No 34

THE UNIVERSITY OF
NEW SOUTH WALES

FACULTY OF LAW

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13 June 2002

Karen Struthers MP
Chair, Legal, Constitutional and Administrative Review Committee
Legislative Assembly of Queensland
Parliament House
George Street
Brisbane, Qd 4000

Dear Ms Struthers,

Thank you for your letter of 18 April inviting a submission to your inquiry into Constitutional Reform. May I commend the Committee on producing a very helpful and clear Issues Paper. I should also note the value of the work of your Committee and the QCRC. State constitutions have been given insufficient attention for far too long. I am sure that the work done in Queensland will also assist those undertaking similar tasks in other States, as is presently envisaged in South Australia.

I plan to address only some of the matters raised in your Issues Paper.

1. [3.2]: Statement of the executive power

There is merit in including in the Constitution some statement regarding executive power. However, I would strongly advise against any provision, modelled on s. 61 of the Commonwealth Constitution, which *vests* the executive power of the State because it could provide the foundation for implying a legal separation between legislative and executive power in the State, with possible consequences such as limitation of parliamentary control over the executive and limits on Parliament's power to delegate legislative power to the Government. It is notable that the Queensland Constitution presently contains no provision vesting legislative power in Parliament or judicial power in the courts. If a vesting provision were to be included, I suggest there be included also a provision analogous to one I included in my draft republican Constitution:

> "The executive power of Queensland shall be subject to the legislative power of Queensland".

["A Constitution for an Australian Republic", in G. Winterton (ed.), *We, the People: Australian Republican Government* (1994), 1, 20 (s. 61(3)).]

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I agree with the comment of the LCARC quoted in the Issues Paper (p. 4) regarding repetition of the provisions of the *Australia Acts* 1986. There appears to be little value in repeating these provisions, which are likely to be transitional, in view of the eventual severance of Australia's link with the Crown. It would, however, be useful to include a provision, modelled on clause 59 of the *Constitution Alteration (Establishment of Republic) Bill* 1999 (hereafter "1999 *Republic Bill*"), which provides that the Governor must act on the advice of the Executive Council, the Premier or another Minister, except when exercising a "reserve power".

I suggest that the Constitution ought to define the "reserve powers" as the powers to appoint and dismiss the Premier and to refuse to dissolve the Legislative Assembly. The Conventions governing the reserve powers should be partially codified, along the lines recommended by the Republic Advisory Committee (on which I served): see *An Australian Republic: The Options — The Report* (1993), 101-5 (hereafter "*RAC Report*"). As envisaged there, the Constitution should provide for the continued application of the constitutional conventions in the absence of express provision. Provisions modelled on clauses 7 and 8 of the 1999 *Republic Bill* Sch 2, providing for the continuing evolution and non-justiciability of the conventions, should also be included.

2. [3.3]: The Governor's role

The suggested provision entitling the Governor to be kept informed and to seek information regarding the conduct of government is unexceptionable, and indeed a corollary of the Governor's role of ultimate constitutional guardian. I included a similar provision in my draft republican Constitution originally published in *The Independent Monthly* in March 1992: see Winterton, above, 20 (s. 60B).

A provision empowering the Governor to seek a declaration from the Supreme Court — preferably the Court of Appeal — regarding the lawfulness of Government conduct has, in principle, much to commend it. The desirability of the Governor obtaining a court ruling thereon before contemplating the dismissal of a Premier on the ground of unlawful conduct was recognized by the UK Dominions Office in its (unsent) advice to NSW Governor Sir Philip Game in 1932, and has been endorsed, virtually universally, ever since. The Republic Advisory Committee included such a provision in its draft codification of the reserve powers in 1993: *RAC Report*, 104. As Richard McGarvie noted (quoted in QCRC *Report* p. 51), a court ruling may well obviate the necessity for an exercise of the reserve powers.

Three objections might be raised to such a provision:

(a) It is often argued that court processes may be too slow for use in a crisis involving continuing Government illegality. However, courts can function speedily if necessary, as was illustrated recently in the federal litigation involving Patrick Stevedores [(1998) 195 CLR 1] and the MV Tampa [*Ruddock v Vadarlis* (2001) 110 FCR 491]. The former matter took 19 days from the initiation of proceedings at first instance to final resolution by the High Court. The latter took 18 days from the commencement of proceedings to determination by the Full Federal Court. (The High Court subsequently refused special leave to appeal.) Moreover, the Governor would only be *empowered*, not *obliged*, to seek a court ruling. If urgent viceregal action were required, the Governor could seek extra-judicial advice from the Solicitor-General, private counsel and others.

