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LEGISLATIVE ASSEMBLY OFFICES

Submission No 15

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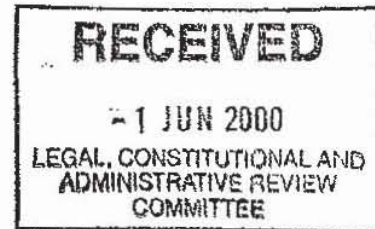
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1 June 2000

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



Dear Kerryn

I refer to the Chairman's letter dated 5 May 2000 requesting submissions on the consolidation of the Queensland constitution and attaching the Committee's Position Paper.

I would like to pass on my thanks to the Committee for inviting me to provide a submission. A detailed submission is attached.

If you have any questions about the submission or require any further information, please do not hesitate to contact me.

Yours sincerely

R D Doyle
The Clerk of the Parliament

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**SUBMISSION TO THE
LEGAL, CONSTITUTIONAL AND ADMINISTRATIVE REVIEW COMMITTEE
ON THE
CONSOLIDATION OF THE QUEENSLAND CONSTITUTION
BY THE CLERK OF THE PARLIAMENT – R D DOYLE**

At the outset, I would like to thank the committee for taking into account most of the submissions that I made in my February 1999 submission in its Final Report – Report No. 13 tabled on 13 April 1999.

Position paper

In relation to the issues specifically in the Committee's position paper dated April 2000, I advise as follows.

- I have no difficulty in respect of the category A recommendations by the QCRC that the committee intends to adopt.
- I consider most of the category B recommendations to be matters of policy about which I do not wish to comment. However, I do note R5.4, and the proposal that *the maximum time limit between sittings of the Legislative Assembly be reduced to six months and the minimum number of sittings be increased to two years*. The relevant provision is Clause 17 of the QCRC Constitution of Queensland Bill:

Minimum sitting requirement for Legislative Assembly

17.(1) The Legislative Assembly must meet at least twice in every calendar year.

(2) Six months must not pass between a sitting of the Legislative Assembly and the next sitting of the Legislative Assembly.

I also note that in Clause 16, the Governor is given power to set the times and places in Queensland for sessions of the Legislative Assembly.

My point is that within two clauses of the Bill, three different concepts are introduced: sessions, meetings and sittings. Whilst it may be necessary to retain the concept of sessions in Clause 16, I query whether it is appropriate to use two terms meet and sitting (in 17(1) and (2)), to explain the same thing. I appreciate that this terminology was also used in the committee's interim and final report, but it is something that I have only recently noted.

The proposed terminology is far preferable to the existing provision in s.3 of the *Constitution Act 1867*. However, I suggest that the consistency of terminology could be improved by stating:

Minimum sitting requirement for Legislative Assembly

17.(1) There must be at least two sittings of the Legislative Assembly in every calendar year.

(2) Six months must not pass between a sitting of the Legislative Assembly and the next sitting of the Legislative Assembly.

Other matters

I would like to take the opportunity to raise with your committee two other matters related to the Consolidation of the Queensland Constitution, (or more particularly the Parliament of Queensland Bill), that are not sourced from the Position Paper.

Committees having "Executive functions"

The Parliamentary Criminal Justice Committee's ("the PCJC") functions as set out in the *Criminal Justice Act 1989* include participating in constitution of the Criminal Justice Commission (CJC).¹ What this in effect means is that a bipartisan majority of the PCJC must approve the appointment and removal of the Chairperson and Commissioners of the CJC.² It is important to note that the Chairperson and Commissioners are not actually appointed by the PCJC, it is merely a requirement that the appointment has the bipartisan support of the PCJC.

