LEGISLATIVE ASSEMBLY OF QUEENSLAND

LEGAL, CONSTITUTIONAL AND ADMINISTRATIVE REVIEW COMMITTEE

The Queensland Constitution:

Specific content issues

AUGUST 2002

Report No 36

LEGAL, CONSTITUTIONAL AND ADMINISTRATIVE REVIEW COMMITTEE

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COMMITTEE CONTACT DETAILS

Copies of this report and other Legal, Constitutional and Administrative Review Committee publications are available at: <**www.parliament.qld.gov.au/committees/legalrev.htm>**.

The committee's contact details are: Parliament House, George Street, BRISBANE QLD 4000.

Telephone: (07) 3406 7307
Facsimile: (07) 3406 7070
E-mail: lcarc@parliament.qld.gov.au

LEGAL, CONSTITUTIONAL AND ADMINISTRATIVE REVIEW COMMITTEE

50TH PARLIAMENT

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PRINCIPAL RESEARCH OFFICER:	Ms Veronica Rogers
EXECUTIVE ASSISTANT:	Ms Tania Jackman / Ms Tamara Vitale
CONSULTANT TO THE COMMITTEE:	Professor Gerard Carney, Bond University Law School

CHAIR'S FOREWORD

On 29 February 2000, the Premier tabled in the Queensland Legislative Assembly 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*.

The former LCARC commenced a review of the QCRC's recommendations and tabled report no 24 titled *Review of the Queensland Constitutional Review Commission's recommendations relating to a consolidation of the Queensland Constitution* in which it reviewed the QCRC recommendations that it considered to be consolidatory and/or relatively non-controversial in nature.

In this report the committee continues the work of the previous LCARC by considering substantive issues of constitutional reform arising mainly from the QCRC's report. In the next stage of its review the committee will consider issues relating to entrenchment of the Queensland Constitution.

The current process of constitutional reform in Queensland is ongoing. Issues yet to be considered include the possibility of special representation for Aborigines and Torres Strait Islanders (raised by the QCRC), and certain issues relating to the judiciary and magistracy (discussed in this report).

On behalf of the committee I thank submitters for their valuable input into the committee's inquiry process. I also wish to express my thanks to Gerard Carney, Professor of Law, Bond University, for his expert and timely advice.

Many thanks also to the committee secretariat staff, particularly Veronica Rogers and Kerryn Newton. The quality of their research and written work is outstanding.

Karen Struthers
Chair

20 August 2002

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SUMMARY OF RECOMMENDATIONS

The *Constitution of Queensland 2001* should identify the key components of government and include provisions that are necessary to explain the operation and interrelationship of these key components. However, constitutional principles, conventions and practices should only be expressly referred to in the *Constitution of Queensland 2001* where this can be achieved without detracting from their flexibility.

Constitutional principles, conventions and practices which are not expressly referred to in the *Constitution of Queensland 2001* should be recognised and explained in appropriate non-legislative annotations to the Constitution.

The *Constitution of Queensland 2001* should include a statement of executive power expressed along the following lines.

(1) The executive power of Queensland is vested in the Sovereign, and is exercisable by the Governor as the Sovereign's representative, and extends to the execution and maintenance of the Constitution and the laws of Queensland.

(2) The Governor shall act on the advice of the Executive Council, the Premier or another Minister as appropriate; but the Governor may exercise a power that is a reserve power of the Crown in accordance with the constitutional conventions relating to the exercise of that power.

(3) The executive power of Queensland is subject to the legislative power of Parliament.'

This provision should include a footnote to the effect that the *Australia Acts 1986* (Cth and UK), s 7(2)-(5) provide for the Sovereign's functions and powers in relation to Queensland.

The inclusion of a provision along these lines should be accompanied by additional provisions stating that the enactment of the provision does not:

- prevent the evolution of the constitutional conventions, including those relating to the exercise of the reserve powers; nor
- make justiciable the exercise by the Governor of a reserve power referred to in the section if the exercise by the Governor of that power was not justiciable prior to enactment of the provision.

Chapter 3, part 4 of the *Constitution of Queensland 2001* should be amended to state that:

- the main function of the Executive Council is to advise the Governor on the government of the State;
- the Executive Council consists of ministers appointed as members of the Executive Council; and
- when ministers resign their portfolio, they must also tender their resignation as a member of the Executive Council if they no longer remain in the ministry.

The *Constitution of Queensland 2001* should include a provision recognising the Governor's right to request information. This provision should be drafted along the following lines: '*The Governor is entitled to request from the Premier or a minister information on any particular matter relating to the government that is relevant to the performance or exercise of the Governor's functions or powers*'.

The Government should establish a commission, constituted by former judges, former magistrates and appropriate community representatives, specifically to inquire into the issues outlined in recommendation 29.

If the government does not establish such a commission, the Legal, Constitutional and Administrative Review Committee should inquire into the issues outlined in recommendation 29.

Provisions for the appointment of acting judges should be relocated from the *Supreme Court of Queensland Act 1991* and *District Court of Queensland Act 1967* to the *Constitution of Queensland 2001* and amended to ensure that a person who qualifies for appointment as a judge may be appointed as an acting judge only:

- for fixed, short-term periods;
- with the consent of the Chief Justice or Chief Judge as the case may be;
- in circumstances where the appointee does not continue to practice as a solicitor or barrister during the term of the appointment; and
- provided that the acting appointment is not terminable or revocable during its term unless the judge is removed pursuant to the procedures generally provided for removal of a judge.

Acting appointments should be renewable.

A compulsory retiring age of 70 years for judges should be retained. The *Constitution of Queensland 2001*, the *Supreme Court of Queensland Act 1991*, the *District Court of Queensland Act 1967* and the *Anti-Discrimination Act 1992* should be amended as necessary to include this compulsory retiring age in the *Constitution of Queensland 2001*.

Section 61 of the *Constitution of Queensland 2001* should be redrafted to require the Legislative Assembly to refer specific allegations to the tribunal. The tribunal's jurisdiction should be confined to a consideration of these allegations. The tribunal should be required to report to the Legislative Assembly on:

- whether the allegations referred to the tribunal are proved on the balance of probabilities; and/or
- whether the allegations, if proved, are capable of constituting misbehaviour justifying removal from office or incapacity to perform the functions of office.

1. INTRODUCTION

1.1 BACKGROUND

On 29 February 2000, the Premier tabled in the Queensland Legislative Assembly 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*.[1] 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.[2]

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 ('the committee' or 'LCARC').[3]

The then LCARC subsequently reviewed and reported to Parliament on:

- the QCRC's recommendations relating to a consolidation of the Queensland Constitution;[4] and
- 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.[5]

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) ('the Constitution') and the adjunct *Parliament of Queensland Act 2001* (Qld). These statutes commenced on 6 June 2002. Their commencement was accompanied by the release of a range of constitutional resource materials including an annotated guide to the new consolidated Constitution with explanatory notes alongside each section.[6]

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 nine years, namely:

- the Electoral and Administrative Review Commission;[7]
- the Parliamentary Committee for Electoral and Administrative Review;[8] and
- the Legal, Constitutional and Administrative Review Committee of the 48th and 49th Parliaments.[9]

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1 Goprint, Brisbane, February 2000. Available at: <www.constitution.qld.gov.au>.

2 The QCRC's terms of reference specifically excluded a review of the unicameral nature of the Queensland Parliament. The QCRC further decided that its review would not re-open the issue of a bill of rights for Queensland: QCRC, *Issues paper for the possible reform of and changes to the Acts and laws that relate to the Queensland Constitution*, Goprint, Brisbane, July 1999 at vi. Available at <www.constitution.qld.gov.au>.

3 Hon P D Beattie MP, Queensland, Legislative Assembly, *Parliamentary Debates (Hansard)*, 29 February 2000 at 45-46.

4 LCARC, *Review of the Queensland Constitutional Review Commission's recommendations relating to a consolidation of the Queensland Constitution*, report no 24, Goprint, Brisbane, July 2000.

5 LCARC, *Review of the Queensland Constitutional Review Commission's recommendation for four year parliamentary terms,* report no 27, Goprint, Brisbane, July 2000.

6 A copy of this annotated guide is available at: <www.constitution.qld.gov.au>.

7 Electoral and Administrative Review Commission (EARC), *Report on consolidation and review of the Queensland Constitution*, report 93/R4, Goprint, Brisbane, August 1993.

8 Parliamentary Committee for Electoral and Administrative Review (PCEAR), *Report on consolidation and review of the Queensland Constitution*, Goprint, Brisbane, November 1994.

9 LCARC: *Consolidation of the Queensland Constitution: Interim report*, report no 10, Goprint, Brisbane, May 1998; *Consolidation of the Queensland Constitution: Final report*, report no 13, Goprint, Brisbane, April 1999; report no 24, n 4.

The Queensland Government also released discussion drafts and exposure drafts of the Constitution of Queensland Bill and Parliament of Queensland Bill in July 1999 and January 2001 respectively.

With few exceptions, the *Constitution of Queensland* and *Parliament of Queensland Act* merely consolidate the various statutes that once contained Queensland's constitutional provisions. However, a referendum is required to relocate those provisions entrenched[10] in earlier constitutional legislation, and thereby fully complete the consolidation of Queensland's constitutional legislation.

1.2 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.[11]

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

- specific issues of substantive constitutional reform; and
- entrenchment of provisions of the Constitution, that is, what provisions of the Constitution *can legally* be entrenched, and whether certain provisions of the Constitution *should* be entrenched.

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.

Finally, the committee will give further consideration to the issue of a preamble for the Constitution.[12]

This report relates to stage one of the committee's inquiry. A consultation paper outlining proposals for comment regarding stage two of the committee's inquiry is being released at the same time as this report.

1.3 THE STAGE ONE REVIEW PROCESS

The committee released an issues paper in April 2002 titled *The Queensland Constitution: Specific Content Issues*,[13] to facilitate a call for public submissions on certain specific issues of substantive constitutional reform. On Saturday, 20 April 2002, the committee advertised this call for submissions in *The Courier Mail*, *The Cairns Post*, *The Townsville Bulletin*, *The Rockhampton Morning Bulletin*, and *The Australian*.

The committee also directly wrote to some 460 persons and organisations that it identified as having an interest in the issues under inquiry inviting their comments.

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10 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 a special, additional procedure is followed, such as approval by the majority of electors at a referendum or approval by a two-thirds majority in the Parliament.

11 LCARC, *Review of the members' oath or affirmation of allegiance*, report no 31, Goprint, Brisbane, October 2001.

12 In its April 2002 issues paper the committee noted that it did not propose to pursue the issue of whether the Constitution should include a preamble and, if so, what form that preamble should take. By letter dated 22 April 2002, the Premier wrote to the committee asking it to reconsider its position.

13 GoPrint, Brisbane. Available at: <www.parliament.qld.gov.au/committees/legalrev/htm>.

The committee received 37 submissions in response to this call for public input. The high quality of submissions has greatly assisted the committee with its consideration of the issues under review.

A list of the persons and organisations that made submissions to this stage of the committee's inquiry appears as **appendix B** of this report. Those submissions that the committee has authorised for publication and tabled can be viewed at the Bills and Papers Office, Parliament House, Brisbane.

1.4 THIS REPORT

This report is divided into the following four parts.

- Part 1 – The incorporation of constitutional principles, conventions and practices (including a statement of executive power, Executive Council, the Governor's role, the appointment of ministers, and the Premier).
- Part 2 – Various issues (including a Lieutenant-Governor for the State, the members' oath or affirmation of allegiance to the Crown, indicative plebiscites, initiation of legislative amendment, summoning Parliament, waste lands of the Crown, parliamentary secretaries, non-compliance with certain requirements, restoration of a local government after suspension, and statutory office holders).
- Part 3 – The judiciary (including judicial independence, emerging issues regarding the judiciary requiring further review, acting judges, compulsory retirement, and removal from office).
- Part 4 – Conclusion.

Unless otherwise stated, all recommendations in this report are directed to the Premier and Minister for Trade who is the minister responsible for administering Queensland's constitutional legislation and, in particular, the *Constitution of Queensland* and *Parliament of Queensland Act.*

PART 1 – INCORPORATION OF CONSTITUTIONAL PRINCIPLES, CONVENTIONS AND PRACTICES

2. INCORPORATION OF CONSTITUTIONAL PRINCIPLES, CONVENTIONS AND PRACTICES

2.1 BACKGROUND

Queensland's Constitution does not explain or incorporate all aspects of the State's constitutional system. 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 as discussed below), and that the ministry's authority to govern is dependent on retaining the confidence of the majority of the Legislative Assembly. In addition, there is a range of constitutional principles and conventions which are observed for political and financial reasons, although they are not included in the Constitution or any other legislation and are not enforceable by the courts.

The *Constitution of Queensland 2001* has, for the first time, made mention of some 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 2001*, 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* should make reference to other constitutional principles, conventions and practices and, if so, to what extent.

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, acting on the advice of the Premier, appoints and dismisses other members of the Legislative Assembly as ministers of the Crown.
- The Governor, in exercising the legal powers vested in that office, always acts on the advice of the Executive Council, the Premier or the appropriate minister, except in exercising a 'reserve power'. (Reserve powers are those rare powers exercised by the Governor in exceptional circumstances without or against the advice of the government.)
- The Premier and 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. The reserve powers are generally recognised as the power to: appoint the Premier, dismiss the Premier, refuse a dissolution of Parliament, and force a dissolution of Parliament.[14]

Codifying the conventions (that is, bringing them together in writing either in the Constitution or other legislation) would have the benefits of clarity and certainty. Other positive consequences of codification might include greater accountability of, and public confidence in, the system of government as a whole. Clarifying the correct and proper use of the reserve powers might also remove

[14] G Winterton, 'The constitutional position of Australian state governors' in H P Lee and G Winterton (eds), *Australian Constitutional Perspectives,* The Law Book Co Ltd, Sydney, 1992 at 293.

the Governor from a political debacle and political interference, and achieve consistent use of the powers.[15]

However, there are several arguments against expressly incorporating conventions, including those that govern the exercise of the Governor's reserve powers, in the Constitution.[16] In particular, while there is general agreement as to the essence of the conventions which surround the exercise of the reserve powers, there is disagreement as to their precise limits. There would be much difficulty in obtaining consensus as to what the rules currently are, what they should be, and indeed whether it is possible for the conventions to be drafted to cover all potential crises. Written provisions would also be subject to differing interpretations. Conversely, unwritten conventions have the distinct advantage of flexibility which means they can be adapted to meet new and unforseen circumstances.

The QCRC also raised the issue of justiciability of written rules and the risk of politicisation of the courts in that 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.

To avoid these outcomes, the QCRC 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. The QCRC explained its position as follows:

> *The Commission does not believe that extensive codification of conventions is a realistic prospect at the present time. Instead, it would draw a distinction between codifying the reserve powers to the extent that they might become justiciable (a possibility which it also rejects for the present) and stating certain basic principles that identify the roles which particular parts of the constitutional system are expected to discharge. The latter informs citizens about the rules by which they are governed.*[17]

2.2 THE COMMITTEE'S BROAD APPROACH TO CODIFICATION

In general, the committee has considerable concerns with codifying constitutional conventions in the Queensland Constitution. Our system of government is continually evolving. Conventions, which underpin our system of government, are flexible in nature and thus have adapted to changes in the legal and political environment brought about by events such as federation, the abolition of the Legislative Council and the rise of party government.

The nature of conventions means that their precise scope has been, and still is, the subject of much debate. Despite attempts by various bodies to formulate agreed conventions, there has been little success in reaching consensus in the most contentious areas.[18] The difficulty in formulating

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15 For a discussion on arguments for codification see: Y Marsh, *Monarchy or Republic? Reserve powers of the head of state: The Gordian knot*, Department of the Parliamentary Library, Parliament of the Commonwealth of Australia, Canberra, 1993 at 42-45; Republic Advisory Committee, *An Australian Republic: The options – the report*, Commonwealth Government Printer, Canberra, 1993 at 89 and 97-99.

16 For a discussion on arguments against codification see: Y Marsh, n 15 at 49-51; Republic Advisory Committee report, n 15 at 89-90 and 99.

17 QCRC report, n 1 at 46-47. 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.

18 For a discussion of the history of the debate over codification of the conventions surrounding the reserve powers see: the Republic Advisory Committee report, n 15 at 96 and appendix 7; and C Sampford and D Wood, 'Codification of constitutional conventions in Australia', *Public Law*, Summer 1987 at 231-244. More recently, the issue has been relevant to the republic debate and the powers of an Australian President: see Constitutional Convention, *Report of the Constitutional Convention: Volume 1 Report of Proceedings,* CanPrint Communications Pty Ltd, 1998; and *Advisory report on Constitution Alteration (Establishment of Republic) 1999 and Presidential Nominations Committee Bill 1999,* Joint Select Committee on the Republic Referendum, the Parliament of the Commonwealth of Australia, Canberra 1999.

conventions is also evidenced by the range of comments made in submissions to the committee on the issue.

Defining constitutional conventions in statute is thus inherently problematic because it would prevent them from being able to evolve and adapt to changing circumstances. In contrast, flexibility means that different scenarios that arise can be responded to according to the political circumstances of the time.

Having said this, the committee believes that the State's Constitution should, as far as practicable, be an accessible, stand alone document which explains how government operates. Thus, the Constitution should identify the key components of government and include provisions that are necessary to explain the operation and interrelationship of these key components. The *Constitution of Queensland 2001* takes this approach.

Fundamental constitutional principles, conventions and practices are important components of the system of government in Queensland. Thus, there is justification for including them in the Constitution where this can be achieved without detracting from their flexibility. Where this is not possible or desirable, the accessibility of the Constitution can nevertheless be enhanced by appropriate non-legislative annotations to the Constitution. The annotated Constitution released by the Government in June 2002 shows how effectively this can be achieved.

The committee's position on which specific principles, conventions and practices should be included in Queensland's Constitution within the general framework described above are addressed in this chapter.

RECOMMENDATION 1 – CONSTITUTIONAL CONVENTIONS

The *Constitution of Queensland 2001* should identify the key components of government and include provisions that are necessary to explain the operation and interrelationship of these key components. However, constitutional principles, conventions and practices should only be expressly referred to in the *Constitution of Queensland 2001* where this can be achieved without detracting from their flexibility.

Constitutional principles, conventions and practices which are not expressly referred to in the *Constitution of Queensland 2001* should be recognised and explained in appropriate non-legislative annotations to the Constitution.

2.3 A STATEMENT OF EXECUTIVE POWER

Recommendation under review	*Source material*
QCRC R6.1 That a statement of executive power be added to the Queensland Constitution	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

2.3.1 Background

Clause 30 of the QCRC's Constitution of Queensland Bill, which gives effect to R6.1, provides as follows:

> *30(1) The executive power of Queensland is vested in the Sovereign and extends to the administration of the Constitution and the laws of Queensland.*

> *(2) Subsection (1) does not limit the Sovereign's other functions and powers in relation to Queensland.*
>
> *(3) Subject to subsections (4) and (5), all functions and powers of the Sovereign in relation to Queensland may be performed or exercised only by the Governor.*
>
> *(4) Subsection (3) does not apply in relation to the power to appoint, and the power to terminate the appointment of, the Governor.*
>
> *(5) While the Sovereign is personally present in Queensland, he or she is not precluded from performing or exercising any of His or Her functions and powers in relation to Queensland.*
>
> *(6) Advice to the Sovereign in relation to the performance or exercise of the Sovereign's functions and powers in relation to Queensland is to be tendered by the Premier.*

The clause essentially comprises two parts:

- subclause (1) which is a statement of the executive power of Queensland; and
- subclauses (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 of Queensland 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*'.[19]

However, the former LCARC did not recommend inclusion of subclauses (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 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.*[20]

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 '*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'*.[21] The Government subsequently referred the matter 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

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19 LCARC report no 24, n 4, Constitution of Queensland 2000, clause 31—Notes to the bill at 13.

20 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 *Australia Acts 1986* (Cth and UK), s 7(2)-(5) in a footnote to the relevant clause.

21 Letter from the Acting Premier and Minister for Trade, the Hon T Mackenroth MP, to the committee dated 17 January 2002: see appendix A. See also Hon P D Beattie MP, Queensland, Legislative Assembly, *Parliamentary Debates (Hansard)*, 9 November 2001 at 3717.

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 Commonwealth 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).[22]

2.3.2 Committee analysis

Inclusion of a statement of executive power. This committee agrees with its predecessor that it is desirable to include a statement of executive power in the Constitution so as to better explain Queensland's constitutional framework.[23] Under our current system of government, the Sovereign is at the apex of executive government. Executive power is vested in the Sovereign and exercised by the Governor as the Sovereign's representative. This should be reflected in the Constitution.

A statement of executive power also provides the opportunity to describe in an introductory manner the relationships between the various persons and institutions of the executive, and is a counterpart to the statement of legislative power in s 2 of the *Constitution Act 1867* (Qld).[24]

Mr John Pyke submitted to the committee that a statement as to the vesting of executive power should be included in the Constitution but that it should not '*maintain the pretence that the Queen (or the Governor) has something to do with the day-to-day exercise of executive power*'.[25] Mr Geoffrey Fisher also recognised the argument that the QCRC's clause 30(1) might be seen as perpetuating a constitutional fiction given the formal and now very limited role of the Queen in practice. Hence, Mr Fisher suggested that the QCRC's clause 30(1) should not be allowed to stand in isolation but rather should be qualified by repeating in the Constitution the substance of s 7(2)-(5) of the *Australia Acts* (as recommended by the QCRC) so as to produce:

> *...a comprehensive and informative statement of the constitutional law regarding (i) the residual role of the Queen, (ii) the exercise of most of the powers and functions of the Sovereign only by the Governor and (iii) the exercise of powers and functions in relation to Queensland by the Sovereign on the advice of the Premier.*[26]

While the Queen and Governor have little to do with the day-to-day exercise of executive power, the committee is strongly of the view that the Constitution should reflect the legal position that the Sovereign heads the executive government in Queensland. Like the former LCARC, the committee is unconvinced that s 7(2)-(5) of the *Australia Acts* should be repeated in the Constitution. However, reference should be made to these provisions in a footnote to the statement of executive power in the Constitution. The annotated Constitution should also explain both the day-to-day exercise of executive power and how the *Australia Acts* provide for the Sovereign's functions and powers in relation to Queensland.