(b) Judges are understandably reluctant to become embroiled in matters of political controversy. However, a provision merely authorizing the Governor to seek a declaration would not compel the court to issue one, since that remedy is discretionary, and the court may also conclude that the issue is not justiciable.

(c) The above objections are easily overcome, but a third, more serious objection, arises from the fact that a ruling would be sought from a penultimate court, and may involve federal law. Two issues arise. First, once the matter has been brought before a court, viceregal action should be deferred until the High Court has had an opportunity to rule on the matter (or decline to do so), since it would obviously be undesirable for viceregal action to be based on a judgment which is subsequently reversed. Viceregal action should only be taken pursuant to a final judgment. This would, of course, further delay viceregal action, but the High Court can act expeditiously when necessary. Incidentally, if it is relevant to the High Court's appellate jurisdiction under s. 73(ii) of the Constitution, a Governor's application for a declaration would arise in respect of a concrete issue and should not be considered a request for an advisory opinion: *cf. P & C Cantarella v Egg Marketing Board* [1973] 2 NSWLR 366, 383-4.

Secondly, the question whether the Government is acting unlawfully may well involve possible contravention of Commonwealth legislation (as was probably the case in the Lang — Game dispute of 1932), and thus the exercise of federal jurisdiction, in which case it is doubtful whether a State Parliament could validly confer standing on the Governor to invoke that jurisdiction. However, the Commonwealth Parliament could do so: see, e.g., *Truth About Motorways Pty Ltd v Macquarie Infrastructure Investment Management Ltd* (2000) 200 CLR 591. Moreover, this difficulty may be overcome if a breach of State law is also alleged, so that the State and federal issues are related and the Governor would validly have standing under State law. This is not the place to examine this complex issue, but the Committee may consider it appropriate to seek legal advice on the State's power to authorize the Governor to seek a declaration regarding contravention of federal law.

Hence, the Constitution ought to provide that, if the Governor seeks a declaration from the Court of Appeal: (a) the Governor (as well as the Government, of course) must comply with it; and (b) viceregal action pursuant to such a declaration should be deferred until the High Court has ruled on the matter (or declined to do so).

3. [3.4]: The appointment of Ministers

I agree with the QCRC's criticism of the *Constitution of Queensland* 2001 s. 34 (*Report* p. 53). This is a bizarre remnant of the constitutional machismo of the Bjelke-Petersen years. It is accepted virtually universally in Westminster constitutions that, while the power to appoint the chief Minister is a reserve power, the power to appoint the other Ministers is not. They are appointed and dismissed on the advice of the chief Minister (e,g., Governor-General Sir John Kerr's dismissal of Clyde Cameron on the advice of Prime Minister Gough Whitlam in 1975). Pursuant to my earlier support for a partial codification of the Governor's reserve powers, the Constitution should expressly provide that Ministers are appointed and dismissed on the advice of the Premier.

The Constitution should likewise acknowledge a fundamental principle of our governmental system — that Ministers must be members of Parliament. However, I believe that the rigid requirement recommended by the QCRC (*Report*, p. 54) would be

inadvisable; the "rare and minor inconveniences" the Commission was willing to accept may well be rare, but they may not be minor. Among foreseeable difficulties are those caused by challenges before a Court of Disputes Returns and transitions between administrations after a general election. The latter situation, could raise disputed questions as to when membership of the Legislative Assembly begins and ends, as it did in New Zealand in 1984: see PA Joseph, *Constitutional and Administrative Law in New Zealand* (2d ed., 2001), [6.12.2]. A provision such as the *Constitution Act* 1934 (Tas) s. 8B would offer greater flexibility than that suggested by the QCRC, but I recommend adoption of a more flexible provision modelled on s. 64 of the Commonwealth Constitution.

