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LEGAL, CONSTITUTIONAL AND ADMINISTRATIVE REVIEW COMMITTEE

4 June 2002

Ms Karen Struthers MP
Chair
Legal, Constitutional and Administrative Review Committee
Parliament House, George Street
BRISBANE QLD 4000

Dear Ms Struthers

ISSUES OF CONSTITUTIONAL REFORM

Thank you for inviting me to make a submission on certain matters of constitutional reform, including various issues raised by the Queensland Constitutional Review Commission (QCRC) in its February 2000 Report on the possible reform of and changes to the Acts and laws that relate to the Queensland Constitution.

I am pleased to submit for the consideration of your committee the following comments prepared in the light of the Issues Paper of April 2002 titled "The Queensland Constitution: Specific Content Issues". Your enquiry ranges broadly and raises diverse issues for deliberation; many of these have already received thorough analysis in the various papers and reports. My comments inevitably are selective and sometimes presuppose earlier analysis. Most of the QCRC recommendations to be considered by your enquiry are not very controversial, and occasionally it would not make much practical difference whether they were adopted or not. Nevertheless, even incremental or relatively minor improvements to the State constitutional order are worth having, especially after the successful consolidation effected by the *Constitution of Queensland 2001*.

I now turn to address some of the issues.

INCORPORATION OF CONSTITUTIONAL PRINCIPLES, CONVENTIONS AND PRACTICES

Issues 1-2: Statement of Executive Power

(a) Should a statement be included in the Constitution?

A statement on executive power should be included in the Constitution. Such a statement would accord due recognition to the Executive branch of government as well as an opportunity to adumbrate, at least in introductory terms, the

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relationships among the various persons and institutions of the Executive. It would provide a counterpart to the statement of legislative power found in s 2 of the *Constitution Act 1867* (Qld). But any statement of executive power should aim at enhancing a coherent and practical understanding of the nature of that power. Formal constitutional theories could be recognised as long as the statement points in the direction of contemporary constitutional and political realities.

(b) Should the statement include reference to the constitutional conventions?
Any statement of executive power should include some reference to the constitutional conventions which regulate its exercise. While complete codification of the constitutional conventions would be difficult and controversial, some limited partial codification along with some general recognition of the role of conventions would be desirable. My views as to how this could be done emerge in the following paragraphs.

(c) QCRC Constitution Bill, clause 30 (1)
Clause 30 (1) does not attempt the impossible task of exhaustively defining executive power but declares that it "extends to the administration of the Constitution and the laws of Queensland". This formulation is about as informative as one could wish without moving into misleading or contested terminology.

Executive power is vested in the Sovereign. This recognises the basic constitutional theory that executive power in the Westminster system is founded on royal authority. It might be objected that Clause 30 (1) perpetuates a constitutional fiction given the formal and now very limited role of the Queen in practice. Certainly the provision should not be allowed to stand in isolation. It needs to be qualified to reflect the residual role of the Queen as outlined in the *Australia Acts 1986* (Cth and UK) and to account for the role of the Governor and the persons and institutions of the "political" executive.

(d) QCRC Constitution Bill, clause 30 (2) – (6)
Subclauses 30 (2) – (6) repeat the substance of s 7 (2) – (5) of the *Australia Acts 1986* (Cth and UK). Something to this effect must be included with any vesting of executive power in the Sovereign so as to produce a comprehensive and informative statement of the constitutional law regarding (i) the residual role of the Queen, (ii) the exercise of most of the powers and functions of the Sovereign only by the Governor and (iii) the exercise of powers and functions in relation to Queensland by the Sovereign on the advice of the Premier.

The reasoning of the former LCARC against inclusion of QCRC subclauses 30 (2) – (6) is unconvincing. It is highly unlikely that their inclusion would run the risk that attempts might be made to amend them unconstitutionally. The government's legislative drafters would surely be aware of the *Australia Act* provisions and their entrenched status. In any event reference to the provisions of

the *Australia Acts* could be included in a footnote to the relevant clauses (as the former LCARC seemed to recognise).

(e) Role of Governor and Conventions

QCRC Constitution Bill clause 30 is insufficient for a contemporary statement of executive power because, as the Government suggests, it does not reflect the convention that requires the Governor to act in accordance with the advice of his/her ministers, with the possible exception of the exercise of the reserve powers.

Something like the following adaptation of clause 59 of the Constitution Alteration (Establishment of Republic) Bill 1999 could be employed: "The Governor shall act on the advice of the Executive Council, the Premier or another Minister of the State; but the Governor may exercise a power that is a reserve power of the Crown in accordance with the constitutional conventions relating to the exercise of that power".

