial Parliaments were, subject to any express limitations imposed by Imperial law or in their own Constitutions, 'as plenary and ample as those of the Parliament at Westminster itself'. A colonial Parliament with such legislative powers needed no express grant of power to regulate the disposition of Crown lands in the late nineteenth century (and no additional reminder that it has the power to appropriate the proceeds), and a State Parliament does not need it now. Laws made by the Parliament about land grants (formerly known as Crown Lands Acts, now the *Land Act 1994*) are authorised by both ss 2 and 30, and have been since 1859 even if that was only made clear in the 1880s, so the repeal of s 30 will not invalidate anything. The only function of the sections is to celebrate, excessively long after the event, the grant of an independent land-granting power to the colony that we once were part of. As to native title implications, grants made under State laws will have the same effect in the future as they had in the past if ss 30 and 40 are repealed. No native title will be abolished and no 'springing' native title will be created.

Issue 26: It follows from the above that there is no need to retain ss 30 and 40 in the *Constitution*, but I should note, with respect, that the question reflects a rather odd presupposition. If for some reason the continuation of something like the sections were desired, they would not have to be precisely 're-enacted'. It would be possible to re-state them exactly and to provide that they continued 'with the same force and effect, if any, as ss 30 and 40 of the *CA 1867* had immediately prior to the commencement of' the amending Act (compare the *Imperial Acts Application Act 1984*, s 5). It would be possible to include them in

redrafted form, qualified by a phrase such as 'subject to laws of the Commonwealth'.

Indeed even if neither qualifying phrase were added -- so that the re-enactment *looked like* a claim to have power to disregard native title – the same effect would probably follow (I say probably because I have not fully researched every possible effect of the *Native Title Act*). It is not even clear that the re-enactment would be a 'future act', because its connection with acts directly affecting native title would be quite remote – it would (redundantly) authorise the making of more specific laws that themselves authorise the granting of land, and, I would suppose (after admittedly brief consideration), it would be those more specific laws that would fall to be tested under, eg, s 24MA of the *Native Title Act*. In any case, as the Issues Paper says, the general effect of the latter Act is that it invalidates a future State act (or Act) only '*to the extent that* it affects native title' (emphasis added) – to the extent that it did not, it would be left standing. *If* there were some reason to re-enact the sections (which there is *not*) they would still have whatever *general* effect they would have (which is *none*) while not having any effect on native title, because Commonwealth law would not permit them to have any effect. But, I repeat, there is no point in 're-enacting' them, and no need to 're-enact' them, in *any* of the possible ways discussed here.

Issues 27-28 – Parliamentary Secretaries

For the reasons discussed in the Issues Paper, I agree that there should be a limit on the number of parliamentary secretaries. As the policy with respect to Ministers has always been to set a 'limit' which describes the current actual number, I suggest that for the moment the number should be set at five. I do suggest the drafting of the *Constitution* should be influenced by the possibility that one day it will become a real Constitution – ie, one in which all sections are entrenched against ready amendment – and that therefore the *Constitution* should refer to a number of Ministers and a number of parliamentary secretaries 'as prescribed by Act', and the numbers could be in the Parliament Act.

Issue 29 – Drafting Errors

Most Constitutions seem to work well enough without provisions such as the one suggested by the Acting Premier, but I suppose it must be acknowledged that there is a potential problem. Quite apart from the kind of errors referred to in the Issues Paper, where the vellum copies do not represent the text approved by the Assembly, there is of course an occasional problem with typographical errors, missing words and so on in the text that *has* been voted on. (These still happen – I noticed a missing word just the other day and advised OQPC.) Of course if errors on the vellum copies are noticed before assent, new corrected copies will be made. As to the second kind of error, I suggest that the scope of Standing Orders 275 and 280 could be clarified. I suggest that even the errors that are dealt with by the Clerk ('of' substituted for 'ot', for example) should be notified to the House. For more substantial, but still minor and technical, errors it may be sufficient to provide that the House can give its consent to a correction by resolution. Perhaps that is what happens already under S.O. 275, but it is not clear from a reading of the Standing Orders.

