The purpose of this paper is to facilitate the committee’s call for public submissions on certain issues of substantive constitutional reform. The committee’s inquiry, among other matters, considers various recommendations of, and issues raised by, the Queensland Constitutional Review Commission in its February 2000 Report on the possible reform and changes to the Acts and laws that relate to the Queensland Constitution.

The subject matter of the issues under review includes:

- incorporation of constitutional principles, conventions and practices (including a statement of the executive power, the Governor’s role, the appointment of ministers, and the Premier);
- a Lieutenant-Governor for the State;
- the members’ oath or affirmation of allegiance to the Crown;
- indicative plebiscites;
- initiation of legislative amendment (including the establishment of a petitions committee);
- summoning Parliament;
- waste lands of the Crown;
- the number of parliamentary secretaries;
- non-compliance with certain requirements (including assent and a message from the Governor recommending an appropriation);
- restoration of a local government after suspension;
- statutory office holders (including special constitutional provision, removal and resources); and
- the judiciary (including acting judges, compulsory retirement, removal from office and the Magistracy).

Additional background information is available from the sources indicated for each recommendation or matter under review.

At this stage the committee is essentially considering whether provision should be made for certain matters in the Constitution. The committee is considering all issues relating to protection of provisions of the Constitution in the next stage of its inquiry.

The closing date for submissions is Friday, 31 May 2002. Please see the back page of this paper for guidelines on making a submission and the committee’s contact details. Submitters are asked to clearly identify which issue they are addressing in their submission.
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APPENDIX B – SELECT STATUTORY OFFICE HOLDERS..........................................................43
1. **INTRODUCTION**

On 29 February 2000, the Premier tabled in the Queensland Parliament the report of the Queensland Constitutional Review Commission (QCRC) titled *Report on the possible reform of and changes to the Acts and laws that relate to the Queensland Constitution*. As this title suggests, the QCRC’s mandate was wide-ranging: essentially, to research and investigate whether there should be reform of, and changes to, the Acts and laws that relate to the Queensland Constitution.

The Premier stated that he tabled the QCRC’s report for ‘consideration and reporting’ by the Legal, Constitutional and Administrative Review Committee of the Queensland Legislative Assembly (LCARC).

The then LCARC subsequently reviewed and reported to Parliament on:

- the QCRC’s recommendations relating to a consolidation of the Queensland Constitution;
- the QCRC’s recommendation that the maximum term of the Legislative Assembly be extended to four years with a fixed minimum period of three years.

The former LCARC did not embark on a review of the remainder of the QCRC recommendations relating to reform of the Queensland Constitution before its dissolution in January 2001 for the 2001 general state election.

In November 2001, an extensive exercise to consolidate Queensland’s Constitution culminated in the Legislative Assembly passing the *Constitution of Queensland 2001* (Qld) and the adjunct *Parliament of Queensland Act 2001* (Qld). The passage of these statutes followed not only the QCRC’s review, but also reviews by other independent commissions and parliamentary committees over the past eight years, namely:

- the Electoral and Administrative Review Commission;
- the Parliamentary Committee for Electoral and Administrative Review;
- the Legal, Constitutional and Administrative Review Committee of the 48th and 49th Parliaments.


With few exceptions, the *Constitution of Queensland 2001* and *Parliament of Queensland Act 2001* merely consolidate the various statutes that currently contain Queensland’s constitutional provisions.

A referendum is required to relocate currently entrenched provisions and thereby fully complete the consolidation of Queensland’s constitutional legislation. (For an explanation of what entrenchment entails see section 2). Ideally,

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this referendum would also incorporate substantive constitutional reform emanating from the QCRC’s and this committee’s review.

As the *Constitution of Queensland 2001* and *Parliament of Queensland Act 2001* are not due to commence until 6 June 2002, this paper includes references to both current law and the 2001 statutes where relevant.

2. **THIS COMMITTEE’S REVIEW**

This committee—the LCARC of the 50th Parliament—has resolved to conduct an inquiry into issues of constitutional reform which encompasses:

- a review of the QCRC recommendations not considered by the former LCARC and other issues raised by the QCRC;
- issues of constitutional reform which the Government referred to the committee in a letter from the Acting Premier dated 17 January 2002 (attached as appendix A); and
- an outstanding issue from LCARC report no 31 relating to the oath or affirmation of allegiance required to be taken or made by Queensland members of Parliament.\(^9\)

The committee is dealing with these issues of constitutional reform in three separate stages. The first two stages largely relate to matters which the QCRC has given substantial consideration to and concern:

1. substantive issues of constitutional reform, that is, what the Constitution should provide for; and
2. protection of provisions of the Constitution, that is, what parts of the Constitution should be protected by special measures and how should any protection be effected.

The third stage of the committee’s inquiry will concern QCRC R5.6 that, during this Parliament, the LCARC conduct an inquiry into the possibility of special representation for Aborigines and Torres Strait Islanders.

This issues paper relates to stage one of the committee’s inquiry. Although, one issue of substantive constitutional reform which the committee does not address in this issues paper is a preamble for the Queensland Constitution. The QCRC recommended that the Queensland Constitution should include a preamble, and recommended wording for the preamble. However, if a preamble is to be included in the Constitution, the committee considers that further public consultation regarding its terms is desirable given that the QCRC received limited public input to its review, and considered a wide range of issues, of which the preamble was only one. It would be most efficient for Government to decide the threshold issue of whether the Constitution should indeed include a preamble before the terms of the preamble are further considered. Further, assuming the Government does support the inclusion of a preamble, the committee believes that the Government will be better placed to facilitate, inform and support an appropriate process to finalise the terms of a preamble. Accordingly, the committee does not propose to pursue the question of whether the Constitution should include a preamble and, if so, what form that preamble should take.

The committee has advised the Premier of its position on this issue.

Further, the committee, like the QCRC, does not propose as part of this review to re-open the issue of a bill of rights for Queensland. This issue was recently considered and reported on by a former LCARC.\(^10\) This is not to say that constitutional recognition of particular rights, for example the right to vote, is not important. However, these matters are more appropriate for inclusion in any future consideration of the issue of a bill of rights.

Essentially, stage 2 of the committee’s review will consider whether part or all of the Constitution should be ‘entrenched’ and, if so, the form of that entrenchment.


Entrenched provisions are laws enacted by Parliament that may not be repealed or amended or the effect of which may not be altered by Parliament unless it follows a special, additional procedure, such as approval by the majority of electors at referendum or approval by a two-thirds majority in the Parliament. The entrenchment of a provision reflects Parliament’s intention to protect a law that it considers to be of special significance, by inhibiting a successor Parliament’s ability to amend the provision through the normal law-making process.

The entrenchment of a provision usually occurs by a substantive provision (the entrenched provision) being subjected to another provision (the entrenching provision) which states that the substantive provision may not be repealed or amended without observance of the special additional procedure. To truly entrench a law, the entrenching provision must also subject itself to a special procedural requirement before it can be amended (that is, the entrenching provision entrenches itself). When this occurs, the substantive provision is said to be ‘doubly entrenched’.

While it is important to understand the concept of entrenchment at the outset, this stage of the committee’s inquiry is simply concerned with whether provision should be made for certain matters in the Constitution. Stage 2 of the committee’s inquiry will consider what provisions of the Constitution can legally be entrenched, and whether certain provisions of the Constitution should be entrenched.

3. INCORPORATION OF CONSTITUTIONAL PRINCIPLES, CONVENTIONS AND PRACTICES

3.1 Background

The statutes which comprise the Queensland Constitution do not explain or incorporate all aspects of the constitutional system in Queensland. Moreover, many of the Westminster principles of responsible government are not referred to, such as the fundamental principle that the Governor acts on the advice of the ministry (except on those very rare occasions when a reserve power needs to be used). In addition, there is a range of constitutional conventions which, although unwritten, are always observed. Although these principles and conventions have not been included in the statutes comprising the Constitution and are therefore not enforceable by the courts, they are observed for political and financial reasons.

The Constitution of Queensland 2001 has, for the first time, made some mention of matters covered by convention. For example, there now exists in the Constitution a reference to Cabinet (s 42). The 2001 Constitution also includes other new provisions reflecting constitutional law or practice, such as the requirement that members of the Legislative Assembly be directly elected (s 10) and the need for parliamentary authorisation for the executive to impose taxation (s 65).

However, given the consolidatory nature of the exercise which led to the Constitution of Queensland, not all conventions essential to the Westminster principle of responsible government appear in the Constitution.

The issue which now arises is whether the Constitution of Queensland 2001 and the Parliament of Queensland Act 2001 should make reference to other constitutional principles, conventions and practices.

Matters which have traditionally been subscribed by convention include the following.

- The Governor commissions as Premier the person who possesses the confidence of a majority in the Legislative Assembly.
- The Governor, in exercising the legal powers vested in that office, always acts on the advice of the Executive Council,\(^\text{11}\) the Premier or the appropriate minister, except in exercising a reserve power.
- The Governor, acting on the advice of the Premier, appoints and dismisses other members of the Legislative Assembly as ministers of the Crown.

\(^\text{11}\) The Executive Council, which is presided over by the Governor, formalises decisions of Cabinet. In Queensland, it is customary for Executive Councillors to be the same persons who comprise the Ministry and Cabinet. Persons are appointed as Executive Councillors immediately after being sworn in as ministers.
The Premier together with the ministers of the Crown constitute the Cabinet so long as they have the support of the Legislative Assembly.

Constitutional conventions also regulate the exercise of the Governor’s ‘reserve powers’. These reserve powers are recognised as essentially confined to the power to appoint and dismiss the Premier, and to summon, prorogue and dismiss the Legislative Assembly.

Two issues often arise in relation to constitutional conventions: how can one establish if there is an unwritten convention on a matter, and should conventions be codified to avoid any uncertainty?

There are several arguments against expressly incorporating conventions, including the Governor’s reserve powers, in the Constitution. These arguments include: the difficulty in codifying the conventions; the consequent lack of flexibility; and their subjection to review by the courts. Of further concern is that the courts may become politicised. In particular, the judicial appointment process might be open to allegations that governments will appoint judges likely to be sympathetic to their political interests in considering constitutional matters.

The QCRC wanted to avoid these outcomes and therefore did not recommend extensive codification of constitutional principles, conventions and practices. However, it did recommend their partial incorporation to explain some key aspects of Queensland’s constitutional system.12

3.2 A statement of the executive power

<table>
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<tr>
<th>Recommendation under review</th>
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<tr>
<td>QCRC R6.1 That a statement of executive power be added to the Queensland Constitution</td>
<td>QCRC report ch 6 at 49-50; QCRC Constitution of Queensland 2000, cl 30; LCARC report no 24; second reading speech and explanatory notes to the Constitution of Queensland 2001; letter from the Acting Premier to the committee dated 17 January 2002: see appendix A</td>
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Clause 30 of the QCRC’s Constitution Bill, which gives effect to R6.1, essentially comprises two parts:

♦ ss (1) which states that: ‘The executive power of Queensland is vested in the Sovereign and extends to the administration of the Constitution and the laws of Queensland’; and

♦ ss (2)-(6) which repeat the substance of s 7(2)-(5) of the Australia Acts 1986 (Cth and UK).

The former LCARC considered QCRC R6.1 as part of its review of the QCRC’s recommendations relating to a consolidation of the Queensland Constitution. That committee recommended inclusion of a clause identical to clause 30(1) of the QCRC’s Constitution Bill on the basis that it reflected the accepted legal position in Queensland and adopted a similar formulation to s 61 of the Commonwealth Constitution which provides: ‘The executive power of the Commonwealth is vested in the Queen and is exercisable by the Governor-General as the Queen’s representative, and extends to the execution and maintenance of this Constitution, and of the laws of the Commonwealth’.13

However, the former LCARC did not recommend inclusion of QCRC subclauses 30(2)-(6). The former committee reasoned:

Although the inclusion of these provisions is consistent with producing a comprehensive and accessible Constitution, complications may arise in the future given that these provisions are entrenched in Commonwealth and United Kingdom legislation which is beyond the capacity of the Queensland Parliament.

12 QCRC report, n 1 at 45-48. For a general discussion on constitutional conventions and the Governor’s reserve powers, see the QCRC’s issues paper, n 2 at chs 6 and 12.

to change unilaterally. In other words, the committee has concluded that their inclusion in the Queensland Constitution might run the risk that attempts will be made to amend them unconstitutionally.\(^{14}\)

The *Constitution of Queensland 2001* does not include a statement that the executive power of Queensland is vested in the Sovereign as recommended by the former LCARC. (Nor does it include the provisions of the *Australia Acts* noted above.) The Government considered that the QCRC’s recommended expression of executive power, as adopted by the former LCARC, was too narrow and did not adequately reflect the convention that requires the Governor to act in accordance with the advice from his or her ministers, with the possible exception of exercising the Governor’s reserve powers.\(^{15}\) The Government subsequently referred this matter back to this committee asking the committee to consider how the executive power of Queensland might be appropriately represented in the Constitution given the Government’s concerns.

The issue raised by the Government has not been an issue in relation to s 61 of the Commonwealth Constitution. However, clause 59 of the republic bill submitted to a referendum of the Australian people in 1999—the Constitution Alteration (Establishment of Republic) Bill 1999—sought to expand upon s 61 to include the convention that: ‘The President shall act on the advice of the Federal Executive Council, the Prime Minister or another Minister of State; but the President may exercise a power that was a reserve power of the Governor-General in accordance with the constitutional conventions relating to the exercise of that power.’ A proposed schedule 2 to the Constitution included provisions to ensure that the adoption of the constitutional conventions in clause 59 did not prevent their evolution (clause 7) and that any exercise of reserve power was not reviewable by the courts (clause 8).

### ISSUES

1. Should a statement of executive power be included in the Constitution?
2. If a statement of executive power is included in the Constitution, should the statement include reference to the constitutional conventions which regulate its exercise? How should those conventions be incorporated?

### 3.3 The Governor’s role

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<td>QCRC R6.2 That the Governor’s right to be kept fully informed and to request information about matters relevant to the performance of the Governor’s functions be recognised in the Queensland Constitution</td>
<td>QCRC report ch 6 at 50-53; QCRC Constitution of Queensland 2000, cl 42</td>
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<tr>
<td>QCRC R6.3 That the Governor have power to apply to the Supreme Court for a declaration concerning possible illegal or corrupt activities by a member of the Ministry</td>
<td>QCRC report ch 6 at 50-53; QCRC Constitution of Queensland 2000, cl 33</td>
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The QCRC considered what should happen if the Governor believes or suspects that the Premier is engaged in ‘illegal’ conduct. In some cases, the lawfulness of the conduct in question might be determined by court action instigated by concerned parties. However, in the absence of such proceedings or their timely resolution, the Governor may have difficulty in deciding whether there is illegality warranting the exercise of his or her reserve power to dismiss the Premier.

The QCRC noted that, on the one hand, the Governor is the ultimate guardian of a state’s Constitution and its laws. Yet, on the other hand, whether a particular Premier or their Government remains in office has, by convention,

\(^{14}\) LCARC report no 24, n 4, Constitution of Queensland 2000, clause 31—Notes to the bill at 13. However, the former LCARC included a reference to the provisions of the *Australia Acts* in a footnote to the relevant clause.

\(^{15}\) Hon P D Beattie MP, Queensland, Legislative Assembly, *Parliamentary Debates (Hansard)*, 9 November 2001 at 3717, and letter from the Acting Premier and Minister for Trade, the Hon T Mackenroth MP, to the committee dated 17 January 2002: see appendix A.
been determined by whether or not they retain the support of a majority of members of the lower (or only) house of the state Parliament.

The QCRC recommended that the ‘*uncertainty, and its consequent risk of inaction, in this conflict of principles*’ can be reduced, in the extraordinary circumstances where it will become an issue, by two steps, namely, legislative recognition of the Governor’s right:

- to be kept informed and to request information about matters relevant to the performance of the functions of that office: QCRC R6.2; and
- to apply to the Supreme Court for a declaration concerning possible illegal or corrupt activities by a member of the ministry so that the Governor has a mechanism by which to establish publicly and with certainty whether a breach of law has occurred: QCRC R6.3.

The first of these recommendations reflects the convention that the Governor is entitled to ask questions and to seek further information from his or her advisers.

The following observations might be made regarding the second of these recommendations.

- A process involving the Supreme Court is likely to be more public than the Governor obtaining advice from the Governor’s own sources. Such advice might never be made public.
- An application for a declaration would need to be heard as quickly as possible and preferably by the Court of Appeal rather than the Supreme Court.
- The recommendation is not confined to the activities of the Premier or those of ministers condoned by the Premier.
- There might be practical difficulties in implementation, for example, if investigations relevant to the conduct in question are necessary and have not yet been finalised. Judges involved in hearing an application for such a declaration might also have to be excluded from considering the same conduct in another context, for example, a criminal trial.

### ISSUES

3. Should the right of the Governor to be kept fully informed and to request information about matters relevant to the performance of the Governor’s functions be recognised in the Constitution?

4. Should the Governor have power to apply to the Queensland Court of Appeal for a declaration concerning possible illegal or corrupt activities by a member of the ministry?