Professor George Winterton also warned against any provision modelled on s 61 of the Commonwealth Constitution which *vests* the executive power of the State on the basis that it could:

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22 The Western Australian Commission on Government (WACOG) also recommended a provision for that State's constitution along the lines that, in the exercise of the Governor's powers and duties, the Governor shall act on the advice of elected officials except in circumstances where the Governor acts independently to safeguard the constitution of the State: *Report no 5*, Perth, Western Australia, August 1996 at 55.

23 Submitters who supported a statement of executive power in the Constitution included: Mr Anthony Marinac (sub no 5); Professor George Williams (sub no 6); Mr Don Willis (sub no 11); Professor Suri Ratnapala (sub no 21); the National Party Queensland (sub no 24); Mr John Pyke (sub no 28); Mr Geoffrey Fisher (sub no 33); Professor George Winterton (sub no 34).

24 See the submission by Mr Geoffrey Fisher (sub no 33).

25 Submission no 28.

26 Submission no 33.

> *...provide the foundation for implying a legal separation between legislative and executive power in the State, with possible consequences such as limitation of parliamentary control over the executive and limits on Parliament's power to delegate legislative power to the Government. It is notable that the Queensland Constitution presently contains no provision vesting legislative power in Parliament or judicial power in the courts.*[27]

Professor Winterton went on to suggest that if a vesting provision were to be included, it be accompanied by a provision along the lines of: '*The executive power of Queensland shall be subject to the legislative power of Queensland*'.

It is significant that these concerns raised by Professor Winterton have not been raised under s 61 of the Commonwealth Constitution, not at least since the decision of the High Court in Dignan's Case[28] in 1931. That case established the capacity of the Commonwealth Parliament to delegate wide powers to the executive to make delegated legislation. That same capacity has always been recognised at the State level. The committee does not believe that this position would change if an express provision vesting executive power in the Sovereign exercisable by the Governor is incorporated in the Queensland Constitution. This would merely be declaratory of the current position. It should not give rise to any suggestion that the Parliament is unable to delegate functions to the executive or has lost its present controls over the executive, especially its financial control.

Moreover, it is firmly established as a constitutional and legal principle that the executive power is always subject to being abrogated or amended by an Act of Parliament.[29] Although it is unnecessary for this fundamental legal principle to be expressly incorporated in the Constitution, its inclusion would accord with the committee's broad approach that the Constitution outline key components of the government of the State and their interrelationship: see chapter 2.2.

The committee also suggests two slight amendments to the QCRC's clause 30(1), namely: (a) replacing the word 'administration' with the phrase 'execution and maintenance' as the latter phrase, which is used in the Commonwealth Constitution, is well understood;[30] and (b) inserting a reference to the fact that executive power is exercisable by the Governor as the Sovereign's representative.

Reference to conventions in the statement of executive power. After considering the concerns of the Government and submissions on point, the committee believes that the statement of executive power should also include some reference to the constitutional conventions which regulate its exercise. In particular, the statement should: (a) refer to the fact that executive power is exercised by the Governor on the advice of Executive Council, the Premier or his or her ministers; and (b) make mention of the reserve powers but not attempt to codify them.

Using the QCRC's clause 30(1) and clause 59 of the 1999 Republic Bill as a starting point, the statement of executive power might be expressed along the following lines.

> ***Executive power of Queensland***
>
> *(1) The executive power of Queensland is vested in the Sovereign, and is exercisable by the Governor as the Sovereign's representative, and extends to the execution and maintenance of the Constitution and the laws of Queensland.*
>
> *(2) The Governor shall act on the advice of the Executive Council,*[31] *the Premier*[32] *or another Minister as appropriate; but the Governor may exercise a power that is a reserve power of the Crown in accordance with the constitutional conventions relating to the exercise of that power.*

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27 Submission no 34.

28 *Victorian Stevedoring and General Contracting Co Pty Ltd v Dignan* (1931) 46 CLR 73.

29 *Attorney-General v De Keyser's Royal Hotel* [1920] AC 508.

30 See comments by Professor Suri Ratnapala in this regard (sub no 21).

31 See chapter 2.4 regarding provisions concerning Executive Council.

32 See chapter 2.7 regarding provisions concerning the office of Premier.

The inclusion of a provision along these lines should be accompanied by provisions stating that the enactment of the section does not:

- prevent the evolution of the constitutional conventions, including those relating to the exercise of the reserve powers; nor
- make justiciable the exercise by the Governor of a reserve power referred to in the section if the exercise by the Governor of that power was not justiciable prior to enactment of the provision. It is particularly important that those powers which require the exercise of the Governor's discretion remain non-justiciable.

RECOMMENDATION 2 – A STATEMENT OF EXECUTIVE POWER

The *Constitution of Queensland 2001* should include a statement of executive power expressed along the following lines.

(1) The executive power of Queensland is vested in the Sovereign, and is exercisable by the Governor as the Sovereign's representative, and extends to the execution and maintenance of the Constitution and the laws of Queensland.

(2) The Governor shall act on the advice of the Executive Council, the Premier or another Minister as appropriate; but the Governor may exercise a power that is a reserve power of the Crown in accordance with the constitutional conventions relating to the exercise of that power.

(3) The executive power of Queensland is subject to the legislative power of Parliament.'

This provision should include a footnote to the effect that the *Australia Acts 1986* (Cth and UK), s 7(2)-(5) provide for the Sovereign's functions and powers in relation to Queensland.

The inclusion of a provision along these lines should be accompanied by additional provisions stating that the enactment of the provision does not:

- prevent the evolution of the constitutional conventions, including those relating to the exercise of the reserve powers; nor
- make justiciable the exercise by the Governor of a reserve power referred to in the section if the exercise by the Governor of that power was not justiciable prior to enactment of the provision.

2.4 THE EXECUTIVE COUNCIL

The statement of executive power proposed by the committee in recommendation 2 states that the Governor shall act on the advice of the Executive Council. Chapter 3, part 4 of the *Constitution of Queensland 2001* contains provisions about the Executive Council but does not state a number of important matters which the committee believes it should address.[33]

First, the Constitution says nothing about the role and functions of the Executive Council. The Executive Council advises the Governor on the exercise of the powers of the Governor in Council. The phrase 'Governor in Council' refers to the Governor acting with the advice of the Executive Council.[34]

The Governor in Council gives legal authority to actions to be taken or decisions made under Acts of Parliament, such as appointments, making regulations and by-laws, and approving financial deeds of agreement.

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33 The QCRC saw retention of the Executive Council in its present form and with its present responsibilities as necessary: report, n 1 at 46.

34 *Constitution of Queensland 2001* (Qld), s 27 (Governor in Council).

Thus, the Executive Council, unlike Cabinet, is not a deliberative body. Rather, it is the forum in which the Premier and ministers tender advice to the Governor as to decisions by ministers and the government, and in which those decisions are given legal effect.

This committee, like its predecessor, does not support clause 23 of EARC's Constitution Bill 1993 which provided that: '*The function of Executive Council is to exercise the executive power of the State'*.[35] For the reasons noted in chapter 2.3, this committee is concerned that this clause might inadvertently vest the executive power of the State in the Executive Council, instead of in the Sovereign.

Rather, the committee prefers wording along the lines that the main function of the Executive Council is to advise the Governor on the government of the State.[36]

Secondly, chapter 3, part 4 does not state that, by convention, executive councillors are the same persons who comprise the ministry and Cabinet.[37] Section 48(2) of the Constitution merely provides that: '*Executive Council consists of the persons appointed as members of the Executive Council by the Governor by instrument under the Public Seal of the State'*. In contrast, s 64 of the Commonwealth Constitution provides that ministers are members of the Federal Executive Council.

The practice in Queensland is that persons are appointed as executive councillors immediately after being sworn in as ministers.[38]

Likewise, the Constitution (s 49) merely provides that the appointment of a person as a member of the Executive Council ends only on the happening of either the person's resignation as a member of the Executive Council, or the person's removal as a member of the Executive Council by the Governor. By convention, when ministers resign their portfolio, they must also tender their resignation as a member of the Executive Council if they no longer remain in the ministry.[39]

When EARC provided for the Executive Council in clause 22 of its Constitution Bill 1993, EARC's provision stated: '*Executive Council consists of persons appointed to be Ministers of the State*'. The former LCARC avoided this wording because it considered that EARC's clause may overstate the existing relationship. The former committee observed:

> *While Ministers are, in practice, Executive Councillors, they become so only after undergoing an additional and supplementary appointment* as *Executive Councillors. When Ministers resign their portfolio and they no longer remain in the Ministry, they must also resign as members of the Executive Council. EARC's cl 22 might have operated to deem Ministers to be Executive Councillors* by virtue of *their appointment* as Ministers*. This could have made both appointments as Executive Councillors and the oath of office and of secrecy that is currently taken by the Executive Councillors obsolete. That oath of secrecy is important.*[40]

The former committee considered making it explicit that the Executive Council consists of *ministers* appointed as members of the Executive Council. However, in light of the consolidatory nature of its review, chose not to adopt such drafting and to leave convention to dictate the matter.

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35 LCARC report no 24, n 4, Constitution of Queensland 2000, clause 48—Notes to the bill at 21.

36 The 1988 Constitutional Commission recommended that the Commonwealth Constitution include a new s 65(1) providing that: '*There shall be a Federal Executive Council to advise the Governor-General in the government of the Commonwealth'*: *Final report of the Constitutional Commission*, AGPS, Canberra, 1988 volume one at para 5.104.

37 Mr Don Willis (sub no 11) submitted that this convention should be considered for inclusion in the Constitution.

38 The Queensland Executive Council Handbook at para 2.4.

39 Note 38.

40 Report no 24, n 4, Constitution of Queensland 2000, clause 48—Notes to the Bill at 20-21.

RECOMMENDATION 3 – THE EXECUTIVE COUNCIL

Chapter 3, part 4 of the *Constitution of Queensland 2001* should be amended to state that:

- the main function of the Executive Council is to advise the Governor on the government of the State;
- the Executive Council consists of ministers appointed as members of the Executive Council; and
- when ministers resign their portfolio, they must also tender their resignation as a member of the Executive Council if they no longer remain in the ministry.

2.5 THE GOVERNOR'S ROLE

Recommendations under review	*Source material*
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	QCRC report ch 6 at 50-53; QCRC Constitution of Queensland 2000, cl 42
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	QCRC report ch 6 at 50-53; QCRC Constitution of Queensland 2000, cl 33

2.5.1 Background

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, 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 fully 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.

Clause 42 of the QCRC's Constitution of Queensland Bill which gives effect to R6.2 provides:

> *The Premier is to keep the Governor fully informed of the general conduct of the government and give the Governor the information the Governor may request on any particular matter relating to the government that is relevant to the performance or exercise of the Governor's functions or powers.*

Clause 33 of the QCRC's Constitution of Queensland Bill gives effect to R6.3. While R6.3 refers to possible illegal or corrupt activities by a member of the ministry, clause 33 of the QCRC's Constitution Bill refers to alleged illegal conduct or official misconduct by: (a) the Premier; or (b) a minister and the Premier is failing to take appropriate action to recommend the minister's dismissal.

2.5.2 Committee analysis: The right to be kept informed and request information

In principle, the committee is not opposed to recognising in the Constitution the convention that the Governor is entitled to ask questions and seek further information from his or her advisers.[41] (Bagehot's oft-quoted traditional formulation of this convention is that the Sovereign has the right to be consulted, to encourage and to warn.[42])

However, the committee has some concerns with the drafting of the QCRC's clause 42 and, in particular, inclusion of a requirement that the Premier must keep the Governor 'fully informed' of the general conduct of the government.

To overcome these concerns, the committee suggests that the clause be redrafted along the following lines: '*The Governor is entitled to request from the Premier or a minister information on any particular matter relating to the government that is relevant to the performance or exercise of the Governor's functions or powers'*.

RECOMMENDATION 4 – THE GOVERNOR'S RIGHT TO REQUEST INFORMATION

The *Constitution of Queensland 2001* should include a provision recognising the Governor's right to request information. This provision should be drafted along the following lines: '*The Governor is entitled to request from the Premier or a minister information on any particular matter relating to the government that is relevant to the performance or exercise of the Governor's functions or powers*'.

2.5.3 Committee analysis: Court declarations regarding possible illegal or corrupt conduct

The committee has concluded against including in the Constitution a provision which states that the Governor has the power to apply to the Supreme Court (or the Court of Appeal) for a declaration concerning possible illegal or corrupt activities by the Premier or a member of the ministry.[43] The primary reasons for the committee's position on this issue are as follows.

Unnecessarily involving the courts in the political process. It seems that the QCRC was concerned with criminal or corrupt conduct in making its recommendation.

> *It might be added that it would be a question of the criminal law, or analogous statutory law relating to corrupt conduct by a public officer, that would be before the Supreme Court. It would not be an interpretation of prerogative or reserve powers, of constitutional conventions or political precedents, which the Commission agrees are better kept out of the courts for the reasons stated above.*[44]

However, it is feasible that a provision such as the QCRC proposes might be seen to promote the transfer of decisions which are properly that of the Governor to the judicial arm of government. A benefit of the Governor exercising powers in accordance with convention is that his or her decisions

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41 Submitters who supported adoption of the QCRC's proposal in some form included: Professor George Williams (sub no 6); Mr Don Willis (sub no 11); Professor George Winterton (sub no 34). Mr John Pyke (sub no 28) saw no harm in including this existing convention in the Constitution but doubted whether it would produce any great benefit. Submitters who did not support adoption of the QCRC's proposal included: Mr Anthony Marinac (sub no 5); Mr Laurie Marquet (sub no 35) and Hon R Hollis MP (sub no 37).

42 *The English Constitution,* Oxford Pocket Classics, at 111 cited in G Marshall, *Constitutional Conventions: The rules and forms of political accountability*, Clarendon Press, Oxford, 1984 at 19.

43 Submitters who also had concerns with including a provision such as suggested by the QCRC included: Mr Anthony Marinac (sub no 5); Professor George Williams (sub no 6); Mr Don Willis (sub no 11); Professor Suri Ratnapala (sub no 21); Mr John Pyke (sub no 28); the Crime and Misconduct Commission (sub no 30); Mr Laurie Marquet (sub no 35); Hon R Hollis MP (sub no 37). Professor George Winterton (sub no 34) submitted that a provision empowering the Governor to seek a declaration from, preferably, the Court of Appeal regarding the lawfulness of government conduct has, in principle, much to commend to it.

44 Report, n 1 at 53.

are non-justiciable, which leaves matters to be resolved by political means (ultimately an election at which the people decide). Bringing the courts (and inevitably also persons such as the Solicitor-General and Crown Solicitor) into the political arena in these circumstances is highly undesirable.

The QCRC's proposal would also increase the likelihood of calls from some sectors of the community for the Governor to apply for a declaration. Professor Suri Ratnapala[45] gave the following as one of his reasons for describing the QCRC's proposal as '*ill-informed, ill-defined and risky'*:

> *Westminster constitutional convention militates against the dismissal of the Premier on grounds of illegal conduct except in very extreme cases. The Governor should act only if the normal processes of law cannot be used to resolve the matter and the potential harm to the constitution or the public interest is clear, present and substantial. The proposed power is not confined to such situations. The Governor will come under constant pressure to exercise this power in relation to decisions made by ministers.*

Existing mechanisms and practicality. A court could only make a declaration about any alleged activity if the factual circumstances involved had been fully investigated. The courts are not investigative bodies as such.

In this regard, the Crime and Misconduct Commission (CMC)[46] submitted that there is presently an appropriate legislative framework to deal with the sorts of problems raised in the QCRC's report.

> *The CMC already has jurisdiction to investigate alleged illegal conduct by the Premier, or other Ministers, in an official capacity. Any alleged illegal conduct in a private capacity would be investigated by the [Queensland Police Service]. In the Commission's view, the appropriate course for a Governor who suspected or believed that a Premier was involved in illegal conduct would be to refer the matter to the CMC or to the QPS for investigation. That way the matter could be fully investigated.*
>
> *...*
>
> *...it would not be appropriate to ask the Supreme Court or the Court of Appeal to make a 'declaration' as to the legality of alleged criminal or corrupt conduct, rather than allowing such matters to be investigated and to proceed to trial in the normal manner. If an investigation of such allegations by the CMC disclosed sufficient evidence to justify charges, a report would normally be made to the Director of Public Prosecutions under section 49 of the* Crime and Misconduct Act 2001. *If the DPP considered that charges were warranted, the matter would proceed through the normal criminal trial process. If an investigation disclosed that the allegations were not substantiated, the CMC would normally report to the Governor, if he or she were the complainant, on the results of such investigation. The CMC could also publish a report (if the allegations were not substantiated) which would clarify the issue on the public record.*
>
> *In cases where a matter was referred for prosecution, and there was likely to be no timely resolution, the Commission could provide information about the matter to the Governor under section 60(1) of the* Crime and Misconduct Act 2001*, which would allow an exercise of his or her discretion on the basis of the information contained in the report.*

The CMC concluded that if it were thought that the situation needs to be clarified this could be achieved by legislative amendment which specified that the Governor may refer his or her suspicion or belief about alleged illegal conduct by the Premier or other ministers to the CMC and that the CMC may report on the results of its investigation of such conduct to the Governor (in addition to other appropriate authorities such as the DPP).

Exceptional circumstances. As the QCRC recognises, it would only be in very rare circumstances that the Governor would be forced to take court action to inform his or her decision whether there is

45 Submission no 21.

46 Submission no 30.

illegality warranting the exercise of his or her reserve power to dismiss a Premier. Since federation there has only been one instance of dismissal of a head of state in Australia on the grounds of perceived illegality, namely, the dismissal of the Lang Government in New South Wales in 1932 by Governor Sir Phillip Game for a breach of commonwealth law.

Federal law issues. Professor George Winterton[47] submitted that a provision empowering the Governor to seek a declaration from, preferably, the Court of Appeal regarding the lawfulness of government conduct has, in principle, much to commend to it. However, he recognised that a serious objection to such a provision does arise from the fact that:

- the alleged conduct might involve a breach of Commonwealth legislation, and thus the exercise of federal jurisdiction, in which case it is doubtful whether a State Parliament could validly confer standing on the Governor to invoke that jurisdiction; and
- there is a possibility of appeal to the High Court. Professor Winterton suggested that this could be overcome by a provision stating that viceregal action pursuant to such a declaration should be deferred until the High Court has ruled on the matter (or declined to do so).

RECOMMENDATION 5 – THE GOVERNOR'S POWER TO APPLY FOR COURT DECLARATIONS

The *Constitution of Queensland 2001* should not include a provision stating that the Governor has the power to apply to the Supreme Court (or the Court of Appeal) for a declaration concerning possible illegal or corrupt activities by the Premier or a member of the ministry.

2.6 THE APPOINTMENT OF MINISTERS

Recommendation under review	*Source material*
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	QCRC report ch 6 at 53-54; QCRC Constitution of Queensland 2000, cl 43(1)

2.6.1 Background

Section 34 of the *Constitution of Queensland 2001* provides 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 is '*an indefensible breach of the principle of responsible government which is one of the main tenets of the Queensland Constitution*'.[48]

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'*. The QCRC noted that this is contrary to the strong convention that only members of the Legislative Assembly will be appointed as ministers. The QCRC also felt that this creates 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*.'[49]

47 Submission no 34.
48 QCRC report, n 1 at 53.
49 QCRC report, n 1 at 54.

The Commonwealth Constitution (s 64) provides a three month grace period in which a minister must become either a senator or a member of the House of Representatives. In South Australia and Victoria, persons appointed as ministers must either be, or must become within three months, members of the state Parliament.[50] In New Zealand, a person who is not a member of Parliament may be appointed as a minister if that person was a candidate for election at the preceding general election for the House of Representatives. However, a person so appointed as a minister vacates office if after 40 days he or she has not become a member of Parliament.[51]

The QCRC recognised that amending the Constitution to provide that ministers must be members of the Legislative Assembly (without any such grace period) 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 the Legislative Assembly: QCRC R6.4.

2.6.2 Committee analysis: Appointing and dismissing ministers

The committee has concerns with stating in the Constitution that the Governor always acts on the advice of the Premier in appointing and dismissing ministers.[52]

Making the requirement absolute means it cannot be lawfully deviated from and thus impinges on the flexibility of our system of government. For example, Mr John Pyke submitted:

> *A section such as is suggested…would imply that the Governor must dismiss Ministers on the advice of a Premier even if it is possible that the Premier has lost the support of his party. If the Constitution had so provided in November 1987, Sir Walter Campbell may not have been able to take the wise decision not fully accept Sir Joh's advice to replace some Ministers until it had become clear whether the Party supported Sir Joh or not.*[53]

It might be possible to attempt to address these concerns by, for example, a provision which makes it clear that the Governor shall, *in accordance with constitutional convention*, act on the advice of the Premier in appointing and dismissing ministers. However, such a provision gives a Premier, in a situation such as occurred in 1987, better leverage to bring pressure to bear on the Governor to immediately follow his or her advice. It also defeats the purpose of making the provision self-explanatory.