As to errors that are discovered after assent, I am not sure that the Acting Premier's suggestion is the best way to go. I presume that by a provision 'validating assent' he did not mean simply to protect the Governor against accusations of impropriety, but that the Act would be treated as valid. Apart from the doubts raised by yourselves as to whether this

would conflict with ss 2 and 2A of the *CA 1867* – and I can happily construct arguments both ways on that point – such validation may have quite varied effects depending on what sort of Act, and what sort of section in the Act, has been erroneously 'assented' to. For example, persons might have been convicted under a section imposing criminal liability that is worded, in the mal-authenticated version, differently from the section as voted on. If this were a frequent happening, I might suggest that there were grounds for enacting something like a "Purported Legislation Act" which would provide that appointments under any purported Act were valid, make some provision as to grants paid or property transferred under such Acts, and provide that all convictions must be re-examined. However, the occurrence of these mistakes should be even less frequent than before, since the embarrassments of 1976 (Commonwealth) and 1995 (Queensland), so I suggest that the best way to deal with any future ones is by an Act tailored to each case, retrospectively validating the original Act as far as that is fair but possibly invalidating some actions taken under it if *that* is fair.

Issues 30-31 – Recommendations from the Governor

I am not convinced that any rule requiring a message from the Governor for appropriation of moneys belongs in the *Constitution*, or indeed anywhere. I know the theory is that it preserves the 'financial initiative of the Crown', or, in less metaphorical language, it ensures that the Ministers who are in charge of, and might be judged on, the financial management of the State do not have their attempts at good management undercut by spending Acts passed on someone else's initiative. However, I have long harboured the suspicion that this rule, which is a mere Standing Order of the House of Commons in the United Kingdom, was given the higher status of a section of the various *Constitution Acts* in our early colonial days for a *different* purpose – so that the Governor, acting as a representative of the Imperial government, could exercise a little fiscal discipline over the boisterous colonials. [But I have not done the research to prove or disprove this.]

Even considering the traditional justification of the rule, I suggest that it is unnecessary. In the real world any Bill, whether it appropriates moneys or not, will only be passed if it has a large degree of support from the government. If a Bill moved by someone other than a Minister is likely to involve the expenditure of money not already appropriated, it is up to the Ministers to, at least, point this out and, if seriously concerned, to make this a ground of opposition to the Bill. If the sponsor of the Bill has not included a well-reasoned Financial Impact Statement in the Explanatory Notes, there would be further ground for opposition. And if the Opposition and some cross-benchers manage to enact something that seriously interferes with the government's financial management of the State, it is probably time that the Opposition should become the government!

Further, even if the rule is necessary, it does not need to be stated in the *Constitution*. As the Issues Paper rightly remarks, attempts to challenge the validity of non-complying Acts would be probably be rejected by the courts (I think nobody has yet tried to base a case on the comparable section of the *Commonwealth Constitution*, section 56, and if they did they would probably fail). Still, it may be tempting fate, and vexatious litigants, to leave the section in the *Constitution*. I suggest, if the Committee thinks there is any need for the rule at all, that we should follow the British example and simply make it a Standing Order of the 'lower' (here, the only) House. And since the rule is really intended to give *the Government* (not the Monarch or Vice-regal representative) control over the expenditure of moneys, I agree with the suggestion that it should not apply to Bills introduced by a Minister. And since the Standing Orders should say what *they* mean just as much as the Constitution should, perhaps,

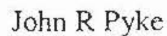
instead of demanding a recommendation from the Governor (drafted in the OQPC at the same time as the Bill!) any such Standing Order would better reflect the purpose of the rule if it simply required the consent of the Treasurer to the Bills in question.

Issue 32 – Restoration of Local Government

This is another chicken soup issue. The requirement that a new local government should be elected as soon as possible is already in the *Local Government Act 1993*, and both that and the proposed statement of the principle in the Constitution are probably non-justiciable. However, since there is reference to the suspension of local government in the Constitution, it is probably appropriate, even if only as a public declaration of principle, that the requirement should be expressed in the Constitution.

As noted at the beginning of this submission, with your leave I will make further submissions on the remaining issues and submit a draft of Chapter 3 of the Constitution to reflect my submissions above, I hope in the next week or two or three.

Respectfully yours,



John R Pyke