4. [3.5]: The Premier

The Constitution's provisions should implement the fundamental principle of responsible government that the Government must retain the confidence of the Legislative Assembly. Accordingly, it should provide that the Governor must appoint as Premier the person most likely to enjoy the confidence of the Legislative Assembly. Such a provision was reflected in Practice B adopted by the Australian Constitutional Convention in Brisbane on 29 July 1986, and was implemented in item 2(b) of the Republic Advisory Committee's Partial Codification (*RAC Report*, 103). However, that provision (wisely, in my opinion) allowed the appointment of the appropriate "person", requiring that he or she become a member of the House of Representatives within 90 days (item 2 (3)). Such a requirement is preferable to the QCRC's more rigid requirement that the Governor may appoint only a MLA as Premier. Moreover, the phrase "best able to command" the Legislative Assembly's confidence in the QCRC's draft clause 41(1) is ambiguous, since it could imply that the Governor is to evaluate the worthiness of the candidate, and not merely assess support in the Legislative Assembly, which is the Governor's true function.

The Constitution should, likewise, provide for the Premier's removal upon loss of the Legislative Assembly's confidence. Two points should be noted:

(a) It would be unwise to employ words such as "removes the Premier following a vote ..." since they may (wrongly) imply that such a vote is the sole method of removal. On the other hand, a provision modelled on the QCRC's draft clause 41(3) should not allow that inference.

(b) The Constitution should provide for the *immediate* removal of the Premier only in the event that an *absolute* majority of the members of the Legislative Assembly passes a resolution requesting the Premier's removal or the Government's dismissal and the appointment of another named person as Premier (in other words, a "constructive" resolution of no-confidence). A simple majority of the members may reflect an "accidental" majority caused by death, illness, delay or even a surprise move by the Opposition which leaves Government members unable to reach the floor of the House in time to vote on the resolution. Hence, the Government should be allowed a reasonable time to seek to reverse a resolution passed by a simple majority. Moreover, the Governor should not be required to remove a Premier who loses a simple motion of no-confidence (or a motion of "confidence"), because no other member may enjoy the House's confidence either, in which case the incumbent Premier would be entitled to seek a dissolution of the Legislative Assembly. The QCRC's draft clause 41(3) would be satisfactory if (a) the majority required were an absolute majority and (b) a resolution to "revoke the appointment" was defined as one which also requested the appointment of

another person as Premier (i.e., a constructive no-confidence resolution). It could prove very destabilizing if the Governor were obliged to remove a Premier but could find no substitute able to command the confidence of the Legislative Assembly. Such concerns led the drafters of the German Basic Law to adopt the concept of a constructive no-confidence resolution: see German Basic Law art. 67.

5. [3.6]: Other Conventions

I would urge the Committee to consider adopting two further provisions.

(a) Most important is a provision forbidding the Governor from dissolving the Legislative Assembly on the advice of a Premier in whom the Legislative Assembly has expressed constructive no-confidence (i.e., has also expressed confidence in an alternative Premier); while a motion of no-confidence in the Premier or the Government is pending; and before the Assembly has met after a general election and considered whether it has confidence in the Premier or the Government, unless it is unable to elect a Speaker. The third refers, of course, to the events in Tasmania in June 1989: see G. Winterton, "The Constitutional Position of Australian State Governors", in H. P. Lee and G. Winterton (eds.), *Australian Constitutional Perspectives* (1992), 274, 304 *ff.* A provision to this effect was included in the Republic Advisory Committee's partial codification (item 5): *RAC Report*, 104-5.

(b) Although it may be difficult to draft, consideration should be given to including an express provision authorizing the Governor to dismiss a Premier who refuses to comply with the Governor's request that he or she desist from conduct which the High Court (or the Court of Appeal if the High Court declines to intervene) has declared to be unlawful. For an example of such a provision, see the Republic Advisory Committee's clause 4: *RAC Report*, 104.

6. [4]: Lieutenant-Governor

There is advantage in appointing a Lieutenant-Governor to deputize when the Governor is ill out of the State (e.g., overseas, interstate, or acting as Administrator of the Commonwealth). I believe the potential problems arising from the Chief Justice fulfilling this role, which are identified by the QCRC (*Report*, p. 56), are given insufficient weight. Disruption to judicial functions is less significant, in my opinion, than contravention of the principle of the separation of powers and the possible necessity for the Chief Justice's recusal in respect of litigation arising out of viceregal actions involving the Chief Justice acting as Lieutenant-Governor. The QCRC's conclusion that the present arrangement works satisfactorily may be correct, but there really is no need to run the slightest risk of difficulty. A provision authorizing the appointment of a retired Supreme Court judge for a term of say, three years (five years may be too long on account of age), would appear preferable to current arrangements.

