Kerryn Newton

From: Janeen Robertson [ ]
Sent: Tuesday, June 18, 2002 4:05 PM
To: Lcarc@parliament.qld.gov.au
Cc: Laurie Marquet
Subject: Submission re April 2002 issues paper

No 35

qldsub.doc

Sent on behalf of Mr Laurie Marquet:

Dear Ms Newton

My comments/observations on some of the issues raised in the Committee's paper are in the attached document. The views and opinions are my own and in no way represent those of any member of the House or the Legislative Council.

I will be in Brisbane for the 1st week of July attending the Presiding Officers and Clerks Conference. If you think a meeting with the committee, some members, or officers would be useful, I would be pleased
to make time available. As well, if you need clarification or expansion
of some of the points made, please let me know. Similarly, I have a raft
of relevant cases should you require them.

Sincerely

L B Marquet

Janeen Robertson
Executive Assistant to the Clerk of the Legislative Council

3.2 Statement of executive power

Such a statement assumes the existence of a theoretical "separation of powers" doctrine. Despite the High Court's quarantining of the judicial power of the Commonwealth and flow-on effects to the States through decisions in cases such as *Kable* and *Grollo* and *Egan*, the fact remains that Queensland's laws apportion **functions** among the various instrumentalities of the Crown. The "powers", so-called, attach to the performance of a function by an instrumentality – a power said to exist in its own right divorced from a function it is intended to support is said to be absolute and is capable of arbitrary exercize. It denies the concept of the rule of law and a just society. Absolutism as manifested in European governance was a claim finally abandoned by the English Crown on the enactment of the *Bill of Rights 1689*. The genius of the English [British] constitutional arrangements has been the ability to retain the forms of monarchy while, through revolution and evolution, effect a "constitutional transubstantiation" to representative governmental institutions balanced on the fulcrum of the collective and individual responsibility of the Crown's ministers. The High Court has consistently maintained that if there is one *grundnorm* in the Commonwealth Constitution applicable to the Commonwealth and the States, it is the representative and responsible nature of Australia's governance and the consequent entitlement of citizens to be informed about, and criticize, the system itself and the acts (and omissions) of those holding public office.

A valid enactment of the Queensland Parliament that imposes on the Crown an obligation to give effect to, or administer its requirements is its own "statement of executive power". At the same time, it delimits the extent of the power conferred. Similar observations apply to an exercize of the prerogatives of the Crown which, as part of the common law, are justiciable both as to their existence and effects and are capable of modification or extinguishment by the Queensland Parliament.

In my submission, it is erroneous to treat "executive power" as a constitutional species that can exist in isolation. In a Westminster-model polity, the Executive, its functions and attendant powers exist because, as Cromwell put it, "Parliament does not govern".

3.2 The conventions

A convention embodied in a Constitution at once loses its elastic qualities and will cease to be of use. Conventions necessarily operate as norms of political decisionmaking that adjust to accommodate political and generational change. Their existence is known to the judiciary. It is not the possibility of judicial intervention that argues against their inclusion in the Constitution so much as stating that what they are in 2002 so shall they be thereafter. A convention, once stated, will be bypassed and another developed in its place as part of the dynamic of the political process. In my submission any formalization of the conventions is a futile gesture.

It would be different were the intent of any alteration to convert a convention into substantive law, eg, the Governor acts on ministerial advice. In my own State, the issue has been sidelined in many cases by vesting the power in the relevant minister rather than the Governor [in Council].

Supposing, for the sake of discussion, that the Constitution provided that the Governor acts with the advice and consent of the Premier or the Executive Council or a responsible minister. In former parlance, is such a provision to be read as directory or mandatory, ie, if what the

Governor purports to have done has been done without observing the constitutional provision, would a court hold the result to be a nullity or something capable of having effect? Or would a court decline jurisdiction? Although the courts have displayed a willingness of late to extend their reach into areas such as the validity of an exercize of the prerogative, their enthusiasm to take an overt role in defining the form and substance of a valid "advice and consent" situation may be doubted.