### 3.4 The appointment of ministers

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<tbody>
<tr>
<td>QCRC R6.4 That the existing provision concerning the appointment of Ministers be amended to provide that (a) the Governor shall act on the advice of the Premier in appointing and removing Ministers, and (b) Ministers must be Members of the Legislative Assembly</td>
<td>QCRC report ch 6 at 53-54; QCRC Constitution of Queensland 2000, cl 43(1)</td>
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Section 34 of the *Constitution of Queensland 2001* replicates s 14 of the *Constitution Act 1867* in providing that the Governor is ‘*not subject to direction by any person and is not limited as to the ... sources of advice*’ in appointing and dismissing ministers. The QCRC considered that this statutory denial of the convention that the Governor will always act on the advice of the Premier in appointing and dismissing ministers as ‘*an indefensible*
breach of the principle of responsible government which is one of the main tenets of the Queensland Constitution."\(^{16}\)

The QCRC had similar difficulties with the provision which now appears in s 43(2) of the Constitution of Queensland 2001 and empowers the Governor to ‘appoint a person as a Minister of the State’. As the QCRC noted, this is contrary to the strong convention that only members of the Legislative Assembly be appointed as ministers. The QCRC also felt that this opens the potential for ‘…a situation where political considerations make it desirable that someone not yet in Parliament or even still sitting in another Parliament or who had recently lost their seat would be put up by their supporters for a Ministerial appointment and that appointment made a condition of support for the Government.’\(^{17}\)

Amending the Constitution to provide that ministers must be members of the Legislative Assembly might pose rare and minor inconveniences. For example, it would require a minister to stand down from office where his or her re-election has been overturned by the Court of Disputed Returns and pending a subsequent by-election. However, the QCRC felt that such inconveniences did not outweigh the overriding principle that ministers, to be responsible to the Legislative Assembly, have to be members of the Legislative Assembly.

Accordingly, the QCRC recommended that both issues be dealt with by a provision stating that the Governor acts on the advice of the Premier in appointing and dismissing ministers, who must be members of Parliament: QCRC R6.4.

An alternative approach is that adopted by 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**

5. Should the Constitution provide that the Governor shall act on the advice of the Premier in appointing and dismissing ministers?

6. Should the Constitution provide that ministers must be members of the Legislative Assembly? If so, should they be allowed a period of three months (or some other period) from their appointment as a minister to be elected to Parliament?

### 3.5 The Premier

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<th>Recommendation under review</th>
<th>Source material</th>
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<tbody>
<tr>
<td>QCRC R6.6 That a section be added to the Queensland Constitution stating that the Governor (a) appoints as Premier the Member of the Legislative Assembly who, in the Governor’s opinion, is most likely to command the support of a majority in the Legislative Assembly, and (b) removes the Premier following a vote of no confidence passed by the Legislative Assembly</td>
<td>QCRC report ch 6 at 55-56; QCRC Constitution of Queensland 2000, cl 41(1) and (3)</td>
</tr>
<tr>
<td>QCRC R14.1 That a provision be inserted that the appointment as Premier of the person who immediately before the commencement of the appropriate section was the Premier should not be affected</td>
<td>QCRC report ch 14 at 81; QCRC Constitution of Queensland 2000, cl 92</td>
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A number of submissions to the QCRC noted the virtual absence of any reference in the Constitution to the Premier and the total absence of any reference to Cabinet.

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\(^{16}\) QCRC report, n 1 at 53.
\(^{17}\) QCRC report, n 1 at 54.
The former LCARC dealt with QCRC R6.7 regarding explicit recognition of Cabinet in LCARC report no 24.\(^{18}\) (See now s 42 of the *Constitution of Queensland 2001*.)

Current references to the Premier in the Constitution refer to various functions of that office rather than actually designating the office.\(^{19}\)

The QCRC recommended that a section be added to the Constitution explaining how a Premier comes to office and how a Premier might be dismissed, namely, that the Governor appoints as Premier a member who, in the Governor’s opinion, is most likely to command the majority support of the Legislative Assembly, and removes that person following a vote of no-confidence: QCRC R6.6. The QCRC reasoned:

> The principle of responsible government requires that the Government, which in the first instance means the Premier who heads that Government, has the confidence of a majority of the Members of the Legislative Assembly. The corollary is that if the Legislative Assembly formally states that it wishes the appointment of a Premier to be revoked, the Governor should do so.\(^{20}\)

The QCRC’s draft clause giving effect to this recommendation provides:

**Premier**

41(1) Whenever the Governor has occasion to appoint a Premier the Governor may appoint as Premier the member of the Legislative Assembly the Governor considers is best able to command the confidence of a majority of the members of the Legislative Assembly.

(2) The Premier is a Minister of the State.

(3) If the Legislative Assembly by a resolution supported by a majority of its members resolves that the Premier’s appointment should be revoked, the Governor must revoke the appointment.

The QCRC felt that the benefit of such a provision outweighed the risks of being seen to start a codification of the reserve powers. The extensive codification of the reserve powers was something which the QCRC earlier warned against.

However, clause 41(3) above arguably raises a number of issues.

- A provision stating the Governor must remove the Premier following a resolution that the Premier’s appointment should be revoked may infer that this is the only basis for dismissing a Premier. Other grounds may exist, such as when a Premier persists in acting illegally, or refuses to resign as Premier on losing leadership of his or her parliamentary party.

- The QCRC’s recommended clause does not rely on a vote of no confidence, but rather a resolution which effectively calls on the Governor to revoke the Premier’s appointment. Such a resolution might only be passed after the Premier fails to act on a vote of no confidence.

- It is arguable that any resolution, like that of a vote of no confidence, should be of an absolute majority of the members of the Legislative Assembly, that is, a majority of half the number of seats in the Assembly (as opposed to a majority of members at the time present in the Assembly).

It should be noted that the QCRC’s R6.6 differs from clause 41(3) in that R6.6 refers to a vote of no confidence, rather than a resolution that the Premier’s appointment should be revoked.

If the Premier were added to the offices designated in the Constitution, the QCRC felt there would also need to be a transitional provision: QCRC R14.1.

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18 Note 4, Constitution of Queensland 2000, clause 42—Notes to the bill at 18.
19 See the *Constitution of Queensland 2001* (Qld), s 25 (Functions of parliamentary secretary), s 26 (Length of parliamentary secretary’s appointment), s 42 (Cabinet) and s 45 (Minister may act for another minister).
20 QCRC report, n 1 at 55.
7. Should a provision be included in the Constitution stating that the Governor:
   (a) may appoint as Premier the member of the Legislative Assembly who, in the Governor’s opinion, is most likely to command the support of a majority of the Legislative Assembly; and/or
   (b) must dismiss the Premier when the Legislative Assembly passes: (i) a resolution requiring his or her appointment to be revoked; or (ii) a vote of no confidence against the Premier?

8. If either such a provision as outlined in issue 7(b) is included:
   (a) should it expressly state that such a resolution is not the only ground for dismissing a Premier?
   (b) should it require an absolute majority of the members of the Legislative Assembly to pass the resolution or vote, that is, a majority of the number of seats in the Assembly?

3.6 Other principles, conventions and practices

The above discussion reflects the extent to which the QCRC made specific recommendations about incorporation of constitutional conventions into the Constitution.

There might be other constitutional principles, conventions and practices which arguably should be included in the Constitution to explain key aspects of Queensland’s constitutional system. For example, clause 29(6) of the QCRC’s Constitution Bill provides: ‘Advice to the Sovereign in relation to the appointment and termination of the appointment of a person as Governor is to be tendered by the Premier’.  

9. Should any other constitutional principles, conventions and practices be included in the Constitution?

4. A LIEUTENANT-GOVERNOR FOR THE STATE

<table>
<thead>
<tr>
<th>Matter under review</th>
<th>Source material</th>
</tr>
</thead>
<tbody>
<tr>
<td>Whether a Lieutenant-Governor should again be appointed for the state</td>
<td>QCRC report ch 6 at 55-56</td>
</tr>
</tbody>
</table>

The Constitution of Queensland 2001, s 40 provides that the Governor may delegate all or any of his or her powers during a temporary absence or illness (expected to be of a short duration) to a ‘Deputy Governor’ who is:
♦ the Lieutenant–Governor; or
♦ if there is no Lieutenant-Governor in the State and able to act—the Chief Justice; or
♦ if there is no Chief Justice in the State and able to act—the next most senior judge of the Supreme Court of Queensland who is in the State and able to act.

Section 41 of the 2001 Constitution provides that the same rank order of officer holders are to perform the functions and exercise the powers of the Governor as ‘Acting Governor’ in circumstances including a vacancy in the office of Governor, and when the Governor is absent from the state or incapable of performing the duties of office and the Governor’s powers are not being exercised by a Deputy Governor.

21 Compare the Australia Acts 1986 (Cth and UK), s 7(5) which provides that: ‘The advice to Her Majesty in relation to the exercise of the powers and functions of Her Majesty in respect of a State shall be tendered by the Premier of the State’.
No appointment has been made to the position of Lieutenant-Governor for more than 50 years. During periods of the Governor’s absence, the Chief Justice has been appointed as ‘Administrator’.22

Lengthy absences of the Governor are now less common than they were in the late 1800s, due to a combination of air travel and the appointment of Australians to the position. Thus, the need for a locum who can serve a lengthy period has been considerably reduced, if not removed.

The QCRC considered whether there are problems with the Chief Justice automatically becoming Administrator, and did not perceive a problem provided the acting periods are short enough to not seriously disrupt the Chief Justice’s judicial duties. However, the QCRC recognised that it is possible that a constitutional crisis might occur while the Chief Justice is acting as Administrator, and that some element of the crisis might become the subject of court action, leaving other members of the Supreme Court to rule on the Administrator’s actions.

The QCRC concluded that ‘[s]hort of reviving the office of Lieutenant-Governor and finding a suitable appointee, who might be a retired Chief Justice or Governor, retention of the present arrangement with the Chief Justice appears to ... be completely satisfactory’.23 Nevertheless, the QCRC considered this matter to be worthy of review.

### ISSUES

10. Are there difficulties with the current arrangement whereby the Chief Justice automatically becomes the Administrator in the Governor’s absence?

11. If there are difficulties with the Chief Justice automatically becoming the Administrator in the Governor’s absence, how might these difficulties be overcome?

12. Should a Lieutenant-Governor for the state be appointed? What qualifications might be appropriate for appointment to the position of Lieutenant-Governor?

13. If there are no difficulties with the Chief Justice automatically becoming the Administrator in the Governor’s absence, should the provisions regarding the appointment of a Lieutenant-Governor be retained?

### 5. THE MEMBERS’ OATH OR AFFIRMATION OF ALLEGIANCE TO THE CROWN

<table>
<thead>
<tr>
<th>Matter under review</th>
<th>Source material</th>
</tr>
</thead>
<tbody>
<tr>
<td>Whether members of the Queensland Legislative Assembly should have the option of swearing or affirming allegiance to the Crown</td>
<td>LCARC report no 31</td>
</tr>
</tbody>
</table>

In LCARC report no 31,24 this committee considered the mandatory requirement that members of the Queensland Legislative Assembly swear or affirm allegiance to the Crown.25 There is currently no constitutional impediment to repealing the requirement. Further, as discussed in report 31, an oath or affirmation is a commitment which is morally, not legally, binding.

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22 The title of ‘Administrator’ is given to the person who assumes administration of the Government under the Constitution (Office of Governor) Act 1987 (Qld), s 9. This title will change on commencement of the Constitution of Queensland 2001 (Qld).

23 QCRC report, n 1 at 56.

24 Note 9.

25 This requirement is contained in s 4 of the Constitution Act 1867 (Qld) and replicated in the Constitution of Queensland 2001 (Qld), s 22. Section 22 of the 2001 Constitution implements another recommendation made by the committee in report no 31, n 9, namely, that members also be required to swear or make an oath or affirmation of office.
The arguments against such a mandatory requirement, as set out in LCARC report no 31, include the following.

♦ Some members might have difficulties with swearing or affirming allegiance to a person who is a foreign national, living in a foreign country and whose position is attained by genetic inheritance.

♦ A compulsory oath or affirmation of allegiance to the Crown is contrary to the notion of a modern, independent, and democratic Australia.

♦ Removing a requirement to swear or affirm allegiance to the Crown is not solely an issue related to the republican debate. Nor does it deny Australia’s history with Great Britain, the strong relationship between the two countries, or respect for the Queen and the position she holds. Rather, it concerns members properly acknowledging where their allegiance and duties lie and whom they are required to serve—that is, the people of Queensland who elected them.

♦ Members currently have a choice as to whether they swear an oath or make an affirmation and likewise should have a choice as to whether they swear allegiance to the Crown. This 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 such a mandatory requirement include the following.

♦ Under our current system of government we are a constitutional monarchy and the Queen remains Queensland’s head of state. Queensland’s Constitution provides that the Parliament of Queensland consists of the Queen and the Legislative Assembly. 26

♦ The issue of whether members should swear or affirm allegiance to the Crown is essentially an issue about whether Australia should be a republic. Australians recently defeated a referendum on becoming a republic. The people at the recent referendum did not vote to change the Constitution and, thus, to remove the mandatory requirement that members swear or affirm allegiance to the Crown would be presumptuous. Removal of the oath or affirmation of allegiance is an issue for the people, not for members of Parliament.

♦ Giving members a choice not to swear or affirm allegiance might also require consideration of whether all other oaths of allegiance taken by public officers and judges in Queensland should likewise be altered. People who are currently required to, or by practice, make an oath or affirmation of allegiance include the Governor, ministers and judges of the Supreme Court. (Although, few public officers are required by statute to swear or affirm allegiance to the Crown.)

Members of the ACT Legislative Assembly and various judicial officers in the ACT have a choice as to whether they swear or affirm allegiance to the Crown (although slightly different constitutional arrangements exist in the ACT). 27 The Tasmanian Parliament has recently passed an Act to remove the oath or affirmation of allegiance from judicial oaths in that state. 28

This committee stated in LCARC report no 31 that it believed the most appropriate course of action is for the committee to conduct public consultation regarding whether there should be a mandatory requirement for members to swear or affirm allegiance to the Crown or only to the people of Queensland and made a recommendation to this effect (rec 2). The committee is taking this opportunity to consult on the issue.

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26 Constitution Act 1867 (Qld), s 2A. This provision is entrenched but referred to in the Constitution of Queensland 2001 (Qld), s 6.
27 In relation to members of the ACT Legislative Assembly, see the Oaths and Affirmations Act 1984 (ACT), s 6A. In relation to the various judicial officers, see the Coroners Act 1997 (ACT), s 10; the Administrative Appeals Tribunal Act 1989 (ACT), s 11; and the Supreme Court Act 1933 (ACT), s 19.
28 See the Promissory Oaths Amendment Act 2001 (Tas).
14. Should there be a mandatory requirement that members of the Queensland Legislative Assembly swear or affirm allegiance to the Crown? Should members have the option of swearing or affirming allegiance to the Crown, or only to the people of Queensland?

6. INDICATIVE PLEBISCITES

<table>
<thead>
<tr>
<th>Recommendation under review</th>
<th>Source material</th>
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</thead>
<tbody>
<tr>
<td>QCRC R17.1 That the Referendums Act 1997 (Qld) be amended to provide for (a) indicative plebiscites which (b) might be conducted by post, and (c) counted electronically</td>
<td>QCRC report ch 17 at 86; QCRC Parliament of Queensland Bill 2000, cl 128-133, sch 1</td>
</tr>
</tbody>
</table>

The QCRC recommended indicative plebiscites as a mechanism whereby electors are given the opportunity to vote on which, of a number of alternative proposals, should be submitted to the electors at a referendum. (This recommendation relates solely to Legislative Assembly-initiated ballots. As to citizen-initiated ballots see the discussion in section 7.1 of this issues paper.) A referendum might be required to alter entrenched statutory provisions, or one might be called simply to determine important public issues.

Thus, while referenda traditionally ask for a ‘Yes’ or ‘No’ answer to a question, the QCRC’s recommendation is designed to involve voters in the formulation of the question put to them. The QCRC believed that if people were to be asked to answer questions, then those questions should be formulated in a way that ‘the great majority of people will accept as valid and fair’. In particular, the QCRC felt that indicative plebiscites might avoid the perceived public dissatisfaction with the fact that the 1999 republic referendum only offered two alternatives when community sentiment was that more than two alternatives existed.

Other advantages the QCRC proposed in support of its recommendation were: greater community involvement in decisions involving the system of government; and a better indicator of community sentiment on an issue than even the best planned public opinion polls.

While the QCRC’s recommendation was made in the context of constitutional matters, the amendments it proposes place no such restrictions on the nature or subject matter of an indicative plebiscite.

An indicative plebiscite was held in New Zealand in 1992 regarding then proposed changes to that country’s electoral system. This plebiscite offered voters two sets of choices: (a) whether they wanted ‘to retain the present first-past–the-post system’ or ‘a change to the voting system’; and (b) regardless of their answer to the first question, voters were asked to indicate a preference for one of four alternative electoral systems. While only 55 percent of registered voters participated in that referendum, nearly 85 percent of those who voted wanted change. The Government subsequently held a second, binding referendum regarding the electoral system at the same time as the November 1993 general election.