7. [5]: Oath or Affirmation of Allegiance

I will confine my comment on this contentious issue to suggesting that all members of the Legislative Assembly should swear or affirm allegiance to the same entity, whether that be the Crown or the people of Queensland. The oath or affirmation of allegiance ought to reflect a common commitment to the welfare of Queensland. It should unite members across party lines, not divide them.

8. [8]: Summoning Parliament

It is accepted in Australia that, when a general election produces a Hung Parliament, the incumbent Government is entitled to remain in office until Parliament meets and then test its support on the floor of the lower House, even if members of a third party or independents have indicated that they will support the Opposition. This occurred in South Australia in 1968 and 2002 and Tasmania in 1989. It is, therefore, desirable that the House meet as soon as possible after a general election. Your Issues Paper suggests 30 days, following s. 5 of the Commonwealth Constitution, and this may be a satisfactory maximum. However, a shorter period is desirable, and surely feasible. It is notable that in the United Kingdom, with a much greater electorate (though a simpler electoral system), Parliament frequently meets within a week of the general election. (For the periods from 1918 to 1987, see R. Blackburn, *The Meeting of Parliament* (1990), 9.) In June 2001 Parliament met six days after the general election. Surely 14 or, at most, 21 days should suffice in Queensland. If a provision modelled on s. 5 were adopted, it would be preferable to provide that the Legislative Assembly "shall meet", not that it "shall be summoned to meet", which may not ensure that it does meet.

Two further reforms should be considered:

(a) At present, the power to summon the Legislative Assembly is vested solely in the Governor — effectively the Premier: *Constitution of Queensland* 2001 s. 15(1). This would effectively preclude the Assembly convening early to consider whether the Government retains its confidence. Since the Assembly is (in theory) supreme over the Executive, which is responsible to it, it would be appropriate to authorize a specified number of members — say, one third of the total membership of the Legislative Assembly — to summon (or convene) the Assembly, presumably through the Speaker, who might appropriately also be authorized to summon (or convene) the Assembly on his or her own initiative. These powers would be additional to, not in substitution of, the present power of the Governor.

(b) The Governor is also empowered to prorogue the Legislative Assembly: *Constitution of Queensland* 2001 s. 15(2). There is some debate as to whether this is a reserve power but, at least in ordinary circumstances, the Premier's advice to prorogue would be followed. This power effectively enables the Government to terminate a session of the Legislative Assembly at will. Such a power is inappropriate in a modern liberal democracy; the power to adjourn sittings of the Assembly should lie in a majority of its members. Moreover, unlike adjournment, prorogation effectively terminates all business before Parliament — requiring, for example, the re-introduction of all Bills to be proceeded with: see *Erskine May's Treatise on The Law, Privileges, Proceedings and Usage of Parliament* (22nd ed., 1997), 233. Accordingly, I suggest that the power to prorogue the Legislative Assembly should be abolished, since it is dangerous and serves no useful function.

9. [14.2]: Independence of the Judiciary

The independence of the judiciary is a vital safeguard for the protection of individual rights and the rule of law but, as is often noted, it is fragile and easily attacked, especially when the attack is supported by public opinion. The principle should receive express protection in the Constitution. The following provisions are suggested:

- The Constitution should at least protect judicial tenure by entrenching the removal mechanism and protecting tenure in the event that a court is abolished. In other words, ss. 61 and 63 the *Constitution of Queensland* 2001 should be entrenched by analogy with the NSW position, where ss.53 and 56 of the *Constitution Act* 1902 (NSW) are entrenched by s. 7B(1)(a);
- Judicial remuneration should be protected against reduction during tenure (*cf.* Commonwealth Constitution s. 72(iii)), except pursuant to a non-discriminatory measure required by economic exigency. Section 62(2) of the *Constitution of Queensland* 2001 is too absolute, if entrenchment is contemplated. Moreover, "salary" would probably not include allowances and pension entitlements, whereas "remuneration" probably would. A threat to reduce future pension entitlements could provide a means for influencing judges and should, therefore, be guarded against.
- It would be desirable to entrench aspects of the separation of judicial power. This doctrine is a vital means for protecting individual liberty by ensuring that rights and obligations are determined by impartial judicial officers, obliged to comply with fundamental notions of procedural due process. Deane J recognized the importance of this doctrine in *Street v Queensland Bar Association* (1989) 168 CLR 461, 521, noting that "the most important" of all the Commonwealth Constitution's express and implied guarantees of rights and immunities is