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50 *Constitution Act 1934* (SA), s 66(1); *Constitution Act 1975* (Vic), s 51.

51 *Constitution Act 1986* (NZ), s 6(2)(a). Section 6(2)(b) provides that if a member of Parliament who is a minister ceases to be a member, he or she cannot continue to hold ministerial office for longer than 28 days after ceasing to be a member.

52 Submitters who likewise opposed codification of this convention included: Mr Anthony Marinac (sub no 5); the National Party Queensland (sub no 24); Mr John Pyke (sub no 28); Mr Laurie Marquet (sub no 35). Submitters who supported codification of this convention included: Professor George Williams (sub no 6); Mr Don Willis (sub no 11); Mr Geoffrey Fisher (sub no 33); Professor George Winterton (sub no 34). Hon R Hollis MP (sub no 37) submitted that the Constitution should provide that the Governor shall take into account the advice of the Premier and resolutions of the Legislative Assembly in appointing and dismissing ministers.

53 Submission no 28. See also the submission of Mr Anthony Marinac (sub no 5).

RECOMMENDATION 6 – APPOINTING AND DISMISSING MINISTERS

The *Constitution of Queensland 2001* should not provide that the Governor shall act on the advice of the Premier in appointing and dismissing ministers.

2.6.3 Committee analysis: Ministers must be members of the Legislative Assembly

It is a key aspect of Queensland's constitutional system that ministers must be members of the Legislative Assembly.[54] As Mr Geoffrey Fisher submitted: '*This conventional rule is basic to sustaining the core doctrine of responsible government, namely that ministers are accountable to Parliament and rely on the support of Parliament for their continuance in office*'.[55] Thus, the committee believes that this convention should be expressly recognised in the Constitution.[56]

To overcome situations which the QCRC termed '*rare and minor inconveniences'*, a person should be able to be appointed a minister provided he or she is elected to Parliament within a certain period of time of their appointment.[57]

Such a 'grace period' would:[58]

- avoid any doubt about the validity of the appointment of a person, elected as a member, as a minister before that person has actually taken his or her seat in the Parliament. This also ensures that a new government can proceed quickly with the business of government before the first meeting of the newly-elected Parliament;
- enable ministers to continue in office once the Assembly's term has expired or once the Assembly has dissolved pending a general election;[59] and
- introduce some flexibility without compromising the basic principle that the ministry should be drawn from the membership of the Parliament. For example, it would: (a) overcome the situation where a minister is required 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; (b) permit a minister who does not seek re-election or is defeated at a general election to retain ministerial office until a successor is appointed; and (c) provide scope for the introduction into the ministry, if a government thinks it desirable, of persons who have yet to be elected for parliamentary office.

The committee believes that it is appropriate that a person should be required to become a minister within 90 days.[60] If the Legislative Assembly sits during the 90 day period in which a minister is not a

54 While the *Constitution of Queensland 2001* (Qld) does not require that to be appointed to office a minister must hold a seat in Parliament, this is implied by the provisions in the *Parliament of Queensland Act 2001* (Qld), chapter 4, part 2 (Candidates and members holding paid public appointments).

55 Submission no 33.

56 Submitters who supported inclusion of this convention in the Constitution included: Mr Anthony Marinac (sub no 5); Professor George Williams (sub no 6); Mr Don Willis (sub no 11); Professor Suri Ratnapala (sub no 21); Mr John Pyke (sub no 28); Queensland Transport and Main Roads (sub no 29); Mr Geoffrey Fisher (sub no 33); Professor George Winterton (sub no 34); Mr Laurie Marquet (sub no 35); Hon R Hollis MP (sub no 37).

57 Submitters who supported/did not object to such a 'grace period' included: Mr Anthony Marinac (sub no 5); Professor George Williams (sub no 6); Professor Suri Ratnapala (sub no 21); Mr John Pyke (sub no 28); Queensland Transport and Main Roads (sub no 29); Mr Geoffrey Fisher (sub no 33); Professor George Winterton (sub no 34); Hon R Hollis MP (sub no 37).

58 The 1988 Constitutional Commission concluded that a grace period should continue to be allowed at the Commonwealth level for similar reasons: n 36 at paras 5.48 and 5.52-5.57.

59 In practice, a person does not cease to be a minister until the general election following the Assembly's expiration or dissolution. Although, during this period the 'caretaker conventions' apply so as to ensure that decisions are not taken which would bind an incoming government and limit its freedom of action: Queensland Cabinet Handbook, chapter 9.

60 The 1988 Constitutional Commission noted that it had received no submissions urging an increase or reduction of the period of grace allowed by s 64 of the Commonwealth Constitution and no evidence to suggest that the

member, the Assembly would have to rely on mechanisms other than questioning the relevant minister during question time to ensure the minister's accountability.

The relevant provision should be drafted so as to avoid the theoretical possibility of a government cycling non-elected ministers through the Cabinet indefinitely by terminating each minister's commission after 89 days.[61]

RECOMMENDATION 7 – REQUIREMENT FOR MINISTERS TO BE MEMBERS OF THE LEGISLATIVE ASSEMBLY

The *Constitution of Queensland 2001* should provide that a person appointed as a minister must either be, or must become within 90 days of their appointment, a member of the Legislative Assembly. The relevant provision should be drafted so as to avoid the theoretical possibility of a Government cycling non-elected ministers through the Cabinet indefinitely by terminating each minister's commission after 89 days.

2.7 THE PREMIER

Recommendations under review	*Source material*
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	QCRC report ch 6 at 55-56; QCRC Constitution of Queensland 2000, cl 41(1) and (3)
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	QCRC report ch 14 at 81; QCRC Constitution of Queensland 2000, cl 92

2.7.1 Background

Current references to the Premier in the Constitution refer to various functions of that office rather than actually designating the office.[62] 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 the 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. (As discussed in chapter 2.1, the Governor's reserve powers are generally accepted to include the power to appoint and dismiss the Premier.)

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.*[63]

present rule has occasioned difficulties or been abused. Accordingly, it recommended that the present rule be retained but that the period of time be expressed as 90 days rather than three months: n 36 at paras 5.55 and 5.57.

61 This possibility was raised by Mr Anthony Marinac (sub no 5).

62 See, for example, 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).

63 QCRC report, n 1 at 55.

Clause 41 of the QCRC's Constitution of Queensland Bill which gives 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'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.]

The QCRC considered that the benefits of such a provision outweigh the risks of being seen to start a codification of the reserve powers. (As discussed in chapter 2.1, the QCRC warned against extensive codification of the reserve powers.)

The QCRC also considered that if the Premier were added to the offices designated in the Constitution there would need to be a transitional provision: QCRC R14.1.

2.7.2 Committee analysis: Appointment of the Premier

The Constitution should provide that the Governor appoints as Premier the member of the Legislative Assembly who is most likely to command the confidence of a majority of members of the Legislative Assembly.[64] This reflects the fundamental principle of responsible government that the Premier must have the confidence of the majority of members of the Legislative Assembly.[65] (In chapter 7 the committee discusses the related issue of whether the Legislative Assembly should be required to meet within a specified period of time following a general election to test the Premier's support on the floor of the Assembly.)

However, the following comments were made by submitters regarding the QCRC's recommendation and its clause 41(1).

Professor George Winterton commented that the phrase 'best able to command' the Legislative Assembly's confidence as used in the QCRC's clause 41(1) is ambiguous. Professor Winterton felt that this clause '*could imply that the Governor is to evaluate the worthiness of the candidate, and not merely assess support in the Legislative Assembly, which is the Governor's true function*'.[66]

Mr John Pyke raised an issue regarding the word 'support' which is used in the QCRC's recommendation but not in its clause 41(1). He suggested that if some phrase such as 'support' is used, '*…it should be made clear that this does not mean that the majority must support the government in everything that it wants to do. If a 'minority government' can muster 'support' in the*

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64 Submitters who supported codification of this convention included: Mr Anthony Marinac (sub no 5); Professor George Williams (sub no 6); Mr Don Willis (sub no 11); Professor Suri Ratnapala (sub no 21); Mr Geoffrey Fisher (sub no 33); Professor George Winterton (sub no 34); Hon R Hollis MP (sub no 37). Mr John Pyke (sub no 28) submitted that if the key principle of responsible government—that the government has the support of a majority—is to be stated then it should be in terms that the Governor should appoint as *ministers* those who *collectively* have the support of the majority of the Assembly. The National Party Queensland (sub no 24) submitted that it would be beneficial for the Constitution to make reference to the Premier but that the process of appointment should be left to relevant conventions.

65 Such a provision was implemented in item 2(2) of the 1993 Republic Advisory Committee's partial codification: report n 15 at 103.

66 Submission no 34.

minimal sense that a majority is prepared to tolerate this Ministry and pass its Appropriation Bills, this is support enough, according to the convention as generally understood'.[67]

The committee agrees with both of these comments. Additionally, the Constitution should expressly state that the Governor's power to appoint a member of the Legislative Assembly as Premier is non-justiciable. (Codification of the Governor's reserve power to appoint the Premier would mean that the provision recommended by the committee in recommendation 2 does not apply.)

Mr Geoffrey Fisher suggested inclusion of a new subclause (1) along the following lines: '*The Governor shall appoint a person, to be known as the Premier, to be the head of the Government of the State'*.[68] While this description is technically correct, the committee is concerned that such a subclause has the potential to cause confusion with the Sovereign who is the head of state and therefore has decided against inclusion of such a subclause.

RECOMMENDATION 8 – APPOINTMENT OF THE PREMIER

The *Constitution of Queensland 2001* should include a provision designating the office of Premier. This provision should state that:

- the Governor appoints as Premier the member of the Legislative Assembly who, in the Governor's opinion, is most likely to command the confidence of a majority of members of the Legislative Assembly; and
- the Premier is a minister.

The *Constitution of Queensland 2001* should also provide that:

- the appointment as Premier of the person who immediately before the commencement of the appropriate provision was the Premier is not affected (as a transitional provision); and
- the Governor's power to appoint a member as Premier in accordance with the above provision is non-justiciable.

2.7.3 Committee analysis: Dismissal of the Premier

The committee has strong reservations about codifying the Governor's reserve power to dismiss a Premier. The scope of this reserve power and the circumstances in which it is appropriate to exercise it are likely to be much more controversial than the power to appoint a Premier. This has been evidenced by the two instances in which the power has been exercised in Australia's history.[69]

The range of comments by constitutional law experts who made submissions to the committee also indicates the difficulties with codification. Issues raised in submissions included the following.

Professor Suri Ratnapala described the QCRC's R6.6 as '*seriously misconceived'* for reasons including the following.

> *1.The loss of confidence of the Legislative Assembly does require the termination of the Premier's commission. However, it is misleading to state that this action is a dismissal. The term dismissal is appropriately applied when the Premier is dismissed for acting contrary to law or convention. The convention is that the Premier who loses confidence of Parliament offers the Governor the resignation of himself and of his ministry with the advice that the Governor:*

67 Submission no 28.

68 Submission no 33. See also the recommendation of the 1988 Constitutional Commission: n 36 at para 5.30.

69 The two instances in which the power has been exercised in Australia occurred in 1932 in NSW when the Governor, Sir Philip Game, dismissed Premier Jack Lang, and in 1975 when the Governor-General, Sir John Kerr, dismissed Prime Minister Gough Whitlam.

> *(a) Invite another member to form a government; or*
>
> *(b) Dissolve the Legislative Assembly so that a general election is held and appoint the Premier as the Caretaker Premier until the new government is formed after the elections.*
>
> *2. The proposal as currently presented will not promote public understanding of the working of the Constitution and may introduce dangerous uncertainties.*
>
> *3. I am of the view that there are only three clear situations warranting the dismissal of a Premier. That is when:*
>
> *(a) The Premier refuses to tender the resignation of the government when a confidence motion (however framed) is lost; or*
>
> *(b) The Premier refuses to resign when the government has failed to secure supply for the ordinary annual services of government; or*
>
> *(c) The Premier or the government is engaging in a gross violation of the law in a situation where timely judicial intervention to prevent irreparable harm to the constitutional order is not possible.*[70]

In relation to the question of whether a provision should be included in the Constitution stating that the Governor must dismiss the Premier when the Legislative Assembly passes: (a) a resolution requiring his or her appointment to be revoked; or (b) a vote of no confidence against the Premier, Mr John Pyke submitted that such a provision:

> *...would seem to remove the option of dissolution on the advice of the PM/Premier who has just lost a vote. I suggest therefore that it should be reworded to say that where, mid-term, the Ministry has lost the support of the majority, the Governor must* ***either*** *dismiss the Ministry* ***or*** *dissolve the Assembly, and that it should leave the choice to his or her understanding of the principles of responsible government.*[71]

Mr Geoffrey Fisher also felt that the QCRC's clause 41(3) should be '*significantly revised'*.

> *It should commence with a general statement to the effect that the Governor may only exercise a power to dismiss the Premier in accordance with the constitutional conventions relating to the exercise of that power. Then the provision should go on to say that in particular if the Premier is defeated on a vote of no confidence passed by an absolute majority of the members of the Legislative Assembly the Governor may require the Premier either to resign or to advise an election.*[72]

Professor George Winterton submitted that the Constitution should provide for the Premier's removal upon loss of the Legislative Assembly's confidence but made two points.

> *(a) It would be unwise to employ words such as "removes the Premier following a vote ..." since they may (wrongly) imply that such a vote is the sole method of removal. On the other hand, a provision modelled on the QCRC's draft clause 41(3) should not allow that inference.*
>
> *(b) The Constitution should provide for the* immediate *removal of the Premier only in the event that an* absolute *majority of the members of the Legislative Assembly passes a resolution requesting the Premier's removal or the Government's dismissal and the appointment of another named person as Premier (in other words, a "constructive" resolution of no-confidence). A simple majority of the members may reflect an "accidental" majority caused by death, illness, delay or even a surprise move by the Opposition which leaves Government members unable to reach the floor of the House in time to vote on the resolution. Hence, the Government should be allowed a reasonable time to seek to reverse a resolution passed by a simple majority. Moreover, the Governor should not be required to remove a Premier who loses a simple motion of no-confidence (or a motion of "confidence"), because no other*

70 Submission no 21.
71 Submission no 28.
72 Submission no 33.

> *member may enjoy the House's confidence either, in which case the incumbent Premier would be entitled to seek a dissolution of the Legislative Assembly. The QCRC's draft clause 41(3) would be satisfactory if (a) the majority required were an absolute majority and (b) a resolution to "revoke the appointment" was defined as one which also requested the appointment of another person as Premier (i.e., a constructive no-confidence resolution). It could prove very destabilizing if the Governor were obliged to remove a Premier but could find no substitute able to command the confidence of the Legislative Assembly. Such concerns led the drafters of the German Basic Law to adopt the concept of a constructive no-confidence resolution: see German Basic Law art. 67.*[73]

A broader and preferable approach to the QCRC's recommendation is a clause along the following lines: '*The Premier shall hold office, subject to this Constitution, until he or she dies or resigns, or the Governor terminates his or her appointment in accordance with the constitutional conventions relating to the exercise of that power'*.[74]

This clause should be complemented by a provision providing for the continuing evolution and non-justiciability of the conventions regarding this reserve power. The additional provisions recommended by the committee in recommendation 2 would suffice in this regard.

RECOMMENDATION 9 – DISMISSAL OF THE PREMIER

The *Constitution of Queensland 2001* should include a provision stating that the Premier shall hold office, subject to this Constitution, until he or she dies or resigns, or the Governor terminates his or her appointment in accordance with the constitutional conventions relating to the exercise of that power.

This clause should be complemented by a provision providing for the continuing evolution and non-justiciability of the conventions regarding this reserve power. The additional provisions recommended by the committee in recommendation 2 would suffice in this regard.

73 Submission no 34.

74 The Republican Advisory Committee recommended a similar clause: n 15 at 103.

PART 2 - VARIOUS ISSUES

3. A LIEUTENANT-GOVERNOR FOR THE STATE

Matter under review	*Source material*
Whether a Lieutenant-Governor should again be appointed for the State	QCRC report ch 6 at 55-56

3.1 BACKGROUND

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 Constitution provides that the same rank order of office 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.

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'.[75]

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'*.[76] Nevertheless, the QCRC considered this matter to be worthy of review.

This issue does not arise at the Commonwealth level as s 4 of the Commonwealth Constitution provides that the person appointed to act as a federal administrator during the Governor-General's absence or incapacity shall not '*be entitled to receive any salary from the Commonwealth in respect of any other office during his administration of the Government of the Commonwealth*'. This therefore precludes the appointment of a Commonwealth judge or official. In practice, the most senior State Governor acts as a federal administrator.[77]

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75 The title of 'Administrator' was given to the person who assumed administration of the Government under the *Constitution (Office of Governor) Act 1987* (Qld), s 9. This Act has now been repealed and its provisions incorporated into the *Constitution of Queensland 2001* (Qld).

76 QCRC report, n 1 at 56.

77 G Moens and J Trone, *Lumb & Moens' The Constitution of the Commonwealth of Australia Annotated*, sixth edition, Butterworths, Australia 2001 at 41.

The position in the other Australian states varies. Currently, in South Australia and Victoria a person other than the Chief Justice is appointed as Lieutenant-Governor. The Chief Justice acts as Governor in the Governor's absence or inability in Western Australia, New South Wales and Tasmania.[78]

3.2 COMMITTEE ANALYSIS

The committee believes that the current arrangement whereby, in the absence of a Lieutenant-Governor, the Chief Justice acts in the Governor's role is inappropriate.[79] While State constitutions do not embody a full separation of powers, the judiciary is required to be separate and independent from both the legislative and executive arms of government. (In chapter 13.2, the committee recommends that the Constitution specifically recognise the independence of the judiciary.) In this context, the highest officer of the State's judiciary should not, at any time, act as the head of the executive.

Moreover, and as the QCRC pointed out, there is the possibility of litigation coming before the Supreme Court involving actions taken by the Chief Justice when acting as Governor. The present Chief Justice does not perceive a difficulty with the fact that the Chief Justice's decisions could be subject to review by less senior judges. The Chief Justice submitted: '*That is a most unlikely possibility: the occasion for judicial reconsideration of a governor's decisions has rarely arisen. But should it occur, there would hardly be difficulty: the present Chief Justice regularly sits in the Trial Division of the Supreme Court, with his decisions subject to appeal, sometimes successfully'*.[80]

However, of greater concern is the fact that the Chief Justice while acting in the Governor's role might be required to make a politically controversial decision which has the potential to compromise the position of Chief Justice and the judiciary in general.[81] As John Pyke submitted:

> *But what if there is a political crisis—eg, a no confidence vote following which the Premier seeks a dissolution and the Leader of the Opposition says she is now entitled to become Premier? There would be some danger of, first, a [Chief Justice] having to make a politically-charged decision between these options, and, secondly (especially if the conventions are codified or 'incorporated by reference'), of other judges possibly being asked to review that decision.*[82]

Also relevant is the length of any acting appointment. The Chief Justice informed the committee that the short periods and limited duties involved in acting as Administrator have not led to any substantial interference with judicial work. However, the possibility exists that the Governor would not be able to carry out his or her duties for a protracted period. While an Acting Chief Justice could be appointed for the Supreme Court, such an arrangement is not ideal if the Governor is likely to be absent for months rather than weeks.[83]

The committee's conclusion that the current arrangement is inappropriate for the above reasons should in no way be seen as casting aspersions on the way in which the current and former Chief Justices have fulfilled the role of Administrator. The committee understands that, in practice, the current arrangement has not caused any difficulty. However, the possibility that a constitutional crisis

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78 The office of Lieutenant-Governor in Tasmania has not always been filled by the Chief Justice, but this has been the case since 1982.

79 Submitters who expressed concern at the current arrangements included: Mr Harry Evans (sub no 1); Professor George Williams (sub no 6); Mr Don Willis (sub no 11); Mr John Pyke (sub no 28); Professor George Winterton (sub no 34); Mr Laurie Marquet (sub no 35); Hon R Hollis MP (sub no 37). Those who felt that the current arrangements were satisfactory included: Mr Anthony Marinac (sub no 5); the Chief Justice (sub no 14); Judges of the Supreme Court (sub no 15); the National Party Queensland (sub no 24); Mr Geoffrey Fisher (sub no 33).

80 Submission no 14. See also the comments of Mr Anthony Marinac (sub no 5).

81 The QCRC noted that the political crisis of 1957 occurred while the then Chief Justice, Sir Alan Mansfield, was acting as Administrator: QCRC report, n 1 at 56.

82 Submission no 28.

83 See the comments of the Judges of the Supreme Court in this regard (sub no 15).

might occur while the Chief Justice is acting as Deputy Governor or Acting Governor is sufficient alone to warrant the revision of these arrangements. As Professor George Winterton submitted: '*The QCRC's conclusion that the present arrangement works satisfactorily may be correct, but there really is no need to run the slightest risk of difficulty'*.[84]

Thus, a Lieutenant-Governor should again be appointed for Queensland. (This requires no constitutional amendment given that the Constitution already allows for the appointment of such a person.)

The cost involved in appointing a person to the position should be minimised to the greatest extent possible. The position of Lieutenant-Governor should not be a permanent and high profile one but rather an ad hoc, quasi-honorary role to be undertaken only when the Governor is unable to perform his or her duties. A Lieutenant-Governor could be paid either a modest annual salary or a modest allowance in respect of duties actually undertaken.