In Queensland, the Referendums Act 1997 governs the conduct of referenda where:

- a bill is required to be submitted to the electors (such as is the case where a bill purports to amend one of the entrenched provisions in Queensland’s Constitution); and

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29 QCRC report, n 1 at 86.
30 Despite no compulsory voting, New Zealand has traditionally enjoyed over 80 percent electoral turnout.
the Legislative Assembly has resolved that a question be submitted to the electors.\(^{32}\)

However, the *Referendums Act* only envisages voters having a choice of voting ‘Yes’ or ‘No’ in relation to a bill or question.

The QCRC proposes to extend the *Referendums Act* by inserting a new chapter 3 concerning indicative plebiscites. Under these provisions, voters would have the choice of indicating their preference for one or more of the alternative proposals put to them. The proposal to be approved is determined by preferential voting. Separate provision is made for plebiscites required to be conducted by postal ballot from those not so required to be conducted. Indicative plebiscites are to be initiated by a resolution of the Legislative Assembly.

The QCRC’s clauses indicate that, as voting at referenda is compulsory, voting at indicative plebiscites would also be compulsory.\(^{33}\) However, the QCRC stated in its report that ‘[w]hether a postal indicative plebiscite should be compulsory, in the sense that non-voters would be asked to explain and might be subject to a penalty if the explanation were not acceptable, could be left to be decided by a resolution of the Legislative Assembly at the time and in the light of the nature of the decision to be made’.\(^{34}\)

While the need for an indicative plebiscite is unlikely to arise very often, the main argument against indicative plebiscites is their cost. The QCRC noted that costs involved could be minimised by holding indicative plebiscites: at the same time as a general election;\(^{35}\) or by post which would be returnable to a single point and thus more amenable to electronic counting.

While holding a plebiscite at the same time as a general state election might be administratively workable and cost effective,\(^{36}\) practical issues might make the option less feasible due to, for example: (a) timing, that is, an answer might be needed urgently to proceed to the next stage of a referendum; and/or (b) political reasons, that is, a government might not want to have the issue the subject of an indicative plebiscite confused with election issues.

There are also good arguments against holding an indicative plebiscite on the same day as a local government election. The Electoral Commission Queensland, the former Electoral and Administrative Review Commission and many local governments have expressed concern at the practice. These concerns relate to the difference in voting systems and election arrangements, flow on effects including increased informal voting, and the fact that state referenda relate to state issues and should not be confused with local government issues. Apparently these concerns were borne out in 1991 when the state referendum on four year parliamentary terms was held conjointly with the 1991 local government elections.\(^{37}\)

A Queensland plebiscite cannot be held on the same day as a federal election without the approval of the Governor-General.\(^{38}\)

Table 1 shows an Electoral Commission Queensland estimate of holding a referendum (including postal referendum) based on 1998 and 2001 election costs. The cost of holding an indicative plebiscite would be similar to that of a referendum.

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\(^{32}\) *Referendums Act 1997* (Qld), s 5.

\(^{33}\) That is, it is an offence not to vote at a referendum without a valid and sufficient excuse: *Referendums Act 1997* (Qld), s 75(1)(a). The QCRC proposed to amend s 75 to also make it an offence not to vote at indicative plebiscites: QCRC report, n 1, Parliament of Queensland Bill 2000, schedule 1, clause 25.

\(^{34}\) QCRC report, n 1 at 86.

\(^{35}\) Part 7 of the *Referendums Act 1997* (Qld), deals with referenda held in conjunction with state elections.

\(^{36}\) This is on the basis that the same electoral rolls and polling booths are used.


\(^{38}\) *Commonwealth Electoral Act 1918* (Cth), s 394(1).
Table 1: Estimated cost of holding a state referendum

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<tr>
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<tbody>
<tr>
<td></td>
<td>Stand-alone referendum</td>
<td>Referendum with election</td>
</tr>
<tr>
<td><strong>Total Estimate</strong></td>
<td><strong>$</strong></td>
<td><strong>$</strong></td>
</tr>
<tr>
<td>Stand-alone referendum</td>
<td>7,856,290</td>
<td>3,387,560</td>
</tr>
<tr>
<td>Referendum with election</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Postal referendum</td>
<td></td>
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</tbody>
</table>

**ISSUES**

15. Should the *Referendums Act 1997* (Qld) provide for indicative plebiscites prior to a referendum to enable citizens to be involved in the formulation of a referendum question?

16. If provision for indicative plebiscites is not introduced, are there any alternative mechanisms by which the QCRC’s concerns might be addressed?

17. If provision for indicative plebiscites were to be introduced:

   (a) should there be any restrictions on the subject matter of an indicative plebiscite, for example, constitutional issues only?

   (b) should voting at indicative plebiscites be compulsory or should this be decided on an ad hoc basis by the Legislative Assembly?

   (c) should the results of an indicative plebiscite be binding, that is, should the government be required to put the most popular question to the people at referendum?

   (d) should there be provision to enable indicative plebiscites to be held by post?

   (e) what other matters should be covered?

7. INITIATION OF LEGISLATIVE AMENDMENT

7.1 A petitions committee

<table>
<thead>
<tr>
<th>Recommendation under review</th>
<th>Source material</th>
</tr>
</thead>
<tbody>
<tr>
<td>QCRC R5.1 That a new statutory committee, the Petitions Committee, be created</td>
<td>QCRC issues paper, ch 10; QCRC report ch 5 at 38-39; QCRC Parliament of Queensland Bill 2000, cls 80 and 94</td>
</tr>
<tr>
<td>QCRC R16.1 That (a) a Petitions Committee be established as a statutory committee, which (b) be required to report on all petitions received, (c) may refer a petition to the appropriate Minister for consideration, (d) may conduct hearings at its discretion, (e) may deal with several petitions in one inquiry, (f) may create guidelines, and (g) may recommend that an indicative plebiscite or a referendum or both be held</td>
<td>QCRC report ch 16 at 83; QCRC Parliament of Queensland Bill 2000, cls 94-96</td>
</tr>
</tbody>
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39 Information supplied to the committee by the Electoral Commissioner, Mr B Longland, under cover of a letter to the committee dated 13 March 2002.
The QCRC received a number of submissions advocating citizens’ initiated referenda (CIR). While there are many different models of CIR, essentially the concept entails complementing the range of mechanisms currently available for citizens to have input into public policy by enabling electors to propose an issue on which a referendum is held and to vote on that issue.\(^\text{40}\)

Instead of CIR, the QCRC recommended that greater public participation in the legislative process could be achieved by adaptation of the right to petition Parliament. Chapter XVI of the Legislative Assembly’s *Standing Rules and Orders* (as amended by sessional orders agreed to by the Legislative Assembly on 22 March 2001), governs the lodging of petitions with Parliament. A petition can only be presented to Parliament by a member of the Legislative Assembly, must be signed by the persons whose names are appended to it, and must contain a request that the Parliament undertake certain action. Under Sessional Order 238A, petitions presented to Parliament are referred by the Clerk to the responsible minister who may forward a response to the Clerk for presentation to the House. Any response by a minister is printed in Hansard and supplied to the member who presented the petition.

The QCRC recommended establishment of a new statutory parliamentary committee, the Petitions Committee, to report on all petitions received.\(^\text{41}\) The QCRC further recommended that the Petitions Committee be able to: (a) refer a petition to the appropriate minister for consideration; (b) conduct public hearings at its discretion; (c) deal with several petitions in one inquiry; (d) create guidelines (for example, to refuse to consider petitions which are similar to petitions reported on by the committee in a time period set by the committee); and (e) recommend in appropriate cases that an indicative plebiscite or referendum be held: QCRC R16.1.

Items (a) and (e) are directly addressed in clauses 94-96 of the QCRC’s Parliament of Queensland Bill which concern the Petitions Committee. Items (b), (c) and (d) are within the power of all statutory committees.

Clause 94(1) and (2) provides that the Petitions Committee’s area of responsibility is petitions received by the Assembly raising public policy issues within the legislative competence of the Parliament, including considering whether the petition seeks, or appears to require, legislation to enact a proposal. If a petition does not seek, or appear to require, legislation to enact a proposal, the committee is to refer the petition to the minister responsible for administering the relevant matter. (It is unclear whether this gives the committee the power to also consider and report on a petition which does not seek some form of legislative action. The QCRC recommended that the Petitions Committee report on all petitions received.)

If the petition does seek, or appear to require, legislation to enact a proposal then the committee’s responsibilities are to include: (a) considering the merits, including costs and legal implications, of the proposal; and (b) recommending to the Assembly whether the proposal should be submitted to electors in a referendum or indicative plebiscite. A committee report recommending that a proposal be submitted to electors in a referendum or an indicative plebiscite is to incorporate certain specified matters including, respectively, a draft bill for the proposal and alternative proposals in the form of alternative provisions of a draft bill: clause 95.

Clause 96 prescribes the form of a resolution of the Legislative Assembly that a question be submitted to electors in a referendum or indicative plebiscite, and adopting the Petitions Committee’s report.

**Other considerations:** The QCRC’s recommendation for establishment of a Petitions Committee should be considered in light of a number of other considerations.

Firstly, a major consideration is cost. This cost would include: additional salary to be paid to committee members for service on the committee (currently $5,698.19 per committee member and $11,124.97 per committee chair per annum); and costs associated with staffing and providing administrative support to the committee.

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\(^{41}\) In the case of petitions concerning constitutional amendments, any draft bill would ultimately go to LCARC for review under the procedures in QCRC R12.3. This recommendation will be considered by the committee in stage 2 of its inquiry.
As an indication of what the committee’s workload might be, Table 2 details the number of petitions formally received by the Legislative Assembly in 2000 and 2001 and the number of which sought some form of legislative action.

Table 2: Nature of petitions formally received by the Queensland Legislative Assembly: 2000/2001

<table>
<thead>
<tr>
<th></th>
<th>2000</th>
<th>2001</th>
</tr>
</thead>
<tbody>
<tr>
<td>Total number of petitions received</td>
<td>139</td>
<td>77</td>
</tr>
<tr>
<td>Total number of petitioners</td>
<td>114,577</td>
<td>122,096</td>
</tr>
<tr>
<td>Average number of petitioners per petition</td>
<td>824</td>
<td>1,586</td>
</tr>
<tr>
<td>Number of petitions seeking the Parliament to pass a new Act or amend a current Act</td>
<td>5 (3.6%)</td>
<td>10 (13.0%)</td>
</tr>
<tr>
<td>Number of petitions seeking the Parliament not to pass a new Act about a matter or amend a current Act about a matter</td>
<td>2 (1.4%)</td>
<td>9 (11.7%)</td>
</tr>
<tr>
<td>Number of petitions seeking the Parliament to repeal a current Act or repeal part of a current Act</td>
<td>9 (6.5%)</td>
<td>1 (1.3%)</td>
</tr>
<tr>
<td>Number of petitions seeking the Parliament to delay passage of a bill until certain matters are considered</td>
<td>2 (1.4%)</td>
<td>0</td>
</tr>
<tr>
<td>Number of petitions seeking the Parliament or Government to review an Act in whole or in part</td>
<td>2 (1.4%)</td>
<td>0</td>
</tr>
<tr>
<td>Petitions seeking action other than of a legislative nature (eg employ or appoint certain people, ban some form of activity, reconsider specific capital works, fund certain projects, take action regarding environmental issues, change government policy)</td>
<td>119 (85.6%)</td>
<td>57 (74%)</td>
</tr>
</tbody>
</table>

Secondly, the QCRC’s recommendation should be considered in light of mechanisms currently available for citizens to have input into public policy making and the legislative process.

Prior to introducing legislation or new policy, ministers often require government departments to call for direct input into the matter under review. Various non-government bodies—such as professional bodies, community organisations, political parties, and public interest advocacy groups—also lobby members of Parliament for changes in public policy whether legislative or otherwise.

Members of Parliament are also an important conduit through which citizens can raise issues. A member might, as a result of representations made by a constituent, introduce a private members’ bill on a particular topic, seek to amend a bill before the Assembly, or ask a question on notice on a particular topic. Parliamentary committees might also recommend legislative action as a result of matters brought to their attention through public consultation.

A third relevant factor is that the Government has announced a trial of the feasibility of the Queensland Parliament accepting petitions on-line. The Government has stated: ‘We will work to develop a system of electronic petitions which contain valid and verifiable personal details. Electronic petitions will give the opportunity for many in the community to support an issue without the difficulty of having physically to locate the petition.’\(^{42}\) The justification for a Petitions Committee might be linked with the outcome of this trial.

The approach in other jurisdictions: The Standing Committee on Environment and Public Affairs of the Western Australian Legislative Council is currently the only parliamentary committee in Australia that considers petitions. All petitions tabled by a member of the Legislative Council are automatically referred to that committee.\(^{43}\)

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\(^{43}\) See schedule 1 of the *Legislative Council Standing Orders*, standing orders 3.3 and 3.5.
The action which the committee takes on a petition depends on the subject matter of the petition. The committee may resolve not to inquire further into a petition in circumstances where the petition: (a) concerns a subject matter that is within the terms of reference of another standing committee; or (b) raises matters which have received, or require, full debate by the Legislative Council. Alternatively, the committee may invite the tabling member, principal petitioner and relevant minister(s) to make a submission concerning the issues raised in the petition. After consideration of these submissions the committee may arrange a public hearing to further discuss the issues. In such cases, the committee usually prepares a final report that is tabled in the Legislative Council.44

Periodically, the committee also reports to the Legislative Council on what action it has undertaken with respect to petitions.45

The practice for dealing with petitions in other Australian Houses of Parliament varies. A study of the standing orders of the various Houses reveals that some require that a copy of every petition lodged with the relevant House be referred by the Clerk to the minister responsible for administration of the subject of the petition (either with or without a time limit for a response). The standing orders of some Houses expressly allow a particular petition to be referred to a committee.

Petitions are considered by parliamentary committees in New Zealand, although the New Zealand Parliament has a different committee system to that of Queensland. Rather than having specific purpose committees, the New Zealand Parliament has 12 select committees each of which has responsibility for examining legislation and the financial performance of public organisations within their designated subject areas.

A petition presented to the New Zealand Parliament (except a petition for a private bill) is allocated by the Clerk to the most appropriate select committee for consideration and report.46 It is a matter for the individual select committee to choose how it deals with a petition. Select committees may call for further written submissions or oral evidence regarding a petition. Options open to a select committee in reporting on a petition include: (a) a report with recommendations; (b) no recommendation at all; (c) if a petition was considered with another item of business, the committee may acknowledge that and include the petition in its report on that item; and (d) presenting a narrative report outlining evidence presented to it and its own recommendation (an option which rarely occurs). If a select committee report on a petition contains a recommendation, then the Government is required to report on what action, if any, it has taken to implement the recommendation within 90 days of the report being presented.47

An alternative approach to establishing a Petitions Committee of the Queensland Parliament is a review of current standing and sessional orders regarding petitions. On 8 August 2001, the Legislative Assembly referred a review of the Standing Rules and Orders of the Legislative Assembly to the Standing Orders Committee.

**ISSUES**

18. Should there be a statutory committee (a petitions committee) established and charged with responsibility for considering and reporting on petitions received by the Legislative Assembly? Alternatively, should this responsibility be conferred on an existing parliamentary committee and, if so, which one?

19. If a petitions committee is established (or if this responsibility is conferred on an existing parliamentary committee), what should its jurisdiction be and what parts of its jurisdiction should be mandatory?

20. If a petitions committee is not established, should there be a review of the current standing and sessional orders regarding petitions? In what respect do the current orders require review?

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45 See, for example, n 44.
46 Standing Order 355 of the *New Zealand Standing Orders 1999*. 
7.2 The objects of statutory committees

<table>
<thead>
<tr>
<th>Recommendation under review</th>
<th>Source material</th>
</tr>
</thead>
<tbody>
<tr>
<td>QCRC R16.2 That s.78.(1) [of the Queensland Government’s Discussion Draft Parliament of Queensland Bill 1999] be amended to include the words “and extend democratic government”</td>
<td>QCRC report ch 16 at 83; QCRC Parliament of Queensland Bill 2000, cl 78(1)</td>
</tr>
<tr>
<td>QCRC R16.4 That the object of statutory committees be extended to include enhancing the transparency of public administration</td>
<td>QCRC report ch 16 at 84; QCRC Parliament of Queensland Bill 2000, cl 78(1)</td>
</tr>
</tbody>
</table>

The QCRC recommended that, as a consequence of the creation of the Petitions Committee, it would be appropriate to amend the objects clause of the chapter of the Queensland Government’s Discussion Draft Parliament of Queensland Bill 1999 dealing with statutory committees of the Assembly. That objects clause—which is almost identical to s 78(1) of the Parliament of Queensland Act 2001—provided that the main object of the chapter is to enhance the accountability of public administration in Queensland. The QCRC recommended that this clause be amended to include the words ‘and extend democratic government’: QCRC R16.2.

The QCRC later recommended a further amendment to the same objects clause to give effect to its recommendation that the object of statutory committees be extended to include enhancing the transparency of public administration: QCRC R16.4. The basis for this recommendation was that it would ‘reinforce a constitutional commitment to FOI [Freedom of Information] requirements’.46

The QCRC’s proposed objects clause incorporating both recommendations—clause 78(1) of its Parliament of Queensland Bill 2001—read: ‘The main objects of this chapter are to enhance the accountability and transparency of public administration, and to extend democratic government, in Queensland.’