> "the guarantee that the citizen can be subjected to the exercise of Commonwealth judicial power only by the 'courts' designated by Ch. III (s. 71)."

Deane J had earlier characterized the doctrine as "the Constitution's only general guarantee of due process" (*Re Tracey; Ex parte Ryan* (1989) 166 CLR 518, 580), an opinion recently endorsed extra-judicially by McHugh J: "Does Chapter III of the Constitution Protect Substantive as well as Procedural Rights?" (2001) 4 *CLPR* 57, 58.

The separation of judicial power could be implemented by adopting a provision, modelled on s. 71 of the Commonwealth Constitution, which "vests the judicial power of Queensland" in the specified courts. This would ensure that State "judicial power" was exercisable only by those courts (with protected tenure and remuneration) and could not, for example, be vested in a statutory tribunal: see, e.g., *Brandy v HREOC* (1995) 183 CLR 245. However, the separation of judicial power effected by the Commonwealth Constitution has been interpreted more broadly than is necessary (e.g., *Boilermakers'* case (1956) 94 CLR 254), making it appropriate expressly to exclude such supposed corollaries of the doctrine. Thus the Constitution ought to provide that non-judicial power can be vested in Queensland courts and in their judges, provided that such functions are not incompatible with the exercise of judicial power or the integrity and status of a court: *cf. Wilson v Minister for Aboriginal and Torres Strait Islander Affairs* (1996) 189 CLR 1, 14-5. It must be remembered that the vesting of non-judicial functions in State courts is already constrained by the implications of ss. 71 and 77(iii) of the Commonwealth Constitution, pursuant *to Kable v DPP (NSW)* (1996) 189 CLR 51.

10. [14.3]: Emerging issues

Since this Submission is already lengthy, it is appropriate to note my suggestions briefly.

Appointment: I believe the most appropriate mechanism for judicial appointment in the Australian constitutional environment is that judges continue to be appointed by the Government, which is accountable therefor to the Legislative Assembly and, ultimately, the electors. However, the Government should be obliged either (a) to select the appointee from a short-list submitted by an independent Judicial Appointments Committee (JAC) or (b) explain publicly why it was considered necessary to choose an appointee not on the short-list. I believe this combination of independent assessment of candidates (by the JAC) with appointment by the popularly elected and accountable Government strikes the best balance between democracy, judicial independence and appointment on merit. I explained the considerations underlying this proposal in an article published 15 years ago: "Appointment of Judges in Australia" (1987) 16 *MULR* 185. The JAC should be constituted as suggested there (pp. 210-11). To promote independence among JAC members, it would appear best that they be elected by a two-thirds majority of the Legislative Assembly, which would require bipartisan support.

Complaints: The present provision for judicial removal (*Constitution of Queensland* 2001 s. 61) is apt, and should be entrenched. However, this mechanism is insufficient in two respects. First, the process of review by the tribunal would presumably be initiated by a resolution of the Legislative Assembly, which would make it difficult to refer matters in confidence. This makes it somewhat inappropriate when serious misconduct is alleged, but later proved to be unfounded, as with Senator Heffernan's recent allegations regarding Kirby J of the High Court. Secondly, the mechanism is unsuited to deal with relatively minor complaints warranting, at worst, a reprimand (see Issues Paper, p. 33). The NSW system established by Part 6 of the *Judicial Officers Act* 1986 (NSW) is superior in this respect, but it appears not to ensure that a complaint will not be investigated by a colleague or former colleague of the judge under investigation, a wise precaution embodied in s. 61(10) of the *Constitution of Queensland* 2001, which should be retained if the NSW model were adopted. Sections 40 and 43 of the *Judicial Officers Act* 1986 (NSW) allowing the head of jurisdiction to suspend a judge who is under investigation, or charged or convicted of an offence punishable by imprisonment for at least one year, is also worthy of adoption.