In my opinion, a better approach would be to leave the conventions to develop outside the formal Constitution but annotate that document with non-legislative "explanatory notes" showing how the black letter provision is applied as part of the political process. This approach has the advantage of informing the interested layperson, maintaining a source of pin-money for constitutional lawyers, while allowing politicians "to get on with it".

Despite what surveys show as an appalling level of popular understanding of our system of government, I suggest that Australians expect the electoral process to be fair and free of any taint of corruption and results in a government (parliament) that accurately reflects the ballot box and that they will have an opportunity in a few years time to pass judgment on that result.

3.3. Governor's role

"Her Majesty's representative in each State shall be the Governor."

Australia Acts 1986 (UK; Cth) s 7(1).

That provision is beyond the reach of the Queensland Parliament acting unilaterally. I do not see the need to state in the Constitution the unquestionable right of the Governor to be kept informed, request information and, it should be added although it is not proposed, the right to counsel and to warn, (if the totality of the traditional formulation is to be maintained).

If, as a condition precedent for validity, my decision is to be made on another's recommendation, or consent, or certificate, I am entitled to satisfy myself that the basis of that recommendation, consent or certificate is reasonable, factual, and accurate. I fail to see why there should be any doubt about the Governor's right to act similarly. The political reality that the Crown must always act on advice, *pace* the reserve powers, does not gainsay its right to examine the content of that advice and the purpose for which it is given. A State Governor is not a constitutional automaton incapable of rational thought and independence of mind. Were that so, the office should be declared redundant, a drain on the public purse, and a proposal made for the repeal of section 7 by all the States as preparation for individual abolition.

In my submission, the Governor has no "role", ceremonial or otherwise. The Governor has functions assigned by the Letters Patent, or that inhere in the office, or that are conferred on him or her by law where, in each case but for the existence of the office, the Sovereign would act in person (a clearly untenable proposition absent a bi-location ability).

For the most part, the Governor will be exercizing a statutory power. Any particular use of the power may give rise to an application for judicial review and the possibility of annulment. As previously observed, once conventions as to the manner and occasion of the exercize of a power by the Crown, or in its name, are formalized they lose their evolutionary abilities and take on the character of a manner and form requirement where any failure to comply opens up the real possibility of a declaration of invalidity. In light of my recent application to the State Supreme Court for a declaration about the validity of 2 bills being passed by this Parliament in [arguable] breach of a manner and form requirement, the likelihood of judicial involvement is a reality rather than an academic "what if?" scenario.

3.3 Reference to Court of Appeal by Governor

Such a proposition is misconceived. If the Governor is asking the Court to make a declaration about acts or omissions which, although yet to be completed, might possibly disclose illegality or impropriety, the question is hypothetical, speculative and one the Court would refuse to consider, yet alone answer. Conversely, (alleged) facts said to constitute illegal or improper conduct are not the basis for a declaration because, were the Court to make a declaration, it would necessarily involve a finding of guilt in a situation where the "defendant" has not been tried for the alleged crime in accordance with proper criminal procedure. I suggest that no court can, or should, be required to make such a finding as though it were a mere incident on the path to advising the Governor whether there are grounds to sack a government or an individual minister.

If the Governor believes advice in such a situation is desirable, the obvious and proper course is to raise the matter with the Premier. Failing a satisfactory response from the Premier, the Governor has a number of options including, it should be noted, the option of resigning and stating the reasons. It would be interesting to know what the Premier communicates to the Palace in nominating a replacement.

3.4 Ministerial appointments

No, for 2 primary reasons. First, there is sufficient case law from the High Court about the nature of Australian governance to put the matter beyond doubt. Second, section 7(3), (5) of the *Australia Acts* and the power there given to a Premier to recall a recalcitrant Governor is a more persuasive means of ensuring gubernatorial compliance than a mere statement of constitutional form.

3.4 Ministers to be MP's

Stating the obvious but no harm done.