It is questionable whether the QCRC’s proposed objects clause achieves the objective of reinforcing a constitutional commitment to FOI objectives. However, in general terms it might be said that parliamentary committees extend democratic government and enhance the transparency of public administration.

**ISSUES**

21. Should the objects clause to the chapter of the Parliament of Queensland Act 2001 (Qld) dealing with statutory committees of the Assembly be amended to include the words ‘and extend democratic government’? Should this amendment be conditional on the establishment of a petitions committee?

22. Should the objects clause to the chapter of the Parliament of Queensland Act 2001 (Qld) dealing with statutory committees of the Assembly be amended to include the words ‘enhancing the transparency of public administration’?

8. SUMMONING PARLIAMENT

<table>
<thead>
<tr>
<th>Matter under review</th>
<th>Source material</th>
</tr>
</thead>
<tbody>
<tr>
<td>Whether the Constitution should include a requirement that the Queensland Parliament meet within 30 days after the day appointed for the return of the writs for the election</td>
<td>QCRC issues paper at 1220</td>
</tr>
</tbody>
</table>


48 QCRC report, n 1 at 84.
In its issues paper, the QCRC stated that it might be desirable for the Constitution to contain a requirement that the Queensland Parliament meet within 30 days after the day appointed for the return of the writ for a general election.\(^{49}\) Such a requirement is prescribed for the Commonwealth Parliament by \(s\,5\) of the Commonwealth Constitution to ensure that there is the earliest opportunity for the lower house to express its confidence or lack thereof in the government.

The QCRC did not raise this issue in its report. However, the committee considers it an issue worthy of further review.

**ISSUE**

23. Should the Constitution include a requirement that the Queensland Parliament meet within 30 days (or some other specified period) after the day appointed for the return of the writ for a general election?

### 9. WASTE LANDS OF THE CROWN

<table>
<thead>
<tr>
<th>Matter under review</th>
<th>Source material</th>
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</thead>
<tbody>
<tr>
<td>Whether (s,30) and (s,40) of the <em>Constitution Act 1867</em> (Qld) should be retained and, if so, what is the effect of re-enacting those provisions and particularly their validity under native title laws</td>
<td>Explanatory notes to the Constitution of Queensland 2001; EARC’s constitution report;(^{50}) letter from the Acting Premier to the committee dated 17 January 2002: see appendix A</td>
</tr>
</tbody>
</table>

Section 69 of the *Constitution of Queensland 2001* provides that:

- \(s\,30\) of the *Constitution Act 1867* gives the Parliament law-making power in relation to the waste lands of the Crown in Queensland; and
- \(s\,40\) of the *Constitution Act 1867* vests particular rights in relation to the waste lands of the Crown in Queensland in the Parliament.\(^{51}\)

A copy of these provisions is contained in attachment 4 of the *Constitution of Queensland 2001*.

The Government did not consolidate \(s\,30\) and \(s\,40\) of the *Constitution Act 1867* into the *Constitution of Queensland*.\(^{52}\) The explanatory notes state that this was because of concerns that:

> ... the re-enactment of these sections would affect native title holders differently than it would affect freehold title holders and would therefore not be a valid future act under the Commonwealth Native Title Act 1993.

> A future act that affects native title is not allowed by the future act regime in the Native Title Act 1993 and under section 240A of that Act is invalid to the extent that it affects native title.

> Sections 30 and 40 of the Constitution Act 1867 only relate to the waste lands of the Crown and have no affect on ordinary title holders as the waste lands, as currently held, are not subject to ordinary (freehold) title. As native title may still exist over some of the waste lands, re-enacting these sections would permit dealings with land in respect of which there may be native title but not ordinary title. The re-enactment may

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\(^{49}\) QCRC issues paper, n 2 at 1220. The *Electoral Act 1992*, \(s\,80(1)(e)\) provides that the day for the return of a writ for an election must not be more than 84 days after the issue of the writ.

\(^{50}\) Note 6.

\(^{51}\) However, note that the proviso contained in the *Constitution Act 1867* (Qld), \(s\,40(2)\) has been repealed on the basis that it is spent. This follows the recommendation of the former LCARC. For further information, see the explanatory notes to clause 69 of the *Constitution of Queensland 2001* (Qld).

\(^{52}\) Both the former LCARC and the QCRC sought to consolidate \(s\,30\) and \(s\,40\) into the new Constitution: see LCARC report no 24, n 4, Constitution of Queensland 2000, clause 69, and QCRC report, n 1, Constitution of Queensland 2000, clause 73.
These comments were made in the context of a consolidation of existing constitutional provisions. However, it might be first questioned whether it is necessary to re-enact ss 30 and 40 at all.

Sections 30 and 40 might be seen now to have only historical significance. The local legislature’s power over the sale and disposal of waste lands was a matter of great importance at the time of self-government as such sales and receipts had earlier been within the control of Imperial authorities.\(^{54}\)

In 1993, EARC suspected that the totality of s 30—the law-making power regarding waste lands—was superfluous in light of the general law-making power in the *Constitution Act 1867*, s 2. However, EARC recommended at that time against repealing the provision because it might ‘inadvertently disturb the constitutional status quo’ surrounding land ownership and native title.\(^{55}\)

Section 40 provides that the entire management and control of the waste lands of the Crown in Queensland and also the appropriation of the gross proceeds of the sales of the lands and all other proceeds and revenues of the lands from any source including all royalties, mines and minerals vest in the Parliament. Arguably, s 40 is also superfluous. However, again EARC recommended retention of s 40 less the proviso in ss (2) on the basis that the section ‘may be relevant to further questions of native title’ and that the implications of the High Court’s 1992 *Mabo* decision were yet to be determined.\(^{56}\) Almost a decade later, those implications have been substantially made clear.

### ISSUES

24. Should s 30 of the *Constitution Act 1867* (Qld) be retained?

25. Should s 40 of the *Constitution Act 1867* (Qld) be retained?

26. If s 30 and/or s 40 of the *Constitution Act 1867* (Qld) are to be retained, what effect might their re-enactment have under native title law?

### 10. THE NUMBER OF PARLIAMENTARY SECRETARIES

<table>
<thead>
<tr>
<th>Recommendation under review</th>
<th>Source material</th>
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<tbody>
<tr>
<td>QCRC R5.7 That the maximum number of Parliamentary Secretaries be set at 5</td>
<td>QCRC report ch 5 at 43-44; QCRC Constitution of Queensland 2000, cl 23(1)</td>
</tr>
</tbody>
</table>

The *Queensland Cabinet Handbook* provides that generally parliamentary secretaries are appointed to:

> ...assist Ministers in prioritising work, to provide a training experience for future Ministers, to facilitate public access to the Executive and to enable the bureaucracy to have an ongoing point of contact so that parliamentary correspondence and other parliamentary administrative issues are neither overlooked nor downgraded.\(^{57}\)

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\(^{53}\) Explanatory notes to the bill for the Constitution of Queensland 2001 at 33.

\(^{54}\) EARC constitution report, n 6 at para 6.223.

\(^{55}\) EARC constitution report, n 6 at paras 6.225 and 6.229.

\(^{56}\) EARC constitution report, n 6 at paras 6.228 and 6.230.

Statutory provision for the appointment of parliamentary secretaries in Queensland occurred relatively recently in 1996. The relevant provisions currently state that: (a) the Governor-in-Council may appoint a member of the Legislative Assembly, apart from a minister, as a parliamentary secretary; (b) the Premier decides the functions of a parliamentary secretary; (c) the appointment of a member as a parliamentary secretary ends on the polling day of the next general election; and (d) a member does not receive additional salary as a parliamentary secretary but is entitled to be reimbursed reasonable expenses associated with that office.

Unlike ministers of the Crown, there is currently no statutory limit on the number of members who might be appointed as parliamentary secretaries. There are currently five parliamentary secretaries in Queensland.

Prior to 2000, Commonwealth parliamentary secretaries were appointed under the *Parliamentary Secretaries Act 1980* (Cth) and were not ministers. Since 2000, the maximum number of Commonwealth ministers is 42 and the maximum number of those ministers who may be designated as parliamentary secretaries is 12. There does not appear to be any statutory limit on the number of parliamentary secretaries in other Australian jurisdictions which make provision for such office holders.

The QCRC recommended (R5.7) that to prevent executive dominance of the Assembly, the present number of five parliamentary secretaries be set as a limit. The QCRC reasoned:

> ...the combination of a title, the opportunity to exercise more power and influence, and the likelihood that good performance will lead to ministerial rank makes appointment attractive. If there were an expectation that the tighter political discipline of Ministers extended to Parliamentary Secretaries, a Government could be tempted to increase their number to the point that virtually all parliamentary party members were subject to the tightest discipline. That would reduce the effectiveness of Parliament in controlling the executive, and its status within the constitutional system.

> In a Legislative Assembly with 89 members, 45 constitute a majority. As 18 Ministers of State plus five Parliamentary Secretaries add up to 23, that is already a majority of the 45 under the tightest discipline. The Commission recommends that the line be drawn there, and the maximum number of Parliamentary Secretaries be set at 5.

However, in recognition of the need for flexibility, the QCRC recommended that the provision should be subject only to parliamentary entrenchment and not referendum entrenchment. This issue will be dealt with in stage 2 of the committee’s inquiry.

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58 The relevant provisions were inserted into the *Constition Act 1867* (Qld) by the *Constitution (Parliamentary Secretaries) Amendment Act 1996* (Qld).

59 *Constitution Act 1867* (Qld), ss 57-60. See now the *Constitution of Queensland 2001* (Qld), s 24 (Appointment of parliamentary secretaries), s 25 (Functions of parliamentary secretary), and s 26 (Length of parliamentary secretary’s appointment). The *Parliament of Queensland Act 2001* (Qld), s 113(2) provides that the amount of additional salary of a parliamentary secretary is fixed by the Governor-in-Council by gazette notice.

60 The *Officials in Parliament Act 1896* (Qld), s 3(1) provides that the maximum number of ministers is 19. This limit is replicated in the *Constitution of Queensland 2001* (Qld), s 43(4).

61 They are: Mr D Briskey MP (Assisting the Premier and Minister for Trade); Dr L Clark MP (Assisting the Premier and Minister for Trade in Far North Queensland); Mrs J Miller MP (Assisting the Minister for Education); Ms L Nelson-Carr MP (Assisting the Minister for Health and Minister Assisting the Premier on Women’s Policy); and Mr N Roberts MP (Assisting the Minister for Employment, Training and Youth and Minister for the Arts).

62 These changes were effected by the *Ministers of State and Other Legislation Amendment Act 2000* (Cth) which amended the *Ministers of State Act 1952* (Cth) and repealed the *Parliamentary Secretaries Act 1980* (Cth).

63 QCRC report, n 1 at 44.
ISSUE

27. Should there be a statutory limit to the number of parliamentary secretaries? If so, at what level should this limit be set?

28. Should there be any other amendments to the provisions in the Constitution regarding parliamentary secretaries?

11. NON-COMPLIANCE WITH CERTAIN REQUIREMENTS

<table>
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<tr>
<th>Matter under review</th>
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<tbody>
<tr>
<td>Whether it is necessary or desirable to make provision for: (a) the validation of assent where the document presented to the Governor for assent contains errors such that it is not the Act as was passed by Parliament; and (b) a bill or motion introduced or moved by a minister that would appropriate money from the consolidated fund to be valid even if it is not accompanied by a message from the Governor recommending the appropriation</td>
<td>Letter from the Acting Premier to the committee dated 17 January 2002: see appendix A; QCRC’s Constitution of Queensland 2000, cl 72(3)</td>
</tr>
</tbody>
</table>

11.1 Assent

The ordinary law-making process requires a bill to be passed by the Legislative Assembly and then presented to the Governor for assent, or in the name of, the Queen. A bill is of no effect until it receives royal assent. This requirement of assent is entrenched, so that a bill which seeks to expressly or impliedly in any way affect this requirement cannot itself be presented for assent unless the bill is first approved by a majority of Queensland electors at a referendum.

When a bill is relayed to the Governor for assent, the Attorney-General provides the Governor with a certificate ‘that the bill has been duly passed through all stages by the Legislative Assembly and that it is in order for His Excellency to assent to the bill’. While provision of a certificate by the Attorney-General is merely a practice and not a legal requirement, Parliament also has in place measures to ensure that assent is only given to bills properly passed by the Legislative Assembly. In particular, the Standing Rules and Orders of the Legislative Assembly provide that the Clerk of the Parliament shall duly authenticate three fair prints of each bill before their presentation to the Governor for assent.

In the case of a bill which has been amended in the committee of the whole stage, parliamentary officers and Queensland Parliamentary Counsel officers independently check that amendments have been correctly incorporated into the bill. The Clerk of the Parliament, with the authority of the Speaker, is empowered under the Standing Rules and Orders to amend minor errors or slips in bills prior to their presentation to the Governor. However, if any major error is discovered in a bill before assent that goes beyond the power of the Clerk under standing orders to amend, the Clerk must report this to the Assembly. The Assembly may deal with such an error in the same way as other amendments to the bill.

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64 Constitution Act 1867 (Qld), s 2A.
65 Constitution Act 1867 (Qld), s 53.
66 As to the history to this practice see the Members’ Ethics and Parliamentary Privileges Committee, Report on a matter of privilege: Alleged contempt by the Attorney-General for failing to resign his ministerial office following a vote of no confidence in him by the Legislative Assembly – matter referred to the committee on 2 September 1997, report no 15, Goprint, Brisbane, April 1998 at 17-20.
67 See SO 277-279 of the Standing Rules and Orders of the Legislative Assembly.
68 SO 283. The committee presumes that the suggested provision is not directed to minor slips or errors in bills. Given this express authority, there would not appear to be any need to validate such acts by the Clerk.
There have been isolated instances in Queensland and other Australian jurisdictions where bills have, due to administrative error, been presented to the Governor in a form which was not that ultimately agreed to by the relevant House.

For example, in March 1995 the Queensland Legislative Assembly passed the Associations Incorporation Amendment Bill 1995. The text of the bill that was assented to by the Governor included an amendment to a clause that was moved in, but not passed by, the Assembly. In November 1995, following discovery of the mistake, the Legislative Assembly passed a bill which declared that the earlier bill had always been validly assented to, and corrected the text of the assented Act to accord with the bill as passed by the Assembly.69

In 1976, the Governor-General assented to a bill which had not passed both Houses of the Commonwealth Parliament as required. The error was brought about by the existence of a second bill of exactly the same title which had passed both Houses. Upon discovery of the error, the Governor-General cancelled his signature on the first bill and, correctly, gave his assent to the second bill. A similar incident occurred in 2001 when a Senate amendment which had not been agreed to by the House was incorporated into the original assent print. Again the Governor-General cancelled his signature.70

Presumably, the Government’s issue relates to a provision validating assent where the document presented to the Governor for assent contains errors such that it is not the bill as was passed by Parliament. Such a provision might be intended to operate in circumstances such as that outlined above in Queensland in 1995. That is, the provision would seek to deem an Act assented to by the Governor to be amended to accord with the bill as passed by the Legislative Assembly. Such a provision would presumably be designed to provide a continuing mechanism to correct any errors which arise in bills presented to the Governor for assent.

The only alternative way that such a provision might seek to operate is to validate an error, that is, provide valid assent to a bill not in the form as passed by the Legislative Assembly. However, there is some doubt whether the Parliament has the capacity to enact such a deeming provision for it purports to alter the basic process of law-making by eliminating the approval of the Legislative Assembly.

On either interpretation, such a deeming provision would appear not to be necessary to deal with typographical errors. The House of Representatives Practice cites advice from the Attorney-General’s Department of 17 October 1995 as follows:

It is considered that should a bill be assented to with typographical or clerical errors in it, if necessary a court would interpret the Act so as to remedy the mistake (the ‘slip rule’) and there would be no question of invalidity. Depending on the circumstances, legislative amendment at a suitable time may still be desirable.71

It may well be that proof of any error may not be reviewable by the courts as it would essentially require the questioning of the legislative process and the proceedings of Parliament. Nevertheless, the above examples indicate that appropriate remedies have been found in the parliamentary process.

Finally, it should be noted that any deeming provision in relation to the Governor’s assent may involve an alteration to s 2A of the Constitution Act 1867 which is entrenched by s 53 of the Constitution Act 1867. Accordingly, a referendum would be required for such a deeming provision to be inserted in the Constitution.

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69 See the Statute Law (Minor Amendments) Act (No 2) Act 1995 (Qld).
70 Harris I C (Ed), House of Representatives Practice, Department of the House of Representatives, Canberra, 2001 at 390.
71 Harris, n 70 at 391.
The following issue is predicated on an assumption that there will be, at some time in the future, a referendum which will provide the opportunity to validly make appropriate amendments. In the absence of approval at such referendum, it will not be possible to address the situation raised by the Government.

29. Where a bill assented to by the Governor contains an error or errors such that it is not the bill passed by the Legislative Assembly, should the Constitution include a provision which deems in any such case that the bill has been duly assented to in the form as passed by the Assembly?