Persons considered for appointment as Lieutenant-Governor should not be restricted to those with backgrounds in the traditional fields of politics and law. Any esteemed member of the community could appropriately occupy the role. As Mr Don Willis submitted:

> *The office should be open to any citizen of the State who has been distinguished in their particular field and who, in that role, has been a positive role model and has made a valuable contribution to Queensland. The Lieutenant-Governor should possess: a thorough understanding of people and the community; a high level of interpersonal skills and abilities; sufficient life experience and depth; and, an understanding of the role, including its constitutional constraints.*[85]

Ideally, the persons holding the positions of Governor and Lieutenant-Governor at any one time should, where possible, reflect diversity in gender, professional background, regional representation and indigenous representation.[86]

Finally, the committee makes two observations relevant to the current provisions concerning the Lieutenant-Governor.

Firstly, the *Constitution of Queensland 2001* contains no explanation of the office and role of the Chief Justice. If the Chief Justice is to retain a role, then a footnote to the relevant sections of the *Supreme Court of Queensland Act 1991* (Qld) might assist readers in this regard.

Secondly, and depending on what approach the Government ultimately decides to take on the issue of a Lieutenant-Governor, there might be some scope to simplify ss 40 and 41 of the *Constitution of Queensland 2001* or at least the terminology used in those provisions.[87]

RECOMMENDATION 10 – A LIEUTENANT-GOVERNOR FOR QUEENSLAND

A Lieutenant-Governor should again be appointed for Queensland.

84 Submission no 34.

85 Submission no 11.

86 See the submission from Mr Anthony Marinac in this regard (sub no 5).

87 The provisions currently refer to a Lieutenant-Governor, a Deputy Governor and an Acting Governor. As to simplification of the provisions and the terminology they employ see the submission of Mr John Pyke (sub no 28 at 11-12).

4. THE MEMBERS' OATH OR AFFIRMATION OF ALLEGIANCE TO THE CROWN

Matter under review	*Source material*
Whether members of the Queensland Legislative Assembly should have the option of swearing or affirming allegiance to the Crown	LCARC report no 31

4.1 BACKGROUND

In LCARC report no 31,[88] this committee considered the mandatory requirement that members of the Queensland Legislative Assembly swear or affirm allegiance to the Crown and noted the arguments for and against its retention. 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.

In its report, this committee made two recommendations.

First, the committee recommended that the Premier introduce a bill to amend then s 4 of the *Constitution Act 1867* (Qld) to include a requirement that members of the Legislative Assembly take or make an oath or affirmation of office. An oath or affirmation of office has now been included in schedule 1 of the *Constitution of Queensland 2001* in the following terms: '*I will well and truly serve the people of Queensland and faithfully perform the duties and responsibilities of a member of the Legislative Assembly to the best of my ability and according to law'*.

Secondly, the committee recommended that it conduct further public consultation on the issue of whether members of the Legislative Assembly should be provided with an option as to whether to swear or affirm allegiance to the Crown, or only to the people of Queensland. The committee, via the stage one issues paper, took the opportunity to consult on this issue.

4.2 COMMITTEE ANALYSIS

Submissions received by the committee on this issue generally support dispensing with a mandatory requirement that members swear or affirm allegiance to the Crown.[89] Even Mr Marinac, who described himself as an avowed monarchist, submitted:

> *It would make me personally delighted if all Members were to swear to the Queen – but* only *if this reflected genuine loyalty to the Queen. If, on the other hand, Members are forced to swear an oath in which they do not believe, then such an oath cheapens the Parliament, cheapens Her Majesty, and cheapens the Members forced so to swear. As a result, I submit that those members who wish to swear or affirm their loyalty to the Crown should be able to do so – and those who wish to swear an oath which does not refer to the Crown should also be able to do so.*[90]

Many submitters feel that it is more important for members to make or take an oath or affirmation of office. As Mr Don Willis submitted: '*…I consider it is far more important for members to be required to publicly and formally commit themselves to respecting and advancing the common interests of the people of Queensland … and to upholding Queensland's democratic system and values'*.[91]

88 Note 11.

89 Those submitters who addressed this issue included: Mr Anthony Marinac (sub no 5); Professor George Williams (sub no 6); Mr Don Willis (sub no 11); the National Party Queensland (sub no 24); Mr John Pyke (sub no 28); Mr Geoffrey Fisher (sub no 33); Hon R Hollis MP (sub no 37).

90 Submission no 5.

91 Submission no 11. See also the submissions by Mr John Pyke (sub no 28) and Hon R Hollis MP (sub no 37).

Mr Geoffrey Fisher also pointed out in his submission that allowing individual members the choice not to swear or affirm allegiance is clearly distinct from the issue of whether Australia should become a republic: '*Those who wish to swear or affirm allegiance to the Crown would still be able to do so. And in any event allowing individual members a choice in the matter confers no real benefit or advantage to the cause of an Australian republic'*.[92]

The National Party Queensland argued the case for retention of the mandatory requirement on the basis that: '*…the Crown is the Head of State and all Members of the Parliament of Queensland must recognise it as such to properly discharge their duties to the Parliament'*.[93]

The committee, like the majority of submitters, does not support retention of the compulsory requirement that members swear or affirm allegiance to the Crown. Rather, members should have a choice in this regard. 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 or affirm allegiance to the Crown. This enables respect to be given to members' different opinions, and enables members to make a promise which truly reflects their moral commitment.

Enabling members to choose not to swear or affirm allegiance does not in any way alter the Queen's role in the State's constitutional system. Moreover, as Mr Geoffrey Fisher pointed out in his submission, allowing individual members this choice is clearly distinct from the issue of whether Australia should become a republic.

It is far more important that members be required to take or make the oath or affirmation of office now contained in the Constitution. This ensures that members properly acknowledge where their allegiance and duties lie and whom they are required to serve—that is, the people of Queensland who elected them.

RECOMMENDATION 11 – OATH OR AFFIRMATION OF ALLEGIANCE TO THE CROWN

The *Constitution of Queensland 2001* should be amended so that members of the Legislative Assembly have the option as to whether to take or make the oath or affirmation of allegiance to the Crown.

92 Submission no 33.

93 Submission no 24.

5. INDICATIVE PLEBISCITES

Recommendation under review	*Source material*
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	QCRC report ch 17 at 86; QCRC Parliament of Queensland Bill 2000, cl 128-133, sch 1

5.1 BACKGROUND

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.

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'*.[94] 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.[95]

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 proposed placed no such restriction on the nature or subject matter of an indicative plebiscite.

5.2 COMMITTEE ANALYSIS

The committee does not see any compelling reason to amend the *Referendums Act 1997* at this point in time to provide for indicative plebiscites.[96] The need for an indicative plebiscite is unlikely to arise very often given the infrequency with which referenda are held. Further, it is arguable whether indicative plebiscites:

- will, in fact, assist with the drafting of a question for a referendum or merely add another step to the process; and/or
- justify the cost involved. As table 1 reveals, indicative plebiscites are likely to be costly even when held by post. (The cost of holding an indicative plebiscite would be similar to that of a referendum.)

94 QCRC report, n 1 at 86.

95 For an example of the conduct of an indicative plebiscite in New Zealand, see the committee's issues paper, n 13 at 12.

96 Submitters who likewise did not see the need to make (immediate) legislative provision for indicative plebiscites included: Mr Anthony Marinac (sub no 5); the National Party Queensland (sub no 24); Mr John Pyke (sub no 28); Mr Geoffrey Fisher (sub no 33); Hon R Hollis MP (sub no 37). Those who supported the QCRC's recommendation included: Professor George Williams (sub no 6); Mr Don Willis (sub no 11); Mr John Walter (sub no 17).

Table 1: Estimated cost of holding a state referendum[97]

1998 Version (based on 1998 election costs)			2001 Version (based on 2001 election costs)		
Stand-alone referendum	**Referendum with election**	**Postal referendum**	**Stand-alone referendum**	**Referendum with election**	**Postal referendum**
Total Estimate $	*Total Estimate $*	*Total Estimate $*	*Total Estimate $*	*Total Estimate $*	*Total Estimate $*
7,856,290	3,387,560	4,651,900	8,897,410	3,554,110	4,978,970

Minimising the cost of an indicative plebiscite by holding the plebiscite at the same time as a general State election is also unlikely to be feasible given issues as to: (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.[98]

A Queensland plebiscite cannot be held on the same day as a federal election without the approval of the Governor-General.[99]

If, in the future, a government feels that there is a need to hold an indicative plebiscite on an issue, then it can pass enabling legislation at that time. Issues such as: how the proposal is to be approved by the electors; whether the plebiscite is to be conducted by post; whether voting at the plebiscite is to be compulsory; and whether the results of the plebiscite should be binding, can then be determined at the time and according to the particular issue under consideration.

RECOMMENDATION 12 – INDICATIVE PLEBISCITES

The *Referendums Act 1997* (Qld) should not be amended at this point in time to provide for the conduct of indicative plebiscites.

97 Information supplied to the committee by the Electoral Commissioner, Mr B Longland, under cover of a letter to the committee dated 13 March 2002.

98 See Hon D E Beanland MP, Queensland, Legislative Assembly, *Parliamentary Debates (Hansard)*, 24 July 1996 at 1813; and LCARC, *The Referendums Bill 1996*, report no 3, Goprint, Brisbane, November 1996 at 5-6.

99 *Commonwealth Electoral Act 1918* (Cth), s 394(1).

6. INITIATION OF LEGISLATIVE AMENDMENT

6.1 A PETITIONS COMMITTEE

Recommendations under review	*Source material*
QCRC R5.1 That a new statutory committee, the Petitions Committee, be created	QCRC issues paper, ch 10; QCRC report ch 5 at 38-39; QCRC Parliament of Queensland Bill 2000, cls 80 and 94
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	QCRC report ch 16 at 83; QCRC Parliament of Queensland Bill 2000, cls 94-96

6.1.1 Background

The QCRC received a number of submissions advocating citizens' initiated referenda (CIR).[100] While there are many different models of CIR, essentially the concept refers to processes which enable citizens to initiate referenda on laws, constitutional issues, or the recall of office holders by gaining support for a referendum in a petition.[101]

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)[102] governs the lodgement 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 standing order 238A (amended by sessional orders), 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.[103] 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.

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100 This committee's predecessor also received correspondence advocating some form of CIR in the Constitution in response to its call for public submissions to its review of those QCRC recommendations relating to a consolidation of the Queensland Constitution.

101 For an in-depth review of citizens initiated referenda see Gregorczuk H, *Citizens Initiated Referenda*, Queensland Parliamentary Library research bulletin no 1/98, Brisbane, February 1998.

102 These Standing Rules and Orders are to be replaced and superceded by sessional orders adopted by the Legislative Assembly on 8 August 2002, to take effect from 26 August 2002. The requirements relating to paper petitions remain substantially the same. The new sessional orders also provide for a process for lodging petitions electronically.

103 The Standing Committee on Environment and Public Affairs of the Western Australian Legislative Council is currently the only parliamentary committee in Australia that routinely considers petitions. Petitions are considered by the select committees of the New Zealand Parliament. The Scottish Parliament also has a dedicated Public Petitions Committee.

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.

6.1.2 Committee analysis

The committee believes that the right to petition Parliament is important. Tabling a petition in Parliament puts an issue on the public record. Ministerial responses to petitions tabled in Parliament likewise promote in a public way the executive's accountability to Parliament and hence the people of Queensland. However, the committee does not support the establishment of a Petitions Committee such as recommended by the QCRC for the following reasons.[104]

First, the committee was not presented with any evidence that a dedicated Petitions Committee will aid parliamentary scrutiny of government or greatly enhance the existing petitions process.

Indeed, the establishment of such a committee runs the risk of being misinterpreted as a complaints mechanism or a means of appeal from agency decisions. Conferring on parliamentary committees a wider 'monitor and review' role regarding agencies responsible for handling complaints against government (as currently occurs) so that wider trends can be identified and addressed is a more productive use of members' time.

Further, a stand alone Petitions Committee is unlikely to have the same knowledge of particular policy issues as a committee which has a background in that policy area. For example, it would be more efficient for a petition concerning a constitutional issue be considered by LCARC and for a petition concerning public works to be considered by the Public Works Committee.

Secondly, there is a limit to the number of committees that a Parliament of 89 members (with 19 ministers and five parliamentary secretaries who are not appointed to committees) can sustain.

Thirdly, establishment of a committee does involve additional 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. While this cost might be justified if it improves public participation in the legislative process, there might be other more effective ways in which this funding could be used for the same objective.

Fourthly, there are a range 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 whom 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 and other bodies and commissions independent of government might also recommend legislative action as a result of matters brought to their attention through public consultation.

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[104] Submitters who did not support (immediate) establishment of a Petitions Committee included: the National Party Queensland (sub no 24); Mr John Pyke (sub no 28); Mr Geoffrey Fisher (sub no 33); Hon R Hollis MP (sub no 37). Submitters who supported establishment of a Petitions Committee included: Professor George Williams (sub no 6); Mr Don Willis (sub no 11); Mr Laurie Marquet (sub no 35). Mr Harry Evans (sub no 1) and Mr Anthony Marinac (sub no 5) submitted that rather than having a Petitions Committee examining petitions regardless of their content, it would be preferable to refer petitions to subject specialised committees. This would require an entire restructure of Queensland's parliamentary committee system.

Fifthly, a close examination of the clauses of the QCRC's Parliament of Queensland Bill which seek to give effect to its recommendation for a Petitions Committee reveals that the QCRC envisages that the focus of the work of the committee is to be petitions which seek some sort of legislative action. In recent years, the bulk of petitions received by the Parliament have sought *non-legislative* action: 85.6% in 2000 and 74% in 2001.[105] This makes it more difficult to justify a dedicated committee whose responsibilities are primarily to examine and consider petitions seeking legislative action.

Finally, a trial of a system whereby citizens can lodge petitions on-line with the Queensland Parliament commences on 26 August 2002.[106] This development is likely to enhance the existing petitions process.

Amendments to Standing and Sessional Orders regarding petitions. While the committee does not support the establishment of a Petitions Committee, the committee believes that there should be a number of amendments to requirements regarding petitions. In particular, the relevant Standing or Sessional Orders should:

- state that the minister responsible for an issue the subject of a petition must forward a detailed and reasoned response to the Clerk for presentation to the Assembly (unless the petition is in similar terms to a petition previously presented to the Assembly and to which the minister has already responded);[107]
- prescribe a time limit of 30 calendar days in which a minister must provide a response to a petition;[108] and
- expressly recognise the Assembly's ability to refer a particular petition to a particular committee.[109]

The S*essional Orders adopted by the Legislative Assembly for petitions (including e-petitions)*, commencing on 26 August 2002, will only remain in force until the end of this session of Parliament. In this regard, the committee notes that the Standing Orders Committee is currently reviewing the *Standing Rules and Orders* of the Legislative Assembly.

RECOMMENDATION 13 – A PETITIONS COMMITTEE

A Petitions Committee of the Queensland Legislative Assembly should not be established.

RECOMMENDATION 14 – MINISTERIAL RESPONSES TO PETITIONS

The relevant Standing or Sessional Orders of the Legislative Assembly should:

- state that the minister responsible for an issue the subject of a petition must forward a detailed and reasoned response to the Clerk for presentation to the Assembly (unless the petition is in similar terms to a petition previously presented to the Assembly and to which the minister has already responded);

105 See table 2 of the committee's April 2002 issues paper: n 13 at 16.

106 Queensland Legislative Assembly *Sessional Orders adopted by the Legislative Assembly for petitions (including e-petitions)*, 8 August 2002; and Hon PD Beattie MP Queensland, Legislative Assembly, *Parliamentary Debates (Hansard)*, 8 August 2002 at 2831-2832.

107 See, for example, SO 100A of the Northern Territory Legislative Assembly.

108 A time limit in which a ministerial response is required to be lodged is prescribed in a number of other Australian jurisdictions. See, for example, SO 100A of the Northern Territory Legislative Assembly (12 sitting days) and Sessional Orders of the Tasmanian Legislative Council (15 sitting days). A time limit of 30 calendar days as recommended by the committee accords with the limit which applies to answers to question on notice to ministers: see SO 67E (as amended by sessional orders).

109 For precedents in this regard see SO 99 of the Northern Territory Legislative Assembly; SO 67 of the Western Australian Legislative Assembly; and SO 99 of the ACT Legislative Assembly.

- prescribe a time limit of 30 calendar days in which a minister must provide a response to a petition; and
- expressly recognise the Assembly's ability to refer a particular petition to a particular committee.

6.2 THE OBJECTS OF STATUTORY COMMITTEES

Recommendations under review	*Source material*
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"	QCRC report ch 16 at 83; QCRC Parliament of Queensland Bill 2000, cl 78(1)
QCRC R16.4 That the object of statutory committees be extended to include enhancing the transparency of public administration	QCRC report ch 16 at 84; QCRC Parliament of Queensland Bill 2000, cl 78(1)

6.2.1 Background

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 clause 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*'.[110]

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

Section 78(1) of the *Parliament of Queensland Act 2001* now provides: '*The main object of this chapter is to enhance the accountability of public administration in Queensland*.' Section 78(2) provides that the chapter's main object is to be achieved by establishing committees of the Assembly with various listed areas of responsibility.

6.2.2 Committee analysis

The committee has no difficulty with the objects clause to chapter 5 (Statutory committees of the Assembly) of the *Parliament of Queensland Act* incorporating the two clauses recommended by the QCRC, albeit for different reasons to that advocated by the QCRC.[111]

As recommendation 13 reflects, the committee does not support the establishment of a Petitions Committee. The committee is also not clear as to how amendments to an objects clause regarding parliamentary committees reinforces a constitutional commitment to FOI objectives. However, in general terms, it can be said that parliamentary committees extend democratic government (via

110 QCRC report, n 1 at 84.

111 For comments by submitters on these proposed amendments see the submissions of: Mr Anthony Marinac (sub no 5); Professor George Williams (sub no 6); Mr Don Willis (sub no 11); Mr John Pyke (sub no 28); Hon R Hollis MP (sub no 37).

inviting public input into their inquiries) and enhance the transparency of public administration (Fitzgerald envisaged a comprehensive system of parliamentary committees for Queensland to '*enhance the ability of Parliament to monitor the efficiency of Government*').[112]

RECOMMENDATION 15 – THE OBJECTS OF STATUTORY COMMITTEES

Section 78(1) of the *Parliament of Queensland Act 2001* (Qld) should be amended to reflect that the objects of statutory committees of the Legislative Assembly include extending democratic government and enhancing the transparency of public administration.

[112] G E Fitzgerald (Chair), *Report of the commission of inquiry into possible illegal activities and associated police misconduct*, Goprint, Brisbane, 1989 at 124.

7. SUMMONING PARLIAMENT

Matter under review	*Source material*
Whether the Constitution should include a requirement that the Queensland Parliament meet within 30 days after the day appointed for the return of the writ for the election	QCRC issues paper at 1220

7.1 BACKGROUND

Queensland's Constitution does not contain a specific provision regarding the summoning of Parliament after a general election. Rather, s 15(1) of the *Constitution of Queensland 2001* provides that the Governor may summon the Legislative Assembly in the Sovereign's name by instrument under the Public Seal of the State. Section 18(1) empowers the Governor to set the times and places in Queensland for sessions of the Legislative Assembly that the Governor considers appropriate. These provisions, in theory, allow for considerable variation in the intervals between the date of a general election and the date that Parliament first meets after the election.

Table 2 shows the actual variations in these dates for the last four general State elections.

Table 2: Intervals between polling dates and first sitting day of new Parliament 1992-2001[113]

Year	Polling date	Date writ returned to the Governor	Date set for the return of the writ to the Governor	Date of first sitting day of the new Parliament
1992	19 September 1992	8 October 1992	31 October 1992	3 November 1992
1995	15 July 1995	1 August 1995	25 August 1995	5 September 1995
1998	13 June 1998	25 June 1998	27 July 1998	28 July 1998
2001	17 February 2001	2 March 2001	19 March 2001	20 March 2001

Although the QCRC did not discuss this issue in its report, in its issues paper the QCRC stated that it might be desirable for the Constitution to contain a requirement that the Queensland Parliament meet no later than 30 days after the day appointed for the return of the writ for a general election.[114] The *Electoral Act 1992* (Qld), 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. Although, the Governor may, by gazette notice, substitute an earlier or later day for the day stated in the writ: s 82(1)(b).

Section 5 of the Commonwealth Constitution provides that, after any general election, the Parliament shall be summoned to meet not later than 30 days after the day appointed for the return of the writs. This ensures an early opportunity for the House of Representatives to express its confidence or lack thereof in the government, and avoids any inordinate delay between the end of a Parliament and the start of a new one.[115] Tasmania's *Constitution Act 1934* similarly prescribes a time period within which Parliament must meet following a general election. Section 12(3) provides:

> *The Governor shall call Parliament together for the despatch of business after every general election of members of the Assembly, within 90 days after the dissolution of the Assembly, unless the Governor, by proclamation, shall extend the time for so doing by such further period not exceeding 30 days as he may think necessary.*

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113 This information was kindly compiled for the committee by Mr Andrew Timperley, Parliamentary Officer (Table), Queensland Legislative Assembly.

114 QCRC issues paper, n 2 at 1220.

115 Moens and Trone, n 77 at 42. Section 32 of the Commonwealth Constitution provides that writs for the election of members shall be issued within 10 days from the expiry of a House or proclamation of its dissolution.

7.2 COMMITTEE ANALYSIS

The committee believes that the Constitution should include a requirement that the Parliament *shall meet*[116] within a reasonably short period after a general election.[117] As table 2 reveals, this has occurred at least in the case of recent elections. However, setting a time frame within which Parliament must meet ensures that there is an early opportunity for the Assembly to express confidence in the government, which is especially important in the case of a hung Parliament.