3.5 Revocation of commission to Premier

In case 7(b) why would it be necessary for the Governor to dismiss rather than requiring the Premier to submit his/her resignation? If a Premier loses the confidence of the House I understand the convention (that word again) to be that the Premier resigns, not that the Governor dismisses. Properly speaking, a loss of confidence in the Premier means the Cabinet goes as well and the "proper" course is for the Premier to advise the Governor to appoint some other person who is likely to command majority support and, once appointed, accept that Premier's advice as to ministerial appointments. Unless I am badly mistaken, my impression is that confidence motions have yet to be used by the party room or caucus as a means of axing a leader of a parliamentary party although the inference might be drawn from the proposal. Were a Premier to refuse to resign, the reserve power to dismiss might be used although the safer course would be to dissolve the Assembly and let the people decide the outcome.

I would add that a resolution **demanding** that the Premier be dismissed has a certain similarity to demands made by the Commons for the dismissal of "evil counsellors" of the Crown in the days before the advent of responsible government and the attendant control of public revenues by the same body. Is it proposed that a Premier of Queensland suffer the same fate as the Earl of Stafford? A vote of [no] confidence surely means a Premier resigns. The House's remedy is not a demand of the Crown but to deny the Crown its supply until such time as there is a change in its ministerial advisers?

4. Lieutenant Governor

I am on record as being highly critical of the Chief Justice acting for the Crown (although it neatly describes the futility of arguing for a separation of powers). The Lord Chancellor's tripartite functions are an accident of England's constitutional and political history and no Australian jurisdiction has made provision for a Justiciar as that office developed in England. Appointment of the Chief Justice may be convenient but, given the widening gap between the mutual deference paid by the judiciary and the executive to each other may we expect an Attorney General to defend, equally, the actions of the Chief Justice as Lieutenant Governor and as the head of the judiciary? If it is possible to find a suitable person to hold the office of Governor it must equally be possible to find a surrogate.

7.1 Parliamentary petitions committee

It was no accident that the WA Legislative Council made provision for automatic referral of petitions to a committee soon after the arrival of the present Clerk, formerly a Table Officer in the NZ House. Quite apart from the wide range of subject matter petitions bring with them, MLC's find that they provide a successful avenue of "bringing Parliament to the people" by having committee hearings in the relevant town or district. It demonstrates, particularly in WA where population is sparse outside the metropolitan fringe and spread exceeding thin, that there is a genuine interest in matters of local concern that would not even register on the richter scale of political issues were there no parliamentary machinery in place.

The success of the Council's handling of petitions lies in the barriers erected by the relevant rules that weed out the frivolous and vexatious, those that make unfounded, serious allegations against holders of public office without a shred of evidence, those that try to avoid taking the appropriate legal action, particularly those that seek to turn the House in an appellate court. If a petition survives that preliminary scrutiny and is given the Clerk's certificate of compliance, it is then in the committee's discretion as to the level of consideration it is given. That exercize of discretion is not based on party political considerations but takes into account the subject matter, what steps the petitioner(s) has taken before petitioning, what kind of remedy is being sought, the likely effects, adverse or not, on individuals or communities, and the apparent merit of the case. There have been cases where the committee has recommended that a petition under consideration on a prorogation be re-presented in the next session so that the committee's inquiry can be finalized and a report made to the House. Several petitions have disclosed illegal or improper conduct on the part of public servants sometimes at the behest of their agency, in others without the agency's knowledge. I would add that developing and fostering a good working relationship with the State Ombudsman ensures that the committee avoids second-guessing that officer's work, or inquiring into a matter in blissful ignorance of work already done by the Ombudsman and, last but not least, allows appropriate cases to be referred by the committee to the Ombudsman with a report-back requirement.

Finally, why set up **any** committee by statute when the House has the powers etc of the Commons? Statutes simply invite judicial scrutiny no matter how "judge-proof" the legislators might think their enactment might be.