11.2 Appropriation

Under the system of responsible government operating in Queensland, the government (or executive) is responsible to Parliament for the conduct of its operations. One of the most important powers the Parliament holds over the government is its control of public finance. This principle is reflected in two rules:

♦ a government cannot raise revenue through taxation except as authorised by Parliament through legislation;\(^{72}\)

and

♦ a government cannot spend public revenue without Parliament’s authorisation.\(^{73}\)

This second rule is subject to a further stipulation, namely, the Legislative Assembly must not originate or pass a vote, resolution or bill for the appropriation of an amount from, or an amount required to be paid to, the consolidated fund\(^ {74}\) unless it has been first recommended by a message from the Governor. This message must be given to the Legislative Assembly during the session of the Legislative Assembly in which the vote, resolution or bill is to intended to be passed.\(^ {75}\)

Because by convention the Governor acts on the advice of the Premier, this additional stipulation means that the executive also controls the expenditure of money from the consolidated fund and prevents, for example, opposition or independent members introducing ‘appropriation’ bills.

Whether a bill provides for an appropriation and thus requires a message from the Governor is not always clear. It seems that to be an appropriation bill, it must at least fix a maximum amount and define the purpose for which that amount might be spent.\(^ {76}\) If there is any doubt whether a provision provides for an appropriation, the safest course is to ensure that a message from the Governor is obtained. Presumably, a provision deeming a bill or motion introduced or moved by a minister that would appropriate money from the consolidated fund to be valid, even if it is not accompanied by a message from the Governor recommending the appropriation, is intended to cover any situation where there is such a doubt.

It is not clear what the position is when a bill is passed or other action taken that does not comply with the requirement regarding a message from the Governor. Presumably, a failure to comply with the requirement could prompt someone to attempt to challenge the validity of the action (most likely the passage of a bill) in the courts. However, there is a good argument that the bill is not invalid. Because the Queensland Constitution is flexible and, in particular, the provision requiring a message of the Governor in the case of appropriations is not entrenched, Parliament’s passage of the bill or other action might be taken to have impliedly amended or waived the requirement for the message.

\(^{72}\) See the Bill of Rights 1688 (Imp), art 4 which is replicated in the Constitution of Queensland 2001 (Qld), s 65.

\(^{73}\) See the Constitution Act 1867 (Qld), s 39(1) which is replicated in the Constitution of Queensland 2001 (Qld), s 66(1).

\(^{74}\) All state revenue is paid into the consolidated fund.

\(^{75}\) See the Constitution Act 1867 (Qld), s 18 which is replicated in the Constitution of Queensland 2001 (Qld), s 68.

Further, failure to comply with such a procedural requirement may not be a matter which is reviewable by the courts as it would essentially require the questioning of the legislative process and the proceedings of Parliament.

The requirement for the Governor’s message recommending appropriation is a long-standing Westminster principle to ensure that Parliament appropriates public moneys only for the executive which has overall responsibility for public expenditure. The Governor is indicating on behalf of the executive that this is appropriation which it requires. Such an indication might be effectively given by a minister moving the appropriation.

Clause 72(3) of the QCRC’s Constitution Bill contains another approach to this issue. That subclause provides that a failure to comply with the requirement ‘affects the validity of a vote, resolution or Bill passed only if, before the vote, resolution or Bill is passed, a member of the Legislative Assembly objects to the vote, resolution or Bill because of the failure’.

In considering these possible exceptions to the requirement of the Governor’s message, there arises the broader issue of whether the requirement should be retained at all. Its original purpose was to prevent private appropriation bills for purposes which the executive did not support. If passed, such private appropriation bills might undermine the executive’s management of public expenditure.

**ISSUES**

30. Should the Constitution retain the requirement for a recommendation by a message from the Governor before the Legislative Assembly is able to originate or pass a vote, resolution or bill for the appropriation of an amount from, or an amount required to be paid to, the consolidated fund?

31. If the requirement for a recommendation by a message from the Governor is to be retained, should there be some exception to that requirement? For example, should there be an exception where a bill or motion is introduced or moved by a minister that would appropriate money from the consolidated fund?

12. **RESTORATION OF A LOCAL GOVERNMENT AFTER SUSPENSION**

<table>
<thead>
<tr>
<th>Recommendation under review</th>
<th>Source material</th>
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<tbody>
<tr>
<td>QCRC R11.2 That a provision supporting the restoration of elected government after the appointment of an administrator be added to the Queensland Constitution</td>
<td>QCRC report ch 11 at 66; QCRC Constitution of Queensland 2000, cl 75(4)</td>
</tr>
</tbody>
</table>

Chapter 7, part 2 of the *Constitution of Queensland 2001* (ss 72-76) is headed ‘Procedure limiting dissolution of local government and interim arrangement’. The relevant sections essentially provide that an instrument purporting to dissolve a local government must be tabled in, and ratified by, the Legislative Assembly before it can have effect. Until an instrument purporting to dissolve a local government is ratified by the Legislative Assembly, the instrument only has the effect of suspending the local government’s councillors from office: s 74. The *Constitution of Queensland 2001*, s 71(3) also makes it clear that another Act may provide for the appointment of a body or person to perform all or any of a local government’s functions and exercise its powers: (a) during a suspension of a local government’s councillors under s 74; or (b) if a local government is dissolved or unable to be properly elected, until a local government has been properly elected.

The QCRC felt that it is important to ‘guard against an overly long suspension of elected local government in a particular area, for which there has been a precedent in Queensland in the past’. An instrument seeking to dissolve a local government must be tabled in Parliament within 14 days of being made: *Constitution of Queensland 2001*, s 73. However, the QCRC noted that there is ‘no obligation placed on the executive to restore elected local government as quickly as possible’, a matter which stands in contrast to the Local Government Act 1993, s 187(2). That section provides that it is Parliament’s intention that a fresh election of the councillors of a
local government for which an administrator has been appointed should be held as soon as possible after the appointment of the administrator.

Hence, the QCRC recommended that a similar form of words should be contained in the Constitution: QCRC R11.2. Clause 75(4) of the QCRC’s Constitution Bill which gives effect to this recommendation provides that ‘The election of the councillors ... should be held as soon as possible after the dissolution of the local government ...’.

Neither form of words appears to impose a legally enforceable obligation on holding an election ‘as soon as possible’. To impose such an obligation would involve the courts in the political process.

** ISSUE **

32. Should the Constitution include a provision stating that a fresh election of the councillors of a local government for which an administrator has been appointed should be held as soon as possible after the appointment of the administrator?

### 13. STATUTORY OFFICE HOLDERS

** 13.1 Special constitutional provision **

<table>
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<tr>
<th>Recommendation under review</th>
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<tbody>
<tr>
<td>QCRC R7.1 That certain statutory office-holders (the Auditor-General, the Crime Commissioner, the Criminal Justice Commissioner, the Director of Public Prosecutions, the Electoral Commissioner, the Information Commissioner and the Parliamentary Commissioner for Administrative Investigations) be identified in the Queensland Constitution as requiring special provisions</td>
<td>QCRC issues paper paras 7.32-7.36; QCRC report ch 7 at 58; QCRC Constitution of Queensland 2000, cl 58</td>
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</tbody>
</table>

The QCRC was concerned to prevent the executive undermining the independence of a number of statutory office holders, such as occurred recently in Victoria in relation to that state’s Director of Public Prosecutions and the Auditor-General. They given recent changes in structure and title, the offices which the QCRC recommended required special protection are now: the Auditor General, the Crime and Misconduct Commissioner, the Director of Public Prosecutions, the Electoral Commissioner, the Information Commissioner and the Ombudsman.

The reasoning behind the QCRC’s concern was explained in its issues paper:

*The Electoral Commissioner is in a sensitive position by reason of responsibilities for conducting elections and drawing electoral boundaries which may affect, favourably or adversely, the political careers of members of the legislature and of Cabinet, and for dealing with political parties. The others are in sensitive positions because they investigate, and may report adversely on, the activities of government departments and agencies with possible consequences for the political reputations and careers of Cabinet Ministers and, more rarely, other Members of Parliament, or in the case of the Director of Public Prosecutions, decide whether Ministers and Members should be prosecuted for breaches of criminal law.*

The *Parliament of Queensland Act 2001*, s 67 recognises the sensitive nature of these and other positions by providing that holders of certain statutory offices, and deputies to those office holders, must resign office

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77 QCRC report, n 1 at 57.
78 The Queensland Crime Commission and the Criminal Justice Commission merged effective from 1 January 2002 to create a new body, the Crime and Misconduct Commission.
79 The *Ombudsman Act 2001* (Qld) changed the name of the office of the Parliamentary Commissioner for Administrative Investigations to the Ombudsman. Currently, the same person holds the offices of Information Commissioner and Ombudsman.
80 QCRC issues paper, n 2 at para 7.33.
immediately on being nominated as a candidate for the Legislative Assembly. The list of offices in s 67 includes the ones listed above.

(The table in Appendix B provides further information regarding the office holders listed in s 67. This table reveals differences in the nature of the office holders, their functions, and arguably their need for independence from government.)

The QCRC recommended three steps to protect the independence of the identified statutory office holders. Clause 58 of the QCRC’s Constitution Bill gives effect to the first of these steps which is embodied in R7.1, namely, that the Constitution identify this special group of statutory office holders whose responsibilities are likely to bring them into conflict with the executive and the majority in Parliament linked to the executive.

In listing these relevant office holders, clause 58 states that these office holders ‘have responsibilities and duties that require they be independent and subject only to the law’ and that ‘they must be impartial and must exercise their powers and perform their functions without fear, favour or prejudice’.

The other two steps recommended by the QCRC which relate to removal from office and resources of these office holders are discussed in sections 13.2 and 13.3 respectively.

**ISSUES**

33. Is there a need for special recognition of certain statutory office holders in the Constitution? Are existing statutory provisions sufficient and/or appropriate to make the independent status of the offices clear?

34. If special recognition of certain statutory office holders is to be made in the Constitution, is the QCRC’s list of statutory office holders appropriate? Should other office holders be added to, or removed from, this list? (See appendix B in this regard.)

35. If special recognition of certain statutory office holders is to be made in the Constitution, is clause 58 of the QCRC’s Constitution appropriate? If not, how should the clause be amended?

### 13.2 Removal

<table>
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<tbody>
<tr>
<td>QCRC R7.2 That [the Auditor General, the Crime and Misconduct Commissioner, the Director of Public Prosecutions, the Electoral Commissioner, the Information Commissioner and the Ombudsman] be removed by a procedure comparable to that provided for the removal of judges</td>
<td>QCRC issues paper paras 7.32-7.36; QCRC report ch 7 at 58; QCRC Constitution of Queensland 2000, cl 59</td>
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</tbody>
</table>

The table in Appendix B sets out the existing statutory criteria and procedures for removal from office of the QCRC’s list of statutory office holders. This table reveals that there is no strict consistency in current provisions regarding the removal of these office holders. However, the provisions reveal certain broad themes.

The alternative procedure for removal recommended by the QCRC is embodied in clause 59 of the QCRC’s proposed Constitution. It provides:

- that the listed statutory office holders may be removed from office only by the Governor on the address of the Legislative Assembly for proved misbehaviour or proved incapacity;
- the address may only be made after a tribunal has found that, on the balance of probabilities, the person to be removed has misbehaved, or is incapable of performing the duties of office, and the person’s removal is justified;
the tribunal is to consist of at least three persons including: (a) a chairperson who is a former judge or former justice of a state or federal superior court in Australia; and (b) two other members who are barristers, of at least five years standing, of the High Court or a Supreme Court of any Australian jurisdiction.\textsuperscript{81}

the tribunal members are to be appointed by resolution of the Legislative Assembly (the QCRC comments that members of the now Crime and Misconduct Commission’s panel of misconduct tribunals would be suitable appointees\textsuperscript{82}),

the resolution of the Legislative Assembly must state full particulars of the grounds on which it is proposed to remove the statutory office holder (see also the discussion on R8.3 in section 14.6 in this regard); and

the tribunal has the functions, powers, protection and immunity given by an Act.

Apart from providing an independent and fair mechanism for determining whether certain statutory office holders should be removed, implementation of the QCRC’s recommendation would result in a consistent approach being taken in the case of such offices. However, consideration must also be given to whether there is an identified need for such a removal procedure and whether the cost and delay which such a procedure would involve is justified.

\textbf{ISSUES}

36. Is there a need for the Constitution to include a removal procedure for certain statutory office holders such as the QCRC proposes? Are existing provisions regarding removal of the identified statutory office holders sufficient, or might they be sufficient with certain amendments?

37. If special provision is to be made in the Constitution for removal of the identified statutory office holders along the lines recommended by the QCRC, does the process contained in clause 59 of the QCRC’s Constitution of Queensland 2000 require amendment in any way?

38. If special provision is to be made in the Constitution for removal of the identified statutory office holders along the lines recommended by the QCRC, should special provision also be made for their appointment? (As the table in Appendix B reveals, there is currently no consistent procedure by which the identified office holders are appointed. Arguably, the independence of such officers would be enhanced by a procedure which required multi-party support for their appointment, such as occurs in the case of the Crime and Misconduct Commission.)

39. If special provision is to be made in the Constitution for removal of the identified statutory office holders along the lines recommended by the QCRC, is there a need for complementary provisions providing for life tenure, or terms beyond which tenure cannot be extended? (See Appendix B regarding existing limits on tenure.)

\textsuperscript{81} Note that in its report the QCRC stated that the two other tribunal members should be persons who meet the basic requirements for becoming a judge, ‘five years standing as a barrister’: n 1 at 58. This is reflected in clause 59. However, the requirement for becoming a judge is five years standing as a barrister or solicitor: see the Supreme Court of Queensland Act 1991 (Qld), s 12 and the District Court Act 1967 (Qld), s 9 which are replicated in the Constitution of Queensland 2001 (Qld), s 59(1).

\textsuperscript{82} QCRC report, n 1 at 58.
The independence of a statutory office holder can potentially be undermined if the executive diminishes the office’s resources to such an extent that the office is unable to fulfil its functions effectively.\(^83\) However, the need to protect against this occurrence must be balanced with the need for the executive to retain some control in relation to appropriation.

The QCRC felt that, so far as is possible within the normal appropriation process, there should be measures in place to ensure that its identified statutory office holders are given sufficient resources to discharge their responsibilities adequately. It recommended that the best way to achieve this is to give an appropriate parliamentary committee responsibility for reporting on the resources of its listed statutory office holders. The appropriate parliamentary committees suggested by the QCRC are:

- the Legal, Constitutional and Administrative Review Committee in the case of the Director of Public Prosecutions, the Information Commissioner and the Ombudsman;
- the Parliamentary Crime and Misconduct Committee in the case of the Crime and Misconduct Commission; and
- the Public Accounts Committee in the case of the Auditor-General.

The relevant clauses of the QCRC’s Parliament Bill seek to implement this recommendation by including in the relevant committee’s area of responsibility a general responsibility regarding the capacity of the relevant statutory office holder to discharge their duties effectively.

The table in Appendix B indicates the extent to which there is currently some form of parliamentary involvement (including involvement by the above parliamentary committees) in determining the budget of these and other statutory office holders.

Current parliamentary committee involvement in the resourcing of the QCRC’s listed office holders is largely limited to cases where the committee’s areas of responsibility relate to the functions of the office holder. For example, the LCARC has a role in relation to the development of the Ombudsman’s budget but also a general mandate to ‘monitor and review’ the Ombudsman and an area of responsibility about administrative review reform which includes considering legislation about review of administrative decisions. Arguably, these other responsibilities with respect to the Ombudsman enable the committee to engage in more informed consultation about the Ombudsman’s resources.

The extent to which a parliamentary committee can meaningfully have input into the appropriate level of resources of an office without such complementary provisions might be questioned.

The New Zealand Parliament has an Officers of Parliament Committee which makes recommendations to the Parliament regarding the resourcing and auditing of each office of Parliament, namely, the Ombudsmen, the Parliamentary Commissioner for the Environment, the Controller and the Auditor-General.

\(^83\) See comments in the QCRC’s issues paper, n 2 at para 7.35.
ISSUES

40. Is there a need for parliamentary committee involvement in the budget of the identified statutory office holders beyond that which already exists?

41. If the QCRC’s R7.3 is to be adopted, do the terms of clauses 86(1)(e), 97(c) and 114 of the QCRC’s Parliament of Queensland Bill 2000 achieve the objective of the QCRC’s recommendation? If not, how might they be improved?

42. To what extent can the above parliamentary committees make a meaningful determination of whether the office holders allocated to them have been given sufficient resources? What other implications might be the result of expanding the jurisdiction of certain parliamentary committees in this regard?

43. Instead of a number of committees having responsibilities regarding the resourcing of statutory office holders, would it be preferable for a designated committee—for example, a statutory officers committee—to be conferred this role?

14. THE JUDICIARY

Civilised society may be judged, in part, by the restraints which it imposes upon the use of power. Human nature being what it is, unchecked power will inevitably be used in ways which are unjust. The misuse of power, and mankind’s attempts to combat the tyranny which results, are central themes of the history of civilisation.

Human ingenuity has been able to devise only one effective mechanism for restraining the misuse of power. That mechanism is the rule of law, which may be roughly defined as the governance of society by laws, to which all citizens, bodies corporate and governments are subject, made with the general concurrence of society and enforced impartially. The rule of law therefore has as one of its opposites the imposition of order by the use of arbitrary might. Another opposite is the absence of order. At its apex is an independent judiciary.