In *CJC v. News Limited*³ Pincus J., in *obiter dictum*, stated:

The Parliamentary Committee is of course an organ of Parliament but it is not merely that. The mode of composition of the committee is dictated by statute: Div 1 of Pt 4 of the Criminal Justice Act, as are its functions: s 118 of that Act. Those statutory functions include the executive function of participating in the constitution of the Commission and removal of Commissioners from office: ss.11, 14(6)(g). Most significantly, the Act creates an offence explicitly applicable to members of the Parliamentary Committee, of wilfully disclosing information received from the Commission, except in certain circumstances; there is of course no doubt that that offence is cognisable in the courts: s 132. [Emphasis added]

Recently another Supreme Court judge has noted the above comments. In *Corrigan v. Parliamentary Criminal Justice Committee*⁴ Dutney J stated:

- [6] **To the extent that the PCJC is acting as a committee of the Legislative Assembly** in considering whether to refer a matter to the Parliamentary Commissioner the challenge under the Judicial Review Act would appear to be incompetent.
- [7] In *Criminal Justice Commission v Nationwide News Pty Ltd* [1996] 2 Qd R 444 at 457 Pincus JA **distinguished those functions of the PCJC in which it was plainly acting as a committee of the parliament from those (such as the appointment of Commissioners) where its functions were executive.**
- [8] If a distinction is to be made between those two roles it seems to me to lie between the role of monitoring the CJC and reporting to parliament on matters pertaining to the CJC⁵ in which the PCJC is plainly acting as a committee of parliament, **the executive role of participating in the**

¹ Section 118(1)(e) *Criminal Justice Act 1989*

² See s.11(3), 12(3), 13(4) and 14(7)(g).

³ (1994) 74 A Crim R 569 at 580.

⁴ (unreported) Supreme Court Queensland, decision by Dutney J, 27 April 2000.

⁵ See *Criminal Justice Act 1989* s 118 (1) (a), (b), (c), (d) and (f)

constitution of the CJC⁶ and, possibly, the role of issuing guidelines and directions to the CJC as provided under the Act⁷ where it is unnecessary to decide on which side the role falls. [Emphasis added]

With all due respect to their Honours, I fail to see how a committee of the Parliament can have an executive function or role. I do not believe that the Parliament intended committees to perform executive functions, simply by being involved in a selection process. If, however, their Honours are correct and provide the basis for a future judicial decision on the issue, I believe it has significant ramifications for a number of committees of the Queensland Parliament, at least in respect of some of their functions.

The Legal Constitutional and Administrative Review Committee ("the LCARC") and the Public Accounts Committee ("the PAC") both have functions similar to the PCJC to participate in the appointment of certain officers and participate in the composition of reviews or setting the budgets of some offices. To demonstrate I provide a list of some of those functions below.

- The LCARC has a number of responsibilities under the *Parliamentary Commissioner Act* relating to the appointment, removal and suspension of the Ombudsman. The LCARC also has responsibilities in relation to the Ombudsman's budget and strategic reviews of the Ombudsman's office.
 - Section 5(6) of the *Parliamentary Commissioner Act* provides that a person can only be appointed as the Ombudsman if the Minister has consulted with the LCARC about: the process of selection for appointment; and the appointment of the person as Ombudsman.⁸
 - Only the Premier may move a motion for the address to remove the Ombudsman. The Premier may move the motion only if the Premier has consulted with the LCARC about the motion and agreement to the motion has been obtained from: all members of the LCARC, or a bipartisan majority of members of the LCARC.⁹
 - When the Legislative Assembly is in session, the Governor in Council may suspend the Ombudsman only on an address from the Legislative Assembly.¹⁰ Only the Premier may move the motion for this address. The Premier may move the motion only if the Premier has consulted with the LCARC about the motion and agreement to the motion has been obtained from: all members of the LCARC; or a bipartisan majority of members of the LCARC.
 - Section 31(3) of the *Parliamentary Commissioner Act* states that the Minister responsible for the administration of the *Financial Administration and Audit Act 1977* (that is, the Treasurer) must consult with the LCARC in developing the proposed budget of the Ombudsman for each financial year.
 - Recently, the LCARC has been given added responsibilities in relation to reviews of the Ombudsman's office and the Office of the Information Commissioner.

⁶ *Ibid* s 118 (1) (e)

⁷ *Ibid* s 118 (1) (g)

⁸ *Parliamentary Commissioner Act* s 5(6)(b).

⁹ *Ibid* s.6(6).

¹⁰ *Ibid* s.6(5).