As Professor George Winterton submitted:

> *It is accepted in Australia that, when a general election produces a Hung Parliament, the incumbent Government is entitled to remain in office until Parliament meets and then test its support on the floor of the lower House, even if members of a third party or independents have indicated that they will support the Opposition. This occurred in South Australia in 1968 and 2002 and Tasmania in 1989. It is, therefore, desirable that the House meet as soon as possible after a general election.*[118]

Other advantages of such a requirement include that it enables the earliest opportunity for: the process of parliamentary scrutiny to begin (including question time and reconstituting parliamentary committees); and the new government to commence its legislative program.

A number of events could trigger the commencement of a period of time within which Parliament must meet, namely: the day of dissolution of the Assembly; the day of the general election; the day the writ for the election is returned; and the day appointed for the return of the writ.[119]

If commencement of the time period is linked with the return of the election writ and the relevant provision is entrenched in some way, the Assembly could effectively circumvent the time limit by amending those provisions of the *Electoral Act* which prescribe the period within which the election formalities must be completed. Thus, it would be necessary for the Constitution to also include and entrench in the same way the *Electoral Act* provisions relating to the return of the writs.

While the committee is considering entrenchment in stage two of its inquiry, commencing the time limit from the day of the general election overcomes any difficulties which might arise.

The committee believes that 60 days from the day of the general election is an appropriate time period within which Parliament should be required to meet. This time period would allow a new government, taking office after a period in opposition, a reasonable period to make the transition to office. Any shorter period in such circumstances might result in the sitting being little more than a motion of confidence and an adjournment debate.

RECOMMENDATION 16 – SUMMONING PARLIAMENT

The *Constitution of Queensland 2001* should include a requirement that the Legislative Assembly shall meet no later than 60 days after the day of a general election.

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116 Professor George Winterton advised that, if a provision modelled on s 5 of the Commonwealth Constitution were adopted, it would be preferable to provide that the Legislative Assembly 'shall meet' not that it 'shall be summoned to meet' on the basis that the latter may not ensure that it does meet: sub no 34.

117 Submitters who supported some time limit within which Parliament must meet following a general election/the (day appointed for the) return of an election writ included: Mr Harry Evans (sub no 1); Mr Anthony Marinac (sub no 5); Professor George Williams (sub no 6); Mr Don Willis (sub no 11); Professor Suri Ratnapala (sub no 21); Mr John Pyke (sub no 28); Mr Geoffrey Fisher (sub no 33); Professor George Winterton (sub no 34); Hon R Hollis MP (sub no 37). The National Party Queensland (sub no 24) submitted that no such requirement is necessary and that the flexibility of the current system is preferable.

118 Submission no 34.

119 Submissions varied on the issue of when the time period should commence.

8. WASTE LANDS OF THE CROWN

Matter under review	*Source material*
Whether ss 30 and 40 of the *Constitution Act 1867* (Qld) should be retained and, if so, what is the effect of re-enacting those provisions and particularly their validity under native title laws	Explanatory notes to the Constitution of Queensland 2001; EARC's constitution report;[120] letter from the Acting Premier to the committee dated 17 January 2002: see appendix A

8.1 BACKGROUND

Section 30 of the *Constitution Act 1867* provides:

> *Subject to the provisions contained in the Imperial Act of the 18th and 19th Victoria chapter 54 and of an Act of the 18th and 19th years of Her Majesty entitled* An Act to repeal the Acts of Parliament now in force respecting the Disposal of the Waste Lands of the Crown in Her Majesty's Australian Colonies and to make other provisions in lieu thereof *which concern the maintenance of existing contracts it shall be lawful for the legislature of this State to make laws for regulating the sale letting disposal and occupation of the waste lands of the Crown within the said State.*

Section 40 of the *Constitution Act 1867* provides:

> *The entire management and control of the waste lands belonging to the Crown in the said State and also the appropriation of the gross proceeds of the sales of such lands and all other proceeds and revenues of the same from whatever source arising within the said State including all royalties mines and minerals shall be vested in the legislature of the said State.*

Subsection (2) of s 40, which was repealed by the *Constitution of Queensland 2001* as being obsolete, saved all contractual obligations undertaken by the Crown in relation to its waste lands before the enactment of s 40.

The Government did not consolidate ss 30 and 40 of the *Constitution Act 1867* into the *Constitution of Queensland 2001*.[121] Rather, s 69 of the *Constitution of Queensland* 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.

Sections 30 and 40 are replicated in full in attachment 4 of the 2001 Constitution.

The explanatory notes to the Constitution bill state that this approach 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,*

120 Note 7.

121 Both the former LCARC and the QCRC sought to consolidate ss 30 and 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.

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 affect native title holders whereas ordinary title holders would not be affected because the legislation has no effect on them.[122]

8.2 COMMITTEE ANALYSIS

The committee believes that ss 30 and 40 are redundant and should be repealed. In reaching this conclusion, the committee has relied on advice sought and received from Dr Gerard Carney, now Professor of Law, Bond University. (Dr Carney's full advice appears as appendix C.)

In summary, Dr Carney advised that:

- the law-making power regarding waste lands in s 30 and the first power in s 40 are superfluous because they are clearly encompassed within the general law-making power in the *Constitution Act 1867*, s 2; and
- the second power conferred by s 40 on the legislature (namely, the power to appropriate all the proceeds and revenues derived from the Crown's waste lands) is also no longer necessary in view of the express provisions in ss 64 and 66 of the *Constitution of Queensland 2001*. (Section 64 vests all revenues of the State in one consolidated revenue fund, payments from which must, by s 66, be authorised by legislation.)

Accordingly, Dr Carney concluded that ss 30 and 40 appear to be of historical significance only and should be repealed in their entirety.[123]

Dr Carney further advised that, in any case, the re-enactment of ss 30 and 40 would be unlikely to have any native title implications in Queensland, but that an express declaration that no such effect is intended would resolve any difficulty in this regard.

RECOMMENDATION 17 – WASTE LANDS OF THE CROWN

Sections 30 and 40 of the *Constitution Act 1867* (Qld) should be repealed. As a consequence, s 69 and attachment 4 of the *Constitution of Queensland 2001* should also be repealed.

122 Explanatory notes to the bill for the Constitution of Queensland 2001 at 33.

123 Submitters who agreed that ss 30 and 40 were superfluous included: Professor George Williams (sub no 6); Mr John Pyke (sub no 28); Queensland Transport and Main Roads (sub no 29); Mr Geoffrey Fisher (sub no 33).

9. PARLIAMENTARY SECRETARIES

Recommendation under review	*Source material*
QCRC R5.7 That the maximum number of Parliamentary Secretaries be set at 5	QCRC report ch 5 at 43-44; QCRC Constitution of Queensland 2000, cl 23(1)

9.1 BACKGROUND

Statutory provision for the appointment of parliamentary secretaries in Queensland occurred in 1996.[124] The *Constitution of Queensland 2001* now provides that:

- the Governor-in-Council may appoint a member of the Legislative Assembly, apart from a minister or a member of Executive Council, as a parliamentary secretary: s 24;
- the Premier decides the functions of a parliamentary secretary: s 25; and
- the appointment of a member of the Legislative Assembly as a parliamentary secretary ends on the polling day for the next general election after the appointment: s 26.[125]

The commentary to s 25 of the annotated Constitution states the following.

> *Although the Premier decides the functions of Parliamentary Secretaries, the portfolio Ministers they assist also have a say in their more specific duties.*
>
> *Among other duties, Parliamentary Secretaries will usually:*
>
> - *make inquiries on behalf of the Minister;*
> - *represent the Minister at official engagements;*
> - *comment upon and publicly discuss government policy and decisions relevant to the portfolio, as instructed by the portfolio Minister;*
> - *meet with delegations, clients of the department and authorities within the portfolio, and report on those meetings to the Minister; and*
> - *liaise with other members of the Legislative Assembly on matters arising within the portfolio.*
>
> *A Parliamentary Secretary can continue to perform all other duties applicable to members of the Legislative Assembly, including asking questions and speaking in support of legislation.*
>
> *A Parliamentary Secretary cannot:*
>
> - *sit as a Minister in Cabinet or on a committee of Cabinet while appointed as a Parliamentary Secretary;*
> - *breach Cabinet solidarity (Although not a member of Cabinet, a Parliamentary Secretary is bound by the collective responsibility of Cabinet);*
> - *attend a meeting of the Executive Council or sign Executive Council Minutes on behalf of the Minister;*
> - *perform any duties in the Legislative Assembly on behalf of the Minister including answering questions without notice, presenting ministerial statements, tabling documents and introducing legislation; or*
> - *appear before a Committee of the House on behalf of the Minister.*

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

[125] The *Parliament of Queensland Act 2001* (Qld), s 113(2) provides that the amount of additional salary of a parliamentary secretary is the amount fixed by the Governor-in-Council by gazette notice.

While the Constitution prescribes a limit on the number of ministers of the Crown,[126] there is no statutory limit on the number of members who might be appointed as parliamentary secretaries. There are currently five parliamentary secretaries in Queensland.[127]

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.[128]

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 (namely, Tasmania, South Australia, New South Wales and Western Australia).

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.*[129]

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 two of the committee's inquiry.

9.2 COMMITTEE ANALYSIS

While it might be argued that, in practice, all government members are bound by tight party discipline whether they are parliamentary secretaries or not, the committee believes that there should be a limit on the number of parliamentary secretaries.[130] As Mr Harry Evans submitted: '*I can only agree with the QCRC that the numbers of parliamentary secretaries should be limited to restrain the patronage power which the government otherwise has over the Assembly*.'[131] Further, it makes sense to place a

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126 A limit of 19 ministers is prescribed by the *Constitution of Queensland 2001* (Qld), s 43(4).

127 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).

128 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).

129 QCRC report, n 1 at 44.

130 Submitters who supported a limit on the number of parliamentary secretaries included: Mr Harry Evans (sub no 1); Mr Anthony Marinac (sub no 5); Professor George Williams (sub no 6); Mr Don Willis (sub no 11); Mr John Pyke (sub no 28); Mr Geoffrey Fisher (sub no 33). The National Party Queensland (sub no 24) submitted that there is no reason why the number of parliamentary secretaries should be limited. Hon R Hollis MP (sub no 37) submitted that this issue can only be addressed after the nature of the role of parliamentary secretaries is reviewed and considered.

131 Submission no 1.

statutory limit on the number of parliamentary secretaries when such a limit is placed on the number of ministers.

The limit on the number of parliamentary secretaries should be set at the current number of five.

Further, it would be more informative if the Constitution contained some broad description of the main role of a parliamentary secretary, such as, to assist a minister in the performance of his or her functions. The annotated Constitution can then further elaborate on how that assistance is provided. At present, the Constitution merely provides that a parliamentary secretary has the functions decided by the Premier.

The committee also notes that the name 'parliamentary secretary' is somewhat of a misnomer. As the annotated Constitution specifically recognises, a parliamentary secretary cannot perform any of a minister's parliamentary functions. The government should consider an alternative title for the office.

RECOMMENDATION 18 – NUMBER OF PARLIAMENTARY SECRETARIES

The *Constitution of Queensland 2001* should provide that a limit of five parliamentary secretaries may be appointed at any one time.

RECOMMENDATION 19 – ROLE OF PARLIAMENTARY SECRETARIES

The *Constitution of Queensland 2001* should contain a broad description of the main role of a parliamentary secretary, such as, to assist a minister in the performance of his or her functions.

10. NON-COMPLIANCE WITH CERTAIN REQUIREMENTS

10.1 ASSENT

Matter under review	*Source material*
Whether it is necessary or desirable to make provision for 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	Letter from the Acting Premier to the committee dated 17 January 2002: see appendix A

10.1.1 Background

The ordinary law-making process requires a bill to be passed by the Legislative Assembly and then presented to the Governor for assent by, or in the name of, the Queen. A bill is of no effect until it receives royal assent.[132] 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.[133]

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,[134] 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 ('the standing orders') provide that the Clerk of the Parliament shall duly authenticate three fair prints of each bill before their presentation to the Governor for assent.[135]

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 orders to amend minor errors or slips in bills prior to their presentation to the Governor.[136] However, the Clerk must report to the Assembly if, before assent, any major error that goes beyond the power of the Clerk under standing orders to amend is discovered in a bill. The Assembly may deal with such an error in the same way as other amendments to the bill.

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.[137]

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132 *Constitution Act 1867* (Qld), s 2A.

133 *Constitution Act 1867* (Qld), s 53.

134 As to the history of 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.

135 See SO 277-279.

136 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.

137 See the *Statute Law (Minor Amendments) Act (No 2) Act 1995* (Qld).

Apparently, there was an incident of a similar nature in Queensland in 1918 which was rectified by the Governor signing a replacement page.

10.1.2 Committee analysis

The committee presumes that 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 which occurred in Queensland in 1995 (outlined above). Thus, 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, to 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, the committee does not see a need for a provision as suggested.[138]

Such a deeming provision would not appear to be necessary to deal with typographical errors. *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.*[139]

In cases other than typographical errors, the above examples indicate that remedies have been found in the parliamentary process. The committee believes that this is the appropriate mechanism for correcting such errors.

RECOMMENDATION 20 – VALIDATION OF ASSENT

The *Constitution of Queensland 2001* should not make provision for 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. Such matters are more appropriately dealt with by Parliament itself.

10.2 APPROPRIATION

Matter under review	*Source material*
Whether it is necessary or desirable to make provision for 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	Letter from the Acting Premier to the committee dated 17 January 2002: see appendix A; QCRC's Constitution of Queensland 2000, cl 72(3)

138 Submitters who likewise did not support inclusion of such a provision in the Constitution included: Mr Anthony Marinac (sub no 5); Mr Don Willis (sub no 11); the National Party Queensland (sub no 24); Mr John Pyke (sub no 28); Mr Geoffrey Fisher (sub no 33); Mr Laurie Marquet (sub no 35); Hon R Hollis MP (sub no 37). Mr Laurie Marquet (sub no 35) suggested an alternative mechanism to address errors in bills presented to the Governor for assent.

139 Harris I C (Ed), *House of Representatives Practice,* Department of the House of Representatives, Canberra, 2001 at 391. Although, 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.

10.2.1 Background

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;[140] and
- a government cannot spend public revenue without Parliament's authorisation.[141]

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[142] 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.[143] A similar requirement appears in s 56 of the Commonwealth Constitution and the constitutions of other Australian states.[144]

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, a bill must at least fix a maximum amount and define the purpose for which that amount might be spent.[145] 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.[146]

10.2.2 Committee analysis

In examining this issue, the committee first considered whether the requirement that an appropriation must be recommended by a message from the Governor should be retained. The committee has concluded that the requirement should be retained.[147] The requirement is a long-standing Westminster principle to ensure that Parliament appropriates public moneys only for the executive which has overall responsibility for the management and expenditure of public money. In other words, the requirement ensures that appropriations are confined to those which enable the government to

140 *Constitution of Queensland 2001* (Qld), s 65.

141 *Constitution of Queensland 2001* (Qld), s 66(1).

142 All state revenue is paid into the consolidated fund. See the *Constitution of Queensland 2001* (Qld), s 64.

143 See the *Constitution of Queensland 2001* (Qld), s 68.

144 *Constitution Act 1902* (NSW), s 46(1); *Constitution Act 1934* (SA), s 59; *Constitution Act 1934* (Tas), s 38(1); *Constitution Act 1975* (Vic), s 63; *Constitution Acts Amendment Act 1899* (WA), s 46(8).

145 Campbell E, 'Parliamentary appropriations', *Adelaide Law Review*, vol 4, 1971 at 153-161.

146 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. For further discussion in this regard see the committee's issues paper, n 13 at 24-25.

147 Submitters who supported retention of the requirement included: Mr Don Willis (sub no 11); the National Party Queensland (sub no 24); Mr Geoffrey Fisher (sub no 33); Mr Laurie Marquet (sub no 35).

implement its broad policies on public expenditure.[148] On this basis the requirement should remain in the Constitution. [149]

Some submitters argued that the requirement should be abolished on the basis that it is archaic and/or redundant as a government can only continue in office if it has the support of the Assembly and that, in practice, the Assembly would only pass or approve an appropriation which the government supports.[150]

However, abolition of the requirement would, for example, enable an independent or opposition member to introduce an appropriation bill for political 'point-scoring' despite knowing that the bill would never be passed by a majority of the Assembly. It is also feasible that an appropriation, other than one initiated by the government, might be passed by a hung Parliament.

There are other mechanisms within the parliamentary process, most notably the annual estimates process, that enable independent and opposition members to criticise and seek change to the government's proposed appropriations.

Thus, the committee does not support abolishing the requirement. However, introducing an exception to the requirement, namely, where a bill or motion is introduced or moved by a minister that would appropriate money from the consolidated fund is a sensible compromise.[151] As Mr Geoffrey Fisher submitted: '*The reality behind s 68 [of the Constitution of Queensland 2001] is that ministers are responsible for the initiation of spending proposals to be considered by Parliament. The suggested amendment accords with and emphasises that reality, while at the same time overcoming uncertainties as to whether a message from the Governor is required*'.[152]

In addition, it would be more appropriate that the requirement be altered so that the Governor *in Council* rather than the Governor provides the message. This amendment would make it clear that the Crown's financial initiative is exercisable by the Governor only on ministerial advice.[153]

RECOMMENDATION 21 – REQUIREMENTS FOR APPROPRIATION BILLS

The *Constitution of Queensland 2001*, s 68 should be amended to require a recommendation by a message from the Governor *in Council* 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 unless a bill or motion that would appropriate money from the consolidated fund is introduced or moved by a minister.

148 The 1988 Constitutional Commission similarly recommended retention of the '*fundamental and long-standing principle'* contained in s 56 of the Commonwealth Constitution that no appropriation bill may be passed unless it has been recommended by the executive government: n 36 at paras 4.601-4.602.

149 The QCRC noted in its issues paper that it is a long-established principle in Westminster model systems that the executive has a monopoly of initiation and that any departure from this would introduce '*a radical transformation of government and politics*': n 2 at 520. In contrast, Mr John Pyke (sub no 28) submitted that this rule is a mere standing order of the House of Commons and if the committee thinks that there is any need for the rule at all Queensland should follow the British example.

150 Those submitters who felt the requirement is unnecessary or should be abolished included: Mr Harry Evans (sub no 1); Mr Anthony Marinac (sub no 5); Mr John Pyke (sub no 28); Queensland Transport and Main Roads (sub no 29); Hon R Hollis MP (sub no 37). See also the recommendation of the majority of the Advisory Committee on Executive Government to the 1988 Constitutional Commission: n 36 at para 4.597.

151 The committee does not support the 'exception' contained in clause 72(3) of the QCRC's Constitution Bill which 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*'.

152 Submission no 33.

153 The 1988 Constitutional Commission relied on the same reasoning when recommending that the reference to the Governor-General in s 56 of the Commonwealth Constitution be amended to the Governor-General *in Council*: n 36 at para 4.591.

11. RESTORATION OF A LOCAL GOVERNMENT AFTER SUSPENSION

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

11.1 BACKGROUND

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 suspends the local government's councillors from office: s 74. The *Constitution of Queensland 2001,* s 71(3) 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*'. While an instrument seeking to dissolve a local government must be tabled in Parliament within 14 days of being made, 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* (Qld), 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. (The *Local Government Act* provides that an administrator must be appointed on dissolution of a local government.[154])

Hence, the QCRC recommended that a similar form of words to s 187(2) should be contained in the Constitution: QCRC R11.2.

11.2 COMMITTEE ANALYSIS

The committee has no difficulty with including in the Constitution a provision stating that a fresh election of the councillors of a local government that has been dissolved should be held as soon as possible after the dissolution of the local government.[155] The Constitution already refers to the suspension and dissolution of local government and therefore it is appropriate that the requirement in s 187(2) of the *Local Government Act* be duplicated in the Constitution as a public declaration of principle.

However, this provision should be drafted so as to make it clear that it is not imposing a legally enforceable obligation to hold an election 'as soon as possible'. To impose a legally enforceable obligation would be highly undesirable as it would potentially involve the courts in the political process.[156] Further, there might be rare situations in which it is desirable for an administrator to stay in

154 *Local Government Act 1993* (Qld), s 164(3)(b) and s 178.

155 Submitters who supported inclusion of such a provision in the Constitution included: Mr Don Willis (sub no 11); Redland Shire Council (sub no 27); Mr John Pyke (sub no 28).

156 Mr Geoffrey Fisher (sub no 33) warned of the risk of 'judicialising' political controversies if the QCRC's proposed clause was to impose an enforceable legal obligation. He suggested an alternative mechanism be established '*to provide regular, periodic reports to the Parliament during the time a local government is dissolved, updating Parliament on the activities of the administrator and what progress has been made towards holding a fresh election of councillors*'.

place longer than the period of time in which it would be possible to hold a fresh election of councillors.[157]

RECOMMENDATION 22 – FRESH ELECTION OF LOCAL COUNCILLORS AFTER DISSOLUTION

The *Constitution of Queensland 2001* should include a provision stating that a fresh election of the councillors of a local government that has been dissolved should be held as soon as possible after the dissolution of the local government.