An independent judiciary is an indispensable requirement of the rule of law.84

14.1 Background

In Queensland, legislation relevant to the courts and judiciary includes the Supreme Court Act 1995, the Supreme Court of Queensland Act 1991, the District Court Act 1967 and, until 6 June 2002, the Constitution Act 1867. None of the current legislative provisions regarding the courts and the judiciary are entrenched. Therefore, subject to restraints derived from the Commonwealth Constitution, these provisions can be amended by Parliament like any ordinary piece of legislation.

The Constitution of Queensland 2001 contains provisions in Chapter 4 (ss 56-63) requiring that there be a District Court and Supreme Court and providing for:

♦ the appointment, retirement and removal of judges;
♦ appropriation of judges’ salaries which are not to be decreased; and
♦ security of tenure of judges whose judicial office is abolished.

These provisions consolidate certain provisions currently contained in legislation relevant to the courts and the judiciary, and introduce some substantial reforms.85

85 For an explanation as to the reforms introduced, see LCARC report no 24, n 4, Constitution of Queensland 2000—Notes to the bill at 22-26, and explanatory notes to the bill for the Constitution of Queensland 2001 at 27-31.
The QCRC made certain recommendations regarding the provisions relating to the courts and the judiciary in the Queensland Constitution. These and other issues are addressed below.

14.2 Independence of the judiciary

It is fundamental to the maintenance of the rule of law and protection of individuals’ rights that judges carry out their functions impartially. A judiciary which is free from being controlled or influenced by the executive or legislature is essential to ensure the existence of, and public confidence in, this impartiality. The basic protections of judicial independence are security of tenure and adequate remuneration which is beyond legislative or executive interference.

The *International Covenant on Civil and Political Rights* (ICCPR), article 14.1 provides:

> All persons shall be equal before the courts and tribunals. In the determination of any criminal charge against him, or of his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law. ...

The constitutional recognition of a judicial branch of government, and the formal assurance that it is separate and independent of the legislature and the executive represents the main way by which most jurisdictions seek to comply with the principles contained in article 14.

A separate and independent judiciary is implicitly provided for in chapter III of the Commonwealth Constitution which provides for the appointment, tenure, removal and remuneration of the justices of the High Court and any federal courts established. Because these provisions are entrenched, they can only be repealed or amended with the approval of a referendum.

The Queensland Constitution might make reference to the principle of an impartial and independent judiciary without restricting the powers of the Queensland Parliament and executive. For example, a provision might be included in the Constitution stating that the courts in Queensland should enjoy judicial independence.

**ISSUE**

44. Should the Constitution make reference to the principle of an impartial and independent judiciary? If so, how should such a principle be incorporated in the Constitution?

14.3 Emerging issues

At the outset the committee notes that the following issues concerning the judiciary are attracting increasing attention:

♦ the process for, and extent of, consultation prior to judicial appointments; and

♦ mechanisms for investigating complaints against the judiciary.

Further, there is arguably a need to provide constitutional recognition of the role which magistrates perform in the state’s judicial system. There might also be the need for other statutory changes to ensure that magistrates are appropriately protected and able to perform their functions independently.

While the committee does not intend to deal with these issues as part of its current inquiry, the matters are significant.

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86 See EARC constitution report, n 6 at paras 7.30-7.31.
14.3.1 Consultation prior to judicial appointments

A person who has been a barrister or solicitor of the Supreme Court for at least five years is eligible for appointment as a judge of the Supreme or District courts.88 Judges are appointed by the Governor-in-Council on the recommendation of the Attorney-General.89 Traditionally, there has been limited public awareness of the extent of consultation undertaken by the Attorney-General in selecting a person to recommend to the Governor-in-Council.90

This appointment process (which is also used in relation to the appointment of High Court judges) has been criticised on several grounds including that it:91

♦ weakens the separation of powers doctrine;
♦ risks politicisation of appointments;
♦ involves unnecessary secrecy;
♦ lacks external scrutiny; and
♦ has resulted in a judiciary that is not reflective of the community at large because there is a serious under-representation of both women and social minorities, arguably because of inherent biases in the system.

Without making any recommendation in relation to the issue, the QCRC commented that ‘it would be desirable if the fact and extent of prior consultation before the executive makes an appointment (to the judiciary) could be made more widely known.’92

Broadly, possible reform options for Queensland include:93

♦ legislative ratification of judicial appointments;
♦ establishing a commission to recommend suitable appointees to the Attorney-General; and/or
♦ retaining the present method of appointment but requiring the Attorney-General to consult various persons or bodies.

The second and third options appear to receive greater support in Australia, as these options are more likely to address the perceived weaknesses in the current system.

14.3.2 Mechanisms for investigating complaints against the judiciary

Public confidence in the rule of law requires not only judicial independence, but also accountability of the judiciary.94 Traditionally, this accountability has been provided through mechanisms including:95

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88 Supreme Court of Queensland Act 1991 (Qld), s 12 and District Court Act 1967 (Qld), s 9. See also the Constitution of Queensland 2001 (Qld), s 59.
90 In 1993, EARC recommended that the matter of selection of judges and other matters concerning the judiciary should be referred to the then proposed Parliamentary Legal and Constitutional Review Committee: EARC constitution report, n 6 at para 7.81.
92 QCRC report, n 1 at 62.
the oath or affirmation of office;

- the fact that judges hear most cases in public;
- the obligation to provide written reasons for decisions, which are published;
- mechanisms to appeal against decisions of judges;
- in some jurisdictions, informal systems whereby complaints regarding a judge’s conduct may be made to a Chief Justice of that jurisdiction; and

- provision for removal from office by the Governor-in-Council on an address from each House of Parliament, on grounds of proved misbehaviour or incapacity.

Institutional scrutiny is supplemented in practice by other mechanisms including the political process, the media, the legal profession and the writings of academic commentators.\(^96\)

Arguably, the traditional accountability mechanisms do not adequately resolve instances of judicial misconduct which do not warrant removal, such as laziness or inefficiency.\(^97\) In some comparative overseas jurisdictions, complaints procedures which complement the traditional forms of accountability have been introduced.\(^98\) In Australia, New South Wales is the only jurisdiction to formally implement such a mechanism, with the establishment of the Judicial Commission of New South Wales. There is support for an internal complaints handling mechanism in the Federal Court.\(^99\)

Complaints procedures, such as implemented in New South Wales, generally include:

- guidelines to determine matters which may be summarily dismissed, for example, on the grounds that avenues of appeal of the decision are more appropriate;
- procedures for dealing with minor complaints; and
- a judicial commission to consider serious complaints, and determine whether they should be referred to the Attorney-General and, in turn, the Parliament.\(^100\)

The only formal discipline which may be imposed is removal by the Governor-in-Council on an address from Parliament. Thus, the complaints body would report to Parliament through the Attorney-General. This is consistent with the principle that it is incompatible with an independent judiciary that one judge should be subject to the control of another in the execution of the duties of his or her office.\(^101\) However, the Chief Justice or equivalent may deal with complaints which are not sufficiently serious to justify removal by, for example, counselling the judicial officer, or making administrative arrangements within his or her court which are designed to avoid the recurrence of a problem.\(^102\)

\(^95\) The Hon Mrs Justice S Denham, Supreme Court of Ireland, ‘The diamond in a democracy: An independent, accountable judiciary’, annual conference of the Australian Institute of Judicial Administration, Darwin, 14-16 July 2000 at 31–34 and Hon D K Malcolm, n 94 at 2.

\(^96\) ALRC report no 89, n 94 at paras 2.243-2.247. See also the Hon D K Malcolm, n 94 at 3.


\(^98\) See, for example, New Zealand and certain jurisdictions in the United States and Canada. ALRC report 89, n 94 at para 2.251 and ALRC discussion paper no 62, Review of the federal civil justice system, AGPS, Canberra, August 1999 at paras 3.136-3.139. See also the Hon Mrs Justice S Denham, n 95 at 38.

\(^99\) ALRC report no 89, n 94 at paras 2.273-2.299. See also the Federal Court submission to ALRC report no 89 quoted at 193 of the ALRC report.

\(^100\) As to the validity of such mechanisms see Gratton v Canadian Judicial Council [1994] 3 FC 769 in which the court upheld the validity of the provisions of the Canadian Judges Act 1971 relating to the inquiry power of the Judicial Council.

\(^101\) See Australian Bar Association, n 84; See also Rees v Crane [1994] 2 AC 173.

\(^102\) See, for example, the procedures of the Judicial Commission of New South Wales at: <www.jc.nsw.gov.au/>. Although, the extent to which it is acceptable to make administrative arrangements in court is limited: see Rees v Crane [1994] 2 AC 173 in which the Privy Council concluded that the Chief Justice of Trinidad and Tobago had no power to not include a judge on a roster for a term. Refer to Hon Justice M Kirby, n 87.
Generally, mechanisms for dealing with complaints against the judiciary do not deal with allegations of criminal conduct or corruption. In this regard it is relevant to note that under the *Crime and Misconduct Act 2001* (Qld) the jurisdiction of the Crime and Misconduct Commission (CMC) in relation to the conduct of a judicial officer is limited to investigating misconduct of a kind that, if established, would warrant the judicial officer’s removal from office. The investigation must be exercised in accordance with appropriate conditions and procedures settled in continuing consultations between the chairperson of the CMC and the Chief Justice. Further, the CMC must proceed having proper regard for the importance of preserving the independence of judicial officers: s 58. Given that determining what constitutes conduct justifying removal from office is a matter which is at the discretion of the Parliament, defining the scope of the CMC’s jurisdiction in this regard could be difficult.

Ideally, any complaints mechanism would dovetail with the procedure for removing judges, discussed in further detail in section 14.6, to ensure that the processes do not unnecessarily duplicate each other.

**14.3.3 The Magistracy**


The Governor-in-Council appoints magistrates. The Attorney-General is required to consult with the Chief Magistrate before recommending a person to be appointed as a magistrate. To be qualified to be a magistrate a person must be less than 65 years of age and be a barrister or solicitor of the Supreme Court of at least five years standing: ss 4-6.

Magistrates are required to retire at age 65 and can only be removed or suspended following an appropriate determination by a Supreme Court judge: ss 15-17. The *Magistrates Act* also contains provision for disciplining magistrates in certain circumstances: ss 10 and 10A.

The QCRC recommended that the District Court be afforded the same protection as the Supreme Court in relation to appointment, tenure and removal of judicial officers. However, the QCRC commented that similar considerations do not apply ‘to a comparable extent, or at all’ to the magistracy. Consequently, the QCRC stated that, while it recognised the important role that the lower courts currently undertake and should continue to undertake, it did not think ‘it necessary or appropriate to seek equivalent guarantees for the independence of the lower courts’.  

In recent years the magistracy has changed in respect of its structure, composition and jurisdiction. As a result it has been suggested that there are now arguments in favour of elevating magistrates to the status of judges including that:

- expectations of independent and impartial adjudication apply equally to magistrates;
- the jurisdiction of magistrates is constantly enlarging and magistrates are performing increasingly complex work;
- a high percentage of cases dealt with in Australia are resolved by magistrates, and most of the public who encounter the court system do so through the Magistrates Courts;
- qualifications for appointment are the same as the qualifications for appointment as a judge (although this has not always been the case, and some current magistrates were not required to possess these qualifications to be appointed); and

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103 QCRC report, n 1 at 62.
105 *Magistrates Act 1991* (Qld), s 4. Although, magistrates are required to be less than 65 years of age. Contrast District and Supreme Court judges who must be less than 70 years of age.
• increased status and working conditions would attract more barristers and solicitors of high quality and ability.

14.3.4 Committee approach

At this stage the committee considers it appropriate to seek public input regarding whether further consideration should be given to these matters and, if so, what form of inquiry is appropriate.

Options regarding inquiry form include: (a) an inquiry by a parliamentary committee; (b) review by the Queensland Law Reform Commission; and (c) establishment of a commission, constituted by former judges and appropriate community representatives, specifically to inquire into these issues.

It is desirable that any necessary consideration of the above issues is finalised before any referendum is held to achieve reform and total consolidation of the Constitution.

ISSUES

45. Should further consideration be given to:
   (a) the process for, and extent of, consultation prior to judicial appointments;
   (b) mechanisms for investigating complaints against the judiciary; and/or
   (c) the constitutional recognition and protection of the independence of magistrates?

46. If the matters raised in issue 45 should be the subject of further consideration, who should conduct the relevant review?

14.4 Acting judges

<table>
<thead>
<tr>
<th>Recommendation under review</th>
<th>Source material</th>
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<tbody>
<tr>
<td>QCRC R 8.2 That a provision authorising the appointment of acting judges, with the consent of the Chief Justice, be added to the Queensland Constitution</td>
<td>QCRC report ch 8 at 61; QCRC Constitution of Queensland 2000, cls 61, 67 and 84</td>
</tr>
</tbody>
</table>

The *Supreme Court of Queensland Act 1991*, s 14 provides that the Governor-in-Council, after consultation between the Attorney-General and Chief Justice, may appoint a person who is qualified to be a judge to be an acting judge of the Supreme Court for up to six months if a judge is absent or otherwise unable to perform the functions of the office.

The same provision also empowers the Governor-in-Council to appoint as an acting judge:

• a duly qualified person (for a period no longer than six months) where the Chief Justice certifies that it is desirable to make such an appointment to assist in ensuring the orderly and expeditious exercise of the jurisdiction and powers of the court in the Trial Division; or

• a person (for a period up to one year) who is or has been a judge of the Supreme Court of another state or territory or the Federal Court of Australia.

An acting judge can be appointed to the District Court if a judge is absent or incompetent or unable to take part in any decision, trial, action or proceeding or if, for any reason whatsoever, the conduct of the business of a District Court in the opinion of the Governor-in-Council requires such an appointment. There is no requirement for consultation between the Attorney-General and the Chief Judge of the District Court, and no time limit on acting appointments.106

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106 *District Court Act 1967* (Qld), s 17.
Acting judges have been appointed from time to time in accordance with these provisions. The appointment of acting judges can assist in ensuring the efficient functioning of the courts.

The QCRC recommended that a provision authorising the appointment of acting judges of the Supreme Court, with the consent of the Chief Justice, be added to the Queensland Constitution. Clause 67(2) of the QCRC’s Constitution Bill similarly provides that the Governor-in-Council may appoint acting judges of the District Court with the consent of the Chief Judge.

This recommendation raises this issue of whether the appointment of acting judges is desirable having regard to the need for an independent judiciary and, if so, whether the safeguard proposed by the QCRC—namely, consent of the Chief Justice or Chief Judge as the case may be—is sufficient and appropriate.

Historically, acting appointments were usually preliminary to permanent confirmation when a sitting judge retired and a position became available to be filled. Acting appointments are now much more common. However, concern has been expressed about the practice of appointing acting judges on the grounds that:

♦ judicial independence is at risk when future appointment or security of tenure is within the gift of the executive;
♦ those who hold acting appointments but who seek, or are thought to seek, permanency cannot be seen to be independent of government;
♦ the appointment of acting judges diverts attention from ensuring that the regular judicial establishment is kept at a level which can discharge the work of the judicial branch of government; and
♦ it is especially inappropriate to have part-time acting judges who continue to practise as lawyers appearing before other acting judges.

Indeed, the importance of judicial independence at the state level has recently been reinforced by the High Court in *Kable v Director of Public Prosecutions*. Section 72 of the Commonwealth Constitution provides federal judges with security of tenure until they reach 70 years (for High Court judges), or the maximum age set for federal court judges (currently 70 years). Thus, it would appear impossible to have acting federal judges. In this light, it might be questioned whether there should be acting judges at the state level.

Conversely, the risk of excessive delays in court proceedings if there is no mechanism to appoint acting judges, might outweigh such considerations.

The QCRC, while noting comments regarding the threat to judicial independence of the appointment of acting judges, considered, on balance, that the possibility of making such appointments is necessary. With a view to strengthening the separation of powers doctrine, the QCRC recommended that the consent of, rather than mere consultation with, the Chief Justice or Chief Judge as the case may be, should be required.

The safeguard proposed by the QCRC, that is, that consent of the Chief Justice or Chief Judge (as the case may be) be required before acting appointments are made, will not necessarily address all of the criticisms of the

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110 See The Hon Justice M Kirby, n 107.
111 QCRC report, n 1 at 61-62; The Australian Bar Association, n 84, also suggested as a safeguard that acting appointments should only be made when the Chief Judge certifies the necessity.
appointment of acting judges. Further, it could place the Chief Justice or Chief Judge in invidious situations. For example, if the Attorney-General sought to appoint acting judges to overcome a shortage of tenured judges, the Chief Justice or Chief Judge would have to either approve acting appointments, and thus divert attention from the underlying issue, or refuse to approve the appointments, resulting in delays in matters before the court.

**ISSUE**

47. Should there be provision in the Constitution to appoint acting judges to the Supreme Court and/or the District Court? If so:

(a) should the appointment of acting judges be subject to the consent of the Chief Justice or Chief Judge as the case may be; and/or

(b) what other safeguards, if any, should be utilised to ensure that the appointment of acting judges does not erode the independence, and perceived independence, of the judiciary?