Alternatively if it were thought desirable to recognise that the reserve powers are essentially confined to the power to appoint and dismiss the Premier, and to summon, prorogue and dismiss the Legislative Assembly, something like the following could be adopted: "The Governor shall act on the advice of the Executive Council, the Premier or another Minister of the State; but the Governor may exercise reserve powers in regard to the appointment and dismissal of the Premier, and to the summoning, prorogation and dissolution of the Parliament in accordance with the constitutional conventions relating to the exercise of those powers".

It would be desirable to include a provision acknowledging the traditional view that the exercise of the reserve powers is not justiciable, especially as detailed codification of the reserve powers is not envisaged. A simple form of words could be used, such as: "The exercise by the Governor of a reserve power of the Crown is not justiciable". Alternatively s 79 of the *Constitution of Queensland 2001* could be amended to include specific reference to the sections that are relevant to the reserve powers.

Issues 5-6: The Appointment of Ministers

The Constitution should conform to the general rule of a Westminster system that the Governor acts on the advice of the Premier in appointing and dismissing ministers. Section 34 of the *Constitution of Queensland 2001* is rightly stigmatised by the QCRC as "an indefensible breach of the principle of responsible government". Under a system of responsible government, the Governor commissions the Premier to form a government. Advice as to the appointment (and dismissal) of ministers is tendered by the Premier, who is responsible for the composition of the government.

Accordingly the Constitution should state that ministers other than the Premier are appointed and dismissed by the Governor on the advice of the Premier. It might be desirable to add that before dismissing any minister other than the Premier, the Governor must be satisfied that the Premier still commands the support of his or her party and of an absolute majority of the members of the Legislative Assembly.

The Constitution should also provide that ministers must be members of the Legislative Assembly. This conventional rule is basic to sustaining the core doctrine of responsible government, namely that ministers are accountable to Parliament and rely on the support of Parliament for their continuance in office. On occasion it has been suggested that it would be desirable to have non-parliamentary ministers. I consider that the advantages of the present system outweigh the advantages of change. But if such a basic change to the system of government were ever contemplated, it should only be introduced after proper consideration by Parliament.

Any "rare and minor inconveniences" that might be posed by amending the Constitution to provide as a matter of law that ministers must be members of the Legislative Assembly could be mitigated somewhat by adopting the technique in the final paragraph of s 64 of the Commonwealth Constitution which allows any person to be appointed a Minister of State provided he or she is elected to Parliament within three months of appointment.

Issues 7-8: The Premier

The Constitution should be amended so as to give explicit recognition to the office of Premier. It is insufficient merely to refer to the various functions of the office; the office should be established in the Constitution and a brief description provided. I suggest that the QCRC's draft clause 41 commence with a new subclause (1) to this effect: "The Governor shall appoint a person, to be known as the Premier, to be the Head of the Government of the State".

The QCRC's draft Clause 41 (2) should be retained as numbered.

I also support inclusion in the Constitution of the QCRC's draft Clause 41 (1) but renumbered as subclause (3).

QCRC's draft clause 41 (3), which would be subclause (4) in my redraft, should be significantly revised. It should commence with a general statement to the effect that the Governor may only exercise a power to dismiss the Premier in accordance with the constitutional conventions relating to the exercise of that power. Then the provision should go on to say that in particular if the Premier is defeated on a vote of no confidence passed by an absolute majority of the members of the Legislative Assembly the Governor may require the Premier either to resign or to advise an election.

A LIEUTENANT-GOVERNOR FOR THE STATE

Issues 10-13
Revival of the office of Lieutenant-Governor should only be assigned a low priority at the present time. The State has managed without the office being filled for more than fifty years. The expedient of having the Chief Justice act as "Administrator" has worked well in practice. The likelihood of the Chief Justice becoming embroiled in a constitutional crisis while acting as Administrator is remote.

Any revival of the office should only be contemplated on the basis that the costs would be no more than under existing arrangements. A Lieutenant-Governor should not receive a salary, but only a very modest allowance in respect of duties actually undertaken. There is no justification nowadays for additional expenditure on the procedures or ceremonials of the Executive.

Even though there are no real difficulties with the Chief Justice becoming Administrator in the Governor's absence, the provisions regarding the appointment of a Lieutenant-Governor could be retained so as to readily allow for a possible appointment in the future.

MEMBERS OATH OR AFFIRMATION OF ALLEGIANCE TO CROWN

Issue 14
There should be no mandatory requirement that members of the Queensland Legislative Assembly swear or affirm allegiance to the Crown. Members should have the option of swearing or affirming allegiance to the Crown, or only to the people of Queensland.