11.1 Royal assent

In WA the Clerk of the Legislative Council is appointed to the separate office of Clerk of the Parliaments (plural). One of the functions of that officer is to present bills passed by both Houses for the assent given by the Governor in the name of the Crown. I have attached a copy of a letter sent to the President and Speaker last year showing where the duty can lead in some cases.

Issues of manner and form aside, there seems no common law impedient, at State level, to the application of the doctrine stated by the House of Lords in the 1974 *Pickin* case that a court will not go behind the official version of an Act for the purpose of declaring its invalidity because of procedural irregularity ascertained on the face of the record. Under section 109 of the Cth Constitution, a State Act is not declared invalid because of a procedural defect or error in what it contains – it becomes inoperable because a superior law "covers the [relevant] field". A declaration by the High Court that a law of the Commonwealth (or a State) is invalid is for the reason that it purports to be a law in relation to subject matter that, because of the federal nature of the Commonwealth, is not a matter for which the Commonwealth (or a State) may legislate.

In WA the Clerk of the Parliaments is authorized to return a bill, passed by both Houses, to the originating House if the error is substantive and incapable of clerical amendment. I have exercized that power twice when the answer to the question "Were the Clerk to make this alteration, can it be said that the Clerk is legislating" was in the affirmative.

It is worthwhile remembering that what passes the House(s) is a set of words formulated as a bill. Each individual word relies for its continuing presence in the bill on the order of the House evidenced by the official record. What emerges is a final set of words that will be presented in the form of an Act for the assent or, in constitutional terms, the advice and consent of the House(s) to the Crown making a particular law is conveyed in the form in which the Act will be published. Although the printed version, as assented to, may contain substantive error, it can be argued that the printed version is merely evidence of what received the assent and that the official record of parliamentary proceedings as to what words were passed is authoritative. Support for this view is to be found in the manner in which the assent is pronounced at Westminster. The Clerk of the Parliaments reads the long title, the Sovereign inclines her head, and the Clerk, not the Sovereign, pronounces the Norman French words of assent and endorses the bill. Unlike Australian forms, the Queen does not give assent by the Royal Sign Manual. Unfortunately, Australian *Evidence Acts* make the version printed and published by the Government Printer the authoritative record so as to preclude such an inquiry, which is perhaps just as well given the not infrequent need for the Clerk to record in the Minutes or the Votes what the House intended rather than what actually occurred!

Many Houses' rules still make provision for "Governor's amendments", a procedure from earlier days when Governors, as agents of the imperial government, sought to ensure that local legislation was in accord with London's world view. For obvious historical reasons , there is a marked reluctance by State governments to use the facility as a means of correcting error in a bill discovered after leaving the House(s) but prior to presentation.

Although the debate has revolved around judicial approaches to Acts assented to in error, the real issue is one surrounding the right of any person to have access to the body of law in the reasonable belief that what is published and purports to be the official version is what Parliament enacted. In the 1993 case *Pepper v Hart* the House of Lords "declared" that a court is entitled to take parliamentary proceedings into consideration to assist clarification where a statutory provision is unclear as to its meaning or intended application. Similar provision has been made in section 19 of WA's *Interpretation Act 1984*. Despite the purist mutterings about judicial intrusion into parliamentary proceedings, which it is not, the provision is sensible and practical and Acts assented to containing error merit the same practical treatment.

I suggest that where an error of substance, ie, one that goes to meaning, application or intent, the Clerk, acting on the certificate of the Attorney General describing the error, be required to gazette the relevant official parliamentary record and/or an explanation of how or when the error occurred. The covering enactment should provide that upon publication, the Act has effect from the date of its commencement in the form it would have had but for the error. This

procedure avoids argument about the validity of the assent and, in addition to further examination of the question about the number of angels on the head of a pin, endless discussion about when an Act is not an Act. Very interesting but not particularly helpful to someone wanting to know what the law is. The covering enactment would also have to provide that any right, title or interest obtained by reason of, or in reliance on, the erroneous provision is not affected **by reason only** of the Act's operation before correction.