157 See the submission of the National Party Queensland (sub no 24) in this regard.

12. STATUTORY OFFICE HOLDERS

Recommendations under review	*Source material*
QCRC R7.1 That certain statutory office-holders [the Auditor General, the Crime and Misconduct Commissioner, the Director of Public Prosecutions, the Electoral Commissioner, the Information Commissioner and the Ombudsman] be identified in the Queensland Constitution as requiring special provisions	QCRC issues paper paras 7.32-7.36; QCRC report ch 7 at 58; QCRC Constitution of Queensland 2000, cl 58
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	QCRC issues paper paras 7.32-7.36; QCRC report ch 7 at 58; QCRC Constitution of Queensland 2000, cl 59
QCRC R7.3 That appropriate statutory committees be required to ensure that the offices of [the Auditor General, the Crime and Misconduct Commissioner, the Director of Public Prosecutions, the Electoral Commissioner, the Information Commissioner and the Ombudsman] be given sufficient resources to discharge their responsibilities adequately	QCRC report ch 7 at 58-59; QCRC Parliament of Queensland Bill 2000, cls 86(1)(e), 97(c), 114

12.1 BACKGROUND

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 Auditor-General.[158] 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,[159] the Director of Public Prosecutions, the Electoral Commissioner, the Information Commissioner and the Ombudsman.[160]

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 Minsters 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.*[161]

To protect the independence of the identified statutory office holders, the QCRC recommended that:

- the statutory office holders be identified in the Constitution: R7.1;

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158 QCRC report, n 1 at 57. Although, note that the Kennett Government which instituted changes to these offices was ousted from office at the subsequent State election. One of the key election platforms of the incoming Bracks government was restoring the independence of the DPP and Auditor-General, a commitment implemented soon after its election: see the *Constitution Act 1975* (Vic), Part IIIA and Part V, Division 3.

159 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 (CMC). The CMC consists of a chairperson and four part-time Commissioners.

160 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.

161 QCRC issues paper, n 2 at para 7.33.

- the statutory office holders be removed by a procedure comparable to that provided for the removal of judges: R7.2; and
- appropriate statutory committees be required to ensure that the relevant offices are given sufficient resources to discharge their responsibilities adequately: R7.3.

12.2 COMMITTEE ANALYSIS

The committee agrees with the principle underlying the QCRC's recommendations, namely, the importance of upholding the independence of certain statutory office holders. The independence of a statutory office holder can potentially be undermined in a number of ways, such as by appointing a person or terminating their appointment on arbitrary or political grounds, or by the executive diminishing the office's resources to such an extent that the office holder is unable to fulfil his or her functions effectively.[162] Thus, factors which protect independence include: an open and impartial appointment process; a salary which is not subject to arbitrary change; clearly defined responsibilities; clearly defined circumstances which can lead to dismissal; and openness in the context of the office.[163]

However, the committee does not believe that provisions such as the QCRC recommends are necessary or desirable for the reasons outlined in section 12.2.1.[164] In section 12.2.2 the committee recommends alternative measures to enhance the independence of statutory office holders.

12.2.1 The QCRC's approach

Identification in the Constitution. The QCRC recommended that the Constitution identify a 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: R7.1. Clause 58 of the QCRC's Constitution of Queensland Bill gives effect to this recommendation and states that these relevant office holders: '*have responsibilities and duties that require they be independent and subject only to the la*w' and that '*they must be impartial and must exercise their powers and perform their functions without fear, favour or prejudice*'.[165]

The committee has the following concerns with this proposal.

- Statutory office holders differ in their nature and functions. This, in turn, impacts on their need for independence from government. Given the unique nature of each office, the specific legislation establishing the office is the appropriate place to locate provisions concerning the independence of the office.
- As discussed in chapter 2.2 the committee considers that the Constitution should explain the key components of Queensland's system of government, and provisions that are necessary to explain the operation and interrelationship of these key components. The relevant statutory office holders play critical roles in the administration of government in Queensland. However, they are one step removed from the provisions establishing and defining the powers of the three arms of

162 See the QCRC's issues paper, n 2 at para 7.35.

163 See the submission of the Queensland Integrity Commissioner (sub no 2) in this regard.

164 Submitters who argued that one or more statutory office holders should be mentioned in the Constitution included: Professor George Williams (sub no 6); the Auditor-General (sub no 12); the Health Rights Commissioner (sub no 18); the Ombudsman and Information Commissioner (sub no 22); and the Adult Guardian (sub no 26).

165 There are some precedents in overseas jurisdictions for constitutional recognition of certain statutory office holders. See, for example: the Constitution of the Independent State of Papua New Guinea, Part IX titled 'Constitutional office-holders and constitutional institutions'; the Constitution of the Republic of South Africa, Chapter 9 titled 'State institutions supporting constitutional democracy'; and the Constitution of the Republic of the Fiji Islands. The Western Australian Commission on Government also recommended that that State's constitution require the independence and impartiality of certain statutory office holders and put in place a special procedure for their removal: n 22 at 67-79.

government, that is the legislature, the executive and the judiciary. Accordingly, the committee considers that they fall below the threshold for inclusion in the Constitution.

- Because of their nature, the names, responsibilities and structure of statutory office holders are liable to fairly regular change for legitimate reasons quite apart from attempts to undermine their independence. New statutory offices are also created quite frequently. This has been evidenced by three such changes since the tabling of the QCRC's report in February 2000. The Constitution should be an enduring rather than transient document.

Removal process. The QCRC recommended that the Constitution provide that the listed statutory office holders be removed by a procedure comparable to that provided for the removal of judges: R7.2. 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;[166]
- the tribunal members are to be appointed by resolution of the Legislative Assembly (the QCRC commented that members of the misconduct tribunals would be suitable appointees[167]);
- 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 QCRC R8.3 in chapter 13.6 in this regard); and
- the tribunal has the functions, powers, protection and immunity given by an Act.

The committee does not consider that there is an identified need for a removal procedure akin to that which applies to the judiciary. The judiciary warrants constitutional mechanisms to protect its independence—particularly in so far as tenure and removal is concerned—by virtue of being a separate arm of government. The same considerations do not apply to statutory office holders. Further, the cost and delay which a procedure such as the QCRC proposes would involve is not justified.

As the Integrity Commissioner submitted:

> *With respect to the removal of certain statutory office holders, it should be noted that Judges hold office until age 70 years and are entitled to a non-contributory pension. Statutory office holders are appointed by contract, for terms often of five years or less. That means that from the point of view of the office holder, the question of termination of the contract does not have the same significance as dismissal has for a judge. The ordinary principles of contract should be sufficient. If the dismissal is not justified this can be demonstrated in court.*[168]

The Crime and Misconduct Commission (CMC) also submitted that such a process would involve an '*unnecessary duplication of existing mechanisms available to carry out such functions*'.[169] In this

166 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 of the QCRC's Constitution of Queensland Bill. However, the requirement for becoming a judge is five years standing as a barrister *or solicitor*: see the *Constitution of Queensland 2001* (Qld), s 59(1).

167 QCRC report, n 1 at 58.

168 Submission no 2.

169 Submission no 30.

regard, the CMC pointed out that all of the statutory offices involved are within the investigative jurisdiction of the CMC, with the exception of the chairperson of the CMC and the Parliamentary Crime and Misconduct Commissioner who are nevertheless subject to other forms of accountability.

Parliamentary committee responsibility. 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 adequately resourced. In particular, the QCRC recommended that appropriate parliamentary committees be required to ensure that the offices of those statutory office holders be given sufficient resources to discharge their responsibilities adequately: R7.3. The appropriate parliamentary committees suggested by the QCRC are:

- the Legal, Constitutional and Administrative Review Committee (LCARC) in the case of the Director of Public Prosecutions, the Information Commissioner and the Ombudsman;
- the Parliamentary Crime and Misconduct Committee (PCMC) in the case of a Crime and Misconduct Commissioner; and
- the Public Accounts Committee (PAC) in the case of the Auditor-General.[170]

The relevant clauses of the QCRC's Parliament of Queensland Bill which seek to implement this recommendation are wider in nature and include 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.

Current statutory provisions require that the Treasurer must consult the LCARC regarding the development of the Ombudsman's (and, due to shared budgetary allocation, the Information Commissioner's) budget,[171] and that the Treasurer must consult the PAC regarding the development of the budget of the Audit Office.[172] These provisions have been reviewed and ultimately found by the respective parliamentary committees to be appropriate.[173] The former PCJC (now the PCMC) has also recommended that the relevant minister be required to consult with that committee in developing the budget of the (CMC) for each year.[174]

This committee does not support statutory obligations regarding the resources of particular statutory office holders over and above these current and proposed obligations.

If a parliamentary committee is to be involved in examining the resources of a statutory office holder, then that committee must have some on-going function in relation to that office holder to make their involvement meaningful. For example, in addition to its role regarding development of the Ombudsman's budget, the LCARC has 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. These other responsibilities with respect to the Ombudsman enable the committee to be more informed about the appropriate resourcing of the Ombudsman's office. Similarly, the PAC has on-going responsibilities in relation to the Auditor-General and the PCMC an on-going 'monitor and review' role in relation to the CMC.

A responsibility to ensure that the resources of a particular statutory office holder are sufficient to fulfil their functions would not, in isolation, be effective.

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170 While QCRC R7.3 impliedly includes the Electoral Commissioner, the QCRC does not refer to the Electoral Commissioner in the relevant discussion in its report.

171 *Ombudsman Act 2001* (Qld), s 88.

172 *Financial Administration and Audit Act 1977* (Qld), s 68.

173 LCARC, *Review of the Report of the Strategic Review of the Queensland Ombudsman*, report no 14, Goprint, Brisbane, July 1999 at 20; PAC, *Review of the Report of the Strategic Review of the Queensland Audit Office,* report no 44, Goprint, Brisbane, April 1998 at 17.

174 Parliamentary Criminal Justice Committee, *Three yearly review of the Criminal Justice Commission*, report no 55, Goprint, Brisbane, March 2001 at 210.

Further, there is a limit to the functions which can be conferred on a parliamentary committee without fulfilment of its other areas of responsibility being adversely affected. For example, if the LCARC were to have an additional responsibility regarding the resourcing of the DPP (and the committee was to have an on-going role regarding that office to make its input meaningful), this responsibility would have to be fulfilled at the expense of the committee considering other matters within its jurisdiction.

RECOMMENDATION 23 – CONSTITUTIONAL RECOGNITION OF STATUTORY OFFICE HOLDERS

The *Constitution of Queensland 2001* should not identify certain statutory office holders as requiring special provision.

RECOMMENDATION 24 – PROCEDURES FOR REMOVAL OF STATUTORY OFFICE HOLDERS

The *Constitution of Queensland 2001* should not provide that certain statutory office holders be removed by a procedure comparable to that provided for the removal of judges.

RECOMMENDATION 25 – PARLIAMENTARY COMMITTEE RESPONSIBILITY

The *Parliament of Queensland Act 2001* should not require that appropriate statutory committees ensure that certain statutory office holders be given sufficient resources to discharge their responsibilities adequately.

12.2.2 The committee's approach

While the committee does not support the QCRC's recommendations 7.1 to 7.3, the committee acknowledges that there could be more consistency in some of the provisions regarding the independence of statutory office holders across the various statutes concerning those office holders. The following examples, drawn from the list of statutory office holders included in appendix B of the committee's issues paper, illustrate this inconsistency.

- Bipartisan support of the PCMC is required for the relevant minister to nominate a person for appointment as a CMC commissioner. Yet in the case of the appointment of a person as Ombudsman or Auditor-General, the relevant ministers are only required to 'consult' the parliamentary committees which otherwise have functions in relation to those offices (namely, the LCARC and PAC respectively).
- The LCARC and PAC are required to be consulted about the budgets of the offices of Ombudsman and Auditor-General respectively. Yet there is no requirement that the PCMC be consulted about development of the CMC's budget.
- The grounds for terminating the appointment of statutory office holders vary. For example, bankruptcy is a ground for terminating the appointment of the Anti-Discrimination Commissioner, Clerk of the Parliament, Director of Public Prosecutions, Electoral Commissioner, Health Rights Commissioner and Solicitor-General, but not for the other listed office holders.
- Some office holders are expressly required to perform their functions independently, impartially and in the public interest. Others are expressly stated not to be subject to direction by any other person. Most have no such requirements in their legislation.
- There are specific limits on the total period of appointment of some statutory office holders but not on others.
- The salary of only a few statutory office holders is specifically protected.[175]

The committee is not advocating complete consistency in relevant provisions. As the committee noted in chapter 12.2.1, complete consistency in such provisions is not desirable. The nature of each office holder must be taken into account. However, some guidance provided on a whole-of-government

[175] See, for example, the *Ombudsman Act 2001* (Qld), s 62(2).

basis regarding matters such as the appointment, termination, suspension, tenure, salary and budget of statutory office holders should prevent unwarranted anomalies occurring.

Such guidance should complement a broader, non-constitutional statement regarding the need to protect the independence of certain statutory office holders.

The Queensland Integrity Commissioner, the Hon Alan Demack AO, submitted that rather than make any provision in the Constitution to provide for the independence of statutory office holders, the *Legislative Standards Act 1992* (Qld) should include a provision to the effect that '*an Act which creates an office must contain provisions which secure the independence of the holder of the office to a degree appropriate to the office*'.[176]

The committee supports the inclusion of such a statement as a fundamental legislative principle (FLP) in the *Legislative Standards Act*, s 4. As an important corollary, the Office of the Queensland Parliamentary Counsel is required to advise on the application of FLPs to proposed legislation.[177] The Cabinet Handbook (section 7.2.6) also reminds departmental officers of the FLPs.

RECOMMENDATION 26 – PROVISIONS RELATING TO STATUTORY OFFICE HOLDERS

The Premier should ensure that some guidance is provided on a whole-of-government basis regarding matters such as the appointment, termination, suspension, tenure, salary and budget of statutory office holders.

RECOMMENDATION 27 – INDEPENDENCE OF STATUTORY OFFICE HOLDERS

The *Legislative Standards Act 1992* (Qld), s 4 should include a fundamental legislative principle to the effect that '*an Act which creates an office must contain provisions which secure the independence of the holder of the office to a degree appropriate to the office'*.

176 Submission no 2.

177 *Legislative Standards Act 1992* (Qld), s 7.

PART 3 – THE JUDICIARY

13. THE JUDICIARY

13.1 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 of Queensland Act 1967* and the *Constitution of Queensland 2001.* 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*[178] contains provisions in Chapter 4 ("Courts") requiring that there be both a Supreme Court and a District Court (s 57) and providing for:

- the jurisdiction of the Supreme Court (s 58);
- the appointment, retirement and removal of judges (ss 59-61);
- appropriation of judges' salaries which are not to be decreased (s 62); and
- security of tenure of judges whose judicial office is abolished (s 63).

Most of these provisions provide significant protection for the independence of the State's judiciary. However, a number of issues regarding the judiciary remain outstanding.

13.2 JUDICIAL INDEPENDENCE

13.2.1 Background

The principle of judicial independence entails two critical requirements. The first is that *judges must be impartial* in the exercise of their judicial functions, in accordance with the terms of their judicial oath, whereby they promise to do right to all manner of people '*according to law to the best of my knowledge and ability without fear favour or affection*'.[179] Sir Gerard Brennan eloquently explained this duty in 1995 when sworn-in as Chief Justice of the High Court:

> *It precludes partisanship for a cause, however worthy to the eyes of a protagonist that cause may be. It forbids any judge to regard himself or herself as a representative of a section of society. It forbids partiality and, most importantly, it commands independence from any influence that might improperly tilt the scales of justice. When the case is heard, the judge must decide it in the lonely room of his or her own conscience but in accordance with law. That is the way in which right is done without fear or favour, affection or ill-will.*[180]

The second critical requirement of judicial independence is that judges are *seen to be* impartial. Public perception of judges as impartial is essential for the maintenance of the rule of law. If public confidence in the impartiality of the judiciary is undermined, law and order is seriously threatened.

Given the importance of this principle of judicial independence, it is necessary to examine how its two critical requirements, actual and perceived judicial impartiality, are protected in our constitutional system.

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178 For an explanation as to the reforms introduced by the *Constitution of Queensland 2001* (Qld) see explanatory notes to the bill for the Constitution of Queensland 2001 at 27-31 and LCARC report no 24, n 4, Constitution of Queensland 2000—Notes to the bill at 22-26.

179 See schedule 1 to the *Constitution of Queensland 2001* (Qld).

180 (1995) 183 CLR ix at x.

Actual impartiality depends on the personal actions and attitudes of judges to comply with the terms of their judicial oath. A failure to honour that oath may warrant removal from the bench in accordance with the procedure and on the grounds now specified in Chapter 4 of the *Constitution of Queensland 2001*.

Perceived impartiality, on the other hand, depends on the nature of the relationship which exists between the judges and all sectors of the community. Judges need to be seen to be independent from the parties who appear before them in litigation, including the other two branches of government, the legislature and the executive (since they are often parties to litigation), as well as from all other groups in the community. Independence from parties in legal proceedings is maintained by the personal integrity of the judges, acting in accordance with a well established code of judicial ethics. Independence from the other two branches of government is also maintained by constitutional provisions which provide judges with security of tenure and protection of their judicial salaries from legislative and executive interference, while independence from the rest of the community is protected by the law of contempt of court.

Chapter 4 of the Constitution currently does not include an express statement affirming the importance of the principle of judicial independence.

13.2.2 Committee analysis

While the independence of the judiciary must be guaranteed by specific legislative measures to provide security of tenure and to prevent interference with judicial functions, express recognition of the principle of judicial independence in the Constitution emphasises its fundamental importance in our constitutional system. Accordingly, the committee believes that the *Constitution of Queensland 2001* should contain express recognition of the principle of judicial independence.[181]

This would be consistent with the committee's view, expressed in chapter 2.2, that the Constitution of this State ought to explain how government operates.

Support for this approach, which accords with Australia's international obligations to maintain an impartial and independent judiciary, can be gathered from the numerous declarations made in Australia and overseas including:

- art 10 of the Universal Declaration of Human Rights;
- art 14(1) of the International Covenant on Civil and Political Rights;
- certain significant regional and Australian declarations on judicial independence. For instance, arts 3 and 4 of the *Beijing Statement of Principles of the Independence of the Judiciary in the LAWASIA Region* (the *Beijing Statement*);[182] and
- the *Declaration of Principles on Judicial Independence.*[183]

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181 Submitters who supported recognition of judicial independence in the Constitution included: Mr Anthony Marinac (sub no 5); Professor George Williams (sub no 6); Mr Don Willis (sub no 11); Queensland Transport and Main Roads (sub no 29); Queensland Law Society (sub no 31); Professor George Winterton (sub no 34). The Judges of the Supreme Court (sub no 15) commented that recognition of the principle in the Constitution would not result in any particular difficulty. The National Party Queensland (sub no 24) submitted that the Constitution is not the appropriate mechanism to embody principles of independence of the judiciary. Mr Anthony Marinac (sub no 5) and Professor George Winterton (sub no 34) supported provisions 'vesting' judicial power in the courts.

182 The Chief Justices of 32 countries are signatories to the *Beijing Statement* which was adopted at the Sixth Conference of Chief Justices of Asia and the Pacific in Beijing on 19 August 1995, amended in Manilla on 28 August 1997 and formally adopted by the LAWASIA Council on 4 October 2001. It is available at: <www.taunet.net.au/lawasia/beijing_statement.htm>.

183 Issued following the *Beijing Statement* (n 182) on 10 April 1997 by the Chief Justices of the Supreme Courts of all the States, and of the Australian Capital Territory and the Northern Territory to enunciate, in more detail, principles relating to judicial appointments and the exercise of judicial office. The text is available in *Judicial Conference News,* May 1997, volume 1.1 at 3, and on the Internet at: <www.jca.asn.au/jcanews1.pdf>.

A number of constitutions of overseas jurisdictions expressly prescribe or recognise the need for an independent judiciary.[184]

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 entrenchment of Chapter III, along with the vesting of the Commonwealth's judicial power in specified courts, has resulted in the recognition under the Commonwealth Constitution of a binding principle of separation of judicial and non-judicial power. This principle imposes constitutional restrictions on the vesting and exercise of Commonwealth judicial power.

Similar restrictions have not arisen under the Queensland Constitution, given the lack of any express entrenched provision vesting the judicial power of the State in specified courts. However, certain restrictions have been recognised to apply at the State level from Chapter III of the Commonwealth Constitution.[185]

An express provision in the Queensland Constitution which merely affirms the importance of the principle of judicial independence will not introduce any new restrictions on State legislative or executive power. If such a provision were effectively entrenched, it might be argued that a restriction could be implied which would preclude the Parliament and the executive from undermining judicial independence. The committee will consider this issue of entrenchment in the next stage of its inquiry into constitutional reform.

At this stage, the committee recommends that the statement of independence refer to 'judges'.[186] The committee recommends in chapter 13.3 that further consideration be given to the extent to which it is appropriate for the Constitution to recognise and protect the independence of the magistracy. Following this review, it might be appropriate to extend the statement of judicial independence to, for example, 'courts'.

The committee considered alternative ways by which recognition might be given to the principle of judicial independence, for example, by including the principle in the list of fundamental legislative principles in s 4 of the *Legislative Standards Act.*[187] However, the committee concluded that an express statement in the Constitution is the preferable option.

RECOMMENDATION 28 – JUDICIAL INDEPENDENCE

The *Constitution of Queensland 2001* should contain express recognition of the principle of judicial independence by including a provision along the following lines:

> *Judges appointed under Queensland law are independent and subject only to the law which they must apply impartially.*

184 See, for example, the: Constitution of the Republic of South Africa 1996, s 165; Constitution of Ireland, art 35(2); and Constitution of India, art 50.

185 See *Kable v Director of Public Prosecutions (NSW)* (1996) 189 CLR 51.

186 'Judge' is defined in the *Constitution of Queensland 2001* (Qld), s 56 to mean a judge of the Supreme Court or District Court.

187 One of the areas of responsibility of the Scrutiny of Legislation Committee is to consider the application of the fundamental legislative principles to particular bills and particular subordinate legislation: *Parliament of Queensland Act 2001* (Qld), s 103.