The arguments in favour of members having the option, summarised in the Issues Paper at p.11, are persuasive. And the most persuasive of these arguments is that giving members a choice as to whether to swear or affirm allegiance to the Crown would "enable respect to be given to members' different opinions, and enable members to make a promise which truly reflects their moral commitment."

The arguments in favour of requiring an expression of allegiance to the Crown, also summarised in the Issues Paper at p 11, are largely countered by the arguments supporting a choice. I would just add the following remarks to supplement the case against the mandatory requirement. The Queen's role in the State constitutional system is not altered in any way by giving members a choice not to swear or affirm allegiance. The issue of allowing members a choice is clearly distinct from the issue about whether Australia should become a republic. Those who wish to swear or affirm allegiance to the Crown would still be able to do so. And in any event allowing individual members a choice in the matter confers no real benefit or advantage to the cause of an Australian republic.

INDICATIVE PLEBISCITES

Issues 15-17
There is no compelling reason for the *Referendum Act 1997* (Qld) to be amended to provide for indicative plebiscites prior to a referendum. As the Issues Paper acknowledges (pp 13-14), the need for indicative plebiscites is unlikely to arise very often, and they are costly to hold no matter how they are organised.

If the Government ever wishes to hold an indicative plebiscite, it can always put legislation through the Parliament on an ad hoc basis and determine the nature of the voting procedures and requirements in the light of prevailing circumstances.

The only reason for amending the *Referendum Act* as suggested by the QCRC would be to expedite arrangements for any future indicative plebiscite. That being so, any *Referendum Act* provisions for indicative plebiscites should do no more than create a basic and permissive framework, able to be flexibly applied to changing conditions and varied issues.

Such a flexible framework envisaged for indicative plebiscites would allow that:

(a) there should be no restrictions on the possible subject matter of an indicative plebiscite
(b) whether voting is compulsory or not should be left for Parliament to determine in the individual case
(c) whether the results of the plebiscite are binding or not should be decided by Parliament in the individual case
(d) there should be a facility to enable indicative plebiscites to be held by post.

INITIATION OF LEGISLATIVE AMENDMENT

Issues 18-20: A Petitions Committee
The QCRC recommendation of a Petitions Committee seems to be almost an after thought designed to placate enthusiasts for citizens' initiated referenda (CIR). While the idea of a Petitions Committee may have some merit it could receive further examination through an inquiry conducted by the Parliament. At the least, any possible establishment of a Petitions Committee should await a review of the current standing and sessional orders regarding petitions.

SUMMONING PARLIAMENT

Issue 23
I agree that the Constitution should include a requirement that the Queensland Parliament meet within thirty days after the day appointed for the return of the writ for a general election. Such a requirement would enhance the recognition of responsible government in the Constitution by ensuring that there is an early opportunity either for a government to have its support tested after an election results in a hung Parliament or for a government clearly defeated at the polls to be removed by a vote of Parliament. The equivalent

provision in s 5 of the Commonwealth Constitution has not caused any problems in its operation. The thirty day period is a reasonable one.

WASTE LANDS OF THE CROWN

Issues 24-26
Neither s 30 nor s 40 of the *Constitution Act 1867* (Qld) should be retained. I agree that those sections now have only historical significance.

The Parliament does not need s 30 to maintain law-making power in regard to waste lands of the Crown. As EARC suspected in 1993, s 30 is superfluous in the light of the general law-making power in s 2 of the *Constitution Act 1867*. Despite EARC's concerns, it is hard to see how the repeal of s 30 would in any way affect the constitutional status quo in regard to land ownership and native title.

If s 40 were repealed, the management and control of the waste lands of the Crown in Queensland would from a practical point of view still be within the preserve of the Parliament and the Executive. Existing statutory regimes (whether Commonwealth or State) and common law rules applicable to the waste lands would subsist. The repeal of s 40 would have no apparent impact on questions of native title.

On the view I have taken, there is no necessity to consider what effect if any the re-enactment of s 30 and / or s 40 might have under native title law.

NUMBER OF PARLIAMENTARY SECRETARIES

Issues 27-28
For the reasons stated in the QCRC Report (at p.44) I agree that there should be a limit on the number of parliamentary secretaries and that the maximum number should be set at 5. Very generally, it makes sense in the interests of a proper and proportionate balance between Parliament and the Executive for there to be a specific limit on the number of parliamentary secretaries, especially when limits are presently in place in regard to number of ministers and number of members of the Legislative Assembly.