Error in an Act must be distinguished from the Commonwealth experience where the wrong bill received the assent. I disagree with the solution of having the Governor-General cancel the signature on the assent version. As a Roman Procurator once said *Quod scripsi, scripsi – what I have written, I have written* in relation to what was to be affixed to the cross above the criminal's head (in Latin, Greek and Hebrew). The only remedy in such as case is to repeal the "Act" and assent to the real "Act". On anyone's reckoning, it becomes a little difficult to point to the parliamentary record as disclosing legislative intent where all that would be shown is a total absence of such an intent to relation to the "Act".

11.2 Appropriations

Issue 30. Yes
Issue 31 No

14.2 Judiciary

I was under the distinct impression that this matter was disposed of by the *Act of Settlement 1702 (GB)* by providing that judges hold office *quamdiu se bene gesserit* rather than *si bene placito*, a provision replicated in State Constitutions (and the *Supreme Court Act 1935 (WA)* just in case you missed it in the Constitution). And in case it might be thought that an address to the Crown by the House(s) of Parliament for removal of a judge holding tenure during good behavior is the sole means, it has been suggested that although abolished in the UK, it may still be possible to secure removal on a writ of *quo warranto* where the capacity remains to issue that writ rather than grant injunctive relief.

The danger in going beyond the form of tenure lies in distinguishing "judicial independence" from "independence of the judiciary" because they are entirely different concepts, the latter being judicial shorthand for absolute judicial control over the level of funding (capital works included) and the quantum and deployment of human and other resources within the court system.

The proposal is not supported – some things are better left unsaid.

L B Marquet
Clerk of the Legislative Council
Clerk of the Parliaments

June 17 2002

Dear Mr President

Electoral Distribution Repeal Bill 2001
Electoral Amendment Bill 2001

As you are aware, there has been considerable debate concerning the applicability of section 13 of the *Electoral Distribution Act 1947* to the bill that provides for the repeal the 1947 Act in its entirety. On different grounds, the question of the application of section 6 of the *Australia Act(s) 1986 (UK) (Cth)* has been raised.

Section 13 of the *Electoral Distribution Act 1947* enacts that it is not lawful to present a bill that amends any provision of that Act to the Governor for the Royal Assent. In this State, the duty to present bills to the Governor resides in the Clerk of the Parliaments. The person appointed to that office is the Clerk of the Legislative Council.

It is my opinion that the commencing words of section 13 – *"It shall not be lawful to present to the Governor for Her Majesty's assent . . ."* - requires me to give active consideration to whether or not the *Electoral Distribution Repeal Bill*, despite its stated repeal of the 1947 Act is, nonetheless, a bill that a court would hold to be one that "amends" the 1947 Act and therefore subject to the provisions of section 13 at the second and third reading stages.

I should also consider whether other enactments, either in concert with, or independently of, section 13 but having an identical effect, apply to either or both bills..

Were the lawfulness of presenting a bill an issue in litigation, the court is entitled to know if I considered that question at all and, if I did, with what degree of diligence. My personal liability under section 13 or similar enactment stands outside any immunity that I may claim as the Clerk of the Legislative Council either under the general law of privilege or section 51 of the *Constitution Acts Amendment Act 1899*. The Clerk of the Parliaments is not an officer of either House.

I therefore advise you and through you, the Legislative Council, that should the repeal bill pass the Council without an absolute majority at second and third readings, I will seek a declaratory judgment in the Supreme Court on 2 questions. The first will seek an interpretation of section 13 and its application (if any) to either or both bills. The second will ask the Court to decide whether, apart from, or in concert with, section 13, any other law imposes conditions which must be complied with in passing either or both bills. The degree of compliance on which the Court will be asked to pronounce is where any failure avoids the enactment. The actual form of the questions will not be settled until counsel's advice is obtained and after the Houses have agreed to the same version of each bill. It is only then that there will be 2 bills that I am able to "present" to the Governor. The presentation of either or both bills will depend entirely on the findings of the Court.

I am sending Mr Speaker a copy of this letter at the time you publish it to the House.