13.3 EMERGING ISSUES

13.3.1 Further inquiry

In its issues paper the committee sought comment on whether further consideration should be given to:

- the process for, and extent of, consultation prior to judicial appointments;
- mechanisms for investigating complaints against the judiciary; and
- the constitutional recognition and protection of the independence of magistrates.

Trends in other jurisdictions, literature[188] and the comments in submissions indicate that it is appropriate to give further consideration to all three of these matters before finalising a modern Constitution for Queensland. The committee's reasons for reaching this conclusion in relation to each of the three issues are discussed below.

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.[189] In practice, the Attorney-General consults with the Chief Justice and the presidents of the Bar Association of Queensland and the Queensland Law Society before making any judicial appointments. Other relevant judicial officers are also consulted for certain appointments. For example, the Chief Judge and President are consulted for appointments to the District Court and the Court of Appeal respectively.[190]

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*'.[191]

It is important for the Queensland community to maintain confidence in the process for appointing judges given the critical role which judges play in our system of government and the need for judges to be, and be seen to be, impartial. There has never been a public review of the process by which persons are appointed to the judiciary in Queensland. It would be timely for such a review to be conducted before the current process of constitutional reform is finalised.[192]

Judges of the Supreme Court of Queensland[193] recognised the need for transparency in the process of appointment, and suggested that a provision could be enacted giving legislative force to the process which already occurs.[194] However, they did not consider that there is a need for further review of the matter.

Legislative provisions requiring consultation with the Chief Justice, the Queensland Law Society and the Bar Association of Queensland, and other relevant judicial officers as appropriate would ensure that future governments, in appointing judges, conduct at least this level of consultation. Such provisions would also inform the general public about the consultation process. However, this

188 For relevant literature see the committee's issues paper, n 13 at chapter 14.3.

189 *Constitution of Queensland 2001* (Qld), s 59.

190 See Judges of the Supreme Court (sub no 15).

191 QCRC report, n 1 at 62. 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 Committee: EARC, n 7 at para 7.81.

192 Submitters who supported review of, or changes to, the process for appointing judges included: Mr Anthony Marinac (sub no 5); Professor George Williams (sub no 6); Mr Don Willis (sub no 11); Professor George Winterton (sub no 34). The National Party Queensland did not consider the matter appropriate for inclusion in the Constitution (sub no 24).

193 Submission no 15.

194 In an addendum to the submission from the Judges of the Supreme Court (sub no 15), the Chief Justice noted that the Senior Judge Administrator should be consulted in respect of an appointment to the Trial Division.

proposal is complicated by questions as to the appropriate placement of such provisions, the extent to which they should be enforceable, and the effect of non-compliance. Further, the committee believes that wider public consultation in relation to this issue is desirable.

Thus, while the suggestion of the Supreme Court judges clearly has merit, the committee considers that further, detailed consideration of the issue and options is preferable to immediate amendment.

Mechanisms for investigating complaints against the judiciary. Public confidence in the rule of law requires judges to be, and to be seen to be, independent and accountable.[195] The committee sought submissions about whether further consideration should be given to the need for formal mechanisms for dealing with complaints against the judiciary as a means to ensure the judiciary retains this public confidence.

Judges of the Supreme Court[196] submitted that there is no need for change to the present system by which complaints may be made to the head of the jurisdiction. In particular, the judges noted that the New South Wales experience suggests that a judicial commission is resource intensive and the vast majority of complaints concern the result of a court case which may be tested on appeal.

Nevertheless, full inquiry into the need for reform in this area is, in the committee's view, justified prior to finalisation of any constitutional reform process.[197] The ALRC report on the federal justice system,[198] and recent events in the Commonwealth Senate[199] indicate that there would be value in, at least, a formal statement of procedures for complaints against the judiciary or protocols for members of Parliament making allegations against the judiciary.

The Magistracy. The *Constitution of Queensland 2001* currently contains no specific recognition of the role of magistrates or the Magistrates Court in the judicial process. Provisions relating to appointment, tenure and removal of magistrates are contained in the *Magistrates Act 1991* (Qld).

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'*.[200]

In contrast, many submitters to the committee's inquiry supported review of the recognition and protection of the magistracy in the Constitution[201] for reasons including the following.

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195 See Hon D K Malcolm AC, Chief Justice Western Australia, 'Independence with Accountability', paper delivered at the annual conference of the Australian Institute of Judicial Administration, Adelaide, 6-8 August 1998 at 1. Available at <www.aija.org.au/online/anconfer.htm>. See also Australian Law Reform Commission (ALRC), report no 89, *Managing Justice: A review of the federal civil justice system*, AGPS, Sydney, January 2000 at para 2.242.

196 Judges of the Supreme Court (sub no 15).

197 Mr Anthony Marinac (sub no 5); Professor George Williams (sub no 6); Mrs Deborah Vasta and Mr Salvatore Vasta (sub no 10); Mr Don Willis (sub no 11); and Professor George Winterton (sub no 34) supported further consideration of whether more formal complaints procedures should be introduced and, if so, what form such procedures should take.

198 ALRC report no 89, n 195. See especially recommendations 11 and 12.

199 In March 2002, Senator Bill Heffernan made certain allegations against Justice Michael Kirby of the High Court in the Commonwealth Senate. See Parliament of Australia, Senate, *Parliamentary Debates (Hansard),* 12 March 2002 at 575-577.

200 QCRC report, n 1 at 62.

201 See the submissions by: Mr Anthony Marinac (sub no 5); Mr Don Willis (sub no 11); Judges of the Supreme Court (sub no 15); Chief Magistrate (sub no 20); Professor Suri Ratnapala (sub no 21); Magistrates' Association of Queensland (sub no 25); Queensland Law Society (sub no 31); Professor George Winterton (sub no 34). See also J Lowndes, SM, 'The Australian Magistracy: From justices of the peace to judges and beyond

- The Magistrates Court has substantial jurisdiction.
- Magistrates' functions are primarily judicial. Accordingly, it is appropriate for magistrates to enjoy similar levels of independence as judges.
- Possible conflict with government could arise out of matters before magistrates.

Such reform would raise complex questions relating to, for example, implications for the administration of the Magistrates Court, the need for judicial pensions rather than superannuation for the magistracy, and appointment and removal processes. Accordingly, the committee considers that comprehensive review of the matter is necessary before relevant legislative amendments are made.

Some submitters also drew attention to the current inequity in relation to compulsory retirement ages for judges and magistrates.[202] Magistrates are required to retire at age 65,[203] while judges are required to retire at age 70.[204] This matter should be considered as part of the review of the need for constitutional recognition and protection of the independence of magistrates.

Other matters. Any review of the matters discussed above might identify additional matters which should be considered before finalising constitutional provisions relating to the Supreme, District and Magistrates Courts. It is desirable that the body responsible for reviewing the matters discussed above should also have jurisdiction to inquire into such related matters.

RECOMMENDATION 29 – REVIEW OF CERTAIN MATTERS RELATING TO THE JUDICIARY

Before finalising the current process of constitutional reform, a comprehensive review should be undertaken in relation to:

(a) the process for, and extent of, consultation prior to judicial appointments;

(b) mechanisms for investigating complaints against the judiciary; and

(c) the constitutional recognition and protection of the independence of magistrates.

The review body should also have jurisdiction to consider other related matters.

13.3.2 Form of inquiry

In its issues paper the committee sought submissions on the appropriate body to conduct any further inquiry into the matters discussed in chapter 13.3.1. Options 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.

The committee considers that establishment of a commission, constituted by former judges, former magistrates and appropriate community representatives, specifically to inquire into the issues outlined in recommendation 29 is the preferable option.

In reaching this conclusion the committee was persuaded by the following factors.

- Substantial input from the judiciary itself will be necessary to ensure that the findings of the inquiry are practical and give due consideration to principles of judicial independence.

– Part II', *The Australian Law Journal*, vol 74 at 592. The National Party Queensland (sub no 24) considered there was no need for the Constitution to recognise the magistracy.

202 See the submissions of: the Chief Magistrate (sub no 20); the Magistrates' Association of Queensland Inc (sub no 25); and Professor George Winterton (sub no 34).

203 *Magistrates Act 1991* (Qld), s 14(d).

204 *Supreme Court of Queensland Act 1991* (Qld), s 23 and *District Court of Queensland Act 1967* (Qld), s 14.

- Given that the inquiry relates to the judiciary, a review body independent of the executive and the legislature is desirable having regard to the separation of powers.
- Credibility of the review will be enhanced if currently serving judges do not form part of the review body. However, the involvement of former judges is acceptable, given that the recommendations of the review body will have no direct impact on them.
- The review will need to involve substantial public consultation given that mechanisms recommended by the review body should serve to promote the independence and accountability of the judiciary, and the public understanding and perception of that independence and accountability.

A specially constituted commission as outlined above is most likely to generate public confidence in the outcomes of the review. If the government does not support this option, review by this or a future Legal, Constitutional and Administrative Review Committee would be an appropriate alternative.[205]

RECOMMENDATION 30 – FORM OF INQUIRY INTO CERTAIN MATTERS RELATING TO THE JUDICIARY

The Government should establish a commission, constituted by former judges, former magistrates and appropriate community representatives, specifically to inquire into the issues outlined in recommendation 29.

If the government does not establish such a commission, the Legal, Constitutional and Administrative Review Committee should inquire into the issues outlined in recommendation 29.

13.4 ACTING JUDGES

Recommendation under review	*Source material*
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	QCRC report ch 8 at 61; QCRC Constitution of Queensland 2000, cls 61, 67 and 84

13.4.1 Background

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

[205] Mr Anthony Marinac (sub no 5), Mr Don Willis (sub no 11) and the Chief Magistrate (sub no 20) supported review by LCARC. Judges of the Supreme Court of Queensland (sub no 15) considered that the issue of constitutional recognition of the magistracy should be reviewed by a panel consisting of former Supreme Court judges and retired magistrates.

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.[206]

The QCRC recognised the threat to judicial independence that the appointment of acting judges presents. However, the QCRC concluded that provision for 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.[207]

The *Declaration of Principles on Judicial Independence Issued by the Chief Justices of the Australian States and Territories*[208] states that:

> *(1) Persons appointed as Judges of* [the courts of the states and territories] *should be duly appointed to judicial office with security of tenure until the statutory age of retirement. However, there is no objection in principle to:*
>
> *(a) the allocation of judicial duties to a retired judge if made by the judicial head of the relevant court in exercise of a statutory power; or*
>
> *(b) the appointment of an acting judge, whether a retired judge or not, provided that the appointment of an acting judge is made with the approval of the judicial head of the court to which the judge is appointed and provided that the appointment is made only in special circumstances which render it necessary.*
>
> *(2) The appointment of an acting judge to avoid meeting a need for a permanent appointment is objectionable in principle.*

13.4.2 Committee analysis

The committee recognises that the need to appoint acting judges arises in practice[209] and the inability to appoint acting judges could potentially impede the effective functioning of the courts in some cases. However, in order to ensure that judicial independence derived from granting judges security of tenure is not eroded, acting judges should be appointed only in limited circumstances, and subject to appropriate safeguards. Thus, acting judicial appointments should only be made:

- for fixed, short-term periods;[210]
- with the consent of the Chief Justice or Chief Judge as the case may be;[211]
- in circumstances where the appointee does not continue to practice as a solicitor or barrister during the term of the appointment; [212] and
- provided that the acting appointment is not terminable or revocable during its term unless the judge is removed pursuant to the procedures generally provided for removal of a judge.[213]

The QCRC further recommended that the statutory provision for acting judges should enable appointment as an acting judge to be renewed.[214] Such a complementary provision is essential to

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206 *District Court of Queensland Act 1967* (Qld), s 17.

207 QCRC report, n 1 at 61-62 and cl 67 of the QCRC's proposed Constitution of Queensland.

208 Note 183.

209 In this regard see the submission of the Judges of the Supreme Court (sub no 15).

210 In this regard see the submission of the Judges of the Supreme Court (sub no 15).

211 Supported by Professor George Williams (sub no 6); Mr Don Willis (sub no 11); Judges of the Supreme Court (sub no 15); and Professor Suri Ratnapala (sub no 21). Professor George Winterton (sub no 34) considered that *consultation* with the Chief Justice or Chief Judge should be sufficient if certain other mechanisms are adopted.

212 Judges of the Supreme Court (sub 15) noted that it is entirely inappropriate that judges be able to act on a part time basis.

213 The *Declaration of Principles of Judicial Independence,* n 183, provides that '*the holder of a judicial office should not, during the term of that office, be dependent upon the executive Government for the continuance of the right to exercise that judicial office or any particular jurisdiction or power associated with that office'.*

214 QCRC proposed Constitution of Queensland 2000, cl 67(3) which forms part of the QCRC's report, n 1.

ensure that the practical benefits of acting judges are realised. However, reappointments should be subject to the same safeguards as original appointments to protect the principle of judicial tenure.

Some jurisdictions provide that acting judges may be appointed for a limited period beyond the compulsory retirement age applied to permanent judges.[215] This serves to facilitate the appointment of retired judges as acting judges. However, in the committee's view the compulsory retirement age should be consistently applied.

Process of appointment. Currently, acting judges, like permanent judges, are appointed by the Governor-in-Council on recommendation of the Attorney-General. However, if changes are made to the process of appointing judges generally (see recommendation 29) consideration will also need to be given to the process for appointing acting judges.[216] The review recommended in recommendation 30 should also consider this issue.

Placement of legislative provision. The Judges of the Supreme Court[217] submitted that there is no reason why provisions for acting judges should not be retained in the *Supreme Court of Queensland Act 1991* (and *District Court of Queensland Act 1967*), as opposed to being relocated to the *Constitution of Queensland 2001*.

However, it is desirable that provisions for acting judges should be located in the same legislation as provisions for security of judicial tenure, given that acting judges are an exception to this general principle.

This issue is more significant if provisions relating to judicial tenure in the *Constitution of Queensland 2001* are entrenched. The issue of entrenchment will be considered in stage two of the committee's inquiry.

RECOMMENDATION 31 – ACTING JUDGES

Provisions for the appointment of acting judges should be relocated from the *Supreme Court of Queensland Act 1991* and *District Court of Queensland Act 1967* to the *Constitution of Queensland 2001* and amended to ensure that a person who qualifies for appointment as a judge may be appointed as an acting judge only:

- for fixed, short-term periods;
- with the consent of the Chief Justice or Chief Judge as the case may be;
- in circumstances where the appointee does not continue to practice as a solicitor or barrister during the term of the appointment; and
- provided that the acting appointment is not terminable or revocable during its term unless the judge is removed pursuant to the procedures generally provided for removal of a judge.

Acting appointments should be renewable.

215 For example, in New South Wales the compulsory retirement age is 72 years: *Judicial Officers Act 1986* (NSW), s 44. However, a person under the age of 75 years may be appointed as an acting judge: *Supreme Court Act 1970* (NSW), s 37. This system was advocated by Professor George Winterton (sub no 34).

216 Mr Don Willis (sub no 11) submitted that, ideally, the same process used to appoint permanent judges should be used in the appointment of acting judges.

217 Submission no 15.

13.5 COMPULSORY RETIREMENT

Matter under review	*Source material*
Whether the re-enactment of provisions regarding the retirement of judges at age 70 is inconsistent with the *Anti-Discrimination Act 1991* (Qld)	Explanatory notes to the Constitution of Queensland 2001; letter from the Acting Premier to the committee dated 17 January 2002: see appendix A

13.5.1 Background

Section 60 of the *Constitution of Queensland 2001* states that the *Supreme Court of Queensland Act 1991*and the *District Court of Queensland Act 1967* provide for a judge's retirement. These Acts (sections 23 and 14 respectively) state 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 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.

13.5.2 Committee analysis

Compulsory retirement ages are generally undesirable as they discriminate on the basis of age rather than focussing on the capacity of a person to fulfil the duties of their office or occupation. Thus, regular assessment of such capacity is, as a general principle, more appropriate than compulsory retirement as a means of ensuring that people do not continue to hold positions when they are no longer fit to do so. However, in the case of the judiciary, security of tenure is an important mechanism to protect judicial independence. Periodic assessment of a judge's capabilities may undermine security of tenure and therefore potentially erode judicial independence.[218]

The Anti-Discrimination Commissioner, Queensland, identified two additional relevant factors:[219]

- *'it would be undesirable for the dignity of the office for a judge to have to be removed who can no longer perform acceptably but who is unwilling to retire voluntarily'*; and
- every retirement of a judge provides an opportunity to broaden the judiciary to a judiciary which is more representative of the community.

For the reasons outlined above, the committee considers that a compulsory retiring age for judges is justified.[220] Provision for compulsory retirement should be contained in the *Constitution of Queensland 2001*, given that compulsory retirement is a limitation on the tenure provided by ss 60 and 61 of the *Constitution of Queensland 2001*. The issue of entrenchment will be considered in stage two of the committee's inquiry.

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218 See the submission of the Anti-Discrimination Commission, Queensland (sub no 32), and the Human Rights and Equal Opportunity Commission, *Age Matters: a report on age discrimination,* Commonwealth of Australia, May 2000 at 42.

219 Submission no 32.

220 Submitters who supported this conclusion include: Professor George Williams (sub no 6); Mr Don Willis (sub no 11); Judges of the Supreme Court (sub no 15); the Chief Magistrate (sub no 20); Professor Suri Ratnapala (sub no 21); the National Party Queensland (sub no 24); the Magistrates' Association, Queensland (sub no 25); Queensland Transport and Main Roads (sub no 29); the Anti-Discrimination Commission, Queensland (sub no 32); Mr Geoffrey Fisher (sub no 33); Professor George Winterton (sub no 34).

RECOMMENDATION 32 – COMPULSORY RETIREMENT AGE FOR JUDGES

A compulsory retiring age of 70 years for judges should be retained. The *Constitution of Queensland 2001*, the *Supreme Court of Queensland Act 1991*, the *District Court of Queensland Act 1967* and the *Anti-Discrimination Act 1992* should be amended as necessary to include this compulsory retiring age in the *Constitution of Queensland 2001*.

13.6 REMOVAL FROM OFFICE

Recommendation under review	*Source material*
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	QCRC report ch 8 at 62; QCRC Constitution of Queensland 2000, cl 64(6)

13.6.1 Background

The *Constitution of Queensland 2001,* s 61 provides that a judge may be removed from an 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. 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.

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.

Under the *Crime and Misconduct Act 2001* (Qld), s 58 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. The CMC is 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: s 70.

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. The tribunal's functions, powers, protection and immunity are to be defined by statute.

The QCRC recommended that any resolution of the Legislative Assembly establishing a tribunal of inquiry should state '*full particulars of the grounds on which it is proposed to remove the judge'*.[221] 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 of the investigation. The QCRC was not explicit as to whether it considered that the grounds on which the judge's removal from office is proposed should limit the jurisdiction of the tribunal.

[221] QCRC report, n 1 at 62, and the QCRC's proposed Constitution of Queensland 2000, cl 64(6).

13.6.2 Committee analysis

Reference and scope of inquiry. The committee considers that s 61 of the *Constitution of Queensland 2001* should be amended to state that a judge can only be removed after the Legislative Assembly has referred specific allegations against a judge to a tribunal.[222] The tribunal's jurisdiction should be confined by the allegations so referred. If further conduct that might justify removal comes to the attention of the tribunal in the course of its investigations then the tribunal should report the matter to the Legislative Assembly and seek an extension of the terms of reference.

The alternative is to refer to a tribunal the broad question of whether a judge has misbehaved to an extent justifying removal from office, or is incapable of performing the duties of office. Given the infinite nature of such a reference, the tribunal would need to define the scope of its own inquiry. This is a role more appropriate for the Legislative Assembly. Any attempt by the tribunal to limit the inquiry to particular incidents or matters considered to be significant could expose the inquiry to criticism. Conversely, a broad ranging inquiry is likely to be far more intrusive than necessary. This was specifically recognised by the 1989 Parliamentary Judges Commission of Inquiry.[223]

In the case of alleged misbehaviour, the Legislative Assembly would be required, when making reference to the tribunal, to identify allegations of the judge's involvement in a particular incident/s or course of conduct. In the case of alleged incapacity, the Legislative Assembly would be required, when making reference to the tribunal, to identify the basis upon which the judge's incapacity to perform his or her duties is alleged.

Findings. The tribunal should be required to report to the Legislative Assembly on whether the judge's misconduct or incapacity, if proved, *is capable of* justifying removal from office. [224] The final decision as to whether a judge should be removed is a role for Parliament and giving a tribunal determinative power undermines the constitutional responsibility of the Legislative Assembly in relation to the removal of judges.[225] However, advice from the tribunal regarding whether the allegations, if proved, *are capable of* constituting misbehaviour or incapacity justifying removal from office should assist the Legislative Assembly to make a fully informed decision. The question of whether the proved allegations *do* constitute misbehaviour or incapacity justifying removal from office would remain a question for Parliament.[226]

Parliament should not have the discretion to remove the judge where the tribunal finds that the misbehaviour or incapacity, if proved, is *not capable of* justifying removal from office. This guarantees that a judge can only be removed when there is a genuine case of misconduct or incapacity and removes the risk of removal on political grounds.[227]

Conclusion. The *Constitution of Queensland 2001* should require the Legislative Assembly to refer specific allegations against a judge to a tribunal. The tribunal should be required to report to the Legislative Assembly:

---

222 Submitters who supported this principle included: Professor George Williams (sub no 6); Mrs Deborah Vasta and Mr Salvatore Vasta (sub no 10); Mr Don Willis (sub no 11); Judges of the Supreme Court (sub no 15); Professor Suri Ratnapala (sub no 21); Mr Geoffrey Fisher (sub no 33); Professor George Winterton (sub no 34). The National Party Queensland (sub no 24) did not consider that a tribunal to consider allegations against judges is necessary.