There is no need for any other amendments to the provisions in the Constitution regarding parliamentary secretaries. Much of the rationale for the position of parliamentary secretary could be compromised if the position did not remain adaptable to changing administrative and political circumstances. There is enough constitutional underpinning of the position already.

NON-COMPLIANCE WITH CERTAIN REQUIREMENTS

Issue 29: Assent
There is no vital need to introduce a deeming provision to deal with the situation where a document presented to the Governor for assent contains errors such that it is not the bill passed by the Legislative Assembly.

Most errors will be detected in a bill before assent and are readily able to be corrected under existing parliamentary procedures. The problem only arises where scrutiny before assent fails and the assent of the Governor is given to the bill in the form which was not ultimately agreed to by the Legislative Assembly. Even then, as the Issues Paper recognises, there would be no necessity for any validating provision where the errors are typographical or clerical.

In the case of more serious errors, perhaps no harm would be caused by having as a backstop a provision deeming an Act assented to by the Governor to be amended to accord with the bill as passed by the Legislative Assembly. But even then legislative amendment could still be required.

The alternative suggestion that a provision be adopted to validate the error in a bill does not offer any advance over the present position; indeed it might even result in undesirable consequences. If such a provision applied, Parliament would in almost every instance have to legislate again to restore its original intentions.

Issues 30-31: Appropriation
These issues concern the so-called financial initiative of the Crown, embodied in s 68 of the *Constitution of Queensland 2001* (Qld) and s 56 of the Commonwealth Constitution.

The arguments for and against retention of s 56 of the Commonwealth Constitution were thoroughly canvassed by the First Report of the Constitutional Commission, Vol. 1, April 1988. The Commission concluded that the provision should be retained.

For the reasons that commended themselves to the Constitutional Commission, I submit that on balance, s 68 of the *Constitution of Queensland 2001* should be retained. Under a Westminster system the purpose of the message from the Governor is to ensure that the Executive alone initiates spending requests: this recognises the responsibility of the executive for the management and expenditure of public money.

But I agree that s 68 should be amended to provide for an exception to the requirement of a message from the Governor where a bill or motion is introduced or moved by a minister that would appropriate money from the consolidated fund. The reality behind s 68 is that ministers are responsible for the initiation of spending proposals to be considered by Parliament. The suggested amendment accords with and emphasises that reality, while at

the same time overcoming uncertainties as to whether a message from the Governor is required.

I submit that s 68 should be further amended such that the words "Governor in Council" be substituted for the word "Governor" so as to make it explicit that the financial initiative is exercised by the Governor only on ministerial advice.

RESTORATION OF A LOCAL GOVERNMENT

Issue 32
I appreciate the concern that prompted the QCRC to insert the Clause 75 (4) in its Constitution Bill. But I cannot summon much enthusiasm for this proposed solution. To require elected local government to be restored "as soon as possible" after the dissolution of the local government seems to be merely exhortatory rather than an enforceable legal requirement. And there is the risk of "judicialising" political controversies were an attempt made to give Clause 75 (4) legal content.

Perhaps as an alternative to Clause 75 (4), a mechanism could be established to provide regular, periodic reports to the Parliament during the time a local government is dissolved, updating Parliament on the activities of the administrator and what progress has been made towards holding a fresh election of councillors.

THE JUDICIARY

Issue 48: Compulsory Retirement
Provision for compulsory retirement of Supreme and District Court judges at 70 should be retained. The laudable policy of the *Anti-Discrimination Act 1991* (Qld) in regard to prohibiting discrimination on the basis of age should continue to defer to the strong public policy arguments in favour of a compulsory retirement age for judges. The Issues Paper (p 38) summarises arguments raised in support of a compulsory retirement age for Commonwealth judges by the 1976 Report of the Senate Standing Committee on Constitutional and Legal Affairs. These arguments are just as applicable at the State level and remain compelling, undiminished by any subsequent developments.

Issue 49: Removal from Office
In the event that a tribunal is established to inquire into the conduct of a judge, it is appropriate that only specific allegations against the judge be referred to the tribunal. Nevertheless, I agree that it should be possible to require the allegations to be spelt out while still giving the tribunal broad discretion to consider other matters which might arise during the course of the inquiry. The words suggested by the QCRC, namely, that the resolution establishing a tribunal of inquiry should "state full particulars of the grounds on which it is proposed to remove the judge" would be more appropriately modified to require that the resolution " state with a reasonable degree of particularity the grounds on which it is proposed to remove the judge".

The views expressed above are my own and of course do not represent any views of my employer, the Queensland University of Technology. I hope that what I have written will be of some assistance to your committee in its deliberations.

Yours sincerely,

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