### 14.5 Compulsory retirement

<table>
<thead>
<tr>
<th>Matter under review</th>
<th>Source material</th>
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</thead>
<tbody>
<tr>
<td>Whether the re-enactment of provisions regarding the retirement of judges at age 70 is inconsistent with the <em>Anti-Discrimination Act 1991</em> (Qld)</td>
<td>Explanatory notes to the Constitution of Queensland 2001; letter from the Acting Premier to the committee dated 17 January 2002; see appendix A</td>
</tr>
</tbody>
</table>

Section 60 of the *Constitution of Queensland 2001* refers to the *Supreme Court of Queensland Act 1991*, s 23 and the *District Court Act 1967*, s 14 which provide that a judge must retire at age 70, although the judge may finish hearing a proceeding that commenced before the judge reached age 70. The Government did not re-enact these provisions in the 2001 Constitution because they considered that such re-enactment would be inconsistent with s 106A of the *Anti-Discrimination Act 1991* (Qld).

As a general principle, a requirement that a person retire at a particular age constitutes age discrimination. However, the Human Rights and Equal Opportunities Commission has stated that:

> There is conflict between the principle of non-discrimination and the principle of judicial independence. If judges were not subjected to age-based retirement their capacity would have to be assessed periodically. This would give rise to possibilities of compromising their independence, especially if the assessment were undertaken by the executive or the legislature.

The *Anti-Discrimination Act 1991* prohibits discrimination on the basis of age. However, that Act expressly provides it has no effect on the imposition of a compulsory retirement age on a Supreme Court judge or a District Court judge: s 106A(a) and (b). A compulsory retirement age for judicial officers is consistent with the Commonwealth Constitution.

The Commonwealth Constitution (s 72) provides that the appointment of a justice of the High Court shall be for a term expiring upon the judge attaining the age of 70 years, and a person shall not be appointed as a justice of the High Court after attaining that age. This provision was inserted by the *Constitution Alteration (Retirement of Judges) Act 1977* (Cth), following a referendum. Prior to this amendment, justices of the High Court held tenure for life, or until their resignation.

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112 Explanatory notes to the bill for the Constitution of Queensland 2001 (Qld).
114 See s 7(1)(f). Section 15(1)(c) provides that a person must not discriminate in dismissing a worker. ‘Dismissing’ is defined to include ending the work of a person by forced retirement.
Arguments, including the following, were raised in support of a compulsory retiring age for judges in the Commonwealth Constitution:115

♦ compulsory retirement of judges assists to maintain vigorous and dynamic courts, which require the input of new and younger judges who will bring to the bench new ideas and fresh social attitudes;
♦ compulsory retirement of judges might provide greater opportunity for able legal practitioners to serve on the bench while at the peak of their professional abilities;
♦ community acceptance of the need for a compulsory retiring age for judges;
♦ a compulsory retiring age helps to avoid the necessity of removing a judge who, by reasons of declining health, ought not to continue in office, but who is unwilling to resign.

**ISSUE**

48. Should provision for compulsory retirement of Supreme and District Court judges at age 70 be retained?

### 14.6 Removal from office

<table>
<thead>
<tr>
<th>Recommendation under review</th>
<th>Source material</th>
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<tbody>
<tr>
<td>QCRC R8.3 That the procedure for removal of a judge be amended to require that any resolution commencing the dismissal procedure state with full particulars the ground on which dismissal is sought</td>
<td>QCRC report ch 8 at 62; QCRC Constitution of Queensland 2000, cl 64(6)</td>
</tr>
</tbody>
</table>

The *Constitution of Queensland 2001, s 61* provides that a judge may be removed from office by the Governor-in-Council on an address of the Legislative Assembly for proved misbehaviour justifying removal from the office, or proved incapacity to perform the duties of the office.116 The provision is drafted to enable a judge to be removed from his or her office (for example, Chief Justice of the Supreme Court) without being altogether removed as a judge of the Supreme or District Court.

Section 61 also provides for the establishment of a tribunal consisting of at least three members to inquire into the conduct of the judge and to report to the Legislative Assembly. Each tribunal member must be a former judge or justice of a state or federal superior court in Australia, and must not have been a judge in the same court at the same time as the judge whose removal is being considered. Misbehaviour justifying removal from office or incapacity to perform the duties of office is proved only if the Legislative Assembly accepts a finding of a tribunal that, on the balance of probabilities, the judge has so misbehaved or is incapable.

On commencement of the *Constitution of Queensland 2001* and related consequential amendments to the *Crime and Misconduct Act 2001*, the Crime and Misconduct Commission will be required to give all the material in its possession relevant to the subject of the tribunal’s inquiry to the tribunal at the tribunal’s request.117

The *Constitution of Queensland 2001, s 61* further provides that the tribunal is to be established by an Act of Parliament, and its members are to be appointed by resolution of the Legislative Assembly. Similarly, the tribunal’s functions, powers, protection and immunity are to be defined by statute.

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116 Under s 16 of the *Constitution Act 1867* (Qld) and s 195(2) of the *Supreme Court Act 1995* (Qld), the power of removal is not presently confined to any specific grounds. Although, s 15 of the *Constitution Act 1867* (Qld) refers to the commissions of judges remaining in full force during their good behaviour.
117 *Crime and Misconduct Act 2001* (Qld), s 70.
The grounds for removal contained in the *Constitution of Queensland 2001* reflect the grounds for removal of federal justices under s 72 of the Commonwealth Constitution.

The procedure provided for by s 61 largely reflects the procedure followed in relation to the Honourable Mr Justice Vasta of the Supreme Court of Queensland in 1989. The tribunal in that case was established by, and the procedure for considering the allegations was set out in, the *Parliamentary (Judges) Commission of Inquiry Act 1988* (Qld). That tribunal, the Parliamentary (Judges) Commission of Inquiry, considered the civil standard of proof to be the appropriate one (that is, on the balance of probabilities).

The Commissioners (Sir Harry Gibbs, Sir George Lush and Hon. Micheal Helsham) expressed concern at the width of their inquiry as defined by the *Parliamentary (Judges) Commission of Inquiry Act*:

> The Commission, as a result of its experience in conducting this inquiry into Mr Justice Vasta and into Judge Pratt, has formed the clear opinion that the holding of an inquiry into the question whether “any behaviour” of a judge warrants removal is open to grave objection. It is one thing to inquire into specific allegations of impropriety but it is quite another to conduct an inquisition into all aspects of a judge’s life. An inquiry of the latter kind exposes the judiciary to unacceptable risks that pressure will be applied to its members and becomes especially dangerous if instigated by pressure groups or as a result of media clamour.\(^\text{118}\)

Accordingly, the QCRC recommended that any resolution of the Legislative Assembly establishing a tribunal of inquiry must state ‘full particulars the grounds on which it is proposed to remove the judge.’\(^\text{119}\) The QCRC considered that this would prevent ‘fishing expeditions’ by which an investigating panel was instructed to find anything to the discredit of the judge in question. Rather, it would ensure that a specific matter had to be the focus. The QCRC was not explicit as to whether they considered that the grounds on which the judge’s removal from office is proposed should limit the jurisdiction of the tribunal.

This recommendation raises two issues.

✦ Is it appropriate to restrict the scope of matters which the tribunal may consider? Pursuant to s 61 of the *Constitution of Queensland 2001*, the Legislative Assembly is unable to remove a judge unless the tribunal finds that the judge has misbehaved in a way that justifies removal from office, or the judge is incapable of performing the duties of office. Therefore, restricting the scope of matters which the tribunal may consider has the effect of restricting the scope of the Legislative Assembly’s authority to remove a judge. Perhaps this difficulty could be addressed in practice by, for example, the tribunal requesting the Legislative Assembly to refer further specific matters to it if it becomes apparent during the course of the inquiry that this is appropriate. If the legislation establishing the tribunal was specific to the inquiry this would have to be effected by amendment to the Act in relation to the tribunal’s functions, unless the Act allowed the Legislative Assembly to refer further allegations to the tribunal.

If it is considered inappropriate to restrict the jurisdiction of the inquiry to specific allegations, it might be possible to require the allegations to be spelt out while still giving the tribunal broad jurisdiction to consider any matter which might be relevant to deciding whether there are grounds for removal.

✦ If it is appropriate to require specific allegations to be referred to a tribunal, is the wording recommended by the QCRC appropriate? Arguably, ‘full particulars of the grounds on which it is proposed to remove the judge’ might be an unreasonable requirement, if not a presumption, prior to the conduct of a full investigation.

The current provisions of the *Constitution of Queensland 2001* are not explicit as to the process to be followed by which allegations against a judge are brought to the attention of the Legislative Assembly. However, this issue is more appropriate for consideration as part of any inquiry into appropriate complaints mechanisms (see section 14.3).

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\(^{119}\) QCRC report, n 1, *Constitution of Queensland 2000*, clause 64(6).
The QCRC recommended that the same protection should be given to the District Court as to the Supreme Court in this regard because ‘the level of its existing jurisdiction has the same potential to bring its judges into conflict with the other two arms of government and attract their enmity’.\(^{120}\)

**ISSUE**

49. In the event that a tribunal is established to inquire into the conduct of a judge, should only specific allegations against the judge be referred to the tribunal? If so,

(a) should these allegations confine the jurisdiction of the tribunal?

(b) are the words suggested by the QCRC appropriate, namely, that the resolution should ‘state full particulars of the grounds on which it is proposed to remove the judge’? If not, what other words would be more appropriate?

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**15. CONCLUSION**

The QCRC’s mandate was to conduct a wide-ranging review of possible reform to the Queensland Constitution. The role of this committee is not to repeat that comprehensive review, but to finalise consideration of the matters raised as part of that review. Other issues of constitutional reform are beyond the scope of this inquiry.

This issues paper canvasses substantive issues arising from QCRC recommendations, other issues raised by the QCRC, and other matters specifically referred to the committee. As discussed at the outset, the committee will undertake future consultation in relation to the extent to which certain provisions of the Constitution should be protected and how such protection should be effected (stage 2), and the QCRC’s recommendation relating to special parliamentary representation for Aborigines and Torres Strait Islanders (stage 3).

Submitters are asked to have regard to the scope of the current inquiry in making submissions.

\(^{120}\) QCRC report, n 1 at 62.
APPENDIX A – CORRESPONDENCE DATED 17 JANUARY 2002

Dear Karen,

As you are aware, the Parliament recently passed the Constitution of Queensland 2001 and the Parliament of Queensland Act 2001. This is a significant event for Queensland and one made possible by the efforts of the members and staff of the Legal, Constitutional and Administrative Review Committees of the last three Parliaments.

However, as the Premier foreshadowed during the second reading debate on the Bills, the passage of the Bills is just a starting point for constitutional reform. This Government will embrace the process of constitutional reform.

I note that your committee has before it for consideration the recommendations of the Queensland Constitutional Review Commission for constitutional reform (other than those recommendations dealt with by the committee in its reports 24 and 27).

In addition to the matters raised by the QCRC, the Government would like to refer to your committee for consideration a number of matters that arose during the finalisation of the consolidation Bills. These matters were alluded to in the explanatory notes to the Constitution of Queensland 2001 and the Premier’s second reading speech.

Accordingly, I now refer the following matters to the Legal, Constitutional and Administrative Review Committee for consideration in the context of the committee’s future review of issues of constitutional reform.

1. The re-enactment of sections 30 and 40 of the Constitution Act 1867 in the Constitution of Queensland 2001 is likely to be an invalid future act and an invalid enactment under section 240A of the Commonwealth Native Title Act 1993. Does the committee consider that the consolidation of sections 30 and 40 of the Constitution Act 1867 into the Constitution of Queensland 2001 is necessary and, if so, how might this be achieved?
2. Section 106A of the Anti-Discrimination Act 1991 establishes a statutory regime to phase out mandatory retirement ages. In this light, does the committee consider that the continued prescription of a mandatory retirement age for judges of the Supreme and District Courts is justified?

3. Does the committee consider that it is necessary or desirable to make provision for the following:
   
   (a) the validation of Assent where the document presented to the Governor for Assent contains errors such that it is not the Act as it was passed by the Parliament; and

   (b) a Bill or motion introduced or moved by a Minister that would appropriate money from the consolidated fund to be valid even if it is not accompanied by a message from the Governor recommending the appropriation?

4. The Constitution of Queensland 2001 does not include a statement of the executive power of Queensland as recommended by the committee in its report number 24, Review of the Queensland Constitutional Review Commission's recommendations relating to a consolidation of the Queensland Constitution. The Government considers the recommended statement does not reflect the convention that requires the Governor to act in accordance with the advice of his or her Ministers, with the possible exception of exercising the Governor’s reserve powers. Given the Government’s concerns, how does the committee consider the executive power of Queensland might be appropriately represented in the Constitution of Queensland 2001?

I also acknowledge receipt of your letter to the Premier of 25 October 2001 enclosing a copy of the committee’s report no. 31, Review of the Members’ Oath or Affirmation of Allegiance. As the Premier indicated in his second reading speech, the Government has responded to the committee’s recommendation 1 by including an oath of office to be taken by members in the Constitution of Queensland 2001. I note that the committee intends to investigate further, through public consultation, whether members should be required to swear or affirm allegiance to The Queen.

The Government looks forward, with interest, to reviewing the outcome of your committee’s consideration of these matters and constitutional reform generally.

Yours sincerely

[Original Signed]

TERRY MACKENROTH MP
ACTING PREMIER AND MINISTER FOR TRADE
## APPENDIX B – SELECT STATUTORY OFFICE HOLDERS

<table>
<thead>
<tr>
<th>OFFICE HOLDER, LEGISLATION AND MINISTER</th>
<th>FUNCTIONS</th>
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</table>
| **Anti-Discrimination Commissioner**   | To promote equality of opportunity and protect people from unlawful discrimination, sexual harassment and certain associated objectionable conduct: see s 235 | Appointed by Governor-in-Council: s 238(1) | Governor-in-Council may terminate the appointment if the commissioner is:  
- incapable of performing duties;  
- guilty of certain misconduct;  
- absent without leave or excuse for 14 consecutive days or 28 days in any one year: s 243(1)  
Governor-in-Council must terminate the appointment if the commissioner:  
- is convicted of an indictable offence;  
- becomes bankrupt;  
- engages in other paid employment without Minister’s approval: s 243(2) | Not longer than 7 years: s 238(2) | NA |  |
| Anti-Discrimination Act 1991 (Qld)     |           |             |                        |        |                                    |                          |
| (Attorney-General and Minister for Justice) |           |             |                        |        |                                    |                          |
| **Auditor-General**                    | To audit in each financial year the public accounts and all public sector entities and to report the audit outcomes to auditee management and, where warranted, to the relevant Minister, the Treasurer and Parliament: see s 73 and 93 | Appointed by Governor-in-Council: s 50(1) 
Minister must consult the PAC¹ about: (a) the process of selection for appointment; and (b) the appointment of the person as the Auditor-General: s 50(2)(b) | Governor may remove the Auditor-General on an address from the Legislative Assembly:  
- on the ground of proved incapacity, incompetence or misconduct; or  
- if the Auditor-General is convicted of an indictable offence: s 57(1)  
Premier must consult PAC about the motion for the address and agreement to the motion must be obtained from: (a) all members of PAC; or (b) a majority of PAC members other than a majority consisting solely of the members of the political party/s in government in the Assembly: s 57(2)-(3)  
Governor-in-Council may suspend Auditor-General from office on the same grounds as above. When the Assembly is in session, an address from the Assembly is required and the motion must comply with s 57, ss 2 and 3. PAC is not involved in suspending Auditor-General when the Assembly is not in session: s 57(4)-(9) | Not longer than 7 years: s 51 | The Treasurer must consult PAC in developing the proposed budget of the audit office for each financial year: s 68 | The Auditor-General is not subject to direction by any person about certain matters: s 49  
The Minister must consult PAC about the appointment of a person to conduct a ‘strategic review’ of the audit office and the terms of reference for the review: s 72(6). A report on a strategic review is referred to the PAC: s 72B(7) |
| **Chairperson, Commissioner and Assistant Commissioner of the** | The CMC’s functions include: helping to prevent major crime, investigating major | The commissioners and a/commissioners are appointed by the Governor-in-Council: ss 229(1), 230(1) | Governor-in-Council may terminate the appointment of a commissioner if:  
- the commissioner becomes incapable of | Commissioner: not longer than 5 years: s 231 | NA | The CMC must at all times act independently, impartially and fairly |
| **Chairperson, Commissioner and Assistant Commissioner of the** | | | | | | |

¹ The Public Accounts Committee of the Queensland Parliament.
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<tbody>
<tr>
<td>Crime and Misconduct Commission (CMC)</td>
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<tr>
<td><em>Crime and Misconduct Act 2001 (Qld)</em></td>
<td>crime, assessing complaints involving misconduct, dealing with complaints about official misconduct, monitoring how the commissioner of police deals with police misconduct, criminal justice research, intelligence activities, and witness protection: see ch 2</td>
<td>and 244(1)</td>
<td>performing their duties or is absent from 3 consecutive commission meetings; • a recommendation to the Legislative Assembly to terminate the appointment is made with the bipartisan support of the PCMC and the Assembly, by resolution, approves the termination of the appointment: s 236(1) and (3)</td>
<td>A/Commissioner: not longer than 8 years in total: s 247</td>
<td>that the Minister be required to consult with the [PCMC] in developing the budget for the [CMC] for each financial year</td>
<td>having regard to the purposes of the Act and the importance of protecting the public interest: s 57</td>
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<td>(Premier and Minister for Trade)</td>
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<td>The CMC consists of a full-time chairperson and four part-time commissioners. There are also two assistant commissioners. See: ss 223, 239 and 251-253 re their appointment and functions</td>
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<td>Clerk of the Parliament</td>
<td>Responsible for noting all Assembly proceedings, other duties conferred by the Legislative Assembly, and management of the Parliamentary Service: see ss 19 and 20</td>
<td>Appointed by the Governor by commission on recommendation of the Minister after consultation with the Speaker: s 18(2)</td>
<td>May be removed or suspended by the Governor upon an address from the Assembly for disability, bankruptcy or misconduct: s 21(3)-(4)</td>
<td>Shall hold office during good behaviour: s 21(1)</td>
<td>Separate appropriation bill for the Parliament</td>
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<td><em>Parliamentary Service Act 1988 (Qld)</em></td>
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<tr>
<td>Commissioner for Children and Young People</td>
<td>To promote and protect the rights, interests and wellbeing of all children and young people in Queensland: see s 15</td>
<td>Appointed by Governor-in-Council: s 21(1)</td>
<td>Governor-in-Council may terminate appointment if the commissioner is: • incapable of performing duties; • guilty of certain misconduct; • absent without leave or excuse for 14 consecutive days or 28 days in a year: s 27(1)</td>
<td>Not longer than 5 years but can be reappointed: s 22</td>
<td>NA</td>
<td>Commissioner is required to act independently and is not under the control or direction of the Minister: s 17</td>
</tr>
<tr>
<td><em>Commission for Children and Young People Act 2000 (Qld)</em></td>
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<td>Appointed under the Act and not the Public Service Act 1996: s 21(5)</td>
<td>Governor-in-Council must terminate appointment if the commissioner is: • convicted of an indictable offence;</td>
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2 ‘Bipartisan support’ of the PCMC is defined in the Act (see the dictionary in schedule 2) to mean: (a) support of the members of the PCMC unanimously; or (b) support of a majority of the members, other than a majority consisting wholly of members of the political party/s in government in the Assembly.