- The LCARC has similar responsibilities in relation to the suspension and removal of the Information Commissioner pursuant to the FOI Act.¹¹
- The LCARC also has responsibilities in relation to the terms and conditions of appointment of senior electoral officers.¹²
- The PAC has certain responsibilities regarding the Auditor-General and the audit office under the *Financial Administration and Audit Act 1977*.
 - The appointment of the Auditor-General, whereby the Premier must consult with the PAC about the selection process and the appointment.¹³
 - The terms of appointment of the Auditor-General, whereby the PAC must be consulted about the salary, allowances and other terms and conditions of the Auditor-General before appointment by the Governor in Council.¹⁴
 - The budget of the audit office, whereby the Treasurer must consult with the PAC in developing the proposed budget of the audit office for each financial year.¹⁵
 - The strategic review of the audit office, whereby the PAC must be consulted about the terms of reference of the review and the appointment of the reviewer.¹⁶

If the above functions of the PCJC, the LCARC and the PAC in relation to the above and, perhaps other functions, are classified as executive functions or roles, it raises a host of consequential issues.

- Are actions taken concerning these roles and functions *proceedings in Parliament*? That is, if the committee is discharging an "executive function or role", does it mean that when acting in discharging that function or role the committee is not covered by parliamentary privilege?
- Are the proceedings of the committee when discharging an "executive function or role" justiciable? That is, is a decision by the committee in respect of such a function or role able to be subjected to judicial review?
- Would it mean that proceedings of the committee when the committee is discharging an "executive function or role" are not exempt from disclosure under the provisions of the *Freedom of Information Act 1992*?

As stated above, I do not agree with the classification of any of these functions or roles as executive in nature. In my opinion a parliamentary committee is incapable of acting in an executive capacity and all of its proceedings are proceedings in Parliament.

However, it may be best to address this issue by explicitly providing in the Parliament of Queensland Bill that when a parliamentary committee is given a function or role under any act to:

- participate in the appointment process of statutory officers or others;

¹¹ Section 67 and *Freedom of Information Act 1992*.

¹² Section 23 *Electoral Act 1992*

¹³ Section 50.

¹⁴ Section 52.

¹⁵ Section 68.

¹⁶ Section 72.

- setting terms of reference for reviews of a state body;
- setting budgets or participate in the setting of budgets for any state body; or
- or any other role or function,

the parliamentary committee is deemed not to be discharging an executive function or role and all of its proceedings are proceedings in Parliament.

Internal procedures of committees contained in statute

The final issue that I wish to address is the practice of detailing the internal proceedings of parliamentary committees in statute. For example, s.4B of the *Parliamentary Committees Act 1995* provides for a quorum of a statutory committee, how questions are determined and the casting vote of the Chairperson.

It has long been held that where a procedure for Parliament to observe is contained in a statute, it is for the Parliament itself to observe the statute and the courts will not interfere with or inquire into the matter for to do so would be to offend Art 9 of the Bill of Rights 1689 and the wider principle of non-intervention. As your committee is aware Art 9 guarantees that the courts and other tribunals will not question or impeach the proceedings of the Parliament. (See Stephen J in *Bradlaugh v Gossett* (1864) 12QB 271 at 278 & 284-285) Nonetheless, I believe that generally the appropriate place for the internal proceedings of the Parliament and its committees is in Standing Orders.

Prior to adopting Chapter XIII of the Standing rules and Orders, Senior Counsel's advice was sought to ensure that Orders within that chapter did not conflict with, *inter alia*, the provisions of the *Parliamentary Committees Act 1995* and the *Criminal Justice Act 1989*. (The fact that this advice was thought necessary is in itself indicative of the problem.) Senior Counsel did make some suggested amendments, which were adopted, but did not raise any difficulty with those provisions that are now SO 191 (enabling the establishment of sub-committees) and SO 189 (giving the Chairperson and the Deputy Chairperson when acting as Chairperson, a deliberative and casting vote). But it remains a fact that at some point in the future an issue may arise where it is alleged that Standing Orders are inconsistent with statutory provisions dealing with the same matters. Such an issue, depending on its importance, may be raised in the courts and unnecessarily open the issue about the role of the courts in respect of parliamentary proceedings.

It may be best to take the opportunity to remove those matters within the Parliament of Queensland Bill that are not required to be in the statute and can be dealt with by standing Orders. A clause that falls into this category is Clause 82¹⁷ – "Quorum and voting at meetings of statutory committees".

R D Doyle
The Clerk of the Parliament

17 QCRC version of the Bill