Magistrates: Magistrates determine the vast preponderance of litigation in Australia. Their independence and impartiality is at least as important to the ordinary citizen as the independence of judges of superior courts. There is no justification whatever for not securing their independence as firmly as that of judges of higher courts. The protections noted above should apply to all "judicial officers", including Magistrates. Magistrates are included in the term "judicial office" in the *Constitution Act* 1902 (NSW) s. 52(1)(f), and "judicial officer" in the *Judicial Officers Act* 1986 (NSW) s. 3.

11. [14.4]: Acting judges

The relevant considerations for and against such appointments are set out well in the Issues Paper (p. 36), so I need not repeat them here. The practice is valuable on several grounds: it enables relief of temporary backlogs; it enables potential judges to determine whether they are suited to judicial office and find it congenial; and it enables the Attorney-General, the judiciary and the Bar to evaluate the acting-judge's competence and suitability for permanent appointment. These considerations underlie the English requirement that all High Court judges have served as part-time Recorders. The principal

objection is the potential threat to judicial independence posed by the possibility that the acting-judge might tailor his or her decisions to suit the Government or not alienate powerful interests. There is also concern that, even if the probability of such "tailoring" is slight, the *appearance* of judicial independence is almost as important as the fact in the eye of public opinion. This is an important consideration, although similar concerns arise when judges are promoted to a higher court. This occurs in all common law countries, especially England, where promotion from High Court judge to Lord Justice of Appeal to Lord of Appeal in Ordinary is virtually the only path by which a judge can reach the House of Lords. It should, moreover, be noted that using acting appointments to evaluate a potential judge's ability, character, and suitability for judicial office is *not* incompatible with judicial independence.

The considerations for and against acting appointments are not inherently contradictory and can be reconciled. Evaluation of potential judicial appointees by an independent Judicial Appointments Committee (JAC) would probably alleviate most concerns regarding judicial independence and the appearance thereof. The latter concerns are greater in the absence of a JAC. They would largely be removed if the acting judge had no proximate prospect of a permanent appointment. I suggest, therefore, an entrenched provision along the lines of the QCRC's clause 67, subject to the following:

- A person should be ineligible for permanent appointment to the relevant court for a period of three years after their last term as an acting judge.
- Provision should be made for retired judges to serve as acting-judges, with a maximum age limit of 75 years, as in NSW: see *Supreme Court Act* 1970 (NSW) s. 37(4) and (4A). Use of retired judges has been common in England, Australia and the United States.
- If these limitations are adopted, *consultation* (rather than consent) with the Chief Justice or Judge should suffice. Even consultation is not required in NSW.
- The QCRC's clause 67 does not apply to Magistrates, but there appears to be no reason why it should not.

12. [14.5]: Compulsory retirement

Compulsory retirement at the age of 70 should be retained, subject to the employment of retired judges as acting-judges up to the age of 75 years, as noted above. I see no reason why the age for retirement of Magistrates should not be the same as that for judges.

13. [14.6]: Removal from office

The rationale underlying the QCRC's clause 64(6) is undoubtedly correct; a general "fishing" expedition is inappropriate for the reasons noted by the Gibbs Commission (quoted in Issues Paper p. 39). However, the specific language of clause 64(6) is inappropriate because it virtually foreshadows the outcome (removal) before the inquiry has begun (as noted in Issues Paper p. 39). I suggest that the Constitution should include a provision confining the ambit of the tribunal's inquiry. It should require the Legislative Assembly's resolution to "specify the specific allegation or allegations into which the tribunal is to inquire" (adapting the words of the Gibbs Commission), and allow for further allegations to be referred if the Legislative Assembly considers it appropriate. If the tribunal believes it requires a further reference to pursue incidental matters it can always request the Legislative Assembly to refer them. To avoid protracted litigation and ensure flexibility, it would be desirable to provide expressly that this provision should not

be justiciable. The tribunal will, after all, be constituted by retired Australian superior court judges (*Constitution of Queensland* 2000 s. 61(9)) who would be competent to enforce such a limitation through their conduct of the inquiry.

Yours sincerely,
George Winterton
Professor of Law