3 The Parliamentary Crime and Misconduct Committee of the Queensland Parliament.

<table>
<thead>
<tr>
<th>Office Holder, Legislation and Minister</th>
<th>Functions</th>
<th>Appointment</th>
<th>Removal and Suspension</th>
<th>Tenure</th>
<th>Parliamentary Involvement in Budget</th>
<th>Other Relevant Provisions</th>
</tr>
</thead>
</table>
| Commissioner of the Police Service     | Responsible for the efficient and proper administration, management and functioning of the police service: see s 4.8 | Governor-in-Council on recommendation agreed to by the chairperson of the CMC: s 4.2(1) Employed under the Act and not under the Public Service Act 1996: s 2.5A(a) and s 2.2(2). | Governor-in-Council may remove commissioner on a recommendation in which the chairperson of the CMC concurs, or on an address from the Assembly, on one of following grounds:  
• incapacity or unfitness to perform duties;  
• incompetence in performing or neglect of the duties of office;  
• being found guilty of official misconduct by a misconduct tribunal if tribunal orders dismissal;  
• conviction of an indictable offence;  
• imprisonment for any offence: s 4.5(3)-(4)  
Commissioner may also be removed for breach of contract of employment: s 4.5(2)  
Governor-in-Council may suspend on grounds listed in s 4.5(3): s 4.5(5) | Not less than 3 years or more than 5 years: s 4.4 | NA | |
| Crown Solicitor                        | Crown Solicitor heads Crown Law which provides legal and advocacy services to the Government on a fee-for-service basis. Crown Law is part of the Department of Justice and Attorney-General | Governor-in-Council pursuant to the Public Service Act 1996, s 60 | Contract may be terminated with one month’s notice: Public Service Act 1996, s 62 | Contract of employment must state a term no longer than 5 years but a further contract may be entered into: Public Service Act 1996, s 62 | NA | |
| Director of Public Prosecutions        | To prepare, institute and conduct on behalf of and in the name of Her Majesty criminal proceedings: see s 10 | Appointed by Governor-in-Council: s 5  
Appointed under Act and not Public Service Act 1996: s 5(3) | Governor-in-Council may terminate appointment on basis of:  
• misbehaviour or physical or mental incapacity;  
• bankruptcy;  
• absence from duty without leave for 14 consecutive working days or 28 working days in any one year;  
• otherwise engaging in the director’s profession;  
• engaging in other paid employment: ss 6-7 | Term set by the Governor-in-Council in the instrument of appointment: s 5(2)(a) | NA | |
<table>
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<tr>
<td><strong>Electoral Commissioner</strong>&lt;br&gt; <em>Electoral Act 1992 (Qld)</em>&lt;br&gt; <em>(Attorney-General and Minister for Justice)</em></td>
<td>The electoral commission is responsible for the conduct of parliamentary and industrial elections, electoral redistributions, and electoral education and research: see s 8</td>
<td>Appointed by Governor-in-Council after Minister consulted with leader of a political party represented in the Assembly and LCARC&lt;sup&gt;5&lt;/sup&gt; about the process of selection for appointment and the appointment of the person: s 23(2) Appointed under Act and not <em>Public Service Act 1996</em>: s 10(5)</td>
<td>Governor-in-Council may terminate appointment for misbehaviour or physical or mental incapacity: s 26(1) Governor-in-Council must terminate appointment if commissioner:&lt;br&gt; • accepts nomination for election to an Australian parliament;&lt;br&gt; • becomes a member of a political party&lt;br&gt; • becomes bankrupt;&lt;br&gt; • is absent without leave or excuse for 14 consecutive days or 28 days in any year;&lt;br&gt; • contravenes requirements re disclosure of interest without excuse;&lt;br&gt; • engages in other paid employment without Minister’s approval: s 26(2)</td>
<td>Not longer than 7 years: s 23(5)</td>
<td>NA</td>
<td>The Legal, Constitutional and Administrative Review Committee of the Queensland Parliament.</td>
</tr>
<tr>
<td><strong>Health Rights Commissioner</strong>&lt;br&gt; <em>Health Rights Commission Act 1991 (Qld)</em>&lt;br&gt; <em>(Minister for Health)</em></td>
<td>The Health Rights Commission provides an independent, impartial and collaborative health complaints system designed to improve health care services and promote health rights and responsibilities in Queensland: see s 10</td>
<td>Appointed by Governor-in-Council: s 9 Appointed under Act and not <em>Public Service Act 1996</em>: s 14(2)</td>
<td>Governor-in-Council may remove commissioner on basis of:&lt;br&gt; • bankruptcy;&lt;br&gt; • conviction of an indictable offence;&lt;br&gt; • being found guilty of misconduct, neglect of duty or incompetence;&lt;br&gt; • becoming incapable of performing duties: s 18(1) Governor-in-Council may suspend commissioner for not more than 6 months to investigate whether commissioner should be removed: s 18(2)</td>
<td>Not longer than 5 years: s 15</td>
<td>NA</td>
<td>The commissioner is to act independently, impartially and in the public interest: s 11 See also s 31 (Minister’s directions)</td>
</tr>
<tr>
<td><strong>Information Commissioner</strong>&lt;br&gt; <em>Freedom of Information Act 1992 (Qld)</em>&lt;br&gt; <em>(Attorney-General and Minister for Justice)</em></td>
<td>To review and investigate decisions of agencies regarding the release of documents under the Act: s 71</td>
<td>The Ombudsman is to be the Information Commissioner unless another person is appointed as the Information Commissioner by the Governor-in-Council on an address from the Assembly: s 61&lt;sup&gt;6&lt;/sup&gt;</td>
<td>Governor can remove the commissioner on an address from the Legislative Assembly:&lt;br&gt; • on the ground of proved incapacity, incompetence or misconduct; or&lt;br&gt; • if the commissioner is convicted of an indictable offence: s 67(1) The Premier must consult the LCARC about the motion for the address and agreement to the</td>
<td>Not longer than 3 years: s 62(1)</td>
<td>As the Ombudsman shares allocated funding with the Information Commissioner, the requirement in s 88(3) of the <em>Ombudsman Act 2001</em> that the</td>
<td>The Minister must consult the LCARC about the appointment of a person to conduct a ‘strategic review’ of the commissioner and the terms of reference for the review: s 108A(5). A</td>
</tr>
</tbody>
</table>

<sup>5</sup> The Legal, Constitutional and Administrative Review Committee of the Queensland Parliament.

<sup>6</sup> This committee has recommended changes to the provisions regarding the commissioner’s appointment: see LCARC, *Freedom of Information in Queensland*, report no 32, Goprint, Brisbane, December 2001 at 134-136.
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<td><strong>The Public Service Act 1996</strong> does not apply to appointment of a person as the Information Commissioner: s 61(3)</td>
<td>The Governor in-Council may suspend the commissioner from office on the same grounds as above. When the Assembly is in session, an address from the Assembly is required and the motion must comply with ss 2 and 3. The LCARC is not involved in suspending the commissioner when the Assembly is not in session: s 67(7)-(9)</td>
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<td><strong>Integrity Commissioner</strong></td>
<td>To provide, upon request, advice to senior decision makers within the government on conflict of interest matters: s 28</td>
<td>Appointed by Governor-in-Council: s 38(1)</td>
<td>Governor-in-Council may terminate appointment if commissioner: (a) cannot satisfactorily perform duties; (b) is convicted of an indictable offence; (c) is guilty of certain misconduct; (d) is absent without leave or excuse for 14 consecutive days or 28 days in any year: s 41</td>
<td>Not longer than 5 years: s 37(3)</td>
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<td><strong>Public Sector Ethics Act 1994 (Qld)</strong> (Premier and Minister for Trade)</td>
<td>To investigate administrative actions taken by, in or for certain agencies, and recommend to agencies ways of improving administrative processes: see s 12</td>
<td>Appointed by Governor-in-Council: s 58(1) Minister must consult with LCARC about: (a) the process of selection for appointment; and (b) the appointment of the person as the ombudsman: s 59(1)(b)</td>
<td>Governor can remove the Ombudsman on an address from the Legislative Assembly: • on the ground of proved incapacity, incompetence or misconduct; or • conviction of an indictable offence: ss 66-67 The Premier must consult LCARC about the motion for the address and agreement to the motion must be obtained from: (a) all members of LCARC; or (b) a majority of LCARC members other than a majority consisting solely of the members of the political party/s in government in the Assembly: s 67(2)-(3) The Governor may, on an address from the Assembly, suspend the Ombudsman from office on the same grounds as above and following the same process: s 68 The LCARC is not involved in suspending the</td>
<td>Not more than 10 years: s 61</td>
<td>The Treasurer must consult with the LCARC in developing the proposed budget of the ombudsman for each financial year: s 88</td>
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<tr>
<td><strong>Ombudsman</strong></td>
<td>To investigate administrative actions taken by, in or for certain agencies, and recommend to agencies ways of improving administrative processes: see s 12</td>
<td>Appointed by Governor-in-Council: s 58(1) Minister must consult with LCARC about: (a) the process of selection for appointment; and (b) the appointment of the person as the ombudsman: s 59(1)(b)</td>
<td>Governor can remove the Ombudsman on an address from the Legislative Assembly: • on the ground of proved incapacity, incompetence or misconduct; or • conviction of an indictable offence: ss 66-67 The Premier must consult LCARC about the motion for the address and agreement to the motion must be obtained from: (a) all members of LCARC; or (b) a majority of LCARC members other than a majority consisting solely of the members of the political party/s in government in the Assembly: s 67(2)-(3) The Governor may, on an address from the Assembly, suspend the Ombudsman from office on the same grounds as above and following the same process: s 68 The LCARC is not involved in suspending the</td>
<td>Not more than 10 years: s 61</td>
<td>The Treasurer must consult with the LCARC in developing the proposed budget of the ombudsman for each financial year: s 88</td>
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7 This committee has recommended changes to the provisions regarding the commissioner’s budget: see LCARC FOI report, n 6 at 134-136.
8 This committee, in a letter to the Premier dated 18 September 2001 regarding the then Ombudsman Bill 2001, suggested that agreement of a multi-party majority of LCARC, similar to that required for removal of an Ombudsman, be included for appointment (and reappointment) of an Ombudsman.
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| Parliamentary Counsel                  | To provide legislative drafting and advisory services and legislative publishing and information services for Queensland legislation: see s 7 | Appointed by Governor-in-Council: s 14(1) Appointed under the Act and not the Public Service Act 1996: s 14(4) | Governor-in-Council may terminate appointment if counsel is:  
- incapable of performing duties;  
- convicted of an indictable offence;  
- guilty of certain misconduct;  
- absent from duty without leave or excuse for 14 consecutive days or 28 days in any year: s 19 | No longer than 7 years but is eligible for reappointment: s 14(3) | NA | review is referred to LCARC: s 85(7). |
| Parliamentary Crime and Misconduct Commissioner | To perform certain tasks involving the monitoring and reviewing of the CMC as required by the PCMC, and to review the intelligence holdings of the CMC and the Queensland Police Service: see ss 314 and 320 | Appointed by the Speaker after gaining bipartisan support of the PCMC: ss 306 and 307 | Governor-in-Council may terminate appointment:  
- if the commissioner becomes incapable of performing duties or is guilty of certain conduct; or  
- a recommendation to the Assembly to terminate the appointment is made with the bipartisan support of the PCMC and the Assembly, by resolution, approves the termination: s 312(2)  
The commissioner can not be dismissed or suspended without the bipartisan support of the PCMC: s 307(2) | Not less than 2 years and not more than 5 years in total: s 309 | Separate appropriation bill for the Parliament |
| Public Service Commissioner             | To assist the Premier to promote and assess the overall effectiveness, efficiency and management of the public service: see s 33 | Appointed by Governor-in-Council: s 38 | Governor-in-Council may terminate appointment: s 39(4)(f) | Not longer than 5 years but a further contract may be entered into: s 39(4)(a) and (b) | NA | The commissioner must perform the commissioner’s functions independently, impartially, fairly, and in the public interest: s 35 |
| Public Trustee                          | To provide accessible legal, financial and associated services to the people of Queensland | Appointed by Governor-in-Council: s 9(1) Appointed under the Act and not under the Public Service Act 1996: s 9(9) | Governor-in-Council may remove Public Trustee if:  
- found guilty of an indictable offence or an offence against the Act;  
- engages in misbehaviour;  
- becomes incapable of performing the duties of office;  
- is incompetent;  
- does not comply with requirement re disclosure of interests;  
- is absent from duty without leave or excuse for 14 consecutive days or 28 days in a year: s 9(6) | Not longer than 5 years but apparently can be reappointed: s 9(2) and (5)(b) | NA | |
<table>
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<tr>
<td>Solicitor-General</td>
<td>To act, upon request of the Attorney-General, as counsel for the State in complex and sensitive matters that may have constitutional, economic or social implications for the State: see s 8</td>
<td>Appointed by letters patent issued by or on behalf of Her Majesty on recommendation of Executive Council: s 5(1) Appointed under the Act and not under the Public Service Act 1996: s 5(5)</td>
<td>Governor-in-Council may terminate appointment on basis of misbehaviour or physical or mental incapacity: s 17(3) Governor-in-Council must terminate appointment on basis of:  • bankruptcy;  • absence from duty without leave for 14 consecutive working days or for 28 working days in any one year;  • non-compliance with restrictions on other employment: s 17(4)</td>
<td>Not exceeding 5 years but is eligible for reappointment: s 5(2)</td>
<td>NA</td>
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GUIDELINES FOR MAKING A SUBMISSION

FORM

♦ There is no set form for a submission to the committee. Submissions may be in the form of a letter, a substantial paper or a short document and they may include appendices. Submissions may contain facts, opinions, arguments and recommendations for action. The most useful submissions are to the point, supported by evidence and written in plain English.

♦ The committee will only consider written submissions. Typed or printed text is preferable, though legible hand-written submissions are acceptable. Numbered pages and, for submissions in excess of 20 pages, a brief summary and a table of contents is also helpful.

♦ All submissions must include (i) the name, (ii) a postal address, and (iii) a daytime contact telephone number of the person making the submission. Those making a submission on behalf of an organisation should indicate at what level the submission has been authorised (eg sub-committee, president, chair, etc.).

♦ Public officers may make submissions as private individuals. However, if reference is made in a submission to their official position, it should also be made clear that the submission is made in a private capacity. Submissions from government departments should be authorised in accordance with normal departmental procedure.

CONTENT AND RELEVANCE

♦ A submission may cover some or all of the issues raised in this paper. It would be helpful if submissions clearly stated which issue they are addressing.

♦ The committee’s usual procedure is to publicly release and table submissions in the Legislative Assembly. Not all submissions will necessarily be published and/or tabled. The committee reserves the right to not publish or table confidential submissions, or submissions which are irrelevant, contain scurrilous or defamatory material, or are otherwise not suitable for publishing. The committee will inform you if it decides not to accept, or not to authorise the publication of, your submission.

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All submissions should be sent to:

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

SUBMISSIONS CLOSE ON FRIDAY, 31 MAY 2002

Extensions to the closing date may be given. If you need more time to make a submission, or if you require further information, contact the committee’s secretariat on:

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