223 Rt Hon Sir H Talbot Gibbs, Hon Sir G H Lush and Hon M M Helsham, *Second report of the Parliamentary Judges Commission of Inquiry*, Government Printer, Queensland, 1989 at page 89, para 11.7.

224 Mrs Deborah Vasta and Mr Salvatore Vasta (sub no 10) submitted that the finding that a judicial officer should be removed is a role solely for Parliament and the role of the tribunal should be limited to investigating and reporting on findings of fact in relation to a complaint against a judicial officer.

225 For further analysis of these issues see H Evans (ed), *Odgers' Australian Senate Practice,* tenth edition, available at: <www.aph.gov.au/senate/pubs/Html/httoc.htm> 31 December 2000 at 534-537.

226 The same conclusion was reached by the 1988 Constitutional Commission, n 36 at para 1.80-2.01.

227 See also EARC's comments in this regard: EARC report, n 7 at para 7.49.

- whether the allegations referred to the tribunal are proved on the balance of probabilities; and
- whether the allegations, if proved, *are capable of* constituting misbehaviour justifying removal from office or incapacity to perform the functions of office.

The order in which these questions should be considered will depend on the circumstances of the case. The tribunal should be empowered to report to the Legislative Assembly if either of these questions can be answered in the negative, without pursuing the other question.

If, and only if, the tribunal finds that the allegations are proved, and are capable of justifying removal from office, the Legislative Assembly should decide whether the conduct does justify removal from office and, if appropriate, address the Governor-in-Council requesting removal of the judge.

RECOMMENDATION 33 – REMOVAL OF JUDGES FROM OFFICE

Section 61 of the *Constitution of Queensland 2001* should be redrafted to require the Legislative Assembly to refer specific allegations to the tribunal. The tribunal's jurisdiction should be confined to a consideration of these allegations. The tribunal should be required to report to the Legislative Assembly on:

- whether the allegations referred to the tribunal are proved on the balance of probabilities; and/or
- whether the allegations, if proved, are capable of constituting misbehaviour justifying removal from office or incapacity to perform the functions of office.

PART 4 - CONCLUSION

14. CONCLUSION

As explained at the outset, this report canvasses select issues of substantive constitutional reform essentially arising from the QCRC's February 2000 report. 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.

However, the committee anticipates that in the short term further recommendations relating to constitutional reform will emanate from future inquiries into:

- the extent to which certain provisions of the Constitution should be entrenched and how such entrenchment should be effected (stage 2 of this committee's review);
- the QCRC's recommendation relating to special parliamentary representation for Aborigines and Torres Strait Islanders (stage 3 of this committee's review);
- the issue of a preamble for the Queensland Constitution; and
- certain matters relating to the judiciary (see chapter 13.3 of this report).

Any move to finalise the consolidation of the Queensland Constitution (by incorporating into the *Constitution of Queensland 2001* those provisions which are currently entrenched in earlier constitutional legislation) should not occur until these inquiries are complete.

It would be feasible to implement many of the recommendations contained in this report in the near future. However, in circumstances where the government has only recently completed the consolidation of the Constitution, and has initiated civics education programs in relation to the *Constitution of Queensland 2001*, the government might choose to delay these amendments pending finalisation of other inquiries relevant to the constitutional reform process.

STATEMENT OF RESERVATIONS

This report considers a broad range of issues of Constitutional reform and makes many recommendations which we consider represent positive reform. However, we have reservations about certain specific recommendations.

A separate statement of reservations for each relevant recommendation appears below. Each statement is signed by the individual members with reservations.

Miss Fiona Simpson MP
Member for Maroochydore
Shadow Minister for Health,
Shadow Minister for Tourism and
Shadow Minister for Women's Policy

Mrs Liz Cunningham MP
Member for Gladstone

Mrs Dorothy Pratt MP
Member for Nanango

A STATEMENT OF EXECUTIVE POWER (SECTION 2.3): RECOMMENDATION 2

We do not believe that it is necessary or desirable to include a statement of executive power in the Constitution. Inclusion of such a statement has the potential to lead to legal arguments as to the effect of such a provision. This is evidenced by the submission of Mr Laurie Marquet, Clerk of the Legislative Council and Clerk of the Parliaments, Western Australia on the issue.

> *Such a statement assumes the existence of a theoretical 'separation of powers' doctrine. Despite the High Court's quarantining of the Commonwealth and flow-on effects to the States through decisions in cases such as* Kable *and* Grollo *and* Egan*, the fact remains that Queensland's laws apportion* ***functions*** *among the various instrumentalities of the Crown. The "powers", so-called, attach to the performance of a function by an instrumentality – a power said to exist in its own right divorced from a function it is intended to support is said to be absolute and is capable of arbitrary exercise. It denies the concept of the rule of law and a just society. Absolutism as manifested in European governance was a claim finally abandoned by the English Crown on the enactment of the* Bill of Rights 1689*. The genius of the English [British] constitutional arrangements has been the ability to retain the forms of monarchy while, through revolution and evolution, effect a "constitutional transubstantiation" to representative governmental institutions balanced on the fulcrum of the collective and individuals responsibility of the Crown's ministers. The High Court has consistently maintained that if there is one* grundnorm *in the Commonwealth Constitution applicable to the Commonwealth and the States, it is the representative and responsible nature of Australia's governance and the consequent entitlement of citizens to be informed about, and criticise, the system itself and the acts (and omissions) of those holding public office.*
>
> *A valid enactment of the Queensland Parliament that imposes on the Crown an obligation to give effect to, or administer its requirements is its own "statement of executive power". At the same time, it delimits the extent of the power conferred. Similar observations apply to an exercise of the prerogatives of the Crown which, as part of the common law, are justiciable both as to their existence and effects and are capable of modification or extinguishment by the Queensland Parliament.*
>
> *In my submission, it is erroneous to treat "executive power" as a constitutional species that can exist in isolation. In a Westminster-model polity, the Executive, its functions and attendant powers exist because, as Cromwell put it, "Parliament does not govern".*

Miss Fiona Simpson MP
Member for Maroochydore

Mrs Liz Cunningham MP
Member for Gladstone

Mrs Dorothy Pratt MP
Member for Nanango

A STATEMENT OF EXECUTIVE POWER (SECTION 2.3): RECOMMENDATION 2

If a statement of executive power is to be included in the Constitution, I do not believe that it is necessary for this statement to refer to the conventions surrounding the exercise of executive power. The Government's concerns in this regard have not been an issue in relation to s 61 of the Commonwealth Constitution on which the QCRC's clause is based. Elaborating on the conventions that surround the exercise of executive power has the potential to raise more issues than it will resolve.

If a statement of executive power is to be included in the Constitution, it should be expressed along the following lines.

> *'(1) The executive power of Queensland is vested in the Sovereign, and is exercisable by the Governor as the Sovereign's representative, and extends to the execution and maintenance of the Constitution and the laws of Queensland*.'
>
> *(2) The executive power of Queensland is subject to the legislative power of Parliament*.'

This provision should include a footnote to the effect that the *Australia Acts 1986* (Cth and UK), s 7(2)-(5) provide for the Sovereign's functions and powers in relation to Queensland.

_____

Mrs Liz Cunningham MP
Member for Gladstone

MINISTERS MUST BE MEMBERS OF THE LEGISLATIVE ASSEMBLY (SECTION 2.6.3): RECOMMENDATION 7

While we support inclusion of a requirement in the Constitution that ministers must be members of the Legislative Assembly, we do not support inclusion of a 'grace period' in which a minister must become a member. The inconveniences which might be occasioned by the absence of such a grace period do not outweigh the overriding principle that ministers, to be responsible to the Legislative Assembly, have to be members of the Legislative Assembly. However, to avoid any doubt the Constitution should make it clear that:

- a person elected as a member can be appointed as a minister before they actually take their seat in Parliament; and
- ministers can continue in office once the Assembly's term has expired or once the Assembly has dissolved pending a general election.

_____ _____ _____

Miss Fiona Simpson MP
Member for Maroochydore

Mrs Liz Cunningham MP
Member for Gladstone

Mrs Dorothy Pratt MP
Member for Nanango

THE MEMBERS' OATH OR AFFIRMATION OF ALLEGIANCE TO THE CROWN (CHAPTER 4): RECOMMENDATION 11

We do not consider that any amendments should be made to the *Oath or affirmation of allegiance and of office - member of the Legislative Assembly* contained in schedule 1 of the *Constitution of Queensland 2001*. The view expressed in submissions, while informative, is not necessarily representative of community sentiment on this issue.

It is appropriate that all members of Parliament swear or affirm allegiance to the Sovereign, as the head of state in Queensland. The requirement for this oath or affirmation, which reflects Queensland's status as a constitutional monarchy, should only be removed with the support of the people of Queensland. It is not appropriate for individual members to decline to officially recognise the Sovereign as the head of state through an oath or affirmation of allegiance.

Miss Fiona Simpson MP
Member for Maroochydore

Mrs Liz Cunningham MP
Member for Gladstone

Mrs Dorothy Pratt MP
Member for Nanango

WASTE LANDS OF THE CROWN (CHAPTER 8): RECOMMENDATION 17

We consider that ss 30 and 40 of the *Constitution Act 1867* (Qld) should remain in the 1867 Act and that reference to them should remain in s 69 of the *Constitution of Queensland 2001*. This will ensure that there is no risk of affecting the status quo regarding the Parliament's power in relation to waste lands of the Crown.

Miss Fiona Simpson MP
Member for Maroochydore

Mrs Liz Cunningham MP
Member for Gladstone

Mrs Dorothy Pratt MP
Member for Nanango

APPROPRIATION (SECTION 10.2): RECOMMENDATION 21

It is appropriate that 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 unless it has been first recommended by a message from the Governor. I have reservations as to whether it is appropriate to exempt bills introduced by a minister from this general requirement, as proposed in recommendation 21. In the absence of evidence that the current requirements present practical difficulties I am not convinced that change is necessary.

Miss Fiona Simpson MP
Member for Maroochydore

Mrs Liz Cunningham MP
Member for Gladstone

Appendix A: Correspondence from the Acting Premier dated 17 January 2002

Queensland Government

Premier of Queensland
and Minister for Trade

Please quote: MN222762/DR08/P2271/CA_S/SA

17 JAN 2002

RECEIVED
22 JAN 2002
LEGAL, CONSTITUTIONAL AND ADMINISTRATIVE REVIEW COMMITTEE

Spec 30

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

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 24OA 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?

Executive Building
100 George Street Brisbane
PO Box 185 Brisbane Albert Street
Queensland 4002 Australia
Telephone +61 7 3224 4500
Facsimile +61 7 3221 3631
Email ThePremier@premiers.qld.gov.au
Website www.thepremier.qld.gov.au

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: Submissions received

SUB NO:	SUBMISSION FROM:
1	Mr H Evans, Clerk of the Senate
2	Hon A Demack AO, Queensland Integrity Commissioner
3	Public Accounts Committee, Queensland Parliament
4	Parliamentary Crime and Misconduct Committee, Queensland Parliament
5	Mr A Marinac
6	Professor G Williams, Faculty of Law, University of New South Wales
7	Mr A Barton
8	Mr P Glover
9	Mr W Tait
10	Mrs Deborah and Mr Salvatore Vasta
11	Mr D Willis
12	Mr L J Scanlan, Auditor-General of Queensland
13	CONFIDENTIAL
14	The Hon P de Jersey AC, Chief Justice
15	Judges of the Supreme Court of Queensland
16	Mr R L Longland, Electoral Commissioner, Queensland
17	Mr J Walter
18	Mr I Staib, Health Rights Commissioner, Queensland
19	Dr J Kingston MP (Member for Maryborough, Queensland Parliament)
20	Ms D M Fingleton, Chief Magistrate, Queensland
21	Professor S Ratnapala, School of Law, University of Queensland
22	Mr D Bevan, Queensland Ombudsman and Information Commissioner
23	Dr J Kingston MP (Member for Maryborough, Queensland Parliament)
24	National Party, Queensland
25	Magistrates' Association Queensland Inc
26	Mr J V Cockerill, Adult Guardian, Queensland
27	Redland Shire Council
28	Mr J Pyke, Lecturer, School of Law, Queensland University of Technology
29	Department of Main Roads and Queensland Transport
30	Crime and Misconduct Commission
31	Queensland Law Society
32	Anti-Discrimination Commission, Queensland
33	Mr G Fisher, Senior Lecturer, Faculty of Law, Queensland University of Technology
34	Professor G Winterton, Faculty of Law, The University of New South Wales
35	Mr L Marquet, Clerk of the Legislative Council and Clerk of the Parliaments, Western Australia
36	CONFIDENTIAL
37	Hon R Hollis MP, Speaker, Queensland Parliament

Appendix C: Dr Gerard Carney's advice regarding ss 30 and 40 of the *Constitution Act 1867* (Qld)

3 June 2002

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

Dear Ms Newton,

Re: **Waste Lands of the Crown**

Your Committee has asked me to provide advice on the following issues:

(1) Are ss 30 and 40 of the *Constitution Act* 1867 (Qld) redundant and hence, should be repealed?

(2) If not, would their re-enactment be invalid as a "future act" under the Commonwealth *Native Title Act* 1993?

Section 30 of the *Constitution Act* 1867 (Qld) provides:

> Subject to the provisions contained in the Imperial Act of the 18th and 19th Victoria chapter 54 and of an Act of the 18th and 19th years of Her Majesty entitled *An Act to repeal the Acts of Parliament now in force respecting the Disposal of the Waste Lands of the Crown in Her Majesty's Australian Colonies and to make other provisions in lieu thereof* which concern the maintenance of existing contracts it shall be lawful for the legislature of this State to make laws for regulating the sale letting disposal and occupation of the waste lands of the Crown within the said State.

Section 40 of the *Constitution Act* 1867 (Qld) now provides:

> The entire management and control of the waste lands belonging to the Crown in the said State and also the appropriation of the gross proceeds of the sales of such lands and all other proceeds and revenues of the same from whatever source arising within the said State including all royalties mines and minerals shall be vested in the legislature of the said State.

Subsection (2) of s 40, which was repealed by the *Constitution of Queensland* 2001 as being obsolete, saved all contractual obligations undertaken by the Crown in relation to its waste lands before the enactment of s 40.

Sections 30 and 40 of the *Constitution Act* 1867 were not consolidated into the *Constitution of Queensland*. Instead, s 69 of the *Constitution of Queensland* 2001 merely 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.

The Government explained in the Explanatory Notes to the Constitution Bill its decision not to consolidate these provisions. There were 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 affect native title holders whereas ordinary title holders would not be affected because the legislation has no effect on them. (p 33)

(1) Purpose of ss 30 and 40

Sections 30 and 40 appear now to be of only historical significance. Their origin lies in the history of land tenure in New South Wales before the colony of Queensland was created in 1859.

On British settlement in 1788, all land in New South Wales vested in the British Crown. Ownership and control of those lands was vested exclusively in the British Crown and they were administered by the Governor. In 1831, the Governor was authorised to dispose of these lands by various Crown grants. Undisposed lands were referred to as the "waste lands" of the Crown. The exclusive power of the British Crown was maintained, despite various grants of legislative power to New South Wales during the first half of the 19th century. These grants of legislative power expressly excluded any power over Crown lands. The British authorities wanted to retain control particularly to use the proceeds of sale for colonial development. However, imperial restrictions were imposed on the Crown in its management of those lands: see 5 & 6 Vic c 36 (1842); 9 & 10 Vic c 104 (1846). For instance, the proceeds of sale were appropriated to the colonial public service provided half of the proceeds were used for assisted emigration to Australia.

However, when New South Wales achieved full self-government in 1855 with the enactment of the *Constitution Act*, the NSW Parliament became vested with the power to regulate and manage all Crown lands in the colony. Specific provision was made to make this clear in ss 43 and 58 of the Constitution Bill, included in the schedule to the Imperial Act 18 & 19 Vic c 54 (*The New South Wales Constitution Act* 1855 (Imp)), which authorised the Bill's enactment, as well as in s 2 of the Imperial Act itself. Section 58 vested in the Legislature "the entire management and control of the waste lands belonging to the Crown…and also the appropriation of the gross proceeds of the sales of such lands". Both this section and s 2 of the Imperial Act contained a proviso preserving all previous transactions entered into by the Crown.

These specific provisions were included to make abundantly clear that the local Legislature was now vested for the first time with power over Crown lands. Strictly, these provisions were probably not required given the conferral of general legislative power in s 1 of the *Constitution Act* 1855 (NSW) to make laws "in all cases whatsoever" for the peace, welfare and government of the colony. This was recognised in *Williams v Attorney-General for New South Wales* (1913) 16 CLR 404 by Barton ACJ at 424-430 and Isaacs J at 453-4. However, apart from clearly indicating a fundamental shift in power from the Imperial authorities to the local legislature, these specific provisions also preserved whatever undertakings the Imperial Crown had already given before their enactment. It would seem though, as Justice Dawson noted in *Mabo v Queensland* (1988) 166 CLR 186 at 239, that any such undertakings no longer exist. Accordingly, when New South Wales enacted its present *Constitution Act* in 1902, s 8 repealed what was then seen to be the redundant express power of the Legislature to regulate the sale, letting, disposal and occupation of waste lands, without expressly preserving any earlier Crown undertakings. Consequently, s 40(2) of the *Constitution Act* 1867 (Qld) was similarly repealed by the *Constitution of Queensland* 2001.

Nonetheless, when Queensland was created as a separate colony in 1859, cl 17 of the Order in Council of 6 June 1859 repeated these express provisions, vesting in the Queensland Legislature the power to make laws for regulating the sale, letting, disposal and occupation of the Crown's waste lands, and vesting the entire management and control over these lands in the Parliament. This was also made clear in cl 5 of the Letters Patent of 6 June 1859 which vested in the Governor, acting with the advice of the Executive Council, full power to make Crown grants over any "waste or unsettled lands" in accordance with any law regulating the sale and disposal of such lands. The provisions in cl 17 of the 1859 Order in Council were then re-enacted in ss 30 and 40 of the *Constitution Act* 1867 (Qld).

At first sight, it may seem odd that s 40 vested the entire management and control of the waste lands in the Legislature, rather than in the Crown. However, this was intended to ensure that this control passed from imperial to local control. Nor did it preclude the revocable delegation of these powers to the local Executive which remained at all times accountable to the Legislature for their exercise.

In 1993, the Electoral and Administrative Review Commission (EARC) in its *Report on Consolidation and Review of the Queensland Constitution* 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 s 2 of the *Constitution Act* 1867. However, it recommended at that time against repealing the provision because it might "inadvertently disturb the constitutional status quo" surrounding land ownership and native title (paras 6.225 and 6.229). It also recommended retention of s 40 without the proviso in subs (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 No 2* decision were yet to be determined (paras 6.228 and 6.230). Almost a decade later, those implications have been substantially made clear.

As with s 30, there seems no reason today for retaining the first power in s 40 which is clearly encompassed within the general law making power in s 2 of the *Constitution Act* 1867 (Qld).

The second power conferred by s 40 on the Legislature is the power to appropriate all the proceeds and revenues derived from the Crown's waste lands. This provision is no longer necessary in view of the express provisions in ss 64 and 66 of the *Constitution of Queensland* 2001. Section 64 vests all revenues of the State in one consolidated revenue fund, payments from which must, by s 66, be authorised by legislation.

Accordingly, both ss 30 and 40 in their entirety should be repealed as they are no longer required.

(2) Native Title

While EARC in 1993 was of the view that both ss 30 and 40 were redundant, it made no recommendation to repeal them for fear that this would, at least in relation to s 30, "inadvertently, disturb the constitutional status quo" (para 6.225) in the aftermath of the decision in *Mabo No 2*.

The legislative responses to *Mabo No 2* and to the *Wik Peoples v Queensland* (1996) 187 CLR 1 are now in force: the *Native Title Act 1993* (Cth) and the *Native Title (Queensland) Act 1993* (Qld). The only possible concern raised in relation to this legislation is that referred to in the Explanatory Notes to the Constitution of Queensland 2001, namely, that the re-enactment of ss 30 and 40 might constitute a "future act" which is rendered invalid by s 240A of the *Native Title Act* 1993 (Cth).

A "future act" is defined in s 233 of the *Native Title Act* 1993 (Cth) as legislation made on or after 1 July 1993, or any other act occurring on or after 1 January 1994, which "affects" native title. A future act "affects" native title "if it extinguishes the native title rights and interests or if it is otherwise wholly or partly inconsistent with their continued existence, enjoyment or exercise" (s 227). Even if a future act affects native title, it will only be invalid if it is not validated under certain provisions in Div 3 of Pt 2, and then only to the extent that it affects native title: s 240A.

The re-enactment of ss 30 and 40 would only "affect" native title within this test if a legislative intention could be derived from the re-enactment to override in some way native title interests. The argument might be mounted that in simply re-declaring Parliament's powers under those sections, without being made expressly subject to native title rights, that Parliament intended those powers to be exercised without regard to those rights.

It is unlikely, however, that such an intention would be derived from a mere re-enactment of those sections, since the courts have regard to the context in which their re-enactment occurs. In any event, an express declaration that no such effect is intended would resolve this difficulty.

Conclusion

In view of the fact that ss 30 and 40 of the *Constitution Act* 1867 (Qld) are now of only historical significance, and that their repeal will have no implications for the recognition of native title in Queensland, I would recommend that both provisions be repealed.

Yours sincerely,

Dr Gerard Carney
Associate Professor of Law